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MSHA V. PEABODY COAL
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. LAKE 91-344
	:	A.C. No. 11-00585-03789
	:	Mine No. 10
PEABODY COAL COMPANY, Respondent	:	

DECISION

Appearances: Susan J. Bissegger, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Petitioner;
David R. Joest, Esq., Midwest Division Counsel, Peabody Coal Company, Henderson, Kentucky, for the Respondent.

Before: Judge Melick

This case is before me pursuant to 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 for a violation of the mandatory standard at 30 C.F.R. 75.1107-7(b). The general issue before me is whether the Peabody Coal Company (Peabody) violated the cited regulatory standard as alleged, and, if so, what is the appropriate civil penalty for such violation.

The citation at bar, No. 3537743 alleges a "significant and substantial" violation of the cited mandatory standard and charges as follows:

> The water type fire suppression system for the No. 17 Joy Miner was not being maintained in a working condition in the sub-main north unit. When actuated from the tail valve it would not operate.

The cited standard, 30 C.F.R. 75.1107-7(b), provides as follows:

> Where water spray devices are used for inundating attended underground equipment the rate of flow shall be at least 0.18 gallon per minute per square foot over the top surface area of the equipment (excluding conveyors, cutters, and gathering heads), and the supply of water shall be adequate to provide the required flow of water for 10 minutes.

The facts are not in dispute. On April 18, 1989, the administrator for Coal Mine Safety and Health of the Federal Mine Safety and Health Administration (MSHA) issued program policy letter P89-V-11 which "describes acceptable compliance methods for fire suppression systems on remotely controlled mining equipment." The letter stressed the need for a means of activating fire suppression systems on mining equipment which would allow the system to be activated from under supported roof while the machine is mining in extended cuts under remote control, and described two acceptable methods of compliance.

Following receipt of the program policy letter, Peabody submitted to MSHA a proposal dated May 5, 1989, for compliance at its Mine No. 10. The proposal stated that Peabody had installed "a system for manually actuating the fire suppression system on continuous miners while operating in the remote control mode," and described the system, which consisted of a valve near the end of the tail of each miner. By letter dated October 20, 1989, MSHA's District Manager informed Peabody that the May 5, 1989, proposal was acceptable.

On January 23, 1991, MSHA inspector Edward J. Banovic conducted an inspection of Mine No. 10 and cited the Joy No. 17 continuous miner because the tail valve would not activate the fire suppression system. The parties have stipulated that the tail valve had been damaged and rendered inoperable by a collision occurring toward the end of the evening shift on January 22, 1991. For the remainder of that shift, the No. 17 miner was used only for 20 foot cuts although extended cuts were authorized in Mine No. 10's ventilation plan and there was nothing to prevent Peabody from taking extended cuts. The midnight shift on January 23, 1991, was a maintenance shift only, and the No. 17 miner was not used to mine coal on that shift. The citation was issued on the next production shift, the January 23, 1991, day shift. The No. 17 miner had not taken any cuts on that shift when the citation was issued.

Inspector Banovic testified that in his experience, extended cuts are taken at Mine No. 10 about 75 percent of the time, and that the continuous miners are operated by remote control 85 percent to 90 percent of the time. He stated that the remote control device was present in the section and that he "assumed" the No. 17 miner would take an extended cut. However, he did not see any extended cuts being taken with the No 17 miner on January 23, 1991, and no statements were made to him by anyone present concerning any intention to take an extended cut. Additionally, the parties have stipulated that there is no evidence that any extended cuts were taken between the time the tail valve became inoperable and the time the citation was issued.

The parties have stated in the following stipulations their respective positions in this proceeding:

> 24. The parties agree that the fire suppression system described in the citation is required to be operable while the miner is making extended cuts greater than 20' under remote control and the other 2 manually operated fire suppression system could not be activated without going under unsupported roof.
>
> 25. The Secretary contends that if a continuous miner is used to make extended cuts at any time, the tail fire suppression system is required to be maintained in operable condition at all times, whether or not the miner is actually making extended cuts at any particular time.
>
> 26. Peabody contends that the tail fire suppression system at issue is required to be maintained in operable condition only when the continuous miner is actually being used to make extended cuts so that the other manually activated systems cannot be used without going under unsupported roof. Peabody contends that if the tail fire suppression system becomes inoperable, Peabody has the option of either immediately withdrawing the miner from service for repairs or of using the miner only to make conventional cuts (20' or less) until the tail fire suppression system can be repaired.

In her posthearing brief, the Secretary places great emphasis in support of her position on the Commission decision in Solar Fuel Company, 3 FMSHRC 1384 (1981). In Solar Fuel, the Commission held that electric face equipment "stipulated to be in non-permissible condition and intended for use inby the last open mine crosscut" was in violation of 30 C.F.R. 75.503, even though located outby the last open crosscut at the time of the inspection. The Commission stated that, under section 75.503,

> [E]quipment habitually used or intended for use inby must be maintained in permissible condition and may be cited regardless of whether it is located inby or outby when inspected. The emphasis is not on where equipment is located at the time of inspection, but simply whether it is equipment which is taken or used inby.

Upon close scrutiny of the Solar Fuel decision however, I am satisfied that it is precisely limited to violations under the mandatory standard there at issue i.e., 30 C.F.R. 75.503. Clearly that decision was premised upon the grammatical interpretation of that specific standard and it is inapposite hereto. In any event it was stipulated in this case that the

cited No. 17 miner was not actually used in a violative manner. Moreover, I do not find that the Secretary would have met her burden of proving that the cited miner was intended to be used in a violative manner. Under the circumstances I cannot find that a violation of the standard at 30 C.F.R. 75.1107-7(b) has occurred.

ORDER

Citation No. 3537743 is hereby vacated.

Gary Melick
Administrative Law Judge

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