CCASE:
BEAVER CREEK COAL v. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
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BEAVER CREEK COAL COMPANY, CONTESTANT	CONTEST PROCEEDINGS
	Docket No. WEST 89-396-R
v.	Citation No. 3411573; 7/13/89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. WEST 89-408-R Citation No. 3411781; 8/3/89 Docket No. WEST 89-410-R Citation No. 3411783; 8/3/89
	Trail Mt. No. 9 Mine
	Mine ID 42-01211
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS Docket No. WEST 90-40 A.C. No. 42-01211-03562
v.	Docket No. WEST 90-103 A.C. No. 42-01211-03564
BEAVER CREEK COAL COMPANY, RESPONDENT	

DECISION

Appearances: David M. Arnolds, Esq., Atlantic Richfield Company, Denver, Colorado, for the Contestant/Respondent;
Robert J. Murphy, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Respondent/Petitioner.

Before: Judge Maurer

STATEMENT OF THE CASE

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 four citations issued by the Secretary of Labor (Secretary) against the Beaver Creek Coal Company (Beaver Creek) and for review of the civil penalties proposed by the Secretary.

Prehearing the Secretary filed a Motion to Approve Partial Settlement and Order Payment. The motion requested approval to vacate Citation No. 3411573 contained in Docket No. WEST 89-396-R, and also requested approval to redesignate section 104(d)(1) Citation No. 3411783 as a section 104(a), nonsignificant & substantial violation and to reduce the proposed penalty from $1100 to $200. I granted the motion on the record (Tr. 5).

Therefore, there remained for trial two section 104(a) citations: Citation No. 3411781, contested in Docket No. WEST 89-408-R and assessed in Docket No. WEST 90-40 for a $213 penalty, and Citation No. 3412086, an uncontested citation assessed at $259 in Docket No. WEST 90-103. Pursuant to notice, these cases were tried before me in Provo, Utah on June 20, 1990. Both parties have filed post-hearing proposed findings of fact, conclusions of law, and briefs which have been considered by me in the course of making this decision.

The general issues before me concerning each of the remaining citations and its accompanying civil penalty petition are whether the citations were properly issued, whether there was a violation of the cited standard, and, if so, whether that violation was "significant and substantial" as well as the appropriate civil penalty to be assessed for the violation should any be found. Included as part and parcel of any determination of these questions is whether or not the inspector who issued the citations properly collected the dust samples which allegedly substantiate the violations.

STIPULATIONS

The parties stipulated to the following (Joint Exhibit No. 1):

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 Mt. 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. 801 et seq. ("the Act").

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject citations were properly served by duly authorized representatives of the Secretary upon an agent of respondent Beaver Creek Coal Company on the dates and places

stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

6. The exhibits to be offered by respondent 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 medium mine operator with 244,097 tons of production in 1988.

10. The certified copy of the MSHA Assessed Violations History accurately reflects the history of this mine for the two years prior to the date of the citation.

THE APPLICABLE STANDARD

Both citations herein involved were issued by MSHA for alleged violations of 30 C.F.R. 75.403, which states in pertinent part:

> Where rock dust is required to be applied, it shall be distributed upon the top, floor and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 65 per centum, but the incombustible content in the return air courses shall be no less than 80 per centum.

I. Docket No. West 89-408-R, and WEST 90-40; Citation No. 3411781

Citation No. 3411781, issued pursuant to section 104(a) of the Act, charges as follows:

> Rock dust was not applied to the ribs and roof and maintained in such quantities that the incombustible content shall not be less than 65 per centum in the No. 4 entry of the main North working section. The effected area was in the No. 3 entry from 40þ outby the face to the intersection a distance of about 65þ . They were roof bolting inby the affected area. A sample was taken to verify the citation. The ribs slough heavily in this section.

FINDINGS OF FACT

1. On August 3, 1989, Inspector Fred L. Marietti, accompanied by his Supervisor, William E. Poncerhoff, arrived at Beaver Creek's Trail Mountain No. 9 Mine to perform a regular triple-A inspection. Marietti and Poncerhoff were joined by Gary Curtis, the Maintenance Supervisor at the mine, and they proceeded underground. They were joined underground by Dan Lucy, the Safety Director for the mine, and Dan Meadors (misspelled "Metters" in the transcript). Mr. Meadors was the Operations Manager at the mine at the time.

2. The inspection party proceeded to the No. 3 or 4 entry (it doesn't matter which) where Inspector Marietti described the condition of the entry as black from 40 feet outby the face to the intersection, a distance of about 65 feet. The ribs and the roof were black. He opined that just by visual observation, he could tell that there was not a sufficient amount of rock dust applied to maintain the required 65 percent incombustible content.

3. The inspector then proceeded to take a sample to verify the violation he felt existed. He used a dust kit--a brush, a pan and a sieve screen. He went across the right rib and then the left rib with his brush and pan, collecting dust. Then because Mr. Meadors was commenting to him about a "band sample" being more representative, he also went across the roof with his brush and pan. He did not, however, collect any material from the floor in this area because the floor was wet and he was satisfied that the dampness itself would suffice to make that material incombustible.

4. The dust sample collected by the inspector was subsequently analyzed by the MSHA laboratory at Mt. Hope, West Virginia. The analysis showed that only 13% of the sample was incombustible. Therefore, 87% of the sample was combustible.

DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS

The inspector went on to opine that this presented a very dangerous situation. In the event that you had an ignition, there was a reasonable likelihood that there would be fatal injuries to miners working on the section. He went on to state that there were numerous ignition sources present in this particular area that could instigate an explosion and/or a fire.

Mr. Curtis testified that this entry had previously been rock dusted and the inspector conceded that it had been at some prior time, but that it was not an adequate amount of rock dust at the time it was cited. The inspector also stated that the ribs slough heavily in this area and therefore heavier and more frequent applications of rock dust are required to maintain the

65 percent incombustible content in the intakes and 80 percent in the returns.

Both Curtis and Lucy opined that the entry was adequately rock dusted. Obviously, this testimony is diametrically opposed to Inspector Marietti's. In order to reconcile this difference of opinion or choose between the two, it is necessary to examine the entire record, including the method the inspector used to obtain the dust sample that corroborates his opinion.

Mr. Curtis did not observe the inspector take the sample. Mr. Lucy did. He testified that Inspector Marietti sampled only one spot on the right rib of about 1 foot by 1-1/2 feet, where a piece of coal had fallen out and that he had dug his pan into the sloughage on the floor, picking up coal fines. Lucy testified that he was present the entire time and that the inspector did not sample the remainder of the right rib or the roof and left rib as he claims to.

I believe and have found as a fact that the inspector obtained the sample as he claimed (Finding of Fact No. 3). The inspector is a very experienced and well-trained coal mine safety and health inspector who I felt testified in a truthful and forthright manner. Furthermore, his field notes, made contemporaneously with the incident, as well as the form he used to submit the dust sample to the Mt. Hope Laboratory state that the sample was taken from the roof and both ribs. Mr. Lucy, on the other hand, has a mere three months of underground coal mining experience, and I therefore assign little relative weight to his descriptions and opinions concerning the adequacy of the rockdusting or the dust sampling.

The senior company representative on the scene at the time, Mr. Meadors, had asked the inspector to take a "band sample" to include the roof, the floor and both ribs. The company felt that this would be a more representative sample of the area. They feel that the 65% criteria applies on an averaging basis to the roof, floor and ribs. The inspector declined to do so because the floor was wet.

There is some precedent for their request. The MSHA Underground Manual, which was published on March 9, 1978, considered the "band sample" to be the most accurate method of measuring incombustible content. However, this manual was rescinded and replaced by the MSHA Program Policy Manual in December 1988. The new manual provides no guidance on dust sampling methodology.

Another MSHA publication, however, entitled The Explosion Hazard in Mining, published in 1981, contains the following excerpt at page 50 (Gov't Exhibit No. 5):

Band sampling, or the combining of the mine dust into a single sample from collection from the floor, ribs, and roof (perimeter) was adopted in 1952 by the Bureau of Mines. Band sampling reduces the time required for collection, quartering, packing, handling, and chemical analysis, thus promoting the possibility of sampling in more locations in mines. In most mines the quantity of dust on the floor is many times greater than that on the ribs and roof. Consequently, band samples tend to represent the dust on the floor. Thus, band sampling should only be used where it is obvious from visual examination that the rib-roof surfaces are adequately rock-dusted. Dust on all mine surfaces--namely, the ribs, roof, and floor--should be neutralized by rock dust. Where an obvious deficiency in rock dust exists on one of these surfaces separate samples should be taken. (Emphasis Added).

In my judgment, whichever methodology is the more correct, or the "best", neither is proscribed for use. The inspector is free to use his judgment as to which technique to employ in the particular circumstances.

An administrative appellate decision with respect to this issue can be found at North American Coal Corporation, (FOOTNOTE 1) MSHC 1130, 1134 (1974). It is a decision of the Interior Board of Mine Operations Appeals, the predecessor to the Federal Mine Safety and Health Review Commission in which the Board held:

> With respect to Order 3 TJD, August 16, 1971; 1 JF, September 3, 1971, and 1 TJD, September 16, 1971, North American challenges the findings of violation on the ground that the samples relied on reflected only the incombustible content of the floor. North American urges that the samples should have reflected the combined incombustible content of the roof and ribs, as well as the floor, at the cited locations.
> Section 304(d)1 was designed to prevent the occurrence of conditions which could lead to a fire, or still worse, an explosion. The floor samples in the instant case, falling as they did within the proscribed area indicated a dangerous condition because a spark might very well have led to at least a fire. We hold therefore that a floor sample standing alone may be the basis of a finding that a section 304(d) violation has occurred. Accordingly, we conclude that the Judge did

not err by determining that these alleged violations occurred.

I am satisfied with the inspector's explanation of why he took no sample from the wet floor and his method of obtaining, handling and packaging the sample he did take for shipment to the laboratory. During cross-examination (Tr. 68), the inspector was asked if every spot in the mine more than 40 feet from the face must be rockdusted in accordance with 30 C.F.R. 75.403. He replied that:

> I would say that no inspector, including myself, is going to go throughout the mine and look where there has been a little sloughage on a rib or a spot on the floor that don't have rock dust and issue you a violation. It would be a considerable area involved.

Given the fact that I find the sample was properly obtained, and that analysis of it demonstrated that only 13% of the sample was incombustible, I must disagree with Curtis and Lucy that the affected area was adequately rockdusted. Rather, I make that credibility choice in favor of the Secretary since the inspector's visual observation and evaluation was subsequently verified by laboratory analysis. Accordingly, I find that a violation of 30 C.F.R. 75.403 existed as the inspector cited it. Furthermore, I also believe the violation was significant and substantial (S&S).

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety-contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the

injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

Coal dust has long been recognized as an active cause of coal mine explosions and its suppression is of primary concern to those involved in the profession of mine safety. The principal suppression measure utilized is the dilution of coal dust with calcium carbonate, better known as rock dust. In underground coal mining operations, rock dust must be applied to all areas within 40 feet of a working face unless those areas are inaccessible, unsafe to enter, too wet or too high in incombustible content to propagate an explosion. (FOOTNOTE 2)

The danger presented by these combustible dust accumulations is a mine fire or a mine explosion. Furthermore, where you have accumulations of combustible materials, there is always the possibility that you will have a methane ignition in the face area and these accumulations would cause the ignition to probably spread or propagate into other areas of the mine, depending how fine, dry and pulverized the accumulations are. There was a lot of electrical equipment on the section at the time as well. Serious injuries were reasonably likely to occur to the section crew such as smoke inhalation in the event of a mine fire, which occurrence I find to be reasonably likely. If a fire were to occur, it would be reasonably likely that the miners would be exposed to smoke and fire hazards and suffer disabling injuries

of a reasonably serious nature. The focus is clearly and properly on the potential of the risk involved and I find that there was plenty of potential for a mine fire here given the conditions the inspector found. All the ingredients were present: accumulations of certifiably combustible materials and nearby ignition sources. If you had a methane ignition which propagated into a mine dust explosion, then it could be fatal. Therefore, I concur with the inspector that the violation was "significant and substantial", and serious.

He also marked the negligence as moderate. I concur that the appropriate level of negligence established by inference in the record is ordinary or moderate negligence.

Considering the criteria in section 110(i) of the Act, I conclude that an appropriate civil penalty for the violation is $213, as originally proposed by the Secretary.

II. Docket No. WEST 90-103; Citation No. 3412086

Citation No. 3412086, issued on October 16, 1989, pursuant to section 104(a) of the Act, charges as follows:

> The analytical results of seven spot dust samples collected on 7-31-89 by a MSHA inspector showed that all seven of the samples fall below the required amount of incombustible content. A copy of the dust sampling lab report is attached to this citation.

FINDINGS OF FACT

1. Citation No. 3412086 was issued by Inspector Robert Jones on October 16, 1989, based on the lab analysis of dust samples taken by Inspector Marietti on July 31, 1989.

2. On July 31, 1989, Inspector Marrieti went underground with Mr. Curtis to the Second Left Section Return. He took seven spot samples at different locations in the return in what he considered to be a representative area. He performed the sampling function generally as previously described in Finding of Fact No. 3 in the previous section utilizing his rock dust kit.

3. Mr. Curtis objected to this spot sampling and asked the inspector to take a "band sample" in each of those spots. The inspector refused because he believes that all surfaces of the mine, roof, ribs and floor must have the required amount of incombustible content.

4. The Dust Sampling Lab Report from Mt. Hope, West Virginia, indicates that four of the samples were taken solely from the right rib; one sample was taken from the roof and one rib and the other two were taken from both ribs. The amount of

incombustible material in the seven samples ranged from a low of 38% to a high of 74.6%. Inspector Marietti admitted on cross-examination that if he had taken a "band sample" of the roof, both ribs and the floor at each of those spots, the samples would possibly have exceeded the required 80% incombustibility.

DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS

The inspector also believed this to be a S&S violation. It presented a dangerous situation because of the same reasoning that applied in the previous section of this decision--only more so. This violation occurred in a return entry which is carrying dust and liberated methane gas from the face area into the return entry during the mining cycle.

Rather than repeat myself, for the same reasons I gave in the earlier part of this decision, I find the samples were properly obtained within the inspector's discretion to do so and do substantiate an S&S violation of 30 C.F.R. 75.403. I also once again find a moderate degree of negligence on the part of the operator and considering the statutory criteria in section 110(i) of the Act find and conclude that the appropriate civil penalty for the violation is $259, as originally proposed by the Secretary.

To reiterate the major point of these cases, I do not believe that the operator can impose a requirement of "band sampling" on the inspector as a precondition to his citing a violation of 30 C.F.R. 75.403. The Interior Board of Mine Operations Appeals has so held and the Commission has not chosen to reverse that precedent to date.

ORDER

1. Citation No. 3411573 IS VACATED.
2. Section 104(d)(1) Citation No. 3411783 IS MODIFIED to a non-S&S section 104(a) citation and AFFIRMED.
3. Citation Nos. 3411781 and 3412086 ARE AFFIRMED.
4. Beaver Creek Coal Company is ordered to pay the sum of $672 within 30 days of the date of this decision as a civil penalty for the violations found herein.

Roy J. Maurer
Administrative Law Judge

(FOOTNOTES START HERE)

1. Section 304(d) of the 1969 Coal Act is identical in language to 30 C.F.R. 75.403.

2. 30 C.F.R. 75.402