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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

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

Civil Penalty Proceeding

Docket No. VINC 78-455-P
A.O. No. 11-00598-02037V

v.

Eagle No. 2 Mine

PEABODY COAL COMPANY,
RESPONDENT

DECISION

Appearances: Inga A. Watkins, Trial Attorney, Office of the
Solicitor, U.S. Department of Labor, Arlington,
Virginia, for the petitioner;
Thomas F. Linn and Thomas R. Gallagher, Esqs.,
St. Louis, Missouri, for the respondent.

Before: Judge Koutras

Statement of the Proceeding

This is a civil penalty proceeding pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, initiated by the petitioner against the respondent on August 17, 1978, through the filing of a petition for assessment of civil penalty, seeking a civil penalty assessment for one alleged violation of the provisions of mandatory safety standard 30 CFR 75.316, as set forth in a section 104(c)(2) order issued by a Federal coal mine inspector on June 14, 1977, pursuant to the 1969 Act. Respondent filed an answer and notice of contest on September 7, 1978, denying the allegations and requesting a hearing. A hearing was held in St. Louis, Missouri, on February 13, 1979, and the parties submitted posthearing proposed findings, conclusions, and briefs, and the arguments set forth therein have been considered by me in the course of this decision.

Issues

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulations, as alleged in the petition for assessment of civil penalty filed in this proceeding, and, if so, (2) the appropriate civil penalty.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent; (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

1. The Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq., now the Federal Mine Safety and Health Act of 1977, P.L. 95-164, effective March 9, 1978.

2. Part 2700, Title 29, Code of Federal Regulations, 43 Fed. Reg. 10320 et seq. (March 10, 1978), the applicable rules and procedures concerning mine health and safety hearings.

Stipulations

The parties stipulated to the court's jurisdiction, agreed that the respondent is a large coal mine operator, and that any civil penalty assessed by me in this matter will not adversely affect respondent's ability to remain in business (Tr. 9).

Discussion

On June 14, 1977, MSHA inspector Harold Gulley issued section 104(c)(2) Order No. 1 HG, 7-0232, charging a violation of 30 CFR 75.317, and it states as follows:

The ventilation system and methane and dust control plan was not being followed on section 033, 4 North off 2 Main East in that the permanent stoppings were not substantially constructed and reasonably air tight to minimize air leakage on the intake aircourse to the section. (1) Permanent stopping no'd 9 had 4 holes where the stopping was partially crush [sic] out. (2) No. 10 stopping had a hole beside the man door where stopping had partially crush [sic] out and not repaired or rebuilt.

Three crosscuts outby trap door on the 4 North supply roadway a stopping had a hole 4 inches by 13 inches and not repaired or plastered. No. 24 and 25 stopping had been rebuilt and not plastered and 25 holes were observed in the 2 stoppings. No. 28 stopping had hole 6 inch by 8 inch and had not been repaired. The approve plan states stoppings, overcast or undercast, shall be

properly maintained for the life of the stoppings to assure minimum air leakage.

Testimony and Evidence Presented by Petitioner

MSHA inspector Harold Gulley testified as to his expertise and training as a mine inspector, and confirmed that he issued the order of June 14, 1977, after observing the conditions cited and described. He was accompanied by George Morris, respondent's safety inspector. While walking the roadway next to the intake stopping line that separates the intake from the return, they observed the permanent stoppings in question and identified their approximate location by means of a mine map (Exh. P-2). Some of the stoppings had been crushed out, some had been partially replaced and blocks had been stacked, but they were not wood-fibered or sealed so as to exclude leakage. He believed that the stopping leaks would affect the ventilation that goes to the 2 West and Main North sections, since the crushed stoppings along the intake would cause the air to short circuit and travel to the belt isolation and into the return to the areas at the areas shown at the top of the mine map. The defective stoppings were on the intake aircourse from the left isolation (Tr. 10-22).

Inspector Gulley identified the notes which he made during his inspection (Exh. P-3), and a copy of the mine ventilation plan (Exh. P-4, Tr. 25-26). The specific ventilation plan provision which he believes was violated is No. 4(f), labeled "General, Methane and Dust Control Plan," which reads "These stoppings, overcast and undercast shall be properly maintained for the life of the stoppings, overcast and undercast to assure minimum air leakage." He also relied on plan No. 4(f)(2) and (3). He described what he believed was a substantially constructed stopping and stated that a stopping which is reasonably airtight would be one that has a minimum of air leakage. He believed that the stoppings cited in his order were not substantially constructed because they had been partially crushed out and partially built back. Stopping No. 9 had four holes in it which he could see through and they were pulling the air from the intake into the belt isolation. The No. 10 stopping had holes beside the man door where the stopping had partially crushed out and the outer layer of blocks had a hole in it 4 inches by 8 inches by 26 inches. The stopping No. 3 crosscuts out by the trap door on the supply road had a 4-inch long hole at the top, and he observed 13 other holes and cracks in the stopping which were not plastered. Pieces of concrete were simply shoved into the holes and were not plastered or woodfibered to keep them in place. The Nos. 24 and 25 stoppings had crushed out and were rebuilt and he observed 25 holes in the stoppings, 1/2 to 4 inches and he could observe that ventilation was going through them. The No. 28 stopping had a hole in it 6 inches by 8 inches which had not been repaired (Tr. 34-40).

Inspector Gulley stated that the stopping conditions affected the ventilation in the entire mine. The crushed-out stoppings at No. 4 could have dropped and short circuited the ventilation. The No. 10 stopping door was not fitting tightly because the blocks and steel frames were crushed out and he could see through the holes. The 25 holes in the Nos. 24 and 25 stoppings resulted from failure to mortar the block joints when the stopping was built, and the No. 28 stopping hole allowed the ventilation to be sucked out (Tr. 40-44). He used a smoke tube to detect that the air was leaking through the stoppings in question, and an anemometer where the ventilation was going through the stoppings, and it turned. The mine does liberate gas, and gas feeders have been found and recorded on the mine books (Tr. 47).

On the particular day in question, Inspector Gulley did not take air readings and he could not state the danger to which the men may have been exposed (Tr. 48). Although he checked the preshift examination books, he could not state whether the specific stoppings which he cited were recorded in the books (Tr. 49). The company was aware of the stopping problems because they were having problems with smaller type blocks which were taking weight and the section foreman should have observed the stoppings when he drove by the stopping line. Weekly examinations of the intake and returns are required to be made. Abatement took about 5 hours and all of the 10 to 13 men on the section were used to abate the conditions (Tr. 50-52).

On cross-examination, Mr. Gulley testified that there was sufficient air on the last open crosscut of the 033 unit on the day the order issued. He indicated the area being worked that day, but could not recall the specific rooms on the map. He took no anemometer readings and only used that instrument to detect air movement. He did not know how much air was leaking through the stopping in question and made no calculations regarding air loss. He issued the order because the stoppings were not substantially constructed and not because of lost air velocity. The Nos. 24 and 25 stoppings were completely rebuilt, and the holes resulted because the concrete blocks used to construct the stopping were not plastered properly. Had they been plastered properly, the leakage would have been corrected. He was not aware of the wildcat strike the week before his inspection. The cited area was not subject to excessive roof squeeze. The ventilation plan previously identified was the plan in effect on the day the order issued, and the plan is modified by attaching supplements to it, but he was not aware of any changes in the criteria in question (Tr. 55-78).

Mr. Gulley conceded that his order does not specifically cite the particular ventilation plan requirement allegedly violated by the respondent. He also indicated that stoppings do leak, but good stoppings have a small percentage of leakage, and he is not surprised that

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60 to 80 percent of the air that enters a mine never reaches the working face because of leakage through permanent stoppings. He did not know how many stoppings were installed along the stopping line in question. None of the stoppings were completely crushed out, and stoppings crush out because of the weight to which they are subjected. No one advised him that a ventilation man was assigned permanently to the section to repair stoppings. He did not check to see whether air was being directed from the neutral return to the working sections. He made methane checks on the day in question, but found none. The unit had sufficient air and he "possibly" could have told face boss Amos Drone that "I'm not shutting you down for air, I'm shutting you down because of the holes in the permanent stoppings" (Tr. 78-87).

On redirect examination, Mr. Gulley confirmed that there was sufficient air in the last open crosscut where mining was taking place (Tr. 87). The preshift reports for June 13, 1977, reflect air readings of 7,500 cfms on the intake, and 9,200 cfms in the return of the 2 West section, and on another shift that day, the readings were 6,000 in the intake and 8,000 on the return with 2-1/2 percent methane noted in the No. 4 entry (Tr. 90). He reviewed the preshift books for June 14, but could not recall all of the recorded air readings for that day, and did not know whether there was sufficient air throughout the entire mine (Tr. 97). The mine is on a 10-day spot frequency inspection schedule because it liberates methane freely (Tr. 106).

Testimony and Evidence Presented by Respondent

Amos Drone, respondent's "floating boss" on the day the order issued, testified that Inspector Gulley advised him of the conditions of the stoppings in question, but there was sufficient air on the unit. He observed the stoppings after Mr. Gulley brought them to his attention, but he did not check them all prior to that time while going underground. The stoppings are on the intake and they serve to maintain the air and to keep it separated from the return. The law does not require the stoppings to be preshifted. There were a total of 60 stoppings on the intake in question, and Mr. Gulley cited six of them. Four of them had holes, and the other two needed plaster. He described the procedure for constructing the stoppings, and indicated they were in the process of rebuilding the two which needed plaster and it would have been completed the same day since a man was on the section to do the work. He indicated that the company has a program for maintaining stoppings and seven men on each of two production shifts are assigned these tasks. It is not uncommon for stoppings to take weight, particularly in the unit in question. He admitted the stoppings cited were in need of repair, but indicated the others were apparently in pretty good shape (Tr. 123-132). Mr. Drone identified Exhibit R-2 as the preshift examination book covering June 14, 5 to 7 a.m. to 8 to 11 a.m. on June 7, 1977, for the unit in question. On June 13, the day he was there, the air reading in the last open crosscut was 10,200, and the two prior shifts were 13,500 and 9,000.

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The first preshift indicated 15,000, and he could recall detecting no methane on the unit on June 14 or prior to that time. The preshift for June 7 indicates three intake stoppings were out, and there were strikes on and off for several days and several shifts (Tr. 133-138). There was a wildcat strike at the mine during the week prior to June 14 (Tr. 138). Referring to the preshift books, Mr. Drone indicated the days that the mine was idle due to the strikes or for other reasons (Tr. 146-157). He also indicated the days that stopping conditions were noted in the preshift books (Tr. 157-158).

On cross-examination, Mr. Drone testified that the unit had not yet begun production when the order was issued. He conceded that he was responsible for repairs to the stoppings, and that they were visually obvious once they were pointed out to him, but he did not see them while riding in (Tr. 159-163).

Mark Eppers, respondent's section manager in the safety department, identified Exhibit R-3 as a list of the days between June 4 and June 13, 1977, that the mine was idle due to a wildcat strike (Tr. 187-189).

On cross-examination, he testified that the mine was idle on June 11 and that was a management decision and not a strike day (Tr. 189).

Jerry Tien, mine ventilation specialist, testified as to his expertise and education in mine engineering. He is a specialist in ventilation, has published three articles on the subject, and was accepted as an expert in mine ventilation (Tr. 191-193). Mr. Tien testified it is not uncommon to have a 60- to 80-percent air loss in a mine before it reaches the working face. Air is lost through leakings on the stoppings and overcasts. He identified Exhibits R-5, R-6, and R-7, as the Bureau of Mines' publications supporting his statement regarding air loss. He read excerpts from these publications indicating that due to air leakage, as little as 30 percent, and less than 40 percent, of the air induced in a mine actually reaches the working faces (Tr. 193-197).

Mr. Tien testified that he made a determination as to the amount of air lost in the ventilation system at the Eagle No. 2 Mine. He took a pressure survey in July 1977, and determined an average fresh air loss of 43 percent, and he believed that was acceptable. No significant and substantial changes were made in the mine ventilation system between June 14 and July 5 to 11. He indicated that he is familiar with the order issued by Inspector Gully and that he has listened to all of the testimony in the case, and he expressed an opinion that the air loss from the areas described was not uncommon or unusual for the areas described because the area was formed by a

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flooding plain which resulted in faults and excessive squeeze. His pressure survey reflected 27,000 cfms of air flowing through the 4 North Section, and he explained that air leakage through stoppings is caused by roof convergence, concussions from blasting, and the actual stopping construction itself. He explained the effects of convergence and marked off the areas in question on Exhibit R-8 (Tr. 197-205).

On cross-examination, Mr. Tien testified that he has been in and out of mines during the course of conducting pressure surveys and he reiterated that 60 to 80 percent of the air is lost due to leakage. He stated he was familiar with the Eagle No. 2 Mine, did not know the amount of air leakage on the day the order issued, and conceded that air leakage is a serious problem. He indicated it is possible that the conditions of the stoppings which were cited could have affected the air in the other mine sections, but explained that due to the type of exhaust system used in the mine, the pressure differential across the stopping line would be minimal and would not cause that much difference insofar as air leakage is concerned (Tr. 205-210). Mr. Tien confirmed that the particular mine area in question has had problems with stoppings being squeezed out because of excessive roof squeeze, and that the problem has existed since 1976 and the company is aware of it (Tr. 218-219). He indicated that the total mine air intake is approximately 220,000 cfms, and the 320,000 cfms goes out. The condition of squeeze or convergence of the mine roof and floor is common to all mines and is a natural condition (Tr. 223).

Petitioner's counsel asked Mr. Tien to compute the air leakage in the entry which resulted from the stopping conditions noted by the inspector on the face of his order. After making certain assumptions, and considering the size of the stopping holes described by Mr. Gulley, Mr. Tien stated he could not calculate the precise air leakage because he would have to measure the entire length of the 60 stoppings, and would have to know the amount of air traveling along the stopping line. He indicated that it would be difficult to calculate each individual stopping for leakage, but that the entire stopping line leakage could be calculated by determining the air coming in and the air going out, divided by the number of stoppings (Tr. 228-234). In response to a question from respondent's counsel, Mr. Tien calculated the air loss through three stopping holes of 26 cfms of air (Tr. 236).

Findings and Conclusions

Fact of Violation

The arguments presented by the parties in support of their respective positions in this proceeding, as well as the facts presented, are essentially the same as those raised in the prior consolidated cases of Peabody Coal Company v. MSHA, Docket No. VINC 78-1, and MSHA v. Peabody Coal Company, Docket No. VINC 78-441-P, decided by me on

December 13, 1978. In those proceedings, I found that MSHA had failed to establish a violation and dismissed the petition for assessment of civil penalty. The thrust of my decision is found on page 19 of that decision, which states, as follows:

In order to establish a violation of the ventilation plan, MSHA must first establish by a preponderance of the credible evidence that the failure by Peabody to properly maintain the stoppings and to keep the stopping doors reasonably airtight did not assure minimum air leakage. MSHA's contention is that the conditions of the stoppings and doors resulted in significant air leakage, the magnitude of which it claims made it apparent that the violation could significantly reduce the amount of air reaching the working faces where it was needed to carry away methane and respirable dust. The critical question presented is whether the conditions cited did, in fact, result in any reduction of the air reaching the faces. Since the inspector failed to take any air measurements on the day in question, I cannot conclude that MSHA has established by a preponderance of the evidence that the air leakage was more than minimum or that the failure to maintain the stoppings and doors resulted in a violation of the ventilation plan. In short, I find that MSHA has failed to carry its burden of proof and that a violation has not been established. In the circumstances, the order must be vacated and the petition for assessment of civil penalty must be dismissed. [Emphasis in original.]

Under the circumstances herein presented, I adopt my previous findings and conclusions made in the aforementioned decision as dispositive of the instant proceeding and those previous findings and conclusions are herein incorporated by reference as my findings and conclusions in this case and serve as the basis for my findings and conclusions that MSHA has again failed to establish a violation of 30 CFR 75.316 as charged in Inspector Gulley's Order No. 1 HG, June 11, 1977, and which is the basis for the petition for assessment of civil penalty filed in this proceeding. It is clear to me in this proceeding that in issuing his order of withdrawal, Inspector Gulley believed that the stopping conditions which he observed prevented the legal minimum limit of air from reaching the working faces because of the air loss caused by leakage through the stoppings in question. He also stated that the stoppings condition affected the ventilation in the entire mine. His order charges that the cited stoppings were not substantially constructed and reasonably airtight to minimize air leakage on the intake aircourse to the section. However, by failing to take any air measurements or to otherwise establish that the air leakage through the stoppings did, in fact, result in a diminution of air at the faces below the minimum allowable limits, the inspector's beliefs and conclusions are simply unsupportable.

Petitioner admits that 12,000 cfms of air were present at the last open crosscut of the 4 North Section at the time the order issued (Brief, p. 14). However, petitioner concludes that it would not require a significant increase in the leakage through the stoppings to result in the quantity of air at the face dropping below the minimum required. While this may be true in theory, the short answer to the asserted conclusion is that petitioner has not proved its theory by any credible evidence. I simply fail to understand how one can conclude as a matter of fact that the quantity of air reaching the face is below the minimum required by the law without taking an air reading or otherwise testing the sufficiency of the air reaching the working face, and petitioner's arguments have not enlightened me in this regard.

Petitioner's argument that the physical condition of the stoppings, alone, establishes that less air than that which was possible, was reaching the face of every working section, begs the question. The issue is not whether less air than that which was possible was reaching the face, but rather, the question presented is whether the amount of air required by the law was, in fact, reaching the working faces. In this case, the evidence and testimony adduced establishes that there were a total of sixty (60) stoppings on the stopping line in the section, six (6) of which were found to be in various stages of disrepair. Two of these stoppings had been rebuilt, but were inadequately plastered, one had a hole next to the man door, and the others needed plastering and patching. Based on the testimony and evidence adduced by the petitioner in support of its case, I simply cannot conclude that petitioner has established that the six defective stoppings, out of a total of 60 along the entire stopping line in question, in fact, disrupted the ventilation to the point where it resulted in other than minimum air leakage in violation of the ventilation plan. The ventilation plan requires that stoppings be properly maintained to assure minimum air leakage. The problem is that petitioner has not established by a preponderance of any credible evidence that failure to maintain the six stoppings in question failed to assure minimum air leakage. Petitioner's entire case is built on the proposition that defective stoppings somehow disrupt ventilation in the entire mine, and that this disruption in the ventilation results in less air reaching the face, thereby establishing a violation. Petitioner glosses over what I believe are the critical facts to establish a violation, namely, the amount of air introduced on the section through the normal mine ventilation system, the amount of air lost through leakage through the six defective stoppings, and the amount of air ultimately reaching the working faces. Without these essential ingredients, such ventilation plan terms as "minimum air leakage" and "reasonably airtight" lead to meaningless and speculative guessing games.

Petitioner's reliance on the testimony of respondent's witness Amos Drone and the assertion at page 5 of its brief, that he admitted

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that four of the stoppings were not maintained to assure minimum air leakage must be taken in context. The transcript reference relied on by petitioner, at page 132, reflects the following:

Q. Well, in your judgment, as a section boss, was the, were the stoppings on your unit maintained to assure minimum air leakage?

A. Well, I would say, I'd have to, with all honesty, say that, as a whole, we got sixty stoppings there and there's about four of them that were really, you know, right at that time, needed repairs that we found.

Q. So is it your judgment then that they were maintained to assure minimum air leakage?

A. Yes, up to a point.

Q. Why do you say, "Yes, up to a point"?

A. Well, I can't say that these stoppings here didn't need repair. In other words, I couldn't tell you that.

They did need repair. But, like I said, in comparison with the whole section and everything, with the problems we had, I can say that the rest of them, you know, apparently were in pretty good shape.

At pages 12 and 14 of its brief, petitioner suggests that the condition of the stoppings "could affect the ventilation of the entire mine," and that the maintenance of the stoppings to assure minimum air leakage is a preventive measure designed to insure continuous adequate ventilation during the mining process in which conditions are in a constant state of flux. I agree with this proposition. My disagreement with the petitioner's position in this case, as well as in my previous decision of December 13, 1978, in VINC 78-1 and VINC 78-441, lies in the fact that petitioner simply has failed to establish a case. In this case, the inspector not only failed to take air readings, but he did not know the total number of stoppings installed along the intake aircourse which he cited, nor did he attempt to determine whether the air from the neutral return was being directed to the working sections. Since he believed there was sufficient air in the last open crosscut where mining was taking place, I simply fail to understand how the 6 defective stoppings adversely affected the entire mine ventilation system or cause significant air leakage of the magnitude suggested by the petitioner.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED that petitioner's petition for assessment of civil penalty, insofar as it seeks a civil penalty assessment on Order No. 1 HG, June 14, 1977, be dismissed.

George A. Koutras
Administrative Law Judge