

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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August 28, 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 95-214
Petitioner	:	A.C. No. 15-03178-03789
v.	:	
	:	Mine: Ohio 11
ISLAND CREEK COAL COMPANY,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 95-502
Petitioner	:	A.C. No. 15-03178-03800 A
v.	:	
	:	Mine: Ohio 11
WILLIAM THOMASON, Employed	:	
by ISLAND CREEK COAL CO.,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 95-519
Petitioner	:	A.C. No. 15-03178-03799 A
v.	:	
	:	Mine: Ohio 11
JOHN CAMBRON, Employed by	:	
ISLAND CREEK COAL CO.,	:	
Respondent	:	

DECISION

Appearances: Anne T. Knauff, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for Petitioner;
John T. Bonham, II, Esq., David J. Hardy, Esq.,
(on brief), Jackson & Kelly, Charleston, West
Virginia, for Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Island Creek Coal Company, William Thomason and John Cambron, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. The petitions allege that the company violated five of the Secretary's mandatory health and safety standards and that Thomason and Cambron, as agents of the company, knowingly authorized, ordered or carried out one of the violations.

For the reasons set forth below, I find that the company did not violate section 50.10, 30 C.F.R. § 50.10, and vacate Citation No. 3859779. In accordance with a negotiated settlement of the remaining petitions, orders and citations, I dismiss the petitions against Thomason and Cambron, vacate and dismiss Order No. 3859663, modify Order No. 3859662 to a citation and assess a penalty against the company of \$352.00.

A hearing was held on April 10, 1996, in Henderson, Kentucky. In addition, the parties filed post-hearing briefs in these matters.

Settled Matters

At the beginning of the hearing, counsel for the Secretary stated that all but one citation in these cases had been settled. With regard to Docket Nos. KENT 95-502 and KENT 95-519, the Secretary moved to dismiss the petitions because the evidence did not demonstrate the aggravation necessary to support the cases against Thomason and Cambron under section 110(c), 30 U.S.C. § 820(c). For Docket No. KENT 95-214, the parties agreed that the Respondent would pay the assessed penalty of \$50.00 each for Citation Nos. 3859614 and 4067100, that Order No. 3859663 would be vacated for lack of proof and that Order No. 3859662 would be modified from a section 104(d)(1) order, 30 U.S.C. § 814(d)(1), to a 104(a) citation, 30 U.S.C. § 814(a), by reducing the level of negligence from "high" to "moderate" and deleting the "unwarrantable failure" designation and that the penalty would be reduced from \$2,500.00 to \$252.00.

After considering the parties' representations, I concluded that the settlement was appropriate under the criteria set forth in section 110(i), 30 U.S.C. § 820(i), and informed the parties that I would accept the agreement. (Tr. 5-22.) The provisions of the agreement will be carried out in the order at the end of this decision.

Contested Citation

The Island Creek Ohio No. 11 mine is an underground coal mine employing 231 miners and producing 8,000 tons of coal daily from four working sections. During the second shift on April 7, 1994, a continuous mining machine cut through a "core drill hole"¹ while mining a crosscut between the numbers five and six entries on the 004 section. The core drill hole went through the No. 11 seam, where the work was being done, down into the No. 9 seam which had been sealed for some time and contained gas under pressure. As a result, gas from the No. 9 seam flowed into the No. 11 seam.

Concentrations of between three and three and one half percent methane were detected in the return adjacent to the continuous miner. Within two or three minutes, ventilation curtains were set up and the methane concentration was reduced to below one percent. The continuous miner was removed from the crosscut and attempts were made to seal the hole.

Around 7:00 a.m. on April 8, the local MSHA office was notified of the situation as a "courtesy." On receiving the notification, a 103(k) order, 30 U.S.C. § 813(K), was issued to preserve the scene and MSHA inspectors traveled to the mine.

After the inspectors reviewed the situation, Citation No. 3859779 was issued, alleging a violation of section 50.10. The citation stated that "[m]ine management failed to notify MSHA immediately after the mine experienced a non-injury accident on April 7, 1994 at 1845 hrs. A core drill hole was cut through on the 004-0 MMU. MSHA was notified by phone on April 8, 1994 at 0700 hrs." (Jt. Ex. 1.)

The gas leak was finally completely solved when a hole was

¹ A "core drill" is " a mechanism designed to rotate and cause an annular-shaped rock cutting bit to penetrate rock formations, produce cylindrical cores of the formations penetrated, and lift such cores to the surface, where they may be collected and examined." Bureau of Mines, U.S. Department of Interior, *A Dictionary of Mining, Mineral, and Related Terms* 266 (1968) (DMMRT). Thus, a "core drill hole" is the hole remaining after the core has been removed.

drilled to the surface on April 13, venting the pressurized gas to the surface. Mining operations on the other sections of the mine were not affected by the gas leak. Consequently, all other mining operations continued.

Section 50.10 requires that "[i]f an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine." Section 50.2(h), 30 C.F.R. § 50.2(h), sets out 12 types of incidents when an "accident" is deemed to have occurred. Section 50.2(h)(4) states that "[a]n unplanned inundation of a mine by a liquid or gas" is an accident.

It is undisputed that this incident was not immediately reported to MSHA. Therefore, if this was an unplanned inundation of the mine by gas, Island Creek violated the regulation. I find, however, that what occurred was not an inundation of the mine. Consequently, it was not a reportable accident under section 50.10.

If there is any doubt as to whether a regulation provides "adequate notice of prohibited or required conduct, the Commission has applied an objective standard, i.e., the reasonably prudent person test." *BHP Minerals International Inc.*, No. CENT 92-329 *et al*, slip op. at 4 (August 19, 1996). That test is "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard. *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990)." *Id.*

The regulation speaks of the inundation of a *mine*, not a part, sections, entries or crosscuts of a mine. Thus, on its face it appears that this type of accident has to be mine wide. That this is the case, is further indicated by the use of the word "inundation."

As the Commission has previously noted, the *DMMRT* at 587 defines "inundation" as an "inrush of water on a large scale which floods the entire mine or a large section of the workings." *Aluminum Company of America*, 15 FMSHRC 1821, 1825 n.8 (September 1993). Under the regulations, inundation can also be an inrush of gas. *Id.*

Clearly, what occurred here was not an inundation. The gases released did not flood the entire mine or even a large section of the workings. Three of the four working sections were unaffected. In fact, only the numbers five and six entries and

the crosscut between them in the 004 section were impacted at all by the release of gas.

I find that a reasonably prudent person familiar with the mining industry would not have concluded that this incident was an accident required to be immediately reported under section 50.10. Therefore, I conclude that the company did not violate the regulation when this incident was not immediately reported.

ORDER

Docket Nos. KENT 95-502 and KENT 95-519 are **DISMISSED**. In Docket No. KENT 95-214, Order No. 3859663 and Citation No. 3859779 are **VACATED** and **DISMISSED**, Order No. 3859662 is **MODIFIED** by reducing the level of negligence from "high" to "moderate" and deleting the "unwarrantable failure" designation and is **AFFIRMED AS MODIFIED**, and Citation Nos. 3859614 and 4067100 are **AFFIRMED**. Island Creek Coal Company is **ORDERED TO PAY** a civil penalty of **\$352.00** within 30 days of the date of this decision. On receipt of payment, these proceedings are **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

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