

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

July 20, 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 94-1215
Petitioner : A.C. No. 15-11072-03595
v. :
 : #2 Mine
APPALACHIAN COLLIERIES, :
Respondent :

DECISION

Appearances: Thomas A. Grooms, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, for the Petitioner;
Richard D. Cohelia, Safety Director, Appalachian Collieries Corp., Brookside, Kentucky, for the Respondent.

Before: Judge Weisberger

This case is before me based upon a Petition for Assessment of Civil Penalty filed by the Secretary (Petitioner) alleging a violation by Appalachian Collieries (Respondent) of 30 C.F.R. ' 75.388(b)(3), and 30 C.F.R. ' 75.388(c)(2). Pursuant to notice, the case was heard in Johnson City, Tennessee, on May 24, 1995. Roger Pace testified for Petitioner. James Ford, and Michael Bates testified for Respondent.

Findings of Fact and Discussion

I. Violations of 30 C.F.R. ' ' 75.388 (c)(2) and 75.388(b)3

Roger Pace, an MSHA Inspector, testified that on June 17, 1994, he inspected Respondent's No. 2 mine. He indicated that on both ribs in the No. 3 and No. 4 entries in the area of the working faces, he observed sealed auger holes at 45 degree angles. He also noted that boreholes had been drilled on both ribs. Pace measured the depth of these boreholes by manually pulling a tape measure from a spool, and pushing it in the boreholes. He indicated that the tape stopped at the back of the holes. The depth of each of the holes was measured at 14 feet. He issued a citation alleging a violation of 30 C.F.R.

' 75.388(c)(2), which, in essence, provides that boreholes drilled in the rib at an angle of 45 degrees should be at least 20 feet deep.

In addition, Pace observed that three boreholes had been drilled in the advancing faces in the No. 3 and No. 4 entries. Using the same method as he used in measuring the 45 degree angle boreholes, he measured these holes at the faces to a depth of only 7 1/2 feet. He issued a citation alleging a violation of 30 C.F.R. ' 75.388(b)(3) which, as pertinent, provides that boreholes shall be " . . . always maintained to a distance of 10 feet in advance of the working face." ¹

James Ford, a miner employed by Respondent, testified that he had drilled the boreholes in question the day prior to Pace's inspection. He indicated, in essence, that the holes had been drilled 20 feet deep. He based this opinion on the fact that the holes were drilled by a barrel comprised of two 10 foot long joints, 1-1/4 to 1-1/2 inches in diameter. He indicated that the holes that were being drilled "would sometimes fall in" (Tr. 53). He also said that the drill barrel could have been inserted into the boreholes about 5 or 6 feet. He stated that in order for the barrel joint to penetrate further, "You'd have to put it back to the drill and work it back out" (Tr. 62).

Ford indicated that subsequent to the issuance of the citation on June 17, four 6-foot long roof bolts, each having a diameter of a half inch, were welded together and then pushed into each of the cited boreholes. According to Ford, "[w]e had so much sticking out, the hole looked like two or three foot. So we had 20, 21 feet" (Tr. 69). Ford also indicated that there was mud in the drilled holes.

Respondent's witnesses have not specifically contradicted the testimony of Pace, that as measured by him, the depth of each of the boreholes was less than mandated by Section 75.388, supra. Michael Bates, Respondent's Safety Director, indicated that there was mud in the holes, and that operation of the drill causes the holes to become "real rough" (Tr. 80). However, there is no specific evidence that any mud or other obstructions were present in the holes measured by Pace to such a degree as to have impeached the accuracy of his measurements. Ford indicated that the holes being drilled on June 16, 1994, were 20 feet deep. However, he did not indicate that any of the holes were measured. Nor did he indicate the length of the portion of the 20 foot barrel, if any, that had not penetrated the holes. Ford testified that the holes were measured by inserting four 6-foot long bolts welded together in the holes, and they were 20 to 21 feet deep. This was based upon his opinion that the bolts

¹Both parties agree that this language stipulates that the boreholes be maintained to a depth of 10 feet.

protruded 2 to 3 feet from the holes. Ford did not testify as to the exact length of the welded bolts that had not penetrated the holes. Nor was this established by any other evidence. Bates indicated that once the heads were cut off, the four 6-foot long bolts that had been welded together, their length totaled 21 feet. He stated that he was present when these welded bolts were inserted into the three cited boreholes at the face, and that, "you had about a foot sticking out" (Tr. 79). However, Respondent's witnesses did not adduce any evidence as to the precise length of the four welded bolts, nor the amount of the bolts that had not penetrated. For these reasons, I find that Respondent's evidence is not sufficient to rebut the testimony of Pace. I thus conclude that Petitioner has met his burden of establishing that Respondent was in violation of Sections 75.388(b)(3), and (c)(2), supra, as cited.

I reject the argument advanced by Respondent that the two citations at issue were invalidly issued as they each cite a violation of the same standard. This argument is without merit, as two different subsections of Section 75.388, supra, were cited covering two different situations.

II. Significant and Substantial

Both citations at issue set forth findings of significant and substantial. According to Pace, boreholes are required to be drilled in order to detect the presence of water, low oxygen, or methane in adjacent sealed areas. He explained that the escape of any of these hazardous materials resulting from an inadvertent entry into a sealed area could cause serious injuries or fatalities. He opined that it was reasonably likely for methane to accumulate in the abandoned auger holes.

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. ' 814(d)(1). A violation is properly designated 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 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

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.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

Hence, the Secretary must establish that there was a reasonable likelihood of an injury producing event, i.e., a fire, an explosion, or exposure to low oxygen contributed to by the lack of boreholes. An injury-producing event can occur only if there is a cut-through into an area containing low oxygen or methane in an explosive range. This event in turn depends upon the manner in which the cutting miner is being operated, its distance to the sealed area, and the presence in the sealed area of low oxygen and explosive methane. All these factors operate independently of the failure to drill boreholes of the proper length, the violative acts herein. I thus find that it has not been established that there was an injury producing event likely to have occurred as a result of the violations herein. I find that it has not been established that the violations were significant and substantial.

III. Penalty

I find that Respondent did drill boreholes the day prior to its being cited. There is no evidence that Respondent did not exercise ordinary care in ensuring the proper depth of the holes

in question. I find that Respondent was negligent to only a low degree. I also find that should miners have been exposed to hazardous materials in an abandoned area as a result of inadvertent cut-through, and should these materials not have been detected beforehand due to inadequate length of the borehole, a fatality might have resulted. Therefore the gravity of these violations is high. I have considered the size of Respondent's operation, as indicated by the parties' stipulation filed subsequent to the trial, and conclude that a penalty of \$1,000 for each of the two violations herein is appropriate to its size, and the factors set forth in Section 110(i) of the Act.

ORDER

It is ORDERED that Respondent pay a total penalty of \$2,000 within 30 days of this decision.

Avram Weisberger
Administrative Law Judge

Distribution:

Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Suite B-201, 2002 Richard Jones Road, Nashville, TN 37215-2862 (Certified Mail)

Richard D. Cohelia, Safety Director, Appalachian Collieries Corp., P.O. Box 311, Brookside, KY 40801 (Certified Mail)

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