# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

January 31, 1995

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| PEABODY COAL COMPANY,<br>Contestant | : | CONTEST PROCEEDING |
| v. | : | Docket No. KENT 94-430-R |
| | : | Citation No. 3861948; 2/16/94 |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Respondent | : | Martwick Underground Mine<br>I.D. No. 15-14074 |
| SECRETARY OF LABOR<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Petitioner | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. KENT 94-1062<br>A.C. No. 15-14074-03664 |
| v. | : | |
| | : | Martwick Underground Mine |
| PEABODY COAL COMPANY,<br>Respondent | : | |

## DECISION

Appearances: Brian W. Dougherty, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for the Secretary of Labor;
David R. Joest, Esq., Henderson, Kentucky for Peabody Coal Company.

Before: Judge Melick

These consolidated cases are before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801, et. seq., the "Act", to challenge two citations issued by the Secretary of Labor against the Peabody Coal Company (Peabody). At hearing the parties moved for approval of a settlement of citation No. 3857222 proposing a reduction in penalty from $168 to $100. The settlement was approved at hearing upon consideration of the representations and documentation submitted and an order directing payment of the agreed penalty will be incorporated in this decision.

Order No. 3861948, issued pursuant to section 104(d)(2) of the Act, charges a violation of the mandatory standard at 30 C.F.R. ' 75.507 and charges as follows: [1]

[1] Section 104(d) of the Act provides as follows:

(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized

**Power connection points which consist of the following are located in return air: belt drive motors, transformers, diesel equipment, and battery powered equipment. Return air is being coursed out the limited intake entries (beltline, supply road) of the second east panel off the northeast submain. This air has passed the working force on #1 unit. The air vol**

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representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, 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.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issue pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

minute. Chemical smoke was released at the #1 unit's check curtain and airlocks. The smoke traveled in an outby direction over power connection points. The airlock in #2 entry is off the mine floor approximately one foot and air is flowing outby through this air lock. The operator's records and ventilation map submitted to District 10 office indicate this condition exists.

The cited standard provides that "[e]xcept where permissible power connection units are used, all power connection points outby the last open crosscut shall be in intake air."

Inspector Troy Davis of the Mine Safety and Health Administration (MSHA) issued the subject order on February 16, 1994, at the Peabody Martwick Mine. In the No. 1 unit he found that air from the face areas was leaking through "airlocks" or temporary brattices into the neutral entries, called "limited intake entries" by Davis. Davis used a smoke tube to verify that air from the faces was entering the neutral entries. It is undisputed that this air had passed at least one working face. Peabody does not dispute that these facts constitute a violation as alleged but maintains that the violation was not the result of its "unwarrantable failure". "Unwarrantable failure" has been defined as conduct that is "not justifiable" or is "inexcusable." It is aggravated conduct by a mine operator constituting more than ordinary negligence. Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007 (1987); Emery Mining Corp., 9 FMSHRC 1997 (1987).

The Secretary maintains that the violation was the result of Peabody's unwarrantable failure because the violative condition was "obvious and continued over a significant period of time". In particular, the Secretary cites a mine ventilation map submitted by Peabody to MSHA on January 28, 1994, and certified as accurate by Peabody officials on January 1, 1994, which shows a greater air volume in the last open crosscut of the unit (intake side) than in the unit's split return (where the unit's return air rejoins the main or submain return). According to Inspector Davis, someone at the mine should have examined these readings and detected a problem. As Peabody points out in its brief, however, Inspector Davis assumed in reaching this conclusion that the ventilation map air readings were all taken on January 1, 1994, and were certified by Peabody's registered professional engineer as being accurate as of that date. He further based this assumption on the engineer's undated certification that the map was "true and correct" . . .
as required by 30 C.F.R. ' 75.372 . . ." and a statement on the map that "mine workings are posted as of January 1, 1994".

However, James Roberts, the professional engineer who certified the maps, testified credibly that the air readings on the ventilation map were not all taken on January 1, 1994, but could have been taken anytime between January 1, 1994, and January 28, 1994. Accordingly, the differences between the readings would not provide a valid measure of whether return air was entering the neutral entries. Moreover, Roberts notes that the certification on the map is not intended to mean that the air readings were all taken on January 1, 1994, but that the language on the map that "mine workings are posted to January 1, 1994" means only that the worked-out areas shown on the map are current as of that date.

Roberts observed that, if such readings were to be used to determine whether return air was being coursed through the neutral entries, he would make sure that simultaneous readings were taken. However, he was never told that MSHA would try to use the readings in this manner.

It is clear from the credible testimony of Peabody's expert, James Roberts, that the Secretary's reliance upon the purported disparities appearing in the January 1994 ventilation map is misplaced. Accordingly, it cannot reasonably be inferred that Peabody had knowledge of the existence of the instant violation as early as January 1, 1994, when that map was "certified" and the evidence cannot, therefore, provide a basis for unwarrantability.

It is also noted that although a previous ventilation map submitted by Peabody in July 1993 had shown similar disparities as the more recent ventilation map, MSHA approved the map without comment or enforcement action against Peabody. It is for this additional reason inappropriate for the Secretary to now suggest that Peabody's inaction based on similar disparities in the air readings was the result of its "unwarrantable failure".

The Secretary next argues, as a basis for unwarrantability, that the violative condition was "obvious and continued over a significant period of time" based on records of a February 14, 1994, weekly examination and the February 14, 1994, and February 16, 1994, pre-shift examinations. The Secretary maintains that since Peabody's mine manager had reviewed and countersigned the February 14, 1994, air readings "due diligence dictates that, at the least, Peabody should have monitored its own weekly return split air readings with the pre-shift last open crosscut air readings taken on the same day to determine whether this violative condition was occurring." The Secretary maintains that such a comparison of air readings would also have alerted mine officials to the existence of this violative condition.

As Peabody observes, however, regulatory standards governing weekly and pre-shift examinations do not require or even suggest that air readings from different examinations should be cross checked. As Peabody also notes there is no evidence that such cross-checking is even an accepted industry practice or has ever been recommended by the Secretary. Indeed, the inspector himself compared the weekly and pre-shift examination reports only after being alerted to the possibility of a violation due to his misinterpretation of the ventilation map.

Within the framework and circumstances of this case, I must agree with Peabody. It cannot, therefore, be said that Peabody was grossly negligent or was involved in an aggravated omission amounting to "unwarrantable failure" by failing to cross-check the cited weekly and pre-shift examinations on February 14 and 16, 1994.

The Secretary further argues that on the day of the inspection the inspector observed that the check and back-curtains for the neutral entries at the working section were standing toward the outby direction. According to the Secretary this is an "obvious physical indication" that return air was escaping into the neutral entries. Peabody counters, however, that the

inspector acknowledged that it is not possible to distinguish intake and return air movement underground which is why he used chemical smoke to verify the violation. Peabody further notes, and it is undisputed, that the miners had already been taking corrective measures to tighten ventilation curtains before the inspector arrived. Accordingly, I cannot find that the position of the check curtains alone is sufficient to warrant a finding of aggravated circumstances amounting to "unwarrantable failure".

The Secretary, in support of his claim of unwarrantability, has argued, in addition, that the inspector found when he "arrived on the section, [that] there were men running around, dragging curtains, trying to tighten up air locks and stuff [sic] on the belt and supply road entries." The Secretary's unexplained position at hearing was that these remedial efforts were evidence of "unwarrantable failure". I disagree. Such remedial efforts to abate a problem before observed or cited by an inspector clearly indicates appropriate corrective action and not negligence.

Finally, the Secretary maintains that "unwarrantable failure" may be found on the "general history of this same violation" at the Martwick Mine. The Secretary relies on prior violations of the standard cited herein occurring on August 13, 1991, August 27, 1991, October 26, 1992 and April 7, 1993, i.e. four violations in the 30 months preceding the violation at issue. I note in particular that there had been no violations of the cited standard for the 10 month period preceding the date of the violation at issue. Under the circumstances I do not find that such a history warrants the aggravated findings necessary to constitute "unwarrantable failure". Compare Peabody Coal Company, 14 FMSHRC 1258 at 1263 (1992) wherein 17 violations of the cited standard in six and one-half months was appropriately considered as evidence of unwarrantability.

Under all of the circumstances, I cannot conclude that the Secretary has met his burden of proving that the violation herein was the result of Peabody's "unwarrantable failure" and, accordingly, the order herein must be modified to a citation under section 104(a) of the Act. I do find, however, that the violation was the result of moderate negligence. Consistent with the Secretary's position I further conclude that the violation was neither "significant and substantial" nor of high gravity. Considering the criteria under section 110 (i) of the Act, I conclude that a civil penalty of $250 is appropriate for the violation herein.

## ORDER

Citation No. 3857222 is hereby affirmed and Peabody Coal Company is directed to pay a civil penalty of $100 within 30 days of the date of this decision for the violation therein. Order No. 3861948 is hereby modified to a citation under section 104(a) of the Act and Peabody Coal Company is directed to pay a civil penalty of $250 for the violation therein within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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