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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 89-40
A.C. No. 36-00840-03665

v.

Cambria Slope No. 33

BETHENERGY MINES, INC.,
RESPONDENT

DECISION

Appearances: Paul D. Inglesby, Esq., Office of the Solicitor
U.S. Department of Labor, Philadelphia,
Pennsylvania for Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll
Professional Corporation, Pittsburgh,
Pennsylvania for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," charging Beth Energy Mines, Inc., (Beth Energy) with three violations of its Ventilation System and Methane and Dust Control Plan (Ventilation Plan) under 30 C.F.R. 75.316. The general issue before me is whether Beth Energy violated the Ventilation Plan as charged and, if so, the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

The three citations at bar allege similar violations of the operator's Ventilation Plan. Citation No. 2887804 alleges a "significant and substantial" violation and charges as follows:

The approved ventilation system and methane and dust control plan was not complied with in that the air lock at the 7 Right between numbers 6 track and 7 intake entries were not properly installed. Both doors would open outby away from each other and a proper air lock was not provided.

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Citation No. 2887805 charges a "significant and substantial" violation and charges as follows:

The approved ventilation system and methane and dust control plan was not complied with in that the airlock doors at the 8 Right between the Nos. 6 track and 7 intake entries were not properly installed. Both doors would open outby away from each other and a proper air lock was not provided.

Citation No. 2887807 charges a "significant and substantial" violation and charges as follows:

The approved ventilation system and methane and dust control plan was not complied with in that the airlock doors used at the 8 Left supply station were not properly installed. Both doors would open outby away from each other and a proper air lock was not provided.

In relevant part the Ventilation Plan provided as follows:

Equipment doors shall be in pairs to form an air lock where permanent stoppings are replaced by doors separating return air entries from intake air entries.

As explained at hearing the Secretary's theory of violations in these cases is that the cited doors did not provide an "air lock".(FOOTNOTE 1) There is no disagreement that in order to constitute an "air lock" within the meaning of the Ventilation Plan the doors need only be "reasonably air tight". More particularly the Secretary argues that the pairs of equipment doors here cited did not form an airlock because the opening of one set of doors caused the second set of doors to open automatically.

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Citation No. 2887804

According to the testimony of MSHA Inspector and Ventilation Specialist Michael Bondra an air lock was not provided at the double sets of doors at the 7 Right section between the Nos. 6 track and 7 intake entries on September 9, 1988. According to Bondra when the doors adjacent to the track entry were opened one of the second set of doors also opened about 12 to 18 inches at the top because of the pressure differential. He accordingly issued Citation No. 2887804.

Steve Olexo, a Beth Energy safety inspector, accompanied Bondra on his September 9, 1988, inspection. Olexo acknowledged that the door had problems--the rubber seal at the top was worn and the nail holding the seal had come loose. Olexo also conceded that the left side of the door had a slight warp allowing the door to remain open some 6 to 7 inches and allowing some air movement toward the No. 7 entry.

Within this framework it is apparent that the cited door was indeed not "reasonably air tight". It admittedly had a gap of at least 6 inches allowing air to pass toward the No. 7 entry and therefore could not form an "air lock" within the meaning of the Ventilation Plan. The violation is accordingly proven as charged. (FOOTNOTE 2)

In order to find that a violation is "significant and substantial" however, the Secretary has the burden of proving not only the existence of an underlying violation of a mandatory standard but also the existence of a discrete hazard (a measure of danger to health or safety) contributed to by the violation, a reasonable likelihood that the hazard contributed to will result in an injury, and a reasonable likelihood that the injury in question will be of a reasonably serious nature. Mathies Coal Co., 6 FMSHRC 1 (1984).

While Inspector Bondra acknowledged that he did not test for air movement or pressure differential at the cited doors, he testified that he "could feel it". According to

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Bondra if there had been any smoke emanating from the track entry, that smoke would therefore contaminate the intake escapeway upon opening the track-side door. He thought it was "very likely that the track-side door would be left open allowing the track air to pass into the escapeway through the gapped second door. He estimated that up to two work crews of eight miners each could have been affected.

On cross-examination Bondra conceded however that neither of the potentially affected sections were then active and that apparently the only reason for the continued existence of the cited doors was to permit removal of some machinery left from active mining i.e. a battery charger and some longwall equipment. According to Mine Foreman William Radebach, at the time the doors were cited the 7 Right section was indeed inactive and the doors were only rarely used. It is also undisputed moreover that while there had been a fire on September 1, in the track entry contaminating the entire track entry the smoke from that fire never entered the No. 7 air course.

Under all the circumstances I cannot find that the Secretary has sustained her burden of proving that the violation charged in Citation No. 2887804 was "significant and substantial" or of high gravity. I observe however that Inspector Bondras' finding of "moderate negligence" is not challenged by Beth Energy.

Citation No. 2887805

Bondra testified that the set of air lock doors at the 8 Right section between the No. 6 track and No. 7 intake entries was also not properly installed and that similarly upon opening the first set of doors the second set of doors would also open about 6 to 8 inches allowing the air to pass from the track entry directly into the intake escapeway. Bondra also testified that no one accompanied him when he observed these conditions. He acknowledged however that he had been unable to locate his notes taken at the time he issued the citation. Mine Inspector Steve Olexo disagreed with Bondra and testified that he was in fact present when Bondra examined this set of doors. Olexo testified moreover that upon opening the first set of doors the second set did not open at all. I find the testimony of Olexo to be entitled to the greater weight. No deficiencies in Olexo's recollection were elicited at hearings and Inspector Bondra admitted that he was unable to locate his contemporaneous notes that would support his testimony. Under the circumstances I find that the Secretary has failed to sustain

I disagree. This may reasonably be inferred from the testimony of Inspector Bondra.