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BEAVER CREEK COAL V. MSHA  
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION  
DENVER, COLORADO  
April 26, 1990

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| BEAVER CREEK COAL COMPANY,<br>Contestant  | CONTEST PROCEEDINGS  |
| v.  | Docket No. WEST 88-105-R<br>Citation No. 3227047; 1/6/88   |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Respondent | Docket No. WEST 88-162-R<br>Citation No. 3224925;<br><br>Trail Mountain Mine No. 9<br>Mine ID No. 42-01211 |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Petitioner | CIVIL PENALTY PROCEEDINGS  |
| v.  | Docket No. WEST 88-265<br>A.C. No. 42-01211-03543<br><br>Docket No. WEST 88-282<br>A.C. No. 42-01211-03545 |
| BEAVER CREEK COAL COMPANY,<br>Respondent  | Trail Mountain Mine No. 9  |

DECISION

Appearances: Charles W. Newcom, Esq., Sherman & Howard, and David M. Arnolds, Esq., Thomas F. Linn, Esq., Beaver Creek Coal Company, Denver, Colorado for Contestant/Respondent; Robert J. Murphy, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner/Respondent.

Before: Judge Cetti

Statement of the Proceedings

These consolidated proceedings concern Notices of Contests filed by the Contestant Beaver Creek pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(d), challenging the captioned citations issued by MSHA. The civil penalty proceedings concern proposals for assessments of civil penalties filed by MSHA seeking assessments against Beaver Creek for the alleged violations stated in the citations. After notice to the parties the matters came on for hearing before me at Salt Lake City, Utah. Oral and documentary evidence was introduced, post-hearing briefs were filed, and the matters were submitted for decision. I have considered the oral arguments made on the record during the hearings in my adjudication of these matters and the post-hearing briefs filed by the parties.

Stipulation

The parties stipulated as follows:

1. Beaver Creek Coal Company is engaged in mining and selling of coal in the United States, and its mining operations affect interstate commerce.
2. Beaver Creek Coal Company is the owner and operator of Trail Mountain No. 9 Mine, MSHA I.D. No. 42-01211.
3. Beaver Creek Coal Company is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. et seq. ("the Act").
4. The Administrative Law Judge has jurisdiction in this matter.
5. The subject citation may be admitted into evidence for the purpose of establishing its issuance, and not for the truthfulness or relevancy of any statements asserted thereto.
6. The exhibits to be offered by Beaver Creek Coal Company and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.
7. The proposed penalties will not affect Beaver Creek Coal Company's ability to continue business.
8. The operator demonstrated good faith in abating the violation.
9. Beaver Creek Coal Company is a large mine operator with 408,452 tons of production in 1987.
10. The certified copy of the MSHA Assessed Violations History accurately reflects the history of this mine for the three months prior to the date of the citation.

Citation No. 3227046

Inspector Donald Gibson, during his inspection of the Beaver Creek Trail Mountain Mine No. 9, issued Citation No. 3227046 which charges a violation of safety regulation

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30 C.F.R. 75.523-2(c), which provides as follows:

Movement of not more than 2 inches of the actuating bar or lever resulting from the application of not more than 15 pounds of force upon contact with any portion of the equipment operator's body at any point along the length of the actuating bar or lever shall cause de-energization of the motors of the self-propelled electric face equipment.

The citation alleges that one of the roof bolters being used "had a defective actuating bar" and went on to state that the "actuating bar for its off-side operator would not de-energize the tramming motors unless extreme pressure was exerted against the bar."

It is undisputed that the actuating bar did operate, without obstruction; the dispute is limited to the amount of force necessary to activate the bar.

The inspectors did not use any pressure gauge or any other measuring device to prove that the actuating bar required more than 15 pounds of force to be activated. They only manually pushed the bar and relied on their opinion based upon their experience without measuring whether or not the force required exceeded 15 pounds.

In view of the fact that the cited regulation is clear and specific in specifying not more than "15 pounds of force" and no measurement of the force needed to activate the bar was made, the evidence presented is insufficient to establish the contested violation of 30 C.F.R.

75.523-2(c). The citation is therefore vacated and the proposed penalty set aside. Contest proceeding Docket No. WEST 88-105-R is granted.

Citation 3227047

This citation charges Beaver Creek with a violation of 30 C.F.R. 75.503 which provides in pertinent part

Permissible electric face equipment:

Maintenance.

The operator of each coal mine shall maintain in permissible condition all electric face equipment required by 75.500, 75.501, 75.504 to be permissible which is taken into or used in by the last open crosscut of any such mine.

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The citation alleges that Beaver Creek had two (2) violative conditions on the continuous miner as follows:

The Joy 12 CM Miner 12G-2917A-30, Ser. #2820 being used on the 6th West Section was not being maintained in permissible condition.

The following conditions were found and observed:

(1) the main controller cover lid had an opening in excess of .005 inch between the lid and cover plane joint, (2) the trailing cable entrance boxpacking gland was not properly packed, the trailing cable could be pulled out of the gland approximately 1/2 inch.

When the continuous miner was first observed by the MSHA inspector about 7:30 a.m., it was locked out and down for repairs. Beaver Creek electrician Gary Sitterud and maintenance supervisor Gay Curtis were making repairs to the miner's lighting system. Sitterud had been working on the miner before the inspectors arrived and continued after they left.

When Sitterud arrived at the job site at the commencement of the 6:30 a.m. shift, the first thing he did was put his lock on the miner's power cable even though it had already been locked out earlier by another mechanic, Jack Fielder.

Sitterud, in troubleshooting the lighting system, found that a lighting transformer had burned up. He changed the transformer and re-energized the miner to determine if the lighting problem was corrected. He never started the miner at any relevant time. When re-energized, the miner twice blew a fuse. Sitterud then removed some covers from behind the main controller to search for additional problems. He discovered an accumulation of coal and also located the miner's lighting problem. He sent the mechanic, Fielder, to obtain the necessary parts. Sitterud remained at the miner, cleaning the coal accumulation.

A short while later, Maintenance Supervisor Curtis met Sitterud at the miner. Sitterud informed Curtis of the coal accumulation and asked Curtis if he should proceed to make a complete in-house permissibility inspection of the machine. Curtis said, "Yes, check the whole machine out." Beaver Creek presented evidence that it routinely performs such a permissibility inspection of any electrical system that had undergone repairs before it is returned to service.

Shortly thereafter Inspector Gibson approached Sitterud and Curtis. Curtis asked Gibson if he was going to conduct the MSHA permissibility inspection while the miner was down or wait until the miner had been repaired. Gibson replied that he would probably conduct the inspection then, but walked away. Sitterud continued cleaning the coal accumulation. Thereafter, Fielder returned with the necessary parts and began repairs.

Approximately one to two hours later, Gibson returned and inspected the miner although neither the repairs to the miner nor the in-house permissibility check was completed.

When Curtis asked Gibson how he could cite a violation on a machine that "is locked out, tagged out and out of service," Gibson replied that Beaver Creek had an "intent to use" the machine and that he was "not going to argue" with him. When Curtis asked the same question a second time at a different location he was given the same answer.

I am satisfied from the evidence presented that due to lack of clarity in communication, the MSHA inspector made his inspection of the continuous miner at a time when it was locked out for repairs and an in-house permissibility check.

It is undisputed that the inspection of the continuous miner was made at a time when the miner was locked out and down for repairs. The communication between Beaver Creek personnel and the inspector was ambiguous. This ambiguity led to a misunderstanding which resulted in Inspector Gibson making an inspection of the continuous coal miner before Beaver Creek completed the repairs and made its in-house permissibility check.

I credit the testimony of Sitterud and Curtis. I find that the ambiguity in Beaver Creek's communication to the inspector caused a misunderstanding and an assumption by Inspector Gibson that Beaver Creek had completed all of the work they intended to do while the machine was locked and tagged out for repairs. This resulted in Inspector Gibson's making his inspection of the miner at a time when Beaver Creek had not completed the work and its in-house permissibility check which they intended to complete before putting the miner back in service. I am satisfied from the testimony that a full in-house permissibility check would have been done by Beaver Creek and any needed corrections would have been made before the miner was put back into service. Under the rationale expressed in Ziegler Coal Company, 7 FMSHRC 452 (March 27, 1985), which was cited by both parties, the citation is vacated.

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In Zeigler Coal Company, supra, an inspector examined a shuttle car which was locked out and undergoing repairs. The mechanic making the repairs planned to check the entire car for permissibility prior to placing the car back in service. Nonetheless, the inspector made the inspection, found the car was not in permissible condition and issued the citation. The Administrative Law Judge vacated the citation. The mechanic should have had the opportunity to check the car for violations of permissibility standards before the citation was issued. (See also, Plateau Mining Company, 1 MSHC 1100, 1101 (Nov. 7, 1973); Zeigler Coal Company, 1 MSHC 1189, 1191 (Sept. 26, 1974).

Citation No. 3227047 is vacated and its related \$147.00 proposed penalty set aside.

Citation No. 3044356

This citation alleges a 104(a), S&S, violation of 30 C.F.R. 75.200. At the hearing the Secretary moved to vacate this citation. In support of its motion, the Secretary advised that there was insufficient evidence to prove the violation. I accept the representations of the parties. Citation No. 3044356 is vacated.

Citation No. 3227048

This citation alleges a 104(a), S&S, violation of 30 C.F.R. 77.504. At the hearing the parties reached an agreement on all issues related to this citation. Beaver Creek agreed to withdraw its contest of this citation and pay the full amount of the Secretary's initial penalty assessment.

Civil Penalty Docket No. WEST 88-282 and  
and Contest Proceeding Docket No. WEST 88-162-R

Citation No. 3224925

This citation, as amended at the hearing, alleges a significant and substantial violation of 30 C.F.R. 75.305 as follows:

The 6th West seals were not examined during the seven days prior to 3-9-88. Because of a bad roof the areas outby the seals is [sic] unsafe.

It is uncontested that at the time the citation was issued that the 6th West seals were not inspected because the area that had to be traveled to inspect the seals had been "dangered off" and was unsafe to travel.

The inspector never physically inspected the seals. He determined that Beaver Creek had not conducted an examination of the seals by checking Beaver Creek's records.

There were a total of ten seals constructed in 6th West, some of which were built December 21, 1987, and the rest of which were built on January 1, 1988. The seals were constructed of 8-inch by 8-inch by 48-inch wooden crib block, running from top to bottom and rib to rib. The seals were well constructed and expected to last for the life of the area. The inspector acknowledged that the seals would bear weight well and would be difficult to breach.

The seals were checked until approximately the last week of February 1988. At that time the timbers in the walkway leading to the seals were starting to give way and that the top showed signs of cracking. Mine Manager Meadors inspected the area and decided for safety reasons that no Beaver Creek employee should proceed beyond seal 5 to inspect seals 6 through 10. Although all the seals were intact, about a half-a-dozen timbers had already broken in the area beyond the fifth seal. Since the area had already been mined out and there was a danger of roof falls, Beaver Creek "dangered off the area at that time. A week or two thereafter Beaver Creek dangered off the area from the third seal in by and installed breaker rows, because the intersections were deteriorating and the timbers were breaking up.

The preponderance of the evidence established that at the time the citation was issued, Beaver Creek was not performing any work in 6th West. Inspector Jones considered that the nearest mining was "a significant distance" away and estimated that distance to be 1,000 feet. Beaver Creek presented evidence that the nearest mining was in 5th West.

Beaver Creek had monitored, and continued to monitor, the air in the area of the seals pursuant to a bleeder system approved by MSHA. (See Joint Ex. 19; Joint Ex. 22; and Joint Ex. 24). The bleeder system draws off methane and keeps the gob, or waste coal left behind, ventilated. If the integrity of any of the seals were breached, this would show up in the monitoring of the bleeder system. There was nothing in the bleeder system to indicate any breach of the seals, and Inspector Jones testified he had never known such a breach to occur at Beaver Creek.



30 C.F.R. 75.305 provides in relevant part:

In addition to the preshift and the daily examinations required by this Subpart D, examinations for hazardous conditions, including tests for methane and for compliance with the mandatory health or safety standards, shall be made at least once a week by a certified person designated by the operator in the return of each split of air where it enters the main return, on pillar falls, at seals, in the main return, at least one entry of each intake and return aircourse in its entirety, idle workings, and insofar as safety considerations permit abandoned areas. (emphasis added)

30 C.F.R. 75.2(h) defines "abandoned areas" as: "sections, panels, and other areas that are not ventilated and examined in the manner required for working places under Subpart D of the Part 75."

It is undisputed that safety consideration did not permit travel through the "dangered off" area that would have to be traveled to inspect the 6 West seals. The Secretary argues that if this area were an abandoned area, the inspector would not have issued the Citation because of the undisputed fact that safety considerations did not permit the inspection of the 6 West seals.

It was MSHA's position that Beaver Creek could and should have adequately supported the roof in that area so that the 6 West seals could be safely inspected. Beaver Creek, on the other hand, presents credible evidence that the roof had been supported and improved to the extent that it could not be improved anymore.

The Secretary argued that the area in question was not an abandoned area because it was not completely sealed off. The Secretary's position was that only an area that has been completely sealed off is an abandoned area.

Within the context of the cited regulation this definition of an abandoned area is not logical in view of the wording of the cited regulation. It cannot be accepted as the meaning of the term "abandoned area" as that term is used in this regulation. The regulation clearly requires inspections of abandoned areas under certain circumstances, i.e., where "safety considerations permit." There is merit in Beaver Creek's contention that if MSHA's definition of abandoned area were adopted, an operator could never inspect an abandoned area -- unless the seals were unsealed.

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I find that the preponderance of the evidence presented established that the area in question was an "abandoned area" within the meaning of that term as used in the cited standard and that safety considerations did not permit travel into that area for inspection of the 6 West seals. Citation No. 3224925 is vacated. Contest proceeding WEST 88-162-R and Civil Penalty proceeding WEST 88-282 are dismissed.

ORDER

Based on the above finding of fact and conclusion of law, IT IS ORDERED:

1. Citation No. 3227048 is affirmed and a penalty of \$91.00 is assessed for this violation.
2. In accordance with the Secretary's motion, Citation No. 3044356 is vacated.
3. Citation Nos. 3227046 and 3227047 are vacated. Contest Proceedings Docket No. WEST 88-105-R is granted.
4. Citation No. 3224925 is vacated. Contest Proceeding Docket No. WEST 88-162-R is granted and Civil Penalty Docket No. WEST 88-282 is dismissed.
5. Respondent Beaver Creek shall within 30 days of the date of this decision pay a civil penalty of \$91.00 for the violation of Citation No. 3227048. Upon payment, Civil Penalty Proceeding Docket No. WEST 88-265 is dismissed.

August F. Cetti  
Administrative Law Judge

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