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

September 28, 2010

AMERICAN COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. LAKE 2010-408-R
v.	:	Order No. 8418503; 01/19/2010
	:	
SECRETARY OF LABOR,	:	Galatia Mine
MINE SAFETY AND HEALTH	:	Mine ID 11-02752
ADMINISTRATION, MSHA,	:	
Respondent	:	

DECISION

Appearances: Robert H. Beatty, Jr., Esq., Dinsmore & Shohl, LLP, Morgantown, WV 26501, for the Contestant
Barbara M. Villalobos, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, IL 60604, for the Respondent

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Notice of Contest filed by American Coal Company challenging the issuance by the Secretary of Labor, Mine Safety and Health Administration ("MSHA") of an Order issued under Section 103(k)[1] of the Federal Mine Safety and Health Act of 1977 ("The Act"). An expedited hearing was held in St. Louis, Missouri. At the conclusion of the hearing the parties presented oral arguments, and a bench decision was made. The decision is set forth below, with the exception of the correction of non-substantive matters.

Introduction

American Coal operates the Galatia Mine, an underground coal operation. Coal is brought to the surface by conveyors and dumped on the New Future Stockpile.

---

[1] Section 103(k), *supra* provides, as pertinent, as follows:

> In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, ...

The Parties' Witnesses

Michael Rennie, an MSHA supervisor, was at the site on January 19, 2010. He observed smoldering areas in the lower portion of the pile.

The Secretary also adduced the testimony of Wendell Ray Crick, who has been an MSHA inspector since 2000, and was previously a miner for approximately 20 years. Prior to his work as an MSHA inspector he made annual refresher training presentations in various areas including stockpile safety. In addition, he has eight years experience as a firefighter.

Rennie testified that he arrived at the New Future Stockpile somewhere between 8:00 and 8:30 a.m. on January 19.

At the time that he arrived he picked up a sulphur-like odor which he described as a burning coal smell. According to him, the odor got stronger as he got closer to the smoking areas. He indicated that at approximately five different locations, he observed some areas that were smoking. Accordingly to Rennie, the smoke was about three to five feet in diameter and rose about eight to ten feet high. He described the smoke as whitish-brownish.

He opined that the hazard was due to the fact that at any time the conditions that he observed could burst into flame due to the action of oxygen or wind. He also indicated that this can cause burning in a void area in the stockpile. In general, it was his opinion that, essentially based on his experience as a firefighter, if there is smoke, there is fire.

He also indicated that at the five areas where he saw smoke, there was a perimeter around the three to five foot diameter of the smoke that he observed. The perimeter was between eight inches and two feet and was composed of white ash. He did not see any flames at the smoking areas that he observed.

Crick issued an order under Section 103(k), *supra*. The order alleges, *inter alia*, as follows:

> "Upon inspection of the New Future raw coal stockpile located at the New Future portal, the stockpile is observed with 5 separate locations smoking with white colored ash surrounding these areas ..."

Michael Smith, a safety inspector, testified for the company. He indicated that he traveled with the inspector and he also did not observe any fire.

Discussion

The parties stipulated that the issue of the existence of a fire on the New Future Stockpile on January 19, 2010, is dispositive of this proceeding; i.e., it will result in either

dismissal of the citation or dismissal of the Notice of Contest.

In essence, the Secretary argues that flames are not necessary to support a finding of fire. The Secretary relies on the testimony of the inspector regarding the presence of smoke, white ash, and "smoldering" (Tr. 25, 27, 28, 29, 54). He also testified that if oxygen or air "hits" hot coal or "smoldering ... it can burst into flame at any time." (Tr. 59).

The Secretary argues, in essence that her interpretation that a fire does not require the presence of flames, should be accorded deference, as it is consistent with the purpose of the Act to provide for safety of miners and mine safety, and to enable the quick evacuation of miners in the event of a fire.

The Secretary also relies on two treatises that set forth a discussion of two types of combustion; one is a fire that requires a flame, and the other is a type of fire or combustion that does not require a flame. And the Secretary also relies on Phelps Dodge Tyrone Inc., 29 FMSHRC 669 (Aug. 2007) (ALJ Manning)(holding *inter alia*, the flames must be present for there to be a "fine", that it was "unplanned" and that it was not extinguished within the time requirements of 30 CFR) *aff'd* in part, 30 FMSHRC 646 (2008) (the Commission affirmed the Judge's findings that a fire was "unplanned" under Section 502(h)(b), but did not make a majority decision as to whether a "fire" requires the presence of flames).

It is critical to focus in on exactly what is at issue here and what is the framework upon which a decision must be made. At heart here is the challenge to an order issued by the Secretary under the authority of Section 103(k) of the Act which states, pertinent, as follows: "In the event of any accident occurring in a coal mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to ensure the safety of any person in the coal or other mine" (emphasis added).

The plain words of Section, 103(k), *supra* authorize the Secretary to take action "when [the secretary's representative is present] in the event of an accident occurring in the mine." The key question for resolution, as posed by counsel, is what is an accident within the meaning of Section 103(k), *supra*. The next step is to look at the Act for a definition of "accident". Section 3(k) of the Act defines "accident" as including "a mine explosion, mine ignition, mine fire ..." The Act does not define the term "mine fire." The Secretary has made reference to §30 CFR 75.1103-4(a)(2)[2] and 30 CFR §50.2(h)(6).[3] The Secretary's regulations are promulgated subject

---

[2] Section 75.1103-4(a)(2) provides, as pertinent, as follows: "...Where used, sensors responding to radiation, smoke, gases, or other indications of fire, shall be spaced at regular intervals to provide protection...".

[3] Subsequent to the hearing, the parties stipulated that the transcript should be amended to reflect the fact that the Secretary cited Section 50.2(h)(6) and not Section 50.10(h)(6) as was set forth in the hearing transcript. Section 50.2(h)(6) provides that "accident" means, as pertinent, as follows:

to notice but under the authority of the Act.

The sections referred to by the Secretary do not relate to the issuance of a Section 103(k) order no. Mainly they relate to the definition "of fire" as it pertains to regulatory responsibilities of a mine operator such as reporting an accident, a fire, or having various sensory equipment. However, once we're dealing with the authority of the Secretary under a section of the Act, the only controlling definitions are those set forth in the Act, rather than some regulatory definition or provision that doesn't pertain to a section of the Act.

The Commission has held that in interpreting a statute, the plain meaning of its terms is controlling. *Phelps Dodge, supra,* at 651-652. Further, as set forth in numerous commission cases, in determining the meaning of a term reference is made to its ordinary meaning. *Bluestone Coal Corp.,* 19 FMSHRC 1025, 1029 (June1997); *see also* cases cited therein.

In ascertaining the common meaning of a statutory term resort is made to a dictionary.[4] I note that in Webster's Third New International Dictionary (2002), "fire" is defined as "the phenomenon of combustion manifested in light, flame, and in heating, destroying and altering effects." (emphasis added). Random House Dictionary of the English Language, (2nd ed.) (unabridged) (1996) defines "fire," as is pertinent as "a state, process, or instance of combustion in which fuel or other material is lighted and combined with oxygen giving off heat, light and flame" (emphasis added). What is in common in both of these unabridged dictionary definitions is the fact that the ordinary meaning of "fire" means the production of a flame.

In the case at bar, there was not a flame present in the cited areas, when observed by the inspector. Applying the common meaning, I don't find any ambiguity with regard to the language of Sections 103(k), *supra,* and 3(k), *supra*.

I have also take into cognizance the Secretary's argument with regard to deference. However, when it comes to deference, the starting point is the plain meaning of the statute and, whether there's any ambiguity. *Phelps Dodge, supra,* I find that, based on the common meaning of "fire" that there is not ambiguity in Section 3(k), *supra*.

As set forth in *Akzo Noble Salt v. FMSHRC* 212 F 3rd 1301 (D.C. Cir. 2000). The Secretary's interpretation of a Regulation to be deferred to when it is the fair and

---

"In underground mines, an unplanned fire not extinguished within 10 minutes of discovery; in surface mines and surface areas of underground mines, an unplanned fire not extinguished within 30 minutes of discovery."

[4] The Secretary made some reference to treatises and treatise at various discussions, but they are not authoritative when it comes to the issue of what is the ordinary meaning of a statutory term. The only authoritative source for the common meaning of the word set forth in a statute is a dictionary.

"considered judgment." *Akzo, supra,* at 1304. I can not find any cases that require or hold that an authoritative interpretation is, as in the case at bar, an argument by counsel and/or position of a Secretary's witness at trial.[5]

Conclusion

Based on the parties' stipulations and for all the above reasons, I find that since the evidence fails to establish that there was a mine fire, it follows that there was not an "accident" as defined in Section 3(k), *supra*. Therefore, I find that there was not any basis to allow for the issuance of an Order under Section 103(k) of the Act. Thus, as was stipulated to by the parties, the order at issue is **Dismissed.**

ORDER

The **Order** issued by the inspector is dismissed, and the Notice of Contest filed by the operator is sustained. If further **Ordered** that this case be **Dismissed**.

Avram Weisberger
Administrative Law Judge

Distribution: (CERTIFIED MAIL)

Robert H. Beatty, Jr., Esq., Dinsmore & Shohl, LLP, 215 Don Knotts Blvd., Morgantown, WV 26501

Barbara M. Villalobos, Esq., Office of the Solicitor, U.S. Department of Labor, 230 South Dearborn Street, Chicago, IL 60604

/lp

[5] Moreover, I take cognizance of the Secretary's Inspector who opined that a fire could start up at any time. He does have extensive experience as firefighter. However, the record does not contain evidence of any extensive experience with regard to coal fires, or that the chemical factors, or physical factors relating to coal fires, are the same as fires that a fireman would normally encounter. Also, it has not been established that the inspector is an expert relating to coal combustion. Therefore, I do not accord much weight to his above opinion.