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March 9, 1995

ENERGY WEST MINING COMPANY, Contestant v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	CONTEST PROCEEDING Docket No. WEST 92-819-R Citation 3851235; 9/2/92 Cottonwood Mine Mine I.D. 42-01944
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. ENERGY WEST MINING COMPANY, Respondent	:	CIVIL PENALTY PROCEEDING Docket No. WEST 93-168 A.C. 42-01944-03613 Cottonwood Mine

DECISION

Appearances: Timothy M. Biddle, Esq., Crowell & Moring, Washington, D.C. for Energy West Mining Company; Robert A. Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Secretary of Labor; Greg Hawthorne, Esq., United Mine Workers of America, Washington, D.C., for intervenor, United Mine Workers of America.

Before: Judge Manning

These cases are before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.' 801 et seq. (1988)("Mine Act" or "Act") following a remand from the Commission. 16 FMSHRC 1414 (July 1994). The Commission reversed and remanded the decision of former Administrative Law Judge Michael A. Lasher, Jr. on the basis that he improperly granted the Secretary of Labor's motion for summary decision. Id. The Commission concluded that summary decision was improper because "central facts were disputed." Id. at 1419.

A hearing was held on November 30, 1994, in Salt Lake City, Utah. The parties presented testimony and documentary evidence, and submitted post-hearing briefs.

I. FINDINGS OF FACT

On September 2, 1992, Fred Marietti, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), issued Energy West Mining Company ("Energy West") a citation alleging a violation of 30 C.F.R.' 75.326 at its Cottonwood Mine. The citation, as modified, states as follows:

> The petition for modification, Docket No. 86-MSA-3, was not being complied with in the 9th left two entry panel. The belt was in the No. 2 entry. The longwall is being set up for pillar retreat. 9th left is the headgate entries. There were three diesel Isuzu trucks that were not approved under 30 C.F.R. Part 36. This is required on page 41 **&**(c)(4).

(Ex. G-1). On the citation, the inspector stated that the alleged violation was not significant and substantial and was caused by Energy West's moderate negligence. Energy West contested this citation and the Secretary proposed a penalty of $50.00.

A. Background

The Cottonwood Mine is a deep coal mine with a coal seam that is between 700 feet and 2,100 feet beneath the surface. (Tr. 157). The mine's depth creates ground control problems, including face and pillar bouncing, pillar bursts and roof control problems. Id. Energy West extracts the coal using the longwall method. It develops entries around a large block of coal using continuous mining machines, sets up the longwall equipment at the inby end of the block of coal, and then extracts this block with the longwall equipment by retreating in an outby direction. A block of coal typically is between 4,000 to 5,000

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[1] The cited safety standard provided, in pertinent part, that "the entries used as intake and return air courses shall be separated from belt haulage entries..." This safety standard was superseded by 30 C.F.R.' 75.350, effective November 16, 1992. For purposes of this proceeding, the two standards are identical and I refer to the old standard in this decision.

feet in length and 700 to 750 feet in width. (Tr. 164). The longwall equipment includes a large sheering machine that cuts the coal, shields that support the roof at the face, and a conveyor system that transports the coal out of the section. The coal face, which is about 700 feet wide, is along the inby side of the rectangular coal block. The block of coal is extracted over a period of between 3 and 12 months with the longwall equipment. Id.

A minimum of three entries are required to be developed along each side of the block of coal when a conveyor belt is used to remove the coal. An MSHA safety standard provides, in part, that "entries used as intake and return air courses shall be separated from belt haulage entries." 30 C.F.R.' 75.326. These entries provide separate air courses for intake and return ventilation, safe access to the working face through the intake entry, and a separate route for the coal conveyer belt.

Because the depth of the overburden was causing ground control problems at the Cottonwood Mine, Energy West filed a petition for modification with MSHA pursuant to Section 101(c) of the Mine Act, 30 U.S.C. ' 811(c), seeking permission to develop two rather than three entries along the sides of each block of coal. The petition was required because Energy West planned on using a belt to remove the coal and the belt entry would also have to be used for intake or return air, thereby violating the safety standard. The petition was granted by the Assistant Secretary for Mine Safety and Health on July 14, 1989, following administrative litigation before the Department of Labor. (Ex. G-7). The Assistant Secretary's Decision and Order ("D&O") granting the petition contains a number of terms and conditions not contained in Energy West's petition. As discussed below, one of these conditions is the subject of this proceeding.

Two-entry mining in longwall sections has been a subject of considerable discussion at MSHA and a task force was formed to study it. In 1985, the MSHA task force issued its report entitled Two-Entry Longwall Mining Systems - A Technical Evaluation.

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[2] See note 1, supra.

[3] Since August 23, 1985, the date the petition was filed, the Cottonwood Mine has been operated by Emery Mining Corporation ("Emery"), Utah Power and Light ("UP&L"), and Energy West. Emery operated the mine until 1986 for the owner, UP&L. In 1990, UP&L merged with Pacific Corp. Energy West is a subsidiary of Pacific Corp. (Tr. 152-3). In this decision, I refer to the operator as Energy West without regard to the corporate identity.

(Ex. G-6). As a result of their study, the task force reached the following conclusion:

> After a through analysis of technical data, review of available "bump" and roof fall records, extensive review of in-mine conditions, and deliberations among all Task Force members, the Task Force concluded that the 2-entry technique for developing longwall panels can be a justifiable mining procedure. The Task Force, however, recognizes that emergency evacuation is limited when using this technique and, therefore, recommends that it be permitted only after the safeguards contained in this report have been considered.

Id. at 2-3. The task force reached this conclusion because technical and historical data establish that the "2-entry technique, under adverse geologic conditions, has reduced the occurrence of pressure `bumps,' roof falls, and other ground control problems during mining operations." Id. at 11.

Safeguard No. 6 in the task force report states: "All diesel-powered equipment, operated on any longwall development or longwall panel where both the intake and alternate escapeways are ventilated with the same continuous split of air, be approved under the provisions of 30 C.F.R. Part 36 and be provided with a fire-suppression system." Id. at 58. The report concludes that because diesel equipment creates additional fire hazards not present with electrical equipment, the use of diesels is "too hazardous for use in areas of a mine with limited escape routes." Id. Accordingly, the report recommends that only diesel equipment approved under Part 36 be permitted because "such equipment has been designed to reduce the likelihood of a machine fire." Id.

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[4] Part 36, of 30 C.F.R. sets forth "requirements for mobile diesel-powered transportation equipment to procure their approval and certification as permissible for use in gassy noncoal mines..." 30 C.F.R. ' 36.1. There are no similar procedures for obtaining the approval and certification of permissible diesel transportation equipment in coal mines. Apparently, MSHA uses these noncoal mine certification procedures to certify permissible diesel transportation equipment in coal mines where such certification is deemed necessary. (Tr. 41).

The Assistant Secretary's D&O accepted Safeguard No. 6, as recommended by the task force. (Ex. G-7 at 34, 41). Under the heading "Requirements Applicable to Both Development and Retreat Mining Systems," the D&O provides, at paragraph III(c)(4):

> No later than two years from the date of this order, and pursuant to a schedule developed by the petitioner and approved by the District Manager, all diesel-powered equipment operated on any two-entry longwall development or two-entry longwall panel shall be equipment approved under 30 C.F.R. Part 36.

Id. at 41. Paragraph III(c)(5) of the D&O states that such diesel equipment "operated on any longwall development or longwall panel shall be provided with a fire suppression system." Id.

In explaining this provision, the Assistant Secretary stated:

> As noted earlier, one of the ... recommendations of the MSHA Task Force on longwall mining was that only diesel equipment approved under 30 C.F.R. Part 36 and equipped with a fire suppression system be used on two-entry panels. The evidence before me establishes that this recommendation should be imposed as a requirement in this case.

Id. at 41 n. 16 (citations omitted).

B. The two-entry longwall mining process

Under the petition for modification, as granted, Energy West develops two headgate entries along one side of the block of coal. Tailgate entries are usually present on the other side from mining the adjacent block of coal. As the two headgate entries are advanced, one entry is used as the air course for intake ventilation, and the other entry is used for belt haulage and return air. (Ex. C-4). After the entries are developed, and the longwall mining equipment has been set up, longwall retreat mining begins. As the longwall retreats, one of the headgate entries is used as the primary air course for intake air and the other entry is used for belt haulage and as a secondary intake

[5] The trucks cited by MSHA in this case were equipped with fire suppression systems.

air course on the same split of air. Id. The tailgate entries are used for return air. In general terms, return air is air that has ventilated the last working place. 30 C.F.R.' 75.301.

During the time that the longwall equipment is being set up, after the headgate entries have been developed but before long-wall retreat mining begins, there is no return air. (Tr. 38). The circulating air does not ventilate a working place. (See, 30 C.F.R. '' 75.2 and 75.301). The ventilation system is modified during the longwall installation period in preparation for retreat mining.

C. The citation

Inspector Marietti issued the citation on September 2 and no coal production had taken place at the panel since August 18. The two headgate entries (9th Left) had been completed with continuous mining machines on August 18. (Ex. C-8, C-9). The tailgate entries had been previously developed. Miners were installing the longwall equipment in the "setup" entries that connect the headgate and tailgate entries along the inby (face) side of the block of coal. (See Ex. J-1). These activities are summarized in Ex. C-8. The belt, which had been used when the headgate entries were advanced, was being modified so that it could be used with the longwall equipment on retreat. The belt structure was still present, but the belt had been cut, sections of the belt removed, and splices were being completed. These activities are summarized in Ex. C-9. (See generally Tr. 244-50). The belt was not trained and ready for use in conjunction with the longwall until September 17. (Ex. C-8). Longwall retreat mining commenced on September 18.

Inspector Marietti issued the citation because he observed three nonpermissible trucks in one of the headgate entries. He believes that the D&O allows only permissible diesel trucks in the longwall panel from the start of longwall panel development until longwall retreat mining is completed. At the time the citation was issued air was moving in an inby direction in the headgate entry containing the trucks and was moving inby at a slower rate in the entry containing the belt conveyor system. This intake air was a single split and the air in the belt entry was mixing with air in the intake entry containing the trucks. (Tr. 223). The air was exiting the panel through one of the tailgate entries and the bleeders. Additional air was entering the panel through two of the tailgate entries.

On this particular panel, there were three tailgate entries.

II. SUMMARY OF THE PARTIES' ARGUMENTS

A. Secretary and UMWA

The Secretary argues that Energy West cannot accept the broad benefits of the D&O while limiting its applicability to those times when coal is being extracted. The Assistant Secretary made clear in his D&O that he could consider safety factors that do not directly relate to the purpose of the standard being modified. By limiting the petition's terms to those periods when coal is being extracted, Energy West ignores safety hazards that are present at other times during longwall mining cycle. The D&O does not include any language limiting its application to production periods. Many activities were occurring in the headgate and setup entries between August 18 and September 18, and Condition III(c)(4) should protect miners performing those tasks. Finally, the Secretary maintains that correspondence between MSHA and Energy West establish that Energy West recognized before the citation was issued that the D&O required it to use permissible diesel equipment during the longwall installation period.

B. Energy West

Energy West argues that because a functioning coal conveyer belt was not present at the time the citation was issued, there was no "belt haulage entry," as that term is used in 30 C.F.R.' 75.326. Accordingly, Section 75.326 did not and could not apply at that time. Because Section 75.326 did not apply, it follows*a fortiori* that neither the petition for modification nor the D&O applied. Therefore, Condition III(c)(4) of the D&O does not pertain to longwall installation and the citation is invalid. It maintains that the petition cannot apply to longwall installation, as a matter of law, because there is nothing to modify.

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[6] The United Mine Workers of America did not file a brief but stated in a letter that it "concurs with" the Secretary's brief.

[7] The Secretary also argues that the conclusions of former Administrative Law Judge Lasher are still valid. He states that "nothing has changed [since] Judge Lasher originally weighed the evidence." S. Br. 5. Judge Lasher, however, did not "weigh the evidence" because he granted the Secretary's motion for summary decision. I have not considered Judge Lasher's analysis or conclusions in reaching my decision in this case.

Energy West maintains that at no time during the protracted modification proceedings before the Department of Labor did anyone suggest that the petition would cover longwall installation. It emphasizes that neither the task force report nor the D&O discuss longwall installation. As discussed in more detail below, it argues that the specific language of the D&O, including Condition III(c)(4), supports its position that longwall installation was not included.

Finally, Energy West argues that Condition III(c)(4) was included because of the dangers inherent when miners are working in an area ventilated by a single split of air with limited escape routes. It points out that at the time the citation was issued, 9 Left was ventilated by two separate spits of air and that there were five escape routes. It maintains that the trucks did not present a fire hazard.

III. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS OF LAW

Energy West makes several compelling arguments that Condition III(c)(4) should not apply during longwall installation. I find, however, that Energy West's factual assumptions, as described below, do not support its legal arguments.

Energy West's reasoning in this case is dependent on its contention that the Assistant Secretary's D&O is not applicable to the process of installing the longwall equipment and modifying the belt ("longwall installation"). It bases this argument on two underlying factual assumptions. First, it maintains that a belt haulage entry does not exist during longwall installation because the miners are modifying the belt and its structure at that time for use with the longwall equipment and the belt is, therefore, inoperable. Second, Energy West contends that the language in the D&O, including the language in Condition III(c)-(4), excludes longwall installation. I find that the evidence does not support Energy West's position.

It is undisputed that the one of the two entries in 9 Left contained the belt structure, rollers, and other equipment necessary for the operation of the belt, designated as the B entry on Ex. J-1. It is also not disputed that the belt was not in use on the date of the inspection and could not be used because it was being modified for use with the longwall equipment. Splices were being vulcanized, rollers added and other changes made. (Tr. 244-50). Energy West argues that the term "belt haulage entry" in Section 75.326 "does not refer to an

entry in which no belt haulage occurs." (E.W. Br. 4). On this basis, it maintains that because there was no belt haulage entry on September 2, Section 75.326 would not have applied and, consequently, the D&O did not apply.

In spite of the fact that the belt was not in use and could not have been used on September 2, 1992, I find that the entry containing the belt and belt structure was a belt haulage entry on that date, as that term is used in Section 75.326. That entry was a belt haulage entry during the development of the longwall panel. The entry was a belt haulage entry when the longwall was mining coal after September 17. I do not believe that this entry ceased being a belt haulage entry during the 30-day period that the belt and its structure were being modified for longwall retreat mining. I find that the term "belt haulage" refers to a belt conveyer system, and a belt haulage entry is an entry that contains a belt haulage system. The entry in question contained a belt haulage system and, therefore, was a belt haulage entry.

If a longwall panel is put on inactive status after the headgate entries are developed, the entry containing the belt conveyer system would, perhaps, no longer be deemed a "belt haulage entry." Under the facts of this case, however, Energy West was proceeding directly through the mining cycle in order to start retreat mining. The fact that longwall installation is a complex process that takes 30 days, as opposed to a shift or two, does not change this fact.

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[8] The term "haulage" refers to a track haulage system or a belt conveyer system. See, Bureau of Mines, U.S. Department of the Interior, Dictionary of Mining, Mineral, and Related Terms, at 530 (1968).

[9] In support of its position, Energy West points to the testimony of Inspector Marietti that section 75.326 did not apply at the time. (E.W. Br. 9; Tr. 39). I interpret the inspector's testimony to mean that the safety standard did not apply to the Cottonwood Mine at all because it had been superseded by the D&O. (See also Tr. 18). This interpretation is consistent with the testimony of MSHA witness Davis (Tr. 86, 106).

[10] Energy West states that it has used shuttle cars for haulage in two entry longwall panels and argues that such a system would not violate the safety standard. (E.W. Br. 4 n.3). I agree that such a haulage system would not have violated the safety standard and would not violate the D&O because a belt haulage entry would not exist. This argument, however, does not support its position in this case.

Energy West also argues that the language of the D&O precludes the application of Condition III(c)(4) to the period of longwall installation. I disagree. I believe that the language of the D&O makes clear that the Assistant Secretary intended that the terms of Condition III(c)(4) apply during the entire mining cycle, from the time that development of a new longwall panel commences until retreat mining has been completed. There is no language in the D&O that excludes the longwall installation process from the requirements of the condition or any other provisions of the D&O. In its brief, Energy West lists a number of conditions under paragraph III that it believes demonstrates that the longwall installation process was excluded. (E.W. Br. 13-14). Some of these provisions, by their very nature, may be inapplicable during longwall installation because there is no working place or working section. Condition III(c)(4), however, does not limit its application to periods when there is a working place or working section.

More importantly, I believe that the language of the D&O supports the Secretary's position. Condition III(c)(4) is included under the heading: "Requirements Applicable to Both Development and Retreat Mining Systems." Two of the Secretary's witnesses testified that longwall installation is part of longwall development. Robert Ferriter, chief of the ground support division of MSHA's Denver Safety and Health Technology Center, was Chairman of the MSHA task force. He testified that during the task force's deliberations they discussed the longwall installation phase and considered it to be "part of the development of the longwall panel." (Tr. 57). He testified that the task force recommendation concerning permissible diesel equipment applies to the entire mining cycle and that there is no "time-out period." (Tr. 59). Allyn Davis, Chief of MSHA's Division of Coal Mine Safety, testified that the Assistant Secretary "intended ... that [the permissibility requirement] apply throughout the use of the two-entry system..." (Tr. 85). He reached this conclusion based on the language of the D&O and the fact that he believes that the hazards associated with using diesel trucks continue to exist while the longwall equipment is being moved in and set up. Id. I credit this testimony and find that longwall installation is part of "longwall development," as that term is used in the D&O.

Condition III(c)(4) provides that "all diesel-powered equipment operated on any two-entry longwall development or longwall panel shall be equipment approved under 30 C.F.R. Part 36." Given my finding that longwall installation is a part of longwall development, I find that the condition applied at the time the citation was issued. There is no dispute that the diesel trucks in question did not meet these requirements.

Energy West is correct in stating that the panel was ventilated by two separate splits of intake air and that there were more than two escape routes out of the panel. As Energy West states, the primary reason that the condition was included in the D&O is because the number of escape routes is limited in two-entry mining. During longwall installation more escape routes are available than when the headgate entries or the longwall panel are being mined. (Tr. 46, 97-98). Nevertheless, I find that the record establishes that nonpermissible diesel trucks present a hazard in the longwall panel even under these circumstances. (Tr. 33, 85). The hazard is the risk of fire caused by nonpermissible diesel equipment. The trucks' catalytic converters, the presence of diesel fuel and the risk that adequate escapeways will not be available create hazards to miners in the panel. (Tr. 26, 33, 85). There would be more escape routes available in the event of an emergency if the headgate and tailgate entry sets were comprised of three entries each. In an emergency one or more of the escape routes could be blocked. I find, however, that the safety hazards are considerably less during longwall installation than at other times. (Tr. 57-58, 75-76, 97-98).

Finally, Energy West states that Condition III(c)(4) was not proposed in its petition for modification and was not included in the proposed decision and order of the Administrator but was "imposed on Energy West *sua sponte* by the Assistant Secretary." (E.W. Br. 5). Energy West contends that the Secretary's unreasonable interpretation of Condition III(c)(4) has likewise been imposed on it without any prior notice. In a letter to David Lauriski of Energy West, dated March 23, 1987, John W. Barton, MSHA District Manager, made it clear that MSHA considers longwall installation to be a part of development mining. (Ex. G-2). Although this letter was in reference to interim relief granted by MSHA under a petition for modification at Energy West's Deer Creek Mine, the principles are the same. Thus, Energy West cannot claim that it did not know that MSHA considered longwall installation to be a part of longwall development and that MSHA might apply Condition III(c)(4) during that period. See also Tr. 20, 226).

I recognize that Energy West has been unable to find the equipment necessary to make the Isuzu trucks permissible or find other small permissible diesel powered vehicles. I also recognize that these trucks have served as an important means of transportation for men and materials in and out of longwall panels during installation. Energy West believes that switching to battery-powered vehicles or requiring miners to walk in and

out of the panel would result in a diminution of safety. (Ex. C-7). I do not have the jurisdiction to consider this issue.

Taking into consideration the criteria of Section 110(i) of the Act, 30 U.S.C. ' 820(i), I find that a civil penalty of $50.00 is appropriate. I find that the violation did not create a serious safety hazard because coal was not being extracted, there were more that two escape routes out of the panel, and the risk of fire was low. I also find that the violation was not significant and substantial because there was not a reasonable likelihood that the hazard will result in the injury. I agree with the inspector's determination that the violation was the result of Energy West's moderate negligence.

IV. ORDER

Accordingly, Citation No. 3851235 is **AFFIRMED** and Energy West Mining Company is directed to pay a civil penalty of $50.00 within 30 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

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