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SOL (MSHA) V. GREENWICH COLLIERIES
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

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

CIVIL PENALTY PROCEEDING

Docket No. PENN 85-305
A.C. No. 36-02405-03608

v.

Greenwich No. 1 Mine

GREENWICH COLLIERIES,
DIVISION OF PENNSYLVANIA
MINES CORPORATION,
RESPONDENT

GREENWICH COLLIERIES,
DIVISION OF PENNSYLVANIA
MINES CORPORATION,
CONTESTANT

CONTEST PROCEEDING

Docket No. PENN 84-90-R
Citation No. 2255016; 3/16/84

v.

Greenwich No. 1 Mine

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

DECISIONS

Appearances: Linda M. Henry, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for Petitioner/Respondent;
Joseph T. Kosek, Jr., Esq., Ebensburg,
Pennsylvania, for Respondent/Contestant.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern a civil penalty proceeding initiated by MSHA against the respondent pursuant

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to section 110(a) of the Federal Mine Safety and Health Act of 1977, seeking a civil penalty assessment for an alleged violation of mandatory safety standard 30 C.F.R. 75.329, as stated in a section 104(a) Citation No. 2255016, with special "significant and substantial" (S & S) findings, issued by an MSHA inspector on March 16, 1984. The contest was filed by the contestant to challenge the legality of the citation.

The cases were consolidated for hearing, and the parties appeared and participated fully therein. Greenwich filed a posthearing brief, but MSHA did not. However, the oral arguments presented at the hearing have been considered by me in the course of these decisions.

Issues

The issues presented are whether or not the condition or practice cited by the inspector constitutes a violation of the cited mandatory safety standard, and whether the alleged violation was "significant and substantial." Additional issues raised by the parties are identified and disposed of in the course of these decisions.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-165, 30 U.S.C. 801 et seq.
2. Commission Rules, 29 C.F.R. 2700.1 et seq.

Stipulations

The parties agreed to incorporate by reference the following agreed-upon stipulations from a consolidated proceeding (PENN 85-204 and PENN 85-114R), heard the day prior to the hearing in the instant cases (Tr. 191):

1. The subject mine is owned and operated by the respondent/contestant Greenwich Collieries.
2. Greenwich Collieries and the subject mine are subject to the Act.
3. The presiding administrative law judge has jurisdiction to hear and decide these cases.

4. The subject citation issued in these proceedings was properly served on a representative of Greenwich Collieries and may be admitted to establish its issuance and service.

5. Payment of the assessed civil penalty will not adversely affect the respondent/contestant's ability to continue in business.

6. The respondent/contestant's annual coal production is approximately two million tons. Greenwich Collieries is a medium-to-large mine operator.

7. The respondent/contestant exhibited ordinary good faith in timely abating the cited condition or practice.

8. Respondent/contestant's history of prior paid civil penalty assessments consists of 245 paid assessments for the first 9 months of 1985, 214 in 1984, and 155 in 1983.

MSHA's Testimony and Evidence

MSHA Inspector William Sparvieri testified as to his background and experience, and he confirmed that he issued the section 104(a) citation in question on March 16, 1984 (exhibit GÄ1). He stated that he was dispatched to the mine to assist MSHA's ventilation technical support personnel who were conducting a ventilation survey at the mine. This survey was being conducted because approximately a month earlier, the mine had experienced a methane explosion which resulted in the death of three miners and injuries to several others. He confirmed that he cited a violation of section 75.329, after finding a 3.3 percent methane accumulation at bleeder evaluation point No. 14. He also confirmed that he collected one 50 cc vacuum bottle sample of the mine atmosphere at that location, and he identified exhibit GÄ2, as the results of the laboratory analysis made of the sample by MSHA's Mt. Hope, West Virginia laboratory. The report reflected .24 carbon dioxide, 19.85 oxygen, 3.26 methane, and zero carbon monoxide (Tr. 4Ä9).

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Mr. Sparvieri stated that a company representative was with him when he took his bottle sample at the bleeder evaluation point, and he confirmed that the representative did not at that time protest the location where he took his sample (Tr. 9Ä11). He confirmed that the location was an approved bleeder evaluation point as shown on the mine ventilation plan, and that the company was required to make an examination at that location at least weekly on a 7Äday cycle, and to record its findings in an approved book used for this purpose. He observed dates and initials at the bleeder point in question to substantiate the fact that the company had made examinations at that location (Tr. 12).

Mr. Sparvieri stated that his initial methane reading of 3.3 percent was made at a location where a sign was posted identifying it as Bleeder Evaluation Point 14. He proceeded 50 feet inby that location and detected methane in the 4.0 percent range with a hand-held methane detector. He decided not to go any further because he was unfamiliar with the mine ventilation as a whole, was aware of the previous methane explosion, was unsure as to how the gob was being ventilated, and was concerned that "questionable air may have been present" if he went any further (Tr. 13). He considered the methane reading which he took as extremely dangerous, and issued a section 107(a) imminent danger order as well as a citation for an excess of 2 percent methane at the bleeder evaluation point. The order was subsequently vacated and made a part of a previously issued imminent danger order and a section 103(k) order which restricted mine activity because of the prior methane explosion (exhibit GÄ3, Tr. 14).

Mr. Sparvieri confirmed that he could not determine whether the operator was aware of the cited condition, and he had no way of knowing how long the methane condition had existed. He was not sure whether a recent examination of the area had been made by the operator because the mine had been closed by the previously issued orders. He took this into account when he rated the negligence as "low," but he believed that the cited condition created an explosion hazard. The "possibility" or "potential" for an explosion was present, and he considered it reasonably likely that an explosion hazard was present since had he proceeded inby any further he could have encountered an explosive mixture of methane. Had an explosion occurred, the results would have been fatal, and 16 miners would have been in danger. He estimated this number after observing miners working along the track haulage and other outby areas as he left the area to find a telephone to

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report his findings to his supervisor. He also observed rehabilitation work, rock dusting, timbering, and the movement of supplies along the track haulage (Tr. 17).

Mr. Sparvieri could not state whether or not the gob area in question had previously experienced any ventilation problems, but he was aware of the fact that an explosion had occurred and that the mine had a history of methane liberation in excess of 2 million cubic feet a day (Tr. 18).

On cross-examination, Mr. Sparvieri confirmed that at the time he issued the citation he was not a ventilation specialist, and that his duties did not normally entail the inspection of the No. 1 Mine. He stated that when he detected the methane in question, he tested the air movement in the vicinity of the bleeder evaluation point, but the air movement was so slight that it would not turn the blades on the anemometer. He then used a smoke tube and took approximately five or six readings over a 10-foot distance with chemical smoke and calculated an air reading of 1,311 cubic feet per minute as reflected on the Mt. Hope laboratory report. The smoke which he released during his test travelled outby in its proper direction (Tr. 19-20).

Mr. Sparvieri stated that during his MSHA training he has received instructions concerning MSHA's standard procedures for making tests in connection with regulatory section 75.329. He explained that once a determination is made as to location of the bleeder evaluation points as shown on the mine map, all air readings and methane examinations are made at these locations. When asked for his interpretation and application of section 75.329, Mr. Sparvieri responded as follows (Tr. 21-22):

Q. I would like to show you the Code of Federal Regulations 75.329, and I would like you to read the area that I have underlined, beginning with "Air" down to "split."

A. Underlined in black?

Q. Yes, sir.

A. Okay. "Air course through the underground areas from which pillars have been wholly or partially extracted and which enters another split of air shall not contain more than 2.0 volume percent of methane when

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tested at a point it enters such other split."

Q. Okay. Could you interpret for me, in conjunction with what you read, the 2 percent volume of methane when tested at the point it enter such other split?

A. My interpretation of that is prior to it enters the other split, not after it enters the main return.

Q. But do you have any specific instructions as to prior to when it enters the other split, the distance involved?

A. Yes, sir.

Q. Could you tell us that?

A. Yes. For example, if the BE was down closer to where it enters that split, you would have to get inby the rib line of that entry, so that turbulence or swirling of air from the main return would not affect your reading in any way.

Mr. Sparvieri confirmed that he made his methane test at the bleeder location approximately 70 to 100 feet away from the split where the air from the bleeder joined the air from the return split (Tr. 30Ä31). He explained the procedure he followed for determining the air mixing point as follows (Tr. 31Ä33):

Q. In your MSHA training, were you ever told what procedure to use to determine the mixing point?

A. What procedure to determine the mixing point?

Q. Yes, sir.

A. Yes.

Q. Would you tell us what that procedure is?

A. To use chemical smoke and to get inby the turbulence and inby the swirling air, so that

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you are getting a true and exact reading off the gob or off of whatever you are ventilating and evaluating with that particular location.

Q. Is that what you did here?

A. Yes, I used smoke in a twofold purpose. I used it primarily to determine direction of air flow and to maintain or to get an accurate air measurement of CFM. When the smoke was discharged, there was no effects of swirling or turbulence in that area. We were inby the main return far enough where there was no mixing.

Q. But isn't the procedure to go inby where the split is, release the smoke at that point, and follow the current and then go 1 foot inby that position and take your reading?

A. I am not familiar with that. My training is to evaluate gobs, abandoned areas, worked out and pillared areas either in their entirety, by walking the perimeter of these locations, or to examine these locations at specified points approved on the ventilation map in the form of IE's and BE's. Regardless if that IE or BE is 10 feet from the mixing point of 150 feet or 500 feet from the mixing point, MSHA instructions are to examine BE's at their approved location on the review map in effect at that mine, at that particular time, and that is what I did.

Q. That MSHA instruction, is that out of the Indiana field office?

A. I can't answer for all of MSHA, but as far as I know, that is everywhere.

Q. Where did you get your instruction on that specific point, was it from your field office?

A. It was from my field office, it was from the district in Pittsburgh, and whether that policy and that training was discussed in Beckley, I can't answer that.

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Q. Do you know if that was discussed out of Hastings?
Do you know what the position of the Hastings field office is?

A. I have no idea, sir.

Mr. Sparvieri stated that 2 percent methane is the limit permitted in by the air mixing point, and that the explosive quantity of methane ranges from 5 to 15 percent (Tr. 36). With regard to the existence of any ignition sources in the cited area, he stated that a possible roof fall could set off an explosive mixture of gas, but he could not state whether any electrical equipment was present in the air return (Tr. 37).

In response to further questions, Mr. Sparvieri confirmed that he contacted his supervisor James Biesinger prior to issuing the citation because he was unfamiliar with the mine ventilation, could not determine what areas of the mine could possibly be effected by the methane, and had no idea as to what areas of the mine he should close (Tr. 37-38). Although the mine had been closed by the prior orders, general mine maintenance was taking place, and this included water pumping, timbering, and rock dusting. No coal production was taking place, and the work being performed was permitted by certain modifications which were made to the orders (Tr. 39-40).

Mr. Sparvieri stated that the roof conditions in the cited area were "fairly good," but that the in by gob areas continuously had roof falls. Water pumps were in operation, but he did not know how close they were to the cited area, and he did not know how much methane would be forced into the main return (Tr. 40). He confirmed that the prior methane explosion occurred when a spark from a water pump ignited an accumulation of methane from a gob which was not adequately ventilated (Tr. 41).

Mr. Sparvieri stated that bleeder evaluation points are the designated locations for an operator to make methane checks for the purpose of compliance with section 75.329. He explained that an operator is required to travel and examine all mine areas on a weekly basis. However, in areas which are inaccessible, hazardous, or have had pillar falls, an operator may apply to the MSHA district manager for designated bleeder or intake evaluation points in lieu of walking the areas. In the instant case, the bleeder evaluation point in question was approved by the district manager, and the operator was relieved from walking and examining the entire perimeter of the gob area. However, during the weekly examination,

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the operator was required to go to the bleeder evaluation point to test for oxygen deficiency, determine the proper direction of air flow, and to evaluate the gob to insure that the ventilation was properly working (Tr. 42).

Mr. Sparvieri stated that section 75.329 requires that a methane test be made at a point before the air enters the split. Assuming the test is made at a location 50 feet before the air enters a split, and that location is not a bleeder evaluation point, the test would not comply with section 75.329. He confirmed that this interpretation has been the way he has been instructed since he has been an inspector (Tr. 45).

John A. Kuzar, MSHA Ventilation Specialist and Hastings, Pennsylvania, Field Office Supervisor, confirmed that the No. 1 Mine is under his supervision. He stated that he participated in the recovery operations after the methane explosion and that he travelled all of the gobs and examined all of the bleeder evaluation points during February and March, 1984. He confirmed that prior to this time the mine was on a section 103(i) 5-day spot inspection cycle because of the amount of methane liberated in a 24-hour period. The mine had problems on numerous gobs, and 11 of the 30 gobs had problems concerning evaluations and direction of air flow (Tr. 62-64). He pointed out that ventilation was being established in some of these areas prior to reopening the mine, and some of the areas had high methane (Tr. 65).

Mr. Kuzar stated that he visited the mine a day after Mr. Sparvieri was there and issued a section 104(d) order on March 17, 1984 (exhibit G4), because of a pressure drop in the air (Tr. 67). Mr. Kuzar agreed that in the instant case, the theory of MSHA's case is that when Mr. Sparvieri found 3.3 percent methane, this indicated that the ventilation system for the cited area was not maintained (Tr. 68).

Mr. Kuzar explained the purpose of section 75.329 as follows (Tr. 71-76):

A. The purpose of 329 is to insure that you have good positive pressure over a gob, that you are diluting and rendering harmless any noxious gases. You are shoving it to your return.

As to answering where you have checked to determine this, it can vary, you know, it depends. What it depends on is the point

where you get the flow off of the gob, and it is not influenced by another air split. You are concerned that it is being diluted, there is enough pressure across that gob through a drop - you have an inlet side; you have an exhaust side. You are determining, at that evaluation point, if the gob cannot be traveled in its entirety around a parameter, and even when you do travel around a parameter, you are required to check your taps or your connectors for excess of methane.

Now, where we get into the point of going inby further than the approved point, if an inspector finds an excess of 2 percent, and that area is accessible for examination, in other words, it is safe, no one is going to be endangered by roof or what have you, he should be going inby to determine, because in a lot of cases, you maybe only have to go a couple feet inby that point and you have the explosive mixture. So, in reality, you have a gob with over 5 percent of methane.

Q. So what you are stating is that - if I can sort of extract from this, and the purpose of 329 - the 2 percent at this area would supposedly reflect an explosive range farther in? Is that what you are saying?

A. Not in all cases. What I am saying is that the 2 percent point - management establishes that point through their vent plan, under 316, is an area that they go on a weekly basis to make an examination.

* * * * *

Q. In your experience, Mr. Kuzar, when a company submits a bleeder evaluation point, what are they submitting that - what is the purpose of that point?

A. The purpose of them submitting for a bleeder evaluation point is something has occurred in that bleeder system that they cannot travel it in its entirety. The purpose of bleeder evaluation points were

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brought out for mines that were developed prior to the effective date of the law.

Older mines, most of them, you had to establish some way to evaluate a gob, because in those days, they did not have to make good bleeders and leave them open.

They normally pillared from the solid to the solid. Now, today, since '69, most vent plans, they require to leave a standing room, in other words, a bleeder system that goes around the entire perimeter of that gob. But there are cases where management uses all steps, everything that is available to them to maintain this entry safe for travel and weekly examination, but they just can't hold it up.

So then management establishes a point where they can get the best evaluation of that gob without it being influenced by another split of air. It is submitted to the district manager. The district manager reviews it, he grants either tentative approval or final approval. If it is tentative approval, what happens then is it is sent out to the field office, an inspector is sent in there to determine if this is an adequate evaluation point, or, you know, area to evaluate it, but they establish the point.

Q. And you have stated - I just want to make this clear in my own mind - that they establish the point. One of the reasons they establish the point is for the purpose of evaluating the air.

A. Yes, ma'am, because they can no longer travel - something has occurred in that bleeder entry that they can't travel it in its entirety. Normally, what is established is an inlet on one side and an exhaust on the other. So you are showing a drop of pressure across that gob by your readings you have here, your reading on your return side, and that reasonably assures that there is an air flow across that gob.

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Q. And they are also establishing that point for you to measure the air off the gob to make sure that it has not been influenced by the air coming down the main return?

A. Yes, ma'am. If I may, there is one other thing that I could add on these gobs. In a lot of instances, we use methane drainage holes from the surface. If, say, we can't get a good flow over the gob, they will drill a hole down into the gob from the surface. A lot of companies, they put pumps on. They pump the methane out, or else they leave it on free flow, because of a problem in a gob, due to caving type where you are not getting a good flow.

Mr. Kuzar stated that the required amount of air over a gob is whatever it takes to dilute any methane, and the limit at the bleeder evaluation point is 2 percent (Tr. 76). Mr. Kuzar was of the opinion that the 3.3 percent methane found by Mr. Sparvieri at the bleeder evaluation point, and the 4.0 percent he found inby that point, were not acceptable levels in those mine areas. He explained that there was an excess of 2 percent at the bleeder point, and as he proceeded inby it kept increasing, and he would have had an explosive level had he gone further (Tr. 78). Mr. Kuzar was of the opinion that the 3.3 and 4.0 percent methane indicated that the gob was not being properly ventilated (Tr. 81-82), and he explained as follows (Tr. 83-84):

THE WITNESS: The basis, what I have, is what they had to do to correct the condition to assure that the gob was properly ventilated. You had air going both ways on the gob, which, in turn, it was bottlenecked. The methane was bottlenecked in the gob. You didn't have the inlet entries. What they were required to do through the District, to assure that this gob was ventilated properly in the future, they drove entries and they had to cut into it to establish new inlet points to induce air over the gob.

JUDGE KOUTRAS: Is that what they had to do to terminate this particular citation?

THE WITNESS: Not Inspector Sparvieri's. The one I issued, they did.

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JUDGE KOUTRAS: Was that a different problem?

THE WITNESS: Well, they weren't complying with 316. The gob wasn't ventilated, yes.

Q. Mr. Kuzar, I know this may be difficult, but even without your order of the next day, just assuming that all you knew about this area was that you had traveled it and that Mr. Kuzar had found 3.3 percent methane, and then found 4 percent methane as he went further on, would you consider that to be - in your opinion, is that indicative of proper ventilation in the mine?

A. There wasn't proper ventilation there, or you wouldn't have had it. You wouldn't have had the methane.

Q. Why would you not have had the methane there had there been proper ventilation?

A. Because the amount of ventilation that would have coursed across the gobs, it would have diluted it at the E.P. point. By the time it reached the E.P. point, it would have been down at 2 or below.

Mr. Kuzar stated that MSHA's policy is that the bleeder evaluation point is where an operator checks for compliance with section 75.329, to insure that no more than 2 percent methane is present at the point the air enters another split. Checks may also be made at bleeder taps or connectors. However, if an inspector determines that the bleeder point is being influenced by another split of air, that bleeder location may be rejected, and another location is established where a true evaluation of the gob may be made of only the air coming over the gob (Tr. 88). He stated that MSHA has no fixed policy as to how close to the return one must be to make a methane check (Tr. 90). He explained MSHA's methods for determining whether an operator fixes his evaluation point too close to the main return air course as follows:

A. What the inspector would do, he would use a smoke cloud. Now, if that air was going in towards that gob off of that return, he would have to follow that smoke to the point where the smoke changed and started coming out, so

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he could get a true evaluation. That is determining flow. If you don't have enough air to take a reading with an anemometer, you are going to use a smoke cloud to determine air direction.

Q. And that is what the inspectors do to determine whether or not the bleeder evaluation point is an accurate determination of the air coming off the gob?

A. That is what they do when they cannot use an anemometer due to low velocities.

On cross-examination, Mr. Kuzar confirmed that MSHA has no written policy or procedure concerning where to test for methane pursuant to section 75.329 (Tr. 92). Referring to the operator's exhibit OÄ1, and in response to several hypothetical questions, Mr. Kuzar marked the sketch to indicate where the air coming off the gob would meet with the air coming off the split on the right-hand side of exhibit (Tr. 96). Assuming a methane reading of 1.2 percent at that location, Mr. Kuzar stated that the operator would be in compliance with section 75.329, but not at the BEÄ14 location where 3.3 percent methane was detected. If the only test was made at the location where 1.2 percent methane was found, the operator would be in violation of section 75.316 for not testing at the approved BEÄ14 location (Tr. 99).

Mr. Kuzar stated that he did know as a fact that the ventilation plan for the No. 1 Mine required that all bleeder evaluation points have methane readings of 2 percent or less (Tr. 100).

In response to further questions regarding exhibit OÄ1, Mr. Kuzar stated that a true reading of the air coming off the gob could not be made at the location marked with a "X" because the air coming off the gob outby BEÄ14 is going out through the connector shown on the left-hand side of the sketch. The proper place to test would be inby the BEÄ14 location where the total uninfluenced air is coming off the gob and before it enters the other split (Tr. 101Ä102).

Mr. Kuzar stated that in District 2 there is an oral policy concerning the proper location to test for methane pursuant to section 75.329, that the policy is consistent throughout the district, and that he instructs his inspectors to proceed in the manner previously described (Tr. 102Ä103). Mr. Kuzar confirmed that District Manager Donald Huntley's

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policy is to check the flow of air off a gob at a point where it is not influenced by another current. This policy was also followed by supervisor James E. Biesinger (Tr. 104).

Respondent's Contestant's Testimony and Evidence

Mine Foreman Richard Endler identified exhibit OÄ2 as a portion of the mine map depicting the location of bleeder evaluation point BEÄ14. He stated that the BE point in question was probably established and approved in 1981, and he agreed that it is in an area which cannot be travelled because of hazards or roof conditions. The BE was located there so that mine management can establish air flow through this area of the mine (Tr. 109).

Mr. Endler identified exhibit OÄ3 as an enlarge diagram of the location of BEÄ14, and he explained his understanding of the proper procedure for checking methane at the mixing point (Tr. 110). He marked an "X" on the diagram as the location of the air mixing point in this case. He stated that he was instructed by MSHA supervisor James Biesinger and MSHA ventilation specialist Richard Schilling to use a chemical smoke tube at the midline of the entry to the right of the diagram where the air is coming off the main return, and to follow the smoke as it swirled to a point where it would proceed back out into the main return. He would then take one step in by that location and take his methane reading (Tr. 110). He stated that he instructed his foreman to make methane checks following this same procedure (Tr. 111).

Mr. Endler stated that assuming a methane reading of 1.3 percent methane at the location of the "X" on the diagram, there would be no violation of section 75.329. Assuming methane readings of 2.9 and 3.1 at the BEÄ14 location, he would still be in compliance with section 75.329, because Mr. Biesinger and Mr. Schilling instructed him that he was allowed up to 4.5 percent methane at bleeder connectors, but at 4.5 percent the mine had to be withdrawn. He was also instructed that where the bleeder connector was influenced by the main return, and that the location where methane had to be below 2 percent was where it dumped into the main return (Tr. 111Ä112).

On cross-examination, Mr. Endler confirmed that the methane percentage figures which appear on diagram exhibit OÄ3, were the readings obtained by the management representative who accompanied Inspector Sparvieri during his inspection (Tr. 113). Mr. Endler had no reason to dispute the 3.26 methane reading at BEÄ14 made by MSHA's Mt. Hope laboratory, even

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though management's reading indicates a reading of 2.9 to 3.1 (Tr. 114).

Mr. Endler disagreed that the 1.3 methane reading at the "X" location on the diagram resulted from the air coming off BEÄ14 going down the crosscut immediately outby BEÄ14. He believed that the 1.3 reading resulted from the 1,311 CFM air current diluting the methane as it approached the main return (Tr. 114). He did not believe the air from the main return affected the 1.3 reading because it was taken "inby where the split dumps" (Tr. 115).

In response to further questions, Mr. Endler stated that he received his instructions from Mr. Biesinger and Mr. Schilling orally underground at the mine. He reiterated that he was instructed to break the smoke device to determine where swirling air stopped and ended, and to take a step inby, which would be 3 feet, and to test at that point (Tr. 116).

Mr. Endler confirmed that he was not with Mr. Sparvieri during his inspection. It was his understanding that Mr. Sparvieri made his methane reading at the BEÄ14 location for a distance of 10 feet as the air flowed down the entry rather than at the point where it dumped into the return (Tr. 117).

Mr. Endler stated that the distance from BEÄ14 to the "X" location on exhibit OÄ3, is approximately 70 feet. Assuming methane readings of 2.9 to 3.1 at location BEÄ14, decreasing to 1.3 at the "X" mixing point, and .4 in the return, it was his opinion that the bleeder was "doing what it was supposed to" in diluting, rendering harmless, and carrying away the methane in the area. In the outby area, the methane was only .4 percent and 27,000 CFM's of air was coming down the return (Tr. 119).

Mr. Endler stated that the MSHA instructions he received with regard to the procedure for testing for methane were received in approximately May, 1984, and he conceded that the individuals who instructed him were not in the area of BEÄ14 (Tr. 119).

Mr. Endler stated that the mine ventilation plan reflects approximately 60 bleeder evaluation points, but that the plan does not state that the methane level at those points has to be at 2 percent. However, he conceded that if an inspector finds 3.1 methane at any bleeder evaluation point he will issue a citation because it is over 2 percent. In his view, 3.1 percent methane at the BE point does not establish that

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the ventilation is not adequate when the air reaches the main return (Tr. 124-125).

Mr. Endler stated that the crosscut immediately outby BE14 as depicted on exhibit O3, was not an open entry. He stated that all of the coal had been pillared out and extracted and the area was caved. The area had rock across it, it was not an opening that one could travel through, and the "cross hatches" on the diagram indicates a cave area which occurred in 1981, and no airflow would be going in that direction (Tr. 128-129). Mr. Endler indicated that the caved area extended to the corner of the rib of the crosscut shown on the diagram, but conceded that it was possible for some of the air to seep through the caved area since they are not air tight (Tr. 131-132).

Mr. Endler explained the effect of the air coming off the gob at BE14, and the caved crosscut as follows (Tr. 135-138):

JUDGE KOUTRAS: Mr. Endler, you have heard all the argument now. What is the effect of the undiluted air theory in your mind? I mean have you heard about that you are only supposed to test air that is undiluted to determine whether or not the gob ventilation is doing its job?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Isn't this air being diluted if it goes down this -

THE WITNESS: No, sir, that is all gob. The main return is one crosscut away from there.

JUDGE KOUTRAS: Do you mean to tell me that the air coming down this entry, some of it is not going to escape down here?

THE WITNESS: It is all the same air.

JUDGE KOUTRAS: What do you mean it is all the same air?

THE WITNESS: It's all the same air that is coming through the gob. It is not being diluted by the return air. That air that is

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coming through there is all trying to get out to the main return.

JUDGE KOUTRAS: It is trying to get out this way?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Does some of it go down this way?

THE WITNESS: Yes, but it is still trying to get out to the main return.

JUDGE KOUTRAS: I don't care whether it is trying to. Is some of it going down this way?

THE WITNESS: Possibly.

JUDGE KOUTRAS: And could theoretically some of the methane seep out down that way?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: And would that be an accurate reading at this point?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Why would it be accurate at this point if some of it is escaping?

THE WITNESS: Because the majority of it would be going down that entry to get to the main return because it is an open entry. The rest of it - there may be some - I can't deny that there might be some filtering through the cave. But that is what your air is supposed to do. It is supposed to filter through all of the cave and dilute and render harmless all the methane in the entire cave, not just one specific area.

* * * * *

Q. The language of 329 is, ". . . when tested at the point it enters such other split." - referring to another split of air. If air

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is going down here, is this another split of air?

A. No. No, it's not.

Q. Where is your other split of air?

A. It's the same split of air that is coming from that entire gob that is going through there. It is the same air.

Q. Where is the other split of air.

A. The other split of air is over here in the main return that this air is trying to filter into.

Mr. Endler conceded that a 3.26 percent methane reading at the BEÄ14 was not personally acceptable to him, and that he would not be satisfied with 3 percent methane at any BE location because he believes it is dangerous. Although MSHA representatives had advised him that up to 4.5 percent methane is acceptable for air coming off the bleeder connectors as a matter of law, Mr. Endler's personal opinion is that it is not acceptable (Tr. 139Ä140). He admitted that as a mine foreman, he would not be comfortable with 3 or 4 percent methane at the BE point because he would be concerned that the ventilation may not be adequate (Tr. 141, 143Ä144).

Larry Luther, testified that he has 17 1/2 years of mining experience and that he is employed by the respondent as a surveyor, and periodically performs duties as a mine examiner examining BE points and air courses. At the time the citation was issued in this case, he was performing these duties (Tr. 151).

Mr. Luther confirmed that he travelled with Inspector Sparvieri on March 16, 1984, and that six BE points were examined that day (Tr. 152). Referring to the diagram, exhibit OÄ3, Mr. Luther stated that he and Mr. Sparvieri walked up the return to the BEÄ14 location and he made a methane reading of 2.9 to 3.1 percent, and Mr. Sparvieri recorded 3.3 percent. Mr. Luther recorded 2.5 methane outby the BEÄ14 location, 1.3 further outby, and .4 further outby. Mr. Sparvieri believed it was safe, and they returned to the BEÄ14 location and inby. Mr. Luther recorded a reading higher than 2.9 inby the BEÄ14 location (Tr. 152Ä153).

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Mr. Luther stated that after making the methane tests, he and Mr. Sparvieri continued to take air readings, but their anemometers would not turn. Mr. Sparvieri then released a puff of smoke from a smoke tube and it went to the roof and then returned outby. They then decided to make an air reading with smoke at 10 foot intervals and the smoke was released at the BE point. The air was timed at 1,311 cubic feet per minute as it returned out the entry toward the main return the way it was supposed to. He did not recall travelling down the entry immediately outby the BE point (Tr. 153-154).

On cross-examination, Mr. Luther confirmed that he took his methane readings with a hand held CSE methane detector, but that he did not test the air where he recorded 2.5, 1.3, and .4 percent methane (Tr. 154). After testing the air at the BE point, he and Mr. Sparvieri left because he wanted to use a telephone, and it took them 45 minutes to an hour to reach the surface. The citation was served on him approximately an hour and a half later (Tr. 156).

Mr. Luther stated that he had no difference of opinion with Mr. Sparvieri at the time he issued the citation and did not suggest that he was taking his air reading at the wrong place. He confirmed that he has tested for methane at designated BE points, as well as BE points which have to be moved because of lack of physical access. In these instances, he would have to move back 20 to 30 feet to make his tests (Tr. 156-157).

Mr. Luther agreed with the procedure for making air readings as explained by Mr. Endler, and confirmed that he has made tests in this manner. Mr. Luther stated that it was his understanding that 3.3 percent methane at a BE point was acceptable, but found out differently when the citation was issued. He did not ask Mr. Sparvieri why he was issuing the citation (Tr. 158).

MSHA's Rebuttal Testimony

John Kuzar testified that during the 11 years he has been in the district he has never known that 4.0 percent methane was permitted at a bleeder evaluation point (Tr. 160). He stated that during the hearing he telephoned his office and spoke with MSHA Inspector Sam Burnatti concerning the mine ventilation plan on file in his office. Mr. Burnatti reviewed the applicable plan which was in effect at the time the citation was issued. Plan review 25 or 24 was in effect, and Mr. Burnatti reported that the plan specifically stated that 2 percent methane was permitted at a BE point (Tr. 161).

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Referring to exhibit OÄ3, Mr. Kuzar stated as follows (Tr. 161Ä164):

Q. Now, again with your knowledge of this area and trying to concentrate solely on March 16, the day before you issued your citation. We're talking about Mr. Sparvieri's citation. In your opinion, using this map which has been submitted as Operator's Exhibit 3, the area where it's listed as 1.3 methane, is it possible for you to tell from that map whether that would be an acceptable spot to measure under 329, the section that we have been talking about where the split enters the other split?

A. Prior to it entering? Yes, but for the purpose of a B.E. point where it was established, no.

Q. And I would draw your attention to this area which is cave which we have established goes down here. In your experience as a ventilation expert, would it still be possible for air to dilute through that crosscut as we have been talking about here today?

A. Yes, it's possible for air to go over that cave. It depends how tight it is, what have you, the amount, because it's trying to get to return.

Q. Do you consider this to be an adequate spot to measure the air coming off the gob under section 75.329? I am pointing to where it is 1.3 percent.

A. No.

Q. We have heard some suggestions that because the air would have diluted to 1.3 percent at this time the ventilation plan - or the ventilation that was in effect would have been working, would have been effectively diluting the methane. Do you agree with that statement?

A. If they had 1.3 out here as indicated, yes it would be diluting.

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Q. What if they had an area of 3.3 percent here, would that be diluted?

A. No, it's not diluted at this point, where the approved location is for them to evaluate.

Q. And how about where it is 2.5 in the crosscut area? Is that diluted?

A. No, it's over 2.0.

Q. Are there circumstances which could explain the diminution of the percentage other than having proper ventilation in effect? Do you understand what I am asking?

A. That would have reduced it?

Q. Yes.

A. The only thing that could have reduced it - distance would have a bearing on it. And if it was being influenced by this other split of air is the only two things that could have had any bearing on a reduction of the amount of methane from this point to this point. The distance - it's being diluted as it is moving. You have distance here. The same thing down here.

And the reason also, there would probably be some of the methane as indicated here. There was 2.5 here through their readings. So some of this gas was going out this way. So in time if you were to evaluate here, you would not be getting all the methane off of this gob. You are getting it here, but you wouldn't be getting it here because some of the gas is being coursed up this direction. It shows 2.5. And it shows 1.3 here.

Q. So you are saying the fact that 2.5 is there proves that some of the gas is being coursed out?

A. Yes ma'am.

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Q. And is that proper ventilation for this area, for the gas to be coursed out that way?

A. There would be nothing wrong with it. It has to be coursed to return. But the fact remains that they had over 3 percent at this bleeder evaluation point.

Q. So what you're saying is although it may course out that way, you still are not getting an accurate reading of what is off the gob?

A. Back here?

Q. Coming off here, back here, I'm sorry.

A. No. You are not getting it all. You are getting a portion, a portion of it here and portion of it that is going out through here. That is why the B.E. point is inby this corner. You are getting it all.

Mr. Kuzar stated that while he was aware of citations issued for violations of section 75.316 at the time, he was not aware of any other citations for violations of section 75.329 (Tr. 165). He confirmed that prior to the issuance of the citation in this case no one from mine management advised him that the BE point was not an accurate place to measure for air entering another split (Tr. 166).

Mr. Kuzar confirmed that it is MSHA's position that the air must be diluted to the point where there is 2 percent or lower methane by the time the air reaches any bleeder evaluation point in the mine, and that if it is above 2 percent when it reaches the BE point, the respondent would not be in compliance with sections 75.316 and 75.329 (Tr. 170). He confirmed that every approved BE point in the mine is at a location immediately before the air is split. Anywhere where there is a possibility that the air would be diluted or escapes after it passes a BE point is not a valid place for testing. The BE point would be established inby such a location so that there is a true evaluation off the gob area.

Findings and Conclusions

Fact of Violation

The section 104(a) "S & S" Citation No. 2255016, issued in this case by Inspector Sparvieri on March 16, 1984, charges

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the respondent with an alleged violation of mandatory safety standard 30 C.F.R. 75.329, and the condition or practice is described as follows: "3.3% of methane was detected at bleeder evaluation point No. 14. Air sample bottle No. I 1059 (50 cc) was collected at this location. The 3.3% of methane was detected with a MSA M402 hand held methane detector."

30 C.F.R. 75.329, provides in pertinent part as follows:

On or before December 30, 1970, all areas from which pillars have been wholly or partially extracted and abandoned areas, as determined by the Secretary or his authorized representative, shall be ventilated by bleeder entries or by bleeder systems or equivalent means, or be sealed, as determined by the Secretary or his authorized representative. When ventilation of such areas is required, such ventilation shall 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. Air coursed through underground areas from which pillars have been wholly or partially extracted which enters another split of air shall not contain more than 2.0 volume per centum of methane, when tested at the point it enters such other split.

* * * (Emphasis added.)

In Itmann Coal Company, 2 FMSHRC 1986, July 31, 1980, Commission review denied, September 2, 1980, final order September 9, 1980, 1 MSHC 2509, former Commission Judge James A. Laurenson affirmed a violation of section 75.329, based on an inspector's detection of 9 percent methane in an abandoned mine area at a point approximately 1/2 mile inby a point where two splits of air met. Itmann disputed MSHA's contention that section 75.329 requires that when a ventilation system is used in an abandoned area, a two-pronged test must be met: (1) the ventilation system must continuously dilute, render harmless, and carry away methane and other explosive gases; and (2) air from abandoned areas which enters another split of air shall not contain more than 2 percent methane. Itmann contended that section 75.329 should be read as a whole, requiring only one thing; that air from abandoned areas which enters another split of air shall not contain more than 2 percent methane. In rejecting Itmann's contention, Judge Laurenson stated as follows at 2 FMSHRC 2001 and 2003:

The legislative history of section 303(z)(2) of the 1969 Act (75.329) indicates that Congress intended for there to be a two-pronged test regarding ventilation of abandoned areas.

* * *

* * * Just because the percentage of methane is below 2 percent does not mean that an operator has not violated this section of the Act. Even if the percentage of methane in the air from the abandoned (sic) areas which enters another split of air is below 2 percent, the operator violates this section if it has not maintained ventilation "so as continuously to dilute, render harmless, and carry away methane and other explosive gases" in the abandoned area. The legislative history states that this regulation means that "such ventilation will be adequate to insure that no explosive concentrations of methane or other gases will be in this area." Leg.Hist.1969 Act at 1044.

In Christopher Coal Company, decided by former Commission Judge John Cook on October 18, 1976, affirmed by the Commission on October 25, 1978, 1 MSHC 1688, Judge Cook affirmed a violation of section 75.329, based on an inspector's finding 4 percent methane with a detector (5.38 percent bottle sample), at a cement block regulator in a bleeder entry. The inspector also measured the methane in the main return at a location outby the intersection in the bleeder entry such that it represented the content after the bleeder split of air had joined the main return split, and found 1.6 percent methane. The operator contended that section 75.329 does not require that the methane test be taken before the bleeder split of air enters the main return split. In rejecting this argument and affirming the violation, Judge Cook stated in pertinent part as follows:

A plain reading of the regulation makes it apparent that the air which is to be tested is the air which is " * * * coursed through underground areas from which pillars have been wholly or partially extracted * * * ," not a mixture of such air with the main return air. And it is to be tested " * * * at the point it enters such other split," not after it enters the other split.

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.

With regard to the question as to whether the place the inspector performed his methane test satisfied the requirement found in section 75.329 that it be at the point it enters such other split, Judge Cook stated that "It is clear that the test of the bleeder split of air is to be made as close as is reasonably possible to the place where the two splits of air join but before the bleeder air enters the other split." On the facts presented, Judge Cook made the following additional findings:

MESA has proved that the inspector took the readings as close as is reasonably possible. As set forth above the inspector stated that he took the measurements and sample at the regulator because of the turbulence caused by the intersection of the main entry split of air with the bleeder split of air as well as by the regulator itself. He was of the opinion that he took the measurements at the location where they would be most accurate because of the turbulence between that location and the actual intersection of the two entries (Tr. 26-27, 31, 57-58, 65, 71-72). He stated that that measurement would show the methane content in the air current coming out of the bleeder entry (Tr. 30).

The Operator has not challenged the fact that such turbulence existed. In fact the General Superintendent of the Osage Number 3 Mine stated that there could be turbulence within the 13 south entry (the bleeder entry) (Tr. 128).

In support of the inspector, Mr. Elam, a ventilation specialist with MESA, stated that

the point at which the inspector made the methane measurement in this case is the same location that MESA's ventilation people would have been instructed to make the check (Tr. 90). He stated that within the area of the regulator, it is possible to get a fairly accurate volume and methane reading. He described swirls and eddys beyond the area where the measurement was taken, caused by the regulator and by the intersection of the two splits of air (Tr. 92-93).

It is therefore apparent that the inspector took his readings at a location as close as is reasonably possible to the place where the two splits of air join, but before the bleeder air entered the main entry. It does not appear that there are any factors affecting the bleeder air which could decrease its methane content between the place of measurement and the actual physical intersection of the two entries.

* * * * *

In light of the mandate of the federal courts, a narrow, restrictive reading of the Act will not be made. Under the facts in our case, the operator has in effect asserted, among other things, that the tests for methane should have been made at the point where the bleeder entry and the main entry intersect. The problem, however, was that the turbulence in the Osage No. 3 Mine at that point would result in an inaccurate reading (Tr. 27, 31, 34, 55, 61, 62, 63, 65, 91, 93, 102, 108). The inspector made his measurements in what he considered was the "threshold of the splits" (Tr. 70). He made his test at a location which was the point nearest to the place where both splits joined, that he could obtain an accurate measurement (Tr. 26-27).

Consequently since it is apparent that the inspector performed the test of the bleeder split of air at a location which was as close as was reasonably possible to the point where the two splits of air joined, it is found and concluded that MESA has proved by

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a preponderance of the evidence that the Operator violated 30 CFR 75.329 as alleged in the petition herein.

In its posthearing brief, Greenwich agrees that the Itmann Coal Company and Christopher Coal Company decisions are applicable precedents in the case at hand. Greenwich also cites a decision by Judge Melick in Beckley Coal Mining Company, 3 FMSHRC 2593, November 9, 1981, vacating a violation of section 75.329, because of the alleged failure by Beckley to reduce the methane concentration to below 2 percent in a bleeder system crosscut.

In the Beckley case, the inspector measured more than 3 percent methane in a panel from which pillars had been wholly or partially extracted and had been abandoned as a gob area. Four bottle samples were taken and the methane content was 2.71 percent, 2.67 percent, 2.74 percent, and 2.73 percent. The inspector further stated that the air movement was minimal; however, he did not use an anemometer or smoke tube to measure the air movement. The operator disagreed with the inspector's evaluation of the air movement, and the next day simulated the same conditions as the inspector found, then conducted a smoke tube test. The released smoke moved out of the crosscut and into the bleeder.

In dismissing the violation, Judge Melick stated that the question of whether a violation of section 75.329 exists depends on the adequacy of the ventilation system, and not solely upon the levels of methane found in any particular crosscut. The test applied by Judge Melick was whether the ventilation system is being "maintained so as to continuously dilute, render harmless and carry away methane." He concluded that the only evidence to suggest the inadequacy of the ventilation system was the one time series of methane readings showing a non-explosive 2 percent to 3 percent methane concentration and the inspector's opinion that there was no perceptible movement of air.

Greenwich submits that no violation of section 75.329 occurred based upon the methane levels detected on March 16, 1984. Greenwich asserts that it had a reading of 1.3 percent methane at the mixing point-less than the violative 2 percent - and a reading of 3.3 percent at bleeder evaluation point No. 14 - less than the violative 5 percent explosive range, and that MSHA has presented no credible evidence that Greenwich violated section 75.329 by failing to maintain its ventilation so as to "continuously dilute, render harmless and carry away methane and other explosive gases" and "to

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protect the active workings of the mine from the hazards of such methane and other explosive gases."

Greenwich concludes that its testimony demonstrated that the ventilation in the vicinity of bleeder evaluation point No. 14 was acting properly and in compliance with section 75.329, and that the ventilation there was in fact diluting, rendering harmless and carrying away methane as evidence by the 1.3 percent reading at the mixing point.

MSHA did not file a posthearing brief in this case. However, during oral argument presented at the close of the testimony, MSHA's counsel agreed that the cases cited by Greenwich, including the two-prong test enunciated in those decisions, would apply in any determination as to whether Greenwich has violated section 75.329.

MSHA argues that the legislative intent of section 75.329, is to preclude the build-up of explosive range of methane in abandoned gob areas. MSHA also agrees that section 75.329 requires the mine ventilation to be maintained so as to continuously dilute, render harmless, and carry away methane and other explosive gases from such areas. MSHA also agrees that the 2 percent methane requirement found in section 75.329, is an additional precautionary provision to insure against methane above that level finding its way into another air split where the air coming off the gob enters that other split.

MSHA asserts that on the facts of this case, the bleeder evaluation point is the most accurate location for the taking of methane tests, and that Greenwich has offered no evidence to establish that its 1.3 percent methane reading at the mixing point was not affected by air turbulence from the main return. MSHA finds "a problem" with the crosscut immediately outby the bleeder evaluation point, and states that credible testimony from its witnesses reflects that the crosscut itself could have diluted the air directly off the gob. Citing the Christopher Coal Company case, MSHA agrees that the methane test should be made as close as reasonable possible to the point where the two splits of air joined in this case. Since accuracy is important, MSHA asserts that section 75.329, should be liberally construed to insure that any air coming off the gob was not a dangerous percentage. Since bleeder evaluation point 14 was located directly before the crosscut in question, MSHA believes that the evaluation point is the most accurate place to test for methane. Assuming that I find otherwise, MSHA argues in the alternative that the ventilation

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was not maintained so as to continuously dilute the methane coming off the gob.

With regard to Greenwich's reliance on the Beckley Coal Mining Company case, MSHA asserts that it is distinguishable from the fact presented here, notwithstanding Greenwich's arguments that 3.26 percent and .4 percent methane readings are not in the "explosive range." MSHA points out that Greenwich conceded that 3 percent methane would cause them concern, and that the mine had experienced a prior explosion, and that it was "obviously" experiencing problems with methane and its ventilation.

Greenwich argues that the mixing point for bleeder evaluation No. 14 was at the point shown on exhibit OÄ3, as indicated by its 1.3 percent methane reading. MSHA's ventilation specialist Kuzar agreed that this was the location where the air coming off the gob would meet with the air coming off the split from the main return (Tr. 96, exhibit OÄ1). He also agreed that this location would be an acceptable spot to measure the methane pursuant to section 75.329 prior to the air entering the other split. Mr. Kuzar conceded that the 1.3 percent methane reading at that location would indicate that the ventilation was working effectively to dilute the methane. He also agreed that the 2.5 percent methane reading at the location immediately outby the 1.5 percent reading proves that the methane is being coursed out of the area to the return and he stated that "there would be nothing wrong" with doing it that way.

Mr. Kuzar's disagreement lies in the fact that he believes the proper location to test the air for methane before it reached the mixing point and entered the return split was at the established bleeder evaluation point No. 14, which in this case was located approximately 70 feet from the mixing point spot claimed by Greenwich where it found 1.3 percent methane, and inby the point where 2.5 percent methane was found. Since the methane found at the bleeder evaluation point was over 3.0 percent, Mr. Kuzar questioned the accuracy of Greenwich's readings with respect to the air coming off the gob because he believed that some of it was escaping down the crosscut immediately outby the evaluation point.

Mr. Kuzar confirmed that MSHA has no written policy or procedure concerning where to test for methane pursuant to section 75.329, and he did not know for a fact that Greenwich's ventilation plan required that all bleeder evaluation points have methane readings of 2 percent or less. Mr. Kuzar confirmed that MSHA's district No. 2 oral policy is

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that the proper place to test for methane would be inby bleeder evaluation point No. 14 where the total air coming off the gob is not influenced by other air currents before it enters another split. Mr. Kuzar conceded that the 1.2 percent methane reading made by Greenwich at the locations shown on exhibits OÄ1 and OÄ3, would place it in compliance with section 75.329 at that location, but not at the bleeder evaluation point No. 14 where 3.3 percent methane was detected. Had Greenwich tested only at the location where it found 1.2 percent methane, Mr. Kuzar believed that it would be in violation of section 75.316 for not testing at the designated evaluation point.

In this case, MSHA has presented no credible evidence to establish that the air located at the mixing point as defined by Greenwich where it found 1.3 percent methane was influenced by air currents off the main return or by turbulence or swirling prior to it leaving the bleeder and joining with the return air. Inspector Sparvieri made his methane test at bleeder evaluation No. 14 which was approximately 70 to 100 feet inby the mixing point. He made a smoke tube test at the bleeder point to determine whether there was any turbulence or swirling at that location, but made no tests outby that location at or near the mixing point. It seems obvious to me that the inspector's failure to test the air at the mixing point was because he believed the bleeder location was the proper place to test. In fact, Mr. Sparvieri stated that even if the test had been made at a location 50 feet before the air entered the split, if the test location were not a bleeder evaluation point, the test would not comply with section 75.329. He also stated that he would not accept any test made at locations other than bleeder evaluation points as compliance even if the air mixing point were 150 to 500 feet outby the bleeder point. Mr. Sparvieri's arbitrary assumptions and conclusions that all of the air outby a bleeder evaluation point for purposes of accuracy and compliance with section 75.329, are rejected.

Inspector Sparvieri conceded that at the time he issued the citation he was not a ventilation specialist, was unfamiliar with the mine ventilation system, was not sure how the gob area was being ventilated, did not know whether the gob area had experienced prior ventilation problems, and that he could not determine what areas of the mine could be affected by the methane which he found. He conceded that the explosive range of methane is 5 percent to 15 percent, and there is no evidence that he detected those levels in this case. Although he indicated that the air movement at the vicinity of bleeder evaluation point 14 where he detected 3.3 percent methane was

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"slight," he confirmed that a smoke test over a 10-foot distance in that area reflected air movement at 1,311 cubic feet a minute, and that the released smoke was travelling outby that area in the proper direction.

Inspector Sparvieri made his initial methane reading at bleeder evaluation point 14, and he detected 3.35 percent methane. Readings taken by Greenwich's representative detected methane between 2.9 percent and 3.18 percent. Inspector Sparvieri then proceeded inby the evaluation point for approximately 50 feet, and after 4 percent methane, he proceeded no further. Readings taken by Greenwich outby the evaluation point reflected 2.5 percent, 1.3 percent, and .4 percent. Inspector Sparvieri could not recall taking and readings outby the evaluation point.

Respondent's witness Endler testified that based on Greenwich's methane readings which indicated decreasing levels of methane outby the bleeder evaluation point up to and including the mixing point before the air entered the return split, the mine ventilation system was doing the job of diluting, rendering harmless, and carrying away any methane from the gob. He pointed out that the methane in the outby areas was only .4 percent and that 27,000 CFM's of air was coming down the main return.

Mr. Endler stated that the crosscut immediately outby bleeder evaluation point 14 was not an open entry, and that all of the coal had been pillared and extracted from the area and that it had caved. Rocks were across the entry and it could not be travelled. He conceded that the caved area was not "air tight" and that it was possible for some of the air to find its way into the area before reaching the mixing point. However, he indicated that the air is supposed to filter through the caved area to dilute any methane which may be present, but that the majority went to the return. He believed that the 1.3 percent methane reading at the mixing point resulted from the 1,311 CFM air current diluting the methane as it coursed its way to the main return, and that the air from the return did not affect that reading because it was made inby the split location where the air dumped into the return.

Mr. Endler also testified as to the procedures he had always followed in making his methane tests at air mixing points pursuant to section 75.329, and to insure against any possible inaccuracies caused by air turbulence or swirling. He indicated that he used the described procedure, and instructed his foremen to do the same, on the basis of oral

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instructions received from MSHA supervisory and ventilation personnel. MSHA has not rebutted this testimony, and after viewing Mr. Endler on the stand during the course of the hearing, I find his testimony to be credible.

MSHA has not established by any credible evidence that the applicable mine ventilation plan requires that all bleeder evaluation points have methane readings below 2 percent, nor do I find any provision that mandates that bleeder evaluation points are the only acceptable locations for conducting methane tests to insure compliance with the requirement of section 75.329 that air leaving the gob and entering another split of air contain less than 2 percent methane.

After careful consideration of all of the evidence and testimony adduced in these proceedings, including the arguments advanced by the parties in support of their respective position, I conclude and find that Greenwich has the better part of the argument that it was in compliance with section 75.329, and that MSHA has failed to establish a violation by a preponderance of the evidence of record.

I conclude and find that Greenwich has established through the credible testimony of its witnesses that the air being coursed away from the gob area in its proper direction to the return and out of the mine was in fact decreasing the amount of non-explosive methane being ventilated through the gob area. I also conclude and find that MSHA has not established through any credible evidence that Greenwich's ventilation system was not being maintained so as to continuously dilute, render harmless and carry away explosive levels of methane and other explosive gases.

I conclude and find that Greenwich's methane test at the mixing point reflected in exhibits OÄ1 and OÄ3, where the methane was at a 1.3 percent level, was a reasonable and proper place to take the test to insure compliance with section 75.329, and that MSHA has not established through any credible evidence that the air was otherwise diluted or disturbed by a turbulence or swirling, or that Greenwich's methane test was unreliable or inaccurate. Since the test was at a point before the air off the bleeder joined with the air off the return, and indicated 1.3 percent methane, which is below the 2 percent mandated by section 75.329, I further conclude and find that Greenwich was in compliance with that standard.

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In view of the foregoing findings and conclusions, Greenwich's Contest IS GRANTED, and the contested section 104(a) Citation No. 2255016, issued on March 16, 1984, IS VACATED, and MSHA's civil penalty proposal IS DISMISSED.

George A. Koutras
Administrative Law Judge