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

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
PETITIONER

CIVIL PENALTY PROCEEDING

Docket No. PENN 90-67  
A. C. No. 36-05466-03721

v.

Emerald No. 1 Mine

CYPRUS EMERALD RESOURCES CORPORATION,  
RESPONDENT

DECISION

Appearances: Anita D. Eve, Esq., Office of the Solicitor, U. S.  
Department of Labor, Philadelphia, Pennsylvania,  
for the Secretary;  
Michael R. Peelish, Esq., Cyprus Minerals Company,  
Englewood, Colorado, for the Respondent.

Before: Judge Weisberger

Statement of the Case

In this proceeding the Secretary (Petitioner) filed a petition for an assessment of civil penalty alleging a violation by the Operator (Respondent) of 30 C.F.R. 75.316. Subsequently, the Respondent filed a timely Answer, and pursuant to notice, the case was heard in Washington, Pennsylvania, on July 31, 1990. At the hearing, Walter Daniel and Robert Newhouse testified for Petitioner. Dennis Dobosh and Edmund Francis McIntire testified for Respondent. Respondent filed a Posthearing Brief on October 11, 1990. On October 18, 1990, Petitioner's Findings of Fact, Conclusions of Law, and Brief were received.

Stipulations

At the hearing, the Parties entered into the following stipulations:

1. Cyprus Emerald Resources Corporation is the owner and operator of the Emerald No. 1 Mine located in Greene County, Pennsylvania.
2. Cyprus Emerald Resources Corporation and its Emerald No. 1 Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge of the Federal Mine Safety and Health Review Commission has jurisdiction over this case pursuant to Section 105 of the Act.

4. A copy of Section 104 and Citation No. 3098272 was properly served by Walter Daniel, a duly authorized representative of the Secretary of Labor, U. S. Department of Labor, upon an agent of Respondent, Cyprus Emerald Resources Corporation, on July 26, 1989, at the time and place stated therein and may be admitted into evidence for the purpose of establishing its issuance, not necessarily for the truthfulness or relevancy of any statements asserted therein.

5. Cyprus Emerald Resources Corporation is a large operator and the subject mine is a large mine.

6. Cyprus Emerald Resources Corporation's operations affect interstate commerce.

7. In the 24 months preceding the issuance of Citation No. 3098272 there were 700 violations cited in the subject mine.

8. The assessment of a Civil Penalty in this proceeding will not affect the coal mine operator's ability to continue with business. (sic).

9. Emerald Mine No. 1 is a gassy mine in that it liberates more than 2,000,000 cubic feet of methane or other explosive gasses during the 24-hour period during mining operations and is under the five day spot inspection cycle mandated by Section 103(i) of the Mine Act, 30 U.S.C. Section 813, Section (i).

#### Findings of Fact and Discussion

##### I.

On July 26, 1989, at the 4 Gate Section of Respondent's Emerald Mine No. 1, intake air coursing inby Entry No. 2 ventilated the face, and then was returned from the face through a 16 inch diameter slider tube that had been placed inside a 20 inch diameter tube, and which extended from the 20 inch main tube inby towards the face. Walter Daniel, an MSHA Inspector, inspected this area on July 26, 1989, and issued a Section 104(a) Citation alleging a violation of 30 C.F.R. 75.316. Essentially, he testified that the equipment used by the Respondent was in violation of its ventilation plan, which provides, under the page heading AUXILIARY FAN INFORMATION, inter alia, the following language under the paragraph heading Type and Diameter Tubing "Tubing is made of rigid plastic. They are 18" diameter tubes, with 16" diameter slider tubes." (Government

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page 19). Essentially, it is Respondent's position that the language in the ventilation plan sets forth only minimum standards, and accordingly, it was not in violation of the plan by substituting a 20 inch diameter tube in lieu of a 18 inch tube.1

Dennis Dobosh, Respondent's safety supervisor, testified that although he was not responsible for drafting the language contained in the Ventilation Plan, ("the Plan"), he was nonetheless responsible for its content. He testified that the Plan sets forth language indicating that the tubing is of 18 inch in diameter with 16 inch diameter slider tubes, as these were the diameter of the tubes that were being used, and thus the use of the larger tubes was not precluded.

I find that the clear language of the ventilation plan, in setting forth the type and diameter of tubing, refers to 18 inch diameter tubes with 16 inch slider tubes. Thus, inasmuch as Respondent herein was using a 20 inch diameter tube, which was not in conformity with the ventilation plan, Respondent violated Section 75.316, supra, as alleged in the issued Citation.

II.

According to Daniel the violation herein is to be characterized as significant and substantial. Robert W. Newhouse, a supervisory coal mine inspector, essentially concurred in this characterization. The subject mine has a history of ignitions, and is a gassy mine. Daniel indicated that on July 26, prior to the issuance of the citation in question, testing performed by him at a point approximately 20 feet outby the face, revealed methane in a concentration of .9 percent, which he termed "borderline" (Tr. 39). Both Daniel and Newhouse opined that there were would be more methane found at the face as that is where it is generated. As explained by Daniel and Newhouse, some of the intake air coursing inby Entry No. 2 towards the face would be diverted from the face and would enter the 20 inch diameter tube, as a consequence of a significant gap in its opening created by the placement therein of a tube whose diameter was only 16 inches. The gap created is clearly double that which would have resulted had a 16 inch flexible tube been placed inside an 18 inch diameter tube as provided by the ventilation plan.<sup>2</sup> In this connection, an inspection report indicated that at 5:00 a.m., on July 26, Entry No. 2 face was found to have .7 percent methane, even though it was being ventilated with an air flow of 9630 cubic feet per minute. Dobosh in his cross-examination conceded that if this air flow would be decreased it could result in a methane problem. Thus, it is clear that the placement herein of a 16 inch diameter slider tube within a 20 inch tube contributed to the hazard of a methane build up, which could have led to a build up in an explosive range of between 5 and 15 percent.

In order for the violation herein to be considered to be significant and substantial, Petitioner must establish that there was ". . . a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." (U.S. Steel Mining Incorporated 6 FMSHRC 1834 at 1836 (1984)). In this connection Daniel testified that, considering the gassy nature of the mine, and the reading of .9 percent found on the date of the citation, there "could have been" an ignition upon a resumption and continuation of mining (Tr. 41). Newhouse opined that inasmuch as air was not properly getting to the face, a methane ignition was "very likely" (Tr. 106). He also indicated that an ignition could "very easily" burn someone (Tr. 106). According to Daniel, two to four miners could have been injured. However, at the time of the violation, the continuous miner was being repaired, and Daniel indicated that there were no ignition sources in No. 2 Entry face. Further, the evidence has not convincingly established that, once mining would have resumed, it would have been reasonably likely, for the violative condition to have bled sufficient air flow, to the extent that the amount of air going to the face, would not have been sufficient to render harmless methane therein. In this connection, I note that the evidence is not adequate to predicate a specific finding as to the precise loss of volume of air to the face occasioned by the gap between the 20 inch outer tube and the 16 inch slider tube. I thus conclude that it has not been established that it was reasonably likely that any hazard of methane accumulation, contributed to by the violation, would have resulted in an injury producing event. I thus conclude that it has not been established that the violation herein was significant and substantial. (c.f., U.S. Steel Mining Corporation, supra).

### III.

I accept the testimony of Dobish that, in essence, Respondent believed that having a 16 inch slider tube within a 20 inch tube was not a violation of its Ventilation Plan. There is no evidence that this belief was not in good faith. I thus conclude that there was only a low degree of negligence on the part of the Respondent with regard to the violation herein. Taking into account the facts that there were no ignition sources at the face at the time of the violative condition, and that the air flow at the face met the standard set forth in the ventilation plan, but that the violation could have led to a build up of methane at the face, I conclude that the violation herein was of a moderate level of gravity. I conclude that a penalty of \$150 is appropriate for the violation found herein.



ventilation fan. It is noted, in this connection, that the slider or innertube protruded from the outer tube inby towards the face, but the evidence is lacking as to this distance.