

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 24, 2010

MACH MINING, LLC, : CONTEST PROCEEDINGS
Contestant :
 :
 : Docket No. LAKE 2009-323-R
v. : Citation No. 8414211; 02/12/2009
 :
 : Docket No. LAKE 2009-324-R
SECRETARY OF LABOR, : Citation No. 8414214; 02/12/2009
MINE SAFETY & HEALTH :
ADMINISTRATION, (MSHA) : Mach #1 Mine
Respondent : Mine ID 11-03141

DECISION

Appearances: Christopher D. Pence, Esq., and David J. Hardy, Esq., Allen, Guthrie, McHugh & Thomas, PLLC, Charleston, West Virginia, for the Contestant,

Barbara M. Villalobos, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Respondent.

Before: Judge Weisberger

I. Introduction

These cases are before me based on Notices of Contest filed by Mach Mining, LLC, (“Mach”) challenging the issuance of two citations alleging violations of the provisions of two mandatory standards¹ relating to the requirement of providing escapeways. Pursuant to notice, a hearing was held in St. Louis, Missouri, on May 14, 2009.² The parties were directed to file briefs addressing the limited issue of whether the cited area was a “working section”, and thus

¹Citation No. 8414211 (Docket No. LAKE 2009-323-R) alleges a violation of 30 C.F.R. § 75.380(d)(1) which requires that escapeways be maintained in a safe condition. Citation No. 8414214 (Docket No. LAKE 2009-324-R) alleges a violation of 30 C.F.R. § 75.364(b)(5), which requires an examination of an escapeway for hazardous conditions. At the conclusion of the hearing held on May 14, 2009, the Secretary made a motion to amend the latter citation by changing the alleged violative standard to 30 C.F.R. § 75.364(h), which requires that a record be made of hazardous conditions found during weekly examinations. After the parties argued the merits of the motion, it was granted.

²The record was kept open to allow for the possibility of an additional evidentiary hearing.

triggering the requirements of escapeways.³ Each party subsequently filed a brief, and a reply. On July 15, 2009, the undersigned issued a partial decision determining that the cited area was a “working section”.

A conference call was held on November 9, 2009; the parties indicated that they did not seek an opportunity to present additional evidence relating to the remaining issues regarding Citation No. 8414211 (Docket No. LAKE 2009-323-R), which alleges a violation of 30 C.F.R. § 75.380(d)(1). Subsequently, the parties each filed a brief and a reply addressing these issues.⁴

II. Whether the primary escapeway to the Headgate #4 section of Mach #1 Mine was maintained in a safe operating condition pursuant to Section 75.380(d), *supra*.

A. The Parties’ Positions

Mach argues that the escapeway at issue in these cases was “fully passable and traversed without incident on February 12, 2009,” when the citation was issued. Contestant’s Second Post-Hearing Brief at 8. Mach further avers that the material in the escapeway was not significant enough to prevent miners from exiting the mine safely in the event of an emergency. *Id.* Moreover, Mach contends that even if a violation of the regulation existed, the violation was not significant and substantial because the material present in the escapeway was not a discrete safety hazard, potential injury from the material was unlikely, and any injury would not be serious. *Id.* at 10.

The Secretary argues that the objects present in the escapeway, including water, a “gob” pile, concrete blocks, wood pallets and crib ties, created an “obstacle course”. Accordingly, the Secretary contends, the conditions created slip, trip and fall hazards for the inspector, and thus, miners facing an emergency situation would have confronted these obstacles under more challenging circumstances. Furthermore, the Secretary argues that the violation was significant and substantial.

B. Standard

Title 30, Code of Federal Regulations requires each mine escapeway to be “[m]aintained in a safe condition to always assure passage of anyone, including disabled persons.” 30 C.F.R. §

³Pursuant to 30 C.F.R. § 75.380(b)(1), an operator is required to provide an escapeway “for each working section.” Thus, the existence of a working section is a predicate for the imposition of all regulatory mandates relating to escapeways, including those set forth in Sections 75.380(d)(1), and 75.364(h), the standards at issue in the cases at bar.

⁴The parties agreed that if it is found that the Contestant violated Section 75.380(d)(1), *supra* the standard at issue in this case at bar, then a hearing be scheduled on May 5, 2010, regarding the remaining citation, No. 8414214 (Docket No. LAKE 2009-324-R).

75.380(d)(1). The relevant legislative history provides that the required escapeways “allow persons to escape quickly to the surface in the event of an emergency.” S.Rep. No. 91-411, at 83, *Legis. Hist.*, at 209 (1975).

In *American Coal Company*, the Commission held that an operator violates Section 75.380(b)(1)’s requirement to “provide” escapeways when its miners are “substantially hindered or impeded from accessing designated escapeways.” 29 FMSHRC at 948. In reaching this conclusion, the Commission set forth the following regarding the purpose and legislative history of escapeways which is equally applicable to the case at bar:

There is no disputing that escapeways are needed for miners to quickly exit an underground mine and that impediments to a designated escapeway may prevent miners from being able to do so. The legislative history of the escapeway standard states that the purpose of requiring escapeways is “to allow persons to escape quickly to the surface in the event of an emergency.” S. Rep. No. 91-411, at 83, *Legis. Hist.*, at 209 (1975).

29 FMSHRC at 948 (emphasis added).

Based on the regulatory scheme and legislative history, it is manifest that the purpose of escapeways is to allow miners to quickly escape.

The Commission has been guided by this legislative history, and “has relied upon Congressional recognition of the importance of maintaining separate and distinct travelable escapeways that are maintained in a safe condition.” *Maple Creek Mine*, 26 FMSHRC 539, 543 (June 2004)(citing *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993)). The Commission has found such language “plain and unambiguous,” and that the standard “establishes a general functional test of ‘passability.’” *Utah Power and Light Company*, 11 FMSHRC 1926, 1930 (Oct. 1989). Moreover, the Commission has stated that “section 75.380 obligates operators to continually maintain the condition of escapeways,” so that passage of all miners, including those who are disabled or injured, can quickly pass from the beginning of the escapeway to the surface, and that “such passage is not hindered.” *American Coal Company*, 29 FMSHRC 941, 948 (Dec. 2007)(emphasis added).

The parties agree that the escapeway included a number of items, including water, rows of blocks at the bottom of the regulator, a gob pile, loose concrete blocks, take-up track, and a pallet of crib ties. However, significant disagreement remains regarding the nature and effect of these materials on the passability of the escapeway.

C. Summary of the Testimony

Bobby Jones, a coal mine inspector for the Mine Safety and Health Administration, testified for the Secretary. Jones characterized the escapeway as an “obstacle course”. (Tr. 39, 70). Jones stated that he measured the standing water, which was 20 feet long, spanned rib to rib, ranged in depth from two inches to eight inches, and was generally clear. He also noted that

the mine's clay floor was uneven and slick when wet. Jones testified that he observed six to eight concrete blocks loosely strewn on the ground on the inby side of the regulator. He further observed 10 to 12 blocks on the outby side of the regulator, which was described as a hole cut out of the wall that served as the stopping. According to his testimony, there were also three rows of concrete blocks at the base of the regulator. Moreover, while crossing through the regulator, Jones stepped on the blocks, and with the air flowing through the regulator pushing him, he stumbled through the opening.

Jones testified that he encountered a pile of gob, which consisted of "clay, rock and debris from the area that had been pushed into a pile." (Tr. 53) He estimated the pile of gob to be five to eight feet long, stretching rib to rib, and varying in height, from three feet at its highest point to approximately 18 inches at its lowest. Jones next discussed a section of "take-up track" that was atop the gob pile. He identified the track as a steel frame-like structure, and estimated it to be 10 inches tall, 10 feet long and six feet wide. Jones further noted a bundle of crib ties placed on a pallet.

Based on the testimony of its witnesses, Mach contends that any alleged obstacles were items commonly found in mines and routinely negotiated by passing miners. Jeff Wilkins, the examiner at the mine, testified that, during his walk-through with the inspector, he looked through the regulator and observed "probably three inches of water" approximately three or four feet away. (Tr. 206). Wilkins also observed two rows of blocks at the bottom of the regulator, one of which was obscured by the pile of gob. Wilkins estimated the pile of gob was "probably about 18 inches high." (Tr. 201). He also estimated that the gob pile was approximately two feet from the right rib and six feet from the left rib.

Anthony Webb, Mine Manager for Mach, testified that there was an unobstructed span of 10 feet from the left rib to the pile of gob. He also stated that the gob pile was nine feet wide, 18 inches at its tallest point, and 2 ½ feet deep. The gob pile included the piece of take-up track. Webb testified that he measured the distance from the left rib to the take-up track to be 10 feet.

Wilkins testified that there were "probably six blocks to the left scattered" in front of the regulator. (Tr. 204-205). By the time Webb arrived at the Headgate #4 site, he did not see any blocks outby the regulator, and was told that they had been moved. Finally, Webb testified that the pallet of crib ties, located at the bottom of the stairway, covered approximately one foot of the stair width, effectively reducing the width of the stairway from six feet to five feet. Wilkins, however, testified that the pallet of crib ties projected approximately six inches into the width of the stairway.

D. Discussion

I take cognizance of the fact that the inspection that resulted in the citation at issue here was conducted by Jones, who was escorted by Wilkins. I give their testimony greater weight than that of Webb, as they observed the conditions as they existed during the inspection. In contrast, Webb observed and photographed the area approximately 4 ½ hours later; in that

intervening period, the ledge of the regulator had been removed, as were the concrete blocks that had been on the ground.

With regard to the depth of the water in the escapeway, I accord more weight to Jones' version based on his testimony that he measured the water with a tape measure, while Wilkins estimated the depth from three or four feet away. Moreover, with regard to the conflict regarding the number of rows of block in the regulator, I give greater weight to the testimony of Jones, who observed the regulator from both sides. In contrast, Wilkins did not cross through the regulator. Thus, he only observed the ledge from one side; he observed two rows of blocks, but noted that one row was obscured by the pile of gob. Similarly, I find Jones's testimony regarding the height of the gob pile more credible because he based his estimation on a fixed point, the ledge of the regulator.⁵

I find that the combination of the pallet of crib ties, take-up track, pile of gob, loosely strewn concrete blocks on either side of the regulator, and the presence of water on the floor would hinder and delay the emergency evacuation of miners, especially any who were injured. Thus, the clear purpose of Section 75.380(d), *i.e.*, to allow persons to escape quickly in the event of an emergency (*Legislative History, supra*, at 209; *American Coal, supra*, at 948), would be thwarted. Hence, I conclude that the escapeway was not maintained in a safe condition; accordingly, Contestant violated Section 75.380(d), *supra*.⁶

III. Significant and Substantial

⁵With regard to the rest of the measurements, I note that all three witnesses vary only slightly from one another in their estimations. Hence, for purposes of this decision, it is not necessary to resolve the minor conflict in this testimony.

⁶Mach argues that the case law requires that a significant obstruction that precludes passage through the escapeway must exist before a citation can be upheld. Contestant's Second Post-Hearing Brief at 6. According to Mach, violations are found "where safe passage through the cited escapeway is extremely difficult due to hazardous conditions." *Id.* at 7. Mach relies on *Maple Creek, supra*, (Commission cited the Judge's conclusion that the water, which was black and murky, of varying depths, approximately 420 feet long, did not satisfy the passability test set forth in *Utah Power*. 26 FMSHRC 539, 547 (June 2004), *aff'd in part and rev'd in part*, 27 FMSHRC 555 (Aug. 2005)).

Mach correctly notes that the conditions in the present case are not as severe as those that existed in *Maple Creek, supra*. However, *Maple Creek, supra*, does not mandate a finding of compliance with Section 75.380(d), *supra*, in all cases where conditions are not as severe as those presented in *Maple Creek, supra*. Each case must ultimately be determined on its own facts.

Jones designated the violation in the present case as “significant and substantial”. A violation is “significant and substantial” if “based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The Commission, in *Mathies Coal Co.*, explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC 1, 3-4 (Jan. 1984)(footnote omitted).

I have found the condition of the escapeway to be a violation of a mandatory safety standard. With regard to the second element of the *Mathies* test, Mach asserts that with good visibility, miners “could easily have maneuvered around the clearly visible material.” *Id.* Mach argues that if visibility was low, miners could have held the lifeline and would likewise avoid any trip or fall risk. However, I note that in low visibility, the miners would have followed the lifeline, which went through or directly over these obstacles. *Id.* As set forth above, Jones described various objects in the escapeway along with the presence of a wet and slick floor. Based on all of the above, I find the conditions of the escapeway constituted a discrete safety hazard.

In evaluating the reasonable likelihood of an injury to satisfy the third criterion of the *Mathies* test, the evaluation should be made in the context of normal “continuing mining operations.” *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). I find, due to the combination of accumulated items in the escapeway, as set forth above, that the hazard of stumbling and tripping, and the resultant impediment to a prompt evacuation in an emergency, was reasonably likely to have resulted in an injury to a miner, especially given the multitude of dangers, such as explosions, fires, collapses and other risks facing miners on a continual basis that require swift evacuation.

The final element of the *Mathies* test is the likelihood that the injury would be of a reasonably serious nature. Jones testified that the concrete blocks laying on the inby and outby sides of the regulator presented “a slip/trip hazard where miners could fall and have strains, sprains, broken limbs, any number of injuries like that.” (Tr. 62). Likewise, Jones added that if a miner were to slip, trip or fall on a concrete block, or on the gob pile and fall onto the take-up track, “there is a very real possibility of broken bones and strains and sprains, back and neck injuries.” (Tr. 68). Considering the nature of the obstacles, particularly the concrete blocks, the

steel take-up track and the pallet of crib ties, I find that it is reasonably likely that an injury sustained by a miner would be of a reasonably serious nature.

Accordingly, I find that the violation is significant and substantial.

ORDER

It is **Ordered** that Docket No. LAKE 2009-323-R be **Dismissed**. It is further **Ordered** that Docket No. LAKE 2009-324-R be severed from Docket No. LAKE 2009-323-R, and scheduled for hearing on May 5, 2010, at a site to be designated in a subsequent notice.

Avram Weisberger
Administrative Law Judge
202-434-9964

Distribution: (CERTIFIED MAIL)

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