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SOL (MSHA) V. BETH ENERGY MINES
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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 89-222 A. C. No. 36-00840-03685
v.	Cambria Slope Mine No. 33
BETH ENERGY MINES INCORPORATED, RESPONDENT	

DECISION

Appearances: Thomas A. Brown, Jr., Esq., Office of the Solicitor, Department of Labor, Philadelphia, Pennsylvania, for the Secretary;
R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Weisberger

Statement of the Case

In this Civil Penalty Proceeding, the Secretary (Petitioner) seeks civil penalties for alleged violations by Respondent of 30 C.FR. 75.301 and 75.316. Pursuant to notice, the case was heard in Johnstown, Pennsylvania, on January 9, 1990. Gerry L. Boring and Samuel J. Brunatti testified for Petitioner. Samuel Brunatti was called to testify by Respondent. Arthur Britten, Charles F. Forst, George W. Moyer, and Nick Carpinello testified for Respondent. Respondent filed a Brief on March 9, 1990, and Petitioner filed Proposed Findings of Fact and a Brief on March 19, 1990.

Stipulations

1. Mine 33 is owned and operated by Beth Energy Mines, Inc., and subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

2. The Administrative Law Judge has jurisdiction over these proceedings.

3. The subject citations were properly served by a duly authorized representative of the Secretary of Labor upon agents of Beth Engergy at the dates and places stated therein, and may be admitted into evidence for the purpose of establishing the issuance, but not for the truth of the matters asserted therein.

4. Beth Engergy demonstrated good faith in the abatement of the citations.

5. The assessment of the civil penalty or civil penalties in this proceeding will not affect Beth Energy's ability to continue business.

6. The appropriateness of the penalty and the size of the operator's business should be based on the fact that Beth Energy's annual production is 9,751,620 tons and Mine 33's annual production tonnage is 2,170,006 tons.

7. The printout of the civil penalty complaint reflects the Secretary's history of violations at Mine 33.

Findings of Fact

1. On March 14, 1989, at Respondent's Cambria Slope Mine No. 33, at the end of the midnight shift, the methane monitor de-energized the power on the longwall face. The miners investigated and determined that there were excessive levels of methane present; they de-energized all the power and withdrew from the face. The power remained off during the day shift.

2. This methane had not been present at the end of the midnight shift. Arthur R. Britten, a longwall foreman at Mine 33, worked the midnight shift on March 14, 1989. As part of his normal duties, Britten inspected the longwall face for the presence of methane. During his examinations he detected no excessive levels of methane. He also took air readings at the headgate entry and obtained a normal reading of approximately 18,000 cubic feet of air per minute ("cfm").

3. Charles F. Forst was the day shift longwall foreman on March 14, 1989. When he arrived at the longwall section, the miners who had remained from Britten's crew informed him of the methane problem. Forst told his crew to proceed to the headgate side of the longwall and to remain outby the longwall face until an examination was conducted to determine the nature of the problem.

4. Forst examined the face of the longwall and found that at the No. 114 chock there was a level of 2.5 percent methane. The bottom was broken in the area of the highest methane readings.

5. Between 8:15 and 8:20 a.m., the crew from the longwall approached MSHA Inspector Gerry L. Boring, who was present to conduct an inspection, and informed him that their supervisor had instructed them to proceed to the headgate side and wait until the foreman determined the extent of the methane problem.

6. Boring entered the return entry and proceeded to the tailgate of the longwall, where he met Forst.

7. Boring and Forst proceeded to take methane readings with an approved methane detector at the bleeder evaluation point 54. A bottle sample was also taken and the detector and bottle samples revealed a reading of 4.9 percent.

8. The methane measurements taken at approximately 8:45 a.m., at chock 167 revealed 2.5 percent methane. At chock 142 a reading of 1.5 methane percent was recorded. A bottle sample taken at chock 167 revealed a reading of 2.4 percent methane.

9. Boring returned to bleeder evaluation point 54 and took a methane reading of 3.7 percent at approximately 9:05 a.m.

10. A methane reading at the regulator near bleeder evaluation point 54 revealed 4.2 percent methane, and an air reading of 20,412 C.F.M. at approximately 9:05 a.m..

11. Bill Moyer, Respondent's longwall coordinator, obtained higher methane readings by placing his methane spotter closer to the bottom. He concluded that the methane was coming from the bottom and not from the gob.

12. At approximately 9:20 a.m., Boring informed Moyer that he was issuing a section 107(a) Imminent Danger Order and posted a sign at the headgate and the tailgate closing off the longwall face.

13. At approximately 9:35 a.m., Boring took an air reading at the headgate which measured 16,254 C.F.M. and a methane reading of 0.1 percent. At approximately 9:35 a.m., Boring measured 2.4 percent methane at chock 166. Boring then traveled to the tailgate section and took an air reading of 5,880 C.F.M. and a methane reading of 0.1 percent. At approximately 10:30 a.m., Boring returned to bleeder evaluation point 54 and took a methane reading of 3.4 percent. On the morning of March 14, the combined total of air measured by Boring in the tailgate and headgate was approximately 23,000 C.F.M.

14. Boring issued Citation No. 2891347 alleging a violation of 30 C.F.R. 75.301. Boring also issued a section 107 Imminent Danger Withdrawal Order.

15. Also on March 14, 1989, Boring issued Citation No. 2891346 alleging that the approved ventilation, methane and dust control plan (review no. 32) was not being complied with, in that a methane reading of 4.9 percent was detected inby bleeder evaluation point No. 54 at Mine 33.

16. At the time of the issuance of Citation No. 2891346 for the alleged violation of 75.316, Beth Energy had an approved ventilation system, methane and dust control plan.

17. In the most recent 6 month review of the plan prior to the citation herein, Petitioner, on January 31, 1989, approved the plan with the following language "These plans and all criteria listed under Section 75.316, 30 C.F.R. 75, shall be complied with." (Gx 7).

18. The sentence quoted in Finding No. 17 is being included by MSHA District Two in approvals of mine plans in the district.

Discussion and Conclusions of Law

A. Citation No. 2891347.

Citation No. 2891347, issued by Boring on March 14, 1989, alleges a violation of 30 C.F.R. 75.301 in that a methane reading of 2.5 percent was detected at chock No. 167. Boring's uncontradicted testimony establishes that testing by him indicated methane readings, along the longwall panel of 2.5 percent at chock 167, 2.7 percent at chock 142, and 1.5 percent at chock 114.

30 C.F.R. 75.301 provides 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; and the volume and velocity of the current of air shall be sufficient to dilute, render harmless, and to carry away, flammable, explosive, noxious, and harmful gases, and dust, and smoke and explosive fumes. The minimum quantity of air reaching the last open crosscut in any pair or set of developing entries and the last open crosscut in any pair or set of rooms shall be 9,000 cubic feet a minute, and the minimum quantity of air reaching the intake end of a pillar line shall be 9,000 cubic feet a minute. The minimum quantity of air in any coal mine reaching each working face shall be 3,000 cubic feet a minute. The authorized representative of the Secretary may require in any coal mine a greater quantity and velocity of air when he finds it necessary to protect the health or safety of miners. In robbing areas of anthracite mines, where the air currents cannot be controlled and measurements of the air cannot be obtained, the air shall have perceptible movement.

It is Respondent's position that section 301, supra, requires at least 9,000 cubic feet of air a minute in order to achieve compliance with the mandate of the first sentence which requires velocity and volume of air sufficient to dilute and render harmless explosive gasses. Respondent refers to undisputed evidence of an airflow of 17-18,000 C.F.M. at the headgate, and argues that as such it was fully in compliance with section 75.301, supra, which is satisfied by a flow of at least 9,000 C.F.M. It further argues that section 75.301, requires only a minimum of 9,000 C.F.M. unless the Secretary requires more, and that no such requirement was imposed herein.

I do not accept the interpretation of section 75.301, supra, advocated by Respondent. I find that plain language of the first sentence of section 75.301, supra, unequivocally requires a current of air sufficient to dilute and render harmless explosive gasses.1 The second sentence requires a "minimum of 9,000 C.F.M. reaching the last open crosscut. To hold, as urged by Respondent, that section 75.301 is fully satisfied if at least 9,000 C.F.M. is provided, would render meaningless the first sentence which requires a volume and velocity of air "sufficient to dilute and render harmless explosive gasses." Thus, an airflow exceeding 9,000 C.F.M., as on the date in issue, does not comply with section 75.301, supra, if it is not sufficient to dilute and render harmless explosive gases. As described in Boring's testimony and not contradicted by other witnesses, methane was present in concentrations close to the explosive range of 5.15 percent. As such I find that the volume and velocity of air was not sufficient to dilute and render the methane harmless, and as such 75.301, supra, was violated.2

II.

According to Boring, the violation herein was significant and substantial. The evidence herein clearly established, that due to the concentration of methane present, there was a

violation as discussed above I, infra, which contributed to the hazard of an explosion. (See, Mathies Coal Company, 6 FMSHRC 1 (1984)). However, according to Mathies at 3-4, supra, to be significant and substantial there must also be a reasonable likelihood that the hazard contributed to will result in an injury. In U. S. Steel Mining Co., Inc., 6 FMSHRC 1834, 1836, (1984), the Commission indicated that this element ". . . requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." The evidence fails to establish this element. The only testimony on this point is that of Boring. He acknowledged that there were no energized equipment or men in the area. When asked what the ignition source was for the methane, he responded as follows: "Well, the ignition source could be anything that would cause a spark, a roof fall, men within the area, hammers, metal to metal, anything that would occur within that given area to create a spark that would maybe ignite the methane there" (Tr. 40-41). When asked to indicate why he concluded the violation was significant and substantial, he said that ". . . if there would have been a roof fall, possibly a spark, rock to rock igniting the methane causing an explosion" (Tr. 42). He indicated that due to the concentration of methane which indicated that somewhere within the gob area there was a "volatile situation" (Tr. 42), there was a danger of an explosion and that he "felt it was likely" (Tr. 42). Since men had been withdrawn from the area, there were no energized equipment in the area, and there is no evidence of any condition making a roof fall, likely, I conclude that it has not been established that there was a reasonable likelihood of the methane being ignited. Accordingly, I conclude that it has not been esablished that the violation herein was significant and substantial. (See Mathies, supra, U. S. Steel, supra).

III.

Due to the high concentrations of methane at various points in the section, and taking into account Boring's uncontradicted opinion that the methane was volatile in the gob, I find that the violation herein constituted a high degree of gravity, mitigated by the absence of proof of the presence of reasonably likely ignition sources. The methane present on the morning of March 14, was not present when the area was examined in the proceeding, or midnight shift. Further, no methane was detected, all power in the area was de-energized by Respondent, and miners were withdrawn. Also, the volume and velocity of air present was about double the minimum required by section 75.301, supra. Further, inasmuch as the bottom of the mine, which had heaved, had the highest methane readings, it might be concluded that the methane present was the result of an outburst from the bottom and was unexpected. Accordingly, I find Respondent not to have been negligent with respond to the violation herein. Taking into account the remaining statutory factors in section 110(i) of the Act, I conclude that a penalty of $100 is appropriate.

B. Citation No. 2891346.

I.

The evidence is not controverted that on March 14, 1989, Boring took a bottle sample of methane at bleeder evaluation point 54, and the results of the testing reveled 4.5 percent methane. Boring issued a citation, in essence, alleging a violation of Respondent's ventilation plan. The ventilation plan does not contain any language setting any limit on methane at the evaluation point tested. However, in the 6 months review of the ventilation plan on January 29, 1989, the MSHA District Manager approved the plan with the following sentence: "These plans and all criteria listed under section 75.316, 30 C.F.R. 75, shall be complied with." The first sentence of section 75.316-2 provides that "This section sets out the criteria by which district managers will be guided in approving a ventilation system and dust control plan on a mine-by-mine basis." Section 75.316-2(h) provides as follow: "The methane content of the air current in the bleeder split at the point where such split enters any other split should not exceed 2.0 volume per centum."

In essence, it is Petitioner's position that the MSHA Letter of Approval of January 31, 1989, (Gx 7), informed Respondent that all the criteria set forth in section 75.316-2, supra, are to be complied with. It is further maintained by Respondent that the criteria set forth in section 316-2, supra, are mandatory, and that a district manager can not approve a ventilation plan without such criteria contained therein. Essentially, the only authority relied on by Petitioner is United Mine Workers of America, Int'l Union v. Dole, 870 F.2nd 662 (D. C. Cir. 1989). Petitioner cites United Miner Workers, supra, for the proposition, in essence, that the criteria in section 75.316, supra, were properly incorporated in the ventilation plan by the approval letter. (Gx. 7). Petitioner relies on United Mine Workers, supra, for the proposition that the district managers do not have the authority to approve ventilation plans without incorporation of the criteria in section 75.316-2, and quotes the following language from United Mine Workers, supra, at 670. ". . . if the criteria were actually incorporated into an approved plan, the Operator was bound to comply with them."

In general, the Commission has held that "In plan violation cases the Secretary must establish that the provision allegedly violated is part of the approved and adopted plan and that the cited condition or practice violates the provision." (Jim Walter Resources, Inc., 9 FMSHRC 903, at 907 (May 1987). For the reasons that follow, I find that the Secretary has not met this burden.

The main issue presented for resolution is whether the criteria set forth in section 316-2(h), can be incorporated unilaterally by the Secretary into the Respondent's ventilation plan along with all the criteria in section 75.316-2.

In Zeigler Coal Co. v. Kleppe, 536 F.2nd 398 (D. C. Cir. 1976),3 the D. C. Circuit Court of Appeals held that violations of requirements in ventilation plans that were not in themselves promulgated as mandatory standards were nonetheless enforceable under the 1969 Coal Act. The Court reviewed the precise manner in which mandatory standards are to be promulgated pursuant section 101 of the 1969 Coal Act.4 The Court concluded that the context of the requirement for a ventilation plan in section 303 of the 1969 Act, the wording of which has been continued in section 303 of the 1977 Act, amidst the other provisions of section 303 which set out specific standards pertaining to mine ventilation, ". . . further suggest that the plan idea was conceived for quite narrow and specific purpose." (Zeigler, supra, at 407.) The Court, in Zeigler, supra, at 407, further stated with regard to ventilation plans that they were ". . . not to be used to impose general requirements of a variety well-suited to all or nearly all coal mines, but rather to insure that there is a comprehensive scheme for realization of the statutory goals in the particular instance of each mine." The Court in Zeigler, supra, recognized that ventilation plans ". . . appear to be developed by informal negotiations between the Operator and the Secretary's representative, without any pretense of compliance with 101." (Zeigler, supra, at 403.) In this connection the Court noted that although the plan must be approved by the Secretary, ". . . it does not follow that he has anything close to unrestrained power to impose terms." (Zeigler, supra, at 406).

In Carbon County Coal Company, 6 FMSMRC 1123, May (1984) (Carbon County I) the Commission, in analyzing Zeigler, supra, took cognizance of the notation by Carbon County that the Court in Zeigler, supra, at 407, drew a distinction between a negotiated plan requirement ""suitable to the conditions and the mining system of the coal mine' and a provision of general nature not based on the particular conditions at the mine, which the government sought to impose in the plan, but which "should more properly have been formulated as a mandatory standard' in conformity with the rule making requirements of section 101 of the 1969 coal Act." (Carbon County, I at 1125).

The Commission in Carbon County, I, supra, was presented with the issue of whether MSHA's insistence on the inclusion in a ventilation plan of a provision, opposed by Carbon County, for a volume of air more than "free discharge capacity," was proper. The commission, in remanding to the trial judge to consider the application of Zeigler, supra, specifically stated that it found the discussion of Zeigler, supra, "persuasive and compelling," (Carbon County I, at 1127, and held that ". . . the general principles enunciated in Zeigler apply to the ventilation plan approval and adoption process under the Mine Act." (Carbon County, I, at 1127.) In Carbon Coal Company, 7 FMSHRC 1367 (September 1985), (Carbon Country, II), the Commission, at 1370, analyzed the statutory system of the approval and adoption of ventilation plans as follows:

> The scheme for the approval and adoption of a mine specific plan supplements the nationally applicable safety and health rulemaking procedures. The bilateral approval-adoption process inherent in developing mine specific plans results from consultation and negotiation between MSHA and only the specifically affected operator, whereas the nationally applicable standards are the product of notice and comment rulemaking pursuant to section 101 of the Mine Act. 30 U.S.C. 811. Further, the scope of a mine specific plan is restricted exclusively to the mine in which the plan will be implemented, whereas a mandatory safety or health standard applies across-the-board to all mines. (Emphasis added).

The Commission, in Carbon County, II, supra, at 1370, noted that the legislative history of the Act emphasizes the individual nature of a mine specific plan. In this connection, the Commission in Carbon County, II, supra, at 1370, quoted the following language from the Senate Committee on human resources, which reported on the bill which became the Act: "Such individually tailored plans, with a nucleus of commonly accepted practices, are the the best method of regulating such complex and potentially multifaceted problems as ventilation, roof control and the like."

In Jim Walter Resources, Inc., supra, the Commission again reiterated the bilateral process of the adoption of ventilation plans as follows: "The approval and adoption process is bilateral, and results in the Secretary and the Operator, through consultation, discussion, and negotiation, mutually agreeing to ventilation plans suitable to the specific conditions at particular mines. Zeigler v. Kleppe, 536 F.2nd 398, 406-407 (D.C. Cir. 1976); Carbon County Coal Company, 6 FMSHRC 1123 (May 1984)." (Jim Walter, supra, at 907). Further, the Commission again indicated its view with regard to the "mine-specific" nature of a ventilation plan as follows: "The ultimate goal of the approval and adoption process is a mine-specific plan with provisions understood by both the Secretary and the Operator, and in which they are in full accord." (Jim Walter, supra, at 907.)

Drawing upon the principles set forth in Zeigler, supra, Carbon County, I, supra, Carbon County, II, supra, and Jim Walter, supra, I conclude that the criteria to be set forth in a ventilation plan can not be unilaterally imposed by the Secretary.5 I

further conclude that various criteria are not to be included in a ventilation plan unless it is established that they are to address a specific problem at the mine in question. In the instant case, not only is the Secretary attempting to unilaterally impose a requirement upon Respondent in its ventilation plan, but it has not established that the requirement would address a specific problem at Respondent's mine, thus making it mine specific. To the contrary, it appears to be MSHA's policy, as indicated by the testimony of Samuel J. Brunatti, an MSHA Ventilation Specialist, to include the approval language in question in approvals of mine ventilation plans in District Two. As such, it would appear that the requirement by MSHA for Respondent, in its plan, to comply with the criteria in 75.316 to have been the result of a rote application of District Two's policy and not based upon particular conditions at Respondent's mine (See, Jim Walter, supra, at 1373). I thus conclude that the criteria set out in 30 C.F.R. 75.316(2)(h) are not to be incorporated into Respondent's ventilation plan. As such, it has not been established that Respondent violated any of the terms of its ventilation plan. Accordingly, Citation No. 2891246 should be dismissed.6

ORDER

It is ORDERED that Citation No. 2891346 be DISMISSED. It is further ORDERED that Order No. 2891345 was properly issued. It is further ORDERED that Respondent, within 30 days of this Decision, shall pay $100 as a civil penalty for the violation found herein. It is further ORDERED that Citation No. 2891347 be AMENDED to reflect the fact that the violation therein was not significant and substantial.

Avram Weisberger
Administrative Law Judge

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FOOTNOTES START HERE

1. I reject Respondent's argument that it is not clear that section 75.301, supra, applies to methane. The Dictionary of Mining, Minerals, and Related Terms, (U. S. Department of Interior, 1968) (DMMRT), in defining methane, indicates that ". . . with air, however, it forms an explosive mixture, ... " I thus find that methane is an explosive gas and is thus within the purview of the first sentence of section 75.301, supra.

2. The fact that Respondent's ventilation system was working to dilute the methane that was present, and the fact that the methane present might have been due to an unexpected outburst rather than an accumulation, are factors bearing on Respondent's negligence, and are discussed in paragraph 6, infra. The fact that Respondent might not have been negligent herein, does not relieve it of its responsibility for not complying with section 75.301, supra. (See, Western Fuels-Utah, Inc. v. FMSHRC 870 F.2d. 711 (D.C. Cir. 1989); Asarco Inc. - North Western Mining Dept. v. FMSHRC, 868 F.2d 1195 (10th Cir. 1989)).

3. In Zeigler, supra, which arose under the 1969 Coal Act, 30 U.S.C. 801 et seq. (1976) (amended 1977), the Court construed section 303(0) of that Act. This provision was retained without change as 303(o) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1982) (The Act).

4. Section 101 of the 1969 Coal Act has been repeated in section 101 of the Federal Mine Safety and Health Act of 1977.

5. I do not find United Mine Workers, supra, relied on by Petitioner, to be dispositive of the issues raised herein. In United Mine Workers, supra, the Court was presented with the issue as to whether the criteria by which the District Manager will be guided in approving roof control plans on a mine-to-mine basis, (30 C.F.R 75.200-6), were mandatory, so as to require the Secretary, in promulgating new replacement standards, to establish that the latter provide at least the same level of protection to miners as the old regulations. In holding in the affirmative, it clearly was not necessary for the Court to entertain the issue presented herein, i.e., whether all criteria by which District Managers will be guided in approving a ventilation plan on a mine-to-mine basis, are to be incorporated

into the ventilation plan of an individual mine in the absence of any proof that the criteria are to address specific problems at the mine. As such, the Court's comments in United Mine Workers, supra, at 670, that a plan could be approved only if it conforms to the general criteria of the Regulations (30 C.F.R. 75.200-6) are clearly dicta. Similarly, the rejection by the Court, in United Mine Workers, supra, of the Operator's argument that a plan for roof support can only impose those requirements necessary to address unique conditions peculiar to each mine, does not appear necessary to a disposition of the issues before it, as that particular issue did not have to be adjudicated. Further, in this connection, it is noted that United Mine Workers, supra, took cognizance, at 667, of the fact that the contents of any plan are ". . . determined through consultation between the mine operator and the District Manager." Also, the Court specifically noted Zeigler, supra, and did not overrule it. In this connection, the Court interpreted Zeigler, supra, as saying ". . . only that the Secretary could abuse her discretion by utilizing plans rather than explicit mandatory standards to impose general requirements if by doing so, she circumvented procedural requirements for establishing mandatory standards laid down in the Mine Act." (United Mine Workers, supra, at 671.) Further, the Court in United Mine Workers, supra, at 672, found Carbon County, II, supra, to be consistent with its interpretation of Zeigler, supra, although it rejected the argument that under either Carbon County, II, supra, or Zeigler, supra, the Secretary ". . . was in a plan precluded from requiring mine operators to incorporate measures necessary to achieve an overall level of miner protection on all pertinent aspects of roof control." The Court, in United Mine Workers, supra, at 672, concluded that Carbon County, II, supra, as Zeigler, supra, did no more than set out a ". . . warning that the Secretary should utilize mandatory standards for requirements for universal application." Thus, I conclude that United Mine Workers, supra, does not mandate that the principles enunciated in Zeigler, supra, as found persuasive by the Commission in Carbon County, 1 and II, supra, and followed in Jim Walter, supra, as discussed above, infra, should not be applied in the case at bar.

6. At the hearing, Respondent's Counsel indicated that Respondent was not contesting the Imminent Danger Withdrawal Order, No. 2891345 which had been issued on March 14, 1989. Although it has been decided herein, infra, that there was no violation of section 75.316, supra, the finding of imminent danger was also predicated upon conditions which constituted a violation of section 75.301, which have been established, (infra, I,A.). As such it is concluded that the issuance of the Withdrawal Order is sustained.