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SOL (MSHA) V. PEABODY COAL CO
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November 1, 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 93-23
PEABODY COAL COMPANY	:	

BEFORE: Jordan, Chairman; Doyle and Holen, C0ommissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988). The issue is whether Peabody Coal Company ("Peabody") violated 30 C.F.R. 75.316 (1991) by collecting a dust sample at a location other than that specified in its approved ventilation and dust control plan ("ventilation plan"). Administrative

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1. Commissioner Marks assumed office after this case had been considered at a decisional meeting and a decision drafted. In light of these circumstances, Commissioner Marks elects not to participate in this case.

2. 30 C.F.R. 75.316, substantially identical to 30 U.S.C. 863(o), provided as follows:

> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

On November 16, 1992, 30 C.F.R. 75.316 was superseded by 30 C.F.R. 75.370, which imposes similar requirements

Law Judge Gary Melick concluded that Peabody violated its ventilation plan by placing the pump at an incorrect location. 15 FMSHRC 1652 (August 1993) (ALJ). The Commission granted Peabody's petition for discretionary review, which challenged the judge's determination. For the reasons that follow, we affirm the judge's decision.

I.

Factual and Procedural Background

On September 21, 1992, Ronald Zara, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), inspected Peabody's Marissa Mine, an underground coal mine in Randolph County, Illinois. In the Main Belt East entry, he noticed a dust collection pump located on the east side of the 1st North Submain conveyor belt, upwind from the transfer point where that belt discharges coal onto the Main East belt.

Under Peabody's ventilation plan, the sampling location for that area was downwind from the dumping point for the North Submain head roller, on the south side of the Main East belt, some 15 feet west of the transfer point. 15 FMSHRC at 1653, 1658; Jt. Stips. 3, 4 Ex. B, p. 5. The approved sampling location was clearly marked. 15 FMSHRC at 1654; Jt. Stip. 4. The pump Zara observed was in a less dusty location than that required by the ventilation plan. Id. Zara issued a citation pursuant to section 104(a) of the Mine Act, 30 U.S.C. 814(a), alleging that Peabody was out of compliance with its plan because the pump was not in the approved location.

The parties filed cross motions for summary decision. In granting the Secretary's motion, the judge noted that 30 C.F.R. 70.208(a) requires operators to take one valid dust sample from each designated area in each bimonthly period. 15 FMSHRC at 1653. He concluded that Peabody violated its ventilation plan by sampling at a location other than the one designated by the plan, with the intention of submitting that sample to meet the requirements of section 70.208(a). Id. at 1653-54. The judge also determined that the sampling did not qualify for the exception set forth in 30 C.F.R. 70.209(d) because Peabody had not previously identified it as

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3. The parties stipulated to the facts, which are set forth at 15 FMSHRC at 1655-57.

4. Section 70.208(a) provides:

> Each operator shall take one valid respirable dust sample from each designated area on a production shift during each bimonthly period .... The bimonthly periods are: ... August 1-September 30 ....

intended for purposes other than those set forth in 30 C.F.R. Part 70, 71, or 90. Id. The judge rejected Peabody's argument that its plan would have been violated only if it had actually submitted a sample collected at the improper location. He concluded that the essence of the violation was the placement of the dust sampling device at an improper location with the intent to submit the resulting sample. Id. at 1654. The judge found that the incorrect placement was unintentional and assessed a civil penalty of $100. Id.

II.

Disposition

Peabody contends that the Secretary has not alleged that it violated a specific provision of the ventilation plan and asserts that the plan "does not prohibit sampling at incorrect locations." PDR at 2-3. Noting that section 70.208(a) requires that a valid sample be taken in each bimonthly period, and that the relevant period did not end until October 1, 1992, subsequent to the citation, Peabody argues that collecting an invalid sample before the deadline for submission cannot constitute a violation.

The Secretary responds that the judge's decision is supported by substantial evidence and is legally correct. The Secretary points out that 30 C.F.R. 70.208(e) obligates operators to collect dust samples for designated areas at the locations set forth in their approved ventilation plans. Peabody's plan specified the proper place for sampling and the sample was not being collected there. The Secretary construes sections 70.208 and 70.209 to impose "two separate and distinct" requirements, "'collecting' valid samples and 'transmitting' valid samples," and contends that "the operator must comply with both requirements, not just with the latter." S. Br. at 8.

A fundamental purpose of a mine ventilation plan is to ensure that the operator collects valid dust samples. Considering the plan provisions and regulations together, we conclude that their plain terms impose location requirements for collecting designated area samples and that

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5. Section 70.209(d) provides:

> All respirable dust samples collected by the operator shall be considered taken to fulfill the sampling requirements of Part 70, 71 or 90 of this title, unless the sample has been identified in writing by the operator to the District Manager, prior to the intended sampling shift, as a sample to be used for purposes other than required by part 70, 71, or 90 of this title.

The judge inadvertently cited 30 C.F.R. 75.209(d), which refers to roof control, but correctly quoted the language of section 70.209(d).

compliance with the ventilation plan is contingent upon sampling at the proper locations.

Section 70.208(e) provides:

> Designated area samples shall be collected at locations to measure respirable dust generation sources in the active workings. The approved mine ventilation plan contents required by 75.371(t) ... shall show the specific locations where designated area samples will be collected.

30 C.F.R. 70.208(e). Section 75.371(t) requires plans to specify "[t]he locations where samples for 'designated areas' will be collected, including the specific location of each sampling device...." 30 C.F.R. 75.371(f). Under section 70.209(d), all respirable dust samples collected by the operator are presumed to be taken to fulfill the sampling requirements of Part 70, 71 or 90 of the Secretary's regulations, unless, prior to the sampling shift and in writing, the operator has identified the sample as one to be used for other purposes.

The sampling requirements in Peabody's plan mirror and implement the Secretary's regulations. The plan includes a "Selection Sheet for Designated Areas," listing the designated areas for dust sampling. The selection sheet sets forth for each area a precisely described "Position of Sampling Instrument Within Designated Area." Jt. Stip., Ex. B, p. 5. The Main Belt East area was one of the designated sampling areas and a specific position for the sampling device was set forth.

It is undisputed that the pump observed by the inspector was collecting a sample in a location other than that designated in the plan. Likewise, it is undisputed that Peabody did not inform MSHA prior to the shift that the sample was intended for purposes other than those required by Part 70, 71 or 90. 15 FMSHRC at 1653-54; Jt. Stips. 8, 12. Peabody has conceded that the cited pump was being used to collect a sample in the designated area for submission pursuant to its bimonthly sampling obligations under section 70.208(a). 15 FMSHRC at 1653; Jt. Stip. 12. We agree with the judge that, under the circumstances, Peabody's dust sampling was in violation of its ventilation plan.

We reject Peabody's assertion that, based on the bimonthly time periods set forth in section 70.208(a), its improper sampling was not a violation because it had nine days remaining to take and submit a valid sample. PDR at 4. The essence of the violation was the improper

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6. Once a ventilation plan is approved and adopted, its provisions are enforceable as mandatory standards. UMWA v. Dole, 870 F.2d 662, 671 (D.C. Cir.. 1989); Zeigler v. Kleppe, 536 F.2d 398, 409 (D.C. Cir. 1976); Freeman United Coal Mining Co., 11 FMSHRC 161, 164 (February 1989).

location of the sampling device. As noted by the Secretary, the collection requirement, although related to the transmittal requirement, is a distinct obligation.

Further, we agree with the Secretary that to accept Peabody's position would undercut MSHA's effective enforcement of the ventilation program. Under Peabody's approach, an MSHA inspector would be barred from issuing a citation when he discovers a dust collection pump in operation at an incorrect location. Instead, MSHA would be required to determine, after such sample had been submitted, that it had been collected at the wrong location.

Accordingly, we conclude that the judge's determination of violation is supported by substantial evidence and is legally correct.

III.

Conclusion

For the foregoing reasons, we affirm the judge's decision.

Mary Lu Jordan, Chairman
Joyce A. Doyle, Commissioner
Arlene Holen, Commissioner