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SOL (MSHA) BUCKET COAL  
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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 PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. PENN 93-109  
Petitioner : A. C. No. 36-07903-03517  
v. :  
 : Heather Mine  
BUCKET COAL COMPANY, :  
Respondent :  
:

DECISION

Appearances: Maureen A. Russo, Esq., Office of the Solicitor,  
U.S. Department of Labor, Philadelphia, PA for the  
Petitioner;  
Andrew Drebitko, President, Bucket Coal Company,  
Minersville, PA for the Respondent.

Before: Judge Weisberger

This case is before me based upon a petition for  
Assessment of Civil Penalty filed the Secretary (Petitioner)  
alleging a violation by the Operator (Respondent) of 30 C.F.R.  
70.207(a). Also at issue is the validity of a subsequentl  
issued order under Section 104(b) of the Federal Mine Safety and  
Health Act of 1977 ("the Act"). Subsequent to notice, the case  
was heard in Harrisburg, PA on October 13, 1993. Leonard W.  
Rogers, Jr., and Thomas J. Garcia, testified for Petitioner.  
Andrew Drebitko, testified for Respondent. The parties waived  
the right to file a written brief, and instead presented oral  
arguments at the conclusion of the hearing.

Findings of Fact and Discussion

Leonard W. Rogers, Jr., an MSHA inspector, testified, in  
essence, that a computer generates a non-compliance notice when  
dust samples required by 30 C.F.R. 70.207(a) are not received  
by MSHA. On May 11, 1992, Rogers issued to Respondent a citation  
which alleges a violation of Section 70.207(a) supra in that "The  
mine operator did not collect and submit five valid respirable

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dust samples for the bimonthly period of March/April, 1992 on mechanized mining unit 0001-1 for the designated occupation 039 (hand loader) as shown in the attached advisory, dated 5/8/92." Section 70.207(a) supra, as pertinent, requires the taking of five respirable dust samples in each mechanized mining unit during each bi-monthly period. It is further provided that the samples shall be collected on "consecutive normal production shifts or normal production shifts each of which is worked on consecutive days." 30 C.F.R. 70.2(1) states that "production shifts" means "(1) with regard to a mechanized mining unit, a shift during which material is produced, or (2) with regard to a designated area of a mine, a shift during which material is produced and routine day-to-day activities are occurring in the designated area."

Tom J. Garcia, a supervisor at the MSHA Shamokin Field Office, testified that, for the period at issue, the subject mine was classified by MSHA as being in an A-A status. He said this means that it was in a production status. Garcia said that a mine remains classified in an A-A status until the operator notifies MSHA that it is no longer producing coal. There is no evidence that the operator had notified MSHA that it was no longer producing coal during the period when it was in an A-A status between July 9, 1991 and November 1, 1992.

Andrew Drebitko testified that the mine was flooded on February 24, 1992, and that the mine was not producing coal until it went back to a partially active status on July 28, 1992. He said that from February, 1992, until June or July, aside from somebody helping him to move pumps, he was the only one at the mine moving machinery and equipment. There is no evidence that he or anyone else representing the operator notified MSHA that the mine was not producing coal in April and May, 1992.

The clear language of the Section 70.207(a) mandates that dust samples in mechanized mining units are to be collected on "normal production shifts." As defined by Section 70.2(1) supra, a production shift is a shift "during which material is produced." I give more weight to the testimony of Drebitko based on his personal knowledge, as opposed to the testimony of Garcia based on an MSHA record, that was not offered in evidence, regarding Respondent's status during the period in question. Hence based upon Drebitko's uncontradicted testimony, I find that it has not been established that in April and May, 1992 Respondent was in production and had "production shifts."

Further, I note that pursuant to Section 70.207(a) the obligation to collect dust samples is limited to "normal" production shifts. A "normal production shift", according to 30 C.F.R. 70.2(k) means "(1) a production shift during which

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the amount of material produced in a mechanized mining unit is at least 50% of the average production reported for the last set of five valid samples; . . . ." There is no evidence that there was production in the period in question of "at least 50% of the average production reported for last set of five valid samples."

For these reasons, I conclude that it has not been established that Respondent violated Section 70.207(a) as alleged. I further find that the Section 104(b) Order issued by Garcia on August 27, 1992 for failure to abate the initial citation is to be vacated.

ORDER

IT IS ORDERED that Citation No. 98500040, and Order No. 3080318 are to be dismissed. It is further ordered that this case be Dismissed.

Avram Weisberger  
Administrative Law Judge

Distribution:

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