

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001-2021
TELEPHONE: 202-434-9964 / FAX: 202-434-9949

July 15, 2009

MACH MINING, LLC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. LAKE 2009-323-R
	:	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

PARTIAL 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. After each party rested, the record was kept open to allow for the possibility of any additional evidentiary hearing. The parties were directed to file briefs addressing the limited issue of whether the cited area was a “working section”, and thus triggering the requirements of escapeways.² Each party subsequently filed a

¹Citation No. 8414211 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 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 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.

²Pursuant 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

brief, and a reply.

The decision that follows addresses only the issue of whether the cited area was a working section.

II. Stipulations

At the hearing, the parties filed Joint Stipulations, which, as pertinent to the issue at bar, are set forth as follows:

9. On February 12, 2009, MSHA Inspector Bobby F. Jones conducted a regular quarterly inspection of Mach #1 Mine, operated by Mach Mining, LLC. [“Mach”]
10. While conducting his inspection, Mr. Jones inspected the primary escapeway to the Headgate (hereinafter “HG”) #4.
11. The objects described in the body of Citation No. 8414211 extended 100 to 120 feet of the primary escapeway in HG #4. There was an amount of water at the intersection of crosscut #2. The objects described in the citation ended at the stairs leading to the overcast at crosscut #1. The width of the portion of the escapeway described in the aforementioned citation is 19 feet from rib to rib.
12. In the escapeway, there was a lifeline.
13. The lifeline in the HG#4 primary escapeway was continuous from the fan at the surface of the mine to the loading point. The lifeline was present in the area cited just outby crosscut #2 to crosscut #1 and ran through the regulator and up to the overcast.
14. A lifeline is a line that the miners may grasp to guide them through the primary escapeway to the surface of the mine in the event of an emergency evacuation.
15. The lifeline is available for miners to use to guide them out of the mine, if necessary.
16. A lifeline is not fixed, but rather is flexible to allow movement of the miner.
17. At the mouth of the escapeway, was a regulator.

Sections 75.380(d)(1), and 75.364(h), the standards at issue in the case at bar.

18. A regulator is a stopping (ie. a solid, concrete block wall) with a hole knocked out of it for purposes of controlling air into the mine.
19. The regulator (or stopping) was approximately 11" tall and stretched from rib to rib, a distance of 19 feet.
20. The hole knocked out of the stopping in order to create the regulator measured 4' 4" wide X 6' tall.
21. The concrete blocks that made up the regulator measured 8" tall X 16" wide X 6" deep.
22. The regulator was created on or about January 6, 2009. Prior to its creation, it was a stopping because there was no need for air inby this location.
23. In order to make it through the escapeway, a miner must walk through the 4'4" wide X 6' tall hole in the regulator.
24. The regulator controls the amount and velocity of air going to the section in order to comply with the approved ventilation control plan.

27. Air blows through the regulator at 106,832 cubic feet of air per minute ("cfm").
28. The fan that blows the air is at the surface of the mine.
29. Further into the escapeway, there were concrete blocks on the ground outby the regulator.
30. The concrete blocks that lay on the ground outby the regulator were knocked out of the stopping when a change in air ventilation was created.
31. Outby the regulator was a pile of gob.
32. In the primary escapeway, there lay a take-up track.
33. A take-up track is a steel piece of equipment used in belt storage units.
34. There were no items between the pullet of crib ties and the stairs to the overcast.
35. Contestant began weekly examination of the primary escapeway at HG #4 five weeks prior to the issuance of the subject citations.

36. Contestant assigned Mine Examiner Dave Adams the task of conducting the weekly examinations at HG#4 from January 8, 2009 through February 12, 2009.
37. The concrete blocks existed in the escapeway outby the regulator since on or about January 6, 2009 when the regulator was created through February 12, 2009 when the subject citations were issued.
38. The pile of gob existed in the escapeway since on or about January 6, 2009 when the regulator was created through February 12, 2009 when the subject citations were issued.
39. The take-up track existed in the escapeway since on or about January 6, 2009 when the regulator was created through February 12, 2009 when the subject citations were issued.
40. The pallet of crib ties existed in the escapeway since on or about January 6, 2009 when the regulator was created through February 12, 2009 when the subject citations were issued.
41. Mine Examiner Adams last conducted a weekly exam of the primary escapeway prior to the issuance of Cit. No. 8414211 on or about February 9, 2009.
42. The concrete blocks outby, pile of gob, take-up track, and pallet of crib ties were present in the primary escapeway at HG#4 since January 6, 2009 when the regulator was created through February 12, 2009 when the subject citations were issued.
43. Mine Examiner Dave Adams did, in fact, conduct weekly examinations for hazardous conditions at the primary escapeway at HG #4 from January 8, 2009 through February 12, 2009.
44. Mine Examiner Dave Adams did not note any hazardous conditions in the weekly examination records for the primary escapeway at HG #4 during the period from January 8, 2009 through February 12, 2009.

III. Mach's Case

Essentially it is Mach's position that HG #4 was not a working section when cited by Jones. According to Anthony Webb, Mach's mine manager, HG # 4 was producing coal from January 9 through February 9, 2009. On February 9, 2009, HG # 4 was idled, and power was removed from the HG # 4 power center and the belt drive. The miners working on the section were assigned to provide assistance to a crew that was setting up a longwall section approximately one mile from HG # 4. Webb indicated that Mach intended that HG # 4 would remain idled for a minimum of approximately four weeks. Production was resumed at HG #4 about the first week of March 2009.

Webb explained that before production could be resumed in the cited area, Mach had to return power to the belt drive, and make sure the area was safe. He indicated that on February 12, 2009, the crew working on moving the longwall would have used the Tailgate #1 escapeway, which was “a distinct separation” from the primary escapeway at HG #4. (Tr. 156) He opined that had there been an emergency on February 12, 2009, the men would not have traversed the cited area to get to the escapeway. Rather, “the lifeline directs them to the shortest distance to the capsule and the lifeline would prevent them from traveling towards Headgate 4 which would actually take them further away from the escape capsule.” (Tr. 159) Webb further stated that on the date cited, HG #4 did not have a designated working face, or a designated loading point.

IV. Discussion

Introduction

Section 317(f) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 877(f), imposes a requirement of escapeways from each “working section.” Title 30, Code of Federal Regulations, reiterates this requirement (*See* 30 C.F.R. § 75.380(b)(1)), and requires further that the escapeways shall be maintained in a safe condition to always assure passage. (*See* 30 C.F.R. § 380(d)(1)).

30 C.F.R. § 75.2 defines working section as follows: “all areas of the coal mine from the loading point of the section to and including the working faces.” Working face is defined as “any place in a coal mine in which work of extracting coal from its natural deposit in the earth is performed during the mining cycle.” *Id.*

In *BethEnergy Mines, Inc.*, 11 FMSHRC 1445 (1989), an issue before the Commission was whether the cited areas were “working sections,” and thus subject to the requirement of providing mandatory escapeways. The Commission set forth the following “chief” broad factors as being among those suggested by the record before it as bearing on whether an area of a mine is a “working section:” “the hazards associated with the work being done in the area (hazards); the geographical components of the area (location); the physical components of the area and their functional readiness (capability); and the development of the area with respect to the actual production (timeliness).” 11 FMSHRC at 1453.

The Commission went on to elaborate as follows:

For example, the hazards associated with the work being done in the area include the increased dangers associated with the ongoing activities in a section. As acknowledged by counsel for the Secretary at oral argument, the activities associated with reasonably imminent coal production introduce increased hazards to the particular area of the mine where production takes place. Oral Arg. Tr. at 12. It is the presence of the increased hazards to miners attendant to actual or reasonably close coal production that form a pragmatic basis for the two escapeways requirement of section 75.1704. It is then

that methane is more likely to be released in larger quantities during extraction of coal at the face. Also at this time, there may be an increase in the generation of suspended coal dust, an increase in the possibility of sparking, and an increased possibility of exposure to unsupported roof. The geographical components of a working section, as delineated in section 75.2(g)(3), are the existence of an identifiable face from which coal is or will be extracted, as well as a section loading point. The physical components of an area and their functional readiness relate to the presence of those mechanical mining components integral to the method of extraction contemplated in the identified location. In this regard, the presence of a functioning power center, a functional loading point connected to the mine's main haulage system, and necessary roof support equipment (such as shields where longwall mining is involved) are appropriate indicators of a section's capability. On the other hand, the location of equipment that merely has to be trammed into position--such as a continuous mining machine, roof bolter or shuttle car--is not necessarily dispositive of the "capability" of a section to extract coal. Timeliness is linked to capability and refers to the imminence of production. We agree with the judge that while actual production is not necessary, the term "working section" is inextricably linked to the term "working face" and that term, we conclude, implies coal production that is reasonably close in time. Once production is reasonably close, mechanical and electrical problems that temporarily interrupt the otherwise established capability of a section to produce coal do not relieve the operator from compliance with the mandates of section 75.1704. Other relevant factors also include the status of the mine's operations at the time of the alleged violation and any evidence as to the operator's plan for establishing unobstructed escapeways prior to the start of production activities. See Oral Arg. Tr. at 23-24.

BethEnergy, 11 FMSHRC at 1453-54.³

Further Findings and Discussion

I take cognizance of Webb's testimony that when HG #4 was cited on February 12, 2009, it had been idled since February 9, 2009, and Mach "had planned" for it to remain idle for

³The Commission, in affirming that the Judge's finding that the cited area was not a working section, noted the following facts in the record: the cited areas were "in a state of shut-down," the lack of evidence that the company would have begun coal production with escapeways in their "obstructed state," a loading point that was not functional because certain equipment required to allow it to be functional had not yet been constructed, the power center was "inoperable," mining did not resume until two months after the MSHA inspection, the cited area was "not capable of coal extraction," a belt necessary in the mining operation had been disassembled, only half of the required roof support had been installed, shears were in company shops, and the conveyor had not been connected to any of the mining equipment. 11 FMSHRC at 1454.

approximately four weeks.⁴ However, there is not any evidence in the record that any equipment had to be moved to HG #4, in order for production to be resumed, nor is there any evidence that any construction or repairs were necessary for the resumption of production. Indeed, the following testimony by Webb is the only evidence adduced by Mach as to what was necessary in order to resume production:

Q. What steps had to be taken before production could resume in Headgate #4?

A. We had to put the power back into the section. We had to –
JUDGE WEISBERGER: Just go slowly here.

A. Okay. We had to put power on the belt drive. We had to make sure that the area was safe. We did an exam where we are required to carry that exam outside by the State of Illinois, and then we were able to resume production.⁵

(Tr. 154) (Emphasis added).

Thus I find that resumption of coal production in HG #4 depended not upon removal of

⁴I take cognizance of Webb’s testimony that, when the area in question was cited, the section did not have a designated working face for the section, nor was there a designed loading point for HG #4. However, it is significant to note that HG #4 had been producing coal for a month up until three days prior to the issuance of the citations at bar, which, of necessity, would have included operations at a working face and a loading point. Moreover, there is not any evidence in the record that the loading point had been removed or rendered incapable of functioning after production was suspended on February 9, 2009.

⁵In this connection, Mach argues in its brief that there is not any evidence that it would have resumed production with the escapeway in the state it was found by Jones on February 12. However, it is significant to note that Webb did not specifically indicate which of the accumulated materials in the escapeway would have had to be removed in order to make the area safe for production to resume. Moreover, there is not any evidence that the presence of the conditions observed by Jones had contributed to the shut-down of the section or delay in the resumption of production. Indeed, I note that from January 6, 2009 through February 9, 2009, Mach was actively producing coal in HG #4, in spite of the fact that concrete blocks outby the regulator, gob, a take-up track, and a pallet of crib ties, existed in the escapeway during this period.

Additionally, I note that Mach represented in its brief that it “contests the Secretary’s assertion that the presence of 2 to 8 inches of water, the ‘gob’ pile and the cinder blocks constituted obstructions of the escapeways violative of 30 C.F.R. § 75.380(d)(1),” (Mach Mining’s Post-Hearing Brief [“Mach’s brief”], at 8). Thus, an inference may be made that Mach’s position is that these materials and conditions do not constitute obstructions of such a degree as to have rendered HG #4 incapable of resuming productions as a working section.

physical obstructions, the return to the area of any equipment, or any repair or construction. Indeed, the cause for the idle state of HG #4 was a decision by Mach to remove the crew from HG #4 in order to assign it to assist in the development of another longwall section. Hence, the resumption of production depended solely on a management decision to return miners back to the area, and to return power to it by turning on a switch. Under these circumstances, clearly the return to production, with all its attendant hazards, for all intents and purposes, is to be considered imminent. Accordingly, I conclude that the situation at bar involved only a temporary interruption by Mach of the established capability of the section to produce coal. As such, I find that it was not incapable of functioning as a working section. Thus, I find that Mach should not be relieved from its obligation to maintain a safe escapeway.⁶

For all of the above reasons, I find that the facts in the case at bar are to be distinguished from those presented in *BethEnergy*, 11 FMSHRC 1445 (1989). I further find, applying the broad factors set forth in *BethEnergy*, that the cited area was a working section.⁷

ORDER

⁶*See BethEnergy*, 11 FMSHRC at 1453-54 (“Once production is reasonably close, mechanical and electrical problems that temporarily interrupt the otherwise established capability of a section to produce coal do not relieve the operator from compliance with the mandates of Section 75.1704 [which provide for two passageways to ensure passage of any person including disabled persons from each working section].)” (Emphasis added).

⁷I take cognizance of Mach’s assertion, in support of its position that the cited area was not a “working section,” that Jones admitted in “deposition testimony” that the area was not a working section at the time he issued the citation at bar. (Mach’s brief, at 3) However, I note that at the hearing, Jones explained his deposition as follows:

Q. Earlier on you were talking about a working section. When you testified at deposition about this not being a working section, why did you consider it to have not been a working section on the day that you cited the escapeway?

A. At the time I cited it, it was idle, but there was nothing to keep it, if another section broke down, say Headgate 3 broke down, there was nothing to prevent a crew from another part of the mine going to that unit and in 15 minutes firing that unit up and loading again.

(Tr. 126-27)

I observed Jones’ demeanor and found his testimony credible on this point. Also, as set forth above, the evidence in this *de novo* proceeding clearly establishes that the area was a working section.

It is **Ordered** that, no later than ten days after the issuance of this partial decision, contestant shall convene a conference call. The agenda for the call is the status of the disposition of all remaining issues posed by the two notices of contest at issue in these proceedings.

Avram Weisberger
Administrative Law Judge

Distribution: (Certified Mail)

Christopher D. Pence, Esq., and David J. Hardy, Esq., Allen, Guthrie, McHugh & Thomas, PLLC, 500 Lee Street, East, Suite 800, P.O. Box 3394, Charleston, WV 25333

Barbara M. Villalobos, Esq., Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn St., 8th Floor, Chicago, IL 60604

/lp