

CCASE:
SOL (MSHA) V. PEABODY COAL
DDATE:
19930628
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 92-818
Petitioner	:	A. C. No. 15-14074-03614
v.	:	
	:	Martwick Underground
PEABODY COAL COMPANY,	:	
Respondent	:	Docket No. KENT 92-869
	:	A. C. No. 15-02705-03754
	:	
	:	Docket No. KENT 92-986
	:	A. C. No. 15-02705-03763
	:	
	:	Camp No. 2 Mine

DECISION

Appearances: W. F. Taylor, Esq., Office of the Solicitor,
U. S. Department of Labor, Nashville, Tennessee,
for the Secretary;
David R. Joest, Esq., Henderson, Kentucky, for
Respondent.

Before: Judge Maurer

In these three proceedings, the Secretary seeks to impose civil penalties on the respondent, Peabody Coal Company (Peabody) under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., for three alleged violations of the mandatory standard found at 30 C.F.R. 75.316. The respondent filed timely answers contesting the alleged violations and these cases were in due course docketed for hearing. Pursuant to notice, an evidentiary hearing was held in Owensboro, Kentucky, on March 9, 1993.

Subsequent to that hearing, the parties filed a written joint motion to approve their proposed settlement with regard to Docket Nos. KENT 92-869 and KENT 92-986. In Docket No. KENT 92-869, the parties propose to reduce the assessed civil penalty from \$2900 to \$2600 and in KENT 92-986, no reduction of the assessed \$5000 penalty is proposed. Based on the representations of the parties, I conclude that the proffered settlement is appropriate under the criteria contained in section 110(i) of the Mine Act and it is approved. The financial terms of this

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settlement agreement will be factored into my order at the end of this decision. There remains for my decision on the merits, a single section 104(a) citation: Citation No. 3552659, contained in Docket No. KENT 92-818. I make the following decision.

DISCUSSION AND FINDINGS

Citation No. 3552659, issued pursuant to section 104(a) of the Mine Act, alleges a violation of the mandatory standard at 30 C.F.R. 75.316 and charges as follows:

The methane and dust control plan was not being followed in that the air behind the curtain in No. 3 entry was 4000 cfm while the wet bed scrubber was off.

Mine Safety and Health Administration (MSHA) Inspector George Newlin issued the citation at bar on May 28, 1992, during a respiratory dust survey. In a nutshell, the inspector felt that the company was operating in violation of its approved ventilation plan because the plan calls for 5000 cubic feet of air at the end of the line curtain while the miner is cutting coal and when he took his air reading, he only found 4000 cubic feet of air moving. Specifically, the plan provides in relevant part: "A minimum of 5000 cfm of air shall be delivered to the inby end of the line brattice before the scrubber is started and shall be maintained until the cut has been completed."

The overriding issue in this case then is whether or not the miner operator cut out a load of coal just before the inspector took his air reading. Because if he did not, then everyone agrees, there is no violation. That seems simple enough, but there is a complicating feature present in the case. From where the inspector was positioned in the crosscut waiting for the miner to start cutting before he took his air reading, he could not see the continuous miner machine in the No. 3 entry. Therefore, the inspector did not see the miner operator cut coal, nor did he see any coal being loaded into the shuttle car, but he believes that he heard the miner cut into the coal and he then went into the entry to take his reading. Peabody's evidence is to the contrary, i.e., they did not start cutting coal until later that morning.

Mr. Geary, a maintenance supervisor at the mine, testified that as part of the federal dust survey, they have to maintain 17 water sprays on the miner with a minimum of 100 psi pressure with the sprays running and, also, in the wet bed scrubber itself, there is one spray that has to also be operating with 100 psi with the wet bed running. In order to check the pressure on these water sprays, you have to unhook a spray or a hose from

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the miner and then hook another hose with a pressure gauge teed into it in its place. While this apparatus is installed, you cannot mine coal; but in order to check the water pressure on the sprays, you do have to turn the scrubber on.

After Mr. Geary had checked the water pressure on the sprays, he sent someone to get the inspector to perform his pressure check. When he came over, but before he checked the pressure on the sprays, he checked the air behind the wing curtain and said they did not have enough air to run coal with. The inspector concurs with that chronology of events (Tr. 34).

I find the testimony of Mr. Geary to be most convincing. The pressure-checking apparatus was installed on the miner until after the inspector checked the water pressure, and even the inspector agrees that this was in turn after he took the air check which prompted the citation at bar. At the same time, it is uncontroverted that while the pressure-checking apparatus is installed it is not possible to cut coal. Therefore, the only logical explanation that takes into consideration all the facts is that the inspector's assumption vis-a-vis cutting coal is wrong. The inspector apparently mistook the sound of the scrubber running on the miner for the somewhat similar sound of the miner cutting coal. Although there is testimony on the record that it is possible to tell the difference in sound between the miner setting with its scrubber running and the miner cutting coal, it was also stated that the farther away a person is from the miner, the harder it would be to detect the difference. I believe that is exactly what happened in this instance. Accordingly, Citation No. 3552659 will be vacated.

ORDER

Based upon the above findings of fact and conclusions of law, it IS ORDERED that:

1. Citation Nos. 3547038 and 3552661 ARE AFFIRMED.
2. Citation No. 3552659 IS VACATED.
3. Peabody Coal Company SHALL PAY a civil penalty of \$7,600 within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge

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