

CCASE:
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,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 93-23
Petitioner	:	A.C. No. 11-02440-03673
v.	:	
	:	Marissa Mine
PEABODY COAL COMPANY,	:	
Respondent	:	

SUMMARY DECISION

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., the "Act," charging the Peabody Coal Company (Peabody) with one violation of its approved dust control plan under the standard at 30 C.F.R. 75.316.(Footnote 1)

The approved dust control plan for this mine was not being followed at the 202-0 designated area sample location located at the transfer point where the 1st Sub Main north belt dumps onto the main east belt. This transfer point is located at 59 crosscut in the main east belt entry. The designated area sample location for this transfer point is on the south side of the main east belt an approx. 15 feet west of the transfer point. A dust pump was observed gathering a sample for this location with the pump positioned on the north side of the main east belt and on the east side of the head roller. With the pump in this location an accurate sample would not be possible. The air movement in this area is in the outby direction in both the 1st Sub Main North and the main east. This air movement would carry airborne dust away

1 These provisions, in effect when the charges at issue were brought, were subsequently repealed November 16, 1992, and replaced by 30 C.F.R. 75.307.

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from the dust pump. The concentration of respirable dust from this designated area was 1.8 milligrams and 1.1 milligrams on last two sampling cycles.

In conjunction with motions for summary decision, the parties agreed and stipulated to certain facts. These stipulations are attached hereto as Appendix A. It is undisputed that on September 21, 1992, an authorized representative of the Secretary issued Citation No. 4051293 at Peabody's Marissa Mine alleging that Peabody failed to comply with its approved dust control plan in violation of 30 C.F.R. 75.316. During his September 21, 1992, inspection of the Marissa Mine, the inspector found a dust collection pump collecting a sample at a transfer point between two conveyor belts. This was a designated area for dust sampling, but the pump was located at the wrong position for sampling this area in that the pump was upwind of the transfer point instead of downwind as required by the plan and at a less dusty location than the proper sampling point. When the pump was discovered in the wrong location it was shut down prior to the end of the shift. However, it is undisputed that Peabody intended to take a sample for the designated area in question at the improper location. It is also undisputed that under 30 C.F.R. 70.208(a), Peabody had until September 30, 1992, to take a sample for the designated area in question.

It is well-established law that an operator can be cited for failure to comply with its approved dust control plan. *Zeigler Coal Company v. Kleppe*, 536 F.2d 398, 409 (D.C. Cir. 1976). The plan in this case sets forth the locations for taking dust samples for designated areas. The requirements to take dust samples in designated areas is governed by 30 C.F.R. 70.208(a), which requires, in essence, that the operator take one valid sample in each bimonthly period.

In addition, 30 C.F.R. 75.209(d) provides that:

all respirable dust samples collected by the operator shall be considered taken to fulfill the sampling requirements of part 70, 71 or 90 of this title, unless the sample has been identified in writing by the operator to the District Manager, prior to the intended sampling shift, as a sample to be used for purposes other than required by part 70, 71 or 90 of this title.

Since it is undisputed that Peabody did not identify in writing to the MSHA District Manager, prior to the intended sampling shift at issue, that the dust sample at issue was intended for purposes other than those required by Part 70, 71 or 90 of the Secretary's regulations, it is clear that the dust sampling in this case, which had begun

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in a location other than that specified in the approved dust control plan and was intended to be submitted for the designated area, was in violation of the plan as charged.

Peabody contends that the dust control plan is violated only if, and when, a dust sample collected at an improper location or in an improper manner is actually submitted to MSHA for analysis or if no proper sample is collected and submitted within the allowed sampling time period. However, the essence of this violation is the improper location of the dust sampling with the intent to submit the sample for the designated area under 30 C.F.R. 70.208(a), contrary to the dust control plan and not within the exception provided by 30 C.F.R. 75.209(d) -- not the submission of a defective sample.

Based upon the information available, I find a civil penalty of \$100 to be appropriate. It is not disputed that the incorrect placement of the dust pump in this case was unintentional, though the proper sampling location was clearly marked. Since the dust conditions would have been underreported at the cited location, the violation could have had serious consequences for exposed miners.

ORDER

Citation No. 4051293 is AFFIRMED and the Peabody Coal Company is directed to pay a civil penalty of \$100 within 30 days of this decision.

Gary Melick
Administrative Law Judge

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APPENDIX A

1. On September 21, 1992, Ronald G. Zara (the "inspector") an authorized representative of the Secretary of Labor, issued citation number 4051293 at Respondent, Peabody Coal Company's Marissa Mine, Randolph County, Illinois, alleging a violation of 30 C.F.R. 75.316 in that Respondent had failed to comply with its approved dust control plan.

2. [Omitted]

3. During his inspection of Marissa Mine on September 21, 1992, the inspector observed that a dust collection pump at the transfer point at which the 1st North Submain conveyor belt discharges coal onto the Main East belt and the east side of the 1st North Submain belt approximately 10 feet north of the head roller. The pump was gathering a sample.

4. Under the approved dust control plan in effect for Marissa Mine on September 21, 1992, the designated sampling location for the 1st North Submain-East transfer point was on the south side of the Main East belt approximately 15 feet west of the transfer point. The dust pump was collecting a sample in the wrong location and was upwind from the transfer point. The proper location of the designated area is downwind from this same dust generating source and was clearly marked on September 21, 1992. No sample was being collected in the proper location.

5. The inspector found the dust pump in the wrong location and the dust pump was shut off prior to the end of the shift for which the sample was being collected.

6. Under 30 C.F.R. 70.208(a), Respondent was required to take a respirable dust sample at each designated area within a bi-monthly period, but not on specified days. September 21, 1992 was not the last day available for sampling at this location under the terms of the plan.

7. Under 30 C.F.R. 70.209(d), all respirable dust samples collected by the operator shall be considered taken to fulfill the sampling requirements of Part 70, 71 or 90 unless the sample has been identified in writing by the operator to the District Manager, prior to the intended sampling shift, as a sample to be used for purposes other than required by Part 70, 71 or 90.

8. Respondent did not identify in writing to the District Manager, prior to the intended sampling shift, that the sample that was cited on September 21, 1992 was intended for purposes other than those required by Part 70, 71 and 90.

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9. The Secretary contends that, pursuant to 30 C.F.R. 70.209(d), a violation of the requirements of an operator's approved dust control plan occurs if a dust pump is set in a location other than that specified in the plan and begins collecting a respirable dust sample at that location when the operator did not identify, in writing, to the District Manager, prior to the sampling shift, that the sampling was to be used for purposes other than those required by Part 70, 71 or 90.

10. Respondent, Peabody Coal Company, contends that the requirements of the approved dust control plan are violated only if a dust sample collected at an improper location or in an improper manner is actually submitted to the Mine Safety and Health Administration for analysis or if no proper sample is collected and submitted within the sampling time allowed under the plan.

11. Collection of the dust sample described in citation had commenced but had not been completed at the time the inspector issued the citation.

12. At the time the dust collection pump referred to in the citation was set out and switched on, and up until the time the pump was discovered in the wrong location, it was Respondent's intent to collect a respirable dust sample for submission pursuant to Respondent's Bi-monthly dust sampling obligations under 30 C.F.R. Part 70.

13. [Omitted]

14. The Federal Mine Safety and Health Review Commission has jurisdiction over these proceedings.

15. Respondent, Peabody Coal Company, owns and operates the Marissa Mine, a bituminous coal mine located in St. Clair County, Illinois.

16. Respondent's operations affect interstate commerce.

17. The Marissa Mine produced 1,972,612 tons of bituminous coal from January 1, 1991 through December 31, 1991.

18. Respondent, Peabody Coal Company, produced over 10,000,000 tons of bituminous coal at all of its mines from January 1, 1991 through December 31, 1991.

19. The payment of the \$50 single penalty assessment will not affect Respondent's ability to continue in business.

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20. The location where the dust-sampling pump was found on September 21, 1992, which was the subject of Citation No. 4051293, was upwind from the transfer point, in a less dusty location than the proper location for designated area 202-0, which was downwind from the transfer point, and therefore was at a more favorable location for Respondent.

21. The attached mine "stick map" is a true and accurate depiction (not drawn to scale) of the locations where the dust-sampling pump, which is the subject of Citation No. 4051293, was found on September 21, 1992, and for where it should have been located according to Respondent's approved dust control plan.

22. The bimonthly dust-sampling period required by 30 C.F.R. 70.208 or a designated area for the period in which Citation No. 4051293 was issued on September 21, 1992 through September 20, 1992.

(Copies of the citation and the approved dust control plan, Exhibits A and B to the Joint Stipulation, have been omitted from the stipulations.)