

CCASE:
SIDNEY COAL V. SOL (MSHA)
DDATE:
19891107
TTEXT:

~2228

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

SIDNEY COAL COMPANY,
CONTESTANT

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

CONTEST PROCEEDING

Docket No. KENT 89-80-R
Citation No. 3158690; 1/12/89

No. 1 Mine

Mine ID 15-07082

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

v.

SIDNEY COAL COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. KENT 89-133
A.C. No. 15-07082-03575

No. 1 Mine

DECISION

Appearances: G. Elaine Smith, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee
for U.S. Department of Labor;
Lynn M. Rausch, Esq., and Michael Heenan, Esq.,
Smith, Heenan and Althen, Washington, D.C. for
Sidney Coal Company.

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 one citation issued by the
Secretary of Labor against the Sidney Coal Company (Sidney) and
for review of civil penalties proposed by the Secretary for the
violation alleged therein.

The citation at bar, No. 3158690, alleges a "significant and
substantial" violation of the mandatory standard at 30 C.F.R.
75.400 and charges as follows:

Accumulations of float coal dust deposited on dry, damp
rock dusted surface, is present in the No. 1, No. 2,
and No. 3 conveyor belt entry's [sic] and connecting
crosscuts ranging in depth from paper thin to 1/8 inch
(approximately) from dark gray to black in color,
beginning at the No. 1 head drive

and extends inby to the No. 3 tail roller. The distance of (approximately) 3,350 feet.

The cited standard provides as follows:

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 electric equipment therein.

According to Inspector Charles Skeens of the Federal Mine Safety and Health Administration (MSHA) the cited conditions were found during his inspection on January 12, 1989. The alleged float coal dust was purportedly dark gray to black in color and was purportedly located on the ribs, floor and roof of the Nos. 1, 2, and 3 belt entries. Skeens opined that the substance was indeed float coal dust because of its coloration and the fact that the material then being transported on the beltline included coal as well as rock.

According to Skeens there had been a roof fall on the 001 section and the fall material was then being removed on the beltline. The area of the mine being cleaned had also been previously mined with blocks of coal some 50 feet square remaining. Coal from the ribs was being put through the crusher thereby, according to Skeens, contributing to the coal dust. According to Skeens no Sidney official requested him to take any coal samples and he therefore did not take any samples.

Underground Mine Foreman Arthur Maynard accompanied Skeens during his inspection and was present at a later closeout conference. According to Skeens, Maynard did not protest the citation when it was issued. Skeens also testified that Maynard did not challenge the existence of the cited float coal dust nor challenge the citation at the time of the closeout conference. John Barnes an MSHA Electrical Inspector was also present at the closeout conference on March 6, 1989. According to Barnes, Maynard acknowledged that he agreed with the citation.

Maynard testified that in June 1988, Sidney began rehabilitating the No. 1 Mine by cleaning up abandoned areas including the clean up of a large roof fall in order to put in a belt line. (See Exhibit R-1). When the citation was issued they were transporting rock from the roof fall via scoop to the conveyor. According to Maynard the pile consisted of 6 to 8 feet of flaky dark shale, 4 to 6 feet of hard blue sandstone, and below that 6 feet of softer dark shale. Maynard maintains that the cutting of the rock with a

~2230

special bit was causing float rock dust. He denied that there was any float coal dust present.

Maynard also claimed at hearing that when he learned that Skeens was about to issue a citation for float coal dust he requested that Skeens take a sample. Skeens purportedly responded that he needed equipment in his truck outside the mine to obtain a sample. Skeens never in fact did obtain a sample. When they arrived at the surface, Mine Superintendent Lavender purportedly asked Skeens if he had taken a sample. Maynard testified that the dust in the mine was rock dust some of which was gray but none was black.

Maynard testified that it was standard company procedure to request coal sample tests when issued citations for float coal dust. Maynard did not deny however that Sydney was cited the previous November 1988 for coal dust and no request was made for sampling. Maynard further testified that he was present at the March 1989 closeout conference and, contrary to the testimony of both MSHA inspectors, protested the instant citation.

Finally, Maynard testified that rock dusting was performed at the No. 1 Mine only to help underground vision and not for the purpose of protecting from float coal dust. Danny Casey a rock duster for an independent contractor agreed that rock dusting was done at the No. 1 mine only for appearance and not because of coal dust. Casey testified that he had not seen any accumulations of coal dust on any of the rock dusted services.

Whether I find that there was a violation in this case depends on my assessment of witness credibility. On the one hand there is the testimony of Inspector Skeens--a coal mine inspector having seven years experience as an inspector and having 30 years experience in the coal mining industry. His visual observations are clearly sufficient, standing alone, to establish the violation. See Exhibit No. R-3, p.49. No motivation has been shown to discredit the testimony of this highly qualified and experienced man.

While Respondent attempts to discredit this testimony by alleging that Skeens failed to take dust samples even upon the request of its underground mine foreman (an allegation denied by Skeens), the Respondent certainly had the opportunity to take its own samples. Indeed since Respondent maintained at trial that it has always vigorously denied the existence of any float coal dust, it would be reasonable to expect under the circumstances that it would have taken its own samples to establish its innocence. In any event I cannot infer under the circumstances, even assuming Skeens did not take samples after being requested to do so, that Skeens' observations were deficient.

~2231

In addition I find the testimony of underground mine foreman Arthur Maynard to be less than credible. Maynard testified for example that it was the uniform practice at Sidney to request coal dust sampling when float coal dust citations have been issued. The evidence shows however that only a few months before the instant citation was issued Maynard himself was presented with a float coal dust citation and according to the issuing inspector, Maynard never requested a coal dust sample. While Maynard denies that he was then present, there is no dispute that, contrary to Maynard's testimony, none of Sydney's employees asked for coal dust sampling.

In addition, the existence of a citation for coal dust only a few months before the one at bar lends doubt to Maynard's (as well as Casey's) claim that coal dust simply did not exist in the mine (only rock dust) while the mine was being rehabilitated. The additional evidence of more recent citations, including one issued the same day as the citation at issue, for loose coal and coal dust further discredits this claim. The Respondent's claim that coal dust simply did not exist in its coal mine is in itself also patently incredible.

Finally, I note the failure of Sidney to have called a key witness, former mine superintendent Charles Lavender, regarding the the alleged practice of challenging float coal citations and his purported request to Skeens for coal sampling. It was not shown that Lavender was unavailable for trial and no effort was apparently made to contact Lavender although his area of residence was known. I infer from the failure of Respondent to have produced this essential witness under the circumstances that the testimony would not have been favorable to Respondent in this regard. See *Karavos Compania, Etc., v. Atlantic Export Corp.* 588 F.2d 1 (2nd Cir. 1978); *Midland Enterprises Inc., v. Notre Dame Fleeting & Towing Service, Inc.*, 538 F.2d 1356 (8th Cir. 1976). Under all the circumstances I find the Secretary's case to be the most credible and that float coal dust did indeed exist as charged. The violation is accordingly proven as charged.

The testimony of Inspector Skeens that the violation was "significant and substantial" is not challenged(FOOTNOTE 1). Skeens noted that within the cited area there were electrical power cables providing a potential ignition source. He also observed that the automatic fire extinguishing system was not then functioning. A permanent overcast was also then

