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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
August 3, 1979

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION, (MSHA)

v. Docket No. DENV 78-31-P

KAISER STEEL CORPORATION

DECISION

This penalty proceeding arises under section 109(a) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (1976) (amended 1977) ["the 1969 Act"]. In his decision, Administrative Law Judge Koutras found that Kaiser Steel Corporation violated the mandatory standard at 30 CFR 75.316 1/ and assessed a \$1,000 penalty. Kaiser's petition for discretionary review of the judge's decision was granted by the Commission.

On February 1, 1977, a Mining Enforcement and Safety Administration (MESA) inspector visited Kaiser's York Canyon Mine No. 1. At a working face, he observed what he considered to be an excessive concentration of float coal dust, extending 15-20 feet from the face, including the area where the continuous miner operator was seated at the machine's controls. He measured both the volume and velocity of air and found it inadequate, with only 1900 cubic feet of air per minute and a mean velocity of 18 feet per minute being delivered to the working face. Kaiser's approved ventilation plan required at least 3000 cubic feet at a minimum velocity of 45 feet per minute. In determining the cause of the substandard air supply, the inspector discovered that one road check curtain was rolled up and another was partially torn. He also observed that the auxiliary fan and ventilation tubing system, being used to pull the air away from the face area and into the return course, had about 387 feet of tubing. The maximum permissible length of exhaust tubing specified in

the ventilation plan is 400 feet. The inspector then

1/ 30 CFR \$75.316 provides in pertinent part:

Ventilation system and methane dust control plan.

[Statutory Provisions]

A ventilation system and methane dust control plan and revisions thereof suitable to the conditions and mining system of the coal mine and approved by the Secretary shall be adopted by the operator ... The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face....

issued the notice at issue. Kaiser immediately abated the condition by repairing the road curtains and reducing the length of tubing in order to move the blower fan closer to the working face.

It is not disputed 2/ that a violation occurred. The issues on review are limited to the judge's finding that Kaiser was negligent and the relevance of that finding to the amount of the penalty assessed. 3/ Kaiser argues that the judge erred in finding: that Kaiser's "positioning of the ventilation tubing in conjunction with the auxiliary fan was the primary cause of the lack of required air velocity"; 4/ that Kaiser "failed to exercise reasonable care to insure that the required velocity of air at the working face was maintained"; and that Kaiser's "failure to exercise reasonable care in the circumstances resulted in ordinary negligence." We conclude that the judge's negligence finding is supported by substantial evidence.

Whether the placement of the fan and tubing was the primary cause of the substandard air volume and velocity need not be reached. There is ample record evidence to support a finding that it was a cause of the reduced air flow. The inspector testified that the repair of the road curtain alone would not have remedied the inadequate air flow if the tubing and fan were not functioning properly. The inspector also testified, and Kaiser's foreman agreed, that friction and resistance to air flow increase as exhaust tubing length is increased, thereby reducing the effectiveness of an auxiliary exhaust fan. Further, Kaiser's foreman testified that on other occasions when inadequate air flow was detected, the exhaust fans were moved closer to obtain proper ventilation at the face.

2/ Kaiser admitted that the air volume and velocity at the working face were below the levels required by its approved ventilation plan.

3/ Section 109(a) of the 1969 Act provides in pertinent part:

(1) The operator of a coal mine in which a violation occurs of a mandatory health or safety standard ... shall be assessed a civil penalty by the Secretary ... which penalty shall not be more than \$10,000 for each such violation.... In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of

a violation. [Emphasis added].

4/ The question of causation is relevant to Kaiser's argument that it was not negligent because the judge found no negligence on Kaiser's part with respect to the failure to properly maintain the road curbs.

Finally, both the foreman and inspector agreed that after the tubing was shortened and the fan was moved closer to the face, in conjunction with the proper positioning of the road curtains, proper air flow was obtained. Therefore, we reject Kaiser's argument that record evidence does not support a finding that the placement of the fan and tubing was not a cause of the inadequate air flow.

The judge's conclusion that Kaiser failed to exercise reasonable care to insure that the required volume and velocity of air were maintained at the face is also supported by substantial evidence in the record. The Act imposes on the operator "a high degree of care to insure the health and safety of persons in the mine." U.S. Senate, Committee on Labor and Public Welfare, Legislative History, 94th Cong., 1st Sess. at 1515. The inspector observed considerable float coal dust extending 15 to 20 feet from the face. The continuous miner operator was situated within the area of the dust concentration. The inspector's tests revealed that only 1900 cubic feet of air at a velocity of 18 feet per minute was being delivered to the face, substantially less than the airflow requirements specified in Kaiser's ventilation plan. The fact that the 387 feet of exhaust tubing being used fell within the 400 foot maximum permitted in the ventilation plan does not excuse the failure to maintain the required air velocity at the face. Kaiser was aware of the interrelationship between length of tubing and amount of air flow. Further, the foreman's pre-shift examination was made at the last open crosscut, not at the face, and he admitted that satisfactory air velocity readings at the last open crosscut do not guarantee that required velocity is being maintained at the face. For these reasons, we affirm the judge's conclusion that Kaiser was negligent in failing to maintain the required volume and velocity of air at the working face.

In assessing a \$1,000 penalty for this violation, the judge fully considered the criteria set forth in section 109 of the Act. The penalty is appropriate and will not be disturbed.