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PYRO MINING v. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, Virginia 22041

PYRO MINING COMPANY,
CONTESTANT

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

CONTEST PROCEEDING

Docket No. KENT 91-169-R
Citation No. 3550463;
2/11/91

Pyro No. 9 Wheatcroft

Mine ID 15-13920

DECISION

Appearances: Robert I. Cusick, Esq., Wyatt, Tarrant & Combs,
Louisville, Kentucky, for Contestant;
W. F. Taylor, Esq., U. S. Department of Labor,
Office of the Solicitor, Nashville, Tennessee, for
the Secretary.

Before: Judge Maurer

This contest proceeding is before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(d), challenging the legality of a single Section 104(a) citation issued by an MSHA mine inspector. The issue is whether the contestant violated the cited mandatory safety standard; or more specifically, whether Pyro Mining Company failed to comply with its approved ventilation plan.

Pursuant to notice, a hearing was held in this case on May 9, 1991, in Owensboro, Kentucky. The parties have both filed post-trial briefs, which I have duly considered in making the following decision.

Section 104(a) Citation No. 3550463, issued on February 11, 1991, by MSHA Inspector James E. Franks, cites an alleged violation of mandatory safety standard 30 C.F.R. 75.316, and the cited condition or practice is described as follows:

The approved Ventilation Plan (approved 11/29/90 see page 3) was not being followed in that crosscuts had not been positioned at or near the face of the Nos. 1 thru 16 rooms in the 2nd North panel. The mining conditions in these areas were good.

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Pyro Mining Company is charged with a failure to follow one of the provisions of its approved ventilation plan. Any violation of an approved plan provision would constitute a violation of mandatory safety standard 30 C.F.R. 75.316, which provides as follows:

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.

The applicable ventilation plan provision in question is found on page 3 of Pyro's approved plan dated November 29, 1990, and it states as follows:

All dead end places shall be ventilated. When practical, crosscuts will be positioned at or near the face of each entry or room before it is abandoned. Otherwise, line curtains will be installed as needed.

The facts of the case are straightforward. During the course of a regular quarterly inspection of Pyro's No. 9 Wheatcroft Mine, Inspector Franks observed that Pyro had failed to cut and position crosscuts at or near the face of the abandoned rooms in the second North panel, identified as rooms numbered 1 through 16. Inspector Franks also noted that ventilation curtains were in place and there was no evidence of methane in the area. He further observed that the roof in the area was good, no water was present and in fact, he opined there were no adverse mining conditions present which would have prevented the operator, from a purely safety standpoint, from making the crosscuts at or near the face of the aforementioned rooms.

Basically, it is the Secretary's position that the plan requires crosscuts be provided if it can be safely done. To the Secretary, the phraseology, "when practical" means in this context that the operator must position crosscuts at or near the face of abandoned rooms, unless because of safety considerations, it would be more dangerous to do so than to place line curtains. The inspector testified that the working definition of "practical" at least in District 10 is that the only excuses the operator would have for not putting the crosscuts through is if

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they had bad top or water in the area, i.e., unsafe conditions.

Pyro, however, does not agree that these are the only two allowable considerations of practicability. I have to concur that this limitation is not clearly apparent from the approved ventilation plan.

If "impractical" can be used as the antonym of "practical," then the Secretary would define "impractical" for the purposes of this case as an act which is impossible to safely perform given the conditions at hand, i.e., water or bad roof. But the ventilation plan does not state "when possible"; it states "when practical" which implies that a fuller range of circumstances could be considered. The inspector himself acknowledged that if we disregard for a moment the very restrictive definition of "practical" that District 10 has devised, then there are many other considerations that could go into determining what is "practical."

There are certainly imaginable situations where it would be possible to make these crosscuts safely, but it would not be practical. Pyro believes that their mining procedure is one such instance. Typically, the first and second shifts work coal production. They try to move out of a set of rooms at the end of the second shift. Then the third shift crew is responsible for the moving of the equipment to position it for the next day's work. Therefore, Pyro's position is that when they abandon a room, they take all operational factors into account (safety factors as well as economic factors) in determining whether it is practical to place crosscuts. If not, line curtain is hung to ensure proper ventilation. In years past, this has been an acceptable interpretation of this provision of the ventilation plan. Pyro has not previously received a citation for a violation of this portion of the plan even though their mining methods have remained unchanged until the instant citation was issued.

The Secretary points out that 30 C.F.R. 75.316-2 which provides criteria for approval of ventilation plans states that:

A crosscut should be provided at or near the face of each entry or room before the place is abandoned.

However, that section also provides in pertinent part that:

A ventilation system and dust control plan not conforming to these criteria may be approved, providing the operator can satisfy the District Manager that the results of such ventilation system and dust control plan will provide no less than the same measure of protection to the miners.

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Pyro's plan did not strictly conform to that particular criteria. The District Manager approved the plan with a somewhat less than mandatory requirement for crosscuts. It is clear that crosscuts are preferred (when practical) but line curtain, as needed, is an alternative albeit less desirable means of compliance. The inspector testified that what this provision really means is that crosscuts are required except in two instances (bad roof or water in the area). Even so, this still does not absolutely incorporate the suggested criteria. The District Manager has allowed for alternative compliance; the only dispute is when is the alternative permissible.

Essentially, the answer to that query is whenever the District Manager says it is. But the important feature to make his intention enforceable is to put it clearly into the approved plan. As it now stands, the inspector's interpretation, which he claims is the District's interpretation, is not to be found in the document. That is the key. The language contained in the plan does not support the allegation that Pyro is not in compliance.

Apparently for years, "practical" in this context was interpreted broadly enough to include all relevant considerations and Pyro's mining practices under the approved plan passed muster. Now a new "unwritten rule" is in effect, without prior notice to the operator and most importantly, without amendment to the plan. Pyro complains that this does not comport with standards of basic fairness, let alone give the operator notice or an opportunity to be heard concerning the changed enforcement procedure. I agree. If the District Manager wishes to make a change to the operator's ventilation plan, he may certainly do so as part of the approval process, but it is not too much to ask that he clearly state what the provisions are to be in writing.

I also take note and it should be clear herein that the inspector found that adequate line curtain was installed and all dead end places were sufficiently ventilated in the affected areas.

Under the circumstances, I find that the Secretary has failed to establish a violation of the cited ventilation plan provision and therefore the citation at bar will be vacated.

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ORDER

On the basis of the foregoing findings and conclusions, IT IS ORDERED THAT Section 104(a) Citation No. 3550463, citing an alleged violation of 30 C.F.R. 75.316, IS VACATED, and Pyro Mining Company's contest IS GRANTED.

Roy J. Maurer
Administrative Law Judge