

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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March 28, 2007

MONTEREY COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. LAKE 2007-49-R
	:	Citation No. 7488388; 12/12/2006
v.	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEATH	:	
ADMINISTRATION (MSHA),	:	No. 1 Mine
Respondent.	:	Mine ID 11-00726

DECISION

Appearances: Thomas C. Means, Esq., Crowell & Moring LLP, Washington, D.C., Counsel for the Contestant;
Christine M. Kassak-Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, IL, Counsel for the Respondent

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Notice of Contest and Motion to Expedite filed by Monterey Coal Company (“Monterey”) on February 2, 2007, challenging the issuance of Citation No. 7488388, and contesting the extension of the abatement time that was served on Monterey by the representative of the Mine Safety and Health Administration on January 4, 2007. On February 5, 2007, in a telephone conference call, the parties indicated that they had not been able to resolve the issues raised by the Notice of Contest, and it was agreed to schedule this case for hearing on February 14 and 15, 2007.¹ On February 5, 2007, subsequent to the conference call, the Secretary filed a Motion to Dismiss asserting that inasmuch as Monterey’s Notice of Contest was filed thirty days beyond the issuance of the citation in violation of Section 105(d) of the Federal Mine Safety and Health Act of 1977, it was untimely, and should be dismissed. On February 7, 2007, Monterey filed its Opposition to the Motion.

In a telephone conference call with Counsel for both parties on February 8, 2007, the Secretary’s motion was denied to the extent that it was held that the Notice of Contest was timely filed regarding the modification of the abatement time served to Monterey by the Secretary’s

¹In the conference call, the Secretary of Labor “the Secretary” advised that she intended to file a Motion to Dismiss, which, if granted, would result in the cancellation of the hearing.

representative on January 4, 2007.² The parties were ordered to prepare for a hearing regarding the validity of the underlying citation, and to file pre-hearing briefs setting forth, *inter alia*, their arguments relating to the propriety of litigating this issue, or whether the Secretary should prevail in the granting of its Motion to Dismiss in its entirety.

On February 12, 2007, the Secretary filed a Pre-Hearing Brief, and Monterey filed a Pre-Hearing Memorandum of Points and Authorities.

A hearing was held in St. Louis, Missouri on February 14, and 15, 2007. At the commencement of the hearing, the Secretary's Motion to Dismiss was denied in its entirety. Subsequent to the hearing, Contestant filed a Post-Hearing Memorandum, and Respondent filed a Post-Hearing Statement.

Introduction

Monterey operates an underground coal mine consisting of a longwall, and two continuous miner working sections. Approximately 60 miners work underground on each shift. However, during the change of the shifts there could be 120 miners underground.

The mine has two designated escapeways, a primary and an alternate, to evacuate mines outby from the working sections to the surface.³ The alternate escapeway proceeds south, in intake belt air, outby the working sections approximately 1,600 feet, to a point approximately 400 feet west of one of the East Hornsby shafts. After proceeding 330 feet beyond the shaft it becomes ventilated by fresh air. The alternative escapeway then travels outby another 200 feet where it makes a 45-degree diagonal turn southwest across a 70-foot entry and then proceeds west ventilated by fresh air. Approximately 200 feet after the alternate escapeway turns west, it passes within approximately 100 feet north of the other East Hornsby shaft. The escapeway continues heading west in fresh air, approximately 13,500 feet to the Main Portal.

The East Hornsby Shaft No. 1 has a diameter of eight feet, and is approximately 308 feet vertically from the bottom to the surface. The East Hornsby Shaft No. 2 has a diameter of 20 feet and is approximately 307 feet vertically from the bottom to the surface. The parties stipulated that “[a] Dover escape capsule . . . that can accommodate between two and four persons . . . is commercially available for use in either of the East Hornsby shafts, assuming it would meet all applicable MSHA standards.” Joint Stipulation, Par. 15, (“Jt. Stip.”).

²This ruling was put on the record at the commencement of the hearing in this matter on February 14, 2007.

³The primary escapeway is not at issue in this case.

The Main Portal shaft is approximately 296 feet from the surface, and served by an elevator which miners use every day to enter and exit the mine.⁴ The elevator is equipped with two-way communication equipment, and can accommodate approximately 25 people per trip.

On December 12, 2006, MSHA mining engineer, Jason Robert Stoltz examined Monterey's mine map located on the surface of the mine. Based on his examination of the map relating to the location of the alternate escapeway, he issued a citation alleging a violation of 30 C.F.R. § 75.380(d)(5). Section 75.380(d) provides that "[E]ach escapeway shall be—
xxx
(5) [l]ocated to follow the most direct, safe and practical route to the nearest mine opening suitable to the safe evacuation of miners[.]”

Findings of Fact and Discussion

The Secretary's Case

The Secretary, in her Post-Hearing Statement, takes the position that the issue presented is not the route to the openings to the surface, but whether the nearest opening is suitable for the safe evacuation of miners. It is argued that the escapeway at issue violated Section 75.380(d)(5), because its route to the mine Main Portal, which bypassed the East Hornsby shafts, was not to the nearest mine opening suitable for the safe evacuation of the miners.

The Secretary's argument appears to be predicated upon the testimony of Inspector Stoltz, who indicated that he cited Monterey because the alternate escapeway does not travel to either of the East Hornsby shafts which, until August 2006, had been used as the primary escapeway evacuation route to the surface by way of electrically operated escape facilities that transported miners up the shaft to the surface. Instead, the alternate route comes within a few hundred feet of these shafts, and then continues 13,500 feet to the Main Portal where miners are evacuated to the surface.

According to Stoltz, in essence, the East Hornsby shafts were suitable to accommodate an escape facility, and the East Hornsby No. 2 shaft was used as the primary escapeway when the shafts were previously ventilated by intake air. Also, according to Stoltz, a non-electrical escape capsule could be used in the return air in the East Hornsby shafts. In addition, he alleged that three stoppings could be installed to direct intake air “to within maybe 75 feet of the bottom of shaft.” (emphasis added) (Tr. 95). Also, Self Contained Self Rescuers Units (SCSRs) are available to the miners and are “scattered” throughout the escape route. (Tr. 164).

Mark Owen Eslinger, a supervisory mining engineer and a qualified professional engineer, agreed with Stoltz that the alternate escapeway was not the most direct route because it by-passed the East Hornsby shafts, and continued two and one-half miles further to the Main Portal. He opined that if a mine opening can be equipped with an escape facility to hoist miners

⁴The miners travel to and from work in the active working sections in diesel mantrips.

up to the surface, it is “suitable” as this term is used in Section 75.380(d)(5), *supra*. Eslinger indicated that he is aware of mines that use non-electric capsules as escape facilities in return air shafts.⁵ He also indicated that capsules could be built big enough to hold a stretcher and four persons to carry it. (Tr. 270).

In addition, according to Eslinger, since the north/south portion of the alternate escapeway is in a belt intake entry, it could become full of smoke as a result of a belt fire. He noted that belts are sources of fire due to friction that results when they rub against metal surfaces, or stuck rollers. Eslinger indicated that the danger of a fire is increased due to the presence of dust that comes off the belt during its operation. He stated that based on his review of MSHA documents, he concluded that belt fires in coal mines outnumber explosions. He also indicated that a secondary explosion resulting after an explosion inby at the working faces, could bypass the East Hornsby shafts and send contaminants directly towards the Main Portal. In this connection, he asserted that the escapeway route contains a transition zone where fresh air flowing east along the west-east portion of the secondary escapeway mixes with intake air flowing outby in the north/south section of the escapeway. Thus, according to Eslinger, if a fire were to occur in the transition zone, “smoke and contaminants would flow towards the main shaft and it would flow up the elevator shaft. ... and it would also flow up the slope.” (Tr. 272).⁶

Discussion of the Secretary’s Case

The weight to be accorded the Secretary’s case is diluted by various facts elicited on cross-examination. Although Stoltz testified on direct examination that he found the alternate escapeway to be not as safe or suitable as one utilizing the East Hornsby’s shafts, he conceded on cross-examination that he did not take into account that the East Hornsby’s shaft were in return air. Nor did he consider the comparative time needed to escape via the East Hornsby shafts or the route via the Main Portal. Specifically, that he did not consider the relative time that it would take an escape facility to travel from the bottom of the Main Portal and East Hornsby shafts to the surface, and then return to the bottom to evacuate more miners.⁷ Nor did he consider the number of miners who could escape from either opening at one time. Also, Stoltz conceded that should there be a fire in the inby working sections, resulting smoke and contaminants would go into the return air, which could result in limited visibility. As a consequence, miners traveling in return air to the East Hornsby shafts could become disoriented. Further, he conceded that in the event of a fire inby at the working faces, the presence of carbon monoxide and the risk of asphyxiation would be higher in return air. Also, he conceded that even with the construction of stoppings to vent intake air to the East Hornsby shafts, it is not possible to totally avoid return air in that area.

⁵Dean Cripps, an electrical engineer, opined that escape capsules with permissible equipment are very common; that they could utilize a cordless communication system, which is acceptable for use in return air.

⁶This testimony was elicited when Eslinger was called by the Secretary as a rebuttal witness.

⁷The round trip of an escape facility, including the required time to unload at the surface, was referred to as a “cycle”.

In the same fashion, Eislinger's opinion that the East Hornsby shafts were "suitable openings" is diluted because it disregards the last phrase of Section 75.380(d)(5) which requires, by its plain language, that the nearest opening be suitable for "the safe evacuation of miners". It is significant to note that these shafts were in return air, and Eslinger agreed on cross-examination, that "... the preferred choice is to have an escape facility in intake air, or at least not in return air". (Tr. 126). Further, due to the lack of a proper foundation, not much weight was accorded his opinion that a capsule could be built to accommodate a stretcher and four persons. Also, he did not testify to the minimum size of such capsule as compared to the diameter of the East Hornsby shafts.

Monterey's Case

Monterey's evidence, which in the most part has not been impeached or contradicted, indicates that the route via the East Hornsby openings is not as safe as the present alternate route.

Donald Stewart is presently retired, but worked at the subject mine for thirty-one years and still visits the mine weekly in his capacity as President of the Local United Mine Workers. He indicated that, in general, he has sided with MSHA in disputes with the Monterey. He indicated that, in testifying at the hearing, he was presenting the position of the miners that he represents. In this connection, he expressed their concern to evacuate approximately 60 people from the section in fresh air as is utilized in the present alternate escapeway. In contrast, he opined that evacuation via the East Hornsby shafts could expose miners to smoke and contaminants, as a fire or an explosion would be more likely to occur at the face where coal is extracted, rather than at the Main Portal. He opined that the capsule proposed for use at the East Hornsby shafts is not large enough to accommodate a stretcher, especially in a horizontal position. On the other hand, the Main Portal elevator, which he approximated as either ten feet by ten feet, or eight feet by ten feet, can accommodate a stretcher.

Stewart indicated that the Main Portal elevator has a capacity to carry 25 miners at a time, and is used daily by miners to enter and exit the mine. Additionally, he stated that the Main Portal is examined three times daily, whereas the return areas are only examined once a week.

Stewart noted that miners daily travel along the two and a half-mile alternate escapeway on diesel cars.⁸ He opined that if the cars failed to operate, it would be still faster to have 60 to 120 miners walk two and a half-miles to be evacuated, rather than to wait in return air at the East Hornsby shafts for a capsule that has a capacity limited to four miners. Since Stewart represents miners, and in this capacity has "always" opposed Monterey's position in disputes with MSHA and the State of Illinois on safety issues (Tr. 143-144), I find him an objective witness and accord considerable weight to his testimony.

⁸The parties stipulated that "Travel from the East Hornsby Shafts to the Main Portal Shaft by diesel mantrip takes about ten minutes, and on foot between 1 and 1¼ hours." (Jt. Stip., Par. 18).

Donald McBride is a mine inspector and supervises other inspectors for the Office of Mines and Materials, Department of Natural Resources, State of Illinois. He testified on behalf of the state to assist Monterey in its defense against the citation. McBride indicated that the Director of his office considers it unsafe to put an escapeway in return air, as it is a gathering place for gases. For the same reason, it is the position of the State of Illinois that it is not safe for miners to gather in return air awaiting evacuation by a capsule via an East Hornsby shaft.

McBride indicated that he is not aware of any mine using a capsule as an escape facility in return air. He opined that although the East Hornsby shaft opening is closer to the present alternate escape route than the Main Portal, it is not safe or suitable due to the limited capacity of the capsule, and the possibility of persons waiting in contaminated air to be evacuated. He opined that accordingly, it is safer to travel a longer distance to be evacuated by an elevator that has a significantly shorter cycle time and much larger capacity. McBride stated that it is safe to enter return air as part of an escapeway, only for the limited purpose of going around a blockage and then returning to intake air. Since McBride is not employed by either party, and is responsible for enforcing miner safety, considerable weight is placed on his testimony.

John Lanzerotte, Monterey's safety manager, indicated that the diesel vehicles that travel the alternate escapeway have a capacity of 20 people. Also, a slope located a couple of hundred feet from the Main Portal elevator shaft is in fresh air. Thus, miners can escape from the mine by walking out the slope at a seventeen degree grade, or riding a slope car which has the capacity to transport 20 people. Since it is approximately ten feet by six feet, it thus can accommodate a ten foot by two foot stretcher. According to Lanzerotte, it takes the Main Portal elevator 25 seconds to go from the bottom to the surface, 20 seconds to unload, and then 45 seconds to return to the bottom. Since Lanzerotte's testimony was not impeached or contradicted by any of the Secretary's evidence or cross-examination, it is accorded considerable weight.

Gary Hartzog, a mining consultant, who has a bachelor's and master's degree in mining engineering is experienced in the areas of ventilation, and the design of mines and escapeways. He indicated that whereas all the entries outby the active sections carry contaminated air to the East Hornsby shafts, the present alternate escapeway is ventilated by three separate splits of intake air.

Hartzog indicated that it takes approximately ten minutes to travel by diesel from the area of the East Hornsby shafts to the Main Portal shafts. Hartzog, estimated that the cycle time for a capsule operating in the East Hornsby shafts is approximately ten to 15 minutes. Therefore, it would take approximately six hours to evacuate 60 miners, and twice that time should the shifts overlap, requiring the evacuation of a 120 miners.

In general, Hartzog opined that routing the alternate escapeway to the East Hornsby shafts rather than to the Main Portal, would expose miners to hazards to which they are presently not exposed.

Further Discussion and Conclusion

In *Southern Ohio Coal Company*, 14 FMSHRC 1781 (November 1992), the Commission analyzed the language set forth in the requirements of 30 C.F.R. § 75.1704(2)(a).⁹ The Commission reasoned that “[t]he language of [Section 75.1704(2)(a), *supra*], ‘safest direct practical route’, implies that there is one best route. Accordingly, the Secretary, in order to prove a violation, must show that there is a specific escapeway alternative that more fully complies with this criteria than does the cited route.” 14 FMSHRC, *supra*, at 1785. Since Section 75.380(d)(5) contains the exact language as the wording quoted from Section 75.1704-2(a), I conclude that the Commissions’ analysis is applicable to the case at bar.

Accordingly, to establish a violation herein, the Secretary must prove that an escape route to one of the East Hornsby shafts more fully complies with the criteria of Section 75.380(d)(5), *supra*, than the cited route to the Main Portal shaft. As set forth in *Southern Ohio, Id.*, the Secretary’s route must be the “best route.” Thus, the Secretary has the burden of establishing that an escapeway route via the East Hornsby shaft is safer than the longer route to the Main Portal, and that the East Hornsby shafts were the nearest openings “suitable for the safe evacuation of miners.” Section 75.380(d)(5), *supra*.

Taking into account the evidence adduced as analyzed above (*infra*, p. 3-6), I conclude that the Secretary has failed to establish, by a preponderance of evidence, that the longer alternate escapeway route to the elevator shaft at the Main Portal is not safer than an escapeway terminating at the nearer East Hornsby shaft. In summary, *inter alia*, I note that the latter are located in return air, which is subject to contamination and resultant visibility. Also, the Secretary did not adduce evidence to contradict Monterey’s evidence that the East Hornsby escape facility is significantly slower and has far less capacity than the elevator located at the terminus of the present alternate escapeway at the Main Portal.

For all these reasons, I conclude that the Secretary has failed to establish, by a preponderance of evidence, that the present alternate escapeway is not “... the most direct, safe and practical route to the nearest mine opening suitable for the safe evacuation of miners ...”. Section 75.380(d)(5), *supra*. Thus, the Secretary has failed to establish a violation of Section 75.380(d)(5), *supra*.

⁹Section 75.1704-2(a), *supra*, is the predecessor of Section 75.380(d)(5), *supra*, and contains the same language relating to the requirements of the escapeway, with the exception of the addition of a phrase stipulating that the designated escapeway follow the route “as determined by an authorized representative of the Secretary...”

The Secretary's Post-Hearing Motion

On March 5, 2007, after the Parties filed a Post-Hearing Memorandum and/or Statement, the Secretary filed a Motion to Hold Issuance of Decision in Abeyance and Hold Record Open. In support of its motion to hold the record open 90 days, the Secretary asserts as follows:

During this time period, the Secretary will be issuing three major accident reports. The accident reports in the Sago, Aracoma and Darby mine explosions and fires will be published most likely within the next thirty days. In all three cases mine evacuations were undertaken and crews were evacuated. All three reports will make findings regarding how crews were evacuated and will describe inability to evacuate portions or all of the mine except on foot, how the low levels of visibility prevents a miners (sic) from continuing forward on mantrips and in some cases that air reversals caused previous intake air courses to be filled with smoke and CO. This is directly material to the issue in this case. The mine operator contends that the distant mine portal is the only suitable mine opening for the escape of miners, but the Secretary expects that the Judge will have a better sense of the strength of these claims in light of the experiences of three major mine emergency evacuations in 2006.

At the conclusion of the expedited hearing, both parties rested, and the proceedings were concluded. (Tr. 278). In numerous conferences with counsel during the hearing, both parties requested an interest that a decision be rendered as soon as practical, due to the closeness of the time set for abatement. After both parties filed memorandum and/or a statement, the record was evaluated, and a decision was reached. In a telephone conference call on February 23, 2007, the parties were advised that a decision had been reached sustaining the Notice of Contest.

Thus, since the record was closed after the hearing, and the parties subsequently filed a Post-Hearing Memorandum and/or Statement based on the existing record, it would not be in the interests of justice to re-open the record. Further, I note that any reports the Secretary wishes to proffer have not been completed, and thus their contents are speculative. Moreover, even if the reports will consist of findings as summarized by the Secretary, these are not of significant relevance or weight to cause me to keep the record open, or to reconsider my decision. Therefore, the Secretary's post-hearing motion is denied.

Order

It is **Ordered** that the Notices of Contest be sustained, and that Citation No. 7488388 be vacated.¹⁰

Avram Weisberger
Administrative Law Judge

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¹⁰The Notice of Contest also challenges the reasonableness of the abatement time set in the modification to the citation. In light of the decision dismissing the citation, this issue has been rendered moot. Accordingly it is not necessary to dispose of it in this decision.