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FMC V. SOL (MSHA)  
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

FMC WYOMING CORPORATION, : CONTEST PROCEEDINGS  
Contestant :  
 :  
v. : Docket No. WEST 94-317-RM  
 : Citation No. 4125677; 3/24/94  
SECRETARY OF LABOR, :  
 :  
MINE SAFETY AND HEALTH : Docket No. West 94-318-RM  
ADMINISTRATION (MSHA), : Citation No. 4125678; 3/24/94  
Respondent :  
 :  
 : FMC Trona Mine  
 :  
 : Mine ID 48-00152

DECISION

Appearances: Henry Chajet, Esq., Jackson & Kelly, Washington,  
DC, for Contestant;  
Robert Murphy, Esq., Office of the Solicitor,  
U.S. Department of Labor, Denver, Colorado, for  
Respondent.

Before: Judge Fauver

These are contest proceedings under 105(d) of the Federal  
Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. FMC  
seeks to vacate two 104(a) citations that allege violations of  
30 C.F.R. 57.22305, which provides:

Equipment used in or beyond the last open crosscut and  
equipment used in areas where methane may enter the air  
current, such as pillar recovery workings, longwall faces  
and shortwall faces, shall be approved by MSHA under the  
applicable requirements of 30 C.F.R. parts 18 through 36.  
Equipment shall not be operated in atmospheres containing  
1.0 percent or more methane.

A key issue is whether the term "last open crosscut" as used  
in this regulation applies to longwall mining. FMC contends that  
the term applies and means the crosscut in which the longwall  
equipment is operating. The Secretary contends that the term  
applies and means the closest crosscut outby the longwall face.

For the reasons set forth below, I find that as used in  
57.22305, the term "last open crosscut" does not apply to  
longwall mining.

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The next issue is whether the equipment cited was in "areas where methane may enter the air current, such as . . . longwall faces . . . ." I find that the evidence does not preponderate in showing a risk of methane entering the air current in the cited areas. Accordingly, the citations will be vacated.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable and probative evidence establishes the Findings of Fact and Further Findings in the Discussion below:

#### FINDINGS OF FACT

1. FMC Wyoming Corporation is a large mine operator engaged in mining trona for sales in and affecting interstate commerce.

2. FMC pioneered the mining of trona. The first longwall operation was installed at FMC in 1981.

3. At the subject mine, longwall production equipment includes the shearer and face conveyer and longwall support and service equipment. These include a crusher, stage loader (which puts the ore on a rubber conveyor belt for transport out of the mine), service and maintenance vehicles, shield haulers, lube trucks, grease jeeps, diesel trucks equipped with a welder, diesel-powered forklifts and front-end loaders.

4. The purpose of 0 Room at FMC's mine is to provide access to perform maintenance and service on the longwall production equipment, particularly the shearer. Zero Room was designed to accommodate equipment needed for these functions.

5. It takes the longwall about 10 days to retreat from one crosscut to another. The longwall face is about 480 feet long. The width of the crosscut in which the longwall is installed is about 16 feet.

6. FMC's trona mine is a Category III mine under MSHA's standards and is regulated by safety standards specific for the trona industry. The mine liberates substantial quantities of methane.

#### DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS

##### History of the Safety Standard

From 1969 until July 1, 1987, safety standards for trona mines (1) prohibited the operation of equipment in any atmosphere where flammable gas ("methane" beginning January 29, 1985) exceeded 1.0 percent and (2) required permissible equipment "beyond the last open crosscut or in places where dangerous quantities of flammable gases are present or may enter the air current." 30 C.F.R. 57.21076 and 57.21078 (and predecessors).

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When FMC installed its trona longwall, in 1981, MSHA inspected the system and interpreted the safety standards as permitting nonpermissible equipment in intake air in the closest crosscut and entry room (0 Room in this case) outby the longwall face. It does not appear that MSHA considered the term "last open crosscut" applicable to trona longwall mining in determining the area for permissible equipment. Instead, MSHA apparently considered trona longwall mining to be governed only by the second phrase in 57.21078: "or in places where dangerous quantities of flammable gases are present or may enter the air current."

On June 4, 1985, MSHA proposed the following safety standard to revise and combine 57.21076 and 57.21078:

57.36302 Permissible Equipment

All electrical and diesel-powered equipment used in or beyond the last open crosscut shall be permissible. Equipment shall not be operated in atmospheres containing 1.0 percent or more methane. Nonpermissible electrical and diesel-powered equipment shall be kept at least 150 feet from pillar recovery workings, longwall faces and shortwall faces.

This proposal would revise and combine existing standards 57.21076 and 57.21078, and appeared as draft proposals 58.21-178, 58.21378, 58.21-478, and 58.21-678. It requires that only permissible equipment be used at the face. 50 F.R. at 23626. The proposal would require that nonpermissible electric and diesel-powered equipment be kept at least 150 feet from pillar recovery workings, longwall faces and shortwall faces. 50 F.R. at 23627. [50 F.R. 23612, 23639; June 4, 1985.]

After considering trona industry objections to the 150-foot restriction, MSHA deleted it and adopted the following final standard:

57.22305 Approved Equipment (III Mines)

Equipment used in or beyond the last open crosscut and equipment used in areas where methane may enter the air current, such as pillar recovery workings, longwall faces and shortwall faces, shall be approved by MSHA under the applicable requirements of 30 C.F.R. Parts 18 through 36. Equipment shall not be operated in atmospheres containing 1.0 percent or more methane.

In the Preamble to the final rule, MSHA gave this explanation:

Comments for Category III mines objected to the proposed 150-foot restriction for nonapproved equipment used in pillar recovery workings, longwall faces, or shortwall faces, stating that the restrictions on nonapproved equipment inby the last open crosscut are sufficient. The Agency agrees and the specific limitation of 150 feet has been omitted from the final rule. Performance-oriented language is substituted in the final rule which addresses the potential for methane forced out of gob areas due to caving resulting from pillar recovery and longwall and shortwall mining.

Consistent with its earlier enforcement policy, MSHA interpreted the new standard as permitting FMC to operate nonpermissible equipment in intake air in the closest crosscut and entry room outby the longwall face.

In January 1994, MSHA decided to apply the standard differently. Under its new policy, nonpermissible equipment is not allowed in and beyond the closest crosscut outby the longwall face. A meeting was held in the District Manager's office on January 24, 1994, at which MSHA's position was explained to FMC. Following the conference, a letter from the District Manager to FMC, on February 1, 1994, repeated MSHA's position and included several maps demonstrating what MSHA expected for future enforcement purposes. The citations at issue were issued in March 1994.

FMC contends that MSHA's new interpretation amounts to rulemaking in contravention of 101 of the Act (requiring formal notice and comment rulemaking).

The Secretary contends that in 57.22305 the term "last open crosscut" means the closest crosscut outby the longwall face and rulemaking proceedings are not required to commence applying this interpretation. FMC contends that this crosscut is not an "open crosscut" because it does not provide ventilation from the intake entry to the return entry. FMC submits that the "last open crosscut" is the crosscut in which the longwall face and equipment are located. Under this interpretation, the last open crosscut is immediately inby the longwall face.

A key to interpreting 57.22305 is the language substituted for the 150-foot restriction that was deleted in the final rule. As stated, the Preamble explained this change as follows:

Performance-oriented language is substituted in the final rule which addresses the potential for methane forced out of the gob areas due to caving resulting from pillar recovery and longwall and shortwall mining.  
[52 Fed. Reg. at 24937; emphasis added.]

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MSHA's witnesses testified as to their understanding of the "performance-oriented language" that was inserted in the new standard. For example, Mr. Fuller testified:

FULLER: The requirement that they substituted performance-oriented language in the standard, which is the requirement that they maintain some separation distance.

MURPHY: And how was that separation distance maintained?

FULLER: What they left us with when they took out the 150-foot separation distance was, at a minimum, the width of the last open crosscut. [Tr. 301.]

Likewise, Mr. Koenning testified:

MURPHY: So what type of performance language, in your opinion, has been put into 57.22305?

KOENNING: The performance that is required is that a separation be maintained that is at least the width of the last open crosscut. [Tr. 397.]

I find that the performance-oriented language referenced by the Preamble is the phrase: "and equipment in areas where methane may enter the air current, such as pillar recovery workings, longwall faces and shortwall faces . . . ." I do not agree with the Secretary's contention that this language means that nonpermissible equipment must be kept a specific minimum distance from the longwall face, e.g., the width of the closest crosscut outby the longwall face.

Nor do I agree with the parties' contention that the term "last open crosscut" as used in 57.22305 applies to longwall mining. The term "last open crosscut" or "last crosscut" is not defined in either the Mine Act or its implementing regulations. In general, a "crosscut" is a passageway or opening driven between entries for ventilation and haulage purposes (U.S. Department of Interior, Dictionary of Mining, Mineral, and Related Terms 280 (1968)), and the "last open crosscut" is "that open passageway connecting entries closest to the working face" (Jim Walter Resources, Inc., 11 FMSHRC 21, 26 (1989)).

The Commission has recognized that "in any given coal mine, the mining methodology used may uniquely determine the last open crosscut" (Peabody Coal Company, 11 FMSHRC 9, fn 8 (1989)) and that "each standard using the term 'last open crosscut' requires 'that certain activities be conducted in an area in which it has been deemed most crucial'" (JWR decision supra, at 26; citations omitted). The Commission has also held that it is "not fatally inconsistent or conflicting" to hold that the "last open crosscut" in one safety standard may be a certain crosscut but

another safety standard using the term "last open crosscut" would not apply to that crosscut. Finally, the Commission has found that the term "last open crosscut" is interchangeable with "last crosscut" when the logic and safety intent of the Act are best served by this flexible interpretation. Id. at 25-26.

The decisions of the Commission and its judges thus indicate a flexible approach to the term "last open crosscut" in order to consider the unique mining methodologies involved, while ensuring compliance with the Congressional intent to protect the safety of miners. Although their approach is very flexible, the decisions show a consistent distinction between development mining and longwall or retreat mining. The term "last open crosscut" has been applied only to development mining in determining the location of permissible equipment. Indeed, the coal regulations ( 75.1002-1) require that nonpermissible equipment be at least 150 feet from "pillar workings" (which would include a longwall), rather than use the term "last open crosscut."

The Category III regulations for trona mining indicate a similar intention, in fixing the place for permissible equipment, to confine the term "last open crosscut" to development mining. I conclude that, in longwall trona mining, the 57.22305 requirement for permissible equipment is limited to the phrase "equipment used in areas where methane may enter the air current, such as pillar recovery workings and longwall faces and shortwall faces" and the phrase "last open crosscut" does not apply.

Accordingly, the controlling issue is whether the equipment cited in 0 Room was in "areas where methane may enter the air current . . . ." The diesel-powered vehicle and the electric light cited were in intake air and there is no evidence that methane was ever found there. The parties offered conflicting opinion evidence as to the possibility of methane entering 0 Room. On balance, I find that the evidence does not preponderate in showing a risk of methane entering the intake air current in the cited areas.

If the Secretary believes a specific separation distance would be a better rule than the current standard, he must proceed through notice and comment rulemaking under 101 of the Act. Consideration of the issue in rulemaking may indicate that the 150-foot standard for longwall coal mining would be appropriate for longwall trona mining as well (as originally proposed in 1985).

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FOOTNOTE 1

In Jim Walters Resources, supra, the Commission held that the term "last open crosscut" was properly applied to a "unique longwall method of mining . . . resulting in large, uneven pillars (blocks) of coal and in interrupted crosscuts between various entries." However, the facts indicate the standard was actually applied to development mining used to set up future longwall panels, and not to longwall equipment outby a longwall face.

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CONCLUSIONS OF LAW

1. The judge has jurisdiction. actually applied to development mining used to set up future longwall panels, and not to longwall equipment outby a longwall
2. The term "last open crosscut" as used in 30 C.F.R. face. 57.22305 does not apply to FMC's trona longwall section
3. The Secretary did not meet his burden of proving that the cited equipment was "in areas where methane may enter the air current" within the meaning of 30 C.F.R. 57.22305. Accordingly, he did not prove a violation of that standard.

ORDER

WHEREFORE IT IS ORDERED that Citations Nos. 4125677 and 4125678 are VACATED.

William Fauver  
Administrative Law Judge

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