

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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May 15, 2009

MACH MINING, LLC,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. LAKE 2009-395-R
	:	Order No. 8414238; 03/13/2009
v.	:	
	:	
SECRETARY OF LABOR,	:	Mach No. 1 Mine
MINE SAFETY AND HEALTH	:	Id. No. 11-03141
ADMINISTRATION (MSHA),	:	
Respondent	:	

**ORDER DENYING MACH MINING’S MOTION FOR SUMMARY DECISION**  
**ORDER GRANTING IN PART THE SECRETARY’S MOTION**  
**FOR SUMMARY DECISION**

This case is before me on a notice of contest brought by Mach Mining, LLC, (“Mach”) against the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et. seq.* (the “Mine Act”). Mach filed a motion for summary decision under Commission Procedural Rule 67 and asked for expedited consideration. 29 C.F.R. § 2700.67. In response, the Secretary filed a cross motion for summary decision. Both parties briefed the issues.

Section 2700.67 sets forth the grounds for granting summary decision, as follows:

A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:

- (1) That there is no genuine issue as to any material fact; and
- (2) That the moving party is entitled to summary decision as a matter of law.

On March 13, 2009, an MSHA inspector issued Order No. 8414238 under section 104(d)(1) of the Mine Act alleging a violation of 30 C.F.R. § 75.370(d). The order alleges the following violation:

A proposed ventilation plan dated February 25, 2009 was implemented before it was approved by the district manager. The mine operator has mined over 1000 feet inby the location of the proposed set up rooms in headgate No. 3. The drawing titled

“Ventilation Plan Map for future Longwall Operations” dated March 19, 2006, which is part of the current approved plan for this mine, approved on March 18, 2008, shows a six panel design with all six panels approximately 18,000 feet deep without any stair steps.

The proposed ventilation plan addendum, panel 3 extension, was received by the MSHA District Manager on February 26, 2009. An acknowledgment letter dated February 26 was sent to the mine operator stating that approval by the district manager was required. The mine operator had been put on specific notice in several meetings and by other letters of this requirement.<sup>1</sup>

The MSHA inspector determined that it was unlikely that the cited condition would injure a miner and that the violation was not significant and substantial. He also determined that the operator’s negligence was high.

The cited safety standard provides:

No proposed ventilation plan shall be implemented before it is approved by the district manager. Any intentional change to the ventilation system that alters the main air current or any split of the main air current in a manner that could materially affect the safety and health of the miners, or any change to the information required in §75.371 shall be submitted to and approved by the district manager before implementation.

## **I. BACKGROUND**

Mach argues that there are no genuine issues as to any material fact and that it is entitled summary decision as a matter of law. Its motion for summary decision is supported by a declaration from Richard “Pete” Hendrick, who is the president of Mach, as well as provisions from its ventilation plan. The Secretary’s cross-motion for summary decision is supported by a declaration from Mark O. Eslinger, who is a supervisory mining engineer for MSHA Coal District 8, and other supporting material.

The Mach No. 1 Mine is an underground coal mine in Williamson County, Illinois. Mach develops headgate entries using a continuous mining machine. The mine uses a longwall to mine the coal. At the time the order of withdrawal was issued, the longwall had just begun mining the second panel and Headgate No. 3 was being developed with a continuous mining

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<sup>1</sup> The order was subsequently modified to allow Mach to remove the section loading equipment from Headgate No. 3.

machine in preparation for future mining of the third and fourth longwall panels. Two mine maps prepared by Mach are included in the Secretary's exhibits and are discussed by both parties. The first map, dated March 19, 2006, is entitled "Ventilation Plan Map for Future Longwall Operation" ("2006 Ventilation Plan Map"). (Sec'y Ex. A). The second map, dated October 28, 2008, is entitled "Ventilation Map 75.1200/75.372 Requirements" ("2008 Annual Map"). (Sec'y Ex. B).

MSHA approved Mach's most recent ventilation plan on March 18, 2008. The plan included provisions describing how Mach will ventilate its gate entries. Mach had previously submitted the 2006 Ventilation Plan Map that contained projections of Mach's anticipated mining development as of March 19, 2006. Those projections depicted six panels that were all about 18,000 feet long. MSHA reviewed 2008 Annual Map as well as earlier maps submitted by Mach and, by letter dated January 26, 2009, advised Mach that the maps were acceptable. (Sec'y Ex. C).

All of the ventilation maps that had been submitted by Mach showed all proposed longwall panels to be of equal length with the result that the setup rooms that would become the bleeder entries were straight from panel to panel. The district manager sent a letter to Mach dated February 4, 2009, noting that the 2006 Ventilation Plan Map "showed a six-panel design will all six panels approximately 18,000-foot depth" and that "[no] stair steps are shown on the drawing." (Sec'y Ex. D). The letter then warns Mach that the "[f]ailure to obtain approval before making changes to the bleeder design could be cause for enforcement action." *Id.*

On February 25, 2009, Mach submitted a ventilation plan amendment to MSHA that indicated that panel three would be developed about 1,000 feet in by the farthest in by point depicted on the 2006 Ventilation Plan Map. (Mach Ex. 2). This submission was made at the request of the MSHA district manager.

The order at issue in this case required miners to be withdrawn from the area of Headgate No. 3 that was in by the area projected on the 2006 Ventilation Plan Map.

## **II. SUMMARY OF THE PARTIES' ARGUMENTS**

The Secretary issued the order of withdrawal because she contends that, when Mach mined the Headgate No. 3 entries in by the setup rooms projected on the 2006 Ventilation Plan Map, it violated the terms of its approved ventilation plan. She states that any change in the information required by section 75.371 must be approved by the district manager before implementation and that the changes being made by Mach had not been approved.

Mach maintains that the order is invalid for two reasons. First, Mach did not violate section 75.370(d) because it was developing the headgate in accordance with the approved ventilation plan. The March 2008 ventilation plan detailed the methods that Mach must use during headgate entry development. Mach was following these approved ventilation methods in Headgate No. 3. Second, the fact that Mach mined beyond the boundary of the projections of

anticipated mining depicted on the 2006 Ventilation Plan Map is irrelevant. A mine operator's projections of anticipated mine development shown on a ventilation map are not subject to MSHA approval. 30 C.F.R. 75.370.(a)(1). These projections are nothing more than an indication of anticipated mine development that a mine operator must update at least annually in its ventilation map. Because anticipated development is not subject to MSHA approval, an operator is not required to obtain approval from MSHA before it mines beyond the previously submitted projections. The operator is only required to maintain a current mine map showing all active workings in a fireproof location on the mine surface.

The Secretary contends that the facts establish a violation of section 75.370(d). Mach was operating without an approved ventilation plan when it mined 1,000 feet inby the set-up rooms depicted in the 2006 Ventilation Plan Map. She states that Mach has incorrectly characterized the 2006 Ventilation Plan Map as a map that simply shows projections of anticipated mine development that is not part of the mine's ventilation plan. The Secretary argues that Mach submitted the 2008 Annual Map for that purpose in October 2008. This map sets out its yearly projections for mining. This map was accepted by MSHA on January 26, 2009 and shows the annual mining projections through October 2009. This map was submitted by the company to comply with sections 75.370(a)(1), 75.372(b)(14), and 75.1200.

The 2006 Ventilation Plan Map, on the other hand, sets forth a number of things that are part of a mine's ventilation plan including the design of the bleeder system. This map is part of the ventilation plan and it requires approval by the district manager because it shows the design of the bleeder system as required by section 75.371(x).<sup>2</sup> The length of longwall panels, the gateways developed for the panels, and the configuration of the bleeder entries is a critical part of MSHA evaluation of the ventilation plan. Under Mach's logic, it could mine Headgate No. 3 as far inby as it wants without the approval of MSHA if it follows the gate entry ventilation protocol contained on page B5 of its current ventilation plan. (Mach Ex. 1). By mining 1,000 feet inby the set-up rooms shown on the 2006 Ventilation Plan Map, Mach went beyond its approved bleeder design. Mach was issued the order of withdrawal because it had been previously told by the district manager that its approved plan did not allow it to mine beyond the panel length set out in the Ventilation Plan Map.

Mach filed a response to the Secretary's cross-motion for summary decision. It argues that the law is clear that the Secretary has no authority to approve projections of anticipated development and an operator need not obtain any additional approval to develop beyond a prior projection where it is developing pursuant to an approved ventilation plan. Projections of future mining, even when part of the section 75.372 map, are never subject to MSHA approval. Section 75.370(a)(1). Because such projections are not subject to MSHA approval, the

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<sup>2</sup> Section 75.371 states that the "mine ventilation plan shall contain the information described below and any additional provisions required by the district manager: . . . (x) A description of the bleeder system to be used, including its design (see 75.334)."

projections shown on the 2006 Ventilation Plan Map could not have been subject to MSHA approval and they did not limit Mach's right to develop Headgate No. 3.

Mach alleges that the Secretary is attempting to shift the focus to whether by mining beyond its previous projections, Mach affected the design and function of its bleeder system. This argument does not have merit because, at the time the order of withdrawal was issued, Headgate No. 3 was not physically connected to the bleeder system. The return air in the headgate traveled outby down the return air course in the headgate to the mains. As a consequence, even assuming that Mach might need to amend its ventilation plan at some future point, a new plan was not required at this time. The order must be vacated because it is premature and speculative since Mach has not cut into the bleeder entries from Headgate No. 3.

In addition, the 2006 Ventilation Plan Map was not submitted by Mach to satisfy the requirements of 75.371(x). Mach satisfied this provision on page B2 and the last page of its approved ventilation plan. (Mach Ex. 1). Mach never intended that the 2006 Mine Ventilation Map be part of the ventilation *plan* setting forth requirements for the bleeder entries. Mach characterizes the Secretary's arguments as "*ipse dixit* at best" but "ultimately immaterial." (Mach Response at 6).

Mach further argues that the court should reject the Secretary's argument that MSHA advised the company that it could not mine Headgate No. 3 any deeper than the first two panels. She bases her argument on the February 4, 2009, letter from the district manager and the "proposed ventilation plan addendum" submitted by the company on February 25, 2009, in response to this letter. Mach maintains that this correspondence does not alter Mach's legal right to develop Headgate No. 3. The issues raised in the district manager's February 4 letter "only bears on ventilation during longwall mining, once the development work in Headgate No. 3 is complete and panel 3 has been set up and connected to the bleeder entries." (Mach Response at 9). If MSHA's letter is interpreted to limit Mach's right to develop Headgate No. 3 until it obtains MSHA approval, then it was acting beyond its authority because "MSHA cannot create new rules by district manager fiat." *Id.* at 10.

### **III. ANALYSIS OF THE ISSUES**

I find that I have the authority to determine whether Mach violated section 75.370(a)(1) as alleged in the order of withdrawal under Commission Procedural Rule 67 because there is no genuine issue as to any material fact. My analysis of the legal arguments presented by the motion and cross motion is set forth below.

#### **A. Did Mach Violate Section 75.370(d)?**

A mine's ventilation plan consists of two parts: the plan content as prescribed in section 75.371 and the ventilation map with the information prescribed in section 75.372. (Section 75.370(a)(1)). Both of the maps discussed above show that Mach planned to develop the longwall panels to a depth of 18,000 feet. That is, the distance between the mains and the set-up

rooms would be about 18,000 feet. At some point after October 18, 2008, the date of the 2008 Annual Map, Mach decided that it wanted to develop the third longwall panel to a greater depth. Because Mach takes the position that the depth of mine development is not subject to MSHA approval, it mined past the 18,000 foot point when it developed the entries in Headgate No. 3. At the time the order of withdrawal was issued, Headgate No. 3 had been driven about 1,000 feet deeper than the other gate entries.

There is no allegation in the order of withdrawal that Mach was not properly ventilating the headgate entry. For example, the ventilation plan calls for 20,000 cfm of air at the last open crosscut and MSHA does not contend that this requirement was not being met. (Mach Ex. 1, B5). The issue is whether Mach was required to obtain MSHA's approval before it developed the headgate entry deeper than the 18,000 feet shown on the approved ventilation maps. As set forth above, Mach argues that the Secretary's ventilation standards do not require a mine operator to obtain approval from MSHA if it decides to mine beyond the boundary of anticipated mining as shown on its ventilation map. Although section 75.372(b)(14) requires that a ventilation map contain "[p]rojections for at least 12 months of anticipated mine development," MSHA does not have the authority to approve or deny these projects. Section 75.371 does not require a mine operator to include projections of anticipated mine development in its ventilation plan and section 75.370(a)(1) states that "[o]nly that portion of the map which contains information required under § 75.371 will be subject to approval by the district manager." As a consequence, Mach argues that MSHA did not have the authority to issue the subject order of withdrawal when Mach mined beyond the projected area of mining development.

Although Mach's arguments have some superficial appeal, I hold that it is looking at the plan approval process too narrowly. Mach is not only mining beyond its projections of anticipated mine development shown on the ventilation maps, it is changing the design of the ventilation system in the longwall panels. By developing the headgate entry for the third panel deeper into the mine, Mach is, *a fortiori*, changing the design of the panel. I find that the 2006 Ventilation Plan Map is part of the existing approved ventilation plan. By developing the headgate 1,000 feet deeper, the bleeder entries will have a different configuration from that shown on this map. Section 371(x) clearly provides that the design of a bleeder system is part of the ventilation plan that is subject to approval by the district manager.

Mach argues that the Secretary's arguments concerning section 371(x) are premature and speculative. I disagree. Once Mach completes its development of Headgate No. 3, the modified design of the bleeder entries proposed by Mach will be a *fait accompli*. MSHA will either have to approve the new bleeder system design for the mine or force Mach to abandon any development mining in by the location of the set-up rooms shown on the 2006 Ventilation Plan Map. The only map showing the modified gateway and bleeder design was submitted by Mach on February 25, 2009, and that map has not yet become a part of the mine's approved ventilation plan. (Mach Ex 2). This map represents a significant change in the ventilation plan and Mach

cannot make these changes without the approval of the district manager.<sup>3</sup> I find that the Secretary established a violation. Consequently, Mach's motion for summary decision is denied and the Secretary's cross-motion for summary decision is granted on this issue.

**B. Was the Violation a Result of Mach's Unwarrantable Failure to Comply?**

The parties have presented conflicting facts with respect to this element. In its response to the Secretary's cross-motion for summary decision, Mach set forth evidence in the supplemental declaration of Mr. Hendrick to show that the alleged violation was not the result of its unwarrantable failure to comply with the cited standard. These paragraphs state, *inter alia*, that Mach decided to start mining the panels about 1,000 feet deeper on the suggestion of an outside roof control engineering consultant. Mach states that poor roof conditions were experienced in the set-up entries in the first two panels and it was trying to avoid these conditions in future panels. It also states that MSHA was aware of this fact and that at least one local MSHA inspector was present when Mach started mining the Headgate No. 3 beyond the 18,000 feet distance shown in the 2006 Ventilation Plan Map and that no objections were raised. During a conference call, counsel for the Secretary stated that MSHA cannot stipulate to all of the evidence set forth in this declaration at paragraphs 3 through 10.

Because there are genuine issues as to material facts, I cannot enter any findings on the unwarrantable failure issue. I note, however, that if Mach were able to establish at a hearing the facts alleged in the supplemental declaration, it is unlikely that I would uphold the Secretary's unwarrantable failure determination. Unwarrantable failure is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id.* 2004-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 193-94. The parties are ordered to confer to try to settle the negligence and unwarrantable failure issues. In the alternative, I am willing to stay this contest proceeding until the Secretary proposes a penalty for the order of withdrawal.

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<sup>3</sup> It is not clear from the record whether the district manager has now acted on the proposed panel extension submitted by Mach. As stated above, the map showing the Panel 3 extension was sent by Mach to the district manager on February 25, 2009. This proposed plan amendment has been pending for almost three months. Many mines have bleeder systems that form a stair step pattern.

#### **IV. ORDER**

Mach Mining's motion for summary decision is **DENIED**. The Secretary's cross-motion for summary decision is **GRANTED** on the fact of violation and **DENIED** on the unwarrantable failure issue. The parties are ordered to confer to discuss the negligence and unwarrantable failure issues and report back to me by no later than **June 11, 2009**.

Richard W. Manning  
Administrative Law Judge

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