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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

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| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>PETITIONER | CIVIL PENALTY PROCEEDING<br><br>Docket No. PENN 85-204<br>A.C. No. 36-02405-03596 |
| v. | Greenwich No. 1 Mine |
| GREENWICH COLLIERIES,<br>DIVISION OF PENNSYLVANIA<br>MINES CORPORATION,<br>RESPONDENT | |
| GREENWICH COLLIERIES,<br>DIVISION OF PENNSYLVANIA<br>MINES CORPORATION,<br>CONTESTANT | CONTEST PROCEEDING<br><br>Docket No. PENN 85-114-R<br>Order No. 2255733-01; 1/17/85 |
| v. | Greenwich No. 1 Mine |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>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 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. 75.316, as stated in a section 104(a) Citation No. 2255733, with special

"significant and substantial" (S & S) findings, issued by an MSHA inspector on January 16, 1985. The citation was subsequently modified by the inspector on January 17, 1986, to a section 104(d)(2) Order No. 2255733Ä01. The contest was filed by the contestant to challenge the legality of the order.

The cases were consolidated for hearing, and the parties appeared and participated fully therein. Greenwich filed a posthearing brief, but MSHA did not. However, I have considered its oral arguments made during the hearing.

## 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, whether the alleged violation was "significant and substantial," and whether it constitutes an "unwarrantable failure" by the contestant to comply with the requirements of the standard in question. Additional issues raised by the parties are identified and disposed of in the course of these decisions, including an appropriate civil penalty assessment for the violation in question.

## Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95Ä165, 30 U.S.C. 801 et seq.

2. Commission Rules, 29 C.F.R. 2700.1 et seq.

## Stipulations

1. The Greenwich No. 1 Mine is owned and operated by the respondent/contestant Greenwich Collieries.

2. Greenwich Collieries and the No. 1 Mine are subject to the Act.

3. The presiding administrative law judge has jurisdiction to hear and decide these cases.

4. The subject order 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. Mine production for the No. 1 Mine is approximately 877,000 tons annually. 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.

9. The 104(d) "chain" is properly established in that no intervening "clean" mine inspections took place immediately preceding the issuance of the subject contested section 104(d)(2) order.

MSHA's Testimony and Evidence

MSHA Inspector Samuel Brunatti stated that he is a ventilation specialist, and he testified as to his experience and training. He confirmed that he issued a section 104(a) Citation No. 2255733, on January 16, 1985, but that the conditions cited were previously observed by him when he was at the mine on January 10, 1985. He explained that his supervisor instructed him to go to the DÄ9 area of the mine during the midnightÄtoÄ8:00 a.m. shift on January 10, to examine the area. The mine had experienced a large methane accumulation and miners were withdrawn when he arrived at the mine.

Mr. Brunatti identified exhibit GÄ2, as a copy of a portion of the mine map depicting the area in question and he confirmed that he made notations on the map on January 10, depicting the direction of air flow, and his air and methane readings. He confirmed that he determined the direction of air flow by means of a smoke test and observation (Tr. 17Ä23).

Mr. Brunatti confirmed that when he was at the mine on January 10, there was no methane accumulation and he indicated that he complimented the company for the job they did in clearing away the methane which prompted the withdrawal of miners. He confirmed the prior methane accumulation by reviewing the mine examiner and foreman books (Tr. 24). He also confirmed that he issued no citations or orders on January 10, and that he was at the mine in his capacity as the resident inspector and was not at that time a ventilation specialist. He also confirmed that he did not have the appropriate ventilation plan with him on January 10, and had no knowledge of the ventilation system (Tr. 24).

Mr. Brunatti stated that after completion of his inspection on January 10, his supervisor was concerned about the methane incident and he asked to review his notes. After a discussion with his supervisor and a review of his notes and the appropriate ventilation plans, it was determined that the conditions he observed on January 10, with regard to the direction of the air flow constituted a violation of the plan (Tr. 25).

Mr. Brunatti identified exhibit GÄ3 as the ventilation plan for the DÄ9 area in question, which was approved by MSHA on June 7, 1985. Exhibit GÄ3(a) is the August 1, 1984, plan for ventilating the active section while producing coal, and the direction of air flow over the gob into the bleeder entries, and to the return. Both plan provisions are applicable in this case, and the June 7, provisions in no way changed the requirements of the plan reviewed on August 1 (Tr. 26).

Mr. Brunatti explained the ventilation plan requirements for maintaining the direction of air flow over the cited DÄ9 area of the mine. He confirmed that the conditions he observed on January 10, which he noted on exhibit GÄ2, reflect that the air ventilating the section was escaping out of the return instead of putting pressure on the gob area, thus creating, in his opinion, a methane build-up in the back end of the gob area. It was his view that had all of the available ventilation air been placed on the gob, and had proper air pressure been maintained on the gob, the methane build-up previously experienced would not have occurred. He confirmed that he issued the citation because the air flow was misdirected in violation of the ventilation plan because in two of the three entries in the area, air was travelling inby, when in fact the plan depicts the air flowing outby.

In support of the violation, Mr. Brunatti stated that the ventilation plan provision shown on the second page of exhibit GÄ3, at the upper left-hand corner, depicts a double arrow pointing to the top of the page indicating the direction of air flow over the gob and exiting at the point marked BE #58, which is the evaluation point for checking methane liberation and air flow. At that point, the air then travels down the three entries in the direction of the three double arrows shown on the diagram and out the return. In contrast to these required air directions, on January 10, he found that the air was travelling down the number one entry, but in the opposite direction in the adjacent two entries (Tr. 27Ä33).

Mr. Brunatti confirmed that the section 104(a) citation issued on January 16, was subsequently modified to a section 104(d)(2) order the next day. He confirmed that it was modified after some discussion with his supervisor, but that he (Brunatti) made the decision to modify the citation to an order. Mr. Brunatti stated that his notes for January 16, reflect a conversation with company safety representative DeSalvo and mine foreman Richard Endler, during which they stated that they believed that the direction of air flow as found by Mr. Brunatti on January 10, was the way it was depicted on the ventilation plan, but was contrary to the way the company engineer submitted it on the plan. Mr. Brunatti stated that mine management was ventilating the section one way, but that the plan submitted by the engineer indicated ventilation in a different way. Mr. Brunatti stated further that he had the "impression" that Mr. DeSalvo and Mr. Endler were aware of the fact that the direction of air on January 10, was different from that shown on the submitted plan, but he conceded that he could not confirm that they had actual knowledge of the plan requirements until he later called it to their attention (Tr. 36).

Mr. Brunatti confirmed that the No. 1 Mine is on a section 103(i) 5Äday spot inspection status because it has a history of methane ignition, and that an explosion occurred at the mine in February or January of 1984, resulting in the death of three miners. The explosion was the result of an accumulation of methane (Tr. 37).

Mr. Brunatti confirmed that at the time he issued the initial citation on January 16, he marked the citation form to reflect "moderate negligence," and that he did so because "I wasn't really aware of all that was involved, you know, as far as the ventilation changes I'm sure" (Tr. 37). He also stated that he was influenced by the fact that the company had withdrawn the miners and had done a fine job in correcting the methane problem. He later realized that mine management should have been aware of the ventilation plan requirements (Tr. 38).

Mr. Brunatti stated that the ventilation plan is designed to prevent methane accumulations, and that "what could happen here is a methane gas explosion." If the cited condition were left uncorrected, he believed it was highly likely that an explosion would have occurred because the area was a pillar area where the roof is constantly falling, and sparks from a roof fall would be an ignition source to ignite the methane. He conceded that he had no knowledge of any such ignitions from roof falls in the mine in question, but was aware of such

an occurrence in another mine (Tr. 40). Mr. Brunatti confirmed that he indicated on the citation form that one miner would be affected by a methane explosion because the area where the air was misdirected was an outby area which was not in an active working section (Tr. 39). He also conceded that while the mine has experienced numerous roof falls, they are planned falls connected with pillar recovery and the "majority probably weren't violations" (Tr. 44). He pointed out, however, that the cited area was only required to be examined once a week, and it was an area that was "coming off the gob" (Tr. 45).

Mr. Brunatti stated that the mine had experienced problems in ventilating other gob areas, and that this was a contributing factor to the explosion which previously occurred. He also indicated that had an explosion occurred in the instant case, "the whole working section" would have been affected because it was in close proximity to the cited area (Tr. 46).

On cross-examination, Mr. Brunatti confirmed that at the time he inspected the mine on January 10, and issued the citation on January 16, 1985, he was not a ventilation specialist, and that the citation was issued as part of a regular mine inspection (Tr. 48). He stated that he was the resident inspector at the mine, and that he was at the mine during the period from January 10 to January 16, but was not in the DÄ9 section (Tr. 53). He confirmed that while at the mine on January 16, he did not conduct an inspection of the DÄ9 section, and simply issued the citation on the basis of the information that he had previously compiled when he was there on January 10 (Tr. 54). The conditions described in the citation were conditions which existed on January 10, and not on January 16, and he did not know what the ventilation conditions were on January 16 (Tr. 56).

Mr. Brunatti stated that the methane accumulation on January 9, 1985, was 4.2 percent, and that he confirmed this information from a review of the mine books for that day. He confirmed that he commended mine management for their reaction to the methane accumulation and for the steps taken to protect the miners, and respondent's counsel confirmed that the miners were voluntarily withdrawn by mine management, and that management contacted MSHA and the appropriate state agency. Counsel also asserted that at the time Mr. Brunatti was at the mine on January 10, the methane had been dissipated and the mine was back in production (Tr. 59).

Mr. Brunatti stated that he took methane readings on the morning of January 10, and detected no methane levels which were in violation of the regulations. The mine was in compliance with the methane requirements, even though the ventilation air was flowing in the wrong direction (Tr. 62). However, Mr. Brunatti believed that the prior methane reading of 4.2. recorded in the mine books on January 9, was caused by the air being coursed in the wrong direction, and that the condition was corrected by making some adjustments to the ventilation system (Tr. 63).

Mr. Brunatti stated that the ideal ventilation for any mine is to insure the maintenance of air pressure on the gob area so that the majority of air is coursed to the gob. In the instant case, the majority of air was escaping outby, and only a minimal amount was coursed to the gob to dilute any methane which may have been present. Since methane concentrations and liberation change because of roof falls or other conditions, the ventilation plan is intended to control these events (Tr. 64). Referring to exhibit GÄ2, Mr. Brunatti explained the desirable and required methods for ventilating the right and left entries while they were partially and fully developed (Tr. 66Ä71).

Mr. Brunatti confirmed that when he was at the mine on January 10, certain changes had been made to the ventilation system, but he still had a problem with the direction of the air flow. However, he stated that "at that time, I wasn't aware that it was a problem" (Tr. 73). He confirmed that during the period between January 10 through 17, he was not aware of any additional methane build-up in the gob at the back of the DÄ9 area, even with the ventilation air flow as he found it (Tr. 73).

Mr. Brunatti confirmed that when he issued the citation on January 16, he marked the "negligence block" on the form as "moderate," and when he subsequently modified the citation to a section 104(d)(2) order on January 17, he did not change his negligence finding (Tr. 72). He testified that he did not believe that the company was indifferent to the requirements of the cited mandatory standard, but felt that there may have been a miscommunication between mine management and the company engineer with respect to the ventilation plan which had been submitted, and with respect to the actual ventilation in the area in question (Tr. 74).

Mr. Brunatti stated that he did not believe that the violation in question resulted from the company's willful intent to violate the law, or that it resulted from a serious

lack of reasonable care on the part of the company (Tr. 74). He confirmed that he modified the citation to an order after discussing the matter with his supervisor (Mr. Baesinger), and he explained the reasons for his action as follows (Tr. 75Ä76):

> A. But basically, we discussed the ventilating system, the type of changes that were made which caused the air to flow in the wrong direction. And it was determined that mine management had to be directly involved in that.
>
> I mean, to say this could have occurred without them knowing, or should have knowing, however you want to say it--well, it just couldn't. You know, the company is responsible--mine management is responsible for ventilation and installing or removing ventilation controls from the ventilating system.

Mr. Brunatti confirmed that the ventilation plan "Review No. 26" as depicted on the first page of exhibit GÄ3, was not applicable at the time of the violation, and that plan "Review No. 25," exhibit GÄ3(a), is the applicable plan provision in this case (Tr. 79Ä80). MSHA's counsel stated that the plan requirements as depicted in both exhibits were essentially the same requirements, and that exhibit GÄ3 had not modified exhibit GÄ3(a) in any way for the purpose of the DÄ9 section of the mine (Tr. 80).

In response to further questions, Mr. Brunatti stated that his notes made on January 16, 1985, (exhibit GÄ4), confirm that mine management agreed with his observations that the air was being coursed in the wrong direction, and that there may have been miscommunication among those management people who were in charge of the ventilation system. He also stated that it is reasonable to expect a mine foreman to check to see what the ventilation should be for a particular mine section and to know what the plan provides in this regard. He also believed it was reasonable for those who designed the system to communicate with the foreman concerning the plan provisions (Tr. 82).

Mr. Brunatti explained the extent to which the cited area in question had been developed when he went to the mine on January 10, and he explained why the air should have been directed in the manner that he required as follows (Tr. 86):

> Good ventilation is, you put the majority of your air or positive pressure on your gob, with just leaving a little bit amount to ventilate that section return to keep whatever little bit of methane is being liberated in that area off the ribs.
>
> Positive pressure on the gob reduces the methane and dilutes it and renders it harmless, taking it into the bleeder entries to return to the fan and out of the mine, and keeping it below an explosion mixture.

Mr. Brunatti stated that when he went to the mine on January 10, he was there to determined whether the large accumulation of methane still existed. When he determined that it did not, he stated that "I was done with what I was sent there to do" (Tr. 92). Although he made a determination as to the direction of the air used to ventilate the area in question, he did not at that time know whether it was right or wrong, but later made this determination a day before he issued the citation on January 16, after he and his supervisor reviewed the ventilation plan and determined that a violation had occurred on January 10 (Tr. 93; 96Ä97). When asked to explain the basis for his conclusion that the misdirected air caused 4.2. methane accumulation on January 9, but did not cause any accumulations on January 10, he replied in pertinent part as follows (Tr. 94): "I base that on some of my experience in and around the mine, based on other conditions of that air, the system ventilating that area. * * * I don't feel that the ventilating system was rendering the methane constantly harmless."

Mr. Brunatti confirmed that even though miners were withdrawn as the result of the 4.2 methane accumulation on January 9, MSHA did not conduct any investigation to determine the cause for this amount of methane. In his opinion, the high methane level was caused by inadequate ventilation, and the misdirected air was one contributing factor (Tr. 95). He confirmed that even though adjustments were made to the ventilation system to dissipate the prior 4.2 level of methane, the continued misdirection of air did not result in unusual or illegal methane accumulations (Tr. 96).

Mr. Brunatti stated that while the misdirected air condition which he found on January 10, was "questionable," he could not remember whether he discussed the condition with mine management at that time (Tr. 98). He conceded that had

his supervisor not raised a question concerning the ventilation, it was "very possible" that the citation would not have been issued (Tr. 97). He reiterated that on January 10, he made no determination that the direction of the air was in violation of the ventilation plan (Tr. 98).

Mr. Brunatti stated that he had no knowledge as to how the cited condition was abated because another MSHA inspector terminated the order (Tr. 112). MSHA's counsel stated that the order was terminated by MSHA Inspector Carl Sensibal on January 21, 1985 (exhibit GÄ1), and the termination reads "as determined with a chemical smoke cloud the air is now travelling in its proper course (outby). Ventilation adjustments were made to assure proper air flow direction through the affected bleeder entry in the DÄ9 butt area" (Tr. 113, exhibit GÄ1).

Respondent' Testimony and Evidence

Richard Endler, mine foreman, testified as to his duties and experience, (Tr. 117Ä121). He stated that he has taken several training courses in mine ventilation and that he participates in the preparation and approval of the company's 6Ämonth ventilation plans submitted to Federal and state agencies. He confirmed that at the time of the violation, plan "review 25" was in effect, and that he participated in the preparation and approval of that plan (Tr. 122).

Referring to several exhibit overlays which were projected on a screen in the courtroom, Mr. Endler explained the projected mining for the DÄ9 area at the time of the violation, the applicable ventilation plan provisions, the projected method for developing the entries, the intended direction of air through the areas in question, and the operation of the ventilation system (Tr. 125Ä133; exhibits OÄ2 through OÄ8).

Mr. Endler disagreed with Inspector Brunatti's interpretation of the applicable ventilation plan, and insisted that the direction of the air on January 10, was exactly the way the applicable plan "review 25" (exhibit GÄ3(a)) was submitted and approved. That plan shows the air going up both entries in the completed first butt heading that had been driven. Mr. Endler explained that Mr. Brunatti believed that the arrow depicted in the upper left-hand corner of the plan sketch depicted air flow down through all three entries, but Mr. Endler could find nothing in the plan supporting Mr. Brunatti's interpretation. Mr. Endler stated that no changes were made in the ventilation depicted in the plan in question which would have resulted in the air flowing down all

three entries as interpreted by Mr. Brunatti. Contrary to Mr. Brunatti's interpretation, Mr. Endler insisted that plan "review 25" and exhibit OÄ2 depict the air going up two entries and down the third one, and that this was precisely how it was directed on January 10, when Mr. Brunatti tested it. Mr. Endler believed that the dispute lies in the fact that Mr. Brunatti believed the arrow at the top left-hand corner of "review 25" reflects that the air should go down all three entries (Tr. 135Ä137).

Mr. Endler explained that in the development of a section, three entries are driven, and the belt is always the middle entry. He explained that air is always going up the middle belt entry, as well as up the right-hand entry, and then down the left-hand entry. Any changes in the direction of the air flow could only be made by submitting them to MSHA for approval. He finds nothing in plan "review 25" to indicate any change in the direction of air down all three entries (Tr. 146Ä148).

Mr. Endler confirmed that the order was terminated after changes in the air flow direction were made to comply with Mr. Brunatti's requirements, and he identified exhibit OÄ8 as the plan revision accepted by MSHA as part of "review 25." He confirmed that at the time the order was issued, Mr. Brunatti believed the direction of air flow should have been as shown in the plan revision submitted to terminate the order, and had it been that way, no citation would have been issued (Tr. 148Ä151).

On cross-examination, Mr. Endler stated that exhibit OÄ2 was submitted as part of the ventilation plan to depict how the mining of the area would be developed, and that it does not basically reflect how a gob area should be ventilated during retreat mining (Tr. 156Ä157). He confirmed that "review 25," exhibit GÄ3(a), reflects how a gob area should be ventilated. He explained that air would be directed up and across the gob area by means of regulators and restricting the area on the return by use of canvass which forces the air through the holes that are created. He confirmed that at the time the violation was observed by Mr. Brunatti, retreat mining was taking place in the cited area in question (Tr. 157Ä158).

Mr. Endler stated that the air in the back-end of the DÄ9 area was being coursed in the direction depicted on "review 25." He stated that Mr. Brunatti was concerned about the direction of air flow in the adjacent panel that had been driven, and that he did in fact determine that it was being

coursed up two entries and down the third entry, but believed that it should have been coursed down all three entries as shown in the print submitted to abate the order, (exhibit OÄ8; Tr. 160Ä161).

In response to additional questions, Mr. Endler confirmed that at the time the citation was issued he and representatives of the company safety department discussed the plan provision found in "review 25" with Mr. Brunatti, and that there was disagreement between the company and Mr. Brunatti as to the significance of the arrow shown in the plan. His testimony in this regard is as follows (Tr. 165Ä171):

* * * * * * * *

And I argued with Mr. Brunatti that that arrow, to me, didn't designate that that air was supposed to come down all three entries. And he argued back that it meant that it was.

And naturally, they have more clout than what I have, so the violation was issued. I lost my case on that. But that arrow, to me, still does not depict air flow in the adjacent panel. No matter how many times I look at it, I can't visualize how that depicts air flow down the other three entries.

JUDGE KOUTRAS: Well, where would the air go, after it--with all these stoppings in place here, then?

THE WITNESS: The air would go out the single entry on the far left-hand side.

* * * As far as I'm concerned, the air, with the ventilation that I know that we had in there, the air would travel across these two entries and proceed down the single entry.

* * * * * * * *

JUDGE KOUTRAS: Okay. And where did the inspector say that that would go?

THE WITNESS: The inspector said that it meant that air was supposed to go down this entry.

JUDGE KOUTRAS: And you're saying, no, it just goes across the top, because you have air coming up there?

THE WITNESS: Yes.

JUDGE KOUTRAS: And he said the air coming up there was not in compliance with your plan?

THE WITNESS: Yes, he did.

JUDGE KOUTRAS: And what did he base that on?

THE WITNESS: His opinion.

*  *  *  *  *  *  *  *

THE WITNESS: Okay, Once these connections were made at the top, these two crosscuts were put through up at the top, then you could change the air around. But we did not have a plan submitted in Review 25 that would have permitted me to turn that air around in them other two entries. I had to keep that air going that way.

JUDGE KOUTRAS: Again, on the 10th, how was the air going in the air that he cited?

THE WITNESS: It was going up the two entries.

JUDGE KOUTRAS: Okay. No dispute about that.

THE WITNESS: No.

JUDGE KOUTRAS: And that's the way you intended it to go?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: And that's the way your plan intended it to go?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: And the dispute is that the inspector says, "You're right, the air's going that way, but under your plan it should be going in the other direction?"

THE WITNESS: That's right.

JUDGE KOUTRAS: And you claim that that was never the intent?

THE WITNESS: No.

JUDGE KOUTRAS: And that that arrow at the top only--

THE WITNESS: That arrow at the top only denotes air flow from the gob as proceeding out through these other two crosscuts at the top. It shows a movement at the back of the gob to the adjacent entries that we had driven up. That's all that arrow shows to me.

JUDGE KOUTRAS: How is the present plan now? You still have the arrow at the top?
(Pause.)

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: What's the difference between the arrow at the top now under this plan and the way it was on this other one, prior to the citation?

THE WITNESS: These two arrows coming down the other two entries. That's the difference. We changed the air around to bring the air--all of the air that was coming through the gob now came down these three entries and ventilated this back here. Prior to that, I had this air that was coming out here going up these two entries, as per the plan.

JUDGE KOUTRAS: What have you accomplished now that you didn't have before, from your point of view, in terms of ventilation?

THE WITNESS: The ventilation is still the same, as far as I'm concerned. I still have the same amount of air. I didn't really change any--

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JUDGE KOUTRAS: Do you feel that the inspector actually believed that your accumulation--that your methane problem that you had that caused the withdrawal of miners was due to the fact that you weren't ventilating this area in the manner in which he felt your plan required it to be ventilated?

THE WITNESS: No, I don't believe that's why it occurred.

JUDGE KOUTRAS: Do you get the impression that's why he issued the citation in this case?

THE WITNESS: Yes, sir--

JUDGE KOUTRAS: Did he tell you that?

THE WITNESS: No--maybe, you know. It's possible that that discussion came up.

*  *  *  *  *  *  *

JUDGE KOUTRAS: Well, can I ask you something? When this thing was submitted, GÄ3A was submitted, why wasn't it as explicit as it is--as it was made after it was--

THE WITNESS: I--

JUDGE KOUTRAS: Do you have any idea?

THE WITNESS: No. I mean, it was just drawing the depicted air flow at the back-end of that gob. It didn't intend to show air flow in the adjacent panel that was already driven, because we had already shown how that was going to be ventilated with the prior print, that showed the air going up those two entries and down the outside one. And really, all that is showing is, the air that's coming through the gob being carried away down the other entry, the outside entry.

MR. KOSEK: Your Honor, if I might--

JUDGE KOUTRAS: Yes?

> MR. KOSEK:--the reason we made the submission was so we wouldn't get any more violations. I don't know that Mr. Endler would necessarily agree with that submission. But obviously, in order to terminate the violation, that's what we did.

MSHA's Rebuttal Testimony

John A. Kuzar, MSHA Hastings, Pennsylvania, Field Office Supervisor, testified as to his experience and background, including 6 years as a ventilation specialist, and 3 years as a mine inspector. He confirmed that he was not at the mine in question when the citation and order was issued, and that he last visited the mine sometime in 1982 (Tr. 174Ä176). He also confirmed that he has no supervision over the No. 1 Mine, but does supervise the inspections of the No. 2 Mine (Tr. 178).

Mr. Kuzar confirmed that while he familiarized himself with plan "review 25" during the 2 days of hearings, he was not familiar with the plan in 1985 when the citation and order were issued (Tr. 179). MSHA's counsel conceded that Mr. Kuzar had no personal knowledge as to what prompted Inspector Brunatti to issue the citation (Tr. 181).

Referring to the right-hand portion of the sketch depicting plan "revision 25," exhibit GÄ3(a), Mr. Kuzar described it as follows (Tr. 182Ä183):

> A. This face print that is in front of me right now shows a retreating--first of all, it shows a bleeder system established around this gob. Okay? It shows--it says, "BE," but in reality, it's an IE.
>
> It's a retreating inlet evaluation point to assure that you've got positive pressure on the inby end of this gob, which in turn--this is a bleeder system around the top.
>
> You must maintain a bleeder around the gob area to assure positive pressure on the gob, and all the gases are diluted and swept out to the return pull to the fan. Now, as far as what I'm seeing right here, this looks all right.
>
> But over here, on the other side--

Q. Okay, Now, you were pointing originally to the right side.

A. Yes, ma'am.
Q. Now, you're pointing over the left side?

A. That is correct, which is the table off the diagram. This is where the problem is, I guess, with which way the air was supposedly going.

*  *  *  *  *  *  *

THE WITNESS: If there was a regulator there--which I do not know--and the regulator was controlled, yes, it would shove air up there. But if it was open, what it would be would be a direct short to the return.

The problem we're addressing here is the fact of 316 being direction of air flow or what have you, where you have more of a problem that apparently this had occurred, or the mine wouldn't have been withdrawn.

It is 329, in which 329 states that gob areas--bleeder entries shall be ventilated in such a manner to prevent any of this occurring, any of this methane gas being pushed back out.

When asked about the hazard presented by ventilating the cited area in the manner in which it was being ventilated at the time the citation issued, Mr. Kuzar responded "I wasn't there. I don't know" (Tr. 188). He then proceeded to explain "You have the possibility of that methane coming back over that equipment, that section that was working" (Tr. 192). In response to further questions, he stated as follows (Tr. 193Ä197):

JUDGE KOUTRAS: What's the significance of that arrow at the top of the page there that seems to be the focal point?

THE WITNESS: This arrow?

JUDGE KOUTRAS: Yes?

THE WITNESS: This arrow here shows me everything going to return through my bleeder entries, across the top. It shows me going--because, what I'm getting at, air doesn't--you don't take air to buck air. You're not shoving air up and air coming down. It's got to go to return someplace.

JUDGE KOUTRAS: Okay.

BY MS. HENRY:

Q. Mr. Kuzar, when you say, "You don't take air to buck air," what is your understanding of what the mine management has stated that their intention was, in the way they were ventilating, the way this air was flowing?

A. The way I understood mine management, the air was coming up those other entries, and I assume that it was joining with this return coming across this bleeder system on the inby end. That's what I believe them--what they were saying.

Q. And do you believe that, with your knowledge and looking at this ventilation plan, with what they were saying, that that would have been an adequate ventilation of that mine, of this area, the way the map is showing it should be ventilated?

A. I would have to see it work that way.

* * * * * * * *

Q. And what would be the effect of, as management has stated, their pushing the air up the other way? And I realize I'm using simple terms, but I'm trying to get sort of a layman's understanding here. Of instead of the air going down, the air flowing the way Mr. Brunatti found it flowing?

A. Conditions could change that. It would depend how much they had available for this section, how much air was on this section where they were mining.

There's a lot of things are involved there. What they had going out this bleeder, quantity-wise; how much was going down the split return. There's a lot of things have a bearing on this, what could occur.

* * * * * * * * *

Q. Why would you consider--let me ask you this. Would you consider the testimony you've heard today from Mr. Brunatti about the condition from the mine management about the condition, and looking at the plans yourself, would you consider this to be a significant and substantial violation?

A. Yes, I would.

Q. Why?

A Because of what occurred.

Q. Okay, could you explain?

A. The occurrence prior to the inspector getting there, you had a methane build-up in a gob area in that mine. And whether it be--the chances of that methane being pushed back over this active section would be very slim, being that the fan is over here.

But a change in a barometer--various things could govern on what that methane did. And it's very unlikely that it would come back over this active section with the fan being over here.

Q. Let me make sure I'm understanding what you're saying. The way the air was flowing, you're saying that the fan placed where it was, it was unlikely that the methane would leave would dissipate? Is that what you're saying?

A. The way that the ventilation that the inspector found with the location of the fan--

Q. Right?

A.--all right? If they did not have a ventilation control that was maintained to assure that air going up in there, the way the inspector cited it, you would have a methane build-up in this gob.

Q. Okay.

A. And apparently, that's what occurred.

Q. Do you have any reason in your knowledge to believe that the way that air flow was coursing would have contributed to the methane build-up in that area, that caused the withdrawal?

A. No, because I don't know the condition of the entries, the other entry that would be on the far side that would be carrying this methane out of there and diluting it. I don't know the condition of the airways. There's a lot of other things come into play.

* * * * * * * * *

JUDGE KOUTRAS: The question is, whether or not the air being coursed in the way that Mr. Brunatti thought it was coursed at the time of the violation, whether that had any direct nexus or relationship to the methane accumulation. That's the question. You don't know that?

THE WITNESS: I could have--I don't know.

JUDGE KOUTRAS: It could have--

THE WITNESS: I wasn't there, but it could have.

The parties agreed that the prior 4.2 methane accumulation occurred in the DÄ9 standing room regulator area depicted on exhibit GÄ3(a), in the upper right-hand corner of the sketch where the statement "Regulator may consist of blocks removed from walls as necessary" appears (Tr. 198Ä199). When asked whether he found some connection with the way in which the air was being directed at the time of the violation, and whether this condition had any relationship to the methane

accumulation, Mr. Kuzar responded "No," "Not outby, I don't, in here, yes" (Tr. 199).

Mr. Kuzar stated that the method used to ventilate the area, as explained by Mr. Endler, up two entries, and then being melded with the air coming out at the top of the area shown on exhibit GÄ3(a), and then down and out of the return, was a wrong way to course the ventilating air because all of the air pressure should be put on the gob, rather than out the return (Tr. 200). Good ventilation practice calls for keeping the majority of the air pressure on the gob to assure that gases go out the bleeder system to the return, with a limited amount down the return that has to be travelled weekly (Tr. 201Ä202).

On cross-examination, Mr. Kuzar confirmed that he first reviewed exhibit GÄ3(a), on Monday prior to the hearing, and was not previously familiar with plan "review 25" when the violation was issued (Tr. 203). He also confirmed that he had no knowledge as to how the prior 4.2 methane accumulation got there (Tr. 203Ä204). When asked if he knew whether the arrow that is shown at the top of the plan in question is still in the current applicable plan, he responded "I do not know what's in there at the present time. But if this is the bleeder system, it better be there" (Tr. 204).

Inspector Brunatti was recalled in rebuttal and referring to his notes made on the mine map, exhibit GÄ2, testified as to certain air readings that he took in the area on January 10. In his opinion, based on his air readings, the air that day was coursing through several check curtains and by-passing the gob area. He measured air quantities of 16,948 and 10,505 CFM's at two locations, and 5,000 CFM was ventilating the gob area. In his opinion, 5,000 CFM for gob ventilation is not positive pressure on the gob. The installation of permanent stoppings rather than ventilation curtains, and the adjustment of the regulator to control the air flow, would have put pressure on the gob. Had the gob area been adequately ventilated, the air in the DÄ9 right butt section would have been coursing down all three entries (Tr. 206Ä210). He also referred to two additional air readings of 1,250 and 725 CFM's, which indicated that positive pressure was not maintained on the gob (Tr. 212).

In response to further questions, Mr. Brunatti stated that in his opinion there was no positive air flow on the gob on January 10, and that this condition constituted a violation of the law. He confirmed that he did not issue a violation for this condition that day because he detected no

methane over 2 percent. He also confirmed that the air readings he took that day were in compliance (Tr. 216), and that there was a positive air flow coming out of the regulator which is shown on the right-hand portion of the sketch containing his notes, exhibit GÄ2 (Tr. 219).

Respondent's Rebuttal Testimony

Richard Endler produced copies of several mine examiner and foreman reports reflecting recorded air readings for the DÄ9 intake and return on January 2, 9, and 10, 1985, indicating 29,880, 6,762, 10,080, 5,875, 26,460, 7,104, and 2,881 CFM's at the locations noted. Mr. Endler concluded that there was "roughly" 13,000 CFM's of air available to ventilate the gob, and while he could not state that all of this air was going through the gob, it was available for that purpose (Tr. 221Ä223, exhibits OÄ9 through OÄ11). He confirmed that the ventilation pattern for the area was the same on January 2 and 9 (Tr. 224). He stated that the gob was being positively ventilated (Tr. 227).

Mr. Endler explained the action taken by the company in response to the 4.2 methane accumulation which was reported on January 9. He stated that checks were installed at the back end area to direct the air coming up the two entries around to flush out the methane. The methane level then decreased to 1.2 percent, and it was then determined that it was safe for the men to go back to work (Tr. 224Ä225; 230Ä234). After the methane was flushed out, the checks "were taken down and put it back to the original way. And the methane did stay down" (Tr. 247). Mr. Endler stated that the amount of air necessary to dilute any methane in the gob varies, and that it did so during the week prior to the violation (Tr. 247).

Mr. Endler identified exhibit GÄ5, as a plan submitted by the company for the pillar mining of rooms off the left of the DÄ9 area, and that it does not reflect mining on the right-hand side at that point in time. In his view, that plan has nothing to do with this case (Tr. 226).

Findings and Conclusions

The condition or practice cited by Inspector Brunatti as an alleged violation of 30 C.F.R.  316, and the respondent's approved ventilation plan, is described as follows in section 104(a) "S & S" Citation No. 2255733, issued on January 16, 1985 (exhibit GÄ1):

> The approved ventilation and methane and dust-control plan was not being complied with in the DÄ9 area of the mine in that two of the three entries (bleeder) in the 1st Rt Butt area were letting air go inby. The plan depicts only air coming outby from this area. With the ventilation this way the air ventilating DÄ9 section was escaping out the return instead of putting all the pressure on the gob area thus creating a methane build-up in the back end of the gob.

Inspector Brunatti modified the citation on January 17, 1985, by a "subsequent action" which modified the citation to reflect that it was changed to a section 104(d)(2) Order No. 2255733Ä01. The modification also included references to a previously issued Order No. 2110076, March 10, 1984, which are incorporated by reference in items No. 14, No. 15, and No. 16 on the citation/order form.

30 C.F.R. 75.316, provides as follows:

> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

The testimony and evidence adduced in these proceedings establishes that on January 9, 1985, a methane accumulation of approximately 4.2 percent occurred in the DÄ9 section of the mine. Greenwich notified MSHA and the appropriate state agency of the accumulation, and withdrew the men from the mine. After corrective measures were taken and the methane cleared up, the miners were permitted to go back to work.

As a result of the reported methane accumulation, Inspector Brunatti was contacted at his home by his supervisor and was instructed to go to the mine to examine the affected area.

Mr. Brunatti went to the mine on the midnight shift of January 10, 1985. The miners had been withdrawn, no unusual methane accumulations were detected, and Mr. Brunatti complimented mine management for their efforts in clearing up the methane problem. Mr. Brunatti confirmed the prior methane accumulation by reviewing the mine examiner's books. He also made some notations concerning the direction of air flow, air velocity, and methane present in the DÄ9 section, and the notations were made on an enlarged portion of the mine map (exhibit GÄ2). Mr. Brunatti confirmed that he determined the direction of the air flow by means of a smoke test and by visual observation. He determined that the air was flowing up two of the entries, and down the third entry as shown by the arrows on exhibit GÄ2.

After completing his examination of the DÄ9 section on January 10, 1985, Mr. Brunatti issued no citations and made no determination as to whether any violations existed at that time. He confirmed that he did not have the appropriate ventilation plan with him, and also confirmed that he did not at that time have any knowledge of the mine ventilation system. He testified that he was directed to go to the mine to determine whether any large accumulations of methane still existed, and that is what he did.

With regard to his notations concerning the direction of air flow on the three entries in question, Mr. Brunatti testified that he had "a problem" with the air direction and considered it "questionable," but made no determination on January 10, that it was a violation of the ventilation plan. He could not recall discussing the matter with mine management, and confirmed that he did not know whether the noted air direction "was right or wrong" at that time.

During the period January 11 and 16, 1985, Mr. Brunatti was at the mine performing his regular inspection duties, but he was not in the DÄ9 section. He issued the contested citation while at the mine on January 16, and he based the citation on the notations he made with respect to the flow of air on January 10, and his belief that the prior reported methane accumulation resulted from the misdirected air flow. He confirmed that on January 16, he did not visit the DÄ9 section and did not know what the ventilation was that day. He also confirmed that he made a finding of "moderate negligence," and so indicated by marking the appropriate block on the citation form. He explained that he made this finding out of consideration of mine management's fine job in correcting the methane problem, and because he was not totally aware of any ventilation changes.

Mr. Brunatti confirmed that the decision to issue the citation on January 16, was made after a consultation with his supervisor. His supervisor was concerned about the reported methane accumulation and asked to review his notes. During these discussions, Mr. Brunatti indicated concern that changes were made in the ventilation system to cause the air to flow in the wrong direction, and he believed that mine management had to be involved in any such changes. After further discussion and review of the ventilation plans with his supervisor, it was concluded that the misdirected air as noted by Mr. Brunatti during his mine visit of January 9, constituted a violation of the ventilation plan and section 75.318.

On January 17, 1985, Inspector Brunatti modified the section 104(a) citation to a section 104(d)(2) unwarrantable failure order, but he did not change or modify his moderate negligence finding. The modification was made after further discussions with his supervisor, and Mr. Brunatti admitted that the decision to modify the citation and issue the order was made prior to his going to the mine on January 17.

Inspector Brunatti testified that he did not consider the action of Greenwich with respect to the violation to be willful, nor did he consider it to be the result of indifference or a serious lack of reasonable care on the part of Greenwich (Tr. 73Ä74).

In its posthearing brief, Greenwich argues that the contested section 104(d)(2) order is invalid because it was based on an investigation of a past methane accumulation incident rather than a condition or practice detected by Inspector Brunatti during the course of an inspection. In support of its argument, Greenwich cites the following cases in which six Commission Judges decided the issue as argued by Greenwich: Westmoreland Coal Company, Docket Nos. WEVA 82Ä34ÄR, et. al., (May 4, 1983), unreported, (Judge Steffey); Energy Mining Corporation, 7 FMSHRC 1908, 1919 (Nov. 1985) (Judge Lasher); Southwestern Portland Cement Company, 7 FMSHRC 2283, 2292 (Dec. 1985) (Judge Morris); Nacco Mining Company, 8 FMSHRC 59 (1986), review pending (Chief Judge Merlin); Emerald Mines Corporation, 8 FMSHRC 324 (1986), review pending (Judge Melick; White County Coal Corporation, 8 FMSHRC 921 (June 9, 1986) (Judge Melick; and Greenwich Collieries, 8 FMSHRC 1105 (July 14, 1986) (Judge Maurer).

Greenwich points out that the inspector was dispatched to the mine to look into a methane accumulation in the DÄ9

area of the mine which occurred on January 9, and which was reported by Greenwich. Upon his arrival at the mine on January 10, the inspector visited the DÄ9 area, but issued no violations. Subsequently, on January 16, when he issued the section 104(a) citation, the inspector did not reenter the DÄ9 section before writing the citation. Still later, on January 17, the inspector modified the citation to a section 104(d)(2) order, and he did so on the basis of a conversation with his supervisor without reentering the DÄ9 section. The decision to issue that order was made prior to the inspector's arrival at the mine on January 17.

Greenwich points out further that the methane accumulation which occurred on January 9, 1985, was never observed or detected by Inspector Brunatti, and that it was dissipated on January 10, when he entered the DÄ9 section. Greenwich concludes that since no methane accumulation was in existence at the time the initial section 104(a) citation and the subsequent modification to a section 104(d)(2) order took place, the order was invalid and should be dismissed.

Citing United States Steel Corporation, 6 FMSHRC 1423 at 1437 (June 1984), where the Commission held that an unwarrantable failure to comply may be established by showing that the violative condition or practice was not corrected or remedied, prior to the issuance of a citation or order, because of indifference, willful intent, or serious lack of reasonable care, Greenwich asserts that there is no evidence in this case to support an unwarrantable failure finding. In support of this conclusion, Greenwich relies on Inspector Brunatti's findings of "moderate negligence" with respect to the citation and order, and his testimony that he did not consider the alleged violation to be due to "indifference, willful intent, or a serious lack of reasonable care" on the part of Greenwich.

With regard to the alleged violation of section 75.316, Greenwich submits that MSHA has failed to establish by any credible evidence that Greenwich violated its ventilation plan. Greenwich asserts that the testimony of foreman Endler clearly indicated that the ventilation was in compliance with plan review No. 25 which was in effect at the time of the citation. Greenwich points out that Mr. Endler, using various exhibits, clearly demonstrated that government Exhibit 3ÄA was the same as operator's Exhibit 4. He indicated that operator's Exhibit 4 showed main intake air coming up the right-hand entry, reduced air flow coming up the belt entry, and return air going down the left-hand entry shown in Exhibit 4. He further testified that the ventilation demonstrated in that exhibit was the same ventilation as cited by Inspector

Brunatti as not being in compliance with the ventilation plan. The citation, later modified to an Order, was ultimately terminated when Greenwich submitted a print to MSHA which showed ventilation going in the direction required in the citation and order of January 16 and 17, respectively. Greenwich submits that no such submission to MSHA would have been necessary had the original plan required ventilation in the DÄ9 area as interpreted by Inspector Brunatti. Hence, Greenwich submits that MSHA failed to show a violation of the ventilation plan.

With regard to Mr. Brunatti's allegations that the air ventilating the DÄ9 section was escaping out the return instead of putting all the pressure on the gob area, thus creating a methane build-up at the back end of the gob, Greenwich asserts that the testimony by foreman Endler clearly revealed there was a positive flow of air on the gob in the DÄ9 area. Greenwich points out that Mr. Endler's testimony was based upon air readings taken in the area on January 2 and 9, and his personal observations of the area on January 9, which indicated a positive flow of air on the gob in the DÄ9 area. Greenwich concludes that MSHA has failed to prove that all available air positive pressure was not put on the gob, thereby creating a methane build-up in the back end of the gob.

In her closing oral arguments, MSHA's counsel relied on the testimony of Inspector Brunatti and Supervisory Inspector Kuzar to support a violation of the ventilation plan. With regard to Mr. Kuzar's testimony, I have given it little or no weight. Mr. Kuzar confirmed that he has no supervision over the No. 1 Mine, was not in it when the citation was issued, and that he last visited it in 1982. His testimony in support of the violation is based on his familiarizing himself with plan review No. 25 during the hearing, and MSHA conceded that he had no personal knowledge as to what prompted Inspector Brunatti to issue the citation. When asked about any hazard involved in ventilating the area cited by the inspector in the manner in which he claimed it was being ventilated when the citation issued, Mr. Kuzar responded "I wasn't there. I don't know."

When asked about the manner in which Greenwich claims it was ventilating the area in question, Mr. Kuzar stated that he would have to observe it operating before he could comment on it. When asked about the effectiveness of the air flowing in the direction that Mr. Brunatti claimed it was flowing, on January 9, Mr. Kuzar responded that "conditions could change that" and that other variables have to be considered. When asked whether he had any reason to believe that the air flow

as found by Inspector Brunatti could have contributed to the reported methane build-up in the DÄ9 area, Mr. Kuzar responded "No, because I don't know the condition of the entries * * * and airways, * * * and there's a lot of other things that come into play." When directly asked whether the air flow as found by Inspector Brunatti had any direct relationship to the methane accumulation, Mr. Kuzar replied "I don't know. I wasn't there, but it could have."

MSHA's counsel agreed that review 25 is the applicable plan in effect at the time the citation was issued. However, counsel took the position that exhibit GÄ3, which is "review 26," while not the official plan that was in effect at the time in question, "makes it a little bit clearer," and that the three arrows in the upper left-hand corner of page two of "review 26" basically describe the direction of air coming down all three entries (Tr. 141Ä142). Counsel asserted that there is no dispute that the air was flowing in the direction claimed by Mr. Brunatti, and that the disagreement lies in the fact that the company believes that the direction of the air was in compliance with the applicable plan, and that MSHA believes that the direction of the air was out of compliance (Tr. 142). Counsel agreed with Mr. Brunatti's interpretation that the direction of air should have been down all three entries, rather than up two and down the third (Tr. 145, 152).

When asked why the single arrow shown at the top left-hand corner of "review 25," exhibit GÄ3(a), does not curve around and come down the entry, MSHA's counsel responded "it is MSHA's position that this is the only way, if the air is going that way, the only way you can ventilate the mine * * * is to get the air out again, is to go back down--" (Tr. 154). Counsel asserted that the air should have gone down all three entries as shown in the plan print submitted to abate the order, exhibit OÄ8 (Tr. 162).

I take note of the fact that the citation issued by Inspector Brunatti fails to include any reference to the particular ventilation plan provisions allegedly violated in this case. I also note the fact that while in the DÄ9 section on January 10, the inspector did not have the ventilation plan with him, and he admitted that he was not at that time a ventilation specialist and had no knowledge of the mine ventilation system. His subsequent opinion that the plan had been violated was based on a review of the ventilation plans and his notations made on a portion of the mine map (exhibit GÄ2) while he was on the section on January 10.

Inspector Brunatti's conclusion that the ventilation plan was violated was based on his findings made on January 10, that the air flow was misdirected in two of the three entries on the DÄ9 section as noted on the face of his citation. He found that in two of the entries the air was travelling inby, when the ventilation plan depicted the air flowing outby in all three entries. Mr. Brunatti also relied on his notes made on January 16, which reflected that Greenwich's safety representative and mine foreman Endler stated that the direction of air flow as he found it on January 10, was the way it was depicted on the ventilation plan, but contrary to the way Greenwich's engineer submitted it for approval.

Mr. Brunatti testified that the applicable ventilation plan provision appears on the second page of exhibit GÄ3, at the upper left-hand corner. The plan depicts three double arrows showing the air travelling down all three of the entries after exiting at the point labeled BE# 58, and out the return. These are the same entries noted by the inspector when he made his notations on the mine map (exhibit GÄ2), on January 10, showing the air travelling up two entries but down the third one. The plan is labeled "Review No. 26," and it reflects that it was submitted on February 15, 1985, and revised on May 31, 1985, after the citation was issued.

Mr. Brunatti also testified that ventilation plan Review 25, dated August 1, 1984 (exhibit GÄ3(a)), is equally applicable in this case and that it in no way changed the requirements depicted in plan Review No. 26. However, he conceded that plan Review No. 26 was not in effect at the time the citation issued, but that plan Review No. 25 was (Tr. 79Ä80, 87). MSHA's counsel asserted that Plan No. 26 was introduced to clarify Plan No. 25 and that it was a "more helpful drawing of what was indicated in Government Exhibit GÄ3(a), and that no changes were made in the plans (Tr. 116Ä117).

Greenwich's counsel asserted that the critical issue in this case focuses on the interpretation placed by Inspector Brunatti on the significance of the double-headed arrow depicted at the upper left-hand corner of ventilation plan Review 25, exhibit GÄ3(a), the ventilation plan which was in effect at the time the citation was issued on January 16. Counsel argued that review 25 and exhibit OÄ2, which is part of a print submitted at the time review 25 was submitted, consistently show the direction of air flow going up two entries and down the third entry. Counsel argued that these exhibits show the direction of intake air coming in the

right-hand entry, reduced air coming up the low-low belt entry, and return air coming out the left-hand entry (Tr. 124, 139).

After careful review of all of the testimony and evidence adduced in these proceedings, I cannot conclude that MSHA has carried its burden of proof in establishing a violation of the ventilation plan by a preponderance of the credible evidence in support of its case. The ventilation plan provision relied on by the inspector in support of his initial citation (review No. 26), was not in effect at the time it issued, and the fact that Greenwich's engineering department may have submitted a subsequent revision depicting the direction of air down all three entries is irrelevant. Any suggestion by MSHA that the applicable plan No. 25, which was in effect at the time the citation issued, must be interpreted to show the direction of air down the three entries, as clearly shown in review No. 26, is rejected.

I further find that Greenwich's testimony and evidence is more credible, and that it has established that it was following the applicable ventilation plan requirements of ventilation review plan No. 25, August 1, 1984, as depicted in exhibits GÄ3(a) and OÄ2. Those exhibits clearly and consistently show the air flow going up two entries and down the third, precisely as found by the inspector when he made his notes on January 10, while on the DÄ9 section.

With regard to MSHA's allegations that Greenwich's failure to maintain positive air pressure on the gob contributed to the methane build-up at the back of the gob, Inspector Brunatti testified that when he tested the air in the DÄ9 area on January 10, he found quantities of 16,948 and 10,505 CFM's at two locations, and 5,000 CFM's ventilating the gob area. In his opinion, 5,000 CFM's is not positive pressure on the gob. However, Mr. Brunatti confirmed that he issued no citation on January 10, for lack of positive air pressure on the gob even though he considered this condition to be a violation of the law. He explained that he issued no violation because he detected no methane over 2 percent. He also testified that the air readings he took on January 10, were in compliance and that there was in fact a positive air flow coming out of the regulator.

Mine foreman Endler produced copies of several mine examiner and foreman reports reflecting recorded air readings for the DÄ9 intake and return on January 2, 9, and 10, 1985, indicating 29,880, 6,762, 10,080, 5,875, 26,460, 7,104, and 2,881 CFM's at the locations noted. Mr. Endler concluded

that there was "roughly" 13,000 CFM's of air available to ventilate the gob, and while he could not state that all of this air was going through the gob, it was available for that purpose. He confirmed that the ventilation pattern for the area was the same on January 2 and 9, and that the gob was being positively ventilated. He also confirmed that the accumulated methane in question was flushed out after two checks were installed at the back end of the gob and then taken down after the methane was reduced to 1.2 percent. Inspector Brunatti agreed that as long as the majority of air is coursed to the gob, the ventilation is ideal.

I cannot conclude that MSHA has established that Greenwich failed to maintain positive pressure on the gob, thereby resulting in the build-up of methane. Aside from Inspector's Brunatti's opinion that this was the case, I can find no credible facts to support his speculative opinion. In fact, Mr. Brunatti admitted that he issued no citation for these alleged conditions, was unaware of any methane build-up at the back end of the gob from January 10Ä17, found less than 2 percent methane on January 10, while on the DÄ9 section, all of his air readings were within MSHA's requirements, and he found positive air flow coming through the regulator. In addition, he conducted no inspection of the DÄ9 section subsequent to his visit there on January 10, when he made some notes on a portion of the mine map, and he admitted that he had no knowledge of the ventilation conditions on January 16.

With regard to Greenwich's arguments concerning the modification of the contested citation to an unwarrantable failure order, I agree with the rationale of the cases cited in support of the proposition that a section 104(d)(2) order may only issue upon an inspection of the mine. However, on the facts of this case, even if I were to find a violation of section 75.316, I would vacate the inspector's unwarrantable findings and modify the order to a section 104(a) citation, and I would do so on the basis of a total lack of credible evidence or facts to support any unwarrantable failure on Greenwich's part. As noted earlier, Inspector Brunatti candidly admitted that he did not consider Greenwich's actions to be willful, or the result of indifference or a serious lack of reasonable care.

## ORDER

In view of the foregoing findings and conclusions, Greenwich's contest IS GRANTED, and the contested section 104(d)(2) Order No. 2255733Ä01, Janury 17, 1986, citing an

alleged violation of 30 C.F.R. 75.316, IS VACATED, and MSHA's civil penalty proposal IS DISMISSED.

George A. Koutras
Administrative Law Judge