FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

February 27, 2003

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.	:	
	:	
LODESTAR ENERGY INC.,	:	
Respondent	:	Mine: Baker Mine

DECISION ON REMAND

This matter is before me on remand from the Commission. *Lodestar Energy, Inc.*, 24 FMSHRC 689 (July 2002). In its decision, the Commission affirmed my conclusion that the company had violated section 75.364(b)(1) of the Secretary's mandatory safety standards, 30 C.F.R. § 75.364(b)(1), as alleged in Citation No. 7640555. *Id.* at 693-94. However, it remanded for additional fact finding and analysis whether the Respondent had adequate notice of the requirements of the regulation. *Id.* at 695. For the reasons set forth below, I find that the company did have adequate notice.

Because this issue was first raised on appeal, the parties were offered the opportunity to present additional evidence and/or to submit briefs. In an October 31, 2002, letter, counsel for the Respondent stated that: "Lodestar has directed me to advise that it will not further contest this matter, but will abide by your ruling on remand." The Secretary declined the chance to offer further evidence, but did file a brief on the question.

To briefly summerize the facts, intake air entered the Nos. 1 and 2 entries of the "K" longwall panel of Lodestar's Baker Mine from a common source at crosscut 10. At that crosscut, a Kennedy Stopping partially blocked the No. 1 entry so that while some of the air continued down the No. 1 entry, most of it went down the No. 2 entry. From crosscut 10 until crosscut 73, a distance of 6615 feet, the two entries were separated by coal pillars and permanent stoppings. At crosscut 74, the air from the two entries came together again. The Respondent had been conducting weekly examinations of the No. 2 entry, but not the No. 1 entry. MSHA cited the company under section 75.364(b)(1) for not examining the No. 1 entry. As noted above, the Commission has confirmed that the rule requires a weekly examination of both entries.

The issue now to be decided is whether "a reasonably prudent person, familiar with the mining industry and the protective purpose of section 75.364(b)(1), would have recognized that

weekly examinations of the No. 1 entry were necessary to discover and remedy potential dangers to miners." *Id.* at 695; *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990). The Commission has held that:

> In deciding whether a party had adequate notice of regulatory requirements, a wide variety of factors are relevant, including the text of the regulation, its placement in the overall regulatory scheme, its regulatory history, the consistency of the agency's enforcement, and whether MSHA has published notices informing the regulated community with ascertainable certainty of its interpretation of the standard in question. *See Island Creek Coal Co.*, 20 FMSHRC 14, 24-25 (Jan. 1998); *Morton Int'l, Inc.* 18 FMSHRC 533, 539 (Apr. 1996); *see also Diamond Roofing Co. v. Occupational Safety and Health Review Comm.*, 528 F.2d 645, 649 (5th Cir. 1976); *United States v. Hoechst Celanese Corp.*, 128 F.3d 216, 224 (4th Cir. 1997).

Lodestar, 24 FMSHRC at 694-95.

Section 75.364(b)(1) provides that: "At least every 7 days, an examination for hazardous conditions shall be made . . . [i]n at least one entry of each intake air course, in its entirety . . . ." Section 75.301, 30 C.F.R. § 75.301, further defines "air course" as "[a]n entry or a set of entries separated from other entries by stoppings, . . . or by solid blocks of coal or rock so that any mixing of air currents between each is limited to leakage." For a distance of 6615 feet the two entries were separated by stoppings or by solid blocks of coal so that the only mixing of air currents between the two was limited to leakage. However, since neither rule addresses whether entries with a common entry and exit can be separate air courses, the Commission concluded that the rules are ambiguous. *Id.* at 693. Nevertheless, when considering the text of the rules with regard to notice to Lodestar, I find that, while the use of the term "set of entries" somewhat confuses the issue, a reasonably prudent person would view the Nos. 1 and 2 entries as separate air courses.

The second factor to be considered is the placement of the rules in the overall regulatory scheme. Section 75.364, 30 C.F.R. § 75.364, is entitled "Weekly examination." In it are listed a number of areas in a mine which have to be examined on a weekly basis. Among them are unsealed, worked-out areas; intake air courses; return air courses; longwall or shortwall travelways; each seal along return and bleeder air courses and each seal along intake air courses not examined under §75.360(b)(5); each escapeway; each working section not examined under § 75.360(b)(3); and each water pump not examined during a preshift examination. In short, almost every place in the mine, including worked-out areas, has to be examined once a week. I find that the broad scope of this regulation would put a reasonably prudent person on notice that a 6615 foot air course has to be examined once a week.

A third factor to look at is the regulatory history of the rule. The Secretary first proposed a definition of "air course" in a 1988 proposed rule making. The proposed definition was that:

> "Air course" means an entry or a set of entries separated from other entries by stoppings, overcasts, other ventilation control devices, or solid blocks of coal or rock so that mixtures of air currents between each is limited to leakage. *For purposes of the examination required by § 75.364 of Subpart D, two adjacent entries or sets of entries with an open crosscut or crosscuts between them shall be considered separate air courses if the distance between open crosscuts is greater than 300 feet in seam heights below 48 inches and 600 feet in seam heights of 48 inches or above*.

53 Fed. Reg. 2382, 2413 (1988) (emphasis added). However, when the rule was finally adopted in 1992 it did not contain the italicized language.[1] 57 Fed. Reg. 20868, 20915 (1992).

In its preamble discussion of the final rule, MSHA stated that:

> For the purposes of the examination required by § 75.364 of this subpart, the proposal would have expanded the definition of air course to include two adjacent entries or sets of entries with an open crosscut or crosscuts between them if the distance between the open crosscuts is greater than 600 feet. Commenters objected to the proposed definition of air course, indicating that the definition requires air courses in the mine that are common at both ends to be examined separately. Also, a commenter noted that since they must be examined separately, each air course must be maintained safe for travel. The Agency has reconsidered this issue and the final rule does not include that part of the definition addressing entries which are common at both ends.
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> MSHA believes that air courses that are not common should be examined separately and has defined air course to achieve this purpose. The Agency does not consider air courses that are common only at each end to be the same air course if the separation between the common openings is more than 600 feet. Weekly examination of all such separate air courses is necessary to ensure that the ventilation system of the mine is functioning properly. Therefore, as suggested by one commenter, the final rule

[1] It was also slightly reworded to substitute "any mixing" for "mixtures."

> requires at least one entry of each intake air course to be traveled in its entirety.

Id. at 20870.

This explanation is far from a model of clarity. In the first paragraph, MSHA appears to be saying that it did not include the part of the proposed rule concerning air courses that are common at both ends, and the common ends more than 600 feet apart, because both air courses would have to be examined. But then it goes on to say, in the second paragraph, that air courses that are not common *should be examined separately* and that it "does not consider air courses that are common only at each end to be the same air course if the separation between the common openings is more than 600 feet." Assuming that operators actually read what is written in the Federal Register when trying to figure out what a rule requires, this apparently contradictory explanation provides confusing guidance.

Finally, the last two factors to be considered are the consistency of the agency's enforcement and whether the agency has published notices informing the regulated community with ascertainable certainty of its interpretation of the standard in question. The evidence is that for 17 inspections prior to the one resulting in this citation, and for at least one inspection subsequent to the citation, the inspector apparently did not recognize that the Nos. 1 and 2 entries were separate air courses. (Tr. 40.) Thus, if there was any consistency in MSHA's enforcement, it was a consistency of failing to enforce the rule.[2] With regard to published notices, there is no evidence that MSHA has published any notices informing the mining community of its interpretation of the standard in question.

While MSHA obviously could have done a better job of informing the regulated community of the requirements of the rule, a reasonably prudent person familiar with the mining industry should have known that section 75.364(b)(1) required that a 6615 foot entry, separated from an adjacent entry by coal pillars and permanent stoppings, so that the only mixture of air between the two was by leakage, be examined for hazardous conditions in its entirety. Even though the Commission has held that the definition of "air course" and, thus, section 75.364(b)(1) are ambiguous, a reasonable person reading them is more likely to arrive at the Secretary's interpretation than the Respondent's. This is especially true when it is viewed in the context of the entire section which requires weekly examinations of all areas of a mine, even worked-out areas. Further, although MSHA's explanation of the rule in the preamble is confusing, it does indicate a concern that air courses with common openings over 600 feet apart be separately examined.

Ultimately, the best reason a reasonably prudent person would know that both entries had to be examined comes down to a statement made by the inspector at the hearing. When asked

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[2] On the other hand, there have been no reported cases addressing this issue since the rule was adopted in 1992.

where in the rules it stated that if air courses with common openings were separated for over a mile they both had to be examined, he replied: "That's just common sense." (Tr. 52.) With all the things that can go wrong in a coal mine, common sense dictates that an entry that is 6615 feet long ought to be examined at least as often as worked-out areas. Accordingly, I find that Lodestar did have sufficient notice of the requirements of the rule.

Order

Therefore, Citation No. 7640555 is **AFFIRMED** and Lodestar Energy, Inc. is **ORDERED TO PAY** a civil penalty of **$45.00** for this violation within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

Distribution: (Certified Mail)

Donna E. Sonner, Esq., Office of the Solicitor, U.S. Department of Labor,
2002 Richard Jones Rd., Suite B-201, Nashville, TN 37215

Randall L. Hardesty, Esq., Mitchell & Hardesty, P.S.C.,
113 E. Center Street, Madisonville, KY 42431

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