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

PEABODY COAL COMPANY, CONTESTANT	CONTEST PROCEEDINGS
v.	Docket No. LAKE 87-62-R Citation No. 2898857; 5/4/87
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. LAKE 87-63-R Citation No. 2898858; 5/4/87
	Sunnyhill No. 9 Mine

DECISION

Appearances: Michael O. McKown, Esq., Henderson, KY., for Contestant;
David J. Isaac, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, OH., for Respondent.

Before: Judge Fauver

These consolidated proceedings were brought by Peabody Coal Company under the Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. The company seeks to vacate two citations issued by the Secretary of Labor which charge a violation of 30 C.F.R. 75.316. The Secretary seeks to have the citations affirmed.

The cases went to hearing on the representation and stipulation by the parties that these cases were being consolidated with related civil penalty cases and that the same hearing record would be the basis for decision in the civil penalty cases and the contest cases. Thus, the following stipulation was confirmed on the record at the commencement of the hearing (Tr. 3):

> JUDGE FAUVER: These are consolidated proceedings; two contest proceedings brought by Peabody Coal Company, and two civil penalty proceedings brought by the Secretary of Labor concerning the citations in these two cases. Citation 2898858 in LAKE 87Ä63ÄR corresponds with MSHA Case No. 3647, with a proposed penalty of $213. Citation 2898857 in LAKE 87Ä62ÄR corresponds with MSHA Case 3657.
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> The parties have stipulated by a pre-hearing conference off the record that this record may be used

for the purposes of deciding the contest proceedings as well as the civil penalty proceedings, and as part of the government's brief in these cases, the government will indicate the Commission docket numbers for the two civil penalty proceedings. Those docket numbers are not presently known, but will be established. Is that a correct stipulation?

MR. ISSAC: Yes, Your Honor.
MR. McKOWN: Yes, Your Honor.

After the hearing and after post-hearing briefs, the Secretary apparently discovered that the civil penalties had been paid, respectively, on July 23, 1987, and August 21, 1987. On that basis the Secretary filed a supplemental brief on November 16, 1987, moving to dismiss the contest cases on the ground that the penalties had been paid. Respondent submitted a letter by counsel (November 2, 1987), stating that the civil penalties had been paid by inadvertence and Respondent never intended to waive its contest rights.

I conclude that the parties went to hearing in the good faith belief and stipulation that the civil penalties had not been paid, that civil penalty cases were to be docketed and consolidated with the contest cases, and that the cases went to a full evidentiary hearing on the factual and legal assumption that the issues raised by the notices of contest were properly before me for adjudication.

I find that the civil penalties were paid inadvertently and not with an intention to waive the Respondent's contest rights. The Secretary's delay in raising the issue of the effect of payment of civil penalties, a delay that went beyond the hearing and post-hearing briefs, constitutes a waiver of this position by the Secretary.

Accordingly, the Secretary's post-hearing motion to dismiss will be denied, and the contest cases will be decided on their merits.

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 following:

FINDINGS OF FACT

1. Peabody Coal Company owns and operates the Sunnyhill No. 9 North and the Sunnyhill No. 9 South mines, which are underground coal mines near New Lexington, Ohio. For each mine Peabody is required to submit a ventilation plan to the Secretary of Labor for his approval, under 30 C.F.R. 75.316. Until the citations at issue, Peabody operated its Sunnyhill No. 9 mines with ventilation plans approved by MSHA District 8.

2. On January 1, 1986, all Ohio mines were transferred from MSHA District 8 to MSHA District 3. Consequently, a new District Manager was given the responsibility for approving the ventilation plans for all Ohio mines.

3. On February 20, 1986, Robert Cerana, a Federal ventilation specialist and mine inspector, informed Ken Diosi, the Safety Manager for Peabody's Sunnyhill operations, of the change in districting and the requirement that Peabody submit new ventilation plans for District 3 approval. Guidelines of items to be included in the plans were furnished and discussed with Mr. Diosi. Similar meetings were held with the other Ohio mine operators.

4. Inspector Cerana went back to Peabody's office on August 4, 1986, to find out why new plans had not been submitted. Mr. Diosi told Inspector Cerana that Peabody would not submit new plans until it received a letter from MSHA stating that new ventilation plans would be required. MSHA wrote such a letter to Mr. Diosi on August 12, 1986, and in response to that letter, Peabody submitted ventilation plans on August 21, 1986.

5. District 3 reviewed the plans and found that the plans failed to meet District 3 guidelines for (1) 3,000 cfm in areas where the roof bolters were operating and (2) detailed sketches of a complete mining sequence (showing more detail than the requirements of the previous District 8 plans). These same guidelines were applied by District 3 to all Ohio mines.

6. After a number of meetings, Peabody submitted new plans to MSHA on December 29. Again, the plans were found to be deficient with respect to the guidelines for 3,000 cfm to roof bolters and detailed sketches of a mining sequence. Another meeting was held with Peabody officials on January 7, 1987. MSHA sent a letter on February 27, requesting Peabody to submit new plans, and another request on March 7. Peabody did not submit new plans. MSHA finally decided to litigate the matter and, on May 4, 1987, issued Peabody citations for operating the mines without approved ventilation plans. Peabody filed notices of contest on May 8, 1987, and a hearing was held on August 25, 1987.

7. Without waiving its right to contest the citations, Peabody submitted plans that included a provision for 3,000 cfm to the roof bolters and sketch prints of a mining sequence. On that basis the citations were terminated by MSHA.

DISCUSSION WITH FURTHER FINDINGS

Institution of a ventilation, methane and dust control plan through the process of Secretarial approval and operator adoption is mandated by 303(o) of the Act, and by 30 C.F.R. 75.316,

which essentially reiterates 303(o). The purpose of the approval-adoption procedure is to provide a plan whose provisions are effective and suitable to the conditions and mining system of the particular mine. Ziegler Coal Co. v. Kleppe, 536 F.2d 398, 409 (D.C.Cir.1976). Once a plan is approved and adopted, the provisions of the plan are enforceable at the mine as though they were statutory safety standards. Id.

The bilateral approval-adoption process, which supplements the Act's rulemaking procedures, involves consultation and negotiation between MSHA and only the affected operator, whereas generally applicable standards are the product of notice and comment rulemaking pursuant to 101 of the Act. The scope of a mine-specific plan is restricted to the mine in which the plan will be implemented, whereas a rulemaking safety or health standard applies across-the-board to all affected mines.

In the Zeigler case, supra, the court held that the approval-adoption procedure is not to be used by the Government to impose general requirements of a variety well-suited to all or nearly all coal mines. It upheld the operator's right to contest MSHA's requirement for a plan provision that relates not to the particular circumstances of its mine but, rather, imposes a provision of a general nature which should be addressed and formulated in rulemaking proceedings.

In Carbon County Coal Company, 6 FMSHRC 1123, 1127 (1984), and (second decision in same case) 7 FMSHRC 1368, 1371 (1985), the Commission found the Zeigler analysis "persuasive and compelling" and held that 30 C.F.R. 75.316 does not permit MSHA to impose, as a condition of approving an operator's ventilation plan, "a general rule applicable to all mines" (7 FMSHRC at 1375).

The controlling issue here is whether MSHA's insistence upon inclusion of provisions for 3,000 cfm to the roof bolters and for detailed sketches of a mining sequence contravened this principle.

The two provisions at issue were created by District 3 as general requirements intended to apply to all mines in that district. They were not based on the particular circumstances of Sunnyhill No. 9 North and Sunnyhill No. 9 South mines. As shown by the testimony of the Secretary's ventilation specialist, Inspector Cerana:

> Q. What was the justification (for requiring 3,000 cubic feet a minute)?
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> A. The justification at that time was that the district manager wanted to have new ventilation plans in accordance with his quidelines for District 3. [Tr. 41.]

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Q. Now, the third difference that thus far has been mentioned has to do with the submission of sketches that show the mining sequence. Were the requirements for a broader or more detailed description of the mining sequence at this company's mine for their ventilation plan, was that requirement of more detail a general requirement of the District Three manager, or was it based on the particular mine sequences of the mine you were inspecting of this company?

A. No, I believe it's just a more broader requirement from District Three. [Tr. 60.]

The approval-adoption procedure in 30 C.F.R. 75.316 requires individual analysis, consultation and negotiation between MSHA and the mine operator, to ensure that a proposed plan is effective and suitable to the conditions and mining system of the particular mine. It does not permit imposition of general requirements that are more appropriate for rulemaking procedures. By attempting to impose general requirements for all mines in District 3 without individual analysis and evaluation of the conditions at Peabody's Sunnyhill No. 9 mines, the Secretary (through MSHA) exceeded his authority under 30 C.F.R. 75.316. Accordingly, the citations will be vacated. This does not mean that the provisions for 3,000 cfm in the roofbolter's area and for detailed sketches of a mining sequence may not be applied to the subject mines by further procedures in compliance with the Act. If there are further negotiations on the ventilation plans or on future proposed changes in them, MSHA may determine and be able to prove that particular conditions at the subject mines warrant the inclusion of either or both of these provisions. But this would require a showing of individual analysis, evaluation and negotiation concerning each mine, rather than imposition of predetermined, across-the-board rules. If the Secretary believes that these provisions or either of them should have general application, he may proceed to rulemaking under 101 of the Act for the purpose of promulgating either or both provisions as generally applicable mandatory safety standards.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in these proceedings.

2. The ventilation, methane and dust control plans for the Sunnyhill No. 9 North and Sunnyhill No. 9 South mines, submitted by the operator on December 29, 1986, are deemed to be approved by the Secretary. The Secretary has not proved that the requirements for 3,000 cfm in the roofbolter's area and for detailed sketches of a mining sequence at these mines were a valid exercise of his authority under 30 C.F.R. 75.316.

3. The Secretary failed to meet his burden of proving violations of 30 C.F.R. 75.316 as alleged in Citations 2898857 and 2898858.

ORDER

WHEREFORE IT IS ORDERED that:

1. The Secretary's post-hearing motion to dismiss the contest cases on the ground of payment of the related civil penalties is DENIED.

2. Citations 2898857 and 2898858 are VACATED.

William Fauver
Administrative Law Judge