

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, D.C. 20001

January 26, 2009

R S & W COAL COMPANY, INC., Contestant	:	CONTEST PROCEEDING
	:	
	:	Docket No. PENN 2009-97-R
	:	Citation No. 7011308; 11/03/2008
v.	:	Order No. 7011310; 11/05/2008
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH Respondent	:	R S & W Drift
	:	Mine ID 36-01818
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B & B COAL COMPANY, Contestant	:	CONTEST PROCEEDING
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	:	Docket No. PENN 2009-98-R
	:	Citation No. 7001051; 11/03/2008
v.	:	Order No. 7001053; 11/05/2008
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH Respondent	:	Rock Ridge No. 1 Slope
	:	Mine ID 36-07741
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BEAR GAP COAL COMPANY, Contestant	:	CONTEST PROCEEDING
	:	
	:	Docket No. PENN 2009-99-R
	:	Citation No. 7011309; 11/03/2008
v.	:	Order No. 7011311; 11/05/2008
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH Respondent	:	N & L Slope
	:	Mine ID 36-02203
	:	

DECISION

Appearances: Lynne Bowman Dunbar, Esq. and Thomas A. Paige, Esq., U.S. Department of Labor, Arlington, Virginia, on behalf of the Respondent
Adele L. Abrams, Esq., Law Office of Adele L. Abrams, P.C., Beltsville, Maryland, on behalf of the Contestants

Before: Judge Barbour

The captioned contest proceedings arise under Section 105(d) of the Federal Mine Safety and Health Act of 1977. 30 U.S.C. § 815(d). In the cases RS&W Coal Company, Inc. (RS&W), B&B Coal Company (B&B) and Bear Gap Coal Company (Bear Gap) contest the validity of citations issued to each company for alleged violations of mandatory safety standard 30 C.F.R. § 75.370(a)(1).¹ The citations allege the companies violated the standard when they failed to revise their ventilation plans to require the main mine fans at the mines to be run for 1-½ hours prior to any persons entering the mines.

The citation issued to RS&W, which is substantially identical to the other two citations, states in pertinent part:

On October 29, 2008, the approved ventilation plan [for the RS&W mine] was revoked, however the operator is continuing to operate without an approved ventilation plan in violation of . . . [section] 75.370(a)(1). On July 1, July 9, and December 11, 2007, MSHA sent letters to . . . [RS&W] requesting . . . a revised ventilation plan be submitted to the district manager. The operator was notified that, based on the results of the analysis of air samples, MSHA has determined that the ventilation plan in effect is not adequate and, in MSHA's view, the plan should require that the main mine fan be run continuously, i.e., during both active and idle shifts. In September[,] 2008, following extended negotiations, the Independent Miners Association and MSHA agreed that . . . [RS&W] would operate the main mine fan for 1 ½ hours before each shift, turning off the fan daily. On October 21, 2008, MSHA sent a letter to . . . [RS&W] giving [it] until October 28, 2008 to submit the revised ventilation plan and warning . . . that failure to submit the revision would result in revocation of the approved plan. The operator failed to submit the revision. The condition has been designated non-S&S [i.e., not a significant and substantial contribution to a mine safety hazard] because the violation is the result of an impasse between the

¹The standard requires operators to “develop and follow a ventilation plan approved by the [MSHA] district manager.” Once filed and approved, the agency retains the right to request revisions of the plan and the right to revoke the plan if, after good faith negotiations, the district manager and the operator fail to agree on the revisions. If the plan is revoked, the operator may not operate its mine until it adopts a revised plan that is approved by the district manager.

parties in negotiating changes to the ventilation plan. During the period in which the operator is attempting to achieve abatement, it shall follow the terms of the original ventilation plan.

Gov't Exh. 2A.

As the citation indicates, once MSHA, acting through its district manager, determined revised ventilation plans were necessary, the agency and the companies entered into protracted negotiations. During the negotiations the companies were represented by the Independent Miners Association (IMA).² At one point, the agency believed the representative and, thus, the companies agreed to revise their plans in a way that would be acceptable to MSHA. However, the companies maintained no such agreement was reached, and they did not submit revised plans to the district manager. This led the agency to notify the companies by letter dated October 21, 2008, that they had until October 28 to submit the plans and, if they failed to do so, their existing plans would be revoked. On October 29, MSHA revoked the companies' existing plans because the companies had not complied with the agency's demands.

The contested citations were issued on November 3, 2008, and the agency gave the companies until November 5, 2008, to submit acceptable plans (i.e., plans containing the provision that the main mine fan would be run for at least 1-½ hours before the miners entered the mines at the start of the workday and before underground power circuits were energized). The companies were warned if they did not submit acceptable plans, orders would be issued closing their mines. Revised plans were not submitted, and the closure orders were issued.

The orders prompted the companies to request their contests of the validity of the underlying section 104(a) citations be heard on an expedited basis. The cases were consolidated and assigned to me, and following discussions with counsels, MSHA agreed to suspend enforcement of the orders until the contest proceedings could be heard and decided.

The matters were called for trial on December 9, 2008, in Pottsville, Pennsylvania. At the commencement of the hearing I summarized the issues.

The issues involved include whether the companies violated [s]ection 75.370(a)(1). As I understand the law, the Secretary will have the burden of proving the unsuitability of the provision [of the ventilation plans] . . . [to which she objects] and the . . . suitability of the provision upon which she . . . insist[s]. This means the Secretary must prove a specific mine

²The IMA is an organization of small, independent anthracite mine operators whose purpose is to protect the interests of its members and to promote the use of anthracite coal.

hazard . . . that is not addressed in the previously approved plan[s], and she must establish that the hazardous condition, assuming she proves one, is corrected by the [provision] she is insisting upon. The Secretary cannot use the . . . approval process . . . to impose . . . requirement[s] . . . well suited to all or nearly all mines so . . . the Secretary must show the provision addresses specific conditions in the mines involved.

Tr. 6-7.

Opening statements then were offered by counsels, and one and one-half days of trial followed, during which the Secretary presented the principal part of her case-in-chief and one of the companies' witnesses was heard. During the noon break on the second day of the hearing (December 10), the parties resumed negotiations to determine if they could resolve their differences. At the beginning of the afternoon session, counsel for the companies announced the parties had reach an agreement. Counsel stated:

[T]he parties . . . have come to an agreement after good faith negotiations that will modify the existing plans and also modify the position taken by MSHA . . . [T]he same provisions will apply to the revised plans for all three mines and everything will remain the same[,] with the change being made to the portion of the plan[s] that stipulates how long the fan must run following resumption of mining in an idle period The current plans say the main mine fan will be operated for a minimum of one half hour after the pressure recorder indicates that the normal mine ventilating pressure has been reached prior to any person entering the mine. That will be changed to one hour. The Secretary's position [originally] had been one and one half hours . . . [In addition,] the main mine fan will be operated for a minimum of one hour after the pressure recorder indicates . . . the normal mine ventilating pressure has been reached prior to energizing power circuits entering underground areas of the mine [and] prior to any person entering the mine. . . . All other provisions of the currently approved plans will remain in effect.

The Government has agreed . . . the operators will have until 5[:00] p.m., Eastern Standard Time on Friday, December 12, 2009[,] to submit a revised . . . section of the plan[s] to the MSHA District . . . office, that . . . [they] can be submitted by facsimile [copy] but . . . [the companies] will also mail a hard copy to the MSHA office for inclusion in the official mine ventilation plan.

Tr. 421-422.

Counsel for the companies further requested the contested citations be vacated, but[,] if they were not vacated[,] that the violations of section 75.370(a)(1) contained in the citations be assessed at not more than \$112, which amount the operators agreed to pay. Tr. 423-424. Counsel for the Secretary agreed with the provisions of the settlement as stated by counsel for the companies, and the hearing was closed. Tr. 424.

ORDER

The settlement, which conforms in all respects with the letter and spirit of the Act, **IS APPROVED**. I note the companies have filed with the agency revisions of their ventilation plans containing the agreed-upon provisions, and the agency has approved the revised plans. Nothing more remains to be done with regard to revising the plans.

With regard to the civil penalties for the violations of section 75.370(a)(1), in a letter dated January 9, 2009, one of the Secretary's counsels stated the agency assessed a civil penalty of \$162 against B&B Coal Co., and the company paid the amount. She further stated, upon issuance of this decision approving the settlement, MSHA will amend B&B's penalty to \$112 to conform to the settlement and will credit or refund \$50 to B&B. Counsel also stated MSHA assessed civil penalties of \$100 each against RS&W and Bear Gap for their violations of section 75.370(a)(1) and will consider payments in that amount as fully satisfying the agreement.

ACCORDINGLY, within 30 days of the date of this decision, the Secretary **IS ORDERED** to credit or refund \$50 to B&B in compliance with the terms of the settlement, and, if they have not already done so, within the same 30 days, RS&W and Bear Gap **ARE ORDERED** to pay \$100 each to the Secretary for the violations of section 75.370(a)(1) contained in the contested citations. Upon the Secretary's credit or refund to B&B of \$50 and RS&W's and Bear Gap's payment to the Secretary of \$100 each, these proceedings **ARE DISMISSED**.

David F. Barbour
Administrative Law Judge

Distribution: (Certified Mail)

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