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FMSHRC-WDC
JUL 2, 1985

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

Docket No. LAKE 83-61

v.

MONTEREY COAL COMPANY, INC.

BEFORE: Acting Chairman Backley; Lastowka and Nelson,
Commissioners

DECISION

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), the issues presented are whether substantial evidence supports a Commission administrative law judge's findings that an operator's violation of its ventilation system and methane and respirable dust control plan was "significant and substantial" and that the operator exhibited negligence in connection with the violation. For the reasons set forth below, we affirm.

On February 3, 1983, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a citation to Monterey Coal Company ("Monterey") pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), during an inspection of Monterey's No. 1 underground coal mine located in Carlinville, Illinois. The citation charged Monterey with a violation of 30 C.F.R. § 75.316, the mandatory safety standard requiring an operator to have an approved ventilation system and methane

and dust control plan for each of its mines. 1/ The ventilation plan for Monterey's No. 1 Mine required the operator to maintain a minimum quantity of 5,000 cubic feet of air per minute ("cfm") at working faces whenever the ventilation tubing at the faces extended in excess of 370 feet from a fan. 2/ The citation stated that Monterey was not complying with its ventilation plan in violation of the standard "in that the quantity of air in the 18-inch tubing (390 feet from fan), when coal was being cut with a continuous miner, was only 1,900 cfm when measured..." The inspector checked the "significant and substantial" box on the citation form and indicated that two persons were exposed to the violative condition.

The inspector did not testify at the hearing, but the judge admitted his affidavit into evidence. In the affidavit, the inspector stated that, following issuance of the citation, rock dust bags were found in the ventilation tubing. Once the bags were removed, the quantity of air at the face increased to 6,302 cfm. The inspector also set forth the findings on which he based his characterization of the violation as being "significant and substantial": (1) the No. 1 mine liberated more than one million cubic feet of methane or other explosive gases during a 24-hour period during mining operations and was under the five-day spot inspection cycle mandated by section 103(i) of the Mine Act, 30 U.S.C. § 813(i); (2) although permissible methane readings of .2% and .3% were recorded 15 feet outby the face, the inspector believed that higher levels could have existed at the face itself, where he could not take measurements because of unsupported roof; (3) the methane level

1/ 30 C.F.R. § 75.316, which repeats section 303(o) of the Mine Act, 30 U.S.C. § 863(o), 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.

2/ The No. 1 Mine used three ventilation fans that collectively

pulled a quantity of air of 700,000 cfm through the mine. A system of exhaust fans and fiberglass tubing removed methane and dust from working face areas. The tubing was hung from the roof and a 55-horsepower exhaust fan pulled air through the tubing, into a return airway, and out of the mine. Before any cutting of coal was done by the continuous miner, the tubing was located two to three feet from the face. As the miner advanced, the tubing was kept within 10 feet of the face.

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could have built up at the face at any time, creating the hazard of an ignition that could have caused burn injuries to the two operators of the continuous miner; (4) such burn injuries could have resulted in lost work days or restricted duty; and (5) the reduction of air quantity from the requisite 5,000 cfm to 1,900 cfm "contributed to the increase in methane gas and respirable dust and increased the exposure of miners to the hazard caused by high methane levels and respirable dust."

Before the administrative law judge, counsel for the Secretary of Labor and Monterey stipulated that a violation of section 75.316 had occurred, and that the No. 1 Mine was a "gassy" mine. The parties also stipulated that the inspector had recorded methane readings in the acceptable range 15 feet from the working face, and had not taken respirable dust samples. The parties further agreed that a continuous miner was cutting coal at the location where the citation was issued. At the hearing, Monterey's safety coordinator explained how rock dust bags had gotten into the ventilation tubing:

As the installers install [the ventilation tubing] and turn the fan on, as they walk past certain joints or weak spots in the fiberglass tubing, they'll find where the tubing is sucking out back there ... and rather than get a piece of plastic material that's manufactured for it, they'll take an empty rock dust bag and put it up there. And it will hold and control air real good. Every once in a while they'll use too small a strip and it will suck in through the tubing, or as they walk away later it'll collapse and suck in. It's not the greatest material in the world to use.... The workmen are putting them there to try to stop a leak.

* * * *

If you have problems when you take your reading and move from room to room, a lot of time the first thing you'll do is walk back to the fan, disconnect the tubing, pull out a rock dust bag and start all over.

Tr. 82-83. During this testimony, Monterey's counsel interjected that this method of tubing repair was "probably not a one time only occurrence." Tr. 83.

The judge found that the admitted violation of the standard was significant and substantial, and that Monterey exhibited "gross"

negligence in connection with the violation. 6 FMSHRC 424, 470-71, 473 (February 1984)(ALJ). With regard to the significant and substantial issue, the judge stated that he "agree[d] with MSHA's arguments that the interruption to the ventilation flow resulted in a significant decrease in the amount of air required to be maintained where coal was being cut" and that this "marked decrease in air presented a substantial hazard to the miners

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working in the cited area...." 6 FMSHRC at 470. The judge emphasized that the interruption to the ventilation flow resulted from what he labelled Monterey's 'practice of using ... rock [dust] bags to make ... repairs [to the ventilation tubing.]" 6 FMSHRC at 471 (emphasis in original). In finding that Monterey was grossly negligent, the judge also focused on the consideration that, in his view, Monterey "routinely used" rock dust bags to make repairs in the tubing. 6 FMSHRC at 473. The judge assessed a civil penalty of \$850 for the violation.

On review, Monterey argues that the judge misapplied the test first stated in *Cement Division, National Gypsum Co.*, 3 FMSHRC 822 (April 1981), for determining whether a violation is significant and substantial. Specifically, Monterey asserts that the judge erred in premising his significant and substantial findings on what he regarded as the cause of the violation, Monterey's "practice" of using rock dust bags to repair ventilation tubing. Monterey contends that substantial evidence does not support the finding that any such "practice" existed, and that the judge's focus on this alleged practice ignored the main issue: whether there was a reasonable likelihood of a reasonably serious injury or illness given the facts surrounding this particular violation. Monterey argues that the Secretary of Labor failed to prove that there was a reasonable likelihood of this violation resulting in the danger of excessive buildup of methane or respirable dust, which in turn could contribute to serious injury or illness. It points out that an excessive level of methane was not actually present and the inspector did not test the respirable dust level. Monterey also maintains that substantial evidence fails to support the judge's finding that the violation was the result of Monterey's gross negligence.

We briefly restate the major principles for determining whether a violation is "significant and substantial." 3/ A violation is properly designated significant and substantial "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a

3/ Section 104(d)(1) of the Mine Act provides in relevant part:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent

danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act.

30 U.S.C. § 814(d)(1)(emphasis added).

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reasonably serious nature." National Gypsum, supra, 3 FMSHRC at 825. In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), we articulated in detail the four elements that the Secretary must prove to meet the National Gypsum test: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety 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. We have further explained that in proving the third element, "the Secretary [must] establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., Inc., 6 FMSHRC 1834, 1836 (August 1984). Finally, as the statutory language directs, we have held that it is the contribution of the violation to the cause and effect of a hazard that must be found significant and substantial. U.S. Steel Mining Co., Inc 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The parties stipulated to Monterey's violation of its ventilation plan, and hence of section 75.316. Indeed, as the judge observed (6 FMSHRC at 459), the violative condition -- a measured air quantity of only 1,900 cfm represented a major departure from the minimum air quantity of 5,000 cfm required under Monterey's plan at working faces when the ventilation tubing extended more than 370 feet from a fan.

With respect to the hazard contributed to by the violation, the hazards associated with inadequate ventilation, especially at working faces, are among the most serious in mining. Section 303(b) of the Mine Act, 30 U.S.C. § 863(b), requires that "the volume and velocity of the current of air shall be sufficient to dilute, render harmless, and to carry away, flammable, explosive, noxious and harmful gases, and dust, and smoke and explosive fumes," and that [t]he minimum quantity of air in any coal mine reaching each working face shall be three thousand cubic feet a minute." See also 30 C.F.R. § 75.301 (restating statutory provisions). A basic reason for these requirements is the grave danger that, if there is not adequate ventilation, ignitions or explosions can result from concentrations of explosive gases like methane, either alone or mixed with coal dust, liberated during mining operations. When coal is freshly cut, methane can be liberated in dangerous amounts in short periods of time. Although methane itself becomes explosive at a 5% concentration, even a smaller percentage concentration of the gas mixed with fine coal dust can generate an explosion. See e.g., S. Cassidy (ed.), *Elements of Practical Coal Mining* 199, 243-47

(1973); R. Lewis & G. Clarke, *Elements of Mining* 695 (3d. ed. 1964).
In enacting the statutory ventilation standards of the Mine Act,
Congress expressly recognized these, and related, dangers associated
with inadequate ventilation:

[V]entilation of a mine is important not only to provide
fresh air to miners, and to control dust accumulation, but
also to sweep away liberated

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methane before it can reach the range where the gas could become explosive. In terms then of the safety of miners, the requirement that a mine be adequately ventilated becomes one of the more important safety standards under the ... Act.

S. Rep. No. 181, 95th Cong. 1st Sess. 41 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 629 (1978).

In the present case, Monterey's mine is a gassy mine that liberates excessive amounts of methane and is under the spot inspection cycle mandated by section 103(i) of the Mine Act. 30 U.S.C. § 813(i). The citation was issued at a working face where coal was being cut. For the purposes of this decision, the discrete hazard contributed to by the loss of ventilation, was, as the inspector explained in his affidavit, a buildup at the face of methane and dust that could result in a possible methane ignition or could propagate an explosion.

The key issue is whether there was a reasonable likelihood that the hazard contributed to would result in an event in which there was an injury. We agree with the judge that there was such a reasonable likelihood. As noted, the mine was gassy and coal was being cut with a continuous miner at the working face where the citation was issued. As the inspector stated in his affidavit, methane could have been liberated at any time and, as a result of the serious deficiency in the ventilation, could have become concentrated in a relatively short period of time. The operation of the miner itself provided a potential ignition source. Given the fact that less than 40 per cent of the required minimum quantity of air was reaching the face, we have no difficulty concluding that, under the facts presented, a reasonable likelihood of an ignition or explosion in which there would be an injury to the miners was established. Monterey does not seriously dispute that any such injury would be of a reasonably serious nature.

The major thrust of Monterey's objection to the judge's significant and substantial findings is that he erred in commenting on the alleged cause of the violation itself, the "practice" of using rock dust bags to repair ventilation tubing. Although substantial evidence supports the conclusion that the presence of rock dust bags in the ventilation tubing was the cause of the decreased airflow, we do not premise our decision on whether such use of these bags was a normal, routine practice at this mine. The essential and undisputed

fact is that there was a major decrease from the required minimum ventilation level. Whatever the precise chain of causation leading to the loss of ventilation at the time of the citation, the loss itself, in conjunction with the other factors discussed above, was sufficient to create a reasonable likelihood of an injurious ignition or explosion. Monterey further objects that at the time of the citation there was no evidence that methane was

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present at dangerous levels. As we have observed previously, our proper focus is on the hazards posed by continued mining operations. See e.g., U.S. Steel Mining Co., Inc., supra, 6 FMSHRC at 1574-75. Here, the cutting of coal was ongoing and the potential for methane liberation was presented.

In sum, we conclude that substantial evidence supports the judge's conclusion that the violation was significant and substantial.

With regard to the judge's negligence findings, we need not engage, as did the judge, in a quantification of the degree of the operator's negligence. See Penn Allegh Coal Co., Inc., 4 FMSHRC 1224, 1227 (July 1982). Rather, we find that the record supports a finding of negligence and that the penalty assessed by the judge is appropriate and consistent with the statutory penalty criteria. 30 U.S.C. § 820(i).

Accordingly, on the bases discussed above, the judge's decision is affirmed. 4/

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

4/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

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