FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
Washington, DC 20001-2021

October 24, 2007

DRUMMOND COMPANY, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. SE 2006-59-R
v.	:	Order No. 7681973; 12/01/2005
	:	
SECRETARY OF LABOR,	:	Docket No. SE 2006-60-R
MINE SAFETY AND HEALTH	:	Order No. 7681974; 12/01/2005
ADMINISTRATION (MSHA)	:	
Respondent	:	Mine ID: 01-02901
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2006-280
Petitioner	:	A. C. No. 01-02901-83883
v.	:	
	:	
DRUMMOND COMPANY, INC.,	:	
Respondent	:	Shoal Creek Mine

DECISION

Appearances: Marybeth Zamer Bernui, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
Noelle Holladay True, Esq., and Marco M. Rajkovich, Jr., Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, Lexington, Kentucky, for Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on Notices of Contest and a Petition for Assessment of Civil Penalty brought by Drummond Company, Inc., against the Secretary of Labor and by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Drummond Company, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815. The company contests the issuance to it of two citations alleging violations of the Secretary's mandatory health and safety standards. The petition alleges the same two violations of the Secretary's mandatory standards and seeks a penalty of $120.00. A hearing was held in Birmingham, Alabama. For the reasons set forth below, I vacate the citations.

Background

Drummond Company operates the Shoal Creek Mine, a large, underground coal mine near Birmingham, in Jefferson County, Alabama. In November and December 2005, the mine had one active longwall section, one longwall section that was being moved, one longwall set-up section and four continuous miner sections, all served by five ventilating main mine fans and two functioning bleeder systems. The mine operated three shifts per day and had nearly 700 underground employees.

Between 2:30 a.m. and 3:00 a.m. on November 30, 2005, James Glynn, the Assistant Mine Foreman on the owl shift, was notified by the communications officer that a fan alarm had been activated and the water gauge on the No. 6 fan had gone down an inch, indicating a reduction in air pressure. Glynn, who was already underground, set out to find the problem. He discovered that the No. 9 North Main stopping had been blown out, creating a 12 foot by 16 foot hole in the stopping.

Glynn, along with the Mine Foreman and the communications officer, who was located on the surface, then contacted each of the working sections and asked that they take air readings to determine the effect of the hole in the stopping on ventilation. The only change of significance was reported by the foreman of the G-5 longwall section, who informed that the airflow measured about 65,000 cubic feet per minute (cfm). Normal airflow at that location was about 85,000 cfm and had been measured at 86,179 cfm during the preshift inspection conducted prior to the start of the shift. The mine's ventilation plan called for a minimum of 45,000 cfm at that section.

Glynn ordered materials to repair the stopping and work began between 5:00 a.m. and 6:00 a.m. Although none was being mined at the time, Glynn directed that no coal be produced until the stopping had been fixed and the sections were notified that it was all right.[1] In addition all sections were instructed to continue to take air readings every 30 minutes and to report any changes. At no time during the repairs was a reading under 65,000 cfm obtained.

Repair of the stopping had not been completed by the beginning of the day shift. At around 8:00 a.m., Johnny Calhoun, supervisor of the ventilation department at the local MSHA field office, received a call from a miner stating that there had been a stopping failure on the previous shift and asking if miners could be sent underground while the stopping was being repaired. Calhoun replied that "when the stopping came out, it was an unintentional change that occurred; that, however, once they started building that stopping back, that they had to comply with 324, 75.324, meaning that it became an intentional change to the ventilation system once they started doing repair on that stopping." (Tr. 23.)

---

[1] The owl shift is primarily a maintenance shift where power sources are moved, belt lines extended and repairs are performed to make sure that the day shifts are ready to operate.

Don Hendrickson, the Mine Manager, arrived at the mine around 5:30 a.m. He learned during the morning shift change that there was a complaint about miners being in the mine while the stopping was repaired. He attended a meeting in the mine office with the union safety committee, someone from the company's safety department, the mine foreman and MSHA Inspector John Church, who happened to be at the mine for an inspection, to discuss the situation. Church left during the meeting and apparently called Calhoun. When he returned, he said that the company had to comply with section 75.324, if it applied. Hendrickson and the other supervisors concluded that it did not apply.

The miner called Calhoun back to say that the company did not agree that section 75.324 applied and that someone from the company would be calling him. Shortly thereafter, Ed Sartain, a member of Drummond's Safety Department, called Calhoun to ask about the situation. Calhoun, who knew no more than that a stopping had been blown out and was being repaired, told Sartain that if Drummond felt that section 74.324 applied to the situation, they should comply with its requirements.

The miner called Calhoun back a third time to advise that miners had been sent into the mine. He also said that the repair of the stopping was almost completed. Calhoun told him that he would send someone to the mine to investigate the complaint the next day. The repair to the stopping was completed between 9:30 a.m. and 10:00 a.m. The preshift air reading taken on the G-5 section after the repair measured 82,940 cfm.

MSHA Inspector David Allen went to the mine on December 1, 2005, to investigate the complaint. As a result of his investigation, he issued Citation Nos. 7681973 and 7681974, which are the subject of this proceeding.

Findings of Fact and Conclusions of Law

Citation No. 7681973 alleges a violation of section 75.324(b)(1), 30 C.F.R. § 75.324(b)(1), because: "The operator did not remove power from the affected area [G-5 Longwall Section (MMU 007-0)] during an intentional change in the ventilation system conducted during the owl and day shifts on 11/30/05." (Govt. Ex. 5.) Citation No. 7681974 charges a violation of section 75.324(b)(2), 30 C.F.R. § 75.324(b)(2), in that: "An intentional change was made in the ventilation system on the owl and day shifts on 11/30/05 and the operator allowed persons who were not involved in this change to remain in the mine while the change was being made." (Govt. Ex. 4.) Both citations were originally charged as 104(d)(2) orders, 30 U.S.C. § 814(d)(2), but were modified on December 19, 2005, to 104(a) citations, 30 U.S.C. § 814(a).

The Secretary asserts that the language of the regulation is clear. She argues that when Drummond intentionally repaired the stopping, which changed the air on the G-5 longwall section by more than 9,000 cfm (from 65,000 cfm to 82,940 cfm), the operator made an intentional ventilation change. Therefore, she concludes that the company violated the regulation

by not removing electric power and shutting off mechanized equipment in the affected areas and removing all miners but the repairers from the mine. On the other hand, while agreeing that the language of the regulation is clear, the operator contends that it does not apply because there was not a intentional change to its ventilation system. In fact, while the meaning of the regulation, as explained by MSHA when the rule was adopted, is indeed clear, it is apparent that the Secretary has misinterpreted it in this situation.

Section 75.324, 30 C.F.R. § 75.324, is entitled "Intentional changes in the ventilation system" and provides, in pertinent part, that:

> (a) A person designated by the operator shall supervise any intentional change in ventilation that –
>
> (1) Alters the main air current or any split of the main air current in a manner that could materially affect the safety or health of persons in the mine, or
>
> (2) Affects section ventilation by 9,000 cubic feet per minute of air or more in bituminous or lignite mines . . . .
>
> (b) Intentional changes shall be made only under the following conditions:
>
> (1) Electric power shall be removed from areas affected by the ventilation change and mechanized equipment in those areas shall be shut off before the ventilation change begins.
>
> (2) Only persons making the change to ventilation shall be in the mine.

Until 1992, changes in ventilation were governed by section 75.322 of the regulations.[2] Section 75.322 was a restatement of section 303(u) of the Act, 30 U.S.C. § 863(u), which requires that:

> Changes in ventilation which materially affect the main air current or any split thereof and which may affect the safety of persons in the coal mine shall be made only when the mine is idle. Only those persons engaged in making such changes shall be permitted in the mine during the change. Power shall be removed from the areas affected by the change before work starts to make the change and shall not be restored until the effect of the change has been ascertained and the affected areas determined to be safe by a certified person.

[2] The rules governing ventilation were revised and recodified in 1992. Safety Standards for Underground Coal Mine Ventilation, 57 Fed. Reg. 20868 (May 15, 1992).

This same standard had been in effect since at least section 303(u) of the Federal Coal Mine Health and Safety Act of 1969.

On first reading, it appears that the inspector's interpretation of the rule may be correct. Drummond intended to repair the stopping, thus intentionally (making a ventilation change) increasing air flow at the G-5 section from 65,000 cfm to about 85,000 cfm. This is clearly more than 9,000 cfm. However, this is not in accord with MSHA's explanation of the rule when it was adopted. In announcing the new rule in 1992, MSHA stated:

> This section revises existing § 75.322. It requires certain precautions when a change is made to increase or decrease ventilation on a working section or when a ventilation change alters the main air current of the mine or any split of the main air current in a manner that could materially affect the health and safety of miners under ground.

57 Fed. Reg. at 20879. MSHA went on to state that: "Section 75.324 sets an action level of 9,000 cfm for ventilation changes on working sections . . . ." *Id.* at 20880. Finally, MSHA stated:

> MSHA recognizes that in some large mines a ventilation change of 9,000 cfm . . . in the main air current of the mine or an individual split of the main air current may not necessarily be significant. . . . Accordingly, *these limits in the final rule do not apply to main air currents or to splits of the main air currents*. Instead, the final rule specifies that the prescribed precautions must be taken when the ventilation change is one that "alters the main air current in a manner that could materially affect the safety or health of persons in the mine."

Id. (emphasis added).

It is apparent from this that since 1992 there have been two kinds of ventilation changes that bring section 75.324 into play. The first is a change in the main air current or any split of the main air current and involves the regulation if the change "could materially affect the safety or health of persons in the mine." The second is a change in air on a working section and involves the regulation if the change "affects section ventilation by 9,000" cfm or more. In effect, the new rule included the old rule and added a new one for changes to increase or decrease ventilation on working sections.[3]

---

[3] It is obvious that the regulation, as it is currently written, is subject to misinterpretation since it can easily be read, as it was in this case, to be in effect whenever there is a change to the main air current or any split of the main air current that materially affects the safety or health of

In this case, the repair to the stopping was on the No. 9 North Main roadway, clearly a main air current or split of a main air current. However, the Secretary has based these allegations solely on the basis that the alleged ventilation change affected ventilation on the G-5 section by more than 9,000 cfm, not that it materially affected the safety or health of miners.[4] (Tr. 126, Sec. Br. at 10.) There was no change made to ventilation air on the G-5 section; the change was made to the main air current or split of main air current on the No. 9 North Main. Accordingly, I conclude that the Respondent's repair of the stopping was not a violation of the regulation and will vacate the citations.

Order

In view of the above, Citation Nos. 7681973 and 7681974 are **VACATED** and it is **ORDERED** that these cases are **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

---

miners *or* affects section ventilation by 9,000 cfm. However, if such an interpretation were correct, than the statement that the 9,000 cfm limit does not apply to main air currents or splits of main air currents would be meaningless.

[4] MSHA revised the ventilation rules again in 1996. Safety Standards for Underground Coal Mine Ventilation, 61 Fed. Reg. 9764 (March 11, 1996). Section 75.324 was not revised. However, in a discussion of the rule, MSHA stated that the phrase "materially affect the safety or health of persons in the mine" is "important in that it identifies those ventilation changes that require approval of the MSHA district manager under § 75.370(c)." *Id.* at 9779. The discussion went on to provide the following examples of intentional changes that would materially affect the safety or health of miners:

> [A]dding a new shaft; bringing a new fan on line; changing the direction of air in an air course; changing the direction of air in a bleeder system; shutting down one fan in a multiple fan system; starting a new operating system with ventilating quantities redistributed from other sections of the mine; changing entries from intakes to returns and vice versa; and any change that affects the information required by § 75.371, Mine ventilation plan; contents.

Id. While these examples are clearly not meant to be exclusive, it does not appear that the repair of a stopping, assuming *arguendo* that a stopping repair is a *ventilation change*, is the type of change covered by section 75.324.

Distribution:

Mary Beth Zamer Bernui, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, TN 37219

Noelle Holladay True, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, 2333 Alumni Park Plaza, Suite 310, Lexington, KY 40513

/sr