FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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January 17, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. LAKE 94-156
	:	A.C. No. 11-00877-04042
v.	:	
	:	Docket No. LAKE 94-197
AMAX COAL COMPANY, Respondent	:	A.C. No. 11-00877-04049
	:	
	:	Docket No. LAKE 94-198
	:	A.C. No. 11-00877-04051
	:	
	:	Docket No. LAKE 94-222
	:	A.C. No. 11-00877-04054
	:	
	:	Wabash Mine

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll, P.C., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Amchan

Overview

These cases arise out of inspections conducted at Respondent's Wabash Mine in southeastern Illinois. Docket Nos. LAKE 94-156 and LAKE 94-222 each contain one citation which was settled at the outset of the hearing. Citation No. 4261640 in Docket No. LAKE 94-197 was also settled.

At issue in Docket No. LAKE 94-197 is Citation No. 3845251 which alleges that Respondent violated 30 C.F.R. ' 77.201 in that methane concentrations exceeded one percent at the head house on the top of the No. 1 silo at the preparation plant. Also unresolved is Citation No. 3536113 in Docket No. LAKE 94-198, which alleges that Respondent violated 30 C.F.R. ' 75.371(hh) in failing to provide MSHA

with the ambient carbon monoxide (CO) levels in areas in which CO sensors are installed. For the reasons stated below, I vacate both these citations and the penalties proposed therefor.

Excessive Methane in the Head House

On February 2, 1994, MSHA representative Arthur Wooten was inspecting the silo area of the Wabash Mine. This is an area where clean coal is brought by conveyor from the preparation plant and deposited prior to shipping it to customers. At about 9:15 a.m., Wooten entered the head house on top of silo No. 1 and his methane detector activated, indicating a concentration of methane in excess of one percent (Tr. 20-21, 90)[1].

Methane readings in the head house ranged from .4 percent to 1.4 percent. The highest readings were detected near a light switch and near an opening where the conveyor belt dumps coal into the silo (Tr. 59-60). These areas were approximately 3 1/2 feet above the floor and one foot away from the sides of the building (Tr. 54, 60). Respondent's safety director, Charles Burggraf, who was accompanying Wooten, immediately diluted the methane by opening the one entrance door of the head house and a set of double doors normally used only to bring in equipment (Tr. 81-82). The methane concentration then dropped below one percent (Tr. 69-70).

Inspector Wooten issued Citation No. 3845251 alleging a violation of 30 C.F.R. '77.201. The cited regulation states that, "the methane content in the air of any structure, enclosure or other facility shall be less than 1.0 volume per centum."

Wooten required that the sides of the head house be removed to assure that methane concentrations in the head house remained below one percent (Tr. 90-91). He further required that this be accomplished in a period of two hours (Citation No. 3845251, blocks 2 and 18). Respondent shut down its preparation plant

[1]Respondent, in a letter dated January 10, 1995, has noted a number of errors in the transcript. I hereby correct the transcript as noted in this letter. There are other transcript errors not noted by Respondent [e.g. Tr. 226, lines 4 and 5 should read "slope heaters" rather than "slope feeders"]. In most instances, particularly those critical to the resolution of the case, what was actually said at hearing can be determined from the context of the testimony.

and sent its five day-shift employees to the top of the silo. The sides were removed within the requested time period (Tr. 98-100).

The citation was characterized as "significant and substantial" (S & S) and MSHA subsequently proposed a $595 civil penalty for this alleged violation. Among the factors that led to the S & S designation was the fact that the head house contained electrical equipment, such as a 4,160 volt conveyor belt starter, a 220 volt automatic lubrication system, and a 120 volt lighting circuit (Tr. 30).

Another factor in the S & S designation was that Respondent experienced a brief and self-extinguishing ignition on January 13, 1994, at the bottom of Silo No. 1, where coal was loaded into railroad cars (Tr. 30-32, 59)[2]. On February 1, the day before the instant citation was issued, 3.1 percent methane had been detected by MSHA inspector Ron Stahlhut at the train load-out, which is approximately 200 feet directly below the head house (Tr. 26, 34-35)[3]. On February 2, the methane concentration at the train load-out was four percent (Tr. 42-44).

The head house was constructed with tin sheeting placed over a steel framework (Tr. 80-81). The floor of the head house is six feet above the roof of Silo No. 1 (Tr. 106-08). The roof of the silo has several holes for ventilation and access (Tr. 105-06). In the 20 years in which it has been situated on top of Silo No. 1, methane had apparently never been detected in the head house prior to February 2, 1994, either by Respondent, who tests for methane every shift (Tr. 80-81, 87-88, 96-97) or by MSHA (Tr. 52).

Does a methane reading in excess of 1 percent establish a violation of 30 C.F.R. '77.201?

The central issue with regard to this citation is whether a valid methane reading of one percent or higher establishes a violation of the cited regulation. Although the language of the standard, standing alone, would lead to an affirmative answer, I

[2]Respondent contends that this ignition was due to coal dust rather than methane (Tr. 101).

[3]MSHA issued Citation No. 4261637 for this methane concentration. A citation was not issued on February 2, because Respondent was in the process of installing an exhaust system to abate the previous day's citation Tr. 44, 87).

agree with Respondent that the standard must be interpreted in the context of other portions of subpart C of Part 77, 30 C.F.R., and MSHA's enforcement policy for similar provisions relating to underground areas of coal mines.

Section 77.201-2, with which Respondent clearly complied, states:

> If, at any time, the air in any structure, enclosure or other facility contains 1.0 volume per centum or more of methane, changes or adjustments in the ventilation of such installation shall be made at once so that the air shall contain less than 1.0 volume per centum of methane.

Respondent contends that compliance with this provision negates any theoretical violation of section 77.201 in this case. In support of its position, the company notes that MSHA's Program Policy Manual directs that the mere presence of methane in excess of one percent is not a violation of the corresponding MSHA standards for underground coal mines.[4] Volume V of the current Program Policy Manual states:

> 75.323 Actions for Excessive Methane
>
> Section 75.323 specifies actions to be performed for excessive methane. Neither the Act nor the regulations provide that a mere presence of methane gas in excess of 1.0 percent is per se a violation. A violation would exist if a mine operator, upon becoming aware of the presence of excessive methane fails to perform the actions specified in Section 75.323.

The wording of the corresponding underground standard, section 75.323, is generally different than that of section 77.201. It provides that when 1.0 percent or more methane is present in a working place, etc., certain corrective actions are to be taken, such as de-energizing equipment and adjusting the ventilation system. However, section 75.323(e) relating to bleeder and other return air courses contains the same kind of categorical prohibition that is present in section 77.201 [The concentration of methane ... shall not exceed 2.0 percent].

Regardless of the differences between the text of sections 75.323 and 77.201, I find any interpretation of 77.201 that makes a per se violation of a methane concentration of

[4]Part 77 rather than Part 75 is applicable to surface work areas of underground coal mines, such as the silo and head house in the instant case.

one percent or more to be an unreasonable one, to which I need not defer. I therefore conclude that this record does not establish a violation of 30 C.F.R. '77.201. There is no evidence that Respondent either failed to act prudently to anticipate

the presence of excessive methane or that it failed to take appropriate and timely corrective action. Without such evidence I vacate Citation No. 3845251.

Citation No. 3536113: Ambient Carbon Monoxide Levels

On January 27, 1994, MSHA issued Respondent Citation No. 3536113, alleging a non-significant and substantial violation of 30 C.F.R. '75.371(h)(h). Section 75.370 of MSHA's regulations requires that mine operators develop and follow a ventilation plan. Section 75.371 states:

> The mine ventilation plan shall contain the information described below and any additional provisions required by the district manager:
>
> * * *
>
> (hh) The ambient level in parts per million of carbon monoxide, and the method for determining the ambient level in all areas where carbon monoxide sensors are installed.

Designation of the proper ambient carbon monoxide (CO) level is important in setting the CO sensors. If they are set far above the ambient CO level they may give insufficient warning when CO levels rise due to fire. If they are set too low, nuisance alarms may be so frequent that miners will disregard the alarms when there is a fire (Tr. 268-272).

The instant citation was the culmination of a months-long dispute between MSHA and Respondent as to whether the company had satisfied the requirements of the standard. On August 26, 1993, MSHA approved Respondent's ventilation plan, which was submitted pursuant to the agency's new ventilation regulations (Tr. 142, Exh. P-6). The plan approval followed several discussions between MSHA officials and the company, which resulted in modifications to the original submission, unrelated to the issue in this case (Tr. 201-213). Paragraph H of the new plan noted that it allowed the use of carbon monoxide (CO) sensors in lieu of point-type heat sensors for an automatic conveyor belt warning system[5]. It went on to state:

[5]The parties agree that CO monitors are superior to point-type heat sensors in alerting miners to a fire along the belt line (Tr. 168). Use of such sensors are optional and Respondent would not have to designate an ambient CO level if it did not use

a CO monitoring system (Tr. 174-75).

> 3. The alarm level of carbon monoxide will be set at 10 ppm above the ambient level of the area of the mine in which the sensors are installed. The ambient level will be determined using properly calibrated hand-held detectors. (Exh. P-6, page 7.)

On September 27, 1993, MSHA inspector Michael Bird informed Respondent that the approved ventilation plan required additional revisions, including specification of the ambient level of carbon monoxide (Tr. 215, Exh. R-75). This was followed by a letter from MSHA, dated December 15, 1993, requesting corrections to the plan, including providing MSHA with the ambient CO level (R-76).

In response, Respondent, through Terry Theys, the supervisor of engineering at the Wabash Mine, proposed that the company provide MSHA with a range of ambient levels between 0 - 15 ppm based on hand-held detector samples taken every 30 days (Tr. 203, 220). Respondent's hesitancy to designate a single number was based on its sampling results showing that ambient CO levels fluctuated, even at the same location during the same shift (Tr. 220, Exh. R-90).

Neither the company nor MSHA realized in the fall of 1993 that there were much greater fluctuations in ambient CO levels at a single location depending on whether slope heaters were being employed (Tr. 260-61). The company's initial proposal would have resulted in nuisance alarms when the slope heaters were running if the sensors were set on the basis of ambient CO levels when the heaters were not running. Conversely, if the sensors were set when slope heaters were running, they may have been set too high to provide an adequate early warning of a fire when the heaters were not operating.

MSHA rejected Respondent's proposal and asked the company to specify a single CO ambient level that was "in the 70, 75 percentile plus or minus the standard deviation (Tr. 220)." On January 12, 1994, Respondent submitted a revised proposal, which stated in pertinent part:

> In addition to the point-type sensors, mine atmosphere sensors (CO, ...) may be installed at various locations to facilitate additional monitoring of atmospheric conditions in locations selected by company representatives.
>
> When CO sensors are installed for additional atmospheric monitoring at company selected locations, the alarm level of carbon monoxide will be set a 10 ppm above the ambient level (r be determined using properly calibrated hand-held detectors. (Exh R-80, p. 4).

On January 18, 1994, MSHA acknowledged receipt of the revised ventilation plan (Exh. R-81). The next communication between MSHA and Respondent was the issuance of the citation on January 27, 1994 (Tr. 233, Exh. R-82). On February 26, 1994, Respondent submitted another revision to MSHA which was approved on March 29, 1994 (Exh. R-85, 86, and 88)[6]. The approved language was as follows:

> The ambient CO level at all sensors will be set at 5 ppm with no slope heaters operating. During the periods of slope heater operation, the CO ambient levels will be set at 35 ppm for the slope sensors, 30 ppm for sensors from the slope to the fault crossing, 30 ppm from the slope to the Portal 2 area of Main South, a level of 5 ppm within eight (8) hours following the shutdown of the slope heaters. The method used to determine the ambient CO level was statistically valid sampling occurring over a period of four days during heater operation and four days without heater operation using an MSA-DAN system for data collection. (Exh. R-88, p. 7.)

Was a Citation appropriate?

I conclude that MSHA cannot issue a citation for violation of section 75.371(hh). The MSHA Program Policy Manual, Chapter V, (Exh. R-91, p. 3c) states that if the operator and the agency can not agree with regard to MSHA-initiated changes to the operator's ventilation plan, revocation of the ventilation plan and a citation for operating without an approved plan in violation of section 75.370(a)(1) is the appropriate procedure to be followed.

Although the Program Policy Manual is not binding on MSHA, the structure of the agency's ventilation regulations mandates such a process. Section 75.371 merely lists the items that must be satisfactorily addressed in a ventilation plan to secure MSHA approval. The penalty for failure to satisfy the requirements of

[6]Although approval of the provisions regarding CO sensors was tentative for a period of 90 days, there is nothing in the record that indicates that MSHA has required further changes from Respondent.

75.371 is non-approval or revocation of the plan, rather than a citation.

I therefore vacate Citation No. 3536113 and the $50 civil penalty proposed for this alleged violation. Vacating the citation on this basis is not merely a matter of placing form over substance. Had MSHA revoked Respondent's ventilation plan and proceeded under section 75.370(a)(1), it would not have necessarily been successful.

MSHA may not have been able to satisfy its burden of proving that Respondent's ventilation plan was no longer suitable for the Wabash Mine and that the plan with MSHA-initiated changes was suitable, Peabody Coal Company, 15 FMSHRC 628 (April 1993). Given the fact that prior to January 27, 1994, neither MSHA nor Respondent was aware of the impact of the slope heaters on ambient CO levels, it is not certain that either plan was suitable to the Wabash Mine.

Respondent's primary arguments in support of vacation of the citation are: (1) that it complied with '75.371(h)(h) and (2) assuming that it did not, the citation should be vacated because MSHA failed to negotiate in good faith, or comply with the requirements of '75.370(b)(1) and (2). Despite my grounds for vacating the citation, the first argument deserves comment because it relates to the questionable suitability of the plan as approved in August 1993 and with the ambient level demanded by MSHA prior to the issuance of the citation.

It appears to me that the standard demands something more than what was contained in the plan as approved in August, 1993 [monitors to be set 10 ppm above CO levels detected]. However, the standard may allow for something other than a single number--given the variation in CO levels from location to location, and at the same location depending on whether diesel equipment and/or slope heaters were in operation (Tr. 225-26, Exhs. R-89, R-90). In view of my disposition of this citation and the fact that both parties missed the significance of the slope heaters at the time the citation was issued, I decline to rule on whether Respondent complied with requirements of '75.371(h)(h).

MSHA's compliance or non-compliance with '75.370(b)(1) and (2) is also sufficiently ambiguous that I decline to rule upon this issue given my disposition on other grounds. One could regard the agency's December 15, 1993, letter (Exh. R-76) as compliance with these procedural requirements. Rather than deciding whether the company's January 12, 1994, response (Exh. R-80) required further written notifications from MSHA,

I have determined that the issue should have been decided through the mechanism of plan revocation rather than citation.

Citation No. 3843883 (Docket No. LAKE 94-156),
Citation No. 4261640 (Docket No. LAKE 94-157),
and Citation No. 3845974 (Docket No. LAKE 94-222)

The parties have settled these items on the following terms:

Citation No. 3843883 is modified to a non-significant and substantial violation and the penalty is reduced from $2,173 to $500.

Citation No. 4261640 is modified to a non-significant and substantial violation and the penalty is reduced from $903 to $100.

The penalty for Citation No. 3845974 is reduced from $950 to $650.

I have considered the representations made and conclude that the above settlement is consistent with the criteria set forth in section 110(i) of the Act.

ORDER

Citation No. 3845251 (Docket LAKE 94-197) is VACATED.

Citation No. 3536113 (Docket LAKE 94-198) is VACATED.

Respondent shall pay the penalties agreed to in the aforementioned settlement agreement within 30 days of this order.

Arthur J. Amchan
Administrative Law Judge

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