

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

721 19th STREET, SUITE 443  
DENVER, CO 80202-2500  
303-844-3577/FAX 303-844-5268

August 2, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2009-898
Petitioner,	:	A.C. No. 05-04591-184581
	:	
v.	:	
	:	Bowie No. 2 Mine
BOWIE RESOURCES LLC,	:	
Respondent.	:	

**DECISION**

Appearances:           Beau Ellis, Esq, Office of the Solicitor, U.S. Department of Labor  
                                  Denver, Colorado, for Petitioner;  
                                  R. Henry Moore, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania,  
                                  for Respondent.

Before:                    Judge Manning

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Bowie Resources LLC, (“Bowie”) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The parties introduced testimony and documentary evidence at a hearing held in Grand Junction, Colorado, and filed post-hearing briefs.

Bowie operates a large underground coal mine in Delta County, Colorado. The case involves two section 104(a) citations alleging violations of 30 C.F.R. § 75.331(c). The Secretary proposed a penalty of \$1,412 for each citation.

**I. BACKGROUND AND SUMMARY OF THE EVIDENCE**

On March 24, 2009, MSHA Inspector Mark Brewer issued Citation No. 6687950 to Bowie Resources for an alleged violation of section 75.331(c) of the Secretary’s safety standards. The citation states that:

The auxiliary face fan unit # FF-21 is located in B8 HG in the #1 return entry outby of 41XC which is the last open crosscut in this section. When checked for methane passing through this fan by testing at the discharge end of the fan both my hand held multigas detector and the one used by the operator indicated methane over 1.0%. My hand Solaris detector and the one used by the operator indicated methane over 1.0%. My hand Solaris detector with SN

AS-18436 indicated 1.15% CH<sub>4</sub> and the operators hand held Scientific Industrial M-40 indicated 1.1% CH<sub>4</sub>. The operator shut off this fan immediately. If a problem were to occur with the auxiliary fan and with methane passing through it is reasonable likely that a fire or explosion would occur.

(Ex. G-2).

On April 1, 2009, MSHA Inspector Bradley Serazio issued Citation No. 6688041 to Bowie Resources for an alleged violation of section 75.331(c) of the Secretary's safety standards. The citation states that:

While performing a E02 spot inspection in the B8 HG, MMU 005-0, in Entry 1 outby XC 46 fan, FF 21, was found with 1.25% CH<sub>4</sub> passing through it and fan FF 3528<sup>1</sup> had 1.3% CH<sub>4</sub> passing through it. The DT&I board had, 04/01/09 24:00 Terry Davis, section foreman, had inspected the fan area prior to our arrival. This section is bringing in .6% CH<sub>4</sub> in the belt entry and .4% CH<sub>4</sub> in the intake entry and they have had problems when they start cutting coal and going over the 1% CH<sub>4</sub>.

(Ex. G-6).

In both citations, the inspectors concluded that an injury was reasonably likely to occur and if that injury were to occur it would result in lost workdays or restricted duty. Additionally, the inspectors determined that both the violations of 30 C.F.R. § 75.331(c) were S&S and moderate negligence.

Section 75.331(c) provides that “[i]f the air passing through an auxiliary fan or tubing contains 1.0 percent or more methane, power to electrical equipment in the working place and to the auxiliary fan shall be deenergized, and other mechanized equipment in the working place shall be shut off until the methane concentration is reduced to less than 1.0 percent.”

A. Inspector Brewer – Citation No. 6687950

Inspector Brewer testified that during his inspection on March 24, 2009, he measured a methane concentration of 1.15% at the discharge end of auxiliary face fan number FF21. (Tr. 23-24, Ex. G-1, p. 4). At this same time, Bowie's maintenance foreman, Ken Pitt, measured a methane concentration of 1.1%. (Tr. 24-25, Ex. G-1, p. 4). Inspector Brewer took two bottle samples at this location for analysis at MSHA's laboratory where levels of 1.48% and 1.55% methane were found. (Tr. 25, Ex. G-3). Inspector Brewer testified that he designated the citation as S&S based on the potential for the electrical fan to ignite the methane, causing fire and potentially injuring six people in the area by means of burns or smoke inhalation. (Tr. 25-

---

<sup>1</sup> The correct face fan number is 3520 according to the record. (Tr. 63).

26). Inspector Brewer assumed the high methane condition at the cited fan had existed for a short time. (Tr. 43).

Addressing the citation's negligence designation of moderate, Inspector Brewer testified that Bowie should have known that FF21 would exceed 1.0% methane because (1) Bowie's records showed 0.7% methane at the feeder breaker, (2) Bowie's foreman told Inspector Brewer that the face being ventilated by the fan had over 1% methane, and (3) the mine had a history of methane problems in that section. (Tr. 27-29). Because the ventilated face was experiencing over 1.0% methane, and because, upon inspection, he observed no damage to the tubing that might have allowed air leakage and methane dilution, Inspector Brewer concluded that it was likely that methane at the auxiliary fan would be over one percent. (Tr. 29-30). Factors mitigating the negligence designation included that, at the relevant face, (1) the roof bolters had identified that methane problem and had deenergized equipment, and (2) Bowie was hanging curtains at the face to reduce methane concentrations. (Tr. 31.) When Brewer notified Bowie foreman Ken Pitt of violation, Pitt immediately deenergized the fan. (Tr. 31-32).

On cross-examination, Inspector Brewer testified that on the day of his inspection Bowie was not mining coal, that he inspected Face 1, Face 2, and Face 3, and that the only ongoing work was at Face 1. (Tr. 34). At Face 1, Bowie had discovered methane over one percent, was deenergizing a roof bolter, and was hanging curtains when the inspector arrived. (Tr. 35). Inspector Brewer testified that these were proper actions upon discovery of one percent methane. (Tr. 35).

After observing the roof bolter at Face 1, Inspector Brewer went to the auxiliary fan discharge area where he monitored methane on three fans. (Tr. 37). Methane was below one percent at the fans ventilating faces 2 and 3. (Tr. 37). Inspector Brewer believed the presence of one percent methane passing through an auxiliary fan violated section 75.331(c). (Tr. 40). He also understood MSHA's Program Policy Manual ("PPM") to state that a violation of section 75.323 exists only when an operator fails to act upon discovery of excess methane. (Tr. 40).

Inspector Brewer testified that Bowie used three fans to provide face ventilation and that fans usually provide much better ventilation than do curtains. (Tr. 41). After Inspector Brewer issued the citation, methane concentrations at Face 1 and Face 2 were 1.3% and 1.05%, respectively. (Tr. 43-45, Ex. G-1, p. 3, 5). At the time of these measurements, Bowie was hanging curtains so methane levels would be expected to decrease. (Tr. 45). The fans ventilating Face 2 and Face 3, having methane under one percent, were not turned off after the citation was issued. (Tr. 37, 44). Inspector Brewer testified that should methane levels increase from 1.3% to 2% at the face, the detected level should be near 1.3% at the fan, a concentration considerably below methane's explosive level. (Tr. 45).

Inspector Brewer inspected the permissibility of the cited fan and found no problems. (Tr. 46). On redirect examination, he testified that permissible equipment, including fans, can sustain damage in the harsh conditions of underground mining, making the equipment nonpermissible. (Tr. 49-50).

Inspector Brewer testified that it was reasonable to believe the methane concentration at the face would be the same as that concentration pulled through the tubing and exhausted out of the fan. (Tr. 49). He testified that he had inspected the fan tubing and saw no areas where air leakage had occurred. (Tr. 49).

Inspector Brewer testified that section 75.331(c) does not require that methane exceed one percent for any length of time; rather, a violation exists the moment it exceeds this level. (Tr. 49). He knew of no interpretation of this section requiring operator knowledge of methane exceeding one percent. (Tr. 51). On re-cross examination, Inspector Brewer testified that a continuous miner would be more likely to be damaged than a fan and that he has observed equipment damaged to an extent rendering it nonpermissible. (Tr. 53-54).

B. Inspector Serazio – Citation No. 6688041

Inspector Serazio testified that on April 1, 2009, at 1:40 a.m., he inspected the B8 Head Gate at the Bowie mine, measured a methane concentration over one percent at the auxiliary fan discharge, and issued a citation for a violation of section 75.331(c). (Tr. 62). Inspector Serazio stated that it was his understanding that a violation occurs whenever one percent or more methane passes through an energized fan. (Tr. 62-63).

At fan FF 3520, Serazio measured 1.3% methane and collected a bottle sample (Tr. 63, Ex. G-5, p. 2-3). MSHA's lab detected 1.6% methane in this sample, substantiating the violation. (Tr. 64, Ex. G-7). At fan FF 21, Serazio measured 1.25% methane and collected a bottle sample in which MSHA laboratory analysis found 0.95% methane, a level less than the field reading. (Tr. 64, 76, Ex. G-5, p. 2-3, Ex. G-7).

Serazio designated the violation S&S, reasoning that the presence of fuel, oxygen and a heat source could result in a fire, potentially spreading to the face, and injuring workers to an extent resulting in lost workdays or greater harm through burns and smoke inhalation. (Tr. 65-66). Serazio determined that Bowie's negligence was moderate based on the mine's history of methane in the area as shown in the mine's books and on the citation issued two weeks earlier by Inspector Brewer. (Tr. 66). As a mitigating factor, Serazio considered that the continuous miner operator told him that his practice was to stop cutting activities and back out the miner in order to maintain methane below one percent. (Tr. 66). On cross-examination, Serazio testified that he had not seen any MSHA policy document or interpretation on section 75.331.

Serazio testified that foreman Terry Davis had found acceptable methane levels at the fans at 12:09 a.m., on the same day he issued the citation at 1:40 a.m. After Serazio's inspection of the fans, he went to the areas ventilated by these fans and observed that the continuous miner had ceased mining, had just exited the cut, and was still warm. (Tr. 71-72). Serazio spoke with a continuous miner operator who told him he backed the miner away from the face to allow the methane to decrease before reentering to continue operations. (Tr. 74). After the fans were shut down, Serazio measured methane at 1.2%, 1.7%, 1.4% in the areas being drawn into the auxiliary fans, respectively designated as Entry 2-Face 2, Crosscut 47 Entry, and Entry 3-Crosscut 47. (Tr. 72, Ex. G-5, p. 3).

In addition to fans FF3520 and FF21, fan FF17 was drawing air from the same area as the cited fan. Serazio measured 0.85% methane at the discharge of FF17 at the same time when methane at FF3520 and FF21 was over one percent. (Tr. 73, Ex. G-5, p. 2).

Serazio testified that Bowie's records showed instances where mining operations were shut down because of methane levels at either the face or at the fan; and the records showed Bowie would shut down the fans when it knew methane exceeded one percent. (Tr. 73). Serazio testified that, if the fans having over one percent methane had continued to run, the methane levels would probably not have increased. (Tr. 75).

Serazio did not inspect the fans for permissibility and agreed that, as far as he knew, they were in good condition. (Tr. 76). On redirect examination, Serazio testified that permissible auxiliary fans can sustain damage that could render the fan a potential ignition source and that this damage could happen suddenly. (Tr. 78-79).

### C. Bowie Maintenance Manager Ken Lyman Pitt – Citation No. 6687950

Bowie employee Ken Pitt testified that he accompanied Inspector Brewer during his inspection on March 24, 2009 at the B8 Head Gate section. (Tr. 83). Pitt testified that a face fan will occasionally be used to ventilate more than one face and that during this inspection FF21 was ventilating Number 1 and Number 2 faces, causing the air from both faces to mix in the fan intake tubing. (Tr. 83-84). Pitt testified that when more than one percent methane is detected at a fan, he will shut down the fan, in accordance with Bowie's practices and procedures. (Tr. 84).

In order to prevent debris from being drawn into the fan where it can cause damage, a strainer and screen are located in front of the fan that catch the majority of debris. (Tr. 85). Debris smaller than one inch can pass through the screens. (Tr. 90). Pitt testified that typical fan damage includes cable damage, damage to the fan's structure and skids, corrosion on the fan's aluminum housing, and sticking buttons caused by humidity. (Tr. 85-86). During this inspection, Pitt observed no damage to the fan. (Tr. 86). He testified that roof bolters and continuous miners are more likely than fans to be damaged because that equipment is continually moving and vibrating and is more frequently hit by falling rocks. (Tr. 86).

Pitt testified that the fan inlet tubing is constructed of ten-foot sections connected with bell-shaped ends that slide onto the next section. (Tr. 88). Sections are joined to a length of 200 feet. (Tr. 89). Some air leaks into the tubing joints that they try to minimize by sealing the connections with tube wraps. (Tr. 88). The tubing inlet is supposed to be located within twenty feet outby the face. (Tr. 89). The face fan is usually located outby the last open crosscut in the return entry. (Tr. 89).

On cross-examination, Pitt testified that he has seen permissible equipment degraded to an extent rendering it nonpermissible, and that this is the reason for weekly permissibility checks. (Tr. 90). Pitt testified that Bowie's March 24, 2009, preshift documentation states section foreman Miles Roop checked the fans, as indicated by Roop putting the date and his initials on the document. (Tr. 91). Pitt confirmed that he measured 1.1% methane at fan FF21 during the MSHA inspection. *Id.*

On redirect examination, Pitt testified that weekly permissibility checks are conducted using a feeler gauge, a thin blade device used to measure the gaps between enclosures down to a thousandth of an inch. (Tr. 92). Pitt has seen citations for gaps being too large. (Tr. 92). Using a feeler gauge to assess permissibility is necessary because differences in the allowable gap of one or two thousandths of an inch are not discernable with the naked eye. (Tr. 92). Other permissibility conditions may also not be readily detected absent the weekly exam. (Tr. 92-93).

D. Bowie Shift Supervisor Rich B. Husted – Citation No. 6688041

Bowie employee Rich Husted testified that he accompanied Inspector Serazio during his inspection on April 1, 2009, and that he measured methane exceeding one percent at two fans. (Tr. 96). Husted testified that he would have shut down the fans upon detecting over one percent methane whether or not the inspector was present. (Tr. 96). He testified that methane levels were below one percent when Bowie foreman Terry Davis did a shift inspection as indicated by Davis's initials at the fan. (Tr. 96). Bowie's procedure upon detecting over one percent methane is to shut off the fans and to ventilate the faces using curtains. (Tr. 96-97).

A section foreman's responsibilities include maintaining the section, watering the roads for dust suppression, taking gas readings at the fans and at the faces, and examining the section continuously. (Tr. 98). When the fans are shut down, reducing ventilation at the face, the methane concentration at the face increases. (Tr. 99).

Husted testified that return air methane readings are taken near the fan discharge and that a different methane level is possible immediately next to the fan discharge. (Tr. 104). During the March 31, 2009 preshift examination, the methane level at the feeder was 0.7% (Tr. 104). The feeder air helps ventilate the faces and methane levels can be increased by additional methane from mining operations. (Tr. 104-105).

## **II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW**

A. Interpretation of 75.331(c)

The Secretary of Labor ("the Secretary") argues that 75.331(c) unambiguously states that a violation exists whenever one percent or more methane passes through an energized auxiliary fan; that is, the regulation contains no requirement that the operator knew or should have known of the condition. (S. Br. 13). Alternatively, if 75.331(c) is ambiguous, the Secretary argues that her interpretation is entitled to deference. (S. Br. 17-19).

To support the regulation's clarity, the Secretary argues that MSHA did not revise the language on auxiliary fans to address operator knowledge during either its 1992 or 1996 revisions. (S. Br. 14). As part of the 1996 revisions, MSHA did clarify in the Federal Register preamble that operator knowledge is part of 75.323 and incorporated this clarification into

MSHA's PPM.<sup>2</sup> (S. Br. 15). MSHA did not similarly clarify 75.331. 61 Fed. Reg. 9764, 9777-9778 (March 11, 1996). (S. Br. 15-16).

Bowie argues 75.331(c) means that a violation occurs only if an operator fails to deenergize a fan when he is aware that methane concentrations exceed one percent. (Bowie Br. 5-6). Bowie maintains that, because the language in sections 75.323 and 75.331(c) is similar, the safety standards should be interpreted in a similar manner. (Bowie Br. 6).

Both parties cite *Amax Coal Company* as illustrative of how section 75.323 and the PPM bear on other similar safety standards. *Amax Coal Co.*, 19 FMSHRC 470, 474-75 (March 1997). (Bowie Br. 8, S. Br. 15, note 4). In *Amax Coal*, the Commission held that the language of 77.201 was not analogous to 75.323. *Id.* at 475.

Next, the Secretary argues that she has never interpreted 75.331(c) to require operator knowledge, as evidenced by the fact that MSHA has not issued interpretive guidance that contains this requirement. (S. Br. 14-15). The Secretary argues that finding a knowledge requirement in 75.331(c) would provide an incentive for operators to reduce or cease monitoring for methane at auxiliary fans. (S. Br. 17). Alternatively, she maintains that the Commission must defer to her interpretation of 75.331 as set forth for the first time in this case. (S. Br. p. 19.). Because no case law or regulatory history has interpreted 75.331, Bowie argues that comparison to the language of 75.323 should guide the decision. (Bowie Br. 8).

Neither the Commission nor any administrative law judges have previously had occasion to construe section 75.331(c). Accordingly, the "language of a regulation . . . is the starting point for its interpretation." *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See id.*; *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). It is only when the meaning is ambiguous that deference to the Secretary's interpretation is accorded. *See Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *Exportal Ltda. v. United States*, 902 F.2d 45, 50

---

<sup>2</sup> MSHA Program Policy Manual, Vol. V, states:

75.323 Actions for Excessive Methane. Section 75.323 specifies actions to be performed for excessive methane. Neither the Act nor the regulations provide that a mere presence of methane gas in excess of 1.0 percent is *per se* a violation. A violation would exist if a mine operator, upon becoming aware of the presence of excessive methane, fails to perform the actions specified in Section 75.323. The presence of methane gas in excess of 1.0 percent is not a *per se* violation, rather, that the violation exists if the operator fails to take corrective action after becoming aware of the excessive methane.

(D.C. Cir. 1990) (“Deference . . . is not in order if the rule’s meaning is clear on its face.” (quoting *Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984)).

As pertinent here, section 75.331(c) provides that if the air passing through an auxiliary fan “contains 1.0 percent or more methane, power to . . . the auxiliary fan shall be deenergized . . . until the methane is reduced to less than 1.0 percent.” The action required by the mine operator is clear; it must switch off the fan when the air passing through an auxiliary fan contains 1.0 percent or more methane. The Secretary argues that an operator commits a *per se* violation if an MSHA inspector detects 1.0 percent methane at the fan. I conclude that nothing in the safety standard provides that the mere presence of 1.0 percent or more methane is a *per se* violation. In contrast, section 77.201, at issue in *Amax Coal*, provides that the “methane content in the air of any structure . . . shall be less than 1.0 volume per centum.” (emphasis added). That safety standard requires an operator to maintain the level of methane in structures at less than 1.0 percent at all times. Section 75.331(c), on the other hand, recognizes that the methane level of the air exiting an auxiliary will exceed the 1.0 percent limit from time to time and it requires the operator to shut the fan off in such circumstances.

In *Amax Coal*, the administrative law judge vacated the citation at issue. 17 FMSHRC 48 (Jan. 1995) (ALJ). He stated that “any interpretation of 77.201 that makes a *per se* violation of a methane concentration of one percent or more to be an unreasonable one, to which I need not defer.” *Id.* at 51. He relied, in part, on the Secretary’s interpretation of section 75.323 in reaching this conclusion. The Commission reversed the judge’s decision and stated that 77.201 “stands in marked contrast to the regulation[] involving methane in underground . . . coal mines (30 C.F.R. § 75.323).” 19 FMSHRC 474. The Commission went on to hold that section 75.323 specifies “the corrective actions that are required when methane accumulations exceed 1 percent but do[es] not contain the same express prohibition regarding methane accumulations over 1 percent.” *Id.* at 474-75. In the present case, the language of section 75.331(c) likewise sets forth “the corrective actions that are required” without any express prohibition. I find that the language of section of 75.331(c) is clear on its face and must be interpreted in the same manner as the Secretary interprets section 75.323. My conclusion is consistent with the Commission’s decision in *Amax Coal*. Consequently, the mere presence of 1.0 percent methane or more in the air passing through an auxiliary fan is insufficient to establish a violation of the safety standard.<sup>3</sup>

---

<sup>3</sup> The Secretary argues that the Commission owes deference to her interpretation of section 75.331(c) even though it is being set forth for the first time in this litigation. (Sec’y Br. 19). There are at least two preconditions that must be met in order to apply deference to an agency’s position first expressed in litigation. First, the language of the regulation in question must be ambiguous, lest a substantively new rule will be promulgated under the guise of interpretation. Second, the agency’s reading of its regulation must be fairly supported by the text of the regulation itself, so as to ensure that adequate notice of that interpretation is contained within the rule itself. *See Auer v. Robbins*, 519 U.S. 452, 46-623 (1997); *Christensen v. Harris County*, 529 U.S. 576, 588 (2000); and *Drake v. F.A.A.*, 291 F.3d 59, 67-68 (D.C. Cir. 2002). I find that the Secretary has not met either of these preconditions. The language of the safety standard is not ambiguous and, in addition, the text of the standard would not provide mine operators with adequate notice of the interpretation she posits for the first time in this case.



B. Constructive knowledge that methane concentrations exceeded 1.0 percent

If 75.331(c) does require operator knowledge, the Secretary argues that Bowie should have known that one percent or more methane was present at the auxiliary fans because of the known methane concentrations in the air being pulled into the fan. (S. Br. 19-20). For Citation No. 6687950, methane was 1.3% at the face near the fan intake and was 0.7% at the feeder breaker that supplied some air to the fan. (S. Br. 19). For Citation No. 6688041, methane at the face near the tubing intake was also greater than 1.0%. (S. Br. 19-20).

Bowie argues that a methane concentration exceeding one percent at the face will not necessarily correlate to this concentration at the fan. (Bowie Br. 11). Bowie argues that possible air leakage into the tubing joints will dilute the methane concentration. (Bowie Br. 11). For example, for Citation No. 6688041 Bowie points out that, though three fans were ventilating areas having methane over one percent, one of those fans had an outlet concentration below one percent. (Bowie Br. 11).

I conclude that constructive knowledge is “knowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person.” *Black’s Law Dictionary* 284 (8th ed. 2004). The issue is whether Bowie management failed to use reasonable care by not deenergizing the fan before the MSHA inspectors took their methane readings. Was management put on notice by the conditions in the section that it should immediately check the methane levels at the fans?

With respect to Citation No. 6687950, the section was not producing coal and the roof bolting machine had just shut down because the methane monitor on the bolter registered one percent methane. (Tr. 31, 34-35). The inspector did not dispute that the methane level at the fan had been over one percent for a short period of time. (Tr. 43, Ex. G-1, p. 4). The record shows that, during the preshift examination, methane levels were measured at 0.7 or 0.8 percent at the three faces and at 0.7 at the feeder breaker. (Tr. 27; Ex. R-1, p. 1). Inspector Brewer testified that, because it would not take “a lot of activities” in the face area to be over one percent methane, the operator should have known that there could be over one percent methane at the fan. (Tr. 28). Although this statement has some superficial logic, the record makes clear that elevated methane levels at the face or at the feeder breaker do not necessarily translate to elevated levels at the fan. The air from the feeder breaker in the belt entry was diluted by intake air. (Tr. 105). The air traveling through the tubing to the fan is diluted through leakage. (Tr. 41, 88-89). I find that the evidence establishes that the high volume of air that is traveling through the fan will generally contain a lower percentage of methane than the air as measured at the face. (Tr. 100). Although the tubing directing air to a face fan starts near the face, the fan itself is typically located outby the last open crosscut in the return. (Tr. 89). There is no evidence that the section foreman was aware that the roof bolting machine had shut down due to high methane levels. (Tr. 36). I find that the Secretary did not establish that mine management failed to exercise reasonable care by not measuring for methane at the fan before the inspector arrived. It would be prudent for a mine operator to immediately measure the methane at the fan whenever methane over one percent is detected at the face but, in this instance, it appears that the overage occurred right before the inspector arrived at the face.

With respect to Citation No. 6688041, Terry Davis, a section foreman, measured the methane levels at the subject fans about 70 minutes prior to Inspector Serazio's inspection and the methane levels at these fans had been less than one percent. (Tr. 70, 96). The evidence demonstrates that the continuous mining crew backed the mining machine away from the face when the methane level at the face approached one percent. (Tr. 74). As with the previous citation, excessive methane developed at the face just prior to the arrival of the inspection party. (Tr. 71-72). I find that the Secretary did not establish that Bowie failed to exercise reasonable care.

In each instance, I find that the Secretary did not establish that Bowie had constructive knowledge that excessive methane was present at the cited fans or that Bowie failed to exercise reasonable care by not measuring for methane at these fans prior to the time that the MSHA inspectors took their methane readings. It is not disputed that employees of Bowie regularly test for methane at auxiliary face fans. (Tr. 97). Excessive methane levels at the face near a fan intake may be a sufficient basis for constructive knowledge and a violation of 75.331(c) should the operator fail to either monitor fan methane levels or shut down the auxiliary fans, given sufficient time. In this case, the record suggests that employees at the face only became aware of the excessive face methane levels at or near the time of MSHA's inspections.

### III. SETTLED CITATIONS

Prior to the hearing, the parties settled the remaining citations in this docket. The parties agreed to reduce the penalty for Citation No. 6687699 from \$687 to \$584. Bowie Resources agreed to pay the Secretary's proposed penalty of \$1,445 for Citation Nos. 3584462 and 3584463. I have considered the representations and documentation submitted and I conclude that the proffered settlement of these citations is appropriate under the criteria set forth in section 110(i) of the Mine Act.

### IV. ORDER

For the reasons set forth above, Citation Nos. 6687950 and 6688041 are **VACATED**. Bowie Resources LLC is **ORDERED TO PAY** the Secretary of Labor the sum of \$2,029 within 30 days of the date of this decision.<sup>4</sup>

Richard W. Manning  
Administrative Law Judge

---

<sup>4</sup> Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390

Distribution:

Beau Ellis, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 800,  
Denver, CO 80202 (Certified Mail)

R. Henry Moore, Esq., Jackson Kelly, 3 Gateway Center, Suite 1340, 401 Liberty Ave.,  
Pittsburgh, PA 15222 (Certified mail)

RWM