CCASE:
BETHENERGY MINES V. SOL (MSHA)
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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BETHENERGY MINES, INCORPORATED, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. PENN 92-511-R
	:	Citation No. 3705954; 4/10/92
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. PENN 92-512-R
	:	Citation No. 3705227; 4/21/92
	:	Docket No. PENN 92-514-R
	:	Citation No. 3705229; 4/22/92
	:	Docket No. PENN 92-515-R
	:	Citation No. 3705230; 4/23/92
	:	Docket No. PENN 92-516-R
	:	Citation No. 3705231; 4/23/92
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. PENN 92-595
	:	A.C. No. 36-00840-03815
v.	:	Docket No. PENN 92-643
BETHENERGY MINES, INCORPORATED, Respondent	:	A.C. No. 36-00840-03818
	:	Docket No. PENN 92-652
	:	A.C. No. 36-00840-03817
	:	Cambria Slope Mine #33
	:	Mine ID 36-00840

DECISION

Appearances: John Strawn, Esq., Office of the Solicitor, Philadelphia, Pennsylvania, for the Respondent/Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania, for the Contestant/Respondent.

Before: Judge Barbour

These consolidated contest and civil penalty proceedings arise respectively under Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. 815, 820, and involve the interpretation and application certain of the Secretary of Labor's ("Secretary") mandatory safety standards regulating the ventilation of underground coal

mines. Citations charging the violations were issued by the Secretary's Mining Enforcement and Safety Administration ("MSHA") to BethEnergy Mines, Inc. ("BethEnergy"), at its Cambria Slope No. 33 Mine ("Mine No. 33"). BethEnergy contested the citations and the proposals of the Secretary for the assessment of civil penalties and the cases were the subject of a duly noticed hearing in Indiana, Pennsylvania, at which R. Henry Moore represented BethEnergy and John Strawn represented the Secretary.

STIPULATIONS

At the commencement of the hearing the parties stipulated as follows:

1. Mine No. 33 is owned and operated by BethEnergy.

2. Mine No. 33 is subject to the jurisdiction of the Act.

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

4. The subject citations were properly served by duly authorized representatives of the Secretary on agents of BethEnergy on the dates and at the places stated therein and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevance of any statements asserted therein.

5. The assessment of civil penalties for any violations found to have occurred will not affect BethEnergy's ability to continue in business.

6. BethEnergy is a large company and Mine No. 33 is a large mine.

7. Mine No. 33 was assessed a total of 624 violations between April 1990 and April 1992. These assessed violations were cited during 1,324 inspection days.

8. The exhibits of the parties are authentic.

9. All citations at issue were abated in a timely fashion.

See Tr. 16-17.

The parties also concurred as follows:

> 1. In Docket No. PENN 92-512-R BethEnergy is contesting Citation No. 3705227. This same citation is one of two at issue in penalty proceeding Docket No. PENN 92-652. The parties agree that the decision concerning this citation will control that portion of Docket No. PENN 92-595 in which the Secretary is seeking a civil penalty assessment for Citation No. 3705986, an alleged violation involving circumstances similar to Citation No. 3705227.
>
> 2. In Docket No. PENN 92-514-R BethEnergy is contesting Citation No. 37095229, the second citation at issue in penalty proceeding Docket No. PENN 92-595. The parties agree that the decision concerning this citation will control the outcome of Docket No. 92-515-R in which BethEnergy contests Citation No. 3705230, a citation involving circumstances similar to Citation No. 3705229.

See Tr. 17-19.

MOTIONS TO WITHDRAW

Prior to the taking of testimony, counsel for the Secretary stated MSHA agreed to vacate Citation No. 3705954. The citation is the subject of contest proceeding Docket No. PENN 92-511-R and civil penalty proceeding Docket No. PENN 92-643. As a result, counsel for BethEnergy moved to withdrawn BethEnergy's contest of the citation and counsel for the Secretary moved to withdraw the Secretary's civil penalty petition. Tr. 20-21. In addition, counsel for BethEnergy announced that Citation No. 3705231, the subject of contest proceeding Docket No. PENN 92-516-R, had been vacated by MSHA and counsel for BethEnergy moved to withdraw its contest. Tr. 13, 21.

I orally granted the motions. Tr. 21. The agreements and motions to withdraw left three citations to be tried.

DOCKET NO. PENN 92-595

Citation No.	Date	30 C.F.R.	Proposed Penalty
3705944	3/19/92	75.309(a)	$506

Citation No. 3705944 states in part:

> The split of air returning from the 026 No. 1 longwall thru the No. 2 entry of 7 left & east main contained 1.3% of methane when tested at a point between the two regulators[,] [n]ot less than 12 inches from the roof and rib. A[n] air sample bottle has been collected at this location.

P. Exh. 2.

30 C.F.R. 75.309(a), which reiterated Section 303(i)(1) of the Act, 30 U.S.C. 863(i)(1), stated:

> If, when tested, a split of air returning from any working section contains 1.0 volume per centum or more of methane, changes or adjustments shall be made at once in the ventilation in the mine so that such returning air shall contain less than 1.0 volume per centum of methane. Tests under this [section] shall be made at 4-hour intervals during each shift by a qualified person designated by the operator of the mine. In making such tests, such person shall use means approved by the Secretary for detecting methane.

Section 309(a) has been replaced by 30 C.F.R. 75.323(c), as part of the Secretary's general revision of the standards for underground coal mine ventilation. 57 F.R. 20914 (May 15, 1992).

RELEVANT TESTIMONY

THE SECRETARY'S WITNESSES

SAMUEL J. BRUNATTI

Samuel J. Brunatti, an MSHA inspector, testified that Mine No. 33 liberates more than a million cubic feet of methane every 24 hours and therefore, pursuant to Section 103(i) of the Act, 30 U.S.C. 813(i), all or part of the mine must be inspected every 5 working days at irregular intervals. (Such inspections are known to as section 103(i) "spot inspections.") On March 19, 1992, Brunatti went to the mine to conduct such an inspection.

Brunatti traveled first to the longwall section where he detected methane in a split of air returning from the longwall face (the "split return"). The methane was in the No. 2 entry on the headgate side of the longwall. Brunatti stated that the No. 2 entry not only returned air from the longwall face, in addition, some air traveled from the gob into the No. 2 entry. Therefore, he described the No. 2 entry as having a dual ventilation purpose. Tr. 61, 64.

Prior to reaching the point at which he tested for methane, Brunatti stated he was told by BethEnergy's foreman, Michael Baker, that methane was present on the longwall. Tr. 35-36. Baker also told Brunatti that because of the methane, Baker had shut down the longwall and de-energized the longwall face equipment during the previous shift. The equipment had not been restarted. Tr. 52

Following the conversation with Baker, Brunatti traveled to Evaluation Point No. 62 ("EP-62") where he tested for methane in the split return between two regulators. The test revealed a methane content of 1.3 percent. Tr. 38, 52. Brunatti waited for approximately two hours and when the methane level did not drop, he issued Citation No. 3705944. Tr. 38-40, 69. Brunatti stated he understood that an inspector was supposed to wait a "reasonable time" to determine if the methane level would fall below 1.0 percent before citing a violation of section 75.309(a). Tr. 56-57. He testified:

> If I would find the methane or one of [the operator's] foremen [would find it], [the operator] is, according to our program policy manual, to make changes or adjustments in the ventilation system itself at once. If he's doing this, [and] that methane goes down, we don't issue the violation. However, if he makes ventilation changes at once and after a reasonable amount of time, then that ventilation isn't going down, we can issue the violation.

Tr. 71. Brunatti maintained that when he issued Citation No. 3705944, he knew only that Baker had de-energized and shut down the longwall.

Brunatti acknowledged that section 75.309 had been revised and superseded by section 75.323 and he read from MSHA's preamble to the revision that "limiting the rate of production of coal to permit the existing ventilation system to maintain the level of methane below 1.0 percent constitutes a reasonable action to control the rate of methane and is acceptable." Tr. 68. He maintained, however, that stopping longwall production was not the type of "change or adjustment" that had to be made "at once"

under section 75.309. Tr. 65. He noted that the mine liberated high quantities of methane, most of it coming from the longwall gob. Tr. 44, 54. If longwall production was stopped, the gob would not cease to liberate methane. The roof would continue to fracture in the gob and methane emissions would continue. Tr. 68.

Brunatti testified he was told later by the mine foreman that the foreman had instructed Baker to try to induce more air into the return split from the 8-left side, the headgate side, of the longwall. Tr. 39. Brunatti believed there were other things BethEnergy could and should have tried to dilute the methane -- things such as routing additional air from the drill site to the No. 2 entry, opening fully the regulators at EP-62 and redirecting ventilation so as to add to air at the longwall face. Tr. 40-42, 54. He acknowledged, however, that such redirection of the air probably would have involved major ventilation changes and therefore would have required MSHA approval. Tr. 55.

To abate the citation BethEnergy reversed the direction of airflow in the No. 2 entry and what Brunatti and MSHA had regarded as a split return became a bleeder entry. Tr. 51. Methane is not required to be maintained at or below 1.0 percent in a bleeder entry. Tr. 57.

BETHENERGY'S WITNESSES

ROBERT DUBREUCQ

There are two seams from which coal is extracted at Mine No. 33, the B seam and the C seam. The B seam is the lower of the two seams. Tr. 78. BethEnergy has been mining the B seam since 1964 approximately and its underground workings are among the most extensive in the industry. Tr. 81. Robert DuBreucq is superintendent of the B seam.

DuBreucq testified that at approximately 6:30 a.m., on March 19, 1992, at the end of the midnight shift, 1.3 percent methane was discovered by the section foreman in the No. 2 entry off of 7-left. Upon detecting the methane, the section foreman shut off the electric power to the face area and ceased longwall operations. Tr. 82. The midnight shift ended at 7:30 a.m., and Brunatti arrived in the area shortly after the day shift had begun. Brunatti was informed of the shutdown. Id.

According to DuBreucq, in addition to shutting down the longwall, changes were made in the ventilation in that a regulator at EP-62 was opened fully and the air at the drill site was decreased from 12,000 cfm to 9,000 cfm, the minimum allowed by the ventilation plan. Less air at the drill site meant increased air on 7-left. Tr. 84, 119. Finally, all of the bore holes were checked to make certain they were functioning at full

capacity. DuBreucq did not know if these steps to alter the ventilation had been brought to Brunatti's attention. Tr. 84, 111-112, 119.

DuBreucq maintained that BethEnergy did all it could to bring down the level of methane short of making major changes in ventilation, that would have required MSHA's approval. DuBreucq stated that by 2:30 p.m., methane readings were below 1 percent and mining was resumed. Tr. 97.

DuBreucq described the No. 2 entry off 7-left as a bleeder entry which was designed to move methane-air mixtures away from active workings, out of the gob and into the return air course. Dubreucq acknowledged that the No. 2 entry also moved air that had crossed the longwall face, and that because of this MSHA believed the entry was a split return, that is an entry that carried air away from a working section. However, because the air that crossed the longwall face and entered the No. 2 entry also mixed with air coming off the gob through bleeder connectors, the No. 2 entry, in Dubreucq's opinion, became a bleeder entry after the air from the face and gob had mixed. Tr. 87. (DuBreucq stated "[T]he fact is, a split return cannot be influenced by air from another split or air coming out of the bleeder connector." Tr. 87.)

DuBreucq described a bleeder connector as a crosscut connecting the gob to the bleeder entry. He also identified a crosscut immediately adjacent to the tailgate end of the longwall. The crosscut connected the No. 1 entry with the No. 2 entry. The stopping in the crosscut had been holed through so that air passed freely through the crosscut. Tr. 98. ("B" on Exh. R-1.) Several other such crosscuts with holed through stoppings also served as bleeder connectors.

DuBreucq described how air that had crossed the longwall face passed through "B" and into the No. 2 entry. In addition, he described how some of the air at the face did not reach the end of the longwall but rather traveled over the gob and out the other bleeder connectors into the No. 2 entry. Tr. 94. In DuBreucq's view, the function of the No. 2 entry was to carry gas coming off the longwall and gas coming out of the gob back to EP-62 and thence into the main return air course. Tr. 91. Thus, when Brunatti tested for methane at the EP-62, he tested air that had ventilated the longwall gob as well as air that had crossed the longwall face. Tr. 91-92, 96.

Because the gob was not part of the working section, DuBreucq believed that under section 75.309 when a test for methane was made of "a split of air returning from any working section" it should be made before the air mixed with air that had ventilated the gob. Tr. 102; Exh. R-1 at "C".

DuBreucq stated that even though BethEnergy considered the No. 2 entry to be a bleeder entry, the company was well aware MSHA regarded it to be a split return entry -- that is as a split of air returning from a working section -- which is why BethEnergy shut down the longwall when 1.3 percent methane was detected. Tr. 89-90.

To abate the violation BethEnergy revised its ventilation plan. Under the revised plan, air traveled from the tailgate end of the No. 2 entry outby to 7-left, rather than from the tailgate end of 7-left inby to EP-62 and what had been intake air became return air. In addition, some of the air that formerly had come up the tailgate entry from 7-left was diverted to the headgate side from 8-left and crossed the face from the headgate to the tailgate side.

PARTIES' CONTENTIONS

Brunatti found that the split of air returning from the longwall through the No. 2 entry contained 1.3 percent methane when tested at EP-62. The longwall had been shut down on the previous shift, but simply shutting down the longwall and waiting was not sufficient for compliance with the regulation. Other steps could and should have been taken. Sec. Br. 12-14. Because it is undisputed that the No. 2 entry contained air from the longwall face, the air tested at EP-62 was from a split of air returning from a working section. The presence of 1.3 percent methane required BethEnergy to make immediate changes or adjustments in the ventilation other than shutting down the equipment which it did not do. Therefore, the violation existed as charged. Sec. Br. 15.

The Secretary dismisses BethEnergy's argument that the entry was a bleeder entry. The Secretary notes that BethEnergy shut down production because of the 1.3 percent level of methane. If BethEnergy really believed the entry was a bleeder entry it would not have taken this drastic step. It could have resolved the issue easily by negotiating a change in its ventilation plan with MSHA prior to being cited. Sec. Br. 14-15.

BethEnergy argues section 75.309(a) did not apply to the cited entry. It notes that section 75.309-2 specified where the methane content was to be measured for a split of air returning from a working section -- between "the last working place of the working section ventilated by the split and the junction of such split with another air split or the location at which such split is used to ventilate seals or abandoned areas." Thus, according to BethEnergy, the purpose of section 75.309(a) was to regulate the amount of methane coming from the working section before any methane from other areas mingled with it. BethEnergy Br. 7-10. Brunatti did not find methane in excess of 1.0 percent in a location uninfluenced by air from another air current. Rather,

the air he tested already had mixed with the air from the gob. Since the air measured by Brunatti included air from the gob, which was an abandoned area, the air was not covered by the standard. BethEnergy Br. 9-10.

In the alternative, BethEnergy argues it complied with the standard, in that the record supports finding it made the required changes or adjustments in ventilation upon discovery of excessive methane by ceasing mining, de-energizing face equipment, fully opening a regulator at EP-62, increasing the air flowing from the drill site and by determining whether the bore hole fans were operating properly. BethEnergy Br. 11-15.

THE VIOLATION

Because it is agreed the air tested by Brunatti contained more than 1.0 percent methane, the initial question is whether the air at EP-62 -- "the air returning from the No. 2 entry of 7-left & east main" -- was "a split of air returning from any working section." If not, the Secretary has failed to prove the violation and the question of whether BethEnergy undertook "changes or adjustments ... at once in the ventilation in the mine" need not be addressed.

The No. 2 entry was the middle of three entries that made up the tailgate side of the longwall. Intake air was brought up the headgate entries and across the longwall face. In what may have been a somewhat unusual configuration for longwall ventilation, intake air also was brought up the tailgate entries. Intake air from the headgate side crossed the face and at the tailgate end of the longwall mixed with intake air from the tailgate side before passing through the open crosscut into the No. 2 entry. As the testimony of both Brunatti and DuBreucq establish headgate intake air also moved from the face over the gob and traveled to the No. 2 entry through the series of bleeder connectors that had been created as the longwall advanced. (This ventilation system is best depicted on Resp. Exh. 1.) Thus, the air that traveled the No. 2 entry inby the longwall and that passed through EP 62, was a mixture of headgate air that had crossed the longwall face, headgate air that had passed over the gob and traveled through the bleeder connectors into the No. 2 entry, and tailgate air that had traveled up the tailgate side of the longwall.

A "split" is defined as "[a] current of air which has been separated from the main intake to ventilate a district in a mine." U.S. Department of the Interior, A Dictionary of Mining, Mineral, and Related Terms (1968) at 1056. The intake air ventilating the longwall constituted a split, but was the air tested by Brunatti "returning from any working section?"

Regulation 30 C.F.R. 75.2(g)(3) defines "working section" as "all areas of the coal mine from the loading point of the

section to and including the working faces. Certainly, the air tested by Brunatti contained air that had ventilated areas to and including the working face, i.e., the longwall. "The problem is that the air tested also contained air that had ventilated the gob, an area not a part of the "working section." Did this mixed air qualify as "air returning from any working section" within the meaning of section 75.309(a)?

The standard could be read to include such air. Strictly speaking, some of the air had traveled inby the loading point and crossed the working face. In this instance, I am persuaded, however, that construing the standard to exclude such mixed air from the gob is more in tune with its intent.

Under the ventilation standards then in effect permissible methane levels varied with respect to air returning from a working section and air returning from the gob, as the criteria for the approval of ventilation system and methane and dust control plans made clear. 30 C.F.R. 75.316-2(d) set as a minimum level of protection that all such plans insure the methane content in any return aircourse other than an aircourse returning from the split air from a working section not exceed 2.0 percent. Presumably, the reason for the different levels of methane allowed in the different types of returns was the desire to assure miners in working sections of enhanced protection against methane related ignitions and explosions, a protection afforded by a strict 1.0 percent level in air that had ventilated a working section. This made sense given the usual presence of miners in working sections and the number of potential ignition sources therein. Presumably, as well, the level of protection was not as stringent in other types of returns because miners were not usually working or traveling in such returns.

Because under the particular circumstances of this case, the air tested by Brunatti did not indicate the methane content of air returning from the working section, but rather indicated the methane content of air returning from the working section and from a part of the mine other than the working section, I find that it did not come within section 75.309(a).

This is not to say that such mixed air always would have been outside the confines of the standard. There might have been situations in which such air only could have been tested after it mixed with air that had ventilated an area other than a working section, and in such a case, application of the standard might well have been necessary to assure miners in the working section the level of protection afforded by the standard. However, here the return air that had ventilated the working section could have been tested at the tailgate end of the longwall before it mixed with the air that had ventilated the gob. The result of such a test that would have indicated the methane connect of the split of air returning from the No. 1 longwall working section and

would have indicated with certainty whether or not BethEnergy was in compliance with section 75.309(a).

While I conclude, the Secretary has not proven a violation of section 75.309(a), my decision in no way implies a criticism of Brunatti. As I have indicated, the manner of ventilating the longwall apparently was unusual. The practical effect was the creation of a return aircourse that did not clearly come within the then existing regulations. The inspector, acting in good faith, tried to fit the system into the regulations and to do so in the face of an acknowledged disagreement between MSHA and the company as to the nature of the return air. In hindsight, the matter might have been handled better through the ventilation system and methane and dust control plan provision of the regulations -- a provision to which the parties ultimately resorted in carrying out abatement of the alleged violation.

DOCKET NO. PENN 92-512-R

DOCKET NO. PENN 92-652

Citation No.	Date	30 C.F.R.	Proposed Penalty
3705227	4/21/92	75.316	$204

Citation No. 3705227 states in part:

> The air current flow exiting from the approved bleeder evaluation point (Co. No. 62) contained methane readings of 2.6% thereby exceeding the maximum allowable level of 2.0%. This bleeder evaluation point is approved in lieu of traveling the bleeder entry for the active 8 left E-East No. 1 L.W. (026) working section's gob line. Two (2) air samples were collected at the inby end of this bleeder evaluation point w[h]ere 2.6% methane was detected with an air quantity of 47,988 cubic feet per minute passing thru.

P. Exh. 4.

Section 75.316, which restated Section 303(o) of the Act, 30 U.S.C. 863(o), required the operator to adopt and MSHA to approve a ventilation system and methane and dust control plan suitable to the mining system of the coal mine involved. Like section 75.309, section 75.316 also was revised, subsequent to the issuance of the contested citation. 57 F.R. 20868, 20914 (May 15, 1992). The ventilation methane and dust control plan provisions now are found at 30 C.F.R. 75.370.

RELEVANT TESTIMONY

THE SECRETARY'S WITNESSES

NEVIN JOHN DAVIS

Nevin John Davis, an MSHA inspector, testified that on April 21, 1992, he conducted an inspection at the mine in the company of Mike Baker, company longwall general assistant, during which the inspection party proceeded to EP-62. (Although the phrase "BP-62" was used by Davis to refer to the bleeder evaluation point, the location is the same as that previously described as EP-62 and for the sake of consistency, I will use the latter term. Tr. 144.) Davis explained that a bleeder evaluation point is an agreed upon place at which to evaluate air to assure the gob is properly ventilated. Such points are used when gob areas can not be traveled due to roof conditions. Tr. 129. The air at EP-62 was checked weekly by a company examiner. Tr. 137.

Davis took an air reading using a smoke tube in order to determine the direction in which air was traveling and then took a methane reading using a methane detector. Tr. 125-126. Davis found a methane level of 2.6 percent. Davis identified a copy of the ventilation system and methane and dust control plan then in effect for the mine. P. Exh. 7. He noted that on page 4, the plan stated bleeder entries were to be examined at least weekly to determine whether they were functioning as required by 30 C.F.R. 75.316-2(e)(1). Reading section 75.316-2(e) and section 75.316-2(e)(1) together, Davis believed the approved ventilation plan required compliance with all of the requirements of section 75.316-2, including section 75.316-2(h), which stated that "[t]he methane content of the air current in the bleeder split at the point where such split enters any other air split should not exceed 2.0[%]." Tr. 148-150. In Davis' opinion, a methane reading in excess of 2.0 percent could indicate a methane buildup in the longwall gob area. Tr. 130. Davis agreed, however, that there was no language in section 75.316-2(e)(1) that specifically limited methane to 2 percent at an evaluation point. Tr. 140.

Davis took contemporaneous notes to document the conditions he found during the inspection. He also made a sketch to depict the conditions. P. Exh. 5 at 24. Referring to that sketch, Davis explained that EP-62 was located at a crosscut that intersected with a main return entry coming from A left east. The return air from A left east and the return air from the bleeder mixed at the mouth of the crosscut and the main return. Davis referred to this as the "mixing point." Tr. 131.

(The mixing point is indicated by the "squiggly" line on the sketch. See P.Exh. 5 at 24.) Davis determined where the two air currents mixed with the smoke tube. Davis then went into the crosscut to measure the quality of air at the evaluation point. Tr. 132. He calculated an air volume of 47,000 cfm. Tr. 137.

Davis stated that when measuring methane at EP-62 he believed it important to measure inby the mixing point in order to get a "true" reading of the methane content of the air coming off of the gob. If the reading were taken outby, in the area of mixed air, the result would have indicated the methane content of air coming off the gob and methane from the A left east return. Tr. 132. Davis believed the mixed air would have had a lower methane content than the gob air. Therefore, Davis moved 17 feet into the crosscut (i.e., the bleeder connector) to test the air before it mixed. Tr. 137.

JOSEPH D. HADDEN

Joseph D. Hadden is the ventilation supervisor of MSHA District 2, the district in which Mine No. 33 is located. Hadden has been the district ventilation supervisor since 1986. As such, one of his duties is to review the ventilation plans operators submit and to recommend whether or not MSHA approve them. (The plans are submitted to MSHA on an annual basis and are reviewed every six months.) He estimated that since 1986, he has reviewed more than 800 such plans, none of which allowed methane levels at bleeder evaluation points to exceed 2.0 percent, and in fact, he would not recommend for approval a plan containing such a provision. Tr. 155.

Once MSHA approves a plan, an approval letter is sent to the operator. Hadden identified an approval letter for a six month review of the plan for No. 33 Mine. Tr. 157; P. Exh. 8. The letter is dated October 28, 1991, and is from the district manager of District 2 to R. E. Stickler, manager of operations for BethEnergy. The letter states in part, "These plans and all criteria listed under Section 75.316 ... shall be complied with." P. Exh. 8. Until 1993, the sentence was included in all approval letters as a matter of district policy. Tr. 157, 164-165. Hadden maintained the statement conveyed to BethEnergy that no more than 2 percent methane in the air at bleeder evaluation points was allowed because that was what one of the criteria -- section 75.316-2(h) -- required. Tr. 157, 159.

Hadden acknowledged, however, that the plan for Mine No. 33 lacked a specific statement that the methane content of air at a bleeder evaluation point could not exceed 2.0 percent. Tr. 161. He further agreed that when section 75.316-2(h) stated that the methane content of air should not exceed 2.0 percent "at the point where ... [the bleeder] split enters any other split," the "point" had been interpreted to mean the mixing point and

that the bleeder evaluation point was not necessarily always the same as the mixing point. Tr. 161. Nonetheless, he believed the measurement of air at the bleeder evaluation point should have been made "[i]nby the mixing point" and "anywhere in that air course where another air split hasn't entered into that air." Tr. 162.

BETHENERGY'S WITNESSES

ROBERT DUBREUCQ

DuBreucq indicated that the question of the percentage of methane allowed in a bleeder split had been a subject of controversy between the company and MSHA for some time. Tr. 178-179. DuBreucq testified that in his opinion, section 75.316-2(h) was not a part of the approved ventilation plan for the mine. Tr. 175. However, if it applied he believed that Davis had not taken the methane measurement where the criterion required. He explained that when section 75.316-2(h) specified a 2.0 percent limit for the methane content "of the air current in the bleeder split at the point where such split enters any other air split," it implied that the measurement of the air current should be made at the mixing point. Tr. 173, 184. DuBreucq testified he asked Davis what the methane content of the air was at the mixing point and that Davis told him it was "probably below 2 percent." Tr. 175.

JOHN GALLICK

John Gallick, is the former director of safety and environmental health for BethEnergy. During the time he worked for the company he interacted with MSHA personnel regarding the agency's approval of mine ventilation plans. Gallick was asked about MSHA's assertion that the criterion of section 75.316-2(h) had been incorporated into the plan by the statement in the approval letter that the company was to comply with "all criteria listed under [s]ection 75.316." He stated that BethEnergy's position was if MSHA wanted something in a ventilation plan the item should have been specifically stated. In his opinion, incorporation by reference was unwise from both a safety and legal viewpoint. Tr. 204-205.

PARTIES' ARGUMENTS

According to the Secretary, the essence of the alleged violation is that BethEnergy violated its ventilation plan by having in excess of 2.0 percent of methane inby the mixing point where the bleeder entry air current entered a return air split. There were two ways in which the 2.0 percent limit was included in BethEnergy's plan for the mine. First, BethEnergy's plan specifically stated that bleeder entries were to be examined or

evaluated at least weekly to determine, inter alia, whether the bleeders were functioning per section 75.316-2(e)(1). The specific reference to section 75.316-2(e)(1) meant that section 75.316-2(e) was incorporated into the plan as well. Section 75.316-2(e) stated, in part, that bleeder entries or bleeder systems should conform with the requirements of section 75.316-2 and section 75.316-2(h) provided that the methane content of the air current in a bleeder split at the point where it entered any other air split should not exceed 2.0 percent. Sec. Br. 17-18. Because, "BethEnergy's ventilation plan in the section on bleeders specifically incorporate[d] [section] 75.316-2(e)(1)" and "[t]hat section provide[d] ... all bleeders must meet the requirements of [section] 75.316-2 ... the 2[.0]% limit [wa]s incorporated in [BethEnergy's] plan." Id. 18.

Second, the plan approval letter from MSHA to BethEnergy specifically stated that the company must comply with the criteria contained in section 75.316-2. Id. Acknowledging that Commission Administrative Law Judge Avram Weisberger had ruled in BethEnergy Mines, Inc., 12 FMSHRC 975 (May 1990), review vacated, 12 FMSHRC 1751 (September 1990), that the criteria of section 75.316-2 could not be incorporated through a plan approval letter, the Secretary nonetheless argues Judge Weisberger's decision does not operate as res judicata. Judge Weisberger did not rule whether the incorporation of section 75.316-2(e)(1) under the bleeder section of a plan could make applicable the 2.0 percent limit of section 75.316-2(h), and in any event, under UMWA v. Dole, 870 F.2d 662 (D.C.Cir. 1989), incorporation of regulatory criteria in ventilation plans is permissible. Id. 26.

With regard to the location of the methane tests, the Secretary asserts that Davis located a point where the bleeder air would not be affected by the air from the main return and correctly tested for methane there. Sec. Br. 19.

According to BethEnergy, the principal question at issue is whether the Secretary has properly imposed, through the plan approval letter, a limit on the amount of methane at a bleeder evaluation point. This was precisely the issue Judge Weisberger decided in BethEnergy Mines, and the Secretary, who did not seek review of this portion of Judge Weisberger's decision, should be barred from attempting to relitigate it. BethEnergy Br. 19-21.

If the Secretary is not so barred, his attempt to incorporate the criterion of section 75.316-2(h) through stating in the plan approval letter that "all criteria listed under section 75.316 shall be complied with" is the type of all inclusive, across-the-board imposition of requirements rejected by the Commission in Carbon County Coal Company, 7 FMSHRC 1367 (September 1985). At most, the Secretary established that MSHA

sought unilaterally to impose all of the criteria in section 75.316-2 without regard to mine specific conditions -- an improper basis upon which to allege a violation of section 75.316. BethEnergy Br. 22-26.

Moreover, there was no such specific language in the plan limiting the methane content to 2.0 percent or below. The only language addressing bleeders and evaluation points require that BethEnergy determine the bleeders were "free from explosive mixtures of methane," i.e., 5.0 percent to 15 percent.

Attentively, if the criterion of section 75.316-2(h) was properly included by reference in the ventilation plan, the Secretary still did not prove a violation. Davis took the methane reading 17 feet from the mixing point rather than at that point, as required. BethEnergy Br. 26.

THE VIOLATION

To sort through the arguments regarding whether the Secretary has proven a violation, it is helpful to review the basic principles underlying section 75.316. They have been repeatedly explained by the Commission, most recently in Peabody Coal Company, 15 FMSHRC 381 (March 1993). There the Commission, citing decisional law beginning with Zeigler Coal Co. v. Kleppe, 4 IBMA 30, aff'd 536 F. 2d 398 (D.C.Cir. 1976), reiterated that once a plan has been adopted and approved its provisions are enforceable as mandatory safety standards. The Commission emphasized, however, the individual nature of a plan and the limits on MSHA's authority to impose general rules applicable to all mines through the plan approval process. 15 FMSHRC at 385-386. After summarizing the law with respect to the process, the Commission stated:

> [M]ine ventilation ... provisions must address the specific conditions of a particular mine. Such conditions, however, need not be unique to the mine. Indeed, a general plan provisions addressing conditions that exist at a number of mines may be permissible providing those conditions are present at the mine in question.

Peabody Coal Company, 15 FMSHRC at 386.

Keeping these principles in mind, I must determine whether the Secretary has established that the criterion of section 75.316-2(h) -- that the methane content of air in the bleeder split should not exceed 2.0 percent -- applied to

Mine No. 33. I conclude that he has not, for the reasons following:

First, I reject the Secretary's suggestion that section 75.316-2(h) was made applicable through the requirement in the plan that bleeders be examined or evaluated weekly to determine whether they "are functioning per 75.316-2(e)(1)." P. Exh. 7 at 4. The specific reference in the plan was to subsection (1) of section 75.316-2(e) and subsection (1) described how bleeders are supposed to function -- that is, how they are "to continuously move air-methane mixtures from the gob, away from active workings and deliver such mixtures to the mine return aircourses." If the plan was meant to impose a requirement that there be compliance with all of the criteria of section 75.316-2, it would have so stated; or it would have stated that there be compliance with section 75.316-2(e). It would have not couched the compliance requirement in terms of bleeder "function," that is, in terms of section 75-316-2(e)(1).

Second, I reject the Secretary's suggestion that the requirement of section 75.316-2(h) was made applicable through the statement in the approval letter that "[A]ll criteria listed under section 75.316 ... shall be complied with." I am persuaded the Secretary's attempt to impose the requirement through the blanket statement in the approval letter was in this instance unavailing. While the result I reach is consistent with that reached by Judge Weisberger in BethEnergy Mines , 12 FMSHRC at 975, it is not based upon the preclusive nature of his decision, but rather upon the conclusion the Secretary has not established section 75.316-2(h) was made applicable on a mine specific basis.

BethEnergy's res judicata argument is not well taken. The nature of the ventilation plan approval and adoption process is such that I would be unwilling to hold MSHA forever barred at Mine No. 33 from establishing the applicability of a particular criterion, based on a 1990 ALJ decision involving an approval letter written in 1989. The process calls for flexibility and requires both the operator and MSHA to adjust to the changing ventilation dynamics of the ongoing mining situation. Conceivably, circumstances could arise in which MSHA would insist upon a criterion applying to the mine and MSHA would be able to establish that the criterion was specifically suited to the mine for the courts and the Commission have emphasized that if the Secretary insists upon a particular provision in a plan, his insistence must be based upon consideration of the particular conditions of the mine involved.

Here, however, he has not done so. Hadden was specific in describing MSHA's policy in District 2 regarding the criteria in section 75.316-2. "In our approval letters that go out with the plans, it's stated that all of the criteria under 75.316 shall be complied with." Tr. 157. He acknowledged the statement was

included in plan approval letters as a matter of district-wide policy in 1989, 1990 and 1991. He believed the policy only changed in 1993. Further, Hadden had no knowledge of any discussions between BethEnergy and MSHA regarding the 2.0 percent limit. He knew only that MSHA never would have approved a plan that indicated the company was not going to comply with such a limit. Tr. 160.

Missing from Hadden's testimony, as from Davis', was any consideration given by MSHA as to why Mine No. 33 required such a limit at bleeder evaluation points when the plan was approved in April 1991, or when it was reviewed and approved again in October of that year. There was testimony by Gallick that the applicability of the 2.0 percent limit to the mine was the subject of discussion between MSHA and BethEnergy in the spring of 1992, but there was nothing to show that such discussions had any effect upon the plan as approved or that they resulted in a revision of the plan. Tr. 206-211.

Thus, the Secretary did not establish that the provision he sought to enforce was included in the adopted and approved ventilation plan because of characteristics individual to Mine No. 33 or because of characteristics shared by many mines in the district, including Mine No. 33. Compare Peabody Coal Co., 15 FMSHRC at 387. Rather, the record suggests rote inclusion by MSHA of the pertinent catch-all sentence in all plan approval letters. Judge Weisberger cautioned MSHA about relying upon such a practice, yet from all that appears on the face of this record, the agency persisted.

As a result, I conclude a requirement that the methane content of air was limited to 2.0 percent or less at EP-62 was not included in the approved and adopted ventilation plan for Mine No. 33, and I hold the Secretary has failed to establish a violation of section 75.316.

DOCKET NO. PENN 92-514-R

DOCKET NO. PENN 92-652

Citation No.	Date	30 C.F.R.	Proposed Penalty
3705229	4/22/92	75.316	$229

Citation No. 3705229 states in part:

> The air current flow exiting from the approved bleeder evaluation point (Co. No. 57) off the abandoned L.W. gob area between 6 right and 7 right off D-East Mains could not be fully evaluated at this time. This marked bleeder evaluation point as indicated by a

> barricade device (wire mesh screen), date board, and chalk markings, was being directly influenced by a return air current flowing across the face of the wire mesh screen barricade. The air current direction of this return air current was indicated by smoketube clouds at this time.

P. Exh. 11. On May 8, 1992, the citation was modified to state:

> "The air current flow exiting from the approved bleeder evaluation point (Co. No. 57) contained methane readings of 2.5% thereby exceeding the maximum allowable level of 2.0%. This bleeder evaluation point is approved for evaluation of the abandoned L.W. gob area between 6 right and 7 right of D.East Mains." Id. at 2.

RELEVANT TESTIMONY

THE SECRETARY'S WITNESSES

NEVIN DAVIS

Davis testified that on April 22, 1992, during the course of an inspection at the mine, he traveled to a bleeder evaluation point, EP-57, where he evaluated the direction of the air current. Davis found that the air from the main return was flowed directly across a fenced area of EP-57. At the fence the air from the main return was mixed with air coming off the gob and through the evaluation point. Because BethEnergy employees could not proceed inby the fence and into an area where air off the gob was not mixed, Davis believed there was no way they could evaluate properly the return air coming off the gob at the evaluation point. Tr. 248. The return air blowing across the bleeder entry made evaluation of the bleeder air at the evaluation point impossible. In Davis' opinion, this constituted a violation of one of the criteria found at section 75.316-2, which, as with the previous citation, was incorporated by reference into the approved and adopted mine ventilation plan. Tr. 260-264.

Upon further examining the screen Davis noted a bent area and he was able to reach over and inby the bent area and to conduct a valid test of unmixed air which showed methane in excess of 2.0 percent. Tr. 248. (Bottle samples taken to substantiate the readings Davis obtained with his methane detector produced results of 2.1 percent and 2.16 percent methane. Tr. 259.)

Davis initially issued two separate citations. Subsequently, at the insistence of the district manager, Davis combined both allegations into Citation No. 3705229. Tr. 249. Thus, as ultimately modified, Citation No. 3705229, alleged two violations of section 75.316: (1) methane in excess of 2.0 percent at EP-57 and (2) inability to evaluate air coming off the gob at EP-57 due to the screen. See Sec. Br. 23.

BETHENERGY'S WITNESSES

GEORGE MOYER

Moyer, the mine foreman for the B seam for the last two to three years, stated he was familiar with the citation and the facts surrounding it. He also stated that the screen was erected to prevent miners from entering the bleeder and the unsupported, unsafe gob area adjacent thereto. Tr. 267-268. Moyer believed that the bleeder was functioning properly and that the gob was being adequately ventilated. In his opinion, there was no violation. Tr. 271-272.

JOHN GALLICK

Gallick believed the effectiveness of gob ventilation could have been evaluated even if air readings were taken in the mixing point because the air readings would have revealed whether the bleeder system was moving air from the gob. The amount of methane detected, whether 2.0 percent or some other number, was not critical from an overall ventilation standpoint. What was critical was whether the bleeder system was working as it should. Tr. 288-289, 291-292.

PARTIES' ARGUMENTS

Regarding the purported violative presence of over 2.0 percent methane the Secretary restates arguments made concerning the previous alleged violation. With respect to the alleged inability to determine the methane content of air coming off of the gob, the Secretary argues that having to take readings of mixed air vitiated the plan's requirement. Sec. Br. 24.

BethEnergy responds to the first part of the alleged violation by referencing the arguments it made with respect to Citation No. 3705227, to the effect that the presence of methane in excess of 2.0 percent at the evaluation point was not a violation of its ventilation plan.

With respect to the second part of the alleged violation, since the approved plan required the bleeder entries be evaluated to determine "whether bleeder entries are functioning per section 75.316-2(e)(1)" (P. Exh. 7 at 4 emphasis added) and since this meant that they were to be evaluated in order to determine

whether they were moving air-methane mixtures away from the gob and in a controlled fashion were preventing methane inundation of the returns, the Secretary failed to establish the alleged violation because a determination was made that air was moving in the proper direction out of the bleeders. BethEnergy Br. 35.

THE VIOLATION

To the extent, Citation No. 3705229 alleges a violation of the adopted and approved ventilation plan for Mine No. 33 because the methane content of air exiting from EP-57 exceeded 2.0 percent, I hold, for reasons previously stated with respect to Citation No. 3705227, that a violation of the plan has not been established. To the extent, Citation No. 3705229 alleges a violation of the adopted and approved ventilation plan because the screen at EP-57 prevented an evaluation of the methane content of the air at that evaluation point, I also conclude that a violation of the plan has not been established.

The plan stated that "bleeder entries ... are to be examined and date marked, so far as safe, or evaluated at least weekly to determine whether they are free from explosive mixtures of methane ... and whether they are functioning per [section] 75.316-2(e)(1)." P. Exh. 7 at 4. As I have previously noted, in describing how bleeder entries are to function, section 75.316-2(e)(1) required in part that bleeder entries be designed so as to continuously move air-methane mixtures from the gob, away from active workings and deliver such mixtures to the mine return aircourses. I therefore interpret the plan to mean that when a bleeder evaluation point was approved by the district manager, the operator was required to evaluate the bleeder at the evaluation point to determine whether the air at the point was free from explosive mixtures of methane and whether the bleeder was moving methane mixtures from the gob and to the return air courses. In other words, whether the bleeder was "functioning per [section] 75.316-2(e)(1)." The question, therefore, is whether the Secretary has established that on April 22, 1992, this evaluation could not be made.

I accept as fact that an evaluation of mixed air would not have yielded an accurate determination of the methane content of bleeder air. Therefore, to determine whether the bleeder air was free of explosive mixtures of methane, it made sense to test the air at the evaluation point before it mixed with air from the main return. I also find, however, that the screen did not prevent Davis, and presumably BethEnergy personnel as well, from testing for methane before the air mixed.

I credit Davis' testimony that he was able to reach over and inby the bent area of the screen and determine the methane content of the unmixed bleeder air. Tr. 247. I also note his speculation that the screen was bent because others might have

reached over at the same spot. Tr. 248. Since it is clear that the screen did not prevent Davis from determining the methane content of the bleeder air, and since what Davis did, BethEnergy personnel also could have done, I conclude that BethEnergy was in compliance with that portion of its plan requiring it to be able to determine whether air exiting at the evaluation point was free from explosive mixtures of methane.

Davis also testified that by reaching over the screen he was able to determine the air current direction with a smoke cloud. Tr. 245-246. From this I conclude that on April 22, BethEnergy personnel also were able to determine whether the bleeder was moving methane mixtures from the gob to the return in compliance with the approved plan. I especially note the following colloquy between BethEnergy's counsel and Davis:

> Q. And on April 22, was there air moving out of this bleeder connector into the return?
>
> A. Yes, if you went inby the fenced area.
>
> Q. [W]hen you brought the smoke tube to test and you saw that the air evaluation point was influenced by the return, that air nonetheless moved out into the return, did it not, when you tested it with the smoke tube?
>
> A. Yes. When it mixed, yes.
>
> Q. And did you bring a smoke tube at the wire mesh to see what the air was doing there?
>
> A. Yes, I [brought] it inby.
>
> Q. And it was moving out toward the return; was it not?
>
> A. Uh-huh (yes).
>
> Q. So the bleeder was functioning properly, as far as you could determine?
>
> A. Yes, as far as I could determine.

Tr. 256-257. Because the plan did not limit the methane content of the air at the evaluation point to no more than 2.0 percent and because the Secretary failed to prove that on April 22, BethEnergy was unable to determine whether at EP-57 the bleeder entr[y] "[was] free from explosive mixtures of methane ... and whether [it was] functioning per [section] 75.316-2)(e)(1)" I hold the Secretary has not established a violation of section 75.316.

ORDER

DOCKET NO. PENN 92-511-R

The Secretary, having agreed to vacate Citation No. 3705954, is ORDERED to do so. BethEnergy's motion to withdraw its contest of the citation is GRANTED. This proceeding is DISMISSED.

DOCKET NO. PENN 92-512-R

Citation No. 3705227, is VACATED. BethEnergy's contest of the citation is GRANTED. This proceeding is DISMISSED.

DOCKET NO. PENN 92-514-R

Citation No. 3705229, is VACATED. BethEnergy's contest of the citation is GRANTED. This proceeding is DISMISSED.

DOCKET NO. PENN 92-515-R

The parties having stipulated that the outcome of BethEnergy's contest of Citation No. 3705229 will determine the outcome of BethEnergy's contest of Citation No. 3705230 and Citation No. 3705229 having been vacated, Citation No. 3705230 is VACATED. BethEnergy's contest of the citation is GRANTED. This proceeding is DISMISSED.

DOCKET NO. PENN 92-516-R

The Secretary having stated Citation No. 3705231 has been VACATED, BethEnergy's motion to withdraw its contest of the citation is GRANTED. This proceeding is DISMISSED.

DOCKET NO. PENN 92-595

The parties having stipulated that the outcome of BethEnergy's contest of Citation No. 3705227 will determine the outcome of the Secretary's penalty proposal for the violation alleged in Citation No. 3705986 and Citation No. 3705227 having been vacated, Citation No. 3705986 also is VACATED. Citation No. 3705944 having been found not to allege properly a violation of section 75.309(a) likewise is VACATED. This proceeding is DISMISSED.

DOCKET NO. PENN 92-643

The Secretary having agreed to vacate Citation No. 3705954 and the citation being the only one at issue in this case, the Secretary's motion to withdraw its proposal for assessment of civil penalty is GRANTED. This proceeding is DISMISSED.

DOCKET NO. PENN 92-652

Citation No. 3705227 and Citation No. 3705229 having been vacated, this proceeding is DISMISSED.

David F. Barbour
Administrative Law Judge

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