FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19th STREET, SUITE 443
DENVER, CO 80202-2536
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

June 23, 2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. THE DOE RUN COMPANY, Respondent.	CIVIL PENALTY PROCEEDING Docket No. CENT 2015-49 A.C. No. 23-00458-362943 Mine: Sweetwater Mine/Mill

DECISION

Appearances: Leigh Burleson, United States Department of Labor, Office of the Solicitor, Kansas City, Missouri, for Petitioner;

R. Henry Moore, Jackson Kelly PLLC, Pittsburgh, Pennsylvania for Respondent.

Before: Judge Miller

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). This docket involves two 104(a) citations with a total proposed penalty of $14,711.00. Prior to the hearing, the Secretary notified the court that he had elected to vacate Citation No. 8768882. Accordingly, only Citation No. 8768883, with a proposed penalty of $3,405.00, remained for hearing. The parties presented testimony and evidence regarding the single remaining citation at a hearing held in Saint Louis, Missouri.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Doe Run Company's Sweetwater Mine/Mill is an underground lead and zinc mine in Reynolds County, Missouri. The parties have stipulated to the jurisdiction of MHSA and the Commission. Jt. Stip. ¶¶ 3, 4.

Citation No. 8768883 was issued by Inspector Nicholas Dunne on August 26, 2014 pursuant to section 104(a) of the Act for an alleged violation of 30 C.F.R. § 57.5002. The citation alleges that five miners were overexposed to nitrogen dioxide and that, while gas levels had been monitored prior to work beginning on the shift, they had not been monitored since that

time and a gas meter was not available to conduct gas monitoring. Dunne determined that the condition was reasonably likely to result in a permanently disabling injury, was S&S, affected five persons, and was a result of high negligence on the part of the operator.

On September 10, 2014, Dunne, based on information he obtained regarding the training on the proper use of gas monitoring equipment, modified the alleged negligence from "high" to "moderate." Further, on September 15, 2014, Dunne modified the citation to remove any reference to the issuance of an imminent danger order after the imminent danger order, which was issued alongside the citation, was vacated. The Secretary has proposed a civil penalty in the amount of $3,405.00 for this alleged violation.

The parties have stipulated that, following the inspection, the imminent danger order was vacated and the inspector's gas reading was invalidated because the gas detector used by the inspector was not properly calibrated. Further, the parties agree that the Secretary relied on the same information when agreeing to vacate Citation No. 8768882, the other citation at issue in the docket before me. For the reasons set forth below, I also vacate Citation No. 8768883 and dismiss this proceeding.

The Violation

On August 26, 2014 MSHA Inspector Nicholas Dunne traveled to the Sweetwater Mine/Mill to conduct a regularly scheduled inspection. During his inspection, Dunne took a nitrogen dioxide gas reading which showed elevated levels of the gas in the 7Y1 working section.. While Dunne was not aware at the time, the gas reading would later be shown to be inaccurate. In addition to taking the reading, Dunne learned that, while gas levels had been monitored in development area 7Y1 prior to work beginning on the shift, no monitoring had taken place since the beginning of the shift and, at the time of the inspection, there was no gas monitoring device in the area. Dunne observed diesel equipment being operated in the area and determined that, even without an adequate gas reading, the exhaust that was likely present would have exposed miners in the area to unsafe levels of nitrogen dioxide. Based on his observations, Dunne issued Citation No. 8768883 for a violation of section 57.5002 of the Secretary's regulations.

The Secretary argues that, because diesel equipment was being operated near miners in the cited area, and no gas monitoring devices were present, the mine violated section 57.5002. Doe Run, conversely, argues that the citation should be vacated because the standard requires gas surveys only when "necessary," and, here, based on the mine's experience and gas testing, surveys were not needed because there was no expectation that there would be excessive levels of nitrogen dioxide where only one piece of diesel equipment was being operated in a fairly open area.

Inspector Dunne has been with MSHA since August 2011. He has worked in the mining industry since 1990, first in an underground mine and next as an employee of an explosives company. He explained that the Sweetwater mine is an underground metal mine that primarily focuses on the mining of lead, with some ancillary metals.

Inspector Dunne explained the normal process for blasting and loading material at this mine. Generally, miners will enter an area, drill holes, place blasting material and then, at the end of the shift, blast the area. Following the blast, prior to the next shift, the mine monitors the air and, when it is safe, miners re-enter the area to scale down and load out the material. Dunne testified that the mine has headers approximately 20 feet tall and the roadways and travelways are 20 to 25 feet wide.

At the time of Dunne's inspection of the 7Y1 development area, three miners were loading blasting materials into drilled holes. The blasting materials were being loaded from a diesel blast truck, which was the only piece of diesel equipment operating at the time and, accordingly, the only source of nitrogen dioxide in the area. At some point two additional miners, who had completed work in another area, arrived and assisted the three miners with the loading of the blasting materials. Dunne testified that there was a ventilation tube about 300 feet back from the area where the five miners were working. While Dunne was told that miners were instructed to extend the ventilation tube another one hundred feet, they had failed to do so. Dunne did not say if he could feel the air movement or if he checked for any air movement. No other evidence was presented that miners, or the area in which they were working, were receiving inadequate air or ventilation. As Pratt, the mine manager, explained in his testimony, the ventilation tube is sometimes 800 feet from the working area and the ventilation remains adequate.

Based upon his observations, Dunne believed that, because the ventilation tube had not been moved and a piece of diesel equipment was running as the blasting material was being loaded, it was necessary for the mine to check for nitrogen dioxide, a gas emitted from diesel equipment. He explained that since the blasting area sloped downhill approximately 30 feet in elevation, he would expect nitrogen dioxide from the diesel equipment to be in the air. There were no gas meters in the work area to monitor the air quality and Dunne believed that there should have been at least one monitor present. While Dunne was told that the air was monitored prior to the shift and the gas detectors were taken to be re-calibrated, he stated that the air should be continuously monitored and the removal of the air meters made that impossible. Dunne did not explain why constant monitoring was "necessary," as required by the standard he cited. Additionally, since Dunne's gas detector was not functioning properly, there is no evidence that the area contained nitrogen dioxide in levels that would raise concerns.

Shawn Pratt, the mine manager, has worked for Doe Run for 18 years and is familiar with gas detectors and the practices for monitoring air at the mine. He explained that there were gas monitors available at the mine, including in underground locations, and stated that a reading had been taken before the shift and there was no evidence of anything out of the ordinary.

Pratt explained that haul crews, along with any other employee who has a concern, can take one of six gas detectors from the foreman's office underground or at the surface. Normally, miners assigned to load a shot do not take a detector because, based on the experience of the mine, nitrogen dioxide is not found at that point in the mining process and, therefore, it is not necessary to take continuous readings. Further, he stated that many, but not all, employees

regularly carry a monitor. Pratt testified that he carries a gas detector underground but has never seen high levels of gas while a shot is being loaded.

Pratt said that based on the way this mine operates and its history, the mine has not seen high nitrogen dioxide levels during the blasting part of the mining process, given that one piece of diesel equipment is in use during that process. He explained that one of the miners loading explosives when the inspector arrived, told him that he experienced no problems with the air during the shift. At hearing, Pratt acknowledged that there are times when it is necessary to take air readings during the mining cycle when the diesel equipment is in operation, but that is normally after the blasting phase when material is removed from the area by diesel equipment. During that phase, he explained, there may be several trucks and a loader in the work area, and it is important to monitor the gas levels. However, in Pratt's experience, taking the additional readings is not needed during the part of the mining cycle when blasting material is being loaded into the drill holes. Rather, during that phase, the air is monitored prior to miners entering into a working area, which, in this case, was done prior to the start of the shift.

Pratt maintained that, in addition, diesel has a distinct odor that would be an indication that the air may require additional monitoring. In his experience, you can smell diesel at about 2 to 3 ppm of nitrogen dioxide. He asserted that, here, no miner indicated that the odor of diesel was present. If an odor had been present, miners would have been able to stop and request that an air reading be taken. While Dunne testified that it is the mine's policy to remove workers when 5 ppm of nitrogen dioxide is found to exist, Pratt's experience has been if anyone smells diesel, they will immediately check the air to determine if nitrogen dioxide is present and at what levels. If a miner observes an area is smoky or detects the smell of diesel or unusual odors, the workers will be pulled back until an air reading can be taken.

Section 57.5002 of the Secretary's regulations requires that "[d]ust, gas, mist, and fume surveys shall be conducted as frequently as necessary to determine the adequacy of control measures." 30 C.F.R. § 57.5002. Commission judges have found violations of this standard where the operator did not have devices to test the mine atmosphere and where the operator failed to take any surveys despite knowledge that miners were working with a material that was an airborne hazard. In *AT&E Enterprises, Inc.*, 17 FMSHRC 739 (May 1995) (ALJ), a violation of 57.5002 was found where a mine had no devices to test the mine atmosphere. There, the mine "violated the standard because it did not, and could not, test the air as frequently as necessary to determine the adequacy of its air control measures." *Id.* at 742. In *FMC Wyoming Corp.*, 10 FMSHRC 822 (June 1988) (ALJ), *rev'd on other grounds*, 11 FMSHRC 1622 (Sept. 1989), the judge applied the reasonably prudent person standard and found that a violation of section 57.5002 existed where a mine operator failed to take dust surveys during the overhaul of a turbine, which included the removal of insulation containing asbestos.

In *Newmont Gold Co.*, 18 FMSHRC 668, 673 (Apr. 1996) (ALJ), a judge, when addressing the identically worded standard applicable to surface metal non-metal mines, reasoned that the regulatory language requiring surveys "as frequently as necessary to determine the adequacy of control measures" seems to make clear that the pivotal issue in an analysis under the standard is whether previous surveys were made and, if so, whether one could reasonably

conclude that they were made as frequently as necessary given the conditions and circumstances at the time of the alleged violation.

I agree that the "reasonably prudent person" standard applies in reviewing this citation. In *Lafarge North America*, 35 FMSHRC 3497, 3500-3501 (Dec. 2013), the Commission explained that it will apply the "reasonably prudent person" test to determine if a condition or practice violates a broadly worded mine safety standard. Here, the cited standard uses the phrase "as necessary" to describe when surveys shall be conducted. The use of that phrase evidences a broadly worded standard. *See Ideal Cement Co.*, 12 FMSHRC 2409, 2415-2416 (Nov. 1990). Under the reasonably prudent person test, "the violative condition is appropriately measured against the standard of whether a reasonably prudent person familiar *with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation.*" *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982) (emphasis added). Here, in order to sustain the violation, the Secretary must show that a person with knowledge of the mining industry would realize that in this situation, it was necessary to take gas surveys given the circumstances described by the two witnesses.

I find that the Secretary has not shown that a reasonably prudent person would have known to take the gas surveys. "In an enforcement proceeding under the Act, the Secretary has the burden of proving all elements of an alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd, Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *ASARCO Mining Co.*, 15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)." Here, the testimony of the inspector demonstrates only that the air tube was not as close to the working area as he would have liked it to have been. The air movement and ventilation effectiveness were not addressed by the inspector. Moreover, while his testimony indicates that there were no gas meters in the area, there was no discussion of when they were removed, where they could be found, or how quickly they could be found and used. Most importantly, there was no evidence from the Secretary about when it is necessary to take a gas survey in the circumstances observed by the inspector. While the inspector testified that monitoring should be continuous, he did not explain why continuous monitoring was "necessary" under these circumstances, which is part of the Secretary's burden for this particular standard. I find that the fact that the ventilation tube was not extended closer to the working area, along with the fact that one piece of diesel equipment was operating in this fairly open area, is not enough to demonstrate a violation.

Even though the absence of monitors may in some cases be enough to show that the air was not monitored "as necessary", the Secretary has not met the burden of proof to show that monitoring was necessary in this instance. The standard does not require constant monitoring. Rather, it limits monitoring to when it is necessary. While it may be a good practice for for miners to carry an air monitor that will alarm if nitrogen dioxide reaches an unhealthy level, the Secretary has not shown that it was necessary under these particular circumstances.

In addition, the Respondent presented evidence as to why it was <u>not</u> necessary to take an air reading at the time in question. Pratt is an experienced miner, with knowledge of the mining

process, and particularly the processes at this mine. He also understands when high levels of gas may be present during the course of the production cycle. Consequently, he is aware of when it is necessary to take a reading at this mine. Pratt did not believe it was necessary to check the levels of NO2 during the process of loading blasts, after the initial test at the beginning of the shift. He would find it necessary in the event one of the miners had reason to believe there was a problem with the air quality while loading of the blasts, which would have been unusual in his estimation. I find that a reasonably prudent person, with knowledge of this mine, would not have found it necessary to take a gas survey at the time.

The Secretary did not overcome the evidence presented by the mine operator, did not meet his burden of proof and, therefore, did not demonstrate that a violation occurred as cited. Therefore, the citation is **VACATED**.

II. ORDER

At hearing, and on the record, the Secretary gave notice that he had vacated Citation No. 8768882. Given my above findings, Citation No. 8768883 is **VACATED**. Since both citations in this docket have been vacated, this penalty proceeding is **DISMISSED**.

Margaret A. Miller
Administrative Law Judge

Distribution:

Leigh Burleson, U.S. Department of Labor, Office of the Solicitor, Two Pershing Square Building, 2300 Main St., Suite 1020, Kansas City, Missouri 64108

R. Henry Moore, Jackson Kelly PLLC, Three Gateway Center, 401 Liberty Ave., Suite 1500, Pittsburgh, Pennsylvania 15222