

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR - 7 2017

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner,

v.

CONSOL PENNSYLVANIA COAL CO.,
LLC,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. PENN 2016-132
A.C. No. 36-10045-402245

Mine: Harvey Mine

DECISION AND ORDER

Appearances: Anthony Fassano, Esq., for the Petitioner, U.S. Department of Labor,
Office of the Solicitor, Philadelphia, Pennsylvania

Patrick Dennison, Esq., for the Respondent, Jackson Kelly, LLC,
Pittsburgh, Pennsylvania

Before: Judge Steele

This case is before me upon a petition for assessment of a civil penalty, pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). A hearing was held in Pittsburgh, Pennsylvania on September 20, 2016.¹ The parties subsequently submitted post-hearing briefs.

STATEMENT OF THE CASE

This case concerns an alleged violation of 30 C.F.R. § 75.403, "Maintenance of incombustible content of rock dust." On December 22, 2015, two MSHA inspectors traveled to the Harvey Mine for a five-day inspection. During the course of this inspection, a rock dust sample was taken in the No. 3 Entry of the mine. After the sample was sent off for laboratory testing, it was found to be non-compliant under rock dusting regulations. As a result, Citation No. 9073907 was issued to the Respondent. The inspector who issued the citation and the supervising inspector who accompanied him differed at hearing on where the sample was taken. The contemporaneous notes of the issuing inspector, as well as the language of the citation, contradicted the testimony of the inspectors at hearing. The discrepancies between the evidence

¹ The above-captioned proceeding contained two 104(a) citations. The parties settled Citation No. 7033725 prior to hearing. The Court issued a Decision Approving Partial Settlement and Order to Pay on November 22, 2016.

presented by the Secretary and the testimony offered at hearing, as well as contentions made by the Respondent, raised questions as to where the sample was actually taken.

STIPULATIONS

At hearing the parties entered the following joint stipulations into the record:

1. The operations of Respondent at the Mine at which the citations in this matter were issued are subject to the jurisdiction of the Act.
2. The above-captioned proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission, and its assigned Administrative Law Judges, pursuant to Sections 105 and 113 of the Act.
3. Respondent was an “operator,” as defined in §3(d) of the Act, 30 U.S.C. § 802(d), at the Mine at which the Citations in this matter were used.
4. The Citations in this matter were issued and served by a duly authorized representative of the Secretary of Labor upon an agent of Respondent at the date, time and place stated therein as required by the Act.
5. True copies of the Citations in this matter were served on Respondent and/or its agents as is required by the Act.
6. The Citations contained in “Exhibit A” attached to the Secretary’s petition in the case bearing Docket No. PENN 2016-132 are authentic copies of the subject Citations, with all the appropriate modifications or abatements, if any.
7. Payment of the total proposed penalty in this matter will not affect Respondent’s ability to continue in business.
8. Respondent demonstrated good faith in the abatement of the alleged violations.
9. Pursuant to 30 C.F.R. §§ 75.402-403, Respondent was not required to rock dust the 3A entry from the face outby 40 feet.
10. With the exception of Respondent’s exhibit R-1, the parties stipulate to the authenticity of the exhibits referenced in the parties Prehearing Statements (with all amendments thereto) but not the relevancy or truth of the matters asserted therein.
11. The R-17 Assessed Violation History Report (Government Exhibit 7) is an authentic copy and may be admitted as a business record of the Mine Safety and Health Administration.

12. Consol escort Albert Stein traveled with the inspector on December 22, 2015 when the rock dust sample at issue was collected.

Sec'y's Br., 3-4.²

SUMMARY OF THE TESTIMONY AND RECORD

On December 22, 2015, Inspector Jason Detrick³ and his supervisor, Inspector Tom Bochna⁴, performed a five day spot-check at the Harvey Mine, operated by the Respondent, Consol Pennsylvania Coal Company. Tr. 28.⁵ The Harvey Mine is a mine that liberates a large amount of methane, necessitating these inspections under the Mine Act. Tr. 28; 30 U.S.C. § 813(i). Inspector Detrick began inspecting on his own in October 2015. Tr. 52-53.

As part of his inspection, Inspector Detrick took a rock dust sample in the No. 3 Entry of the Harvey Mine. Tr. 37. Inspector Detrick also sampled the air for methane concentrations. Tr. 45. The methane detected within the tested area was .5 percent. Tr. 45. The rock dust sample contained 66.2 percent incombustible content. Tr. 48.

² References to the Secretary's brief will be styled as "Sec'y's Br.", followed by the referenced page number. References to the Respondent's brief will be styled as "Resp't's Br.", followed by the referenced page number.

³ At time of hearing, Jason Detrick had been an MSHA inspector for approximately two and a half years. Tr. 19. Before joining MSHA, Detrick was a coal miner for Alpha Natural Resources at the Emerald Coal Mine for seven years. Tr. 19-20. Detrick worked there as a loading machine operator, operated a continuous miner, and was a shield operator. Tr. 19-20. Detrick was also chairman of the health and safety committee at the mine for the United Mine Workers Local 2258, which involved the escorting of inspectors on their inspections. Tr. 20. Prior to his work at Alpha Natural Resources, Detrick worked for approximately a year at the Powhatan No. 6 Mine, in Bel Air, Ohio. Tr. 20. Detrick also worked for Maple Creek Mining, Inc., for two and a half years, beginning as a general laborer. Tr. 21. Before joining Maple Creek Mining, Inc., Detrick worked for Mathies Coal in the supply house of a mine for approximately two and a half years. Tr. 21-22. Detrick testified that as an inspector trainee he took hundreds of rock dust samples. Tr. 23. While working as a miner, Detrick assisted MSHA inspectors with the collection of their rock dust samples. Tr. 25.

⁴ At time of hearing, Thomas Bochna had been a supervisory coal mine health and safety inspector for approximately two and a half years. Tr. 93. Prior to becoming a supervisor, Bochna was a regular mine inspector beginning in February of 2008. Tr. 94. Before joining MSHA, Bochna worked for 30 years at the Emerald Mine in Waynesburg as an hourly employee. Tr. 95. Bochna holds an associate's degree in mining technology from Penn State. Tr. 95. Bochna testified that he has collected hundreds of rock dust samples over the years. Tr. 97.

⁵ References herein to the September 20, 2016 hearing transcript are styled as "Tr.", followed by the referenced page number.

The inspection party on December 22, 2015, consisted not just of Inspectors Detrick and Bochna but also Albert Stein, safety escort for the Harvey Mine, and Steve Apperson, the supervisor of safety at the Mine. Tr. 36. Detrick testified that no mining was ongoing at the time and that ventilation controls were in place and adequate at the time of inspection. Tr. 77. Parameter checks, which generally take place within the first hour of operation and are a prerequisite before progressing into mining, were ongoing. Tr. 43, 84.

Citation No. 9073907 was issued on December 30, 2015, to Albert Stein⁶, the Harvey Mine's company representative, eight days after Inspector Detrick took his sample. GX-1.⁷ The citation alleges a violation of 30 C.F.R. § 75.403, "Maintenance of incombustible content of rock dust." GX-1. The citation's "condition or practice" section reads:

According to lab analysis results of rockdust bag sample 0155450AA collected on 12/22/2015 in the #3 Entry (40 ft outby the face) of the 3A Section Return Spad#87+34.09 the sample is non compliant. The rockdust sample is 66.2% incombustible content instead of the required 82.0% due to the presence of 0.5% of methane. The results of the rockdust analysis are attached to the citation. Standard 75.403 was cited 7 times in two years at mine 3610045 (7 to the operator, 0 to a contractor). Supporting rock dust sample bag numbers: 0155450AA.

GX-1.

The citation was signed by supervising Inspector Bochna. Tr. 68.

According to Inspector Detrick, 30 C.F.R. § 75.403 requires that rock dusting be performed by the Respondent 40 feet outby the working face and beyond. Tr. 58. At hearing, Detrick testified that as part of the inspection he was required to take a rock dust sample in the affected area. Tr. 37. Detrick reported that the sample location was black, dark, and dry, suggesting that adequate rock dust had not been applied in the area. Tr. 37, 41.

Detrick testified that before sampling he stood at the last row of supported bolts from the working face, and Inspector Bochna stood approximately twelve to fourteen feet from the working face. Tr. 37- 38. Using a 25 foot tape measure held at one end by Inspector Bochna, Detrick walked out 25 feet, made a mark on the rib, and waited for Bochna to come up to the

⁶ Albert Stein was employed by Consol Energy for five years at the time of hearing as a safety inspector. Tr. 128, 129. Stein was a safety inspector for Consol at the time of citation as well. Tr. 130. Stein worked at the Harvey Mine for approximately three years. Tr. 129. Prior to working for Consol Energy, Stein was employed by Siemens as an electrical technician. Tr. 129. Stein has his Pennsylvania and West Virginia black hats and is certified for surface and underground mining. Tr. 129. Stein also has his "machine runners." Tr. 129. Prior to his employment at Consol as a safety inspector, Stein was also an industrial engineer and a safety tech. Tr. 130. Stein holds an associate's degree in specialized technologies from Triangle Tech. Tr. 130.

⁷ The Secretary's exhibits are styled "GX-", followed by the exhibit number referenced. The Respondent's exhibits are styled "RX-", followed by the exhibit number referenced.

point marked on the rib. Tr. 75. Then he measured out another 15 feet. Tr. 75. Detrick testified that Inspector Bochna then directed him to give the operator the benefit of the doubt and measure out eight to ten feet further. Tr. 37. At hearing, Inspector Detrick testified that he was “anywhere from 62 to 64 feet out by the working face,” when he took his sample. Tr. 38.

Inspector Detrick testified that he then took a rib sample, putting half in his rock dust bag, and giving the other half to Stein. Tr. 38-39. Inspector Detrick testified that he asked Al Stein if there were any problems with either where or how he took the sample, and that Stein said no. Tr. 39. Inspector Detrick also testified that Harvey Mine safety supervisor Steve Apperson was concerned about the area and that Apperson pledged to work a rock dust hose around the corner to rock dust the area. Tr. 41-42, 46.

Inspector Detrick testified that, while in the area, he used a multi-gas detector and discovered a half percentage of methane, as well as methane in every working face throughout his inspection. Tr. 45. After collecting the rock dust and gas samples, Detrick mailed them to the national laboratory for testing and analysis. Tr. 45. Upon receiving the results of the testing, and learning the samples taken contained 66.2 percent incombustible content (instead of the required 82 percent, given the half percent presence of methane in the gas sample), Inspector Detrick issued Citation No. 9073907. Tr. 47-48.

Detrick testified that he was concerned about a methane ignition within the No. 3 Entry of the Harvey Mine where the samples were taken.⁸ Tr. 48-50. Detrick testified that the combination of float coal dust in the Entry, as well as the presence of methane in the area, would make an ignition more violent than a simple coal dust or methane ignition on its own. Tr. 50. Detrick also testified that the likely injuries from such an ignition would affect ten to twelve people with injuries including smoke inhalation and burns. Tr. 51. These injuries, Detrick testified, could cause lost work days, permanent disabilities, or fatalities. Tr. 51.

During cross-examination, Inspector Detrick acknowledged that MSHA’s Mine Academy trains inspectors to describe with particularity the nature of each alleged violation. Tr. 53. Inspector Detrick acknowledged that, according to MSHA Mine Academy training, each citation or order must include the location of the violation, and that failing to provide the location may impede an operator’s attempts to abate the violation. Tr. 54. Detrick also acknowledged that the Mine Academy instructs inspectors to note the persons who traveled with the inspector, and that the notes and citation must accurately capture all relevant facts of the violation. Tr. 54-55.

⁸ At hearing, the Secretary introduced into evidence an accident investigation report of a methane and/or dust ignition that occurred at the Harvey Mine in January of 2015, as GX-5. Tr. 31-35. The Respondent objected to its introduction on the grounds that Inspector Detrick had no personal knowledge of the events described in the report, that the events occurred nearly two miles from those in the instant matter, and that there was a discrepancy regarding the dating of the report. Tr. 31-32. The Respondent also objected to the introduction of the investigation report on the grounds that the report had no relevance toward determining whether the citation was Significant and Substantial or not. Tr. 32. This Court, as stated at hearing, assigns very little weight to this exhibit, while still considering it admitted, given that the Inspector had no personal knowledge regarding the report. Tr. 33.

In the same exchange at hearing Detrick acknowledged that the citation appeared to state the sample was taken at spad 87 + 34.09.⁹ Tr. 56-57. Inspector Detrick acknowledged that the plain text of the citation appeared to contradict testimony he offered at hearing that the samples were taken over 60 feet from the working face, but asserted that his testimony at hearing was accurate. Tr. 57. Inspector Detrick testified that when he submitted the samples to the national laboratory, he labeled them as taken 40 feet from the working face, and not over 60 feet. Tr. 59. Inspector Detrick testified that his contemporaneous notes contained the measurement of 40 feet outby the working face to mirror the language of the mandatory safety standard in question, 30 C.F.R. § 75.403. Tr. 40; *see also* Tr. 37. Inspector Detrick testified that the spad number was meant to be a reference point for future inspectors to return to in order to ensure proper termination of any potential citation. Tr. 57.

Inspector Detrick testified that he did not note the presence of Inspector Bochna or company representative Steve Apperson in his notes for the December 22 inspection, despite their accompanying him on his inspection that day. Tr. 62-63. Detrick stated at hearing that he did not document in his notes on December 22 any conversation he had with Steve Apperson regarding the condition of the Entry or its need for rock dusting. Tr. 66-67.

Inspector Detrick and the Respondent's attorney, Patrick Dennison, had the following exchange at hearing:

Q: Would you agree with me today, based on your testimony, you didn't accurately describe with particularity the violation?

A: That's correct, and as you said, yes, I was a new inspector at the time, and I'm not using that as a crutch by any means.

Tr. 60.

Inspector Detrick later stated that "[i]f I'm guilty of anything, it is not accurately describing where I took the rock dust sample." Tr. 66. Detrick affirmed that he took an accurate and representative rock dust sample. Tr. 66-7. Inspector Detrick testified that he took his sample from the rib of the affected area and did not take samples from the roof or floor of the mine. Tr. 70. Inspector Detrick testified that he did not cone and quarter the sample as taught at the Mine Academy, and that on most inspections, cone and quartering is not done. Tr. 71.

Inspector Bochna, Detrick's supervisor, also testified regarding the December 22 inspection. Tr. 101. Bochna testified that he stood at roughly the last strap, or the last bolt away from the working face, holding the tape measure, while Detrick drew the length of the tape out. Tr. 100-101. Bochna estimated he was approximately fourteen feet from the working face when the measurements began. Tr. 101. Bochna asserted that Detrick was approximately 50 feet from

⁹ Spads are triangular pieces of metal embedded in the ceiling of a mine, fixed by engineers, and used to guide a mining machine in the course of mining or locate miners in the case of emergency. Tr. 121-22, 165. The numbers indicate the distance from the spad's location to the mine's entrance, which is designated the zero point. Tr. 164, 172. Thus, spad 87 + 34.09 was 8,734 feet and 9 hundredths of a foot from the mine entrance at the time of inspection. Tr. 172.

the working face when the sample was collected. Tr. 101. Bochna could not recall any conversations with either Steve Apperson or Albert Stein during the collection of the sample or after the collection of the sample. Tr. 102.

Looking over Citation No. 9073907, Inspector Bochna testified that it stated the sample was taken 40 feet outby the working face “roughly in that area” of spad 87 + 34.09. Tr. 104; GX-1. Bochna asserted that the operator has an independent incentive to properly mark and measure spads, because failure to do so could lead to unforeseen consequences in the mining process. Tr. 106-107.

Inspector Bochna could not recall at hearing what length tape measure was used in determining the distance for the citation. Tr. 109. Bochna could not recall if he was required to move in order to measure, as would be necessary if Inspector Detrick used a 20 or 25-foot tape measure. Tr. 110. Bochna testified that he would expect to see how the distance was measured in the notes of Citation No. 9073907, but that information was not included in the citation or Inspector Detrick’s contemporaneous notes. Tr. 112. Bochna could not recall definitively at hearing whether Inspector Detrick took a band sample, consisting of the roof, ribs, and floor, or instead a rib sample alone. Tr. 118.

Inspector Bochna testified at hearing that he would not know, simply by reviewing the citation, where exactly the rock dust sample was taken by Inspector Detrick. Tr. 121. He further testified that he did not see Inspector Detrick take a sample. Tr. 126.

At hearing, the Respondent introduced testimony from three witnesses: Albert (“Al”) Stein, Terry Reamer, and Doug Bell.

Albert Stein was a safety inspector at the Harvey Mine in December of 2015, and accompanied the inspectors on their December 22, 2015 inspection. Tr. 129-130, 132. At hearing, Stein testified that he handwrote notes on a notepad during the inspection.¹⁰ Tr. 133. The admission of these notes, introduced in typewritten format as RX-1, was objected to by the Secretary. Tr. 135. The Court overruled the objection and agreed to admit the notes with the caveat that the exhibit's weight would be considered post-hearing. Tr. 137. The weight assigned Stein’s typewritten notes in deciding this case is discussed *infra*.

Stein testified that he saw Inspector Detrick take his rock dust sample. Tr. 139. Stein testified that the sample was taken at spad 87 + 34.09. Tr. 140. Stein testified that neither Inspector Detrick nor Inspector Bochna measured where they sampled. Tr. 141. Stein testified that Inspector Bochna pointed to the spad in the ceiling and directed Inspector Detrick to, “[t]ake [the sample] from this area.” Tr. 141.

Stein testified that Detrick did not take a band sample, but did collect more than just a rib sample. Tr. 142, 162. Stein testified that Inspector Detrick reached as high as he could into the

¹⁰ Stein testified that his typed notes did not differ from his handwritten notes. Tr. 137. Stein testified that once a notepad was filled, it was discarded. Tr. 138. Notes are typed up if a citation is subsequently issued. Tr. 137-138. Once the notes are stored on the mine's computer system, the handwritten notes are discarded. Tr. 137-138.

corner of the roof and rib, and dusted down a sample into his rock dusting pan. Tr. 140. Then, Stein testified, Detrick proceeded to take a sample from the floor on the other side of a canvas ventilation shield. Tr. 141. Stein testified that without a tool to reach the roof, Inspector Detrick could not have taken a sample from the roof. Tr. 143.

Stein's testimony differed from Inspector Detrick's regarding the state of the No. 3 Entry. Tr. 144. Stein testified that the area was a grayish color. Tr. 144. Stein testified that the area was thoroughly rock-dusted and effectively ventilated. Tr. 144. Using a mine map, labeled RX-2, Stein testified that a current of positive air pressure ran along the wall until it came to the working face of the No. 3 Entry. Tr. 144-145. Once the positive air pressure struck the working face, it would rebound back out of the No. 3 Entry and travel to the exterior. Tr. 144-145. The mine map was drafted by Harvey Mine engineers and draftsmen. Tr. 145; GX-2.

Stein, using the mine map, testified that the No. 3 Entry was lined on one side by a canvas shield. Tr. 145; RX-2. This canvas shield helped guide positive air pressure from the No. 1 and No. 2 entries into the No. 3 Entry. Tr. 145. Once the positive air current struck the working face, it would travel along the other side of the canvas shield, eventually to fans that blow the air out of the mine. Tr. 147.

At hearing, Stein used an enlarged section of the mine map to visually demonstrate that on December 22, 2015, spad 87 + 34.09 was marked on the mine map as fifteen feet from the working face. Tr. 148; RX-3. Stein also testified that he took his own methane measurements during the inspection. Tr. 149. Stein testified that, using an Altair pocket detector, he reached up into the corner nearest the last strap from the working face, twelve inches from the roof and rib, and took a gas sample. Tr. 149. According to Stein, the sample read .45 percent methane. Tr. 149. The Altair sample's reading was memorialized in Stein's transcribed notes. Tr. 148, RX-1.

Stein testified that the roof and ribs were in good condition in the No. 3 Entry. Tr. 150. Stein testified that "Tensar" brand roof mesh was secured between straps of bolts placed every four to five feet. Tr. 150-151. Stein also testified that there was no mining ongoing in the No. 3 Entry on December 22, 2015. Tr. 151-152. Eventually mining would begin again in the section. Tr. 157.

The Respondent introduced Terry Reamer¹¹ at hearing, a draftsman and surveyor-transit man at the Harvey Mine.¹² Tr. 169.

¹¹ Reamer worked with Consol for over twelve years at the time of hearing. Tr. 168. Reamer worked previously as a draftsman at Mine 84. Tr. 168. Reamer has his Pennsylvania experienced miner card, as well as assistant mine foreman papers. Tr. 169. Reamer also took an associate's degree in drafting and design, as well as a bachelor's degree in industrial technology, from California University of Pennsylvania. Tr. 169-170.

¹² The Secretary objected to the testimony of Terry Reamer and Doug Bell, two of the Respondent's witnesses at the hearing. Tr. 166-167. The Secretary argued at hearing that the testimony of Terry Reamer and Doug Bell should be restricted to what each had personal knowledge of. Tr. 166-167. The Secretary contended this was due to Reamer and Bell's status as

As a surveyor and draftsman, Reamer was responsible for map-making at the Harvey Mine, as well as advancing the sights of the Harvey Mine while underground. Tr. 170-171. Advancing a sight involves taking a previous day's sight and beginning from that point. Tr. 170. Afterward, Reamer uses a back sight to advance a line of sight to the furthest in-by point of the Entry. Tr. 171. This is necessary to keep mining on course, as well as keeping detailed records of the mine's layout for mapping purposes. Tr. 171. Reamer testified that spads are used as guideposts to measure distances within the mine, sometimes as fixed points for advancing the sights. Tr. 172.

Reamer testified that he installed spad 87 + 34.09 on December 16, 2015. Tr. 173. A copy of Reamer's time book, labeled RX-5, was admitted, which appears to show that Reamer recorded advancing the sights in the No. 3 Entry on December 16, 2015. Tr. 173-174; RX-5. A copy of the mine's underground field notes from December 15-16, labeled RX-6, were used by the witness to support his testimony. Tr. 174-175. Reamer testified that the underground field notes from that day, as seen in RX-6, include an Entry listing spad 87 + 34.09. Tr. 176; RX-6.

Reamer testified that he shared the location of the spad with his colleague, Doug Bell. Tr. 178.

Doug Bell¹³ testified at hearing for the Respondent. Tr. 178. He testified that, on December 15, 2015, he was employed as a transit-operator and drafter in the Harvey Mine. Tr. 181. Bell's duties included using a surveying instrument, called a "transit," to locate and map out parts of the mine. Tr. 182. Using distances from the company field book, Bell drafted maps of the mine in computer software. Tr. 183.

Bell testified that he measured the distance from spad 87 + 34.09 to the working face. Tr. 185; RX-6. This was performed on December 30, 2015, as part of a monthly review conducted by the mine to determine how much mining had taken place in the last 30 days. Tr. 185. Bell testified that on December 30, 2015, spad no. 87 + 34.09 was fifteen feet distant from the working face. Tr. 185. Bell also testified that the distance of the spad from the working face could not have changed between December 22, 2015 and December 30, 2015, as no mining had taken place in the No. 3 Entry until January of 2016. Tr. 189.

lay witnesses without personal knowledge of the events of December 22, 2015. Tr. 166-167. The Court allowed both to testify at hearing.

¹³ Doug Bell, a current employee of the Harvey Mine, began work there in May of 2012 as a transit operator. Tr. 179. He still held this position at time of hearing. Tr. 179. Prior to work at the Harvey Mine, Bell worked for Consol Energy out of the Monongah office as a surface and underground surveyor, responsible for the survey of three mines. Tr. 179-180. Prior to his work at Monongah, Bell was an engineering technician at Mine 84. Tr. 180. Bell also has his Pennsylvania miners papers, as well as his "machine runners." Tr. 181. Bell has two associate's degrees, one in land surveying, the other in forestry technology, both from Glenville State College. Tr. 181. Bell had been engaged in survey work for fifteen years at time of hearing. Tr. 181.

LAW AND REGULATIONS

Burden of Proof and Standard of Proof

The Secretary must prove the basis of a violation by a preponderance of the evidence. *Jim Walter Resources, Inc.*, 28 FMSHRC 983, 992 (Dec. 2006), *RAG Cumberland Resources, Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987). This includes every element of the citation. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.*, 17 FMSHRC 872, 878 (Aug. 2008).

The Commission has held that “[t]he burden of showing something by a ‘preponderance of the evidence’ the most common standard in the civil law, simply requires the trier of fact ‘to believe that the existence of a fact is more probable than its nonexistence.’” *RAG Cumberland Resources Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), quoting *Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California*, 508 U.S. 602, 622 (1993).

The United States Supreme Court has held that “[b]efore any such burden can be satisfied in the first instance, the factfinder must evaluate the raw evidence, finding it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty.” *Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California*, 508 U.S. 602, 622 (1993). The assessment of evidence is a process of weighing, rather than mere counting: “[T]here is a distinction between civil and criminal cases in respect to the degree or quantum of evidence necessary to justify the [trier of fact] in finding their verdict. In civil cases their duty is to weigh the evidence carefully, and to find for the party in whose favor it preponderates.” *Lilienthal's Tobacco v. United States*, 97 U.S. 237, 266 (1877).¹⁴

Assessment of Credibility

As trier of fact, this Court is free to accept or reject, in whole or in part, the testimony of any witness. In resolving any conflicts in testimony, this Court has taken into consideration the demeanor of witnesses, their interests in the case’s outcome, or lack thereof, consistencies or inconsistencies in each witness’s testimony, and any other corroborative or conflicting evidence of record. Any failure to provide detail as to each witness’s testimony is not to be deemed a failure on the Court’s part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

¹⁴ “What is the most acceptable meaning of the phrase, proof by a preponderance, or greater weight, of the evidence? Certainly the phrase does not mean simple volume of evidence or number of witnesses. *One definition is that evidence preponderates when it is more convincing to the trier than the opposing evidence.* This is a simple commonsense explanation which will be understood by jurors and could hardly be misleading in the ordinary case.” 2 McCormick On Evid. § 339 (7th ed.), emphasis added.

Regulations

30 C.F.R. Section 75.402, “**Rock dusting**,” provides that:

All underground areas of a coal mine, except those areas in which the dust is too wet or too high in incombustible content to propagate an explosion, shall be rock dusted to within 40 feet of all working faces, unless such areas are inaccessible or unsafe to enter or unless the Secretary or his authorized representative permits an exception upon his finding that such exception shall not pose a hazard to the miners. All crosscuts that are less than 40 feet from a working face shall also be rock dusted.

30 C.F.R. § 75.402.

30 C.F.R. Section 75.403, “**Maintenance of incombustible content of rock dust**,” provides that:

Where rock dust is required to be applied, it shall be distributed upon the top floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall not be less than 80 percent. Where methane is present in any ventilating current, the percent of incombustible content of such combined dust shall be increased 0.4 percent for each 0.1 percent of methane.

30 C.F.R. § 75.403.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Contentions of the Parties

The Secretary contends that he has proven a violation of 30 C.F.R. § 75.403 beyond a preponderance of the evidence. Sec’y’s Br., 9. The Secretary contends that the alleged violation was Significant and Substantial (S&S) and reasonably likely to cause an injury resulting in Lost Workdays or Restricted Duty to at least one miner. Sec’y’s Br., 14-20. The Secretary further argues that the violation was the product of the operator’s moderate negligence. Sec’y’s Br., 20.

The Respondent contends that there was no violation of 30 C.F.R. § 75.403 as Consol was not required to rock dust where the sample was collected. Resp’t’s Br., 8-19. The Respondent contends in the alternative that even if the sample was collected more than 40 feet from the working face, the Secretary failed to demonstrate the sample was representative of the No. 3 entry. Resp’t’s Br., 19-21. The Respondent further argues that the Significant and Substantial (S&S) designation and the gravity determination made by the Secretary were improper. Resp’t’s Br., 21- 28. The Respondent finally contends that the negligence determination made by the Secretary was improper. Resp’t’s Br., 28-30.

The Secretary Failed to Carry His Burden of Proving a Violation by a Preponderance of the Evidence

MSHA's website for "Most Frequently Cited Standards of 2015; Underground – Coal" ranks 30 C.F.R. § 75.403 as the fourth most cited mandatory safety standard that year; in 2015 alone the Secretary alleged over 1,683 violations of the 30 C.F.R. § 75.403 in underground coal mines, comprising 4.34% of all alleged violations within the set.¹⁵

In order to show that 30 C.F.R. § 75.403 has been violated, the Secretary must present persuasive evidence that the operator failed to apply a sufficient amount of incombustible material in a mine. In other words, the Secretary must present persuasive evidence that the operator failed to rock dust an area adequately. Thus, the relevant element to be determined in this matter is whether sufficient evidence has been presented to prove that the sample was taken more than 40 feet from the working face. The Court finds that the Secretary failed to present sufficient evidence for the proposition, and therefore vacates the citation.

A. The Secretary Failed to Present Sufficient Evidence that the Sample Was Taken More Than Forty Feet from the Working Face

In presenting his case, the Secretary asks the Court to disregard the plain language of the citation, as well as contemporaneous documentation, by arguing that the sample was not taken at spad 87 + 34.09, and, that the sample was not taken forty feet from the working face. Instead, the Secretary's witnesses alleged at hearing the sample was taken significantly more than forty feet from the working face (the witnesses differed on how much further it was), and that spad 87 + 34.09 was written as a marker for abatement of a future, hypothetical citation. Tr. 13, 41, 58, 101.

The Commission has held that an inspector's testimony, standing alone, if found credible and reliable, may constitute sufficient evidence to prove the existence of a safety violation and support an S&S finding. *See Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-1279 (Dec. 1998) (holding that the opinion of an investigator that a violation is S&S is entitled to substantial weight); *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135-136, (7th Cir. 1995) (ALJ did not abuse discretion in crediting expert opinion of experienced inspector); and *Cement Division., National Gypsum Co.*, 3 FMSHRC 822, 825-826 (Apr. 1981) (regarding the probative value of inspector's judgment).

Determining the credibility and reliability of any witness's testimony is the province of this Court. *Hall v. Clinchfield Coal Co.*, 8 FMSHRC 1624, 1629 (Nov. 1986) (holding that a judge's credibility resolutions cannot be overturned lightly). The Commission is reluctant to disturb credibility determinations, but will, if it finds they are self-contradictory or if there is no evidence, or dubious evidence, to support them. *Austin Powder Co. and Bruce Eaton*, 21 FMSHRC 18, 22 (Jan. 1999).

¹⁵ This information is publicly available on MSHA's website. MSHA, *Most Frequently Cited Standards of 2015; Underground – Coal*, <http://arlweb.msha.gov/stats/top20viols/top20viols.asp> (last visited Dec. 28, 2016).

The Secretary asks that the Court privilege the testimony of two inspectors over the contemporaneous documentation accompanying the citation, as well as the citation itself, in arguing for the fact of the violation. However, the testimony presented by the Secretary's witnesses lacked sufficient indicia of reliability to be deemed credible enough for the Court to overlook the plain language of the citation, as well as contemporaneous documentation.

The Secretary's witnesses in this matter differed from one another on basic facts regarding the violation. Most critically, they disagreed on where the sample was taken. *Compare* Tr. 41 *with* Tr. 101. But these disagreements in testimony extended to other areas as well. For instance, Inspectors Detrick and Bochna appeared to disagree on where the working face began for rock-dusting purposes. *Compare* Tr. 75-76 *with* Tr. 100-101, 107-109, 111. Inspector Detrick testified at hearing that the face for rock-dusting purposes began at the last row of bolts, or the last row of straps. Tr. 75-76. Inspector Bochna testified that the working face did not begin at the last row of bolts. Tr. 100-101, 107-109, 111.

In another instance, the inspectors' testimony was inconsistent and at times self-contradictory when it came to the condition of the No. 3 Entry. Inspector Detrick appeared to be of two minds regarding the condition of the No. 3 Entry. At one point Inspector Detrick testified that the Entry was obviously in violation, black, dark, and dry, with float coal dust everywhere. Tr. 52, 37, 41. Later, under questioning by the Respondent's attorney, Inspector Detrick testified that it appeared there was a violation, but he was not sure. Tr. 82. Detrick's supervisor Inspector Bochna testified that he was unsure if the Entry was improperly rockdusted, and seemed to suggest that it wasn't possible to determine visually if there was a rock-dusting violation. Tr. 114-115.

The inspectors did not corroborate one another's account on the method of measurement. Inspector Detrick agreed with the Respondent's attorney at hearing that a 25 foot tape measure was used to measure the distance from the working face. Tr. 73. But Inspector Bochna could not recall what length tape measure was used. Tr. 109, Tr. 123. Inspector Bochna could not recall if the inspectors had to move to measure forty feet (as would be necessary with a 25 foot tape measure). Tr. 109-110. Inspector Bochna also failed to see the sample collected, as he was possibly walking back to check the return of the No. 3 Entry, and therefore could not recall precisely how and where the sample was taken. Tr. 113, Tr. 126.

The Court considers the most important factual issue to be whether the sample was taken more than forty feet from the working face, because the regulation itself describes this requirement. 30 C.F.R. §§ 75.402-403. Given the Secretary's evidence, the Court has multiple measurements to choose from. First, there is the citation itself, which lists the sample's location as taken at either spad 87 + 34.09 or forty feet from the working face. GX-1. Then there is the testimony of the issuing inspector, who testified that the rock dust sample was taken 62 to 64 feet from the working face. Tr. 38. Later, at the same hearing, the issuing inspector testified that the sample was taken 64 to 65 feet from the working face. Tr. 41. Finally, supervising Inspector Bochna testified that the sample was taken 50 feet from the working face. Tr. 101.

Moreover, the location of where the sample was taken was challenged by a witness of the Respondent's.

Stein testified that the sample was taken roughly fifteen feet from the working face at spad 87 + 34.09.¹⁶ Tr. 140-141. The Respondent also presented evidence in the form of transcribed notes, describing the sample as “taken at spad 87 + 34.09 less than 40’ outby the face of #3.” RX-1. Stein testified at hearing that these transcribed notes are a faithful representation of contemporaneous notes he took while accompanying the inspectors on the inspection. Tr. 134-135. Stein further testified at hearing that the original contemporaneous notes were part of a notepad that has since been discarded as the notepad became full. Tr. 135. The Secretary stated in his brief that these handwritten notes were never produced during discovery and were discarded following the Respondent’s receipt of the citation, possibly constituting destruction of evidence. Sec’y’s Br., 11. The Court assigns little weight to the exhibit itself, given the difficulties regarding its provenance, and assesses the credibility of Stein’s testimony separately.

The Respondent has demonstrated through testimony and visual aids that spad 87 + 34.09 was close to, if not exactly, fifteen feet from the working face at the time the sample was taken. Tr. 148, 173, 185; RX-3; RX-6. The spad was installed on December 15, 2015, and there is persuasive evidence to suggest that the spad remained fifteen feet from the working face for some time after the sample was taken.¹⁷ Tr. 187-188; RX-3; RX-5; RX-6. Thus, if the sample was taken at spad 87 + 34.09, it is not evidence of a violation.

It is not clear to the Court upon review of the citation and the inspector’s contemporaneous notes that spad 87 + 34.09 was identified as a marker for future termination of a hypothetical citation, as alleged by the Inspector at hearing. Tr. 58. Instead the citation, the notes drafted to accompany the citation on December 30, 2015, and the inspector’s contemporaneous notes of December 22, 2015 all appear to identify spad 87 + 34.09 as the location where the sample was taken, with no mention of the spad as a future locus for abatement. GX-1; GX-2; GX-3. Inspector Detrick’s December 30, 2015, notes state the sample was “collected on 12/22/15 in the #3 entry 40’ outby the face @ spad # 87 + 34.09.” GX-2, (emphasis added).

¹⁶ In his post-hearing brief, the Solicitor argues that one would expect Stein to voice an objection to the sample’s location at the time of its taking “rather than remaining silent and challenging the location after the Mine had incurred the costs of litigation.” Sec’y’s Br., 13. Stein’s failure to challenge the inspector’s sampling location and/or technique could have arisen out of a fear of retaliation or a hope that the inspector would not issue a citation at all. Stein did say during questioning that if he thought an inspector was doing something improper, he would point it out to him, but then quickly noted that the inspector had a right to take samples wherever he liked, suggesting that is why he didn’t object. Tr. 162-163. Regardless, it is not the Respondent’s duty to object to a sample’s validity at its taking in order to preserve such an objection at the hearing stage.

¹⁷ The Solicitor objected at hearing to the inclusion of Reamer and Bell’s testimony because the two lacked personal knowledge of the conditions that led to the violation. Tr. 166-167. After considering the testimony of both witnesses and the Respondent’s accompanying exhibits, the Court notes that the salient facts raised by all concern the location of spad 87 + 34.09. The Court credits the testimony and evidence as having established that no mining occurred between the taking of the sample and the issuance of the citation, and that the location of spad 87 + 34.09 remained unchanged at 15 feet from the working face.

The inspector's assertion that he wrote in the body of the citation and accompanying notes "40 feet outby the working face" to "mirror" the language of 30 C.F.R. § 75.403 does not inspire confidence in the Court. Tr. 37, 40. This assertion creates, essentially, a second and undefined measurement point, to be defined later by the Secretary's witnesses at hearing, raising questions of reliability. If the sample was taken more than twenty feet from where the Respondent was required to begin rock-dusting, as the issuing Inspector alleged at hearing, including that information in the citation would better support a finding of violation. Similarly, if spad 87 + 34.09 was meant solely as a location for future inspectors to use to terminate a citation, including the spad number without a reference to how far the sample was taken from the spad could confuse a future inspector, especially if mining took place in the interim.

The Court is aware that, in the past, the Commission has held that it does not demand inspectors write citations with the legal precision of attorneys sitting in comfortable offices. *Sunbelt Rentals, Inc.*; *LVR, Inc.*; and *Roanoke Cement Co. LLC*, 38 FMSHRC 1619, n. 10 (July 2016). This citation's imprecision, however, arises from a deliberate decision made by the issuing inspector. Tr. 37, 40. This imprecision in drafting could be overcome if the Secretary's witnesses presented a credible account of the inspection's events, but they failed to do so.

Not only do the Secretary's witnesses differ from the stated language of the citation, they differ with one another. These discrepancies in the Secretary's evidence create a contradictory narrative that the Court cannot credit. Accordingly, the Court cannot find there was sufficient evidence presented to prove that the sample was taken more than forty feet from the working face, as required by the regulation.

B. The Citation Met the Requirements of Section 104(a)

In a separate argument for vacating Citation No. 9073907, the Respondent's attorney contends that the citation as issued failed to satisfy the requirements of Section 104(a) of the Mine Act.

Section 104(a) states that:

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this chapter has violated this chapter, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this chapter, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the chapter, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this chapter.

30 U.S.C. § 814(a).

Citation 9073907's "condition or practice" reads:

According to lab analysis results of rockdust bag sample 0155450AA collected on 12/22/2015 in the #3 Entry (40 ft outby the face) of the 3A Section Return Spad#87+34.09 the sample is non compliant. The rockdust sample is 66.2% incombustible content instead of the required 82.0% due to the presence of 0.5% of methane. The results of the rockdust analysis are attached to the citation. Standard 75.403 was cited 7 times in two years at mine 3610045 (7 to the operator, 0 to a contractor). Supporting rock dust sample bag numbers: 0155450AA.

GX-1.

The Respondent contends that the citation fails to satisfy Section 104(a)'s requirements because "Mr. Detrick testified that he failed [to describe with particularity the condition in the Citation and to accurately capture the facts in his notes to substantiate a violation]." Resp't's Br., 14. The Respondent's attorney appears to be referring, primarily, to this line of questioning at hearing:

Q: Would you agree with me today, based on your testimony, you didn't accurately describe with particularity the violation?

A: That's correct, and as you said, yes, I was a new inspector at the time, and I'm not using that as a crutch by any means.

Tr. 60.

The requirements of 104(a) are not so restrictive as the Respondent contends. Section 104(a) merely requires that a particular set of facts, and a particular safety standard, be identified in the body of the citation. The purpose for this is two-fold: firstly, to enable a Respondent to defend against the citation in a hearing, and secondly, to enable a Respondent to abate the citation in order to terminate it. The citation as issued in the present litigation satisfies both requirements, and therefore, is valid under Section 104(a). *See, e.g., Pocahontas Coal Co., LLC*, 38 FMSHRC 176, 182, (Feb. 2016); *Summit, Inc. v. Secretary of Labor*, 19 FMSHRC 429, 431 (Feb. 1997) (ALJ Manning); *Asarco Mining Co.*, 15 FMSHRC 1303, 1306 (July 1993); *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 379 (Mar. 1993).

Recently, the Commission addressed a very similar argument in the matter of *Mill Branch Coal Corporation*. *Mill Branch Coal Corporation v. Secretary of Labor*, 37 FMSHRC 1383 (Jul. 2015). In that case the Commission reasoned that:

We find unpersuasive Mill Branch's argument that the orders fail to sufficiently identify hazardous conditions. Section 104(a) requires that each "citation shall be in writing and shall describe with particularity the nature of the violation" 30 U.S.C. § 814(a). We have recognized that the requirement for specificity serves the purpose of allowing the operator to discern what conditions require abatement,

and to adequately prepare for a hearing on the matter. *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 379 (Mar. 1993) (citations omitted). Mill Branch's extensive examination and cross-examination of witnesses concerning the cited conditions demonstrate that Mill Branch was able to adequately prepare for trial and knew what conditions would have required abatement.

Mill Branch Coal Corporation, 37 FMSHRC 1383, n. 17.

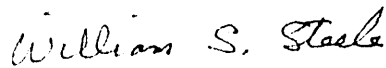
This Court finds that, as in *Mill Branch*, the Respondent in this case clearly knew what safety standard was at issue, and how to properly defend against the Secretary's allegation of a violation. Moreover, the Respondent's attorney's extensive examination of witnesses and cross-examination of the inspectors concerning the cited condition demonstrates that the Respondent was able to prepare for trial, and knew what conditions would have required abatement. Therefore, this Court rejects the Respondent's 104(a) argument, and instead vacates the citation on evidentiary grounds.

Conclusion

The Secretary has not carried his burden by the preponderance of the evidence that a violation of 30 C.F.R. § 75.403 occurred. Therefore, the Court finds that the citation at issue should be vacated. For this reason the Court makes no finding regarding the significant and substantial (S&S), negligence, and gravity determinations made by Inspector Detrick.

ORDER

Accordingly, it is hereby **ORDERED** that Citation No. 9073907 is **VACATED**.



William S. Steele
Administrative Law Judge

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