

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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April 6, 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 92-340
Petitioner : A.C. No. 05-02820-03621
 :
v. : Docket No. WEST 92-384
 : A.C. No. 05-02820-03627
WYOMING FUEL COMPANY, n/k/a :
BASIN RESOURCES, INC., : Golden Eagle Mine
Respondent :
 :
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 93-186
Petitioner : A.C. No. 05-02820-03657
 :
v. :
 : Golden Eagle Mine
EARL WHITE, employed by :
BASIN RESOURCES, INC., :
Respondent :

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Charles W. Newcom, Esq., Sherman & Howard, Denver,
Colorado, for Respondents.

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 1618 (August 1994). The Commission affirmed in part, reversed in part, and remanded in part, the decision of Administrative Law Judge John J. Morris in these cases. The only issue on remand is whether Order No. 3244406 issued to Basin

Resources, Inc. ("Basin Resources")¹ on June 25, 1991, for making unauthorized changes to its ventilation system, constituted a significant and substantial violation of 30 C.F.R. ' 75.316 (1991). For the reasons the follow, I conclude that the violation was significant and substantial.

I. BACKGROUND

On Sunday, June 23, 1991, Basin Resources changed its ventilation system in the Northwest No. 1 longwall section without notifying the Department of Labor's Mine Safety and Health Administration ("MSHA") in advance. MSHA first learned of the ventilation change during a telephone conversation between MSHA Inspector Donald L. Jordan and Golden Eagle Mine General Manager Earl R. White on Monday, June 24, 1995. Inspector Jordan went to the mine early on June 25, and issued an order of withdrawal (Order No. 3244406) alleging a significant and substantial ("S&S") violation of the mine's ventilation plan. He determined that the alleged violation was the result of Basin Resources' unwarrantable failure to comply with the ventilation plan. He charged Basin Resources with a violation section 75.316.

In his decision, Judge Morris affirmed the violation, found that the violation was S&S, but determined that it was not caused

¹ Effective June 1, 1991, KN Energy (Wyoming Fuel Company) sold the Golden Eagle Mine to Enteck, Inc. (Basin Resources, Inc.) (Tr. 205-06).

² Section 75.316 provided:

A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form.... The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

On November 16, 1992, this safety standard was superseded by 30 C.F.R. ' 75.370, which imposes similar requirements.

by Basin Resources' unwarrantable failure to comply with the safety standard. 15 FMSHRC 1968, 1970-78 (September 1993). On review, the Commission affirmed the judge's finding that a violation occurred and that the violation was not caused by Basin Resources' unwarrantable failure. 16 FMSHRC at 1619 n. 3. The Commission vacated the judge's conclusion that the violation was S&S and remanded that issue for further analysis consistent with the Commission's decision. 16 FMSHRC at 1626-27. On March 13, 1995, these cases were reassigned to me for an appropriate resolution. I have reviewed the hearing transcript and exhibits and make the following findings of fact based on the evidence.

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

Mr. Earl White became General Manager of the Golden Eagle Mine on June 1, 1992. Between June 1 and June 23, he became concerned that the mine's ventilation system was not diluting and removing methane from the Northwest No. 1 longwall section. Following meetings with his staff on Friday, June 21 and Sunday, June 23, Mr. White decided to make a number of changes to the ventilation system in this longwall section. For purposes of this remand, two major changes in the ventilation system were made: (1) the No. 3 entry on the headgate side was changed from a return to an intake aircourse, and (2) stoppings between the gob and the No. 3 tailgate entry were opened in the Nos. 62 and 63 crosscuts. Mr. White did not confer with or obtain the approval of MSHA before making these changes. As stated above, Inspector Jordan determined that, by making these changes in the ventilation system, Basin Resources violated section 75.316. Judge Morris agreed and the Commission affirmed his decision.

The only issue on remand is whether Basin Resources' violation was S&S. As the Commission stated:

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. ' 814(d), and refers to more serious violations. A violation is S&S if, based on the facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or illness of a reasonably serious nature.

16 FMSHRC at 1625 (citation omitted). The Commission has established a four part S&S test, as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial . . . , the Secretary of Labor

must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete 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.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). An evaluation of the reasonable likelihood of an injury should be made assuming continued normal mining operations. U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985).

On remand, there is no dispute that the first element of the Mathies test has been met, an underlying violation of a safety standard. With respect to the second step, the parties disagree.

Basin Resources contends that any explosive levels of methane that might have existed in the longwall section on June 25 did not relate back to the violation, because the ventilation system was changed back to the previously approved system soon after the unwarrantable failure order of withdrawal was issued. It states that the changes made to the ventilation system on June 23 no longer existed by the afternoon of June 25. The Secretary contends that Basin Resources did not change the ventilation system back to its former condition and that conditions found by the inspector on the afternoon of June 25 directly relate to the violation.

I find that the Secretary established, by a preponderance of the evidence, that the ventilation system was not changed back to the approved system before the afternoon of June 25. In making this finding I rely on the testimony of Inspector Jordan, Steve Salazar, who was General Mine Foreman, and David Huey, who was Manager of Mine Operations. (Tr. 71, 73, 87, 99, 374-76, 379) They each testified that the ventilation system was not changed back on June 25 to the system set forth in the approved plan. Id. Inspector Jordan's testimony was supported by his contemporaneous notes. (Tr. 374-76, 379; Ex. BR-3). I find that the

³ During an inspection of the longwall section on the afternoon of June 25, Inspector Jordan detected methane levels of 4% to 5% and more at crosscuts 62 and 63 between the gob and the No. 3 tailgate entry. He issued an imminent danger order and a citation. The Commission vacated the citation on the ground that the Secretary failed to prove that the inspector measured the methane at proper locations. 16 FMSHRC at 1630-31. The imminent danger order was not contested by Basin Resources.

violation of the ventilation plan contributed to a discrete safety hazard. My findings in this case are not dependent upon the methane measurements taken by Inspector Jordan on the afternoon of June 25. As discussed more fully below, I believe that the violation created a risk of a fire or explosion because of the potential for explosive levels of methane to accumulate in the tailgate entries near the longwall face.

Basin Resources also contends that the Secretary failed to establish the third step of the Mathies S&S test. Basin Resources states that there were no ignition sources because the section was deenergized on June 25. It also states that, although production was resumed on June 24, methane readings show that the highest methane reading obtained on that date was 0.5%.

Basin Resources maintains that the changes ultimately approved by MSHA in the ventilation plan were essentially the same as the changes made by Basin Resources on June 23. It contends that the fact that these changes were approved by MSHA establishes that the Secretary failed to prove the third element of the Mathies test. It further states that the high methane readings obtained by the inspector on June 25 were invalid because they were taken at an improper location and that these readings and the imminent danger order issued as a result should not be used to support an S&S finding.

I reject Basin Resources' arguments for a number of reasons. First, in evaluating whether there is a reasonable likelihood that the hazard contributed to by the violation will result in an injury, one must assume continued normal mining operations. U.S. Steel, 7 FMSHRC at 1130. Whether or not the longwall section was energized or high methane readings were found in the two days following the ventilation change does not resolve the issue. The question is whether there was a reasonable likelihood of an injury if Basin Resources' ventilation changes remained in place in the face of continued normal mining operations. I find that the Secretary established that there was such a reasonable likelihood.

The amendment to the ventilation plan approved by MSHA on June 28, 1992, was not the same as the changes implemented by Basin Resources on June 23 in at least one important respect that is relevant here. (Tr. 89-93, 97, 125-27, 279-80; Ex. M-2). The difference relates to the method by which methane in the gob is

⁴ I also believe that the dispute whether the ventilation system was changed back on June 25 is largely irrelevant. The issue is whether, assuming continued normal mining operations, the ventilation changes made on June 23rd significantly and substantially contributed to a mine safety hazard.

diluted and removed from the longwall section. After Basin Resources changed the ventilation system on June 23, methane from the gob ("gob gas") traveled through crosscuts 62 and 63 into the tailgate return entries. (Tr. 85-86, 87-88, 91, 123, 175-76; Ex. M-2). As a consequence, the gob gas exited the gob through an area that was about 50 to 100 feet from the tailgate side of the longwall face. (Tr. 54, 95, 106, 123-24, 142, 149, 187; Ex. M-2). Under MSHA's subsequently approved plan, those crosscuts were closed and a bleeder connector entry, referred to at the hearing as a bleeder tap, was opened up at the back of the gob in crosscut 67. (Tr. 88, 90-91, 105, 126, 149-50, 166, 174-75; Ex. M-2). The plan approved by MSHA on June 28, specifically required Basin Resources to establish "a pressure drop to the back of the gob" so that the gob gas would be directed away from the longwall face to the back of the gob. (Tr. 126-27, 149, 166; Ex. M-2). In addition, an intake air shaft was located at the back of the gob near the bleeder connector at crosscut 67, which would help dilute the methane. (Tr. 88; Exs. M-2, M-8). The difference between the two ventilation systems is significant because the MSHA approved system moved the point where explosive methane is mixed with return air from an area adjacent to the face, where ignition sources are present, to the back of the gob, where ignition sources are not usually present.

Basin Resources' witnesses correctly stated at the hearing that a gob can contain a high level of methane, up to 100% concentration, and that at some location in the mine this methane must be diluted and removed from the mine. The Commission has recognized that explosive mixtures of methane and oxygen may sometimes accumulate in the gob area. Island Creek Coal Co., 15 FMSHRC 339, 347 (March 1993). A hazard is created if explosive methane exists where an ignition source is present. In many underground coal mines using the longwall method, separate bleeder entries are present along the back of each set of longwall panels to remove the gob gas away from active areas of the mine. See, e.g., Island Creek, 15 FMSHRC at 340; VP-5 Mining Co., 15 FMSHRC 1531, 1532 (August 1993). At the Golden Eagle Mine, however, the gob gas is removed through the tailgate entries. Under the ventilation system implemented by Basin Resources on June 23, the point where the gob gas exited the gob and mixed with return air to dilute the methane was near the longwall face. As a consequence, ignition sources were close to this mixing point. Under the plan approved by MSHA on June 28, the mixing point was further away from the face at the back of the gob. I find that the presence of bleeder connectors in proximity to the tailgate side of the longwall face contributed to a safety hazard and that there was a reasonable likelihood that the hazard contributed to would result in an injury,

assuming continued normal mining operations. The hazard was a fire or explosion of methane.

I have considered a number of other factors in reaching my conclusion that the violation was S&S. First, the Golden Eagle Mine is a highly gassy mine liberating over one million cubic feet of methane during a 24-hour period. (Tr. 25). In fact, the mine liberates more methane than any other underground coal mine in MSHA's District 9. (Tr. 183). Second, this mine experienced a serious methane explosion in the same longwall section several months before the citation was issued. (Tr. 52). MSHA's investigation of the explosion revealed that someone removed a stoppage, which allowed methane to accumulate near the face. (Tr. 142, 184, 199-200). Although the section was not in production at the time of the explosion, the circumstances are similar because, in both cases, stoppings were opened which could allow methane to accumulate near the longwall face. Finally, a major change in a ventilation system will often have unintended adverse effects that are difficult to determine in advance. (Tr. 185-86). One of these unintended effects is the accumulation of methane in "unknown areas," i.e. unanticipated areas of the mine. (Tr. 139-42; 185-86). One of the reasons that the safety standard requires prior approval of significant ventilation changes is to allow MSHA to think about such unintended effects and conduct a thorough investigation "to make sure that there isn't a hazard associated with that change." (Tr. 185-86). By unilaterally making the ventilation change, MSHA was unable to study whether methane might accumulate in areas where ignition sources are present.

III. CIVIL PENALTY

Judge Morris analyzed the civil penalty criteria in section 110(i) of the Mine Act, 30 U.S.C. ' 820(i), and determined that a civil penalty of \$300.00 was appropriate for this violation. 15 FMSHRC at 1982. Since I am affirming, in result, Judge Morris's conclusion that the violation was S&S, I adopt his analysis of the penalty criteria and find that a penalty of \$300.00 is appropriate.

IV. ORDER

⁵ The fourth element of the Mathies S&S test has been met because it is reasonably likely that the injury in question would be of a serious nature.

In his decision, Judge Morris used an incorrect citation number when referring to this violation.

Accordingly, I find that the violation described in Order No. 3244406 in WEST 92-384 significantly and substantially contributed to the cause and effect of a coal mine safety hazard. Basin Resources, Inc. is **ORDERED TO PAY** the Secretary of Labor the sum of \$300.00 within 30 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

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