

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 5, 2010

R S & W COAL COMPANY, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. PENN 2010-259-R
	:	Citation No. 7000438; 01/19/2010
v.	:	
	:	Docket No. PENN 2010-260-R
SECRETARY OF LABOR,	:	Order No. 7000439; 01/19/2010
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Mine ID 36-01818
Respondent	:	R S & W Drift

DECISION

Appearances: John Strawn, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, on behalf of the Secretary of Labor; Randy Rothermel Sr., President, RS&W Coal Company, Inc., Klingerstown, Pennsylvania, *pro se*, on behalf of the Contestant.

Before: Judge Paez

These cases are before me on a request for expedited hearing by RS&W Coal Company, Inc. (“RS&W”), to contest Citation No. 7000438 and Withdrawal Order No. 7000439, both issued on January 19, 2010, pursuant to sections 104(a) and 104(b), respectively, of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the “Act”).¹ The general issues before me are whether RS&W violated 30 C.F.R. § 75.370(a)(1) for operating a mine without an approved ventilation plan, as alleged by the Secretary; and whether the Secretary properly issued a withdrawal order under section 104(b) of the Act for RS&W’s alleged failure to abate the citation.

A hearing was held on February 18, 2010 in Harrisburg, Pennsylvania, pursuant to section 105 of the Act, 30 U.S.C. § 815. At the hearing, the parties stipulated that RS&W is subject to the jurisdiction of the Act, the RS&W Drift mine is owned and operated by RS&W, and the Commission judge has jurisdiction pursuant to section 105 of the Act, and further stipulated to the authenticity of their exhibits but not to the relevance or truth of the matters

¹ By order dated February 2, 2010, I granted the request for an expedited hearing under Commission Rule 52, 29 C.F.R. § 2700.52, and a hearing was set for February 10, 2010 in Pottsville, PA. Due to two unprecedented snowstorms that closed federal government offices in Washington, D.C., from February 5 through February 12, the hearing was postponed.

asserted therein. (Joint Ex. 1.) At the conclusion of the hearing, the parties were permitted to submit written closing arguments and additional documentation.²

For the reasons stated below, Citation No. 7000438 is affirmed, except that the operator's negligence is reduced to "low", and Withdrawal Order No. 7000439 is accordingly affirmed.

Findings of Fact

RS&W operates the RS&W Drift anthracite mine located near Klingerstown, Pennsylvania. The mine is not mechanized. (Tr. 21-22.) The operator engages in conventional mining where coal is loaded by hand and gravity loaded, and explosives are used to blast the rock to reach the coal. (Tr. 142, 170.)

Citation No. 7000438 alleges a violation of 30 C.F.R. § 75.370(a)(1), which requires that operators develop and follow a ventilation plan approved by the MSHA district manager, which consists of a written document and a mine map. (Ex. G-11.) RS&W's written plan generally remains the same, but an accompanying map – reflecting changes in the working areas and mined out areas – is resubmitted every year on the plan anniversary date, which for RS&W happens to be in November, and the map becomes part of the ventilation plan if approved by the district manager. (Exs. G-4, G-5, C-1; Tr. 24-25.)

Citation No. 7000438, issued on January 19, 2010 by Gregory Mehalchick, an authorized representative of the Secretary (Tr. 18), alleges a non-"significant and substantial" violation of the standard at 30 C.F.R. § 75.370(a)(1), and charges as follows:

The operator is working without a ventilation plan approved by the district manager. The ventilation plan shall consist of two parts, one part being the ventilation map with information prescribed in Sec. 75.372. The operator submitted a mine ventilation map to the District Office on November 16, 2009. Upon review by the district, deficiencies were found on the map and the map was returned to the operator with a letter of non-approval, listing the deficiencies that had to be corrected. The operator, Randy Rothermel, met with this inspector in the District's Pottsville Field Office on December 29, 2009 to address all deficiencies. During this meeting, the operator insisted that a permanent ventilation control, that being an evaluation point (EP), was going to be removed from the map and that one deficiency, that being the airflow direction in an area of the mine, was not going to be added to the map. The operator was informed at

² After the hearing, RS&W submitted a copy of a letter dated December 17, 2009, from Randy Rothermel, President, RS&W Coal Co., Inc., to MSHA District Manager John A. Kuzar requesting a meeting on the ventilation map, which is hereby marked as Exhibit C-3. Counsel for the Secretary commented on this submission by letter dated March 3, 2010, noting that MSHA checked its files and could not locate that document. Exhibit C-3, as well as Exhibits C-1 and C-2 which were marked but not admitted at the hearing, are hereby received into evidence.

this meeting that the mine ventilation map would not be approved by the district if these two edits were made. However, the operator removed the EP and did not add the airflow directions. The operator was called twice since this December meeting, January 4, 2010 and January 6, 2010 and was left messages regarding the necessity to meet again and resolve the two items. A return call was not received.

(Ex. G-11.) Mehalchick determined the operator's negligence to be high. Section 75.370(a)(1) provides in relevant part:

The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine. The ventilation plan shall consist of two parts, the plan content as prescribed in § 75.371 and the ventilation map with information as prescribed in § 75.372. Only that portion of the map which contains information required under § 75.371 will be subject to approval by the district manager.

30 C.F.R. § 75.370(a)(1).

The parties agree, and the evidence introduced at hearing establishes, that the May 13, 2009 prior-approved ventilation map – which is part of the overall ventilation plan in conjunction with the written plan (Ex. G-5) – contained an evaluation point (“EP”) near the Skidmore section of the mine (“Skidmore EP”), as well as directional arrows indicating airflow in an inby direction along the Skidmore section. (Ex. C-1.) As part of the process, RS&W submitted its ventilation map for annual review on November 11, 2009, which was received by MSHA on November 16, 2009. (Exs. G-3, G-4.) This submission included the Skidmore EP but did not include arrows indicating airflow along the Skidmore section. (Ex. G-4.) MSHA issued a deficiency letter on December 9, 2009, which included, among other things, approval of the Skidmore EP and MSHA's request to add directional airflow arrows on the mine map along the Skidmore section. (Ex. G-6.) Randy Rothermel Sr. testified that he wrote to MSHA District Manager John Kuzar on December 17, 2009 requesting a meeting on the ventilation plan. (Tr. 181; Ex. C-3.) Randy Rothermel Sr. and MSHA District Mining Engineer Greg Mehalchick, who was Acting Supervisory Specialist at that time, met at the MSHA Pottsville field office on December 29, 2009 to resolve the outstanding issues on the proposed ventilation map. (Tr. 15-16, 33.)

At the December 29, 2009 meeting, Rothermel Sr. deleted the Skidmore EP from the map and would not add the airflow directional arrows along the Skidmore section of the mine, which had been identified as a deficiency. (Exs. G-6, G-8.) During the meeting, Mehalchick told Rothermel Sr. that the ventilation plan would in all probability not be approved by the district manager with those two items missing, thus compelling Mehalchick to return over these same issues. (Tr. 85-86, 222-23.) Thereafter, in early January, Mehalchick left a voice mail message for Rothermel Sr. informing him that the ventilation plan would not be approved without those two changes. (Tr. 86.) Rothermel Sr. called back Mehalchick the next day and left a message asking to have a meeting with the district manager. (Tr. 86-87, 194-96.) Mehalchick testified at

the hearing that he returned that call, though he could not state when, and left another voice mail message indicating that Rothermel Sr. would have to arrange a meeting in the MSHA Wilkes-Barre district office if he wanted to meet about resolving the ventilation plan. (Tr. 87.) The parties exchanged no further communications until January 19, 2010.

On January 19, 2010, Mehalchick went to the RS&W Drift mine specifically to determine if the ventilation plan was in compliance. He met with Foreman Steve Rothermel to notify him that the two missing items – the Skidmore EP and the directional airflow arrows along the Skidmore section – on the ventilation map were grounds for a citation. Steve Rothermel contacted Randy Rothermel Sr. who told Mehalchick by telephone that RS&W would not add those two items to the ventilation map, even when warned the mine would be subject to a section 104(b) withdrawal order. Mehalchick then issued Citation No. 7000438 and Withdrawal Order No. 7000439.

General Legal Principles - Standard of Review

The law applicable to plan disputes was recently explained by the Commission in *Twentymile Coal Company*, where the Commission stated as follows:

One of the cornerstone principles with regard to plan formulation under the Mine Act is that MSHA and the affected operator must negotiate in good faith for a reasonable period concerning a disputed plan provision. *Carbon County Coal Co.*, 7 FMSHRC 1367, 1371 (Sept. 1985). The Commission has noted, “Two key elements of good faith consultation are giving notice of a party’s position and adequate discussion of disputed provisions.” *C.W. Mining Co.*, 18 FMSHRC 1740, 1747 (Oct. 1996). . . .

While the contents of a plan are based on consultations between the Secretary and the operators, the Commission has recognized that “the Secretary is [not] in the same position as a private party conducting arm’s length negotiations in a free market.” *Id.* at 1746. As one court has noted, “the Secretary must independently exercise [her] judgment with respect to the content of . . . plans in connection with [her] final approval of the plan.” *UMWA v. Dole*, 870 F.2d 662, 669 n.10 (D.C. Cir. 1989), *quoting* S. Rep. No. 181, 95th Cong., 25 (1977), *reprinted* in Senate Subcom. on Labor, Com. on Human Res., 95th Cong., Legislative History of the Federal Mine Safety and Health Act of 1977, at 613 (1978). Ultimately, the plan approval process involves an element of judgment on the Secretary’s part. *Peabody Coal Co.*, 18 FMSHRC 686, 692 (May 1996) (“*Peabody II*”). “[A]bsent bad faith or arbitrary action, the Secretary retains the discretion to insist upon the inclusion of specific provisions as a condition of the plan’s approval.” *C.W. Mining*, 18 FMSHRC at 1746; *see also Monterey Coal Co.*, 5 FMSHRC 1010, 1019 (June 1983) (withdrawal of approval of water impoundment plan was not arbitrary or capricious where MSHA’s conduct throughout the process was reasonable). *Emerald Coal [Res., LP]*, 29 FMSHRC [956,] 965 [(Dec. 2007)].

Twentymile Coal Company, 30 FMSHRC 736, 747-48 (Aug. 2008). The standard involves a review of the record to determine whether the Secretary properly exercised her discretion and judgment in the plan approval process. In the event a plan provision is challenged by an operator, the Commission has held that the Secretary carries the burden of proving the disputed provision is “suitable” to the particular mine in question. *Peabody II*, 18 FMSHRC at 690 (applying the ordinary meaning of the word “suitable”).

Further Factual Findings and Conclusions of Law

This case involves the removal of the very same evaluation point for the Skidmore area of the mine that RS&W itself included in its November 11, 2009 ventilation map and had submitted to MSHA for approval. However, over a month later at the December 29, 2009 meeting between Randy Rothermel Sr. and Mehalchick, RS&W proposed eliminating this EP for the Skidmore area of the mine, an area that had been worked out and which was some 2400 feet from the current working face. (Ex. G-4; Tr. 56, 78, 145.) In addition, RS&W would not indicate with arrows the airflow direction on the Skidmore section of the map. These two issues are what led to the dispute over approval of the ventilation plan resulting in MSHA’s issuance of the citation and withdrawal order.

1. Good Faith Negotiations

Denying an operator’s proposed ventilation plan must be done in writing from the district manager with an opportunity for the operator to discuss the denial, as noted in 30 C.F.R. 75.370(c).³ Technically, MSHA did provide the written denial of the operator’s November 11 submission in its December 9, 2009 letter, along with an opportunity to discuss those deficiencies on December 29, 2009. I do not find RS&W’s suggested change to eliminate the Skidmore EP or its continued refusal to place airflow arrows bad faith negotiating. The testimony by RS&W’s witnesses provided a rationale for the positions the operator took on these two issues, and testimony from Rothermel Sr. and Mehalchick himself indicates that Rothermel Sr. did communicate his rationale to Mehalchick at that time. (Tr. 38-39, 50, 183-85, 190, 193.) Nevertheless, Mehalchick informed Rothermel Sr. at the December 29 meeting of the unlikelihood that this change would be accepted, as the December 9 deficiency letter had required the Skidmore EP to be in the plan and stated the plan would not be approved with the absence of the airflow arrows. (Tr. 85-86.) At this point, disapproval by the MSHA district

³ Section 75.370(c) provides as follows:

(c)(1) The district manager will notify the operator in writing of the approval or denial of approval of a proposed ventilation plan or proposed revision. A copy of this notification will be sent to the representative of miners by the district manager.

(2) If the district manager denies approval of a proposed plan or revision, the deficiencies of the plan or revision shall be specified in writing and the operator will be provided an opportunity to discuss the deficiencies with the district manager.

manager of RS&W's ventilation plan was inevitable, and for all intents and purposes the parties were at an impasse. I find that both sides had given notice of their positions and had adequate negotiations. Thus, I conclude that the parties had met their duty to negotiate in good faith and had done so over a reasonable period of time.

2. Arbitrary and Capricious Analysis

Absent bad faith or arbitrary action, the Secretary retains the discretion to insist upon the inclusion of specific provisions as a condition for approval of RS&W's ventilation plan. Thus, the Secretary must establish a rational basis for her inclusion of the Skidmore EP and the airflow directional arrows along the Skidmore section.

RS&W's Arguments

At the hearing, RS&W gave several reasons for wanting to remove the Skidmore EP, including the difficulty of traversing that area, especially walking hazards for an examiner going to the Skidmore EP. These walking hazards involved various pitted areas some six inches wide and deep in the mine floor created when RS&W tore out the rail lines that existed on the way to the Skidmore EP. (Tr. 146.) RS&W had begun tearing up the rail lines for reuse in other parts of the mine after May 2009, or approximately six months before the hearing. (Tr. 146, 215-16.) The removal of the rails from the area of the Skidmore EP could cause some tripping hazards. Testimony from Foreman Steve Rothermel, the miner who actually conducted the weekly examinations of the Skidmore EP, indicated it was not a regularly maintained part of the mine and that the "conditions aren't nice to travel back there," though he never stated he was unable to conduct the Skidmore EP examinations due to these conditions. (Tr. 146.) Indeed, RS&W still continued to conduct the weekly examinations of the Skidmore EP, a requirement under the old ventilation plan, up until the time the mine became subject to a withdrawal order on January 19, 2010. (Tr. 197-199.)

Rothermel Sr. also testified at the hearing that he understood if he put arrows on the map indicating the airflow for a particular part of the mine, then RS&W would be required to have an examiner walk that whole area of the mine to check the airflow. If that were true, the weekly examiner would need to walk down the length of the Skidmore section, which both Mehalchick and Rothermel Sr. agree is towards a worked out and hazardous area of the mine. (Tr. 112,179.) RS&W also presented testimony from Rothermel Sr. that as long as air was flowing and ventilating the Skidmore section, it was immaterial which direction the air flowed. (Tr. 210-14.) I find these last two arguments disingenuous given the testimony of the MSHA witnesses. Mehalchick, who was Acting Specialist Supervisor at the time and is the District Mining Engineer tasked with reviewing ventilation plans for the district manager, stated there is no requirement that placing airflow arrows on the ventilation map requires RS&W to have an examiner walk the area to inspect it. Moreover, Mehalchick and MSHA Supervisor Specialist Thomas Garcia both testified that having air flowing constantly and in one direction through various sections of the mine is the proper way to ventilate the mine and prevent the build up of gases and dust. (Tr. 38-39, 45-48, 55-56, 62-63, 233-35.) They unequivocally stated that

vacillating airflow is to be avoided. I credit their testimony over that of Randy Rothermel Sr. on these points.

Analysis of Secretary's Evidence

The Secretary has established through the testimony of Mehalchick and Garcia, that weekly monitoring at the Skidmore EP for sustained and non-variable airflow to the Skidmore section of the mine is needed to ensure proper ventilation to prevent the build up of methane, dust, and low oxygen levels. Steve Rothermel, who conducts the examination of the Skidmore EP, and Rothermel Sr. admitted in testimony that the airflow in the Skidmore section of the mine varied and that, depending on barometric conditions and outside temperatures, the directional flow of air could fluctuate in that part of the mine. (Tr. 157-60, 186-89.) Rothermel Sr. indicated that as long as air was flowing in that part of the mine – regardless of direction – there was no hazard to the working sections, which were some 2400 feet outby the Skidmore EP. Nevertheless, this ignores that inby areas adjacent to and east of the Skidmore section, some several hundred feet east of the Skidmore EP, had collapsed after being worked out and were sealed because they were difficult to reach, not maintained, and dangerous. (Tr. 111-12, 163-64, 183-84, 233.) Nothing indicates that over time similar problems could not occur in the Skidmore section, which had been worked out and was not an active area of the mine (Tr. 179), making it imperative that proper airflow be monitored at the Skidmore EP.

Moreover, Mehalchick testified that this mine does not use push ventilation, which entails placing a large blower fan at the entrance to the mine that pushes air into the mine. Rather, an exhaust fan sucks air out of the mine and it is that sucking function that creates a vacuum pulling air from other parts of the mine, like the mine entrance, to ventilate the various worked out portions as well as the active workings of the mine.

Witnesses for both MSHA and RS&W observed breaches that ran from the mine ceiling up to the surface in areas extending several hundred feet to the east and west of the exhaust fan. (Gov't Ex. 8; Tr. 116-19.) These breaches indicate that some of the air exiting through the exhaust fan could be pulled down from the surface through these breaches and then back up and out through the exhaust fan, thereby short-circuiting the mine's ventilation. Crediting Rothermel Sr.'s testimony and Mehalchick's rebuttal testimony that these breaches did not extend down as far as the length of the Skidmore section, it is clear that the breaches reduce the vacuum that would otherwise be created if there were no such breaches. (Tr. 116-19.) It stands to reason that, with the potential for inaccurate readings due to breaches, removal of the Skidmore EP reduces the ability of the operator to determine the amount and direction of airflow along the length of the Skidmore section.

Consequently, I find that the Secretary has established that placement of the Skidmore EP and the directional arrows on the mine map were suitable for the conditions at this mine. Having determined the suitability of these provisions, I must determine whether the Secretary acted in a manner that was arbitrary or capricious or whether she abused her discretion in requiring these items for approval of the ventilation plan. Based on my review of the record, I conclude the

Secretary did not. Therefore, Citation No. 7000438 for a violation of 30 C.F.R. § 75.370(a)(1) is sustained.

3. Negligence

It is undisputed that at the time Citation No. 7000438 was issued, RS&W did not have an approved ventilation plan, as the EP and airflow direction for the Skidmore section were not placed on the mine map, which is part of the ventilation plan. Consequently, the operator was technically in violation of the regulatory provision. An examination of the circumstances surrounding the period of time leading up to the issuance of the citation, however, leads me to conclude there is no basis for the Secretary's allegation that RS&W's violation was highly negligent. The communication, or lack thereof, between RS&W and MSHA personnel, coupled with the fact that no direct communication took place between the parties as to the next steps in resolving the two remaining issues on the mine map until Mehalchick appeared at the mine, may not technically be bad faith negotiation, but it begins to approach a line that governmental agencies such as MSHA should not cross.

While the parties were technically at an impasse at the conclusion of the December 29 meeting, MSHA left the door open for the possibility of further negotiation. Yet MSHA believed it sufficient to simply leave a voice-mail message reconfirming the plan's denial.

Arguably, Randy Rothermel Sr.'s change to the ventilation map on December 29 without a corresponding written rationale for the change created a problem. However, MSHA compounded that problem by not issuing a reply in writing. RS&W then responded in kind by leaving a message asking to meet with the district manager. The testimony from Mehalchick is unclear as to when he left a message for Rothermel Sr. to come to the Wilkes-Barre MSHA office if he wanted another meeting on the ventilation plan. Nevertheless, the lack of a paper trail before the inspector visited the mine on January 19 and issued the citation and withdrawal order is troublesome. Moreover, it appears to be a departure from nine years of past practice. This, coupled with the fact that under the old plan (still in effect at the time the withdrawal order was issued) the Skidmore EP airflow measurements were still being taken throughout the plan approval process, indicates that RS&W's negligence was "low" given the overall context of the negotiations. Indeed, the Commission decisions that explain the process by which MSHA and operators negotiate invariably find that both parties had sufficient time to explain their positions and consider the alternatives. RS&W was given an opportunity to explain its position, which it did on December 29, 2009. Although RS&W was told its position would likely be rejected, the operator was still under the impression that MSHA might reconsider after another meeting – right up until the time Mehalchick was at the mine and provided the operator 15 minutes during a telephone conversation to consider whether to capitulate to MSHA's demands.

While it is clear that Rothermel Sr. chose not to acquiesce to Mehalchick's request to place the EP and directional airflow arrows on the ventilation map on January 19, 2010, the designation of the violation as involving "high" negligence is not supported by the evidence of record. In the Secretary's closing brief, she states that "Mehalchick testified that RS&W's negligence was high because Mr. Rothermel was aware that MSHA had not approved the

ventilation map but continued to operate.” (Sec’y Post-hearing Br. at 4.) That statement is also true as of December 29, 2009, but both Rothermel Sr. and Mehalchick testified that at their meeting on that date, the two remaining provisions in the plan, removal of the Skidmore EP and the directional arrows, were going to be reconsidered by MSHA. (Tr. 131, 194.)

Much like the fact that the operator cannot prove MSHA received Rothermel Sr.’s December 17, 2009 letter requesting a meeting with the district manager, the Secretary is likewise at a loss to prove Rothermel Sr. received Mehalchick’s voice message that Rothermel Sr. could meet about the ventilation plan at the Wilkes-Barre office. Based on my evaluation of the demeanor of the witnesses, I believe each side genuinely could not understand the other side’s reaction – Rothermel Sr. could not understand why he was being cited when he had an outstanding request to meet with the district manager, and Mehalchick was equally perplexed as to why the operator would be recalcitrant to place two simple marks on the ventilation plan mine map that, if not done, would shut down his mine operation. This does not amount to bad faith as the Commission has defined that term. What occurred, instead, was a miscommunication. This miscommunication could have been avoided had both sides stated their positions in writing, as Rothermel Sr.’s un rebutted testimony revealed to be the practice between the two sides for the past nine years – or at least spoke to one another directly. Accordingly, I find that the operator’s negligence should be reduced to “low”. This is especially true considering airflow measurements at the Skidmore EP were being taken up until the issuance of the withdrawal order.

4. Withdrawal Order

Withdrawal Order No. 7000439 was issued under section 104(b) of the Act⁴ because Citation No. 7000438 had not been abated within the time frame provided. Based on the testimony of Mehalchick and Randy Rothermel Sr. regarding their telephone conversation on January 19, 2010, it is clear the operator did not intend to abate Citation No. 7000438 at the time of its issuance, and thus extending the abatement period further would have been fruitless. I conclude the two requirements for issuance of the withdrawal order were met, and Order No. 7000439 is hereby affirmed.

⁴ Section 104(b) of the Act states:

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

ORDER

In view of the above, **IT IS ORDERED** that RS&W Coal Company's contests are **DISMISSED**; section 104(a) Citation No. 7000438 is **MODIFIED**, by reducing the level of negligence from "high" to "low," and is **AFFIRMED** as modified; and section 104(b) Order No. 7000439 is **AFFIRMED**.

Alan G. Paez
Administrative Law Judge

Distribution:

Randy Rothermel, President, R S & W Coal Company, Inc., 207 Creek Road, Klingerstown, PA 17941

John Strawn, Esq., Office of the Solicitor, U.S. Department of Labor, The Curtis Center, Suite 630E, 170 S. Independence Mall West, Philadelphia, PA 19106-3306

/lp