

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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July 15, 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 95-568
Petitioner : A.C. No. 15-02263-03520
v. :
: Darby Fork No. 1 Mine
LONE MOUNTAIN PROCESSING, INC., :
Respondent :

DECISION

Appearances: Charles H. Grace, Conference and Litigation Representative, U.S. Department of Labor, Mine Safety and Health Administration, Barbourville, Kentucky, for the Petitioner; Michael O. McKown, Esq., Robinson & McElwee, Charleston, West Virginia, for the Respondent.

Before: Judge Feldman

The above captioned proceeding is before me as a result of a petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 *et seq.*, (the Mine Act). This case was called for hearing on March 27, 1996, in Pineville, Kentucky.¹ The parties stipulated the respondent is a large operator subject to the jurisdiction of the Mine Act. (Joint Ex. 1).

¹ The March 27, 1996, hearing was initially scheduled for November 14, 1995. The hearing was continued until January 11, 1996, due to an interruption in government operations as a consequence of the budget impasse. The January 11, 1996, hearing date was once again continued because of the government shutdown.

At the hearing the parties moved to settle Citation Nos. 4485356 and 9987989. The settlement terms include deleting the significant and substantial (S&S) designation from Citation No. 4485356, and reducing the total proposed civil penalty for these two citations from \$925.00 to \$600.00. The terms of the parties' settlement proposal were approved on the record and are incorporated herein.

Remaining Citation No. 4465629, issued by Mine Safety and Health Administration Inspector (MSHA) Harold Scott on March 1, 1995, concerns an S&S violation of the mandatory safety standard in 30 C.F.R. ' 75.370 for the respondent's alleged failure to follow its approved ventilation plan. The parties' post-hearing briefs with respect to this citation have been considered in my disposition of this proceeding.

Statement of the Case

The operative ventilation plan dated September 13, 1994, required the installation of numerous check curtains in entries outby the last open crosscut in order to ventilate the working faces. Inspector Scott testified there was no set way the curtains had to be installed as long as you get ventilation to all [working] places. (Tr. 46-47). The issue to be decided is whether the Secretary has established, by a preponderance of the evidence, that one of the numerous required check curtains was not installed at 8:30 a.m. on March 1, 1995.

The Secretary contends Inspector Scott observed a missing check curtain in the No. 4 entry at the No. 2 crosscut (also referred to as the No. 2 Abreak). Scott's citation was issued on the surface after Scott found excessive methane in a cavity caused by a bleeder crack.² However, there was no methane detected at the roof line inby or outby the bleeder cavity. Significantly, as discussed below, Scott did not specify which required check curtain was missing in Citation No. 4465629. (See Gov. Ex. 2).

The respondent asserts that Scott's detection of this excessive methane from a bleeder crack in the roof cavity motivated Scott to speculate that there was a missing check curtain although all required curtains had been installed. The

² A bleeder is an area in a coal seam where methane is liberated causing a pocket of methane. (Tr. 100-01).

respondent argues the ventilation plan was followed. It maintains the bleeder crack in the roof cavity was a unique condition that could not be ventilated by routine adherence to the approved ventilation plan.

Preliminary Findings

The respondent's Darby Fork No. 1 Mine is an underground coal site located in Eastern Kentucky. Work at the facility is divided into three shifts -- 11:00 p.m. to 7:00 a.m. (owl shift), 7:00 a.m. to 3:00 p.m., and 3:00 p.m. to 11:00 p.m. The owl shift is the maintenance shift. The two other shifts produce coal. Bernie Johnson was the supervisor when the owl shift ended at 7:00 a.m. on March 1, 1995. Johnson's responsibilities included readying the section for coal production on the next shift. As part of his duties, Johnson conducted a preshift examination, including an inspection of the check curtains, at approximately 6:00 to 6:30 a.m., on March 1, 1995. Johnson testified that his preshift exam revealed a problem with the check curtain in the No. 4 entry in that the curtain had been torn ~~about~~ halfway down. Johnson testified that he hung the curtain back up sometime prior to 6:30 a.m.

At about the same time Johnson was conducting his preshift exam at 6:30 a.m., Scott arrived at the Darby Fork facility to perform an inspection and to conduct respirable dust surveys. Scott testified he entered the mine at approximately 7:00 a.m. with John Richardson, the respondent's Foreman. Scott testified that as he and Richardson traversed the No. 2 crosscut proceeding towards the No. 5 entry, he observed a curtain down in the No. 4 entry. However, Scott did not advise Richardson of any violative condition at that time.

Scott testified he proceeded to turn in by the No. 5 entry off the No. 2 break. The No. 5 entry was approximately 56 inches from floor to roof requiring Scott and Richardson to bend as they traveled the entry. As they turned into the No. 5 entry, Scott observed a cavity between the No. 2 and No. 1 breaks. The cavity area, which was properly supported, was created by draw rock that had fallen during the mining process. The cavity width was the full width of the entry and it was approximately 20 feet long. Scott estimated the highest part of the cavity was approximately 76 inches from the mine floor. The depth of the cavity above the normal roof line ranged from approximately 13 to 24 inches.

Scott placed his methanometer approximately 12 inches from the roof of the cavity and immediately obtained readings above two percent. Scott withdrew the methanometer to avoid causing

damage to this sensitive instrument by this high reading. In view of the high methanometer reading, Scott, remembering that the [No. 4 entry] curtain was down,[@] ordered Richardson to get that block curtain over there and make the air shift over here to number five.[@] (Tr. 29).

Scott remained in the cavity and took air bottle samples and did not accompany Richardson to redirect the air flow. (Tr. 29, 109-10, 184). Scott took two bottle samples from locations approximately 12 inches from the top of the cavity which ultimately revealed high methane concentrations.³ Methane readings were negative for methane in by and out by the cavity at the mine roof line. (Tr. 105-06). Scott testified that methane gas is lighter than air. (Tr. 101). Therefore, Scott conceded that a pocket of methane could remain in a cavity for an extended period of time although there continued to be negative methane readings at the roof line. Id.

Richardson testified he took immediate steps to ventilate the cavity. He went to the No. 4 entry but did not see any problem. Richardson, with the assistance of employees Jimmy Taylor and Roy Gibson, tore down the disputed curtain in the No. 4 entry and rehung it from corner to corner narrowing two curtains to one for better airflow. (Tr. 181). In order to better ventilate the cavity, Richardson also installed a line curtain from the No. 4 entry across the No. 2 break directing the intake air from the No. 4 entry into the cavity. (Tr. 183-89; See Ex. R-1). Scott did not inspect the check curtains Richardson had installed although they went through the curtains as Scott continued his inspection. (Tr. 189). Richardson testified Scott never identified any specific curtain that was missing and that should have been installed. Id. Richardson stated he did not know Scott was going to cite the respondent for a missing curtain until they had exited the mine and arrived on the surface. (Tr. 190).

Further Findings and Conclusions

Mandatory safety standards are promulgated through the rulemaking process and apply to all similarly situated mine operators. 30 U.S.C. ' 811. However, such universal applications of safety standards are ineffective in addressing

³ Subsequent laboratory analysis revealed methane readings of 5.780 percent and 2.730 percent.

conditions that are unique to particular mines. Consequently, Congress provided for MSHA to require mine operators to adopt comprehensive plans tailored to each mine that address specific areas of health and safety such as the adequacy of mine ventilation systems. 30 U.S.C. ' 863. The plan adoption and approval process is flexible and bilateral, requiring discussions and negotiations between the operator and MSHA. The goal is approval of a ventilation plan that is mutually agreeable and that maximizes safety given the specific conditions that are known to exist at a particular mine. Jim Walter Resources, Inc., 9 FMSHRC 903, 907 (May 1987). A ventilation plan is not intended to address future unanticipated conditions, such as cavities and bleeders, that occur during the mining process.

Once a ventilation plan is adopted, its provisions are enforceable as mandatory safety standards. Id. However, the Secretary bears the burden of proving that the provision allegedly violated is part of the approved plan, and, that the cited condition or practice violates the provision. Id. The Commission has stated that a violation cannot be established when the disputed language of the plan provision is ambiguous and the Secretary cannot dispel the ambiguity. Id. at 906-07.

In this case, the closest operative provisions in the subject ventilation plan consist of a diagram on page 7 of the plan that depicts curtains out by the last open crosscut in all entries except the first and last entry. (Gov Ex. 4 at p. 7; Tr. 45). While the diagram is clear, for the reasons discussed below, the Secretary's application of the diagram to the facts of this case is ambiguous and inconsistent.⁴

Section 104(a) of the Mine Act, 30 U.S.C. ' 814(a), specifies A[e]ach citation shall be in writing and shall describe with particularity the nature of the violation@ However, Inspector Scott's citation, as well as his testimony, reflects his uncertainty about the precise nature of the alleged violation of the approved ventilation plan. For example, Citation No. 4465629 only contains the general conclusion that A[t]he approved ventilation plan was not being followed in the

⁴ Of necessity, I have considered page 7 of the approved plan as the operative provisions for the purpose of clarity. I note, however, the Secretary has not even shown that page seven constitutes the alleged violative provision. When asked Awhich portion of the plan, if any, was violated by the condition [Scott] observed,@ Scott replied, Athe closest one to it is page seven.@ (Tr. 45).

002 section in that block curtains were not installed to direct a volume and velocity of air current thru (sic) the No. 5 working place in the 002 section, sufficient to dilute, render harmless and to carry away explosive gasses [confined to the cavity].@ Thus, Citation No. 4465629 is lacking in specificity in that it fails to identify the missing curtain or curtains that caused the alleged violation.

Even if Scott had identified the missing curtain in Citation No. 4465629, Scott's testimony reflects the curtain requirements in the approved plan were vague and subject to different interpretations. In this regard, Scott stated:

There's no set way that you could say this is exactly, it has to be done exactly like this because you can do it different ways and still get the same effect. But you still would have to use the same amount of check curtains in order to do it. You could -- I'm sure there's -- as sure as I sit here and tell you two ways, someone else can tell me three others. But the basic thing on the ventilation plan is so that you get ventilation to all the [working] places. (Emphasis added) (Tr. 46-47; See also Tr. 102).

Although Scott based his citation on inadequate ventilation, Scott testified that all working places were indeed being ventilated. He admitted there was no evidence of methane at the mine roof line immediately inby the cavity indicating the bleeding methane in the cavity was being effectively ventilated and carried away through the air course. (Tr. 105-06). Scott also believed there was no methane at the face, with or without the disputed curtain. (Tr. 102-03, 120).

These inconsistencies in the Secretary's case are reflected by Scott's testimony:

Q. However, if you put aside the cavity for a moment, without the [No. 4] curtain, it was ventilating the entries. There was no methane in the entries . . . If it was ventilating the entries . . . would the assumption be that the ventilation plan was being complied with because the result was there was no methane?

A. If the cavity hadn't been there, it would have been being complied with. But I'm sure there was movement of air through there somewhere, but not by eliminating a curtain.

Q. But there was enough movement inby and outby the cavity because there was no methane at the normal roof height; is that correct?

A. Right.

Q. So in essence installing the curtain was -- solely the routine as far as you know was to clear the cavity?

A. Yes, sir.

Q. Given the fact that there was no methane inby the cavity, would that give you any reason to draw conclusions with regard to whether or not there was methane at the face before the curtain was installed?

A. No, sir. I don't think there was any methane at the face.

Q. Before the curtain was installed?

A. Before or after, neither one. (Tr. 119-20).

Albert McFarland, an MSHA ventilation supervisor, also testified he did not know whether the respondent was violating the plan's minimum air velocity requirements in the last open crosscut and at the face, with or without the disputed curtain.⁵ (Tr.149-50).

With respect to bleeders in cavities, Scott conceded that a ventilation plan doesn't contemplate anything on bleeders unless we have a mine that specifically has a problem with bleeders.⁶ (Tr. 108). However, the Secretary does not contend the respondent's mine has a bleeder problem. Thus, the respondent's approved ventilation plan was not intended to address future isolated pockets of methane caused by unanticipated bleeder problems. Nevertheless, Scott opined that he would not have cited the respondent for violating its ventilation plan if there was no methane in the cavity. (Tr. 93-94, 95, 116). This is the essence of Secretary's problem. The lynchpin of the Secretary's case, i.e., the methane confined to the cavity, is not a material

⁵ The ventilation plan requires a minimum of 4,500 cubic feet per minute (CFM) at the working face and 15,000 CFM at the last open crosscut. (Tr. 147-48; Gov Ex. 4 at pp. 6-7).

⁶ McFarland testified ventilation plans are generic in nature⁶ and specify minimum ventilation requirements at a particular mine. (Tr. 122, 146).

factor in determining whether the respondent complied with its ventilation plan.

In summary, the record is unclear as to whether the No. 4 curtain was down when Scott commenced his inspection. Scott did not initially believe there was a violation. It was only after he discovered methane in the cavity that he remembered seeing the missing curtain. (Tr. 29). Moreover, Scott did not accompany Richardson to observe the curtain conditions before Richardson took remedial measures to redirect air into the cavity. Even if the disputed curtain was not in place, the effective ventilation of methane at the faces, in conjunction with Scott's testimony that there are many permissible alternative methods of curtain placement under the plan, leads me to conclude that the Secretary has not established the alleged condition violated the plan's provisions.

In conclusion, an isolated pocket of methane, alone, is not evidence of a ventilation plan violation. When asked if Scott would have issued the citation absent the methane in the cavity, Scott replied, "I may have, and then I may not." (Tr. 116). Such indecision does not satisfy the Secretary's burden of proof.⁷ Accordingly, Citation No. 4465629 citing a violation of section 75.370(a) for the respondent's alleged failure to follow its approved ventilation plan is vacated.

ORDER

In view of the above, **IT IS ORDERED** that Citation No. 4465629 **IS VACATED**. **IT IS FURTHER ORDERED** that the motion for approval of settlement with respect to Citation Nos. 4485356 and 9987989 **IS APPROVED**. Consistent with the settlement terms, the respondent shall pay a total civil penalty of \$600.00 to the Mine Safety and Health Administration within 30 days of the date of this decision. Upon timely receipt of payment, this case **IS DISMISSED**.

⁷ This decision should not be construed as a finding that excessive methane is a prerequisite to a ventilation plan violation. On the contrary, I agree with McFarland that a required missing curtain, absent methane concentrations, still constitutes a plan violation. (Tr. 150). Here, however, the Secretary failed to demonstrate the disputed curtain was missing, or, that it was required under the provisions of the plan.

Jerold Feldman
Administrative Law Judge

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