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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 87-50  
A.C. No. 36-02405-03658

v.

Greenwich Collieries No. 1

ROCHESTER & PITTSBURGH COAL  
COMPANY,

RESPONDENT

DECISION

Appearances: Linda M. Henry, Esq., Office of the Solicitor,  
U.S. Department of Labor, Philadelphia,  
Pennsylvania, for the Petitioner;  
Joseph Yuhas and Joseph T. Kosek, Esqs.,  
Greenwich Collieries,  
Ebensburg, Pennsylvania, for the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking a civil penalty assessment of \$650, for an alleged violation of mandatory safety standard 30 C.F.R. 75.316, as stated in a section 104(d)(2) Order No. 2690667, issued on August 5, 1986. The respondent filed a timely answer and contest and a hearing was held in Indiana, Pennsylvania. The parties filed posthearing briefs, and I have considered the arguments made in the course of my adjudication of this case.

Issues

The issues presented in these proceedings are as follows:

1. Whether the respondent violated the cited mandatory safety standard, and if so,

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the appropriate civil penalty to be assessed for the violation based on the criteria found in section 110(i) of the Act.

2. Whether the inspector's "significant and substantial" (S & S) findings concerning the violation are supportable.

3. Additional issues raised by the parties in this proceeding are identified and disposed of in the course of this decision.

#### Applicable Statutory and Regulatory Provisions

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

2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).

3. Commission Rules, 20 C.F.R. 2700.1 et seq.

#### Stipulations

The parties stipulated to the following (Tr. 6-7):

1. The respondent is subject to the jurisdiction of the Commission and the presiding Administrative Law Judge.

2. The section 104(a) citation in question, as modified to a section 104(d)(2) order, was duly served on the respondent by an authorized representative of the Secretary of Labor.

3. The size of the respondent company is 8,580,078 tons of coal produced, or man-hours worked, and the size of the subject mine is 565,108 production tons of coal.

4. The respondent's history of prior violations consists of 168 violations for the 8-month period preceding the issuance of the violation in issue.

5. The proposed civil penalty assessment will not affect the respondent's ability to continue in business.

6. The violation was abated by the respondent in good faith within the time fixed by the inspector.

7. At the time of the issuance of the modified order respondent's Greenwich No. 1 Mine was on "a (d) Chain, and there had been no intervening clean inspections to remove them from the (d) chain."

8. The applicable ventilation plan for the Greenwich No. 1 Mine, Review Number 28, was in effect at the time of the issuance of the violation in issue.

#### Discussion

The inspector initially issued a section 104(a) "S & S Citation No. 2690667, on August 4, 1986, alleging a violation of 30 C.F.R. 75.316, and the violative condition or practice is stated as follows:

The approved ventilation and methane and dust-control plan was not being complied with in the DÅ5 active working section in that the section is on full retreat mining and the operator does not have an approved ventilation plan showing the ventilation system for retreat mining in this area.

The inspector modified the citation on August 8, 1986, to a section 104(d)(2) order, to reflect the correct date of issue as August 5, 1986, and the justification for the modification states as follows:

No. 2690667 is being modified based on the fact that when the condition was observed and a discussion held with mine management, James Kukura, General Manager, stated pillaring had been done in the area for several months with on-going inspections by MSHA and no one questioned the need of a ventilation plan so therefore using this in the thought process for determining negligence it was determined to be moderate. However, after telephone conversations with William Onuscheck, company ventilation engineer, and review of the ventilation plan, it is apparent to this writer that the company did have an approved ventilation plan

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for pillar mining prior to the date of issuance for the DÄ5 area. However, the system of mining changed, thus necessitating a need for a new ventilation plan, and MSHA inspectors had not been in this area prior to this writer's observations of the violation.

#### Petitioner's Testimony and Evidence

MSHA Inspector and Ventilation Specialist Samuel J. Brunatti, testified as to his experience, training, and duties, which include the review of underground mine ventilation plans to insure that the system of mining coincides with the approved plans. He confirmed that he issued the citation, as modified to an order, during the course of a ventilation technical inspection of the mine, (exhibit GÄ1). He also confirmed that ventilation plan Review 28 was in effect at the time of his inspection, and he stated that he was "fairly familiar" with that plan at the time of the inspection (Tr. 9Ä13).

Mr. Brunatti stated that he issued the violation after observing retreat mining in the DÄ5 working section where pillars had been extracted on the return side while driving the section in, and rooms were being driven to the left side off the intake side and pillars were being extracted "the whole way across, creating a solid gob." Mr. Brunatti observed that one row of pillars had been extracted, and "they were on the second row" (Tr. 21). He issued the violation because the respondent did not have an approved ventilation face print covering the type of mining which was taking place, and he confirmed this when he reviewed the ventilation plans and prints (Tr. 14).

Mr. Brunatti confirmed that the inspection took place on August 5, 1986, and that his reference to August 4th was a mistake (Tr. 13). He identified a copy of his inspection notes of August 5th, which reflect that "Gob air was coming into the section in return entry," and he confirmed that he made this observation on August 5th. He stated that no ventilation plan was available to show this ventilation, and that the approved plans are required to show how the section is to be ventilated, with appropriate ventilation controls to assure a positive pressure on the gob to keep methane gas going away from, rather than back into, the active section. None of the plans which he had reviewed showed how the gob area was to be ventilated in the DÄ5 section (Tr. 19).

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Mr. Brunatti stated that while underground at the time he issued the citation, respondent's safety inspector escort Joseph DeSalvo advised him that a plan was in effect for the mining which was taking place. When they arrived on the surface, mine superintendent Lowmaster and general mine manager James Cocora advised Mr. Brunatti that another MSHA inspector had previously been in the same DÄ5 section area which was cited and that the same type of mining was taking place. Based on this information, Mr. Brunatti issued a section 104(a) citation with a "moderate" negligence finding because "I felt that if one of our inspectors didn't observe it to be a violation, I didn't feel maybe the company did" (Tr. 20).

Mr. Brunatti stated that after issuing the citation, he spoke with the inspector who had been in the area previously and learned that pillar mining was taking place at that time on the return side only, and that the left or intake side had not as yet been developed or pillared. Mr. Brunatti stated further that he also spoke with respondent's ventilation engineer William Onuscheck by telephone, and Mr. Onuscheck led him to believe that there was some miscommunication between his office and mine management in that the mine ventilation plans that had been submitted did not correspond to the type of mining taking place in the DÄ5 area on August 5. Mr. Brunatti stated that he was left with the impression that the respondent had submitted a ventilation plan for review without mine management at the mine level being aware of it, and he came to this conclusion because of statements made by Mr. Lowmaster and Mr. Cocora that they had never seen the plan even though it was the one in effect at that time, and they "were stunned" that it was the plan which was in effect. Mr. Onuscheck assured Mr. Brunatti that he would submit a plan to correspond with the mining taking place to MSHA's Pittsburgh Office for approval (Tr. 20Ä26).

Mr. Brunatti stated that based on the aforesaid conversations with mine management, including Mr. Onuscheck, he concluded that the respondent submitted face prints as part of the mine ventilation plan without management at the mine level being aware of it, and that the plan submitted did not correspond with the type of mining that he observed going on. Mr. Brunatti also stated that when he first showed mine management the plan which was in effect, he felt that they realized that they needed a plan for the mine area other than the one which had been submitted as part of Review No. 28. Mr. Brunatti did not believe that Review No. 28 pertained to the area being mined (Tr. 28). Mr. Brunatti believed that the respondent knew that it was required to submit new face

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prints when it changed its system of mining, and as an example of this, he identified a copy of Review 27, which had previously been submitted to show how the return and intake pillars and gob would be ventilated (Tr. 29-30; exhibit G-3).

Mr. Brunatti identified exhibit G-4, as a copy of the ventilation plan addendum made a part of Review 28, as submitted by the respondent to MSHA to abate the violation, and he explained the map shown on page three of the plan (Tr. 31-34). Mr. Brunatti confirmed that a mine operator may at times use the same ventilation face print to cover different mine entries or sections if every section and entry uses identical ventilation systems. However, this was not the case when the violation was issued, and any time changes occur in the ventilation system or direction of airflow, an operator is required to submit an addendum to the ventilation plan to the district manager before making any changes (Tr. 38-39). Mr. Brunatti explained the meaning of "mirror image" ventilation plans, and confirmed that it did not apply in this case because "they took rooms and pillared off the return side and also drove rooms and pillars off the intake side," and the respondent had no approved plan for mining off both sides (Tr. 40).

In response to further questions, Mr. Brunatti confirmed that the essence of the violation lies in the fact that the respondent was in full retreat mining and had no ventilation plan to cover full retreat mining both left and right, left off the intake, right off the return, and pulling everything solid across (Tr. 41-42). He confirmed that the section was not being ventilated properly because the air going out of the gob was coming back on the return side of the section (Tr. 45). He explained the change in the mining system which prompted him to issue the citation for not having submitted a new ventilation plan to cover that change as follows (Tr. 49-50):

THE WITNESS: Originally they had a plan approved, as they were driving the entries they drove rooms to the right off the return side and pillared those; and they did that. When they advanced the section to its limit, then they started driving rooms left off the intake and pulling pillars and connecting that gob on the return side; that's when it necessitated the change. Not a change so much as a new plan.

JUDGE KOUTRAS: And since they had this prior plan, that led you to believe that they had prior knowledge that they were required to submit a new plan when they went to a different system of mining, is that correct?

THE WITNESS: Yes. On previous ventilation reviews, they have submitted those plans.

On cross-examination, Mr. Brunatti confirmed that he believed the violation was "significant and substantial" because the section was not being properly ventilated in that air was coming out of the gob back into the section in the number 3 entry which was a return, and he could feel the air (Tr. 59). He agreed that the gob air is supposed to go into a return, but that "the pressure is to be from the section through the gob to the return, not the pressure from the gob through the gob back into the return" (Tr. 57). He could not recall taking any smoke tests, but he did take methane readings at various locations in the section, but found no excessive levels. The highest methane reading on the section was .2 percent, and he agreed that methane was not a problem on the day of his inspection (Tr. 57-58).

Mr. Brunatti confirmed that the system of mining he observed taking place on August 5, 1986, in the DÄ5 section was retreat mining in which rooms were originally driven up and pillared on the return side, and he agreed that the respondent had a plan for this. However, after reaching the limits of the mined entries, rooms were driven to the left off the intake side, and pillars were being extracted, thus creating one gob from the intake side to the return side. Mr. Brunatti believed that retreat mining and pillar mining are interchangeable terms. He agreed that the respondent had an approved plan to pillar the right return side, but did not have a plan to drive the rooms off the left intake side to extract the pillars off the solid back to the other gob. In his view, when mining moved from the right side, which had been pillared, to the left side, the system of mining was changed from mining rooms off the return side to the system of mining rooms off the intake side, and the system of ventilation was also changed. Since there was no plan drawing to cover these changes, Mr. Brunatti believed that a violation of section 75.316 occurred. He also alluded to the criteria for ventilation plan approval found in section 75.316Ä1, and confirmed that the essence of the violation lies in the fact that the respondent changed its mining system and failed to submit a ventilation plan to correspond with that change (Tr. 59-66).



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Mr. Brunatti stated that when he discussed the citation with Mr. Lowmaster and Mr. Cocora outside the mine, they went through the ventilation plans and tried to find a drawing for the DÄ5 section, and they admitted that they had no plan to cover the area in question (Tr. 73). Mr. Brunatti identified exhibit RÄ2 as a face ventilation plan, and confirmed that it was a part of ventilation plan Review 28 which was in effect at the time the citation was issued. He described what is depicted in that plan as "a working section completely separated and isolated from a gob on the right side by permanent stoppings and pillar mining being done on the left off the intake side, not connecting the gobs, but leaving a separation by the use of permanent stoppings and bradishes" (Tr. 74). He elaborated further by stating that "The area on the right side of that section had been pillared out at one time and now has been separated by permanent stoppings. In essence you've created, you have two gobs there" (Tr. 75).

Mr. Brunatti totally disagreed that exhibit RÄ2 depicts the system of mining and ventilation in use at the time of his inspection, and confirmed that what he observed is what is depicted in exhibit GÄ4, pg. 3, the plan which was submitted to abate the violation (Tr. 77). Mr. Brunatti stated that he could not specifically recall whether Mr. Lowmaster, Mr. DeSalvo, or Mr. Cocora produced exhibit RÄ2 during their discussions, and he believed "they were just grabbing for straws for something that they thought would cover" what they were doing. Even if they had produced exhibit RÄ2, Mr. Brunatti still believed it did not cover what was going on in the DÄ5 section (Tr. 79). Mr. Brunatti stated that no one can tell from exhibit RÄ2 when the pillars on the right and left side were pulled, and that is why it does not pertain to the system of mining taking place. He also indicated that the print shows two gobs being totally separated with permanent stoppings and with blocks of coal left in, while the system of mining actually taking place on August 5, on the DÄ5 section was not leaving a row of coal blocks or stoppings (Tr. 80).

Mr. Brunatti further explained the differences between the ventilation system he observed on August 5, and what is depicted on exhibit RÄ2, and pointed out that one of the differences was that no permanent separation was being maintained between the two gob areas as it is depicted on the print (Tr. 85Ä89). He also explained what he considered to be major differences in RÄ2 and GÄ4 (Tr. 95Ä101; 104Ä106).

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Mr. Brunatti confirmed that the respondent could continue to use the face print used to abate the violation, exhibit GÄ4, pg. 3, if they start mining elsewhere as long as the same system of mining is used. He explained the meaning of "same system" as follows (Tr. 103):

THE WITNESS: If they're just going to drive entries up and room and pillar to the right side or the return side, that would be a one-face print for that, just showing that, how they'll ventilate that section plus assure positive pressure from the section to the gob. Now, if they want to go up and do that and then pull pillars coming back out, then they need a face print to show not only how they'll ventilate the section, but also how they'll assure ventilation to that gob to keep the air off the section from the gob air.

Mr. Brunatti explained further that in order for plan print RÄ2 to be effective, once pillaring started on the left side, a row of permanent stoppings must be in place to prevent the air from the right side from coming into the left. There was no way this could have been done on August 5, because pillaring was taking place across the section without leaving any separation, and any variation in the prints would require prior MSHA approval because the system of ventilation was changed and the plan is supposed to reflect the system of mining as well as the system of ventilation being incorporated (Tr. 106Ä107). Mr. Brunatti confirmed that prints RÄ1 and RÄ2, both reflect the same system of mining, namely, retreat pillar mining. However, the conditions which prevailed on August 5, were different from those reflected in RÄ2 (Tr. 109).

MSHA Inspector and Ventilation Specialist Richard Zilka, testified as to his experience and duties, which include the review of all mine ventilation plans in MSHA District No. 2. He confirmed that he holds a degree in mining engineering from the University of Pittsburgh. He stated that he reviews all addendums to mine ventilation plans which are required to be submitted every 6 months, including changes in ventilation, and he explained the procedures for this review (Tr. 118Ä122).

Mr. Zilka stated that his review of ventilation prints RÄ2 and RÄ1 indicates significant differences in the manner in which the two gobs are being ventilated, and that it would require a change or an addendum to be mining as the two

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prints indicate. Assuming that print RÄ1 accurately reflects what was taking place on August 5, print RÄ2 would not as a matter of policy in his district be an acceptable face print to cover that situation (Tr. 123). In explaining the respondent's plan "variations" provided for in RÄ3, Mr. Zilka stated as follows (Tr. 124Ä126):

A. The variations that they're talking about would be considering, if you have a five-entry system you submit one plan that shows you mining say, Number 1 Entry, and the Number 2, 3, 4 Entries, how the back checks are set up so it's ventilated while they're mining the Number 1 Entry.

Variations is that we wouldn't require them to show how Number 2 Entry's being mined, Number 3 Entry and Number 4, repetitive. These are variations. We don't require that. One face print would suffice for that.

Q. The differences that you have noted, and I think you stated it as mainly the permanent stopping between RÄ2, that is shown on RÄ2 and the abatement plan that is shown on Government Exhibit 4; are you following me?

A. Yes.

Q. Would that be the kind of variation that the company could do by themselves?

A. Not according to District policy, it would not be accepted.

Q. Now, you talk about District policy. Do you have reason to believe that Greenwich Number 1 Mine or R & P Coal Company is familiar with District policy?

A. Yes. On numerous occasions, the situation of how face prints, what are to be on face prints and addendums to them to be submitted have been discussed with R & P personnel on numerous occasions.

Q. Have you had such discussions with R & P personnel?

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A. Yes.

Q. Have you had such discussions prior to the time that this citation order was issued in August of 1986?

A. Yes.

Mr. Zilka stated that based on his conversations with respondent's personnel, they should have been aware of the fact that print RÄ2 was unacceptable for what was going on in the section on August 5. He explained that the system for ventilating the gob should be marked down accurately to assure that there is no chance of gob air containing high methane or black damp coming back on the miners. He indicated that one of the primary differences between prints RÄ2 and RÄ1 is the differences between how one ventilates two gobs separately as opposed to ventilating one gob (Tr. 128).

Mr. Zilka identified exhibit GÄ5 as 1983 cover letters concerning an overall packet of ventilation plans submitted to MSHA's District Office by the respondent covering all of its mines. Included in the packet were the specific plans for each mine which were submitted every 6 months. However, the respondent was still required to submit new plan addendums when changes in the system of mining and ventilation occurred, and this is reflected in the correspondence (Tr. 129Ä132). In response to further questions, Mr. Zilka stated (Tr. 132Ä134):

Q. Let's assume that a company is using pillar mining on one side and pillar mining on the other side of an entry. And let's assume that they are always pillar mining but that their system of ventilation changes from one side to the other.

Does not the District Office, would they or would they not consider it a violation of 75.316 not to submit a face print for the other side of the entry?

A. Absolutely; Just because you're pillar mining does not mean that your face ventilation plan is exactly the same every time, especially if you're pillaring, if you're driving entries and you're mining on the right and pulling those pillars on the right side or pillaring on the left side; you could change the ventilation, you could be taking the air

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up on the right side and dumping it or when you're mining on the left you could still be doing the same thing but in--. It would be different, let me assure you.

Q. When you say it would be different, what would be different?

A. The face ventilation system, how you're ventilating the gob area, either to the left or the right of you.

Q. And under 75.316, would a company be required to submit a face print for that next section?

A. Yes.

Q. Even if they were using pillar mining in both sections?

A. Even if they're using pillar mining. If they're using a different ventilation system, the way they're setting it up and ventilating the gobs, they would have to submit a new plan.

Mr. Zilka confirmed that in an effort to reduce the amount of paperwork being submitted by the respondent with respect to its ventilation plans, the respondent was requested to eliminate those face prints which were not being used and to submit them at the time they intended to use them (Tr. 136). Mr. Zilka stated that he has "briefly looked at" plan Review 28, and based on the conditions cited by Inspector Brunatti as a violation in this case, he could find no face print which would correspond to the ventilation which existed on August 5, 1986 (Tr. 138). Mr. Zilka agreed that Mr. Brunatti's order was in compliance with MSHA district policy, and he confirmed that as a matter of policy, the mine ventilation system is considered to be a part of the mining system, and that the respondent is aware of this (Tr. 139-142).

On cross-examination, Mr. Zilka confirmed that regardless of the same mining system being followed in a mine, ventilation systems vary even though the mining system may stay consistent. Prints RÄ2 and RÄ1 reflect plans for ventilating two separate gobs, and he believed that both have been approved by the district manager (Tr. 143-146). A "typical"

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face plan is one that shows how the face area is being ventilated, and if there is any deviation from that plan, another plan has to be submitted for approval (Tr. 154).

Mr. Zilka was of the opinion that the respondent could not use face print RÄ2 as a typical print for the conditions observed by Mr. Brunatti, and as shown in print RÄ1, because the two prints contain different ventilation systems (Tr. 161). Mr. Zilka confirmed that his understanding of the violation is that Mr. Brunatti found the respondent in full retreat pillar mining on August 5th with no ventilation plan to cover what was going on (Tr. 169). Face print RÄ2, would not apply because it shows a different system of ventilation with two gob areas separated by a stopping going all the way up to the face (Tr. 179).

In response to further questions, Mr. Zilka confirmed that he did not discuss face print RÄ2 with the respondent, but has discussed similar prints and changes that may occur. He discussed the matter with Mr. Onuscheck after the violation was issued and advised him that face prints could not be mixed, and that print RÄ2 was not acceptable in a situation where one is pillar mining on the right side and then goes over to the left side and starts pillaring and pulling back (Tr. 183Ä184).

#### Respondent's Testimony and Evidence

Joseph N. DeSalvo, testified as to his background and experience, and confirmed that he is employed by the respondent as a safety inspector. He holds a B.S. degree in education from Indiana, Pennsylvania University. He confirmed that he accompanied Inspector Brunatti during his inspection on August 5, 1986. He identified print RÄ1, which is identical to GÄ4, as a diagram of how the DÄ5 section looked on the day of the inspection, and he described what he and Mr. Brunatti did by reference to an enlarged copy of RÄ1 (Tr. 186Ä191).

Mr. DeSalvo confirmed that face print RÄ1 depicts the system of mining and the system of ventilation on the DÄ5 section on the day of the inspection, and he stated that the print was submitted after Mr. Brunatti issued the violation, and it was approved at that time as part of the ventilation plan (Tr. 192). Mr. DeSalvo stated that while underground, he advised Mr. Brunatti of his view that the manner in which the gob was being ventilated "was the best possible way that it could be ventilated," and that Mr. Brunatti agreed with him (Tr. 193). They then went to the surface and discussed

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the matter with superintendent Lowmaster and division manager Cocora. Upon review of the face prints contained in plan Review 28, management came to the conclusion that face print RÄ2 reflected what was taking place in the DÄ5 section, and this opinion was conveyed to Mr. Brunatti, but he disagreed (Tr. 194Ä195).

On cross-examination, Mr. DeSalvo confirmed that Mr. Brunatti reviewed the face prints produced by mine management before issuing the citation, and that the "whole packet" of prints was reviewed. However, management concluded that RÄ2 "applied the best" (Tr. 197). When asked why management would not specifically know which face print applied, rather than going over the entire package to find one which may have applied, Mr. DeSalvo responded "I don't really specialize in those plans, neither do people like Mr. Lowmaster. \* \* \* that particular day we did try to contact the ventilation engineer at the mine, and he was unavailable for certain reasons, but we were not the specialists in ventilation" (Tr. 197). Mr. DeSalvo confirmed that prior to the group discussion concerning the prints, he had not seen Review 28 (Tr. 198). When asked whether Mr. Lowmaster was surprised concerning the prints in Review 28, Mr. DeSalvo responded "in the past we had submitted more specific drawings, and I think that may have been a bit of surprise to Mr. Lowmaster, but I don't think the packet itself" (Tr. 199). When asked why the respondent stopped submitting more specific prints, Mr. DeSalvo responded "I really don't get involved in that end of it" (Tr. 199).

Mr. DeSalvo conceded that face print RÄ2 is less specific than prints submitted in the past, and it does not specify that it is a drawing for the DÄ5 section. In response to further questions, Mr. DeSalvo stated as follows (Tr. 199Ä200):

Q. Isn't it true that Mr. Lowmaster said when you came up above ground to Sam that the prints didn't match their mining system that was going on at the time?

A. I remember Mr. Lowmaster saying something similar to that, but I'm sure, the context that I took what Mr. Lowmaster was saying in was I believe at that time the packet contained somewhere around 20 or 25 prints, and we were operating five sections. So, many of the prints really didn't apply to the number of sections that we had.

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Q. Do you have any idea from the conversations that were going on between Sam and Mr. Lowmaster at the mine, whether Mr. Lowmaster had indicated that he had ever seen Review 28 before, the prints in Review 28?

A. I don't honestly recall Mr. Lowmaster saying that, but then I wasn't in the room all the time.

Mr. DeSalvo confirmed that all of the blocks of coal shown across the top of the section on RÄ1 had been pillared and mined at the time of the inspection, and that the area to the right side of the print was a mined-out gob area, but there was no separation between the two gob areas (Tr. 202Ä203). Mr. DeSalvo stated that there was "very little difference" between prints RÄ1 and RÄ2, and that RÄ2 "is close enough" to what was going on in the DÄ5 section (Tr. 205Ä206). He then stated that there are definitely differences, and though he is not a ventilation specialist, his understanding as a miner of the basic ventilation of a mine indicates to him that the ventilation shown in RÄ1 and RÄ2 is the same (Tr. 206). Mr. DeSalvo confirmed that while the stoppings shown on RÄ2 are needed, he could not explain why because he did not participate in the drafting of that print (Tr. 210). Although the prints look the same, he was not sure why the coal blocks shown in RÄ2 were left as shown, but agreed that if mining continued in the same area they would eventually be pulled (Tr. 211).

Mr. DeSalvo confirmed that the respondent has previously been cited for ventilation plan violations under circumstances similar to those in the instant case, but he could not recall the details of those prior citations. He recalled one citation issued by Mr. Brunatti subsequent to the one issued in this case for failing to change a plan or submit a print (Tr. 212Ä213).

William Onuscheck, respondent's Ventilation Engineer, testified as to his education, ventilation training, and experience. He confirmed that plan Review 28 contains typical rather than specific face plans, and confirmed that the respondent does not submit specific ventilation plans pertaining to the ventilation employed on any particular mine section. He stated that at one time, the respondent submitted specific plans to MSHA, but this became cumbersome. He identified exhibit RÄ5, which was not offered and received as part of the record in this case, as a "binder" containing ventilation plans which was submitted to MSHA's district



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office on May 10, 1983. The exchange of correspondence concerning this binder is reflected in exhibit GÅ5. The binder contained an accumulation of all previously submitted and approved face prints (Tr. 214Å221).

Mr. Onuscheck explained that the prior procedure of submitting specific face plans to be added to the binder resulted in practical paperwork problems and delays in having plans approved. As a consequence, he met with MSHA's District Manager Huntley, and they worked out a different system for submitting ventilation plans, namely the submission of "typical plans." Subsequent meetings with Mr. Emil Piontek, Mr. Zilka's co-worker in MSHA's ventilation department, resulted in the formulation of a typical packet of face ventilation plans covering the driving of entries, rooms, stumping, driving rooms and entries with multiple splits, and advance and retreat stumping of rooms. All of these typical plans are incorporated as part of Review 28, and there are 20 such plans, one of which is RÅ2 (Tr. 221Å222). Mr. Onuscheck identified a copy of a letter dated December 12, 1984, addressed to Mr. Huntley, submitting two packets of typical face ventilation plans used in the respondent's mines (Tr. 224). Plan RÅ2 was among the packets submitted, and it was also submitted as part of Review 28 for the Greenwich No. 1 Mine in February, 1986, and subsequently approved by MSHA on June 4, 1986 (Tr. 225).

MSHA's counsel disputed any assertion or inference that MSHA accepted the binder as the respondent's ventilation plan. Counsel asserted that the binder was simply acknowledged as part of the effort to cut down on paperwork, but that MSHA made it clear to the respondent that specific face ventilation plans needed to be submitted and "it never was acceptable to the district office that you just submit a general plan and then go do whatever you want as a variation of that plan" (Tr. 227). Mr. Onuscheck further explained as follows (Tr. 229Å230):

THE WITNESS: Yes, and I don't want to give you a false impression, even with the binder there were times when we would be mining, even with all those plans, we still wouldn't have a plan incorporated into the binder for the type of mining we were doing.

JUDGE KOUTRAS: That's right, what would you do then?

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THE WITNESS: So we would have to keep on submitting.

JUDGE KOUTRAS: Submitting?

THE WITNESS: Yes, so if we kept on, at this point our binder would, we'd probably have four of those by now. Which, at which point, we went to the typical, 20 typicals instead of the binder.

MSHA's counsel confirmed that while the binder was not acceptable to MSHA's District office, the "typical packets" were acceptable. However, if there is a change in the mining or ventilation systems, a new plan would still have to be submitted. Counsel explained the meaning of a "typical plan" as follows (Tr. 234-235):

MS. HENRY: Your Honor, I think it's been well established by Mr. Zilka's testimony, that he informed R & P representatives of this numerous times, of what MSHA's definition of what typical was.

JUDGE KOUTRAS: Which was?

MS. HENRY: That typical means you can use a plan, and let's say you're driving up one entry, you use that plan. I want to make sure I'm getting this right. You start going up the second entry and it's the same thing, you may use that plan again.

Or if you're pillaring out one block, you have particular plans, and you go to pillar the next block, you can use that plan.

It doesn't mean that in situations were you create a gob where no gob was before you can use that plan.

JUDGE KOUTRAS: Well let me ask you this: Is the bone of contention here that on the one hand Mr. Brunatti believes there were two separate, distinct gob areas on August the 5th

MS. HENRY: No, you have it reversed. There are two separate, distinct gob areas shown on the face print that they tried to pass off.

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JUDGE KOUTRAS: On the face print, but they didn't have two separateÄ

MS. HENRY: They didn't have two separate gobÄ

JUDGE KOUTRAS: They just had one?

MS. HENRY: Right.

JUDGE KOUTRAS: They didn't have a sketch for that?

MS. HENRY: Right.

JUDGE KOUTRAS: And that's the violation?

MS. HENRY: That's it in a nutshell.

And, at (Tr. 238Ä241):

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JUDGE KOUTRAS: Couldn't the conditions change from day-to-day?

MS. HENRY: These conditions had changed, obviously small conditions could change from day-to-day, but the act of creating one gob and going over to the intake section and mining the intake section is the kind of, as there was testimony, is a kind of major variation, a kind of major change that requires a new face print.

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MS. HENRY: A typical plan. We're saying that Greenwich has, and R & P has been informed, it's not like they're left out there to dry in the windÄ

JUDGE KOUTRAS: Informed of what?

MS. HENRY:Äabout what typical means. thEy've been told that.

JUDGE KOUTRAS: Well, what does it mean?

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MS. HENRY: It means that if you, on certain limited circumstances such as mining entry-by-entry or block-by-block

JUDGE KOUTRAS: Right.

MS. HENRY: You can use the same plan without submitting a new one. It does not mean that if you go from the return side of the entry to the intake side of the entry and start mining there that you can use the print that they were claiming applied.

Mr. Onuscheck stated that since the submission of the typical plans, and prior to the respondent's dealings with MSHA's Hastings field office, the respondent has mined approximately 15 million tons of coal, and no one has ever questioned the use of the typical face plans even though various mining methods were used. He indicated that in the year and a half prior to the issuance of the citation by Mr. Brunatti, the use of typical face plans was not an issue. He believed that the Hastings field office was unfamiliar with the use of the typical face plans, but since the district manager accepted them, he further believed that the respondent has complied with the requirements of section 75.316 (Tr. 241-242).

Mr. Onuscheck confirmed that face print R2 is the plan that was submitted by the respondent when it submitted its original typical plans, as well as later when it submitted Review 28 for the No. 1 Mine. He identified print R1 as the plan submitted to abate the violation issued by Mr. Brunatti. He described the similarities and differences in the two plans, and while he conceded that there are differences in the manner in which the gob is being ventilated, he did not believe that they are significant (Tr. 254-256). He confirmed that R2 depicts what was going on on the D5 section in terms of pillar mining and ventilation at the time the violation was issued (Tr. 257).

On cross-examination, Mr. Onuscheck stated that once a typical plan is filed and approved by MSHA, the ventilation direction could be changed without notifying MSHA or submitting another plan, because to do otherwise would require a new plan every day or every hour. He did not believe that finishing one gob on one side of the entry and starting another gob on the other side is important enough to require the submission of a new plan (Tr. 259). He confirmed that

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during his conversation with Mr. Brunatti, they discussed "typical" plans as compared to "specific" plans, and that when he asked Mr. Brunatti why he issued the citation, Mr. Brunatti responded that there was no plan explaining exactly what was going on in the DÄ5 section (Tr. 261). Mr. Onuscheck stated that he believed he was complying with a variation of plan RÄ2, but not the exact plan, and that Mr. Brunatti insisted that he was not complying with "an exact replica of what we were doing." In order to do this, up-to-date maps, rather than plans would have to be submitted, and this was done to abate the violation (Tr. 262). Mr. Onuscheck confirmed that RÄ2 "is close to" what was going on in the DÄ5 section when the citation was issued (Tr. 263).

Mr. Onuscheck confirmed that face print RÄ2 was not submitted to abate the violation, even though it had previously been accepted by the district office, and represented what was going on in the DÄ5 section, because he believed an order may have been issued by Mr. Brunatti. Rather than argue about it, and to achieve abatement as fast as possible, "it was simple just to make up a plan and send it in to abate the violation" (Tr. 279).

Mr. Onuscheck confirmed that the plan binder previously referred to consisted of previously submitted and approved face plans, and that it was put together as a matter of convenience for the district office and "we just listed them and instead of sending down 40 face prints for whatever mine it was, we just listed the numbers" (Tr. 282). Mr. Onuscheck confirmed that prior to Mr. Brunatti's citation, pillars had been pulled and extracted utilizing print RÄ2. With regard to the prior submissions of the typical plans, he stated as follows (Tr. 284Ä286):

Q. So it's true, then, that those plans that you drew up were not specific for Greenwich Mine; in fact, when you drew them up you didn't even have Greenwich in mind since Greenwich is not under R & P's direction?

A. Right. At the time we didn't have Greenwich in mind. When we took over, and we made studies of the Greenwich Mine prior to taking over, we spent, oh, I'd say a month up there, a good month going over their plans and how they mined and everything. Their type of mining was very similar to ours. We tailored a typical plan and added

two other face plans to our typical. In addition to the typical we added two other plans, because mine management said that, you know, these, we want to put them in with your typicals.

Q. Were you mining DÄ5 at the time, Section DÄ5?

A. When we started managing; no.

Q. Mr. Onuscheck, do you understand that the use of a typical face plan has been established by the testimony from Mr. Zilka, means only mining from entry-to-entry or from block-to-block, that it does not cover a situation where you go over from an intake side to a return side?

A. No, ma'am. Without hearing his testimony I don't agree that it's just, how did you say, adding an entry?

Q. Yes, either adding an entry or going from block-to-block, those are the only cases in which you could use a typical plan?

A. No, we take the opinion that we, you can vary a lot more than just that.

Q. But hasn't MSHA told you that you can't vary a lot more than that, that that's the only variance you can have under typical plans?

A. We hear a lot of things from MSHA, ma'am, I don't know if they've ever said, specified how far you can go.

Q. Has MSHA ever told you that you're varying too much on the typical plans, that you can't vary as much on your typical plans?

A. Prior to Sam's violation, I don't think they did. Now, recently, they have been questioning the face plans, the typical face plans quite a bit in the last couple of months, or I'd say even the last half of year. But prior to Sam's violation, I don't believe they had.

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Michael Ondecko, stated that he is employed by the respondent as a ventilation engineer, holds a B.S. degree in mining engineering from the Penn State University, and he testified as to his experience and duties. He confirmed that he and Mr. Onuscheck worked together in the preparation and submission of plan Review 28, and the face print packet that was part of that plan. Mr. Ondecko identified exhibit RÄ2 as a page from the packet submitted with plan Review 28 that was submitted and approved by MSHA. RÄ1 is the addendum which was sent in to abate the citation issued by Mr. Brunatti, and RÄ2 is a face print which had previously been submitted and approved, and it was in effect at the time the citation was issued (Tr. 303Ä307).

Mr. Ondecko explained what he believed to be the similarities and differences in face prints RÄ1 and RÄ2, and he stated that had Mr. Brunatti been on the section a week or two prior to his inspection, he would not have observed as much gob being extracted, and at that time the two prints would have been very similar. He indicated that without the extraction of the five stumps which he identified between the No. 11 and No. 12 rooms on face print RÄ2, the two prints would look the same. In his opinion, there was no need to send in a new face print for the specific location because it was already covered in print RÄ2. He confirmed that the only difference in the two prints is the amount of mining which is taking place. Otherwise, they would perhaps be identical (Tr. 307Ä311).

In response to a question as to the ventilation directional arrows shown on RÄ1, indicating that return air was going to the right, Mr. Ondecko stated as follows (Tr. 311Ä313):

Q. And the question was if we show the air going to the right, why do we think we can move the air in another direction. Do you have an answer for that question?

A. Possibly to clarify that, it is when these face prints are sent in they're to show general face ventilation patterns. It's not uncommon for some of our sections to have two, three thousand feet of gob area, and it's not uncommon for air to come out of a crosscut in the opposite direction as shown on the map

But it does not, in any fact, say that we're ventilating the gob any differently, we're still pressurizing the gob and we're loosening, when MSHA is looking at this plan, they're looking at the general plan that may show the ventilation pattern is going in the same direction.

And we've had instances at our mines where violations have been vacated because of an air directional arrow in, say, one crosscut out of eight was going in the wrong direction.

And Pittsburgh has said that you show the basic ventilation pattern; we can't hold you down to every crosscut that has ventilation coming out of that crosscut.

But there are certain situations where gob will tighten up here, (indicating) and not be as tight here to where you can only control that gob with canvas checks and do the best you can to pressurize your gob.

And in some cases you will have air flow coming out in the opposite direction, but it doesn't say that you're still not pressurizing the system. Okay, the system is still functioning properly.

On cross-examination, Mr. Ondecko confirmed that he was not at the mine when the citation was issued. He agreed that the ventilation plan states that air flow must be maintained over the gobs so that it is course away from the active working section. He indicated that there are times when all of the air does not go away from the working section, and all that is required to be shown on a plan is a general ventilation pattern (Tr. 313). Mr. Ondecko stated that it was possible that Mr. Zilka may have advised him that a ventilation plan showing a double split of air could not be used as the same plan for a single split of air, but he could not recall such a conversation (Tr. 314).

#### Rebuttal Testimony

Inspector Brunatti testified that any "system of mining" necessarily includes a "system of ventilation," and that the two go hand-in-hand. In his view, the term "typical plan" means one that is approved for a particular mine, and that



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section 75.316Ä2 makes it clear that a typical mining method should correspond with a typical ventilation pattern on a mine-by-mine basis (Tr. 316). He reiterated his disagreement that face print RÄ2 could be used in mining across the stumps shown in print RÄ1, and no ventilation controls are shown on RÄ2 so as to control the air going to the gob being created by mining across the area and taking out the stumps (Tr. 316Ä321). He confirmed that when he spoke with Mr. Onuscheck by phone, face print RÄ2 was not mentioned, and when he advised Mr. Onuscheck that there was no print to correspond with the mining taking place "he left me with the understanding he'd get one in and get it submitted" (Tr. 322). Mr. Brunatti confirmed that even if Mr. Onuscheck had produced print RÄ2, he would have rejected it because it was totally unrelated to the mining which was taking place (Tr. 323).

Referring to an enlarged diagram of face print RÄ1, Mr. Brunatti stated that the ventilation controls are different from those on RÄ2, and he explained how he determined that some of the air from the gob was leaking into the active working section, and how the gob pressure was other than that shown on RÄ2. In his view, had a proper face print been submitted, and the ventilation controls shown therein been followed, the air leakage problem would not have existed (Tr. 327Ä338).

Mr. Brunatti stated that at the time he discussed the citation with mine management at the mine, he was shown several face prints, and while some of them may have closely resembled the approved ventilation plan, none of them resembled the mining which was actually taking place. He denied that he insisted on a face print depicting exactly what was going on, and stated that he would have accepted any plan that reasonably approximated what was going on, but he does not consider RÄ2 to be such a reasonable approximation (Tr. 342Ä345). He confirmed that while district policy allows reasonable variations in the ventilation methods shown on face prints, if such variations affect the manner in which an area is being ventilated, or if changes are made in the direction of the air or in the system of mining, they would not be permitted without another plan to cover these changes. In the instant case, the system of mining had changed on the day of his inspection. Although a plan was approved to cover the time when the three room entries were initially driven and pillared off the return side of the section, they had no plan when they started across and began driving and pillaring rooms on the intake side. Such a new face print was required

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to insure adequate ventilation over the intake gob area (Tr. 346).

Mr. Zilka testified that face print RÄ1 represents a ventilation system involving a double split of air, and he indicated that "Mr. Ondecko and Mr. Onuscheck and every ventilation engineer in the district has been told and informed since day one that a single split and a double split is totally different and there is no way that you can go from a single split to a double split without a ventilation change which requires an addendum" (Tr. 348). Inspector Brunatti agreed with Mr. Zilka (Tr. 369).

Mr. Ondecko disagreed that face print RÄ1 reflects a double split of air, and indicated that it is possible to find at least five or six splits of air on the print (Tr. 373Ä375).

#### MSHA's Arguments

MSHA asserts that a violation of section 75.316 occurred when Inspector Brunatti observed retreat mining performed in the DÄ5 section and the respondent did not have a face print to show how to ventilate the mined-out right side while mining the left side. MSHA asserts that this is a change in the "conditions and mining system" of the mine which requires appropriate revisions in the ventilation plan, and such changes include changes in the pattern of mining. To claim otherwise, argues MSHA, would render section 75.316 almost meaningless, for it would mean that operators need only submit changes in ventilation plans if they changed, for example, from pillar mining to longwall mining.

MSHA further asserts that the respondent cannot defend against the issuance of the citation by asserting collateral estoppel, because MSHA, in the issuance of a citation or order, is not bound by collateral estoppel. *El Paso Rock Quarries*, 2 MSHC 1133 (1981), *King Knob Coal Co.*, 2 MSHC 1371, 1375 (1981), *U.S. v. Browning*, 630 F.2d 694 (10th Cir.1980). MSHA, therefore, concludes that even if the respondent's arguments that they could institute variations in mining without corresponding face prints approval were credible, it is not a defense to the issuance of Inspector Brunatti's order. MSHA points out that Inspector Brunatti determined that the face prints submitted by the respondent, and shown to him on August 5, 1986, did not reflect the actual ventilation system in the mine, and further, did not show how such

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retreat mining was to be ventilated in the future. MSHA concludes that this is a violation of section 75.316, which provides that ventilation plans shall correspond with the pattern of mining in any one area, and that any alleged previous belief that the respondent could modify its plans without prior approval is irrelevant as to whether the order was properly issued.

MSHA argues further that such a belief on the respondent's part exceeds credulity and that its negligence was properly rated as high. In support of this conclusion, MSHA points to the testimony of Richard Zilka, who reviews the ventilation plans for compliance at the District Office level, and who stated that he had explained the requirements of ventilation face prints to the respondent on several occasions. MSHA suggests that Mr. Zilka's testimony at trial was clear and consistent, and that his testimony that he was in almost daily contact with the respondent is uncontradicted. Mr. Zilka recalled the names of people to whom he had spoken as part of this daily contact, and clearly stated that the respondent expressed no confusion during these meetings; therefore, Zilka did not need to reduce such constant communication to writing. Mr. Zilka emphatically stated that his views represented those of the district, and that on the day the order was issued, respondent's engineer Onuscheck admitted that he knew he needed face prints for this new pattern of mining, and Mr. Brunatti recorded this conversation in his contemporaneous notes.

MSHA concludes that it has established a prima facie case of high negligence in that the respondent knew it was required to submit a new ventilation face print for this mining, and further knew and admitted that at the time of the order the prints in the ventilation plan did not cover the situation at the DÄ5 area. MSHA suggests that the respondent's current claims that it believed all the while that its prints were "close enough" to its mining system are contradicted by its employees' statements at the time of issuance of the citations and by Zilka's and Brunatti's explanation of MSHA policy. Although respondent referred to alleged statements made by District Manager Huntley, neither a deposition nor any written material from Huntley supports these allegations; rather the consistent, emphatic statements of Zilka and Brunatti disprove them.

MSHA maintains that the respondent's defense to negligence that it could vary plans on its own volition undercuts the very purpose of the Act. MSHA states that in addressing such arguments as the "diminution of safety" defense, the

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Commission has rejected the argument that "an operator can unilaterally determine that a mining operation can be conducted in a safer manner by foregoing compliance with the requirements of a mandatory standard." Westmoreland Coal Co., 3 MSHC 1939, 1943 (1985). MSHA states that by arguing that the ventilation of one gob, the system in place the day Inspector Brunatti issued the inspection, may be regulated by a face print showing the ventilation of two gobs, the system revealed in Exhibit RÄ2, respondent suggests that it may determine what is and is not minor variation, and that it may determine if MSHA's safety standards are met. This argument, concludes MSHA, impermissibly contradicts the presumption that MSHA's safety standards protect miners and the "strict liability" nature of the Act itself. Therefore, MSHA further concludes that the respondent's arguments strain credulity and do not refute the testimony of Engineer Zilka and Inspector Brunatti that it was well informed as to the requirements of the ventilation plan regulations.

Citing Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981); Mathies Coal Co., 6 FMSHRC 1, 3Ä4 (January 1984), and Consolidation Coal Company, 6 FMSHRC 34 (January 1984), MSHA asserts that Inspector Brunatti properly rated the violation as significant and substantial.

MSHA points out that the Commission has recognized that the violation of a ventilation plan where "an insufficient quantity of air could lead to a build-up of methane" was a serious violation. Peabody Coal Co., 1 MSHC 1573 (1977), and has stated that " the hazards associated with inadequate ventilation are among the most serious in mining." Monterey Coal Co., 3 MSHC 1833, 1855 (1985). MSHA states that in Monterey the Commission reaffirmed that the proper focus of a hazard presented by a violation is not solely on the instant situation, but "on the hazards posed by continuing mining operations." 3 MSHC at 1836. MSHA concludes that the violation in issue here meets those standards in that the face prints Mr. Brunatti reviewed did not show how to ventilate the area he inspected. As a result of the lack of an applicable face print, there was no plan to re-route the air leakage into the working section which endangered the miners, and Mr. Brunatti's contemporaneous notes support his observation on the existence of this leakage.

MSHA asserts that ventilation leakage causes methane and black damp, and therefore there was an underlying violation as a result of the lack of face prints and a discrete safety hazard from the leakage caused by such lack of a ventilation plan. The mere direction of air into the return entry is not

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enough to overcome this safety hazard. The fact that the respondent would suggest that simply directing air into the entry, and not also directing it away from the working section complies with the Act, reveals a dangerous ignorance of the correct ventilation procedures. MSHA maintains that the air must be directed away from the working face as well as to the return airway. Otherwise, there is a reasonable likelihood that miners will be exposed to black damp and to accumulations of methane. These exposures lead to explosions which produce serious health injuries.

MSHA asserts that even if no leakage occurred that day, the order was still properly rated "S & S" in that a ventilation plan by its very nature is directed against future hazards. The mere fact that the air may happen to be flowing in the right direction without benefit of a ventilation plan does not assure that the air will continue to flow that way. In fact, the very presence of ventilation plan requirements in the MSHA regulations indicates that this system is too important to leave to the operator's good will, or to presume that air flowing in the "correct" direction will continue to do so in the absence of a ventilation plan. Such a presumption, maintains MSHA, undercuts the strict liability nature of the Act and the very existence of ventilation plan requirements.

MSHA asserts that such a presumption also trivializes the serious hazards associated with ventilation violations. Without a face print showing how pressure would be kept on the gob to direct air away from the face, respondent presented a discrete safety hazard to its miners. Without such a print to regulate ventilation, it is reasonably likely that dangerous gob air will travel to the face. In ventilation problems, the focus is on the effect of the violation on future mining, and not whether the air luckily travels in the "right" direction at the time of the order. Without a face print, the respondent cannot assure that gob air will flow away from the working section. Such gob air travelling to the working section will carry methane and black damp to the miners, raising a reasonable likelihood that miners will suffer serious injury. Thus, MSHA concludes that the order is properly rated significant and substantial.

#### Respondent's Arguments

Respondent's first argument is that the citation and subsequent modification do not properly, and with any particularity, advise the respondent as to the nature of the alleged violation. Respondent points out that although the citation

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alleged that it did not have an approved ventilation plan showing the ventilation system for retreat mining in the cited area, the modification to the citation stated that it did have an approved ventilation plan for pillar mining in the same area prior to the issuance of the citation. Respondent contends that the modification discounts any notion that it did not have an approved ventilation plan, and that the citation and modification are contradictory.

In response to the inspector's statement in the modification that "the system of mining changed, thus necessitating a need for a new ventilation plan," the respondent contends that the inspector's attempt to substantiate a violation by stating that the system of mining had changed, thus necessitating the filing of a new ventilation face print, is contradicted by his own testimony that the system of mining employed was pillar mining. Respondent asserts that the terms "pillar mining" and "retreat mining" are interchangeable. It points out that while Inspector Brunatti attempted to distinguish pillar mining on the left and right sides of the cited area being mined, he nonetheless admitted that "pillar mining" is a "system" of mining, and that the respondent did have a face print, drawing #11 of the ventilation plan (Exhibit RÄ2), which did show pillar mining on the left side.

In response to Inspector Brunatti's testimony that "the essence of the violation is that the operator didn't have a plan to show how the ventilation would be established while retreat mining" (Tr. 45), respondent contends that this is contradicted by his written modification which states that it did have a plan for pillar mining in the cited area, and by his own testimony that the approved plan print showed gob ventilation in the section (Tr. 89).

Respondent contends that the attempts by Inspector Brunatti and MSHA's ventilation engineer Zilka to support a violation of section 75.316 because the face print submitted to abate the order (Exhibit RÄ1) shows one gob area and the face print in the ventilation plan (Exhibit RÄ2) shows two gobs, must be rejected. In support of this conclusion, respondent contends that this is not a violation of section 75.316, and that even if it were, respondent has never been informed in writing that the condition was a violation. Respondent points out that neither the citation nor the modification mentions gobs, and that it cannot even be inferred from the citation that gobs had anything to do with the violation. Since section 104(a) of the Act requires that the nature of the violation be described in writing with particularity, respondent concludes that the lack of any mention of

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gobs in the citation violates the specificity requirements of section 104(a) when the nature of the violation is alleged to be a distinction between one gob and two gobs.

Citing a Commission decision in *Jim Walter Resources, Inc.*, 1 FMSHRC 1827 (November 1979), respondent maintains that it was not sufficiently apprised of the nature of the violation to either litigate the alleged violation or cure any alleged deficiencies which might pose a hazard to miners. Respondent states that it became aware on the eve of the hearing that the violation involved a distinction between one and two gobs. Although Inspector Brunatti testified that he told the respondent that Drawing 11 (Exhibit RÄ2) of the ventilation plan did not apply, respondent asserts that there is no indication that he mentioned a distinction between gobs, and that no such distinction was ever related to the respondent in writing. Further, respondent states that although it requested more specific information with regard to the factual basis for the violation when it served prehearing interrogatories on the petitioner, the interrogatories were unanswered.

Respondent concedes that it was sufficiently apprised of the nature of the violation in order to abate the citation because all that was required to abate was a drawing of exactly what the section looked like on the day in question, but that until the eve of the hearing, it was not aware of the one gob versus two gob distinction asserted as the basis of the violation. Recognizing the fact that abatement suggests knowledge of the violation, respondent maintains that this is not enough to satisfy the specificity requirements of section 104(a). In support of this conclusion, respondent relies on a prior decision by me in *Monterey Coal Company*, 6 FMSHRC 424, 444 (February 1984), vacating citations for lack of specificity as required by section 104(a), and it points out that in the instant case, aside from the fact that the citation did not specifically mention gobs, it did not even generally allude to any gobs.

Respondent's second argument is that Drawing No. 11 of the approved ventilation plan (Exhibit RÄ2) portrayed the ventilation system in the cited section in sufficient detail to preclude a finding of a violation of section 75.316. Respondent takes the position that the inspector's allegation in the citation that a violation of section 75.316 occurred because the respondent did not have a ventilation plan showing the ventilation system for retreat mining is not true because in the modification the inspector admits that the respondent had an approved ventilation plan for pillar mining.

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Respondent also takes the position that the inspector's testimony that a violation of section 75.316 occurred because of the lack of an approved face print to conduct that type of mining is also not true because the inspector admitted that the type of mining being conducted at all relevant times was pillar mining. Respondent further argues that the inspector's allegation that a violation existed because of the lack of a face print showing pillar mining on the left side is also not true because he admitted that there was a face print showing pillar mining on the left side.

Respondent concedes that the face print in the approved ventilation plan (Exhibit RÄ2) shows two gobs while the print submitted for abatement (Exhibit RÄ1) shows only one gob. However, respondent maintains that the petitioner has not shown that its regulations or the respondent's approved ventilation plan requires it to show the number of gobs in a section, and that it has not even shown that the respondent is required to show gobs on a face print. With respect to the inspector's suggestion that section 75.316Ä1(13)(b)(3) may serve as a basis for a violation of section 75.316, respondent points out that the inspector admitted that no violation of section 75.316Ä1(13)(b)(3) existed.

The respondent states that initially, the two gobs are only a temporary condition. It points out that respondent's ventilation engineer Onuscheck testified that the print in the approved plan had not shown any stumps extracted (Tr. 273), but that stumps would be extracted (Tr. 274), and that the inspector incorrectly assumed that the stumps would remain (Tr. 274Ä275). Respondent further points out that ventilation engineer Ondecko testified that once blocks have been extracted, one gob would result and the gobs would be identical (Tr. 308Ä309), and that Inspector Brunatti agreed that if the blocks are removed one big gob would result (Tr. 319). In these circumstances, respondent suggests that the issue is then whether it was required to have in the approved plan a face print showing each stage of mining and the removal of each stump as the two gobs evolve into one gob.

Respondent refers to the testimony of Mr. Onuscheck that MSHA's District Manager Huntley suggested to him that three plans would cover everything that was necessary; one print showing rooms being driven, one print showing entries being driven, and one print showing stumping (Tr. 221). Respondent concludes that this does not indicate that the District Manager required a face print showing the ventilation for each step in the mining process, and it points out that



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Mr. Onuscheck, in conjunction with MSHA personnel, then formulated the packet of typical face prints that are presently submitted and approved as part of the ventilation plan (Tr. 222). There are twenty face prints in mine ventilation plan Review No. 28 which was in effect at the time in question, far more than the number suggested by MSHA's District Manager to cover the system of mining and ventilation employed at the respondent's mines. Mr. Ondecko then went over each print individually and tailored the packet of prints to conform to mining practices at Greenwich No. 1 Mine (Tr. 305), and the intent of the District Manager, Mr. Onuscheck, and the MSHA personnel with whom Mr. Onuscheck worked, was obviously to have general face prints. Respondent points out that MSHA ventilation engineer Zilka agreed that the District Office requested only face prints that were representative of the mining going on at the mine (Tr. 147), and that the prints submitted in Review No. 28 are a typical face ventilation plan for each system (Tr. 150).

Respondent maintains that a distinction must be made between general prints, as intended in this case, and universally applicable prints. Respondent recognizes the fact that the parties involved in the formulation of typical face prints are aware that ventilation plans are mine specific, Jim Walter Resources, Inc., 9 FMSHRC 903, 909 (May 1987), and that section 75.316 requires that the plan is "suitable to the conditions and the mining system of the coal mine." Respondent points out however, that Mr. Onuscheck and MSHA personnel from the District Office in Pittsburgh formulated the typical prints to conform to the conditions and mining systems at the respondent's mines, and that Mr. Ondecko further tailored the prints to conform to the conditions and mining practices at the Greenwich No. 1 Mine. Respondent concludes that the testimony shows that it did not violate that portion of section 75.316 which requires it to adopt a ventilation plan approved by the District Manager suitable to the conditions and the mining systems of the mine in question.

Respondent quotes a pertinent portion of section 75.316, which provides as follows: "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."

Respondent maintains that the petitioner has not shown or even alleged that a violation existed due to deficiencies in the ventilation equipment, and there are no allegations

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that the quantity and velocity of air reaching each working face was unsatisfactory. Respondent concludes that it must be presumed that the plan initially contained enough information because it was approved by the District Manager, and the information submitted apparently was in compliance with section 75.316A1 and he presumably used the criteria set forth in section 75.316A2 as a guideline in the approval process.

Respondent observes that the petitioner is apparently alleging that it violated section 75.316 by not providing "such other information as the Secretary may require." Conceding the fact that MSHA may require additional information or ongoing information, the respondent nonetheless asserts that it must be informed as to the nature of the information required, and suggests that the petitioner alleges an act of "omission" rather than "commission." Respondent concludes that in order to be in violation due to omission it must first be required to do something and to have a duty to perform. In this case, respondent maintains that the petitioner has not shown that it had a duty to submit a new face print when the mining sequence showed two gobs rather than one, and that any such requirement cannot be found in the applicable MSHA regulations or in the specific ventilation plan for the mine in question. Respondent further asserts that the applicable plan does not require it to show the number of gobs.

In response to the petitioner's suggestion that it should have been aware that MSHA's District policy requires that a face print must be submitted when two gobs exist rather than one (Tr. 124A125, 134, 140A141), respondent points to the testimony of Mr. Onuscheck that he had requested District policy in written form but that he never received it (Tr. 287). Further, citing *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398 (D.C.Cir.1976), and *Carbon County Coal Company*, 7 FMSHRC 1367, 1371 (September 1985), (cited as 6 FMSHRC 1123 (May 1984)), respondent maintains that since ventilation plans are mine specific, any MSHA District general policy regarding the requirements of a ventilation plan are improper. Respondent quotes from the *Zeigler* case, where the court stated:

[T]he plan idea was conceived for a quite narrow and specific purpose. It was not to be used to impose general requirements of a variety well-suited to all or nearly all coal mines, but rather to assure that there is a comprehensive scheme for realization of the statutory goals in the particular instance at each mine. *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398 (1976).

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And, from the Carbon County case, where the Commission, quoting from the Zeigler court decision, stated: "Insofar as those plans are limited to conditions and requirements made necessary by peculiar circumstances of individual mines, they will not infringe on subject matter which could have been readily dealt with in mandatory standards of universal application."

Respondent asserts that if MSHA believes that more specific face prints are required as a general policy, then the proper procedure is to promulgate a regulation to that effect rather than attempt to impose the requirement across the board in each mine specific ventilation plan. Furthermore, the respondent asserts that its mine plan does not contain a provision requiring it to submit such specific information, but in fact contains a provision which expressly negates such a requirement, namely, Part "E" (Exhibit RÄ3), which provides as follows:

(2) TYPICAL FACE PRINTS

The following face ventilation plans depict typical systems of face ventilation used in the mine. Variations of the following plans may be used provided that the systems of ventilation remain in accordance with Federal Regulations.

Respondent points out that Inspector Brunatti, while stating that he was "fairly familiar with the ventilation plan" (Tr. 13), admitted that he was not familiar with Exhibit RÄ3 and that it was not a part of Review 28 because he could not find it in his copy of the ventilation plan (Tr. 81), and that District engineer Zilka testified that if the exhibit was not in Inspector Brunatti's plan, it was not filed in the District Office in Pittsburgh (Tr. 151). Contrary to this testimony, respondent states that Mr. Onuscheck and Mr. Ondecko testified that Exhibit RÄ3 was in fact a part of Review 28 of the approved ventilation plan (Tr. 245, 305Ä306), and that in response to a bench order for an affidavit from the responsible person in the MSHA District Office concerning the filing of the exhibit, petitioner's counsel confirmed that it was in fact on file in the District Office.

Respondent refutes the inspector's inferences that the respondent was not aware of its own ventilation plan, and takes issue with his testimony that when mine management

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attempted to show him a print that showed the mining and ventilation system used on the cited section it was "grabbing at straws for something that they thought would cover" the situation. Conceding that this may be true, respondent asserts that the mine manager and safety director cannot be expected to be aware of all the technicalities of the face prints in the ventilation plan. If they were, there would be no need for ventilation personnel or for that matter any other management people. The mine manager could do everything himself. Respondent suggests that the only plausible way to operate such a complicated operation is to delegate some authority to responsible people, and that if Mr. Ondecko was available when the inspector asked for the print, Mr. Ondecko would have shown the inspector, as did those present, Drawing No. 11 (Exhibit RÄ2), without the alleged hesitancy.

In response to the inspector's testimony that Mr. Onuscheck had submitted a ventilation plan for review without mine level management's knowledge (Tr. 23, 27), respondent states that this is pure speculation and totally inaccurate, and that mine ventilation engineer Ondecko testified that he and Mr. Onuscheck formulated the packet of face prints, and that Mr. Ondecko went over each print individually to insure that it pertained to the mine in question (Tr. 305).

Respondent maintains that on the facts of this case, the inspector was attempting to enforce a ventilation plan that he knew very little about, that his copy of the plan, for whatever reason, did not contain Exhibit RÄ3, and that he was unaware of the procedure followed by the respondent and MSHA's District Office used to formulate the plan, which was to reduce the number of face prints that possibly could have been submitted from approximately 500 prints to the 20 prints that were submitted (Tr. 264). Respondent points out that the inspector admitted that mine management had some face prints that closely resembled the mining activity in the cited section, and that the mine is permitted to vary from the specific print in the ventilation plan (Tr. 342, 345). Mr. Onuscheck testified that the inspector wanted a plan that showed exactly what was going on in the mine (Tr. 261), but respondent takes the position that it was not the intent of MSHA or the respondent, the parties involved in the approval and adoption of the ventilation plan, that exact prints would be required. Respondent points out that Mr. Onuscheck testified that in the year and a half the typical prints were in use, respondent had mined approximately fifteen million tons of coal and had no problems with the face prints, and no other MSHA inspectors had ever questioned the manner in which

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the respondent was mining (Tr. 241, 294). Respondent concludes that it was not the intent of the parties that detailed face prints were required as part of the ventilation plan.

Respondent maintains that Part "E" of plan Review No. 28 (exhibit RÄ3), as part of the approved ventilation plan, allows it leeway to vary from the drawings on the specific prints submitted as part of the plan, and that any such leeway is limited only by MSHA's ventilation regulations. Respondent asserts that the petitioner has not shown that there are other provisions in the mine ventilation plan which limits the respondent's right to vary from the print submitted, and it points out that Mr. Onuscheck testified that MSHA has never told the respondent that it was varying too much from the plans prior to the alleged violation in question (Tr. 286). Respondent further maintains that the petitioner has not shown that the variance has violated any other MSHA regulatory provisions, and has not shown that the respondent is required to submit more specific prints than the prints that were submitted in this case.

In response to the inspector's allegation that gob air was going into the section return (Tr. 18), respondent states that the petitioner has not shown that this constitutes a violation of the ventilation plan. To the contrary, respondent asserts that the credible evidence suggests that the gob air was moving in the proper direction (Tr. 191Ä192), Exhibit GÄ1), and observes that if it was not, the inspector would have included that finding in the citation or modification. In fact, this allegation is not mentioned in either the notice or the modification. Respondent takes the position that if the inspector thought this to be a violation, he should have properly included it in the citation. Respondent maintains that it serves no purpose to put such a finding in the inspector's notes where conceivably, if the citation was not challenged, no one would ever see the finding and the respondent would not have an opportunity to contradict the allegation, or more importantly, could not cure any alleged existing hazard.

Respondent concludes that the inspector's allegation that the gob air was improperly directed is nothing more than a balled assertion by the inspector, and that the respondent's mine safety inspector DeSalvo, who accompanied the inspector on the day in question testified that while the inspector took a smoke test, it showed that the air was not going back to where people were working (Tr. 191Ä192). Although the inspector had an opportunity to rebut Mr. DeSalvo's testimony, he simply testified that he normally does a smoke test, but he

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could not recall if he did on the day in question (Tr. 370). Respondent concludes that a violation cannot stand on unsupported allegations that air was moving improperly, when the actions of the inspector and the testimony of an eyewitness suggest otherwise.

Respondent's final argument is the assertion that assuming a violation existed, it was not significant and substantial within the guidelines established by the Commission in Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981), and Mathies Coal Co., 6 FMSHRC 1, 3A4 (January 1984).

Respondent points out that in the instant case the inspector alleged that "if the section isn't properly ventilated or the pressure isn't kept on the gob, you could have accumulations of methane in the gob area or, which could in essence come back into the working area" (Tr. 14, emphasis added). Respondent does not disagree with this statement, but takes the position that the petitioner has not shown that the section was improperly ventilated. Respondent maintains that the facts show that the entire testimony of inspector Brunatti and MSHA ventilation engineer Zilka, does not show that the ventilation system was improper, and neither witness even suggested that the section should have been ventilated differently than it was ventilated. The only testimony regarding the propriety of the ventilation system in use was that of Mr. DeSalvo who testified that he told Mr. Brunatti that he felt the way Greenwich was ventilating the gob area was the best possible way to ventilate it (Tr. 193), and that Inspector Brunatti agreed with this statement (Tr. 193). The inspector testified that he took methane readings at various locations, including the return, and found no problems or excessive levels of methane (Tr. 57A58).

Respondent suggests that it was not reasonably likely that an injury of a reasonably serious nature would result from a methane ignition when the section was ventilated in the best possible way and the particular facts show that there is no accumulation of methane. Even assuming that air was flowing improperly from the gob, the significant and substantial finding is not supported because it would be necessary to assume that methane would accumulate to combustible concentrations and assume that these concentrations would go undetected. It is also necessary to assume that the combustible concentrations would reach ignition sources. If a cable or electrical component is the asserted source of ignition, it is necessary to assume that a violation exists regarding the cable or electrical component which would cause a spark

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and also assume that this violation was undetected by the inspector.

Respondent further argues that if the source of ignition is claimed to be the mining machine, it is necessary to assume that the methane monitor would fail to warn the machine operator, or the machine operator would not heed the warning, and assume that the methane monitor would fail to deenergize the equipment at the required time and assume that something produced a spark.

Respondent concludes that while the foregoing scenarios are possible, the likelihood of that chain of events occurring is so remote as to preclude any finding that there was a "reasonable likelihood" of the occurrence. Respondent believes that, even assuming gob air was moving improperly, and a possibility of an injury existed, that possibility would be so remote as to be unlikely, rather than reasonably likely to occur. Respondent points out that the inspector testified that if gob air was not going back into the section, the system of ventilation used was adequate for the system of mining employed, and that the hazard posed by simply not having a print in the plan was minimal, if any hazard at all (Tr. 46, 48).

#### Findings and Conclusions

##### Alleged Lack of Specificity of the Citation and Modification Thereto

Respondent raised the specificity issue for the first time when it filed its posthearing brief. While it may be true that MSHA did not respond to the respondent's prehearing interrogatories, filed on February 4, 1987, respondent had more than ample time prior to the hearing to file an objection or seek an order requiring MSHA to respond, but it did not do so. Respondent also failed to avail itself of a more than ample time to depose the inspector in advance of the hearing.

While it is true that the citation and modification do not specifically refer to gobs, respondent's counsel conceded that he was made aware of the "gob theory" of MSHA's case on the eve of the hearing. If counsel believed that he was unduly prejudiced in the preparation of his case, he could have requested a continuance of the hearing, but he did not do so. Further, the record here establishes that the citation was terminated and the violation was abated after Mr. Onuscheck hand delivered to MSHA a ventilation face print

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covering the prevailing conditions at the time the citation was issued. This was done 2 days after the issuance of the citation. Mr. Onuscheck confirmed that he and Mr. Brunatti discussed the reasons for the issuance of the citation, and Mr. DeSalvo confirmed that before issuing the citation, Mr. Brunatti discussed the matter with the mine and division managers, and that they collectively reviewed the ventilation plans and prints which were available at the mine. Given all of these circumstances, I find it hard to believe that the respondent was unaware of the theory of MSHA's case.

Although the citation and modification issued by Mr. Brunatti appear to be contradictory, the modification makes it clear that while the respondent had an approved ventilation plan covering any retreat-pillar mining prior to the date of the inspection and issuance of the citation, Mr. Brunatti could find no evidence that any plan provision on file covering the particular conditions which prevailed on the day of his inspection. While it is true that Mr. Brunatti did not spell out the gob conditions that concerned him, he did state that "the system of mining changed thus necessitating a need for a new ventilation plan." His notes of August 4, 1986, reflect that Mr. DeSalvo admitted that the available face prints did not match the prevailing face ventilation system, and his notes of August 8, 1986, reflect that Mr. Onuscheck and mine management were aware of the need for new face prints. Mr. Brunatti's notes also reflect that the respondent had plans to pillar the return side of the cited area, that he observed the return side being pillared, and that mine superintendent Lowmaster acknowledged that he was not aware of any ventilation plan to cover that situation, as well as the lack of face prints to cover future mining, and that he would discuss the matter with Mr. Onuscheck.

Mr. Brunatti testified in detail with respect to the "changed mining system" referred to in his modified citation. In my view, while the use of the words "mining system," without further elaboration describing precisely what Mr. Brunatti had in mind, was a poor choice of language, Mr. Brunatti's testimony clarified the matter, and Mr. Brunatti was subjected to cross-examination by the respondent. Coupled with the detailed posthearing brief filed by the respondent, and the testimony adduced in this case, I find no basis for concluding that the respondent was oblivious to the theory of MSHA's case, or that it was prejudiced by Mr. Brunatti's failure to spell it all out on the face of the citation. Accordingly, respondent's assertions to the contrary ARE REJECTED, and its request that the citation, as modified, be vacated on the ground of lack of specificity IS DENIED.



Fact of Violation

The respondent is charged with an alleged violation of the ventilation system and methane and dust-control plan requirements of mandatory safety standard 30 C.F.R. 75.316, which 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.

It seems clear that the intent and purpose of section 75.316, is to require a mine operator to adopt an MSHA approved ventilation plan which is tailored to and "suitable to the conditions and the mining system" of the particular mine where it is to apply. It is also clear that once approved and adopted, the ventilation plan and any revisions thereof, are enforceable as though they are mandatory safety standards. Zeigler Coal Co. v. Kleppe, 536 F.2d 398 (D.C.Cir.1976); Carbon County Coal Company, 7 FMSHRC 1367 (September 1985); Jim Walter Resources, Inc., 9 FMSHRC 903 (May 1987).

Respondent's defense in this case is based on its assertion that ventilation face print RÄ2 is in fact the applicable ventilation plan face print which applied to the existing mining conditions at the time Mr. Brunatti inspected the DÄ5 section and issued his citation. Respondent maintains that even if the prevailing mining and ventilation conditions on that day were at variance from what is shown on the print, it is nonetheless permitted to vary from the print, on its own volition, and that it can change or vary the ventilation system without MSHA approval, or without submitting another print. Respondent is of the view that since MSHA has approved the use of "typical" prints, RÄ2 being one of them, such

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prints need not reflect the actual mining conditions or ventilation system in use at any particular time. As examples, respondent maintains that assuming an inspector found some air leakage due to an inadequately ventilated gob, or found that the gobs were not separated by stoppings as reflected on any "typical" print, it may be cited for a violation of any applicable mandatory ventilation standard, but it may not be cited for a violation of section 75.316 for failing to have a specific ventilation plan face print to cover the prevailing mining and ventilation conditions.

The parties are in agreement that the terms "pillar mining" and "retreat mining" are synonymous. The respondent takes the position that the inspector's allegation in the citation that no plan provision existed showing the ventilation system for retreat mining in the cited area is contradicted by the modification to the citation where the inspector states that the respondent did have an approved ventilation plan for pillar mining. While it is true that the two statements, on their face, appear contradictory, the inspector's statements must be taken in context. The inspector qualified the statement which appears on the modification, and he clearly indicated that while the respondent may have had approved ventilation plans covering pillar and retreat mining, which may have taken place prior to his inspection, he could find no evidence of the existence of any applicable plans for what was taking place at the time of his inspection. Thus, the focus of the alleged violative conditions is properly on the inspector's belief that, notwithstanding the pillar or retreat mining ventilation procedures being followed in those past instances when other inspectors may have inspected the mine, the system of mining being followed on the day of his inspection was not the same, and that since conditions had changed, which either affected, or may reasonably be expected to affect, the ventilation in the section, an approved plan provision to cover the changed mining procedures and conditions was necessary.

The term "mining" is defined by the Dictionary of Mining, Mineral, and Related Terms, published by the Bureau of Mines, U.S. Department of the Interior, 1968 Edition, in part as "[T]he excavation made in undermining a coalface." The term "system" is defined by Webster's New Collegiate Dictionary, in part, as "an organized or established procedure or pattern." The term is also defined by the mining dictionary, in part as follows:

d. Regular method or order; a plan.

g. The term system or general system of work means simply that the work, as it is commenced is such that, if continued, will lead to a development of the veins or ore bodies that are supposed to be in the claim, or, if these are known, that the work will facilitate the extraction of the ores and mineral.

Mr. Brunatti confirmed that the "system" of mining being followed at the time of his inspection was retreat mining. He explained that after reaching the limits of the mined areas on the right return side of the entry, the mining cycle proceeded to the left intake side of the entry and pillars were being extracted, thereby creating one gob across the entire intake and return sides of the entry. Mr. Brunatti believed that with the completion of the pillaring work on the right return side of the entry, the change of direction towards the left intake side of the entry where coal was being extracted constituted a change in the mining "system." It seems rather apparent to me that while Mr. Brunatti characterized the general "system" of mining taking place on the day of his inspection as retreat or pillar mining, he viewed the completed work which had taken place on the right return side of the entry, as well as the working being performed on the left intake side of the entry, as two distinct "systems of mining" within the overall "system" of retreat or pillar mining.

Inspector Brunatti's unrebutted testimony establishes that when he conducted his inspection, retreat mining was in progress in the DÅ5 working section. The return side of the entry, located on the right side, had already been mined, and rooms were being driven to the left off the intake side, on the left side of the entry. One row of pillars had already been extracted, and work was in progress extracting a second row of pillars at the time the inspector arrived on the scene. The inspector observed that the area was in full retreat, and that the mined-out return side to the right of the entry, which constituted a gob area, was not separated by stoppings from the area being extracted on the left intake side of the entry. The inspector described both sides of the entry as a "solid gob," and he did not believe that the section was being ventilated properly because he detected air leaking from the gob into the return side of the entry.

I conclude and find that the "system of mining" alluded to by Mr. Brunatti was the pillar retreat extraction work

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taking place on the left intake side of the entry. I further conclude and find that the work being performed at that time constituted a change in the mining system in that the work on the right side of the entry had been previously completed after the area had been driven to its planned limits, and at the time Mr. Brunatti arrived on the scene, a row of pillars had been extracted on the left intake side, and work was in progress extracting the second row of pillars.

Mr. Brunatti confirmed that the respondent had an approved ventilation plan to cover the driving and pillaring of the rooms to the right return side of the entry. The essence of the alleged violation in this case lies in Mr. Brunatti's belief that the respondent did not have an approved ventilation plan or face print to cover the pillar work being conducted on the left intake side of the entry. In support of this belief, Mr. Brunatti pointed out that during his discussions with mine management officials, including a review of certain ventilation plans and face prints on file at the mine, the respondent could not produce any plan or print covering the procedures for ventilating the gob area which was created by the extraction of pillars on the left side of the entry. Mr. Brunatti also relied on what he believed to be ventilation engineer Onuscheck's admissions that the previously submitted mine ventilation plans did not correspond to the type of mining taking place in the DÄ5 section on the day of the day of the inspection, and Mr. Onuscheck's assurance that such a plan would be submitted to correspond with the mining which was taking place in order to abate the citation. Mr. Brunatti further relied on certain statements made to him by mine superintendent Lowmaster's and division superintendent Cocora's admissions that they had no ventilation plan to cover the DÄ5 section.

Respondent's safety director DeSalvo admitted that at the time Inspector Brunatti reviewed with management the 20 to 25 ventilation face prints which were part of the approved mine ventilation plan, many of the prints did not match the five operating mine sections. Mr. DeSalvo also admitted that he had never seen the approved ventilation plan prior to the issuance of the citation, that face print RÄ2 is less specific from the prints submitted to MSHA in the past, and that the print does not specify on its face that it is applicable to the DÄ5 section. He also corroborated that superintendent Lowmaster said something to the effect that none of the prints reviewed by Mr. Brunatti matched the mining conditions which prevailed at the time the citation was issued.

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Mr. DeSalvo's testimony regarding face prints RÄ1 and RÄ2 is contradictory. On the one hand, he testified that print RÄ1, which was filed to abate the violation, depicted the mining and ventilation system in place at the time the citation was issued. On the other hand, he testified that print RÄ2 depicted what was taking place at the time the citation was issued, and that it "applied the best," and was "close enough," if not identical to the mining and ventilation system depicted in RÄ1. Further, Mr. DeSalvo conceded that he and Mr. Lowmaster were not ventilation specialists, and he confirmed that he was not involved in the formulation and submission of ventilation plans or face prints.

I find little merit in the respondent's assertion that safety inspector DeSalvo and mine manager Lowmaster cannot be expected to be aware of "all the technicalities" of ventilation face prints. Aside from any "technicalities," one would expect the mine safety inspector and mine manager to at least have some basic knowledge as to the contents of ventilation plans and prints covering the prevailing mine conditions, and would at least know which plan was applicable at any given time.

Respondent's ventilation engineer Ondecko, who was not present when the citation was issued, believed that face print RÄ2 was the approved part of the plan in effect when the citation was issued. However, he conceded that there were differences in face prints RÄ1 and RÄ2, and he attributed these differences to the extent of the mining which had taken place at the time of the inspection. Since Mr. Ondecko did not view the prevailing conditions at the time the citations were issued, he could not rebut Inspector Brunatti's observations, as confirmed by Mr. DeSalvo, that the coal pillars on the left side of the entry were being mined in a manner which created one large gob area which was not separated by stoppings from the previously mined out right side gob area.

Mr. Ondecko contended that all that is required of the respondent is the submission of general ventilation plans and face prints showing the general mine ventilation pattern, and that specific ventilation face prints covering any particular mining method or system which is being followed at any given time are not required. Although he agreed that the mine ventilation plan requires that the ventilation air flow over the gob areas be maintained in such a manner as to insure that such gob air is coursed away from the active working section, he conceded that at times all of the gob air is not coursed away from the working section. He also conceded that it was not uncommon for the air used to ventilate a gob area to

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course out of a crosscut in the opposite direction from that shown on a face print.

Respondent's ventilation engineer Onuscheck initially contended that face print RÄ2 represented the prevailing pillar mining conditions and ventilation plan at the time the citation was issued. When asked to explain why that particular face print was not submitted to abate the violation, rather than face print RÄ1, Mr. Onuscheck suggested that since Inspector Brunatti disagreed that print RÄ2 covered the conditions which he observed he would probably have issued an order for non-compliance if he submitted RÄ2 to cover the abatement. Mr. Onuscheck further suggested that he submitted print RÄ1 to expedite the abatement of the violation.

Notwithstanding his contention that face print RÄ2 depicted the prevailing conditions at the time the citation issued, and that it was the approved plan print covering those conditions, Mr. Onuscheck conceded that the print was only "close to" what was required, rather than the "exact plan" as depicted in RÄ1, and that the respondent was following a "variation" of print RÄ2. Further, Mr. Onuscheck's claim that MSHA had not previously questioned the use of "typical" face prints such as RÄ2 in the past, is contradicted by safety inspector DeSalvo's testimony that the respondent had in fact been previously cited for ventilation plan violations under circumstances similar to those in this case.

Respondent's counsel conceded that there are differences in face prints RÄ1 and RÄ2, but he considered them to be "insignificant." He also conceded that there were "small variations" between RÄ2 and the RÄ1 plan submitted to abate the violation (Tr. 77Ä78; 324). As an example of what he considered to be a "slight difference" in the two prints, counsel cited the ventilation directional arrows as shown on print RÄ1, which reflects a different directional flow of the air used to ventilate the gob than that shown on print RÄ2 (Tr. 92).

MSHA's ventilation specialist Zilka testified that there are significant differences in face prints RÄ1 and RÄ2, particularly with respect to how the two gobs are being ventilated. He confirmed that the driving of entries, and the pulling of pillars on the right and left sides entails changes in ventilation, and the face ventilation system used to ventilate the resulting gob areas would be different. On the facts of this case, Mr. Zilka was of the view that the respondent could not use face print RÄ2 as a "typical" face print for the conditions observed by Inspector Brunatti, as depicted in

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"typical" face print RÄ1, because the two prints contain different ventilation systems, and print RÄ2 shows a different system of ventilation with two gob areas separated by a stopping going all the way to the face. Mr. Zilka concluded that under these circumstances, the respondent would be required by section 75.316, to submit a face print other than RÄ2 to cover the changed mining and ventilation conditions, and that its failure to do so constitutes a violation of that section.

I conclude and find that the preponderance of the credible evidence and testimony adduced in this case establishes that face print RÄ2, which the respondent maintains is applicable in this case as a "typical" print covering the conditions cited by Inspector Brunatti, clearly depicts two separate gob areas separated by stoppings, and I reject the respondent's assertion that it covers the cited conditions. I further conclude and find that the petitioner has established that face print RÄ1 accurately depicts the existing conditions as observed by Inspector Brunatti at the time he issued his citation, and it seems clear to me that his unrebutted testimony, and that of Mr. Zilka, which I find credible, clearly establishes that at the time of the inspection, the cited area was in the process of being pillared on the left side of the entry, and that one unseparated gob area was created with no stoppings isolating the right return side of the entry from the left intake side. I further conclude that the respondent had no approved face print, "typical" or otherwise, to cover the prevailing changed mining conditions and system in place at the time of the inspection.

Section 75.316 requires a mine operator to adopt a ventilation plan, including any revisions, suitable to the prevailing mine conditions and mining system, and to submit such plan to MSHA for approval. Further, the ventilation criteria found in section 75.316Ä1(b)(4), requires an operator to include in its proposed plan face ventilation systems and drawings depicting the use and application of the system under all anticipated mining conditions. On the facts of this case, the evidence establishes that the respondent has done neither. The "typical" face plan, RÄ2, which respondent maintains applied to its system of mining, did not conform to the actual mining which was taking place, and there is no credible evidence that the respondent had ever submitted an applicable specific face print until after the citation was issued.

The record in this case establishes that at the time the respondent's ventilation plan "binder" system was initiated, the respondent was not managing the subject mine, and the DÄ5 section was not being mined. A letter dated May 23, 1983,

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from MSHA's District Manager Donald W. Huntley, (exhibit GÄ5), acknowledges the receipt of the binder containing multiple face ventilation plans which were applicable to the Keystone and Helvetia Coal Mining Companies. The letter also advised the respondent that it should list all face ventilation plans which were to be used at those mines for each 6Ämonth ventilation review period, and that any proposed plans not in the binder or which have previously been approved by MSHA for use during any current plan review, should be submitted for approval prior to being implemented. In its May 10, 1983, letter submitting the binder, the respondent characterized the face prints which were included in the binder as illustrative ventilation systems to be utilized at the Keystone and Helvetia Mines which were being managed by the respondent at that time. The letter advised MSHA that: "In the event that a system of ventilation is to be used that is not contained in the folder, we will submit it as an addendum. After it is approved the new plan will be added to the folder." (Emphasis added).

Mr. Onuscheck confirmed that even with the submission of the binder, with its face prints, there were times when the respondent had no plan incorporated in the binder to cover the type of mining that it may have been engaged in, and in those instances, it was required to submit a face print to cover that system of mining not previously covered.

Mr. Onuscheck confirmed that at the time the respondent took over the management of the subject mine, the type of mining conducted was similar to that which had taken place at the others mines managed by the respondent. Although the DÄ5 section was not being mined at that time, additional "typical" face prints were tailored to the anticipated mining in the subject mine, and a group of 20 prints, including face print RÄ2 were submitted to MSHA as part of Ventilation Plan Review 28, (Exhibit RÄ3), and they were approved by MSHA on June 4, 1986. Contrary to Mr. Onuscheck's belief, I find no credible evidence that establishes that face print RÄ1 was included among the face print "packet" submitted to MSHA, and it seems clear to me from the testimony and evidence in this case that the face print was submitted by Mr. Onuscheck after the citation was issued in order to abate the violation. The record confirms that the face print was approved by MSHA and incorporated as part of plan 28 on August 7, 1986, 3 days after the citation was issued (Exhibit GÄ4).

After careful consideration of the arguments advanced by the parties with respect to the "typical face print" issue raised in this case, including the respondent's attempts to



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use this a defense to the violation, I reject the respondent's arguments and conclude and find that MSHA has a more compelling argument, and that its position in response to the respondent's asserted defense of the violation is correct. While it may be true that the respondent's Plan Review 28, exhibit RÄ3, which is included as part of its omnibus ventilation plans on file with MSHA, contains a sentence seemingly authorizing variations from the "typical" face ventilation prints which were submitted and approved by MSHA, such authorization is qualified and conditional. This condition specifically mandates that any variations from the "typical" face prints, which I construe to mean "illustrative" or "representative examples," must insure that any future prints depicting mine systems of ventilation submitted by the respondent must comply with Federal Regulations. On the facts of this case, it seems clear to me that the lack of any applicable ventilation face print provision or plan to cover the changed mining conditions as found by Inspector Brunatti during his inspection was not in compliance with the clear language found in section 75.316, requiring the respondent to adopt a plan provision consistent with, and conforming to, the prevailing mining conditions at the time of the inspection.

I agree with MSHA's position that the acceptance of the respondent's "typical" face print argument would allow the respondent to deviate from its approved ventilation plan and face prints with no consideration given to the pattern of mining in existence at any given time, any changes in the ventilation system which necessarily are affected by such changes, the absence of ventilation stoppings clearly indicated in previously submitted face prints, the creation of additional gob areas not shown on previously submitted prints, and any clearly defined areas of anticipated mining and ventilation to insure that all ventilation requirements are met, and to guard against possible air leakage from the anticipated gob areas into the active workings of the mine. The evidence in this case establishes that at the time the respondent submitted its omnibus ventilation plans covering other mines which it managed, the same plans which it apparently incorporated by reference as covering the subject mine, it recognized its obligation to submit additional plans and face prints not previously filed for MSHA's approval, and that it was required to submit ventilation face prints covering any system of mining not previously covered.

In view of the foregoing, I conclude and find that MSHA has established a violation of section 75.316, by a preponderance of the credible evidence and testimony adduced in this case. Accordingly, the violation IS AFFIRMED.

Significant and Substantial Violation

A "significant and substantial" 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, 3Ä4 (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 hazardÄthat 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, 1574Ä75 (July 1984).

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While it is true that Inspector Brunatti could not recall taking any smoke tests, and did not mention any air leakage in the citation and order, his testimony, which I find credible, and his contemporary notes of August 4, 1986, exhibit GÄ2, reflect that gob air was coming into the section. Mr. Brunatti testified that his belief that air was leaking off the gob was based on "sight and feel," and that he could "see it (air) on the canvas, the way the canvas, the pressure on the canvas, and you could fee the air" coming from the pillared gob area back into the section (Tr. 59, 370).

Respondent's reliance on Inspector Brunatti's testimony that the lack of a face print posed only a minimal, if any hazard at all, is rejected. That testimony came in response to a hypothetical question which assumed no air leakage and a proper ventilation system in place suitable to the prevailing mining conditions. Even if there were no air leakage, I agree with MSHA's position that the lack of a ventilation face print presented a discrete safety hazard to miners. The purpose of a ventilation plan and ventilation prints is to lay out the ventilation system for ongoing and future mining, and the means for insuring that adequate ventilation is available to carry away methane and other noxious gases from the active working areas of the mine. Such plans usually include the required quantities of air and pressures, and the ventilation system and equipment used to control and distribute the air throughout the areas where miners may be working. In the absence of any definitive ventilation plans or prints corresponding with the actual mining which may be taking place, and given the fact that changes in the mining system and prevailing conditions occur as the mining cycle advances or retreats, there is a real potential that air leakage will go undetected, that necessary corrections or adjustments to ventilation curtains, stoppings, or other means of maintaining and controlling the ventilation may not be taken into account, and that air pressures and air quantities will not be monitored to insure continued and uninhibited adequate ventilation in the working section. Should this occur, I believe it is reasonably likely that miners will be exposed to potentially dangerous and hazardous ventilation conditions of a reasonably serious nature likely to result in serious injuries.

On the facts of this case, the absence of a ventilation face print is particularly critical in terms of maintaining a continuous safe working environment for the miners. In this case, the respondent's own safety director admitted that at times all of the gob air is not coursed away from the working

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section, that it was not uncommon for the air used to ventilate a gob area to course out of a crosscut in the opposite direction from that shown in the ventilation plan, and that he, and possibly the mine manager, were unaware of the applicable ventilation plan or face prints covering the mining conditions in place at the time of the inspection. Given all of the aforementioned circumstances, I conclude and find that the inspector's special "significant and substantial" finding was justified, and IT IS AFFIRMED.

#### The Unwarrantable Failure Issue

The governing definition of unwarrantable failure is still to be found in Zeigler Coal Company, 7 IBMA 280 (1977) decided under the 1969 Act which held in pertinent part as follows at 295Å96:

In light of the foregoing, we hold that an inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care.

Zeigler was specifically approved during consideration of the 1977 Act. S.Rep. 95Å181, 95th Cong., 1st Sess., at 31Å32 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 619Å620 (1978).

In United States Steel Corporation, 6 FMSHRC 1423, 1437 (June 1984), the Commission concurred in the Zeigler definition of unwarrantable failure and held that an unwarrantable failure to comply may be proved by a showing that the violative condition or practice was not corrected or remedied, prior to the issuance of a citation, because of indifference, willful intent, or a serious lack of reasonable care.

During the course of the hearing in this case, I ruled from the bench that the question as to whether or not the

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alleged violation was the result of the respondent's unwarranted failure to comply with the cited mandatory safety standard was not an issue in this civil penalty proceeding, Black Diamond Coal Co., 7 FMSHRC 1117, 1122 (August 1985). However, in a recently issued decision, MSHA v. Quinland Coals, Inc., 9 FMSHRC 1614, September 30, 1987, the Commission held that the merits of any special unwarrantable failure allegation may be addressed in a civil penalty proceeding, and it stated as follows at 9 FMSHRC 1621:

Because under the Mine Act a special finding is a critical consideration in evaluating the nature of the violation alleged and bears upon the appropriate penalty to be assessed, we conclude that the Act does not preclude the review of special findings in a civil penalty proceeding and that the purpose of the Act and the interests of those subject to it are best served by permitting review.

Although the unwarrantable failure issue was not discussed in the initial posthearing briefs filed by the parties, they were afforded an opportunity to further supplement their arguments in light of the Quinland Coals, Inc. decision, and I have considered these arguments in the course of my decision.

On the facts of the instant case, and with respect to the issue of negligence, MSHA takes the position that the respondent exhibited a "high" degree of negligence in that it knew that it was required to submit a new ventilation face print to cover the mining system and conditions which prevailed at the time of the issuance of the citation, and that it further knew that the then available prints did not cover that situation. MSHA's definition of "high negligence," as reflected in its Part 100 civil penalty assessment criteria, 30 C.F.R. 100.3(d), is as follows: "High Negligence. (The operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances)."

In further explanation of the term "mitigating circumstances," section 100.3(d) states "Mitigating circumstances may include, but are not limited to, actions which an operator has taken to prevent, correct, or limit exposure to mine hazards" (emphasis supplied).

Although Mr. Brunatti alluded to changing his negligence finding from "moderate" to "high" when he modified the citation to an order (Tr. 20, 90A91), and the copy of the citation

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reflects a faint circle around the appropriate "high" negligence and "order" blocks under items 11 and 12 of the citation form, I find no specific mention of any such modifications on the face of the order (Exhibit GÄ1). Mr. Brunatti explained that he initially issued the section 104(a) citation, with a moderate negligence finding, because he was led to believe by mine management that another MSHA inspector had previously inspected the section under circumstances similar to those which prevailed at the time of his inspection but issued no violation. Since the previous inspector did not believe that there was a violation, Mr. Brunatti concluded that the respondent also did not know or believe that a violation existed. Mr. Brunatti later changed his mind and modified the citation to an order, and he did so after a telephone conversation with Mr. Onuscheck, during which Mr. Onuscheck led him to believe that there was some miscommunication between his office and mine management, and after a telephone conversation with the inspector who had been on the section previously indicated that this was not so.

Although Mr. Brunatti stated on the face of his order that MSHA inspectors had not been in the cited area prior to his own observations, his testimony, which I find contradictory, is that the prior inspector had been on the section, but only observed pillar mining taking place on the right return side only, and that the left or intake side had not as yet been developed or pillared. Further, the record in this case is devoid of any testimony by Mr. Brunatti that he considered the respondent's actions to be willful, or the result of indifference or a serious lack of reasonable care.

Mr. Brunatti confirmed that his inspection was a "ventilation technical inspection" to insure that any mining taking place was in accordance with the respondent's approved plan. He also confirmed that before embarking on such an inspection, he reviews the mine file which contains all ventilation plans, and that he was "fairly familiar" with the applicable plans for the mine in question. Mr. Brunatti confirmed that face print drawing 11, exhibit RÄ2, was included as part of the respondent's ventilation plan Review #28, but he could not state whether Part E, which contained the typical face print and variation language, exhibit RÄ3, was a part of that Review (Tr. 80). Upon subsequent examination of Review 28, which Mr. Brunatti had with him at the hearing, he stated that his copy contained a different Part E, from the one introduced by the respondent, and Mr. Brunatti concluded that it was not a part of Review 28 on file with MSHA (Tr. 81).

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MSHA's district engineer Zilka, testified that he last reviewed respondent's ventilation plan Review #28 in August, 1985, a year before the citation was issued, and he could not recall whether Part E was in that file. Although Mr. Zilka did not have the plan in his possession when he testified, he confirmed that the plan in Mr. Brunatti's possession would be the same one on file with his office (Tr. 150). Mr. Zilka could not recall whether or not Part E was in the file that he reviewed, and stated that if it was not in Mr. Brunatti's file it would not be in the official file kept in his office at Pittsburgh (Tr. 151).

In view of the obvious uncertainty as to whether or not Mr. Brunatti and Mr. Zilka were even aware of the existence of Part E, I issued a bench order instructing MSHA's counsel to either take the posthearing deposition of an appropriate MSHA official, or to otherwise confirm whether or not Part E was in fact on file with MSHA's official approved ventilation plan for the mine. By letter dated June 29, 1987, MSHA's counsel confirmed that it was in fact a part of the applicable ventilation plan on file in MSHA's district office.

Based on the foregoing, it seems obvious to me that Inspector Brunatti and Mr. Zilka were not aware of the fact that Part E of the respondent's ventilation plan, which contains some rather ambiguous language with respect to the use of the term "typical systems of face ventilation used in the mine," and seemingly permits some "variations" of the plans. Given this language, Mr. Zilka conceded that it was possible that the respondent may have misconstrued this language (Tr. 180). Mr. Zilka also conceded that some variation is permitted, and he cited as an example a variation concerning "mining a certain block or mining the entries" (Tr. 155). Inspector Brunatti alluded to a variation which would be acceptable with respect to the "erection of the controls right in the working section" (Tr. 90). He also alluded to another "reasonable variation" or "reasonable approximations" from a "typical plan" concerning the positioning a continuous-mining machine (Tr. 343).

Mr. Zilka confirmed that in an effort to reduce the amount of paper work transmitted back and forth between MSHA and the respondent, MSHA requested the respondent to eliminate those ventilation face prints which were not in active use, and to resubmit them when they were to be used (Tr. 136). Mr. Zilka also confirmed that he does not personally approve or reject any mine ventilation plans, and that he simply makes recommendations. He indicated that his recommendations are

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reviewed by two additional supervisors before they are submitted to the district manager, who then makes the final decision as to approval or rejection of any particular plan provision (Tr. 153). Mr. Zilka further conceded that with respect to the submission of any ventilation plans, there are often differences of opinions among those people involved in the review process, and he confirmed that he did not discuss face print drawing No. 11, exhibit RÄ2, which respondent maintains applied in this case, with Mr. Onuscheck prior to the issuance of the violation, and that any such discussion came later (Tr. 184Ä185). Inspector Brunatti testified that had the respondent submitted a "reasonable approximation" of drawing No. 11, he would have accepted it. Since it was not, he rejected it as being applicable to the conditions which he observed (Tr. 343).

In what I consider to be a rather feeble rebuttal attempt on the part of Mr. Zilka to support his contention that his prior conversations with respondent's representatives over "many years" should have clearly put the respondent on notice as to what was required to be in compliance at the time the violation was issued, Mr. Zilka explained certain differences in single and double air splits. He conceded that this was not relevant to the facts of this case, and that he only cited it to bolster his contention that the respondent has been informed that it cannot mix plans without submitting a plan addendum (Tr. 359). When Inspector Brunatti was called in rebuttal after Mr. Zilka's testimony, he was asked whether he agreed or disagreed with Mr. Zilka's explanations of single and double splits of air. Mr. Brunatti admitted that while listening to Mr. Zilka's explanation, he was not aware of these distinctions, and was not aware of them at the time he cited the violation. However, Mr. Brunatti then stated that Mr. Zilka was "totally right," and made the comment "that's why he's in Pittsburgh and I'm in the field office" (Tr. 371). Respondent's ventilation engineer Ondeko was called to rebut Mr. Zilka's explanation of what constitutes single and double splits of air, and he expressed total disagreement with Mr. Zilka's analysis (Tr. 371Ä374).

In a recently decided case, Jim Walters Resources, Inc., 9 FMSHRC 903, 909, the Commission made the following observations with respect to mine ventilation plans:

The Act and the mandatory standard requires the Secretary and the operator to agree upon a ventilation plan. It is of paramount importance under the statute that both the Secretary and the operator proceed diligently and in good



faith to develop a conclusive and suitable plan containing provisions clearly understood by both. \* \* \* It serves neither the safety of the miners nor the policy of the Mine Act when the Secretary and an operator are unable to reach firm agreement on the meaning of a mine plan provision even after several years of dealing with that provision. Given the importance Congress attached to mine specific plans, we emphasize that it is incumbent upon the parties to adopt a more effective mechanism to ensure that mine plans are expeditiously, unambiguously and conclusively approved and adopted. (Emphasis Added).

On the facts of this case, although I have affirmed the violation and have rejected the respondent's implied collateral estoppel defense theory that it could vary its ventilation face prints at its own discretion without prior approval by MSHA, and reject any notion that the absence of any citations by other inspectors during prior inspections absolves the respondent of any liability in this case, I nonetheless conclude and find that MSHA has failed to present any credible or probative evidence to establish that the violation resulted from the respondent's unwarrantable failure to comply with section 75.316.

MSHA's reliance on the testimony of Mr. Zilka, including the asserted MSHA district policy since 1979, and certain policy statements attributed to District Manager Donald Huntley in support of said policy, in support of its conclusion that the respondent has had a long-standing clear understanding of the requirements of section 75.316, are rejected. There is no evidence that MSHA's policy has ever been clearly defined or reduced to writing, or that it was clearly incorporated by reference or otherwise referred to in any of the plans or plan correspondence, and Mr. Huntley was not called by MSHA to testify in this case. As for Mr. Zilka's prior contacts with the respondent, I find them to be rather general, undocumented as to any references to the specific issue concerning the use of the terms "typical face ventilation plans," and any "variations" from those plans. Further, based on my prior findings concerning Mr. Zilka and Mr. Brunatti's testimony regarding their knowledge and understanding of these particular plan provisions, I am convinced that they, as well as the respondent, did not have a clear and unambiguous understanding as to how those particular provisions were to be interpreted and applied in this case, particularly during the period prior to the issuance of the violation, and that this

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mitigates the respondent's negligence. Under the circumstances, I find no reasonable or rational basis for concluding that the violation resulted from the respondent's lack of indifference, willful intent, or serious lack of reasonable care. Accordingly, MSHA's assertion that the violation resulted from an unwarrantable failure on the part of the respondent IS REJECTED.

#### Modification of Order to Citations

In light of my foregoing unwarrantable failure findings, the modified section 104(d)(2) order issued by Inspector cannot stand. It seems clear to me that under section 105(d) of the Act, I have the authority after a hearing to affirm, modify or vacate an order. See also Old Ben Coal Company, 2 FMSHRC 1187 (June 1980); Consolidation Coal Company, 3 FMSHRC 2207 (September 1981); Youngstown Mines Corporation, 3 FMSHRC 1793 (July 1981). Accordingly, the order in question IS HEREBY MODIFIED to a section 104(a) citation.

#### Size of Business and Effect of Civil Penalty on the Respondent's Ability to Continue in Business

Based on the stipulations of the parties, I conclude and find that the respondent is a large mine operator and that payment of the civil penalty assessment for the violation in question will not adversely affect its ability to continue in business.

#### History of Prior Violations

On the basis of the stipulations by the parties, and given the size and scope of the respondent's mining operations, I find no basis for concluding that the respondent's compliance record is such as to warrant any additional increase in the civil penalty assessment which I have made for the violation in question.

#### Negligence

I conclude and find that the violation resulted from the respondent's failure to exercise reasonable care, and that this constitutes ordinary negligence on its part.

#### Gravity

For the reasons stated in my significant and substantial finding, I conclude and find that the violation in question was serious.

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Good Faith Compliance

The parties have stipulated that the violation was abated by the respondent in good faith within the time fixed by the inspector. I adopt this stipulation as my finding and conclusion on this issue.

Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that a civil penalty assessment in the amount of \$500 is reasonable and appropriate for the violation which I have affirmed.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of \$500 for a violation of 30 C.F.R. 75.316, and payment is to be made to MSHA within thirty (30) days of the date of this decision. Upon receipt of payment, this proceeding is dismissed.

George A. Koutras  
Administrative Law Judge