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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 PROCEEDING
v.	Docket No. WEVA 87-263-R Order No. 2956024; 5/29/87
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Robin Hood No. 9 Mine Mine ID 46Ä02143
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEVA 88-26 A.C. No. 46-02143-03567D
v.	Robin Hood No. 9 Mine
PEABODY COAL COMPANY, RESPONDENT	

DECISION

Appearances: Thomas Clark, Esq., Charleston, West Virginia for Peabody Coal Company;
Ronald E. Gurka, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for Secretary of Labor.

Before: Judge Melick

These consolidated cases are before me under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et. seq., the "Act," to challenge Withdrawal Order No. 2956024 issued by the Secretary of Labor under section 104(d)(2) of the Act and for review of civil penalties proposed by the Secretary for the violation alleged therein. (Footnote 1)

Order No. 2956024, as amended at hearing, alleges a "significant and substantial" violation of the regulatory standard at 30 C.F.R. 75.303(a) and charges as follows:

> [a] preshift examination was not made in 1 right section and air used to ventilate 1 right section faces and air passing by openings at mouth 1 right section was used to ventilate the active working faces in 1 North section and continuous miner was loading coal in No. 5 face 1 North. Chemical smoke was used to check air movement.

There is no dispute in this case that preshift examinations were not being conducted in accordance with the regulatory standard at 30 C.F.R. 75.303(a) in the 1 Right area when the order was written on May 29, 1987. That standard provides in relevant part as follows:

> Within 3 hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative. Each such examiner shall examine every working section in such workings and shall make tests in each such working section for accumulations of methane with means approved by the Secretary for detecting methane, and shall make tests for oxygen deficiency with a permissible flame safety lamp or other means approved by the Secretary; examine seals and doors to determine whether they are functioning properly; examine and test the roof, face, and rib conditions in such working section; examine active roadways, travelways, and belt conveyors on which men are carried, approaches to abandoned areas, and accessible falls in such section for hazards; test by means of an anemometer or other device approved by the Secretary to determine whether the air in each split is traveling in its proper course and in normal volume and velocity; and examine for such other hazards and violations of the mandatory health or safety standards, as an authorized representative of the Secretary may from time to time require . . . .

The term "active workings" is defined as "any place in a coal mine where miners are normally required to work or travel". 30 C.F.R. 75.2(g)(4).

In her "Final Argument" set forth in a post hearing brief, the Secretary argues that the 1 Right area at issue was "considered to be an integral part of the 1 North working section" and since the 1 North area was admittedly within the "active workings" of the subject mine on May 29, 1987, then the 1 Right area must also be within the "active workings" and likewise subject to the preshift examination requirements of section 75.303(a). (Footnote 2) Peabody Coal Company (Peabody) disagrees and maintains that the 1 Right area was then in a separate and distinct area of "idle workings" and was therefore subject only to the weekly inspections required by the standard at 30 C.F.R. 75.305.

It is not disputed that Peabody began producing coal in the area designated as "1 Right" at the Robin Hood No. 9 Mine in April of 1987. Production continued in this area until May 21, 1987, when the mining equipment was moved from that area into the adjacent 1 North area. Weekly examinations for hazardous conditions were then scheduled to be performed in the 1 Right area and pursuant to that schedule a weekly examination was in fact performed on May 26, 1987. Coal production in the 1 Right area did not resume until September 1987.

On May 29, 1987, an inspector for the Federal Mine Safety and Health Administration (MSHA), Clinton Lewis, arrived at the No. 9 Mine to investigate an unrelated matter. Lewis observed that coal was then being produced in the 1 North area but not in the 1 Right area. Moreover he found no mining equipment in the 1 Right area and found that no miners were working in the 1 Right area and no miners were scheduled to work in the 1 Right area. In fact Lewis concluded that the 1 Right area had been "abandoned". Based on this undisputed evidence it is clear that on May 29, 1987, the 1 Right Section was not "active workings" as defined in the regulations. See Vesta Mining Co. v. Secretary of Labor, 6 FMSHRC 1547 (Judge Fauver, 1984) and Secretary of Labor and UMWA v. Jones and Laughlin Steel Corp. and Vesta Mining Co., 8 FMSHRC 1058 (1986).

The Secretary nevertheless argues that a notation on a ventilation map current for May 1, 1987, and an entry on the record of a weekly examination of the "1 North Panel" on May 26, 1987, show that Peabody itself considered the 1 Right area to be "active workings". While the determination of whether an area is "active workings" as defined in 30 C.F.R. 75.2(g)(4) depends on the underlying facts, the Secretary's evidence is in any event irrelevant to the date at issue, i.e. May 29, 1987. Indeed Peabody does not dispute that the 1 Right area was an "active working" until May 21, 1987. The Secretary's argument is accordingly devoid of merit.

Finally, the Secretary argues that whether or not the 1 Right area was within the "active workings" of the mine, it was nevertheless subject to preshift examinations under the provisions of 30 C.F.R. 75.303Ä1. She argues that since a split of air which passes through the 1 Right area was used to ventilate the working places of the 1 North section (admittedly active workings) a preshift exam of the 1 Right area should have been made in order to determine whether the air in each split" is traveling in its proper course, normal volume and velocity" under 30 C.F.R. 75.303Ä1. (Footnote 3)

The short answer to this argument is that no violation of the regulatory standard at 30 C.F.R. 75.303Ä1 has been charged in this case. Indeed this allegation was made for the first time well after the conclusion of hearings and in the Secretary's post-hearing brief. Section 104(a) of the Act requires that "each citation shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation or order alleged to have been violated." Section 104(d)(2) of the Act may be regarded in pari materia with Section 104(a) and orders issued under Section 104(d)(2) would therefore be expected to conform to the same notice requirements. In this case the operator was charged (after amendment on the date of hearing) only under the general provisions of 30 C.F.R. 303(a). To now charge posthearing that section 75.303Ä1 was violated denies the operator an opportunity to properly defend and denies the trial judge an opportunity to make appropriate inquiry. See Secretary v. B.B. & W Coal Co., 1 FMSHRC 1479 (1979) affirming the decision of Judge Michels reported at 1 MSHC 2238.

Notice of the specific regulation charged is particularly important in this case where the cited regulatory language is ambiguous and subject to several interpretations and the mine operator has been denied the opportunity to present expert testimony on relevant industry experience and practices and on the "reasonably prudent person" test relating specifically to section 75.303Ä1. See Alabama ByÄProducts, 4 FMSHRC 2128, 2129 (1982). Here for example Peabody argues in its response brief that the Secretary's proposed interpretation, of section 75.303Ä1 "would require mine operators to preshift each split of air which is used to ventilate a working place and would require mine operators to examine intake airways that may be thousands of feet long between the working places and the ventilation fan, even though such airways or splits of air are never traveled by miners other than certified persons who do this only for the purpose of conducting weekly examinations or performing functions that are otherwise required by law."

In any event based on the limited record before me I find that the Secretary has miscontrued her regulations. The specific inspection requirements under section 75.303Ä1 must reasonably be limited to areas in which a preshift examination is required by the first sentence of section 75.303(a), i.e. to the "active workings". Otherwise the mine operator would indeed be required to preshift intake airways from the working places all the way to the ventilation fan even though such airways are not in "active workings" and may never be traveled by miners except those conducting weekly examinations. There is an insufficient record to warrant the sweeping construction the Secretary here urges.

Finally, even assuming arguendo, that section 75.303.1 was violated, it would have been a violation of improperly performing a pre-shift examination of the 1 North section. Peabody is here charged with failing to perform a pre-shift exam of the 1 Right section. Thus not only has the Secretary failed to cite the specific regulation alleged to have been violated, as required by the Act and due process standards, she has also failed to state in the order the factual allegations necessary to constitute a violation of the regulation she failed to cite. For this additional reason the Secretary's charge is deficient.

Under the circumstances Order No. 2956024 must be vacated.

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ORDER

Order No. 2956024 is vacated. Civil Penalty Proceeding Docket No. WEVA 88Ä26 is dismissed and Contest Proceeding Docket No. WEVA 87Ä263ÄR is granted.

Gary Melick
Administrative Law Judge
(703) 756Ä6261

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Footnote starts here:-

~Footnote_one

1 Section 104(d)(2) of the Act provides as follows:

"[I]f a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine."

~Footnote_two

2 The Secretary had maintained until the date of hearing that the 1 Right area was an "abandoned area" and had argued at hearing, alternatively, that the 1 Right area was a "worked-out area of active workings". The Secretary also produced evidence at hearing that the 1 Right area was an abandoned area and not "active workings". These contentions have apparently now been completely abandoned.

~Footnote_three

3 30 C.F.R. 75.303Ä1 provides as follows:

To determine whether the air in each split is traveling in its proper course and in normal volume and velocity, the mine examiner shall use an anemometer or other device approved by the Secretary to measure the velocity and determine the volume of air at the following locations:

(a) The last open crosscut of each pair or set of developing entries;

(b) The last open crosscut of each pair or set of rooms,

(c) The intake end of each pillar line.