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SOL (MSHA) V. ENERGY FUELS 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 PROCEEDING

Docket No. WEST 89-149  
A.C. No. 05-03771-03515

v.

Raton Creek Mine No. 1

ENERGY FUELS COAL, INC.,  
RESPONDENT

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor,  
U.S. Department of Labor, Denver, Colorado,  
for the Petitioner;  
Phillip D. Barber, Esq., Welborn, Dufford, Brown  
& Tooley, Denver, Colorado,  
for the Respondent.

Before: Judge Lasher

This proceeding was initiated by the filing of a Proposal  
for Penalty by Petitioner on April 24, 1989, pursuant to Sections  
105 and 110 of the Federal Mine Safety and Health Amendments Act  
of 1977, 30 U.S.C. Section 801 et seq.

During the hearing on September 14, 1989,<sup>1</sup> the parties  
consummated a settlement covering two of the three Citations  
involved in this docket (T. 3, 4, 77). Pursuant to the agreement,  
Respondent is to pay Petitioner MSHA's administratively assessed  
penalties in full for the two Citations, Nos. 2874080 and  
2931302, in the sums of \$68 and \$42, respectively, and Petitioner  
agrees to the deletion of the "significant and substantial"  
designations on the face of both. My bench decision approving the  
settlement is here affirmed and the penalties agreed to by the  
parties are here assessed.

Citation No. 2931301 remains for resolution.

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Citation No. 2931301.

This Section 104(a) Citation, issued on December 9, 1988, by MSHA Inspector Earl W. Griffith, charges Respondent with a violation of 30 C.F.R. 75.316, to wit:

"The supply haulage road from cross cut 2 + 40 to cross cut 7 + 30, on the first east section MMU-001-9 was not maintained in a damp or compact condition. Visibility for the Wagner scoop operator was very poor. IV Methane and dust control in the outby areas para. 2-page 14. Plan dated 7/11/1988."

30 C.F.R. 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 provision (Section IV, Paragraph 2, page 14) of the Ventilation System and Methane and Dust Control Plan (Ex. P-2, herein "Plan") charged to have been infringed states:

"All normal haulage roads including production haulage on the section and supply haulage from the section to the portals (surface) shall be maintained in a damp or compact condition to maintain the average concentration of respirable dust in the intake airways at or below 1.0mg/m<sup>3</sup> of air."

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Findings and Pertinent Testimony.

The purpose of the quoted provision is to control respirable dust and to keep it at a particular level (T. 47-48, 49-50, 55-56, 60-61).

The haulage road cited was the main escapeway and the main intake air course (intake airway) for the mine (T. 50).

Although Paragraph 2 of the Plan refers to a specific level at which the average concentration of respirable dust must be maintained, the Inspector took no measurements to determine the average concentration of respirable dust (T. 30-31).

Inspector Griffith gave this description of what he observed when the Citation was issued and his reasons for not taking measurements:

- Q. All right. Now will you tell us, please, what you observed in this area of the haulage road that you mentioned in your citation?
- A. The scoop was coming into the section with section supplies. And I was on the inby side along with Andrew Franklin, the section foreman. I was conducting a triple A inspection at this time. And as the scoop approached us, a dust cloud had proceeded the scoop, and this has been the main intake for the section. The air and the dust was moving ahead of the scoop.
- Q. Where were you in relation to the scoop when you first observed it on the road?
- A. I was approximately two hundred feet inby the scoop.
- Q. Does that mean that you saw the scoop coming toward you?
- A. Yes ma'am.
- Q. And what did you observe with regard to the dust that you mentioned?
- A. Well, the dust -- this is a diesel scoop that has a tremendous exhaust on it. A lot of air is blown out and it was suspending the dust from the roadway, due to the roadway not being damp and compact. It was suspending the dust particles in the air. And due to the air current, it was blowing ahead of the operator.

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Q. All right. Can you describe for us, please, how much dust you saw?

A. It was -- I can't say how much dust but it was enough dust that the visibility was impaired. My visibility from seeing the scoop was impaired, and I'm sure that the operator would have had a hard time seeing me." (T. 16-17)

"Q. Okay. Now on page 14, paragraph 2, the portion of the vent plan that you just told us about, we talked about the supply haulage and the damp or compact conditions, there is -- the last part of that paragraph I don't believe we've talked about, and that refers to maintaining the average concentration of respirable dust at or below 1 milligram. When you wrote your citation did you refer to that part of the vent plan? Did you refer to the 1 milligram portion of that paragraph?

A. No ma'am.

Q. Why not?

A. I didn't cite that. First of all, I was on a triple A inspection.

Q. Okay.

A. And we do not carry estimates unless we're doing a BAB type of inspection, which is a respirable dust, then we would be carrying those instruments to measure that.

Q. Did you feel like you had to measure the concentration?

A. No ma'am. I wrote the citations on the fact that the road wasn't kept damp or compacted and the dust that was airborne creating a visibility hazard as well as a dust hazard.

Q. Okay. In your experience, Mr. Griffith, is it possible to see 1 milligram of respirable dust?

A. Not in the air, no ma'am.

Q. Okay. What -- are you responsible for designating this citation as a significant and substantial violation?

A. Yes ma'am, I am.

Q. All right. What hazard, if any, did you see as being created by the condition of the haulage road on December 9th, 1988?

A. There were two areas that I was looking at. There was the visibility of the scoop operator, his visibility was limited due to the dust being suspended and the amount of intake air that was coming into -- by the haul road.

Q. Now, with regard to the visibility, would you tell us, please, given the visibility as you observed it on that day, what could happen?

A. Well, there were several things that could have happened. The operator could have accidentally run into a piece of equipment that was parked in a break through. He could also, if an individual had been on the haul way with his back turned to him, it is possible that he could have run into him.

It also limits his visibility as far as rough and ribbed conditions, that he might not be able to see them clearly and possibly cause him an accident in this way." (T. 21-22)

On cross-examination, the Inspector conceded that he was unable to testify that the average concentration of respirable dust on the date he issued the Citation was above or below the Plan requirement (T. 30-31). Thus, this critical aspect of his testimony appears as follows:

"Q. Did you make any measurement, at any place in the intake haulage way, to determine whether the average concentration of respirable dust in the intake airway was at or below 1 milligram per meter cubed of air?

A. No sir, I did not.

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Q. You can't testify today whether the average concentration of respirable dust in the roadway on that date was above or below that concentration - -

A. No sir, I cannot." (Tr. 30-31)

Discussion.

Paragraph (2) of the approved (T. 62, 69-70, 73) Ventilation Plan is unambiguous. Roadways must be kept sufficiently damp or compacted to assure that the intake airways contain no more than 1.0 mg/m<sup>3</sup> of respirable dust.

The Petitioner interprets the language of paragraph (2) to mean that the stated standard of 1 mg/m<sup>3</sup> of air is merely a statement of purpose as to why roads must be maintained damp and compact, so samples are not necessary to prove that a violation has occurred. This interpretation -- contrary to the plain language of paragraph (2) -- is rejected. One milligram of dust per m<sup>3</sup> of air is the stated standard (T. 61, 62). Dampening and/or compacting the roads is the means to accomplish it. The Inspector conceded that without sampling he could not tell whether the roadway was sufficiently damp or compact (T. 30-31).

It is a cardinal principle of statutory and regulatory interpretation that words that are technical in nature "are to be given their usual, natural, plain, ordinary, and commonly understood meaning." *Old Colony R. Co. v. Commissioner of Internal Revenue*, 284 U.S. 552, 560 (1932). When the meaning of the language of a statute or regulation must be interpreted according to its terms, the ordinary meaning of its words prevails, and it cannot be expanded beyond its plain meaning. *Old Colony R. Co. v. Commissioner of Internal Revenue*, *supra*; see *Emery Mining Corp. v. Secretary of Labor*, 783 F.2d 155, 159 (10th Cir. 1986).

Using the 1.0 mg/m<sup>3</sup> standard for haulage roads is reasonable and logical (T. 48, 50) since this is the respirable dust standard for all intake airways. 30 C.F.R. 70.100(b) states that:

Each operator shall continuously maintain the average concentration of respirable dust within 200 feet outby the working faces of each section in the intake airways at or below 1.0 milligrams of respirable dust per cubic meter of air . . .

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If the respirable dust in the haulage road is less than 1.0 mg/m3, then the operator has satisfied the regulatory health standard. Conversely, if the respirable dust concentration is greater than 1.0 mg/m3 in the haulage ways, the operator has violated the standard and must further dampen or compact the roadway.

As Respondent contends, without the 1.0 mg/m3 standard to guide the operator and inspectors in determining how "damp" or "compact" the haulage roads must be, the Inspector could simply decide whether, in his opinion, a violation exists. The interpretation argued for by the Petitioner gives insufficient notice to the mine operator of the standard of conduct to which it is required to adhere and is contrary to the precise wording of the Plan. Respondent's interpretation follows the plain meaning of the standard and does not lead to an absurd result (T. 48, 50, 69-70, 73-74). Conclusion.

The language of Section IV, paragraph 2, page 14 of the Plan is clear and unambiguous. It requires that certain roads be maintained in a damp or compact condition to maintain the average concentration of respirable dust in the intake airways at or below 1.0 mg/m3 of air. If a visibility or other standard was intended, Petitioner could have provided it as a condition to approval of the plan. The Petitioner has failed to prove the charge that the concentration of respirable dust in the haulage road exceeded the standard in the Plan.

ORDER

Citations numbered 2874080 and 2931302 are modified to delete the "Significant and Substantial" designations thereon.

Citation No. 2931301 is vacated.

Respondent, if it has not previously done so, shall pay the Secretary of Labor the sum of \$110.00 for the civil penalties above assessed.

Michael A. Lasher, Jr.  
Administrative Law Judge

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FOOTNOTES START HERE

1. This matter was consolidated for hearing with two other penalty dockets, WEST 89-148 and WEST 89-217.