CCASE:
COSTAIN COAL V. SOL (MSHA)
DDATE:
19930204
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

COSTAIN COAL, INC., Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. KENT 92-332-R
	:	Citation No. 3550973;
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	2/11/92
	:	Baker Mine
	:	Mine ID 15-14492
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. KENT 92-412
	:	A. C. No. 15-13920-03736
v.	:	
	:	Docket No. KENT 92-450
COSTAIN COAL, INC., Respondent	:	A. C. No. 15-13920-03730
	:	Docket No. KENT 92-451
	:	A. C. No. 15-13920-03731
	:	Pyro No. 9 Wheatcroft Mine
	:	Docket No. KENT 92-413
	:	A. C. No. 15-14492-03602
	:	Baker Mine

DECISION

Appearances: Carl B. Boyd, Jr., Esq., Henderson, Kentucky, for the Operator;
Mary Sue Taylor, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for the Secretary.

Before: Judge Maurer

STATEMENT OF THE CASE

Contestant, Costain Coal, Inc. (Costain), filed a Notice of Contest challenging the issuance of Citation No. 3550973 at its Baker Mine (Docket No. KENT 92-332-R). The Secretary of Labor

(Secretary) subsequently filed a petition seeking a civil penalty of $50 for the violation charged in that contested citation (Docket No. KENT 92-413).

Pursuant to a notice of hearing, these two cases were consolidated for hearing and decision with three other Costain civil penalty cases from a different mine and were heard on October 14, 1992, in Owensboro, Kentucky.

At that hearing, the parties proposed to settle the majority of the citations pertaining to the Pyro No. 9 Wheatcroft Mine. In Docket No. KENT 92-412, there was a single section 104(a) citation; Citation No. 3553122 charged a violation of 30 C.F.R. 75.316 and the Secretary originally proposed a $276 penalty The parties now propose to settle this case with the payment of a $50 civil penalty. In Docket No. KENT 92-450, the parties propose to settle 9 out of the 10 section 104(a) citations included:

CITATION NO.	30 C.F.R. SECTION	ASSESSED	PROPOSED
3549963	75.1725	$178	$ 50
3549764	75.316	276	276
3549765	75.316	276	50
3549767	75.316	20	20
3549961	75.1403-5(g)	178	50
3550236	75.1403-5(g)	63	50
3546406	75.220	311	50
3546407	75.316	213	213
3549768	77.408	178	178

In Docket No. KENT 92-451, The parties propose to settle all four of the included citations on the following basis:

CITATION NO.	30 C.F.R. SECTION	ASSESSED	PROPOSED
3549771	75.400	$192	$135
3549964	75.316	178	178
3546409	75.220	178	50
3549973	75.316	311	311

Based on the representations of the parties and the trial testimony, I conclude that the proffered settlement is appropriate under the criteria contained in section 110(i) of the Mine Act. The financial terms of this settlement agreement will be factored into my order at the end of this decision.

There remained for my decision at the conclusion of the hearing, two section 104(a) citations: Citation No. 3550973; contested in Docket No. KENT 92-332-R and assessed in Docket No. KENT 92-413, and Citation No. 3549766, assessed in Docket No. KENT 92-450.

Both parties subsequently briefed the issues concerning the aforementioned two citations and I have considered those along with the entire record herein. I make the following decision.

DISCUSSION AND FINDINGS

I. Docket No. KENT 92-332-R; KENT 92-413: Citation No. 3550973

Citation No. 3550973, issued pursuant to section 104(a) of the Act, alleges a violation of the mandatory standard at 30 C.F.R. 75.316 and charges as follows:

> A review of the currently approved Methane and Dust Control Plan for this mine dated October 21, 1992 (sic) and a resubmittal dated January 15, 1992 revealed some deficient provisions. Letters dated December 19, 1991 and January 16, 1992 were mailed to and received by the operator requesting that these deficiencies be corrected and to include them in an amended plan. In the letter to the operator dated January 16, 1992 the operator was advised that failure to comply with the requests would result in revocation of the Methane and Dust Control Plan in its present form. As of this date the requested corrections have not been included in an amended plan. This mine is now operating without an approved Methane and Dust Control Plan.

In a nutshell, Costain is charged with operating without an approved methane and dust control plan for the Baker Mine at least as of 0715, February 11, 1992. Of course, it is not quite that simple. Costain had submitted a plan for the Baker Mine for approval back on July 2, 1991. The company was notified by the District Manager on October 21, 1991, that the submitted plan had been reviewed and had met review criteria. Tentative approval of the plan was granted at that time until such later time as an on-site plan review could be conducted by MSHA. The operator was also notified at this time that: "Should any significant deficiencies be detected in the Methane and Dust Control Plan during an inspection or investigation, this approval may be revoked and a revised plan shall be required."

The on-site plan review was completed by MSHA on December 9, 1991. On December 19, 1991, the District Manager notified the company that the plan submitted by them on July 2, 1991, no longer met review criteria. The letter further advised that the plan needed to be revised by the inclusion of three items that were unrelated to dust control (and thus to the case at bar).

Costain submitted a revised plan dated January 15, 1992 that created a new problem which became the focus of this case, and approval of the revised plan was denied. The letter to Costain from the District Manager dated January 16, 1992, stated in pertinent part as follows:

> Your statements under (active working sections) P. 3/4 item (h) "calcium chloride or water with wetting agent shall be applied as needed to haulage roads and supply roads to maintain respirable dust at 2 MG/M3 or less except for roadways in intake airways within 200 feet outby the working faces which will be treated as needed to maintain respirable dust to 1 MG/M3 or less" and under (areas other than active working sections), Page 2 item 4, "water with wetting agent or calcium chloride shall be applied as needed to maintain respirable dust to 2 MG/M3 or less except for haulage ways in intake airways within 200 feet outby the working faces which will be treated as needed to maintain respirable dust to 1 MG/M3 or less", are unacceptable because they cannot be routinely checked during the six month review.

The District Manager further advised by that January 16, 1992 letter that Costain had 10 days after receipt of this latest disapproval within which to submit a plan suitable for approval. He further emphasized to the company that failing to submit such an approvable plan would result in the revocation of their present plan and would place them in the position of operating without an approved Methane and Dust Control Plan. He warned that: "Operating after the revocation date is a violation of the standard requiring an approved plan."

Costain, for its part, admits that at the moment the citation was issued on February 11, 1992, it was, in fact, operating without an approved plan. But, Costain disputes that a violation occurred, in any event, because they argue the plan which had been submitted to the District Manager was a valid and acceptable plan which should have been approved. Costain urges that the District Manager's refusal to approve the plan was an abuse of discretion and the citation should therefore be vacated.

MSHA personnel had several discussions with Costain management between January 16, 1992, and February 11, 1992, concerning plan language that the District Manager would approve. In fact, Costain was expecting and perhaps welcomed the citation when it finally came on February 11. A plan which contained acceptable language was submitted within 30 minutes after the citation at bar was issued. It was given final approval by the District Manager on February 12, 1992. This plan, as finally revised and approved, simply stated that: "Water with wetting agent or calcium chloride shall be applied as needed to control the dust." This simple provision replaced the unacceptable language in both of the two virtually identical paragraphs quoted above from the District Manager's January 16 letter.

The Secretary justifies her insistence on this substituted language on the principle that MSHA policy requires that all plan language be enforceable using current technology. For enforcement purposes, MSHA cannot at this time take an instantaneous or "snapshot" measurement of the dust level in a specific area. The substituted provision, on the other hand, does not require a dust sample (which could take a one to five day period to obtain) before a violation of the provision could be issued. And, of course, once the sampling process was underway, the operator would be aware and could easily take extraordinary steps, such as constant watering of the roadway being tested, to skew the result.

However, it is also true, as the operator complains, that this type of provision is totally subjective, without any objective standards or bench marks to measure the inspector's opinion against. At what point does the roadway become too dusty? At what point is the dust not under control? However, having said this, I would note that the regulatory standards in the mining industry are replete with examples of subjective prescriptions and proscriptions and I believe that experienced coal mine inspectors as well as certified coal mine examiners and foremen can adequately and fairly evaluate the condition of the roadways based on their many years of experience to determine if the roadways are sufficiently treated to control the dust.

Citation No. 3550973 was issued only after a long process of negotiation concerning the dust control plan at this mine. I am satisfied that MSHA and Costain had an adequate opportunity to discuss the various provisions of the plan and propose language that might be acceptable to both parties. The failure of Costain to incorporate a dust control provision acceptable to the District Manager into their proposed plan within a reasonable amount of time inevitably led to the citation which was issued in this case. I understand the operator's concern, but, in the end,

I concur with the Secretary that public policy requires that any provision included in an MSHA-approved plan be enforceable. If it is not, it is worse than useless.

The plan language finally approved by MSHA simply requires the mine operator to take steps to allay the dust which is created on dry underground roadways. It is relatively easy to comply with or to enforce, if necessary. Therefore, I find MSHA's District 10 Manager to have operated well within the bounds of his discretionary authority to approve/disapprove dust control plans in this instance.

Accordingly, since Costain was admittedly operating without an approved plan, Citation No. 3550973 IS AFFIRMED, the operator's contest of the same IS DENIED and a civil penalty of $50 will be ordered, as originally proposed by the Secretary.

II. Docket No. KENT 92-450: Citation No. 3549766

Citation No. 3549766, issued pursuant to section 104(a) of the Mine Act, alleges a violation of 30 C.F.R. 75.316 and charges as follows:

> Water or calcium chloride has not been applied to the supply road to the #4 unit ID-004 lst East off 2nd M. North for a distance of 1,000 ft. Roadway dust was observed in suspension creating a hazy condition against a lighted background.

The approved Methane and Dust Control Plan for the Pyro No. 9 Wheatcroft Mine at the time the instant citation was issued contained a provision substantially similar to that finally approved in the plan discussed in Section I of this decision.

Essentially, Costain is charged with having failed to sufficiently wet down or otherwise suppress dust along a supply road in violation of its dust control plan. Inspector Whitfield, who issued this citation, was traveling in a golf cart on a mine supply road at the time he observed the violation. He saw dust being raised on the road from a scoop and another golf cart which created a hazy condition against a lighted background. The inspector testified that the dust involved was "roadway dust, rock dust, probably clay." He further opined that "[i]t is not coal dust. There may be some coal dust mixed in, but it is basically rock dust and fire clay."

Costain does not dispute the fact of violation of the cited standard. Rather, they contest only the "significant and substantial" special finding that was made.

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)(l). 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 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 (August 1985), 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).

In this case, the violation is a given and the discrete safety hazard identified is an indisputable health hazard to some degree for the miners who must breathe in this dusty environment. However, after that the Secretary's burden of proof becomes more difficult because of the very subjective nature of the cited plan provision that she insists is necessary to make it enforceable as

a practical matter by her inspectors on the scene. By including a provision that can be cited on the spot (and get the dust abated) on purely subjective grounds, she is giving up the more rigorous collection of evidence that could perhaps easily establish the third element of the Mathies formula.

The Secretary carries the burden of proof to show by a preponderance of the competent evidence in the record that breathing the dust observed in the roadway by Inspector Whitfield will result in an injury or illness of a reasonably serious nature. The record evidence, however, is to the effect that the major health concern with dust is with respirable dust, and there has been no definitive showing that there was any respirable dust involved with the observed dust being "kicked-up" by the equipment which the inspector cited. We do have the general opinion testimony of two of the Secretary's witnesses that wherever you have dust in suspension, you have respirable dust. But I note that neither of these gentlemen observed the cited condition and in any event their opinion is not quantifiable. It must be remembered that some concentration of respirable dust is allowable under the applicable regulatory standards. Whether or not the dust observed in suspension by Inspector Whitfield contained respirable dust in excess of the allowable concentration is unknown by anyone, even if we assume that "some" respirable dust was in suspension.

Accordingly, I find and conclude that there are insufficient facts proven in this record to support an S&S special finding in this case.

Therefore, Citation No. 3549766 IS AFFIRMED as a non S&S violation of 30 C.F.R. 75.316 and a civil penalty of $100 will be assessed as appropriate under the criteria contained in section 110(i) of the Mine Act.

ORDER

Costain Coal, Inc., shall within 30 days of the date of this decision, pay the sum of $1811 as a civil penalty for the violations found herein. Upon payment of the civil penalty, these proceedings are DISMISSED.

Roy J. Maurer
Administrative Law Judge

~213
Distribution:

Carl B. Boyd, Jr., Esq., 223 First Street, Henderson, KY 42420 (Certified Mail)

Mary Sue Taylor, Esq., Office of the Solicitor, U. S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

dcp