

CCASE:
MSHA V. ZEIGLER COAL
DDATE:
19920124
TTEXT:

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 91-635
Petitioner : A.C. No. 11-02408-03642
v. :
: Zeigler No. 11 Mine
ZEIGLER COAL COMPANY, :
Respondent :

DECISION

Appearances: Rafael Alvarez, Esq., U.S. Department of Labor,
Office of the Solicitor, Chicago, Illinois, for
Petitioner;
Gregory S. Keltner, Esq., Zeigler Coal Company,
Fairview Heights, Illinois, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments in the amount of \$40, for two alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations. A hearing was held in St. Louis, Missouri, and the parties waived the filing of posthearing briefs. However, I have considered their oral arguments made on the record during the hearing in my adjudication of this matter.

Issues

The issues presented in this proceeding are (1) whether the conditions or practices cited by the inspector constitute violations of the cited mandatory safety standards, and (2) the appropriate civil penalties to be assessed for the violations, taking into account the statutory civil penalty criteria found in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and health Act of 1977, 30 U.S.C. 801 et seq.
2. Commission Rules, 29 C.F.R. 2700.1, et seq.
3. Mandatory safety standards 30 C.F.R. 75.1105 and 75.316.

Stipulations

The parties stipulated to the following (Exhibit ALJ-1):

1. The Commission has jurisdiction in this proceeding.
2. The respondent owns and operates the No. 11 Mine, an underground mine extracting bituminous coal, and the mine affects interstate commerce.
3. As of February 5, 1991, the respondent extracted 14,918,109 tons of coal at all of its mines. The No. 11 Mine extracted 1,655,780 tons of coal from February 5, 1990, to February 5, 1991.
4. Respondent had 183 violations in the preceding 24 months ending on May 30, 1991, at the Murdock Mine and Mine No. 11.
5. The payment of the full civil penalty assessments for the citations in question will not impair the respondent's ability to continue in business.
6. On May 2, 1991, Inspector Robert Montgomery conducted an inspection in Mine No. 11. He found that belt air was traveling from the section belt tail outby and no regulator was provided in the intake stopping line. The check curtain was between the No. 23 and 24 crosscuts. This was in the east off 2nd north off main east unit No. 3 working section. The inspector issued Citation No. 3536731 for an alleged violation of 30 C.F.R. 75.316.

Discussion

Section 104(a) non-"S&S" Citation No. 3842906, issued on April 17, 1991, cites an alleged violation of mandatory safety standard 30 C.F.R. 75.1105, and the cited condition or practice is described as follows:

The air current used to ventilate a battery charging station was not coursed directly into the return. The charging station contained a set of batteries for a battery powered scoop tractor that had the charging

leads connected to the battery but no power was on the charging box. A chemical smoke cloud was used to determine the direction of air flow in the charging station. This smoke cloud showed part of the air ventilating the charging station coursing into the haulage entry and not to the return entry.

The parties agreed to settle this violation and they presented arguments on the record in support of the settlement. The parties agreed that the issue with respect to the violation is whether or not the area cited as a battery charging station was in fact such a station covered by section 75.1105. The parties confirmed that after discovery, including the taking of depositions, the respondent conceded that the cited area was a battery charging station. Further, the respondent does not now dispute the fact that the station was not in compliance with the cited section 75.1105, and it concedes that the citation was properly issued (Tr. 12-13).

The respondent agreed to pay the full amount of the proposed civil penalty assessment and to withdraw its contest. After further consideration of the pleadings and arguments in support of the proposed settlement, and pursuant to Commission Rule 30, 29 C.F.R. 2700.30, the settlement was approved from the bench (Tr. 15). My decision in this regard is herein re-affirmed.

Section 104(a) non-"S&S" Citation No. 3536731, issued on May 2, 1991, cites an alleged violation of mandatory safety standard 30 C.F.R. 75.316, and the cited condition or practice states as follows:

The ventilation plan was not followed in the No. 3 unit. The belt air was traveling from the section belt tail outby and no regulator was provided in the intake stopping line as depicted in sketch No. 6, page 15 of the plan. The check curtain was between the No. 23 and No. 24 crosscuts.

Petitioner's Testimony and Evidence

MSHA Ventilation Specialist, Robert M. Montgomery testified that he has been so employed for three years, and previously served as a mine inspector for approximately ten years. He confirmed that he was familiar with the MSHA approved mine ventilation plan through his review of the plan every six months, and he identified a copy of the plan (Exhibit R-5, Tr. 20). He confirmed that the plan addresses the basic way the mine is to be ventilated, and it includes drawings of how the face ventilation is to be obtained. He explained that sketches 5 and 6 which appear at pgs. 14-15 of the plan depict typical five entry panel or room sections, but there could be more or less than five entries. He further explained that the term "typical" means

"examples of the basic system by which they're going to advance the working places". The plan was in effect at the time the citation was issued, and he explained the symbols shown on the sketches. Referring to page 2 of the plan, he confirmed that the respondent may deviate from the plan sequences where mine conditions warrant (Tr. 23).

Mr. Montgomery confirmed that page 9, paragraph C of the ventilation plan covers the construction and operation of regulators. He explained that a regulator provides ventilation air from one location to another, and that "in order to comply with other sections of the regulations, it's necessary to separate your intake escapeway and return from the belt entry which means that you have to arrive at air provided for the neutral from a clean air source" (Tr. 24).

Mr. Montgomery stated that on May 2, 1991, he was in the process of making a six-month review of the mine ventilation plan and he walked the neutral air entries to the mouth of the section. He also walked the belt line and determined that the air was flowing out. After making several smoke tests and noting that there was no intake regulator, he determined that the air was coming through the curtain between the No. 23 and No. 24 crosscut as shown on the sketch which he made at that time (Exhibit P-2, Tr. 25-26). He confirmed that the intake air was in the No. 6 entry and the return was in the No. 1 entry. Entries No. 2 through No. 5 were neutral air entries, and the No. 4 entry was the belt entry (Tr. 28-29).

Mr. Montgomery stated that he walked the belt line and determined with a smoke cloud that the neutral air was traveling outby the face and away from the entries. He found a shuttle car parked against a check curtain between the No. 5 and No. 6 entries, at the No. 25 crosscut, and the air was passing under the curtain. He considered this to be a violation of section 75.316, because the ventilation plan required the installation of an intake regulator just outby the tailpiece in the No. 23 crosscut between the No. 5 and No. 6 entries. The purpose of the regulator is to allow clean intake air to be supplied to the belt and neutral entries. However, in this instance, instead of a regulator being used to supply the air, it was being supplied by the check curtain which had been pushed back by the shuttle car (Tr. 31-35).

Mr. Montgomery stated that if the shuttle car were moved, the curtain would drop and it would be reasonable to expect that "the air would travel to the No. 6 working face and then go back" (Tr. 37). He confirmed that he checked the air sweeping through the check curtain for methane and oxygen content and his test device alarm did not sound. He assumed from this that the air was "clean air". The air had not swept the face because it was coming off the intake and through the check curtain, and it was

~207

probably the same quality of air that would have gone through the regulator if it had been there (Tr. 39-40).

Mr. Montgomery stated that the failure to install the regulator is a violation of sketch No. 6, page 15, of the ventilation plan. Even though clean air was passing through the curtain by the shuttle car, a violation still existed because "they were relying on a shuttle car being parked in the curtain as a place to gain their intake air for their neutral entries. When the shuttle car is moved, it ceases to become that" (Tr. 41). Mr. Montgomery did not know whether the use of the curtain in lieu of the regulator was by accident or design (Tr. 43).

Mr. Montgomery confirmed that he issued the citation and found a low degree of negligence because during his inspection of other units he found that the regulators were installed where they were supposed to be under the plan. He confirmed that the respondent did not challenge the need for a regulator and informed him that one would be installed. He also determined that an injury was unlikely because a combination of circumstances would have to occur before any possible injury, and he concluded that the violation was non-"S&S". Abatement was achieved by removing a block from the intake stopping at the No. 23 crosscut between the No. 5 and No. 6 entries, and he smoke tested the air after this was done and found that it was traveling through the regulator at the required volume and velocity (Tr. 45-48).

On cross-examination, Mr. Montgomery confirmed that the ventilation plan does not contain an exhaustive list of when the respondent may deviate from the plan sketches, and any deviation would depend on what is called for by good mining practices (Tr. 8). He confirmed that all of the neutral entries had check or isolation curtains across them one crosscut in by the location where he believed the required regulator should have been installed (Tr. 51). He confirmed that ventilation plan sketch No. 6, page 15, rather than sketch No. 5, page 14, applies in this case, and he explained that the direction of the air in the intake stopping line determines whether a regulator is to be provided (Tr. 53).

Mr. Montgomery confirmed that the ventilation sketch on page 14 of the plan also has check curtains across all neutral entries, and that the sketch on page 15 only has one check curtain. He explained that plan part 1, paragraph 4(c), provides for the hanging of additional curtains as necessary to control the air. He did not consider the lack of a regulator to be a minor plan deviation "because you're changing the position from where you're obtaining your air for those entries" (Tr. 55). He confirmed that he was not involved in the development or approval of the ventilation plan in question, and in terms of the approval

~208

process, he could not speak to the intent of the sketches which are included in the plan (Tr. 55).

Mr. Montgomery stated that there is no ventilation plan provision covering the exact situation where all of the neutral entries have check curtains across them and the air is flowing in an outby direction. He confirmed that there is no specific plan sketch that is identical to the situation which caused him to issue the citation, but he denied that he overlapped the two plan sketches in question. He further explained the basis for issuing the citation as follows at (Tr. 56-57):

Q. So you just looked at Page 15, saw there was no regulator, didn't consider the presence of absence of the check curtains, and issued the citation?

A. Yes, sir.

JUDGE: Let me understand that again. On Page 15, sketch No. 6, that Mr. Keltner -- you circled it on the copy you gave me. That little square with a line through it, is that the symbol for regulator?

THE WITNESS: Right here, yes, sir.

JUDGE: That is the symbol for regulator?

THE WITNESS: Yes, sir.

JUDGE: So you looked at that and then you looked at the actual scene and you saw there was no regulator there?

THE WITNESS: Yes, Sir.

Mr. Montgomery stated that some leakage in check curtains can be expected as a normal part of mine ventilation. He confirmed that the respondent timely abated the violation in good faith (Tr. 63).

In response to further questions, Mr. Montgomery confirmed that he is familiar with ventilation plans and has reviewed them as part of his job. He stated that the sketches are "examples", and that the sketches showing neutral airflows outby show intake regulators, and neutral air flowing inby shows return regulators. He explained his sketch of the scene, exhibit P-2, as compared to ventilation plan sketch No. 5, including the functioning of the regulators and the direction of the air (Tr. 66-70). He confirmed that he made a smoke test to determine the direction of the air flow outby the check curtains in the No. 2 and 3 entries, but he did not measure the air velocity. He did not check the air leakage volume, and he believed that the air quantity on the

~209

intake side was 50,000 cubic feet, and 30,000 on the return side (Tr. 72).

Respondent's Testimony and Evidence

David L. Lyon testified that he presently serves as manager of accident investigations in the mine safety department, and that at the time of the inspection he was the company representative traveling with Inspector Montgomery. He stated that he has a degree in mining engineering from the University of Missouri where he took a course in mine ventilation, and has worked 15 years for the respondent in the safety and engineering departments. He has also drafted ventilation plans, and is familiar with the mine ventilation plan in this case (Tr. 74-75). He described the section where the citation was issued, and confirmed that there were check curtains across the four neutral entries, and that coal cutting began while he and the inspector were on the section (Tr. 76). He further confirmed that he assisted the inspector in taking his air readings and that the inspector stated that the air was well balanced on the unit. The citation was abated by knocking a block out of the stopping at the No. 23 crosscut, and it had no effect on the direction of the air flow. However, air did flow through the stopping from the intake side (Tr. 78).

Mr. Lyon confirmed that the inspector released some smoke clouds to determine the direction of the airflow. The air direction in the Nos. 2 through 4 entries "was an outby movement and also towards the return stopping line" and the smoke "rose to the top and just dissipated" (Tr. 79). Mr. Lyon did not believe that there was a violation of the ventilation plan, and he explained as follows at (Tr. 80-81):

A. Basically I told Inspector Montgomery I wanted to look at the ventilation plan first. And I looked at the ventilation plan with the section foreman and the situation we had there did not depict either one of the sketches in the plan. We had a situation that wasn't really shown on the sketches.

Q. Did you feel at the time it was in violation?

A. No. I didn't feel like there was a violation at the time.

Q. Why is that?

A. Because there wasn't -- the sketch that he was using to show the violation was not exactly the situation we had there.

Q. And even that being the case, Mr. Lyon, why did you go ahead and have the hole knocked in the stopping?

A. Well, to -- he was going to write a citation and in order to abate it, you know, the citation, we had to install a regulator in that stopping line.

On cross-examination, Mr. Lyon confirmed that he was very familiar with the mine ventilation plan, and that the situation he observed with the inspector was not identical to sketch No. 6, on page 15 of the plan. He confirmed that at the time of the inspection there were six entries, and the plan sketch shows five entries (Tr. 82-83). Mr. Lyon agreed that the sketches are only examples, and he pointed out that note No. 1 at page 2 of the plan allows for variations in the number of entries depending on ventilation requirements and mining conditions and that the plan serves as a guide for good mining practices to provide safe ventilation. He explained that a regulator directs the air from the intake into the neutral, or from the neutral into the return, and that the regulator shown on the sketch is used to draw either the intake into the neutral or the neutral into the return. The regulator shown on the sketch directs the air flow from the intake into the neutrals so that the neutrals have enough air movement to preclude any methane build-up on the belt entry. Mr. Lyon agreed that nonpermissible equipment and power points are located in the belt entries and that the neutral and return air which has passed the working faces should not be coursed into these entries (Tr. 87). He also agreed that regulators are important and conceded that there was no regulator in the stopping (Tr. 89).

In response to further questions Mr. Lyon stated that it was his position that insofar as the neutral curtains and neutral air movement is concerned, none of the sketches in the ventilation plan are applicable to the situation which was presented at the time of the inspection. Mr. Lyon further stated that sketch No. 5 does not apply, and he believed that the citation was issued in error because there was no ventilation sketch that applied to the particular situation presented (Tr. 91).

David Stritzel, respondent's director of health and safety, stated that he holds a B.S. degree in mining engineering from the University of Missouri at Rolla, and that his studies included ventilation. His responsibilities include the development of ventilation plans, and his former experience includes eleven years of service as a Federal coal mine inspector and supervisory technical specialist reviewing various mine plans (Tr. 92-97). He confirmed that he was familiar with the mine ventilation plan in effect on May 2, 1991, and that he wrote it. He confirmed that he was not present when the inspector issued the citation, and he did not dispute the facts as found by the

~211

inspector. However, he did not believe that there was a violation (Tr. 98-99).

Mr. Stritzel stated that the only purpose for an intake regulator in the ventilation plan is in connection with the check curtains which were up across all of the neutral entries. He explained that as a result of a fatality which occurred in 1985, in an accident involving equipment passing through one of the curtains, the company decided that the best method for avoiding future incidents of this kind was to eliminate the check curtains. He submitted such a plan to MSHA, and during the discussions with MSHA which followed, the control and direction of the air became an issue, and discussions continued for a year while he resubmitted a plan to allow the removal of the check curtains (Tr. 99-102). He further explained as follows at (Tr. 102-104):

* * * * *

And the stipulation that MSHA was demanding in that plan in order to approve my request to remove those curtains, they requested only two items; one, that an isolation curtain be maintained in the power entry and that a hole be knocked out in the intake stopping line.

And quite frankly, I was tired of fussing with them and it dragged on already for a year and those two particular items I didn't see where it did anything or would have no effect on the ventilation or have any effect on the mining process so I just gave in and put it into the plan knowing it would have no effect simply so we could get rid of these isolation curtains and we wouldn't have to be faced with people getting killed again.

Mr. Stritzel agreed that the check curtains were up at the time of the inspection, but he did not believe that they were necessary and he could not explain why the foreman had them installed. He also agreed that what the inspector observed and sketched at the time of the inspection was similar to ventilation plan sketch No. 6, as well as No. 5. He confirmed that the plan does not clearly explain when the two sketches are to be applied, and he stated as follows at (Tr. 110-112):

But if someone were to just pick up this plan, I'm having difficulty right at this point in time and -- I mean I haven't reviewed it carefully but it would seem to me that the plan some place in here would explain in King's English when sketch No. 5 applied and when

sketch No. 6 applied. But apparently it doesn't do it, does it?

THE WITNESS: No, sir, it doesn't. In the development of the plan both of those issues on the regulator on the intake stopping and that one isolation curtain in reference to sketch No. 6 were both issues that I objected to that was demanded by MSHA.

I merely put them in there simply because I saw where they had no effect. We haven't had any problem with the application of these sketches by any of the inspectors that inspect No. 11 mine until this incident. This is the first time we were issued a citation for this particular issue so it never was a problem.

THE WITNESS: I will tell you very frankly. It's not that it's an issue that causes us any significant economic problems or safety problems or anything else. It centers around one issue. It's part of the programs that's being developed by MSHA in Washington that puts our company in a spot.

What I'm referring to is the special emphasis program. 75.316 is one of the criteria that they've targeted. We've already been hit with one mine placed on this special emphasis program.

We have very strong feelings about that program. We feel it is illegal. Encompassing provisions like 316 is too broad. It encompasses too many different provisions of the law or particular type violations.

* * * * *

This is one of the particular criteria, 75.316, that MSHA has targeted. Consequently, we're looking very close at each and every one of those provisions that MSHA has targeted to be included in this special emphasis program.

Mr. Stritzel believed that the placement of the curtains determines whether or not a regulator is required, and when asked why the ventilation plan does not specifically state that this is the case, he explained that during the development of the plan "there didn't seem to be a need for it because of all of the discussions which took place and no one expressed any problems with wanting to know why that regulator was there and under what circumstances" (Tr. 117).

On cross-examination, Mr. Stritzel stated that the regulator shown "to the far right" in ventilation plan sketch No. 6 has no purpose whatsoever and that it was placed in the sketch "to satisfy MSHA's desires" (Tr. 118). He stated that the regulator would suck in intake air, but that the regulator on the intake stopping line as shown in the sketch is not necessary (Tr. 123). He confirmed that regulators are also shown on sketch No. 6, for proper ventilation of the neutral air on the return side (Tr. 124).

Mark Eslinger, MSHA ventilation engineer, who was present at the hearing, was called as the court's witness in this matter to clarify the ventilation plan. He stated as follows at (Tr. 137-139):

MR. ESLINGER: Sir, if we approve this sketch without the regulator and that the source of the intake air that goes down the belt and other neutral entries came from a curtain as shown on a sketch, yes, that would be okay.

But we don't approve that. Sir, I have not -- I'm involved in a day-to-day approval of mine plans and we have not approved a curtain regulator let's say as the means providing the neutral air to the neutral entries.

* * * * *

Q. Is there any reason why this particular ventilation plan doesn't explain when sketch 5 comes into play and when sketch 6 comes into play?

A. Judge, I understand it as the way I would approve that plan is every time the belt air goes into outby direction -- every time that the belt air or the neutral air flows out that there is a regulator on intake stopping letting the air in.

Q. So that would be exactly how the inspector has his sketch. The air is going in the outby direction?

A. Yes, going outby direction, going out of the mine. There is a regulator to let it in. Every sketch for the air goes out, there is a regulator on the intake side. Every sketch where the air goes in the inby direction, there is a regulator on the return side to let the air out.

Mr. Eslinger confirmed that according to the inspector's smoke tests, the air used to ventilate the neutral entries was air that had not yet reached the face. The air going up the intake entry was sweeping past the curtain and shuttle car and it

~214

was in effect performing a function similar to that of the regulator. Mr. Eslinger agreed that the inspector issued the citation after he sketched out the conditions he observed and concluded that a regulator was required pursuant to plan sketch No. 6 (Tr. 139-140). He stated as follows at (Tr. 141-142):

Q. You also heard Mr. Stritzel's comment that this -- that Zeigler put this stopping in this sketch No. 6 grudgingly, shovingly?

A. Yes.

Q. And pretty much to placate MSHA if you will so they could get their plan?

A. Yes.

Q. Do you agree with that?

A. Yes. That is an adversarial relationship, sir.

Q. So there is some difference of opinion as to the usefulness of this particular stopping on sketch 6?

A. No. I've never known there being a question on the regulator. I knew there was a question on the number and location of curtains but never on the location of the regulator. This is the first time I've heard that argument presented, sir.

Q. But there was some difference of opinion about where to put the curtains?

A. Correct.

Q. But not on the regulator?

A. Correct.

Petitioner's Arguments

Petitioner's counsel argued that the facts in this case are not disputed or controverted by the respondent. He stated that the inspector believed that a regulator was necessary between the No. 23 and No. 24 stoppings, as shown on the ventilation plan map because it was necessary to have intake air go over the belt line in the neutral air. Counsel conceded that intake air was flowing in that area at the time of the inspection, even without the regulator, but he took the position that the curtain propped against the shuttle car was used for this purpose and that once

~215

mining took place, the shuttle car would be used for mining and it is not intended to be used for ventilation. Counsel asserted that the regulator shown in the sketch is there to provide intake air over the belt entry. Since it is unrebutted that nonpermissible power points are located in that entry, intake air is necessary to clear out any contaminants, particularly methane (Tr. 127-130).

Petitioner's counsel asserted further that the ventilation plan provides for the use of ventilation check curtains to regulate the flow of air, and the plan also covers the construction of regulators to help regulate the neutral air. Counsel pointed out that regulators are permanent air control devices and that curtains can be ripped down and may fall (Tr. 132-135).

Respondent's Arguments

Respondent's counsel took the position that ventilation plan sketch No. 6 does not apply in this case because the direction of the air flow is irrelevant. Counsel further asserted that sketch No. 5 is not a fair and accurate representation of the prevailing situation at the time of the inspection and that both sketches have some similarities to what the inspector found. Counsel argued that there is no specific sketch covering the situation which prevailed, and since MSHA is responsible for approving the ventilation plan, it should require the respondent to put a specific sketch in its plan. Since the plan does not cover every contingency and provides for certain exceptions, counsel concluded that MSHA has the burden of proving a violation and that it has not done so in this case (Tr. 144-146).

Findings and Conclusions

Fact of violation. Citation No. 3536731.

In this instance the respondent is charged with a violation of mandatory safety standard 30 C.F.R. 75.316, for failure to follow its approved ventilation system and methane and dust control plan. It is well settled that the failure to follow an approved plan constitutes a violation of section 75.316, which provides as follows:

A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the

Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

The citation was issued after the inspector, who is a ventilation specialist, observed that a ventilation regulator was not installed in the intake stopping line, and that instead of a regulator, the respondent was using a check curtain pushed back by a shuttle car to supply air ventilation to the belt entry. The inspector believed that ventilation sketch No. 6, which appears at page 15 of the applicable MSHA approved ventilation plan, which is labeled a "typical 5-entry panel or room section", and which clearly shows a regulator installed in a cross-cut between two entries, applied to the six-entry section in question. He further believed that a regulator was required at the stopping location in the No. 23 crosscut between the No. 5 and No. 6 entries as shown on the sketch of the scene which he made in the course of his inspection (Exhibit P-2).

Although the inspector conceded that the air passing under the check curtain which had been propped open by the shuttle car was "clean air", he was concerned that once mining began, the shuttle car would be moved and used in the mining process and the curtain would drop and would no longer serve as a device to supply or course the air to the belt entry in question. Under the circumstances, and in order to maintain and allow an uninterrupted means of regulating the airflow through the belt entry in question, the inspector believed that the respondent should have provided a regulator as shown in ventilation sketch No. 6, which was incorporated as part of the approved plan.

The inspector conceded that the cited violative condition was on a six entry panel or section, rather than a five entry panel or section as shown on the ventilation sketch in question. However, he explained that the sketch is intended as an example of a typical basic system or method of ventilating a unit as mining is advanced, and that there is no identical or specific sketch which may apply to neutral entries, including a belt entry, which have check curtains installed across all of the entries and air is flowing in an outby direction. Under these circumstances, he believed that the use of a check curtain propped open by a shuttle car was not intended as a means of regulating the air flow over a belt entry where nonpermissible power points are located, and that a regulator was required under the particular conditions he found at the time of his inspection.

The respondent concedes that there are similarities in ventilation sketches 5 and 6, and the conditions found by the inspector at the time of his inspection and which prompted him to issue the citation. However, the respondent's defense is based

on an argument that the approved ventilation plan does not include a sketch which is identical to the situation found by the inspector. However, respondent's safety manager Lyon, who was familiar with the ventilation plan, acknowledged that the plan sketches are only examples, and he cited the first part of the plan which allows for variations in the number of entries depending on ventilation requirements and good mining practices, and provides for deviations from the plan under certain circumstances. Mr. Lyon did not believe that there was a violation because there is no identical sketch which precisely covers the ventilation system in use at the time of the inspection. However, he conceded that regulators are important ventilation devices.

Respondent's safety director Stritzel, who drafted the ventilation plan which was in effect at the time of the citation, but who was not present during the inspection, did not dispute the facts as found by the inspector at that time. He also agreed that the inspector's sketch of the prevailing conditions as he observed them were similar to ventilation sketch No. 6, as well as sketch No. 5. Even though he authored the plan, Mr. Stritzel admitted that it does not clearly explain the conditions under which the two sketches would apply. Further, Mr. Stritzel was of the opinion that an intake regulator served no useful purpose, and he indicated that the regulator provided for in the ventilation plan was included as part of the plan at the insistence of MSHA following a fatality which resulted from equipment passing through one of the ventilation check curtains which has been installed across neutral entries. Mr. Stritzel stated that in exchange for allowing him to eliminate the curtains, MSHA insisted on a regulator in the intake stopping line. However, he could not explain why the curtains were installed across the neutral entries at the time of the inspection in this case, and he did not believe they were necessary. In short, Mr. Stritzel apparently did not believe that the ventilation curtains which were in place, or the regulator which was not in place, were necessary to maintain the ventilation at the time of the inspection.

MSHA's ventilation engineer Eslinger, who agreed with Mr. Stritzel's testimony that the regulator was included as part of the ventilation plan at MSHA's insistence, testified that any prior disagreements by the respondent were in connection with the number and location of ventilation curtains, and that the respondent has never at any time prior to this case voiced any disagreement about the need for a regulator. Mr. Eslinger also agreed that under the conditions found by the inspector at the time of his inspection, a regulator, rather than a curtain, would be required in those instances where the air ventilation is traveling in an outby direction in a neutral belt entry.

Part I, paragraph 1, page 2, of the respondent's applicable ventilation plan (Exhibit R-5), provides as follows:

The enclosed sketches numbered 5 through 13 depict all section and face ventilation systems (typical for each system of advance and retreat mining) including all regulators, check curtains, wing curtains, 9000 CFM measuring points, and stoppings.

NOTE: The number of intake, neutral and return air courses, as depicted on the typical face sketches may vary due to the number of entries or rooms being mined, mining conditions, or the ventilation requirements.

All plan sequences may be deviated from where conditions warrant a change conducive to good mining practices. However, ventilation as specified in the plan must be maintained.

The respondent's assertion that the citation must be vacated because the ventilation plan sketch relied on by the inspector is not identical to the conditions he found is rejected. During closing arguments at the hearing, respondent acknowledged the fact that the ventilation plan does not cover every contingency. While it may be true that the ventilation sketch relied on by the inspector depicts a five entry system, the respondent concedes that the "typical" sketches are intended as examples of ventilation, and that the conditions found by the inspector, as noted in the sketch that he made during his inspection, were similar to those shown in the ventilation plan sketch. Further, the ventilation plan itself recognizes the fact that the number of intake entries and air courses as shown in the typical sketches may vary due to the number of entries being mined and other factors. Even though the plan provides for deviations in plan sequences, it specifically states that ventilation as specified in the plan must be maintained. I construe this to mean that all required ventilation control devices, such as intake regulators, must be in place as required by the overall plan, including any appropriate sketches incorporated as part of the plan.

After careful consideration of all of the testimony and evidence adduced in this case, including the testimony of Inspector Montgomery and ventilation engineer Eslinger, which I find credible, I conclude and find that the petitioner has established by a preponderance of the evidence that the failure of the respondent to install a regulator at the cited location in question constituted a violation of its approved ventilation and methane and dust control plan as charged in the citation. A violation of the plan constitutes a violation of the cited

~219

mandatory safety standard 30 C.F.R. 75.316. Under all of these circumstances, the violation IS AFFIRMED.

Size of Business and Effect of Civil Penalty Assessments on the Respondent's Ability to Continue in Business

I conclude and find that the respondent is a large mine operator. I adopt as my finding the stipulation by the parties that the payment of the full civil penalty assessments for the violations in question will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

Based on the stipulations by the parties, and taking into account the fact that the respondent is a large mine operator, and in the absence of any further evidence to the contrary, I cannot conclude that the respondent's compliance record is such as to warrant any additional increases in the civil penalties which I have assessed for the violations which have been affirmed.

Gravity

The inspector determined that an injury was unlikely and he found that the violation of section 75.316, was not significant and substantial. I agree with these determinations and I conclude and find that in the circumstances presented, the violation was nonserious.

Negligence

The inspector found a low degree of negligence with respect to the violation of section 75.316, and I agree with his finding.

Good Faith Compliance

The record reflects that the respondent immediately took corrective action by removing a block from the intake stopping to provide an intake regulator and the citation was abated within 40 minutes of its issuance. I conclude and find that the respondent displayed rapid good faith abatement of the violation.

Civil Penalty Assessments

Section 104(a) non-"S&S" Citation No. 3842906, April 17, 1991, 30 C.F.R. 75.1105. As noted earlier, the proposed settlement for this violation has been approved and the respondent has agreed to pay the \$20 penalty assessment in full.

~220

Section 104(a) non-"S&S" Citation No. 3536731, May 2, 1991, 30 C.F.R. 75.316. On the basis of the foregoing findings and conclusions affirming this violation, I conclude and find that the petitioner's proposed civil penalty assessment of \$20 for the violation is reasonable and appropriate, and it is affirmed.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of \$20, in satisfaction of the settlement for Citation No. 3842906. The respondent IS FURTHER ORDERED to pay a civil penalty assessment in the amount of \$20, for Citation No. 3536731, which I have affirmed. Payment shall be made to the petitioner (MSHA) within thirty (30) days of the date of this decision and order, and upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn St., 8th Floor, Chicago, IL 60604
(Certified Mail)

Gregory S. Keltner, Esq., Zeigler Coal Company, 50 Jerome Lane, Fairview Heights, IL 62208 (Certified Mail)

/ml