

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

April 14, 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA)	:	Docket No. LAKE 97-46
Petitioner	:	A.C. No. 11-02440-03776
v.	:	
	:	Marissa Mine
PEABODY COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Gay F. Chase, Esq., Office of the Solicitor, U. S. Department of Labor, Chicago, Illinois, for the Secretary;
Caroline A. Henrich, Esq., Peabody Coal Company, Charleston, West Virginia, for Respondent.

Before: Judge Weisberger

This civil penalty proceeding, commenced by the Secretary of Labor (Petitioner) by the filing of a Petition for Assessment of a Penalty, presents, as the only issue for resolution, whether an MSHA inspector abused his discretion when he issued an order, pursuant to Section 104b of the Federal Mine Safety and Health Act of 1977 ("the Act") to Peabody Coal Company (Respondent) based on his determination that a previously issued citation alleging a violation of 30 C.F.R. Section 75.400 had not been abated, and an extension in abatement time was not warranted.¹ Subsequent to notice, the case was heard in St. Louis, Missouri, on October 28-29, 1997. On February 27, 1998, the parties each filed proposed findings of fact and a brief. On March 24, 1998, reply briefs were filed by the parties.

^{1/} At the hearing, the parties advised that they had reached a settlement regarding the remaining citation in this case, No. 4575855. A motion to approve the settlement was filed on February 27, 1998, along with Petitioner's brief.

Findings of Fact and Discussion

I. Petitioner's Evidence

Respondent operates the Marissa mine, an underground coal mine. On November 25, 1996, Ronald Zara, an MSHA inspector, inspected a No. 26 Simmons Rand Scoop that was located in by the 005 working section in the 3 West Section of the mine. At approximately 6:00 p.m., he observed that there were various permissibility violations on the scoop, and it was leaking oil in several places. He issued citations for these conditions, and these citations are not at issue herein. Upon closer examination of the scoop, Zara found pooled hydraulic oil, as well as oil saturated coal dust and gob up to 1 inch deep on the valve bank compartment floor. He observed hydraulic oil running off the scoop and pooling on the cab floor, as well as accumulations of oil-soaked coal on the cab floor. In the pump compartment he observed numerous oil leaks causing an accumulation of oil. He said that the material that he observed on the floor was primarily saturated gob with some coal, and coal dust and oil "puddled up" (Tr. 37). He said that he measured the accumulations with a 3-inch probe and it was found to be up to 2 inches deep. According to Zara, he reached into all these three areas, felt the material that had accumulated, and concluded it consisted of oil saturated coal, and coal dust. Zara issued Citation No. 4575486 alleging a significant and substantial violation of 30 C.F.R. § 75.400. Respondent does not contest these findings.

According to Zara, upon issuance of the permissibility, leaking, and accumulation citations, he met with B.J. Williams, the face boss. It was agreed that the permissibility and leaking violations would be abated by midnight, and the accumulation violation would be abated by 8:00 a.m., on November 26. Later on that evening, Zara met with Melvin R. Kiehna the mine manager, and informed him that the abatement for the accumulations had been set for 8:00 a.m., and asked him to so inform the next shift manager. According to Kiehna, he told Zara that the oil leaks and the permissibility violations would be immediately worked on to be abated, and that he would make every effort to clean the accumulations by 8:00 a.m. There is no evidence that either Kiehna, Williams, or any other of Respondent's agents sought an abatement time beyond 8:00 a.m., or indicated that the 8:00 a.m. deadline was not reasonable or feasible.

On the morning of November 26, Zara returned to the mine and went underground. Zara was accompanied by William Mulholland, the Union safety committee man, but was not accompanied by anyone representing the Respondent. At approximately 8:30 a.m., he observed that the subject scoop had been moved approximately 75 feet outby. No one was working on the scoop at the time. Two miners, William Gibson and James Van Doren were in the area of the scoop. When asked whether they were sent to wash the scoop, they informed Zara that they were told only to put the scoop back in service if he were to abate the violation. They also informed him that after they arrived on the section at approximately 7:30 a.m., no one worked on cleaning the scoop.

Zara spent approximately 15 minutes examining the scoop. He noted that the permissibility violative condition and the leaks had been repaired, and he abated those citations. According to Zara, there was evidence that the scoop had been washed and the oil that had pooled was no longer present. However, he indicated that, in general, the same accumulations still existed in the same amounts as observed by him on November 25. Specifically, he testified that up to 1 inch of the materials remained in the valve bank compartment, that there was up to 1 inch of oil soaked coal around the perimeter of the cab, and there was solid and semi solid combustible material up to 2 inches deep in the pump compartment. Zara reached into the scoop at the junction of the cab and pump compartment, and took a large handful of material. He characterized the material as being clay-like. Zara testified that he formed a ball of the material and squeezed it. He said that oil exuded out of the material, and ran down his arm. He opined that the material was combustible based upon his experience, and “the appearance of the material” (Tr. 55). He said he had felt it, looked at it, and smelled it.

According to Zara, in essence, he decided to verbally issue a section 104(b) order to Mulholland, as the abatement time period had expired, and the combustible materials that he had cited on November 25, still existed in the same amounts and in the same areas. In this connection, he indicated that the same fire hazards contributed to by the violative conditions on November 25, still remained the next morning. He noted that the presence of moving parts in the pump compartment in combination with heat generated by the pump, constituted an ignition source. He opined that since the accumulations contacted the drive shaft motor, electrical conduits, and hydraulic hoses, all of which generate heat “to some degree,” the accumulations could have ignited.

According to Zara, he considered granting an extension of the abatement time but decided not to. This decision was based on the following considerations: no one was working to abate the violation when he arrived, and no abatement efforts were performed subsequent to 7:30 a.m.² On November 26, none of Respondent’s agents requested an extension, none of Respondent’s agents informed him that there were any problems abating the violation, and none of Respondent’s agents explained to him why the scoop had not been cleaned better.

According to Zara, when he was tagging the scoop after he had orally issued the 104(b) order to Mulholland, Jeffrey Gurley, the safety supervisor, approached him and said, “. . . you don’t have to do this. We will go ahead and finish cleaning this machine” (Tr. 116). Zara testified that he asked Gurley why they had not done the job correctly to begin with, and Gurley said that he did not know.

II. Respondent’s Evidence

^{2/} On cross examination, Zara indicated that when he issued the 104(b) order he did not know what action Respondent took after he had written the original citation on the evening of November 25. Only after he issued the 104(b) order, on the afternoon of November 26, he was informed that a miner had worked approximately 4 hours after midnight November 26 cleaning the scoop, and that this worker had to obtain a washer from another section as there were problems with the washer on the subject section.

At approximately 9:00 p.m., on November 25, Melvin R. Kiehna, the mine manager of the 4 p.m. to 2 a.m. shift informed Dennis Gladson, the third shift mine manager, that work was in progress abating the permissibility and oil leak violations, but that the scoop needed to be washed to abate the accumulation violation. Gladson said he selected David Bottrell to clean the scoop as he's "very very good at what he does" and "will spend all day on whatever he's doing until it's done" (Tr. 356). Gladson then informed James Park, the repair foreman, of the work that had to be done. Park assigned Bobby Hicks, a repairman, to work on abating the oil leaks and permissibility violations as a priority. Hicks testified that when he observed the scoop at approximately 10:35 p.m., on November 25, it contained dirt, shale, slate, fine clay, "probably even some coal" (Tr. 298), and oil leaks. Hicks finished abating the oil leaks and permissibility violations at approximately midnight. He then attempted to turn on the high pressure washer for Bottrell, but the breaker did not stay on. Hicks then informed Park of the problem, and told him that they needed another washer. Park, who was then in another unit, checked out the washer located there, and directed that it be hauled back to where the scoop was located. The washer arrived at about 1:00 a.m. at which point Bottrell commenced cleaning the scoop.

Bottrell described the scoop as being dirty, and greasy. He said the scoop had oil and coal on it. Bottrell used a detergent (swoop) to loosen the oil. According to Bottrell, he sprayed the cab with a pressure washer until it was clean. He indicated that after he finished, the area looked clean. He was asked whether he saw any oil or grease on the floor and he said "not that I remember" (Tr. 387). He indicated that there was no oil on the hoses and conduits after he finished washing them. He stated that after he cleaned the valve bank compartment no oil or coal remained. According to Bottrell, he cleaned the scoop continuously for 3 to 4 hours. He indicated that when he finished cleaning the scoop it looked clean, and no additional cleaning was necessary.

Gladson testified that at approximately 5:00 a.m., on November 26, he checked the scoop and found that an area adjacent to the valve bank compartment was not yet washed, and he told Bottrell to wash it. Gladson indicated that he could see the floor of the pump compartment, and did not see any oil or combustible material. He indicated that he did not see oil or grease in the cab. He said he was able to see the floor of the valve compartment, and he did not see any oil coal or combustible substances. According to Gladson, he saw the distinctive color of the hoses, and there were no accumulations around them. He told Bottrell he had done a good job.

Hicks saw the scoop again at approximately 5:30 a.m., and indicated that it "looked a lot better" (Tr. 307). According to Hicks, the coal, slate, and oil that he had previously observed was no longer present. He indicated that he did not see 2 inches of oil and coal, and the other conditions set forth in Zara's section 104(b) order. However, on cross-examination, it was elicited that when he looked in the scoop after it had been washed, he could not see the floor of the valve bank and pump compartments, as it was covered with water. He indicated that he did not believe that he looked in the cab after Bottrell completed cleaning the scoop.

James Park, a repair foreman, testified that when he was in the area of the scoop sometime

around 5:30 a.m., on November 26, Bottrell told him that he had finished washing the scoop and he (Park) checked it out. He indicated that the hoses on the valve bank compartment floor were visible and clean, and he did not see oil or grease on the floor. He told Bottrell that he had done a good job. He indicated that he did not see the pump motor compartment.

Gurley, who was present on November 26, testified that he saw Zara pick up some material from the area at the junction between the cab and the pump compartment, and it looked like mud. According to Gurley, he saw muddy water run down the arm of Zara, and he did not see any oil or coal. Gurley indicated that after the section 104(b) order was issued, he examined the scoop before it was cleaned by Dale Harstick. He was asked if he saw 2 inches of oil soaked coal and hydraulic oil on the compartment floor. He answered as follows: "If there had been two inches there, those half inch hoses would have been covered by an inch and a half" (Tr. 249). He also indicated that he did not see coal or oil soaked gob in the pump and valve bank compartments.

Before Respondent cleaned the scoop to abate the section 104(b) order, Gurley took photographs of the affected areas. He testified that the pictures depict, inter alia, hoses that were not covered with accumulations (Ex. R2-9).

Melvin R. Kiehna, the mine manager of the 4:00 p.m. to 2:00 a.m. shift, observed the accumulations on November 25, but not on November 26. He compared the conditions he had observed to photographs of the cab (Ex. R2), taken on November 26, prior to the cleaning of the scoop. According to Kiehna, there were accumulations in the cab on November 25, which do not appear in the photograph.

Hicks compared a picture of the pump compartment taken on November 26, to what he had observed on November 25, before the scoop was washed. He stated that in contrast to the picture, on November 25, there was a lot of oil at the bottom of the compartment and the hoses could not be seen. He also stated that on November 25, when he observed the area across from the operator's cab before it was washed, he "couldn't hardly see any hoses" (Tr. 313), and there was "a lot" of coal and "quite a bit of oil," especially on the floor (Tr. 313). In contrast he said that a photograph taken on November 26, shows hoses that appear to had been cleaned. Hicks examined a photograph, taken on November 26, of the valve bank compartment that he had observed on November 25. He indicated that the loose material consisting of coal, fine clay, slate, and oil which he had noted then was not present in the picture. Similarly, he testified that on November 25, he observed oil, and accumulations on hoses and components under the valve bank, which were not apparent in the pictures taken on November 26.

Dale Harstick, a roof bolter, cleaned the scoop after the section 104(b) order was issued. He indicated that he spent most of his time cleaning the cab and the pump compartments with a high pressure washer. He described the materials located there as a mixture of fire clay, wet rock dust, and a black substance that could have been coal or slate. He said that he worked on the scoop for about 3 to 4 hours.

III. Discussion

A. Applicable Law

Section 104(b) of the Act provides as pertinent, as follows:

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 . . . 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 . . . all persons . . . to be withdrawn from . . . such area. . . .

In *Mid-Continent Resources, Inc.*, 11 FMSHRC 505, 509 (1989) the Commission held, in interpreting section 104(b), supra, as follows:

When the validity of a section 104(b) order is challenged by an operator, it is the Secretary, as the proponent of the order, who bears the burden of proving that the violation described in the underlying citation has not been abated within the time period originally fixed or as subsequently extended. We hold, therefore, that the Secretary establishes a prima facie case that a section 104(b) order is valid by proving by a preponderance of the evidence that the violation described in the underlying section 104(a) citation existed at the time the section 104(b) withdrawal order was issued. The operator may rebut the prima facie case by showing, for example, that the violative condition described in the section 104(a) citation had been abated within the time period fixed in the citation, but had recurred.

B. Analysis

1. Abatement of the violative conditions described in the citation issued on November 25

I observed Bottrell's demeanor and found his testimony credible that he spent approximately 4 hours after 1:00 a.m., November 25, cleaning the accumulations in the scoop with a high pressure washer and a detergent solution. Since Petitioner did not proffer any direct testimony to contradict Bottrell, nor did Petitioner impeach or rebut this testimony, I accept it. Further, Respondent's witnesses who observed the scoop after it was cleaned testified that there were no accumulations of oil saturated material in the areas cited by Zara on November 25.

However, it is significant to note that Kiehna, Hicks, and Park did not inspect all of the areas that were cited by Zara. On the other hand, on November 26, Zara spent approximately 15 minutes inspecting the areas he previously cited. Further, his opinion that the material that remained was still saturated with oil, was based upon the fact that he reached into the material squeezed it and noted that oil ran out of it. He further explained that his conclusion that it was oil, was based on his experience and the fact that he smelled it. Mulholland essentially corroborated Zara's observations. Also, he took a sample of the material and rubbed it between his fingers. He stated that ". . . it was obvious to see that there was oil running out of it" (Tr. 165). In contrast, Gurley, who opined that the liquid that ran out of the material when squeezed by Zara was water and not oil, neither touched nor smelled the material. I thus do not accord much weight to his testimony, and give more weight to Zara's testimony based on the extent of his observations and examinations of the conditions at issue.

On November 26, Gurley took photographs of the conditions in the scoop at the areas cited by Zara on November 25. Gurley, Kiehna, Hicks, and Bottrell all interpreted the photographs and indicated that the accumulations observed on November 25, could not be seen in these pictures. However, I do not assign much probative weight to the pictures due to their lack of depth, and the presence of shadows which obfuscates the clarity of the photographed items. Further, it is significant that whereas Zara was convincing in his testimony regarding accumulations that were still present on the floor in the three compartments cited, the pictures do not depict the floor. For all these reasons, I find that although Respondent clearly acted in good faith, not all the accumulations cited by Zara on November 25, were eliminated by 9:00 a.m., on November 26. I conclude that the violative conditions described in the underlined citations were not completely abated within the time originally set for abatement i.e., 8:00 a.m. See, *Martinka Coal Co.*, 15 FMSHRC 2452 (1993).

2. Extension of the abatement.

At issue is whether Zara acted unreasonably on November 26, in not extending the time for abatement. For the reasons that follow, I find that Zara's failure to extend the time for abatement was reasonable.

The original time set for abatement i.e., 8:00 a.m., November 26, was set by Zara upon talking with Kiehna and Gurley. Neither of them, nor any other representative, or Respondent requested that the abatement should be set for a later time. When Zara arrived at the section at approximately 9:00 a.m., on November 26, and observed accumulations that had not been abated, no one was engaged in washing the scoop. Also, Zara had been told by Gibson and VanDoren that no one washed the scoop subsequent to their arrival on the section at approximately 7:30 a.m., on November 26. Further, based upon this information, when Zara determined to issue a section 104(b) order, none of Respondent's agents had requested an extension, informed him that there were any problems with abating the violative conditions, or explained to him why the scoop had not been cleaned better. Moreover, according to Zara, when he was tagging out the scoop he asked Gurley "why they had not done the job correctly" (Tr. 116), and Gurley said he did not know.

The failure to timely completely clean the accumulations posed a hazard to miners. In essence, according to Zara, the continued existence of combustible materials on November 26, presented a fire hazard. I accept this opinion having found above, III(B)(1), supra, that oil saturated material still remained.

For all the above reasons, I conclude that the time set for abatement was reasonable, and that Zara acted reasonably in determining not to extend the time to abate the violation previously cited on November 25.

IV. Citation No. 4575855

Petitioner filed a motion to approve a settlement agreement regarding this citation. A reduction in penalty from \$431 to \$259 is proposed. I have considered the representations and documentation submitted, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. I therefore approve the settlement and grant the motion.

ORDER

It is **ORDERED** that, within 30 days of this Decision, Respondent shall pay a total civil penalty of \$1,716.

Avram Weisberger
Administrative Law Judge

Distribution:

Gay F. Chase, Esq., Office of the Solicitor, U. S. Department of Labor, 230 South Dearborn Street, 8th Floor, Chicago, IL 60604 (Certified Mail)

Caroline A. Henrich, Esq., Peabody Coal Company, P. O. Box 1233, Charleston, WV 25324 (Certified Mail)

dcp