CCASE:
SOL (MSHA) V. PEABODY COAL CO.
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 93-234
	:	A.C. No. 11-02440-03695
v.	:	
	:	
PEABODY COAL COMPANY, Respondent	:	Marissa Mine
	:	

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor, U. S. Department of Labor, Chicago, Illinois, for Petitioner;
David R. Joest, Esq., Henderson, Kentucky, for Respondent.

Before: Judge Amchan

ISSUE

The issue in this matter is whether MSHA should have issued a section 104(b) order to Respondent when it determined that a non-significant and substantial violation had not been corrected within the one hour abatement period specified, or whether the abatement period should have been extended. I conclude that, under the circumstances, the abatement period should have been extended. I, therefore, vacate the order but affirm a $200 civil penalty for the underlying citation.

Factual Background

On Friday, April 16, 1993, Ronald Hutson was conducting an MSHA inspection of Respondent's Marissa mine in Washington County, Illinois. He noticed an accumulation of coal and coal dust under the rollers of the mine's first subeast conveyor belt leading to mechanized mining unit #4 (Tr. 11-12, 16, 67-68). Inspector Hutson did not issue a citation but asked Respondent's walkaround representative, Compliance Manager Ervin "Butch" Shimkus, to have the area cleaned up (Tr. 11-12, 67-68). Shimkus inadvertently noted the location of the accumulation as the second subeast conveyor belt and, thus, Respondent sent its personnel to clean up a different area (Tr. 12, 16-17, 67-69).

Monday morning, April 19, 1993, Hutson continued his inspection. At about 9:20 a.m.(Footnote 1) he passed the same area again and noticed that the coal and coal dust had not been cleaned up, and, in fact, the accumulations were somewhat more extensive than on the preceding Friday (Tr. 12-13). They were between 6 and 18 inches in depth and extended over an area approximately 360 feet in length (Tr. 13). However, the coal and coal dust accumulation was not continuous. It consisted of piles underneath the rollers of the conveyor which were 10 - 12 feet apart (Tr. 22, 43). None of the piles touched the bottom rollers of the conveyor which were approximately 2 feet above the floor (Tr. 26-27).

Hutson informed Shimkus that he would issue a citation for the accumulation (Tr. 12-13). Shimkus immediately attempted to contact James Glynn, the mine manager, who would be responsible for getting personnel to clean up the coal and dust (Tr. 69).(Footnote 2) Inspector Hutson informed Shimkus that Respondent had 45 minutes to terminate, or abate the cited condition (Tr. 22). Mr. Shimkus expressed doubts that 45 minutes would be sufficient (Tr. 32). Hutson replied that he would be flexible if employees were in the process of cleaning up when the 45 minute period expired (Tr. 32, 77-78).

The conversation between Hutson and Shimkus regarding the abatement period may have occurred after Shimkus spoke to Glynn (Tr. 73-74, 85). In any event, Glynn was not informed as to the time period allowed for abatement until the section 104(b) order was issued later in the day (Tr. 96). The record is unclear as to whether it would have been possible for Shimkus to notify Glynn of the abatement period until they saw each other approximately two hours later (Tr. 76-77).

The inspector proceeded about 300 feet further towards the working face when he observed additional accumulations of coal and coal dust underneath a belt drive (Tr. 22, 25-26, 73). He

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1 Inspector Hutson may have observed the accumulated coal and coal dust in this area and initially informed Respondent of the citation somewhat earlier than 9:20 (Tr. 105).

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2 When he arrived at the mine surface later in the day Hutson wrote citation 4050582 which noted the time of violation as 9:20 a.m. (Tr. 24-25). The citation alleges a violation of 30 C.F.R. 75.400, which requires that:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

informed Shimkus that this area was included in the citation (Tr. 73-76). Hutson also extended the abatement period to one hour, from 9:20 to 10:20 (Tr. 22). Half of that period may have already run at the time of this conversation (Tr. 84).

Shimkus called Kevin Lynn, the section foreman for unit 4, who was responsible for the area added to the citation. Shimkus told Lynn that he had 45 minutes to clean up the area (Tr. 75). Lynn sent 3 miners to the belt drive and they cleaned up the coal and coal dust accumulations in about 10 - 15 minutes (Tr. 85-86).

After receiving Mr. Shimkus' call, Mine Manager Glynn had to travel 2 miles to get 2 miners to clean up the first area cited by Hutson (Tr. 92-93). He dropped the men off and instructed them to work towards the belt drive. He left for 20 minutes and, when he returned, the employees had cleaned up 150 feet of the accumulated coal and coal dust and were still shoveling (Tr. 93-94).

Glynn left the area again and encountered Inspector Hutson. In response to the inspector's inquiry, Glynn told Hutson that the cited area was being cleaned (Tr. 94)(Footnote 3). The mine manager returned to the belt ten minutes later and found that the miners had left the area (Tr. 94-95). He found the men eating their lunch on a trolley vehicle and told them that the area was under citation and that they had to finish cleaning it up immediately (Tr. 94-95). By the time that Glynn and the two employees arrived back at the belt, Hutson had returned to the area. When the inspector arrived at 12:05 p.m., he found that nobody was working there and that only 1/4 to 1/3 of the area had been cleaned up (Tr. 17-19, 59, 93-94).(Footnote 4)

Shimkus and/or Glynn explained to Inspector Hutson that the employees who had been cleaning the cited area had taken a lunch break (Tr. 79-80, 95-96). Hutson informed Glynn and Shimkus that he was issuing Respondent a withdrawal order pursuant to section 104(b) of the Act (Tr. 80)(Footnote 5). The inspector placed a closure tag

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3 Hutson understood Glynn to say that the area had been cleaned (Tr. 103).

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4 At Tr. 20-21 Hutson testified that 2/3 of the area had been cleaned up. This testimony is obviously not what the inspector meant to say. This is not consistent with his testimony that the amount of clean-up constituted only a "token effort", or that an area 2 crosscuts in length, out of 8, had been cleared (Tr. 17-19).

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5 Order No. 4050583 was written out when Hutson returned to the mine surface later that afternoon. It is not clear whether Hutson issued the order before or after he received Respondent's

on the conveyor belt which required Respondent to stop the belt (Tr. 50). With the conveyor stopped, there was no way for Peabody to send coal out to the surface from mechanized mining unit #4. Therefore, unit 4 shut down and employees working at the face came out to the belt to help clean up the area (Tr. 50, 86, 97). Within 30-45 minutes, approximately ten employees cleaned up the area (Tr. 54, 86-87, 97). The withdrawal order was then terminated and the belt was allowed to operate again.

A civil penalty of $724 was proposed for citation No. 4050582 and order 4050583. This penalty was contested by Respondent and a hearing was held in this matter on April 19, 1994, in Mt. Vernon, Illinois.

THE ABATEMENT PERIOD FOR CITATION NO. 4050582 SHOULD HAVE BEEN EXTENDED AND ORDER 4050583 SHOULD NOT HAVE BEEN ISSUED.

Section 104(b) provides

> If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation . . . has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, 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.

In Mid-Continent Resources, Inc., 11 FMSHRC 505 (April 1989), the Commission held that, if the Secretary establishes that the violation of the underlying section 104(a) citation existed at the time of the section 104(b) withdrawal order, it has established a prima facie case that the 104(b) order is valid. There is no dispute that such is the case in the instant matter.

Respondent seeks to rebut the prima facie case by arguing that the abatement period set in the underlying citation was unreasonable and/or that inspector Hutson should have extended the abatement period at mid-day on April 19, 1993. Although I

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fn 5 cont'd.

explanation for the employees' absence (Tr. 79-80, 96).

can empathize with the inspector's frustration upon first finding that the accumulations had not been cleaned up on April 16, and then finding nobody engaged in clean-up on April 19, I agree with Respondent on both counts.

Inspector Hutson conceded that walkaround representative Shimkus immediately expressed doubts as to whether 45 minutes was sufficient time to abate the cited condition, and that he responded by promising flexibility if Respondent was having difficulties getting people to abate the violation (Tr. 32, 78). His decision not to extend the abatement period appears to have been influenced primarily by the fact that the two miners had decided to take a break just before he arrived at the belt, that he understood Mine Manager Glynn to have represented that the condition was completely abated, and the fact that the accumulations had not been cleaned up on April 16 (Tr. 44-45, 78, 103).(Footnote 6)

I find that Mine Manager Glynn acted in a reasonable manner in getting two employees to clean-up the accumulated coal and coal dust. In the past, Respondent has most often been given until the end of the shift to correct similar violations (Tr. 99). The fact that Glynn was not aware of the original 45 minute abatement period, later modified to one hour, may be due to a communication breakdown between Glynn and Shimkus. On the other hand, it may have been impossible for Shimkus to have contacted Glynn with the information about the abatement period, which he may not have had when he talked to Glynn (Tr. 74-77). Nevertheless, nothing in this record indicates that the cited condition, a non significant and substantial violation, warranted heroic abatement efforts (Tr. 81). Indeed, Inspector Hutson concedes that this was not a particularly serious violation (Tr. 37).

The record establishes that two employees could have cleaned up the accumulations underneath the belt rollers in about 3 hours (Tr. 60). After Shimkus contacted him, Glynn immediately got two employees and took them to the cited area. They began working between 11:00 and 11:30 a.m. and, thus, should have completed their abatement efforts by 2:30 or 3:00 p.m. at the latest--even allowing a half-hour lunch break (Tr. 60, 100). Although, the

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6 Hutson testified that he "possibly" would have issued the 104(b) order even if the employees had been working when he arrived. He stated that he may have issued the order anyway because the work hadn't progressed very far (Tr. 107). He also testified that Respondent's failure to clean up the coal and coal dust on April 16, 1993, had nothing to do with his decision to issue the 104(b) order (Tr. 108). The undersigned infers, however, that this was a factor in the inspector's decision to issue the withdrawal order.

area could have been cleaned up much faster by assigning more employees to the clean-up task, there is nothing in this record that indicates that Respondent was acting unreasonably in not doing so.

The Secretary is justified in requiring Respondent to allocate resources to the abatement effort beyond those the operator would normally utilize--if the conditions warrant it. The fact that Peabody had only 1 or 2 employees on each shift designated as belt shovelers does not necessarily mean that Respondent may not be required to use other employees to abate a citation(Footnote 7). However, in the instant case there appears to be no reason for the extremely short abatement period--other than the fact that Inspector Hutson may have been somewhat irritated that the coal and dust accumulations had not been cleaned up on April 16 (Tr. 44-45).

One cannot fault Inspector Hutson for being upset in finding the violation unabated with nobody engaged in the clean-up effort. However, he is required to be reasonable in deciding whether to extend the abatement period or issue a section 104(b) order, United States Steel Corporation, 7 IBMA 109 (1976). I conclude that it was not reasonable for the inspector to cause unit 4 to be shut down under the circumstances.

The factors that make it unreasonable to issue the 104(b) order rather than extend the abatement period are: the degree of hazard presented by extending the abatement period; the short abatement period originally set, the fact that work on the abatement had obviously started, and, as Respondent explained, had not stopped. I conclude also that Hutson should have considered Respondent's immediate response in abating the violation at the belt drive. Given these factors, Inspector Hutson should have extended the abatement period.

For the reasons stated above, I vacate order No. 4050583. However, it is undisputed that Respondent violated 30 C.F.R. 75.400 as alleged in citation No. 4050582. Considering the six factors enumerated in section 110(i) of the Act, I assess a $200 penalty for this violation. Peabody is a large operator, whose ability to continue in business is obviously not compromised by such a penalty. I find nothing in Respondent's prior history of violations that influences my assessment one way or another. The most critical factors are the gravity of the violation, which was, I consider, fairly low, and Respondent's negligence, which I consider to be relatively high.

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7 The record indicates that it would take 2 employees 3 hours to abate the violation herein, and 5-6 employees 1 hour (Tr. 60).

Anyone can make a mistake, as did Mr. Shimkus, in writing down the wrong location for the conveyor belt on April 16, but I conclude that the penalty assessed should be somewhat higher than otherwise because of this mistake. On the other hand, given the fact that gravity of the violation was relatively low and that I conclude that Respondent acted in good faith in trying to achieve compliance, I conclude that $200 is an appropriate civil penalty.

ORDER

Order No. 4050583 is VACATED. A $200 civil penalty is assessed for citation No. 4050582. This penalty shall be paid within thirty (30) days of this decision.

Arthur J. Amchan
Administrative Law Judge

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