

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 24, 1995

AMAX COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. LAKE 95-259-R
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Wabash Mine
ADMINISTRATION (MSHA),	:	Mine I.D. No. 11-00877
Respondent	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 95-267
Petitioner	:	A.C. No. 11-00877-04096
v.	:	
	:	Wabash Mine
AMAX COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: R. Henry Moore, Esq., Buchanan Ingersoll, P.C.,
Christine M. Kassack, Esq., Office of the

Before: Judge Amchan

Docket No. LAKE 95-267

On November 8, 1994, MSHA representative Robert M. "Bud" Montgomery inspected an area of the 2 West/Main West-South section of Respondent's Wabash Mine in eastern Illinois. While

inspecting the working faces, he came upon a ram or shuttle car sitting in the crosscut between entries 4 and 5, which was waiting to enter entry 6, where coal was being mined (Tr. 21-24).

When the ram car entered entry 6, Inspector Montgomery followed it. He saw section foreman Kyle "Jody" Wethington walking out of the entry (Tr. 23). When Wethington noticed the inspector he turned around and walked back to the working face. Wethington then had the continuous mining machine operator turn off his equipment and sent his helper outby the working face to obtain material to extend the line curtain (Tr. 116-118).

When Inspector Montgomery arrived at entry 6 he immediately noticed that the line curtain, erected to maintain an adequate airflow to the working face, was much farther away from the face than it should have been. The inspector measured the distance from the end of the line curtain to the tail of the continuous mining machine. The distance was between 20 and 25 feet. Since the continuous miner is approximately 35 feet long, the end of the curtain was 55 to 60 feet from the face, rather than within 40 feet as required by Respondent's ventilation plan (Tr. 24).

Montgomery issued Respondent, by serving Wethington, section 104(d)(2) Order No. 4258538, which alleges a violation of 30 C.F.R. '75.370(a)(1). The order alleges a significant and substantial (S & S) violation of this regulation due to Respondent's unwarrantable failure to comply with the requirements of its ventilation plan. A \$6,000 civil penalty was subsequently proposed.

Respondent concedes that it violated the Act. It contests however that this violation was S & S or due to its unwarrantable failure to comply with the Act.

Unwarrantable failure

The Secretary's allegation of unwarrantable failure relates to the conduct of section foreman Wethington, who was in entry 6 at a time when the violation was obvious and left the entry without having it corrected. Although the continuous miner operators, William Rowe and Tommy Stephens, were obviously negligent, or worse, in failing to maintain the line curtain

within 40 feet of the working face, their conduct, as rank and file employees, is not imputable to Respondent for purposes of determining an "unwarrantable failure" or in assessing a civil penalty, Southern Ohio Coal Co., 4 FMSHRC 1459, 1464-5 (August 1982)¹.

On the morning of November 8, 1994, Wethington was in entry 6 prior to the commencement of mining. The miners had to clean up gob in the entry before beginning to cut coal. The line curtain was within 40 feet of the face (Tr. 112).

Wethington left the entry to examine some stoppings that had collapsed, pursuant to an inquiry from MSHA Inspector Michael Rennie. He returned 40 to 45 minutes later (Tr. 113-115). While he was gone Mr. Rowe had completed three cuts into the coal and was finishing a fourth. Respondent's procedure was to advance 20 feet on the right side of the entry, then 20 feet on the left. Thereafter the mining machine was moved back to the right to advance another 20 feet (Tr. 193). At this time the line curtain should have been advanced to stay within 40 feet of the face. However, it was never moved from its original position (Tr. 224). Thus, the third cut on the right and the fourth cut on the left side of the entry were performed without adherence to Respondent's ventilation plan.

¹ Respondent's supervision, training and discipline of rank and file employees, however, may be examined to determine whether it took reasonable steps to prevent the violative conduct. The instant record discloses no deficiencies in Amax's training, supervision and discipline of Rowe and Stevens with regard to its ventilation plan. Indeed, annual refresher training on the ventilation plan, including the placement of line curtains, was conducted a few days prior to the citation in this case (Tr. 261-265). Mr. Rowe and Mr. Stevens were present either at that session or at a make-up session held later in the same month.

When Wethington returned to the entry, he instructed Mr. Stephens, who would operate the mining machine in entry 5, to advance only 30 feet, rather than 40 feet, as they had in entry 6. After several minutes, Wethington left entry 6². He saw Inspector Montgomery coming, turned around and went back into entry 6. Before Montgomery said anything to him, Wethington stopped the continuous miner and sent Mr. Rowe to get additional line curtain material and Mr. Stephens to get a ladder (Tr. 115-118).

Foreman Wethington contends he did not notice that the curtain was too far back because he was thinking about the collapsed stoppings and was concentrating on avoiding contact with the ram car (Tr. 117). The foreman's explanation of his thought process when he saw Inspector Montgomery is as follows:

When I got to the intersection of No. 6, between 5 and 6, I saw Mr. Montgomery through the cross-cut, and I immediately turned around and started looking to see if everything was kosher.

I noticed the curtain was too far back. I immediately told the men to shut the miner down and get the curtain hung.

Tr. 116.

²In finding that Wethington was in entry 6 for several minutes after his return I credit the testimony of ram car operator Robert Scott (Tr. 97) over that of Wethington (Tr. 116). Scott testified that Wethington was in entry 6 for approximately 5 minutes (Tr. 98-99) and that he saw Wethington in the entry on his ram car trip prior to the one in which he saw inspector Montgomery. I credit Mr. Scott because I find that he is the more disinterested witness of the two, and appeared to have a recollection of these events equal or superior to that of Mr. Wethington.

Although it is difficult to delve into the foreman's mental processes, I draw an inference from several factors that Wethington was aware that the line curtain was not close enough to the face before he saw Inspector Montgomery. These factors

are the time he was in the entry, the obviousness of the violative condition, and his conduct upon encountering the inspector.

As to the obviousness of the violation, I note that Bruce Thompson, an Amax section supervisor who was accompanying Inspector Montgomery, recognized that the location of the curtain was in violation of the ventilation plan as soon as he walked into the entry (Tr. 183). I infer that Wethington's "about-face" was precipitated by his realization that the curtain's location violated the ventilation plan and that Montgomery would immediately notice it.

I conclude the foreman was unlikely to react as he did if he was not aware of any violations. As there appear to have been no violations other than the placement of the line curtain, I infer he was aware it violated Respondent's plan. Therefore, I impute his knowledge to Respondent and find an "unwarrantable failure" to comply with the regulation. Since Wethington knew that the violation existed and ignored it, his conduct is sufficiently aggravated to constitute an "unwarrantable failure", Youghiogeny & Ohio Coal Company, 9 FMSHRC 2007, 2011 (December 1987).

Significant and Substantial

The Secretary contends that failure to maintain the line curtain within 40 feet of the face of entry 6 was a AS & S@ violation of the Act. Inspector Montgomery opined that there was a reasonable likelihood that the violation would contribute to an accident likely to result in serious or fatal injury. An accident, he believes, would likely occur due to a frictional ignition of methane at the face. This might result from the bits of the continuous miner sparking into an area in which methane had accumulated due to the inadequate airflow (Tr. 35-37). The violation would contribute to the hazard in that adequate airflow is dependent on maintaining the line curtain within 40 feet of the face.

The Commission test for "S&S," as set forth in Mathies Coal Co., supra, is 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 applying this test to a situation in which the hazard is a methane ignition or explosion, the Commission has held that there must be a confluence of factors indicating a likelihood of ignition or explosion, Texasgulf, Inc., 10 FMSHRC 498, 501 (April 1988). In this regard, the Secretary notes that the Wabash Mine liberates over a million cubic feet of methane through its North portal on a daily basis (Tr. 31-32). This puts the mine on a 5-day schedule for methane spot checks by MSHA.

Moreover, eight to nine months prior to the instant citation, Amax had to discontinue mining in the 1 North, 1 West section because it was unable to keep methane levels below 1 percent sufficiently to mine effectively (Tr. 179, 237-38). The Secretary also notes that Inspector Montgomery observed a .6 percent reading on the continuous miner's methane monitor when he entered entry 6³ (Tr. 28-29).

Respondent, on the other hand, argues that an ignition or explosion was and is unlikely. Although some areas of the Wabash Mine have experienced significant methane problems,

³I credit Inspector Montgomery in this regard, although no other witnesses noticed readings that high. A reading of .6 percent is not out of line with the .4 percent noticed momentarily by Bruce Thompson (Tr. 176) or the readings taken by Respondent's pre-shift examiners in the three weeks prior to the citation (Tr. 241). Indeed, one reading of .6 percent was taken during this period by Amax, as well as two at .5 percent.

Amax argues that there have been no such problems in the 2 Main, West South sections. The 1 North, 1 West area in which it had to discontinue mining due to methane, is 7,000 to 8,000 feet from the 2 Main, West South area (Tr. 238). Respondent contends its experience there is not relevant to the instant case.

The results of Respondent's preshift examinations of the 2 Main, West South sections in the three weeks prior to the instant citation, indicate that methane levels are most often between zero and .2 percent, and rarely above 3 percent (Tr. 241). There is no evidence of a reading above .6 percent (Tr. 170, 241).

Amax argues also that liberation of greater amounts of methane is not likely because the area in which the violation occurred is not virgin coal. The areas all around it had been previously mined (Tr. 154-58). Moreover, there has apparently been only one frictional ignition at the Wabash Mine, which occurred in 1981 as a roof bolting machine installed a bolt (Tr. 233).

I conclude that the record does not establish the confluence of factors necessary to establish that an ignition or explosion was reasonably likely to occur. I therefore find the violation to be non-significant and substantial. Methane liberation is not always predictable and an ignition or explosion under the circumstances created by the violation is well within the realm of possibility. However, under the circumstances that existed in entry 6 on November 8, 1994, and that may have been presented in the 2 Main, West South section during the continued course of mining operations, an ignition or explosion was unlikely to occur as a result of the instant violation.

Assessment of Civil Penalty

The Secretary proposed a \$6,000 civil penalty for the instant violation. I assess a \$1,500 penalty pursuant to the criteria in section 110(I). Although an ignition or explosion was not reasonably likely, I deem the gravity of the violation to be quite high. If the violation had contributed to such an incident there is a reasonable likelihood that it would have produced fatal injuries. I decline to assess a higher penalty due to the rather short duration of the violation.

Secondly, the negligence of Respondent's foreman warrants a relatively substantial penalty. Wethington had a lot of other things to be concerned with at the time of the violation and mining in entry 6 was almost finished when he returned. Nevertheless, as I conclude he was aware of the violation, it is apparent he would have done nothing to correct it had not Inspector Montgomery appeared on the scene. In order to adequately protect miners, operators and their agents must take corrective action when inspectors are not present. Thus, I assess what I consider a relatively large penalty based on the omissions of foreman Wethington.

Respondent has stipulated that such a penalty will not affect its ability to stay in business. The three other penalty criteria have been considered and have been found only marginally relevant in arriving at a penalty figure.

Docket No. LAKE 95-259-R

On February 28, 1995, MSHA representative Michael Pace conducted an inspection of the 3 South/4 East working section of the Wabash Mine. He measured the distance between the roof and the floor in a number of locations in the last open crosscut and one crosscut outby the last open crosscut. He found this distance to exceed 7 feet and to be over 9 feet for a distance of 10 feet (Tr. II: 40-41).

Randy Questelle, a Wabash safety inspector who accompanied Pace, took measurements between entries 4 and 5 in the last open crosscut at every row of bolts. His measurements ranged from 7 feet 3 inches to 7 feet 10 inches. Questelle tried to measure what he considered representative mining heights and avoided Aholes in the floor.@ (Tr. II: 120). Between crosscuts 3 and 4, his measurements ranged between 7 feet, 2 inches and 8 feet, 3 inches (Tr. II: 121).

After taking his measurements and determining that rib bolts had not been installed in this area, Pace issued Amax Citation No. 4263560. This citation alleges that Amax violated 30 C.F.R. '75.220(a)(1) in failing to comply with its approved roof and rib control plan.

The Wabash Mine is the only one of the approximately 25 mines in MSHA's District 8 that has a roof control plan requiring rib bolting. The plan requires rib bolting under the following conditions:

When the mining height is greater than 7 feet but less than or equal to 8 feet, partial rib bolting (East/West) is required;

When the mining height is greater than 8 feet,

full rib

Exhibit G-6, page 3.7, subparagraphs 8b and 8c.

The partial rib bolting scheme set forth at page 3.9 of the plan requires bolting on 7 foot centers in the East-West direction, bolting on 5 foot centers at the corners of the intersections between entries and crosscuts and no bolting in a North-South direction.

The rib bolting requirements have been part of the Wabash Mine's roof control plan since the 1970s (Tr. II: 81). These requirements have been relaxed since 1982, for example, by allowing Amax not to rib bolt when advancing in a North-South direction (Tr. II: 82-86).

Up until October, 1993, all mining at the Wabash Mine was performed in either a North-South or East-West direction. The ribs in the mine were much more stable in the North-South direction than in the East-West direction. This was the reason for the roof and rib control provisions exempting North-South entries from rib bolting if the mining height was under 8 feet.

In 1993 Amax experienced many roof falls in the southeastern perimeter of the Wabash mine (Tr. II: 143). To remedy this problem, Amax began advancing 5 entries in width, rather than 10 entries to reduce the stress on the roof. They also retained Jack Parker as a roof control consultant (Tr. II: 147-48). Mr. Parker and Amax concluded that the roof instability was due at least in part to an imbalance in the stress in the East-West direction, as compared to North-South (Tr. II: 148-152).

They further concluded that the stress could be equalized by advancing at an angle to North-South. Thus, in October 1993, Amax began advancing the 3 South/4 West section towards the southeast so that the entries were at a 58 degree angle from East-West (Tr. II: 168, Exh. R-3, R-4). At the same time the 1 North/4 East section and later the 6 East section were advanced at similar angles (Tr. II: 169-70, Exh. R-3). As of August, 1995, three of the mechanized mining units (working sections) at the Wabash Mine are advancing at angles and five are advancing North-South or East-West.

Amax contends that partial bolting under 8 feet is only required by its plan when mining East-West. MSHA contends that such bolting is required in all eight of the sections--unless Amax is advancing North-South.

I conclude that the current plan does not require partial rib bolting when advancing at an angle. I therefore vacate Citation No. 4263560 insofar as it alleges a violation in areas in which the mining height was under 8 feet. MSHA concedes that the mine's roof and rib control plan did not contemplate mining at an angle because when it was developed Wabash was only mining in a North-South and East-West direction (Tr. II: 90, 107, 241-2). Roof control plans are the product of good-faith negotiations between a mine operator and MSHA. Plan provisions therefore are generally the result of an agreement regarding mine specific requirements, Jim Walter Resources, Inc., 9 FMSHRC 903, 907 (May 1987). There has been no agreement, or in contract parlance, no ~~A~~meeting of the minds@ with regard to rib bolting in areas with a mining height of 7 to 8 feet in the angled sections.

That such is the case was admitted by Thomas Buelow, the roof control supervisor in MSHA's Vincennes, Indiana District Eight Office (Tr. II: 242.)

THE COURT: But we are going back to when this plan and language first came into the plan. There was no discussion of what might happen if they were to turn at an angle?

A. No, ...

Q. One reason for the failure to discuss it was there was no anticipation that angle mining would be instituted?

A. Well, I would say we failed to anticipate that better in a North-South direction. We would like to propose that. We want to have you come and evaluate it.= In fact, the ribs stood better in a North-South direction, and that was the relief we gave. You know, we gave relief in the North-South direction...

The thir

Since Amax started advancing at an angle in the southeast portion of the mine, it has experienced dramatic improvement in its roof conditions and improved rib conditions as well (Tr. II: 152-156). MSHA recognizes that the problems of rib stability are not as severe in the angled sections as they are in the East-West direction (Tr. II: 107). Although ribs have collapsed since October 1993 at the Wabash mine and miners have been injured, there is no evidence that any of these incidents have occurred in the angled sections (Tr. II: 52, 61-62, 127-29, 221, 248-49) Indeed, the record indicates that there were no injuries due to rib collapses in the angled sections between October 1993, and the issuance of the citation in February 1995 (Tr. 221)⁴.

⁴Although I find that the existing roof and rib control plan does not require partial rib bolting in the angled sections, MSHA could try to impose such a change in the plan. If Amax does not acquiesce in such a change, its plan approval can be terminated and the dispute can be brought to the Commission for resolution. If the parties pursue such a course, the Secretary would have the burden of proving that the plan without partial rib-bolting

in the angled sections is unsuitable for the Wabash mine and that a plan requiring such bolting is suitable, Peabody Coal Company, 15 FMSHRC 628 (April 1993); 15 FMSHRC 381 (March 1993).

Essentially the Secretary would have to show that rib conditions in the angled sections pose a sufficient hazard to mandate partial bolting. The Secretary would also have to address Amax's contention that in some situations rib bolting increases the hazards to which miners are exposed (See, e.g. Tr. II: 50, 103-04, 130)

Is the Secretary's interpretation of Respondent's roof and rib control plan entitled to deference from the Commission?

In Energy-West Mining Company, 17 FMSHRC 1313, 1317 (August 1995), the Commission stated that MSHA's reasonable interpretation of a ventilation plan is entitled to deference from the Commission. I conclude in the instant case that the Secretary's interpretation of Amax's roof and rib control plan is not sufficiently reasonable to be entitled to such deference.

I reach this conclusion because the Secretary's interpretation of Amax's roof and rib control plan addresses a situation not contemplated by either party in the plan approval process. My conclusion is also based on the fact that the Secretary has not established that rib bolting is Asuitable for the angled sections of the Wabash Mine (see footnote 4, herein).

Areas in which the mining height was over 8 feet

There remains the question as to whether the Secretary established a violation with regard to areas in which the mining height exceeded 8 feet. Amax challenges Inspector Pace's measurements as not being representative and therefore argues that they do not establish mining heights over 8 feet. I agree with Contestant's position that an isolated spot or depression in which the distance from floor to ceiling exceeds 8 feet does not establish a mining height above 8 feet.

I credit the testimony of Mr. Questelle and find that the mining height in the cited area was generally between seven and eight feet (Tr. II: 119-121). Nevertheless, even Mr. Questelle measured areas between crosscut 3 and 4 in which the Arepresentative height exceeded 8 feet (Tr. II: 121). These areas had to be rib-bolted under the plan. I therefore affirm the citation with respect to this area.

ORDER

Section 104(d)(2) Order No. 4258538 in Docket LAKE 95-267 is affirmed as a non-significant and substantial violation and a \$1,500 civil penalty is assessed.

Citation No. 4263560 in Docket LAKE 95-259-R is vacated with respect to those areas in which the mining height was below 8 feet and is affirmed with regard to the area between crosscut 3 and 4 in which the mining height exceeded 8 feet.

The penalty in Docket LAKE 95-267 shall be paid within 30 days of this decision.

Arthur J. Amchan
Administrative Law Judge

Distribution:

R. Henry Moore, Esq., Buchanan Ingersoll, P.C., One Oxford Centre, 301 Grant St., 20th Floor, Pittsburgh, PA 15219-1410 (Certified Mail)

Christine M. Kassak, Esq., Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn St., 8th Floor, Chicago, IL 60604 (Certified Mail)

/lh