# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

(703) 756-6230

11 AUG 1980

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| SEWELL COAL COMPANY, | | Contest of Citation |
| | Contestant | |
| v. | | Docket No. WEVA 80-264-R |
| SECRETARY OF LABOR, MINE SAFETY ANDHEALTH ADMINISTRATION (MSHA), | | Contest of Order |
| | | Docket No. WEVA 80-265-R |
| | Respondent | |
| | | Sewell No. 4 Mine |

## DECISION

Appearances: Gary W. Callahan, Esq., Counsel for Sewell Coal Company, Lebanon, Virginia, for Contestant;
John H. O'Donnell, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent.

Before: Judge James A. Laurenson

## JURISDICTION AND PROCEDURAL HISTORY

These are proceedings filed by Sewell Coal Company (hereinafter Sewell) under section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), to contest the issuance of a citation and an order issued by the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA). The citation alleges a violation of 30 C.F.R. § 75.316 (failure to operate under an approved ventilation and dust-control plan). The order alleges a failure to abate that violation. A hearing was held in Falls Church, Virginia, on April 10, 1980. Dane H. Isabel1 and James W. Rutherford testified on behalf of MSHA. James Lively, James M. Krese, Ernest Kincaid, Paul

Givan, and Peter Ambrosiani were called as witnesses by Sewell. MSHA filed a brief after hearing but Sewell elected not to file a brief.

## ISSUES

The issues are whether Sewell violated the regulation as charged by MSHA and whether the order of withdrawal for failure to abate the violation was properly issued.

## APPLICABLE LAW

30 C.F.R. § 75.316 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.

Section 104(b) of the Act, 30 U.S.C. § 814(b), provides as follows:

> If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

## STIPULATIONS

The parties stipulated the following:

1. The Administrative Law Judge has jurisdiction over the case.

2. Sewell is a large company.

3. Sewell is located in Nicholas County, West Virginia. It is a mine that mines bituminous coal by continuous miner-operator method. It is a large mine and an old mine.

4. The copies of the order and citation are authentic and were properly served by a duly authorized representative of MSHA.

## SUMMARY OF THE EVIDENCE

This case involves the dust-control plan for section 033 at the Sewell No. 4 Mine. Dust-control plans are specific for particular sections because the conditions in different sections require different plans. Coal at this mine is extracted by continuous-mining machines. The height of the coal seam varies significantly throughout the mine. Along with the coal, a substantial amount of rock is cut and dust from this cut rock can be more adverse to health than coal dust.

In May 1979, Sewell had a dust-control plan for the entire mine which was approved by MSHA (hereinafter May 1979 plan). The May 1979 plan provided for a ventilation system which was "half blowing and half exhaust." In a blowing system, the intake air comes from between the line curtain and the rib, sweeps the face, and then exits over the working area. In an exhaust system, the intake air comes from over the working area, sweeps the face and

then exits between the line curtain and the rib. On January 9, 1980, James Rutherford, an MSHA subdistrict manager, met with Sewell management and union officials. MSHA had conducted a test at the mine which showed that an exhaust ventilation system kept dust within acceptable limits, whereas blowing systems did not. Rutherford, therefore, told Sewell management that where rock was being cut only an exhaust system would be approved and that sections of the mine would be tested to see if they were in compliance with acceptable dust limits.

After the meeting, Sewell abandoned the May 1979 plan and switched to an all-exhaust system for dust control in the section. At the same time, it submitted to MSHA a proposed ventilation and dust-control plan (hereinafter proposed plan) which detailed the changes from the May 1979 plan.

MSHA gave verbal, tentative approval to the proposed plan. Inspector Dave H. Isabell, who was already-at the mine, was instructed to conduct tests in the section to determine if the proposed plan adequately controlled dust and if it should be approved. To conduct the test, the inspector put dust samplers on miners with five different occupations. The samples were then sent to an MSHA laboratory to determine the dust concentration to which the men were exposed. The men were instructed to wear the samplers for 2 to 5 days and the measured dust concentrations were averaged. A maximum concentration of 2.0 milligrams per cubic meter is permitted for a plan to be approved.

Upon arriving at the mine to begin the tests, Inspector Isabel1 instructed Sewell that it could set its ventilation controls at any level

it wished. Inspector Isabel1 further indicated that the actual conditions during the test would be the minimum conditions which would be approved. Sewell chose not to change its ventilation. During the tests, Inspector Isabel1 measured the actual conditions present in the mine. The actual controls far exceeded the conditions in the proposed plan. The proposed plan required 18 operating water sprays at 90 pounds pressure on the continuous-mining machines; but during the test, there were 30 operating water sprays at 100 pounds pressure on the continuous-mining machines. The proposed plan required that an air velocity of 15 feet per minute be maintained in the main entry; during the test, there was an average air velocity of 60 feet per minute in the main entry. The proposed plan required an air volume of 3,000 cubic feet per minute at the end of the line curtain; but during the test, there was an average air volume of 4,000 cubic feet per minute behind the line curtain. Even with the controls set at these higher levels during the test, the results of the tests showed Sewell barely within the acceptable 2.0 milligrams per cubic meter level.

At the end of the inspection on February 4, 1980, Inspector Isabel1 told Sewell that the proposed plan would- not be approved. He told Sewell to submit a new plan by February 8, 1980. On February 14, 1980, Inspector Isabel1 returned to the mine. A new plan had not been submitted. Inspector Isabel1 thereupon issued a citation for a violation of 30 C.F.R. § 75.316. In that citation, he wrote:

> Based on results of respirable dust samples collected by MSHA, the operator has not submitted a ventilation and methane and dust-control plan setting forth the minimum acceptable respirable dust control requirements for section

033. The operator was given the opportunity to adjust the control measures and establish the conditions that would prevail during the respirable dust technical inspection. The operator was informed of the requirement of having to revise the dust control plan on February 4, 1980.

At that time, he set February 18, 1980, as the time by which the violation should be abated. On February 19, 1980, Inspector Isabel1 returned to the mine. Sewell had not submitted a new plan to abate the violation. Inspector Isabel1 thereupon issued a section 104(b) order of withdrawal. Immediately upon being served with the order of withdrawal, Sewell submitted to Inspector Isabel1 a new proposed plan. That plan mirrored the conditions present in the mine during the tests. Inspector Isabel1 thereupon terminated the order of withdrawal. The plan submitted on February 19, 1980, has been approved.

Sewell presented testimony that the proposed plan should have been approved by MSHA. Jim Lively, Manager of Mines for Sewell, testified that in late January 1980, Sewell conducted its own respirable dust tests. During those tests, Sewell tried to stay as close as possible to 3,000 cubic feet per minute main entry air volume. According to Sewell's analysis, dust samples taken at that time were in compliance.

Ernest Kincaid, Sewell's assistant chief engineer, testified as an expert in ventilation that, in his opinion, MSHA required Sewell to utilize unreasonable dust-control measures before it would approve a plan. He stated that the volume of air, velocity of air, and height of the mine are all interrelated. The height of this mine varies. Therefore, to maintain a certain volume of air, the velocity of air would have to change; to maintain a certain velocity

of air, the volume of air would have to change as the height changed. He testified that studies done with methane demonstrated that the volume of air could be lowered from 10,000 cubic feet per minute to 5,000 cubic feet per minute without an appreciable change in the methane concentration. He believed that that study would be applicable to respirable dust. He further stated that it is very difficult to maintain volume and velocity around air curtains. He stated that a plan requiring an air velocity of 60 feet per minute and an air volume of 4,000 feet per minute could be significantly reduced and still maintain a safe level of dust. On cross-examination, Mr. Kincaid stated that the minimum air velocity that would move dust would have to be empirically determined. He stated that the type of dust and the concentration of rock in the dust would be important in determining what velocity would be necessary.

Peter Ambrosiani, a self-employed consulting mining engineer, testified that he did not think that the requirements by MSHA of 60 main entry air velocity and 4,000 cubic feet per minute air volume at the 033 section were reasonable. He saw no evidence that these requirements were specifically designed for the methane and dust problems in that particular mine.

James W. Rutherford, a subdistrict manager of MSHA, testified as an expert witness for MSHA on rebuttal. He stated that a main entry air velocity of 60 feet per minute was needed to control respirable dust. This was so especially when rock was being cut. In his opinion, the parameters in the approved plan were not arbitrary because Inspector Isabel1 had spent 5 days testing to find what was necessary to control the respirable dust.

## DISCUSSION

The issue of whether there was a violation in this case is muddied by MSHA's failure to follow regular procedures in processing and evaluating Sewell's proposed plan. Normally when a proposed plan is submitted, MSHA will give the operator tentative written approval. Subsequent to such tentative approval, tests are performed to evaluate the efficacy of the proposed plan. Thereafter, that plan is either approved in writing or disapproved. Here tentative approval and the subsequent disapproval were given verbally.

Although regular procedures were not followed, Sewell was aware that the proposed plan was disapproved. Sewell also had sufficient time to rework the proposed plan to meet MSHA's requirements. When Inspector Isabel1 issued the citation, Sewell had not adopted a dust-control plan which showed the equipment and quantity and velocity of air in the mine which had been approved by MSHA. Sewell, therefore, was in violation of the requirements of 30 C.F.R. § 75.316.

Sewell has failed to submit a brief as ordered, so it is difficult to determine the exact issues it intended to raise at the hearing. From the testimony adduced, it seems that Sewell intended to argue either that its May 1979 plan which had been approved satisfied the requirements of the regulation or that NSHA should have approved the proposed plan.

The fact that Sewell formerly had an approved plan which had not been disapproved in writing is not a defense to this violation. That plan was abandoned by Sewell. The regulation requires that the plan "show the type

and location of mechanical ventilation equipment installed and operated in the mine * * * the quantity and velocity of air reaching the working face." The May 1979 plan listed the ventilafion equipment and the air velocity and volume which then was in the mine; it did not show the equipment that was in the mine at the time that the citation was issued. Therefore; the May 1979 plan did not meet the requirements of the regulation.

Sewell also seems to argue that it did not violate the regulation because its proposed plan should have been approved by MSHA. In Zeigler Coal Company v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976), the court wrote that when an operator of a mine refuses to adopt a ventilation plan requested by the Secretary, the Secretary may invoke the civil and criminal penalties of the Act. At the hearing, the operator may offer arguments as to why certain terms sought to be included are not proper subjects for coverage in the ventilation plan. An operator should have an opportunity to contest whether MSHA erred in not approving its plan. See Affinity Mining Company, 6 IBMA 100. In Affinity Mining Company, supra, the Interior Board of Mine Operations Appeals held that under §301(c) of the Federal Coal Mine Health and Safety Act of 1969, an operator had a right to a review of MESA's decision not to approve a modification of its roof control plan. Similarly, allowing the operator to contest a citation by arguing that its proposed ventilation and dust-control plan should have been approved affords the operator an opportunity to question MSHA's determination not to approve the plan.

In the instant case, MSHA contends that Sewell has waived its right to raise the issue of whether the proposed plan should have been approved by MSHA because it filed a subsequent plan which was approved. I find that

Sewell has not waived its right to challenge MSHA's refusal to approve its proposed plan. Sewell clearly disputes the reasonableness of the provisions in the plan required by MSHA.

However, Sewell has failed to show that MSHA's decision not to approve the plan was incorrect. One of Sewell's witnesses testified that in its own tests the respirable dust standard was met, but he could not state the exact conditions which existed during the test. Another witness for Sewell gave a theoretical argument why air volume could be lowered without affecting dust concentration, but he could not state exactly to what extent the volume should be lowered. He conceded that the-only way to arrive at the proper volume would be to test it empirically. Sewell failed to establish that its proposed plan should have been approved.

Here MSHA tested the conditions in the mine empirically. Sewell was given the opportunity to adjust its controls to correspond to the proposed plan for the test; it chose not to do so. The test results show that the conditions present during the test were barely adequate to control dust. Therefore, the average conditions during the test were considered to be the minimum acceptable conditions. MSHA did not err in requiring these conditions or in refusing to approve Sewell's proposed plan.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. In January 1980, Sewell abandoned its May 1979 approved ventilation and dust-control plan and changed to a new ventilation and dust-control plan.

2. Sewell submitted the proposed plan to MSHA for approval; MSHA gave a verbal, tentative approval of the proposed plan pending its tests.

3. MSHA conducted tests to determine whether to approve the proposed plan. Inspector Isabel1 told Sewell that actual ventilation and dust-control conditions present during the test would be the minimum conditions approved. Sewell was given the opportunity to set its controls at the levels of the proposed plan; it chose not to do so.

4. During the test, the equipment and controls were set significantly higher than the proposed plan. Sewell was barely within acceptable dust-concentration limits during the test.

5. On February 4, 1980, after completing the tests on the proposed plan, Inspector Isabel1 told Sewell that its proposed plan would not be approved and that it should submit a new plan by February 8, 1980.

6. Sewell did not submit a new plan by February 14, 1980. On that date, Inspector Isabel1 issued a citation to Sewell for a violation of 30 C.F.R. § 75.316. He set February 18, 1980, as the time by which the violation must be abated.

7. On February 19, 1980, Inspector Isabel1 returned to the mine. Sewell did not submit a new plan to abate.the violation. Inspector Isabel1 issued a section 104(b) order of withdrawal.

8. Sewell thereupon submitted a new plan to abate the violation. That plan has been approved.

9. An operator may contest a citation for failure to adopt an approved ventilation and dust-control plan by establishing that MSHA erred in not approving its proposed plan.

10. Sewell failed to establish that its proposed ventilation and dust-control plan should have been approved by MSHA.

11. MSHA did not err in concluding that Sewell's proposed plan would not adequately control dust. Therefore, MSHA did not err in refusing to approve Sewell's proposed plan.

12. Sewell violated 30 C.F.R. § 75.316 by failing to adopt an approved ventilation and dust-control plan. Citation No. 644408 was properly issued because of that violation.

13. Sewell did not abate the violation of 30 C.F.R. § 75.316 in the reasonable time for abatement set by Inspector Isabell. Order No. 644409 was properly issued under section 104(b) of the Act.

ORDER

THEREFORE, IT IS ORDERED that the contest of citation and contest of order are DISMISSED.

James A. Laurenson

James A. Laurenson, Judge

Distribution:

Gary W. Callahan, Esq., Sewell Coal Company, Lebanon, VA 24266 (Certified Mail)

John H. O'Donnell, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)