

CCASE:  
SOL (MSHA) V. BETHENERGY MINES  
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 92-895
Petitioner	:	A. C. No. 36-00840-03845
v.	:	
	:	Mine No. 33
BETHENERGY MINES, INC.,	:	
Respondent	:	

DECISION

Appearances: Pamela W. McKee, Esq., U.S. Department of Labor  
Office of the Solicitor, Arlington, Virginia for  
Petitioner;  
R. Henry Moore, Esq., Buchanan Ingersoll  
Professional Corporation, Pittsburgh,  
Pennsylvania, for Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based on a petition for assessment of civil penalty filed by the Secretary (Petitioner) alleging a violation by the operator of 30 C.F.R. 75.316. Subsequent to notice, a hearing was held in Johnstown, Pennsylvania on March 10, and 11, 1993. At the hearing, John A. Kuzar, Gerald A. Krosunger and Gene Ray testified for Petitioner. Robert L. Price, Edward J. Fedorko, Stephen Horvath, and John M. Gallick testified for Respondent.

On May 11, 1993, Respondent filed its Brief. Petitioner's Brief was filed May 13, 1993. On May 19, 1993, Petitioner filed a Reply Brief.

Findings of Fact and Discussion

1. In May 1992, the 10 Left (LT) Longwall Section at Respondent's Cambria Slope Mine No. 33, consisted of a return, an intake, and a belt entry. The intake entry was between the return and belt entries.
2. Four carbon monoxide sensors were situated in the belt entry to provide early warning, by way of a visual and auditory alarm, of carbon monoxide (CO) in the atmosphere (indicating flaming or combustion). One was placed 100 feet outby the drive at the head

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of the belt. The second sensor was situated 1,000 feet inby. The third sensor was 1,000 inby the second. The fourth sensor was 100 feet outby the tail of the belt.

3. According to the Guidelines for the Installation and Maintenance of a Mine Wide Carbon Monoxide Detection System at Cambria Slope Mine No. 33C BethEnergy Mines Inc., (MSA, Dan System), ("Ventilation Plan"), it is required that the CO sensors emit a visible and audible "warning" alarm when exposed to carbon monoxide at a level more than 10 parts per million ("PPM"), above the ambient(Footnote 1) but less than 15 PPM. An "unannounced" alarm is required to be emitted when the sensor is exposed to carbon monoxide at a level of 15 PPM or more, and the source is unknown. This alarm results in the activation of the fire defense and evacuation plan.

4. In actual practice, the carbon monoxide sensors at issue were set to provide a "warning" at 4 PPM and an "alarm" at 7 PPM. The presence of carbon monoxide at these levels is evidence of a smoldering, flameless, combustion.

5. The Ventilation Plan requires that "Air velocity along the belt will be no less than 50 FPM."

6. On May 16, 1992, John A. Kuzar an MSHA inspector-supervisor, and Gene Ray, an MSHA inspector, inspected the intake entry of the 10 (LT) longwall section at the subject mine. An air reading at the mouth of the intake entry indicated a velocity above 50 feet per minute ("FPM"). An air reading taken at the overcast of the mouth of the entry in question on May 19, 1992 indicated a velocity of 107 FPM. The section had extended only a few hundred feet on May 19, 1992, and the inspectors were concerned that air velocity would decrease as the entry lengthened. According to Kuzar, the mine foreman, Edward J. Fedorko, "...was informed that there could be a problem maintaining the 50 velocity on the belt if someone opens doors or knocks one of their checks down on the track. He agreed. I put him on notice that they would have to watch the amount of air because ten left could be warranting without fire protection." (sic) (Tr. 55)

According to Fedorko, it was his recollection that the discussions with Kuzar on May 19, regarding ventilation, related to the latter's concern about the use of check curtains. However, Fedorko did not explicitly rebut or contradict the testimony of Kuzar that he (Fedorko) was informed by Kuzar of the need to pay attention to the velocity of the air in the belt entry. Nor did Stephen Horvath, the mine superintendent, who was

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1 The ambient, considered as the normal background carbon monoxide present in the atmosphere, was set at "0".

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present on May 19, when Kuzar spoke to Fedorko, specifically contradict Kuzar's testimony. I therefore accept Kuzar's version of the conversation he had with Fedorko and Horvath on May 19, 1992.

7. On July 6, 1992, at the end of the day shift, Horvath was informed by the foreman of the day shift that the air velocity in the belt entry, 10 LT, was more than 50 FPM, but was less than normal. Horvath assigned Tom Corber, the shift foreman of the next shift, to check the beltline and "make sure everything was the way it was supposed to be." (Tr. 252) (sic). According to Horvath, Corber advised him that readings that he took at "several" locations indicated air velocity in the 70's, and that independent readings taken by the Section foreman indicated an air reading of 77 FPM. (Tr. 252)

8. Examinations of air velocity in the belt entry on the day and night shifts on July 6, on all three shifts July 7-8, and on the midnight shift, July 9, all indicated velocities in excess of 50 FPM.

9. On July 9, 1992, Kuzar inspected the 10 LT longwall section at the subject mine along with Gerald A. Krosunger, an MSHA inspector.(Footnote 2) At about 9:30 a.m. Kuzar took 5 traverse smoke tube tests of the air movement in the belt entry 100 feet outby station 7920, which indicated air velocity of 26.54 feet per minute.(Footnote 3) An order was issued under Section 104(d)(2) of the Act, alleging a violation of 30 C.F.R. 75.316.

10. About 40 minutes after the Order was issued, Horvath and Fedorko traveled from other areas of the mine to the 10 Left section. Along the way, Fedorko made a minor adjustment in a check curtain that was installed in the track entry. This adjustment did not affect the ventilation in the belt entry in the 10 left section. Once Fedorko entered the 10 left belt entry, he took an anemometer reading near the mouth of the section between survey stations 7778 and 7785. The reading indicated a velocity of 80 FPM. As he walked up towards the section, he took four or five more readings along the belt, and they were all between 70 and 80 FPM. When he arrived at the tailpiece and met with Kuzar and Krosunger, he took a reading that indicated a velocity of 68-70 FPM.

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2On July 9, 1992, Krosunger had not yet received his certification as an authorized representative of the Secretary.

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3In taking the smoke tube test, Kuzar and Krosunger stood 10 feet apart, and timed the flow of smoke between them. An order was issued alleging a violation of the Ventilation Plan.

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11. Approximately 1 1/2 hours after the order in question was issued by Kuzar, Horvath took an anemometer reading of 67 FPM at the location where Kuzar had taken the initial smoke tube tests. Kuzar then took smoke tube tests which indicated an air velocity of 53 FPM and the order was terminated.

#### Discussion and Additional Findings of Fact

##### I. Violation of the Ventilation Plan

It is the position of Respondent, that Petitioner has not met his burden of proof in establishing that a violation occurred herein i.e., that the air velocity was less than 50 FPM. Respondent argues, in essence, that readings taken by Fedorko after the order in question was issued, and all prior readings indicated air velocities more than 50 FPM, including one taken a few hours prior to the issuance of the order. Respondent also argues that the smoke tube readings may have been inaccurate. In this connection, Respondent cites the fact that Kuzar utilized a 10 percent correction factor, which reduced the figure arrived at by results of the smoke tube tests by 10 percent, whereas Horvath testified that he has never utilized such a correction factor. Respondent also argues, on the basis of responses given by Krosunger on cross-examination, that in performing the smoke tube test, at the time of the arrival of the smoke Kuzar had to simultaneously observe the smoke, and the face of his watch. Respondent also points to the disparity between the smoke tube test results indicating an air velocity of 53 FPM which formed the basis of the termination of the Order at issue, and the anemometer readings, on two different types of anemometers, of 66 and 67 FPM. I do not find Respondent's arguments to be persuasive for the reasons that follow.

The Ventilation Plan requires that air velocity in the area in question be at a minimum 50 FPM. Five smoke tube tests taken by Kuzar indicated a velocity of only 26.54 FPM which, even adding on to this figure the 10 percent that had been reduced by Kuzar as a correction factor, results in a velocity of 26.89 FPM which is significantly less than the required 50 FPM. Anemometer readings taken before and after those taken by Kuzar indicated an adequate velocity of air, and there was a disparity between the smoke tube tests and anemometer test results at the time of termination. However, I place most significance on the fact that there were no anemometer tests taken at the same time, at the same place as those smoke tube tests taken by Kuzar which indicated a velocity less than 50 FPM. Hence, there are no anemometer results, or other physical evidence which directly contradict the results obtained by the smoke tube tests taken by

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Kuzar.(Footnote 4) I find that the smoke tube tests taken by Kuzar establish that at about 9:00 a.m., July 9, the air velocity in the belt entry at the site of the tests was significantly less than 50 FPM. Hence, I conclude that Respondent did violate its Ventilation Plan, and hence a violation 30 C.F.R. 75.316 occurred as alleged in the order at issue.

## II. Significant and Substantial

In analyzing whether the facts herein establish that the violation was significant and substantial, I take note of the recent decision of the Commission in Southern Ohio Coal Company, 13 FMSHRC 912, (1991), wherein the Commission reiterated the elements required to establish a significant and substantial violation as follows:

We also affirm the judge's conclusion that the violation was of a significant and substantial nature. A violation is properly designated as significant and substantial "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood

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4 I reject, as mere conjecture, Respondent's argument that the smoke tube tests readings may have been inaccurate, as mere conjecture. Respondent argues that Kuzar had to simultaneously observe smoke and his watch face. This conclusion is not based on any portion of Kuzar's testimony, but on responses given by Krosunger on cross-examination. In this connection, Krosunger, who at the time of the testing stood 10 feet from Kuzar, testified as follows on cross-examination: "Q. Okay. So he said to you now and then you release the smoke? A. Correct. Q. And then the smoke would travel down to Mr. Kuzar? A. Correct. Q. And he would look at his watch to see how long it took the smoke to travel? A. Correct. Q. And he would do that --- or he did that by watching a smoke cloud and simultaneously looking at his watch? A. Correct." (Tr. 159) I find this testimony insufficient to impeach the test results obtained by Kuzar.

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that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

See also *Austin Power Co. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g*, 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria). The third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury" (U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984)), and also that the likelihood of injury be evaluated in terms of continued normal mining operations (U.S. Steel Mining Co., Inc. 6 FMSHRC 1573, 1574 (July 1984); see also *Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986)." (*Southern Ohio*, *supra* at 916-917).

Hence, as elaborated upon by U.S. Steel, *supra*, in order to establish the third element set forth in Mathies *supra*, it must be established that there was a reasonable likelihood of the occurrence of an injury producing event, i.e., in this case a fire. (Petitioner's Post Hearing Brief, p.15) Petitioner concedes that at the time of the violation there was "no evidence of fire potential". Petitioner argues that the situation must be viewed in terms of continued mining operations, and refers to the testimony of the inspectors which Petitioner summarizes as follows: "During the normal course of mining, the possibility of hot rollers, coal spills, and problems with electrical components, the belt drive, or the starter box all contributed to the reasonable possibility of a fire, which would go undetected for a longer period because of the reduced air velocity." (Emphasis added) (Petitioner's Brief P.6) Certainly the fire producing conditions referred to by the inspectors could have occurred in the normal course of mining, but the record does not establish that these conditions were reasonably likely to have occurred. To the contrary, I take cognizance of the existence of the following conditions within the framework of which it must be considered whether a fire was reasonably likely to have occurred: the lack of any accumulation of combustible materials along the belt; the effect of the height of the belt and the reduction in potential for friction between the belt or a belt roller and an accumulation of combustible materials; the belt slip switches were in good working order, reducing the potential for frictional heating of the belt; the belt sequence switches were in good working order, reducing the potential for an accumulation of coal because of malfunction of an outby belt; the belt was in good alignment on July 9, reducing the likelihood of spills or frictional rubbing of the belt; there were no electrical defects along the belt; there were no defective rollers along the belt; the conveyor belt was fire resistant; and the lack of any history

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of reportable belt fires at the subject mine.

Within the framework of this record, I conclude that it has not been established that there was a reasonable likelihood of the occurrence of a fire herein. Accordingly the third element of Mathies supra, has not been established. Thus, I conclude that it has not been proven that the violation herein was significant and substantial.

### III. Unwarrantable failure

According to Petitioner, the violation herein resulted from Respondent's unwarrantable failure. In this connection, Petitioner argues that on May 19, 1992, Kuzar had put Respondent on notice of his concern that there could be problems with the air velocity in 10 left; that management was aware that the air velocity was marginal; that when Horvath was informed on July 6, 1992 that there was a "surge" in the air velocity he should thereby have become aware that there were velocity problems in 10 left; and that Respondent had failed to ensure that velocity readings were taken toward the tail where the readings would most accurately reflect the velocity along the entire belt entry. For the reasons that follow I reject Petitioner's arguments.

In Emery Mining Corp, 9 FMSHRC 1997, 2004 (December 1987), it was determined by the Commission that unwarrantable failure is aggravated conduct which constitutes more than ordinary negligence. Management was made aware by Kuzar on May 19, that there could be problems with the air velocity on the 10 Left Section. However, there is insufficient evidence that the specific violative condition herein i.e., air velocity below 50 FPM at approximately 9:30 a.m. on July 9, was the result of Respondent's aggravated conduct. There is no evidence in the record as to the cause of the decrease in the air velocity observed by Kuzar. Nor is there any evidence that the decrease in the air velocity below the requirement of the Ventilation Plan had existed for any significant period of time. To the contrary, testing of the air velocity on July 6, on all three shifts July 7 and 8, and during the pre-shift examination between approximately 3:30 a.m. and 4:30 a.m. on July 9, all indicated air velocities in excess of 50 FPM.(Footnote 5) Further, according to Horvath, whose testimony I found credible on this point based on observations of his demeanor, when he had informed Kuzar on July 10 that he knew the air was marginal, he meant to refer to an incident that had occurred on July 6, 1992. On that date, he was advised by the foreman at the end of the day shift that there was a surge in the air velocity, and that although the air velocity was more than 50 FPM, it was less than normal. It is significant to note that

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<sup>5</sup>The pre-shift examination of air velocity was made 100 feet outby the tail.

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upon receipt of this information, Horvath assigned the shift foreman of the next shift to check the belt entry, and the latter reported that air velocity readings were in excess of 50 FPM.

Within the framework of the evidentiary record as set forth above, I conclude that it has not been established that the violation herein resulted from any aggravated conduct on the part of Respondent. Hence, I conclude that the violation herein did not result from any unwarrantable failure on the part of Respondent.

#### IV. Penalty

In analyzing the gravity of the violation herein, I find that in the event of a fire, or if smoke is present, time is of the essence in warning miners to escape, these hazards. In this connection, I note that carbon monoxide in a stream of air, as a result of a fire or smoke, would travel to the first sensor in the belt entry in 2 minutes if the air velocity is 50 FPM. In contrast, if the air velocity is only 26 FPM, it would take approximately 4 minutes for the air stream to reach the sensor. However, it was the testimony of John M. Gallick, who was Respondent's Director of Safety at the dates in question, that, in essence, in the event of a fire producing CO, the relative amount of CO that would be found in a quantity of air (expressed as PPM) is related to the velocity of the air. The lower the velocity of the stream of air, the greater would be its concentration of CO. Accordingly, he opined that a warning sensor set at 4 PPM(Footnote 6) would detect CO in an air stream moving at 25 FPM at about the same time as a sensor set at 10 PPM(Footnote 7). I accept this testimony since it was not contradicted or impeached.

I find Respondent's negligence herein to have been mitigated by the factors discussed above, III infra.

Considering all the above, and taking into account the remaining factors set forth in Section 110(i) of the Act, as stipulated to by the parties on the record at the commencement of the hearing on March 10, 1993, I find that a penalty of \$200 is appropriate for the violation found herein.

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6Respondent's actual sensor setting for a warning alarm.

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7The Plan's requirement for a warning alarm.

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ORDER

It is ORDERED that Respondent pay a civil penalty of \$200 within 30 days of this decision. It is further ORDERED that Order No. 2689541 be amended to a Section 104(a) citation to reflect the fact that the violation cited therein was not as a result of Respondent's unwarrantable failure, and was not significant and substantial.

Avram Weisberger  
Administrative Law Judge

Distribution:

Pamela W. McKee, Esq., Office of the Solicitor, U.S. Department of Labor, 3535 Market Street, 14480 Gateway Building, Philadelphia, PA (Certified Mail)

R. Henry Moore, Esq., Buchanan Ingersoll Professional Corporation, USX Tower, 57th Floor, 600 Grant Street, Pittsburgh, PA 15219 (Certified Mail)

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