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Issue Date: 06 November 2008

Case No.: 2007-MSA-00003

In the Matter of:

R. S. & W. COAL COMPANY, INC.
Petitioner

v.

**MINE SAFETY & HEALTH ADMINISTRATION
(MSHA)**

Party Opposing Petition

DECISION AND ORDER

Jurisdictional Basis

This matter involves a request for modification of mandatory safety standards promulgated under the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 811 et seq. Title 30 C.F.R., Part 75, sets forth mandatory standards for underground coal mines, promulgated by the U.S. Department of Labor's Mine Safety and Health Administration (MSHA) in accordance with the Act's procedures under 30 U.S.C. § 811(a).

Background and Procedural History

In accordance with 30 U.S.C. § 811(c), mine operators may petition for modification of mandatory standards. The statute provides in pertinent part:

Upon petition by the operator or the representative of miners, the Secretary may modify the application of any mandatory safety standard to a coal or other mine if the Secretary determines that an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard, or that the application of such standard to such mine will result in a diminution of safety to the miners in such mine

The procedures set forth in 30 C.F.R. Part 44 govern such requests for modification. Section 44.4(a) implements the standard set out in 30 U.S.C. § 811(c). It provides:

A petition for modification of application of a mandatory safety standard may be granted upon a determination that --

- (1) An alternative method of achieving the result of the standard exists that will at all times guarantee no less than the same protection afforded by the standard, or
- (2) Application of the standard will result in a diminution of safety to the miners.

Under the regulation, a party seeking a modification of a mandatory safety standard has the burden of proof to establish that the modification should be granted, by a preponderance of the evidence. 30 C.F.R. § 44.30.

Section 101 of the Federal Coal Mine Health and Safety Act of 1969, as amended by Section 201 of the Federal Mine Safety and Health Act of 1977, codified at 30 U.S.C. § 811(a), empowers the Secretary to make rules, under the notice-and-comment procedure set out in the Administrative Procedure Act, 5 U.S.C. § 553, for mandatory health and safety standards “for the protection of life and prevention of injuries in coal or other mines.” Such rules, when put into effect, are set out at 30 C.F.R. Part 75.

The RS&W Drift Mine (“RS&W”) is an anthracite coal mine located in Schuylkill County, Pennsylvania, operated by the RS&W Coal Company, Inc. Randy Rothermel is the President of RS&W, Inc. and the operator of RS&W. On December 1, 2005, Mr. Rothermel submitted a petition to MSHA for modification of various provisions of 30 C.F.R. § 75.1312, the mandatory safety standards covering storage of explosives and detonators in underground magazines. Joint Exhibit A (“JX-A”).

This regulation is as follows:¹

§ 75.1312 Explosives and detonators in underground magazines.

(a) The quantity of explosives kept underground shall not be more than is needed for 48 hours of use.

(b) Except as provided in Sec. 75.1313², explosives and detonators taken underground shall be kept in--

(1) Separate, closed magazines at least 5 feet apart; or

(2) The same closed magazine when--

(i) Separated by a hardwood partition at least 4 inches thick; or

(ii) Separated by a laminated partition; or

(iii) Separated by a device that is equivalent.

(c) Only explosives and detonators shall be kept in underground magazines.

(d) Magazines shall be substantially constructed and all interior surfaces shall be made of nonconductive material, with no metal or other conductive material exposed inside.

(e) All magazines shall be--

(1) Located at least 25 feet from roadways and any source of electric current;

(2) Located out of the direct line of the forces from blasting; and

(3) Kept as dry as practicable.

(f) Magazine locations shall be posted with indelibly marked and readily visible warnings indicating the presence of explosives.

¹ The 2006 version of § 75.1312, applicable at the time the petition was submitted, is set out herein. The most recent version of the regulation (2008) is identical to the 2006 version.

² This section is titled: “Explosives and detonators outside of magazines” and sets limits on quantities of explosives that may be outside of magazines for use in a working section. This section also requires that explosives and detonators not used during a shift be returned to magazines at the end of the shift.

(g) Only materials and equipment to be used in blasting shall be stored at magazine locations.

The petitioner's petition for modification requested the following:

- 1) Clarification of the quantity of explosives to be kept underground, in light of ostensibly conflicting MSHA and ATF (Bureau of Alcohol, Tobacco and Firearms) standards.
- 2) Authorization to place explosives and detonators in magazines adjacent to each other; or, in the alternative, to separate the magazines with four inches of hardwood.³
- 3) Authorization to place explosives and detonators in a gangway five feet from the rail and offset from the rib at least two feet into solid rock, protected by a door at the opening.⁴

JX-A at 1-4.

The petition was assigned number M-2005-079-C. As required under 30 C.F.R. § 44.13, an investigation as to the merits of the petition was conducted by MSHA personnel. Leonard Sargent, Coal Mine Safety and Health Specialist, and Gregory Mehalchick, P.E., Mining Engineer, conducted the investigation. They submitted a written report dated May 4, 2006 to the MSHA District Manager, which recommended that the petition be denied. JX-A at 6-12. On June 6, 2007, the MSHA Acting Deputy Administrator for Coal Mine Safety and Health issued a Proposed Decision and Order ("PD&O") denying the petition. JX-A at 13-20.

On July 3, 2007, the petitioner timely requested a hearing on this matter, as permitted under 30 C.F.R. § 44.14. The matter was forwarded to the Office of Administrative Law Judges and designated as docket number 2007-MSA-00003. In accordance with 30 C.F.R. § 44, subpart C, I held a hearing on this petition on March 10 and 11, 2008, in Hazleton, Pennsylvania.⁵ The parties submitted post-hearing arguments.

³ At the hearing, the petitioner amended this aspect of the petition and stated he wanted to have explosives and detonators in separate chutes, approximately 25 feet apart. T. at 125-27, 147, 248-250. The Party Opposing Petition noted that MSHA has not had the opportunity to conduct an investigation on this amended petition. T. at 256.

⁴ On the second day of the hearing, the petitioner clarified that the rib (wall of the mine) is three feet from the rail. His proposal would place the door two feet into the rock, for a total horizontal distance of five feet from the rail. T. at 253-54.

⁵ This hearing covered three petitions for modification the petitioner filed. Of these, this Decision and Order involves only case 2007-MSA-00003. By Order dated March 20, 2008, I approved the petitioner's request to withdraw the petition in case 2007-MSA-00005. By Order dated May 13, 2008, I remanded the petition in case 2008-MSA-00002 to MSHA for appropriate action. Consequently, I omit any discussion of evidence pertaining to the cases already disposed of by Order.

The decision that follows is based upon an analysis of the record, the arguments of the parties, and the applicable law. I have considered all of the evidence of record, including items not specifically referred to or discussed herein.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Summary of the Evidence

Stipulations

At the hearing, the parties stipulated to the following:

- 1) The operations of RS&W Coal Company at the RS&W Drift Mine are subject to the jurisdiction of the Act;
- 2) The petition is subject to the jurisdiction of the U.S. Department of Labor and its designated administrative law judge;
- 3) Careful storage of explosives and detonators is a basic precaution against damage and accidental detonation.

T. at 7.

Documentary Evidence

The parties jointly submitted the following evidence pertaining to this petition, which I admitted. T. at 82.

- JX-A: RS&W Petition for Modification, dated 12/1/05;
MSHA Investigation Report, dated 5/4/06;
MSHA Proposed Decision and Order, dated 6/6/07;
RS&W Request for Hearing, dated 7/3/07.
- JX-D: RS&W Mine Ventilation Plan approved 11/19/99.
- JX-E: RS&W Roof Control Plan approved 12/3/01.
- JX-F: Portion of RS&W Mine Map dated 11/07.

At the hearing, the Petitioner submitted the following item of evidence pertaining to the petition, which I admitted. T. at 80.

- RSX-2: DVD showing mine operations.⁶

⁶ At times during the hearing this item was referred to informally as a “video.”

The Party Opposing Petition (hereafter MSHA) submitted the following items of evidence pertaining to this petition, which I admitted. T. at 272.

- MSHA-1: MSHA proposed rule discussion of 30 C.F.R. § 75.1312, 51 Fed. Reg. 17,286-87 (May 9, 1986).
- MSHA -2: MSHA final rule discussion of 30 C.F.R. § 75.1312, 53 Fed. Reg. 46,773-75 (Nov. 18, 1988).
- MSHA-9: Documents related to petition M-1999-042-C [filed by petitioner in May 1999].

Testimonial Evidence

Steve Rothermel

Steve Rothermel testified under oath in support of the petition for modification. He stated that he has been in mining for almost 11 years and is certified as a miner and a foreman. He stated he has a certificate from the ATF for handling explosives. He testified that before the current regulations were enacted, magazines at the mine were built in solid rock with a cinder block base plate; five sides of the magazine were solid rock, and the front had a lockable steel door. He stated the magazine was four to six feet “off of the track haulage” and five feet alongside, but the cars were less than five feet high so the magazine could not be hit by a car even if it was to derail. Mr. Rothermel stated that powder now is stored in a steel box, 30 feet away from all roadways and trackways, and it is hard to unload and also must be carried. Under the former system, one could drive up to the magazine and slide dynamite out on wooden planks. Mr. Rothermel also stated because there is not room to get the magazine 30 feet off the road, it was put in return air behind a cinder block air stop. He opined that storage in return air could be hazardous if there were gas in the return air. He stated that the company uses from 200 pounds to a ton of dynamite in a week. T. at 13-15

On cross-examination, Mr. Rothermel stated that the petitioner, Randy Rothermel, is his uncle. He stated that under the former storage scheme, the magazines and detonator were not separated by five feet. He stated he did not know if there was a prohibition against storing magazines in return air, and stated that the mine liberates little or no methane gas. He stated it is difficult, but not impossible, for the mine to store magazines 25 feet from the roadway, and said he did not know the capacity of the miner’s current magazine. T. at 15-17.

In response to my questions, Mr. Rothermel clarified the company had only one magazine blasted out of rock, and stated it was separated into two compartments (left and right) by four to six inches of hardwood, with dynamite on one side and detonators on the other. T. at 17-19.

Randy Rothermel, Jr.

Randy Rothermel, Jr., testified under oath in support of the petition for modification. He stated he has been in mining for 13 years and is certified as a miner and a foreman, and also has an ATF certification to handle explosives. He stated he has handled explosives for more than 10 years and in his opinion it is safer to store explosives in intake air than in return air. He stated that he is not sure of the distance between the magazine and the working face at present, but noted that explosives have to be carried about 50 feet from the magazine to the locomotive, and they have to open up a stopping to get the powder from the return air into the intake. He stated that when powder is transported into the mine, it is put on a mine car to be taken inside. T. at 41-43.

On cross-examination, Mr. Rothermel stated that he is the son of the petitioner. He stated he did not know whether there was a prohibition against storing explosives in return air. He clarified that at present, explosives are carried to a locomotive, and then taken on the locomotive to the location for use; he noted the proposal to store explosives in a "chute" will allow the miners to drive the locomotive right up to the location where the explosives are stored. He stated the chutes are about 30 feet long, with a 35 degree pitch, but to make a magazine they would put a stopping on the back and front to make the magazine five feet in from the rib. T. at 43-45.

Ryan Andracchio

Mr. Andracchio testified under oath in support of the petition for modification. He stated he transports explosives from outside the mine into the mine using the locomotive, and when they are transported they are not more than five feet from the locomotive's battery box. He confirmed the locomotive battery is the only electricity source in the mine. T. at 50.

On cross-examination, Mr. Andracchio stated that he is married to Randy Rothermel's niece, and clarified that the explosives are transported on a mine car pulled by the locomotive. T. at 51-52.

John Rothermel

John Rothermel testified under oath in support of the petition for modification. He stated he is the son of the petitioner, Randy Rothermel, and he has about three years of mining experience. John Rothermel stated he is a certified miner and electrician, and he is the electrician at the mine. He stated he is 22 years old. T. at 66-67.

Mr. Rothermel stated that explosives magazines are currently stored 25 feet from the track and about 60 feet from the main haulage, on a sidetrack. He stated there are two magazines, one for timers and one for powder. He stated the explosives magazine has the capacity for about one ton but normally only about half a ton is stored there. He stated the magazine for the timers has the capacity to hold about a thousand timers, which is about the amount stored there. He stated that the mine normally uses at most a half ton of powder per week, but the amount is not predictable. He stated that usually powder is delivered once a week, and also stated that at times powder has been stored for more than a week in the magazine when

the mine was shut down. He stated that he understands that there are three sets of regulations – MSHA, ATF, and the state – and that the mine is required to abide by the most stringent of the three. T. at 67-69.

Mr. Rothermel testified there is no place in the mine gangway where a magazine could be placed 25 feet from a rail, and the closest spot was be 22 feet from the rail. In his opinion, storing explosives in a chute off the level, behind a steel door, would be as safe as the current practice. He stated there is no electricity in the mine other than the battery-powered locomotive and the battery powered phones. He stated that in his opinion it would be impossible for electricity to get from the locomotive to a magazine built into the rib of the mine. T. at 69-70.

In response to my questions, Mr. Rothermel stated the mine has a pump run by air pressure, not by a battery or electric source, and there is no lighting other than head lamps. He stated the locomotive batteries are in a case on top of the motor, and are charged every night outside the mine. He stated the rails are dead, and without any power running through them. He stated the phones are MSHA approved and are very low voltage, with wiring run to the outside of the mine. T. at 71-73.

Randy Rothermel

MSHA called the Petitioner, Randy Rothermel, as a witness. He stated he is the superintendent and owner of the mine, and has been in the mining business for 36 years. He stated he has done most mining jobs, is certified as a miner and foreman, and also has certification from ATF to purchase and store explosives. T. at 86-87.

Mr. Rothermel stated he did not agree that limiting the amount of explosives underground protects against a large quantity of explosives being consumed in a fire or explosion, and stated he guessed that placing explosives and detonators side by side provides less protection from sympathetic detonation than placement five feet apart. He commented that the ATF regulations are more stringent than MSHA regulations because the ATF requires a half inch of steel, in addition to four inches of hardwood, to separate explosives and detonators in the same magazine. He stated he did not agree that placement of explosives and detonators side by side provides less protection from a roof or rib fall because there would be more steel if the placement were side by side. T. at 85-89.

Mr. Rothermel stated there is only one location where it is possible to store magazines 25 feet from the haulage road not carry powder “up the pitch,” and that location is the present location, in return air. He did not agree that his petition requested placement of magazines in a shelter hole. He clarified that his petition seeks placement of the magazines five vertical feet from the rail, and five feet horizontal from the rail to the door, with the door being two feet into the rock. He stated the door would be steel, lined with two inches of hardwood. T. at 89-92.

Regarding his request for a hearing, Mr. Rothermel stated that ATF regulations permit magazines to be touching each other, and in such circumstances they are considered one magazine. He clarified that his mine operates five to six days per week, seven hours per day. He stated the mine liberates 245 cubic feet of methane per day, which is “nothing,” and also stated

he understands that state law prohibits storing magazines in return air. He stated the mine does not operate during lightning storms because he is concerned about electricity being carried in on the rails. T. at 93-96. Mr. Rothermel conceded that the mine has not been cited for having magazines in return air. T. at 111.

Mr. Rothermel described the layout of the mine, and remarked that there was only one way into the mine. He stated he was unaware that there has been any static electricity discharge in the mine. He stated that the former location of the magazine was 22 ½ feet from the track, and it could not be moved farther from the track or rotated to meet the requirement to be 25 feet from the track because it was already against the solid rock face. T. at 117-125.

Mr. Rothermel commented that the magazine was eight feet wide and the rock tunnel only seven feet wide. He stated he did not want to widen the tunnel to accommodate the magazine because the requirement to store the magazines five feet apart would have required the removal of six feet, which might risk a rock fall. He stated that there are chutes driven every 25 feet that will accommodate the magazines, but they can only be five feet from the road. Mr. Rothermel commented that the current location of the magazines requires dynamite to be carried in to the face by hand approximately 1500 feet. He stated his proposal was to store explosives in one chute and timers in another, so they would be 25 feet apart, closer to the working face. He stated he would line the chute with two inches of hardwood and put cinder block batteries (sic) front and back for air stoppings, and then put in a door with locks, as ATF requires. He stated his proposal was to store about 1000 pounds of explosives at a time. Each box is 44 pounds, and the mine receives 20 to 25 boxes at a time. T. at 125-29.

Mr. Rothermel also stated that the chutes connected the monkey to the gangway, and conceded that accidental detonation of the magazine in a location between the monkey and the gangway would affect both escapeways, and would be between both escapeways. He stated that a 44-pound box of explosives can be carried by a single individual. T. at 129-31.

Leonard Sargent

Mr. Sargent testified under oath in opposition to the petition for modification. He stated he is a coal mine inspector with MSHA, with specialties in ventilation and roof control, and has held this position for 21 years. He stated he is familiar with the RS&W mine through inspections and investigations, and also through review of files kept in the MSHA office; he stated that he participated in the investigation of the petition. T. at 131-34.

Mr. Sargent testified that the MSHA 48-hour requirement is intended to refer to 48 work-hours, not 48 clock-hours. Based on that requirement, presuming that RS&W works one eight-hour shift per day, then six days' of explosives may be stored underground. Mr. Sargent stated that the mine is currently working the Skidmore vein. He defined "gangway" as the entry developed for the intake air course and usually also the haulage entry. In the RS&W mine, the gangway is in the Skidmore vein and is a rock gangway. He defined "intake" as fresh air brought continuously from the surface to ventilate the workings, and stated there are fans, located on the surface, to suck air into the mine. He stated once the air ventilates the monkey, it becomes return air. Mr. Sargent defined the monkey heading as an entry developed in

companion with the gangway, and he stated in the RS&W mine the monkey goes underneath the return slant. T. at 134-139.

The witness stated that the magazines are in the rough vein, located behind a stopping (inby the stopping) with a steel door on the stopping. The stopping is a permanent ventilation control that separates intake air courses from return air courses. Mr. Sargent stated there is room to have the magazines outby the stopping, but he is not sure whether it is possible to move the stopping. He also stated he believed there was another area that a magazine could be placed, which was 22 feet from the rail, and this area could possibly be configured so the magazine itself was 25 feet from the rail. T. at 141-44.

Mr. Sargent confirmed the locomotive is a low voltage system (which he believed to be 96 volts). He stated he did not recall seeing explosives being hauled during his inspection. He stated he does not believe that if the mine complied with the regulatory standard there would be a diminution in safety for the miners. He stated he could not conclude that the mine proposal would afford the same level of protection to the miners, because he is unsure how far voltage from the locomotive could travel through the mine, for instance through the ground under damp conditions. He stated he took into consideration that the proposal included a provision that the explosives would be behind a door; he also commented that the petitioner had not set up a model that conformed to his proposal for the investigators' examination. T. at 145-50.

On cross-examination, Mr. Sargent explained that he did not investigate the aspect of the petition that requested clarification on the amount of explosives to be stored underground, because MSHA's interpretation of the regulation is quite clear that a 48-hour supply of explosives means the amount normally used over 48 hours of mining operations. Mr. Sargent also stated that a mine operator would be expected to amend the amount of explosives kept underground if the pattern of use changed, and commented that he has never seen an operator cited for having too many explosives in a magazine. He also agreed that if the petitioner stored explosives in a chute, behind a door two feet into the rib, the petitioner would not be able to keep the explosives 25 feet or more from the roadway. Mr. Sargent also commented that storing explosives in the monkey may not be proper if the explosives are not protected from blast in that location, and cited 30 C.F.R. § 75.1312(e)(2) as a prohibition against storing explosives in a direct line of blast. Mr. Sargent noted that explosives are generally hauled into the mine in the boxes in which they are stored. In response to the petitioner's comment that miners must carry boxes of explosives 1500 feet to the working face, Mr. Sargent stated that he could not conclude it would be safer to grant the petition, but could say it would be more convenient for the miners and more economical. On the issue of whether manually carrying explosives subjects miners to injuries such as sprains, Mr. Sargent responded there are alternate means of carrying the explosives. Mr. Sargent also commented that before the current regulations were enacted, mine operators stored explosives in chutes, but even then they were required to be 25 feet from the roadway. Mr. Sargent also commented that he is not thoroughly familiar with all the properties of 96 volts of electricity, but stated he is aware that "96 volts will set timers and explosives off." T. at 150-165.

In response to my question, Mr. Sargent confirmed that all coal mines are subject to the same standard that requires explosives to be stored 25 feet or more from the roadway and 25 feet

or more from a source of power, and that the locomotive itself is considered a source of power. He stated some coal mines use 240 volt sources of power, but was unable to quantify any difference between 240 volt sources and 96 volt sources of power necessary for safe operations. He also commented there may be other sources of power in mines, and this mine has a phone line as a source of power. T. at 165-169.

On redirect examination, Mr. Sargent stated that the 48-hour limitation on storage makes sense because explosives deteriorate over time, and it is not a good thing to have explosives underground for a long period of time. He also commented that it is possible that, if explosives were stored in a chute, an accidental detonation could affect both escapeways, but he noted that the RS&W escapeways are developed in rock, not coal, and so are much less susceptible to damage. Mr. Sargent also commented that explosives in a chute in the monkey would not be out of the line of blast. He also indicated that it is possible for a lightning strike to be conducted underground through a locomotive rail. T. at 169-171.

Gregory Mehalchick

Gregory Mehalchick testified under oath in opposition to the petition for modification. He stated he is a mining engineer for the District in the Mine Safety and Health Administration, and that he has held this position for 10 years. He stated he has bachelors and masters degrees in civil engineering and is certified as a coal mine inspector. He said he is familiar with the RS&W mine, through review of documents the mine operator has submitted, and also through inspections of the mine. T. at 218-221.

Mr. Mehalchick identified the mine's ventilation plan (JX D), and described the ventilation system of the RS&W mine as an exhaust system, where air is pulled by the main mine fan into the mine. Mr. Mehalchick also identified the RS&W roof control plan (JX E), and commented that this plan indicated that miners would use chutes as travel ways, with installation of a protective man way (sic) along the rib. T. at 219-226.

Mr. Mehalchick stated he is familiar with the Federal Mine Safety and Health Act of 1977, and stated that section 313(f) of the statute required explosives and detonators stored underground be kept in boxes or magazines, located at least 25 feet from roadways and power lines, protected from falls of roof, except in pitching beds. Where it is not possible to comply with the location requirement, boxes shall be placed in niches cut in to solid coal or rock. He stated that RS&W is currently in compliance with the location requirement. He also stated that section 313(g) requires explosives and detonators to be kept in separate containers at least five feet apart, and if kept in niches in the rib, the distance from any pipe line, power line, rail or converter shall be at least five feet. T. at 227-232.

The witness identified MSHA Exhibit 9 as an extract from a PD&O dated August 2003, regarding RS&W's previous petition relating to magazine placement, which was granted. He stated he investigated the petitioner's current petition, and he does not have any problem with storing explosives in return air. He stated, if properly stored, there would be no potential for a "confluence of factors" to create an ignition of explosives, even if there were methane buildup in

the return air. He stated there was a location in the petitioner's mine where magazines could be stored 25 feet from the haulage road, without resorting to shelter holes. T. at 232-236.

Mr. Mehalchick stated his opinion that the ATF regulations in title 27, Code of Federal Regulations, do not apply to underground storage of explosives. He also stated that separating magazines would provide more protection from a roof or rib fall, because roof falls are generally localized, and a roof fall striking two magazines separated by a distance is less likely. He also stated that magazines separated by a distance are less subject to sympathetic detonation. He stated that his investigation concluded that RS&W's compliance with the regulatory standard would not result in a diminution of safety to miners, and also concluded that the petitioner's proposed alternative would not provide the same measure of protection to miners. T. at 237-40.

On cross-examination, Mr. Mehalchick stated the principal concern about storing explosives near the roadway is because of the electricity, and remarked that stray currents could ignite blasting caps. The petitioner cited Mr. Mehalchick to section 313(g) of the Act, which states that explosives and detonators, if kept in niches in the rib, shall be at least five feet from a rail line or power line. T. at 241-46.

On re-direct examination, Mr. Mehalchick stated that the term "working places." in section 313(f) and (g) of the Act, refers to the working face where coal is being actively mined, and extends from the working face out to the transfer or dumping point. T. at 252. On recross-examination, he conceded, in the case of RS&W, this would be considered the entire mine. T. at 258. He also stated the on-site investigation regarding the petition took less than a day. T. at 273-74.

Rebuttal Testimony

On rebuttal, Mr. Randy Rothermel testified that his petition requested to have two separate magazines, one to store timers and one to store explosives, five feet from the rail to the door of the magazine. This would include a two foot niche in the rib to the door of the magazine, and the magazines would be constructed to ATF standards, which require cinder blocks with a steel door and two inches of hardwood. He stated that electricity cannot make dynamite detonate, but can detonate a timer. Mr. Rothermel explained that a timer makes the powder go off, and both are required to work together. T. at 276-77.

Mr. Rothermel stated he still was unclear as to how much powder could be stored underground, because there are weeks that 3,000 pounds of powder are used in his mine. He stated that there is no way that he knows in advance how much powder he is going to use in a week, and powder sometimes runs out or is left over. On cross-examination, Mr. Rothermel clarified that 990 pounds of powder was an average level of use for a week. T. at 277-78.

In response to my questions, Mr. Rothermel stated that there is no other location, other than inside the mine, to store powder. He stated he has a regular supplier of powder, whose preference is to make deliveries once a week. He stated that if he ran out of powder, it would take his supplier up to two days to deliver a resupply. T. at 278-80.

Discussion

A mine operator may petition for modification of a mandatory safety standard under 30 U.S.C. § 811(c). Under the statute, a modification may be approved if “an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard, or that the application of such [mandatory] standard to such mine will result in a diminution of safety to the miners in such mine.” Under the implementing regulations, the burden to establish that a petition should be granted, using the statutory standard of protection to miners set out in § 811(c), rests with the petitioner, by a preponderance of the evidence. 30 C.F.R. § 44.30(b).

Courts also have interpreted Section 811(c) using this two-part test. See International Union, United Mine Workers of Am. v. MSHA (Utah Power & Light), 823 F.2d 608, 610 (D.C. Cir. 1998). The party seeking the modification must show: 1) the proposed modification promotes the same safety goals as the mandatory standard, thereby guaranteeing the same level of protection to the miners as provided by the statute, and 2) the proposed modification, considered in light of overall safety in the mine, will achieve a net gain, or at least equivalence, in mine safety as compared to the statutory safety standard. As the Circuit Court noted, “The primary purpose of the ... Act was to protect mining’s most valuable resource – the miner...” 823 F.2d at 617, quoting International Union, United Mine Workers of Am. V. Kleppe, 532, F.2d 1403, 1405 (D.C. Cir), cert. denied 429 U.S. 858 (1976).

The present standard for storage of explosives and detonators in underground magazines, which has been in effect since 1988, is set out in 30 C.F.R. § 75.1312. See 53 Fed. Reg. 46,773-75 (Nov. 18, 1988); Exhibit MSHA-2. These regulations, promulgated under the procedure set forth in 30 U.S.C. § 811(a), are the sole standards currently applicable to the storage of explosives in underground coal mines.⁷

As set forth above, the petitioner in this case requested clarification of the amount of explosives that could be stored underground, in light of ostensibly conflicting ATF regulations. The petitioner also requested to construct magazines in “chutes” hewn from rock, lined with cinder block and hardwood, behind a door offset two feet into the wall. At the hearing, the petitioner amended his petition by stating that he wished to place explosives and detonators (“timers”) in separate “chutes,” at least 25 feet apart. As constructed, the doors of the magazines would be offset two vertical feet from the wall (“rib”) of the mine. According to the petitioner’s testimony, the mine wall is offset at least three feet from the rail used by the mine’s locomotive. The petitioner testified that the entrance to the magazines will be approximately four feet vertically from the rail. T. at 249; see JX-A at 3.

⁷ The standards set out in § 313(f) and (g) of the Act were codified at 30 U.S.C. § 873. As § 301 of the Act makes clear, these standards were “interim mandatory safety standards,” which were to be in effect until superseded by regulations promulgated in accordance with § 101 of the Act. See 30 U.S.C. § 861. Thus, these standards were superseded by the current regulatory standards, and no longer apply.

In his petition for modification, the petitioner asserted that the application of the current regulatory standard to RS&W resulted in a diminution of safety to the miners. The petitioner stated that the current magazine location “requires the explosives to be handled by mine personnel traveling the pitching seams on ladders to the return monkey heading area by ladder approximately 40-50 feet, select the amount of explosives needed and return to the gangway area. This action exposes the miners to additional risk by handling [carrying] the explosives while traveling on the pitching seams. The proposed location of a gangway storage area would allow the explosives to be stored in an intake air as opposed to the present storage area located in return air, providing better air quality as well as accessibility for personnel who need to access explosives.” JX-A at 3.

As is authorized under 30 U.S.C. § 811(c) and 30 C.F.R. § 44.13, a departmental investigation into the merits of the petition was conducted. JX-A. Among other things, the investigation verified that the horizontal distance from the front of the chute to the rail was at least two feet and the vertical distance from the rail to the base of the chute was at least four feet. JX-A at 10. The investigation also verified that the haulage system which uses the rail in the mine is a low voltage locomotive, 44 inches high. The investigation did not make any other findings pertaining to the locomotive’s source of power or the amount of electric current, if any, that travels through the rails. The investigative report concluded that “information contrary to the operator’s belief that compliance with the existing regulation would result in a diminution of safety and the use of the proposed alternative will provide no less than the same measure of protection afforded the miners under the existing regulations was ascertained.” JX A at 11. However, the investigative report does not explain the reasons for this conclusion.

As required under 30 U.S.C. § 811(c) and 30 C.F.R. § 44.13, a PD&O was issued, on May 4, 2006. The PD&O denied the petitioner’s petition. It discussed the various ATF and MSHA requirements for explosives storage; however, like the petitioner, the PD&O also presumed that ATF type 2 magazines (mobile and portable) were at issue. As to the petitioner’s request for a modification of § 75.3712, the PD&O stated: “The petitioner’s proposal ... does not meet ATF requirements. In addition, the proposed location would move the magazines closer to the small-battery locomotive and its direct current motor; closer to any derailments, to the current flows in the rail, and to the adjacent wet material and, thereby, provide less protection than the standard.”⁸ JX-A at 18.

The PD&O also remarked that the petitioner’s allegation that the current practice of storing magazines on the gangway presents hazards to the miners because they are required to carry explosives up and down ladders to the monkey “was not confirmed.” In addition, it stated that the level on which the magazines are located has no impact on the overall safety of

⁸ The PD&O also determined that the petitioner’s request to place explosives and detonators in the same magazines, separated by four inches of hardwood, “provides less protection from a fall of roof or rib and less protection against sympathetic detonation of both magazines should an unplanned detonation occur than would be full 5 feet of separation required by 30 C.F.R. 75.1312(b).” JX-A at 18. In light of the petitioner’s clarification that the petition seeks authorization to place explosives and detonators in separate magazines 25 feet apart, this part of the PD&O is not relevant.

transporting explosives, and noted that, even if the petitioner's petition is granted, miners will still need to carry explosives up ladders to locations for the blasting.

Clarification of Standard of 48 Hours Use

In his petition, the petitioner sought clarification of the regulatory requirement that underground storage was limited to what is needed for 48 hours of use. See 30 C.F.R. § 75.3212(a). Testimony at the hearing from MSHA officials clarified that 48 hours of use means 48 hours of coal mine operations. See T. at 134-35. This is consistent with the comment that accompanies the promulgation of the current regulation, which states: "MSHA emphasizes that the 48-hour rule is not a time limit for storage underground which requires that explosives be removed after 48 hours. Instead, it is a quantity limit on the volume of explosives stored underground, the quantity being that amount which would normally be used in the operation over 48 hours." 53 Fed. Reg. at 46,774 (Nov. 18, 1988)(MSHA-2).

The current regulation revised a prior requirement that explosives actually be used within 48 hours of being taken underground. See 51 Fed. Reg. 17,286 (May 9, 1986)(MSHA-1). The comments to the current regulation indicate that the purpose of the regulatory requirement is to address the hazard of excessive quantities of explosives being stored underground, while recognizing that delays may prevent explosives from being used promptly.

The petitioner testified that he receives deliveries of explosives about once a week, and can arrange for deliveries with about two days' notice. He also testified that he stores explosives only in RS&W's underground magazine, and does not have any other storage facility at the mine site. T. at 279-80. Based on the petitioner's uncontradicted testimony, I note that storage of explosives for one week's mine operations is within the petitioner's capabilities, given his source of supply. Conformance with the regulatory requirement limiting the amount of explosives that can be stored underground will require the petitioner to plan his mine operations carefully, and likely will require him to vary quantity of explosives that his supplier is to deliver, based on anticipated mine operations. However, there is no evidence that the petitioner is unable or unwilling to plan his operations so as to comply with the regulatory requirements.

Based on the evidence that the RS&W mine operates seven hours per day, five or six days per week, I find that the amount of explosives that may be stored in the RS&W mine is that quantity which may reasonably be anticipated to be used within less than seven days of mine operations.⁹ See T. at 94. As the comments to the current regulation note, the quantity will vary according to the amount of explosives to be used in mine operations. 53 Fed. Reg. at 46,774 (Nov. 18, 1988). This is consistent with the evidence adduced at the hearing, which is that the amount of explosives at RS&W varies, based on the nature of the mine's operations.

⁹ Operation of the mine for seven days at seven hours per day is 49 hours of mine operations, which exceeds the regulatory limitation. Therefore, the amount that may lawfully be stored underground must be less than the amount required for seven days of mine operations, but may be more than the amount required for six days of mine operations.

In his petition, the petitioner also asserts that ATF regulations limit the amount of explosives that may be stored in a “type two magazine.”¹⁰ JX-A at 1. Contrary to the petitioner’s assertion, I find no conflict between the current MSHA and ATF regulations regarding storage of explosives in underground coal mines. The ATF regulations regarding commerce in explosives are found in part 555 of Title 27, Code of Federal Regulations. By their terms, these regulations are “in addition to, and are not in lieu of, any other provision of law, or regulations, respecting commerce in explosive materials.”¹¹ 27 C.F.R. § 555.2.

As set forth above, therefore, I find that the amount of explosives that may be stored underground at the RS&W mine, under 30 C.F.R. § 75.1312(a), is the amount that is reasonably anticipated to be used within less than 7 days of mine operations.¹²

Construction of Magazines in Rock Chutes

The petition also seeks authorization to “permit location of storage explosives and detonators in an anthracite coal mine gangway at a location of 5 feet from the rail and offset at least 2 feet into solid rock.” JX-A. As explained in his testimony at the hearing, the petitioner wishes to construct magazines within “chutes” hewn out of rock. T. at 90-92. Although the petitioner’s written petition seeks authorization to store explosives and detonators in the same magazine, at the hearing the petitioner amended his petition to explain that he wishes to store explosives and detonators in separate, but identically constructed, “chutes,” located at least 25 feet apart. T. at 248-50.

As amended by the petitioner at the hearing, I find that the petition requests modification of the following regulatory requirement at 30 C.F.R. § 75.1312(e):

Location of magazines “at least 25 feet from roadways and any source of electric current.”

¹⁰ The limitations in 27 C.F.R. § 555.208 (50 pounds of high explosives and 5,000 detonators) apply to “indoor” type two magazines. It is not entirely clear, in the petitioner’s petition, whether the petitioner wishes to construct fixed magazines or merely use existing chutes as storage places for type 2 magazines. However, I presume, from the discussion at the hearing pertaining to lining the rock chutes with hardwood and cinder blocks, that the petitioner wishes to construct a permanent, fixed magazine, for storage of boxes of explosives and/or detonators. I find that an underground magazine, of the type discussed at the hearing and in the petitioner’s petition, is a type 1 magazine, not a type 2 magazine. Type 1 magazines are permanent fixtures, and type 2 magazines are “mobile and portable.” See 27 C.F.R. § 555.203(a) and (b).

¹¹ Under ATF regulations, indoor magazines containing quantities of blasting agents exceeding 50 pounds are subject to restrictions in distance from “inhabited buildings, passenger railways, public highways, or other magazines in which high explosives are stored.” 27 C.F.R. § 555.211(b)(1)(2008). See also 27 C.F.R. §§ 555.206, 555.207(b). Based on the evidence before me, it is not clear whether the detonators the petitioner uses in the RS&W mine are “blasting agents” as defined in the ATF regulations. See 27 C.F.R. § 555.11.

¹² Under ATF regulations, explosive materials in excess of 300,000 pounds or detonators in excess of 20 million are not to be stored in one magazine unless approved by the ATF director. 27 C.F.R. § 555.213(a). There is no evidence that the petitioner seeks to store amounts of explosives exceeding 300,000 pounds or more than 20 million detonators underground.

As described by the petitioner, the magazine will be emplaced behind a locked door, offset at least two feet into the wall of the mine. The entry to the magazine will be approximately four vertical feet from the floor of the mine. The rail for the battery-powered line locomotive is located at least two feet from the wall of the mine. JX-A at 10. There is no electric current flowing through the rail. T. at 72. The petitioner stated at the hearing that the magazine would conform to ATF construction requirements.¹³ T. at 127-29.

In May 1986, using the procedure set out in 30 U.S.C. § 811(a), the Secretary proposed new mandatory safety standards for explosives and blasting in underground coal mines. Proposed Rule, Safety Standards for Explosives and Blasting, 51 Fed. Reg. 17,284 (May 9, 1986). In the notice of proposed rule, the Secretary explained that new provisions “would upgrade existing provisions consistent with current technology, eliminate duplicative and unnecessary standards, reorganize the existing standards and provide alternative methods of compliance where possible.” *Id.*¹⁴ Specifically, the proposed new § 75.1312(e) “would clarify and supplement existing requirements for the location of magazines. The proposal would retain the existing requirement that magazines be located at least 25 feet from roadways and sources of electric current and in a dry location....The proposal would also include a requirement from existing § 75.1307 that stored explosives be located out of the direct line of forces from blasting.” 51 Fed. Reg. 17,284, at 17,286 (May 9, 1986)(MSHA-1). The comments did not explain why the former standard, permitting explosives stored in boxes to be placed in niches cut into solid coal or rock where it was not possible to locate the boxes or magazines at least 25 feet from “roadways and power wires,” was to be changed. See 30 C.F.R. § 75.1306 (1971).¹⁵

The final version of § 75.1312(e), announced in November 1988, did not differ from the proposed rule. When announcing the final rules, the Secretary’s only comment regarding this provision was as follows: “Paragraph (e), which is consistent with both the proposal and the existing standard, requires that magazines be at least 25 feet from roadways and any source of electric current. Magazines must also be out of the direct line of the forces from blasting and be kept as dry as practicable.” Final Rule, Safety Standards for Explosives and Blasting, 53 FR 46,768, at 46,774 (Nov. 18, 1988)(MSHA-2).

The record of the rulemaking pertaining to the current regulation does not indicate why the former standard, which permitted boxes of explosives to be stored in niches cut from solid rock or coal under certain circumstances, was abandoned. I presume, therefore, that the reason for the new standard is consistent with the general comments that accompanied the Proposed

¹³ For the purpose of this discussion, I presume the petitioner intends to apply the standards for type 1 magazines set out at 27 C.F.R. § 555.207.

¹⁴ MSHA Exhibit 1 (MSHA-1) consists of an extract of the Proposed Rule, specifically Volume 51 Federal Register, pages 17,286 and 17,287. This quotation is from a portion of the Proposed Rule that is not included in the Exhibit. See 1986 WL 136679 (F.R.) at 1.

¹⁵ These older sections mirrored the interim standards set out in 30 U.S.C. § 873, which permitted boxes of explosives in pitching beds to be placed in niches cut into solid coal or rock where it was not possible to comply with the requirement that explosives boxes or magazines be kept at least 25 feet from roadways or power wires.

Rule, noted above, and is not based on any identifiable safety hazard that placement of explosives in niches hewn from solid rock may present.¹⁶

As the statute makes clear, a petition for modification of a mandatory safety standard may be granted only if the petitioner establishes either that the proposed alternative guarantees no less than the same measure of protection to miners afforded by the mandatory standard, or that the application of the mandatory standard provides less safety to the miners at the mine in question. 30 U.S.C. § 811(c); see 30 C.F.R. § 44.4(a).

Based on the foregoing, I find the petitioner has not established that application of the mandatory safety standard set out in the regulation provides less safety to the miners than the proposed modification. The petitioner's assertion that the regulatory standard compromises safety is premised on his observation that, under the current practice at RS&W, miners are subjected to potential injury because they are required to carry explosives from the magazines to the place of use. Although there is no evidence of record directly on point, I presume that the petitioner intends that, in the event his petition is granted, explosives will not be hand carried by the miners but rather will be transported via the mine locomotive. However, the place at which explosives are stored has little bearing on the miner's safety when transporting explosives, because the requirement to hand-carry explosives is never entirely eliminated. See JX-A at 19.

However, under the statute and the regulation, the petitioner also may sustain his burden regarding approval of the proposed modification if he establishes that his proposed alternative, as set forth in his petition, guarantees no less than the same measure of protection afforded by the mandatory standard. 30 C.F.R. § 44.4(a)(1). Therefore, I will assess whether the proposed modification provides at least the same measure of safety as the current mandatory standard.

Based on the evidence of record, as well as the Secretary's comments accompanying the proposed and final rules published in the Federal Register, I find that the principal purpose of the mandatory standard for storage of explosives and detonators is to protect miners from unintended detonations. I find that the regulation's mandatory safety standard provides this protection through the following mechanisms:

Separating detonators from explosives when these items are stored. Under the regulation, detonators and explosives must be kept in separate magazines at least five feet apart; alternatively, detonators and explosives may be kept in the same magazine, but separated by impenetrable partitions (hardwood or lamination). § 75.1312(b). As the comment to the final regulation noted, "Keeping explosives and detonators in either separate closed magazines or in the same closed magazine with the explosives and detonators separated minimizes the potential detonation of explosives in the event that the detonators are accidentally ignited." 53 Fed. Reg. at 46,774 (Nov. 18, 1988).

The petitioner's proposal, as amended at the hearing, is to separate magazines for detonators and explosives by at least 25 feet. I find this proposal provides a level of safety at

¹⁶ I note the former standard permitted explosives placed in niches at working places to be five feet from railways and power lines. 30 U.S.C. § 873(g); see also 30 C.F.R. § 75.1307 (1971).

least equivalent to the current mandatory standard, which permits magazines to be separated by five feet.¹⁷

Maintaining distance from sources of electric current. Under the regulation, magazines must be located at least 25 feet from “any source of electric current.” § 75.1312(e)(1). There was no specific comment regarding this requirement when the final version of the current regulation was published. However, I note that the Secretary’s comments to the proposed regulation indicated the purpose of this provision was to “clarify and supplement” existing requirements for the location of magazines, and that the former regulation required magazines to be located at least 25 feet from “power wires.” 51 Fed. Reg. at 17, 286 (May 9, 1986). See 30 C.F.R. § 75.1306 (1971). I find, therefore, that the term “any source of electric current” is broader than the term “power wires,” because it encompasses sources of current other than from wires (e.g., from battery-powered sources).

The regulation does not explain why a distance of 25 feet from the source of any electric current is mandated. The former requirement, superseded by the current version of the standard in 1988, stated that explosives and detonators must be kept at least 25 feet from “power wires.” 30 C.F.R. § 75.1306 (1971). Based on the evidence of record, a low-level power line connected to a MSHA-approved battery-operated telephone is a source of electric current in the mine. See T. at 70-73. As the petitioner has not sought modification of this mandatory safety standard, I must conclude that, if the petition for modification is approved, the petitioner will ensure that his magazines are sited so as to conform to this regulatory requirement.¹⁸

I concur with the MSHA investigator’s conclusion that the locomotive’s batteries are a “source of electric current.” The batteries, which are located in a closed box on top of the locomotive, are a source of direct current. See T. at 50-52; 72; JX-A at 11. However, there is no evidence that the petitioner’s petition seeks to locate either explosives or detonators within 25 feet of the place the locomotive is kept. According to the testimony at the hearing, the batteries are charged outside the mine overnight. T. at 72. I do not agree with the MSHA investigator’s conclusion that the 25-foot regulatory standard prevents the locomotive from traveling within 25 feet of the magazines, and therefore prevents the magazines from being placed as the petitioner seeks in his petition.¹⁹ To be sure, the locomotive travelling past the magazine will travel within 25 feet of the magazine, but only momentarily. The current regulation permits explosives and detonators to be transported into the mine via the locomotive. See, e.g., 30 C.F.R. § 75.3211.

¹⁷ Because the petitioner’s petition, as amended, does not seek modification of the current standard that magazines be separated by at least five feet, I find that a new MSHA investigation of the amended petition is not necessary. MSHA’s investigation of the original petition was adequate, because it covered all aspects in which the petitioner sought modification of the mandatory safety standard. See 30 U.S.C. § 811(c), 30 C.F.R. § 44.13(a).

¹⁸ I also note that the MSHA investigation does not address the placement of the telephone line with regard to the petition for modification.

¹⁹ In addition, I note the miners in the RS&W mine use battery-powered sources of illumination, such as headlamps. See T. at 71-72. They transport explosives by hand within the mine. See JX-A at 3. To my knowledge, there is no prohibition against miners transporting explosives and detonators by hand while using battery-powered sources of illumination.

Transportation of these items on the locomotive seems to involve a greater risk of accidental detonation than does the momentary passage of the locomotive by the spot in which these items are stored. I conclude, therefore, that incidental proximity from battery-powered sources of electric current, such as the locomotive, is not prohibited under the current regulatory standard.

In sum, therefore, I find that the mandatory safety standard requires only that explosives and detonators be maintained at least 25 feet from any source of electric current. Therefore, the proximity of the explosives and detonators to the rail line as a potential source of electric current need not be addressed. I find the prohibition of magazines within 25 feet from a source of electric current is not intended to prevent a magazine from being located within 25 feet of a moving source of direct current, such as a locomotive powered by a battery, but rather is intended to prevent placement of magazines within 25 feet of a stationary source of current. Any incidental risk from proximity of the battery can be minimized by ensuring the locomotive is not parked where the battery is within 25 feet from the magazines, particularly when explosives are being loaded or unloaded.

Regarding the issue that the locomotive rail could be a source of electric current, for example from a lightning strike, I note that the regulatory standard prohibits explosives and detonators to be stored within 25 feet of any “source” of electric current, not any “potential source” of electric current. Had MSHA chosen to prohibit explosives and detonators to be stored within 25 feet of any potential source of current, such as a metal object conductive of electricity, the regulation would have so reflected this limitation. The fact that it does not (and has never included this limitation) indicates that the presence of the locomotive rail less than 25 feet from the explosives and detonators is not prohibited under the current regulatory standard.

I also have assessed the evidence before me, specifically the MSHA investigation, the PD&O, and the testimony adduced at the hearing. I note that John Rothermel, a certified electrician, testified that the petitioner’s proposal would not create a risk of electric current traveling into the magazines. In this regard, I have taken into consideration both John Rothermel’s professional expertise and interest in seeing the petition granted, based on his status as a son of the petitioner and miner at RS&W. The MSHA investigation and PD&O recommended denial of the petition, but did not give any specific reasons why granting the petition would increase the risk of detonation from electrical sources. Mr. Mehalchick, a professional engineer, opined that stray current could ignite blasting caps. However, he did not explain how, under the circumstances described, a source of stray current could come near the magazines. In light of the professional expertise of the petitioner’s witness, and considering the lack of evidence rebutting the witness’ position, I give greater consideration to the testimony of this witness than I do to the evidence MSHA provided.

I find, therefore, that, provided the petitioner neither places the magazines so they are within 25 feet of the mine’s telephone line nor parks the locomotive so that its battery is within 25 feet of a magazine, granting the petition does not require modification of the current regulatory standard that explosives and detonators be stored at least 25 feet from sources of electric current. Consequently, I find that the proposal provides a level of safety at least equivalent to that in the mandatory standard.

Maintaining distance from roadways. Under the regulation, magazines must be located at least 25 feet from “roadways.” § 75.1312(e)(1). As the comment to the final regulation noted, “Locating the magazine 25 feet away from any roadway will keep it out of areas of concentrated mine traffic where the magazine might be struck by equipment.” 53 Fed. Reg. at 46,774 (Nov. 18, 1988).²⁰

The petitioner’s amended proposal is to emplace explosives and detonators in magazines, recessed at least two feet into solid rock in the wall of the mine and behind a door, at a level approximately four feet from the ground. As the comment to the final regulation noted, the purpose of the 25 feet standoff distance is to keep explosives out of the way of traffic, where they could be struck by equipment. Recessing explosives into rock a distance of at least two horizontal feet, at least four vertical feet from the ground and behind a door, ensures that they will not interfere with mine traffic and will not be inadvertently struck by mine equipment.

Mr. Steve Rothermel testified that, if the magazines are sited as described in the petition, they could not be hit by equipment even if a locomotive car was to derail. I have taken into consideration that Mr. Rothermel is the son of the petitioner and a miner at RS&W. Nevertheless, his testimony in this regard is un rebutted. As set forth above, I have found that the purpose for the 25-foot standoff rule is to protect against detonation if the magazine were to be struck by equipment. Consequently, I find that Mr. Steve Rothermel’s testimony establishes that granting of the petition will not result in a diminution of safety to miners, because the purpose of ensuring that a magazine is not struck by equipment is met under the petitioner’s proposal.

In assessing the evidence provided by MSHA, I note that neither MSHA’s investigation nor the testimony at the hearing provided information on the purpose for the current regulatory standard. They seem to oppose the petition simply because it seeks a modification of the standard, not because the modification of the standard would diminish miner safety. This is not helpful in conducting a thorough investigation into the merits of the petition, and is not helpful to me in making a determination as to whether the petition for modification should be granted.

Based on the foregoing, I find the petitioner’s amended petition provides a level of safety at least equivalent to the current mandatory standard, which requires magazines to be maintained at least 25 feet from roadways.

Keeping magazines out of the direct line of forces from blasting. § 75.1312(e)(2). As the comment to the final regulation noted, “Keeping the magazine out of the direct line of the force of blasting protects the explosives supply from being damaged or accidentally initiated.” 53 Fed. Reg. at 46,774 (Nov. 18, 1988).

The petition does not seek modification of this requirement. Therefore, I presume that placement of explosives and detonators, as described by the petitioner, also ensures that these

²⁰ I presume, for the purpose of discussion, that the term “roadway” is equivalent to the term “railway.” The evidence of record establishes that the railway is the only means for vehicular travel in the RS&W mine. JX-A at 11.

items will be out of the direct line of blasting. I find, therefore, that the proposal provides a level of safety at least equivalent to the current mandatory standard.

Conclusion

Based on the foregoing, I find the petitioner has established that his amended petition, if granted, will guarantee a level of safety to miners not less than the current standard, as expressed in the mandatory safety regulations. In this regard, I specifically find that the petitioner's request to place magazines as set forth in his amended petition provides equivalent protection from potential sources of accidental or inadvertent detonation such as electric current; contact with mine equipment; and blast concussion.

ORDER

Therefore, based on the foregoing, I GRANT the petitioner's petition for modification of the mandatory safety standards set out in 30 C.F.R. § 75.1312, as amended at the hearing, provided the following conditions are met:

- 1) Magazines are placed as described in petitioner's petition and hearing testimony (in chutes hewn from solid rock, behind doors offset at least two feet into wall of mine, point of entry at least four vertical feet above mine floor).
- 2) The amount of explosives stored in a magazine is limited to the amount reasonably anticipated to be used within less than the next seven days of mine operations.
- 3) Magazines are constructed in accordance with ATF standards for construction of Type I magazines set forth in 27 C.F.R. § 555.207.
- 4) If the detonators fall within the description of "blasting agents" as set forth in ATF's regulations (at 27 C.F.R. § 555.11), the number of detonators stored in the magazine are limited, as required under 27 C.F.R. §§ 555.218 (based on distance from high explosives in the explosives magazine).
- 5) Magazines must be placed at least 25 feet from the wire for the mine's telephone line, as this is a source of electric current.
- 6) The locomotive battery, a source of electric current, must be stored outside the mine portal when not in use, as described in the hearing testimony. In addition, the locomotive shall not be parked so the battery is within 25 feet of the magazines during mine operations.

In accordance with 30 C.F.R. § 44.4(b), this granted modification shall not become effective until 30 days after service of this Decision, to permit any party to file a notice of appeal. See 30 C.F.R. § 44.33.

A

ADELE H. ODEGARD
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Notice of Appeal (“Notice”) with the Assistant Secretary of Labor for Mine Safety and Health within thirty (30) days after service of the "Initial Decision" of the Administrative Law Judge. *See* 30 C.F.R. § 44.33(a). The Assistant Secretary's address is: Assistant Secretary for Mine Safety and Health, U.S. Department of Labor, Room 2322 TT#2, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Assistant Secretary.

At the time you file the Notice with the Assistant Secretary, you must serve it on all parties. *See* 30 C.F.R. §§ 44.6 and 44.33(a). If a party is represented by an attorney, then service must be made on the attorney. *See* 30 C.F.R. § 44.6(c).

If no Notice is timely filed, then the administrative law judge’s “Initial Decision” becomes the final decision of the Secretary of Labor. *See* 30 C.F.R. § 44.32(a).