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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, PETITIONER	Civil Penalty Proceeding
v.	Docket No. LAKE 81-46 AC No. 11-02544-03040
OLD BEN COAL COMPANY, RESPONDENT	No. 27 Mine

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor,
U.S. Department of Labor, for Petitioner

Robert J. Araujo, Esq., and Derwood H. Rusher II, Esq.,
for Respondent

Before: Judge Fauver

This proceeding was brought by the Secretary of Labor under section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., for assessment of civil penalties for alleged violations of a mandatory safety standard.

On August 22, 1980, an MSHA inspector issued a citation/withdrawal order at Respondent's Mine No. 27, charging two violations of 30 CFR 75.507 because of power connection points alleged to be in return air. The fundamental issue is whether they were in return air or intake air. If they were in return air, the charges must be sustained, with civil penalties. If the power connection points were in intake air, the charges must be dismissed.

The case was heard at Evansville, Indiana.

Having considered the contentions of the parties and the record as a whole, I find that the preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. At all pertinent times, Old Ben operated an underground coal mine, known as Mine No. 27, in Franklin County, Illinois, which produced coal for sale or use in or substantially affecting interstate commerce.

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2. The mine included a longwall unit that mechanically mined large blocks of coal.

3. No. 4 Entry South was used as a return air course. "Return air" is air that has circulated through the mine's workings and is directed toward the mine fan to be evacuated from the mine.

4. The entry immediately to the west of 4 Entry South was 5 Entry South. A nonpermissible (FOOTNOTE 1) 7200 volt A.C. transformer was located in the fourth crosscut (FOOTNOTE 2) outby the longwall face, between 4 and 5 Entries South.

5. About two crosscuts inby the transformer in 5 Entry South, there was a nonpermissible trailing cable coupling that fed electrical power from the transformer to a permissible Fletcher roof bolter, located off 5 Entry two crosscuts outby the longwall face.

6. At the time of an inspection on August 22, 1980, the transformer was energized and the trailing cable to the roof bolter was not energized.

7. Nonpermissible electrical equipment can generate electrical arcs when circuits are opened and closed. An electric arc can serve as an ignition source to cause methane gas or float coal dust to explode. This mine liberated methane gas.

8. Nos. 4 and 5 Entries South were separated by stoppings; however, two stoppings were knocked out and two contained open regulators. The stoppings in the first and second outby crosscuts were knocked out so that equipment could be moved between the entries. The stopping in the third crosscut was intact. Air normally did not flow from 4 Entry, a return entry, into 5 and 6 Entries, which were intake entries, because air tends to flow from high-pressure points to low-pressure points, and the mouth area of 4 Entry South was the lowest pressure point. The stopping in the fourth crosscut was intact except for a regulator, about two feet square, and the stopping in the fifth crosscut was intact except for a regulator, about 2 1/2 feet square. At the time of the inspection on August 22, 1980, both these regulators were open, by the removal of concrete blocks, and drew air from 5 Entry into 4 Entry South.

9. Prior to the inspection on August 22, 1980, Old Ben management had been monitoring the direction of air flow in 5 Entry South to ensure that only intake air was passing over the nonpermissible power connection points. The mine superintendent, Mr. Cavinder, had been checking the

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flow of air in 5 Entry South three or four times a week for four or five weeks before this inspection. He personally took smoke tube readings to ensure that only intake air was passing over the nonpermissible electrical equipment and in each test found that this was the case.

10. In certain areas in 5 Entry South, use of a smoke tube was required to test the direction of the air flow because of the air's slow and almost imperceptible movement. In such areas, motion of the human body could create sufficient air turbulence to cause an erroneous appearance of the air direction. For this reason, the smoke-tube test had to be performed carefully and slowly so as not to disturb the natural flow of air.

11. On August 21, 1980, MSHA Inspector Joe Tennant conducted a ventilation inspection at Mine No. 27, in the areas in which the transformer and roof bolter trailing cable coupling were located. Mr. Tennant had no criticism of the manner in which the air was coursing over these connection points.

12. On August 22, 1980, Inspector Lonnie D. Conner conducted a ventilation inspection at Mine No. 27. He was accompanied by Old Ben's Safety Inspector, Jim Clark, and UMW's Safety Representative, Gordon De Grave.

13. In 5 Entry South, Mr. Conner observed the nonpermissible transformer and the nonpermissible trailing cable coupling. He believed that these were in return air, constituted violations of 30 CFR 75.507, and constituted an imminent danger. Based on these findings, he issued a citation/withdrawal order, which reads in pertinent part:

Two pieces of nonpermissible electrical equipment were observed in the return air coursing from the #1 longwall section. A nonpermissible 7200 volts A.C. transformer was located at the 1200 foot mark between the 4th and 5th south entries, and a nonpermissible trailing cable coupling to a roof bolting machine was located approximately 200 ft. in by the transformer; the transformer was energized.

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14. At the return end of the longwall, air was traveling about 250 feet per minute. Most of the air was drawn by a fan down 4 Entry South to a slidinghood regulator. A turbulence at the end of the longwall face caused return air to circulate between 4 and 5 Entries South before being drawn finally into 4 Entry South. Return air mixed in this turbulence and entering 5 Entry South re-entered 4 Entry South in the first two outby crosscuts. Inby the trailing cable coupling at issue in 5 Entry South and extending near the next inby crosscut, the air was stale, i.e., there was barely any movement. The air passing over the coupling at issue was intake air moving inby to mix with the air moving from 5 Entry South into 4 Entry South at the next inby crosscut, which had no stopping. The preponderance of the evidence establishes the ventilation pattern and direction of air flow as shown in Old Ben's Exhibit No. 1 and by the testimony of Old Ben's witnesses explaining such exhibit.

DISCUSSION WITH FURTHER FINDINGS

Based on the citation/withdrawal order, the Secretary charges two violations of 30 CFR 75.507, which states:

Except where permissible power connection units are used, all power connection points outby the last open crosscut shall be in intake air.

It is the Secretary's main contention that the transformer and trailing cable coupling were in return air and thus in violation of 75.507. The Secretary proposes a civil penalty of \$1200 for each alleged violation.

The inspector testified that, in 4 Entry South, about 350 feet outby the longwall, he heard the longwall machine operating and saw dust moving from 4 Entry South into 5 Entry South through an open crosscut. He stated that he traced this air flow down 5 Entry South and observed its exit in the open regulator in the crosscut in which the transformer was located. He did not use a smoke tube or any other instrument to determine the air flow, but stated that, "If you have enough movement there, it's very easy to put dust in suspension and see which way the air is blowing" (Tr. 38). He made two "tests" to determine the air flow, one at the transformer and one at the roof bolter, by patting his clothing to cause dust to be suspended in the air.

I find, based on a demonstration of using a smoke tube, which was conducted in the hearing room, and the testimony of the witnesses who make smoke-tube tests at the transformer, roof bolter, and trailing cable coupling sites, that the inspector's method of visual observation and patting his clothes to send dust in the air was not an accurate or adequate method in the circumstances. The air flow at these sites was too slow to warrant this approach, and required a smoke tube test for a reasonable and accurate determination of the direction of the air.

About one and a half hours after Inspector Conner issued the citation/withdrawal order, members of mine management, including Mr. Wagner, mine manager, and Mr. Young, general mine superintendent, questioned his finding as to the air direction at the sites and requested Mr. Conner to go with them to the cited areas to perform smoke-tube tests. Mr. Conner refused. After these discussions, Mr. Wagner and Mr. Young went to 5 Entry South and conducted a number of smoke-tube tests. These tests, which I find were properly performed, revealed that both of the nonpermissible power connection points were in intake, and not return air.

Although Inspector Conner testified that the UMWA safety representative, Mr. De Grave, confirmed his opinion that return air was passing over the nonpermissible connections, Mr. De Grave's testimony did not agree with the inspector's account but supported the testimony of Messrs. Cavinder, Wagner, and Young. Mr. De Grave stated he was a neutral observer during the MSHA inspection, and that he did not feel it was his role to question the inspector's method of investigation or in any other way interfere with the investigation. He also testified that, "When Mr. Conner refused Mr. Wagner to go back into the section, it put a little spark into my conscience that I thought Mr. Conner might have had a doubt of his own on the air" (T.150), so the next day Mr. De Grave returned to 5 Entry South and made his own smoke-tube tests. In front of the transformer, he found "Very slight movement intake of air." His other tests, totaling six, confirmed that the air passing over the transformer and the trailing cable coupling was intake and not return.

There is no evidence suggesting a change in the air flow conditions in the cited areas from the time of Mr. Conner's inspection until the time smoke-tube tests were made by mine management or by Mr. De Grave. I find that the tests made with a smoke tube establish, by a preponderance of the evidence, the air flow direction in the cited areas as of the time of Mr. Conner's inspection. In addition to the greater weight of the testimony, this finding is supported by the careful demonstration of the smoke-tube test in the hearing room, where one's senses could not reasonably determine the direction of air current but the smoke tube test could do this. The demonstration also showed convincingly that movement of the body or arms can affect air flow and cause an erroneous impression of the actual direction of air flow.

