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SOL (MSHA) V. PEABODY COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) PETITIONER	CIVIL PENALTY PROCEEDING Docket No. KENT 91-1417 A.C. No. 15-02705-03726
v.	
PEABODY COAL COMPANY RESPONDENT	Camp No. 2 Mine

DECISION

Appearances: MaryBeth Bernui, Esq., Office of the Solicitor, United States Department of Labor, Nashville, Tennessee, for Petitioner;
David R. Joest, Esq., Peabody Coal Company, Henderson, Kentucky, for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to 105(d) of the Federal Mine Safety and Health Act of 1977, 30 C.F.R. 801 et seq., the "Act," charging the Peabody Coal Company (Peabody) under Section 104(d)(1) Citation No. 3551466, with one violation of the mine operator's ventilation plan. (FOOTNOTE 1)

It is established law that once a ventilation plan is approved and adopted, its provisions are enforceable at the mine as mandatory safety standards. Zeigler v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976), Carbon County Coal Co., 6 FMSHRC 1123 (1984), Carbon County Coal Co., 7 FMSHRC 1367 (1985), Jim Walter Resources, Inc., 9 FMSHRC 903 (1987). The general issue before me is whether Peabody violated the ventilation plan as charged, whether the violation was "significant and substantial" and/or the result of "unwarrantable failure," and what, if any, civil penalty should be assessed.

Citation No. 3551466, charges as follows:

> The No. 2 monitoring borehole drilled from the surface penetrating through the No. 11 Coal Seam into the No. 9 Coal Seam for the purpose of monitoring the No. 8 and No. 9 seals in the No. 9 Coal Seam, was not properly identified on the mine map for the No. 11 coal seam and as the result of was mined into destroying the borehole.

It is undisputed that the alleged violation is based upon provisions of a petition for modification which had been granted and had become part of the mine operator's approved ventilation plan. In essence, those provisions required that "the 5 east and 6 east seals shall be monitored from a borehole identified on the mine map as Hole No. 2."(FOOTNOTES2) Peabody does not dispute that the violation occurred as charged but maintains that the violation was neither "significant and substantial" nor caused by its "unwarrantable failure" to comply with the applicable law.

The essential facts are not in dispute. Mining operations at the Camp No. 2 Mine are conducted in two seams, the No. 11 seam (upper) and the No. 9 seam (lower). Pursuant to an order granting a petition for modification of the application of a mandatory safety standard, Peabody had been monitoring air quality outside certain seals of abandoned areas in the lower seam by sampling through boreholes drilled from the surface. On March 7, 1991, a mining unit in the No. 1 section of the upper seam mined through one of these methane monitoring boreholes, the No. 2 borehole. There seems to be no dispute that this occurred because the mine map in use in March 1991 erroneously showed the No. 2 borehole as if it were a core sample drillhole rather than a monitoring borehole. Core drillholes are plugged after they are drilled and are normally mined through. The No. 2 borehole should have been clearly marked on the mine map so that it would not be mined through, however, due to negligence in the

preparation of the map in the mine engineering office it was not. It is not disputed that the area in the upper seam through which the No. 2 borehole passed was not originally projected to be mined so that marking the No. 2 borehole as a borehole would not have been critical at the time. When the plans changed and projections for mining that area were added to the map, someone neglected to mark the No. 2 borehole as it should have been marked.

In evaluating whether a violation is "significant and substantial" the Commission in Mathies Coal Company, 6 FMSHRC 1 (1984), explained 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 Co., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Co., 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. Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 1007 (1987).

The third element of the 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" and that the likelihood of injury must be evaluated in terms of continued normal mining operations. U.S. Steel Mining Co., 6 FMSHRC 1573 (1984); Monterey Coal Co., 7 FMSHRC 996 (1985). The time frame for determining if a reasonable

likelihood exists includes the time that a violative condition existed or would have existed if normal mining operations continued. Rushton Mining Co., 11 FMSHRC 1432 (1989).

MSHA Inspector Ted Smith found the violation in this case to have been "significant and substantial." He testified that the roof conditions in the area of the seals was bad and had not been physically examined for two years. He further noted that the area behind the seals historically accumulates high levels of methane, between 30 and 50 percent, and oxygen is depleted in those areas. He opined that such methane could migrate into the cavities and cracks of the No. 9 and No. 11 seam and into the borehole either through a roof fall or cracked seal. According to Smith, if the methane should escape into these areas, which were ventilated by the old south fan, the level of methane could very well be diluted to the explosive 5 to 15 percent range. In addition, according to Smith, if the continuous miner should strike the lining of the borehole or limestone it could cause an ignition. He further opined that the ignition could travel back down into the No. 9 seam causing a violent explosion and injuring miners working in both the No. 9 and No. 11 seams.

Peabody argues on the other hand that the violation was not "significant and substantial" because the inspector's scenario required at least three discrete steps: (1) a failure of the seals monitored by the No. 2 monitoring borehole, (2) explosive concentrations of methane in the No. 9 seam workings, and (3) sufficient quantities of methane travelling from the No. 9 seam to the No. 11 seam to cause an explosion. Peabody argues that the ten previous months of daily monitoring at the borehole reflects either no methane or occasional negligible amounts of methane at the borehole and, similarly, only negligible amounts of methane found at the old south exhaust fan for several weeks after the incident at issue. Peabody also argues that it is unlikely that sufficient quantities of methane would travel from the No. 9 seam to the No. 11 seam to cause an explosion since the pipe was only one and a quarter inches in diameter and a pump had to be used to extract samples at the surface.

While it is true that the targeted hazard in this case would require the coincidence of several events, I nevertheless find that the Secretary has proven through the credible testimony of her expert witness that there was a discrete safety hazard contributed to by the underlying violation and that there was a reasonable likelihood that the hazard would result in serious injuries or death. Accordingly, the instant violation meets the stated criteria to be "significant and substantial." For the same reasons the violation was also of high gravity.

I do not however find that the Secretary has sustained her burden of proving that the violation was caused by Peabody's "unwarrantable failure" to comply with the standard. Unwarrantable failure has been defined by the Commission as aggravated

conduct constituting more than ordinary negligence. See Emery Mining Corporation, 9 FMSHRC 1997 (1987), Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007 (1987). In this case it is clear that the instant violation was the direct result of the inattention of the mine engineering office in preparing the mine map. This inattention constitutes negligence but not of a particularly aggravated nature. In addition it is noted that the persons performing and supervising the actual mining did not know the location of the No. 2 borehole or did not realize that it was a borehole as a result of the negligent preparation of the mine map. Absent more I cannot find that these circumstances constitute more than simple negligence. Accordingly, and considering all the facts under section 110(i) of the Act, I find that a reduction in the proposed civil penalty to $700 is appropriate.

ORDER

Citation No. 3551466 is modified to a citation issued under 104(a) of the Act and is AFFIRMED as modified. Peabody Coa Company is directed to pay civil penalties of $700 within 30 days of the date of this decision for the violation therein.

Gary Melick
Administrative Law Judge
703-756-6261

FOOTNOTES START HERE:-

1. Section 104(d)(1) of the Act provides in part as follows:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety and health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under the Act.

2. The apparent contradiction between the language in the citation that the No. 2 monitoring borehole monitored the No. 8 and No. 9 seals and the statement in the ventilation plan that the No. 2 borehole monitored the 5 and 6 East seals was explained at hearing by MSHA Inspector Smith (See Tr. 31-32).