CCASE:
MSHA V. MID-CONTINENT COAL AND COKE
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
November 12, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	Docket Nos. DENV 76-83-P DENV 76-84-P DENV 76X99-P
v.	DENV 76XlOO-P
MID-CONTINENT COAL AND COKE COMPANY, Respondent	IBMA 77-14

DECISION

This penalty proceeding arises under section 109 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. $ 801-960 (1976)(amended) 1977) (the Act). After an evidentiary hearing and decision by an administrative law judge, Mid-Continent Coal and Coke Company appealed the judge's finding of a violation with respect to one order and five notices issued by the Mining Enforcement and Safety Administration (MESA).1/ For the reasons stated below, we vacate Notice No. 5-105 (2-RLM) and affirm the judge's decision as to the remaining order and notices.2/

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1/ Order No. 5-073-C (1-RLM) dated April 8, 1975
Notice No. 5-083 (1-RLM) dated April 24, 1975
Notice No. 5-085 (3-RLM) dated April 24, 1975
Notice No. 5-105 (2-RLM) dated June 5, 1975
Notice No. 5-214 (7-LBL) dated October 2, 1975
Notice No. 5-219 (4-LBL) dated October 3, 1975

2/ On March 8, 1978, this case was pending on appeal before the Secretary of Interior's Board of Mine Operations Appeals under the 1969 Act. This appeal is before the Commission for disposition under section 301 of the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. $ 961 (Supp. III 1979). MESA's enforcement responsibilities were transferred to the Department of Labor's Mine Safety and Health Administration (MSHA), and MSHA is substituted as the petitioner in this appeal.

This order alleged a violation of 30 CFR 75.308 in that the quantity of air reaching the working face of No. 1 entry was inadequate to maintain the methane below 1.0 percent.3/ Mid-Continent does not dispute the readings taken by MESA showing 1 or more percent of methane at the working face but state they check the face for methane after each cutting and, if methane in excess of one percent is found, they cut the power, wing the curtain to increase the air to clear the methane and recheck the face. While this is continued throughout the working day, Mid-Continent acknowledges this procedure to be only a temporary solution.

The record clearly shows that the changes or adjustments made by Mid-Continent do not maintain the methane content at the level required by the regulation. According, we affirm the judge in finding a violation as alleged.

Notice No. 5-083 (1-RLM), April 24, 1975

This notice asserts a violation of 30 CFR 75.308 3/ because a continuous miner was not deenergized immediately when the methane monitor on the continuous miner indicated more than 1 percent methane.

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3/ 30 CFR 75.308 provides: Methane accumulations in face areas. "If at any time the air at any working place, when tested at a point not less than 12 inches from the roof, face, or rib, contain 1.0 volume per centum or more of methane, changes or adjustments shall be made at once in the ventilation in such mine so that such air shall contain less than 1.0 volume per centum of methane. While such changes or adjustments are underway and until they have been achieved, power to electric face equipment located in such place shall be cut off, no other work shall be permitted in such place, and due precautions shall be carried out under the direction of the operator or his agent so as not to endanger other areas of the mine. If at any time such air contains 1.5 volume per centum or more of methane, all persons, except those referred to in section 104(d) of the Act, shall be withdrawn from the area of the mine endangered thereby to a safe area, and all electric power shall be cut off from the endangered area of the mine, until the air in such working place shall contain less than 1.0 volume per centum of methane. [Emphasis supplied].

30 CFR 75.308-1 provides: "The "changes or adjustments" which shall be made in the ventilation means increasing the quantity or improving the distribution of air in the affected working place to the extent sufficient to reduce and maintain the methane content less than 1.0 volume per centum when operations are resumed." [Emphasis supplied].

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The facts are undisputed. Approaching the face of a crosscut, both the inspector and respondent's superintendent observed a

continuous miner backing away from the face with the amber light on its methane monitor glowing. The glowing light indicated the presence of over 1 percent methane. The superintendent proceeded to the face and took two methane readings before ordering the continuous miner deenergized.

We interpret 30 CFR 75.308 and its statutory authority, section 303(h)(2) of the Act, to require electric face equipment in a working place be deenergized immediately when 1 percent or more of methane is detected in such working place. After such methane accumulation had been detected by the methane monitor here, to continue an ignition source while rechecking the monitor's reading was a violation of the regulation alleged. The judge is affirmed.

Notice No. 5-085 (3 RLM), April 24, 1975

This notice was issued alleging a violation of 30 CFR 75.316 4/ because of insufficient ventilation at a working face. The air movement was not sufficient to measure by using an anemometer. Respondent admitted that the quantity of air was not sufficient to permit mining operations, and that their ventilation plan required 15,000 cubic feet per minute, but only when coal was being cut, mined or loaded. Respondent argued that, at the time the notice was issued, a break-through had just been made, the continuous miner had been backed out preparatory to cleaning up the crosscut and reestablishing ventilation at which time there was no cutting, mining or loading coal to be in violation of their ventilation plan and 30 CFR 75.316.

The parties do not dispute that the requirements of a duly adopted ventilation plan are generally enforceable under the Act. Ziegler Coal Company, 4 IBMA 30, aff'd 536 F.2d 398, 409 (D.C. Cir.)(April 22, 1976). Here, the area cited was a working face, the continuous miner had just backed away from the face to allow the crosscut to be cleaned up and ventilation reestablished for further cutting in the production of coal. A temporary halt in cutting, mining or loading to permit other mining activities in preparation for further mining and production does not interrupt the ventilation requirements of 30 CFR 75.316. To hold otherwise would allow unsafe conditions, as in this instance, to escape sanction unless the operator were caught in the act of cutting, mining or loading. The judge's finding of violation is affirmed.

4/ 30 CFR 75.316 provides: "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 on or before June 28, 1970. 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."

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Notice No. 5-105 (2-RLM), June 5, 1975

This notice alleged a violation of 30 CFR 70.201 5/ in that respondent did not collect an accurate respirable dust sample from one of its employees. The respirable dust pump was not operating properly as it had no flow rate. Mid-Continent argued that the pump was properly maintained, that it was operating properly when issued to the employee and that any mechanical malfunction, not attributed to its negligence, does not constitute a violation.

We vacate this notice. See our decision in V and R Coal Company, 3 FMSHRC_____, (Nov. 14, 1981).

Notice No. 5-214 (7-LBL), October 2, 1975

This notice was issued alleging a violation of 30 CFR 77.401(3)(c) 6/ when the inspector observed a worker in the shop operating a grinding wheel without wearing a face shield or goggles. The worker was wearing ordinary eye glasses with safety lenses which did not cover or protect the peripheral area of the eyes. Goggles were readily accessible to the worker and the foreman was present in the shop but made no attempt to warn or caution the worker concerning the use of goggles. Mid-Continent contended that there was no violation because the worker was wearing eye glasses with safety lenses and the worker's failure to wear the goggles provided was negligence of the worker and not a violation of the regulation by Mid-Continent.

We agree with the judge that ordinary eye glasses with safety lenses do not provide as much protection for the peripheral area of the eyes as would face shields or goggles required by the regulation. Further, the foreman was present but made no attempt to cause the worker to wear his goggles.7/ The judge's finding of a violation under these facts is affirmed.

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5/ 30 CFR 70.201 provides: "Each operator of a coal mine shall, as prescribed in this Part 70, take accurate samples of the amount of respirable dust in the mine atmosphere to which each miner in the active workings of such mine is exposed."

6/ 30 CFR 77.401(3)(c) provides: "Face shields or goggles, in good condition shall be worn when operating a grinding wheel."

7/ Mid-Continent's argument relying on North American Coal Corp., 3 IBMA 93 (1974) is rejected. See United States Steel Corp., 1 FMSHRC 1306, 1307 at n3 (Sept. 17, 1979).

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Notice No. 5-219 (4-LBL), October 3, 1975

The inspector issued a notice of violation of 30 CFR 77.1710(a)8/ when he observed a worker in the shop using a cutting torch to cut holes in a 55 gallon drum without wearing protective goggles or a face shield. Protective goggles were hanging on one of the acetylene tanks connected to the torch. The worker's foreman was just a few feet away when the violation occurred but made no attempt to warn or cause the worker to use goggles.

Mid-Continent contended that there was no violation because the worker was wearing eye glasses with safety lenses and failure to wear the readily available safety goggles was negligence of the worker and not a violation of the regulation by Mid-Continent.

For the same reasons accepted and stated in the notice immediately above, we find that ordinary eye glasses with safety lenses do not meet the requirement of face-shields or goggles of 30 CFR 77.1710(a). Further, the defense relying on North American Coal Corp., supra, is rejected for the reason stated in United States Steel Corp., supra, 1 FMSHRC at 1307, n3. The judge is affirmed.

Accordingly, Notice No. 5-105 (2-RLM) June 5, 1975 is vacated. The decision of the administrative law judge in each remaining order and notice on appeal in these proceedings is affirmed.

8/ 30 CFR 77.1710(a) provides: "Protective clothing or equipment and face-shields or goggles shall be worn when welding, cutting or working with molten metal or when other hazards to the eyes exists.

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