FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
Washington, DC 20001-2021

December 23, 2003

DRUMMOND COMPANY, INC.,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. SE 2003-100-R
	:	Citation No. 7679500; 03/19/2003
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Shoal Creek Mine
Respondent	:	Mine ID: 01-02901

SUMMARY DECISION

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Notice of Contest filed by Drummond Company, Inc. (Drummond) challenging the validity of the issuance of Citation No. 7979500 which alleges a violation of 30 C.F.R. Section 75.321(a)(1). Subsequent to the filing of an Answer by the Secretary of Labor, Drummond filed a motion for summary decision. On September 23, 2003, the Secretary filed a statement in opposition to Drummond's motion and a cross motion for summary decision. On September 30, 2003, Drummond filed a reply brief in opposition to the Secretary's cross motion for summary decision. On October 20, 2003, pursuant to a telephone conference call with the undersigned, the parties filed statements setting forth their position regarding the precedential status of decisions of the Interior Board of Mine Operations and Appeals (IBMA). In addition, on October 20, 2003, the Secretary filed a further statement clarifying its legal position on the factual basis of the violation at issue. On October 27, 2003, Drummond filed its response to this statement. On October 27, 2003, the Secretary filed a reply to Drummond's opposition to the Secretary's cross motion for summary decision.

Material Facts Not in Dispute

On March 19, 2003, at 9:00 a.m., a roof support crew, consisting of three contract employees and four hourly Drummond miners, arrived at the No. 32 crosscut in the headgate of the G-2 longwall section. While moving roof support materials in the No. 1 face area, one of the contract employees of the roof support crew told his fellow crew members that he felt light-headed.

In response to the crew's concerns about a possible methane problem, Wayne Cox, a certified pumper, performed a methane check in the area where the roof support crew was working. Cox detected 2.0% to 2.8% methane in the face of the No. 2 entry. Minutes later he detected more than 5.0% methane in the No. 1 entry. Steve Duncan, an hourly employee, also took a methane reading and he detected 6.4% methane approximately 12 inches from the roof in the No. 1 entry inby the last open crosscut. Cox instructed the crew to leave the entry area, which they did.

Immediately upon discovery of the high methane readings, Marty Benson and David Whitworth, both hourly miners, dropped a curtain that had been rolled and chained up across part of Entry No.1 where it joined the last open crosscut.[1] They lowered the curtain most of the way down, waited a few minutes and then took a methane reading. Benson and Whitworth then dropped the curtain all the way to the bottom, and took additional readings. At 12:10 p.m., the methane levels were down to a safe level.

In the meantime, upon learning of the high methane readings, Jerry Brown, a company safety inspector, informed Dickie Estep, the safety director, and Jay Vilseck, the mine manager, of the presence of methane. They then instructed the communications clerk to call Norwood Brown, the longwall coordinator, to shut down production on the G-2 longwall, and go to the bleeder area to address the problem.

At 1:30 P.M., Norwood Brown arrived at the G-2 bleeder area and checked for methane in the faces of all three entries. The highest level of methane he detected in Entry Nos. 1, 2, and 3 was 1.4%. Brown then checked ventilation controls in the area that could improve ventilation in the face areas. At the number 40 crosscut, he found a drop-curtain that was a third of the way down, and tacked it back up. He also instructed the crew to remove a curtain from the Entry No. 3 between crosscuts 39 and 40, and to hang it at Entry No. 2, between crosscuts 40 and 41.

On March 19, 2003, MSHA Inspector John Terpo, who was above ground at the subject mine, learned of the existence of high methane, and in addition to issuing an imminent danger order[2] also issued Citation No. 7679500 alleging an unwarrantable failure violation of 30 C.F.R. § 75.333(h), because he thought required stoppings were missing or damaged. Terpo modified this Citation on May 28, 2003, to instead allege a violation of 30 C.F.R.§ 75.321(a)(1).[3]

---

[1]The roof support crew stated that this wing curtain had been rolled up the entire time they had been working in the area - approximately 10 days.

[2]Drummond filed a notice of contest challenging the validity of this order. Subsequent to an evidentiary hearing, a decision was issued sustaining the notice of contest and dismissing the imminent danger order. Drummond v. Secretary, 25 FMSHRC 621(October 14, 2003).

[3]30 C.F.R. § 321(a)(1) provides, as pertinent, as follows: "... the air in areas where persons work or travel, except as specified in paragraph (a)(2) of this section ... shall be sufficient to dilute, render harmless, and carry away flammable, explosive, noxious, and harmful gases, dusts, smoke, and fumes"

The Parties' Positions

In essence, the Secretary seeks summary decision based upon the undisputed fact that 6.4 % methane was measured in Entry No. 1 of the G-2 longwall panel. The Secretary argues that based on this undisputed fact "it can reasonably be inferred that the ventilation to the face of Entry No. 1 was not 'sufficient to dilute, render harmless, and carry away, ... explosive, ... gases, ...' ". Drummond, in contrast, in its motion for summary decision and in its opposition to the Secretary's cross motion for summary decision, argues, in essence, relying on Mid-Continent Coal and Coke Company, (Mid-Continent II), 8 IBMA, 204, 212 (1997), that methane levels in excess of 5% do not constitute a per se violation of Section 75.321(a)(1), supra.

For the reasons set forth below, I am constrained to find, based on legal precedent established by the Commission's predecessor, the Interior Board of Mine Operations Appeals (IBMA), that the uncontested facts herein do not establish a violation of Section 75.321(a)(1), supra. (Section 303(b) of the Federal Mine Safety and Health Act of 1977 (the Mine Act)). Accordingly, Drummond's Motion for Summary Decision is granted, and the Secretary's Cross-Motion for Summary Decision is denied.

Discussion

In Mid-Continent II, supra, relied on by Drummond, the operator was served with a notice of violation alleging that methane in excess of 5% had been detected and that 30 C.F.R. § 75.301, had been violated.[4] In an initial decision, the Administrative Law Judge vacated the Notice of Violation. On appeal to the IBMA, the Secretary argued, in essence, that in order to sustain a violation of former Section 75. 301, supra, it is only necessary to show a harmful accumulation of noxious or poisonous gases and that the notice of violation was issued "... solely because of a 5% methane at the face." IBMA, supra, at 213. In affirming the decision of the Judge, and in considering the position of the operator that "methane accumulation is not per se a violation of the act" 8 IBMA, supra, at 211, the Board found as follows: "... we find that the instant case is controlled by the Board's earlier decision in Mid-Continent Coal and Coke Company, 1 IBMA 250, 79 I.D. 736 (1972) (Mid-Continent I), in which we stated: 'Neither the Act nor the Regulations provides that a mere presence of methane gas in excess of 1.0 volume per centum is *per se* a violation.'" 8 IBMA, supra, at 211.

I take cognizance of the Secretary's argument that Mid-Continent II, supra, does not have precedential value due to its flawed reasoning and misplaced reliance on an earlier Board decision, Mid-Continent I, supra, involved three notices issued under Section 303(h)(2) of the Federal Coal Mine Health and Safety Act of 1969 (the Coal Act). As correctly pointed out by the Secretary, Section 303(h)(2) of the Coal Act, which is identical to Section 303(h)(2) of the Mine Act, requires certain actions to be taken by an operator once it is found that methane exists at

[4]The wording of Section 75.301, supra, is now set forth in Section 75.321(a)(1), supra, at issue in the case at bar.

more than 1%, and other actions to be taken once it is found that the air contains more than 1.5% of methane. In contrast, Section 303(b)[5] of the 1969 Coal Act, at issue in Mid-Continent II, supra, does not contain any provision setting forth actions to be taken by the operator once excessive levels of methane have been found. Section 303(b), supra, only requires a sufficient volume and velocity of air to "... dilute, render harmless, and to carry away ... harmful gases, ... and explosive fumes." Thus, the Secretary argues, with persuasion, that under Section 303(b), supra, it appears that it would not have been necessary for the Secretary to establish the operator's failure to act upon becoming aware of the presence of excessive methane to support a violation under Section 303(b), supra. However, Mid-Continent II, supra, held, referring, with approval to Mid-Continent I, supra, that it is the operator's failure to act that constitutes the violation and not the excess, as such. 8 IBMA, supra, at 212. Thus, I recognize merit in the Secretary's position that because Mid-Continent II's, supra, reliance on Mid-Continent I, supra, appears to be misplaced, its decision is flawed, and should not have any precedential value regarding the case at bar, where Section 303(b), supra, not 303(h)(2), supra, is at issue. Additionally, the Secretary's arguments appear to be supported by the clear language of Section 321(a)(1), supra, which does not require any specific action to be taken by the operator once excessive methane has been found. Section 321(a)(1), supra, states only that the lack of sufficient volume and velocity of air to ventilate harmful gases constitutes a violation. However, the decision of the Board in Mid-Continent II, supra, i.e., that the presence of explosive methane alone does not establish a violation of Section 303(b) of the Mine Act, whose language has been repeated in Section 75.321(a)(1), supra, remains in effect as precedent unless it has been superceded or overruled by the Commission. (Section 301(c)(2) of the Mine Act). Although the flaws in the decision as argued by the Secretary might dilute its value as a precedent, it would not be proper for a Commission Judge to usurp the function of the Commission, and rule on the precedential value of a decision of the Commission's predecessor. To do so would violate the principle of *stare decisis*. Hence, I am constrained to follow the ruling in Mid-Continent II, supra, unless it has been superceded or overruled by the Commission. I take cognizance of the fact that, to date, the Commission has not expressly overruled Mid-Continent II, supra.

The Secretary cites Monterey Coal Co., 7 FMSHRC 996 (July 1985), and Consolidation Coal, 22 FMSHRC 340 (March 2000), both issued subsequent to the Board's decision in Mid-Continent II, supra, as demonstrations that Mid-Continent II, supra, no longer has precedential value for the interpretation of Section 75.321(a)(1), supra. In Monterey Coal Co., supra, the issue was an alleged violation of 30 C.F.R. § 75.316. In discussing hazards contributed to by the violation of Section 75.316, supra, the Commission quoted from Section 303(b) of the Act, the statutory parallel to Section 75.321(a)(1), supra, and concluded that a basic reason for this mandatory requirement "... is the grave danger that, if there is not adequate ventilation, ignitions or explosions can result from concentrations of explosive gases like methane, ... liberated during

[5]Section 303(b) of the Coal Act, contains the same language as 30 C.F.R. § 75.301, which was the regulatory standard at issue in Mid-Continent II, supra and contains the same language as Section 303(b) of the Mine Act, which is repeated in Section 75.321(a)(1), supra, formerly numbered Section 75.301, supra,.

mining operations." 7 FMSHRC 1000-101. However, although these comments might indicate the Commission's approach in 1985, to Section 75.321(a)(1), supra, they are clearly dicta. Since the Commission did not expressly overrule Mid-Continent II, supra, it still must be followed in the case at bar as precedent. Similarly, in Consolidation Coal, supra, a case involving 30 C.F.R. § 75.301, which contains the same language as Section 75.321(a)(1), supra, the Commission found that the operator had violated Section 75.301 based on "... largely undisputed evidence" of insufficient ventilation to render methane harmless. (22 FMSHRC, supra, at 350). Specifically, the Commission noted the conclusion of the Secretary's expert and the Operator's expert that air flow in the area in question had been reduced, and that it was insufficient to render methane harmless. Since the Commission, in Consolidation Coal, supra, did not deal with the issue of whether an accumulation of explosive methane is per se a violation of Section 75.321(a)(1), supra, which was the issue in Mid-Continent II, supra, and did not mention Mid-Continent II, supra, it certainly does not supercede precedent established by Mid-Continent II, supra.

The Secretary, lastly[6], predicates Drummond's liability under Section 75.321(a)(1), supra, upon Drummond being at fault when it failed to ventilate the entries in question causing the accumulation of methane. The Secretary here cites undisputed facts that in the entries in question curtains had been rolled up for at least 10 days causing 6.4% methane in the explosive range to accumulate in the face of Entry No. 1. However, regarding the operator's "failure to act" as a predicate for establishing a violation under Section 75.321(a)(1), supra, the Board in Mid-Continent II, supra, held as follows: "It is the failure to act upon becoming aware of the presence of an excessive methane accumulation that constitutes the violation, and not the excess, as such." 8 IBMA, supra, at 212. (Emphasis added). Hence, liability is based upon the presence of excessive methane, and the operator's failure to act "upon becoming aware" of the methane. In this connection, Drummond's actions prior to its becoming aware of the presence of methane appear to be not relevant. In contrast, the undisputed facts indicate that upon becoming aware of the presence of methane in an explosive range, Drummond made various ventilation changes including the dropping of the curtain and the hanging of two additional curtains. Methane readings taken after these actions indicated the presence of methane in amounts below the explosive range.[7] It thus appears that a predicate for establishing a violation under Section 75.321(a)(1), supra, is missing.

Therefore, for all the above reasons, Drummond's Motion for Summary Decision is granted and the Secretary's Cross Motion for Summary Decision is denied.

---

[6]The Secretary also argues that its interpretation of 30 C.F.R. § 75.321(a)(1) is entitled to deference. As a Commission Judge, as set forth above, I must find that any deference to be accorded the Secretary's interpretation of her regulation, and the statutory provision, is outweighed by the essential principle of *stare decisis* and my obligation to follow Commission precedent, i.e., Mid-Continent, supra.

[7]For a timeline of the finding of excessive methane and the specific actions taken by Drummond see Drummond v. Secretary, 25 FMSHRC 621 (October 14, 2003), and Drummond v. Secretary, 25 FMSHRC _ November 18, 2003, which both deal with the alleged violative conditions in the same area, time, and date as the case at bar.

Order

It is **Ordered** that the Notice of Contest herein be **Sustained** and Citation No. 7679500 be **Dismissed**.

Avram Weisberger
Administrative Law Judge

Distribution: Certified Mail

Timothy M. Biddle, Esq., Bridget E. Littlefield, Esq., Crowell & Moring, LLP, 1001 Pennsylvania Ave., N.W., Washington, DC 20004

Thomas A Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Rd., Suite B-201, Nashville, TN 37215

/sc