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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. WEST 89-217
A.C. No. 05-03771-03516

v.

Raton Creek Mine No. 1

ENERGY FUELS COAL, INC.,
RESPONDENT

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Phillip D. Barber, Esq., Welborn, Dufford, Brown &
Tooley, Denver, Colorado,
for Respondent.

Before: Judge Lasher

This proceeding was initiated by the filing of a Proposal
for Penalty by Petitioner on June 12, 1989, pursuant to Sections
105 and 110 of the Federal Mine Safety and Health Amendments Act
of 1977, 30 U.S.C. Section 801 et seq.

At the outset of hearing on September 14, 1989 the
parties announced their settlement of one of the four Citations
(T. 5, 6) and such was approved from the bench (T. 6). Pursuant
to the agreement, Respondent is to pay MSHA's administratively
assessed penalty of \$74 in full for Citation No. 2931286, and
Petitioner agrees to the modification of paragraph 10 D on the
face of the Citation to reflect that the "Number of Persons"
affected by the violation is "1" rather than "7". My bench
decision affirming this settlement is here affirmed.

Citations numbered 2873899, 2873900 and 2931204 remain for
resolution.

CITATIONS 2873899 and 2873900

MSHA seeks penalties of but \$20.00 each for these two Citations.

These two related non-"Significant and Substantial" citations were issued when Respondent turned off the main fan at the subject mine on three separate weekends when it was idle and miners were not working in the mine. Maintenance was not being performed on these occasions (T. 45) which occurred on a total of 6 days in February, 1989. During the pertinent period, Respondent had 15 miners who were working during the week on one shift daily (T. 55). After receiving the Citations, Respondent kept the mine fans running at all times and in the following month (March, 1989) applied to MSHA for a variance from the standard (T. 36, 46, 55). While the subject mine had methane at a detectable level (T. 46), a lethal or toxic level had never been detected (T. 45). On the three weekends in question no miners were working (T. 45) and all power to the mine was shut off (T. 42)

Turning first to Citation 2873900, it alleges a violation of 30 C.F.R. 75.316 which requires mine operators to adopt a "ventilation system and methane and dust control plan" approved by the Secretary of Labor. Section 75.316 thus provides:

A ventilation system an 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.

The subject plan is Exhibit B attached to Court Exhibit 2 in the "Exhibits" File.

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Once adopted and approved, such plans are enforceable as mandatory safety standards. Petitioner alleges that Respondent violated Paragraph II E (2) of the Plan, pertaining to "Main Fan Operation", which provides:

All main fan installations shall meet the criteria found in 30 C.F.R. 75.300-2 and 30 C.F.R. 75.300-3, unless a variance is granted by the (MSHA) District Manager."
(Emphasis supplied)

The C.F.R. Section referred to in the adopted and approved Plan, 30 C.F.R. 75.300-3(a), (the preface to which, 30 C.F.R. 75.300-1, sets out the pertinent "criteria by which . . . District Managers will be guided in approving main fan installation and operation . . . ") provides:

(a) All main fans should be kept in continuous operation except in the event of:

(1) Scheduled maintenance or adjustments on idle days when all men other than those performing evaluation or adjustments are withdrawn from the mine and the mine power is cut off.

(2) Uncontrolled stoppage or fan failure.

(3) Other stoppages, when written permission is obtained from an authorized representative of the Secretary.

(Emphasis supplied)

The second Citation, #2873899, alleges a violation of 30 C.F.R. 75.3002 which requires the mechanical ventilation equipment to be inspected daily and for this inspection to be recorded daily. The safety director for Energy Fuels, Keith Hill, conceded that inspections were not performed when the main fan was not in operation (T. 46).

Respondent contends, with respect to Citation No. 2873900, that the approved Plan does not require that the fans be kept in continuous operation. This of course directly contradicts the express language of 30 C.F.R. 75.300-3(a) which provides that all "main fans should be kept in continuous operation" except for the three exceptions noted above.

Without citing authority therefor, Respondent contends that use of the word "should" rather than "shall" in the quoted provision indicates the standard is "advisory" rather than "mandatory."

There is, by virtue of a recent descent decision of the Mine Health and Safety Review Commission, *Secretary of Labor v. Utah Power & Light Company*, 11 FMSHRC 1926 (October, 1989) authority for the general proposition asserted by Respondent that use of the word "should" in a regulatory or statutory requirement normally indicates the non-mandatory nature of such a provision. Thus the Commission held:

"The Secretary's argument is undercut also by the use of the term "should" in the wording of the criteria, a term that normally signals the non-mandatory nature of a regulation. See generally, *Jim Walter Resources, Inc.*, 3 FMSHRC 2488 (November 1981). The Commission has emphasized that when assessing the nature of a regulation the essential question is whether the standard as written imposes a mandatory duty upon operators. For instance, the Commission has found that even the inadvertent use of the word "should" instead of "shall" could be overcome as an indicia of a regulation's non-mandatory nature where the regulatory history of the standard made clear that the standard imposes a mandatory duty on mine operators. See *Kennecott Minerals Co., Utah Copper Division*, 7 FMSHRC 1328, 1332 (September 1985). The standard at issue, however, was neither proposed as mandatory nor promulgated with a mandatory designation. Compare *Kennecott Minerals Co.*, supra. Rather, as the judge properly observed, the standard simply purports to set forth criteria by which MSHA's District Managers will be guided in approving escapeways, without imposing a commensurate mandatory duty on mine operators to seek such approval. 10 FMSHRC at 23."

It is concluded, however, that Respondent's argument lacks merit. To be first noted is that plans addressing particular safety areas in mines, such as ventilation and roof control plans, are, once approved, mandatory inasmuch as violations of

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such plans constitute violations of the Mine Act. Once adopted by the mine operator and approved by MSHA, the provisions of ventilation plans are enforceable as mandatory safety standards. Zeigler Coal Co. v. Kleppe, 536 F.2d 398, 409 (D.C. Cir. 1976); Utah Power and Light, supra.

In determining the nature of the standard here, if the question were confined to evaluating the language of the regulation (30 C.F.R. 75.300-3) only, the Respondent's position would be tenable, since such regulation uses the word "should" and there is little else to go on in this record as to interpretation of the regulation. However, the standard consists of two parts, the Plan itself and the regulation it incorporates. The regulation is simply a subject of reference contained in Paragraph II E (2) of the subject Plan, and that Paragraph, upon which the minds of the parties to the Plan met (Respondent in adopting it and MSHA in approving it) provides a clearly mandate that all main fan installations "shall" meet the criteria found in 30 C.F.R. 300-3, unless a variance is granted by MSHA. Here the use of the mandatory word "shall" in the Plan clearly overrides the word "should" in the referenced material and I conclude Respondent formulated and agreed to a regulatory requirement - to keep the fans in continuous operation - thus making the standard mandatory in nature. Significantly, Respondent, following the requirements of this standard after the violation in question and seeking to invoke one of its exceptions, sought permission (a variance) from MSHA and was refused (T. 18, 19, 35).

Respondent also contends that MSHA denial of such permission (a variance) for it to de-energize its fans during "off hours" was arbitrary. This argument is found irrelevant to the issues in this proceeding. To begin with, the two Citations in issue here were issued in February, 1989, and as Respondent points out it did not apply for permission (a variance) until after the Citations were issued, i.e. in March, 1989. Such permission was withheld.³ Further, under Paragraph II E (2) of the Plan the main fan installation shall meet the regulatory standard specified "unless a variance is granted . . ." No variance was ever granted. It is thus concluded that Respondent's allegation of after-the-violation arbitrariness by MSHA is not germane to the issue of whether the violation charged did occur. (T. 34-36, 37, 53).

The violation charged in Citation No. 2873900 is thus found to have occurred. This violation was not designated by the issuing Inspector as being "Significant and Substantial", presumably since there was no indication that the hazard contemplated by the infraction was reasonably likely to have occurred. Nevertheless, the hazard posed by the violation could have resulted in serious consequences. Thus, William Knepp, an MSHA ventilation expert, testified:

Q. And during certain idle days when the mine is not producing, is there a need to have ventilation?

A. I think that the danger would be on the start-up, and dependent on how long the fan was down. Without the ventilation you could have buildup of methane or black damp "

(T. 21)

* * *

A. . . . I think the real danger comes when mine examiners have to reenter the mines after the fans are restarted."

(T. 24)

Mr. Knepp also described the mine as being "low gassy" (T. 28); re-emphasized the concern for the welfare of the preshift examiner whose job, he said, is made "much more difficult and more hazardous after a fan has been shut off for several days" (T. 25); and described the risk involved to the examiner of "running into bad air, or high methane concentrations" (T. 32).

Having determined that a violation occurred by Respondent's failure to keep the fans running continuously (including over weekends) without a variance we now turn to Citation No. 2873899 which alleges a violation for Respondent's failure to examine such equipment on the weekends the fans were turned off.

Respondent admits (Brief, page 1) that the "record book does not contain entries for examinations on the indicated days for the reason that the fan was properly idle and daily examination of idle fans was not required by 75.300." Respondent contends that William Knepp, the MSHA ventilation expert, testified "that when a fan is not running the requirement of 30 C.F.R. 75.300-4(a) for daily examination of main fans does not apply (Brief, pgs. 1 and 2). In support of this representation, Respondent relies on a partial excerpt of Mr. Knepp's testimony (T. 22, lines 12-17), to wit:

"We just assume that the mandatory standard is no longer applicable if the fan is not running."

Taking this portion of testimony out of context somewhat misrepresentative since it fails to reveal that it occurred during a line of questions based on the hypothetical situation where a "variance" had been granted. Seen in toto, the testimony in this connection (adduced on cross-examination by Respondent's counsel), appears as follows:

Q. Does the -- in the instances where you have granted variances and allowed the mine fans to be shut off, do you also require that the man power to the mine be shut off?

A. Yes.

Q. And in those instances, do you require that a daily examination of the ventilation equipment occur?

A. No.

Q. So when the mine fans are permissible shut off, you don't require an examination on a daily basis of those fans?

A. Correct. That issue really isn't addressed. I guess we do it by -- we've never had a problem with it. We just assume that that mandatory standard is no longer applicable if the fan is not running."

(T. 22) (emphasis supplied)

I thus find no merit in Respondent's argument. It having been conceded that the daily examinations required by the regulation cited, 30 C.F.R. 75.300, were not conducted or recorded and it further appearing that the fans were required to have been kept running on the days in question since no variance had been granted, the violation is found to have occurred as charged.

CITATION NO. 2931204

This Section 104(a) "Significant and Substantial" Citation was issued on January 25, 1989, by MSHA Inspector Melvin H. Shively, and alleges a violation of 30 C.F.R. 75.316, to wit:

The operator was not complying with approved Ventilation Methane, Dust. Control Plan dated July 8, 1988, in that page 2, Item F Ventilating controls shall be of incombustible material.

At cross cut #3 of the primary intake, Electrical installation was being vented to the return through 12" inch P.U.C. Plastic pipe, through permanent stopping."

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Item F, Page 2 of the ventilation plan (herein Plan) which MSHA alleges was violated, provides:

"All ventilating controls such as stoppings, overcasts, undercasts, doors, regulators, etc. shall be of substantial and incombustible construction to all possible and practical extent, installed in a workmanlike manner and maintained in the condition to serve the purpose for which they were intended."

Respondent used a PVC pipe 12 inches in diameter at cross Cut No. 3 of the primary intake of the Raton Creek Mine to vent the electrical installation there through a permanent stopping into the return air course. (T. 59-62).

The PVC pipe in question was plastic and not made of an incombustible material (Stipulation No. 7, Court Ex. 1, T. 63, 64, 89, 108).

Respondent contends that the PVC pipe in question is not a "ventilating control" within the meaning of Item F, page 2 of the Plan since it does not fit generically into the types of such controls actually enumerated in Item F as examples of such controls since such examples are of "major" controls. Respondent also contends that the "Secretary" failed to prove that the PVC pipe was not "incombustible".⁴ Finally, Respondent alleges that since PVC pipe was in extensive use in underground mines when Item F of the Plan was approved by MSHA, that the Secretary should promulgate a rule under prescribed rulemaking procedures prohibiting use of PVC pipe rather than amending the regulatory standards by issuing a 104(a) citation⁵

According to MSHA Inspector Melvin H. Shively, the electrical installation was located in the primary air course "just outby" the ventilation control where the 12-inch plastic PVC pipe was located (T. 59). The PVC pipe ran approximately 65 feet from the permanent electrical installation to the return air course of the mine (T. 62, 83) and ran through the middle of the permanent stopping (T. 61, 62).

The purpose of the PVC pipe in question was to meet the mine operator's obligation (T. 59, 64, 65) under the mandatory standards (T. 109) to ventilate the permanent electrical installation directly (T. 111) to the return air course (should a fire in the electrical installation create smoke) by directing smoke to the return and thus avoid contamination of other areas of the mine (T. 59-60, 80, 83, 108-109).

The PVC pipe is a "very large piece of plastic pipe" established "inside or along with the other construction" of the stopping (ventilation control). According to the Inspector, it is established "right in the center of the stopping" and "is used to direct the currents that pass over" the electrical installation through to the air return. (T. 60, 61, 85, 96). The PVC pipe is not part of the "construction" or "integrity" of the stopping (T. 73, 74, 77, 78, 103). Nevertheless, should the PVC pipe burn or melt, the hole in the stopping would become enlarged, and "all the smoke that is built up" and "the fire" would enter to the other side of the stopping and contaminate two airways (T. 66-67, 103, 106). Thus, although not part of the actual "construction" of the stopping (T. 106) it appears that the PVC pipe once installed becomes part of the stopping (T. 61-63), 66, 74, 93, 106).

Inspector Shively explained the stopping/pipe mechanism in the following manner:

- "Q. And your citation refers to this plastic pipe through permanent stopping. Please explain what you mean by that.
- A. A permanent ventilation control is a device that is built out of incombustible material, blocks and such. It will be there permanently in that mine, or in that airway. And what it is, what it is set up for is to direct the currents through to the working section, and -- that is it, just to direct the air currents to the working section.

Q. Since I have never seen this particular mine, will you describe what a stopping looks like, and how that plastic pipe is related to it?

A. You have an opening between two entries, so now you have to establish some type of device to prevent that air flow from being mixed between the two. So you build a device with cinder blocks, concrete blocks out of noncombustible material.

* * *

Q. And does this plastic pipe go right through this stopping through the wall?

A. It was constructed right in the middle of it.

Q. Okay. So there is a hole in the stopping for the pipe to go through.

A. The stopping was built around the pipe.
(T. 61-62)

The subject PVC pipe was, when cited, an "overcast", again according to William P. Knepp, whose actual title was MSHA supervisory mining engineer in charge of ventilation (at pertinent times) and who was Staff Assistant to the District Manager at the time of hearing (T. 83, 86, 92). "Overcast" is defined as "an enclosed airway to permit one air current to pass over another one without interruption. They should be built of incombustible material such as concrete, tile, stone, or brick." A Dictionary of Mining, Mineral and Related Terms, (U.S. Department of the Interior, 1968).

On this subject, Mr. Knepp convincingly testified as follows:

"Yes, it definitely is. It is used as an overcast in this particular case. It overcasts the belt entry and takes the intake air that is passing over the electrical installation, overcasts the air in the bell entry into the return. So it is used as an overcast in this particular case." (T. 83).

* * *

"They were using it as an overcast, in this case. To take the air that passed over the electrical installation to comply

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with the law. Which, I assume, they were in compliance with that part of the standard. They were taking the air and ventilating it directly into the return air current. So the PVC pipe acted as an overcast it would direct the air directly into the air current, or into the return air course." (T. 86).

Respondent's Safety Director, Keith Hill, conceded that there was no other ventilation control in place which would take air away from the electrical installation other than the PVC pipe (T. 109-110) and that the purpose of the PVC pipe was to "direct" the air (T. 106-110).

It is also clearly established in the record that metal pipe was a reasonable and viable alternative to the use of PVC pipe in the ventilation application under discussion (T. 81, 98-99, 107, 113-114, 116).

The hazard posed by the combustible PVC pipe was credibly described by the MSHA witness as follows:

"To begin with, if the condition exists, or happens, I should say if the condition happens, now we have got to direct the air currents out of the mine, and not to the area of the mine that the people are working in. And that is the intent there I think, that if the plastic pipe, if a condition did come about, that the plastic pipe would melt away or burn away, now we've contaminated possibly the primary escapeway, also the secondary escapeway for that mine, and the basic location of this electrical installation, being that it is only three breaks in by the main portal of the mine, we could have a smoked mine pretty bad." (T. 65)

It is concluded from the preponderance of the reliable evidence that if a fire occurred in the electrical installation, the PVC pipe would melt down and burn which in turn would open up a "hole through that stopping" which would result in the contamination of two escapeways (T. 65-67, 84, 85, 93). Such occurrence could cause fatalities to miners (T. 67-68, 86, 89, 95) from smoke inhalation.

In October or November, 1987, Inspector Shively discussed the subject of the combustibility of the PVC pipe with Mr. Keith Hill, indicating that all "areas that were being ventilated with plastic pipe . . . needed to be changed and metal pipe put in place" (T. 70-71).

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Ultimate Findings and Conclusions.

The approved ventilation control plan refers to and requires "incombustible construction" of overcasts and stoppings "to all possible and practical extent" (T. 63).

The combustibile plastic PVC in question was a control (overcast) used for ventilating the mine and, as such, is a ventilating control within the reasonable meaning of Item F, at page 2 of the approved ventilation Plan. Further, the pipe was an integral part of the stopping in the area and such stopping is a ventilation control within the reasonable meaning of Item F, at page 2 of the Plan which requires again, that such controls be "of substantial and incombustible construction to all possible and practical extent."

The purpose of the PVC pipe was to meet Respondent's obligation to ventilate the permanent electrical installation to the return air course should a fire in the electrical installation create smoke by directing the smoke to the return - thus avoiding contamination of other areas of the mine.

Use of the PVC pipe, since it was not incombustible and it was a ventilation control, constituted a violation of the Plan and a resultant violation of 30 C.F.R. 75. 316.6

Penalty Assessment

General

The parties stipulated (Ct. Ex. 1; Ex. P-1; T.4) that Respondent is engaged in mining and selling of bituminous coal and is a large mine operator; that Respondent, with a history of 6 violations, proceeded in good faith to promptly abate the violations involved, and that the proposed penalties would not affect Respondent's ability to continue in business.

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A. Citation Nos. 2873899 and 2873900

As to both violations involved, it is found that Respondent's explanation for its failure to adhere to the standards was extremely thin and that as a minimum the violations occurred as a result of its negligence. It is also concluded with respect to Citation No. 2873900, that in view of the danger created by it, it was quite serious in nature. Considering the other criteria involved, a penalty of \$50.00 is assessed for this violation. The violation described in Citation No. 2873899 is incidental to that in Citation No. 2373900 and involves non-feasance in discharging an inspection and a record-keeping obligation. It is not found to be serious and the \$20 penalty sought by Petitioner is found appropriate and here assessed.

B. Citation No. 2931204

Respondent established that it did not install the PVC pipe but that such was in place in 1982 when it "bought" the mine (T. 108); that it had not received any prior directive or instructions from MSHA to discontinue use of the PVC pipe (T. 92, 96, 104-105); and that PVC pipe has in the past been in common use throughout the mine (T. 104-106).⁷ Based on these findings, and the generality of the inspector's testimony concerning prior notification to the mine operator, it is concluded that negligence was not involved in this violation. The violation is found to be moderately serious in view of the fact that there was the potential for making escapeways unsafe for travel and resultant fatalities. In consideration of all the above assessment factors a penalty of \$50.00 is found appropriate and here assessed.

ORDER

Citation No. 2931286 is MODIFIED to amend Paragraph 10 D thereof to reflect that the "Number of Persons" affected by the violation is "1" rather than "7", and is otherwise AFFIRMED.

Citations numbered 2873899, 2873900 and 2931204 are AFFIRMED.

Respondent, if it has not previously done so, shall pay the Secretary of Labor within 30 days from the date of issuance of this decision the sum of \$ 194 representing the total civil penalties above assessed.

Michael A. Lasher, Jr.
Administrative Law Judge

AA
FOOTNOTES START HERE

1. This matter was consolidated for hearing with two other penalty dockets, WEST 89-148 and WEST 89-149.

2. 30 C.F.R. 75.300 provides:

All coal mines shall be ventilated by mechanical ventilation equipment installed and operated in a manner approved by an authorized representative of the Secretary and such equipment shall be examined daily and a record shall be kept of such examination.

(Emphasis added)

3. There is no evidence that Respondent, after the variance was denied, ever filed a petition for modification of the standard with the Department of Labor. In any event, there is, contrary to Respondent's assertion, substantial persuasive evidence in this record that MSHA's denial of a variance was based on strong safety rationale and not arbitrary.

4. This defense is rejected since the parties stipulated that the PVC pipe in question was not made of an incombustible material. Further, the record independently establishes combustibility (T. 70, 83, 84).

5. This defense is rejected since it is concluded on the basis of this record that PVC pipe is combustible and that such is prohibited by the Plan for use in construction of ventilating controls. The salient question is whether the PVC pipe in question is such a control or part of such control.

6. As previously noted, once such a plan is approved and adopted its provisions are enforceable at the mine as mandatory standards. Zeigler Coal Company v. Kleppe, 536 F.2d 398 (D.C. Cir., 1976).

7. Although Respondent contended that it once (in 1985-1986) had MSHA "permission" to use PVC pipe for ventilation purposes

due to the fact that such was shown in a drawing attached to a ventilation plan, it appeared that such drawing was not incorporated in the Respondent's current approved ventilation Plan (T. 104-112).