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MSHA V. OLD BEN COAL
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SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 91-416
Petitioner	:	A. C. No. 11-00589-03812
v.	:	
	:	Mine No. 26
OLD BEN COAL COMPANY,	:	
Respondent	:	Docket No. LAKE 91-720
	:	A.C. No. 11-00589-03790
	:	
	:	Mine No. 24

DECISION

Appearances: Miguel Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois for Petitioner;
 Gregory S. Keltner, Esq., Old Ben Coal Company, Fairview Heights, Illinois for Respondent.

Before: Judge Weisberger

These two consolidated civil penalty proceedings are before me based upon petitions filed by the Secretary (Petitioner) alleging violations of 30 C.F.R. 316 and 400. Subsequent to notice, the cases were heard in St. Louis, Missouri, on January 28, 29 and 30, 1992. At the hearing, Robert Stamm, James D. Britton, George Dvorzank, Robert M. Montgomery, and Mark Eslinger, testified for Petitioner. Jeffrey Lane Bennett, Joseph W. Rizor, Roger Griffith, Clarence H. Woodford, Robert Mcatee, David Stritzel, and Donald William Mitchell, testified for the Operator (Respondent). The parties filed post hearings briefs on March 26, 1992.

- I. Order No. 3538631 (Docket No. LAKE 91-416), and Citation No. 3220697 (Docket No. LAKE 91-720).

Findings of Fact and Discussion

On November 2, 1990, Robert Stamm, an MSHA inspector, inspected Respondent's Mine No. 26, an underground coal mine. At the time of the inspection, a diesel-powered scoop was being operated on the 12th CM-2 (007-0) working section. There was loose coal in the articulation area, and under the torque

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converter, diesel engine, and winch. The coal had a depth ranging from 2 to 4 inches. The loose coal under the engine and torque converter extended approximately 3 feet by 6 feet. In the area of the articulation, the extent of the coal accumulation was approximately 2 feet by 3 feet. Under the winch, the extent of the accumulation was approximately 2 1/2 feet by 3 feet.

Stamm opined that the coal that had accumulated was combustible, inasmuch as it was being sold in order to be burned, and in addition, combustible hydraulic oil was mixed with the coal. He further indicated that the combustible material was likely to propagate a fire.

George Dorznak, the Chief of Mechanical Safety Division for MSHA, indicated that ignition could occur if the electric wires on the scoop would short. He indicated that this could easily occur if the wires should lie on a sharp corner of the machine. In this situation, over a period of time, the wires can rub against the corner causing it to tear and short. He also indicated that a collision or a roof fall could cause the wires to short. He further explained that if the shaft of the articulation joint should break, it could cause a cut in the electric wires. Should the hydraulic lines be cut at the same time, a fire could result. Also, ignition could occur should one of the scoop's shafts or bearings become overheated.

Stamm issued a section 104(d)(2) order, citing an accumulation of coal in violation of 30 C.F.R. 75.400.

On May 10, 1991, James D. Britton, an MSHA inspector, inspected Respondent's underground No. 24 Mine, and observed a diesel eimco scoop being operated in proximity to the C shaft. Dry loose coal, coal covered with oil, and loose rock was present on several parts of the scoop. Oil, from a "film", (Tr. 81, 83) to up to 5 inches in depth, was located in the operator's compartment, under and around the engine, water tank, and drive compartment, and on hoses, conduits, and the frame of the transmission and engine. In addition, there was loose coal saturated with oil. Britton issued a citation alleging an accumulation of coal and oil on the scoop car in violation of section 75.400 supra.

Both citations present the identical issue i.e., whether 30 C.F.R. 75.400 supra has been violated. Section 75.400 supra, provides, as pertinent, that coal dust and other combustible materials shall be cleaned up and not be permitted to accumulate "...in active workings, or on electric equipment therein." This language is identical to that found in section 304(a) of the Federal Mine Safety and Health Act of 1977 (P.L. 95-164, "the 1977 Act"), and section 304(a) of its predecessor, the Federal Coal Mine Health and Safety Act of 1969

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(P. L. 91-173, "the 1969 Act").(Footnote 1) Neither the 1969 Act, nor the 1977 Act, nor the regulatory equivalent, (section 75.400 supra) contains any definition of the term "electric equipment".

Further, the legislative history of the 1977 Act, and 1969 Act does not shed any light on the Congressional intent as to the meaning to be accorded the term "electric equipment." Hence, reliance is placed on its common meaning. Webster's Third New International Dictionary, (1986 Edition) ("Webster's"), defines "electric" as "2a: operated by an electric motor [an refrigerator] 2.

The diesel scoops in question are used to haul and load materials. Each scoop contains a set of 4 lights that are powered by an alternator. Conduits containing wires make an electric connection between the alternator and the scoop by way of a switch. It is Petitioner's position that, since the scoops have an electric component, they are to be considered electric equipment. For the reasons that follow I find this position to be without merit.

Each scoop is operated by a diesel engine, and no electricity is involved in its operation. The scoop's alternator is used only to operate the scoop's lights, and this electric lighting system is not connected to, and operates independent of the operation of the scoop itself. Also, it is clear that the scoops perform their function of loading and hauling material independent of their electric component. Accordingly, considering the common meaning of the term electric equipment, I

1 In order for Petitioner to prevail, it must first be established that any accumulations herein were either in "active workings" or on "electric equipment". Neither the order nor the citation in issue alleged, as a basis for the violations cited, that there were any accumulations in "active workings". Nor does Petitioner urge that the violation herein be predicated upon accumulations located in active workings which are defined as "...any place in a coal mine where miners are normally required to work or travel;" (30 C.F.R. 75.2(g)(4)) Since the only accumulations cited were those found on the two scoop cars in question, the issue for resolution is whether these scoops are electric equipment within the purview of section 75.400.

2 Donald William Mitchell was called as an expert witness by Respondent in the hearing on Citation No. 35364831 (Docket No. LAKE 91-416, infra). He testified that, based on his experience in the mining industry, the term "electric equipment" is commonly defined as any piece of equipment powered by an electric source or cable. Due to his extensive experience, considerable weight was placed upon his testimony in this regard.

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conclude that the scoops in question are not electric equipment. Hence, I find that Respondent did not violate Section 75.400 supra as alleged. Accordingly, Order No. 3538631 and Citation No. 3220697 are to be dismissed.

II. Citation No. 3536483 (Docket No. LAKE 91-416).

Findings of Fact and Discussion

A. Introduction

On August 4, 1990, Robert N. Montgomery, an MSHA ventilation specialist, inspected Respondent's mine No. 26. He indicated that seals(Footnote 3)/ were being constructed with the use of concrete cement blocks 6 inches high, 8 inches wide, and 16 inches long. He said that the blocks were rolled in Block Bond, and then laid in 3 separate rows on top of a concrete footer that was 30 inches wide and 36 inches high. Montgomery stated that he was able to insert a .025 inch thick gage 2 1/2 to 3 inches between the horizontal joints of the seals, and that the "opening" extended "several inches" horizontally "in a number of places" (Tr.36). He also indicated that there was no "visible" mortar between the joints (Tr.36).

According to Montgomery, mortar is a cement product containing sand, or mixed with sand and water, and is used to provide a joint between blocks. In essence, he indicated that this is the common definition of mortar in the mining industry. According to Montgomery, Block Bond is a sealant, and not interchangeable with mortar.

Mark Eslinger, an MSHA supervisory mining engineer in charge of a group of ventilation specialists, accompanied Montgomery in his inspection. He indicated that he did not see mortar between the joints of the cement blocks. Eslinger testified that in the mining industry, mortar means a mixture of cement, sand, and water, which is sometimes pre-mixed, and that the "common way" to apply mortar is to trowel it (Tr. 101).

3 In general, seals are constructed in a mine to seal off the gob or other areas that are no longer being ventilated. Specifically, seals are constructed to prevent the buildup of gases in an abandoned area from entering the rest of the mine. As such, as explained by Eslinger, seals should be structurally sound, and made of material that is non-combustible. Also, in order to prevent an explosion in the abandoned area from propagating into the working areas of the mine, the seals should be constructed of material that is able to withstand an explosion.

Montgomery issued a citation alleging a violation of 30 C.F.R. 75.316. His testimony indicates that it is his position that the Ventilation Plan ("the Plan") was not being complied with in the following particulars: (1) the plan requires the use of mortar in the joints of the cement blocks, but the blocks in question were "dry stacked" (Tr. 33) without mortar; and (2) the plan requires two parallel rows of cement blocks separated by 8 inches with the gap filled with mandoseal, whereas Respondent was constructing three parallel rows of blocks 8 inches wide; and (3) the use of 8 inch blocks is required by the plan whereas Respondent used blocks that were 6 inches in height. Further, Montgomery testified that when he returned to the mine on January 11, 1991, subsequent to the date set for abatement, substantially no work had been performed to correct the cited condition, and he therefore issued a section 104(b) order.

David Stritzel, Respondent's Director of Health and Safety, indicated that it was his decision to construct the seals at issue, in order to seal a gob area of approximately 15,000 to 16,000 feet by 10,000 feet, to prevent the gob gases or water in the gob area from entering the rest of the mine. He indicated that, in his experience, mortar is defined as an adhesive. Essentially the same definition was provided by Robert Macatee, Respondent's manager of safety, who indicated that the common understanding of the term mortar is a substance that bonds surfaces of block together. Stritzel, in essence, indicated that it was his decision to use B-bond (Block Bond) as it was safer than other materials with regard to chemical burns, and he had previously used it in constructing block stoppings.

Joe Rizor, who was in charge of the construction of the seals in issue, testified that hitches were cut out of the ribs, top, and bottom of the entries in which the seals were constructed, in order to tie in the seal to the strata. He testified that he had instructed the mine superintendent, and notified all the miners working on the seals, that the cement blocks were to be immersed in a B-Bond (Block Bond) mixture and then stacked. He stated that the bag that contained the B-Bond indicated that it consisted of portland cement, fiberglass, and an aggregate. According to Rizor, on the date of the initial inspection he observed an area of B-Bond material, approximately 4 to 5 inches high, in a corner of the outby side of seal number 34 A. He further opined that inasmuch as the concrete blocks have smooth surfaces, if they were dry stacked without any bonding material it would not have been possible to insert a gauge between the blocks. Hence, he concluded that the fact that it was possible to insert a gauge indicates that there was material in the joints. He also stated that gaps in the joints between the blocks do not establish a lack of mortar, as such gaps are common.

B. Mortar in the Joints

Based on the testimony of Rizor, whom I found to be a credible witness, I find that the miners who constructed the seals were instructed to dip or immerse the cement blocks in the block bond mixture, and then stack them. Also, due to the fact that Rizor was present in the area of the construction of the seals eight hours a day throughout the period of their construction, I accord considerable weight to his testimony that the blocks were dipped in the mixture. Donald Williams, a mining engineer, testified that if a cement block is dipped in Block Bond mixture, an eighth to a quarter of an inch of the mixture, would remain, and partially cover the bottom of the surface of the block. He also indicated that although it is desirable, it is not critical to have coating of the entire surface of the block. This testimony was neither impeached nor rebutted. I thus accord it considerable weight, especially considering Mitchell's impressive work experience, publications and expertise.

Petitioner did not impeach or rebut Rizor's testimony with regard to the presence on the date of the inspection of a mass of B-Bond material on the floor, which indicated that this material had been used to bond the blocks. In addition, I note Rizor's testimony that had B-Bond material not been used, it would not had been possible to have inserted a .025 gauge to a depth of 2 1/2 inches, I find this testimony credible inasmuch as it has not been impeached or rebutted. Indeed it was essentially corroborated by the testimony of Mitchell. Due to the latter's expertise, I accord considerable weight to his testimony. I thus conclude that the cement blocks had been dipped into the Block Bond mixture, and then stacked.

Diagram No. MB-631(B) of the plan requires that "...all joints between blocks will be mortared." In evaluating the evidence before me with regard to the common meaning of the term "mortar" in the mining industry, I accord most weight to the testimony of Mitchell, due to the extent and breadth of his experience, and the fact that it is based upon the definition found in the American Society of Testing Materials (ASTM). He testified to that definition as follows: "The primary purpose of mortar in masonry is to bond masonry units into an assemblage which acts as an integral element, having desired functional performance characteristics. Mortar consists of a mixture of cementitious material, aggregate, and water" (Tr. 224-225). According to the testimony of Mitchell, which was not rebutted or contradicted, Block Bond consists of portland cement, pulverized limestone, and alpha glass fibers and is used in surface bonding. Mitchell testified that B-Bond (Block Bond) is a surface bonding mortar mix that, when mixed with water, becomes a mortar. According to Mitchell, the fact that there was a gap between the concrete blocks and that it was possible to insert a gauge about

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2 inches, indicates the presence of mortar between the joints, as the only way that the gap could have occurred, was if rough material or mortar had been placed between the blocks. This opinion has not been rebutted or contradicted by Petitioner.

Based on the above, I conclude that there was B-Bond material in the joints between the concrete blocks, and that this material was mortar.

C. The Middle row of Cement blocks as the equivalent of Mandoseal.

It is Petitioner's position that the plan was not complied with inasmuch as Respondent did not fill the gap between the two eight inch thick walls of the seal with mandoseal, but instead constructed an 8 inch thick concrete block wall in that gap. The plan provides that the eight inch space between the walls is to be "...filled with mandoseal or equiv... ."

Mitchell testified that mandoseal is a cementitious material as it is comprised of portland cement, pulverized limestone, and vermiculite. He indicated that its compressive strength i.e., ability to withstand stresses, loads, and pressures, is between 100 and 350 pounds per square inch (psi). In contrast, a cement block has a compressive strength between 2,500 and 3,500 psi, and the compressive strength of Block Bond is between 3,000 and 3,500 psi. Accordingly, the middle wall in issue, comprised of cement blocks and mortared with Block Bond, had a compressive strength approximately 10 times as much as the compressive strength that would have been in effect had that area been filled with mandoseal. Also, Mitchell testified that block bond has an impulse load, i.e. the ability to withstand the sudden load of an explosion 10 to 30 times more than that of mandoseal. I accept the testimony of Mitchell with regard to the comparison of the concrete wall constructed by Respondent, and mandoseal, as it has not been either rebutted, contradicted, or impeached. I therefore conclude that the gap between the two outer block walls of the seals in question were filled with material more than the equivalent of mandoseal. Hence, the plan was not violated in this regard.

D. Dimensions of the Cement Blocks

Montgomery also asserted that the plan was violated inasmuch as Respondent used cement blocks that were 6 inches high 8 inches wide and 16 inches long. MB-631(B), relied on by Petitioner, does not stipulate the size of blocks to be used in constructing the seals. Specifically, the height of the blocks is not depicted. A side view of the seal wall in question depicts blocks 8 inches wide, which is the size utilized by Respondent herein. Similarly, the first line on MB-631(B) calls for "2, 8" solid concrete block walls" which would appear to indicate the

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depth of the wall, or width of the block, inasmuch as the accompanying sketch is of the top view of the walls of the seal.

Mitchell indicated that in 1979, the year in which MB-631(B) was revised, the term "8 inch solid block walls" "might" have meant blocks of a dimension of 8 inches high, 8 inches wide, and 16 inches long (Tr. 254), but that he did not know what the practice was in the Mid-West. However, it was also his testimony that, utilizing a block 6 inches in height, 8 inches in width 16 inches long results in a "marked effect" on reducing back and finger injuries, because these blocks weigh 20 pounds less than those that are 8 inches high, 8 inches wide, and 16 inches long (Tr. 252). He also said that utilizing blocks 6 inches high instead of those 8 inches high does not reduce the strength of the structure "in any manner" (Tr. 252). Petitioner did not contradict, rebut or impeach this testimony. I thus conclude that the 8 inch wide, 16 inches long, 6 inches high blocks utilized by Respondent were not in violation of the plan.

E. Conclusions of Law

Therefore for all of the above reasons, I conclude that the construction of the seals in question did not violate the terms of the plan, and as a consequence Respondent did not violate 30 C.F.R. 75.316 as charged.(Footnote 4) Accordingly, Citation No. 3536483 should be dismissed, and the Section 104(b) Order No. 3536850 should also be dismissed.

ORDER

It is ORDERED that Docket Nos. LAKE 91-416 and LAKE 91-720 be DISMISSED.

Avram Weisberger
Administrative Law Judge

Distribution:

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4 I have considered to the arguments of counsel as set forth in their briefs. To the extent that these arguments are not consistent with my decision, they are rejected.