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SOL (MSHA) V. YOUGHIOGHENY & OHIO COAL
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
FEBRUARY 4, 1985

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

v.

Docket No. LAKE 83-36

YOUGHIOGHENY & OHIO COAL
COMPANY

DECISION

This civil penalty case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1982). The Secretary of Labor has filed a motion to dismiss the proceeding and to vacate the underlying citation alleging that Youghioghenny and Ohio Coal Company ("Y&O") violated 30 C.F.R. 75.308, a methane control standard. 1/ Y&O does not oppose the motion. The Secretary filed the dismissal motion after we granted Y&O's petition for discretionary review of a Commission administrative law judge's decision concluding that Y&O had violated the standard. 5 FMSHRC 1581 (September 1983) (ALJ). For the reasons that follow, we grant the Secretary's motion.

1/ 30 C.F.R. 75.308, entitled "Methane accumulations in face areas," is identical to section 303(h)(2) of the Mine Act, 30 U.S.C. 863(h)(2), and provides

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, contains 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1.5 volume per centum or more of methane, all persons, except those referred to in section 104(c) of the Act, shall be withdrawn from the area of the mine endangered thereby to a safe area, and all electric power shall be cut off from the endangered area of the mine, until the air in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.

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The relevant facts are essentially undisputed. On July 19, 1982, during a roof control inspection of Y&O's Nelms No. 2 underground coal mine located in Harrison County, Ohio, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issues Y&O an imminent danger order of withdrawal pursuant to section 107(a) of the Mine Act. 30 U.S.C. 817(a). The order, which also alleges a violation of section 75.308, was issued by the inspector after he took a methanometer test showing a 5% level of methane in the E entry, an area immediately adjacent to the main working section.

The inspector had arrived on the main working section during the day shift about 9:00 a.m., and had issued the withdrawal order at 10:45 a.m. Following a roof fall in the E entry during the previous shift, Y&O had abandoned the E entry and dangled it off shortly before the inspector's actions. Because of the abandonment, Y&O had begun cutting coal in the crosscut approximately 40 feet from the E entry. To provide air to the face of the new mining area, an auxiliary fan was employed. Use of the auxiliary fan required extending the fan tubing into the crosscut. The inspector testified that the position of the auxiliary fan and the extended tubing caused air to bypass the E entry, permitting methane to accumulate in the entry.

The section foreman had taken a methane reading in the E entry at the beginning of the day shift, about 8:40-8:45 a.m., before turning on the power in the section. He testified that at that time the methane level was below 1% and that he had found everything normal except for the roof fall. Some 20 minutes or more before the inspector's methanometer test, the foreman had also taken a second methane reading in the E entry, showing a methane level of .2%.

In addition to the methanometer reading, the inspector took an air sample, a more accurate measure of the concentration of methane. After laboratory analysis, the air sample showed a methane level of 6.34%. The inspector testified that the methane level in the E entry was potentially explosive, and could cause death or serious injury. Nelms is a gassy mine with a history of previous ignitions and is on a 5 day inspection cycle pursuant to section 103(i) of the Mine Act. 30 U.S.C. 813(i).

At the time the inspector found the excessive methane concentration, electrical equipment--the continuous miner, the shuttle cars, and the auxiliary fan--was operating and eleven miners were working in the section. Upon issuance of the withdrawal order, the operator immediately turned off the fan and the continuous miner,

stopped mining operations, removed all miners from the affected area, except those needed to abate the hazardous condition, and took precautions not to endanger other areas of the mine. The inspector terminated the citation at 11:50 a.m., after the operator had reduced the methane level below .1%.

The only issue litigated by the parties below and considered by the judge was whether Y&O had violated section 75.308. The operator did not challenge either the existence of an excessive level of methane or the presence of an imminent danger. Y&O argued that section 75.308 requires an operator to take specific remedial actions once concentrations of 1% or more of methane are found, and that an operator violates the standard

only if it fails to so act upon becoming aware of the presence of 1% or more of methane. Y&O contended that because it took the actions specified in the standard, as soon as it became aware of the methane accumulations, it had not violated section 75.308. The Secretary argued below that regardless of whether Y&O had taken the actions required by section 75.308 upon the discovery of excessive methane, Y&O violated the standard because its foreman had inadequately monitored for methane and thereby negligently allowed the methane to accumulate to an explosive level.

The administrative law judge concluded that Y&O's failure to take "necessary and reasonable steps to control and dissipate methane concentrations before they reached the explosive range" constituted a violation of section 75.308. 5 FMSHRC at 1584 (emphasis in original). The judge reasoned that because Congress intended to prevent methane accumulations, it was "not enough that a mine operator take steps to eliminate explosive levels of methane after they are found by an inspector and a withdrawal order is issued." 5 FMSHRC at 1585 (emphasis in original). In the judge's view, the presence of certain conditions--either alone or in combination--require an operator to take extra precautions to prevent methane from reaching explosive levels: (1) if a mine liberates excessive methane; (2) if there is a recent roof fall; or (3) if there is an abandoned area near the working face. *Id.* The judge found that all of these factors were present at the time of the citation, that Y&O was aware of them, and that Y&O knew or should have known that the placement of the fan and tubing would short-circuit the air to the abandoned entry. *Id.* Based on these findings, the judge concluded that Y&O's failure to take necessary and reasonable steps "to assure that there would not be a methane building in entry E" constituted a violation of the standard. 5 FMSHRC at 1585-86. The judge also found that the foreman checked for methane at the beginning of the shift, and once again some 20 minutes before the inspector arrived, when he found a concentration of about .2%. 5 FMSHRC at 1582.

The Secretary's motion to dismiss the proceeding and to vacate the citation asserts that on the facts as found by the judge "no violation of 30 C.F.R. 75.308 can be proved." The Secretary states that "the judge found that [the foreman] had checked the methane concentration in the affected area only 20 minutes before the inspector performed his test," and that there is "probably sufficient evidence in the record to support [this finding.]" The Secretary does not, however, set forth his position with respect to the judge's interpretation of the standard--that conditions existed which required Y&O to take extra precautions to prevent methane from reaching

explosive levels and that when Y&O failed to take these precautions and methane reached explosive levels, it violated the standard. 2/

2/ The Secretary asserts, however, that in his view the evidence might have established a violation of 30 C.F.R. 75.301 (requiring operators to maintain a "volume and velocity of air ... sufficient to ... render harmless and ... carry away ... harmful gases") and, possible, of 30 C.F.R. 75.316 as well (requiring operators to comply with their approved ventilation plans), but that it is too late in this proceeding to amend the citation to allege such violations. Sc'y Mem. at 5.

Y&O does not oppose the Secretary's dismissal motion. Thus, this case comes to us in an unusual procedural posture--the prevailing party below seeks now to have the decision in his favor vacated.

Our responsibility under the Mine Act is to ensure that a contested case is terminated, or continued, in accordance with the Act. *Climax Molybdenum Co.*, 2 FMSHRC 2748, 2750-51 (October 1980), *aff'd sub nom.* (1983). For that reason, we do not automatically grant motions to vacate citations that have been contested and thereby placed before the Commission for decision. See 30 U.S.C. 815(d). Such motions are granted only where adequate reasons to do so are present. *Kocher Coal Co.*, 4 FMSHRC 2123, 2124 (December 1982).

We conclude that adequate reasons exist in the present case. First, there is no longer a true adversarial contest suitable for judicial resolution. The Secretary, who is charged by the Mine Act with the responsibility of prosecuting civil penalty actions, has by his motion indicated that he no longer wishes to participate actively as a party. Further, the Secretary has not informed us as to what, in his view, is required for compliance with the standard. The failure of the Secretary in this regard is significant. Section 75.308 is one of a series of standards, critical to mine safety, aimed at methane detection and control. To construe this important standard without adversarial argument and without benefit of the views of the party charged with its enforcement would be contrary to principles of sound judicial administration. See *Climax Molybdenum Co. v. Secretary*, 703 F.2d at 451-52.

Second, Y&O did not respond to the Secretary's motion to dismiss this proceeding. Y&O could have repeated its request for a decision on the merits. We interpret Y&O's silence as acquiescence in the Secretary's motion. Nor has Y&O requested declaratory relief pursuant to section 105(d) of the Mine Act, 30 U.S.C. 815(d), and section 5(d) of the Administrative Procedure Act, 5 U.S.C. 554(e), asserting that it faces a continuing legal dilemma in being forced to act at its peril absent an interpretation of section 75.308. Cf. *Climax Molybdenum*, 2 FMSHRC at 2751-53; and *Climax Molybdenum Co. v. Secretary*, 703 F.2d at 452-53.

Third, even in the face of the Secretary's motion to vacate and Y&O's silence, we could decide this case on the merits if, in our view, the public interest demand such a course. However, no third party asserts, and it does not otherwise appear from our review of the record, that such action is necessary in this case. Rather, the Secretary's motion appears to be based upon a bona fide belief that

he lacks the evidence to prove a violation and perhaps upon confusion as to the proper standard under which to proceed in the circumstances presented.

Finally, vacation of the underlying citation requires vacation of the judge's decision affirming the citation. Thus, dismissal of this proceeding will not prejudice Y&O, because the vacation of the citation and the judge's decision will expunge the violation and the penalty, and negate the possibility that the violation charged will become part of its history of previous violations. In short, no prejudicial collateral

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consequences will arise from our granting the Secretary's motion..
Cf. Robinson v. Rodgers, 481 F.2d 1110, 1112 (D.C. Cir. 1973).

For all of these reasons, the Secretary's dismissal motion is granted. The citation contained in the order of withdrawal alleging a violation of section 75.308 is vacated, as is the judge's decision, and the civil penalty proceeding is dismissed.

L. Clair Nelson,

Commissioner
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