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WEBSTER COUNTY COAL V. SOL (MSHA)
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

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| WEBSTER COUNTY COAL CORP., Contestant | : | CONTEST PROCEEDING |
| | : | Docket No. KENT 93-201-R |
| v. | : | Citation No. 3549595: 12/3/92 |
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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent | : | Retiki Mine |
| | : | I.D. No. 15-00672 |
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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner | : | CIVIL PENALTY PROCEEDING |
| | : | Docket No. KENT 93-341 |
| | : | A.C. No. 15-00672-03644 |
| v. | : | Retiki Mine |
| | : | |
| WEBSTER COUNTY COAL CORP., Respondent | : | |

DECISION GRANTING THE CONTESTANT'S
MOTION FOR SUMMARY DECISION

Appearances: Timothy M. Biddle, Esq. Crowell and Moring, Washington, D.C., for Contestant/Respondent;
Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for Respondent/Petitioner

Before: Judge Feldman

This consolidated contest and civil penalty proceeding is before me as a result of Citation No. 3549595 issued on December 3, 1992, pursuant to Section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 814(a). The subject citation, designated as non-significant and substantial, alleged a violation of the mandatory safety standard contained in

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Section 75.333(e)(1), 30 C.F.R. 75.333(e)(1), a standard promulgated in May 1992 which requires, in pertinent part, that permanent stoppings shall be constructed of "durable" material. Specifically, Section 75.333(e)(1) provides:

> ...permanent stoppings, and regulators installed after November 15, 1992, shall be constructed of durable and noncombustible material, such as concrete, concrete block, brick, cinder block, tile, or steel. (Emphasis added).

The term "durable" is defined in Section 75.333(a), 30 C.F.R. 75.333(a). The provisions of this rule section state:

> For purposes of this section: ..."durable" describes a material and construction method that when used to construct a ventilation control results in a control that is structurally equivalent to an 8-inch hollow core concrete block stopping with mortared joints as described in ASTM E72-80 Section 12-Transverse Load-Specimen Vertical, load only. (Emphasis added).

The "structural equivalency" standard in Section 75.333 is quantified in the rulemaking proceeding that promulgated this new mandatory safety standard. The rulemaking specified that "structurally sound material" must withstand the same or greater static pressure as 8-inch hollow core concrete block with mortared joints (39 pounds per square foot) when pressure is applied according to ASTM E72-80 testing methods. 57 Fed. Reg. 20868, 20885 (1992). ASTM is the acronym for the American Society for Testing and Materials, an organization that has standardized sophisticated laboratory test methods to ensure sound engineering design of structures. (Contestant's Motion for Summary Decision, Attachment 4). The citation in question charged that the use of concrete block stoppings, plastered on one side only, by the contestant/respondent (hereinafter referred to as contestant) did not satisfy the structural equivalency standard in Section 75.333(e)(1).

This matter was stayed on July 20, 1993, at the parties' request in order to permit the parties to confer with their expert witnesses in an attempt to reach settlement. The parties agreed that if settlement was not reached, the contestant would file a Motion for Summary Decision (contestant's Motion). The contestant's Motion was filed on August 16, 1993. The Secretary

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1 The mandatory safety standard in Section 75.333 was promulgated at 57 Fed. Reg. 20868, May 15, 1922, and amended at 57 Fed. Reg. 53858, November 13, 1992.

filed his opposition on September 14, 1993, and the contestant replied to the Secretary's Opposition on September 21, 1993. As a result of the parties' inability to reach settlement, by Order dated December 1, 1993, I lifted the stay in this matter and scheduled the contestant's Motion for oral argument. The parties participated in oral argument on December 8, 1993, at which time they addressed the issues designated in the December 1, 1993, Order.

The parties have stipulated that the permanent stopping in issue consists of 8"x6"x16" solid concrete blocks which are plastered with "Rite-Wall" bonding adhesive on the pressure side only. The parties also stipulated to language in a Mine Safety and Health Administration (MSHA) guidance document issued on November 9, 1992, which is entitled "Ventilation Questions and Answers" (VQA) which addresses dry stacked stoppings which are plastered on one side. (Secretary's Opposition, Attachment 2). The stipulated language states,

> The law does not preclude [dry stacked stoppings plastered on one side], but so far no product has demonstrated adequate strength when applied to only one side. However, if the stopping, when tested under Section 12 of the American Society for Testing and Materials (ASTM) E72-80, passes the test, the stopping will be acceptable. (Emphasis added).

It is unclear whether the contestant was aware of MSHA's November 9, 1992, VQA when the subject citation was issued on December 3, 1992. However, in view of the equivocal nature of this VQA with respect to the permissibility of concrete block stoppings plastered on one side, the issue of actual or constructive notice of the VQA on the part of the contestant is not dispositive.

## FINDINGS OF FACT

On the basis of the parties' pleadings, their submissions in support thereof, their presentations at oral argument and their post-oral argument briefs, I have reached the following findings of fact:

1. The purpose of "durable" stoppings is to withstand pressure during fire or explosion in order to maintain the integrity of escapeways to protect miners from the harmful effects of combustion contamination. (Tr. 26-27; 57 Fed. Reg. at 20868, 20885).

2. Prior to the promulgation of Section 75.333, Section 75.316-2(b), 30 C.F.R. 75.316-2(b), governed the structural

standard for permanent stoppings. That mandatory standard required that "permanent stoppings...should be constructed of substantial, incombustible material, such as...concrete blocks,...having sufficient strength to serve the purpose for which the stopping or partition is intended."

3. The stoppings in issue were constructed of 8"x6"x16" solid concrete blocks which were plastered with "Rite-Wall" on the pressured side only.

4. 8"x6"x16" solid concrete blocks plastered with Rite-Wall bonding adhesive on the pressure side only satisfied the fitness for purpose requirements of Section 75.316-2(b).

5. Section 75.333 was promulgated by rulemaking on May 15, 1992. Section 75.333 superseded Section 75.316-2(b) effective November 16, 1992.

6. The new "durable" standard specified in Section 75.333 does not preclude the use of concrete block plastered on one side if it is structurally equivalent (can withstand pressure of 39 pounds per square foot) to an 8-inch hollow core concrete block stopping with mortared joints.

7. Citation No. 3549595 was issued on December 3, 1992, citing a violation of the new mandatory standard in Section 75.333(a) because the cited stoppings were plastered on the pressure side only. The citation was issued approximately two weeks after the new regulatory standard became effective.

8. Citation No. 3549595 was modified on December 14, 1992, to change the cited violated mandatory standard from Section 75.333(a) to Section 75.333(b)(1).

9. Citation No. 3549595 was modified on December 30, 1992, to change the cited violated mandatory safety standard from Section 75.333(b)(1) to Section 75.333(e)(1).

10. On July 2, 1993, approximately seven months after the issuance of Citation No. 3549595, MSHA issued Report No. 07-183-93 on Sealants for General Purpose and for Application on Dry Stacked Stoppings which concluded that in order to reach the 39 pounds per square foot structural equivalency requirement of section 75.333, "...dry-stacked concrete block stoppings require strength-improving sealants to be applied in suitable thickness to both sides of the stopping." (Secretary's Opposition, Attachment 3, p. 2).

11. On August 13, 1993, more than eight months after the issuance of Citation No. 3549595, MSHA issued Report No. 09-225-93 on Small-Scale Testing of Concrete Masonry Unit Wall Sections. The report noted that "the Mine Safety and

Health Administration (MSHA) accepts 8-inch hollow-core concrete block stoppings, coated on both sides with a suitable strength-enhancing sealant (surface bonding product), at least 1/8 inch in thickness as meeting 30 C.F.R. 75.333(e)(1)." (Secretary's Opposition, Attachment 4).

12. On September 1, 1993, approximately nine months after the issuance of Citation No. 3549595, MSHA's Pittsburgh Safety and Health Technology Center (PSHTC) had a facsimile of the permanent stopping in issue tested using ASTM E72-80 Section 12-Transverse Load-Specimen Vertical Methods by the Pittsburgh Testing Laboratory Division of PSI, Inc., under contract with the Mine Safety and Health Administration. Three 48"x96"x8" thick solid concrete block walls coated with a 1/4 inch thick coating of Rite-Wall on one side only were tested. The sample stopping walls were loaded on the coated side and exhibited an average strength of 22.1 pounds per square foot as per the subject ASTM testing methods. The specific test results on the three sample stopping walls were 21.7 pounds per square foot, 16.1 pounds per square foot, and 28.5 pounds per square foot. (Letter from Edward H. Fitch, Esq., to Timothy M. Biddle, Esq., dated September 2, 1993.).

## FURTHER FINDINGS AND CONCLUSION OF LAW

As noted above, Section 75.333 the cited mandatory safety standard, became effective on November 16, 1992, only two weeks prior to the issuance of the subject citation. Consequently, this case presents questions of law concerning the interpretation, application and enforcement of this new regulatory provision that are matters of first impression. These questions of law are:

1. Whether Section 75.333(e)(1) requires the operator to utilize durable construction methods as well as durable construction materials;

2. whether the Secretary or the operator has the burden of proof with respect to whether a violation of Section 75.333 in fact occurred;

3. whether the subject citation was issued in accordance with the requirements of Section 104(a) of the Mine Act;

4. and, whether the operator had adequate notice of the requirements of Section 75.333 on December 3, 1992, the date the subject citation was issued.

Issue One - The "Durability" Requirement as It Pertains to Construction Methods and Materials

The contestant argues that the durable construction method component of the term "durable" as defined in Section 75.333(a) should not be incorporated into Section 75.333(e)(1) which only references a requirement of durable construction material. Thus, the contestant questions the relevance of its application method of adhesive compound on one side only in that it utilized concrete block which is admittedly a "durable material."

At the culmination of oral argument on this issue, I rendered a bench decision that the definition of "durable" in Section 75.333(a), which describes a construction method as well as a construction material, must be incorporated in the interpretation of Section 75.333(e)(1). I noted that a regulatory safety standard should be interpreted harmoniously with the hazard it seeks to avoid. See Emery Mining Corp. v. Secretary of Labor, 744 F.2d 1411, 1414 (10th Cir. 1984). In this regard, the contestant has conceded, consistent with the language in the implementing rulemaking proceeding, that the purpose of Section 75.333 is to ensure proper underground coal mine ventilation by requiring stoppings that can withstand pressure from fire or explosion. It is clear, therefore, that this mandatory standard seeks to achieve a certain minimal structural strength. Thus, the contestant's proffered interpretation, which ignores construction methods and simply requires durable construction materials, regardless of their effectiveness, is inconsistent with the regulatory purpose and must be rejected. (Tr. 26-27, 34-35, 38-40; 57 Fed. Reg. at 20868, 20885).

Issue Two - The Burden of Proof

The subject citation alleges that the contestant's concrete block stoppings, plastered on one side, are not structurally equivalent to an 8-inch hollow-core concrete block stopping with mortared joints. Mortared joint stoppings are capable of withstanding flexural loading of 39 pounds per square foot as determined by application of ASTM E72-80 Section 12-Transverse-Specimen Vertical. (Secretary's Opposition, Attachment 3, p. 2; 57 Fed. Reg. at 20885). This ASTM testing method is an expensive and sophisticated procedure which must be performed in a controlled laboratory setting. (Contestant's Motion, Attachment 4). MSHA has estimated that conducting "...an ASTM E72-80 [test] on a candidate alternate ventilation control can cost over $1,000." (Secretary's Opposition, Attachment 4,).

At oral argument, the Secretary argued that "the pragmatic reality" is that the Secretary does not have the facilities or the budgetary wherewithal to perform the requisite ASTM test to determine structural equivalency. (Tr. 57-58). In fact, the

September 1, 1993, ASTM test using Rite-Wall adhesive conducted by PSI, Inc., was performed under contract with MSHA for the sole purpose of preparation for a hearing in this proceeding as distinguished from testing to support the citation when written. (Tr. 63-64). Thus, apparently relying on "pragmatic realities," the Secretary asserts that it is the burden of the operator to prove that its stoppings are structurally equivalent to 8-inch hollow-core concrete block with mortared joints if it chooses to use an alternative method of stopping. (Tr. 57-58).

At the oral argument, I issued a bench decision noting that I was not persuaded by the Secretary's attempt to shift the burden of proof. (Tr. 58-60). As a threshold matter, there is nothing in the rulemaking proceeding that reflects that the operator has the burden of proving structural equivalency. Moreover, the Commission has consistently held that the Secretary bears the burden of proving alleged violations. See ASARCO Mining Company, 15 FMSHRC 1303, 1306-1307 (July 19,1993) citing Jim Walter Resources, Inc., 9 FMSHRC 903, 907 (May 1987) and Wyoming Fuel Co., 14 FMSHRC 1282, 1294 (August 1992).

While the burden may shift to the operator if the Secretary presents evidence that the pertinent ASTM structural equivalency test was failed, the mere allegation of such failure by the Secretary is not sufficient to shift the burden of proof. Simply put, the accuser must present evidence to support the accusation.

Moreover, the burden of proof remains with the Secretary even in instances where the operator must operate with the prior approval of MSHA. For example, the Secretary must establish that a ventilation plan provision sought to be enforced by MSHA is suitable to the mine in question. Peabody Coal Company, 15 FMSHRC 381, 388; Jim Walter Resources, Inc., 9 FMSHRC at 907. The Secretary must also establish that an operator is violating an approved ventilation plan provision. Thus, the Secretary's assertion that the contestant bears the burden of proof in this matter is lacking in merit.

At oral argument, I indicated that even if it were appropriate to shift the burden of proof, it is not a pragmatic solution because the validity of the purported ASTM testing method used by the operator would remain at issue. In such an event, it would be the Secretary's burden to prove that the operator's ASTM testing results were unreliable. (Tr. 59). Thus, in the final analysis, the burden of proof must always remain with the Secretary.

## Issue Three - Section 104(a) Statutory Requirements for Issuance of a Citation

Section 104(a) of the Mine Act requires that,

> ...if, upon inspection or investigation, [an inspector] believes that an operator...has violated...any mandatory health or safety standard...he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. (Emphasis added).

In this case it is appropriate to focus on two of the requirements of Section 104(a). Namely, the inspector's belief and the specificity of the violation cited.

a. Inspector's Belief

Turning to the issue of the inspector's belief, such belief must be based on the inspector's consideration, upon inspection or investigation, of past events and circumstances, or upon his analysis of current circumstances and conditions. NACCO Mining Company, 9 FMSHRC 1541, 1549 (September, 1987). A citation may not be issued based upon a future analysis in the hope that the inspector was correct when, as in this case, past events or current observation does not support the fact of a violation.

It is of fundamental significance that, according to the position taken by MSHA in its November 9, 1992, VQA, the contestant's use of concrete block, plastered on one side only, was not a per se violation of Section 75.333. Therefore, we must focus on the inspector's December 3, 1992, inspection observations and findings. In Consolidation Coal Company, 15 FMSHRC 130, 138 (January 1993), I concluded that an inspector's observations of widespread sealant cracking on Kennedy stoppings established that the stoppings were not an adequate ventilation control. However, in the current case, the Secretary does not contend that the issuing inspector's observations revealed a stopping in such poor condition that it was readily apparent that the structural equivalency test was not met. On the contrary, September 1, 1993, laboratory testing, performed approximately nine months after the issuance of the citation, revealed flexural strength of 22.1 pounds per square foot. (Letter from Edward A. Fitch, Esq., to Timothy M. Biddle, Esq., dated September 2, 1993). As these test results were not available on December 3, 1992, when the citation was issued, they cannot be used to support the inspector's belief at the time of his investigation.

b. Specificity of Citation

With regard to specificity, the Commission has stated that this requirement of Section 104(a) of the Mine Act serves the dual purpose of permitting the operator to determine what conditions require abatement and to adequately prepare for a hearing. See Cyprus Tonopah Mining Corp., 15 FMSHRC 367, 379 (March 1993) and citations therein. The December 3, 1992, citation failed to serve these purposes.

The December 3, 1992, citation charged that the contestant's stoppings could not withstand 39 pounds per square foot pressure. The Secretary mailed his proposed assessment of $50.00 to the contestant on February 2, 1993. The contestant, pursuant to Section 100.7, 30 C.F.R. 100.7, had 30 days from the receipt of the proposed assessment to either pay the assessment or notify MSHA that it desired a hearing before this Commission. On February 8, 1993, the contestant requested a hearing which gave rise to my jurisdiction in this matter. However, at the time of the proposed penalty and the contestant's subsequent hearing request, the contestant could not intelligently determine whether to request a hearing, let alone prepare for a hearing, as it was not advised, nor did the Secretary know, the alleged flexural strength of the stoppings in question. Thus, the operator was prejudiced by the Secretary's admitted reticence to perform the requisite ASTM testing to support the alleged 75.333(e)(1) violation. (See tr. 57-58).

It is incumbent on the Secretary to inform the contestant what the alleged deficient structural strength is. Pertinent citation specific ASTM testing using Rite-Wall adhesive on one side of dry-stacked concrete block was not performed by PSI, Inc., under contract with MSHA, until September 1, 1993, approximately nine months after issuance of the subject citation. This situation is analogous to citations for alleged excessive respirable dust concentrations under 30 C.F.R. 70.100, or inadequate rock dusting under 30 C.F.R. 75.403, without quantification through supporting laboratory analysis. Thus, even if the issuing inspector had the requisite belief required under Section 104(a) of the Mine Act, the instant citation is fatally flawed because it was lacking in specificity. Therefore, Citation No. 3549595 must be vacated on this basis alone.

Issue Four - The Prudent Person Test

Although I have concluded that the citation in question was defective when issued, I will address the issue of whether Section 75.333 afforded adequate notice to the contestant. This issue must be resolved based upon the information available to the contestant as of the December 3, 1992, citation date. The Commission has stated that adequate notice requires that a mandatory safety standard cannot be "so incomplete, vague,

indefinite or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." Ideal Cement Company, 12 FMSHRC 2409 (November 1990). The appropriate test in applying this standard:

> ...is not whether the operator had prior notice of a specific prohibition or requirement, but whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard. Id at 2416.

As noted above, the reasonably prudent person test must be viewed in the context of what the operator knew or should have known on the date the citation was issued. Significantly, concrete block plastered on one side was not prohibited by Section 75.316-2(b), the predecessor of Section 75.333. When viewed prospectively from the December 3, 1992, citation date, it is clear that MSHA has concluded that concrete stoppings plastered on one side do not satisfy the structural equivalency test in Section 75.333. This prospective analysis consists of the results of MSHA's July 2, 1993, report on sealants for dry-stacked stoppings, which concluded that adhesive compound must be applied to both sides; MSHA's August 13, 1993, report on small-scale testing of concrete masonry walls which enumerated three alternative methods of construction consisting of a surface bonding product applied to both sides of block stoppings that would satisfy the structurally equivalency test; and, finally, the September 1, 1993, laboratory test of PSI Inc., which determined that Rite-Wall plaster applied to one side of concrete block resulted in structural strength of 22.1 pounds per square foot. All of these facts were not known to the contestant on December 3, 1992. Thus, the contestant did not have an adequate basis for anticipating that its stoppings were structurally deficient and in violation of the new regulatory standard. Moreover, MSHA's initial citation with its two modifications changing the alleged cited subsections of 75.333 further supports the conclusion that there were significant uncertainties associated with the application of this new regulatory standard.

Thus, I conclude that the contestant was not afforded adequate notice as a matter of law and is, therefore, not liable for the alleged violation in issue. I reach this conclusion based solely upon the undisputed evidence of record. The contestant asserts that ASTM laboratory test results on simulated stoppings do not accurately reflect the flexural strength of actual stoppings that are subject to mine conditions such as roof weight. The propriety and validity of ASTM testing methods as they pertain to structural equivalency findings require expert testimony and are beyond the scope of this proceeding.

I also wish to note that this holding should be narrowly construed. I have not addressed whether the industry has been adequately notified of MSHA's pertinent findings in its July and August 1993 reports and whether a citation issued after such notification would alter my conclusions in this matter.

ORDER

In view of the above, I conclude that there are no unresolved issues of material fact that require a hearing in this proceeding. Accordingly, the contestant's Motion for Summary Decision IS GRANTED. Consequently, Webster County Corporation's contest of Citation 3549595 IS GRANTED and this citation IS HEREBY VACATED.

Jerold Feldman
Administrative Law Judge

Distribution:

Edward Fitch, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Timothy M. Biddle, Esq., Crowell and Moring, 1001 Pennsylvania Ave., N.W. Washington, D.C. 2004-2595 (Certified Mail)