

CCASE:
PEABODY COAL CO. V. SOL (MSHA)
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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PEABODY COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. KENT 94-347-R
	:	Citation No. 3861905; 1/6/94
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Camp No. 11 Mine
ADMINISTRATION (MSHA),	:	I.D. No. 15-08357
Respondent	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 93-813
Petitioner	:	A.C. No. 15-08357-03743
v.	:	
	:	Camp No. 11 Mine
PEABODY COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: David Joest, Esq., Henderson, Kentucky, for Peabody Coal Company;
Anne T. Knauff, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Secretary of Labor.

Before: Judge Melick

These cases are before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., the "Act," to challenge two citations issued by the Secretary of Labor to the Peabody Coal Company (Peabody) for operating its Camp No. 11 Mine without approved ventilation plans and therefore in violation of 30 C.F.R. 75.370(a)(1).

Citation No. 3547687 was issued May 14, 1993, by Supervisory Ventilation Specialist Louis Stanley of the Mine Safety and Health Administration (MSHA) for the failure of Peabody to have included in its April 26, 1993, ventilation plan, provisions for a four-cut mining sequence (Joint Exhibit No. 5). It was Stanley's conclusion that the two-cut mining sequence provided in the Peabody plan (Appendix A, Figure 1) was not suitable to the Camp No. 11 Mine and that it could not therefore be approved. The citation was abated when Peabody thereafter submitted a ventilation plan providing for a four-cut mining sequence (Exhibit 7-A, page 3, Appendix A, Figure 2).

Section 303(o) of the Act requires a coal mine operator to adopt "a ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine" The plan must be approved by the Secretary, who has delegated this responsibility to the appropriate MSHA District Manager. 30 C.F.R.

75.370. The Secretary's standards require that the plan be "designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine." 30 C.F.R. 75.370(a)(1).

If the operator and MSHA are unable to agree on the suitability of a plan provision after good faith negotiations over a reasonable period, then the operator may refuse to include the disputed provision in its ventilation plan, whereupon MSHA may revoke its previous approval of the mine's plan and cite the operator for failing to have an approved ventilation plan.(Footnote 1) The operator may obtain review of the disputed requirement in proceedings arising out of the citation. Peabody Coal Co., 15 FMSHRC 381, 387-388 (1993). The Secretary bears the burden of proof in such proceedings as to the suitability of the disputed plan provision, Peabody Coal Co., at p.388, and the Secretary has previously acknowledged that in cases in which he seeks to require changes to previously approved plans, he does not object to "bearing the burden of proving the non-suitability of those plans."(Footnote 2)

While the Commission has never specifically articulated a formula to apply the standard "suitable to the conditions and mining system" of the mine, the undersigned previously held in Peabody Coal Co., 15 FMSHRC 1703, 1705 (1993), that the

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There is no claim in these cases that good faith negotiations did not precede this action.

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In his posthearing brief the Secretary, contrary to his previous position, now argues that because a ventilation plan, once approved, has the legal force and effect of a mandatory safety standard, his decision to impose a requirement in a ventilation plan should be reviewed by the administrative law judge under the "arbitrary and capricious" standard of review employed by the courts of appeal in judicial review of the Secretary's regulations. This position is inconsistent however with the role Congress has provided for the Commission and with the nature of the plan approval process itself. See Old Ben Coal Co., 1 FMSHRC 1480, 1484 (1979) and Zeigler Coal Co. v. Kleppe, 536 F.2d 398, 405-406 (D.C. Cir. 1976). More specifically as noted above, in Peabody Coal Co., 15 FMSHRC 381, 388 (1993), the Commission held that the Secretary has the burden of proving the suitability of a ventilation plan requirement he seeks to impose.

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Secretary could meet his burden of proof if he has "objectively identified a measurable safety hazard that is not addressed in the previously approved ventilation plan" and that he can establish the suitability of the disputed plan provision by showing that "his proposed modifications address the above safety hazard."

Within this framework the underlying issues before me in case Docket No. KENT 93-813 are (1) whether the previously approved ventilation plan for the Peabody Camp No. 11 Mine providing a two-cut mining sequence was no longer suitable to the conditions of that mine as of May 14, 1993, and (2) whether the ventilation plan provisions (incorporating a four-cut mining sequence) advocated by the Secretary were suitable to the Camp No. 11 Mine as of that date.

According to MSHA Supervisory Ventilation Specialist Stanley, the Secretary's proposed ventilation plan changes were warranted by evidence of increasing methane liberation. He testified that the objective measurable safety hazard to be addressed by the four-cut mining sequence was the hazard of methane ignition. In this regard, he cited as a basis for the proposed plan changes, "the fact that we did some in-mine inspections and we observed that methane was being liberated from the face at a higher rate than I had seen before at Camp No. 11."

Rather than present evidence of increased face methane liberation, however, Stanley cited evidence of increased total mine methane liberation.(Footnote 3) That evidence shows that the total methane liberated from the mine for the 24 hour period on February 10, 1992, was 258,896 cubic feet, on June 11, 1992, was 436,462 cubic feet, on December 15, 1992, was 491,674 cubic feet, during the period January 21 through February 5, 1993 was 499,392 cubic feet, and on April 6, 1993 was 387,508 cubic feet.(Footnote 4) Based on this information Stanley opined that the two-cut sequence of mining at the Camp No. 11 Mine was no longer suitable and that a four-cut sequence was required.

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Stanley's reference to an in-mine evaluation lacks record support (See May 17 Tr. 145). Moreover, I do not find that Stanley's reference to the observations of his assistant, Troy Davis, that he (Davis) once noted methane levels briefly exceeding one percent, constitutes sufficient evidence of increased face methane concentrations.

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While the evidence also shows that 410,003 cubic feet of methane was liberated over the 24 hour period on June 21, 1993, Stanley obviously did not have this information when he issued the citation on May 14, 1993.

It is clear, however, from the testimony of highly qualified expert Donald Mitchell, (Footnote 5) as well as the expert testimony of James Wolfe, that total mine methane liberation is not a valid measure of face methane liberation. Indeed, both Mitchell and Wolfe unequivocally reject the use of total mine methane liberation as a valid measure of face methane liberation in this case.

Both of these experts noted, in explaining why total mine methane liberation is not relevant to the issue of face methane liberation, that total mine methane liberation increases as the number of active working sections increases. In particular, they noted that from February 1992 to June 1992 the number of working sections at the Camp No. 11 Mine increased from three to five. They also observed that overall mine methane liberation increases as mining progresses because there are more inactive sections and more rib lines to produce methane. Indeed, Mitchell concluded that the increases in total mine methane liberation at the subject mine between February 1992 and December 1992 were low considering the increased number of worked-out areas, increased rib lines and increased production. Finally, Mitchell noted that in order to determine face methane liberation you must examine the records of each working section. He did so and found no changes in face methane liberation.

In light of Mitchell's extraordinary credentials and the inherent logic of his presentation I give his testimony particular weight. I therefore conclude that the Secretary's reliance upon total mine methane liberation to determine the need for the proposed changes is misplaced and indeed does not support the proposed changes in Peabody's ventilation plan from a two-cut mining sequence to a four-cut mining sequence. In addition, the unchallenged evidence from the section records that face methane liberation has in fact not changed, completely undermines the Secretary's position herein. The Secretary has accordingly failed in his burden of proving that Peabody's pre-existing plan setting forth a two-cut mining sequence was not suitable to the Camp No. 11 Mine as of May 14, 1993, and has failed in his burden of proving that the four-cut sequence

Mitchell has a Masters Degree in Mining Engineering from Columbia University, is a registered professional engineer in Pennsylvania, and is presently a consultant for unions, mine operators and governments throughout the world specializing in mine ventilation, mine fires and mine explosions. He was formerly MSHA's principle mining engineer in technical support and, in that capacity, was chief of its approval certification center, chief of miner emergency operations and chief of the electrical laboratories. Mitchell was also assistant coordinator in the development of regulations under the Federal Coal Mine Health and Safety Act of 1969.

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should be substituted as suitable to the conditions at the Camp No. 11 Mine as of that date. Accordingly, Citation No. 3547687 must fail and civil penalty proceeding Docket No. KENT 93-813 must be dismissed.

In reaching the above conclusions, I have not disregarded Mr. Stanley's testimony that in finding the pre-existing plan unsuitable, he also considered a "draft" from "headquarters" that included language recommending that cuts be limited to twenty feet "unless it can be proven that a deeper cut is all right to take." I have also not disregarded Stanley's testimony that he also relied upon reports from "other people" in MSHA that his MSHA district, District 10, was the only district in the country that permitted a two-cut sequence and did not require a four-cut sequence. However, such statements, without any underlying foundation or analysis, can be given but little weight. (Footnote 6)

The Secretary also argues, in essence, that even if the citation was issued without sufficient grounds, results of a face ventilation investigation by MSHA's Pittsburgh Safety and Health Technology Center (Tech Center) obtained subsequent to the citation at issue justifies his prior conclusion that the pre-existing plan calling for a two-cut mining sequence was not suitable and that the four-cut mining sequence should be substituted at the Camp No. 11 Mine. The investigative report (Report) resulting from a May 11 through 13, 1993 study directed by MSHA mining engineer Michael Snyder, appears, however, to have been seriously flawed for several reasons.

First, the underlying data may have been seriously compromised by the presence during the study of eight to ten people between the line brattice and the rib thereby obstructing the face ventilation. James Wolfe the Peabody supervisor of ventilation at Camp No. 11, who was present during the subject investigation, testified that he frequently observed persons in the area between the brattice and the rib, including two working miners and up to eight participants in the study group.

Wolfe later performed a test in this area in January 1994, and found that, on average, one person within the area between the brattice and the rib produced a ten percent reduction in the

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This evidence suggests, moreover, that the Secretary has been attempting to enforce a provision that is not mine specific, but should have been implemented through the Act's notice and comment rulemaking procedures set forth in section 101 of the Act. See *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398 (D.C. Cir. 1976), and *Secretary v. Peabody Coal Co.*, 15 FMSHRC 381 (1993).

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volume of air and two persons caused a fifteen percent reduction. According to Wolfe, the actual air flow during the testing period would therefore have been somewhat less than the actual readings observed during the MSHA investigation. Under the circumstances, it may reasonably be inferred that the face ventilation was in fact restricted during the MSHA investigation thereby causing more frequent and higher methane readings than otherwise would have resulted. On this basis alone, the face ventilation investigation must be viewed with caution.

In any event, even assuming the accuracy of the investigation data, I nevertheless give significant weight to the expert testimony of Donald Mitchell who, even when assuming the validity of the investigative results, rejected each of the conclusions in the Report based on those results. Mitchell also rejected the underlying premise of the Report, i.e., that relatively brief peak periods (averaging 10 seconds) of methane of one percent or slightly higher provided a basis for the proposed ventilation plan modifications.

Mitchell testified that the regulatory requirement for corrective measures to be taken upon reaching one percent methane was developed to create a margin of safety. He noted that it was established as the last point before which you must take action. Mitchell further noted that since the peak methane readings taken in the investigation were essentially instantaneous and since no action was necessary to actually reduce the methane concentration, no modifications to face ventilation were needed. Mitchell concluded that nothing in the Report showed any reason for concern for the existing face ventilation at the Camp No. 11 Mine. He maintains that there is no statutory or regulatory basis or actual need based on safety for the ventilation plan to guarantee that methane be less than one percent at all times.

Mitchell testified, in summary, that the two-cut system is a safe and efficient method of mining and that it was a "suitable" method for the subject mine. Mitchell further observed that the four-cut system may indeed create an even greater hazard to miners because it requires more frequent movement of the continuous miner and shuttle cars. According to Mitchell, this movement exposes the miner helper to more back injuries and slipping injuries in handling the trailing cable and exposes the miner helper to the danger of moving shuttle cars.

Citation No. 3861905 (Docket No. KENT 94-347-R) was issued by Stanley on January 6, 1994, for Peabody's refusal to incorporate two further provisions in its ventilation plan in addition to the requirement for a four-cut mining sequence, i.e., (1) that at least 8,000 cubic feet per minute (cfm) of air be delivered to the inby end of the line brattice when the

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wet bed scrubber is operating and (2) that a second methane sensor be installed on the line brattice side of the continuous miner between the cutting head and the scrubber inlet (Joint Exhibit No. 20, 4th and 5th pages, paragraphs 3 and 6).

As before, the issues regarding this citation are similarly (1) whether the previously approved ventilation plan for the Peabody Camp No. 11 Mine was no longer suitable to the conditions of that mine as of January 6, 1994, and (2) whether the ventilation plan amendments advocated by the Secretary were suitable to the Camp No. 11 Mine as of that date. As previously noted, the Secretary bears the burden of proof on these issues. Peabody Coal Co., 15 FMSHRC 381 (1993) and Peabody Coal Co., 15 FMSHRC 628 (1993).

As the basis for the Secretary's insistence on these two additional requirements, Stanley testified that he relied upon the same evidence of an increase in overall mine methane liberation previously discussed in reference to Citation No. 3547687. For the reasons already noted, however, I find such reliance to have been misplaced and that such data is invalid for determining face ventilation requirements. Stanley testified that he also relied upon the MSHA Report (Joint Exhibit No. 12) and, in particular, upon the following suggestions in the Report:

3. Based on the data collected during the investigation, a quantity of 12,200 cfm (5.76 m³/s) would have been necessary to maintain a peak face area methane concentrations below 1.0 volume percent 97.5 percent of the time. This indicates that an increase in the available air quantity or other modifications to the face ventilation system may be necessary.

4. Since 20 of 26 peaks detected on the right side of the miner were not detected on the left side of the miner, an additional sensor located on the right side of the miner would improve the detection of methane in the face area.

The Report itself may not be relevant however since the study on which it was based was conducted while the Camp No. 11 Mine was following the two-cut mining sequence. When the Report was prepared, MSHA had already required Peabody to switch to the four-cut sequence. No additional study was conducted under the four-cut sequence and no in-mine investigation was performed before MSHA imposed the new requirements.

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In any event, Stanley's decision to require the subject modifications in the ventilation plan was bottomed on his belief that a ventilation plan must be such that it "guarantees that [in all areas being mined] methane can be kept to a one percent or less than one percent value." However, neither the Secretary nor his representatives can simply and arbitrarily decide through the ventilation approval process that ventilation plans should be required to maintain methane at such levels at all times. Zeigler Coal Co. v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976); Carbon County Coal Co., 7 FMSHRC 1367 (1985), and Peabody Coal Co., 15 FMSHRC 381, 186-387 (1993).

For the reasons previously noted, however, and giving decisive weight to the testimony of Peabody's highly qualified expert, Donald Mitchell, that neither the "8,000 cfm" nor the "second methane monitor" proposed requirements were necessary for proper ventilation at the Camp No. 11 Mine, I do not find that the Secretary has met his burden of proving that the pre-existing plan was "not suitable" to the Camp No. 11 Mine, or that the proposed modifications were "suitable" or necessary to that mine. Under the circumstances Citation No. 3861905, issued January 6, 1994, must also be vacated.

ORDER

Citation Nos. 3861905 and 3547687 are hereby vacated. Civil Penalty Proceeding Docket No. KENT 93-813 is dismissed and Contest Proceeding Docket No. KENT 94-347-R is granted.

Gary Melick
Administrative Law Judge

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