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SOL (MSHA) V. CONSOLIDATION COAL
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SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 92-793
Petitioner : A.C. No. 46-01438-03932
v. :
Ireland Mine
CONSOLIDATION COAL COMPANY, :
Respondent :

DECISION

Appearances: Patrick DePace, Esq., U.S. Department of Labor
Office of the Solicitor, Arlington, Virginia
for Petitioner;
Daniel Rogers, Esq., Consolidation
Coal Company, Pittsburgh, Pennsylvania,
for Respondent.

Before: Judge Feldman

This case is before me as a result of a petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (The Act). The petition charges Consolidation Coal Company, pursuant to 104(a) of the Act, with four nonsignificant and substantial violations of certain mandatory safety standards specified in 30 C.F.R. Part 75.

This matter was heard in Wheeling, West Virginia, at which time Lyle R. Tipton testified for the petitioner and Hestle B. Riggle Jr., and Steven Perkins testified on behalf of the respondent. The parties' stipulations concerning the pertinent jurisdictional issues and the relevant civil penalty criteria found in section 110(i) of the Act are of record. The general issue for determination is whether the respondent violated the cited safety standards and, if so, the appropriate civil penalty to be assessed. The parties filed post-hearing briefs which I have considered in my disposition of this matter.

At the hearing the Secretary moved to settle two of the citations in issue. In this regard, the respondent stipulated that it had agreed to pay the \$20 assessed penalty for Citation No. 3331974.1 The remaining part of the settlement agreement concerned the Secretary's request to vacate Citation No. 3331975 because of her inability to establish that the unreported presence of water in an escapeway existed at the time of a pre-shift examination. As noted at the hearing, the parties' settlement agreement was approved and will be incorporated as part of this decision.

PRELIMINARY FINDINGS OF FACT

Lyle Robert Tipton is an experienced Federal Coal Mine Inspector with specialized training as a mine ventilation expert. On January 14, 1992, during an inspection of the respondent's Ireland Mine, Inspector Tipton issued 104(a) Citation No. 3331969 for a nonsignificant and substantial violation of the mandatory safety standard found in 30 C.F.R. 75.1707. 2 Citation No. 3331969 noted:

At the conclusion of a verbal request for an Inspection/Investigation it has been determined that 34 out of 40 Kennedy type stoppings each identified to management, that are used to separate the No. 3 conveyer belt entry from the No. 2 track intake air escapeway entry, did not effectively separate the two entr[ies] due to cracks in the stopping sealant which allows air to travel between the two entries on the 5 right off 3 north 3 entry development section. Pressures were positive track to belt.

Inspector Tipton returned to the Ireland Mine on January 22, 1992, at which time he issued Citation No. 3331973 for a similar

1 At the hearing the Secretary amended the proposed civil penalty assessments for each of the four citations from \$50 to \$20 because they were issued prior to the modification of the Secretary's single penalty assessment criteria.

2 30 C.F.R. 75.1707 provides, in pertinent part, that ". . . the escapeway required by this section to be ventilated with intake air shall be separated from the belt and trolley haulage entries of the mine for the entire length of such entries to the beginning of each working section . . ." (Emphasis added).

nonsignificant and substantial violation of 30 C.F.R.
75.1704.3 Citation No. 3331973 noted

The No. 2 designated track intake air escapeway servicing the 5 right off 3 north section, was not adequately separated from the No. 1 return secondary escapeway entry where the sealant on the Kennedy Stopping separating these entr[ies] had cracked and/or fell off causing the two entries not to be adequately separated in this three entry development section. Twelve stoppings were leaking and all were marked for identification.⁴

This case involves the condition and resultant effectiveness of the Kennedy type stoppings observed by Inspector Tipton on January 14, and January 22, 1992, in the respondent's three entry development section at its Ireland Mine. Stoppings are erected between entries to adequately separate the air courses in those entries. Stoppings serve the dual purpose of 1) providing discrete airways for ventilation of the mine face and 2) maintaining the integrity of escapeways to prevent smoke in one escapeway from contaminating the adjoining escapeway in the event of evacuation due to fire. Kennedy stoppings are a recent development in the mine industry. Conventional stoppings are constructed of masonry block. A Kennedy stopping is comprised of

3 Section 75.1704 provides, in pertinent part, that ". . . at least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuance to the surface escape drift opening, . . . shall be maintained in safe condition and properly marked. Mine openings shall be adequately protected to prevent the entrance into the underground area of the mine of surface fires, fumes, smoke, and flood water. Escape facilities . . . properly maintained and frequently tested, shall be present at or in each escape shaft or slope to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency." (Emphasis added).

4 Citation No. 3331973 was issued on January 22, 1992, for a violation of 30 C.F.R. 75.1704. It was subsequently modified to a Section 75.316 violation as a result of a Health and Safety Conference on January 26, 1992. At the hearing the Secretary moved to modify this citation back to a Section 75.1704 violation as initially issued. The respondent had no objection. (Tr.16). The motion was granted as it was unopposed and there was no allegation of any prejudice on the part of the respondent.

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steel panels strapped to two steel cross beams erected across each entry. The steel panels extend from the cross beams at the mine roof to the mine floor. These steel panels, which must be installed by trained personnel, are pressurized against the mine roof and floor and locked into position. Foam is installed at the top and bottom of the panels to prevent against air leakage and to allow for some flexibility in the event of roof sagging or floor movement. Finally, sealant is applied in an approximate four inch bead at the connecting seams between each panel and around the roof, rib and floor.

As in the instant case, Kennedy stoppings are frequently used in three entry development sections for longwall panel operations. As the longwall advances, the Kennedy stoppings can be recovered and reused as a cost effective measure. (Tr.61). Use of Kennedy stoppings in the three entry development of the respondent's mine, a short life area, complies with the respondent's approved ventilation plan. In long life areas, such as the main entry and main return airways, the respondent's ventilation plan requires use of permanent block stoppings. When properly installed and maintained Kennedy stoppings are as effective as masonry block stoppings. (Tr. 87).

The Kennedy stoppings in issue are located between the No. 1 secondary escapeway and No. 2 intake air primary escapeway and between the No. 2 intake air escapeway and the No. 3 conveyer belt entry. The stoppings are erected in the crosscuts separating these three entries at approximately 180-foot centers. Each entry is approximately 15-1/2 feet wide by seven feet in height. Therefore, each Kennedy stopping installed in each crosscut is comprised of numerous vertical steel panels totalling the approximate 15-1/2 foot width by 7 foot height of each crosscut entry. 5

FURTHER FINDINGS AND CONCLUSIONS

Citation No. 3331969

On January 14, 1992, Inspector Tipton conducted a spot inspection of the respondent's Ireland Mine.⁶ Tipton was accompanied by the respondent's Safety Director Hestle B. Riggle

5 These stoppings are pictured in the manufacturers' pamphlet detailing the Kennedy stopping specifications. (Ex.7). Inspector Tipton described the extensive presence of the sealant in issue by annotating an exhibit at the hearing. (See ex.9).

6 Under section 103(i) of the Act, a spot inspection is required once in every five working days for any mine which liberates more than one million cubic feet of methane in a 24 hour period.

and hourly employee William Keller. During the inspection, Tipton was approached by a member of the United Mine Workers' Safety Committee who complained that the stoppings in the 5 right off 3 north, 3 entry development section were not being adequately maintained.

Tipton, accompanied by Riggle, inspected the three entry development section. The inspection was accomplished with Riggle in the No. 3 conveyer belt entry while Tipton stood in the No. 2 intake escapeway entry. Each individual proceeded to shine his cap lamp across the stoppings. Tipton observed the amount of light shining through the stoppings to evaluate the effectiveness of the sealant and to determine whether the stoppings were adequately maintained. Tipton described his observations as ". . . a field with a bunch of automobiles in it with their lights turned on, that would be an example of how much light I could see shining through the stoppings through the [sealant] being cracked." (Tr.27). Of the forty stoppings observed in this area, Tipton observed thirty-four that had excessive cracks in the sealant between the vertical steel panels. The cracks observed by Tipton varied in size from the width of a piece of paper to one quarter inch in diameter. Tipton also observed cracks in the remaining six stoppings. However, these stoppings were determined to be in compliance because the cracks were minor and the stoppings remained effective.

Tipton testified that he was "absolutely positive" that he determined that the air current traveled from the No. 2 intake entry to the No. 3 conveyer belt entry because air pressure was positive in the No. 2 entry. (Tr.81). Although Tipton did not recall doing any formal smoke test to determine the airflow direction, he stated that the air current direction could be easily ascertained by something as simple as opening a man door between the entries.(TR.81).

On cross examination Tipton conceded that he did not perform any testing to determine the quantity of airflow that was infiltrating through the stoppings. Tipton testified that such testing could be accomplished only in a laboratory setting and was not feasible in a mine environment, particularly, in this case involving air infiltration through a multitude of cracks in numerous stoppings. However, Tipton opined that it is undisputed that there is greater air pressure in an intake entry, particularly in a three entry development system, which would increase the rate of air infiltration from the No. 2 intake entry to the adjacent entries through the defective stoppings.⁷

⁷ On cross-examination Riggle conceded that the direction of air flow was out from the No. 2 entry given the positive pressure in that entry. (Tr.137).

The respondent called Hestle B. Riggle, Jr., to testify with regard to his recollection of the inspection in question. Although Riggle testified that it was Tipton who predominantly shined the light on the stoppings, thus purportedly preventing Tipton from observing the light through the cracks, Riggle ultimately admitted on cross examination that he also shined his light toward Tipton. (Tr.125). Although Riggle stated that he could not feel air through the cracks, he corroborated Tipton's testimony that the air pressure was positive from the No. 2 intake escapeway to the No. 3 conveyer belt entry. He admitted that the direction of air flow could be easily determined by opening any man door which was present at approximately every third stopping. Riggle also corroborated Tipton's testimony with regard to previous discussions between the respondent's mine management and the manufacture of the Kennedy stoppings concerning several different kinds of sealant that could be used to counteract the deterioration of the stoppings. In fact, Riggle testified that he had met with representatives of the manufacture to discuss problems with the sealant. (Tr. 140).

Citation No. 3331973

On January 22, 1992, Inspector Tipton returned to the respondent's Ireland Mine. Tipton once again examined the three entry development section in issue. Tipton was accompanied by safety department representative Steven Perkins and hourly employee Rich Baker. Tipton again determined the effectiveness of the sealant by observing the amount of light which could be seen through the stoppings. This was accomplished by repeating the procedure performed the previous week with Riggle. Specifically, he examined the Kennedy stoppings used to separate the No. 2 track intake air primary escapeway from the No. 1 return secondary escapeway. Of the stoppings observed between these two entries, Tipton noted twelve stoppings where the sealant between the panels had cracked or fallen off. He cited these twelve stoppings because of the multiple cracks which he believed rendered the stoppings ineffective.

Perkins testified that he did not feel air moving through the stoppings. Perkins opined that the difference in air pressure between the two entries would not effect the movement of air, a conclusion that was contradicted by both Tipton and Riggle. Perkins corroborated the methodology described by Tipton in that it was he who shined his light toward Tipton so that Tipton could evaluate the condition of the sealant. (Tr.145).

DISCUSSION AND EVALUATION

The fundamental issue is whether the conditions cited by Inspector Tipton resulted in violations of sections 75.1704 and 75.1707. These mandatory safety standards require intake primary

escapeways for mining sections to be kept "separate" from the belt and trolley haulage entries.

The respondent, in its brief, asserts that the stoppings fulfilled the functions for which they were erected, i.e., to promote positive pressure in the intake escapeway so as to provide an abundance of fresh air to the working face. Consequently, the respondent maintains that the evidence, which establishes positive pressure in the intake escapeway and a high volume of air reaching the working section, demonstrates that the intake escapeway was adequately "separated" from the adjacent entries. In this regard, the respondent argues that although the regulations require the entries be kept separate, they do not require the ". . . intake escapeway to be absolutely, hermetically sealed off from other entries." (Respondent's Brief, P.4). 8

The petitioner, on the other hand, relies on the MSHA Program Policy Manual which interprets the separation standard in section 75.1707 as:

Separation of the escapeway from belt and trolley haulage entries shall be made with substantially built, permanent-type stoppings, such as concrete blocks, brick, tile, or metal, and they shall be reasonably airtight (emphasis added). See exhibit no. 8.

In support of MSHA's interpretation the petitioner points to a holding by Judge Melick involving application of section 75.1707 wherein he noted that it is understood in the mining industry that "reasonably airtight" is the applicable separation standard. However, Judge Melick also acknowledged widespread disagreement over what constitutes a "reasonably airtight" separation. See Rochester & Pittsburgh Coal Company 10 FMSHRC 1576 (November 1988).

Resolution of this case requires placing the term "separation" in the proper perspective. Thus, "separation" must be viewed in the context of the hazards that the mandatory safety standards in section 75.1704 and 75.1707 are intended to prevent.

8 In support of this proposition the respondent relies on a recent decision by Judge Weisberger that entries were adequately separated as contemplated by section 75.1707 despite an 8 x 16 inch hole in a cement block. See Consolidation Coal Company 14 FMSHRC 1450 (August 1992), appeal pending. I do not view my decision in this case as inconsistent with Judge Weisberger's finding in that I do not equate widespread deterioration of sealant on numerous stoppings with one 8 x 16 inch hole in a single stopping.

Significantly, these regulatory provisions concern escapeway rather than ventilation safety standards. Therefore, the respondent's reliance on the apparent effectiveness of its Kennedy stoppings in ventilating the working face as required by the mandatory ventilation safety standards in 30 C.F.R. 75.301 et seq. is not in issue and is, therefore, not dispositive of this matter.⁹

I credit Tipton's un rebutted testimony that failure to have reasonably airtight separation between each entry could result in smoke contamination of an escapeway effectively eliminating a possible escape route for miners, who for whatever reason, do not have the benefit of self-contained breathing apparatus. Moreover, a fire in the primary intake escapeway with ineffective stoppings would result in smoke contamination in the secondary return escapeway in advance of the escaping miners. Thus, while I am not bound by MSHA's "reasonably airtight" interpretation, I conclude that it is entitled to deference and that it is the reasonable and proper standard to be applied. See *Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411 (10th Cir. 1984); *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414 (1945).

The Commission has recognized that many safety and health standards must be broadly adaptable to a myriad of circumstances. See *Kerr McGee Corp.*, 3 FMSHRC 2496, 2497 (November 1981). The "reasonably airtight" requirement is one such broad standard. The application of broad standards is committed to the inspector's discretion which should be exercised in a reasonable manner. In exercising his discretion, Tipton acknowledges that air infiltration through conventional block or Kennedy stoppings is not, in and of itself, a violation of the escapeway mandatory safety standards. Moreover, Tipton's testimony reflects that masonry block stoppings, by nature are porous and permit some air infiltration. Similarly, Inspector Tipton testified that minor cracks in the sealant of Kennedy stoppings do not warrant a citation.

To support his judgment that the cited stoppings were defective, Tipton testified that he found 34 Kennedy stoppings between the No. 2 and No. 3 entries (Citation No. 3331969) and twelve Kennedy stoppings between the No. 2 and No. 1 entries (Citation No. 3331973) that were not adequately separating the

⁹ The respondent has relied on the stoppings' role in ventilation rather than escapeway safety throughout this proceeding. At trial Riggle testified that . . ." you just have to check [the stoppings] periodically to make sure that the stoppings are in the condition to put ventilation where you want it." (Tr. 129).

entries because of cracks in the sealant measuring up to one quarter inch in diameter.¹⁰ Tipton attributed these cracks to mine roof and floor movement and to a lack of durability of the Kennedy stopping sealant applied in numerous four inch beads approximately seven feet in height between the steel panels from floor to roof.

The testimony of Tipton is essentially corroborated by the two witnesses called upon by the respondent. Significantly, Tipton's testimony that the manufacturer of the Kennedy stoppings is aware of sealant problems related to durability and fitness was confirmed by Riggle. (Tr.59-60, 87). In fact, Riggle testified that the respondent's management has had several meetings with the manufacturer concerning sealant problems (Tr. 139-140). In addition, Riggle conceded that some of the sealant in question had in fact deteriorated. (Tr. 126-127). Finally, the respondent failed to call any representative of the manufacturer to attest to the performance of the sealant in question. Therefore, I conclude that the evidence supports Tipton's observations of widespread cracking as a result of extensive sealant deterioration.

Having determined that there was widespread cracking in the Kennedy stoppings, I must address the effect of such cracking with regard to direction of air loss and the magnitude of such loss. The respondent takes issue with Tipton's alleged failure to ascertain the direction of air flow and the magnitude of air infiltration. With respect to air direction, the testimony of both Tipton and Riggle indicates that air pressure was positive in the No. 2 intake entry as compared with the No. 1 and No. 3 entries. In fact, in its post hearing brief, the respondent prides itself on the pressure in the No. 2 entry. Therefore, it is reasonable to conclude that the direction of air flow, which could be determined by opening any man door between the entries, was from the No. 2 intake entry into the lower pressured No. 1 and No. 3 entries as stated by Tipton and confirmed by Riggle.

With respect to the extent of air loss, Tipton testified that he knew of no method to quantify the air loss due to the widespread nature of the cracking. Nor has the respondent offered any means of measurement. While the magnitude of escaping air could not be determined, it is clear given the nature and extent of the cracking and the higher pressure in the No. 2 intake entry, particularly, in a three entry development system, that significant air flow in the direction of the No. 1

¹⁰ Tipton characterized these stoppings as only approximately forty percent effective.(Tr. 105).

and No. 3 entries occurred.¹¹ Consequently, the Secretary established violations of sections 75.1704 and 75.1707 as the cited Kennedy stoppings were not reasonably airtight in that they did not effectively "separate" this three entry section.

Having determined that these violations occurred, I wish to emphasize that the evidence reflects that Kennedy stoppings are as effective as conventional masonry block stoppings when adequately maintained. These stoppings are apparently a cost effective alternative to block stoppings in that they can be recovered for reuse as the longwall advances. However, the benefit of the flexibility of design of the Kennedy stoppings which facilitates their removal and reuse imposes a corresponding obligation on the mine operator to monitor the condition of the sealant to ensure that these stoppings continue to create an effective barrier which maintains the integrity of the escapeway. In this regard, it is noteworthy that the violations in issue were abated by the application of additional sealant.

ULTIMATE CONCLUSIONS

Based on Tipton's testimony that the circumstances surrounding these violations constituted best case scenarios because the primary intake escapeway could not to be contaminated from adjacent entries because of its higher pressure, I conclude that the violations in issue were nonsignificant and substantial. I also concur with the opinion of Tipton that the respondent's underlying negligence associated with these violations was moderate and that these violations were of low gravity.

Considering the non S&S nature of the violations as well as the remaining statutory factors stipulated to by the parties, I conclude that a penalty of \$20 is appropriate for Citation No. 3331969 which was issued on January 14, 1992. Although Citation No. 3331973, issued on January 22, 1992, is similar in nature, I am assessing a penalty of \$100 because the respondent failed to service the sealant on these Kennedy stoppings despite the fact that it was placed on notice by the earlier citation that these stoppings may also be in need of maintenance. Thus, the negligence associated with this citation is higher in degree and justifies a higher penalty. I am also incorporating the previously noted settlement agreement in this decision which

¹¹ Tipton testified that pressures are higher in a three entry development section in order to maintain sufficient quantities of air to the last open crosscut. The integrity of these entries is critical in view of the reduced number of entries. A fire in the number 2 intake track primary escapeway with defective stoppings could subject personnel in the No. 3 belt entry to smoke inhalation and impede evacuation through the No. 1 secondary escapeway (Tr. 38,46-47,63).

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requires the respondent to pay a penalty \$20 for Citation No. 3331974 and which results in vacation of Citation No. 3331975.

ORDER

Based upon the above findings of fact and conclusions of law, IT IS ORDERED that:

1. Citation Nos. 3331969 and 3331973 ARE AFFIRMED.
2. The proposed settlement agreement concerning Citation No. 3331974 IS APPROVED.
3. Citation No. 3331975 IS VACATED.
4. The respondent shall PAY a civil penalty of \$140 within 30 days of the date of this decision.

Jerold Feldman
Administrative Law Judge

Distribution:

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