

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

**601 NEW JERSEY AVENUE N.W., SUITE 9500
WASHINGTON, D.C. 20001**

October 26, 2009

ABUNDANCE COAL, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. KENT 2010-5-R
	:	Citation No. 8227636;09/29/2009
v.	:	
	:	Docket No. KENT 2010-6-R
	:	Order No. 8227637;09/29/2009
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	#1 Mine
ADMINISTRATION, (MSHA),	:	Mine ID 15-18711
Respondent	:	

DECISION

Appearances: Billy R. Shelton, Esq., Jones, Walters, Turner & Shelton, PLLC, Lexington, Kentucky, on behalf of the Contestant;
Mary Sue Taylor, Esq., and Schean G. Belton, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Respondent.

Before: Judge Melick

These cases are before me upon the request by Abundance Coal Inc., (Abundance) for expedited hearings to contest Citation Number 8227636 and Withdrawal Order Number 8227637 issued pursuant to Section 104(a) and Section 104(b), respectively, of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the “Act”. Hearings were expedited pursuant to Commission Rule 52, 29 C.F.R. § 2700.52, and were held on October 14 and 15, 2009. Upon Contestant’s request, expedited briefs were filed on October 23, 2009. The general issues before me are whether the violation was committed as alleged in the citation and whether the withdrawal order was properly issued.

Citation Number 8227636, issued September 29, 2009, alleges a non-“significant and substantial” violation of the standard at 30 C.F.R. § 75.336(c) and charges as follows:

The mine owner and superintendant have been notified that samples taken in the sealed area of the Consol of Kentucky, Jones Fork E-3 mine ID# 15-18589 behind the No. 1 set of seals on 9/27/09 contained an explosive mixture of oxygen greater than 10% and methane between 4.5% and 17%. This sealed area is interconnected in a contiguous seam and is located behind the #2 set of seals in this mine, and is a commonly sealed area between these two mines. The mine owner and superintendant were notified that under 30 CFR 75.336 part c

the operator is required to withdraw persons from the affected area, which was explained to be the entire mine. The mine owner stated that the next scheduled production shift would continue unless given an order from MSHA.

The cited standard 30 C.F.R. § 35.336(c) provides in relevant part as follows:

Except as provided in § 75.336(d), when a sample is taken from the sealed atmosphere with seals of less than 120psi and the sample indicates that the oxygen concentration is 10 percent or greater and methane is between 4.5 percent and 17 percent, the mine operator shall immediately take an additional sample and then immediately notify the district manager. When the additional sample indicates that the oxygen concentration is 10 percent or greater and methane is between 4.5 percent and 17 percent, persons shall be withdrawn from the affected area which is the entire mine or other affected area identified by the operator and approved by the District Manager in the ventilation plan, except those persons referred to in § 104(c) of the Act.

Approximately 16 minutes following the issuance of the citation, Order Number 8227637 was issued pursuant to Section 104(b) of the Act directing the closure of the Abundance No. 1 mine.¹ The order charges that “[a]fter a reasonable abatement time the operator stated his intention to not comply with 30 C.F.R. § 75.336(c) unless given an order from MSHA”.

Abundance operates the No.1 mine at issue which is adjacent to the Jones Fork mine owned and operated by Consol of Kentucky (Consol) and the Marshall Coal No. 22 mine. Both the Abundance No. 1 mine and the Marshall Coal No. 22 mine were originally part of the Jones Fork mine but were separated by seals sometime before June 2006. The three mines share a common gob area. Subsequently, 120 psi seals were constructed at the Abundance and Marshall mines on the working section side of the seals. On or about November 27, 2008, Abundance submitted to the Department of Labor’s Mine Safety and Health Administration (MSHA) an “alternate seal sampling plan-ventilation plan revision” advising the that it would not conduct any sampling behind its 120 psi seals. Thereafter, on or about December 12, 2008, MSHA approved Abundance’s “alternate seal

¹ Section 104(b) of the Act provides 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 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 ©, 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.

sampling plan-ventilation plan revision” accepting Abundance’s proposal that it not conduct any sampling behind its set of 120 psi seals.

As a part of a regular quarterly inspection on September 27, 2009, MSHA inspector Sam Hill took gas readings at, among other locations, the No. 1, seal set of Consol’s Jones Fork mine and found 15% oxygen and 13.3% methane. On the following day, September 28, 2009, Inspectors Hill and Ritchie returned to the Jones Fork mine, inspected seal set No. 1 and found 13.4% oxygen and 17% methane. Based on the second reading and the range covered by the standard, Consol removed the miners from the underground portions of the Jones Fork mine.

Terry Michael Jude, an MSHA inspector, traveled to the Abundance No. 1 mine on September 29, 2009, to report that MSHA had found this explosive mixture of gases behind the No. 1 set of seals at the adjacent Jones Fork mine. Jude advised Abundance officials that, due to the explosive mixture at the Jones Fork mine and pursuant to 30 C.F.R. § 75.336(c), Abundance was required to submit a plan to the district manager and withdraw miners from its mine. Jude also then issued the citation at bar for a violation of 30 C.F.R. § 75.336(c). Abundance owner Ray Slone first told Jude that he would comply with the citation and withdraw the miners; however, about 16 minutes later Slone changed his mind and advised Jude that he would not voluntarily withdraw his miners without an order. Slone advised Jude that he was refusing to withdraw his miners due to his understanding that the 120 psi seals installed in the Abundance No. 1 mine and previously approved by MSHA were sufficient to protect his miners. As a result, Jude issued the “Section 104(b)” Order at bar.

The Abundance 120 psi seals are approximately 4000 to 8000 feet from the No. 1 set of seals in the Jones Fork mine. After the 120 psi seals constructed by Abundance went through the cure period, Abundance was no longer required to sample atmosphere behind those seals, pursuant to its approved ventilation plan. The miners at the Abundance No. 1 mine are not required to travel in the area behind the 120 psi seals and the area behind the 120 psi seals is not used as an escapeway.

John Urosek is employed by MSHA at its technical support center. He is currently chief of the mine emergency operations group and is also responsible for the seal approval group within MSHA’s technical support center. In that capacity he is responsible for administering MSHA’s seal approval program. He has a B.S. degree in mining engineering from Pennsylvania State University and is a registered professional engineer. He was also the chairman of the emergency temporary standard and the final rule committees for what was promulgated as 30 C.F.R. §§ 75.335, 75.336, 75.337 and 75.338. Mr. Urosek is eminently qualified as an expert in mining engineering and, in particular, in regard to mine ventilation and mine explosions. Mr. Urosek has also been designated as the sole decision maker authorized to speak for the Secretary of Labor on this matter and therefore he is the designee to be given deference in interpreting the agency’s regulations should that be necessary. See *Thomas Jefferson University v. Shalala*, 512 U.S. 504-512 (1994) and *Akzo Nobel Salt, Inc., et.al. v. Federal Mine Safety and Health Review Commission and Secretary of Labor*, 212 F.3d 1301 (2000).

There are currently ten seals in the Jones Fork mine. The seals in the Jones Fork mine at the No. 1 and No. 2 sets are Mitchell Barrett seals. The Mitchell Barrett seal is recognized as a 20 psi seal. Mr. Urosek was aware that there was an ignition in the sealed area within the Jones Fork mine in 2006. During this ignition in 2006, seals were damaged in the area of the Jones Fork mine. Urosek opined that because the Jones Fork mine has 20 psi seals, the Abundance mine is required to take action not based on the language of the cited standard but on its preamble in the Federal Register and upon a series of questions and answers published by MSHA on the internet. Even though it was Urosek's opinion that Abundance was required to perform sampling behind its set of 120 psi seals, he acknowledged that Abundance had a plan approved by MSHA which would not require them to do so. Urosek opined that this provision in Abundance's ventilation plan (which did not require any sampling behind the 120 psi seals) was issued in error.

Abundance owner Ray Slone testified that in 2006, there was a set of Mitchell Barrett seals about 9,000 feet down the main line entry and another set of Mitchell Barrett seals approximately 4,500 feet down the main line. These Mitchell Barrett seals were pre-shifted on a daily basis and there was no problem with these seals. At some point in time, a set of Omega seals was constructed approximately 1,500-2,000 down the main line. In December 2007, Abundance constructed the 120 psi seals at its mine based on his understanding that these seals would separate him from the Jones Fork mine and the gob area. Indeed, Norman Page, the MSHA district manager and several MSHA inspectors had confirmed his understanding. Moreover, since Slone constructed the 120 psi seals at the Abundance mine, and until the citation at bar, he had not been required by MSHA to perform any sampling of the atmosphere behind those seals. Furthermore, MSHA approved a change in Abundance's mine ventilation plan to acknowledge that no sampling was required behind Abundance's 120 psi seals.

Gary Hartsog has B.S. and M.S. degrees in mining engineering and is licensed in nine states as a professional engineer. He testified that, in the course of his practice, he has been involved on a day-to-day basis with seal issues and as a member of the West Virginia Coal Association and the National Mining Association, has served on several safety commissions. He has also conducted seminars for professional engineers on sealing issues. He is clearly an expert in mine engineering and, in particular, in mine sealing. Hartsog is of the opinion that the regulations found at 30 C.F.R. Sections 75.335 and 75.336 are clear and do not require sampling behind the 120 psi seals after they have reached their strength. Hartsog opined that the Abundance mine is a separate mine by being separated by 120 psi seals. He concluded that based on the regulations there is no expectation that there would be a breach on the Abundance seal side. It is Hartsog's expert opinion that if an operator has 120 psi seals, the regulations found at 30 C.F.R. Sections 75.335 and 336 are not applicable to that mine.

The underlying issue in this case is a question of regulatory interpretation. More particularly the interpretation to be placed on the language in section 75.336(c) that triggers withdrawal of miners when the air sample "taken from the sealed atmosphere with seals of less than 120 psi" reach certain action levels of oxygen and methane. Abundance maintains that since it is undisputed that it had 120 psi seals separating its atmosphere from the sealed atmosphere of the common gob area, the cited standard is not applicable and accordingly there was no violation as charged.

It is a cardinal rule of construction that if a regulation's meaning is plain, the regulation cannot be construed to mean something different from that plain meaning. *Exportal Ltda. v. United States*, 902 F.2d 45,50 (D.C. Cir. 1990); *Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984), (citing *Udall v. Tallman*, 380 U.S. 1, 16 (1965)). When the language of a provision is plain, the plain language is the meaning of the provision and the sole function of the courts is to enforce the language as written. *Hartford Underwriters Ins. Co. v. Union Planters Bank*, N.Na, 530 U.S. 1, 6 (2002).

I find the language of the cited standard to be perfectly clear and that since it is undisputed that Abundance was utilizing seals of 120 psi strength separating its workings from the sealed atmosphere at issue, I find that Abundance was in compliance with the requirements of section 75.336(c) and that there was no violation as charged.

The fact that MSHA had indeed approved the very practice that Abundance was following in approving its "alternate seal sampling plan-ventilation plan revision" on December 12, 2008, that permitted Abundance to not conduct any sampling behind its set of 120 psi seals (See Exh. AB-6 and 7) is also certainly consistent with the plain language of section 336(e). Since the cited standard is unambiguous, a second step *Chevron* (*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)) analysis is not required. *Exportal Ltda* at 50.

Under all of the circumstances I find that there was no violation of the standard at 30 C.F.R. § 75.336(c) and that Citation Number 8227636 must be vacated. Since the "Section 104(b)" order at issue is preconditioned upon the existence of a violation charged in that citation, that order must also be vacated.

ORDER

Citation Number 8227636 and Order Number 8227637 are hereby vacated.

Gary Melick
Administrative Law Judge
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Distribution:(Facsimile and Certified Mail)

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