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SOL (MSHA) V. STANSBURY COAL
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceedings Docket No. DENV 77-80-P A.C. No. 48-01012-02001
v.	Docket No. DENV 77-81-P A.C. No. 48-01012-2003
STANSBURY COAL COMPANY, RESPONDENT	Docket No. DENV 77-98-P A.C. No. 48-01012-2004 Docket No. DENV 78-13-P A.C. No. 48-01012-2002 Stansbury Mine

DECISION

Appearances: Robert J. Phares, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner
Warren L. Tomlinson, Esq., and Deborah J. Friedman, Esq., Holland & Hart, Denver, Colorado, for Respondent

Before: Judge Lasher

I. Procedural Background

The alleged violations involved in these four proceedings were issued pursuant to, and these proceedings are governed by, the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1970), hereinafter, the Act.(FOOTNOTE 1) Pursuant to section 301(c)(3) of the Federal Mine Safety and Health Act of 1977,(FOOTNOTE 2) proceedings pending at the time such Act takes effect shall be continued before the

Federal Mine Safety and Health Review Commission. A total of 18 alleged violations are involved in these four dockets which will be taken up in the following order: DENV 77-81-P, 98-P, 80-P, and DENV 78-13-P. Separate transcripts were developed for each docket. Respondent filed lengthy findings of fact and conclusions of law in all dockets together with an accompanying brief.

A. Findings of Fact Relevant to Each Alleged Violation

1. The inspections which resulted in issuance of the orders and notices which are the subject of this document were issued shortly after the reopening of the Stansbury Mine. As a result, Respondent had no history of previous violations.

2. Any penalty assessment herein will not affect Respondent's ability to continue in business.

3. In 1975, Respondent did not produce any coal. In 1976, total production was approximately 80,000 tons. In 1977, Stansbury produced approximately 300 tons of coal per day, or 72,000 tons per year. Respondent's present production level is approximately 1,000 tons per day. Respondent is a large coal operator.

4. The Stansbury Mine and Stansbury Coal Company are a joint venture between Ideal Basic Industries and Winton Coal Company.

5. With respect to all alleged violations found to have occurred, Respondent proceeded in good faith to achieve rapid compliance with the safety standard cited.

DOCKET NO. DENV 77-81-P

This docket consists of one violation.

Notice No. 2 BM (August 11, 1976); 30 CFR 75.316

In a notice of violation issued August 11, 1976, inspector Bill Matekovic charged Respondent with failing to provide devices for controlling dust at transfer, crushing and loading points as required by a Government-approved ventilation system and methane and dust control plan, herein, the ventilation plan.

30 CFR 75.316 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.

The pertinent provision of the ventilation plan provides as follows:

> In general, dust will be controlled at transfer points, loading points and at face areas with the use of water sprays. At the time this plan is being submitted, however, we do not have these facilities in operation. Therefore, it cannot be determined how many sprays will be needed at what water pressure and volume. As mining operations commence, engineering surveys will be run on all areas to determine the exact number of sprays needed, their location along with working pressures and volumes.

There is no question but that devices for controlling dust (sprays) were not installed at the transfer points as charged in the notice. However, there is no specific limitation in the ventilation plan with respect to the time the surveys would be run nor is there any provision requiring installation of the sprays within a given period after production commenced.

The ventilation plan, which was approved by MSHA's predecessor, MESA, clearly did not require installation of specific numbers of sprays at particular locations, and, as urged by Respondent in its brief, the ventilation plan merely required that Respondent make reasonable efforts to complete engineering studies and install what it determined to be necessary sprays as mining commenced.

The record indicates that for a 2-1/2-month period prior to issuance of the notice, coal production at the mine was on a sporadic basis (Tr. 17); that during this period Respondent did install sprays at the locations which were cited in the notice, but since such were installed without the benefit of engineering studies, they were ineffective; that by August 11, 1976, the date of the alleged violation, Respondent had completed two engineering studies and was experimenting with different types of water pressure regulators. Although MESA's supervisory mining engineer at the time, W. P. Knepp, felt that a period of 1 month from the commencement of production was a sufficient time in which to install the sprays (Tr. 54-56), the plan did not require completion within 1 month, or any other period for

that matter. Furthermore, Knepp's opinion in this regard has no support in the record (Tr. 56) and is rejected.(FOOTNOTE 3)

From the record, it appears that Respondent had completed all necessary preliminary work for the installation of the sprays and was in the process of completing the engineering studies necessary to determine the number, location, pressure and volume of the sprays. Accordingly, I find Respondent was in compliance with the plan on August 11, 1976, and that the subject notice of violation should be vacated.

DOCKET NO. DENV 77-98-P

This docket contains four violations which are taken up in the order in which they appear in the transcript.

Notice No. 1 JBD (October 18, 1976); 30 CFR 70.100(b)

On October 18, 1976, inspector James B. Denning issued the above notice (No. 6-0077), alleging that laboratory analysis of 10 air samples taken at Stansbury on August 31, 1976, revealed an average concentration of respirable dust in excess of the applicable limit established by 30 CFR 70.100(b), which provides:

> Effective December 20, 1972, each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of such mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air.

Respondent contends, and I agree, that this notice should be vacated pursuant to the decision of the Interior Department's Board of Mine Operations Appeals in Eastern Associated Coal Corp., 7 IBMA 14, (1976), aff'd on reconsideration, Eastern Associated Coal Corp., 7 IBMA 133 (1976). In the Eastern cases, the Board found that neither MESA's air sampling techniques nor the subsequent laboratory analysis of such samples screened out particulates larger in size that those defined as respirable dust in the Coal Act and regulations promulgated pursuant thereto. See 30 U.S.C. 801 at section 878(j) and 30 CFR 70.2(i). The instant notice was issued prior to December 20, 1976, i.e., the final Eastern decision and the analysis

techniques utilized by MESA were apparently identical to those found insufficient to support a notice of violation in Eastern.

On January 19, 1977, the Secretary of the Interior issued a decision and order which stayed the effectiveness of the Board's opinions in the Eastern cases pending his review of those cases. On January 3, 1978, the Secretary dissolved the stay of the Board's Eastern opinions because the Federal Mine Safety and Health Act of 1977 ("1977 Act"), 30 U.S.C. 801 et seq. (1977), redefined "respirable dust" so as to eliminate the legal basis for the Board's invalidation of MESA's respirable dust program in the Eastern cases. Because the Secretary's stay was lifted, the Board's decision in the Eastern cases now effectively invalidates all notices of violation issued pursuant to 30 CFR 70.100(b) during the period prior to the Eastern cases when the laboratory analysis techniques invalidated by the Board were in use. I also note that in MSHA v. P M & B Coal Company, Inc., Docket No. NORT 78-13-P (June 13, 1978), Administrative Law Judge Richard C. Steffey found, inter alia, that the Board had invalidated all notices of violation issued pursuant to 30 CFR 70.100(b) as a result of the fatal defects in the sampling procedures utilized in MESA's respirable dust program.

In the instant case, MSHA presented no evidence with respect to the sampling techniques or otherwise which would change or alter the conclusions previously reached in the Eastern cases. Although counsel for MSHA claimed that MSHA had amassed scientific evidence which would demonstrate that MESA's analytical procedures did, in fact, discount the weight of oversized particles contained in the air samples, MSHA declined to submit any evidence in support thereof whatsoever, stating that "because of the fact that only one dust violation is at issue in this proceeding, my supervisors in the Solicitor's Office have decided not to present the lengthy scientific testimony which I referred to earlier."

On this state of the record, I am unable to find that a violation has been established. Accordingly, it is ordered that the subject notice of violation be vacated.

Notice No. 4 BM (January 26, 1977); 30 CFR 75.316

The subject notice was issued by inspector Bill Matekovic on January 26, 1977, alleging that Respondent was not in compliance with its ventilation plan, a violation of 30 CFR 75.316 in that 10 of the 28 water sprays used to allay dust created by the operation of the Lee-Norse continuous miner were not operational (Tr. 33-34).

The inspector observed the continuous miner in operation for from 45 to 60 minutes with the 10 sprays out of operation due to clogging from dirt and mud. During this time, float coal dust was in suspension presenting a hazard to two miners working in the face area (Tr.

34). The miner operator told the inspector that he had never seen all the sprays operating at one time (Tr. 36). The inspector testified that he cited the violation for an infraction of the January 25, 1977, plan, which on page 3, in paragraph 2-E, required that the continuous miner have at least 32 sprays (Tr. 35; Exh. P-31-A). However, the operator did not receive this particular plan, as approved from MSHA, until 2 or 3 days after the alleged violation occurred (Tr. 41). At the hearing, MSHA conceded that since the operator on the date it was cited had not yet received the plan approved January 25, 1977, that the Government must rely upon the earlier plan and its provisions, specifically paragraphs 1 and 2 of the plan discussed hereinabove in connection with Notice No. 3 BM (Docket No. DENV 77-81-P) (Tr. 48). That plan (Exh. 24), approved May 3, 1976, has no express or implied coverage of the continuous miner as does the January 25, 1977, plan under which Inspector Matekovic erroneously cited the violation. The May 3, 1976, plan did not provide for a specific number of sprays on the continuous miner. The inspector testified he proceeded pursuant to the January 25, 1977 plan. Neither at the hearing or in its brief does the Government explain how it can rely on the May 3, 1976 plan to establish a violation. Nor can I. In these, circumstances, I am unable to conclude that more than the 18 sprays which were operating on January 26, 1977, when the notice was issued were required. Such a requirement is not to be found either in the regulation or in the plan on which the Government must rely. Accordingly, the subject notice is ordered vacated.

Notice No. 1 CID (February 2, 1977)

After all the evidence had been presented at the hearing, counsel for MSHA concluded that a violation had not been shown and properly moved to dismiss (Tr. 64). My order vacating the subject notice at the hearing is affirmed.

Notice No. 3 BM (April 13, 1977)

Upon MSHA's motion to dismiss made at the hearing, I ordered the subject notice vacated (Tr. 66) and that order is hereby affirmed.

DOCKET NO. DENV 77-80-P

This docket is comprised of five alleged violations.

Order No. 1 HP (May 21, 1976); 30 CFR 75.1722(a) (Tr. 6-41)

30 CFR 75.1722(a) provides as follows:

> Gears; sprockets, chains; drive, head, tail, and takeup pulleys; flywheels; couplings, shafts; sawblades; fan inlets; and similar exposed moving machine parts

which may be contacted by persons, and which may cause injury to persons shall be guarded.

Inspector Harvey Padgett cited Respondent for not providing guards on the two drive pulleys and takeup pulleys on the No. 2 conveyor belt drive located in the rock tunnel. Padgett testified that he actually saw the belt running immediately preceding the time he walked up the tunnel and observed that there were no guards on the drive (Tr. 7, 8). Based on his evaluation of scratches on the guards, Padgett was of the opinion that the guards had never been attached or put in place (Tr. 8, 38). As further verification that the belt had been running without the guards in place, Padgett pointed out that even though Respondent had been mining coal on the day in question, there was no coal in the bins--indicating that the coal had been transported out of the mine on the belt (Tr. 10). Padgett also indicated that Respondent's safety director, James Hake, made no mention at the time that the belt was in operation for installation and adjustment of the belt.

Respondent admits that the guards were not put up at the time in question (Tr. 17), but maintains that the guards had been on and off a number of times (Tr. 18), presumably for adjusting the belts and pulleys (Tr. 21, 57). The testimony of Respondent's witnesses Hake and Joe Skriner, its underground maintenance supervisor, insofar as it contradicts the inspector's version of the situation he observed is rejected. Skriner disclaimed actual knowledge of the facts and events and Hake's testimony was laced with statements indicating his lack of knowledge or memory. The testimony of Respondent's third witness, mine engineer Mel Pyeatt, to the effect that he had never seen the guards off during normal hauling operations (Tr. 34), is not probative evidence that at the specific time and place cited in the order the guards were up, particularly since Pyeatt admitted he was "not sure" of the situation on the date in question (Tr. 34).

Accordingly, I find that the violation charged did occur and since no justification appears for the guards not having been installed (Tr. 21), and Respondent having been warned thereof previously (Tr. 46), that the violation resulted from Respondent's gross negligence. The evidence with respect to seriousness was not at all demonstrative (Tr. 9, 10), and I conclude this was only a moderately serious violation. A penalty of $500 is assessed.

Order No. 2 HP (May 21, 1976); 30 CFR 75.1722(a); (Tr. 42-61)

As in the prior violation, Inspector Padgett cited Respondent for not providing guards on the two drive pulleys and takeup pulleys on the No. 1 conveyor belt drive located in the rock tunnel.

After observing the conditions cited in the previous order (1 HP), Inspector Padgett walked up the belt line and observed the conditions cited in the subject order (Tr. 43). Specifically, he observed that guards were not provided on the two large drive pulleys. However, Padgett did not see the belt in operation (Tr. 45, 49), and saw no one in the area other than Mr. Hake, who was accompanying him on the inspection (Tr. 44, 45). It does appear that the manufacturer's guards which accompany the pulleys were difficult to put up and take down (Tr. 56, 57) when repairs on the belt drive were being made and that to abate this violation, Respondent installed a chain link fence (Tr. 57). To constitute a violation, it is unnecessary that the belt drive actually be observed in operation. The regulation requires simply that the drive "shall be guarded." Furthermore, Respondent's evidence as to the difficulty of putting up and taking down the guards to make repairs was in the abstract. There is no evidence that in this instance it had actually taken the guards down to make such repairs. Accordingly, I find that a violation did occur, and again, Respondent having received a prior warning (Tr. 46), and there being no explanation for the guards being down, that it resulted from Respondent's gross negligence. As with the previous violation, MSHA provided no substantive evidence with respect to the gravity of this violation. That is, there is no indication as to the number of miners ordinarily exposed to the hazard, the nature or mechanics of the hazard, the type of injury one might expect to result from the hazard, the immediacy of any risk posed, or the probabilities of injuries or fatalities occurring as a result of the danger created by the violation, I conclude that this is but a moderately serious violation for which a penalty of $500 is appropriate.

Notice No. 1 WPK (December 16, 1975); 30 CFR 77.1721 (Tr. 62-143)

Inspector W. P. Knepp issued this notice alleging a violation of 30 CFR 75.1721(a) which provides as follows:

> On and after the effective date of this section, each operator of a new underground coal mine, and a mine which has been abandoned or deactivated and is to be reopened or reactivated, shall prior to opening, reopening or reactivating the mine notify the Coal Mine Health and Safety District Manager for the district in which the mine is located of the approximate date of the proposed or actual opening of such mine. Thereafter, and as soon as practicable, the operator of such mine shall submit all preliminary plans in accordance with paragraph (b) of this section to the District Manager and the operator shall not develop any part of the coalbed in such mine unless and until all preliminary plans have been approved by the District Manager.

The notice charges Respondent as follows:

> The operator has begun development of the #3 seam (coalbed) before the following preliminary plans have been approved; a proposed roof control plan per 75.200-5; a proposed ventilation plan and methane and dust control plan per 75.316-2; a proposed plan for training and retraining per 75.160-1; a proposed plan for scaling abandoned areas per 75.330-1; a proposed plan for searching miners for smoking materials per 75.1702; a proposed plan for emergency medical assistance and emergency communication per 75.1713-1 & 75.1713-2.
>
> Emergency medical assistance and communication plans and smoking search plan were submitted on Dec. 12, 1975; however, not yet approved. The mine was being prepared and developed with approximately 15 men per shift working two shifts doing roof bolting, blasting bottom rock and coal seam for turncut from rock slopes; installing a new hoist; and building ventilation controls. Also building timber sets and pumping water. Also, this seam #3 was connected to a new rock slope being developed by a contractor where mucking, drilling, and shooting operation where [sic] place. Approximately 60,000 cfm was leaving rock slope intake air current and entering return in #3 seam near where men where [sic] working.
>
> No coal was being mined and taken out of mine to date. The #3 seam was previously the stansbury mine of the Union Pacific and was abandoned in 1957. The operator is reopening this mine.(FOOTNOTE 4)

By notice of termination dated April 23, 1976, the violation was found to have been abated because the operator "submitted the required plans and the plans were approved by MESA" (Exh. P-7).

In brief, the regulation requires that the operator shall not develop any part of the coalbed of a new, reopened or reactivated mine until all preliminary plans submitted by the operator have been approved by the district manager.

From the uncontradicted testimony of Inspector Knepp, it is clear that (1) an entry had been driven for a distance of approximately 175 feet, (2) the entry was 20 feet wide and a large block of coal had been extracted from the No. 3 seam; and (3) the seam extracted was approximately 8 feet thick (Tr. 66, 67). I find that this constitutes "development" of the coalbed.

Respondent contends that its rehabilitation plan was being followed, and that the plans required by section 75.1721(a), covering such specific subjects as roof control, ventilation, methane and dust control, emergencies, etc., were not required to be submitted. However, it is clear from the record and Respondent admits, that as of December 16, 1975, Respondent had not submitted its roof control and ventilation plans (Tr. 129, 130). It is also clear that Respondent had mined coal from the No. 3 seam (Tr. 66, 67, 70, 105, 106, 112), and that it was developing the coalbed and had gone beyond the stage properly covered by its rehabilitation plan since it was developing a "solid block" of coal (Tr. 105) in a working face (Tr. 78-81, 135, 136, 138, 140). Respondent attempted to establish, primarily through the testimony of Franklin D. Mink, its general manager at the time of the violation, that it had been authorized by the acting director of MESA's Western District Office, M. J. Turnipseed, to proceed under the rehabilitation plan. This evidence, however, is so general, vague and uncertain that inferences cannot reasonably be drawn from it. Specifically, I am unable to find on the basis of the record that MESA waived the requirements of 30 CFR 75.1721(a) prohibiting development of "any part of the coalbed" until all preliminary plans had been approved by its district manager. In finding that a violation did occur, I also find that Respondent was guilty of but ordinary negligence, since there is substantial evidence that it was genuinely convinced that it was engaged in rehabilitation work when it extracted coal from the No. 3 seam (Tr. 99-101, 140-141). On the other hand, there is evidence that the violation was relatively serious (Tr. 70-72, 80, 112, 113) since some of the potential hazards posed were roof falls and mine explosions. Upon consideration of the various statutory criteria, including good faith abatement (Tr. 142) and the general circumstances of this violation, a penalty of $250 is assessed.

Notice No. 1 HP (April 23, 1976); 30 CFR 75.200 (Exhs. P-8 - 12)

Prosecution of this notice of violation was abandoned by MESA at the hearing (Tr. 144) and my bench order vacating such notice is affirmed.

Notice No. 2 HP (April 23, 1976); 30 CFR 75.316 (Exhs. P-13 - 15)

Prosecution of this notice was abandoned by MESA at the hearing (Tr. 144) and my bench order vacating it is affirmed.

DOCKET NO. DENV 78-13-P

This docket consists of eight alleged violations contained in three withdrawal orders.

Order No. 1 BM (August 10, 1976); Exhibit P-37; Six Alleged Violations

1. 30 CFR 75.301

Inspector Bill Matekovic charged in this "imminent danger" order that "Air reaching the working face of the No. 10 Room, 5 north section where a Lee-Norse continuous mining machine was in operation was 2400 CFM." The regulation requires 3,000 cubic feet of air per minute (Tr. 10).

Respondent admits the occurrence of this violation (Respondent's Brief, p. 26).

No evidence was presented with respect to negligence on the part of Respondent in the commission of this violation and I find none.

With respect to seriousness, Inspector Matekovic testified that this violation--in conjunction with the other five alleged violations--resulted in an imminent danger:

> My thought was, because of the poor ventilation in the section, the line curtains, the check curtains and travel curtains, and the ventilation devices being in such bad repair, and the air returning from the bog area, that it was possible, with the temperature change or barometric change, or a roof fall in the gob area, possibly force out an oxygen deficiency atmosphere in the face area causing death by oxygen deficiency atmosphere.

(Tr. 18). Respondent's witness did not effectively rebut this testimony (Tr. 49).

I thus conclude that this violation occurred and that it was very serious, and that it resulted from Respondent's ordinary negligence.(FOOTNOTE 5) A penalty of $250 is assessed.

2. 30 CFR 75.302-1

Respondent also admits this second violation, i.e., "that the line brattice was terminated 24' outby the deepest penetration of the face."

Since both the shift foreman and a section foreman were present in the section when the violation was observed (Tr. 11), I find that Respondent was negligent in allowing the infraction to occur.

For the reasons set forth in connection with the first violation, supra, I find this to be a serious violation. A penalty of $250 is assessed.

3. 30 CFR 75.301

Respondent admits this violation, i.e., "that the quantity of air reaching the last open crosscut was 6300 CFM" (Respondent's Brief, p. 26).

Respondent's management should have been aware of this violation since ventilation throughout the section was "not up to par" and either the section foreman or area foreman should have checked the quantity of air by the time the violation was observed (Tr. 12, 13).

For the reasons previously indicated, I find this to be a serious violation. A penalty of $250 is assessed.

4. 30 CFR 75.312

This fourth alleged violation contained in Withdrawal Order 1 BM states that "Air being used to ventilate the inaccessible pillared and gob areas off the main section intake was bleeding back thru an old works entry into the face area," is denied by Respondent.

Inspector Matekovic testified that when he employed a smoke tube test, the white smoke traveled into the intake entry instead of in the opposite direction into the old gob area where it was supposed to have gone (Tr. 13). He also indicated that the purpose of the regulation is to prevent any "explosive or noxious gases that come into the intake from going the working area of the section" (Tr. 14); that the cause of the condition was "a curtain down" (Tr. 13, 14), and that Respondent's management personnel should have been aware of the problem. With respect to the occurrence of this violation, I have not found the testimony of Respondent's witness, Pyeatt, sufficiently clear or probative, to overcome the relatively detailed and persuasive testimony of the inspector.

Accordingly, I find that this violation occurred, and was the result of Respondent's ordinary negligence, there being no evidence

to the contrary. This violation, when considered in combination with the other violations found to have occurred, is found to be very serious. A penalty of $250 is assessed.

5. 30 CFR 75.507

The occurrence of the fifth alleged violation contained in Withdrawal Order 1 BW, that "A non-permissible transformer power distribution center was located in the return aircourse of the rooms outby the last open cross-cut," is also denied by Respondent. Respondent contends that the transformer was not in the return aircourse but was located in a niche excavated into the tunnel wall.

Inspector Matekovic convincingly indicated that the transformer was located at point "E" on his sketch of the section (Exh. P-37-A). Based thereon, I find that the nonpermissible transformer was located in a return aircourse, and that Respondent's management necessarily was aware of the violation since the "niche had to be cut and the transformer %y(3)5C installed there" (Tr. 15, 43). The inspector gave the following reasons for his opinion that a "hazardous condition" existed:

> Because of the gob area, and it was inaccessible and hadn't been examined; nobody knew what was back there. And also because the transformer was not permissible. Arcing could have taken place and coal dust, float coal dust being transported back to the return, could have accumulated on the transformer and become a fire and explosion hazard.

(Tr. 16).

Accordingly, I find this violation occurred, was very serious, and resulted from the ordinary negligence of Respondent--there being no evidence of gross negligence on the one hand, or evidence exculpating Respondent from its failure to properly discharge its safety responsibilities on the other. A penalty of $250 is assessed.

6. 30 CFR 75.302

Respondent also admits this last violation charged in Order 1 BM, i.e., that line brattice, check curtains and travel curtains necessary to provide proper and adequate ventilation to the face areas were not properly installed and adequately maintained. The inspector felt that the onshift section foreman should have discovered the violation had he "made his rounds through the sections" (Tr. 18). I find this to be a very serious violation which resulted from Respondent's ordinary negligence. A penalty of $250 is assessed.

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Order No. 2 BM (August 10, 1976); Exhibit P-40; One Alleged Violation

In this "imminent danger" withdrawal order, Inspector Matekovic charged Respondent with allowing dangerous accumulations of float coal dust to accumulate on electrical equipment and rock-dusted surfaces in certain belt entries and in certain crosscuts in violation of 30 CFR 75.400, which provides:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electrical equipment therein.

The inspector was accompanied by Respondent's mine engineer, Mel Pyeatt, on his inspection. His testimony that at various places the floor was black and float coal dust had been allowed to accumulate on electrical equipment (Tr. 56-58) is not refuted. The only measurement taken by the inspector was on a transformer where the dust was found to be from one-sixteenth to one-eighth of an inch deep (Tr. 58). There was no evidence of recent rock dusting. Also, it appears that the belt was operating, various ignition sources were present, the material had accumulated over a period of from three to six shifts, 25 miners were exposed to the hazard, and mine management should have known of the violative conditions since at the beginning of each shift the belts are required to be examined by a certified person (Tr. 57-61). The inspector observed no evidence that Respondent was in the process of removing the accumulated material (Tr. 65). Although the inspector did not test the combustibility of the material, he was certain it was float coal dust (Tr. 66) which is flammable and explosive (Tr. 67). Respondent's general evidence that it had "more than a regular scheduled program" for cleanup of the material was not persuasive since its witness did not know the frequency of the alleged program (Tr. 73, 74) and, in effect, admitted the existence of some of the accumulations (Tr. 71-73). On the basis of this record, I am unable to find that Respondent had in effect at the time a cleanup program which was effectively minimizing the accumulation of float coal dust, much less eliminating it. Thus, even under the stringent evidentiary requirements of Old Ben Coal Company, 8 IBMA 98 (August 17, 1977), aff'd on reconsideration, 8 IBMA 196 (October 26, 1977), which is presently before the Commission for review in another matter, Marshall v. Peabody Coal Company (VINC 77-91), I conclude that MSHA has established a violation. There is no testimony or other evidence with respect to the seriousness of the violation. One is left to speculate as to the immediacy of the hazard posed, its nature, its mechanism, and its severity. Accordingly, because of this evidentiary lacuna, I find that the violation established was not serious in the circumstances, and further that it resulted from only ordinary negligence on the part of Respondent. A penalty of $200 is assessed.

Order No. 3 BM (August 10, 1976); Exhibit P-43; One Alleged Violation

In this "imminent danger" withdrawal order, Inspector Matekovic charged that the overspeed and overwind controls for the No. 3 seam hoist were not in operating condition, and that the electrical terminals for the controls were bridged across with a piece of wire which caused the controls to be bypassed in violation of 30 CFR 75.1400, which provides: "Every hoist used to transport persons at a coal mine shall be equipped with overspeed, overwind, and automatic stop controls."

The inspector also charged that the hoist was used to transport men and materials and that he observed men being transported on the hoist on slope trips, including mantrips.

The order was modified on August 12, 1976 (Exh. P-45) to allege an additional violation of another section of the cited regulation in that the Long-Airdox brake car attached to the hoist rope as an equivalent means for a safety catch was inoperable in that the batteries which supply electricity to the magnetic brakes were not kept charged.

Respondent contends that there was no violation since the hoist was not used to transport persons--a requirement of the regulation. It admits that Joe Skriner, the underground maintenance foreman, had bridged out or bypassed the overspeed control (Tr. 95, 96-99), but denies that the overwind control was bypassed. Respondent also alleges that Skriner posted signs at all hoist stations saying "No men on the Man Trip," and that he informed the hoist operator that the hoist must only be used to haul materials.

There is no question but that the inspector observed four men, believed to be employees of Gunn Construction Company, "on the brake car riding up the slope, pulled by the hoist" (Tr. 84, 85, 119, 124). It also appears that there was a hoisting engineer on duty at the time in the hoist room who operated the hoist, and that if someone at the bottom of the slope wanted to go up the slope, a "bell" communication system was rigged so that the hoisting engineer would know whether a mantrip or material was to be moved up the slope (Tr. 86). The danger posed by the violation was that if an emergency occurred on a mantrip, there would be no means to stop the hoist (Tr. 87).

According to Respondent's witness, Skriner, he did bypass the overspeed control but not the overwind (upper hoisting limits) control on the hoist (Tr. 95-99). With respect to the issue whether the overwind control had been bypassed, I credit Skriner's testimony over that of the inspector (Tr. 82, 83) since it is the more detailed and convincing, and since Skriner was in the best position to know

what had occurred. In any event, it is clear that the overspeed control had been bypassed, and that the additional violation cited in the amendment to the notice, i.e., that the "safety device," in this instance, a brake car, was inoperable due to a malfunctioning battery, did occur (Tr. 10 4-108). I thus find that in both respects, there was an infraction. Contrary to Respondent's contention, on the basis of the record before me, I am unable to conclude that this serious violation was solely the result of employee disobedience. In this respect, I note that the employees involved were not identified, nor did they testify. Nor did Respondent explain why the hoisting engineer permitted the trip to occur after receiving a mantrip signal. On the other hand, it does appear that Respondent took significant steps to prevent the misuse of the hoist for transporting personnel. I thus conclude that the violation resulted from but ordinary negligence. A penalty of $250 is assessed.

ORDER

1. All proposed findings of fact and conclusions of law proposed by the parties which are inconsistent with the foregoing are rejected.

2. Respondent is ORDERED to pay to the Secretary of Labor, within 30 days from the date of issuance of this decision, the following penalties heretofore assessed:

DOCKET NO.	NOTICE OR ORDER NO.	PENALTY
DENV 77-80-P	Order 1 HP	$ 500
	Order 2 HP	500
	Notice 1 WPK	250
	Notice 1 HP	VACATED
	Notice 2 HP	VACATED
DENV 77-81-P	Notice 2 BM	VACATED
DENV 77-98-P	Notice 1 JBD	VACATED
	Notice 4 BM	VACATED
	Notice 1 CID	VACATED
	Notice 3 BM	VACATED
DENV 78-13-P	Order 1 BM (six separate violations)	1,500

~420

Order 2 BM	200
Order 3 BM	250
Total	$3,200

Michael A. Lasher, Jr.
Judge

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FOOTNOTES START HERE
~FOOTNOTE_ONE
1 Section 109(a)(1) states in pertinent part as follows:

"The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, except the provisions of Title 4, shall be assessed a civil penalty by the Secretary under paragraph (3) of this subsection which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense."

~FOOTNOTE_TWO
2. 83 Stat. 742, 30 U.S.C. 801 et seq.

~FOOTNOTE_THREE
3. The safety standard sought to be enforced is, to begin with, arrived at vicariously through the ventilation plan. Zeigler Coal Company, 4 IBMA 30 (1975). Inadequacies in the plan itself should not be curable by opinion testimony rendered long after the fact. Furthermore, the plan could have been reevaluated by MESA at any time and revised (Tr. 55, 56).

~FOOTNOTE_FOUR
4. By virtue of a subsequent modification, the last paragraph of the notice was amended (Exh. P-5) to indicate that "coal was being mined in that an entry was driven approximately 175 feet for a future belt installation by drilling and blasting method. The coal was then hauled to the surface along with the muck from the slope sinking projects."

~FOOTNOTE_FIVE
5. In determining the degree of negligence attributable to the operator, reference is made to the general tort principal that the unexcused violation of a Governmental safety regulation (or statute and ordinance designed to provide for the health and safety of others) is negligence per se. See Gatenby v. Altoona Aviation Corp., 407 F.2d 443 (3rd Cir. 1968); Miles v. Ryan, 338 F. Supp. 1065 (1972), aff'd 484 F.2d 1255 (3rd Cir. 1973); 57 Am. Jur. 2nd, NEGLIGENCE, 234-242 (1971).