

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR 11 2016

ROSEBUD MINING CO.,
Contestant,

v.

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

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

v.

ROSEBUD MINING CO.,
Respondent.

CONTEST PROCEEDING

Docket No. PENN 2015-268-R
Citation No. 7032005; 07/06/2015

Mine: Brush Valley
Mine ID: 36-09437

CIVIL PENALTY PROCEEDING

Docket No. PENN 2015-318
A.C. No. 36-09437-388936

Mine: Brush Valley

ORDER DENYING RESPONDENT’S MOTION FOR SUMMARY DECISION
ORDER GRANTING SECRETARY’S MOTION FOR SUMMARY DECISION
ORDER TO PAY

Before: Judge Harner

On September 22, 2015, Rosebud Mining Company (“Contestant” or “RMC”) filed with the undersigned a Motion for Summary Decision in contest case PENN 2015-268-R. This docket includes one citation (No. 7032005) for a violation of 30 C.F.R. §75.370(d), which prohibits the implementation of a ventilation plan before it is approved by the District Manager.¹

¹ The full text of the Regulation is as follows: “No proposed ventilation plan shall be implemented before it is approved by the district manager. Any intentional change to the ventilation system that alters the main air current or any split of the main air current in a manner that could materially affect the safety and health of the miners, or any change to the information required in § 75.371 shall be submitted to and approved by the district manager before implementation.” 30 C.F.R. § 75.370.

The citation is in the nature of a technical citation intended to bring the matter before a judge, and was assessed as No Likelihood, No Lost Workdays, Non-S&S, No Negligence, 0 Persons Affected, with a civil penalty of \$100.00. The Secretary filed, on October 14, 2015, a motion requesting that summary decision be denied to the Contestant, and instead be ruled in favor of the Secretary. For the following reasons, I deny the Contestant's Motion for Summary Decision and grant the Secretary's Motion for Summary Decision.

Undisputed Facts

Both parties have stipulated that there are no material facts at issue in this case. The Contestant submitted a list of "Proposed Facts," of which the Secretary agreed with all but a few. I find the several facts over which there are disagreements to constitute either conclusions, speculative, or restatements of regulatory requirements. The mutually agreed-upon proposed facts are as follows:

- 1) Rosebud Mining Company's (RMC) Brush Valley Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977 ("The Act").
- 2) The Administrative Law Judge has jurisdiction to hear the contest of the penalties and citations at issue here.
- 3) Citation No. 7032005 was properly served by a duly authorized representative of the Department of Labor upon an agent of Rosebud on the date and place indicated therein.
- 4) Rosebud Mining Company owns and operates the Brush Valley Mine.
- 5) The Brush Valley Mine accesses the Lower Kittanning coal seam via two slope entries.
- 6) The Brush Valley Mine utilizes two continuous miner sections to extract coal using the room and pillar method.
- 7) Approved seals are utilized to seal off (isolate) worked out areas from the active mine workings.
- 8) Seal Plans are developed by the Operator and submitted to MSHA for approval. If approved, the seal plan is incorporated into the mine's ventilation plan.
- 9) RMC prepared a plan dated March 6, 2015, to seal the Bl Butt at Brush Valley Mine (36-0943 7).
- 10) A decision letter from District Manager Thomas E. Light dated April 9, 2015, stated that the proposed plan has been reviewed and cannot be approved because (1) *"The review revealed that the Bl Butt is to be sealed with two sets of seals. "* and (2) *"The set of seals identified as "#1, #2 & #3" does not meet the requirements of 30 CFR 75.337(h)."*
- 11) MSHA and RMC held a meeting on April 30, 2015, to discuss the seal plan. The issues with the seal plan were not resolved and RMC asked for a technical citation to be issued so the plan issues could be resolved.

- 12) Citation #7032005 issued on July 6, 2015, and states "The proposed plan did not include provisions for installing a water drainage system in each set of seals."
- 13) Four seals must be constructed to isolate the BI Butt from the remaining active workings of Brush Valley Mine (i.e., create a BI Butt sealed area).
 - a. The BI Butt sealed area comprises a series of entries that are interconnected.
 - b. There is no barrier within the BI Butt sealed area that separates entries behind Seals# 1-3 from entries behind Seal #4.
 - c. Construction of seals # 1-3 alone does not create a sealed area.
 - d. Construction of seal #4 alone does not create a sealed area.
- 14) Maps/drawings submitted with the BI Butt seal plan designate areas on the perimeter of the BI Butt sealed area where mining is prohibited; these mining limits ensure that barriers of sufficient size will be established as mining proceeds adjacent to the sealed area. These minimum barrier sizes are adequate and consistent with those determined using customary engineering design procedures.
 - a. Seals # 1-4 in conjunction with established barrier pillars effectively isolate the BI Butt sealed area from the remaining active workings at Brush Valley Mine.
- 15) Criteria pertaining to drainage systems in mine seals are addressed in 30 CFR §75.337(h) and in MSHA approved seal installation guidelines (developed under §75.335(b)(1)(i)), MSHA Approval Number: 102M-02.1 120 psi ORICA I MAIN LINE TEKSEAL:
 - a. 30 CFR §75.337(h) *Water drainage system. For each set of seals constructed after April 18, 2008, the seal at the lowest elevation shall have a corrosion resistant, non-metallic water drainage system. Seals shall not impound water or slurry. Water or slurry shall not accumulate within the sealed area to any depth that can adversely affect a seal.*
 - b. 30 CFR §75.335(b)(1) *An engineering design application shall - (i) Address gas sampling pipes, water drainage systems, methods to reduce air leakage, pressure-time curve, fire resistance characteristics, flame spread index, entry size, engineering design and analysis, elasticity of design, material properties, construction specifications, quality control, design references, and other information related to seal construction.*
 - c. Page 9 of the Seal Installation Guidelines for the Orica Main Line Tekseal developed per 30 CFR §75.335(b)(1) states that *"A water drainage system must be installed during seal construction in the lowest elevation seal(s) of the set. This seal is not designed to impound water, other than to a minimal, unavoidable depth. The actual size and number of pipes must be determined by a CPE (certifying professional engineer) based on the anticipated maximum flow rate at the seal location. "*
- 16) The proposed water trap is located at the #4 seal which is at the lowest elevation of all of the proposed BI-Butt seals.
- 17) All seals must be examined on a weekly basis.

- 18) All water traps must be examined (weekly) to make sure they are functioning properly.
- 19) MSHA District 2 Manager, Mr. Light was supplied with all information relied on as exhibits.

Contestant's Motion for Summary Decision, 1-3; *Secretary's Motion for Summary Decision*, 4-5.² In addition to the stipulated facts, the parties each submitted affidavits and documentation supporting their positions.

Summary Decision Standard

The Court may grant summary decision where the “entire record...shows: (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law.” 29 C.F.R. §2700.67(b); *see also UMWA, Local 2368 v. Jim Walter Res., Inc.*, 24 FMSHRC 797, 799 (July 2002); *Energy West Mining*, 17 FMSHRC 1313, 1316 (Aug. 1995) (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986), which interpreted Fed.R.Civ.P. 56). The Commission has analogized its Rule 67 to Federal Rule of Civil Procedure 56, which authorizes summary judgments upon a proper showing of a lack of a genuine, triable issue of material fact. *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007). A material fact is “a fact that is significant or essential to the issue or matter at hand.” *Black's Law Dictionary* (9th ed. 2009, *fact*). “There is a genuine issue of material fact if the nonmoving party has produced evidence such that a reasonable factfinder could return a verdict in its favor.” *Greenberg v. Bellsouth Telecommunications, Inc.*, 498 F.3d 1258, 1263 (11th Cir. 2007)(citation omitted). The court must evaluate the evidence “in the light most favorable to ... the party opposing the motion.” *Hanson Aggregates*, 29 FMSHRC at 9. Any inferences drawn “from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion.” *Id.* Though the moving party bears the initial burden of informing the court of the basis for its motion, it is not required to negate the nonmoving party’s claims. *Celotex*, 477 U.S. at 323. “When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial.’” *Scott v. Harris*, 550 U.S. 372, 380 (2007) (citation omitted).

Analysis

At issue in this case is the definition of the phrase “set of seals” in 30 C.F.R. §75.337(h), and whether the District Manager abused his discretion when he denied Rosebud’s March 06, 2015 seal plan. In the decision letter, the District Manager explained that §75.337(h) Seals #1-3 and Seal #4 are separate “sets of seals” such that each requires a water trap. The Contestant

² Joint Stipulations will hereinafter be cited as Stip., followed by the stipulation number. The Contestant’s Motion will be cited as CMSD, followed by page number, and the Secretary’s Motion will be cited as SMSD, followed by a page number.

argues that the phrase, “set of seals,” by definition implies more than one seal such that Seal #4 cannot constitute a “set of seals” that requires a water trap.

Section 75.337(h) (Water Drainage System) of the Regulations states:

For each set of seals constructed after April 18, 2008, the seal at the lowest elevation shall have a corrosion-resistant, non-metallic water drainage system. Seals shall not impound water or slurry. Water or slurry shall not accumulate within the sealed area to any depth that can adversely affect a seal.

30 C.F.R. § 75.337(h).

The Contestant grounds its argument primarily in the Merriam Webster Dictionary definition of “set,” as “a number of things of the same kind that belong or are used together.” Using that definition, the Respondent argues that the Secretary’s interpretation of the regulation would lead to an absurd result. Furthermore, it offers that if the term “set” is ambiguous, the Secretary’s interpretation should not be granted deference because “it is not logically consistent with the language of the regulation and it serves no permissible regulatory function.” *CMSD* at 7. Accordingly, the Contestant moves this court to find that the District Manger abused his discretion in denying the seal plan.

Alternately, the Secretary argues that though the term “set of seals” is not defined in the Act or Regulations, the plain language is clear when read in context. The Secretary rebuts the Contestant’s appeal to the dictionary by nothing that the mathematical and technical definition of “set” may contain a single unit.³ Furthermore, single seals do occur in mines, and the Contestant’s reading of the Regulation would exempt them from the requirements of Section 75.337(h). Beyond dictionary definitions, the Secretary argues that the District Manager fully considered the details of the plan and he followed MSHA’s reasonable interpretation of the Regulation in denying the plan.

Because the issue presented concerns both the agency interpretation of the Regulation and the District Manager’s denial of the Plan, there are two standards of review that must be applied. First, in determining the proper interpretation of “set of seals” in the Regulations, the agency’s interpretation is given “controlling weight unless it is plainly erroneous or inconsistent with the regulation.” *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *See Also Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994). This requires an analysis of whether the Regulation’s plain meaning is clear or ambiguous, and if ambiguous whether the agency’s interpretation is unreasonable. Following this analysis, it must next be determined whether the District Manager abused his discretion in denying the plan. *Prairie State*

³ Indeed, according to the Oxford English Dictionary, which contains a more complete entry for “set” than Merriam Webster, the term may refer to a number of elements, a single element, or no elements. Though not particularly relevant for the instant inquiry, a “set” may have zero elements contained within it. “set, n.2.” *OED Online*. Oxford University Press, December 2015. Web. 8 March 2016. *See Also* A. Shen & N.K. Vershchagin, *Basic Set Theory*, American Mathematical Society (2000), for a full definition, replete with logic formulas, of “sets.”

Generating Co. LLC v. Sec'y of Labor, MSHA, 2013 WL 3947974, *aff'd*, 792 F.3d 82 (D.C. Cir. 2015). An abuse of discretion occurs where the District Manager's actions are arbitrary or capricious. *Mach Mining, LLC v. Sec'y of Labor, MSHA*, 34 FMSHRC 1784 (Aug. 2012), *aff'd* 728 F.3d 643 (7th Cir. 2013), *cert. den.* No. 13-645, 2014 WL 1515720 (Apr. 21, 2014); *Twentymile Coal Co. v. Sec'y of Labor, MSHA*, 30 FMSHRC 736 (Aug. 29, 2008). This standard simply requires the agency to show that the District Manager made "a full appraisal of the relevant and available facts, and is reasonable in drawing conclusions."⁴ *Prairie State Generating*, 2013 WL at n. 6.

Applying these standards of review, it is clear that the Contestant's arguments fail for several reasons. First, I find Contestant's appeal to Merriam Webster to be a damp squib. The Contestant provides one definition of one word in the regulations, and announces that it is "evident" that a set cannot include one element, and any alternate interpretation would "result in an absurd result."

However, the phrase "set of seals" has no such singular definition. When viewed in the context of the Regulations and the purpose of §76.337(h), it is clear that the Contestant's reading is unnecessarily and artificially narrow. Such a reading runs counter to the general rule that statutes and regulations intended to protect individuals' health and safety must be interpreted in a broad manner to effectuate their goals. *See Rag Shoshone Coal Corp. v. Sec'y of Labor, MSHA*, 23 FMSHRC 407, 422 (Apr. 9, 2001) (ALJ) (citing cases for this proposition). Appealing to dictionaries—from Merriam Webster to the Oxford English Dictionary—simply shows that a "set" may contain a number of elements, a single element, or no elements.

Words are written in context, and they must be read in context. *Mach Mining, LLC v. Sec'y of Labor, MSHA*, 728 F.3d 643, 647 (7th Cir. 2013) ("The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)). Sections 75.334-75.337 clearly concern the sealing off of areas to isolate any problems that occur in those areas. Section 75.337(h) fits this general plan by preventing water and slurry accumulations. *See Final Rule and Commentary, Sealing of Abandoned Areas*, 73 FR 21182-01 (April 18, 2008). The Contestant's argument that the required water drainage systems would only be necessary for multiple seals makes little sense in light of the regulation and its context. Water and slurry could accumulate at one seal just as they could accumulate at multiple seals. Therefore, the plain meaning of the Regulation clearly includes a single seal. Such a reading as urged by the Contestant would exempt single seals not only from §75.337(h), but also §75.364(c)(3) (concerning the testing of methane) and §75.336(a)(iii) (concerning the monitoring of atmosphere behind a seal). *Declaration of Stephen*

⁴ The Commission has explained that "this is an appropriately deferential standard, as judges (as well as Commissioners) are not always best-equipped to decide technical issues regarding ventilation and roof control. They are instead charged with deciding whether the district manager has made a fair and informed suitability determination." *Prairie State Generating Co. LLC v. Sec'y of Labor, MSHA*, 2013 WL 3947974, at n. 6, *aff'd*, 792 F.3d 82 (D.C. Cir. 2015).

G. Sawyer, Jr., Sec. Ex-3, ¶ 8. There is no conceivable reason why MSHA would have intended for water and methane to be contained in very specific ways for multiple seals, but not for singular seals. The clear intent of these regulations is to keep miners safe, and an exemption for single seals would not serve this purpose. Therefore, I find that the phrase “set of seals” can mean one seal for purposes of the regulation.

Based on the stipulated facts it appears that the District Manager, Thomas E. Light, had a reasonable factual and legal basis to conclude that the Contestant’s plan violated §75.337(h). The District Manager was supplied with all relevant information regarding the seals. Stip. 19. He considered the fact that Seals #1-3 are within 50 feet of each other. *Declaration of Thomas E. Light*, Sec. Ex.-1, ¶ 9. Seal #4 is located approximately 2,600 feet from Seals #1-3, and this distance is occupied by an uninterrupted barrier of coal that runs along the B Mains. *Id.* at ¶¶ 9-10. Furthermore, Seal #4 is 123 feet lower than Seals #1-3. Att. F-1. The District Manager was concerned that a roof or rib fall could block water from reaching Seal #4, thereby allowing water to accumulate behind Seals #1-3. *Id.* at ¶ 11.

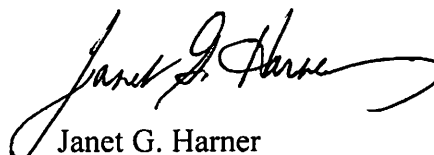
Furthermore, the District Manager also consulted with staff who were assigned to review the proposed plan in light of the conditions at the mine. *Id.* at ¶ 14. Staff such as Supervisory Specialist Jeremy Williams and Civil Engineer Stephen Sawyer each reviewed the proposed plans and concluded that they did not comply with the regulations. *Declaration of Jeremy S. Williams*, Sec. Ex-2; *Declaration of Stephen G. Sawyer, Jr.*, Sec. Ex-3. Specifically Williams was concerned not only with the possibility of a roof or rib fall, but also with the effect on methane readings under §75.364(c)(3) of not having separate water traps at Seals #1-3 and at #4. *Declaration of Jeremy S. Williams*, Sec. Ex-2, ¶¶ 13-19. Sawyer reiterated these concerns and emphasized that the proposed plan would have an adverse effect on barometric pressure and methane testing. *Declaration of Stephen G. Sawyer, Jr.*, Sec. Ex-3.

The District Manager communicated his concerns to the Contestant. *Declaration of Thomas E. Light*, Sec. Ex.-1, ¶ 12. He considered all the information submitted, as well as MSHA guidance regarding seals, and drew factual conclusions based on his knowledge and experience. *Declaration of Thomas E. Light*, Sec. Ex.-1, ¶¶ 25-26. In rejecting the proposed plan, he stated that the information had been reviewed, and “the review revealed that the B1 Butt is to be sealed with two sets of seals. The set of seals identified as ‘#1, #2 & 3’ does not meet the requirements of 30 C.F.R. 75.337(h).” *Stip.* 10; *Resp.* Ex-B.

The stipulations and documents show that the District Manager fully considered the relevant and available facts and drew reasonable conclusions based on the regulations, MSHA guidelines, and his experience and knowledge. Therefore, I find that he did not abuse his discretion.

Having found that the District Manager did not abuse his discretion in rejecting the proposed plan on the basis that it did not comply with §75.337(h), I find that Contestant violated §75.370(d) by taking steps to implement the plan. Wherefore, the Secretary’s Motion for Summary Decision is **GRANTED**, the Contestant’s Motion for Summary Decision is **DENIED**,

and Rosebud Mining Co., is hereby **ORDERED** to pay the Secretary of Labor the sum of \$100.00 within 30 days of the date of this Order.⁵


Janet G. Harner
Administrative Law Judge

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⁵ Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390