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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

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

CIVIL PENALTY PROCEEDING

Docket No. WEVA 88-113
A.C. No. 46-06722-03556

v.

No. 2 Mine

STONEY COAL COMPANY,
RESPONDENT

DECISION

Appearances: Ronald E. Gurka, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for the Petitioner;
William D. Stover, Esq., M.A.E. Services, Inc.,
Beckley, West Virginia, 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). Petitioner seeks civil penalty assessments in the amount of \$1,500 for two alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations. The respondent filed a timely answer contesting one of the alleged violations, namely section 104(d)(1) Order No. 2716156, 30 C.F.R. 75.319, served on the respondent by an MSHA inspector on August 25, 1987. The respondent opted not to contest the second alleged violation, section 104(d)(1) Order No. 2716152, 30 C.F.R. 75.303, served on August 25, 1987, and has agreed to pay the proposed civil penalty assessment of \$700 (Tr. 3). A hearing was held in Beckley, West Virginia, and the parties waived the filing of posthearing briefs. However, I have considered the oral arguments made by the parties during the course of the hearing in my adjudication of this matter.

Issues

The issues presented in this case are (1) whether the condition or practice cited by the inspector constitutes a violation of the cited mandatory safety standard, (2) the appropriate civil penalty to be assessed for the violation, taking into account the statutory civil penalty criteria found in section 110(i) of the Act, and (3) whether the violation was "significant and substantial." Additional issues raised by the parties, including the "unwarrantable failure" issue, 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, 29 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 4):

1. The presiding judge has jurisdiction to hear and decide this matter.
2. The assessment of a civil penalty for the alleged violation in question will not affect the respondent's ability to continue in business.
3. The respondent has products which enter commerce or has operations which affect commerce.

Discussion

The contested section 104(d)(1) Order No. 2716156, served on the respondent on August 25, 1987, cites an alleged violation of mandatory safety standard 30 C.F.R. 75.319, and the cited condition or practice is described as follows: "A separate split of intake air was not provided for the mechanized mining section being operated in the return air courses, 35 feet inby the No. 4 drift opening."

Petitioner's Testimony and Evidence

MSHA Inspector George Bowman, testified as to his experience and training, and he confirmed that he has conducted

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"quite a few" regular and spot inspections of the respondent's mine. He confirmed that he was at the mine on Friday, August 21, 1987, to complete an inspection, and that he advised Mine Foreman Don Hughes that he would be back the following Tuesday, August 25, to "run dosimeters on his underground employees." Upon his return to the mine he noticed two employees exiting a drift opening where a new fan installation was begun over the weekend, and he identified exhibit P-1 as a copy of the approved mine map ventilation system for the area where this installation was being made. The entry had been advanced approximately 70 feet, and Mr. Bowman confirmed that he observed a continuous miner and a shuttle car in the entry, and that he issued Citation No. 2716152, for a violation of section 75.303, when he could not find any evidence that a preshift examination had been conducted and reported for the entry. After observing the employees exit the drift, he proceeded into the area and observed that no ventilation line curtains had been installed. He also observed other violative conditions, and issued a total of six citations for several ventilation and electrical violations (Tr. 5-15).

Mr. Bowman stated that he noticed that the air current was coming back down the entries toward the area that was being mined, and the "air current was to the extent that you could feel it; it was very good movement" (Tr. 15). He then proceeded to the mouth of the six left entry toward the six left gob, between the first and second crosscuts between the two entries to take a reading of the direction of the air flow from the pillared area, and he marked the location with an "X" on the mine map. He confirmed that he used an anemometer to check the air, and that "the vanes of the anemometer did turn rapidly," and he determined that the air coming from the gob area was flowing toward the drift entry. After making this determination, he cited the respondent with a violation of section 75.319 (Tr. 16-17).

Referring to the mine ventilation system map, exhibit P-1, Mr. Bowman described and explained the intake air flow system through the area in question, and he confirmed that it should have been coursing positive toward the outside of the mine. He found that the air had apparently reversed through the approach to the six left pillared out area and that under the approved plan it should have been going in the opposite direction toward the gob area rather than toward the new drift mouth where the continuous miner and shuttle car were located (Tr. 17-20). The coursing of the air in the wrong direction presented a hazard in that any methane or "black damp" which may have developed during mining would not be coursed away from the new drift entry. Since the entry had been mined for

approximately 69 feet with no line ventilation curtains, contaminants from the pillared area would have passed over or near the equipment which was operating, and an arc or blown cable may have ignited any methane in that drift entry which he marked with the letter "A" on the map. Mr. Bowman confirmed that this location in the entry was inby the last open crosscut (Tr. 22).

Mr. Bowman identified a copy of a supplemental ventilation plan submitted by the respondent on August 26, 1987, after his inspection, and it shows the installation of two stoppings across the number one and two entries separating the intake split from the air that passed by the six left bleeder. These stoppings provided a separate split of intake air to the miners working down in the drift opening, and had the effect of abating the violation (Tr. 26).

Mr. Bowman believed that the violation resulted from a high degree of negligence because mine foreman Don Hughes was aware of the installation of the fan and they had discussed the situation the week prior to the inspection of August 25, 1987, when the drift in question was being developed. The drift was constructed in an effort to control some water located inby the drift which was freezing and causing problems for the fan and travel in the area (Tr. 30). Mr. Bowman confirmed that coal was being mined as the drift was being advanced, and upon completion of the drift entry, normal mining operations would have continued (Tr. 32).

On cross-examination, Mr. Bowman confirmed that although he discussed the fan installation prior to August 25, 1987, he raised no objections about the new drift entry because the method of mining the new entry never came up, and he was not aware that a new entry would be needed for the fan installation (Tr. 32). He confirmed that he did not go beyond the point marked "X" on the map, and did not walk into the gob area. He confirmed that he made no methane test in that area, and that the anemometer readings which he made indicated that the air was coming in the opposite direction from what was shown on the approved ventilation plan (Tr. 33). He explained the direction of air travel by reference to the map (Tr. 34-36).

Mr. Bowman stated that intake air becomes return air when it has passed through or ventilated the lasted open crosscut, or after it passed the working faces. Assuming the intake air was going through the regulator down toward the area being developed, it would not have passed any working faces if it were travelling that course (Tr. 38). He confirmed that he

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walked the area where the continuous miner had been working and made methane tests. Although he could not recall the exact methane level, it could not have been over one percent (Tr. 40). However, methane and "black damp" is a concern when the air current in a ventilation bleeder system is not travelling in the proper course and direction, and he believed the air was coming from the approaches to the gob area, and not the gob area itself (Tr. 41, 44). He confirmed that he did not check the bleeder evaluation points in the gob area (Tr. 43), but reiterated that the air "wasn't going the way it was supposed to be going" as shown on the ventilation plan (Tr. 45-46).

Mr. Bowman identified the "mechanical mining section" that was not being ventilated by a separate split of air as the area marked "A" on the ventilation map, and he indicated that it was 35 feet in by the number four drift (Tr. 48). He stated that when that area was initially developed it was an entry, and when "he goes back and rehabilitates the area, its a crosscut" (Tr. 49). He explained that the area in question had no equipment in it when he was at the mine on August 21, and it would have been an entry. However, when he returned on August 25, the entry had been developed, and it became a crosscut (Tr. 54). The air that was ventilating this area was return air rather than intake air (Tr. 56).

Respondent's Testimony and Evidence

Josiah C. Lilly, mine superintendent, confirmed that he was at the mine when Mr. Bowman issued the order on August 25, 1987, and he explained the work performed to install the fan at the number 4 entry or portal in order to increase ventilation and improve the efficiency of the fan. He also confirmed that his engineering department informed MSHA about the ventilation changes, but he was not sure that he spoke with Mr. Bowman about them, but that the mine foreman did (Tr. 63). Referring to a copy of the ventilation map, exhibit R-1, Mr. Lilly explained the working ventilation system prior to the installation of the fan, and he confirmed that the map was in effect at the time the order was issued (Tr. 64-66).

Mr. Lilly identified two stoppings shown on the map which were installed soon after the violation was issued to separate the gob area, and he confirmed that they were installed in response to the violation. In response to a question as to whether or not intake air passed through the regulator shown on the map down to the cited area in the number 4 drift opening, Mr. Lilly replied that "it was possible," but he did not go to the area to check it (Tr. 67).

Mr. Lilly stated that he walked through the area designated as No. 1 on exhibit R-1, and that the air coming into the entries "had to come off the main intake." The bleeders were functioning properly, and he stated that "the air going in at this point, there's no way it could be coming out and going to the area where the men had been working" (Tr. 70). He tested for methane and found none. He confirmed that the regulator stopping marked on the map with a "green R" had some blocks out of it and that air was coming through at the barrier point. He agreed with Inspector Bowman that air was coming out in the wrong direction, and that "it wasn't supposed to be travelling in that direction at that point, that's correct" (Tr. 70). However, he did not believe there was any danger of air coming out of the gob because pressure was kept against the gob by means of a blowing fan.

Mr. Lilly confirmed that he discussed the abatement of the violation with the inspector and the company engineering department, and that the two stoppings marked in green on the map were installed to abate the violation. He also believed that the regulator had to be opened more, but he was not sure. The effect of the stoppings "prevented any air from coming that way, and made all the air come out at one point--out of one location, where the regulator is" (Tr. 72). He did not check the air after this was done, and he did not know whether this made any difference in the amount of air at that point (Tr. 72). However, he indicated that the intake air was still traveling in the same direction at every location, but that the stoppings which were installed eliminated the inspector's concern with the air coming off the gob. This change was approved by MSHA to abate the violation so that the order could be terminated to allow work to continue (Tr. 73).

On cross-examination, Mr. Lilly confirmed that the ventilation map he referred to, exhibit R-1, is undated, and that he did not know when it was prepared or submitted to MSHA. Respondent's counsel stated that the map was never submitted to MSHA, but was prepared specifically for this case as Mr. Lilly's recollection of the ventilation in place at the time of the violation (Tr. 74). Mr. Lilly stated that the arrows marked in blue on the map shows the direction of the intake air flow going down the entries at the time of the violation. When asked whether intake air was in fact going in the direction of the arrows, Mr. Lilly replied "I know when I went into this area that air was going into the gob, and there was going this direction also (sic). These areas were being ventilated off of the intake air" (Tr. 76). He confirmed that he was in the area at 7:30 a.m., after the violation was

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issued at 6:30 a.m., and that he had not previously been there for at least 3 months. Prior to the violation, he did not know whether intake air was flowing down towards the number two entry as indicated by the blue arrows. He also confirmed that the four single arrows which he circled in red on the map indicated the direction of return air, and that according to the map, it reflects that intake air and return air were flowing in the same direction down the same air course (Tr. 77-78). Mr. Lilly stated that "I feel like myself, that it was more intake air than was needed to ventilate the gob area, and that was the air that was coming down" (Tr. 78).

Mr. Lilly confirmed that it was impossible for intake and return air to be flowing in the same direction within the same air course as shown on the map, but that his testimony regarding the ventilation which he believed existed at the time of the violation is based on the map (Tr. 84). When asked whether he knew whether intake or return air was going to the entry marked number two on the map used by the inspector during his testimony, exhibit P-1, Mr. Lilly replied "not at the time of the violation, no" (Tr. 85). Mr. Lilly confirmed that he was aware of the fact that the fan in question would be installed 3 or 4 weeks before the violation was issued, and that he made the decision to install it with his engineering department. He confirmed that the ventilation system shown on his map, exhibit R-1, reflected the planned ventilation system, but he could recall no blue or orange coloring on the map when he reviewed it (Tr. 86). Respondent's counsel reiterated that the map was presented "for the purpose of Mr. Lilly's recollection" (Tr. 89). Petitioner's counsel confirmed that the two maps, exhibits P-1 and R-1, are identical except for the blue and orange arrow markings (Tr. 90).

Mr. Lilly conceded that the cited area in question was not being ventilated in the manner shown on the ventilation map submitted to MSHA, and respondent's counsel stipulated that the plan submitted to MSHA showed that area in question "showed that as being the return" (Tr. 90-91). Mr. Lilly contended that on the day of the violation, intake air was being used to properly ventilate the entry where the fan was being installed (Tr. 92). When asked why the stoppings were installed after the violation was issued if in fact the area was being properly ventilated, Mr. Lilly responded "to get everything taken care of to get the violation abated" and "we had to get back to work. We had to do what would satisfy MSHA" (Tr. 92-93).

Mr. Lilly stated that the regulator next to the number 2 entry was removed on the Sunday prior to Inspector Bowman's

return to the mine on Tuesday, August 25, 1987. He explained that the regulator had "quite a few openings" and "wasn't plastered to actually seal the air completely off." He stated that the removal of the regulator could possibly have had the effect of reversing the air flow in the gob area, but he believed that this was not the case. He conceded, however, that he would not have known this until after he went to the area at 7:30 a.m., on the day the violation was issued (Tr. 103). In explaining his travel through the area, he stated that "there were different locations up through here where air was coming in, along with the leakage through the stoppings. No matter how you build a stopping, it leaks a little" (Tr. 104-105). When asked to locate those areas, he stated that they do not appear on the map, exhibit P-1 (Tr. 105). He confirmed that the regulator had to be removed so that equipment could pass through the drift that was being driven (Tr. 107).

Inspector Bowman was called in rebuttal by the petitioner, and he explained the effect of the removal of the regulator on the ventilation used for the number 2 entry in question, as well as the gob area. Although he was of the opinion that the air ventilating the gob was not sufficient to ventilate it properly, he conceded that he could not support a citation for this purported condition because he could not make such a determination, and he did not know how much air was coming off the gob. The only determination that he could make was that "the air was coming by the approaches," and that some of it was pulling away from the gob area, as determined by his anemometer reading which indicated that "there was enough to turn the vanes of the anemometer" (Tr. 111, 113, 115-116). He confirmed that he had no knowledge as to the quality of the air going over the working area because he did not sample it (Tr. 116).

On cross-examination, Mr. Bowman stated that the regulator marked with a green "R" on respondent's map, exhibit R-1, was there during his inspection, and that intake air was going through it (Tr. 117).

Petitioner's Arguments

Petitioner maintains that given the fact that coal producing machinery was located and used for mining in the cited mechanized mining section, that area was in fact a mechanized mining unit within the meaning of section 75.319. With regard to the respondent's arguments concerning the phrase "contiguous working places" as found in the section 75.319-1, the definition of a "mechanized mining section," and the definition of "working places," petitioner maintains that the evidence establishes that there was only one working place,

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namely the cited drift area where the mining equipment was located. Petitioner points out that the inspector believed that the cited location of the violation was in by the last open crosscut, and it takes the position that the definition found in section 75.319-1, does not require the existence of a number of working places at this location. Petitioner asserts that the definition was designed for application to a normal working face with an open crosscut and several entries going up to the working faces, and that a typical mechanized unit would have a set of equipment used to work several entries, and the definition was designed with this in mind.

Petitioner asserts that the facts in this case present a "unique situation" where mining was being done just inside the opening of a well developed mine, and that the primary purpose of this mining was to install a ventilation fan whose ultimate purpose was to improve mine ventilation. However, given the presence of mechanized mining equipment and mining in an entry which was not ventilated on a separate split of intake air, the hazards designed to be addressed by section 75.319 existed. In the event a hypothetical second entry was necessary, and was mined prior to the situation found by the inspector, the hazard to miners would have been the same because the hazard presented comes from the equipment used for mining in the area, rather than from the number of entries that the equipment is being used in. By citing section 75.319, and requiring a separate split of intake air to ventilate the area to abate the violation, the inspector believed that this was the safest method for ventilating the area and preventing possible explosions or other hazards (Tr. 118-120).

With regard to the question of negligence, petitioner asserts that the evidence presented clearly demonstrates more than "mere negligence" and supports the inspector's "unwarrantable failure" finding. In support of this conclusion, petitioner maintains that the respondent proceeded to install the fan without concern for the safety of miners, conducted no preshift inspection, and did not check its ventilation plan to ensure there was proper ventilation where mining was taking place. Given the fact that the respondent "just wanted to go in there and get this done and didn't care about the miners in there one way or another," counsel concludes that the respondent demonstrated a high degree of negligence (Tr. 120-121).

With regard to the gravity of the violation, petitioner points out that the inspector compared it with the "Farmington Disaster," which presented a serious explosion hazard, and it takes the position that the requested minimum civil penalty assessment of \$800 is adequate. Petitioner conceded that

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there is no evidence of the presence of any explosive levels of methane or that the continuous-mining machine was in other than a permissible condition. However, petitioner took the position that the mere presence of the miner was a potential ignition source, and that the respondent had an obligation to preshift the cited area to verify that no hazardous conditions were present (Tr. 123-124).

Respondent's Arguments

Respondent asserted that in the absence of any "mechanized mining section," the alleged violation of section 75.319, cannot stand. Given the definition of "working place" as the "area of coal inby the last open crosscut," and the absence of any crosscut at the place where the fan was to be installed, an "SMU number," and a dust-control plan, respondent concludes that there is no evidence of the existence of any "mechanized mining section" on the day of the inspection. However, the respondent conceded that at the time of the inspection, four entries were being driven, and that while the last entry may be considered the last open crosscut, given the absence of a definition of "crosscut," and the mine map which shows that one would have to travel a long way beyond the location of the alleged violation to reach a point inby the last open crosscut, the respondent questions whether or not these driven entries may be considered "contiguous working places," or whether the alleged violation took place "inby the last open crosscut" within the meaning of section 75.319. Further, respondent stated that "contiguous working places" means "more than one place you're working," and the only place the respondent intended to work "was just to cut this one place for the fan." Respondent concluded that "it's stretching the definition quite a bit to try to include this area in a mechanized mining section" (Tr. 124-126).

With regard to the alleged use of return air to ventilate the area 35 feet inby the drift opening where the respondent intended to install a fan, respondent states that the only evidence advanced by the petitioner to support this contention is the ventilation plan reference on the mine map which depicts an arrow showing that return air was ventilating the cited location. Respondent maintains that an arrow drawn on a map "does not make it return" air, and that in order for it to be return air, the air would have to pass through a working place and then out of the mine. Respondent contends that there is no evidence that the air that ventilated the area being developed passed through any working place, and that "the only smidgeon of evidence or assertion of it passing somewhere where it might be turned into return, was the fact

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that it went by an abandoned area." Referring to mandatory section 75.311, which states that "Air which has passed by an opening of any abandoned area shall not be used to ventilate any working place in the coal mine if such air contains .25 volume per centum or more of methane," respondent asserts that even if the intake air somehow becomes return air by passing an abandoned area, it can still be used for ventilation purposes because the petitioner has not established the presence of any methane or contaminants in the air (Tr. 127).

With regard to the lack of any preshift examination, respondent pointed out that "you're looking at sixty feet in by the opening of the mine. It's just a question of walking sixty feet and coming out and writing it in a book . . . it wasn't like the whole mine didn't get pre-shifted" (Tr. 127). The respondent concluded as follows at (Tr. 127-128):

At best, I think that what could have been written in regard to the actions that transpired here was a technical violation of the ventilation plan. What instead was written was an unwarrantable failure of the operator to properly ventilate where it was working. And there's no allegations that there was improper air, improper volumes of air where the mining machine was operating. The only allegation is that instead of intake air it was return air. And that comes back to the definition. When did it become return air? Just having the arrows on the map doesn't make it return air. It's got to be exposed to some contaminants, and it's Respondent's position that there was no such exposure.

Respondent asserted that given the "unwarrantable failure" standard of proof required by the Commission in Emery Mining Corporation, 9 FMSHRC 1997 (Dec. 1987), the respondent's negligence was only "ordinary" because it did not believe it was mining in "a mechanized mining section," and that this is "something that's not plain, unambiguous" (Tr. 129). Assuming that the facts and evidence establishes an unwarrantable failure, respondent concedes that the underlying procedural time sequence requirements for the issuance of the section 104(d)(1) order in question were technically correct (Tr. 129). Given the absence of any evidence of improper or insufficient air ventilating areas where men were working, respondent concludes that no one was exposed to any hazards, and that only three men would normally be working in the area where the fan was being installed (Tr. 130).

Respondent conceded that the cited location was driven 60 feet on a conventional mining section which utilized a continuous-mining machine, bolter, and shuttle car operating in sequence, and that it intended to cut the entry in for a distance of approximately 100 feet to connect up with the number 10 entry. The principal purpose of cutting at the cited location was to facilitate the installation of the fan which was ultimately installed approximately 3 weeks later (Tr. 131).

Arguing in rebuttal to the respondent's reference to the first sentence of section 75.311, petitioner's counsel stated that the next sentence of the standard requires that all air containing less than .25 volume per centum or more of methane be examined during the preshift examination required by section 75.303. Counsel pointed out that the respondent was also cited by Inspector Bowman on August 25, 1987, for not performing the required preshift and did not contest that order. Had the required preshift been conducted, and the air tested along the entire air course as required, and found to be below .25, the gravity would have been much less (Tr. 132). Although the respondent's counsel stated that "the rest of that area was preshifted," and that only the area where the miner was operating was not tested, I take note of the fact that the uncontested order citing a violation of section 75.303, was issued for the failure by the respondent to preshift the active workings in by the drift opening in question, and that all areas in by the drift opening were ordered withdrawn by the inspector (Tr. 132-133).

Findings and Conclusions

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. 75.319, which provides as follows:

Each mechanized mining section shall be ventilated with a separate split of intake air directed by overcasts, undercasts, or the equivalent, except an extension of time, not in excess of 9 months, may be permitted by the Secretary, under such conditions as he may prescribe, whenever he determines that this subsection cannot be complied with on March 30, 1970.

The term "mechanized mining section" is defined by 30 C.F.R. 75.319-1, as follows

The term "mechanized mining section" means an area of a mine in which coal is mined with one set of production equipment, characterized in a conventional mining section by a single loading machine, or in a continuous mining section by a single continuous mining machine, and which is comprised of a number of contiguous working places. Specialized mining sections, such as longwall mining sections, which utilize equipment other than specified in this section, may, if approved by the Coal Mine Safety District Manager, be ventilated by a single split of air.

The term "working place" is defined by 30 C.F.R. 75.2(g)(2) as "the area of a coal mine in by the last open crosscut." The term "crosscut" is synonymous with the term "breakthrough," and it is defined in part by A Dictionary of Mining, Mineral, and Related Terms, Bureau of Mines, U.S. Department of the Interior, 1968, pg. 280, as follows:

A crosscut may be a coal drivage * * * . In room and pillar mining, the piercing of the pillars at more or less regular intervals for the purpose of haulage and ventilation. * * * In general, any drift driven across between any two openings for any mining purpose. * * *

"Breakthrough" is defined as "A passage cut through the pillar to allow the ventilating current to pass from one room to another. * * * An opening made either accidentally or deliberately, between two underground openings." Mining Dictionary, at pg. 137.

A "split of air" means a separate air circuit, e.g., when mine workings are subdivided to form a number of separate ventilating districts. The main intake air is split into the different districts, each of which is given a specific supply of fresh air free from contamination by the air of other districts, and later the return air from the districts reunited to restore the single main return air current. Mining Dictionary, at pg. 1201.

The respondent's contention that the area cited by Inspector Bowman was not a "mechanized mining section" as defined by section 75.319-1, because it did not include any "contiguous working places" due to the absence of any "last open crosscut" and the fact that the only place it intended to work was where the fan was to be placed is rejected. The evidence clearly

establishes that when the violation was issued, the entry in question was being actively mined. Inspector Bowman observed a continuous-mining machine and shuttle car in the entry, and he observed miners leaving the area. Mine Superintendent Lilly confirmed the fact that the mining sequence included the use of a continuous miner, shuttle car, and roof bolter, and the roof was being bolted as coal was being mined in the entry.

Superintendent Lilly admitted that at the time the violation was issued, the respondent intended to drive the entry for a distance of approximately 100 feet to connect it up with the number 10 entry, and that the fan was actually installed 3 weeks after the entry was initially driven (Tr. 131). Further, the evidence establishes that at the time the entry in question was being driven and mined, three additional adjacent entries were in existence, and the mine maps reflect the presence of crosscuts, stoppings, regulators, and the establishment of air ventilation.

Inspector Bowman's unrebutted testimony reflects that while the cited location may have been an entry when it was initially designed and cut, once it is driven and rehabilitated due to changes and maintenance resulting from the presence of water, that location would be considered the last open crosscut (Tr. 49). The evidence establishes that at the time the violation was issued, the entry had been driven and developed for approximately 70 feet, and the mining cycle included the use of a mining machine, shuttle car, and roof bolter. Mr. Bowman explained and described the location of the last open crosscut (Tr. 23).

The evidence also reflects that during his inspection of August 25, 1987, Inspector Bowman issued an uncontested violation because of the failure by the respondent to conduct an adequate preshift examination "in the active workings" inby the drift opening in question, and that he also issued several other citations for violations of the respondent's approved roof-control plan, the failure to adequately protect a continuous miner trailing cable, and the installation of line brattice only within 69 feet of the working face, rather than 10 feet as required by the cited mandatory ventilation standard section 75.302 (Exhibit P-2). This particular standard requires that such ventilation devices be continuously used from the last open crosscut of an entry or room of each working section in order to provide ventilation to the working faces.

Under all of the aforementioned circumstances, I conclude and find that the area cited by Inspector Bowman included contiguous working places within the meaning of section 75.319-1, and that it was in fact a mechanized mining section within the scope of cited section 75.319. I also find the testimony of Inspector Bowman regarding the existence and location of the "last open crosscut" within the area which he cited to be credible. See: MSHA v. Jim Water Resources, Inc., Docket Nos. SE 87-8, SE 86-105-R, decided by the Commission on January 13, 1989.

Inspector Bowman cited a violation of section 75.319, because of the failure by the respondent to provide a separate split of intake air to ventilate the mechanized mining section which was operating in the return air course inby the drift opening which had been driven to facilitate the installation of a fan. Mr. Bowman confirmed that when he conducted his inspection and issued the violation, he observed that the entry had been advanced and developed for a distance of approximately 70 feet, and that it was being driven around some water located inby the Number 4 drift opening. Mr. Bowman observed a continuous-mining machine and a shuttle car in the entry, and he also observed several miners coming out the drift entry which had been driven and mined. Mr. Bowman proceeded into the area and found that no ventilation curtains had been installed, and using an anemometer, he determined that the air currents leaving the gob area were flowing in the direction of the drift entry where coal was being mined as the entry was advanced. Mr. Bowman testified that the anemometer vanes were turning rapidly and that he could feel the air movement. Mr. Bowman determined that the air coursing into and down the entry towards the drift area in question had apparently reversed itself and was flowing in the "wrong direction" contrary to the respondent's ventilation plan, and he concluded that this was ventilation return air rather than intake air as required by section 75.319. Since this was the case, he issued the violation.

The respondent contended that the ventilation directional arrows shown on the mine ventilation maps, which indicate the cited area in question being ventilated by return air, rather than intake air, were "engineering mistakes." However, it presented no credible engineering testimony or evidence to support any such conclusion. The only witness called to rebut the inspector's testimony was mine superintendent Lilly. Mr. Lilly confirmed that the mine ventilation map, exhibit R-1, which clearly shows the cited area being ventilated by return air, rather than intake air was in effect at the time the violation was issued. The evidence shows that Mr. Lilly

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was not at the cited location when the violation was issued, had not previously been there for at least 3 months, and that he arrived at the scene an hour after the violation was issued. Further, Mr. Lilly agreed with the inspector that the air passing through a regulator from the gob area was moving in the "wrong direction," and that the air flow directional arrows shown on the mine ventilation map reflecting the ventilation pattern for the cited entry shows that the area was being ventilated by return air. Mr. Lilly admitted that at the time the violation was issued, he did not know whether the cited area was being ventilated by intake air or return air. He also agreed with the inspector that air was coursing in the wrong direction through a regulator (Tr. 70, 103).

After careful review of the testimony presented in this case, I conclude and find that the credible testimony and evidence presented by Inspector Bowman establishes that the cited area in question was being ventilated by return air and that a separate split of intake air was not provided to ventilate that area. Since the cited standard clearly requires the area to be ventilated by intake air, I further conclude and find that a violation of section 75.319 has been established. Accordingly, the violation issued by Inspector Bowman IS AFFIRMED.

The Unwarrantable Failure Issue

The governing definition of unwarrantable failure was explained in *Zeigler Coal Company*, 7 IBMA 280 (1977), decided under the 1969 Act, and it held in pertinent part as follows at 295-96:

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.

In several recent decisions concerning the interpretation and application of the term "unwarrantable failure," the Commission further refined and explained this term, and concluded that it means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a

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violation of the Act." Emery Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghioghney & Ohio Coal Company, 9 FMSHRC 2007 (December 1987); Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). Referring to its prior holding in the Emery Mining case, the Commission stated as follows in Youghioghney & Ohio, at 9 FMSHRC 2010:

We stated that whereas negligence is conduct that is "inadvertent," "thoughtless" or "inattentive," unwarrantable conduct is conduct that is described as "not justifiable" or "inexcusable." Only by construing unwarrantable failure by a mine operator as aggravated conduct constituting more than ordinary negligence, do unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme.

In Emery Mining, the Commission explained the meaning of the phrase "unwarrantable failure" as follows at 9 FMSHRC 2001:

We first determine the ordinary meaning of the phrase "unwarrantable failure." "Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect of an assigned, expected, or appropriate action." Webster's Third New International Dictionary (Unabridged) 2514, 814 (1971) ("Webster's"). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence," "thoughtlessness," and "inattention." Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention. * * *

I take note of the fact that at the time he issued the section 104(d)(1) unwarrantable failure order in question, Mr. Bowman made a negligence finding of "Reckless Disregard" (item 11(E), Order), but then changed it to reflect a finding of "High" negligence (item 11(D)). I also take note of MSHA's civil penalty assessment criteria found in Part 100, Title 30, Code of Federal Regulations. Section 100.3(d), Table VIII, explains the various degrees of negligence associated with a violation which is being reviewed for assessment purposes. Under these guidelines, "high negligence" is applicable in those instances where an "operator knew or should have known

of the violative condition or practice, and there are no mitigating circumstances," "Reckless disregard" is applicable in those instances where an "operator displayed conduct which exhibits the absence of the slightest degree of care."

In support of his "high negligence" and unwarrantable failure finding, Inspector Bowman explained that after completing his prior inspection on August 21, 1987, he advised mine foreman Don Hughes, who he knew very well, that he would be returning to the mine the following Tuesday, August 25, to conduct his noise surveys. Since the foreman knew he would be coming back, and since he advised Mr. Bowman that he had been in the area the preceding day, Mr. Bowman questioned "why he allowed this to go on" (Tr. 28). Since the foreman was responsible for the operation of the mine, and given the "overall conditions" that he found upon his return to the mine, Mr. Bowman concluded that the foreman should be held accountable for his failure to address all of these conditions which Mr. Bowman believed were readily observable. Although Mr. Bowman alluded to the fact that he had a general conversation with the mine foreman concerning the installation of the fan within 2 or 3 weeks of his inspection, Mr. Bowman confirmed that he was not aware of the fact that a new entry was required for the fan installation, and that this "was never brought up" (Tr. 29, 32).

It seems obvious to me from the facts of this case that Inspector Bowman's "high negligence" finding was not limited to the conditions which prompted him to cite a violation of section 75.319. His justification for issuing the unwarrantable failure order included the additional conditions which he found and cited during the course of his inspection, and Mr. Bowman tacitly admitted this was the case when he stated that "whenever you have several problems that one piece of paper can correct, I try to stay that way as much as I can" (Tr. 114).

Mine foreman Hughes was not called to testify in this matter. Superintendent Lilly stated that 3 or 4-weeks prior to the inspection he made the decision to install the fan after consulting his engineering department. He confirmed that he reviewed the ventilation plan prior to the installation of the fan, and that the proposed ventilation changes were submitted to MSHA through the engineering department. However, he had not visited the cited area for at least 3-months prior to the inspection, and only discussed the matter with Mr. Bowman after the violation was issued in order to abate it (Tr. 76-77, 86, 94). Mr. Lilly further explained that the fan was installed to improve the ventilation and to

increase the amount of air used to ventilate the mine, and he confirmed that the installation was finally completed approximately 3 weeks after the violation was issued (Tr. 131).

During the course of oral argument, respondent's counsel suggested that given the fact that the regulatory definition of a "mechanized mining unit" is not plain and unambiguous, the respondent could not have known whether the cited location was in fact a mechanized mining section which was required to be ventilated by intake air pursuant to section 75.319. I agree that the interpretation and application of this section requires one to refer to the definition of "mechanized mining unit" as stated in section 75.319-1, the definition "working place" found in section 75.2(g)(2), and to make a determination as to the location of the "last open crosscut," and the existence of "contiguous working places." Given the complexity of these regulatory and factual determinations, I find some merit in the respondent's argument, but find nothing in Mr. Lilly's testimony to support a conclusion that he was confused or oblivious to the fact that the cited area was required to be ventilated by intake air rather than return air.

The petitioner takes the position that the additional violations issued by Inspector Bowman during the course of his inspection shortly before the issuance of the contested unwarrantable failure order in question reflects a complete disregard for any safety concerns on the part of the respondent, and clearly supports an unwarrantable failure finding in this case (Tr. 14, 120-121, 129-130). I disagree. Unlike an imminent danger order issued pursuant to section 107(a), which may be based on a combination of violative conditions or practices, an unwarrantable failure violation and order issued pursuant to section 104(d)(1) of the Act, is limited to a specific violation of a particular mandatory safety or health standard. Accordingly, I conclude and find that the degree of negligence associated with the additional violations which are not in issue in this case must be determined on the particular facts associated with those violations and may not be used to support an alleged unwarrantable failure by the respondent to comply with the requirements of the cited standard section 75.319.

Although one of the aforementioned prior violations included a negligence finding of "reckless disregard," and was included as part of the petitioner's pleadings in this case, the respondent subsequently decided not to contest it further (Tr. 3; respondent's answer). No information has been forthcoming with respect to the status of the other violations, and

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I take note of the fact that with respect to two of these violations, Inspector Bowman made findings of "moderate negligence," and found "high negligence" with respect to another one (Exhibit P-2).

The respondent's history of prior violations, as reflected by an MSHA computer print-out submitted by the petitioner reflects that for a 2-year period prior to the inspection by Mr. Bowman on August 25, 1987, shows that the respondent paid civil penalty assessments for a total of 77 violations of the mandatory ventilation standards found in Part 75, Subpart D, Title 30, Code of Federal Regulations. Except for two section 104(d)(1) unwarrantable failure citations, one of which was issued on October 17, 1985, for a violation of section 75.316, and one of which was issued on March 10, 1987, for a violation of section 75.319, the same standard cited in this case, the remaining citations were all section 104(a) citations, and 29 of them were "single penalty" non-"S&S" citations.

After careful review of all of the evidence and testimony adduced in this case, I find no credible or probative evidentiary support for any conclusion that the respondent's conduct in failing to adhere to the requirements of section 75.319, was aggravated, inexcusable, or egregious, or resulted from the absence of the slightest degree of care. Accordingly, the inspector's unwarrantable failure finding IS VACATED.

Modification of the Contested Order

In view of my unwarrantable failure finding, the contested section 104(d)(1) Order is modified to a section 104(a) citation. See: 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).

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, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

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

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

We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

Inspector Bowman testified that the mine has a history of liberating methane, and since the entry in question had mined and advanced for some 69 feet without the use of ventilation line curtains, he was concerned that a buildup of methane and mine contaminants or "black damp," which could be present at any time in the return air being coursed to the area where mining was taking place, could have exposed the miners working

in the area to an ignition hazard, particularly in the event of arcing or a blown electrical equipment cable (Tr. 21-22).

Superintendent Lilly did not dispute the fact that coal was being mined as the drift entry was being advanced, and he confirmed the fact that the mining sequence included the use of a continuous-mining machine, shuttle car, and roof bolter, all of which I consider to be potential ignition sources. Although the entry had been driven for approximately 69 feet at the time of the inspection, Mr. Lilly conceded that the respondent had intended to drive it for a distance of 100 feet, and he did not rebut the inspector's credible testimony with respect to the absence of, or inadequately placed, ventilation line curtains in the area where coal was being mined.

Although there is no credible evidence to establish the actual presence of explosive mixtures of methane, or the presence of "black damp" in the return air course being used to ventilate the working area in question, since all mines freely liberate methane, particularly when coal is being cut at the face, inadequate ventilation and the use of return air, which normally is used to course methane and other contaminants out of the mine, to ventilate such areas poses a discrete explosion hazard, as well as a hazard of the miners who could be exposed to other mine gases and contaminants commonly known as "black damp." Since the clear intent of section 75.319, is to insure that such areas are ventilated by "clean" intake air, the use of return air for this purpose is contrary to the requirements of the standard.

On the facts of this case, given the fact that three to five miners would normally be present in the area while the entry in question was being mined and advanced by electrically powered machinery which posed a potential ignition source, and given the added fact that the right mixture of explosive methane and air could be present at any time, particularly in an area which has not been preshifted to insure the absence of excessive levels of methane or other mine contaminants, or which had not been adequately ventilated by line curtains, I believe it is reasonable to conclude that a potential accident or explosion hazard was present at the time of the inspection when the violation was issued. In the event of any such occurrences, I further conclude that it would be reasonably likely that the miners working in the area would likely suffer fatal injuries or injuries of a reasonably serious nature. Under all of these circumstances, I agree with the inspector's "significant and substantial" finding, and IT IS AFFIRMED.

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

Exhibit P-1, an MSHA "Controller Information Report," reflects that the respondent's No. 2 Mine produced 244,116 tons of coal in 1986, and 386,954 tons in 1987, and respondent's counsel characterized the respondent's mining operation as "medium." I conclude and find that the respondent's mining operation is medium in scope, and I adopt the stipulation by the parties that the civil penalty assessment for the violation in question will not adversely affect the respondent's ability to continue in business as my finding on this issue.

History of Prior Violations

An MSHA computer print-out submitted by the petitioner reflects that for the period August 25, 1985 through August 24, 1987, the respondent paid civil penalty assessments in the amount of \$24,930, for 372 violations, 219 of which are characterized as "significant and substantial" violations. Seventy-seven (77) of these prior paid violations were for violations of the ventilation requirements found in 30 C.F.R. Part 75, Subpart D, but only one was for a prior violation of section 75.319. For a mine operation of its size, I conclude that the respondent's overall prior compliance history is not particularly good, and I have considered this in the civil penalty assessment which I have made for the violation in question.

Negligence

I conclude and find that the violation which has been affirmed resulted from the respondent's failure to exercise reasonable care, and that this constitutes ordinary or moderate negligence.

Gravity

For the reasons stated in my "significant and substantial" findings and conclusions, I conclude that the violation was serious.

Good Faith Abatement

The evidence establishes that abatement was achieved by the installation of stoppings to provide a separate split of intake air to the miners working in the cited area (Tr. 26, 71-73), and I conclude and find that the respondent timely abated the cited condition in good faith.

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 \$450 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 \$450 for a violation of 30 C.F.R. 75.319, as stated in the modified section 104(a) "S&S" Citation No. 2716156. If it has not already done so, respondent is FURTHER ORDERED to pay a civil penalty assessment in the amount of \$700 for the uncontested August 25, 1987, section 104(d)(1) Order No. 2716152, 30 C.F.R. 75.303. Upon receipt of payment by MSHA, this proceeding is dismissed.

George A. Koutras
Administrative Law Judge