

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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January 28, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 98-37
Petitioner	:	A.C. No. 46-01968-04266
v.	:	
	:	Blacksville No. 2 Mine
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Daniel M. Barish, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
Elizabeth S. Chamberlin, Esq., Consolidation Coal Company,
Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Feldman

This proceeding concerns a petition for assessment of civil penalty filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 820(a), by the Secretary of Labor (the Secretary) against Consolidation Coal Company (Consol). The petition sought to impose a civil penalty for Citation Nos. 3500519 and 4540528 issued at Consol's Blacksville No. 2 Mine. A decision approving partial settlement of this matter was issued on July 7, 1998, accepting Consol's agreement to pay a reduced civil penalty of \$1,155.00 for Citation No. 3500519.

Remaining Citation No. 4540528, issued during the midnight shift on August 5, 1997, involves an alleged violation of the mandatory safety standard in section 72.630(d), 30 C.F.R. § 72.630(d), that provides the requirements for adequate ventilation control of drill dust. Section 72.630(d) provides:

To adequately control dust from drilling rock, the air current shall be so directed that the dust is readily dispersed and carried away from the drill operator or any other miners in the area.

Resolution of Citation No. 4540528 was stayed pending a decision in *Hobet Mining, Inc.*, 20 FMSHRC 889 (August 1998) (ALJ), that addressed issues that are similar to this case. The *Hobet* case concerned the proper parameters for issuing citations, without air sampling, for alleged drill dust violations at a surface mine, and, whether such violations are presumptively significant and substantial (S&S) in nature. After the release of the *Hobet* decision, on May 4, 1999, the Secretary modified Citation No. 4540528 to delete the S&S designation from the cited section 72.630(d) violation.

The stay in the disposition of Citation No. 4540528 was lifted on June 11, 1999, shortly after the Secretary's modification action. The hearing in the Citation No. 4540528 matter was conducted in Morgantown, West Virginia, from September 1 through September 3, 1999. The parties' post-hearing proposed findings and conclusions have been considered.

I. Statement of the Case

It has long been recognized that underground coal drilling operations during the roof bolting process present significant respiratory hazards to roof bolt operators. (Gov. Ex. 9) However, it is also recognized that drilling is "one of the most prolific dust-producing operations." (*Id.*). The mandatory safety standard in section 72.630(a) three general types of dust control measures. These measures are: (1) dust collection, by vacuuming dust at the dust source; (2) water control, by circulating water through a hollow steel drill at the dust source; and (3) ventilation control, by directing air flow to disperse and carry dust away from the drill operator.¹

Although all three measures of dust control are permissible, some methods of permissible dust control are superior to others. For example, dust collection, that removes dust by vacuum at the source, is a more effective method of dust control than ventilation that removes dust after it is released in the air. (Gov. Ex. 9). Regardless which approved method is used, in the final analysis, in order to satisfy the dust control provisions of section 72.630, the dust control method employed by the mine operator must be "effective in controlling dust." In other words, section 72.630 does not require an operator to use the most efficient method of dust control as long as the selected method is effective.

Respirable dust particles are very small particles that are not visible. (Tr. 1272). Therefore, observation of a dust cloud by an MSHA inspector, particularly at the site of a dust producing rock drilling activity, is not, alone, evidence of ineffective dust control measures.

¹ Section 72.630(a). 30 C.F.R. § 72.630(a), provides:

Dust resulting from drilling in rock shall be controlled by use of permissible dust collectors, or by water, or water with a wetting agent, or by ventilation, or by any other method approved by the Secretary that is as effective in controlling dust.

Rather, ineffective dust control measures must be evidenced by an operator's identifiable failure to follow the MSHA approved ventilation and dust control plan, or, an identifiable defect in the dust control equipment. Thus, in this case, in order to establish a section 72.630(d) ventilation dust control violation, the Secretary must identify a failure by Consol to follow MSHA's approved ventilation and dust control plan, such as Consol's use of an inadequate exhaust fan, and/or the existence of a ventilation control defect, such as defective ventilation tubing.

II. Findings of Fact

Since the early 1970's, ventilation control and scroll auger drill steels on roof bolting machines had been used at the Blacksville No. 2 Mine without incident. A scroll auger drill has a spiral drill design. As the drill penetrates the roof, larger rock particles are displaced onto the drill's spirals or ribs to allow the drilled material to escape from the hole to prevent the drill from plugging up. (Tr. 90). The particles displaced by the auger drill fall towards the ground. The lighter dust particles are pulled into the inby end of a ventilation tube located within 10 feet of the face by a section ventilation fan located at the opposite, outby end of the ventilation tube. Regardless of the length of the ventilation tube, the exhaust fan must remain at the outby end of the tube to ventilate the dust away from the working section. The degree of effectiveness of the ventilation is a function of the length of the ventilation tubing. In other words, as the section face advances, even though an operator has "done everything" it can, there is a negative correlation between the ventilation tube length and the intensity of the vacuum created by the exhaust fan. (Tr. 685-86).

During the mid-1990's, miners who had previously worked at mines where state-of-the-art dust collection, rather than ventilation control measures, were used, came to work at the Blacksville No. 2 Mine. The dust collection method uses a hollow steel drill with a vacuum at the drill hole. The vacuum is connected to a dust collection box. Unlike ventilation control that redirects dust through the atmosphere into a ventilation tube, dust control methods remove dust from the atmosphere at the source. Consol miners who had prior experience with dust collection methods, began to question why the roof bolting work stations on the continuous mining machines at the Blacksville No. 2 mine were not equipped with dust collection equipment. Miners began complaining to MSHA about their exposure to drill dust.

Randy Murray has been a safety committeeman since 1990. (Tr. 219). At approximately the beginning in 1997, Murray had received complaints from miners about their exposure to drill dust. Murray explained, although "a roof bolter['s] [exposure to drill dust] . . . was a normal condition . . . we're trying to better it." (Tr. 225-26). Murray testified that he believed Consol could not adequately control drill dust using the ventilation method because "we would still be getting dust no matter what they did." (Tr. 209-10, 240-42). Murray stated that "individual miners that come from other mines for employment in our mines, they tell us stories of dust collectors in mines. They said that we 'can't believe that you're 20 years in the past.'" (Tr. 239-40). Murray concluded that only the dust collection method could adequately control drill dust exposure. (Tr. 242).

Section 103(g)(1) of the Mine Act, 30 U.S.C. § 813(g)(1), confers on a miner the right to obtain an immediate MSHA inspection if the miner notifies a representative of the Secretary that he has a reasonable basis for believing that a violation of a mandatory safety standard exists. On December 5, 1996, in response to a section 103(g) complaint, MSHA inspector Richard Stephanic issued Citation No. 4073086 citing an alleged violation of section 72.630(d) based on Stephanic's observations of visible drill dust in the 9-S section in the vicinity of the return-side roof bolter operator. The citation was abated by applying plastic wrap to a ventilation tube joint.

In early 1997, ventilation in the Blacksville No. 2 working sections was improved by replacing 45 horsepower exhaust fans with 75 horsepower fans. At that time, a 75 horsepower fan was the largest fan used for dust ventilation control purposes.

On April 8, 1997, Consol's corporate dust coordinator Craig Yanak, and Consol superintendent Roy Pride, had a meeting with MSHA Assistant District Manager Pat Brady and MSHA Inspector William Ponceroff to discuss dust control parameters. At the meeting Brady expressed concern over "new" scroll augers that were used on the continuous miners at Blacksville No. 2. Yanak responded that Blacksville No. 2 had used these steel auger drills since at least 1984. Yanak testified that, at the meeting, Ponceroff stated his next project was to get rid of the scroll augers and that he 'would continue to see dust until the steel auger drills were eliminated from the mine.' (Tr. 973, 1038; Resp. Ex. 10).

On April 30, 1997, Citation No. 3492306 was issued on the 9-S section for an alleged violation of the respirable dust standard in section 70.100(a), 30 C.F.R. § 70.100(a). (Gov. Ex. 8). The citation was based on an average respirable dust concentration of 2.98 milligrams of respirable dust per cubic meter of air (2.98 mg/m^3) that exceeded the 2.0 mg/m^3 standard. The 2.98 mg/m^3 average dust concentration was based on samples taken over an unusually long two month period from February 20 through April 23, 1997.

To terminate the Citation No. 3492306, the slider tube on the inby end of the ventilation tube was wrapped. Yanak also designed and installed a piece of conveyor strip along the roof bolting drill chuck to divert the drill rock dust from falling on the roof bolt operator's work position. The citation was abated on June 17, 1997, after respirable air dust samples taken from May 7 through June 11, 1997, revealed average respirable dust concentration levels below 2.0 milligrams. (Resp. Ex. 5). Many of the samples taken during the abatement process were voided due to oversized particles.²

² Although there is no evidence to support their supposition, Consolidation Coal Company officials speculate that respirable dust samples were tampered with by miners who were committed to demonstrating that the company's ventilation controls were inadequate.

On June 4, 1997, inspector Ponceroff issued Citation No. 4540525 alleging a violation of the ventilation control standard in section 72.630(d). (Gov. Ex. 6). The violation was based on Ponceroff's observations of drill dust in the vicinity of the return-side roof bolter operator, occupation code 048, in the 9-S section. The citation was terminated on June 11, 1997, after belting was installed on the frame of the continuous miner, and at the drill head, to divert dust away from the drill operator. Significantly, Ponceroff's observations of excessive dust due to inadequate ventilation control were not confirmed by MSHA's respirable air dust sample results taken on the 048 occupation during the period June 4 through June 6, 1997, to abate Citation No. 3492306 issued on April 30, 1997. (Resp. Ex. 5). Those respirable dust results reflect mg/m³ readings for the 048 occupation of 0.8, 1.1, 2.4, 2.0 and 0.7, for a five sample average of 1.4 mg/m³, well below the average 2.0 mg/m³ respirable dust concentration standard in section 70.100(a). (*Id.*).

On June 5, 1997, Yanak, Consol's dust control specialist, returned to the 9-S section to evaluate the effectiveness of the 9-S section's dust ventilation control system. Yanak took spot respirable dust concentration readings for the return side drill operator using a real time aerosol monitor (RAM). A RAM measures the particles of aerosol in the air, whether the particles are dust, water vapor, or some other contaminant. (Tr. 1072). Since RAM readings can't distinguish between dust particles and other particles, RAM readings for respirable dust tend to be higher than air sampling using the cassette method. (*Id.*) The readings showed respirable dust concentrations within permissible limits, between .1 and .2 mg/m³.

In response to continuing complaints from union representatives about the miners' exposure to drill dust, Ponceroff returned to the Blacksville Mine on the midnight shift on August 5, 1997. (Tr. 88). Ponceroff was accompanied by safety committeeman and miners' representative Randy Murray. Ponceroff went to the 9-S section to observe the roof bolters drilling on the Joy 1210 continuous miner. Murray and Ponceroff walked inby the 9-S section to approximately 15 to 20 feet behind the drill operators' stations. (Tr. 110-11). Ponceroff observed that the return-side roof bolter operator as well as the intake-side roof bolter operator were being exposed to drill dust from drilling the rock in the roof above them. He observed drill dust engulfing both roof bolter operators. Ponceroff reportedly observed the drill dust traveling across the continuous miner, exposing the return-side bolter to "a very dense cloud of dust." (Tr. 109, 117). Based on his observations, Ponceroff concluded the dust was in the roof bolters' breathing zones around their noses and mouths.

The ventilation control system in the S-9 section was designed to divert the dust into the end of a slider tube that is the last extension segment of the ventilation tube. The slider tube is periodically extended as the face advances so that the end of the slider tube always remains within 10 feet of the face. In this way, dust is ventilated in a forward direction, away from the roof bolting stations. Ponceroff concluded the ventilation system was diverting the dust into an opening, located slightly behind the return-side roof bolter, between the main ventilation tube and the slider tube. Thus, Ponceroff concluded the ventilated dust was being directed across the roof bolters' faces, instead of being directed in an inby direction away from their faces. (*See* Gov. Ex. 3).

At the time of Ponceroff's inspection, the continuous miner was deep into the mining cycle, approximately 15 feet from cutting through to the No. 3 track entry. The ventilation tubing extended approximately 84 feet in the crosscut being mined, an additional 74 feet in the No. 4 belt entry, plus an additional 30 feet into the adjacent crosscut where the exhaust fan was located. Thus, the total length of the exhaust tubing was approximately 188 feet long. (Gov. Ex. 2; Tr. 683-84). Mining deep in the mining cycle is a worst case scenario for ventilating dust because of the distance between the exhaust fan and the face. In this regard, Ponceroff's contemporaneous August 5, 1997, notes reflect "[Consol] management was to evaluate the [ventilation] system to assure that it was effective during the complete mining cycle." (Gov. Ex. 1, p.9).

At the time of Ponceroff's inspection, the return-side roof bolter was Ralph Justus and the intake-side roof bolter was Charles Robert Fetty, Jr. On August 5, 1997, Justus was filling in for Jerry Price, the regular midnight return-side roof bolter who was on disability leave. Justus testified, no matter how you placed the exhaust tubing, he was exposed to dust from his own bolter as well as from the intake-side bolter. Justus stated the dust traveled under the mining machine and came up into his face. Justus believed he was inhaling the dust because "there was dust on my teeth when I come out of the mine." (Tr. 410). Although Justus acknowledged that roof bolting "is a dusty job," he stated the 9-S roof bolting "was dustier than any other bolting job that I had." (Tr. 411, 413).

Fetty, the intake-side bolter, also testified that he believed he was exposed to breathing in drill dust on the midnight shift of August 5, 1997. Fetty testified he was exposed to dust that came down from the roof directly in front of his face. Fetty opined that the belting that had been installed on the frame of the continuous miner in an attempt to suppress the dust made matters worse in that it exposed him to more dust. (Tr. 450-51). Fetty, consistent with Justus' testimony, stated that the return-side bolter was exposed to more dust than the intake-side bolter because of the dust that traveled up from under the continuous miner. Fetty testified he had complained to safety committeeman Randy Murray and safety manager Ron Thomas about the dust.

Murray, who accompanied Ponceroff, observed dust around the roof bolters, including dust in the vicinity of their faces. Although he admitted the section ventilation was adequate, Murray testified he believed Consol's exhaust ventilation was not carrying the dust away adequately from the miners. (Tr. 231). In this regard, Murray testified:

. . . . They can't do it . If they say they can do it by ventilation, no, they can't do it by ventilation. Because we would still be getting dust no matter what they did.

(Tr. 209-10).

As a result of his observations, Ponceroff issued Citation No. 4540528 alleging an S&S violation of section 72.630(d) for ineffective ventilation dust control measures. After the citation was issued at 3:20 a.m., at Ponceroff's suggestion, Consol added an additional ventilation tube section to extend the main part of the tube further in by the roof bolters. (Tr. 135-37, 1210, 1215-17). Consol also repaired the belting that had been placed on the frame of the continuous miner to abate Citation No. 4540525 previously issued by Ponceroff on June 4, 1997. The belting had been installed, at Ponceroff's suggestion, to prevent dust from migrating from underneath the machine on the intake side to the vicinity of the return-side roof bolter. In addition, water sprays were installed. (Tr. 142-47, 183, 188, 342-43, 1214-15). It is apparent, however, that the absence of belting and water sprays did not contribute to the excessive dust observed by Ponceroff, as these measures did not improve the dust conditions observed by Ponceroff on the midnight shift.

Ponceroff returned to the 9-S section on the day shift of August 5, 1997, to determine if the dust control had improved. Ponceroff was accompanied by safety committeeman Phil Nine. Nine, who had been chairman of the safety committee, stated that continuous miners with auger steels had been used at Blacksville No. 2 since the late 1970's without complaints. Nine stated in the mid-1990's new miners that had worked at other mines started asking why dust collection methods were not being used. Consequently, Nine stated that he had complained to mine management about drill dust problems on numerous occasions starting in 1996. (Tr. 652, 657-58, 669). Specifically, Nine stated he had complained to safety supervisor Frank Nickler and superintendent Roy Pride. Nine related that sometimes Consol would correct the ventilation problems. However, once mining progressed more than 80 feet down an entry, the dust conditions would intensify and the condition was not corrected regardless of what was tried. (Tr. 660).

When the complaints from miners continued, the safety committee turned to MSHA to try to correct the problem. (Tr. 660-61). As noted above, a section 103(g) complaint resulted in the issuance of Citation No. 4073086 on December 5, 1996, for the first dust control related condition in the 9-S section. (Tr. 659). Like safety committeeman Murray, Nine opined that the basic problem was Consol's use of ventilation control instead of dust collection technology. (Tr. 687-88).

The August 5, 1997, day shift return-side roof bolter was Frank Burnette and the intake-side roof bolter was Kenny Leach. Both Burnette and Leach testified that they were exposed to dust in their breathing zones. (Tr. 531, 467-470, 474). Leach stated that he "ate dust." (Tr. 475). Return-side bolter Burnette testified that he was exposed to dust from his drill and from Leach's drill. (Tr. 531-32). Burnette also stated he was exposed to dust that came from underneath the continuous miner. (*Id.*).

As a result of Ponceroff's observations on the day shift of August 5, 1997, Ponceroff concluded that the cited dust control problem on the midnight shift had not been corrected despite his remedial suggestions. Ponceroff extended the termination date for Citation No. 4540528 until August 12, 1997, to obtain an evaluation from MSHA's technical support staff. (Tr. 148-49; Gov. Ex. 5).

MSHA technical support personnel observed mining operations in the 9-S section on August 12, and August 19, 1997. (Gov. Ex 13). The face was advanced up to a distance of 50 feet during the technical support investigation. (*Id.* at p.5). After the August 12, 1997, technical support visit, Consol replaced the Joy 12-CM continuous miner with a Joy 12-CM continuous satellite miner. (*Id.* at p.4). The roof bolter operator's controls on the satellite miner are located 2.7 feet from the drill hole, a little further back than the location of the controls on the Joy 12-CM miner. (*Id.*). In addition, the configuration of the satellite miner's frame results in less dust dispersion from underneath the machine than the dust that was generated from under the Joy 12-CM.

During the August 19, 1997, technical support visit, the satellite miner was operating only 50 feet from the exhaust fan, as compared to 188 feet from the exhaust fan when Ponceroff issued Citation No. 4540528 on August 5, 1997. Thus, it could not be determined if the satellite miner would have corrected the ventilation problem Ponceroff observed on August 5, 1997. MSHA's technical support staff determined the 75 horsepower exhaust fan utilized by Consol and the resultant face exhaust air velocity were adequate. (*Id.* at pp.2,4). The final recommendation of the technical support team was for Consol to replace its 18 inch diameter oval tubing with 18 inch diameter round tubing with internal seals. With the exception of the oval tubing being replaced by round tubing, the auxiliary face ventilation system configuration remained unchanged. (*Id.* at p.4). The technical support team concluded "no visible dust was observed in the breathing zone of the roof bolters during the drilling process." (*Id.* at p.5). Thus, on August 19, 1997, Ponceroff terminated Citation No. 4540528 because the drill dust was being adequately controlled.³

The miners generally testified that, although the satellite miner improved the situation, they still believed that they were exposed to unacceptable levels of drill dust. (Tr. 534-39, 558, 560, 611-13). As a result of the miners' continued complaints, despite the technical support findings, MSHA and Consol informally agreed that over the next 18 months, as continuous miners were brought to the surface for maintenance and repair, the continuous miners would be retrofitted with hollow steel drills and dust collection systems. Apparently, the dust control methods at the Blacksville No. 2 Mine are no longer a problem.

As previously noted, on May 4, 1999, Ponceroff modified Citation No. 4540528 by deleting the significant and substantial designation.

³ The condition cited by Ponceroff in Citation No. 4540528 on the midnight shift on August 5, 1997, was never abated because the continuous miner had been moved to a new location, for operations early in the next mining cycle, when Citation No. 4540528 was terminated on August 19, 1997.

III. Further Findings and Conclusions

Respirable dust is comprised of extremely small particles that are not visible in the atmosphere. Although respirable dust may be mixed with visible dust, the goal of dust control is to divert lighter respirable dust particles away from miners even though visible dust may continue to exist. (Gov. Ex 9, p.8323). In fact, the use of auger steels ensures that drill dust will be visible. In this regard, inspector Ponceroff testified:

- Q: Is it your position that any visible dust created from the drilling of rock is a violation of 72.630?
- A: No. You're always going to have dust You're going to have dust coming out of that hole. When that drill is drilling in that rock the dust must be ventilated away and readily dispersed from that worker
- Q: . . . But what about heavier dust particles? You mean some dust can fall in the vicinity of workers?
- A: Sure. That's what I was talking about, the dust generating sources. Because even though large particles are falling, you're still going to have smaller particles attached. So if very heavy particles are falling at a very rapid rate of speed, that's why we look at the floor.

(Tr. 1270-71).

The issue in this case is whether the Secretary has met her burden of proving that the ventilation control system in the 9-S section was inadequate on the midnight shift on August 5, 1997. In *Hobet*, Judge Melick found several violations of the drill dust control standard for surface mining in section 72.620, 30 C.F.R. § 72.620, based on missing or defective dust control measures. 20 FMSHRC at 898. For example, Judge Melick found holes were not drilled wet, although wet drilling was required by section 72.620. *Id.* In other instances, Judge Melick concluded dust collection systems were not maintained in proper working order. *Id.* at 899-90. In view of these defective dust control systems and faulty dust control practices, Judge Melick determined it was unnecessary to address the issue of whether the presence of visible dust, alone, can establish a violation of a drill dust control standard. *Id.* at 898.

In addressing the issue of whether visible dust, alone, can support a cited section 72.630(d) violation, the preamble to the Secretary's drill dust control health standards notes "the Public Health Service in conjunction with the Bureau of Mines has identified drilling as one of the most prolific dust-producing operations." (Gov Ex. 9 at 8322). Thus, drill dust observed in the beam of an underground mine cap light is a normal condition. The notion that visible dust

observed in a cap light during the drilling process in an underground mine, alone, should provide a generic basis for allegations of violative conduct must be rejected. In fact, Ponceroff conceded, “I believe that visible dust is not a violation of [the section 72.630] standard. I believe that. I believe it is not a violation of the MSHA standard.” (Tr. 1295).

Subjective visible observations that serve as the sole basis for alleging a 72.630 violation are not always reliable. For example, as discussed above, Ponceroff’s June 4, 1997, observations of visible dust that served as the basis for Citation No. 4540525 alleging a violation of the ventilation control standard in section 72.630(d), a citation not contested in this proceeding, were shown to be unreliable based on MSHA’s non-violative respirable dust sampling results. (Resp. Ex. 5).

Moreover, the significance of visible observations of drill dust is particularly suspect in this case, where pressure was brought to bear on MSHA inspectors to force Consolidation Coal Company officials into replacing the ventilation controls with dust collection systems. Thus, Ponceroff’s observations and conclusions must be viewed in context. As Ponceroff stated, “its very difficult because I’m in a bad position,” and “[the miners] were never totally satisfied.” (Tr. 1273, 1291). As a result of the miners’ continuing complaints, Ponceroff concluded in his August 7, 1997, notes, “ventilation was no longer acceptable.” (Gov. Ex. 1, p.11). While I am cognizant of the vivid descriptions of dust exposure provided by the miner witnesses in this proceeding, these descriptions must be viewed in the context of the roof bolter’s general dissatisfaction with ventilation as a means of controlling drill dust, and their desire for state-of-the-art dust collection. As Justus testified, roof bolting “is a dusty job.” (Tr. 411). Accordingly, Ponceroff’s observations of visible dust, alone, do not provide an adequate basis for establishing the cited section 72.630(d) violation.

The remaining issue, which must be decided on a case-by-case basis, is whether MSHA has identified a missing, defective or otherwise ineffective means of dust control on the part of Consolidation Coal Company under the unique facts of this case. In this regard, the preamble to the Secretary’s dust control standards notes, “MSHA issues a citation for a [dust control] violation . . . if visual observation indicates that drill dust controls on the equipment are not functioning properly.” (Gov. Ex 9 at 8321-22).

At the outset, it is important to note, while ventilation is not the most effective method of dust control, it is a permissible method of dust control under section 72.630(d). Significantly, Consol’s ventilation and dust control plans had been approved by MSHA. Moreover, MSHA’s technical support team determined the 75 horsepower exhaust fan used by Consol, and the resultant exhaust air velocity in the exhaust tube at the face, were adequate. In fact, with the exception of the oval tubing being replaced by round tubing, a distinction without a significant difference, MSHA’s technical support personnel did not recommend any substantive changes in Consol’s ventilation system configuration. (Gov. Ex. 13 at p.4).

Turning to the August 5, 1997, midnight shift implementations of Ponceroff's suggested modifications, the forward movement of the ventilation tube, as well as the installation of the belting on the frame of the Joy 12-CM continuous miner, were not shown to be defective ventilation equipment or practices. I reach this conclusion because, according to Ponceroff, these modifications did not lessen the level of dust exposure of the roof bolters on the August 5, 1997, day shift. Finally, there is no evidence to support the conclusion that use of the Joy satellite miner instead of the Joy 12-CM miner on August 5, 1997, would have effectively controlled the dust. Unlike August 5, 1997 when the exhaust fan was 188 feet away from the face, when the Joy satellite miner was observed by the technical support staff on August 19, 1997, the miner was positioned in an early stage in the mining cycle when the inby end of the ventilation tube only was 50 feet from the exhaust fan.

In the final analysis, the roof bolters' desire to work under the most optimum dust control conditions is understandable. MSHA's response to the miners' repeated complaints achieved an admirable result - - replacement of the ventilation control system with a state-of-the-art dust collection vacuuming system. In fact, perhaps Consolidation Coal Company voluntarily should have installed dust collection methods sooner. However, the fact remains that Consol's use of ventilation controls was permitted by section 72.630(d) of the Secretary's mandatory safety standards. In this regard, the preamble to section 72.630(d) states:

Paragraph (d) recodifies existing § 70.400-3 with no change in the existing requirement that air currents be so directed that the dust is readily dispersed and carried away from the drill operator or other workers in the area. . . . One commenter recommended deleting paragraph (d), stating that the preferred means of drill dust control should be limited to permissible dust collectors, water, or water with a wetting agent. This commenter stated that ventilation is less effective in the control of drill dust and harder for MSHA to enforce.

MSHA recognizes that ventilation may not always be a practical method of drill dust control and that it is not the predominant method used in underground coal mines. Under some circumstances, continuous mining machines and roof bolters work on a single split of air, and this can result in only the drillers being protected while persons working downwind could be exposed. If proper precautions are taken, however, ventilation can be an effective method of drill dust control. MSHA, therefore, has not deleted paragraph (d). MSHA will continue to determine compliance with this requirement under the final rule as it has enforced § 70.400-3; i.e., through the measurement of air quantity or other measures set forth in a mine's ventilation and methane and dust control plan. MSHA does not intend that exposure samples be the routine method of determining compliance with this paragraph.

(Gov. Ex 9 at 8325). If the Secretary now wishes to require dust collection methods instead of ventilation control she may wish to initiate a rulemaking proceeding.

In summary, on balance, the Secretary has failed to demonstrate, by a preponderance of the evidence, that Consolidation Coal Company's ventilation control configuration was defective, or that it otherwise failed to adequately control dust from rock drilling on August 5, 1997. This conclusion is not inconsistent with MSHA's May 4, 1999, decision to delete the significant and substantial designation in Citation No. 4540528. For the conclusion that the cited condition was unlikely to cause respiratory illness, when viewed in the context of continued mining operations, is difficult to reconcile with MSHA's assertion that the roof bolters were not adequately protected from drill dust exposure. *Halfway Incorporated*, 8 FMSHRC 8, 12 (January 1986) (whether a violation is reasonably likely to result in serious illness or injury must be viewed in the context of continued mining operations); *Cement Division, National Gypsum, Co.*, 3 FMSHRC 822, 825 (April 1981). Accordingly Citation No. 4540528 shall be dismissed.

ORDER

In view of the above, Citation No. 4540528 **IS DISMISSED**. The settlement agreement with respect to payment of a \$1,155.00 civil penalty for Citation 3500519, the remaining citation in this docket proceeding, was previously approved by Order dated July 7, 1998. All citations in this docket proceeding now having been resolved, this matter **IS HEREBY DISMISSED**.

Jerold Feldman
Administrative Law Judge

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