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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. PENN 89-17
A.C. No. 36-00856-03616

v.

Rushton Mine

RUSHTON MINING COMPANY,
RESPONDENT

DECISION

Appearances: Linda Henry, Esq., Office of the Solicitor
U.S. Department of Labor, Philadelphia,
Pennsylvania for Petitioner;
Joseph A. Yuhas, Esq., Rushton Mining Company
Ebensburg, Pennsylvania for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor against the Rushton Mining Company (Rushton) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," in which the Secretary has charged one violation of the regulatory standard at 30 C.F.R. 75.301. The issue before me is whether Rushton has committed the violation as alleged and, if so, what is the appropriate civil penalty for the violation.

The citation at issue, No. 2884010, charges a "significant and substantial" violation of 30 C.F.R. 75.301 and alleges as follows:

The active workings on the outby side of bleeder evaluation point No. 9 was [sic] not being ventilated by a current of air containing not less than 19.5 volume per centum of oxygen as was indicated using and approved MX240 oxygen-methane detector. The detector indicated that 19.1 volume per centum of oxygen was ventilating the immediate outby side of the evaluation point where persons are required to evaluate the 3, 4 and 5 butts

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bleeder systems. Bottle sample No. 1 was collected to substantiate the condition.

The citation was subsequently modified on March 21, 1988, as follows:

Citation No. 2884010 is being modified to reflect the analytical results of the air sample. The per centum of oxygen was 19.2. The per centum of carbon dioxide was 1.4 which was more than the allowable 0.5 per centum. This additional information shall therefore be inclusive in the citation as part of the violation.

The cited standard, 30 C.F.R. 75.301, provides in part as follows:

All active workings shall be ventilated by a current of air containing not less than 19.5 volume per centum of oxygen, not more than 0.5 volume per centum of carbon dioxide, and no harmful quantities of other noxious or poisonous gases. . .

Rushton does not dispute the oxygen and carbon dioxide readings obtained by MSHA Inspector Donald Klemick but maintains that the area in which these readings were obtained, bleeder evaluation point Number 9, was not within the "active workings" of the mine. Indeed it is not disputed that this bleeder evaluation point is part of the bleeder system. If the cited bleeder evaluation point was not within the "active workings" then clearly there was no violation of the cited standard.

The same issue has previously been litigated before several judges of this Commission. In U.S. Steel Corp., 6 FMSHRC 291 (1984) Judge Koutras concluded that "when read together with the other standards in Part 75, a bleeder entry is not active workings is a sound and logical interpretation and application of the cited standard." Recently in Rochester and Pittsburgh Coal Co., ___ FMSHRC ___ (July 18, 1989) (Docket Nos. PENN 88-164-R and PENN 88-288) Judge Weisberger similarly concluded that a bleeder system is not a part of the "active workings" of the mine. These decisions are based on sound logic and policy reasons and are therefore followed here. I therefore find that bleeder evaluation point Number 9 here cited is not within the "active workings" of the subject mine. Accordingly there can be no violation of 30 C.F.R. 75.301 as charged.

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ORDER

Citation No. 2884010 is vacated and these proceedings are dismissed.

Gary Melick
Administrative Law Judge
(703) 756-6261