

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 27, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2000-79
Petitioner	:	A. C. No. 15-14492-03802
v.	:	
	:	Baker Mine
LODESTAR ENERGY, INC.,	:	
Respondent	:	

DECISION

Appearances: Donna E. Sonner, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, and Arthur J. Parks, Conference and Litigation Representative, Mine Safety and Health Administration, U.S. Department of Labor, Madisonville, Kentucky, for Petitioner;
Richard M. Joiner, Esq., Mitchell, Joiner & Hardesty, P.S.C., Madisonville, Kentucky, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Lodestar Energy, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges three violations of the Secretary’s mandatory health and safety standards and seeks a penalty of \$165.00. A hearing was held in Madisonville, Kentucky. For the reasons set forth below, I vacate one citation, affirm the other two and assess a penalty of \$100.00.

Settled Citations

The parties reached a settlement with regard to Citation Nos. 7641238 and 7641286. In accordance with the agreement, the Secretary moved to vacate Citation No. 7641238 and the Respondent agreed to pay the proposed penalty of \$55.00 for Citation No. 7641286. (Tr. 5-6.) The agreement was approved and will be carried out in the order at the end of this decision.

The remaining citation, No. 7640555, was contested at the hearing.

Findings of Fact¹

Lodestar Energy, Inc., owns and operates the Baker Mine, an underground, bituminous coal mine, located in Webster County, Kentucky. Although the initial entries in a mining section are cut by a continuous mining machine, the main method of mining coal is by longwall mining unit.

Three entries are cut by the continuous miner on each side of a panel of coal that is to be mined by the longwall. Typically, the entries are 10,000 feet long and the panel is 1,000 feet wide. While the first panel is being mined by the longwall, a continuous miner is cutting three more entries along the next panel to be mined. Thus, except for the first and last longwall panels, the three intake entries on the right side of the panel, become the tailgate entries on the left side of the next panel. Of the three intake entries, the entry closest to the panel, the No. 3 entry, is the belt line entry and also serves as an alternate escape way. The Nos. 1 and 2 entries carry intake air toward the face where it mixes with air coming across the face and eventually exits the mine. The No. 2 entry also serves as the primary escape way from the section.²

On October 26, 1999, MSHA Inspector Robert A. Sims, a ventilation specialist, was assisting in a quarterly inspection at the Baker Mine. Mining was taking place on longwall panel “K” in the 11th East Gates section of the mine. At that time, intake air entered the Nos. 1 and 2 entries from a common source outby crosscut 10. At crosscut 10, a portable metal stopping, known as a “Kennedy Stopping,” partially blocked the No. 1 entry. While a portion of the airflow passed through openings in the stopping and continued down the No. 1 entry, the stopping directed most of the airflow down the No. 2 entry.

From crosscut 10 to crosscut 73, a distance of about 6,615 feet, the No. 1 and No. 2 entries were separated by coal pillars and permanent stoppings.

Inspector Sims determined that although the No. 2 entry had been examined for hazardous conditions, by walking it at least every seven days, the No. 1 entry had not been so examined. Concluding that this was a violation of section 75.364(b)(1) of the regulations, 30 C.F.R. § 75.364(b)(1), he issued Citation No. 7640555, which alleged that: “The #1 entry (intake) of the 11th East Gates was not being examined from crosscut 10 to crosscut 73 at the Baker Mine.” This was the first time that Lodestar had been cited for failing to examine the No. 1 entry.

Conclusions of Law

¹ The parties have stipulated to most of the facts in this case. (Jt. Ex. 5, Tr. 10-13.) The facts that have not been stipulated to are not in dispute.

² The No. 1 entry serves no apparent purpose on the right side of the longwall panel. When it is on the left side, it takes air down to and then across the mining face.

Section 75.364(b)(1) requires that: “At least every 7 days, an examination for hazardous conditions at the following locations shall be made by a certified person designated by the operator: (1) In at least one entry of each intake air course, in its entirety, so that the entire air course is traveled.” Section 75.301, 30 C.F.R. § 75.301, defines “air course” as: “An entry or a set of entries separated from other entries by stoppings, overcasts, other ventilation control devices, or by solid blocks of coal or rock so that any mixing of air currents between each is limited to leakage.”

The company argues that the Nos. 1 and 2 entries are a set of entries making up a single air course and that by inspecting the No. 2 entry they are complying with the regulation’s requirement that “at least one entry of each intake air course” be examined. On the other hand, it is the Secretary’s position that the Nos. 1 and 2 entries are separate air courses and, therefore, each one has to be examined in its entirety. I find that the facts and the law support the Secretary’s position.

The thing that distinguishes one air course from another, whether it is one entry or a set of entries, is that it is separated from other entries so that the only mixing of air currents between the two is the result of leakage, not design. Thus, for a set of entries to be an air course, they would have to mix air currents and be separated from other entries. In this case, the two entries are separated from each other by stoppings and solid blocks of coal for over a mile and there is no mixing of the air between the two except by leakage.

The Respondent asserts that because common air enters the two entries at crosscut 10 and again becomes common air after leaving the entries at crosscut 73, the entries are part of the same air course. However, if this contention is taken to its logical conclusion it would mean that only one entry in the entire mine, or at least one entry for each outside air source, would have to be examined, because the same air comes into the mine at one place, proceeds down numerous entries and eventually joins back together to exit the mine.

The operator also maintains that the Secretary’s interpretation of the regulation is determined by the distance over which crosscuts between entries are blocked. This is based on the inspector’s testimony that if only crosscut 11 were blocked between the two entries, so that common air entered the entries at crosscut 10 and became common again at crosscut 12, the two entries would be one air course. Clearly, a rule of reason applies here. At some point the blocking of crosscuts between entries to seal the air within them changes them from one air course to two. While that may not occur if only two or three crosscuts are blocked, it undoubtedly has occurred when 63 crosscuts are blocked. Since that is what the facts are in this case, it is not necessary, for this decision, to determine exactly when one air course becomes two.

Inspector Sims testified that among the hazards that could take place in the No. 1 entry are roof falls and methane accumulations. While it is arguable that methane levels could be discovered by monitoring the air as it exits the entry, the only way that roof falls or potential roof

falls can be discovered is by walking the entry. The fact that the roof in the entry may be exceptionally well secured, as the No. 1 entry appears to be, does not change this fact.

Accordingly, I find that the Nos. 1 and 2 entries are separate air courses under the regulations and that they must both be examined for hazardous conditions. Since the No. 1 entry was not being examined, I conclude that Lodestar violated section 75.364(b)(1) of the regulations.

Civil Penalty Assessment

The Secretary has proposed a penalty of \$110.00 for the two remaining citations. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the civil penalty criteria, the parties have stipulated, and I so find, that: (1) the Baker Mine produced 4,398,310 tons of coal in 1999, making it a large mine; (2) Lodestar Energy, Inc. mined 9,387,053 tons of coal in 1999, making it a large operator; (3) the proposed penalty will not affect Lodestar's ability to remain in business; and (4) Lodestar demonstrated good faith in abating the cited violations. (Jt. Ex. 5, Tr. 13-14.) Based on the Assessed Violation History Report, (Jt. Ex. 1), I find that neither the mine's nor the operator's history of violations is very good.

The inspector found that neither of the citations was "significant and substantial" and that in the unlikely event that an accident occurred the expected injury would result in lost workdays or restricted duty. Therefore, I find that the gravity of the violations was not very serious.

Finally, the inspector alleged that both of the violations resulted from "moderate" negligence on the part of the operator. In accordance with the settlement agreement, I find that the company's negligence in Citation No. 7641286 was "moderate." However, concerning Citation No. 7640555, the evidence is that the company had never been cited for this violation before and that even subsequent to the issuance of the citation at least one MSHA inspector did not inspect the No. 1 entry during a quarterly inspection. Accordingly, I find that the negligence for that violation was "low."

Taking all of these factors into consideration, I assess a penalty of \$55.00 for Citation No. 7641286 and a penalty of \$45.00 for Citation No. 7640555.

Order

Citation No. 7641238 is **VACATED** and Citation No. 7641286 is **AFFIRMED**, in accordance with the settlement agreement, and Citation No. 7640555 is **MODIFIED** by reducing the level of negligence from “moderate” to “low” and **AFFIRMED** as modified. Lodestar Energy, Inc. is **ORDERED TO PAY** a civil penalty of **\$100.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

Distribution: (Certified Mail)

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