

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE  
721 19<sup>th</sup> ST. SUITE 443  
DENVER, CO 80202-2500  
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

February 22, 2024

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Petitioner,

v.

THUNDER BASIN COAL COMPANY,  
LLC,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEST 2023-0157  
A.C. No. 48-00977-571261

Mine: Black Thunder

**DECISION AND ORDER**

Appearances: Gregory W. Tronson, U.S. Department of Labor, Office of the Solicitor,  
1244 Speer Blvd, Suite 515, Denver, CO 80204-3516

Kenneth J. Polka, CLR, U.S. Department of Labor, MSHA, P.O. Box  
25367, DFC, Denver, CO 80225

Christopher G. Peterson, Fisher & Phillips LLP, 1125 17th Street, Suite  
2400, Denver, CO 80202

Before: Judge Simonton

**I. INTRODUCTION**

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Thunder Basin Coal Company, LLC, (“Respondent”), pursuant to the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. § 801.<sup>1</sup> This case involves one Section 104(a) citation with a total proposed penalty of \$3,006.00.

The parties presented testimony and documentary evidence regarding the citation at issue at a hearing held on August 23, 2023, in Gillette, WY. MSHA Inspector Errol Scott Arnett testified for the Secretary. Equipment Dump Manager James Braswell, Equipment Operator and Miner’s Representative Patricia Gregory, Safety Department Member and Equipment Operator Kayla Schipman, Safety Manager Lynn Busskohl, Production Superintendent Ryan Woodard,

<sup>1</sup> In this decision, the joint stipulations, transcript, Secretary’s exhibits, and Respondent’s exhibits are abbreviated as “Jt. Stip.,” “Tr.,” “Ex. GX-#,” and “Ex. R-#,” respectively.

and Production Superintendent Bradley Erdman testified for the Respondent. After fully considering the testimony and evidence presented at hearing and the parties' post-hearing briefs, I VACATE Citation No. 9151820.

## II. STIPULATIONS OF FACT

At hearing, the parties agreed to the following stipulations:

1. The Respondent is an "operator" as defined in § 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the Mine where the contested citations in these proceedings were issued.
2. The Thunder Basin Coal Company LLC Black Thunder Mine is a "mine" as defined in § 3(h) of the Mine Act, 30 U.S.C. § 802(h).
3. The mine is subject to the jurisdiction of the Mine Act.
4. These proceedings are subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act.
5. Payment of the total proposed penalty in this matter will not affect the Respondent's ability to continue in business.
6. The individual whose name appears in Block 22 of the citation in contest was acting in an official capacity and as an authorized representative of the Secretary of Labor when the citation was issued.
7. The citation contained in this matter was properly issued and served by a duly authorized representative of the Secretary of Labor upon an agent of Respondent at the date, time, and place stated in the citation, as required by the Mine Act.

Tr. 7.

## III. FINDINGS OF FACT AND SUMMARY OF TESTIMONY

Thunder Basin Coal Company, LLC, operates the Black Thunder Mine, a large-scale surface coal mine. Tr. 334. On September 23, 2022, MSHA Inspector Errol Scott Arnett arrived at the mine to conduct a regular EO-1 inspection. Tr. 25. While inspecting the site, he was accompanied by safety manager Lynn Busskohl and miner's representative Patricia Gregory. Tr. 25-26. This was the inspector's first visit to the facility. Tr. 33.

Inspector Arnett issued Citation No. 9151820 because he believed that the ground control plan was inadequate for failing to address the hazards of berm bumping or driving through a berm. Tr. 51-54; Ex. GX-1. He testified that he observed two sets of tire tracks from different pieces of equipment imprinted into the soil of the berm. Tr. 33-34. One set of tracks indicated what he termed a "normal push": the dozer pushed material perpendicular to the berm, pushing the material over the berm or creating a new berm. Tr. 34-35. The other tire track indicated that the dozer drove on or near the flat, making an "abrupt swooping" motion to the right, leaving an

impression into the berm all the way to the top of the berm. Tr. 35, 56; Ex. GX-3-2, GX-3-4. In the inspector's opinion, this was not normal practice. Tr. 36. Because the dozer was driving on uncompacted material near the top of the berm, he believed there was potential for the weight of the vehicle to tilt it over, leading to fatal injuries. Tr. 42-45. Arnett did observe some superficial cracks in the soil but that did not give him much concern. Tr. 56, 163; GX-3-7. On the back side of the berm there was roughly an angle of repose of 30-35 feet in vertical height. Tr. 58. GX – 3-11. In summary, he believed that the berm had no substantial compaction and that there was no way of stopping breakthrough. Tr. 111.

In addition to the dozer tire tracks on the berm, there were also haul tire tracks imprinted into the berm and a depression roughly 18 or 19 inches deep that trucks had been making in the toe of the berm Tr. 46, 56-57, 58; Ex. GX-3-9. This depression indicated that haul trucks were stopping in a weak spot in the foundation of the dumping location and causing sinkage. Tr. 46, 112, 169. Rather than stopping in the berm, the inspector believed the best practice would be to dump the load in front of the berm and then push the material into the existing berm, thereby creating a new berm. Tr. 48-49. When the inspector questioned the mine's personnel on the issue of stopping in the berm, he was informed that it was not common practice to stop in the berm and drivers are instructed to stop short of the berm. Tr. 51; Ex. GX-2-5.

As a result of these concerns, the inspector requested to see the mine's ground control plan. Tr. 51-52. After reviewing the plan, the inspector determined that it was insufficient, based in part on his own experience reviewing ground control plans. Tr. 52-53. The only statement pertaining to berms stated that "[b]erms are maintained at the outer edge of truck dumps to prevent overtravel or overturning." Tr. 53; Ex. GX-10-4. The inspector believed that this was not enough to train or enough to prevent the possibility of rollovers, breakthroughs, and push-throughs. Tr. 54. He supported this assertion with the fact that the mine had an incident where a haul truck overturned when it backed through a berm on June 3, 2022, although he was unaware of this previous incident when he issued the citation. Tr. 60-62; Ex. GX-4. He testified that the best practice to prevent overturning fatalities is to dump material from a safe location and push the material over the edge with a bulldozer. Tr. 71.

To further support the citation, the inspector referenced the MSHA inspection handbook, which instructs inspectors to look for signs of unsafe dumping practices such as backing up at an angle, hitting or traveling up the berm, and excessive braking or stopping and turning close to the edge before dumping. Tr. 80; Ex. GX-7-12, GX-7-13. The guidebook also instructed to ensure that equipment operators dump short "if there is uncertainty about the stability of the dumping location." Tr. 80. Other educational materials stated that berms are meant to prevent a vehicle from going over a berm but that they are not designed to be bumped or hit. Tr. 100; Ex. GX-8. The inspector also referenced MSHA fatality alerts involving rollover accidents and berms that could have been prevented using a dump short and push procedure. Tr. 69-73, 102; Ex. GX-5, GX-6. This research was conducted after the citation had already been issued. Tr. 71-73, 87.

In response to the citation, the inspector held conversations with the operator to update and submit a ground control plan that addressed his concerns with the berm and the reason why he issued the citation. Ultimately, he elected to cite the ground control standard rather than the berm standard in order to prompt change in the language of the ground control plan. Tr. 175.

James Braswell, a dump operator with fifteen years' experience, testified for the Respondent. Tr. 179-80. He had been running the dump on the day of the citation and had been operating the dozer whose rubber tire track was visible in the berm. Tr. 179-80, 184. Braswell testified that he had looked at the berm with the inspector and had explained to the inspector that when he was rebuilding the berm, he sometimes used a feathering motion because the dozer's blade could articulate. Tr. 182. It was part of his practice to travel up the berm a bit to fill in any low spots and maintain a stable berm. Tr. 184. Further, the GPS in his dozer provided information regarding his location, elevation, and angle. Tr. 186-87. He had never been instructed not to do this feathering motion, and instead had been trained to move the material where it is needed. Tr. 209.

Regarding the material that comprised the berm, Braswell described it as a "soft virgin material" that hasn't been compacted and that heavy haul trucks are likely to leave an impression at the tow of the berm. Tr. 197, 199-202, 216. This compaction always occurs at the edge of the berm, and the cracks in the berm itself are tiny superficial cracks. Tr. 201, 222. When there are indications of berm failure, cracks will occur in the front of the berm and the berm will start opening up. Tr. 221. On the day of the citation, he did not see any instability in the berm and that the dump was solid. Tr. 190, 215. Further, if the dozer were to fall through the berm, it would just sink into the soft material and would not flip over because the weight of the vehicle is in the back half. 90 percent of the weight is in the rear of the machine. It's fairly light in the front end. There was one tire up on the berm which barely made an impact, maybe one to two inches in depth. Tr. 211-13, 246; RX 6. In addition, the length of the rubber tire dozer is almost 30 feet long. If there was a breakthrough the dozer would just roll through it or settle in, not flip. Tr. 235-236; Ex. RX6. Lynn Busskohl, a member of the mine management who observed the inspection, corroborated this in his own testimony by reiterating that the weight of the dozer is in the back, as stated in the vehicle's manual. Tr. 302-04; RX 6.

Patricia Gregory, a miner's representative, and Kayla Schipman, an employee with the safety department, testified for the Respondent about the berm's condition on the day of the citation. Gregory accompanied the inspector and stated that she was not overly concerned with seeing the rubber tire marks on the berm and that she did not see any evidence of a haul truck powering up or riding up on the berm. Tr. 255-59. The haul truck's contact with the berm was incidental, and that the trucks are going slowly enough to feel when they make contact with the berm. Tr. 263, 265-66. She had no concerns that the berm would fail. Tr. 259. Schipman, who did not accompany the inspector but saw the berm when she was called to bring the mine's ground control plan to the area, testified that she thought the berm looked good with adequate height and thickness, and that it was not unusual to see tire tracks in the berm. Tr. 270-71, 291. She also testified that she had driven haul trucks at the mine before, and that when the truck approaches the berm it is going very slow and that drivers are instructed to look for conditions in the berm that would indicate cracks or weaknesses. Tr. 272-73. Trucks are instructed to stop backing up when they are in the toe of the berm, and when the trucks just touch the berm, there is a feeling of resistance. Tr. 275, 278. Busskohl also confirmed that this is the way haul trucks approach the dump in the mine. Tr. 299.

Two production superintendents, Ryan Woodard and Bradley Erdman, testified for the Respondent. Woodard provided additional information regarding the composition of the berm, explaining that it was made out of a clay loam material that is safe for haul trucks to compact as they advance a dump. Tr. 362. He also did not have any concerns about the berm's integrity because if there had been vehicles riding up on the berm, it would have knocked part of the berm away. Tr. 361. He observed that the berm was "perfectly in place" with no material sloughing or falling away. Tr. 361-62. If there had been sloughing, the procedure would have been to dump short. Tr. 365. Erdman supported the prior witnesses' testimony about the berm's condition, saying that he believed the berm had good integrity and that there was nothing to give him pause. Tr. 378, 382. He saw the tire tracks but did not think that they compromised the integrity of the berm and that the contact points were normal. Tr. 379.

In response to his previous statements in the inspector's notes, Woodard confirmed that he had told the inspector that it was not a common practice for the rubber tire track to be that high on the berm. Tr. 363-64. He did testify that the dozer is there to make the berm safe for other pieces of equipment and it was designed to be operated in that manner. Tr. 364, 370. He further explained that the dozer operator has to ride up on the berm in order to build it up, and it is not normal to see tire tracks on the berm because material falling out of the dozer's blade will cover the tracks. Tr. 367-68. The blade is concave so it holds some of the material. As it comes back down the rest of the material falls out of the blade and covers up the tracks which also helps fill in compacting as you do it. Tr. 368. The weight of the dozer is in the back of the machine, there was no danger of the dozer overturning, and the dozer operator was using the machine as it was intended to be used. Tr. 370-72.

#### **IV. DISPOSITION**

During his inspection on September 23, 2022, Arnett issued 104(a) Citation No. 9151820 which alleged:

There are significant tire markings pressed into the existing soil berm located at the 5 South dump. The operator is using a Cat 854 G RT dozer to push material over the spoil dump. There are two sets of tracks against the berm, from the RT dozer and haul trucks. This creates an over-turn hazard and exposes the miner to fatal injuries from blunt force trauma and crushing injuries.

A new Ground Control plan must be submitted addressing the dumping procedures. The current ground control plan is dated March 26, 2018.

Ex. GX-1-1.

Arnett designated the citation as a significant and substantial violation of 30 C.F.R. § 77.1000 that was reasonably likely to cause an injury that could reasonably be expected to be "fatal," would affect one miner, and was caused by Respondent's moderate negligence. Tr. 107-09; Ex. GX-1-1.

The Commission has long held that “[i]n an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation.” *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987); *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1294 (Aug. 1992). The burden of showing something by a “preponderance of the evidence,” the most common standard in the civil law and the standard applicable here, simply requires the trier of fact “to believe that the existence of a fact is more probable than its nonexistence.” *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989).

30 C.F.R. § 77.1000 states that “[e]ach operator shall establish and follow a ground control plan for the safe control of all highwalls, pits and spoil banks to be developed after June 30, 1971, which shall be consistent with prudent engineering design and will insure safe working conditions. The mining methods employed by the operator shall be selected to insure highwall and spoil bank stability.”

This standard requires each operator to establish and follow a ground control plan that provides safe working conditions at the mine site. “The requirement to “insure safe working conditions” is a mandate over and above the particular requirements contained in the plan itself, which means although an operator may comply with all parts of its submitted and acknowledged plan, it may still be in violation of the standard if the plan does not provide a safe workplace.” *Central Appalachia Mining* 29 FMSHRC 430, 437 (June 2007). In order to find that a ground control plan is inadequate, there must first be a hazard or unsafe condition present that is not addressed or that is not addressed sufficiently in the ground control plan. It is undisputed that at the time of the citation, the only statement in the ground control plan pertaining to berms was “[b]erms are maintained at the outer edge of truck dumps to prevent overtravel or overturning” and that the Respondent was not in violation of this provision as written. Ex. GX-10-4.

The facts of the case, the overall testimony of the witnesses and the preponderance of the evidence do not indicate that such a hazard was present to render the ground control plan deficient. There were no signs of sloughing or cracking in the berm, and the inspector stated in his testimony that he was not concerned with the superficial cracks visible in the toe of the berm. I credit each of the Respondent’s witnesses who consistently and without equivocation credibly testified that the berm appeared stable and that they did not consider the berm to be dangerous in any way. Notably, this included Patricia Gregory, whose responsibilities include miner safety as a miner’s representative. Further, the testimony indicates that management was aware of the dump short and push method advocated for by the inspector but did not believe that the berm conditions, at that time, warranted employing this method when dumping. Finally, I place little weight on the prior tipping incident that had occurred at this mine because it is apparent it occurred due to operator error rather than deficiencies in Respondent’s ground control plan. The inspector also did not rely on this prior incident when deciding to cite the Respondent for an inadequate ground control plan.

While the dozer operator admitted that he had driven onto the berm and was the source of the rubber tire tracks imprinted there, testimony and evidence indicate that the dozer was meant to perform these maneuvers. The dozer’s blade is articulated, which allows the operator to carry out feathering motions with the blade. Both the equipment manual and the testimony from the

operator as well as mine management state that the weight of the vehicle is in the back and not in the vehicle's blade. Further, the dozer was equipped with a GPS that provided the operator with information regarding his position, reducing the chance that he would drive on top of the berm. Based on the vehicle's features, I find that the dozer's operation in this manner to not be hazardous and that there is minimal, if any risk that the vehicle will overturn. While the production superintendent acknowledged he told the inspector at the time of the citation that it was not common practice for the rubber tire to run up on the berm like that, that does not detract from the evidence that the articulated blade and dozer is designed for this type of work in order for it to make the berm safe for other equipment.

Concerning the haul truck tire marks, I find the testimony regarding the composition of the berm's material by the Respondent's witnesses to be credible. The material was described as a virgin clay material that is uncompacted and that truck tires are likely to leave an impression in it. The inspector did not refute this and did not testify regarding his understanding of the material. It was also his first visit to the mine when he issued the citation. The Respondent's witnesses are likely to have a greater understanding of the berm's composition and the ground conditions present at the time of the citation. While the haul truck tires may be incredibly close to the berm, based on the evidence presented it is not sufficient to demonstrate that the haul truck tires were rode up on the berm or otherwise generated a hazardous condition.

The Secretary did not prove by a preponderance of the evidence that the Respondent's ground control plan required updating to insure safe working conditions. I accept that when ground conditions indicate sloughing or material cracks dumping short and pushing is the best method to prevent fatalities from vehicles tipping over or driving through a berm. However, those conditions were not present at the time the citation was written. There is insufficient evidence to demonstrate that the Respondent's methods of dumping or building up the berm, in the ground conditions that existed at the time the citation was written, were unsafe. Because there is not sufficient evidence of a hazardous condition that would render the ground control plan inadequate, I vacate the citation.

## V. ORDER

It is hereby **ORDERED** that Citation No. 9151820 is **VACATED**.



David P. Simonton  
Administrative Law Judge

Distribution: (Electronic and Certified mail)

Gregory W. Tronson, U.S. Department of Labor, Office of the Solicitor, 1244 Speer Blvd, Suite 515, Denver, CO 80204-3516, [Tronson.gregory@dol.gov](mailto:Tronson.gregory@dol.gov)

Kenneth J. Polka, CLR, U.S. Department of Labor, MSHA, P.O. Box 25367, DFC, Denver, CO 80225, [polka.kenneth@dol.gov](mailto:polka.kenneth@dol.gov)

Christopher G. Peterson, Fisher & Phillips LLP, 1125 17th Street, Suite 2400, Denver, CO 80202, [cpeterson@fisherphillips.com](mailto:cpeterson@fisherphillips.com)