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U.S.STEEL V. SOL (MSHA)  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

UNITED STATES STEEL CORP.,  
CONTESTANT

v.

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

CONTEST PROCEEDING

Docket No. WEVA 83-160-R  
Citation No. 2132552; 3/16/83

Gary No. 50 Mine

DECISION

Appearances: Louise Q. Symons, Esq., United States Steel Corporation, Pittsburgh, Pennsylvania, for Contestant;  
Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a Notice of Contest filed by the contestant against the respondent pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, challenging a section 104(a) citation issued by an MSHA inspector on March 16, 1983, citing the contestant with an alleged violation of mandatory standard 30 CFR 75.301.

The respondent filed a timely answer asserting that the citation was properly issued, and pursuant to notice, a hearing was convened in Beckley, West Virginia, on October 5, 1983, and the parties appeared and participated fully therein. The parties filed post-hearing briefs, and the arguments presented therein have been carefully considered by me in the course of this decision.

The Section 104(a) Citation No. 2132552, which is the subject of this proceeding, was issued by an MSHA inspector

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on March 16, 1983. The citation alleges a violation of mandatory standard 30 CFR 75.301, and the condition or practice alleged by the inspector to be a violation of that standard states as follows:

Based on the results of laboratory analysis of samples taken on 2/8/83 and 1/27/83 at the No. 1 A-Panel Bleeder Tap (Back Side) the volume per centum of carbon dioxide was 0.65 (2/9/83) and 0.72 (1/27/83) which is above the allowed limit of 0.5.

30 CFR 75.301 states in pertinent part as follows:

All active workings shall be ventilated by a current of air containing not less than 19.5 volume per centum of oxygen, not more than 0.5 volume per centum of carbon dioxide, and no harmful quantities of other noxious or poisonous gases; and the volume and velocity of the current of air shall be sufficient to dilute, render harmless, and to carry away, flammable, explosive, noxious, and harmful gases, and dust, and smoke and explosive fumes. \* \* \*

#### Issues

The critical question presented is whether or not the cited condition or practice constitutes a violation of mandatory standard section 75.301. Included as part of any determination of that question is whether or not the violation and/or the sampling made by the inspector to support his citation occurred in "active workings" as stated in section 75.301. Additional issues raised by the parties are identified and discussed in the course of this decision.

#### Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164, 30 U.S.C. 801 et seq.

2. Commission Rules, 29 CFR 2700.1 et seq.  
Testimony and Evidence Adduced by Respondent MSHA

MSHA Inspector Melvin C. Harper, testified as to his background and training and he confirmed that he issued the citation in question. He stated that he took the bottle

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sample approximately one foot to two feet outby from the regulator "at midstream." By "midstream," he explained that he placed his bottle sampling device halfway down the regulator and "straight out from it" for a distance of one to two feet. He described the regulator as a cinderblock stopping with a metal door regulator in it (Tr. 51-53).

Mr. Harper stated that on the day of his inspection he was part of an MSHA group ventilation saturation inspection, and he described the procedures he followed in taking his air sample. He took one sample on January 27, 1983, the results of which indicated .72 per centum of carbon dioxide, and he was accompanied by Cecil Berge, a U.S. Steel safety inspector. Mr. Harper could recall no protest from Mr. Berge as to where the sample was taken (Tr. 56).

Mr. Harper stated that he considered the location where he took his sample as being within "active workings," and when asked why, he replied "From all training and instructions I've had, the active workings begin at the outby side of the bleeder tap." He also confirmed that the air sample he took was a sample of air coming through the regulator at the bleeder evaluation point before it mixed with any other air. He estimated the distance from the air split where he took his sample to the split of air where it mixed with the air in the entry as 25 to 30 feet (Tr. 57).

Mr. Harper stated that he was familiar with the approved mine ventilation plan "to a certain extent," and he stated that the location where he took his sample is indicated on the mine map as an "evaluation point" or "BEP" (exhibit G-2, Tr. 58-59). He explained the three arrows on the map as two open entries with no regulators, and the third arrow as the regulator where he took his sample. He confirmed that he took samples at the other two locations and that they were in compliance (Tr. 60).

Mr. Harper stated that the regulator location where he took the sample was "the location to the gob itself." He placed the regulator approximately thirty feet from the crosscut that parallels the gob line (Tr. 60).

Mr. Harper testified that after he mailed his air sample to MSHA's Mt. Hope District Office for analysis he heard nothing further until March 16, 1983, when he received a telephone call from his supervisor Jimmy Humphrey who instructed him to issue the citation in question. Since that time he has not been back to the mine to take any other samples at the bleeder evaluation point in question (Tr. 62).

On cross-examination, Mr. Harper stated that carbon dioxide is not an explosive gas, and it was his understanding that up to two percent methane was permitted to be present at the location where he took his sample before there would be any methane violation (Tr. 62-63). He could not state whether anyone from MSHA had the results of his air samples within a week or two after he took them on January 27, 1983 (Tr. 65). He confirmed that he held his sampler at arm's length away from his body for a distance of approximately three feet, and he was standing sideways with neither his face or his back to the regulator (Tr. 66).

Mr. Harper defined "return air" as active air leaving the last working place and dumping into the main air course. He considers a "bleeder" to be air coming out of a gob area that has been worked out. He also indicated that he accepts the ventilation plan's location of the bleeder evaluation (Tr. 67).

Mr. Harper reviewed the last sentence of mandatory safety standard criteria section 75.316-2(e)(2) which states "Such systems should extend from active pillar line of such gob to the intersection of that bleeder split with any other split of air, and shall not include active workings." He was asked whether the area in which he took his sample fits the area described by the referenced sentence. He answered "no," and said "I believe that right at that regulator point is the split, the separation between the air coming off the gob then entering into the rest of the return" (Tr. 68).

When asked whether the area where he took his air samples was part of the bleeder system that extended from the active pillar line of such gob to the intersection of that bleeder split with any other split of air Mr. Harper again answered "no." He said "I think the bleeder is from the regulator back. Once it comes to there, it enters--that is the immediate bleeder coming off that gob area" (Tr. 69). The parties stipulated that the area where the samples were taken was "in the crosscut, some point between the crosscut and the regulator, because the two splits would join. I don't know that we could say on any given day where that mixing point is" (Tr. 70).

Mr. Harper estimated that from where he took his sample, it was some thirty feet to where the air coming from the gob mixed with the air in the return (Tr. 71). He confirmed that the bleeder check points shown on the mine map are those submitted and finally approved by MSHA, and he confirmed that he learned through hearsay that mine management has indicated to MSHA that bleeder check-points are not the proper place to take the air samples required by section 75.301 (Tr. 71).

Mr. Harper stated that section 75.305 requires the fire boss to travel weekly to the area where he took his air samples for the purpose of conducting his weekly examinations required by that section (Tr. 72). However, section 75.305 does not require the taking of any bottle air samples (Tr. 76).

Mr. Harper could not recall the size of the opening in the regulator at the location where he took his sample, but he did indicate that "the doors were pretty well all the way open," and that the opening would be three to six feet. He could not state exactly how much air was coming through the regulator from the gob, and he has been unable to locate his notes (Tr. 103). He did not take an air reading in the return entry (Tr. 104).

MSHA Inspector Jackson L. Snyder, testified that he is assigned to the district ventilation group and that in that capacity he reviews the ventilation plans submitted by operators and evaluates their effectiveness (Tr. 108). Mr. Snyder confirmed that he was at the mine in question on February 9, 1983, and took a bottle sample of air similar to the one taken by Inspector Harper. He stated that he took his sample at the same bleeder check point where Mr. Harper took his. He took it approximately one foot outby the regulator, downstream, and at arm's length (Tr. 110).

Mr. Snyder stated that the air he sampled was air from the regulator and he did not believe that the air which he sampled was mixing with other air in the entry. He considered the sampling location to be in active workings because "it is required, by the ventilation plan, that the bleeder point be at this location. And it is also required that this person go to this location once a week to evaluate that part of the gob" (Tr. 110).

Mr. Snyder stated that men travel to the bleeder check points once a week to take air samples with bottles, evaluate the direction of the air flow, as well as the quality of the air and the presence of any methane or gases. While there is no requirement to take bottle samples, U.S. Steel has chosen to use this method to insure conformance with their own ventilation plan (Tr. 111).

Mr. Snyder confirmed that he was at the mine to evaluate the gob area as part of his ventilation survey and that the volume of air in the entry outby the bleeder evaluation point was 43,000 cubic feet, and the amount of air coming off the gob was approximately 3900 (Tr. 113). The amount of air present when the citation was abated was 8,000 cubic feet (Tr. 114).

On cross-examination, Mr. Snyder stated that U.S. Steel safety inspector Earl Stone was with him when he took his sample on February 9, 1983. The opening in the regulator was 40 square feet (Tr. 115). He took no air readings in the intersection where the air from the regulator mixed with the return air (Tr. 116). However, he approximated the air movement there as 15,000, and he did not believe that there was any mixture of return and bleeder air at the point where he took his bottle sample (Tr. 117).

Mr. Snyder stated that any bleeder entries which are part of the approved mine ventilation plan would be bleeder entries in conformance with section 75.316 (Tr. 119). He indicated that he had no conversations with mine management as to where the bleeder check points should be before the plan was approved, and he does not know what was originally proposed by mine management in this regard (Tr. 120).

Mr. Snyder stated that he "supposed" he received the results of his air sample within a week and that it took him until March 16 to issue the citation because he ran across it while he was preparing his report on the mine ventilation survey (Tr. 145). When asked whether it was true that within his district there is a lot of controversy as to whether section 75.301 applies to bleeder check points in bleeder entries, he replied "at a certain time, yes, there was" (Tr. 145). When asked whether it is still true that there are certain inspectors in his district who do not believe that section 75.301 applies to bleeder check points and a bleeder entry, he answered "I don't know that." He believes that it does apply (Tr. 146).

Mr. Snyder stated that when his air sample indicated noncompliance he asked Mr. Harper to take care of issuing the citation (Tr. 148). Mr. Snyder confirmed that he was aware of MSHA's policy letter, exhibit G-3, at the time the citation issued, but he did not know whether Mr. Harper was aware of it (Tr. 149).

Paul J. Compton, MSHA Division of Safety, Arlington, Virginia testified as to his background and experience, and he confirmed that his present duties include assisting the division chief in matters concerning ventilation (Tr. 156-159). He commented as to the importance of measuring bleeder air, and he indicated that the "BCP" or bleeder check point location shown on the mine map is the point where undiluted air coming from the bleeder is sampled and that is what MSHA is trying to achieve (Tr. 164).

Mr. Compton was asked about his "concerns" with respect to the question of interpretation of "active workings at a bleeder evaluation point," and he responded as follows (Tr. 168-169):

A. My concern--I have no concerns with it. I feel that if a man has to travel there, it has to be safe for him to travel. I don't only feel that it's CO<sub>2</sub> and the CO<sub>2</sub>, as we have in this case here, I think he's responsible to see that the roof is supported, that the area is adequately ventilated, and that it's safe for whoever goes up there to evaluate that, for whatever they're evaluating; whether it be for the roof, whether it be for anything that's in there, not necessarily methane. He is evaluating the effectiveness of that system to determine whether the gob, per se, is being ventilated accurately.

And he measures the quantities of air, he checks the roof, he checks for whatever may be. He may be checking for CO<sub>2</sub>; he may be checking for CO, as we do in many, many mines, where we have spontaneous combustion and so forth; or he may be checking for any number of gases that could exist in coal mines. But he had to, also, make sure that it's safe, as I say, from roof support and everything else.

Asked whether the bleeder evaluation point is an alternative to inspecting the bleeders, Mr. Compton responded as follows (Tr. 169-170):

Q. Mr. Compton, is the bleeder evaluation point an alternative to inspecting the bleeders?

A. Only if the bleeder becomes unsafe for reasons beyond the control of the operator. The operator, under two hundred, is responsible to support the top throughout the coal mines. He has to make a reasonable--or make a diligent effort to maintain the bleeders, to support them, to be able to travel them. And, as I say, there are circumstances that occur in every coal mine in certain areas where it becomes difficult, maybe impossible, maybe he has it cribbed and maybe the ribs are sloughing in, or maybe it's of a nature that breaks around. Those conditions develop; that recognizes that could develop, and allows them to evaluate at the point--to the point where it is safe to travel. And, as I say,



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following legislative history, that is not, in my opinion, for all times. That is until such time as that area can be safely mined out and then sealed. Or if anytime it becomes apparent that the ventilation is inadequate, for whatever reason, it doesn't only have to be methane. It can be for any reason. If it's ineffectively ventilated, then the area has to be sealed.

When asked why MSHA cannot agree to placing a bleeder evaluation point 100 feet outby where it was located in this case, even after 2300 or 43,000 CFM's of air was sweeping through that point, he responded as follows (Tr. 172):

A. Because I could have any amount of any explosive, noxious, or poisonous gases accumulating just in by the point where I'm measuring, diluting it as it comes out. And I could have a condition exist that would be an extreme hazard to the men in the coal mine.

When asked whether the issues concerning "samples taken in active workings and whether it has to be in compliance with 301," has been discussed with industry and MSHA personnel, Mr. Compton responded as follows (Tr. 173-174):

A. Yes. We have discussed this many times in staff meetings. We've discussed it in meetings with BCOA, the national coal association, various coal operators associations. We have discussed this with them. We have never had adverse response.

Q. Are you aware of a division of opinion at the district manager level in MSHA on this question?

A. Not in the sense that it's strictly a difference of opinion, but anytime you put twelve people together, some have different thoughts on things. But we have never had anything to say that we had a strong difference of opinion.

Q. Is there some reason why this letter which was sent to Mr. Krese by Mr. LaMonica, Exhibit 3, in the summer of '81, has not been issued as an MSHA policy document?

A. The reason it wasn't issued as an MSHA policy document is because we've had no questions or no problems with it. And I don't district four. Often times in discussions with management, and even among--we get many of the same with personnel within the agency; where people have ideas and they express them, and in order to come to one uniform interpretation, you may say, or just to affirm something, we'll put those out.

And it's not uncommon to respond to our district people. We have responded to many coal operators without saying it's a policy and issue those to every one. We address the question to the particular individual because it's not a question to other people.

On cross-examination, Mr. Compton confirmed that he drafted exhibit G-3, and when asked to reconcile section 75.316(e)(2) and the interpretation stated in the letter, he responded as follows (Tr. 176-177):

A. I interpret that active working to refer to the active workings from which the air is coming; the pillar line at the outby side of the gob. I interpret that to say that the air that flows across the active area, flows across the gob and then into the bleeders. And my interpretation that the bleeders are active so long as they have to be traveled. And we do, as a matter of--I don't say it's policy--but we do as matter of it being active when bleeders are traveled; we collect samples in the bleeders and we do enforce the same regulation that we enforce at the ventilation point.

Q. Mr. Compton, is there anywhere in the regulations where bleeders are defined as active workings?

A. There are very few places where any particular entry is defined as an active working. Active workings are defined as any place where men work or travel, regardless of whether you call it a bleeder, whether you call it a track entry, whether you call it a return entry, or an intake entry. If the man works and travels, it's active.

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Q. Mr. Compton, how do you define what a bleeder entry is?

A. The bleeder entry is a special air course, by design, to carry the products of gob areas away from the active area, which is a pillar line outby, through the bleeder system and into the return airways and to the ventilation system, to the surface.

Q. How can a bleeder entry carry gases away from the active workings, if they are active workings?

A. Away is a relative term.

Q. Relative to what?

A. To where you are taking it from. When you talk about away, you're talking away from the active area.

Mr. Compton stated that the reason air readings are taken at a bleeder evaluation point is to determine if the gob is effectively ventilated. If it is, he indicated that it would be in compliance with the requirements of the regulations (Tr. 188). In response to further questions, he testified as follows (Tr. 198-200):

Q. Mr. Compton, if you made the evaluation after the bleeder air was diluted, why would it then be hazardous?

A. I didn't say it would be hazardous. It wouldn't tell me what is in the bleeder area. It wouldn't tell what's coming through the bleeder entries off the gob. It would tell me--

Q. Why--

A. --what's coming from other areas also.

Q. Why is it important to know what's coming from the gob?

A. Because I could have a condition existing in the gob area that is very hazardous and bring that out and dilute it, and not recognize it, and the hazard exists. But, I don't know it.

Q. So, you agree that it's in everybody's interest to take a reading of the undiluted bleeder air?

A. I--I don't like the way you asked the question. I don't know what everyone's interest is.

Q. Well, don't you believe--

A. I'm hoping it's safety. And if it is safety, then it is important.

JUDGE KOUTRAS: Isn't that what the inspectors did in this case? They took a reading of the undiluted air? Isn't that what they did?

MS. SYMONS: Yes.

JUDGE KOUTRAS: Okay.

BY MS. SYMONS:

Q. Mr. Componation, isn't it true that, according to your theory, any time anyone takes that reading, it makes it into active workings?

A. That isn't my theory. That is a 301--or the definition of active workings says: where they have to work or travel. I didn't make that definition.

#### Respondent MSHA's Arguments

In its post-hearing brief, MSHA asserts that the key issue in this case is the interpretation of the words "active workings," and whether the air which leaves a bleeder evaluation point must comply with the air quality requirements of 30 CFR 75.301 at the location such air leaves the gob and enters a return (Tr. 94, 219-223).

In support of its case, MSHA cites the definition of "active workings" found at 30 CFR 75.2(g)(4), as follows:

"Active workings' means any place in a coal mine where miners are normally required to work or travel;

MSHA also cites the definition of "active workings" as found in the Dictionary of Mining, Mineral, and Related Terms, U.S. Department of Interior, Bureau of Mines, 1969, at page 11, as follows:

"Active workings.' All places in a mine that are ventilated and inspected regularly [U.S. Bureau of Mines Federal Mine Safety Code-Bituminous Coal and Lignite Mines, Pt. 1 Underground Mines, October 8, 1953.]

In support of its argument with respect to the application of the words "active workings" to an entry inspected only regularly, but otherwise not used in the active extraction of coal, MSHA cites a 1972 decision of the former Interior Board of Mine Operations Appeals, Mid-Continent Coal and Coke Company, 1 IBMA 250, decided December 29, 1972, where the Board stated as follows at 1 IBMA 257:

Since the operator is charged with the duty of regular inspection of high-voltage cable, it can be inferred that a miner or miners normally work and travel in this entry. The Board concludes that the entry is subject to the requirements of Section 75.400 of the Regulations [Section 304(a) of the Act] because it does constitute an "active working.' Even though it may be that only one miner is required to regularly inspect the entry, an accumulation of coal dust is a potential hazard to him, and clean up procedures are therefore warranted.  
\* \* \* (Emphasis added.)

In further support of its position in this case, MSHA cites a decision by former Commission Judge John F. Cook, in Christopher Coal Company, MORG 76-8-P, decided on October 18, 1976, slip opinion at page 10, aff'd by the Commission on October 25, 1978, IBMA 77-7, first unnumbered volume March 1979. Judge Cook upheld a violation of mandatory standard section 75.329, which regulates methane in bleeder entries and returns, and supported MSHA's position that the air sample was properly taken at a location after leaving a pillared area and prior to entering another split of air. Judge Cook stated as follows at page 10 of his decision:

It is clear that the test must be made before the bleeder air actually leaves the bleeder split of air and joins with the main return split of air. To interpret the regulation any other way would make it meaningless since the test, under the operator's theory, would

only indicate what the methane content was in the main return after a mixture took place. The regulation clearly was designed to ascertain what methane content would be entering the main return split of air.

Conceding the fact that the Christopher decision involved a standard dealing with methane in bleeder entries and returns, whereas the cited section 75.301 in the instant case deals with carbon dioxide in active workings, MSHA nonetheless argues that the air sample is used for both purposes and that the logic advanced to support the location of the Christopher samples likewise is applicable in this case.

MSHA points out that the citation issued in this case noted that on two occasions when samples were taken in January and February that the carbon dioxide levels were above .5 percent. The citation required that the carbon dioxide levels be lowered to below .5 percent, which was achieved when U.S. Steel increased the quality of ventilation through the pillared area from around 1200 cfm (Tr. 102) to around 8,000 cfm (Tr. 114, 118-191).

MSHA submits that the location involved is always considered to be active workings as long as "miners are normally required to work or travel" to it. Consequently, even when a miner is not present at a location in the mine, the fact that a miner must at some point work or travel to the location makes that location active workings 24 hours a day, 365 days a year (Tr. 209-211). It does not shift back and forth between active and inactive just because a miner is not always present. The fact that he must work or travel to the location mandates its active status.

MSHA further asserts that it is clearly important to evaluate the effectiveness of a mine's bleeder system, and that regulatory standard section 75.316-2(f)(2), requires that bleeder entries which cannot be traveled must be evaluated. MSHA makes the point that the issuance of the citation in this case is based on MSHA's position that the air leaving the gob area must be in compliance with section 75.301, at the point where it enters the return because the regulator at the bleeder evaluation point is the line separating the untravelable gob area and the traveled return area of the mine. MSHA concludes that the fact that miners are required to work in the area mandates that the air quality requirements of section 75.301 are applicable.

MSHA maintains that the contestant's reliance on the language found in Section 75.316-2(e)(2), that bleeder systems

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shall not include active workings, is not well taken. In support of its conclusion, MSHA relies on the testimony of Mr. Compton (Tr. 176), as well as its argument that the intent of the words "active workings" at the end of said regulation relates to the fact that bleeder air systems are not to cross active working sections or faces on their way to the return after leaving the active end of a pillar line, and that it was never intended to deprive the miner who must evaluate the bleeder of the protection provided by 30 CFR 75.301.

MSHA concludes its argument by asserting that its interpretation of the law must be followed, and that the cases cited at page 7 of its brief support its broad application of the term "active workings" as found in sections 75.2(g)(4) and 75.301, and that any narrow or limited construction as argued by the contestant should be eschewed. MSHA submits that the citation in question was properly issued and that section 75.301 is applicable to the air quality allowed at a bleeder evaluation point.

#### Contestant's Arguments

In its post-hearing brief, the contestant argues that notwithstanding the definition of "active workings" found in 30 CFR 75.2(g)(4), in view of the language found in 30 CFR 75.316-2(e)(2), which seemingly excludes a "bleeder systems" from "active workings," a regulator in a bleeder entry 25 to 30 feet from the intersection where the air mixes cannot be considered "active workings."

In support of its argument, the contestant points out that under section 75.316-2, the whole purpose of having bleeder entries is to continuously move air-methane mixtures from the gob, away from active workings, and to deliver such mixtures to the return air courses. Contestant suggests that there is no way this may be accomplished if section 75.301 is applied to the bleeder entry because there is no way the air-methane mixture can move from the active workings to the return air courses unless it goes down the bleeder entry.

In response to MSHA's argument that section 75.316-2(f)(1) deals only with roof control in bleeder entries, contestant asserts that roof control is never mentioned. In response to MSHA's concern that the oxygen level decreases as the level of carbon dioxide increases, contestant points out that the foreman or fireboss checking the area has a flame safety lamp which would detect a low oxygen level, and that the plain

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language of section 75.316-2(f)(2) indicates that it can deem the area unsafe for examination for any reason and take other steps to measure the effectiveness of the movement of air from one area to another. The contestant points out further that there is no other regulation which allows an operator to declare an area unsafe to travel, and that the bleeder entry is also the only area of a coal mine where methane is allowed to be at 2.0%.

On the facts of this case, the contestant contends that the only reason the bleeder evaluation point is at the regulator is because MSHA "forced the company to put it at this location." Contestant asserts that if one wants to sample the air as it comes off the gob, the bleeder evaluation point is the logical place to take the reading before that air has a chance to mix with return air. Contestant also points out that there is no requirement in the Act that air from the gob be measured or sampled at the bleeder evaluation point other than what MSHA has imposed through the ventilation plan, and that there is no question that the fireboss could take the methane reading at the intersection.

Contestant suggests that the only point in having the bleeder evaluation point at the regulator is that someone has to walk it, and this fact makes that location an "active working" under MSHA's theory. Contestant suggests further that there are two ways to handle the problem. One way is to move the bleeder evaluation point to the intersection where the air mixes with the return, and contestant concedes that this will not give as accurate a reading of the air-methane mixture from the gob. A second way is to assume that MSHA meant what it said when it specifically stated that the bleeder entry is the area where air moves from the active pillar line to the intersection with the return and it not active workings. Contestant emphasizes the fact that pursuant to Section 75.316-2(f), MSHA expected travel in this inactive area of the mine, and contestant suggests that the second method is the more logical solution and meets the needs of the parties as well as preserving the safety of the miners.

Finally, contestant asserts that MSHA should not be permitted to ignore the definition of "bleeders" as defined in its own regulations. As for MSHA's suggestion that it seal the gob, contestant states that this argument totally ignores the fact that MSHA has no authority to request a gob be sealed unless methane or explosive gases are a problem (30 CFR 75.329 et seq.). Contestant states that carbon dioxide is not an explosive gas. Since a bleeder entry is specifically defined as an area that is not in active workings, contestant concludes that section 75.301 does not apply and that the citation should be vacated.



Findings and Conclusions

Fact of Violation

The contestant in this case is charged with a violation of mandatory standard Section 75.301, for an alleged failure to maintain the carbon dioxide level at the cited bleeder location at or below the level stated in that standard. The cited standard does not specifically address the air quality required to be maintained in bleeder entries. It simply requires that all active workings be ventilated in such a manner as to prevent "not more than 0.5 volume per centum of carbon dioxide."

MSHA's position in this case is that the quality of air passing through bleeder areas and leaving a bleeder evaluation point must comply with the requirements of section 75.301. In order to reach this conclusion, MSHA must establish that the cited bleeder entry and evaluation point in question is in fact part of the "active workings" of the mine. In support of its theory of this case, MSHA relies on the interpretation of the term "active workings" found in the definitions section of its regulations, namely section 75.2(g)(4), and a prior decision by former Commission Judge Cook in Christopher Coal Company, *supra*, interpreting mandatory section 75.329.

It seems clear to me that the intent of section 75.301, is to insure that active workings of the mine are properly ventilated by air currents which do not contain oxygen and carbon dioxide levels outside of the parameters fixed by that standard. Further, the standard is also intended to insure sufficient air volume and velocity to dispel flammable, explosive, noxious, and harmful levels of gas, dust, or fumes. In the instant proceedings, the contestant's assertion that carbon dioxide is not a harmful, explosive, or hazardous gas is not rebutted by MSHA. Further, section 75.301-2, specifically excludes carbon dioxide from the TLV method of determining harmful concentrations of noxious gases. Section 75.301-5, does not list carbon dioxide among other explosive gases required to be controlled. The problem is that the regulatory scheme encompassed by section 75.301, and the criteria subsections which follow, does not mention bleeder entries or bleeder systems. That subject is covered by sections 75.329 and 75.316-2(e) through (i).

Mandatory standard section 75.320, requires that bleeder entries or systems used to ventilate wholly or partially extracted and abandoned pillar areas be ventilated or sealed.

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If ventilated, the standard requires that such ventilation be maintained "so as continuously to dilute, render harmless, and carry away methane and other explosive gases within such areas and to protect the active workings of the mine from the hazards of such methane and other explosive gases." Similar language is found in section 75.316-2(e)(1), which specifically defines "bleeder entries" in pertinent part as "special aircourses %y(3)27 designed to continuously move air-methane mixtures from the gob, away from active workings and deliver such mixtures to the mine return aircourses."

On the facts of the instant case, MSHA's reliance on the Christopher Coal Company case in support of the citation is rejected. The requirements for controlling and dissipating methane in bleeder areas as encompassed by section 75.329, are different from the requirements found in cited section 75.301, which addresses carbon dioxide, and I conclude that the two standards are mutually exclusive. MSHA's attempts to use them interchangeably are rejected. It seems to me that if MSHA wishes to promulgate a mandatory standard requiring the quality of air in bleeders to be maintained at the same levels and requirements as air in "active workings" as specifically covered by other mandatory standards, it should amend its regulations to clearly and directly state this proposition, rather than attempting to "boot strap" its enforcement by reliance on theories which simply do not make sense.

MSHA's reliance on the definition of "active workings" to support the citation issued in this case is likewise rejected. Contestant's arguments in support of its conclusion that when read together with the other standards found in Part 75, a bleeder entry is not active workings is a sound and logical interpretation and application of the cited standard in case. As correctly pointed out by the Contestant here, the specific purpose of bleeders is to provide a system and means for removing the air which is used to ventilate gob areas from the mine. Testing that air at the the regulator before it has an opportunity to mix with return air seems logical. However, the fact that an examiner must travel there once a week, or more frequently, to take methane readings, thereby placing that particular location in "active workings" in accordance with the definition of that term, may not serve as a basis for MSHA reading something into the requirements of section 75.301 which is not there.

Although Inspectors Harper and Snyder both indicated that Section 75.305, requires a fire boss weekly examination

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of the area where their air samples were taken, they conceded that this section does not require the fire boss to take such samples. This seems rather strange to me. On the one hand, MSHA takes the position that requiring the fire boss to travel to that area at least once a week places him in "active workings" by definition. Once the fire boss is there, he is not required to take any air samples to determine the air quality in those areas covered by this section. Inspector Snyder reasoned that the mine ventilation plan requires this weekly examination. This supports the contestant's assertion that MSHA's insistence that its plan include this provision has in effect placed the fire boss in "active workings," thereby supporting MSHA's desire that the bleeder air conform with the requirements of section 75.301.

Inspector Snyder conceded that the question of whether section 75.301 applies to bleeder entries or bleeder check points has been a matter "of controversy" among his fellow inspectors at the MSHA district level. Even though he denied any knowledge of the fact that some inspectors do not believe that section 75.301 applies to such areas, it seems to me that such doubts should be resolved so as to insure even-handed enforcement. However, in this case, since the contestant raised the issue, it was incumbent on the contestant to establish this assertion through some credible testimony or evidence. Simply raising the issue will not suffice. Since the contestant has not done this, I have given this little weight. However, I have not totally discounted Inspector's Snyder's statement that there may well be a difference of opinion or "controversy" among MSHA's enforcement staff.

Although not directly stating so, MSHA's experienced ventilation specialist Paul Componation alluded to the fact that the application of section 75.301 to bleeder evaluation point has been a topic of concern to MSHA as well as the industry, and he implied that there may be "different thoughts on things" (Tr. 174). When asked why a Memorandum dated September 14, 1981, from MSHA's Acting Administrator Joseph A. Lamonica to District Manager James E. Krese (exhibit G-3), addressing the quality of air of air samples collected at bleeder evaluation points, has not been issued as a general MSHA policy document, Mr. Componation responded that "we've had no questions or problems with it" (Tr. 174).

The memorandum referred to above quotes the partial language of section 75.301, the definition of "active workings" found in section 75.2(g)(4), the partial language found in section 75.316-2(f)(3), stating the requirements of weekly examinations of bleeder systems where it is unsafe to travel a bleeder entry, and concludes as follows:

A bleeder evaluation point is an area of a mine where a certified person, a miner, is required to examine and conduct tests weekly. The bleeder evaluation point is an active area of the mine. A citation shall be issued when sample results at a bleeder evaluation point are not in conformance with the statutory provisions of Section 75.301, 30 CFR 75. (Emphasis added.)

I take note of the fact that the memorandum characterizes a bleeder evaluation point as an "active area of the mine." That term is not further defined. It seems to me that to obviate confusion, and to preclude controversies of the kind generated by the instant proceedings, MSHA should either publish such memorandums universally, promulgate an amended clear standard, or clarify precisely what it has in mind.

In view of the foregoing findings and conclusions, I conclude and find that MSHA has failed to establish by a preponderance and of any credible evidence or testimony that the contestant violated the provisions of cited section 75.301, when it assertedly failed to maintain the carbon dioxide level at less than 0.5 in the cited location where the inspector made his air readings. Accordingly, Citation No. 2132552 IS VACATED, and the contest IS GRANTED.

George A. Koutras  
Administrative Law Judge