CCASE:
ENERGY WEST MINING V. SOL (MSHA)
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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ENERGY WEST MINING COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. WEST 94-22-R
	:	Order No. 3587924; 10/4/93
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Deer Creek Mine Mine ID 42-00121
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 94-186
	:	A. C. No. 42-00121-03823
v.	:	
	:	Deer Creek Mine
ENERGY WEST MINING COMPANY, Respondent	:	

DECISION

Appearances: Timothy M. Biddle, Esq., Crowell & Moring, Washington, D.C. for Contestant;
Carl C. Charneski, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for Respondent.

Before: Judge Hodgdon

These cases are before me on a notice of contest filed by Energy West Mining Company against the Secretary of Labor and a petition for assessment of civil penalty filed by the Secretary of Labor against Energy West Mining Company pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815 and 820.(Footnote 1) Energy West contests the issuance of Order No. 3587924 to it on October 4, 1993. The Secretary has proposed a civil penalty for the same violation. For the reasons set forth below, the order is vacated.

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1 The civil penalty proceeding was filed subsequent to the hearing on the contest. Energy West's motion to consolidate the proceedings is unopposed. Accordingly, the motion to consolidate is GRANTED and these proceedings are CONSOLIDATED for disposition in this decision.

The case was heard on January 19, 1994, in Price, Utah. Mine Safety and Health Administration (MSHA) Inspectors Donald E. Gibson, Robert Baker, Fred L. Marietti and Ted E. Farmer testified on behalf of the Secretary. Mr. Mark Tuttle, Mr. Chad S. Hansen, Mr. Scott Timothy, Mr. Arch Allred, Mr. Rudy L. Madrigal(Footnote 2) and Mr. Kent L. Norton testified for Energy West. The parties have also filed post hearing briefs which I have considered in my disposition of these cases.

FINDINGS OF FACT

The following facts are undisputed in this matter. On September 13, 1993, Inspector Gibson conducted respirable dust sampling on the day shift in the 1st Left Longwall Panel at Energy West's Deer Creek mine. He placed dust sampling equipment on five longwall face workers, including the headgate and tailgate shear operators. At lunch time, Inspector Gibson discovered that the tailgate shear operator had taken his dust sampling pump with him to the "dinner hole" and that the replacement tailgate shear operator did not have any sampling equipment. He advised the section foreman, Mark Tuttle, that when the tailgate shear operator is replaced to go to lunch, the dust sampling equipment should be given to his replacement to wear.

On September 20 and 21, 1993, Inspector Gibson monitored procedures at the Deer Creek mine when Energy West took its own dust samples as required by the Regulations.(Footnote 3) During this sampling, the dust pump was only on the tailgate shear operator, the "designated occupation" (DO) for dust sampling of Deer Creek's longwall mechanized mining unit (MMU).

When the tailgate shear operator went to lunch on the 20th, he gave his dust pump to his replacement, Rudy Madrigal. As this was occurring, Tuttle asked Inspector Gibson if that was the way

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2 Mr. Madrigal's name is spelled Madrijal throughout the transcript of record, however, the correct spelling is with a "g" and will appear that way in this decision.

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3 Section 70.207(a) of the Regulations, 30 C.F.R. 70.207(a), requires that the operator take five valid respirable dust samples from a designated occupation in each mechanized mining unit every two months. The samples have to "be collected on consecutive normal production shifts or normal production shifts each of which is worked on consecutive days."

it was supposed to be done. Gibson responded that he was not "going to tell them how to collect their sample." (Tr. 47-48, 175, 219.)

During the sampling on September 20 and 21, the longwall was operated the way it was always operated. On the "grade" cycle, when the longwall shear travelled across the face from headgate to tailgate, both the headgate shear operator and the tailgate shear operator walked along with the shear. On the "cut" cycle, when the shear travelled from tailgate to headgate, only the headgate operator walked with the shear; the tailgate operator returned to the headgate to wait in fresh air until the "cut" cycle was completed. The tailgate operator did this because the tailgate cutting drum on the shear was not used on the "cut" cycle, only the headgate drum.

On October 4, 1993, Inspector Gibson returned to the Deer Creek mine and issued an order of withdrawal, Order No. 3587924, pursuant to Section 104(d)(1) of the Act, 30 U.S.C. 814(d)(1).(Footnote 4)

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4 Section 104(d)1) provides:

> 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 or 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 this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

The inspector concluded that the company had violated Section 70.207(e)(7) of the Regulations, 30 C.F.R. 70.207(e)(7), because:

> The required bi-monthly samples collected by the operator on MMU-052, designated occupation 044 longwall operator (tailgate side) for the September October 1993 sampling cycle were not collected as required by 30 CFR 70 [emphasis in original].
>
> Cassette No.'s 47830675 and 47831351 collected September 20-21, 1993, respectively, and submitted to the Pittsburgh Dust Center were not collected in accordance with MSHA regulations. The sampling device did not remain at the designated occupation [emphasis in original]. The tailgate shearer [sic] operator changed occupations after each longwall cut and did not leave the device at the shearer [sic] and retain it at the designated occupation position.
>
> This practice did not reflect accurate monitoring of the mine atmosphere of the mechanized mining unit and would render the above mentioned dust samples invalid.
>
> The operator submitted the invalid samples to be used for the September-October sampling cycle.
>
> Air stream helmets or respirators were not worn by all miners.
>
> This type of practice has been discussed with management prior to the sampling on September 20-21, 1993.

(Govt. Ex. 6.) The order was modified that same day to allow the operator to take new dust samples. (Govt. Ex. 7.) The order was terminated on October 19, 1993, when the new samples showed the dust concentration to be within required limits. (Govt. Ex. 8.)

FURTHER FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 70.207(e)(7) states that:

> (e) Unless otherwise directed by the District Manager, the designated occupation samples shall be taken by placing the sampling device as follows:
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> * * * *

> (7) Longwall section. On the miner who works nearest the return air side of the longwall working face or along the working face on the return side within 48 inches of the corner.

In his Brief for the Secretary of Labor, the Secretary asserts that Energy West violated this regulation when the DO, the tailgate shear operator, retained the dust sampling device and stayed in fresh air while the longwall shear was cutting coal on the "cut" cycle. (Sec. Br. at 5.) He further argues that the company knew that this was not the proper method to conduct dust sampling based on prior conversations with Inspectors Gibson, Baker, Marietti and Farmer, and the dust sampling provisions in MSHA's Program Policy Manual and Coal Mine Health Inspection Procedures Handbook. (Sec. BR. at 4-9.)

In Energy West's Proposed Findings of Fact, Conclusions of Law, and Brief, the company maintains that it did not violate the Regulation. Energy West further avers that it "had no reason to believe its sampling procedures were improper, particularly since the mine had used the same procedures for at least 10 longwall panels and that procedure had never been questioned by any MSHA inspector before October 4, 1993." (Co. Br. at 18.)

Fact of Violation

I conclude that Energy West did not violate Section 70.207(e)(7) of the Regulations. I reach this conclusion because neither the regulation nor MSHA's Program Policy Manual or Coal Mine Health Inspection Procedures Handbook indicate that Energy West's method of dust sampling was improper. Further, I find that until the citation was issued, no MSHA official had advised Energy West management that MSHA considered that the company's method of dust sampling was not in accordance with the Regulations.

Section 70.207(d), 30 C.F.R. 70.207(d), states that "[e]ach designated occupation sample shall be taken on a normal production shift." Section 70.201(b), 30 C.F.R. 70.201(b), provides that: "Sampling devices shall be worn or carried directly to and from the mechanized mining unit or designated area to be sampled and shall be operated portal to portal. Sampling devices shall remain operational during the entire shift or for 8 hours, whichever time is less." Other than these two sections, the Regulations provide no guidance as to how sampling is to be conducted.

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On the other hand, the Program Policy Manual explains:

> 70.207 Bimonthly Sampling; Mechanized Mining Units
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> * * * *
>
> (e) If the operator's mining procedures result in the changing of miners from one occupation to another during a production shift, the sampling device must remain on or at the designated occupation (DO). For example, if an operator alternates the duties of the continuous miner operator on a one-half shift basis between the continuous miner operator and helper, the dust sampler shall be worn for one-half of a shift by the continuous miner operator and the other one-half of a shift by the helper, while each is operating the continuous mining machine, or the sampler shall remain on the machine as required by this section.

at 8 (Vol. V, Part 70, July 1, 1988). (Govt. Ex. 2.) In addition, the following guidance to MSHA inspectors conducting dust sampling is provided by the Coal Mine Health Inspection Procedures Handbook 1.1 (February 15, 1989) concerning MMU's: "When sampling the DO, the sampling device shall remain in the environment of the DO rather than with the individual miner, even when miners change positions or alternate duties during the shift." (Emphasis in original)(Govt. Ex. 3.)

It is apparent from reading these two sections that Energy West was not put on notice that they were not performing their dust sampling properly.(Footnote 5) The Program Policy Manual states that if a miner changes from one occupation to another, "the sampling device must remain on or at the designated occupation DO." However, in this case the tailgate shear operator did not change occupations by going to the headgate, he was still the tailgate shear operator and performing those duties, and the sampling device remained on or at the DO. Likewise, the tailgate shear operator did not change positions or alternate duties during the shift (except when he went to lunch, which is not at issue in this case), therefore, the sampling device did always remain in the environment of the DO as indicated in the handbook.

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5 For the purposes of this decision, it is not necessary to determine whether the manual and the handbook have any binding effect on the company. See, e.g., Utah Power and Light v. MSHA, 12 FMSHRC 965 (May 1990) and King Knob Coal Co., 3 FMSHRC 1417 (June 1981). Nor is it necessary to determine whether Energy West had access, or should have had access, to either or both of these publications.

Cf. Consolidation Coal Company v. Secretary of Labor, 9 FMSHRC 1509 (August 1987, Judge Weisberger) (Headgate and tailgate operators alternated going to the headgate in fresh air and when operating alone, the headgate operator "may be required, in the normal course of mining operations, to go to the tail position and perform duties . . . .").

In his brief, the Secretary contends that "to have properly and accurately sampled the tailgate operator (i.e., the DO) on September 20, the sampling device would have had to have remained 'in the environment of the MMU, at the [shear] machine.'" (Sec. Br. at 6.) Although he does not go on to explain exactly how Energy West should have complied with this requirement, at the hearing, it was the Inspector Gibson's opinion that when the tailgate shear operator went to the headgate, he should have given the sampling device to the headgate shear operator. (Tr. 46-47.)

While Energy West's method of sampling appears to conform to the plain meaning of both the manual and the handbook, the Secretary's construction of the meaning is strained. In the first place, it is clear that the tailgate shear operator never left his working environment, nor changed positions. In the second place, the Secretary's interpretation would have some one other than the DO, i.e. the headgate shear operator, performing the sampling for half of the shift. And in the third place, it would require the tailgate and headgate shear operators to be constantly handing the sampling device back forth to one another.

The Commission has held that:

> [I]n interpreting and applying broadly worded standards, the appropriate test is not whether an operator had explicit prior notice of the specific prohibition or requirement, but whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.

Ideal Cement Co., 12 FMSHRC 2409, 2416 (November 1990). Applying this standard, it is still evident that the company was not put on notice by either the manual or the handbook that this was the way dust sampling on the longwall was supposed to be conducted.

Similarly, nothing that the MSHA inspectors told the management at the Deer Creek mine put them on notice that the tailgate shear operator was supposed to give the sampling device to the headgate shear operator on the "cut" cycle in order to

properly conduct their dust sampling. Inspector Gibson's testimony was vague, contradictory and, at times, implausible.

While all parties agree that Inspector Gibson told Mr. Tuttle, the Section Foreman, on September 13 that the sampling device was not to be taken to the "dinner hole" (Tr. 41, 172-73), only Inspector Gibson remembers telling Tuttle in another conversation on that same day that when the DO went to fresh air he had to give the pump to the headgate shear operator. Further, although the inspector testified on direct examination that he had two conversations with Mark Tuttle on the 13th, he only related the contents of the "dinner hole" conversation, he did not reveal what was said in the critical other conversation. (Tr. 49.) Nor did he divulge it on cross examination, (Tr. 84), redirect, (Tr. 113), recross or re-redirect.

It was only when I questioned the witness, and specifically asked him what he told Mark Tuttle was supposed to be done, that Inspector Gibson stated that he told Tuttle "that that pump was to have been exchanged and stayed with the machine. I thought they knew that and that's the way they were doing it." (Tr. 121.) Since this conversation is one of the bases for Gibson's issuance of the order, (Tr. 59), as well as one of the crucial factors in the Secretary's prosecution of the case, this lack of specificity is perplexing and raises doubts about whether it occurred. On the other hand, Tuttle unequivocally testified that Inspector Gibson did not say anything to him about the tailgate operator going to the headgate, that he only talked to him about the operator taking the dust pump to the kitchen. (Tr. 171-174.)

Inspector Robert Baker testified that he had conversations with various members of management at Deer Creek in 1992 and early 1993 concerning dust sampling by designated occupations. With respect to the longwall, he said that he told them that the dust pump had to stay with the designated occupation and that if the DO "went to dinner or left to do something else, then if his occupation continued to work then the pump was to stay with the machine or the occupation." (Tr. 128-29.) He also stated that he had observed dust sampling at Deer Creek in May 1993 when the DO remained on the intake [headgate] side of the shear in fresh air and that he did not consider that to be a violation of the dust sampling regulations. (Tr. 134-35.)

Inspector Fred Marietti testified that he talked with Randy Tatton, who was then Safety Director at the Cottonwood mine, about dust sampling.(Footnote 6) He stated that he told him that "when taking respirable dust samples that it was mandatory

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6 At the time of the alleged violation in this case, Tatton was Safety Director at both the Cottonwood and Deer Creek mines.

that the respirable dust pump be kept with the operator of the machine." (Tr. 137.)

Inspector Ted Farmer testified that he talked to Randy Tatton in November 1992 at the Cottonwood mine concerning dust sampling. He related the conversation as follows:

> Q. What was the substance of your conversation?
>
> A. It was that the respirable dust pump remain at the shearer(Footnote 7) with whoever was operating the tailgate shearer, end of the shearer. And that if they switched individuals then that pump would have to stay with the individual that was running the shearer.
>
> Q. So if the tailgate operator left the shearer to go somewhere else and another individual took his place, what would happen with that pump?
>
> A. That pump would stay with the individual who took his place.

(Tr. 141-42.) Inspector Farmer sent a memorandum concerning this conversation to his superiors. (Govt. Ex. 12.) Inspector Farmer also testified that he was at the Deer Creek mine on October 4, 1993, when the order in question was issued, and that it was his understanding that the order was issued because "the pump left the area and went to the kitchen with the operator." (Tr. 145, 147.)

Significantly, Inspector Gibson is the only witness for the Secretary who states that Energy West was notified prior to being cited about how dust sampling was to be conducted. His testimony was less than straightforward. (See, e.g., Tr. 120-124). On the other hand, none of the other inspectors had told Energy West that the dust sampling at the Deer Creek mine was improper; at least one specifically testified that he did not think it was improper; what they told Energy West about the Cottonwood mine did not necessarily apply to Deer Creek and, furthermore, would not have put them on notice that what they were doing at Deer Creek was improper; and even at the time Inspector Gibson issued the order an inspector who was with him did not understand that the alleged violation involved the DO going to the headgate.

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7 Throughout the transcript the word "shear" appears as "shearer."

Energy West's witnesses were unanimous in stating that up until the order was issued on October 4, 1993, the only issue concerning dust sampling and the DO that they had been advised by MSHA about, and had discussed with MSHA, was the DO taking the sampling device to lunch. I find their testimony to be forthright, consistent with the rest of the evidence in the case, and, therefore, credible.

Having found that Energy West was not put on notice either by MSHA's publications or by MSHA's inspectors that its method obtaining dust sample's by the tailgate shear operator was improper, and that its sampling procedure appears to be consistent with MSHA's publications, I conclude that the company did not violate Section 70.207(e)(7) of the Regulations.(Footnote 8) Accordingly, the order will be vacated and the civil penalty proceeding dismissed.

ORDER

It is ORDERED that Order No. 3587924 is VACATED and the civil penalty proceeding is DISMISSED.

T. Todd Hodgdon
Administrative Law Judge

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8 The Secretary does not claim in this case, nor is there any evidence to support such a claim, that Energy West's method of operating the longwall at the Deer Creek mine was designed wholly, or in part, to avoid taking valid dust samples for the DO.