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SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 91-636
Petitioner	:	A.C. No. 11-00586-03654
v.	:	
	:	Murdock Mine
ZEIGLER COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Rafael Alvarez, Esq., U.S. Department of Labor, Office of the Solicitor, Chicago, Illinois, for Petitioner;  
Gregory S. Keltner, Esq., Zeigler Coal Company, Fairview Heights, Illinois, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking a civil penalty assessment of \$329, for an alleged violation of mandatory safety standard 30 C.F.R. 75.507. A hearing was held in St. Louis, Missouri, and the parties waived the filing of posthearing briefs. However, I have considered their oral arguments made on the record during the hearing in my adjudication of this matter.

Issues

The issues presented in this proceeding are (1) whether the conditions or practices cited by the inspector constitute a violation of the cited mandatory safety standard, (2), whether the violation was "significant and substantial," and (3) the appropriate civil penalty to be assessed for the violation, taking into account the statutory civil penalty criteria found in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.
2. Commission Rules, 29 C.F.R. 2700.1, et seq.
3. Mandatory safety standard 30 C.F.R. 75.507.

Stipulations

The parties stipulated to the following (Exhibit ALJ-1):

1. The Commission has jurisdiction in this proceeding.
2. The respondent owns and operates the Murdock Mine, an underground mine extracting bituminous coal, and the mine affects interstate commerce.
3. The respondent extracted 14,918,109 tons of coal at all of its mines ending on February 5, 1991. The Murdock Mine extracted 994,759 tons of coal from February 5, 1990 to February 5, 1991.
4. Respondent had 183 violations in the preceding 24 months ending on May 30, 1991, at the Murdock Mine and Mine No. 11.
5. The payment of the full civil penalty assessment for the citation in question will not impair the respondent's ability to continue in business.
6. On May 1, 1991, Mine Engineers Richard Gates and Mark Eslinger conducted a petition investigation of the Murdock mine. A chemical smoke cloud was used to trace air from the No. 1 and No. 2 working places through the check curtain in the No. 3 entry and outby in the No. 3 entry over golf carts parked in the entry. The golf carts were located outby the last open crosscut. This condition was in unit 2 which was driving 1 main west entries off the 2 north off the 3 main west off the main south. Mr. Gates issued Citation No. 3535675 for an alleged violation of 30 C.F.R. 75.507.

Discussion

Section 104(a) S&S" Citation No. 3535675, issued on May 1, 1991, cites an alleged violation of 30 C.F.R. 75.507, and the cited condition or practice states as follows:

The air current used to ventilate the working places of unit No. 2, ID 002, was being coursed over non-permissible power points outby the last open crosscut.

A chemical smoke cloud was used to trace the aircurrent from the No. 1 and No. 2 working places through the check curtain in the No. 3 entry and outby in the No. 3 entry over golf carts parked in the entry. The golf carts were located outby the last open crosscut.

#### Petitioner's Testimony and Evidence

MSHA Supervisory Engineer, Mark O. Eslinger testified that he is a ventilation supervisor and his duties include supervising three ventilation inspectors, and evaluating and approving mine ventilation plans. He also serves as a member of an MSHA committee that is revising subpart D of the ventilation regulations, and he holds a college degree in civil engineering and is a registered professional engineer in the State of Indiana. Mr. Eslinger confirmed that he was at the mine on May 1, 1991, with MSHA engineer Richard Gates conducting an investigation in connection with a section 101(c) modification petition concerning the application of section 75.1105, and the ventilation of transformer stations (Tr. 4-8).

Mr. Eslinger confirmed that Mr. Gates issued the citation, and that he is his supervisor and was with him at all times. Mr. Eslinger stated that upon arriving on the No. 2 unit he observed that the check curtains that were placed across the neutral entries were "standing out like a sheet in the wind" and were leaning in an outby direction away from the face, which indicated that air was coming in and around and under the curtain. He identified Exhibit R-7 as a sketch of the prevailing conditions as he observed them, and he confirmed that the air was blowing in the outby direction away from the face at the "pull-through curtain" and he marked the location of that curtain on the sketch (Tr. 8-12).

Mr. Eslinger stated that he traced the movement of the air with a smoke tube test to verify that it was pulling through the curtain in question in an outby direction in the direction of the arrows shown in entry No. 3 as shown on the sketch. He also found air flowing in, around, and under another curtain in the entry and it was standing out "like a sheet in the wind on a clothes line". Two company officials were present when he performed his tests. He also determined that the air was flowing from the last open crosscut into the No. 3 entry, and he traced the air between the No. 2 and No. 3 entry and found that the air was coming out of the working place of the No. 2 entry into the last open crosscut (Tr. 13-15). He further explained the smoke tests which he conducted to confirm where the ventilation air was coursing through the entries, and he marked these locations on his sketch (Tr. 15-18).

Mr. Eslinger stated that after conducting the tests he informed mine superintendent Russ Carpenter that "I have a

problem here. You've got a violation of 75.507". Mr. Carpenter questioned his test results, and Mr. Eslinger then decided to conduct a tracer gas study to determine the actual course of the air and to confirm his belief that the air was coming out of the No. 2 entry working place and was flowing into the neutral returns (Tr. 19). Mr. Eslinger explained how he and Mr. Gates conducted the tracer gas test, including the collection of bottle samples to test the atmosphere. He identified exhibit P-4 as the laboratory results of this testing, and he confirmed that they established that there was a violation of section 75.507, because air had passed the working faces and was being coursed over nonpermissible power connection points, which he identified as carts, rectifiers, belt drives, transformers, and starter boxes. In short, the air was passing over all of this nonpermissible equipment and power points located in the neutral entries (Tr. 19-23).

Mr. Eslinger stated that the air coming off the face was return air which was coursing over and into the mine. Section 75.507, provides that all power connection points outby the last open crosscut shall be in intake air. Since the air had passed two working faces, it would be considered return air for purposes of section 75.507, and a violation. He explained the location of the last open crosscut, and marked it on the sketch (Tr. 24),

Mr. Eslinger stated that after informing Mr. Carpenter of the violation, Mr. Carpenter opened a door in the No. 3 travel entry, and this permitted more air to flow in the neutral entries and it put pressure against the pull-through curtain. Mr. Eslinger confirmed that he then determined that the air no longer pulled under and around the curtain. He also determined with a smoke test that the air no longer coursed down the No. 3 entry. He considered this to be abatement, and Mr. Gates abated the violation (Tr. 25-26).

Mr. Eslinger stated that the violation was the result of moderate negligence because the unit was new and mining had just started at that location and management should have taken care to see that the air was coursed in the proper direction (Tr. 26). He believed that the likelihood of an injury was "reasonably likely" because less than two months earlier there was an ignition in the same part of the mine, and an investigation of that incident disclosed that there was in excess of one percent methane in the working places and in the neutral entries. However, he found no excessive levels of methane on the section on the day of his inspection (Tr. 27).

Mr. Eslinger stated that he considered the violation to be significant and substantial because he believed there was a possibility of an explosion, and there was a reasonably likely chance of this happening because of the methane which was found

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two months earlier in all of the sections driving in a westerly direction. He also confirmed that he considered the "real seriousness" of the situation in light of the fact that methane is produced in the working places and it could drift over the non-permissible power points in the neutral entries in question. He confirmed that the pre-shift and on-shift books were checked on the day of the inspection and there was no indications of any excessive methane violations (Tr. 29-31).

Mr. Eslinger stated that the No. 6 and No. 7 entries were return air courses, and that entries No. 2 thru 5 were neutral entries (Tr. 32-43). He confirmed that a violation of section 75.507, rather than the ventilation plan, was cited because the air was coming from the last open crosscut and flowing over power connection points (Tr. 35). After the door was opened, the pressure was going in the other direction and the air was coursed down the last open crosscuts. He confirmed that with the door closed, the air coursing down and across the non-permissible power points had already passed working faces and it was therefore return air at that point coursing down over the non-permissible equipment (Tr. 36). For purposes of section 75.507, the air that has passed a working face is considered to be return air (Tr. 37). Mr. Eslinger described the door which was open and subsequently closed to abate the violation, and he stated that "I was told that the door was normally left closed" (Tr. 38).

On cross-examination, Mr. Eslinger confirmed that once the intake air in the No. 1 entry passes the first working face in that entry it is considered return air for purposes of section 75.507, but not for the purposes of separate splits, and separate intake splits would not be necessary for the other entries. He explained that one continuous air split can be used for the one unit in question, which is comprised of seven entries, but all of the equipment in by the last open crosscut has to be permissible, and he further explained as follows at (Tr. 39-41):

Q. Well, permissibility aside for just a moment, if I understand your testimony correctly then, as soon as we hit entry No. 1 we've got return air for purposes of 507?

A. Correct.

Q. We don't have return air for purposes of ventilating the remaining 5, 6 working faces?

A. For the purposes of separate splits you do not have. It is still intake air, sir.

Q. I thought intake and return had to be separate. They're not here though, are they?

A. Intake and return air courses have to be separated by stoppings.

Q. Well, it sounds to me like there are two different definitions of return air then, is that fair to say?

A. No, I think there is one definition of return.

Q. And what is that definition?

A. I think -- well, excuse me for a second. You know, I look at return air as air that has ventilated the last working place on any split of any working section, any work that area, whether pillar or non-pillar.

If air mixes with air that has ventilated the last working place on any split on -- of any working section or any work area, whether pillared or non pillared, it is considered return air.

For the purpose of the existing 75.507, air that has been used to ventilate any working place in a coal mine producing section of pillared air or air that has been used to ventilate any working space, if such air is directed away from the immediate return is return air.

Q. Where are you coming up with that second definition of return air?

A. Out of the -- our program policy manual.

And, at (Tr. 45, 51):

Q. Now, for purposes of the citation in 75.507, the air that went over those golf carts you've told us would be considered return air?

A. That's correct.

Q. What about for purposes of ventilation?  
What would the air be considered?

A. That air is return air, sir.

Q. It's past all the working faces when it got to the golf carts?

A. No. I'm going off of 507. Really there is no definition of that air between those -- between those two check points. That is to me return air because it came off the last open cross-cut.

Q. But you yourself described earlier in your direct testimony that the air in these neutrals was I believe neutral intake air.

A. Yes. The air that traveled in outby this first main west working unit was intake -- neutral intake air.

Q. So what do you call the air that passes over the golf carts is all I want to know.

A. I call it return air, sir.

Q. And that is for purposes of 75.507?

A. That's correct. We have a problem here. The air is coming off the last open cross-cut. If the air was flowing in the other direction, yes, then it would have been intake. But then the air would have been going to the working places and you had a violation of 75.326.

Mr. Eslinger confirmed that in the context of ventilation, and for purposes of separate air splits, the intake air passing the No. 1 entry from the No. 1A entry remains intake air until it travels outby and down the No. 6 and No. 7 entries. However, for purposes of permissibility and section 75.507, the air is considered return air after it passes over the first working face (Tr. 57). He explained that this air is gaining methane and coal dust as it goes across the face and it is important that it not flow over nonpermissible power points (Tr. 58).

Mr. Eslinger stated that he found no deliberate attempt by the respondent to course the air down the No. 3 entry, and he confirmed that the ventilation check curtains and stoppings were properly located pursuant to the mine ventilation plan (Tr. 42).

Mr. Eslinger confirmed that the problem concerning the violation was return air leakage from the No. 1 and No. 2 entries into the No. 3 entry (Tr. 43). He confirmed that the golf carts referred to in the citation were the first power connection points that the return air flowed over, and this was the most serious aspect of the violation because people could drive into a possible explosive mixture of gas and ignite the methane (Tr. 45). Methane could have come out of the No. 1 or No. 2 entries and flowed over the golf carts (Tr. 52).

Mr. Eslinger confirmed that tests were made to determine the volume of air-passing the check curtain and that the tracer gas essentially showed that air was moving from one location to another. Conceding that air leakage around check curtains is not



unusual, he would, however, not expect to find tracer gas outby two sets of curtains if the section were properly ventilated (Tr. 55-56). He also confirmed that he made no tests to determine the amount of coal dust in suspension, and that the methane he found was less than one percent and was not in the explosive range (Tr. 56).

#### Respondent's Testimony and Evidence

Michael L. Woods, section foreman, stated that at the time the citation was issued he was serving as the mine manager of safety and training (Tr. 71). He confirmed that he was with Mr. Eslinger and Mr. Gates the entire time during their inspection and he explained what transpired, including the gas tests. He confirmed that he took an air quantity reading in the last open crosscut before the citation was issued and found "29,500 and something". He confirmed that Mr. Eslinger informed Mr. Carpenter that "we had a problem, that there was return air. The air that had swept rooms 1 and 2 was going outby over power connection points which is a violation" (Tr. 74). Mr. Eslinger then told Mr. Gates "I'll have you write this" (Tr. 74).

Mr. Woods stated that attempts were made to put a solid curtain across the No. 2 entry and putting up a curtain regulator across the No. 1 entry. However, this did not correct the problem and the only way to correct it was to open the door and this took care of the problem to the inspectors satisfaction (Tr. 76). Mr. Woods stated that the door was normally kept closed "to hold the air". The door was on a haulage room, and after equipment passed in and out, the door would be opened and then closed (Tr. 77).

Mr. Woods stated that he did not discuss whether he believed there was a violation with Mr. Eslinger or Mr. Gates, but that Mr. Carpenter did. Mr Woods did not believe that there was a violation because he was always taught that intake air does not become return air until it passes the last working place. He considered the air passing over the golf carts to still be intake air (Tr. 78).

On cross-examination, Mr. Woods stated that he saw nothing wrong in the air passing through working entries No. 1 and No. 2, and then going over non-permissible points because "It's intake air. It's not return air yet" (Tr. 80). He believed that this was an acceptable mining practice and that he would not knowingly allow return air to pass over power connection points (Tr. 81).

Mr. Woods stated that methane monitors are located on the continuous mining machines and the monitor will shut down a machine if excess methane is liberated (Tr. 81-82). The machines will deenergize before a methane problem develops (Tr. 84).

David Stritzel, respondent's director of health and safety, testified that he has been involved in coal mining for 24 years and that he designed the mine ventilation system and plan. He testified that it is common knowledge that "return air" is air "that has passed the last working place on a section and it exits the mine toward the mine fan" (Tr. 89). This was the definition he learned from an "engineering standpoint" while in college and during his prior employment with MSHA. He stated that although the air in the No. 3 entry where the golf carts were located is termed "neutral air", it is nonetheless "all in the same as intake air" because of its location and proximity to the return air course and intake air course and the direction that the air courses in those set of entries" (Tr. 90).

Mr. Stritzel was of the opinion that the section 75.507 application of the definition of return air, if applied in a general mining context, would cause severe problems throughout the industry with respect to the location of underground power distribution, belt lines, leakage, and stoppings. Most of the problems would center around mines employing a blowing ventilation system operating off positive pressure. The natural air flow direction on a positive system forces the air in an outward direction on neutral entries and it is physically impossible to maintain absolute control over the ventilation movement through the mine, and there will be leakages (Tr. 91).

Mr. Stritzel stated that the intent of the law is that it is to be applied in a practical sense manner so that mine operators can comply and stay in business. In his opinion, compliance with section 75.507, as interpreted by MSHA in this case, would basically put a mine operator who employs the blowing ventilation system out of business. He stated that the respondent has such a mine in Illinois (Tr. 91-92).

Mr. Stritzel stated that sections 75.308 and 75.309 refer to specific mine locations where air quality and methane tests must be made, and section 75.309 requires methane tests to be made from the last working place outby where the air returns from the section out to the point where it enters another return air split. At that point, the air is considered to be return air (Tr. 93).

Mr. Stritzel stated that the prior methane ignition referred to by the inspector was not remotely similar to the existing conditions at the time the citation in this case was issued and be explained the differences (Tr. 93-94).

Mr. Stritzel stated that according to the mine ventilation plan the air traversing across the last open crosscut is classified as intake air because "its specified in the plan and it meets the definition outlined in the law" (Tr. 94). He believed that opening the door or putting up regulators to abate

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the violation presented problems. He stated that opening the door was a direct violation of state law and "goes against all of our training Programs that we've had in existence for years whereby we've preached to our people to always close the door" (Tr. 95). He further stated that there have been many instances where ventilation doors were inadvertently left open and the air was short circuited throughout the mine, resulting in fatal methane ignitions and explosions. The erection of intake regulators or curtains which would result in the elimination of 30% of the ventilation being delivered to the section, poses a methane control risk at the face area because of lower air velocities. There was no doubt in his mind, within a reasonable degree of engineering certainty, that the air coursing over the golf carts was intake air (Tr. 96).

On cross-examination, Mr. Stritzel acknowledged that he would be concerned about air that has passed by the first entry working face passing over nonpermissible power points or equipment because it could contain methane, and he indicated that methane tests are made for this reason (Tr. 98). Referring to the sketch which depicted the section or unit at the time the citation was issued (exhibit R-7), Mr. Stritzel stated that the air passing the No. 1 entry working face would not cause him great concern because the ventilation is sufficient in those areas and methane which may be liberated is diluted (Tr. 100). He stated that he would not place nonpermissible equipment in that area because the law prohibits it, but under proper testing procedures, he would not be concerned (Tr. 101). However, there is always the possibility of a methane ignition, and methane may be liberated at higher concentrations (Tr. 103).

Mr. Stritzel confirmed that some of the air coursing across the No. 1 and No. 2 working faces was coursing down the No. 3 entry and making the curtains stand out, but that the majority of the air was still sweeping the other faces (Tr. 106). He characterized the air coursing down the No. 3 entry as "an imbalance in the pressure", and he explained that it was near impossible to have absolute control over all of the air because of the presence of two splits of air at one location within three or four crosscuts of the face and the air is going in many different directions and is regulated by pressure. He did not disagree with the inspector's finding with respect to the direction of the air as confirmed by his smoke tests, and he did not dispute the fact that the air was passing over the nonpermissible golf carts (Tr. 108).

Mr. Stritzel stated his position as follows at (Tr. 108-110):

THE WITNESS: I didn't feel there was a violation of of law or a problem to start with, that there was a need for

anything. The imbalance would be corrected as we further developed those entries and got them away from that split.

JUDGE: Is the reason that you thought that there was not any problem or not any ventilation because of your definition of intake air?

THE WITNESS: No, sir. It was because of what the definition is explained in the law of return air as well as what we outlined in our ventilation plan where we identify on the sketches the location for the 9,000 CFM air reading on the unit on each unit.

And that area under 301 of the law specifies that air is to be taken in the line of pillars that separates the intake from the return. At that point it doesn't become return air until it passes that point.

\* \* \* \* \*

JUDGE: In other words, does your ventilation plan allow for air that has passed over two working faces to course down a neutral entry and over nonpermissible equipment? Is that allowable under your ventilation plan?

THE WITNESS: I don't think it's spelled out anywhere even in the law.

Mr. Stritzel further believed that the air coursing over the golf carts was still intake air, and not return air, and that under these circumstances, there was no violation of section 75.507 (Tr. 111-112).

Petitioner's Arguments

Petitioner asserted that the facts in this case are not in dispute and that the crucial issue is the question of what constitutes intake air and what constitutes return air. Petitioner argued that pursuant to the mine ventilation plan, when mining is taking place in the seven entries, the air sweeping through entries No. 1 through No. 7 is recognized by MSHA as intake air so that the respondent does not have to establish air splits at the different intake entries.

Petitioner asserted that it is recognized that when air passes through a working face it becomes contaminated. If this contaminated air seeps down to the neutral areas where non-permissible equipment is located, miners would be exposed to a methane ignition hazard because contaminated air sweeping the face and then passing over nonpermissible equipment can cause an explosion. Petitioner concludes that regardless of whether the

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air is characterized as "intake, neutral, A,B,C,D, whatever word you want to give that air", for purposes of section 75.507, the contaminated air is no longer intake air. It is return air (Tr. 118-120).

#### Respondent's Arguments

Respondent disagreed with the petitioner "calling the air what we like". Respondent argued that pursuant to section 75.507, there must be a standard by which an operator can determine whether not it is in compliance with the law.

Respondent asserted that one cannot say that "it doesn't matter if this is intake or return air. It's just possibly got methane in it and that potentially leads to an explosion" (Tr. 121). Respondent agreed that the issue here is "what is return air", and it pointed out that Judge Weisberger considered the definition of "return air" in Secretary of Labor v. Shamrock Coal Company, 10 FMSHRC 2098, 2105, and relied on the definition found in the Dictionary of Mining, Minerals, and Related Terms.

Respondent asserted that the dictionary definition of return air "is air which has circulated the workings and is flowing towards the main mine fan". Respondent stated that "that's not what we have here", and it took the position that in this case the air has not circulated the workings, and at most, it had only passed by two or three working places. (Tr. 121-122).

Respondent concluded that MSHA's reliance on the definition of return air in its policy manual is not necessarily enforceable and places the respondent at a great disadvantage "because it essentially allows MSHA to fliplop its interpretation of terms". Respondent concluded further that with respect to the air going by two or three working places "all of a sudden its return air when its' clear that when this particular issue has come up before the definition that Mr. Stritzel talked about, the common sense description definition, is the one that has been fallen back on " (Tr. 121-122).

#### Findings and Conclusions

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. 75.507, which provides as follows: "Except where permissible power connection units are used, all power-connection points outby the last open crosscut shall be in intake air". The inspector issued the citation after finding that the air current used to ventilate the working places was being coursed over non-permissible power points (golf carts) outby the last open crosscut. The citation reflects that a smoke cloud test was conducted to trace the air current from the No.1 and No. 2 working places through a check curtain in the No. 3 entry and outby over the golf carts parked in that entry.

The record reflects that in the course of an inspection on May 1, 1991, in connection with a section 101(c) modification petition, MSHA mining engineers and authorized representatives of the Secretary Mark Eslinger and Richard Gates observed the conditions which resulted in the citation issued by Mr. Gates. Although Mr. Gates did not testify in this case, Mr. Eslinger, who is Mr. Gates' supervisor, and who was with him when the citation was issued, testified credibly as to the conditions which they jointly observed, and Mr. Eslinger concurred that the cited conditions constituted a violation of section 75.507. Although the narrative description of the alleged violative conditions is not a model of clarity, it seems clear to me that the parties are in agreement as to the critical issues presented in this case, including their respective positions concerning the alleged violation.

The record establishes that the area where the alleged violation occurred consisted of seven entries as shown on a map and sketch (Exhibit R-7), referred to by the witnesses. The No. 1 and 1A entries were intake entries, entries No. 2 through No. 5 were neutral entries, and the No. 6 and No. 7 entries were return air courses. The petitioner takes the position that the intake air which passed through the No. 1 and No. 2 working places and faces, and then coursed its way outby the last open crosscut and down the No. 3 neutral entry through some check curtains and over nonpermissible power connection points (golf carts and other electrical equipment described by Mr. Eslinger) was return air for purposes of section 75.507. Since that regulatory section requires that all power connection points be located in intake air, the petitioner concludes that a violation occurred when the return air passed over the nonpermissible equipment, and that the citation should be affirmed.

The respondent takes the position that the air passing over the nonpermissible power connection points outby the last open crosscut in the No. 3 neutral entry was intake air when it passed through the No. 1 and No. 2 working places and remained intake air as it was coursed through the No. 3 entry and through the check curtains in question. Respondent characterized the air as "leakage" which often occurs in a mine because of pressure changes, and it insists that the intake air did not become return air until it passed by and through all of the remaining working places and reached the return entries. Under these circumstances, the respondent concludes that a violation did not occur and that the citation should be vacated.

The parties are in agreement that the critical issue in this case lies in the definition of "return air". In this regard, the Dictionary of Mining, Mineral, and Related Terms, U.S. Department

of the Interior, 1968 Edition, provides the following relevant definitions:

- Intake. The passage by which the ventilation current enter a mine. \* \* \* Any roadway underground through which fresh air is conducted to the working face. \* \* \* Ventilating passage through which fresh air is conducted . . . . to the workings.
- Return. Any airway in which vapid air flows from the workings to the upcast shaft or fan. \* \* \* Any airway which carries the ventilating air outby and out of the mine.
- Return air. Air traveling in a return. \* \* \* Air which has circulated the workings and is flowing towards the main mine fan; vitiated or foul air.
- Return aircourse. Portion of ventilation system of mine through which contaminated air is withdrawn and evacuated to surface.

MSHA's July 1, 1988, Program Policy Manual, Volume V, Part 75, page 55, provides the following definition of the term "return air" as used in section 75.507, as well as other guidance for the application of this section:

"Return air" . . . . means air that has been used to ventilate any working face in a coal-producing section or pillard area, or air that has been used to ventilate any working face if such air is directed away from the immediate return. (Emphasis added).

In Shamrock Coal Company, Inc., 12 FMSHRC 2098 (October 1990), Judge Weisberger affirmed a citation which was issued to the mine operator for a violation of 30 C.F.R. 75.507-1, for locating a nonpermissible power center in a return entry ventilated by return air. In affirming the citation, the judge held that the dictionary definition of "return air" (Air which has circulated the workings and is flowing towards the main mine fan) was consistent with the inspector's credible and un rebutted observation, that the power center was located in an entry through which return air from the working section was being coursed in violation of the cited standard.

In Eastover Mining Company, 4 FMSHRC 123 (February 1982), the Commission affirmed a violation of 30 C.F.R. 75.507, because the mine operator placed a nonpermissible pump control box in a return airway. Although the box was not energized, the Commission nonetheless affirmed the violation and pointed out that the record did not show that the equipment could not or

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would not have been energized in return air. In this regard, the Commission stated as follows at 4 FMSHRC 123-124:

The purpose of this regulation is to prevent methane gas explosions. In the presence of methane gas, a source of ignition, such as arriving from power connections, can course an explosion.

In Pyro Mining Company, 7 FMSHRC 517, (April 1985), Judge Fauver affirmed two violations of 30 C.F.R. 75.507, after finding that the mine operator allowed return air that had been used to ventilate the active mine workings to mix with neutral air flowing through two track entries where nonpermissible electrical equipment (conveyor belt drive motors, battery charger, water pumps) were located. In one instance, return air was mixing with neutral air in part because stoppings had been removed and were not replaced, and in the second case, return air was being dumped into neutral air at a damaged overcast.

In Southern Ohio Coal Company, 1 FMSHRC 1642, 1663 (October 1979), I affirmed a violation of section 75.507, after finding that a nonpermissible battery charging unit was located in a return air course. I rejected the operator's contention that the unit was located in intake air. The unit was located in an area where a curtain had been installed as a temporary stopping in order to separate the intake from the return. The inspector testified that the crux of the violation was the fact that the air sweeping over the battery charging unit was return air, and that it prevented or reduced intake airflow over the charger. The inspector concluded that ventilating the nonpermissible charger in return air posed an explosion hazard. I concluded that the positioning of the curtain determined whether the unit was located in intake or return air.

Mr. Eslinger's hearing testimony regarding the essence of the violation in this case is consistent with his pretrial deposition testimony of October 31, 1991 (Exhibit R-4). At deposition Mr. Eslinger testified that the path of the intake air which had traveled up the intake entries and past the No. 1 and No. 2 working places was such that it flowed over nonpermissible power connection points. He stated that a violation of section 75.507 occurred when he determined by a smoke test that the air which had passed through the two working places in question was going down and through a check curtain in the No. 3 neutral entry and over the nonpermissible electrical equipment (Dep. Tr. 4, 9-11). He took no tests to determine the air volume passing through the curtain because "The violation exists when the air goes from the working place into the neutral entry" (Dep. Tr. 25).

At the hearing, Mr. Eslinger testified that for purposes of section 75.507, and in connection with the definition and



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application of the term "intake air", once the intake air in the No. 1 entry passed the first working face in that entry, it is considered return air and remained return air as it passed by the No. 2 place and down the No. 3 entry through the curtain and over the nonpermissible equipment. Mr. Eslinger relied on MSHA's section 75.507 policy definition of "return air" which defines such air as "air that has been used to ventilate any working face in a coal producing section". In support of the policy definition, petitioner's counsel relied on the fact that intake clean air which has passed by one or more working faces where coal is being mined has become contaminated air which can longer be considered clean intake air. Counsel characterized this air as return air, and he maintained that this contaminated air poses a potential explosion hazard when it passes over nonpermissible electrical power connection points.

Mr. Eslinger testified at hearing that the definition of return air in connection with the application of the requirements of section 75.507 (air which has passed any working face), does not apply in the context of ventilation on separate air splits. In this context, he stated that return air is air which has ventilated the last working place on any split (Tr. 39-41; 57-58). This testimony is consistent with Mr. Eslinger's deposition testimony where he offered several definitions of "return air", in other contexts, as follows at (Tr. 12-13):

Q52. Okay. What -- tell me if you will what constitutes return air?

A. Return air for the purposes of 507 is air that has ventilated a working place.

Q53. You said for purposes of 507 it's air that's ventilated a working place. Does return air have a different meaning in another context?

A. There is another context that talks about air that goes all the way across the faces or the places as -- as not being return air until it passes -- passes the last working place. And that's for the purposes of ventilating where you're mining coal.

Q54. So there's two different definitions of return air?

A. Well, I could see the policy under 507, the definition there.

Q55. Right.

A. I believe there's another accepted definition. I -- you, know, I don't find it written.

Q56. Was -- where is that definition coming from?

A. That's just a general use definition. I mean, that's what we've been taught, that it's not return air until it passes the last working place on a section.

The other definition of -- of return air provides from the fact that you have to use intake air to ventilate your faces, which means that you cannot take return air from other -- some other unit.

So it's just a -- the definition that's used to say that when you're mining, let's say in -- on -- I don't know what you're calling this, Sketch No. 8 page 17. When you're mining coal in face number nine, you don't have a different split from mining face number nine versus face number eight and face number seven. That's so you can use one continuous split of air across all the faces.

Q58. Okay. And that's -- that's another definition -- I mean, that's separate from the definition of return air that you're using for Section 507?

A. That's correct.

Referring to Sketch No. 8, page 17, of the mine ventilation plan (exhibit R-1), which depicts a nine entry section, Mr. Eslinger explained that in the context of an idle section and without regard to section 75.507, the air traveling up the No. 1 intake entry and then sweeping across all of the nine working faces is considered intake air for the purpose of ventilating a unit with a separate intake air split, and it does not become return air until it passes the last working place at the No. 9 return. If active mining were taking place, the intake air would still be considered intake air until it sweeps past the last No. 9 working place, and it may be used to ventilate any mining machine cutting at the face (Depo. Tr. 14-17). However, for purposes of section 75.507, the intake air which has ventilated the No. 1 working place is considered return air, and he explained in relevant part as follows at (Depo. Tr. 17-20):

Q84. Tell me when this intake air becomes return air that's coming down entry one.

A. When it reaches number one working place because that air is used to ventilate number one working face. So that air that has entered into this working place here passes a face and becomes return air for the purposes of 507. Any

equipment that is in by this rib line right here has to be permissible equipment.

Q88. All right. So we can have a situation then where if we're mining coal in one of these nine entries, we don't have return air for purposes of ventilating the working place, but we do have return air for purposes of 75.507 and permissibility?

A. Correct.

Q89. (By Mr. Keltner) Okay. What are the -- will you tell me what -- and I guess pick your definition and tell me which one you're talking about -- what are the characteristics of return air? What do you find in return air? What do you expect to find in return air?

\* \* \* \* \*

A. Well, first of all, different rules apply to return air. Return air is carrying away from a working section the gases, such as methane, dust, respirable dust, float dust. Carrying those dusts away from where the mining is taking place.

Q92. Well, for purposes of 75.507, what -- what makes it return air? I mean, is it --

A. Well, it makes it return air when it's ventilated one working face.

Q93. Okay. And -- and if you were to do an analysis of that air, I mean, what -- what kinds of things could you expect to find in it? And I'm speaking in terms of generalities.

A. Well, return air can carry methane --

Q94. (By Mr. Keltner) Okay.

A. -- and respirable and float dust.

Q95. Do you think anything else that you can -- that you find in return air?

A. Just air from the --

Q96. Oxygen you mean?

A. Well, you have your, you know, oxygen, nitrogen, carbon dioxide, may be carbon monoxide, a few PPM carbon monoxide in coal mines.

Q97. Any other harm -- harmful or explosive gases that you might find in it?

A. Ethane. Ethane is found. Usually other than methane and ethane, we don't find them. That doesn't mean you can't find them, but generally all you ever see is methane and ethane.

In Jim Walter Resources, Inc., 11 FMSHRC 21 (January 1989), the critical issue presented was the definition of the term "last open crosscut". In the absence of any statutory or regulatory definition of that term, the Commission applied one of the definitions of "crosscut" found in the Mining Dictionary to the mining configuration which existed at the time the violation was issued. In the instant case, the terms "return air" and "intake air" are not defined in the mine Act or in MSHA's part 75 regulations. They are also not defined in the applicable ventilation plan.

Section foreman Woods testified that he "was always taught" that intake air does not become return air until it passed the last working place. He relied on this interpretation of "intake" and "return" air in forming his opinion that the intake air which had initially swept by the No. 1 and No. 2 entries and then passed outby down the No. 3 neutral air entry and over the nonpermissible golf carts and other electrical equipment was still intake air and remained intake air until it passed the last working places at the No. 6 and No. 7 return entries. Mr. Woods saw nothing wrong with using the air which had passed by the No. 1 and No. 2 working places to ventilate the no. 3 working places where the nonpermissible electrical equipment was located, and he believed that this was an acceptable mining practice.

Safety director Stritzel testified that it was "common knowledge" that "return air" is defined as "air that has passed the last working place on a section and it exits the mine toward the mine fan", and that he learned this "engineering standpoint" definition while in college and during his prior employment with MSHA. Thus, Mr. Stritzel agreed with Mr. Woods that intake air does not become return air until it has passed by the last working place. However, unlike Mr. Woods, Mr. Stritzel acknowledged his concern that air which has passed by the No. 1 entry face and then found its way outby over nonpermissible power points might contain methane, and he indicated that he would not locate nonpermissible equipment in that area because "the law prohibits it". Further, Mr. Stritzel did not disagree with the inspector's smoke tests, which confirmed the direction of air travel after it swept the two working faces in question, nor did he dispute the fact that the air was indeed passing over the nonpermissible golf carts.

Mr. Eslinger acknowledged that he too "was taught" that intake air does not become return air until it passed the last working place on a section. Although he characterized this definition as an acceptable "general use definition", he indicated that pursuant to MSHA's policy definition, and insofar as section 75.507, is concerned, "return air" is considered air which has ventilated a working place or one working face. In short, Mr. Eslinger relied on the 1988 policy definition of return air (air which has been used to ventilate any working face) to support the violation.

I take official notice of the fact that MSHA's Underground Inspection Manual, March 9, 1978, states in relevant part that "For the purpose of Sections 75.507 and 75.507-1, return air means air that has been used to ventilate the last working face in a coal producing section or pillared area, . . ." (emphasis added). Every prior underground coal manual from December 1971 through June 1974, also define "return air" for purposes of section 75.507, as air that has been used to ventilate the last working face in a coal producing section. Thus, it would appear that MSHA's longstanding inspector's manual definition of "return air", prior to the current 1988 policy manual definition, was identical to the "general use" and "common knowledge" definition which all of the witnesses were "taught" during their mining careers, but contrary to the current policy definition. However, the parties offered no background information or explanation for the initial policy definition of the term "return air" or for the change of definition which apparently became effective when the July 1, 1988, manual was published.

In *Old Ben Coal Company*, 2 FMSHRC 2806, 2809 (October 1980), and *King Knob Coal Company, Inc.*, 3 FMSHRC 1417, 1420 (June 1981), the Commission held that instructions and directives found in MSHA's inspectors' manuals are not officially promulgated and do not prescribe rules of law binding on an agency. In *King Knob*, the Commission noted that the Manual "is a relatively informal compilation not published in the Federal Register, and those factors weigh against deference", 3 FMSHRC 420 fn.3. However, the Commission also stated that in appropriate situations "Cases may arise where the manual . . . reflects a genuine interpretation or general statement of policy whose soundness commends deference and therefore results in our according it legal effect", 3 FMSHRC 1420. Likewise in *Coal Employment Project v. Dole*, 889 F.2d 1127, 1130 n.5 (D.C. Cir. 1989), the Court stated that while MSHA's policy manual may not be binding on the agency "we consider the MSHA Manual to be an accurate guide to current MSHA policies and practices".

In support of its defense in this case, the respondent relies on the Mining Dictionary definition of "return air" (air which has circulated the workings and is flowing towards the main mine fan) applied by Judge Weisberger in *Shamrock Coal Company*,

supra. During closing arguments at the hearing, respondent's counsel pointed out that the application of the definition of return air in Shamrock Coal, is consistent with the common sense definition advanced by Mr. Stritzel, and that it should be followed and applied in the instant case.

The Mining Dictionary definition relied on by Judge Weisberger in Shamrock Coal is but one of several relevant definitions of "intake" and "return". The term "intake" is defined as "Any roadway underground through which fresh air is conducted to the working face". The term "return" is defined in part as any airway in which vapid air flows from the workings, outby and out of the mine. "Return air" is also defined as vitiated or foul air, and "return aircourse" is defined as a portion of the ventilation system through which contaminated air is withdrawn. The common thread in all of these definitions is the fact that ventilation air which has circulated or passed by active working places is not fresh air, but air which is fouled or contaminated. In short, intake air is "clean and uncontaminated", while return air is "dirty and contaminated".

The respondent does not dispute the fact that the air which had passed the No. 1 and No. 2 working places and faces was passing over nonpermissible electrical equipment. Further, the respondent has not rebutted Mr. Eslinger's credible testimony that air which has passed any working face is carrying away contaminants such as methane, coal dust, and other mine gasses, and that such air poses a potential explosion hazard if it were to sweep over nonpermissible electrical power-connection points and equipment. Indeed, respondent's safety director Stritzel agreed that methane ignitions are always possible and that he would be concerned about air which has passed one working face passing over nonpermissible power points.

On the facts of this case, and taking into account all of the aforementioned circumstances, the respondent's assertion that the intake air which had swept only one or two working places and faces, remained intake air at all times and under all circumstances until it had swept all of the working places and faces and exited out of the returns IS REJECTED. The intent and purpose of section 75.507, is to insure that nonpermissible electrical power connection points, which are potential sources of ignition, are located only in areas which are ventilated by uncontaminated and clean intake air. Although I recognize the fact that methane tests, proper ventilation, and other precautionary measures may be taken to insure against potential explosions or fires, the acceptance of the respondent's interpretation of "return air" would permit the use of contaminated air to ventilate nonpermissible electrical equipment which is a recognized potential source of ignition, particularly where unexpected levels of methane may be released at any time during mining. Under the circumstances, I conclude and find that

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MSHA's policy definition and application of the term "return air", for purposes of section 75.705, is reasonably sound and not inconsistent with the aforementioned dictionary definitions. I further conclude and find that the inspector's reliance on MSHA's policy definition was reasonable and proper, and that the petitioner has established a violation of section 75.507, by a preponderance of all of the credible evidence adduced in this case. The contested citation is therefore AFFIRMED.

#### Significant and Substantial Violation

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety-contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining

Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

In United States Steel Mining Company, Inc., 7 FMSHRC 327, (March 1985), the Commission reaffirmed its previous holding in U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984) that it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial, and that a determination of the significant and substantial nature of a violation must be made in the context of continued normal mining operations, including the question of whether if left uncorrected, the cited condition would reasonably likely result in an accident of injury.

Mr. Eslinger confirmed that he found no excessive levels of methane on the section on the day of his inspection, and that his review of the pre-shift and on-shift books did not reflect any excessive methane violations. Mr. Woods confirmed that methane monitors located on the mining machines would shut down a machine in the event excess methane were liberated, and Mr. Stritzel believed that the ventilation was sufficient.

Mr. Eslinger's opinion that the violation was significant and substantial was based in part on the fact that two months prior to his inspection an ignition occurred in the same mine area and an investigation disclosed in excess of one percent methane in the working places and neutral entries. He believed that it was reasonably likely that this would occur again and that a possibility of an explosion existed. Mr. Stritzel disagreed and he pointed out that the conditions which prevailed with respect to this past event were different from the ones present at the time of Mr. Eslinger's inspection.

Mr. Eslinger also based his significant and substantial opinion on the fact that methane is produced in the working places, and he was concerned that it could drift outby over the nonpermissible electrical golf carts and power points. He also stated that the golf carts are usually pulled in and parked before any methane tests are made with the push-button methane detectors, and he was concerned about gas coming from the working places, belt drives, and transformers (Tr. 30-31). He stated that "some of the more serious aspects of it (sic) because people could drive into a possible explosive mixture of gas and ignite the methane" (Tr. 45). He also indicated that the air is gaining methane and coal dust as it sweeps across the face, and it is important that it not flow over nonpermissible power points (Tr. 58).

As noted earlier, Mr. Stritzel did not dispute the fact that the air which the inspector believed was return air was passing



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over nonpermissible power points, and Mr. Stritzel conceded that there is always the possibility of a methane ignition, and that methane may be liberated at higher concentrations. Under the circumstances, and in the context of continued normal mining operations, I conclude and find that a measure of danger to safety was contributed to by the violation, and that it was reasonably likely that an ignition resulting from the presence of nonpermissible electrical power connection points in contaminated return air would result in injuries of a reasonably serious nature. Accordingly, the Significant and Substantial (S&S) finding IS AFFIRMED.

#### Size of Business and Effect of Civil Penalty Assessments on the Respondent's Ability to Continue in Business

I conclude and find that the respondent is a large mine operator. I adopt as my finding the stipulation by the parties that the payment of the full civil penalty assessment for the violation in question will not adversely affect the respondent's ability to continue in business.

#### History of Prior Violations

Taking into account the fact that the respondent is a large mine operator, and in the absence of any further evidence to the contrary, I cannot conclude that the respondent's compliance record is such as to warrant any additional increases in the civil penalty which I have assessed for the violation which has been affirmed.

#### Gravity

I conclude and find that the violation was serious.

#### Negligence

Mr. Eslinger testified that he found no deliberate attempt by the respondent to course the air down the No. 3 entry, and he confirmed that the violation was the result of air ventilation leakage. The citation reflects a finding of "moderate negligence", which I find is appropriate, and it is affirmed.

#### Good Faith Compliance

The record reflects that the cited condition was immediately corrected and the citation was terminated within an hour of its issuance. Under the circumstances, I conclude and find that the respondent exercised rapid good faith compliance in correcting the cited condition.

Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, I conclude and find that a civil penalty assessment of \$275 is reasonable and appropriate for the violation which has been affirmed.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of \$275, for Section 104(a) "S&S" Citation No. 35335675, May 1, 1991, 30 C.F.R. 75.507. Payment shall be made to the petitioner (MSHA) within thirty (30) days of the date of this decision and order, and upon receipt of payment, this matter is dismissed.

George A. Koutras  
Administrative Law Judge

Distribution:

Rafael Alvarez, Esq. Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn St., 8th Floor, Chicago, IL 60604  
(Certified Mail)

Gregory S. Keltner, Esq., Zeigler Coal Company, 50 Jerome Lane, Fairview Heights, IL 62208 (Certified Mail)

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