

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 4, 2015

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

v.

Drummond Company, Inc.,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. SE-2014-0197
A.C. No. 01-02901-344208

Mine: Shoal Creek Mine

**DECISION AND ORDER AFFIRMING BENCH DECISION
AND APPROVING SETTLEMENT**

Appearances: Latasha Thomas, Esq., U.S. Department of Labor, Office of the Solicitor,
Nashville, Tennessee for Petitioner

Noelle Holladay True, Esq., Rajkovich, Williams, Kilpatrick & True,
PLLC, Lexington, Kentucky for Respondent

Before: Judge McCarthy

I. Statement of the Case

This case is before me upon a Petition for Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

Docket No. SE 2014-0197 involves two citations, Citation Nos. 8527643 and 8527576. The parties submitted a joint motion to approve settlement of Citation No. 8527643. Citation No. 8527576 remains in dispute.

On January 15, 2014, MSHA inspector Timothy Fisher issued section 104(a) Citation No. 857576 to Drummond’s Shoal Creek Mine. P. Ex. 1. The citation alleged a violation of 30 C.F.R. § 75.1506(a)(1), which sets forth standards for underground coal mine refuge alternative components.¹ Specifically, the citation states:

¹ 30 C.F.R. § 75.1506 (a)(1) states that “[e]ach operator shall provide refuge alternatives and components as follows: (1) Pre-fabricated self-contained units, including the structural, breathable air, air monitoring, and harmful gas removal components of the unit, shall be approved under 30 CFR Part 7”

The operator has not installed components approved pursuant to 30 CFR part 7 in its 24 person Mine Arc refuge alternative serial No. MAA-110 located on the West Main (MMU-001-0) section at survey spad no. 87 + 82 (crosscut no. 103) in the crosscut between no. 3 and the no. 4 entry. After December 31, 2013, all refuge alternatives used in underground coal mines must be equipped with Part 7 approved breathable air, harmful gas removal and air-monitoring components. This refuge alternative was not equipped with these Part 7 approved components. This refuge alternative is a critical part of MMU-001-0.

P. Ex. 1. The citation was designated as unlikely to result in a fatal injury, with 24 persons affected, as a result of low negligence. P. Ex. 1. A \$946 civil penalty was proposed. Tr. 138.

The Respondent argues that the citation should be vacated because it had installed or ordered all components as they were approved by MSHA. Further, the Respondent asserts that it has a “valid, bona fide, written purchase order” for the last component MSHA approved, which is consistent with the preamble to the final rule (73 Fed. Reg. 80657) and with MSHA’s Published Guidance, “Q&A on Refuge Alternatives Requirements.” R. Br. 3.² Respondent also argues that if a violation is found, the fatal designation was incorrect, and that the Respondent acted with no negligence, rather than low negligence. R. Br. 3.

The Secretary contends that Drummond’s approval plate was not in a conspicuous position on its refuge chamber and that the plate did not indicate whether the required components were installed. Tr. 14. The Secretary also argues that Part 7 approved components were available and that the installation in a mine depended on the interaction between manufacturers and operators. Tr. 15.

The issues presented are whether Respondent violated 30 C.F.R. § 75.1506(a)(1), whether any such violation could have reasonably been expected to result in fatality, and whether negligence was properly designated as “low.”

A hearing was held in Birmingham, Alabama on April 7, 2015. Witnesses were sequestered. At hearing, the parties stipulated to the following:

1. Drummond Company, Inc., is subject to the Federal Mine Safety and Health Act of 1977.
2. Drummond Company, Inc., mines and produces coal which enters into and which has an effect upon interstate commerce within the meaning of the Federal Mine Safety and Health Act of 1977.

² The purchase order was received into evidence as Respondent’s Exhibit 1. R. Ex. 1; Tr. 9. The List of Part 7 approvals was received into evidence as Respondent’s Exhibit 2. R. 2; Tr. 9.

3. Drummond Company, Inc., is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission. Further, the administrative law judge has the authority to hear this case and issue a decision.
4. A reasonable penalty will not affect Drummond Company, Inc.'s ability to remain in business.
5. Drummond Company, Inc. is a large-sized operator.
6. A true copy of Citation No. 8527576 was served on Drummond Company, Inc. as required by the Mine Act.
7. Drummond Company, Inc. did abate Citation No. 8527576 in good faith.

Jt. Ex. 1; Tr. 7.

After hearing witness testimony and considering record evidence and opening and closing statements from both parties, I issued a bench decision vacating Citation No. 8527576.³ Having carefully reviewed the record, I affirm my bench decision, as set forth below.

II. Bench Decision and Affirmation

The standard that was cited by Inspector Foster on 1/15/2014 states that each operator shall provide refuge alternatives and components as follows:

Paragraph 1, prefabricated self-contained units including the structural breathable air, air-monitoring, and harmful gas removal components of the unit shall be approved under 30 CFR Part 7.

I find that the Respondent, Drummond, was in compliance with the standard because the air-monitoring component was approved by MSHA on 9/11/2013. When Drummond was unable to obtain from a long-time provider of similar components, MineARC, the equipment, by late December, Mr. Clements, according to his credited testimony, felt that he was being given the runaround by Mr. Rau, and he took prudent steps to contact the MSHA-approved provider, Industrial Scientific Corp., through one of their distributors. Respondent had submitted a purchase order, Respondent's Exhibit 1, which is dated November 26, 2013 with a

³ In resolving conflicts in testimony, I have taken into consideration the demeanor of the witnesses, their interests in this matter, the inherent probability of their testimony in light of other events, corroboration or lack of corroboration for testimony given, experience and credentials, and consistency, or lack thereof, within the testimony of witnesses and between the testimony of witnesses.

confirmed delivery date or due date of 12/27/2013, which would have met the 12/31/2013 deadline. The original question and answers dated July 9th, 2013 from MSHA's Refuge Alternative Requirements, and from April 29th, 2009 concerning the Final Rule on Refuge Alternatives provides that a purchase order with a firm delivery date may be accepted by the district manager.

Mr. Clements credibly testified that [he has] a past practice of dealing with the District, through purchase orders, and when he was -- when he has presented a purchase order, MSHA has dealt with him favorably or leniently. In this case, they failed to do so based on instructions from the inspector that if they did not see the approval tag when they went underground, they were to issue a citation.

I find under those circumstances that this citation is an abuse of discretion and that the Respondent was in compliance with the standard.

Tr. 140-41.

Based upon further reflection and review of the transcript, I find that MSHA's failure to approve the MineArc air-monitoring component by the December 31, 2013 deadline or to accept the purchase order for the MSHA-approved Industrial Scientific air monitoring component left Drummond in a position amounting to impossibility of performance due to factors outside its control, despite its good-faith efforts at compliance. Furthermore, additional facts support my conclusion that it was arbitrary and capricious and an abuse of discretion for MSHA to issue Citation No. 8527576. In these circumstances, the citation is appropriately vacated.

The following facts are instructive. It is undisputed that by December 31, 2013, all underground mine operators were required to install three MSHA-approved components in their refuge chambers, a breathable air component, a harmful gas removal component, and an air monitoring component. Tr. 27. Drummond had the MSHA-approved component for breathable air and harmful gas. Tr. 122. Drummond had an air monitoring component on the cited refuge chamber, but it was not the approved version required by MSHA. Tr. 104, 122.

Initially, Drummond attempted to order the air-monitoring component from MineArc, who had manufactured the refuge chamber itself. In early 2013 through November 2013, Clement was in contact with a sales manager from MineArc to order the air-monitoring component. Tr. 90-93, 130. Thereafter, toward late November 2013, Clements determined that MineArc was giving him the runaround, especially since MSHA had not yet approved MineArc's air-monitoring component, and that Drummond was running out of time to meet the December 31, 2013 deadline. Tr. 113, 131. Clements also discovered that the MSHA-approved Industrial Scientific air-monitoring component was the same as the MineArc version. Tr. 114.

Accordingly, toward late November 2013, Drummond ordered an MSHA-approved air-monitoring component from Industrial Scientific based on its determination that the MineArc component would not meet the deadline. Tr. 113-14, 131; R. Ex. 1. The Industrial Scientific air-monitoring component had been approved by MSHA on September 11, 2013, a few months prior to MSHA's own December 31, 2013 deadline. R. Ex. 2.

Despite the proximity of the impending deadline, Industrial Scientific was the first manufacturer to have its air-monitoring component approved by MSHA. Tr. 110. The Industrial Scientific purchase order was dispatched on December 2, 2013 and scheduled to arrive on December 27, 2013, four days before the deadline. Tr. 115. United Central, the distributor for Industrial Scientific, did not meet the purchase order deadline. 113, 115.

In the meantime, the instant MSHA inspection took place on January 13, 2014. When inspector Foster arrived to check for the required refuge alternative components, Clements told Foster that he had ordered the MSHA-approved air monitoring component from Industrial Scientific, but it had not yet been delivered by distributor United Central. Tr. 94. Clements gave Foster a purchase order for the component. Tr. 102. Foster went back to his supervisor armed with this information, but was directed to issue the citation anyway and told how to write it. Foster returned to the mine and issued said citation on January 15, 2014. Tr. 31, 79; P. Ex. 1. The January 15, 2014 citation gave Drummond two weeks to abate, with no explanation for the time period chosen, and no rationale given at hearing. Tr. 118.

The MSHA-approved Industrial Scientific air monitoring component was received and installed by Drummond on January 16, 2014, just one day after the citation issued. Tr. 115. The MineArc component that Drummond initially sought to order was eventually approved by MSHA on January 17, 2014, two days after the citation issued. Tr. 112. Thus, despite its best efforts to comply with the cited standard by installing an MSHA-approved air-monitoring component in the cited refuge chamber, Drummond was unable to do so as a practical matter until MSHA issued the requisite MineArc approval for the air-monitoring component (Tr. 122) or the Industrial Scientific purchase order was delivered. *See generally Climax Molybdenum Co.*, 2 FMSHRC 1884, 1886 (July 1980) (ALJ) (vacating a citation based on respondent's defense of impossibility of compliance). *See also Jim Walter Resources, Inc.*, 25 FMSHRC 435, n. 11 (July 2003) (ALJ) ("It is not accurate to state . . . that an operator is always liable for a violative condition. There are exceptions, impossibility of compliance being one."); *Buffalo Mining Co.*, 2 IBMA 226, 259 (Sept. 1973) (holding that under the 1969 Coal Act, Congress did not intend that a civil penalty be assessed "where compliance with a mandatory health or safety standard is impossible due to unavailability of equipment, materials, or qualified technicians.") Based on these facts, I find that Drummond has established a valid defense of impossibility of performance.⁴

⁴ Although air-monitoring component models from other manufacturers were approved by MSHA after Industrial Scientific, they were approved shortly before MSHA's deadline of December 31, 2013. Strata Safety Product's air-monitoring component was approved by MSHA

In addition, the facts establish that MSHA's issuance of the citation was arbitrary and capricious and an abuse of discretion because contrary to its past practice of relying on purchase orders with a confirmed delivery date for refuge alternatives or components. Concededly, when analyzing MSHA's action, the Commission may not substitute its own judgment for that of the agency, but must consider whether the agency's decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *See e.g., Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 48-49 (1983). Expert discretion is said to be the lifeblood of the administrative process, but there must be a cogent explanation for agency action, including a rational connection between facts and judgment to pass muster under arbitrary and capricious analysis. *Id.* Consistency with past practice is pertinent in examining whether an agency's action is arbitrary and capricious. *Puerto Rico Sun Oil Co. v. U.S. E.P.A.*, 8 F.3d 73, 77 (1st Cir. 1993). I find that issuance of the instant citation was arbitrary and capricious and amounted to an abuse of discretion.

The record establishes that MSHA's past practice led Drummond to believe that it could rely on a purchase order for the MSHA-approved component that arrived a day after the citation issued. Tr. 102, 121. For example, when new refuge alternatives were required in underground mines, parts were often on back order with manufacturers because the entire industry needed them. Tr. 121. Thus, during prior inspections of refuge alternatives, MSHA accepted purchase orders from Drummond as proof of compliance with the new refuge alternative standard. Tr. 93, 121. In this case, Clements credibly testified that he gave inspector Foster an Industrial Scientific purchase order for the MSHA-approved air-monitoring component on the day of the inspection based upon his reliance on this past practice. Tr. 102.

Further, the issuance of this citation appears to be an abuse of discretion on the part of MSHA. The Commission has found an abuse of discretion when "there is no evidence to support the decision or if the decision is based on an improper understanding of the law." *Utah Power & Light Co.*, 13 FMSHRC 1617, 1623 n.6 (Oct. 1991), *quoting Bothyo v. Moyer*, 772 F.2d 353, 355 (7th Cir. 1985); *see also Energy West Mining Co.*, 18 FMSHRC 565, 569 (Apr. 1996). In particular, the Commission has held that an inspector abuses his discretion when he uses no independent judgment in issuing an order, but rather indiscriminately complies with a directive to issue based solely on a single criterion. *Cumberland Coal Resources, LP*, 28 FMSHRC 545, 555-58 (Aug. 2006) (holding there was an abuse of discretion where inspector was given instructions to issue an order based on a single criterion and thus had no discretion to make a reasonable investigation or use independent judgment).

on November 22, 2013; ChemBio Shelter's component was approved by MSHA on December 12, 2013; A.L. Lee's component was approved by MSHA on December 23, 2013; and Mine Shield's component was approved by MSHA on December 26, 2013. R. Ex. 2. These air-monitoring components, if ordered, would likely encounter the same delays in shipment, or simply not arrive at the mine by the deadline, even if dispatched on the day of approval. In any event, I find that Drummond was justified in relying on a purchase order from Industrial Scientific, which had a confirmed delivery date that fell within the MSHA deadline. I further find that the subsequent MSHA approvals were issued so close to the deadline that it made it practically impossible for an operator to comply with the standard.

In this case, inspector Foster was instructed by his superiors to issue a citation to the operator if there was no approval tag on the outside of the refuge alternative. Tr. 24. Foster was not directed to check for the requisite components, and he was not aware if the components were installed, only that there was no approval tag affixed to the refuge chamber. Tr. 26. According to Foster, inspectors were told how to write citations for refuge alternative components, including the format and verbiage to be used in the citation. Tr. 31. In fact, during a pre-inspection conference, Foster indicated to safety superintendent Clements that he was going to issue a citation for the absent component even before he saw the chamber or went underground. Tr. 96. Foster did not use his own judgment with regard to gravity designations, and MSHA did not take surrounding circumstances into account, including the purchase order with confirmed delivery date for the MSHA-approved Industrial Scientific air monitoring component. Tr. 31.

For all of the foregoing reasons, Citation No. 8527576 is vacated.

II. Joint Motion to Approve Settlement

I have reviewed the parties' Joint Motion to Approve Partial Settlement. A reduction in penalty from \$1,203 to \$963 is proposed under the Settlement Agreement. The parties request that Citation No. 8527643 be modified to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," and to delete the "significant and substantial" designation.

I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.⁵

III. Order

For the reasons set forth above, Citation No. 8527576 is **VACATED**.

The motion for approval of settlement of Citation No. 8527643 is **GRANTED**.

It is **ORDERED** that Citation No. 8527643 be **MODIFIED** to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," and to delete the "significant and substantial" designation.

⁵ Pursuant to 29 C.F.R. 2700.1(b) and Federal Rule of Civil Procedure 12(f), I strike paragraphs three and four of the motion as immaterial and impertinent to the issues legitimately before the Commission. The paragraphs incorrectly cite and interpret the case law and misrepresent the statute, regulations, and Congressional intent regarding settlement under the Mine Act. Instead, I have evaluated the proposed settlement in accordance with sections 110(i) and 110(k) of the Act.

To the extent Respondent has not already done so, within 30 days of the date of this decision, Respondent, Drummond Company, Inc., is **ORDERED TO PAY** a total civil penalty of \$963.00 for the settled citation.⁶

Thomas P. McCarthy

Thomas P. McCarthy
Administrative Law Judge

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⁶ Payment should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.