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SOL (MSHA) V. ZEIGLER COAL
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June 22, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 91-636
ZEIGLER COAL COMPANY	:	

BEFORE: Holen, Chairman; Backley, Doyle and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)("Mine Act"). At issue is whether Zeigler Coal Company ("Zeigler") violated 30 C.F.R. 75.507(Footnote 1) by allowing return air to course over non-permissible power connection points outby the last open crosscut and whether the violation was significant and substantial ("S&S"). Administrative Law Judge George A. Koutras concluded that Zeigler violated the standard and that the violation was S&S. 14 FMSHRC 304 (February 1992)(ALJ). For the reasons that follow, we affirm the judge's finding of violation but remand for further consideration of whether the violation was S&S.

I.

Factual and Procedural Background

On May 1, 1991, Inspectors Mark Eslinger and Richard Gates of the Department of Labor's Mine Safety and Health Administration ("MSHA") conducted an investigation on a petition for modification filed by Zeigler's Murdock Mine, an underground coal mine in Douglas County, Illinois. In the 1st Main West section, the inspectors observed that air that had ventilated the working

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1 Section 75.507 provides:

> Power connection points. Except where permissible power connection units are used, all power connection points outby the last open crosscut shall be in intake air.

faces in the No. 1 and 2 entries was leaking past check curtains placed across the No. 3 entry and was flowing outby.

The inspectors observed several golf carts, used for transport, in the No. 3 entry. They concluded that Zeigler had violated section 75.507 because return air was coursing outby the last open crosscut over the golf carts and other non-permissible equipment with power connection points. Accordingly, they cited Zeigler for a violation of section 75.507 and designated the violation S&S.

Before the judge, the Secretary defined return air for purposes of section 75.507 as air that has been used to ventilate any working face or place in a coal-producing section. The judge found that definition reasonable and proper. 14 FMSHRC at 325. He found that the air coursing over the golf carts was return air because it had ventilated working faces. 14 FMSHRC at 324-25. The judge concluded that the Secretary had established a violation of section 75.507. 14 FMSHRC at 325. He also found the violation to be S&S and assessed a civil penalty of $275. 14 FMSHRC at 327, 328.

II.

Disposition of Issues

A. Whether Zeigler violated section 75.507

In order to establish a violation of section 75.507, the Secretary was required to show that non-permissible power connection points outby the last open crosscut were not in intake air. It was undisputed that the carts were not "permissible" equipment, as that term is defined in section 318(i) of the Mine Act, 30 U.S.C. 878(i), and that the carts contained "power connection points," as that term is used in the standard. It was also undisputed that they were outby the last open crosscut. If the cited non-permissible power connection points were in return air rather than in intake air, Zeigler was in violation of the standard.

Zeigler argues that the air travelling outby the last open crosscut in the No. 3 entry was still intake air, and that the judge erred in finding that it was return air. Zeigler relies on the common definition of return air, which is air that has circulated through the active workings and has passed over the last working place on a section. See Bureau of Mines, U.S. Department of the Interior, Dictionary of Mining, Mineral, and Related Terms 919 (1968). Zeigler contends that the judge erred in accepting the Secretary's position that, for the more specific purposes of section 75.507, intake air becomes return air once it has ventilated any working face or place.(Footnote 2)

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2 The regulations then in effect did not define return air. See 30 C.F.R. 75.2 (1991). Return air is defined in the current regulations to be:

> Air that has ventilated the last working place on any split of any working section or any worked-out area, whether pillared or nonpillared. If air mixes with air that has ventilated the last working place on any split

We conclude that the Secretary's interpretation of "return air" is a proper construction of section 75.507 that effectuates its essential purpose. Section 75.507 is taken from the interim mandatory safety standard in section 305(d) of the Mine Act, 30 U.S.C. 865(d), which was carried over from section 305(d) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1976)(amended 1977)("Coal Act"). The Coal Act's legislative history indicates that the concern addressed by the standard was the "ever-present danger of sudden methane buildup in the air current which could be ignited by arcing from the power connections." See S. Rep. No. 411, 91st Cong., 1st Sess. 69 (1969), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 195 (1975). The Commission has recognized: "The purpose of [section 75.507] is to prevent methane gas explosions. In the presence of methane gas, a source of ignition, such as arcing from power connections, can cause an explosion." Eastover Mining Co., 4 FMSHRC 123 (February 1982).

Air that passes any working face carries away methane and other contaminants that could present an ignition and explosion hazard if the air is coursed over non-permissible power connection points. The judge found credible Inspector Eslinger's testimony that air sweeping over any working face picks up coal dust, methane, and other mine gases, and that such contaminated air poses a potential explosion hazard if it seeps outby over non-permissible power connection points and equipment. l4 FMSHRC at 324; Tr. 58; Dep. of Eslinger Tr. 19-20 (October 3l, l99l). Eslinger emphasized that "the real seriousness here [i]s that the gas in the mine is generally produced in the working places and the gas that could be produced in these working faces could drift outby over [the] ... nonpermissible power points." Tr. 30. The judge also noted that Zeigler's safety director, David Stritzel, said that he would be concerned about air that has ventilated a working face passing over non-permissible power points. l4 FMSHRC at 324; Tr. 98, 102.

Here, some of the air leaking past the No. 3 entry check curtains and coursing over the non-permissible power points had passed over the working

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> of any working section or any worked-out area, whether pillared or nonpillared, it is considered return air. For the purposes of existing 75.507-1, air that has been used to ventilate any working place in a coal producing section or pillared area, or air that has been used to ventilate any working face if such air is directed away from the immediate return is return air.

30 C.F.R. 75.301 Definitions (1992). These regulations became effective August 16, 1992, 57 Fed. Reg. 20868 (May l5, l992).

faces of the No. 1 and 2 entries. Thus, for purposes of section 75.507, it is appropriate to regard that air as return air.(Footnote 3)

Zeigler argues further that the Secretary changed his position as to the meaning of return air for purposes of section 75.507.(Footnote 4) Zeigler asserts that from 1971 until 1988, MSHA defined return air for purposes of that section as air used to ventilate the last working face in a coal producing section. As early as 1983, however, MSHA had defined return air, for purposes of section 75.507, as air that has ventilated any working face or working place. See IV MSHA, U.S. Dept. of Labor, Coal Mine Inspection Manual: Underground Electrical Inspections 22 (1983). In 1988, MSHA set forth in its Program Policy Manual the definition of return air presented in this proceeding, which is consistent with the earlier 1983 definition. V MSHA, U.S. Dept. of Labor, Program Policy Manual, Part 75, at 55 (1988). In any event, an agency interpretation is not necessarily "carved in stone" and, in general, an agency should "consider varying interpretations and the wisdom of its policy on a continuing basis." Chevron U.S.A., Inc. v. Nat. Resources Def. Council, 467 U.S. 837, 863-64 (1984).

Accordingly, we uphold the Secretary's interpretation of the standard and affirm the judge's finding of violation.

B. Whether the violation was significant and substantial

Zeigler argues that the judge erred in concluding that the violation was S&S. Zeigler asserts that the judge's finding that there was a reasonable likelihood of a serious injury resulting from the violation is based on "mere possibilities" that are insufficient to sustain a finding of reasonable likelihood. PDR at 10.

A violation is properly designated S&S "if, based upon 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 reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825

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3 Return air may have a different meaning for purposes of other standards. A term does not necessarily have the same meaning or serve the same purpose in every statutory or regulatory context. See, e.g., Loc. U. 1261, UMWA v. FMSHRC, 917 F.2d 42, 45 & n.8 (D.C. Cir. 1990).

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4 Zeigler also argues in its supplementary brief that it was not given fair warning of the change in the definition of return air in section 75.507 and that, therefore, its due process rights were violated. Z. Br. at 2-3. Zeigler has not proffered any reason why this argument was not presented to the judge. Under the Mine Act, "[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass." Section 113(d)(2)(iii) of the Mine Act, 30 U.S.C. 823(d)(2)(iii); see also 29 C.F.R. 2700.70(d).

(April 1981).(Footnote 5) In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (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.

The first and second Mathies elements are established. We have concluded that Zeigler violated section 75.507 and it is undisputed that a safety hazard, an ignition that could result in an explosion, was present.

The third element of the Mathies test "requires that the Secretary 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., 6 FMSHRC 1834, 1836 (August 1984)(emphasis in original).(Footnote 6) The Commission has recognized that, when examining whether an explosion or ignition is reasonably likely to occur, it is appropriate to consider whether a "confluence of factors" exists to create such a likelihood. Texasgulf, Inc., 10 FMSHRC 498, 501 (April 1988); see also Eastern Assoc. Coal Corp., 13 FMSHRC 178, 184 (February 1991).

In addressing the third element, the judge concluded that "it was reasonably likely that an ignition resulting from the presence of nonpermissible electrical power connection points in contaminated return air would result in injuries of a reasonably serious nature." 14 FMSHRC at 327. The judge did not make a finding, however, as to the likelihood of an ignition. The reasonable likelihood of an ignition is the necessary precondition to the reasonable likelihood of an injury. See U.S. Steel Mining, 6 FMSHRC at 1836.

The judge summarized the relevant testimony (14 FMSHRC at 326), but he did not analyze the confluence of factors necessary to establish a reasonable likelihood of an ignition (see l4 FMSHRC at 327). Eslinger testified that people "could drive" a golf cart into a "possible" explosive mixture of gas

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5 The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. 814(d)(1), which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard...."

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6 The Secretary is not required to prove that the hazard contributed to will actually result in an injury causing event. Youghiogheny & Ohio Coal Co., 9 FMSHRC 673, 678 (April 1987).

and ignite the methane. 14 FMSHRC at 326; Tr. 45. Eslinger also expressed concern that methane liberated in working places "could drift" over the golf carts and other non-permissible power points. 14 FMSHRC at 326; Tr. 30. Stritzel conceded "that there is always the possibility of a methane ignition, and that methane may be liberated at higher concentrations." 14 FMSHRC at 327; see Tr. 102-03. Although this testimony is relevant to the reasonable likelihood of an ignition, statements that such events could occur, standing alone, do not support a finding that there was a reasonable likelihood of an ignition. Cf. Eastern Assoc. Coal, 13 FMSHRC at 184-85; Union Oil Co. of California, 11 FMSHRC 289, 298-99 (March 1989). The judge also restated but failed to resolve certain conflicting testimony. Eslinger was concerned that an ignition had occurred in the same area of the mine some two months prior to the citation. 14 FMSHRC at 326; Tr. 27. Stritzel testified that the conditions at the time of the prior ignition were different from those at the time of the inspection. 14 FMSHRC at 326; Tr. 93-94. Accordingly, we remand for further analysis of the third Mathies element.

With regard to the fourth Mathies element, Zeigler contends that the Secretary introduced no evidence to suggest that any resultant injury would be reasonably serious in nature. The citation indicates that four miners would be affected by the violation and that the injury would be fatal. Ex. P-3. Eslinger testified that any potential accident would be fatal. Tr. 28. A methane ignition, by its nature, presents a danger of serious injury to miners. We conclude that substantial evidence supports the judge's conclusion that, if an ignition occurred, any resultant injury would be reasonably serious.

III.

Conclusion

For the foregoing reasons, we affirm the judge's conclusion that Zeigler violated section 75.507. We vacate his determination that the violation was S&S and remand for further findings and analysis on the existing record consistent with this opinion.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner