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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 89-184
A.C. No. 36-00840-03682

v.

Cambria Slope No. 33

BETHENERGY MINES, INC.,
RESPONDENT

DECISION

Appearances: Paul D. Inglesby, Esq., U.S. Department of Labor,
Office of the Solicitor, Philadelphia, Pennsylvania,
for Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll, 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 two violations of regulatory standards. The general issues before me are whether Beth Energy violated the cited regulatory standards and, if so, the appropriate civil penalty to be assessed in accordance with Section 110(i) of the Act.

At hearing the Secretary filed a Motion to Approve a Settlement Agreement with respect to Citation No. 2888987 proposing a reduction in penalty from \$329 to \$255. I have considered the representations and documentation submitted in the case and conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. Accordingly an appropriate order will be incorporated as part of this decision setting forth the terms of payment for the noted penalty.

The citation remaining at issue, No. 2887802, alleges a "significant and substantial" violation of the mine operator's Ventilation System and Methane and Dust Control Plan under 30 C.F.R. 75.316 and charges as follows:

The approved Ventilation System and Methane and Dust Control Plan was not complied with in that the airlock installed in the seven left chute

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area, between the tractor trolley No. 6 Entry and intake escapeway No. 4 Entry was not properly installed. Both doors were installed to open outby away from each other and a proper airlock was not utilized. This citation was revealed during a mine fire accident that occurred in the seven left chute area on 9-1-88.

At the conclusion of the Secretary's case-in-chief counsel for Beth Energy moved for an involuntary dismissal for insufficient evidence. The motion was granted in a bench decision. That decision is set forth below with only nonsubstantive corrections:

All right. I must say it's a nice try by the Government but the evidence really is not sufficient to support the citation. The citation, of course, does state, and I will read from the citation:

The approved ventilation plan system and methane and dust control plan was not complied with in that the air-lock installed in the number seven chute area between the track trolley, number six entry, and the intake escapeway, number four entry, was not properly installed. Both doors were installed to open outby away from each other and a proper air-lock was not utilized.

The violation alleged was that the system of doors here cited did not provide a reasonably airtight air-lock as set forth in the ventilation plan, Exhibit G-2(A). The Government does concede through the testimony of Inspector Bondra that the ventilation plan does not require any particular construction for these doors, only that they must be reasonably airtight to form an air-lock. So the doors (and this is again conceded by the Government) need not have a latch, they need not close automatically and they need not in themselves open in certain directions. That in itself is not a violation. The Government also acknowledges that when the doors here cited (the three and four and one and two doors that were designated on Court Exhibit Number One) were closed, they were, in fact, admittedly reasonably airtight and formed an air-lock. The Government also acknowledges that it did not test the cited doors number three and four when doors one and two were opened to determine whether,

in fact, they would remain reasonably airtight upon the opening of doors one and two. The Government would have this Court infer from tests on other doors that the cited doors would open, that is, doors number three and four would open upon the opening of doors one and two. But there has not been sufficient evidence of the similarities between the previously tested doors and the untested doors here at issue for me to draw such an inference.

The evidence is clear that the ability of the doors to seal would vary depending on the contour of the roof and floor, the condition of the rubber belt edging contacting the floor and roof, etc. Thus the amount of air it would take to open the numbers three and four doors upon the opening of the numbers one and two doors could vary widely. So I cannot infer from tests on other doors, the conditions of which may vary considerably, that the same air velocity would also open the doors at issue here. Therefore, I cannot find that the government has met its burden of proving that the numbers three and four doors here would have opened upon the opening of the number one and two doors from the difference in air pressure alone.

Now if the Government had in fact tested these doors and found that they did open that's a different case. But the tests were not performed here and without those tests there is simply not sufficient proof in my mind to support the allegations in the citation. Therefore, I'm going to vacate the citation and grant the motion to dismiss.

ORDER

Citation No. 2888987 is affirmed and Beth Energy Mines, Inc., is directed to pay a civil penalty of \$255 within 30 days of the date of this decision. Citation No. 2887802 is vacated.

Gary Melick
Administrative Law Judge
(703) 756-6261