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

ZEIGLER COAL COMPANY,
CONTESTANT

CONTEST PROCEEDING

v.

Docket No. LAKE 90-102-R
Citation No. 3035656; 5/17/90

SECRETARY OF LABOR,
MINES SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

Murdock Mine
Mine ID No. 11-00586

DECISION

Appearances: Timothy M. Biddle, Esq., Susan E. Chetlin, Esq.,
Crowell & Moring, Washington, D.C., for the
Contestant;
Robert Cohen, Esq., Office of the Solicitor, U.S.
Department of Labor, Arlington, Virginia, for the
Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a Notice of Contest filed by the
contestant pursuant to section 105(d) of the Federal Mine Safety
and Health Act of 1977, 30 U.S.C. 815(d), challenging the
validity of a section 104(a) non-"S&S" Citation No. 3035656,
issued on May 17, 1990, citing an alleged violation of mandatory
safety standard 30 C.F.R. 75.329-1(a). The contestant's request
for an expedited hearing was granted, and a hearing was conducted
in St. Louis, Missouri, on June 6 and 7, 1990. The parties filed
posthearing briefs, and I have considered their arguments in the
course of my adjudication of this matter.

Issues

The issues presented in this proceeding are (1) whether the
cited mandatory safety standard is applicable to the cited
abandoned area of the mine, and if so, (2) whether the evidence
presented establishes a violation. Additional issues raised by
the parties are discussed 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. Mandatory safety standard 30 C.F.R. 75.329-1.
4. Commission Rules, 29 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 8-9):

1. The Murdock Mine is owned and operated by the contestant, and the mine and the contestant are subject to the jurisdiction of the Act.
2. The presiding judge has jurisdiction to hear and decide this matter.
3. The parties agree to the authenticity of the documents offered in evidence in this matter.
4. The citation was properly served on the contestant by an authorized representative of the Secretary, and all of the "paperwork" served on the contestant in this matter by the Secretary was properly served and may be admitted as procedurally correct, but not for the purpose of establishing the truthfulness of the matters asserted therein.

Discussion

The Zeigler Mine in question employs approximately 170 miners, and produces approximately 1,200,000 tons of coal annually by the room and entry development method using continuous-mining machines. In order to preclude subsidence of the surface farmland, no pillaring or "second mining" is done. Room and entry mining is done in distinct panels which are not connected or ventilated by bleeder systems, and the mine liberates 350,000 cubic feet of methane over a 24-hour period. There have never been any methane ignitions at the mine, nor have any citations been issued for exceeding 1 percent methane.

The cited West panel was a distinct room and entry panel consisting of 21 entries driven off the 2d North submains. The development of the panel began in December, 1987, and all mining activity in that area ceased in July, 1989. From July, 1989 until December, 1989, the panel was ventilated by an air course which circumvented the perimeter of the panel. Return air

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entered the section at the mouth, was coursed into the northern most entry around the perimeter of the panel, returned through the southern most entry, eventually flowing into the main return. Zeigler's testimony reflects that the return air course was maintained by a solid concrete block stopping line, and the return air course was examined on a weekly basis to meet the requirement of section 75.305 that at least one entry of each return air course be examined in its entirety.

Zeigler's testimony reflects that sometime during the middle of October or early November, 1989, it decided to abandon the panel and made plans to seal that area when the development of Main West was completed. Although Zeigler maintains that it was not required, the cited panel continued to be ventilated even after it was abandoned, and weekly examinations of the area were still conducted because they could be done safely. However, a roof fall occurred in December, 1989, at crosscut No. 13, and Zeigler determined that continued examinations of the entire panel return air course was unsafe. In view of its determination that it was no longer safe to walk the return air course around the perimeter of the panel, Zeigler instructed its mine examiners to preshift the panel approaches to check the amount of air, methane and carbon dioxide entering and returning from the panel.

MSHA Inspector John Stritzel, who had visited the mine periodically every 6 months for ventilation and spot inspections, was advised by a fellow inspector George Cerutti, that he had visited the cited panel in mid-April 1990, and did not believe the panel was being ventilated. Although Inspector Cerutti did not issue a violation at that time, Inspector Stritzel discussed the matter with MSHA ventilation specialist Mark Eslinger, his supervisor, at a staff meeting where the subject of abandoned areas at various mines was discussed, and concern was voiced at that meeting that abandoned mine areas in MSHA District 8 were not being ventilated or sealed and that violations for section 75.329-1(a), should be issued where that was the case.

In preparation for his ventilation inspection at the mine, which took 4 days, Inspector Stritzel reviewed the mine plans and mine map at his office on May 4, 1990, and made his initial visit to the mine on May 10, 1990. He spent 4 days underground, and completed his inspection after he had inspected the cited panel area on May 17, 1990. In view of the roof falls, the inspector could only travel as far as the No. 13 crosscut in the intake (northern most) entry of the panel, and after releasing some smoke tubes at that location, and at several other locations outby, he determined that the air in the panel contained at least 19.5 percent oxygen and less than 1 percent methane. However, because he could not physically inspect the panel beyond crosscut No. 13 to the point of deepest penetration, the inspector did not believe that he could determine whether the panel was ventilated. Further, since he believed that section 75.329-1(a), required

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Zeigler to be able to determine the adequacy of the ventilation on the panel by physically walking and examining it to its point of deepest penetration in by or beyond crosscut No. 13, he issued the citation. The cited condition or practice states as follows:

An abandoned panel 02 working section was not being ventilated and could not be determined by the inspector as being adequately and completely ventilated due to massive roof falls. These roof falls were across the entire section at No. 13 room or crosscut. The section was driven 34 rooms deep. The head end of the section could not be accessed to determine if the 33 rooms and entries, and the last open crosscut of these rooms and entries, were being ventilated so as to continuously dilute, render harmless, and carry away methane and other explosive gases within the section. 2 West, 2 North, 1 West.

MSHA's Testimony and Evidence

MSHA Inspector John D. Stritzel, Vincennes district office, testified that he is a ventilation specialist, and his duties include the physical inspection of mines, the review of ventilation plans, and the making of recommendations for plan changes. He has served as a ventilation specialist since 1983, and has inspected the contestant's mine every 6 months since that time. His ventilation inspections normally take 4 to 5 days, 8 hours a day, and they include a review of the mine ventilation plan and physically walking the air courses to determine the quantity of air available for ventilation and whether or not the ventilation is adequate.

Mr. Stritzel stated that the mine consists of two shafts and one slope, and that it has three working sections. Mining is conducted during two production shifts a day. No pillar extraction or "second mining" is conducted, and coal is mined by continuous-mining machines by entry and room development. Methane liberation varies and it is less than one million CFM's. The mine employs approximately 90 miners, and only 50 percent of the available coal is mined in order to leave the pillars to prevent surface land subsidence.

Mr. Stritzel confirmed that he reviewed the mine ventilation plan on May 4, 1990, and went to the mine on May 10, 1990. He identified a copy of the mine map furnished by the contestant (exhibit R-2), and he identified and marked the mine areas where he traveled during the course of his inspection. He confirmed that he inspected the cited area on May 17, 1990, and issued the citation that day. He confirmed that the section has been mined out and abandoned and that all of the equipment and power has been moved out. He believed that active mining had ceased on the section on February 25, 1989.

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Mr. Stritzel stated that prior to his inspection he was "on notice" that there was a ventilation problem on the section through conversations with MSHA Inspector George Cerutti who informed him that he had visited and entered the area less than a month prior to his inspection with the mine superintendent. Mr. Cerutti found that the top was bad and he did not believe the area was being ventilated.

Mr. Stritzel confirmed that he discussed the matter with his ventilation specialist supervisor Mark Eslinger during a staff meeting. The discussions involved different mines, including the Murdock Mine, and it was noted that abandoned mine areas were not being examined and ventilated. He confirmed that most mine operators seal their abandoned mine areas, and that some mines in Southern Illinois have bleeders and bleeder evaluation points to check the adequacy of ventilation in abandoned mine areas, and that this is usually covered in the mine ventilation plans. However, the ventilation plan for the Murdock Mine does not cover what has to be done with the abandoned areas in the mine.

Mr. Stritzel stated that section 75.329-1 requires that all abandoned mine areas be ventilated or sealed. He stated that this section has no "grandfather" clause or cut-off date and that it is a continuing requirement applicable to all mines. He confirmed that there is no current MSHA policy explaining the application of this section (Tr. 10-30).

Mr. Stritzel confirmed that the citation which he issued was the first one that he has ever issued for a violation of section 75.329 or 75.329.1(a), because he has never encountered a mine condition that required it. He explained the "condition" as "a section not being ventilated properly where you could check to determine that it is being ventilated properly" (Tr. 27).

The inspector stated that the general mine manager (Carpenter), the safety manager (Colign), and the union safety walkaround representative (Cross), were with him during his inspection, and when they started at the mouth of the section, Mr. Carpenter informed him the section was preshifted by a mine examiner during each operational shift, but that weekly inspections were not being made. The inspector confirmed that he saw the date boards at the return entry with the mine examiner's initials and dates, indicating that the inspections had been made. However, he did not believe that these inspections satisfied the requirements for weekly inspections because someone has to physically be present in the idled or abandoned areas in order to conduct these inspections, and that person must walk the length of the abandoned area on both sides to the deepest depth that it has been driven in order to determine that the air is being coursed into the section to the deepest point and around the area, sweeping out anything that could buildup. It was his

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understanding that this was not being done on a preshift or weekly basis, and that the only inspections being conducted were at the outby side at the mouth of the section where the date boards were located (Tr. 31-36).

The inspector explained the route of travel taken by the inspection party, and as they reached a massive fall area in the second entry, he activated a chemical smoke cloud 4 or 5 feet from the fall and stated that "it just went up and hung at the road." He activated another one and "it drifted very, very slowly up over the fall," and this indicated to him that very little air was going over the right fall (Tr. 38). He then proceeded to the first intake entry and stated that "the smoke did the same thing there. . . couldn't hardly get it to go over the fall . . . there was some movement up over the fall, but it was very, very small" (Tr. 39). He then proceeded across to the neutral side, and activated additional smoke clouds, and he detected no air movement at one location, and air movement toward the return side at another location. This indicated to him that the air coming up the track entry was going to the return side, but that this was not necessarily where it was supposed to go. He then proceeded to the return side, and encountered a rock fall on the other side of a man door, and Mr. Carpenter informed him that they could not go further because the area had fallen in solid across at room 13. They then proceeded out of the section, and he informed Mr. Carpenter that a citation would be issued, but did not tell him which standard he would cite (Tr. 42).

The inspector confirmed that his inspection took approximately 1 hour and 45 minutes, and that he based his determination that the abandoned area was not being ventilated on the fact that his smoke cloud tests indicated little or no air movement, and that he expected to see air movement. He stated that a minimal amount of air would have "carried the smoke cloud up" and that "you shouldn't have to wait on it" (Tr. 42). Even if he had seen air movement, he would still have issued the citation because the respondent could not demonstrate that the air was being coursed throughout the abandoned area and out of the return. In view of the rock falls, the air could have been short-circuiting and not ventilating the entire area properly, and the only way to determine if this was being done was to physically walk the abandoned areas to the deepest cut and inspect the areas. If this cannot be done, the area must be sealed (Tr. 44-45).

The inspector confirmed that there is no requirement that examiners walk the area if they are exposed to hazardous roof falls, and the alternatives would be to support the roof and establish a safe means of travel for inspections or to seal the area (Tr. 46). Another alternative would be to establish ventilation evaluation points, possibly at the outby side of the falls, but he had no way of knowing whether this could be done, and he indicated that the district manager would have to approve

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of any evaluation locations (Tr. 47-48). The inspector believed that "the easiest way out" would be to seal the area, and he confirmed that this entails some amount of work, depending on the roof conditions. He would have sealed the area across the five entries when they were abandoned, but in view of the massive falls, it would now have to be cleaned up at great expense (Tr. 49). He estimated that it would take two people working 10 days on each of the entries to seal all five entries (Tr. 51).

The inspector confirmed that he made methane checks at the approximate locations where he made his smoke cloud tests, and found no high concentrations of methane. Although he found one-tenth of a percent of methane, the area at the upper end of the section beyond the No. 13 room was "an area of an unknown quantity of methane or CO₂" (Tr. 54). Although the area outby was safe, he had no way of knowing what was inby because he could not inspect it because of the falls (Tr. 55). He confirmed that he considered the violation be no non-"S&S" because the conditions did not meet the "reasonably likely" standard required for an "S&S" violation (Tr. 56).

The inspector confirmed that he reviewed his district office records and found that 12 prior citations and orders have been issued in his district for violations of section 75.329 and section 75.329-1(a), and that two of them were issued at the Zeigler No. 5 Mine (Tr. 59). Respondent's counsel stipulated that two violations were issued at that mine in May and July, 1986, for violations of section 75.329-1(a), by another inspector (Tr. 60). The inspector confirmed that the superintendent at the No. 5 Mine was Roger Roper, the present superintendent at the Murdock Mine, and that the No. 5 Mine is 3 miles from the Murdock Mine and both mines are in the same coal seam (Tr. 61-62; Exhibits R-5 and R-6). The inspector was also aware of another 1984 citation for section 75.329-1(a), at the Murdock Mine, but he did not have a copy (Tr. 62).

On cross-examination, the inspector confirmed that there was no loading point or working faces in the cited abandoned section, and he found no evidence that anyone had "worked their way through the fall areas and were up there mining coal" (Tr. 63). He confirmed that the area was not a working section, and that the requirements for ventilating a working section did not apply on May 17, 1990. He further confirmed that his definition of an "abandoned area" comports with the definition found in section 75.2(h), and that the area did not have to be ventilated as a working place has to ventilated (Tr. 65). He conceded that the use of the term "working section" which appears on the face of the citation he issued was an oversight (Tr. 65).

The inspector confirmed that he did not use an anemometer during his inspection because "the velocity was so minute that an anemometer would have been useless" (Tr. 66). He conceded that

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every crosscut and every entry in the cited section was not required to be ventilated, and that this is not required even on a working section. He confirmed that the language in his citation about "continuously diluting, render harmless, and carry away methane and other explosive gases within the section" came from his reading of section 75.329-1(a) (Tr. 68). He stated that Mr. Roper and Mr. Carpenter informed him that they could not seal the area within 30 days, and that he fixed the abatement time at 30 days "as a time element that I could see some work being accomplished in thirty days," and that it was possible that he told Mr. Carpenter that there would be no abatement time extension if no work had been performed to abate the citation (Tr. 69).

The inspector defined "ventilation" as "Air," but he believed that the air had to be moving in order to qualify as ventilation (Tr. 71). He confirmed that the inspector who told him about the "ventilation problem" in the cited area issued no citations for any violations in that area (Tr. 72). He further confirmed that the Murdock mine was mentioned during his discussions with his supervisor, but he was not sure that the subject of unventilated abandoned mine areas has had a lot of MSHA emphasis in the past 3 to 4 months. Staff meeting discussions were held with respect to which particular standard could be cited in such circumstances and that "two or three" were mentioned (Tr. 74). Conceding that "there's different ways that can be approached," he believed that section 75.329-1(a), was an appropriate standard to cite in this case (Tr. 75). He stated that sections 75.316 and 75.330, were discussed, but that section 75.316, which applies to ventilation plans, did not apply because the mine has no ventilation plan covering abandoned areas, and section 75.330, deals with mine design and mining methods, and is limited to sealing and not to ventilation or sealing. He also discounted the use of section 75.305, because that section deals with examinations of hazardous conditions and abandoned areas, and states that "a person shall go just as far as safety permits" (Tr. 76-77).

The inspector confirmed that the cited abandoned area is not considered a gob area because it is not "second mined," and there is no way for the respondent to ventilate it by use of bleeders. He confirmed that the only way to determine whether the cited area was being ventilated, and where the air is being coursed, is to physically walk and inspect the abandoned area, and this was the basis for the issuance of the citation (Tr. 79). He confirmed that even if his smoke tube tests had established that the smoke had gone directly into the fall area in an inby direction, he would still have issued the citation because he could not walk into those areas, and his use of the smoke tubes made no difference (Tr. 79-80). In his view, as long as no one can physically travel to the back of an abandoned section, it has to be sealed pursuant to section 75.329-1(a) (Tr. 81-82). He confirmed that

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the areas which were being preshifted complied with section 75.305 (Tr. 84).

The inspector agreed that he wanted to insure that a pressure differential was maintained in the abandoned section, and that such a differential would indicate that the air is moving from high pressure to low pressure. He confirmed that each place which cannot be travelled must be sealed, and if the direction of air travel through the section cannot be determined, the respondent would be out of compliance with the cited section (Tr. 86-88). He confirmed that he took no air reading to determine the air quantity on the main return (Tr. 92).

In response to further questions, the inspector confirmed that there is nothing in the respondent's ventilation plan that requires it to ventilate abandoned mine areas. He stated that this omission is not typical of other mines that he inspects in his district, and that the ventilation plan was last approved approximately 6 months ago (Tr. 95).

Mark O. Eslinger, testified that he is employed as a mining engineer with MSHA's District No. 8 office, and that his duties include the supervision of inspectors in the ventilation department. He is a 1971 graduate in civil engineering from the Michigan Technological University, has worked 19 years for MSHA, and is a member of the committee currently rewriting the Subpart D ventilation regulations. He confirmed that he has reviewed section 75.329-1(a), and stated that this regulation will be clarified when the new regulations are promulgated, but that the basic provision found in that section will be retained. He explained the proposed changes, and also explained the ventilation method for abandoned and working mine areas (Tr. 97-103).

Mr. Eslinger agreed with the inspector's position that there is no way one can assure that an area is being properly ventilated without travelling the deepest point of penetration. He stated that the inspector could only travel one-third of the way into the cited abandoned panel and had no assurance as to what may have been occurring in the remaining areas. Even if he had some air flow from the smoke tubes, there was no way to assure that the air reached the end of the panel, and it may have been short circuiting across the panel, and the numerous falls may have destroyed the stopping line. Although it was not necessary to go into each entry, one needs to be able to go into "key locations" to insure that the rest of the panel is being ventilated (Tr. 105).

Mr. Eslinger stated that sections 75.329, 75.329-1, and 75.329-2, require the ventilation or sealing of abandoned areas. If a mine operator decides to ventilate the area, it must be able

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to demonstrate that it is being ventilated by physically examining the area at key locations to determine that the air is moving, and taking methane and oxygen readings to assure movement of air and no accumulations of methane or carbon dioxide. If this cannot be done, the area must be sealed. If key locations cannot be reached because of falls, they must be cleaned up to provide a safe access way. If an operator decides to ventilate the area, it must advise MSHA how this will be done, and if it decides to seal an area, it must file a plan pursuant to section 75.330 (Tr. 105-108).

Mr. Eslinger did not believe that the contestant's preshift examinations were adequate to meet the requirement for weekly examinations of abandoned areas because the examinations were being made at the fronts of the abandoned area, and the examiners were not walking into or penetrating the panel. The examinations which were conducted would not fulfill the weekly examination, or section 75.305 requirements, because the weekly examination requires an examination for hazardous conditions "insofar as safety considerations permit," and weekly examinations have to be made as far as you can safely travel in an abandoned area. Since the examiners were only going to the fronts of the panel, rather than to the location described by the inspector where his inspection party went, the weekly examinations should have been made at that location if it was safe to travel there (Tr. 109). Mr. Eslinger stated that he had information that someone had gone halfway up the panel to take methane and air pressure drop locations, and that if this were true, the examiners who were conducting the preshift examinations as a substitute for weekly examinations should also have gone to these areas for their tests. He confirmed that if it were unsafe to go to these areas, section 75.305 would not require weekly inspections because it provides an exception based on safety considerations (Tr. 111).

Mr. Eslinger confirmed that mine operators generally include a provision in their ventilation plans that they will maintain safe access to the deepest point of penetration of mining or the area will be sealed. However, in the instant case, the contestant did not include such a provision in its plan, and if it were a part of the plan, the inspector would have cited a violation of the plan for not maintaining safe access to the deepest point of penetration, and the area would have to be sealed (Tr. 112). He confirmed that he initially reviews all ventilation plans in the district and is familiar with them, and he is not aware of any similar situations where the abandoned areas are not sealed or ventilated (Tr. 113). He agreed with the citation issued by the inspector, and believed that section 75.329-1(a), was an appropriate and available "tool" for the inspector to insure compliance. Mr. Eslinger considered this standard to be an "ongoing requirement" (Tr. 115).

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On cross-examination, Mr. Eslinger identified exhibit C-1, as the contestant's ventilation and dust-control plan for the Murdock Mine, and he confirmed that he signed it and must have reviewed it (Tr. 123). Although he reviews such plans, the district manager approves them, and Mr. Eslinger did not believe that he made an initial review of the plan in question, even though he signed it (Tr. 124). He disagreed that the failure by the inspector to cite the contestant with a violation of section 75.305, implied that the inspector believed that the contestant was in compliance with this section. He believed that the inspector made a judgment that the deepest point of penetration could not be travelled and cited section 75.329-1(a), rather than "double barrelling" the contestant with an additional violation of section 75.305 (Tr. 127).

Mr. Eslinger conceded that although section 75.305, does not specifically mention travelling to the point of deepest penetration to conduct weekly inspections of abandoned areas, he believed the requirement for examining such areas "means you travel to the deepest penetration" (Tr. 129). He also believed that simply stepping one foot into an abandoned area to examine it would constitute an inadequate examination (Tr. 130).

Mr. Eslinger stated that the reference to the date December 30, 1970, in section 75.329-1(a), "meant something at a certain point in time," and that for those mines in existence prior to that time, "you had to do something by that date. From then on you have to have the area either ventilated or sealed" (Tr. 134, 135). He agreed that section 75.329-1(a) does not contain any date for the submission of ventilation plans, or for seeking MSHA approval to ventilate or seal such an area, other than the date December 30, 1970, and he was not familiar with MSHA's program policy manual with respect to this standard (Tr. 136). He agreed that there are no "bleeder entries" in the mine, and that according to the mine map there has been no "second mining" or any "pillar pulling or pillar size reduction." In the case of an MSHA approved second mining system, provisions are made to establish bleeder evaluation points to determine the sufficiency of the air ventilating the gob area, and such bleeder points are permitted only if they can be walked (Tr. 139). He agreed that a ventilation evaluation point could be established in the back end of the section, but if it were established outby an inaccessible area outby the point of deepest penetration, MSHA would not approve it because of its position that one cannot determine that the area is being adequately ventilated without travelling to the deepest point of penetration. If bleeder entries cannot be established, and they cannot be travelled, MSHA would require the sealing of the area (Tr. 140-143).

Mr. Eslinger confirmed that the proposed new regulations, which have not as yet been promulgated, will require that "worked

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out areas" be ventilated or sealed (Tr. 144). He further confirmed that the argument advanced by the contestant in this case that the application of section 75.329-1(a), is limited to December 30, 1970, and does not apply subsequent to that date, has been discussed internally at MSHA, and that MSHA's position is that "it's an absolute rule and it can be used" and that it was used in this case. However, this standard has generally not been used in District No. 8, because "we try to put into the ventilation plan other measures to assure the same basic thing" (Tr. 146). He agreed that the contestant's approved plan is devoid of any requirement that requires the sealing or ventilation of abandoned mine areas (Tr. 148).

Mr. Eslinger agreed that the cited abandoned area has no pillars which have been "wholly or partially extracted," and that the inspector made a determination on May 17, 1990, that the area was an abandoned area. He further agreed that while there is no bleeder system or bleeder entries in the area, "equivalent means" of ventilation may be used. He conceded that the term "equivalent means" is not further defined, and it is not in the approved mine ventilation plan. He explained further as follows at (Tr. 153):

A. I can't find an exact definition of equivalent means. That doesn't mean it's not here. I still think it's here. I can give you a statement that we go by in approving equivalent means, and we go by providing the operator can satisfy the district manager of the results of the ventilation system and the dust control plan would provide no measure of protection to the miners.

Q. And what are you reading that from?

A. I'm reading from the criteria for the approval of ventilation plans, sir.

Q. So equivalent means then becomes a ventilation plan, as you understand it?

A. It becomes -- yes. Well, in this case if you wanted to submit it, it's a 329 plan or it's a 316 plan, whichever way you wish to submit it.

Contestant's Testimony and Evidence

Mine Superintendent Roger D. Roper testified that the contestant uses a room and pillar mining method using continuous miners to extract coal, but that pillars are not extracted. The mine is a relatively non-gassy mine liberating approximately 350,000 cubic feet of methane over a 24-hour period (Tr. 158).

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He identified and explained the mine ventilation system by reference to the mine map (exhibit R-2), and he also identified a copy of the approved ventilation plan (exhibit C-1), and confirmed that the mine is ventilated in accordance with that plan (Tr. 160). He confirmed that he had no knowledge of any methane ignitions in the mine, and was not aware of any citations for more than 1 percent of methane (Tr. 160).

Mr. Roper stated that the cited 2nd West section was started or developed in December, 1987, and that it was mined by continuous miners on a 75 by 85 foot block system. The section was developed into seven entries, including intake and return stopping lines, and he explained the development which has taken place (Tr. 162-164). He confirmed that the mining of the panel was completed in July, 1989, and that all of the equipment was moved into the "east side of the main," and he identified this area as the 1st East off the 2d North. He explained how the mined out area was ventilated, and confirmed that the primary ventilation is provided by return air from the operating 1st East panel. He stated that in July, 1989, the area was being ventilated by approximately 8,000 cubic feet of air, and the decision to abandon the area was made in December, 1989 (Tr. 167). During the period July, 1989 to December, 1989, the 2nd West section was examined on a weekly basis by travelling to the point of deepest penetration, and since there was belt material in the mouth of the panel, the area was not actually abandoned until October or early November of 1989 (Tr. 168).

Mr. Roper stated that the abandoned area was being examined after production stopped because it was safe to examine and he was trying to comply with section 75.305. He could recall nothing in the ventilation plan which applied to the cited area. He confirmed that roof falls occurred in the area, which required additional stopping lines. At least one return entry could be examined to comply with section 75.305, but after additional falls occurred in December 1989 or January 1990, he determined that travelling into the back end of the section by any route would be too hazardous to allow. He explained how certain air changes were made, and confirmed that the air entering the section was approximately 15,000, and that the air quantity had dropped because of the roof falls. Further changes were made, and other stoppings were opened up, allowing 20,000 to 22,000 of return air to pass by the mouth of the panel. The approaches to the panel were preshifted on a daily basis, and examiner's date boards were erected at the number five entry leading into the panel (Tr. 173).

Mr. Roper identified the areas on the mine map where the examiners conducted their preshift examinations, and he explained that the examiners were to determine the air flow going into the abandoned panel. The examiners made methane checks where the air was going into the area, and also checked for methane and CO2 on

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the return side of the panel. The examiners took no air measurements at the return, but did check to see that there was air movement coming out of the panel (Tr. 174). He believed that the area was being ventilated at the time of the inspection, and confirmed that he was not with the inspector on that day (Tr. 175).

Mr. Roper stated that he discussed the citation with the inspector, and disagreed with the citation for the following reasons (Tr. 176):

A. Yes. My contention was that the panel was being ventilated.

Q. All right.

A. My contention was also that there was nobody that was, you know, working in this area, that it was an abandoned area, that there had been no perceptible amount, and when I say perceptible amount, an amount of methane concentrations in excess of one percent returning from that panel, none of the preshift mine examiners had found any concentrations along with the air that was being intaked on the north side of the 2nd West panel. The methane readings there at those points of time whenever I've been underground and checked it would range from .0 to .1 of one percent methane entering the panel. On the return side of the panel what was coming -- what was being ventilated or bled out of this panel and being read out here on the front end was showing three tenths of one percent to four tenths of one percent.

Mr. Roper confirmed that the inspector informed him that he issued the citation because the cited section could not be examined in its entirety to the deepest point of penetration and the respondent could not determine that this area was being ventilated. Mr. Roper stated that the day following the issuance of the citation he and Mr. Carpenter went underground and took some air readings with an anemometer and five bottle samples in order to determine how much air was going in and out of the abandoned area and to determine the concentrations of methane and CO2 being liberated from the area. Based on those tests, he was satisfied that the area was being ventilated. Mr. Roper disagreed with the inspector's assertion that a ventilation determination could not be made unless one travelled to the deepest point of penetration because the outby areas had no methane concentration build up and the oxygen content was in excess of 19-1/2 percent (Tr. 178-179). In addition, the inspector found that air was going over the roof falls at one location and found no perceptible amount of methane at several other locations. The oxygen must have been sufficient since the inspector's oxygen

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detector did not sound, and the amount of oxygen which he (Roper) found when he tested the area was in excess of what was required by the law (Tr. 179).

Mr. Roper stated that he took his bottle samples on May 18, 1990, and that Mr. Carpenter and Mr. Colign took three additional bottle samples on May 21, 1990. He identified exhibit C-2, as a map of the abandoned area noting the locations and results of the samples which were taken. He confirmed that the bottle samples were processed by the State of Illinois Department of Mines and Minerals, through the contestant's engineering department, and he believed that the results were accurate. There were no changes in the ventilation in the area since late December 1989, and there were no differences in the ventilation between the date the citation was issued and the dates the samples were taken. He explained the results of the methane and carbon dioxide sampling, and confirmed that none of the first five bottle samples showed less than 16 percent oxygen content, and the highest methane content of these samples was four-tenths of one percent (Tr. 181-187). Based on the results of these samples, Mr. Roper concluded that the area was being ventilated. He reached the same conclusion with respect to the samples taken on May 21 (Tr. 188).

Mr. Roper stated that he visited the abandoned area again on June 1, 1990, in the company of Mr. Don Mitchell, a professional engineer, and Mr. Larry Harp, a chief engineer employed by the contestant, for the purpose of conducting a further ventilation study. He confirmed that no ventilation changes occurred between May 17 and June 1, and referring to the mine map, he explained the route of travel made by his group on June 1 (Tr. 190). Although he believed that the area was hazardous, since he and the engineers were experienced, they could evaluate and avoid hazardous roof conditions, and did not walk the air courses. He confirmed that he would not allow an examiner to travel through the areas where he and the others travelled because there was no reason for them to go there. If the area was not being ventilated, he would have expected methane readings in excess of one percent (Tr. 196).

Mr. Roper stated that plans have been made to seal the cited area, and that cleanup and other work has been undertaken since the time the citation was issued. He estimated that the sealing work would take approximately 2-1/2 months, and that "at the present time we're sealing because we're under violation." He believed that sealing would eventually be a good mining practice (Tr. 201-202). He explained what would be done to seal the area (Tr. 203-206). He also explained the projected mining plans for another nearby panel (Tr. 207-208).

On cross-examination, Mr. Roper confirmed that he was aware of the two prior citations for violations of section 75.329-1(a),

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issued at the contestant's No. 5 Mine, but was not aware of any 1984 citation mentioned by the inspector in this case (Tr. 209). He also confirmed that he had no notes which may have been made by Mr. Carpenter or Mr. Colign when they were underground with the inspector on the day the citation was issued (Tr. 212). Although he did not believe that the abandoned area is required to be ventilated pursuant to section 75.329-1(a), the bottle samples previously referred to indicate to him that it was being ventilated (Tr. 218-220). He could not recall how the prior citations were terminated or whether the cited areas were sealed (Tr. 221).

Mr. Roper stated that he activated a smoke tube, or took an air reading, at one of the same locations where the inspector sampled, and he could also feel the air going over the falls and could see minute dust particles in the area. He measured the volume of air going in and out of the panel, and found approximately 8,000 going in on the intake side of the panel at the mouth of the unit, and approximately 7,500 to 7,800 returning out of the number one entry near an old regulator (Tr. 224). While it was his opinion that the area was being ventilated on May 17, he had no information on that day to support this opinion, but that nothing had changed during the following 2 days when the air was sampled (Tr. 226).

David L. Stritzel, contestant's director of health and safety, testified that he has 21 years of mining experience, and has worked for the respondent for 8-1/2 years. He holds a B.S. degree in mining engineering, has received ventilation training, and his experience includes previous employment with MSHA as a supervisory mining engineer. He confirmed that he was familiar with the cited abandoned area, and has reviewed the mine maps and has discussed it on a daily basis with the miners. He identified exhibit R-2 as a ventilation mine map which is updated and submitted to MSHA annually, and he identified the air intake and return on the map (Tr. 235-239).

Mr. Stritzel disagreed with the citation and did not believe that section 75.329-1(a), is applicable in this case. He believed that sections 75.303, 75.305, 75.311, and 75.312 were applicable. These sections provide for weekly examinations of return air in abandoned areas, if it can be done safely, preshift examinations of the approaches to the area, and prohibitions against using air passing by or through the area to ventilate active working places (Tr. 241). He did not believe that the abandoned area was required to be ventilated, and he pointed out that it was impossible to ventilate every place in the mine. He was aware of other mines in MSHA District 8 with more extensive abandoned areas, and they are not sealed. He stated that the State of Pennsylvania and "some parts of West Virginia" prohibit mine sealing. He visited one mine which was not sealed, and learned that MSHA required evaluation points in outby areas far

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from the deepest penetration of the gob areas, and would not permit sealing (Tr. 243-245).

Mr. Stritzel disagreed with the inspector's belief that one had to walk to the point of deepest penetration in order to determine whether the cited area was being ventilated. He explained that intake and return stopping lines are established around the perimeter of the panel, and if they are intact, "if you've got air going in, you've got air coming out." As long as the air is monitored, and there are no indications of any major breakdown or changes in the ventilation system, and the atmosphere is clear of any explosive gasses or carbon dioxide, the area is obviously being ventilated. The fact that there are falls in the area does not mean that it is not being ventilated and that the air is not going over the falls. In mines which extract pillars, there are massive roof falls, and the bleeders are used to pull air over the falls and to bleed off any explosive gasses (Tr. 247-248).

Mr. Stritzel confirmed that he was aware of the prior citations and orders issued at the No. 5 Mine, and he explained that the contestant was attempting to recover equipment out of the cited areas and that MSHA was trying to force the contestant to seal the areas. He stated that the previously cited areas were being ventilated, and that such a determination was made in the same manner as the instant case. He contested the violations and requested a hearing, and his objections to the citations were based on the same reasons raised in the instant case. However, the matter did not proceed further because of a lack of available and affordable counsel, and the matter was dropped and the civil penalty assessments were paid. Seals were eventually constructed, the mine was shutdown at the same time, and the violations were terminated (Tr. 250-254).

Mr. Stritzel stated that he constructed the Murdock Mine stoppings and that he was certain that they were intact, and that its not very likely that a roof fall would damage them. He identified one of the mines which is not sealed, but he did not know the extent of the ventilation in that mine because MSHA has granted permission for evaluation points thousands of feet outby the deepest point of penetration and no one can get back into the area to determine whether the areas are ventilated (Tr. 257).

Mr. Stritzel believed that MSHA has seriously misapplied section 75.329-1(a) in this case, and was "picking on Zeigler." He explained that he discussed the matter with MSHA's district manager in an effort to determine why MSHA was permitting other mines to establish evaluation points at outby locations of abandoned areas, while at the same time denying Zeigler permission to do the same thing. The district manager informed him that the other mines in question have bleeder systems which are covered in

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their ventilation plans, and that no exception would be made for Zeigler (Tr. 258-268).

Mr. Stritzel stated that the day before the inspector issued the citation, and when he found out that the citation would be issued, he asked Mr. Roper to prepare a letter to MSHA requesting bleeder evaluation points, and it was sent to the district manager. Although he has seen no written response, Mr. Stritzel stated that he was verbally informed that the request would not be granted. A copy of the letter was produced, marked for identification, but was withdrawn by the contestant's counsel (proposed exhibit P-7; Tr. 261-264). Mr. Stritzel stated that he discussed the request with MSHA assistant district manager Charles Rack on approximately May 30, 1990. He also discussed the citation which was issued in this case, including the ventilation tests results of May 18, but he did not give the information to Mr. Rack because "he didn't seem interested enough to want to see them." He did not discuss the abatement time with Mr. Rack, and their discussion focused on the legality of the violation, the evaluation points, and the application of the standards to other mine operators (Tr. 264-266).

Donald W. Mitchell, a registered professional engineer and consultant, was qualified as an expert in mine ventilation. He holds B.S. and M.S. Degrees in mining engineering from the Penn State University, and Columbia University. Exhibit C-3, is a copy of his resume detailing his 40 years of work experience, including membership in a number of mining and related professional associations and groups, and the authorship or co-authorship of 87 mining publications or papers, including ventilation and ventilation controls. His prior work experience includes employment with the U.S. Bureau of Mines and MSHA from April, 1951, to July, 1978, and his last government position was Principal Mining Engineer and special advisor to the Assistant Administrator, Technical Support (MSHA) (Tr. 277-279).

Mr. Mitchell defined the term "ventilation" as follows (Tr. 279):

A. I define ventilation as the imposing a pressure differential on a network, as a result of putting a pressure differential on a network.

Q. What do you mean by network, Mr. Mitchell?

A. Network being the passageways throughout the mine, the shafts, the slopes, the entries, the crosscuts we've heard testimony, this R-2 is a network. We impose a pressure differential by means of a fan and also by the elevation differential and the temperature differential between the surface and the underground workings. These pressures induce air movement; not

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only air, it induces movement of all gases, air being among the gases.

Q. Would that also include methane?

A. Of course, it would include methane as well.

Mr. Mitchell identified exhibit C-4, as a transcript excerpt of his hearing testimony in a case now pending for decision before Commission Judge John Morris, in which the identical issue of the application of statutory section 75.329, and its associated regulatory sections were raised by a mine operator represented by the contestant's counsel in the instant proceeding (Wyoming Fuel Company v. Secretary of Labor, Docket Nos. WEST 90-112-R through 90-116-R). Mr. Mitchell confirmed that his prior testimony with respect to the appropriateness of the application of section 75.329-1(a), also applies in the instant case (Tr. 280).

Mr. Mitchell stated that section 75.328 deals strictly with the requirement that bleeder entries be used where pillars are being extracted. Section 75.329 and 75.330, were the result of section 303(z) of the Act, which was enacted out of congressional concern that mine explosions were being experienced and had worsened because of the existence of long continuous mine gob areas. In his view, as well as the view of the other individuals who were drafting the regulations, including the Director of the Bureau of Mines, John O'Leary, as expressed to the Congress, section 75.329 was intended to specifically apply to mines which were in existence and operating at the time this section was enacted, and section 75.330, was intended "to take care of future mining and future sections" (Tr. 285). The only application of section 75.329-1(a), to the cited abandoned area of the contestant's mine is that the type of explosion-proof seals required under that section were also the type required under section 75.330 (Tr. 285).

Mr. Mitchell defined an "abandoned area" as "an area that is neither ventilated nor examined as are active areas," and he stated that sections 75.303, 75.305, 75.311, 75.312, 75.314, and 75.330, are the appropriate regulations that may apply to abandoned areas. He believed that the requirement found in section 75.314, for the examination of an abandoned area for oxygen deficiency, methane concentration and other hazards, within 3 hours of persons entering such an area, is the only regulation relative to examination and ventilation within an abandoned area other than the weekly or preshift examination requirements found in section 75.303 and 75.304 (Tr. 286).

Mr. Mitchell confirmed that he visited the abandoned mine section in question on June 1, 1990, with Mr. Harp and Mr. Roper

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to determine whether there were any conditions that would constitute a hazard to persons working in the mine. He confirmed that he made a ventilation pressure survey and a methane survey, and also considered the results of Mr. Roper's ventilation and methane sampling. He also considered the information which was available to the inspector during his inspection of May 17, as corroborated by his testimony in this case and which he heard (Tr. 287-290). He then conducted an analysis based on all of the information which was available to him, and concluded that the cited abandoned panel was ventilated and safe and did not create an explosion or fire hazard to persons working in the mine. He identified exhibit C-5, as a summary of his data analysis and findings in support of his conclusion, and he explained them (Tr. 290-293).

Mr. Mitchell explained that his data and analysis reflects no dangerous accumulations of methane anywhere within the areas he travelled during his survey, and that it provides strong evidence of the probability that the abandoned area was indeed ventilated and that the ventilation pressures and movement of air extended throughout the natural air flow paths within the area, and extended to the deepest point of penetration of the panel. He explained the basis for his conclusions (Tr. 294-296). Mr. Mitchell stated that he took steps to satisfy himself that the conditions in the abandoned area were the same on May 17 and June 1, and that this was an important part of his analysis. He did this by comparing the methane percentages recorded on May 18 and 21, with those found on June 1, and that "this is strong evidence that nothing important has changed within the area during that period." He also considered the fact that the inspector found no important methane concentrations on May 17 (Tr. 297).

Mr. Mitchell stated that proof that air was indeed flowing through the abandoned area is further evidenced by the fact that he found 0.1 percent methane at the northernmost fall on the right hand side of the panel, and 0.4 and 0.5 percent methane in the return, and that when one considers the stopping line, the probabilities are that either the stopping line or falls are maintaining a flow of air through the area because the only way for the air to have the increase in the return is for the air to be coursing through that area in by the fall line which extended across the width of the panel. This conclusion is further corroborated by the fact that the concentrations of carbon dioxide are similar to the methane concentrations, and this indicates that air movement must be occurring in order to flush out the carbon dioxide and to have a quantity of carbon dioxide in the return air flow greater than that in the intake air flow (Tr. 298).

Referring to an "airflow directions" chart, Mr. Mitchell explained the direction of the air flow in the panel which he

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determined as part of his survey by means of two techniques, namely, "sweat of the brow" and "feel and sense of a strong flow of air." He explained that the "sweat of the brow" technique is used in areas where there is a weak flow of air and where there is no benefit in trying to measure such air with an anemometer or smoke tube. He stated that by using this technique "one senses these flows, either the flow is specific and definite because you can feel it and the best way you feel it is by the sweat on your brow. This is quite similar to a person wetting their finger to see the direction the air is--the wind is blowing." He confirmed that "all of us who do ventilation in mines for the government today" were instructed in the use of this technique (Tr. 300).

Mr. Mitchell further explained the direction of air travel as shown on the chart, and he confirmed that he perceived definite air flows in the intake right entry of the panel, that he could feel the flow of air in the middle of the entry before he got to the fall, and that there was no question that air was flowing to and through the fall because "it was flowing up to us standing there some 10, 20 feet outby the fall." When they travelled behind the fall, he found that the air flow through the top of the fall was much stronger. When he reached the northernmost fall line, he found a strong flow of air continuing in the intake entry going over the fall. He also indicated that air was also entering the panel, coming up the No. 2 entry, as depicted by the "tilting" arrow on the upper portion of the chart, and the air was flowing through a partially opened man-door across the fall at that point (Tr. 304). He further explained the locations where he detected air flows, and his recorded methane concentrations (Tr. 305-307). He confirmed that his conclusions concerning air flow were consistent with the conditions found on May 17 (Tr. 309).

Mr. Mitchell referred to a "pressure differentials" chart which is a part of his survey, and he concluded that the results show that there was a pressure differential sufficient to move air, and that air was moving across the falls inby crosscut 13, a definite flow of air over the fall at crosscut 23, and a flow of air through the falls into the return on the left side of the panel. He also concluded that there was a pressure differential between the intake and return sides of the panel, and that there was indeed a ventilation network present because the only way one would obtain the pressures noted is by the flow of air or other gases through the network (Tr. 311). He also believed that the bottle sample results taken by Mr. Roper establish the probability that air of some unknown quantity was sweeping behind crosscut 23 and coming back through the returns of the panel and that there was an established air intake and return despite the fall (Tr. 313).

Mr. Mitchell disagreed with the inspector's assertion that the only method to determine whether an area is ventilated is to

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physically inspect it and take measurements. He stated that the industry and MSHA practice for determining the adequacy or inadequacy of ventilation is by pressure differential surveys. Such pressure differential measurements are made by the use of a number of anemometers, taking into account mine elevations through altimeter readings, dry and bulk temperatures, and the quality of the atmosphere. He confirmed that "there are problems with pressure readings where the air velocity exceed 400 feet per minute" (Tr. 314).

Mr. Mitchell disagreed with MSHA's position that section 75.329-1(a), presently requires that abandoned mine areas be ventilated. He stated that the only regulation that he is aware of that requires an abandoned area to be ventilated is section 75.314 which requires adequate ventilation if people are to enter the area to work (Tr. 322). He conceded that the general practice of leaving abandoned mine areas alone and unventilated "is a matter of great concern to all of us," and that if he had not found a strong flow of air on the cited panel in this case and had not found it to be safe, he would not be testifying in this case (Tr. 323). He disagreed with MSHA's position that section 75.329-1(a), is a viable standard for current application and stated that "I only disagree it cannot apply and cannot be intended to apply when written in 1970" (Tr. 324).

With respect to the application of section 75.316, and MSHA's argument that no one has argued that the language requiring a mine operator to adopt a ventilation plan "on or before June 28, 1970," limits the application of the standard to that date, Mr. Mitchell pointed out that the last sentence of section 75.316, requiring the review of ventilation plans "at least every six months" indicates the congressional intent that such plans be submitted every 6 months following June 28, 1970, and that this has been the basis for requiring the submission of such plans. In his view, this language distinguishes section 75.316 from section 75.329-1(a) (Tr. 325).

Mr. Mitchell stated that in the event section 75.329 were found not to apply in this case, MSHA would not be left in any enforcement "predicament" because it could require Zeigler to seal the abandoned area pursuant to section 75.330, or to adopt a ventilation plan pursuant to section 75.316 covering the abandoned area (Tr. 327-328).

Mr. Mitchell was of the opinion that it would not be safe for a mine examiner to travel the areas where he travelled during his survey, but that it would be safe to travel to crosscut 13 on the intake side of the panel to be assured of air flow up to that point, and to the return regulator to take a reading at the mouth of the panel (Tr. 330).

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On cross-examination, Mr. Mitchell confirmed that he did not draft section 75.329-1(a), but was responsible for the committee that considered statutory section 303(z) of the Act, and then developed sections 75.329 and 75.330. The committee worked on the promulgation of the standards which followed, including section 75.329-1(a), among others. He confirmed that the committee was concerned with the problem of "these long contiguous gobs that we were having that were causing explosions to worsen," and that the intent of section 75.329-1(a), was to require areas of mines then in existence to be ventilated or sealed (Tr. 333).

Mr. Mitchell stated that section 75.329-1(a) is related to section 75.328, because it was the intent of Congress and the government to require bleeder panels to be constructed around mined-out or abandoned areas, and that this would constitute adequate ventilation if one could demonstrate a pressure differential. Section 75.329-1(a), was intended in part to allow an operator to comply by building a bleeder system around an existing mined-out area, and it is nothing more than an "add-on" to section 75.329 which addresses bleeders (Tr. 335).

When asked for his interpretation of the phrase "or equivalent means" found in section 75.329, Mr. Mitchell responded "that's a good question," and he agreed that it means "other ventilation systems other than bleeders as approved by MSHA" (Tr. 335). When asked why section 75.329-1(a), should not be applicable to present day mines, Mr. Mitchell stated that "it should be; it isn't" (Tr. 335).

Mr. Mitchell agreed that it would be desirable to be able to walk to the point of deepest penetration to determine whether the ventilation was adequate, but he did not believe that it was necessary to do so. It would be desirable because one would be dealing with facts rather than probabilities or possibilities, and he agreed that survey opinions are based on probabilities. He confirmed that he traveled close to the same place as the inspector at the No. 13 crosscut, and he believed it was safe to travel up to the fall and no further. The question of whether someone making an inspection pursuant to section 75.305 could safely travel to that area would be a management decision after discussion with MSHA (Tr. 339).

Mr. Mitchell stated that while it would be desirable to include a provision in a ventilation plan requiring one to travel to the point of deepest penetration in order to determine whether the ventilation was adequate, he did not believe it would be practical and it might create safety problems. He believed that MSHA should require a mine operator to demonstrate with reasonable engineering certainty that the area is being ventilated, and this could be done by making a ventilation survey or requiring the drilling of a bore hole in the back end of the area in shallow mines and injecting tracer gas (Tr. 352-353). He believed it

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would be appropriate for Zeigler to conduct a weekly examination at the intake side of crosscut No. 13, and to maintain a safe access route to that location (Tr. 361). He also believed that methane readings should be required at the mouth of the intake and at the fall, and if the results are approximately the same, this would constitute an atmosphere that is being adequately ventilated (Tr. 362).

Mr. Eslinger was called in rebuttal by the petitioner, and stated that when he took courses at the Bureau of Mines in 1971, as well as subsequent courses, he was not taught the "sweat of the brow" technique referred to by Mr. Mitchell, and Mr. Eslinger believed that it was difficult to determine air flow without instrumentation (Tr. 368). Mr. Eslinger also expressed concern about the pressure differential results of Mr. Mitchell's survey, the integrity of the stoppings, and the existence of the falls. He also commented about the methane readings, the amount of air measured on the panel by the respondent, and he still believed that to assure oneself that the area is being ventilated it was necessary to travel to the point of deepest penetration (Tr. 372).

Mr. Eslinger agreed that it would be desirable for an inspector to travel to the point of deepest penetration to determine whether the ventilation was adequate, and that this is the best way to make such a determination. He agreed that the inspector in this case testified that he could not establish that the abandoned panel was being adequately ventilated because he could not travel to the point of deepest penetration, and could only go as far as crosscut No. 13 where he activated a smoke tube (Tr. 373). He stated that "we like and encourage people to put that into their ventilation plan" so that the operator and MSHA can satisfy themselves that an abandoned area is being adequately ventilated, and he agreed that in this case, such a provision was not in the contestant's plan (Tr. 374).

On cross-examination, Mr. Eslinger conceded that he had no actual knowledge of the integrity of the stoppings outby the No. 23 crosscut area, and although he has seen crushed stoppings at the Murdock Mine, this was in 1974 or 1975, and the mine was using a variety of concrete block stoppings at that time (Tr. 377). Mr. Eslinger agreed that if MSHA were to conduct a ventilation survey of the abandoned panel in question similar to the survey done by Mr. Mitchell, the methodology it would follow would be the same basic methodology followed by Mr. Mitchell (Tr. 378). However, rather than indulging in probabilities based on computerized analysis, he would prefer to clean up the falls and clear out entranceways so that one can travel all the way around to the four corners of the panel (Tr. 379).

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Zeigler's Arguments

Application of Section 75.329-1(a)

Zeigler's arguments in support of its position in this case are set forth in its posthearing brief and reply brief, and in its motion for summary decision filed on June 1, 1990 (no ruling was made on this motion because the case proceeded to an expedited hearing on the merits pursuant to Zeigler's request). Zeigler's counsel in the instant case has raised the same issue, and has advanced an identical argument with respect to the applicability of section 75.329-1(a), in several pending contest proceedings heard by Commission Judge Morris on March 13, 1990, Wyoming Fuel Company v. Secretary of Labor (MSHA), Docket Nos. WEST 90-112-R through WEST 90-116-R. Zeigler's counsel furnished the presiding judge in the instant case, as well as MSHA's counsel, with copies of the posthearing briefs filed with Judge Morris, and has incorporated the arguments advanced in that proceeding as well as the summary decision motion, with the arguments advanced in the instant matter.

Relying on the language found in statutory standard section 75.329, (on or before December 30, 1970), and the language found in the cited regulatory standard section 75.329-1(a), (by December 30, 1970), Zeigler maintains that when read together, these standards, on their face, only apply to mine areas which were pillared or abandoned prior to December 30, 1970, and do not apply to mine areas established or opened subsequent to that date. Since the unrebutted evidence adduced by Zeigler in this case establishes that the cited 2nd west panel of the mine was initially developed on December 8, 1987, it takes the position that section 75.329-1(a), does not apply to the cited mine area.

Citing several court decisions dealing with statutory and regulatory construction, Zeigler asserts that the plain meaning of any statutory or regulatory language is conclusive unless a clear legislative intent to the contrary can be demonstrated, and it takes the position that section 75.329-1(a) must be analyzed in light of its plain meaning and congressional intent. In support of its argument that section 75.329-1(a), is applicable only to mine areas abandoned prior to December 30, 1970, Zeigler points out that according to its plain language, the application of this section was limited to areas which were pillared or abandoned prior to December 30, 1970, and that the congressional intent to limit the application of this section is evidenced by (1) the use of past tense ("have been . . . extracted" and "abandoned") in conjunction with the time limitation of "by December 30, 1970" and (2) the directive found in section 75.329-1(b). Zeigler concludes that congress's use of the past tense in section 303(z)(2) of the 1969 Coal Act, and the Secretary's use of it in the supplementary section 75.329-1, demonstrate an intent to extend those requirements only to areas

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pillared or abandoned prior to December 30, 1970 and to require only those areas to be ventilated or sealed "by" that time.1

Citing *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 56 (1987), in support of its statutory construction argument with regard to the words "by December 30, 1970" found in section 75.329-1(a), Zeigler quotes the following from the Court's opinion: "Congress could have phrased its requirement in language that looks to the (future) . . . , but it did not choose this readily available option. Moreover, Congress has demonstrated in yet other statutory provisions that it knows how to avoid this (retro) spective implication by using language that targets wholly (prospective events)." As examples, Zeigler makes reference to 30 C.F.R. 75.326 ("[i]n any coal mine opened after March 30, 1970"); 30 C.F.R. 75.330 ("[i]n the case of mines opened on or after March 30, 1970 or in the case of working sections opened on or after such date in mines open prior to such date"); 30 C.F.R. 75.500 ("[o]n or after March 30, 1971"); 30 C.F.R. 75.501 ("[o]n or after March 30, 1974").

Assuming that the plain language of section 75.329-1(a) is not sufficiently clear, Zeigler maintains that the directive of section 75.329-1(b) leaves no doubt that the intent of section 75.329-1(a) was to require that only areas of mines in existence when the 1969 Coal Act was passed be ventilated or sealed prior to December 30, 1970. Zeigler notes that section 75.329-1(a) provides that if an area of a mine existing in 1969 could be ventilated, MSHA had to be notified and approve. (The evidence in this case establishes that Zeigler has never sought approval from MSHA to ventilate the abandoned area in question, and Zeigler has apparently never been cited for its failure to do so). The timing for notification and approval is specified in section 75.329-1(b) as follows:

The request for permission to ventilate such areas must be submitted in time to allow consideration of the request, to obtain approval, and to permit the operator to install the ventilation system, or to install seals

in the event the request to ventilate is denied, on or before December 30, 1970. (Emphasis added).

Zeigler concludes that the only interpretation of sections 75.329 and 75.329-1(a) consistent with the statutory scheme is that these regulations required only areas already pillared or abandoned prior to December 30, 1970 to be ventilated or sealed. Gwaltney of Smithfield, 484 U.S. at 59. It further concludes that any other reading would make section 75.329-1(a) incomprehensible, violating the rule of construction that regulations must be interpreted "as a whole, in light of the overall statutory and regulatory scheme," *Campeanos Unidox v. United States Department of Labor*, 803 F.2d 1063, 1069 (9th Cir. 1986), "to give them a harmonious, comprehensive meaning, giving effect . . . to all provisions." *McCuin v. Secretary of Health & Human Services*, 817 F.2d 161, 168 (1st Cir. 1987) (citing *Weinberger v. Hynson*, 412 U.S. 609, 631-32 (1973)).

Zeigler argues that in 1969, Congress was concerned with methane accumulations in areas of mines that (1) were being pillared, (2) had been pillared or abandoned, or (3) would be pillared or abandoned. H.R. Rep. No. 91-563, 91st Cong., 1st Sess. 20-21, reprinted in HOUSE COMMITTEE ON EDUCATION AND LABOR, 91ST CONG., 2D SESS., LEGISLATIVE HISTORY OF THE COAL MINE HEALTH AND SAFETY ACT 578-79 (Comm. Print 1970) ("LEGISLATIVE HISTORY"). Zeigler asserts that Congress enacted section 303(z) of the 1969 Coal Act to deal with methane accumulations in the three situations described above:

1. Section 303(z)(1) requires operators to ventilate an area "[w]hile pillars are being extracted" from it. That section of the 1969 Act was incorporated without amendment in 30 C.F.R. 75.328.
2. Section 303(z)(2) required operators "within nine months after the operative date of this subchapter" (by December 30, 1970) to ventilate or seal all areas in existing mines which had been pillared or abandoned. That section was incorporated without amendment in section 75.329, which was supplemented by section 75.329-1.
3. Section 303(z)(3) requires mines and sections of mines opened after the 1969 Act's effective date (March 30, 1970) to be designed so that abandoned sections can be sealed in accordance with an approved plan. That section became section 75.330 of the regulations.

Zeigler further argues that even assuming that this plain statutory scheme, "admitt(ed) a smidgen of ambiguity sufficient to allow a look at the legislative history, it provides no basis

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for overturning . . . the clear meaning of [the regulation]," International Union, UMWA v. MSHA, 900 F.2d at 386 (D.C. Cir. 1990), because both the House Report and the Conference Report bolster the interpretation that section 75.329 (and the supplementary section 75.329-1) were intended to apply to sections of mines already in existence when the 1969 Coal Act became effective (giving the affected mines 9 months to ventilate or seal those areas), leaving section 75.330 to deal with sections of mines opened after the 1969 Act's effective date.

Zeigler points out that the House Report distinguishes the requirements for existing sections of mines from those for new sections of mines (and new mines) as follows:

Seals and bulkheads shall be used to isolate in an explosion-proof manner all abandoned areas in existing mines. [303(z)(2) of the 1969 Act, 75.329, 75.329-1]. In addition, wherever possible, new areas of existing mines will be "sectionalized" with explosive-proof sealing when abandoned, that is isolated from active sections. [303(z)(3) of the 1969 Act, 75.330]. In new mines, opened after the operative date of the act, it is intended that the mining system be such as to permit isolation by explosion-proof bulkheads of each section of a mine as it is abandoned. [303(z)(3) of the 1969 Act, 75.330].

H.R. Rep. No. 91-563, 91st Cong., 1st Sess. 21, reprinted in LEGISLATIVE HISTORY at 579 (Emphasis added).

Zeigler asserts that the same tripartite statutory scheme for regulating active pillar sections, areas already pillared or abandoned, and finally, areas to be pillared or abandoned, is evident in the Conference Committee's explanation of how the three subparts of 303(z) of the Act work in tandem to regulate present, past, and future conditions:

The House amendment provided for the ventilation of areas of the mine while actively being pillared in a manner approved by the Secretary or his inspector. It also provided that, within 9 months after enactment, all mines which are or which have been abandoned must be sealed or ventilated, as determined by the Secretary or his inspector. The Secretary could permit a further time extension of 6 months. It described how adequate the ventilation should be and the method of sealing. In new mines and new working sections, a plan requiring sealing would be required.

* * * * *

The conference substitute is adopted after the House amendment.

Under this substitute, paragraph (1) of section 303(z) [75.328] requires that areas which are actively being pillared must be ventilated in the manner otherwise prescribed under section 303.

* * * * *

Under the conference substitute paragraph (2) of section 303(z) [75.329] provides that, within 12 months after enactment, all areas from which pillars have been wholly or partially extracted, and abandoned areas shall be ventilated by bleeder entries or by bleeder systems or by equivalent means or be sealed.

* * * * *

Under the conference substitute, paragraph (3) of section 303(z) provides that, in the case of mines opened on or after the operative date of this title, or in the case of areas developed on or after such date in mines opened prior to such date, the mining system shall be designed, in accordance with a plan and revisions thereof approved by the Secretary and adopted by the operator, so that, as each set of cross entries, room entries, or panel entries of the mine are abandoned, they can be isolated from the active workings of the mine with explosion-proof bulkheads approved by the Secretary or his inspector.

H.R. Rep. No. 91-761, 91st Cong., 1st Sess. 81-82, reprinted in LEGISLATIVE HISTORY at 1043-44 (emphasis added).

Zeigler concludes that the statutory and regulatory language, the statutory scheme, and the legislative history lead to only one conclusion: Sections 75.329 and 75.329-1(a) apply only to sections which were pillared or abandoned prior to December 30, 1970. Because the development of the cited 2nd West panel of the Murdock Mine was not begun until 1987, Zeigler further concludes that sections 75.329 and 75.329-1(a) do not apply to it and that the contested citation must be vacated.

The Alleged Violation of Section 75.329-1(a)

Zeigler points out that Inspector Stritzel and his supervisor, Mark Eslinger, both testified that to show an abandoned area is ventilated in accordance with section 75.329 and 75.329-1(a)(1), the operator must be able to determine that the abandoned area is being ventilated and (2) it must make that determination by travelling the abandoned area to its point of

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deepest penetration. However, Zeigler argues that these requirements are not in section 75.329 and 75.329-1(a), but are found in MSHA's proposed ventilation regulations which have not as yet been promulgated as mandatory standards. See: 53 Fed. Reg. 2382, January 27, 1988.

Reviewing MSHA's proposed new ventilation regulations, Zeigler argues that proposed ventilation regulation section 75.334(a), which is derived from current sections 75.329 and 75.316, would require that worked-out areas which have not been pillared "shall be ventilated so that gases from throughout the worked-out areas are routed into a return air course or to the surface of the mine, or they shall be sealed." 53 Fed. Reg. 2417. However, Zeigler points out that proposed section 75.334 would have to be read in conjunction with proposed section 75.364 (covering weekly examinations underground), which would apply to worked-out areas where no pillars have been recovered, and "would generally require weekly travel to the area of deepest penetration, and measurements and tests at locations where the effectiveness of the ventilation system can be determined." 53 Fed. Reg. 2394, 2417, 2420.

Zeigler concludes that the inspector applied the requirements of the proposed and unpromulgated ventilation regulations cited above to the cited abandoned panel in question in this case and that he issued the citation because he could not physically follow the flow of air "to the deepest depth" of the panel and therefore could not determine where the air was going on the panel. However, Zeigler points out that the words "deepest penetration" or "deepest depth" apply only in the proposed rules and that Mr. Eslinger was unable to identify any regulation in Part 75 which contained these words, and that only the proposed rules--not the existing ones--would impose mandatory requirements on operators to determine "the effectiveness of the ventilation system." Under these circumstances, Zeigler maintains that the inspector "jumped the gun" by engrafting proposed requirements onto existing section 75.329-1(a). Because the inspector applied these "homegrown" requirements drawn from tentative proposals in issuing the citation, Zeigler concludes that he held it to a standard not found in section 75.329-1(a), and for this reason, the citation must be vacated.

Zeigler further argues that MSHA's position that Zeigler must initially show that an abandoned area is ventilated to demonstrate compliance with section 75.329-1(a), and that MSHA need not show the opposite to prove a violation, cannot be sustained because the burden is on MSHA to prove a violation. Unlike proposed sections 75.334 and 75.364, which would require the operator to test ventilation of a worked-out area where it can determine its effectiveness, Zeigler points out that no similar requirements is found in section 75.329-1(a), and that

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this section only requires that an abandoned area existing in a mine opened prior to December 30, 1970, be ventilated or sealed.

Zeigler concludes that assuming section 75.329-1(a) can be applied by MSHA in this case, in order to sustain a violation of that standard, the burden of proof is on MSHA to show that the cited panel was not ventilated or not sealed. Since the inspector admitted that he could not determine whether the cited panel was ventilated and informed mine management that he was issuing the citation because "we couldn't get to the head end of the section and determine if it was being ventilated or not," Zeigler concludes that MSHA has failed to prove a violation and that the citation must be vacated on that basis. Zeigler observes that even if there were a requirement that ventilation of an abandoned area be determined only by travelling to the point of deepest penetration, in a case such as the instant one, MSHA would never be able to prevail. If the inspector were unable to travel the section to its deepest point, then MSHA would never be able to prove by a preponderance of the evidence that the area was not ventilated.

Even assuming the application of section 75.329-1(a), to the cited panel, Zeigler maintains that the evidence in this case establishes that the cited panel was in fact ventilated when the citation was issued. Contrary to MSHA's position that the inspector cited a violation because he could not determine with absolute certainty that the cited panel was being effectively ventilated by walking the panel to the point of deepest penetration, Zeigler maintains that it has demonstrated with reasonable certainty that the panel was being effectively ventilated, that this is sufficient to establish compliance with the standard, and that its proof with reasonable certainty that the panel was being ventilated outweighs MSHA's allegations to the contrary.

Zeigler argues that its showing with reasonable certainty that the cited panel was in fact ventilated when the citation was issued is consistent with the preponderance-of-the-evidence standard applicable in Commission proceedings and that the concept of absolute certainty does not exist when it comes to proving violations of the Act; rather, the focus is on probabilities. Zeigler believes that to prove a violation, MSHA must show by a preponderance of the evidence, and not with absolute certainty, that a violation exists. Zeigler concludes that to prove a violation by a preponderance of the evidence, MSHA must show that it was more probable than not that the cited panel was not ventilated. And, assuming a prima facie showing by MSHA, Zeigler has to show that it was more probable than not that the panel was ventilated, and it believes that it has done so in this case.

In support of its assertion that MSHA has not established a violation by a preponderance of the evidence, Zeigler points out that other than the smoke tube tests performed by the inspector,

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MSHA produced no evidence to show that methane and other gases were not rendered harmless and carried out of the cited panel. In contrast, Zeigler believes that through the testimony of its expert witness Don Mitchell, it has proved by a preponderance of the evidence that the cited panel was ventilated. In support of this conclusion, Zeigler relies on the testimony and facts presented by Mr. Mitchell with respect to analyses derived from his observations and data, which included a ventilation survey and computer analysis of the cited panel (exhibit C-5), methane readings, bottle samples reflecting concentrations of methane, carbon dioxide, and oxygen on the panel, airflows on the panel, and measured pressure differentials. (Zeigler's detailed discussion and conclusions concerning Mr. Mitchell's analyses and findings are set forth at pages 16 through 22 of its posthearing brief). Zeigler concludes that compared to MSHA's inconclusive smoke tube tests, Mr. Mitchell's irrefutable conclusions, based on undisputed accepted scientific principles and methodology, constitute the preponderance of evidence clearly supporting its position that the cited panel was in fact ventilated in compliance with the cited regulatory standard.

Reasonableness of the Abatement Time

Assuming a violation occurred, Zeigler argues that the time fixed by the inspector for abatement was unreasonable because he arbitrarily settled on a 30-day abatement period without considering the disruptive effect it would have on the operations of the mine. Zeigler suggests that the inspector set a 30-day abatement period with the idea that operations would be disrupted, and in support of this conclusion it cites the inspector's testimony that notwithstanding his belief that there was a lack of personnel to construct seals he "set thirty days as a time element so that he could see some work being accomplished in thirty days" (Tr. 52, 68).

Citing Freeman Coal Mining Corp., 1 IBMA 1, October 5, 1970, holding that the availability of equipment and the operator's difficulties in abating the cited conditions are relevant considerations in setting an abatement time, Id. at 25-27, Zeigler asserts that the inspector ignored the Board's admonition that "where a longer abatement period will vastly reduce the cost of abatement or the operational disruption, without exposing the miners to significant danger, we think an order fixing the longer period would be reasonable," Id. at 27. Zeigler points out that although the inspector testified that the existence of a hazard resulting from the alleged violation would be unlikely, he did not adjust the abatement time accordingly to avoid the complete disruption of mining operations and did not consider how long it would take to construct the seals because he had already decided that he would set 30 days as an abatement period even before he went underground to inspect the panel. In support of this conclusion, Zeigler cites the un rebutted testimony of superintendent

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Roper that the inspector informed general mine foreman Carpenter on May 10, 1990, that the panel would have to be sealed within 30 days.

Zeigler asserts that the inspector's "calculation" and belief that 30 days was sufficient to permit rehabilitation work to be done and seals to be constructed bore no relation to Mr. Roper's estimate that the work would normally take more than 2-1/2 months. Zeigler states that the inspector never discussed with mine management how long it would take to construct the seals and told Mr. Roper that no extensions in abatement time would be granted. Zeigler points out that although the inspector claimed not to remember making this statement to Mr. Roper, he conceded that he might have told him that no abatement time extensions would be granted (Tr. 69). Under all of these circumstances, Zeigler concludes that the inspector acted improperly by "blindly" imposing a 30-day abatement period without considering the available manpower and the disruptive effect such an abatement period would have on its operations.

MSHA's Arguments

Application of Section 75.329-1(a)

MSHA takes the position that section 75.329-1(a), required Zeigler to either ventilate or seal the cited abandoned area, and that this was a continuing requirement which has not expired. MSHA also asserts that Zeigler could not demonstrate on May 17, 1990, that the cited panel was being adequately ventilated, and that the 30-day abatement time given by the inspector was reasonable considering the information he had on May 17, 1990.

In support of its argument that section 75.329-1(a), has current application, MSHA argues that the underlying statutory provision found in section 303(z)(2) of the 1969 Coal Act contains no specific expiration date, but merely states "within nine months . . . all areas . . . shall be ventilated . . . or be sealed." MSHA concludes that this statutory requirement for sealing or ventilated abandoned mine areas has current application to the cited abandoned mine panel and continues to be applicable to all coal mines. MSHA states that Zeigler's expert witness, Don Mitchell, acknowledged that the protections incorporated into section 75.329-1(a) should be applicable to present day mines, and it concludes that the reason for this is because the hazards of a methane build-up in abandoned mine areas must still be addressed in 1990.

MSHA asserts that it has not promulgated any new standards which supersede the requirements of section 303(z)(2) of the 1969 or 1977 Acts, and that the only difference between section 303(z)(2) and 30 C.F.R. 75.329-1(a) is that a specific date (December 30, 1970) is mentioned in the standard. MSHA concludes

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that since Congress has stated its position that abandoned mine areas must be properly ventilated or sealed on two separate occasions, 8 years apart, it is clear that it intended this standard to be an ongoing requirement for all underground coal mines.

MSHA argues that Zeigler's interpretation of section 75.329-(a), implies that section 303(z)(2) of the 1977 Act was superfluous when it was enacted. MSHA concludes that if Zeigler's interpretation that the requirements of section 303(z)(2) expired on December 30, 1970, is correct, then it would follow that there was no requirement for ventilation of abandoned mine areas until the passage of the 1977 Act, with the added implication that the 1977 Act required ventilation only for a 9-month period. MSHA views this interpretation as a "tortured" interpretation of the two statutes which would result in a standard being in effect for 9 months in 1970 and for 9 months in 1978, with no protection during the 8 years in between, nor for the time period since November 1978.

MSHA states that while many provisions of the 1969 Act became obsolete and were removed from the 1977 Act, the language of section 303(z)(2) was repeated word for word, and it concludes that it must be assumed that Congress knew what it was doing in 1977 when it repeated the language which Zeigler claims was obsolete 7 years earlier. By repeating this language from the 1969 Act in the 1977 Act, MSHA further concludes that Congress intended to continue the protections afforded by section 303(z)(2).

Referring to mandatory standard 30 C.F.R. 75.316, which requires a mine operator to adopt a ventilation system and methane and dust-control plan, and which contains language ("on or before June 28, 1970"), which is similar to the language found in section 75.329-1(a) ("by December 30, 1970"), MSHA suggests that acceptance of Zeigler's "plain meaning" argument would lead to the conclusion that section 75.316 expired on June 28, 1970. Such a result, argues MSHA, would reduce the safety of every coal miner, and it points out that section 75.316 has never been enforced in such a restrictive manner. MSHA further concludes that the acceptance of Zeigler's argument would also be used to negate the applicability of a number of other important safety standards, and would result in some serious consequences affecting the safety of miners.

MSHA believes that the dispute in this case is the result of a fundamental difference in the meaning of the dates specified in section 303(z)(2) of the 1969 and 1977 Acts, and that Zeigler believes that these are expiration dates, while MSHA contends that these are effective dates. MSHA believes that Zeigler's interpretation makes no sense since Congress clearly could not have intended for these ventilation provisions to apply only to

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certain mines for only two distinct 9-month periods, and that the only logical conclusion is that the language of section 303(z)(2) and 30 C.F.R. 75.329-1(a) provided a grace period during which mine operators could prepare to comply with the ventilation requirements.

In MSHA's view, Zeigler's argument that section 303(z)(3) of the Act is the only appropriate standard for mines (or mine sections) opened after December 30, 1970, is totally without merit since section 303(z)(3) and 30 C.F.R. 75.330 only require that mining systems be designed with a plan which will allow the sealing of abandoned areas, whereas section 303(z)(2) requires ventilation or sealing of such areas. MSHA asserts that following Zeigler's contentions to their logical conclusion means that mines opened after December 30, 1970, need only provide for the possibility of sealing abandoned areas, but not the requirement for ventilating or sealing such areas.

The Alleged Violation of Section 75.329-1(a)

MSHA takes the position that the citation was properly issued because the inspector could not determine, nor could Zeigler demonstrate to him, whether there was sufficient air movement in the abandoned panel to render harmless or carry away any concentrations of methane or other dangerous gases. MSHA points out that when the inspector traveled up the intake side of the panel to the No. 13 crosscut, he and the general mine foreman could travel no further because a massive roof fall had blocked the entry, and the return side of the panel at the No. 13 crosscut was also blocked. Through the use of two smoke clouds, the inspector confirmed that there was little, if any, air movement over the fall, inby where the inspector was standing.

MSHA points out that since the inspector could not travel beyond crosscut No. 13, he had no way of knowing how much air was ventilating the remaining two-thirds of the abandoned panel, and the inspector testified that the only method he had to determine if the panel was being adequately ventilated was to physically walk to the back corners of the panel (the point of deepest penetration) to make his checks for hazardous conditions. Even assuming that some air was moving over the fall at crosscut No. 13, MSHA concludes that there was no way of knowing how far the air was going beyond that point. Since it was likely that additional roof falls existed throughout the back area of the panel, MSHA suggests that air could be travelling up a few crosscuts, and then cutting across into the return, without ventilating most of the back portion of the panel. MSHA concludes that the inspector issued the citation and cited a violation of section 75.329-1(a), based on the information that he had on May 17, 1990, and because he found no evidence of adequate ventilation in the panel.

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MSHA asserts that both of its witnesses indicated that if an operator decided to ventilate an abandoned panel, it has to clean up the roof falls and establish an air course so that mine examiners can physically travel to key locations to take air and methane readings. MSHA asserts that most mine operators decide to seal abandoned areas because reestablishing ventilation after a roof fall has occurred may be difficult or impossible. MSHA points out that Zeigler had the option of sealing the entire panel or sealing outby the fall area at the No. 13 crosscut, and if it did the latter, a weekly examination for hazardous conditions, pursuant to section 75.305, would have to be made up to that crosscut.

MSHA cites the testimony of mine superintendent Roper that weekly examinations for hazardous conditions were stopped in December 1989, after roof falls blocked the entries inby crosscut No. 13, and that instead of travelling up the entry to check for hazardous conditions, a preshift examination was performed at the mouth of the panel to check for methane and air flow going into the panel and coming out the return side. MSHA asserts that such a preshift examination is not an adequate substitute for the weekly examination which requires the abandoned entry to be traveled as far as it is safe to go. MSHA concludes that without physically walking the panel, Zeigler had no way of knowing if there were any hazardous conditions in the panel after December, 1989, and that it is inconsistent for Zeigler to argue that it was making a serious effort to ventilate the panel on May 17, 1990, without having qualified examiners checking for hazardous conditions on a regular basis.

MSHA maintains that the intent of 30 C.F.R. 75.329-1(a) contemplates a process where a mine operator requests permission to ventilate an abandoned panel and gives the MSHA District Manager sufficient data for him to make a determination that the abandoned area is being adequately ventilated. This data, which can be submitted as a part of an operator's ventilation plan or by separate letter, must be submitted to the MSHA District Manager to allow him sufficient amount of time to act on the operator's request. MSHA asserts that an operator should not be allowed to wait until a citation is issued before collecting sufficient data in the abandoned area, to determine if it is being properly ventilated, and it suggests that this is what Zeigler is attempting to do in this case.

MSHA asserts that the methane and air readings collected in the cited panel on May 18 and June 20, 1990, do not in any way rebut the inspector's findings in the citation because low methane readings, taken by Zeigler in the front areas of the abandoned panel, are not a good indication of continued low methane levels for the entire panel. When there are roof falls similar to those present in the cited panel, methane can become trapped behind the falls and pockets of methane can be present.

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MSHA concludes that without proper ventilation an operator cannot assume that methane accumulations will not migrate from the abandoned panel to active workings, nor can it protect against explosive levels of methane occurring in the abandoned areas.

MSHA views the testimony of Zeigler's safety director (David Stritzel), that he was sure the back area of the panel was being ventilated because he believed that the block stoppings constructed in the abandoned panel were still intact, as mere speculation because no one had recently observed these stoppings, and MSHA's expert witness (Eslinger) testified that he had observed solid block stoppings crushed out at the Murdock Mine on previous occasions.

In summary, MSHA submits that whether there is a violation of 30 C.F.R. 75.329-1(a) depends on the adequacy of the ventilation in the entire abandoned panel, not on after-the-fact methane and CO readings taken at various outby locations. MSHA believes it is essential to know if ventilation can be maintained by directing the air flow throughout the abandoned panel, including the back corners. Relying on the testimony of its witnesses, MSHA concludes that the only way to determine if ventilation is being maintained is to actually travel up to the point of deepest penetration of the abandoned panel to take methane and air readings.

Reasonableness of the Abatement Time

MSHA takes the position that usually, the only time the issue of reasonable time for abatement is raised in a contest proceeding is after a section 104(b) order is issued for failure to abate a citation and a mine operator is contending that the citation should be further extended. MSHA points out that there is a lack of case law on what constitutes a reasonable abatement time of an original citation, and that the obvious reason for this is that once the citation abatement time is extended or the citation is abated, a determination of whether the original abatement time was reasonable becomes moot.

MSHA points out that the abatement time for the citation was June 18, 1990, and that it was extended to August 1, 1990, after the hearing. The citation was subsequently terminated on July 16, 1990, after the cited abandoned panel was sealed by Zeigler. Since Zeigler would be entitled to a determination of whether the original abatement time was reasonable only if a section 104(b) were issued, and since no such order was in fact issued, MSHA concludes that any ruling on this issue at this point of the proceeding would be a mere academic exercise since Zeigler has already received all of the abatement relief it needed.

Findings and Conclusions

The Application of Section 75.329-1(a)

Mandatory safety standard 30 C.F.R. 75.329 mirrors section 303(z)(2) of the 1977 Mine Act, and it was carried over without amendment from the 1969 Coal Act. Section 75.329 states as follows:

75.329 Bleeder systems.

[Statutory Provision]

On or before December 30, 1970, all areas from which pillars have been wholly or partially extracted and abandoned areas, as determined by the Secretary or his authorized representative, shall be ventilated by bleeder entries or by bleeder systems or equivalent means, or be sealed, as determined by the Secretary or his authorized representative. When ventilation of such areas is required, such ventilation shall be maintained so as continuously to dilute, render harmless, and carry away methane and other explosive gases within such areas and to protect the active workings of such mine from the hazards of such methane and other explosive gases. Air coursed through underground areas from which pillars have been wholly or partially extracted which enters another split of air shall not contain more than 2.0 volume per centum of methane, when tested at the point it enters such other split. When sealing is required, such seals shall be made in an approved manner so as to isolate with explosion-proof bulkheads such areas from the active workings of the mine. (Emphasis added).

The cited mandatory section 75.329-1(a) in this case, is a supplementary regulation promulgated by the Secretary of the Interior on March 28, 1970, 35 Fed. Reg. 5236, and it provides as follows:

75.329-1 Sealing or ventilation of pillared or abandoned area.

(a) All areas of a coal mine from which the pillars have been wholly or partially extracted and abandoned areas shall be ventilated or sealed by December 30, 1970. For those coal mines in which ventilation can be maintained so as to continuously dilute, render harmless and carry away methane and other explosive gases within such areas and to protect the active workings of the mine from hazards of such methane and other explosive gases, the operator shall

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request permission from the Coal Mine Safety District Manager in whose district the mine is located to ventilate such areas. (Emphasis added).

Subsections (b) and (c) of section 75.329-1, provide as follows:

(b) The request for permission to ventilate such areas must be submitted in time to allow consideration of the request, to obtain approval, and to permit the operator to install the ventilation system, or to install seals in the event the request to ventilate is denied, on or before December 30, 1970.

(c) The determination of whether ventilation will be permitted will be made after taking into consideration the history of methane and other explosive gases in the mine, the size of the gob or abandoned areas, and if the areas can be ventilated adequately.

Subsections (d) (e) and (f) of section 75.329-1, concern the information required to be submitted by the mine operator for consideration by MSHA with respect to the request for permission to ventilate an abandoned mine area.

The parties have cited no Commission decisions construing the language "on or before December 30, 1970," found in section 75.329, or the language "by December 30, 1970," found in section 75.329-1(a), and I have found none. However, in two decisions construing the application of 30 C.F.R. 75.326, the first sentence of which begins "In any coal mine opened after March 30, 1970," former Commission Judges Boltz and Cook followed the literal meaning of this phrase and concluded that the standard did not apply to mines opened before March 30, 1970. See: C.F. & I. Steel Corporation, 3 FMSHRC 99, 104 (January 1981); Rushton Mining Company, Docket No. PITT 73-371-P, slip op. at pg. 22, January 31, 1975.

In the Wyoming Fuel Company case pending before Judge Morris, supra, MSHA relied on three decisions affirming violations of section 75.329, in support of its conclusion that "the Commission has treated this section as a valid safety standard that is not obsolete when an abandoned area has not been sealed or ventilated after 1970." See: Christopher Coal Company, decided by Judge Cook on October 18, 1976, affirmed by the Commission on October 25, 1978, IBMA 77-7, 1 MSHC 1688 (1978); Itmann Coal Company, 2 FMSHRC 1986 (July 1980), Commission review denied, September 2, 1980, 2 FMSHRC (September 1980); Mettiki Coal Corporation, 6 FMSHRC 1507 (June 1984).

The statutory construction issue raised by Zeigler was not raised or addressed in the three aforementioned cases.

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Christopher Coal involved an established bleeder ventilation system, and the issue presented concerned the proper location for testing return air from a bleeder to determine whether there was compliance with the methane concentration limit found in section 75.329.

In Itmann Coal, former commission Judge Laurenson affirmed an imminent danger order issued by an inspector in September, 1979, citing a violation of section 75.329, for the failure by the operator to adequately maintain the ventilation in an abandoned area to continuously dilute, render harmless, and carry away methane and explosive gases. The cited area had previously been closed by an imminent danger order issued in October, 1969. Rather than attempting to abate the conditions which prompted the issuance of that order, the operator opted to abandon the affected area. Given the choice of sealing or ventilating the abandoned area by bleeder entries or bleeder systems pursuant to section 75.329, the operator chose to ventilate it, and a bleeder system ventilation plan was adopted and approved by MSHA. The plan included a provision requiring the operator to travel the bleeder system "if safe."

In Mettiki Coal, Chief Judge Merlin affirmed a violation of section 75.329, because of the failure by the operator to establish a bleeder system to ventilate a gob area. The air coursing through the gob area was not directed through the bleeder entries, and the misdirected air was the result of a roof fall which blew out a metal stopping. The violation was abated by the installation of permanent concrete stoppings, and Judge Merlin took note of the fact that there was some confusion by the operator as to whether a bleeder system plan had ever been approved for the mine area in question.

In Secretary of Labor v. Gateway Coal Company, 10 FMSHRC 1189 (September 1988), Judge Broderick affirmed a violation of section 75.329, because of the failure by the operator to ventilate a travelable portion of its bleeder system so as to dilute, render harmless and carry away methane within such areas. Citing Judge Laurenson's decision in Itmann Coal Company, supra, Judge Broderick concluded that section 75.329, has two distinct mandates: (1) ventilation in bleeder entries required where pillars have been extracted shall be maintained so as to dilute, render harmless and carry away methane within such areas and to protect the active workings of the mine; (2) air from such areas which enters another split of air shall not contain more than 2 percent methane, 10 FMSHRC 1192).

In Beckley Coal Mining Company, 3 FMSHRC 2593 (November 1981), Judge Melick vacated an alleged violation of section 75.329, which was issued because of the failure by the operator to reduce the methane concentration to below 2 percent in a bleeder system crosscut on an abandoned gob panel from which

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pillars had been wholly or partially extracted. Judge Melick concluded that the question of whether a violation of section 75.329 exists depends on the adequacy of the ventilation system, and not solely upon the levels of methane found in any particular crosscut. The operator took issue with the inspector's methodology for evaluating the air movement in the cited area, and in vacating the violation, Judge Melick concluded that the only evidence to suggest the inadequacy of the ventilation system was the one time series of methane readings showing a non-explosive 2 percent to 3 percent methane concentration and the inspector's opinion that there was no perceptible movement of air. He gave greater weight to the operator's smoke tube tests, taken the day following the issuance of the violation, and which simulated the same conditions found by the inspector. Those tests showed that the released smoke moved out of the crosscut and into the bleeder. The inspector had relied on his opinion that the air movement was minimal, and he did not use an anemometer or smoke tube to measure the air movement.

In Greenwich Collieries, Division of Pennsylvania Mines Corporation, 8 FMSHRC 1390 (September 1986), I vacated an alleged violation of section 75.329, issued by an inspector in the course of a mine ventilation survey. The inspector issued the violation after finding a 3.3 percent methane accumulation at a bleeder evaluation point which had been approved by MSHA as part of the mine ventilation plan. I found no credible evidence to support any conclusion that the approved plan required all bleeder evaluation points to have methane readings below 2 percent, or that bleeder evaluation points were the only acceptable locations for conducting methane tests to insure compliance with the requirement found in section 75.329, that air leaving a gob area and entering another air split contain less than 2 percent methane. I found credible the operator's evidence that its methane readings indicated decreased levels of methane outby the bleeder evaluation points up to and including the mixing point before the air entered the return air split. Coupled with the fact that the operator's methane tests at a point before the air off the bleeder joined with the air off the return showed 1.3 percent methane, I concluded and found that the ventilation system was being maintained so as to continuously dilute, render harmless and carry away any explosive levels of methane.

In the Greenwich Collieries case, MSHA presented the testimony of Mr. John Kuzar, a ventilation specialist and field office supervisor. Mr. Kuzar confirmed that the mine ventilation plan permitted 2 percent methane at a bleeder evaluation point. He testified that the purpose of section 75.329, is to insure positive air pressure over a gob area to dilute and render harmless any noxious gases so that "you are showing it to the return," 8 FMSHRC 1398. Mr. Kuzar agreed that it was possible for air ventilation to go over a caved crosscut, depending on how tight it was, because "it's trying to get to the return," that the

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distance travelled by any methane would result in diluting it as it is moving, and that any decreased levels of methane at locations where readings are taken would indicate that the air is diluting the methane and that it is being coursed out of the area, 8 FMSHRC 1410, 1411.

In commenting on a mine operator's application to MSHA for the establishment of bleeder evaluation points pursuant to section 75.329, Mr. Kuzar alluded to the fact that bleeder evaluation points were critical in mines developed "prior to the effective date of the law" because "in those days" "good bleeders" were not required and that mines were "normally pillared from the solid to be solid." Mr. Kuzar stated that "since 1969," most mine ventilation plans require "a bleeder system that goes around the entire perimeter of that gob" (8 FMSHRC 1399-1400). Mr. Kuzar's testimony lends support to Mr. Mitchell's testimony that the primary intent of Congress with respect to section 75.329, as well as section 75.329-1(a), which he viewed as an "add-on" regulation, was to address bleeders, and to require the construction of a bleeder system around mined-out areas of a mine which were in existence at the time these statutory and regulatory standards were promulgated and adopted.

As noted earlier, the statutory construction issue raised by Zeigler in the instant proceeding was not raised in Christopher Coal, Itmann Coal, or Mettiki Coal. Neither was it raised in any of the other aforementioned cases in which alleged violations of section 75.329, were cited (none of the cases involved citations of section 75.329-1(a)). In each of these cases, the mine operator had established bleeder systems which were incorporated as part of its MSHA approved ventilation plan for ventilating abandoned areas of the mine. In the instant case, the Zeigler mine has no bleeder entries or bleeder systems, and no pillar extraction has taken place in the cited area. Further, the applicable mine ventilation plan, as reviewed and approved by MSHA, does not cover abandoned mine areas, and contains no provisions requiring the ventilation of these areas. The only reference to the "deepest point of penetration," appears at paragraph 4, page 2, of the plan, but it refers to the "deepest point of face penetration, where coal is being cut, mined, or loaded" (Exhibit C-1).

Mr. Eslinger stated that section 75.329-1(a) has generally not been cited in his district because compliance is attempted through the use of a ventilation plan provision to assure "the same basic thing" required by the standard. He confirmed that the question of whether or not section 75.329-1(a), is limited to December 30, 1970, has been discussed within MSHA, and MSHA has taken the position that it is an absolute ongoing rule. However, Mr. Eslinger was unaware of any MSHA policy discussing the interpretation and application of this standard, and I have found none.

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MSHA's proposed revisions of the Part 75 standards for underground coal mine ventilation, as published in the Federal Register on January 27, 1988, 53 Fed. Reg. 2382, as reported in the BNA Mine Safety & Health Reporter, pgs. 500-542, February 5, 1988, contain no commentary on existing standard sections 75.329 or 75.329-1(a). The proposed revisions contain a new definition of "worked out area," whether pillared or nonpillared, and it will include all areas within the existing definition of abandoned areas. A proposed new section 75.334, which is derived from existing section 75.329, would revise the requirements for bleeder systems and will establish ventilation standards for worked-out mine areas where no pillars have been recovered and areas where pillars are being mined. Sealing would be permitted in lieu of ventilating worked-out areas, and sealing would be required if the results of air measurements indicate that the ventilation system is not effectively moving gases out of a worked-out area. Proposed section 75.364, would require weekly travel to the area of deepest penetration, and measurements and tests to determine the effectiveness of the ventilation system.

Zeigler's evidence reflects that prior to its abandonment in November or December, 1987, the cited panel was being ventilated by an air course which circumvented the perimeter of the panel. After it was abandoned, Zeigler made plans to eventually seal the area after completion of development in another area, but continued to ventilate it. However, there is no evidence that Zeigler ever sought or received permission from MSHA pursuant to section 75.329-1, to continue ventilating the abandoned area and it has never been cited for failing to do so. The applicable ventilation plan contains no provisions or requirements for ventilating the area, and no explanation was forthcoming from MSHA as to why the ventilation plan was approved without such a requirement.

Although MSHA's conclusion that it must be assumed that Congress knew what it was doing when it repeated the language found in section 75.329 of the 1969 Act word for word in the 1977 Act and intended to continue the application of this section as an ongoing requirement for all underground mines is inviting, I find it less than persuasive. I agree with Zeigler's argument that the legislative history shows that Congress intended to leave the interim mandatory standards of Title III of the 1969 Act intact, leaving the business of promulgating new or revised standards to MSHA. I also agree with Zeigler's assertion that since Congress did not change Title III, the legislative history of the 1969 Act still serves as an interpretive statutory guide, and that the relevant legislative history is that which relates to sections 303(z)(1), (z)(2) and (z)(3) of the 1969 Act.

MSHA has not promulgated any new standards which supercede sections 75.329 and 75.329-1(a), and only recently engaged in rule-making proposing revisions of its Part 75 requirements for

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underground coal mine ventilation. As noted earlier, MSHA's proposed revisions contain no commentary on existing standard sections 75.329 or 75.329-1(a), and MSHA has not published any definitive policy guidelines dealing with the interpretation and application of section 75.329-1(a). With respect to section 75.329, which is directed to bleeder systems (which are not used in Zeigler's mine), MSHA's current Program Policy Manual, July 1, 1988, discusses abandoned mine areas ventilated by bleeder systems and bleeder entries. The policy requires a mine operator to submit ventilation plans covering the use of bleeder entries, bleeder systems, "or equivalent means" to MSHA's district manager for approval. The term "or equivalent means" is not further explained. The policy further mandates the sealing of an abandoned area should the bleeder system prove inadequate, or in the event the methane concentrations exceed 2.0. However, if an operator can show that such conditions can be corrected by modification of the mine ventilation or bleeder system, it must apply to MSHA for approval.

MSHA's assertion that Mr. Mitchell acknowledged that section 75.329-1(a), should be applicable to present day mines must be taken in context. The record reflects that Mr. Mitchell qualified his statement. When asked on cross-examination "If the intent of 329-1(a) was . . . to require in abandoned areas to ventilate or seal, . . . shouldn't (that requirement) also be applicable to present day mines," Mr. Mitchell replied "It should be; it isn't" (Tr. 335) (emphasis added). Mr. Mitchell further testified as follows at (Tr. 323-324):

ADMINISTRATIVE LAW JUDGE KOUTRAS: * * * [A]re you telling me that assuming that the general rule is that you leave abandoned areas alone and that's a matter of concern, then shouldn't MSHA have some clear standard or at least clarified or amended or gone through rule making to specifically and clearly require abandoned mine areas in all of the mines, that they be ventilated?

THE WITNESS: And the manner by which they enter -- define what they mean by ventilation.

ADMINISTRATIVE LAW JUDGE KOUTRAS: You think they should do that?

THE WITNESS: Yes, sir.

ADMINISTRATIVE LAW JUDGE KOUTRAS: That hasn't been done. It's their judgment it's already on the books, 75.329-1?

THE WITNESS: Yes, sir.

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ADMINISTRATIVE LAW JUDGE KOUTRAS: You understand that?

THE WITNESS: Yes, sir.

ADMINISTRATIVE LAW JUDGE KOUTRAS: You disagree?

THE WITNESS: I only disagree it cannot apply and cannot be intended to apply when written in 1970.

After careful consideration of the arguments advanced by Zeigler, I conclude and find that the legislative history of the 1969 Act, as cited and discussed by Zeigler in its brief, and the credible testimony of Mr. Mitchell, supports Zeigler's conclusion that Congress intended that section 75.329 apply only to abandoned mine areas already in existence when the 1969 Coal Act became effective. I find persuasive Zeigler's arguments that Congress's use of the past tense in the legislative history of section 75.329 demonstrates an intent to apply those requirements only to mine areas abandoned prior to December 30, 1970, and to require only those areas to be ventilated. I agree with Zeigler's assertion that if Congress had intended future application of section 75.329, it would have incorporated language mandating future compliance as it did in numerous other mandatory statutory provisions found in Part 75 (e.g. "in any coal mine opened after March 30, 1970," 30 C.F.R. 75.226; "in the case of mines opened on or after March 30, 1970 or in the case of working sections opened on or after such date in mines open prior to such date," 30 C.F.R. 75.330; "on or after March 30, 1971," 30 C.F.R. 75.500; and "on or after March 30, 1974," 30 C.F.R. 75.501).

I agree with Zeigler's assertion that section 75.329-1 was an "add on" to section 75.329, which addresses bleeder systems, and was intended to allow a mine operator to comply by building a bleeder system around an existing abandoned area. My interpretation of this section is that if an operator could not comply with section 75.329, by erecting a bleeder system by December 30, 1970, it had to seal the abandoned area or request approval from MSHA if it wished to continue ventilating the area by a ventilation method other than a bleeder system. Subsection (e) of section 75.329-1, required an operator to include a description of the alternative ventilation system proposed for the abandoned area. However, pursuant to subsection (b) of section 75.329-1, the request had to be submitted "in time to allow consideration of the request, to obtain approval, and to permit the operator to install the ventilation system, or to install seals in the event the request to ventilate is denied, on or before December 30, 1970." I construe these date references to be expiration dates, rather than effective dates, and I conclude that an operator would have been required to seal the abandoned area if its request to continue to ventilate the area were not approved, or the ventilation was not in place, on December 30, 1970. Sealing

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would be accomplished pursuant to the requirements found in section 75.330.

MSHA's belief that acceptance of Zeigler's interpretation of sections 75.329 75.329-1, would result in serious safety consequences and would affect the application of other mandatory safety standards is not well taken. It seems to me that MSHA has other means available to require ventilation of an abandoned mine area to insure against buildup of unsafe levels of methane and other gases in such an area. The most obvious method is the ventilation plan approval process found in section 75.316. MSHA's suggestion that acceptance of Zeigler's argument with respect to the application of section 75.329-1(a), would lead to the conclusion that section 75.316 expired on June 28, 1970, is rejected. As correctly pointed out by Mr. Mitchell, the last sentence of this standard requires a mine operator and MSHA to review such plans at least every 6 months, and that Congress intended that such plans be submitted every 6 months following June 28, 1970. Mr. Eslinger confirmed that the phrase "or equivalent means" language found in section 75.329, for a ventilation system other than bleeder entries or bleeder systems contemplates a ventilation plan approved pursuant to section 75.316. Mr. Mitchell agreed, and confirmed that the phrase "or equivalent means" encompasses a ventilation system other than bleeders and that such a ventilation system must have MSHA's approval (Tr. 335).

Zeigler correctly points out that section 75.316, when read together with sections 75.316-1 and 75.315-2, clearly establishes that the ventilation plan provisions found in section 75.316, were intended by MSHA to currently apply to all underground coal mines. Under all of these circumstances, I conclude and find that the ventilation plan requirements found in section 75.316, are of current application and that compliance for insuring adequate ventilation of an abandoned mine area can be achieved through that procedure. However, for some unexplained reason, Zeigler's ventilation plan, which was last approved by MSHA on December 28, 1988 (Exhibit C-1), some 5 months before the issuance of the citation, contains no provisions for ventilating or sealing Zeigler's abandoned mine areas.

In addition to the use of section 75.316, I believe that mandatory safety standard sections 75.303, 75.305, 75.311, 75.312, 75.314, and 75.330, are viable and appropriate standards for dealing with any perceived or potential methane and gas hazards associated with abandoned mine areas, and may be applied if the circumstances warrant it. Zeigler's witnesses, Mr. Mitchell, and safety and health director David Stritzel, a former MSHA supervisory mining engineer, agreed that this was the case. Mr. Mitchell testified credibly that section 75.330 was intended to apply to sealing of abandoned areas after December 30, 1970, and that absent section 75.329, MSHA can still

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require the sealing or ventilation of abandoned mine areas by exercising its authority under sections 75.316 and 75.330 to require ventilation or sealing of abandoned mine areas where appropriate. Further, promulgation of the revised regulations should provide MSHA with a direct and unambiguous means of insuring ventilation of abandoned mine areas.

Even if I were to conclude that sections 75.329 and 75.329-1(a), are viable and currently applicable standards, I would further find that in the absence of sealing, a mine operator would be required to ventilate an abandoned area by bleeder entries or bleeder systems. If bleeders cannot be used, an operator would have to adopt an MSHA approved ventilation plan pursuant to the requirements found in section 75.316, in order to insure that the "equivalent means" of ventilation referred to in section 75.329, is as effective as bleeders. In the absence of such a plan, the operator would have to seal the abandoned areas pursuant to section 75.330.

Since the evidence in this case establishes that the cited abandoned area in question was developed in December, 1987, I conclude and find that the cited mandatory standard section 75.329-1(a), does not apply to that area and that Zeigler was not required to ventilate the area pursuant to that standard. Under the circumstances, I further conclude and find that MSHA has not established a violation and the contested citation IS VACATED.

Even if I were to conclude that section 75.329-1(a), applied to the cited abandoned area, I would still vacate the citation based on a preponderance of the evidence which in my view establishes that the area was in fact being ventilated. My reasons for such a finding follow below. (In view of my findings and conclusions vacating the citation, I find it unnecessary to address the abatement issue raised by Zeigler).

The inspector charged Zeigler with a violation of section 75.329-1(a), for failing to ventilate the cited abandoned area, and the burden is on MSHA to establish that fact. However, the citation, on its face, states that the inspector could not determine whether the area was being adequately and completed ventilation because of the existence of massive roof falls. The falls prevented access by the inspector to the "head end of the section," and precluded any determination on his part as to whether or not the last open crosscuts of the rooms and entries were being ventilated so as to continuously dilute, render harmless, and carry away methane and other explosive gases within the section. The inspector believed that the only way to determine whether the abandoned area was being ventilated and where the air was being coursed is to physically walk and inspect the area.

According to the inspector's interpretation of section 75.329-1(a), if the deepest point of penetration on an abandoned

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section cannot be readily traveled or inspected to determine whether the entire section is being ventilated properly, a violation of section 75.329-1(a), is established. In this case, the inspector made a determination that since no one could travel to the back of the abandoned section to determine whether the section was being ventilated, section 75.329-1(a) required that it be sealed. Although the inspector did not cite Zeigler with a violation for failing to seal the section, he believed that each place on the section which could not be travelled had to be sealed, and that if the direction of air travel through the section could not be determined, because of the inability to travel to these places, Zeigler would be out of compliance with the cited standard. He confirmed that Zeigler's approved ventilation plan contains no requirement that the deepest point of penetration be walked and inspected, and he conceded that the plan does not cover or require the ventilation of abandoned mine areas.

I find nothing in any of MSHA's mandatory ventilation standards which require a mine operator to walk to the deepest point of penetration to determine whether an abandoned mine area is adequately ventilated. Although this may be a desirable method for determining whether an abandoned area is adequately ventilated, I cannot conclude that it is the only method. Further, although such a requirement is found in MSHA's proposed ventilation regulations, they have yet to be promulgated and do not apply in this case.

The only evidence produced by MSHA in support of its conclusion that the abandoned area was not adequately ventilated so as to render harmless and carry away methane and other gases out of the cited abandoned panel is the smoke tube tests performed by the inspector at crosscut No. 13 and other outby locations. One smoke tube activated 4 or 5 feet outby the fall indicated that the air "went up and hung." A second smoke tube indicated air movement over the fall, but "slowly," and other smoke tubes reflected slow air movement over another fall, and air movement toward the return at another location. The inspector confirmed that even if his smoke tube tests had established that the smoke travelled in an inby direction directly over the fall area, the use of the smoke tubes would have made no difference, and he would have issued the citation anyway because he could not travel beyond the fall area at crosscut No. 13. He believed that section 75.329-1(a), required physical travel to the back of the abandoned panel to determine the adequacy of the ventilation.

In contrast to the evidence presented by the inspector, the credible, probative, and un rebutted testimony of Zeigler's ventilation expert Mitchell, including his ventilation survey and analyses conducted under accepted scientific principles and methodology which are not rebutted by MSHA, supports a reasonable conclusion that the cited abandoned panel was ventilated so as to

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carry away and render harmless methane and other gases which may have existed on the panel, and that the air was being coursed through the panel and out of the return.

The survey and analyses conducted by Mr. Mitchell with respect to the area was accomplished under conditions substantially similar to those which existed at the time the citation was issued. MSHA's ventilation specialist Eslinger agreed that if MSHA were to conduct a ventilation survey similar to the one conducted by Mr. Mitchell, it would follow the same basic methodology used by Mr. Mitchell. Although Mr. Eslinger expressed some concern about the pressure differential results of Mr. Mitchell's survey and the integrity of the stoppings, I cannot conclude that these "concerns" rebut Mr. Mitchell's findings. Although Mr. Eslinger testified that he has observed crushed stoppings in the Murdock Mine, his observations were made "years and years ago, in the early seventies" when a variety of stopping materials were used in the mine (Tr. 377). With regard to Mr. Mitchell's pressure differential study, Mr. Eslinger agreed that the method used by Mr. Mitchell, which included altimeter readings, pressure differences, flow of air, and methane concentrations, would be similar to any such study conducted by MSHA. Inspector Stritzel agreed that if a pressure differential were being maintained on the panel, it would indicate that the air was moving from high pressure to low pressure.

Mr. Mitchell concluded that the pressure differential on the panel was sufficient to establish air movement across the falls inby crosscut No. 13, a definite flow of air over the fall at crosscut No. 23, and a flow of air through the falls into the return side of the panel. He also concluded that the bottle samples taken by Mr. Roper established the probability of air sweeping behind crosscut No. 23 through the panel returns and that there was an established air intake and return despite the fall. Mr. Mitchell's testimony that the industry and MSHA practice for determining the adequacy or inadequacy of ventilation is by pressure differential studies stands un rebutted. His credible and un rebutted testimony regarding decreased concentrations of methane and carbon dioxide as the air moved through the panel from the intake to the return also supports his conclusion that the panel was being adequately ventilated.

In view of the foregoing, I would conclude that the preponderance of the evidence adduced by Zeigler supports its conclusion that the abandoned area was being ventilated and rebuts MSHA's conclusion to the contrary. In short, I would find that MSHA has failed to establish a violation and I would vacate the citation.

ORDER

In view of the foregoing findings and conclusions, Zeigler's contest IS GRANTED, and the contested citation IS VACATED.

George A. Koutras
Administrative Law Judge

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FOOTNOTES START HERE

1. Zeigler points out that the word "by" means "[b]efore a certain time; . . . not later than a certain time; on or before a certain time" Black's Law Dictionary 172 (5th ed. 1979). The dictionary is evidence of common usage, Puerto Rican Cement Co., 4 FMSHRC 997, 998 n. 1 (1982) (citing 2A Sutherland, Statutes & Statutory Construction " 46.02 at 52 (4th ed. 1973)), to which adjudicatory bodies often refer to deciding matter of statutory construction. See Phelps Dodge Corp., 681 F.2d at 1192; Jim Walter Resources, Inc., 7 FMSHRC at 496.