

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

March 31, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. PENN 96-221
Petitioner	:	A. C. No. 36-02398-03756
v.	:	
	:	Docket No. PENN 96-248
LION MINING COMPANY,	:	A. C. No. 36-02398-03759
Respondent	:	
	:	Grove No. 1 Mine

DECISION

Appearances: Andrea J. Appel, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner;
Joseph A. Yuhas, Esq., Barnesboro, Pennsylvania, for the Respondent.

Before: Judge Feldman

These consolidated civil penalty proceedings concern petitions for assessment of civil penalties filed by the Secretary of Labor against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. ' 820(a). These matters were called for hearing on January 15, 1997, in Somerset, Pennsylvania.

The petition in Docket No. PENN 96-248 sought to impose a total civil penalty of \$1,128.00 for two alleged violations of mandatory safety standards in Part 75 of the regulations. At the hearing, the parties advised they had reached settlement in PENN 96-248. The record was left open to enable the parties to file a motion for approval of their agreement. The motion was filed on January 29, 1997. The respondent has agreed to pay a reduced civil penalty of \$733.00 in satisfaction of 104(d) Order No. 4387378 and 104(a) Citation No. 4387380. The reduction in penalty is based on reduction in the gravity and degree of the respondent's negligence with respect to the cited violations, although the 104(d) Order remains unmodified. I have considered the representations submitted in support of their agreement, and I conclude the proffered settlement in Docket No. PENN 96-248 is appropriate under the criteria set forth in Section 110(i) of the Act, 30 U.S.C. ' 820(i). Thus, the motion for approval of settlement in Docket No. PENN 96-248 shall be granted.

The petition in Docket No. PENN 96-221 seeks to impose total civil penalties of \$1,795.00 for five alleged violations of mandatory safety standards in Part 75 of the regulations, 30 C.F.R. Part 75. This docket concerns four 104(a) citations and a 104(d) order. At the hearing, the parties moved to settle the four 104(a) citations. The settlement terms

included reducing the proposed civil penalty for the four 104(a) citations from \$595.00 to \$471.00. The reduction in penalty is based on the deletion of the significant and substantial designation for Citation Nos. 4387717 and 4387660. The parties' settlement with respect to these four citations shall be approved.

The parties failed to reach an agreement with respect to the remaining \$1,200.00 civil penalty in Docket No. PENN 96-221 proposed by the Secretary for 104(d) Order No. 4387711. Thus, the evidentiary hearing was limited to the propriety of Order No. 4387711. The parties' post-hearing Proposed Findings of Fact and Conclusions of Law regarding this Order are of record.

Order No. 4387711 presents the issue of whether depositing piles of gob, taken by scoop from the face, in unused crosscuts off a return entry, a common and permissible industry practice, constitutes a violation of the mandatory safety provisions of section 75.400, 30 C.F.R. ' 75.400. This mandatory standard states:

Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein. (Emphasis added).

While, as alleged by the Secretary, the cited, stored deposits may not have been adequately rock-dusted in accordance with the provisions of section 75.403, 30 C.F. R. ' 75.403, the issue in this case is whether the cited gob material was a prohibited accumulation under section 75.400. As discussed below, the respondent's permissible storage of the cited piles of gob, euphemistically characterized as by the Secretary as accumulations, is in glaring contradiction to the provisions of section 75.400 that prohibit accumulations in active workings. Consequently, Order No. 4387711 shall be vacated.

Statement of the Case

The pertinent facts in this matter are not in dispute and can be briefly stated. Mine Safety and Health Administration (MSHA) Inspector Rudy Kotor inspected the respondent's Grove No. 1 Mine on April 10, 1996. Kotor was accompanied by Mine Superintendent Russell Lambert and Shift Foreman Kevin Sleasman. The three men traversed the 1st Left (017) Section Immediate Return in the L2 return entry. The Immediate Return is examined weekly, requiring an employee to travel the entire length of the return entry. At the time of the inspection, the floor of the L2 entry was white with rock dust.

It was the respondent's practice to deposit fallen rock and other gob material removed from the face in unused crosscuts off the return entry, moving in an inby direction as the section developed. Kotor testified that gob material deposited in crosscuts is a valid procedure that is not prohibited by MSHA. (Tr. 154). Kotor observed a pile of accumulations, consisting of coal dust,

coal dirt and rock in each of nine crosscuts off the L2 entry. Specifically, Kotor observed piles of gob in the third, fifth, sixth, seventh, eighth, ninth, tenth, eleventh and thirteenth crosscuts. There were footprints, presumably left by the weekly mine examiner, and scoop tire tracks on the rock dusted floor in proximity to the nine gob piles observed by Kotor. Based on his observations, which included observations of dry gob piles, black in color, Kotor concluded that, with the exception of a small portion of the gob pile in the thirteenth crosscut, none of the gob piles had been rock dusted.

The respondent admits that there was some coal dust content in the gob material that was scooped up with the fallen rock at the face. However, the respondent asserts that Kotor's observations with respect to the degree of combustible material was misleading because the roof rock is blackish-grey in color. (Tr. 156).

Kotor took spot samples, consisting of several shovels of material from various places from each of the gob piles in the third, fifth, sixth, eighth, ninth and thirteenth crosscuts. The samples from each gob pile were sifted through a 20-mesh wire screen. The sifted samples were then placed in different tagged plastic bags. The plastic bags containing the samples were placed in the trunk of Kotor's car on April 10, 1996, where they remained for approximately nine months until January 6, 1997, when, in preparation for this January 15, 1997, hearing, Kotor sent them to the Department of Labor's laboratory for combustible content analysis. (See Gov. Ex. 5, p.2). Kotor testified that he had forgotten that the samples were in his automobile trunk.

Kotor issued 104(d) Order No. 4387711 on April 10, 1996, citing a significant and substantial (S&S) violation of section 75.400. At the hearing, the Secretary moved to modify Order No. 4387711 by deleting the S&S designation. (Tr. 22). Order No. 4387711 was abated by Kotor on April 12, 1996. In abating the Order, Kotor noted:

A heavy application of rock dust was applied to all (9) gob piles¹ to maintain the accumulations to a (sic) incombustible content along the first left (017) Section Immediate Return air course. (Emphasis added). (Gov. Ex. 2, p.2).

¹ Kotor repeatedly refers to the cited accumulations as gob piles.@ (See, e.g., Gov. Ex 2, Gov. Ex. 3 pp. 14(a), (b), (c), 15, 18, 19, 20; Tr. 37, 40, 48, 49,).

The belated laboratory results revealed incombustible content in the seven samples varying from 14.9 per cent to 25.9 per cent. Section 75.403, not cited by Kotor, requires incombustible content of materials in return aircourses to be no less than 80 per cent.²

Findings of Fact and Conclusions

At the outset, it is important to focus on the two materials extracted or dislodged in underground coal mining -- coal and everything else (gob). Whether accumulations are primarily gob, or, prohibited combustible accumulations under Section 75.400, must be decided on a case-by-case basis. For only combustible accumulations of coal that are by-products of the

² Section 75.403 provides:

Maintenance of incombustible content of rock dust

Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall not be less than 65 per centum, but the incombustible content in the return aircourses shall be no less than 80 per centum. Where methane is present in any ventilating current, the per centum of incombustible content of such combined dust shall be increased 1.0 and 0.4 per centum for each 0.1 per centum of methane where 65 and 85 per centum, respectively, of incombustibles are required.

There was no evidence of methane in the cited 1st Left (017) Section Immediate Return. (Tr. 124, 198-9; Gov. Ex 3, Kotor's notes at p.4).

coal extraction process, such as accumulations of coal dust and float coal dust, are prohibited by section 75.400. These by-products, when Apermitted to accumulate@ over a period of time, in mine areas such as the floor and ribs, without Abeing cleaned up@ constitute a violation of Section 75.400. Similarly, coal dust accumulations and loose coal spillage on equipment, such as a continuous miner, or around beltlines and rollers, that remain unaddressed, constitute section 75.400 violations. Such combustible accumulations of coal dust and loose coal are violative accumulations under section 75.400 regardless of whether they are permitted to remain at their original location, or whether they are transported for storage by scoop into crosscuts off of a return entry.

Gob is defined as material Astore[d] underground, as along one side of a working place, the rock and refuse encountered in mining.@ Dictionary of Mining, Mineral and Related Terms, U.S. Department of the Interior, 1968, p. 497. Although gob may contain particles of coal, accumulations of gob material are not prohibited. While the mandatory standard in section 75.403 may require gob, depending on its combustible content, to be rock dusted, gob, by its nature, is not amenable to clean-up and removal.

In the instant case, by his own admission, Kotor observed gob piles that, consistent with industry practice, were stored in crosscuts. Kotor conceded that the roof, floor and ribs in the immediate area in the L2 entry were rock dusted. Although Kotor opined that the gob piles consisted of Aover half@ combustible coal material, he also stated the piles contained A some rock,@ including A large pieces of rock.@ (Tr. 64-67).

I am unpersuaded by the Secretary's apparent reliance on the inert laboratory analysis to support her assertion that the cited Aextensive accumulations@ were coal dust accumulations contemplated by section 75.400. With regard to extensiveness -- there is nothing unusual about extensive gob piles that contain large pieces of rock. Although I am cognizant of the laboratory results that suggest an incombustible content of approximately 20 per cent, the validity of these samples in this case must be placed in context. This procedure is intended to achieve a representative sample of the percentage of rock dust in a given accumulation of coal dust and float coal dust. This procedure is not designed to obtain a representative sample from a gob pile. For when one sifts coal dust and rock through a 20-mesh screen, a resultant sample containing primarily coal dust is not surprising. Consequently, these sample results do not establish that the cited Aaccumulations@ were 80 per cent coal. Thus, I remain unconvinced that Kotor's samples accurately reflect the percentage of combustible material in these gob piles. In any event, while these gob piles may have required additional rock dusting, notwithstanding the chain of custody problem and the validity of the rock pile sampling method, the respondent was not charged with a rock dusting violation. Finally, in discussing the evidentiary value of these sample results, I would be remiss if I did not note that the laboratory analysis, that occurred only one week before this hearing, was untimely in that it interfered with the respondent's ability to prepare for this case. See Cyprus Tonopah Mining Corp., 15 FMSHRC 367, 379 (March 22, 1993).

At the hearing, the Secretary was requested to cite case law to support her position that section 75.400 is applicable to gob piles. In her post-hearing brief, the Secretary relies on the

Commission decision in Mid-Continent Resources, Inc., 16 FMSHRC 1226 (June 1994) for the proposition that section 75.400 applies to relocated accumulations. However, the Secretary's reliance on Mid-Continent begs the question. Rellocated accumulations constitute a violation of section 75.400 only if they are prohibited accumulations. In Mid-Continent, the cited accumulations had been transported to a crosscut off an intake roadway. The subject of the section 75.400 violation in Mid-Continent was mostly full of material consisting of timbers, lump coal, very dry coal dust, float coal dust and coal fines. Id. at 1228. The accumulations were extensive and combustible, and they were noted in various pre-shift examination reports. Id. at 1229, 1233.

The Secretary also relies on the Commission's holding in Doss Fork Coal Company, 18 FMSHRC 122 (February 1996). In Doss Fork, the operator had been issued citations on several previous occasions for storing dirty coal, consisting of mud, rocks and coal, in crosscuts. Consequently, in Doss Fork, the Commission concluded the operator was on notice and affirmed the ALJ decision that the cited dirty coal condition constituted a violation of section 75.400.

This case concerns gob piles that were stored in crosscuts. Unlike Doss Fork, where the operator had a history of citations for the same condition, Kotor's testimony reflects the cited gob piles were stored in accordance with industry practice. Moreover, unlike the cited condition in Mid-Continent that dealt with extensive, combustible accumulations, the alleged section 75.400 violation in this case is characterized as non-significant and substantial. Significantly, both Mid-Continent and Doss Fork dealt with prohibited accumulations that were required to be removed. In fact, in Mid-Continent, the operator's defense was that it was impossible to remove the [cited] accumulations from the mine via the conveyor belts due to unexpected mechanical problems Id. 16 FMSHRC at 1233. In the instant case, the Secretary does not argue that the gob piles should have been removed from the mine.

In short, regulations must be interpreted to harmonize with their intended purpose. Emery Mining Corp. v. Sec'y of Labor, 744 F.2d 1411, 1414 (10th Cir. 1984). Section 75.400 requires the clean-up of the cited combustible accumulations. The notion that gob in an underground mine should be cleaned up and not be permitted to accumulate is, indeed, strange. Rather, the mandatory standard in section 75.403 concerning rock dusting is the appropriate standard to address the potential hazards associated with combustible material in gob. In this regard, Kotor admitted that he normally does not take samples to support a section 75.400 violation. (Tr. 156).

The Secretary's interpretation of section 75.400, as it applies to the facts of this case, is not entitled to deference as the meaning of the clean-up requirements is neither doubtful nor ambiguous. Pfizer Inc. v. Heckler, 735 F.2d 1502, 1509 (D.C. Cir. 1984). Here the cited accumulations constituted gob that was permissibly stored in crosscuts. Thus, in the final analysis, the Secretary's interpretation of section 75.400 is at odds with the plain meaning of the standard. Sunny Ridge Mining Company et al., 18 FMSHRC 254, 258 (February 1997). Since storage is permitted, clean-up and removal cannot be required under section 75.400. Accordingly, Order No. 4387711 is hereby vacated.

ORDER

Accordingly, **IT IS ORDERED** that, consistent with the parties' settlement agreements, the respondent shall pay civil penalties of \$733.00, in Docket No. PENN 96-248, and \$471.00 in Docket No. PENN 96-221. **IT IS FURTHER ORDERED** that Order No. 4387711 issued in Docket No. PENN 96-221 **IS VACATED**. Consequently, the respondent shall pay a total civil penalty of \$1,204.00 in these matters. Payment is due within 30 days of the date of this decision. Upon timely receipt of payment, these proceedings **ARE DISMISSED**.

Jerold Feldman
Administrative Law Judge

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April 2, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. PENN 96-221
Petitioner	:	A. C. No. 36-02398-03756
v.	:	
	:	Docket No. PENN 96-248
LION MINING COMPANY,	:	A. C. No. 36-02398-03759
Respondent	:	
	:	Grove No. 1 Mine

ORDER CORRECTING DECISION

Before: Judge Feldman

The decision in these proceedings was issued on March 31, 1997. The last sentence in the first paragraph on the last page of the decision omitted the word "not." The sentence is hereby corrected to read as follows: In the instant case, the Secretary does not argue that the gob piles should have been removed from the mine.

Jerold Feldman
Administrative Law Judge

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