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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. LAKE 86-67  
A.C. No. 11-00599-03631

v.

Orient No. 6 Mine

FREEMAN UNITED COAL MINING  
COMPANY,  
RESPONDENT

AND

UNITED MINE WORKERS OF AMERICA,  
LOCAL UNION NO. 1591, INTERVENOR

DECISION

Rafael Alvarez, Office of the Solicitor,  
U.S. Department of Labor, Chicago, Illinois,  
for Petitioner; Harry M. Coven, Esq., Gould &  
Ratner, Chicago, Illinois, for Respondent;  
Larry G. Eubanks, United Mine Workers of America,  
Local Union 1591, Benton, Illinois, for Intervenor.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges respondent with violating a safety regulation promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq., (the Act).

A hearing on the merits took place in St. Louis, Missouri on March 10, 1987.

Issues

The issues are whether a violation occurred. If a violation occurred, was it of a significant and substantial nature. Finally, if the citation is affirmed what penalty is appropriate.

Contested Order

Order Number 2823383, issued under Section 104(d)(2) of the Act, alleges respondent violated 30 C.F.R. 75.316. The cited regulation reads as follows:

75.316 Ventilation system and methane and dust control plan  
[Statutory Provisions]

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.

Stipulation

At the hearing the parties stipulated as follows:

(1) The Federal Mine Safety and Health Review Commission has jurisdiction over these proceedings.

(2) Freeman United Coal Mining Company is a subsidiary of Material Service Corporation.

(3) Material Service Corporation is a subsidiary of General Dynamics Corporation.

(4) Freeman United Coal Mining Company owns and operates the Orient No. 6 mine.

(5) The Orient No. 6 mine is an underground mine, which extracts bituminous coal.

(6) The Orient No. 6 mine extracted 1,429,622 tons of coal from February 26, 1985 to February 26, 1986.

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(7) Respondent extracted 6,471,856 tons of coal from February 26, 1985 to February 26, 1986.

(8) Respondent's business affects commerce.

(9) Respondent's business will not be affected by the payment of the proposed assessment of \$950.00.

(10) Orient No. 6 is a gassy mine.  
(Tr. 8, 9, 68).

#### Summary of the Evidence

##### Secretary's Evidence

John D. Stritzel and Larry Eubanks testified for the Secretary.

JOHN D. STRITZEL, a ventilation specialist, has been a coal mine inspector with MSHA since 1971. His specialty includes reviewing plans and checking their adequacy (Tr. 15, 16). His expertise includes training in Beckley, West Virginia (Tr. 16, 17).

Prior to working for MSHA he started the safety division for respondent and served as a foreman trainee (Tr. 16-18).

On December 11, 1985 he conducted a technical ventilation inspection at the Orient No. 6 mine (Tr. 18). The inspection team consisted of Stritzel's immediate supervisor, Mark Eslinger, as well as Larry Eubanks of the UMWA; Howard Hill represented respondent (Tr. 19, 23).

The inspector took notes and drew a map of the area (Tr. 20, 23, Ex. P3). He stopped between room 31 and room 32 at the last open crosscut in the intake entry. As he passed through the pull-through curtain he observed a shuttle car being loaded at the face (Tr. 24, 54). He also observed the curtain down in the corner of room 31. There was about a three-foot gap in the plastic curtain. He did not know how long the gap had existed. He then began to take an air reading after first turning on the scrubber (Tr. 26-28, 64, 65). The air reading was taken with an anemometer. (FOOTNOTE 1)

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The inspector then directed the miners not to rehang the curtain until he took his air reading (Tr. 29, 30). He calculated the air flow at 1662.5 cubic feet per minute, (cfm), at the end of the line curtain (Tr. 30, 31). He then advised Paul Little, the section foreman, that a violation existed (Tr. 31). Little said he thought there should be an air velocity of 3000 cfm in the entry. Mark Eslinger said 5000 cfm was required (Tr. 32). An order was issued; the ventilation plan requires 5000 cfm (Tr. 33, Ex. P4).

The order was issued because the condition they found short-circuited the air from the face area. The inspector issued a 104(d)(2) (FOOTNOTE 2) order because the section foreman didn't know how much air was required. The inspector believed it constituted an unwarrantable failure for the company to put in a man who did not know the air requirement in the gassy mine (Tr. 34, 35). Little stated this was his second day in the working section. His prior experience was as a belt and construction foreman for 15 years (Tr. 35).

The company abated the violation by having the entire crew repair the hole and reposition the curtain. They then had 5800 cfm (Tr. 36).

The inspector concluded that the violation was S & S because the volume of air was approximately a third of the required amount. But he did not know how long this condition existed. An ignition would be possible if a buildup of methane gas occurred in this gassy mine (Tr. 41, 42, 45). The inspector further felt that the gravity of the violation could affect the two miner operators and the buggy runner. In addition, the operator's negligence was high (Tr. 42, 43).

In considering whether a violation is S & S, various factors to be considered include the duration and the seriousness of the condition (Tr. 45, 46). The inspector felt the condition described in his order existed for probably two minutes (Tr. 46).

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The methane concentration in the section was not dangerous; it measured one-tenth of one percent (Tr. 47, 49).

It was necessary to turn the scrubber on so they would know how much air was coming out at the end of the line curtain. The scrubber pulls out about 1000 cfm (Tr. 62).

The shift started at 8:00 a.m. and the inspector's air reading was taken at 9:35 a.m. (Tr. 63).

No reading was taken between the time the three-foot opening was closed and the repositioning of the curtain (Tr. 65). The inspector had not observed any excessive gaps in the curtain before it was repositioned. The three-foot hole and the minimal air at the end of the line curtain were the only violations (Tr. 66).

LARRY G. EUBANKS is a coal miner for respondent. He is presently a laborer and pit committeeman for the UMWA (Tr. 71).

The witness was a member of the inspection team (Tr. 73). While underground he made notes during the investigation (Tr. 75, Ex. P7). During the inspection Little said the required air was 3000 cfm.

Eubanks saw the hole in the curtain. The air reading was 1662 cfm (Tr. 76, 78).

#### Respondent's Evidence

Robert Newton and Howard O. Hill testified for respondent.

ROBERT NEWTON, a shuttle car operator for respondent, is presently unemployed. On December 11, 1985, he was unloading coal from the continuous miner. With his on-side standard shuttle car he took coal to the tail belt (Tr. 88, 89, Ex. R2, R4) The off-side car will become entangled and will tear down curtains when there is a lot of air coming through (Tr. 89).

The off-side buggy follows a different route than the on-side buggy (Tr. 91, Ex. R4).

It takes about four or five minutes between the time the buggy is filled and until it unloads at the belt tail. When operating the buggy the witness always looks back to be sure the curtain hasn't been torn down. The off-side car operator doesn't have this advantage (Tr. 94). On his trip to the belt tail the curtain was in good shape (Tr. 96). After dumping his load and returning to the mining machine he was sitting in the crosscut waiting for the other buggy to leave room 31.

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While in that position he heard a "big snap." The other buggy operator had to stop and unroll some of his cable (Tr. 97). Just as the shuttle car passed in front of him he heard a noise like a tear and the witness saw that the curtain was gone. In about three seconds the witness then stopped his buggy, got his hammer and nails and he was going to rehang the wadded-up curtain. At that point the inspector directed him not to rehang the curtain (Tr. 98, 99, 101-104, 113, 115). About 16 or 18 feet of curtain had been torn down. Newton estimated he could rehang the curtain in three or four minutes (Tr. 99, 100). The cable of the off-side machine will frequently become entangled with the curtain (Tr. 100).

Newton identified the position of the tear on Exhibit R4 (Tr. 112, Ex. R4). If he had not been stopped by the inspector, the curtain would have been down no more than five or six minutes (Tr. 122).

HOWARD O. HILL, a field ventilation engineer, is a retired employee of respondent (Tr. 123). The witness, who helped develop the ventilation plan, produced the pre-shift and shift reports covering December 11, 1985 (Tr. 124, 125, 158). The reports indicated all of the faces and entries had been determined to be safe. No indication of methane gas was found (Tr. 126, 127). The ventilation in the intake entry was 14,400 cfm and 12,000 cfm at the point of return (Tr. 127, 129, Ex. R6).

The witness accompanied the inspection team and observed that 16 to 20 feet of the curtain was down.

The inspector's initial air reading was about 1600 cfm; the next one was almost 6,000 cfm (Tr. 139). Mr. Stritzel and Eubanks both said there was a 2- to 3-foot opening in the curtain. The smaller opening would still leave enough air at the end of the line curtain. But a 16- to 20-foot gap would have totally short-circuited the air (Tr. 131, 132).

In Hill's opinion 14,400 cfm of air on the intake is sufficient. Further, in his opinion, the inspector did not correctly recreate the conditions for which he issued the citation (Tr. 145). If the curtain had been restored by Mr. Newcom, the ventilation would have been around 7,000 cfm (Tr. 146). Further, in Hill's opinion the curtain was down less than five minutes (Tr. 147). It is the practice in this mine to rely on intake air readings to determine whether it is safe to cut coal at the face (Tr. 151).

In Hill's opinion a 16- to 20-foot gap in the curtain would create a hazard over a period of time (Tr. 153, 154). Methane could build up to the point of ignition (Tr. 154).

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A violation exists if the continuous miner is cutting coal at the face below 5,000 cfm (Tr. 159).

#### Discussion

The credible evidence adduced by the inspector shows that he took an air reading after he observed a three-foot gap in the line curtain. On the other hand, the credible evidence adduced by respondent's witnesses establishes that the off-side shuttle car became entangled in the line curtain at about the same time, thereby tearing an 18" to 20" foot gap in the curtain. Under these conditions the air velocity was measured at 1,662 cfm.

Respondent initially contends that the Secretary did not establish a violation. I disagree. The evidence is uncontroverted that the air velocity measured 1,662 cfm at the end of the line curtain. A velocity of 5,000 cfm is required. Accordingly, the Secretary's evidence establishes a violation of the regulation.

Respondent further asserts that the inspector interfered with the mining cycle when he ordered the employee to stop hanging the curtain. Further, respondent argues that such action constitutes a violation of MSHA's policies.

Respondent's arguments lack merit. It can hardly be considered a part of any mining cycle for a shuttle car to tear down a portion of the line curtain. It accordingly follows it is not proper, as the operator urges, to issue an advisory directive to the inspector prohibiting such activities. Respondent cites no MSHA directives and no case law in support of its view that the inspector overreached his authority in prohibiting the shuttle car operator from rehangng the curtain while he took an air reading.

Respondent further claims the inspector did not accurately recreate the conditions he initially observed. Further, the operator claims the air measurement did not reflect a three-foot hole in the blowing line curtain.

Respondent's arguments are misdirected. It is true that respondent's expert witness testified that a three-foot gap in the curtain would not cause the cfm to drop sufficiently to cause inadequate air. However, the violation occurred when the air velocity was below 5,000 cfm. It is immaterial whether such velocity was caused by a three-foot gap or a twenty-foot gap.

The Secretary contends that the violation herein was both S & S and that it constituted an unwarrantable failure on the part of the operator.



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I disagree. An S & S violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature," Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3A4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574A75 (July 1984).

In the instant case there was no methane hazard and the reduction of the air flow only lasted a short time.

An unwarrantable failure occurs if the operator is indifferent, shows a willful intent or if there is a serious lack of reasonable care. U.S. Steel Corporation, 6 FMSHRC 1423, 1437 (1984). The record fails to establish the necessary factors to establish unwarrantable failure on the part of the operator.

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The inspector's opinion was based, in part, on the fact that the foreman did not know the amount of air required at the end curtain. This factor, in and of itself, is insufficient to establish an S & S violation or an unwarrantable failure within the Commission decisions outlined above.

Civil Penalty

The statutory criteria to assess civil penalties is contained in 30 U.S.C. 820(i).

The stipulation of the parties addresses the size of the business of the operator and the effect of a penalty on its ability to continue in business. The company has an adverse prior history which is high: in the period ending September 3, 1986, the company incurred 571 violations and was assessed \$68,141. The operator was negligent but the gravity of the violation was low since the violative condition existed only for a minimal period of time. The company's good faith is apparent in that the inspector interrupted the abatement effort. On balance, I deem a civil penalty of \$200 to be appropriate.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portion of this decision, I enter the following conclusions of law:

- 1. Respondent violated 30 C.F.R. 75.316.
- 2. Citation 2823383 should be affirmed and a civil penalty assessed.

ORDER

Based on the foregoing facts and conclusions of law I enter the following order:

Citation 2823383 is affirmed and a penalty of \$200 is assessed.

John J. Morris  
Administrative Law Judge

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~FOOTNOTE\_ONE

1 An anemometer is a device that measures the flow of air in feet per minute (Tr. 29).

~FOOTNOTE\_TWO

2 The parties stipulated that a predicate 104(d) order was issued (Tr. 38, Ex. P5).