FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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Washington, D.C. 20001

May 25, 2004

SAN JUAN COAL COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. CENT 2004-35-R
	:	Citation No. 7605607; 11/10/2003
v.	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent	:	San Juan South Mine
	:	Mine ID No. 29-02170

DECISION

Appearances: Timothy M. Biddle, Esq., Crowell & Moring, LLP, Washington, D.C., on behalf of Contestant;
Timothy S. Williams, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, on behalf of Respondent.

Before: Judge Zielinski

This case is before me on a Notice of Contest filed by the San Juan Coal Company ("San Juan") pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 815. The notice challenges the validity of a citation issued by the Secretary of Labor's Mine Safety and Health Administration ("MSHA") on November 10, 2003. Citation No. 7605607 alleges a violation of air quality standards in an area adjacent to the last shield on the tailgate side of San Juan's longwall panel. San Juan contends that the site of the alleged violation is not an area where persons work or travel, rendering the regulation inapplicable. A hearing was held in Farmington, New Mexico, and the parties submitted briefs following receipt of the transcript. For the reasons set forth below, I find that San Juan did not commit the alleged violation and vacate the citation.

Findings of Fact – Conclusions of Law

San Juan operates the San Juan South Mine, an underground coal mine located near Farmington, New Mexico, where longwall equipment is used to extract coal from a seam that is 10-12 feet thick. A double-drum shearing machine travels back and forth across the 1,000 foot coal face, depositing coal onto a chain conveyor, which moves it to the headgate side of the longwall where it is loaded out by belt conveyor. Temporary roof support is provided by 178 shields, which are advanced by a computerized system as the shearer advances the face. Each

shield has a base, with "toes" that extend toward the face. Two hydraulic cylinders apply pressure between the base and the upper portion of the shield that extends out over the shield toes and longwall equipment, pressing against the mine roof. Miners travel along the face by walking on the toes of the shields, in the space between the shearer/conveyor equipment and the shields' hydraulic cylinders.

There are three entries to the longwall face. Two are located at the headgate. They provide both the primary and alternate escapeways, a path for intake air to ventilate the face, and space for transport of miners and equipment, as well as conveyor belts to remove coal from the mine. The entry at the tailgate provides a path for return air. It also must be maintained as an escapeway, except in limited circumstances.[1] The entries were driven with continuous mining machines and their roofs are supported by bolts, wire mesh and cable trusses.

As with any longwall mining operation, the roof is supported only temporarily by the shields. As the longwall shearing machine and shields advance, the unsupported roof is allowed to fall into the area behind the shields, the "gob."[2] The roof generally falls as the support provided by the shields is removed. However, roof falls in the entries, where the roof is supported by bolts, are more sporadic. Tr. 368-69. In the tailgate entry, for example, the roof may not fall until the face has advanced as much as 20 or 30, or even 100 feet. Tr. 229. More importantly, the falling roof can pull down the roof adjacent to the shields. San Juan has experienced tailgate roof falls three feet outby the shield legs, and, on one occasion, as far as the face. Tr. 269-71. In order to prevent rocks and other debris from entering the working area under the shields, a two-inch thick steel plate is mounted on the outside of the last shield. That plate, which will be referred to as the gob separation plate, is approximately three feet high, and is attached to the shield by a hinge, which allows it to move as the shield advances. The longwall drive equipment housing also has heavy plate on the tailgate side.

San Juan's mine liberates large amounts of methane and is subject to inspections by MSHA every five days, pursuant to section 103(i) of the Act. In addition, the coal in San Juan's mine has characteristics that make it susceptible to spontaneous combustion. To address these problems, San Juan employs a bleederless ventilation system, does not allow wood products in the mine, and has an exacting cleaning program. The ventilation system is designed to achieve substantial air flow across the face and to reduce the oxygen content of the atmosphere in the gob to below five percent as soon as possible. Under the mine's approved ventilation plan, 65,000 to 100,000 cubic feet of air per minute flows in the headgate entry, across the face and out the

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[1] If the tailgate travelway becomes unavailable, an operator may resume mining, with the permission of MSHA, by implementing its tailgate blockage plan. *See* 30 C.F.R. §§ 75.215.(b), 75.222(g), 75.384(c).

[2] "Gob" is "[t]he space left by the extraction of a coal seam into which . . . the immediate roof caves." Am. Geological Institute, *Dictionary of Mining, Mineral and Related Terms*, 239 (2d ed. 1997).

tailgate entry.[3] In order to reduce the concentration of oxygen in the gob, the gob atmosphere is ventilated to the surface. Six-inch diameter boreholes are drilled from the surface on 500-foot centers down to close proximity to the top of the coal seam.[4] As the longwall face advances and the roof of the gob falls, the boreholes are opened to the surface. Pumps at the top of the boreholes draw air out of the gob. That air is replaced by nitrogen, which is injected into the gob through seals separating it from an adjoining entry.

The large quantity of air ventilating the face of the longwall tends to cause the low-oxygen gob atmosphere to remain in the gob, and quickly dilutes and renders harmless any gob atmosphere that infiltrates through the spaces between the shields. However, San Juan has had difficulty maintaining air quality in an area in the tailgate entry adjacent to the last shield. As the air current ventilating the face sweeps around the corner of the face and out the tailgate entry it has a tendency to draw low-oxygen atmosphere out of the gob, especially when outside atmospheric pressure declines. The oxygen content of the air in that area, where gob atmosphere mixes with ventilation air, can drop below 19.5%, the concentration required in areas where persons work or travel. 30 C.F.R. § 75.321(a).

The area where low concentrations of oxygen have been found is depicted on exhibit C-4 as a rectangle labeled "AA," and has been referred to throughout this proceeding as the "Affected Area."[5] It extends across the 18-20 foot width of the tailgate entry from the last shield to the rib. The inby border, a line starting at the shield legs drawn perpendicular to and across the entry, represents MSHA's view of the extreme inby active workings of the section. The outby border is represented by a line approximately 12 feet from the inby border. The most problematic portion of the Affected Area is in the lower right corner and along the rib. Tr. 343.

Events of November 10 - 16, 2003

On November 10, 2003, William E. Vetter, an experienced MSHA inspector, conducted a spot inspection of the mine pursuant to section 103(i) of the Act. He reviewed the mine's preshift inspection books and noted that low concentrations of oxygen, 18.3-19.4%, had been reported in the tailgate area of the longwall several times from November 6 through 10. The reports described the corrective action taken, i.e., the area had been "dangered off." He spoke to David Hales, San Juan's safety manager, and Scott Langly, the mine manager, and was told that San Juan's attorney had advised that adverse observations should be recorded, along with the

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[3] 30 C.F.R. § 75.325(c)(1) requires that a minimum quantity of 30,000 cubic feet of air per minute reach the working face of a longwall, unless a different amount is specified in the mine's approved ventilation plan.

[4] The borehole spacing exceeds the current 1,000 foot requirement in San Juan's approved ventilation plan.

[5] A replica of exhibit C-4 is attached as an Appendix to this Decision.

corrective action, and that the tailgate blockage plan should not be implemented because the tailgate travelway was not, in fact, blocked.

Vetter knew that there had been repeated problems maintaining oxygen levels in the area and had been "trying to work with" San Juan, employing a flexible enforcement policy. Tr. 122-23. If he found low oxygen in the area, he did not issue a citation if San Juan had detected the problem and was working to correct it.[6] Tr. 120. On November 10, he was concerned that low oxygen levels had been found periodically over four days and that the only corrective action that had been taken was that the area had been dangered off. He believed that it was permissible to danger off the area temporarily, but not as a permanent fix, and it "look[ed] like it [was] going to be permanent." Tr. 124-25. He called MSHA supervisory personnel in Denver, Colorado, and was advised to travel underground and enforce the regulation, which he interpreted to mean that he was to inspect the Affected Area and issue a citation if he found low oxygen. He traveled to the tailgate area of the longwall and observed a "danger" sign posted so as to bar persons from passing through an opening, or "notch," in the gob separation plate adjacent to the shield's toes. He advised San Juan personnel that it was not permissible to danger off the area in lieu of taking other actions to correct the problem. The sign was taken down, and he entered the Affected Area, holding a multi-function atmospheric monitoring system ("AMS") meter in front of him. As he proceeded, he observed meter readings showing low levels of oxygen, as well as elevated levels of methane. He took two bottle samples of air and issued Citation No. 7605607, alleging a violation of 30 C.F.R. § 75.321(a)(1), which requires that air in "areas where persons work or travel" contain a minimum of 19.5% oxygen. Ex. S-3. Vetter's observations were recorded in the "condition or practice" section of the form as follows:

> The air quality in an area of the working section (MMU-010), LW102 tailgate, was not being maintained to contain at least 19.5% oxygen. The oxygen level ranged from 18.8% to 19.3% at a location 8 feet from the coal rib, 2 feet from the roof, and aligned with the tailgate shield walkway and at a location 3 feet from the rib and 3.5 feet from the roof the oxygen level ranged from 16.5% to 17.3%. This area of inadequate air quality extended along the rib from the extreme inby active workings to a point approximately 12 feet outby. Bottle samples E0313 and E0341 were collected from the aforementioned locations.

Vetter determined that the violation was unlikely to result in an injury, and that it was not significant and substantial. He assessed the operator's negligence as moderate, because the area had been dangered off. He specified that the condition was to be corrected by November 12, 2003, at 1400 hours. That deadline was subsequently extended and the condition was abated on November 16, 2003, after San Juan implemented an amendment to its ventilation plan establishing a diffusion zone further outby in the tailgate travelway. Implementation of the plan

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[6] San Juan had many discussions with MSHA about the problem, and the enforcement policy followed by Vetter was consistent with that described by Donald A. Gibson, an MSHA field office supervisor. Tr. 62-63.

amendment did not permanently remedy the problem, although it "appeared to have helped for a period of time." Tr. 69. The company eventually stopped using the diffusion zone, and MSHA subsequently rescinded its approval of the amendment, because it resulted in other hazards that could not be effectively addressed.[7] Tr. 80-81.

The Dispute

30 C.F.R. § 75.321, provides, in pertinent part:

§ 75.321 Air Quality

(a)(1) The air in *areas where persons work or travel*, except as specified in paragraph (a)(2) of this section, shall contain at least 19.5 percent oxygen and not more than 0.5 percent carbon dioxide, and the volume and velocity of the air current in these areas shall be sufficient to dilute, render harmless, and carry away flammable, explosive, noxious, and harmful gases, dusts, smoke and fumes (emphasis added).

The issue to be decided is whether section 75.321(a)(1) applies at the locations where low oxygen levels were found. In other words, on November 10, 2003, was the Affected Area an area where persons work or travel, within the meaning of the regulation.[8] While the parties advance strongly opposing views on that issue, they agree that the regulatory language is unambiguous, and that application of the plain meaning of the phrase "work or travel" dictates an outcome in their favor.[9]

The rules governing statutory and regulatory interpretation are well-settled, though their application may prove difficult. As the Commission recently explained in *Cannelton Industries, Inc.*, 26 FMSHRC 146, 150-51 (Mar. 2004):

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[7] A number of other measures to address the problem have been considered. However, they, too, pose additional potential problems. For example, increasing the amount of air drawn out through the boreholes would reduce the likelihood of gob air infiltrating the Affected Area. However, it would also draw oxygen bearing air into the gob, increasing the risk of spontaneous combustion.

[8] The parties agree that the exception contained in paragraph (a)(2), which deals with bleeder entries and worked out areas, is not applicable to this case.

[9] The Secretary argues, in the alternative, that if the regulatory language is found to be ambiguous, that her interpretation is entitled to deference. San Juan counters that the Secretary's interpretation is unreasonable and inconsistent with the legislative and regulatory scheme.

> 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). . . .
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> "In determining the meaning of regulations, the Commission . . . utilizes 'traditional tools of . . . construction,' including an examination of the text and the intent of the drafters." *Amax Coal Co.*, 19 FMSHRC 470, 474 (Mar. 1997) (quoting *Local Union* [*1261, UMWA v. FMSHRC*, 917 F.2d 42, 44-46 (D.C. Cir. 1990)]). In a plain meaning analysis, a provision at issue must be considered in the context of the language and design of the Secretary's regulations as a whole. *New Warwick Mining Co.*, 18 FMSHRC 1365, 1368 (Aug. 1996); *see Meredith v. FMSHRC*, 177 F.3d 1042, 1053-54 (D.C. Cir. 1999) (stating that reading the plain words of a provision *literally* can carry a different meaning than intended; meaning of the language, plain or not, depends on the context). The Secretary's regulations should be interpreted to give comprehensive, harmonious meaning to all provisions. *New Warwick*, 18 FMSHRC at 1368. Additionally, "a regulation must be interpreted so as to harmonize with and not conflict with the objective of the statute it implements." *Emery Mining Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984) (citations omitted); *see also Canterbury Coal Co.*, 20 FMSHRC 718, 721-22 (July 1998) (referring to both Mine Act and regulatory history in plain meaning analysis).

Work or Travel in the Affected Area

The Secretary contends, and San Juan does not dispute, that persons have worked and traveled in the Affected Area on numerous occasions prior to November 10, 2003, and thereafter. It is also undisputed that, on November 10, Vetter and others entered the area for the inspection and miners were later required to enter the area to install and maintain ventilation controls. However, San Juan contends that no one could work or travel in the dangered off Affected Area on November 10, 2003, that no one was scheduled to work or travel in the Affected Area under normal work conditions, and that persons have entered the Affected Area only because MSHA has insisted that it be maintained as active workings.

San Juan had been a surface mine. It started its underground longwall operations about one year before the citation was issued. When it developed its ventilation and other plans, it originally proposed to bar persons from entering the Affected Area. However, MSHA rejected

that proposal, and required that the area be treated as active workings, mandating preshift examinations and compliance with the ventilation standard.[10] Tr. 265-67.

It was not necessary for an examiner to physically enter the Affected Area in order to conduct the preshift examination. The existence of hazards was typically determined through visual inspection from adjacent locations under the shield or in the tailgate travelway, and air quality was checked by extending an AMS meter into the area on a probe. When low oxygen levels were detected, however, miners often had to enter the area to install or adjust ventilation control devices, typically air curtains, to address the problem. On one occasion, a miner entered the Affected Area to retrieve an AMS meter that had fallen from a probe. Tr. 47-48.

The Secretary asserts, based upon non-specific hearsay statements, that miners enter and work in the Affected Area to service and maintain the longwall equipment. However, I reject that assertion. Scott Jones, an engineer and longwall coordinator, testified as an expert on longwall equipment and operations. He participated in the design of San Juan's longwall, coordinating with the original equipment manufacturer, Joy Mining. Jones explained that the equipment was designed to assure that no one would go beyond the last shield, i.e., into the Affected Area. No equipment is accessible from that area, and no servicing or maintenance of the longwall equipment can be done from the Affected Area. As noted above, the longwall drive equipment is protected by heavy steel plate on the side that faces the tailgate entry, and the gob separation plate protects the lower portion of the last shield. Servicing and maintenance of the longwall equipment is performed from positions under the shields. A catastrophic failure of the longwall drive, that would necessitate replacement of the motor or transmission, may require that work be performed in the Affected Area. However, in 18 months of operation, that has been required only once.

Miners travel from the face into the tailgate travelway for a number of reasons. Various ventilation control devices, including a gob isolation stopping, are located outby in the tailgate travelway, and must be inspected every shift. Miners also enter the tailgate travelway to maintain AMS components and dewatering pumps, and perform other tasks. The tailgate travelway must be maintained as an escapeway. It is also the return air course, and air courses must be inspected weekly.

There are two routes from the face to the tailgate travelway. The route that San Juan has designated for such travel, and has trained its miners to follow, starts under the shields near the longwall drive. The mining equipment must be deenergized and locked-out, after which the

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[10] 30 C.F.R. § 75.360(a)(1) requires, generally, that preshift examinations be conducted by certified persons before any shift in which "any person is scheduled to work or travel underground." It also provides that no person other than a certified examiner may remain in any underground area unless a preshift examination has been completed for the shift. 30 C.F.R. § 75.2 defines active workings as, "Any place in a coal mine where miners are normally required to work or travel."

miner steps up onto and across the face conveyor, which typically would have some coal on it, and travels along the face into the tailgate travelway. That route is depicted on exhibit C-4 as a hand-drawn line (green on the original) with an arrowhead at its end in the tailgate travelway. A miner following that route would not enter the Affected Area.[11]

The second route passes through the Affected Area. From the end of the walkway along the toes of the shields, a miner could step through the notch in the gob separation plate, crawl or walk over rubble from roof falls, travel through the Affected Area, and enter the tailgate travelway. Tr. 280. When a preshift examination disclosed no ventilation or other hazards in the Affected Area, miners were free to enter, work in, and travel through it during the subsequent shift. Many have done so, both before and after the citation was issued.

While San Juan disputes the Secretary's assertion that miners found it more "convenient" to travel through the Affected Area to reach the tailgate travelway, it does not dispute that miners, including foremen, used that route. It also does not dispute that miners are required to enter the Affected Area to maintain ventilation controls required by MSHA, because of its insistence that the area be maintained as an active working area.

I find that persons frequently traveled through the Affected Area, prior to and after November 10, 2003, in order to perform various tasks outby in the tailgate travelway. With the exception of actions required to address ventilation problems, all such travel occurred after a preshift examination had been conducted and the area was found to be free of hazards. Persons have also been required by MSHA to be in the Affected Area to conduct inspections and maintain ventilation controls, because of its determination that the area must be maintained as an active working area. Vetter entered the Affected Area on November 10 to perform the inspection, and others entered it after the citation was issued, in order to take corrective action. Persons are not required to enter the Affected Area to perform service or maintenance on the longwall equipment.

San Juan has consistently maintained that the Affected Area is not an area where persons should work or travel, and that its miners should not be exposed to the hazard of roof falls. Because of that hazard, San Juan's miners have complained about being forced to enter the Affected Area. Contestant's exhibit C-9 is a photograph, taken through the opening in the gob separation plate, depicting fallen roof in the Affected Area. Tr. 282. Exhibit C-5 is a copy of an MSHA accident report form submitted by San Juan on December 7, 2003, reporting a roof fall in the tailgate travelway that extended through the Affected Area outby the face. David C. Hales, San Juan's underground safety coordinator, testified that MSHA had written a letter to San Juan a week prior to the hearing, expressing concern that roof falls might destroy ventilation controls

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[11] The route to the tailgate travelway designated by San Juan passes somewhat closer to the corner of the face than the route through the Affected Area, and miners using it would be exposed to a marginally increased risk of a rib failure due to the pressures on that corner of the face.

located in the Affected Area. He noted that miners examining the area or working on the ventilation controls would also be exposed to the hazard. Tr. 303.

Prompted, in part, by miners' complaints, San Juan submitted a request to MSHA for a modification of the air quality standard, proposing that a diffusion zone be established in the vicinity of the Affected Area. Concentrations of oxygen lower than those required in section 75-321(a)(1) would be allowed in the diffusion zone, and miners would not be permitted to work or travel in it. MSHA has investigated the proposal, which had been submitted over a year before the hearing, but no decision has yet been made. MSHA's concern with the proposal is apparently the size of the diffusion zone proposed by San Juan. Notably, on the day that MSHA conducted an on-site inspection in conjunction with the petition, a roof fall, extending three feet into the Affected Area, occurred. Tr. 270.

The Validity of the Citation

The Notice of Contest filed by San Juan challenges the validity of Citation No. 7605607, alleging that on November 10, 2003, the air in the Affected Area contained insufficient oxygen. The parties agree that oxygen levels in the Affected Area were less than 19.5%. They disagree on whether the Affected Area was an area where persons work or travel within the meaning of the regulation.

The main argument advanced by the Secretary is that persons entered the Affected Area on many occasions, both to travel through it and to perform work, mandating application of the regulation. Had the area not been dangered off, I would be compelled to agree. While San Juan argues that none of its miners were ever scheduled to work or travel in the area, it is clear that many did so, both as a matter of convenience and to perform tasks mandated by MSHA's directive that the standard applied. Absent the danger sign, miners would have been free to enter the area and may well have done so. Consequently, application of the standard would be entirely consistent with its plain wording, and logically necessary to protect persons from hazardous air, whether or not anyone actually traveled or worked in the area, or was scheduled to, on November 10.

However, on November 10, 2003, the date the citation was issued, San Juan had taken effective steps to assure that no person worked or traveled in the Affected Area. Vetter testified that when he arrived, he observed a danger sign that had been posted on the gob separation plate, and he determined that it was an effective measure to bar persons from entering the area. Tr. 128, 145-46. Despite a possible suggestion by the Secretary to the contrary, there is no evidence that the Affected Area was not effectively dangered off, and that miners and others who might have been in the vicinity had been put on notice that entry and travel through the Affected Area was prohibited.[12] Vetter had not observed anyone in the Affected Area prior to entering it

[12] The Secretary notes, in a footnote in her brief, that there was no physical barrier preventing entry to the Affected Area by persons approaching from the tailgate travelway. Sec.

for the inspection, and the Secretary does not contend that any San Juan miners or other persons were in the Affected Area on November 10, 2003, other than in conjunction with the inspection and any remedial measures generated as a result of issuance of the citation. I find that, in the absence of the Secretary's intervention, no person would have worked or traveled in the Affected Area on November 10, 2003.

The Secretary counters that dangering off is "a temporary measure designed to prevent access to a dangerous area until the hazard can be eliminated, which must be undertaken immediately," and that dangering off "is prohibited in this case."[13] However, the regulation on which she primarily relies, 30 C.F.R. § 75.363(a), does not prohibit dangering off an area of poor air quality.[14] Nor does it compel immediate corrective action under the circumstances presented here. In fact, section 75.363(a) provides that when San Juan detected low oxygen levels in the Affected Area, it was compelled to danger it off. Thereafter, the regulation dictates that the "condition shall be corrected immediately *or the area shall remain posted until the hazardous condition is corrected* (emphasis added)." Further immediate actions are required only if the condition is found to constitute an imminent danger. The condition found on November 10 and, apparently, on other occasions when low oxygen levels have been found, did not remotely approach the seriousness of an imminent danger.[15]

The Secretary's witnesses, in essence, agreed that it was appropriate to danger off the area. Vetter sanctioned it as a temporary corrective action, but not a permanent one. Tr. 124-25.

Br. at 23, n. 13. However, any such person would have entered the travelway by the route designated by San Juan and would have been aware that entry into the Affected Area had been prohibited. The danger sign would also have been visible from the tailgate travelway.

[13] Sec. Reply Br. at 12.

[14] § 75.363 Hazardous conditions; posting, correcting and recording

> (a) Any hazardous condition . . . shall be posted with a conspicuous danger sign where anyone entering the areas would pass. A hazardous condition shall be corrected immediately or the area shall remain posted until the hazardous condition is corrected. If the condition creates an imminent danger, everyone except those persons referred to in section 104(c) of the Act shall be withdrawn from the area affected to a safe area until the hazardous condition is corrected. Only persons designated by the operator to correct or evaluate the condition may enter the posted area.

[15] Vetter determined that an injury was unlikely, and MSHA extended the time when abatement was required to November 16, 2003. MSHA's enforcement policy, whereby citations for low oxygen levels were not issued if some corrective action was underway, also indicates the relative seriousness of the hazard.

He also maintained that dangering off is not an appropriate corrective action for low air quality because it can't be isolated from the rest of the environment, and because the Affected Area is part of the return air course that must be inspected weekly. Tr. 124, 159-60. Gibson testified that it would not only be acceptable to danger the area off, but that it would be required by the regulation if a hazard were found. Tr. 90, 93-95, 100-01, 104-05.

The Secretary also argues that dangering off the Affected Area is impermissible because the tailgate travelway is a return air course that must be inspected weekly, and that it must be maintained as an escapeway.[16] Barring travel through the Affected Area, however, would not appear to interfere with either of those functions. The route established by San Juan from the longwall face to the tailgate travelway does not pass through the Affected Area. The main flow of air also follows that route.[17] That route remained open to travel for escape and inspection purposes on November 10. San Juan's witnesses testified that all longwall mines have ventilation problems on the tailgate side, and that MSHA has not enforced the ventilation standard at several other mines with comparable areas where persons did not work or travel. Tr. 379-80, 417-21. The Secretary's witnesses maintained that such areas have been considered part of the tailgate travelway. Tr. 43.

Underlying the Secretary's argument is the contention that, unlike at least some other hazards, an area with sub-standard air quality cannot simply be dangered off because that action does not physically isolate or contain the bad air. The contention cannot be disputed. However, on the facts of this case, any low quality air in the Affected Area is effectively contained by the characteristics of the air flow, itself. While low oxygen levels have been found on numerous occasions, there is no evidence that they have migrated out of the Affected Area, or that sub-standard air has ever been found in adjacent working areas. The quantity of air in the Affected Area is about 2,000 cubic feet. In contrast, 65,000-100,000 cubic feet of air is being drawn across the face and out the tailgate travelway every minute. As air in the Affected Area escapes the localized air flow anomalies that can result in low oxygen levels, it is promptly diluted. The same is true for any gob air that might seep between shields and the air under the last shield, inby its legs, where the standard has been made inapplicable by a provision in San Juan's ventilation plan. Tr. 235.

The Secretary notes that if section 75.321(a)(1) does not apply in the Affected Area, then no atmospheric standards would apply and very low concentrations of oxygen and/or very high concentrations of methane or other gasses could exist without violating any standard. She then posits that a roof fall in, or adjacent to, the Affected Area, could force any sub-standard air onto

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[16] *See* 30 C.F.R. §§ 75.215(a), 75.364(b). To the extent that the Secretary suggests that dangering off the Affected Area may violate other standards, the merits of such a charge would have to be decided in a subsequent case.

[17] Restrictions in air flow caused by the five-foot-high gob separation plate and other equipment contribute to the air quality problems in the Affected Area.

the working face and/or into the tailgate travelway, exposing persons in those areas, and if high methane levels were present, ignition sources might be encountered, with potentially disastrous results. The argument is unconvincing for several reasons.

There is no evidence that explosive concentrations of methane or excessively low concentrations of oxygen have ever been found in the Affected Area, and there is no reason to believe that concentrations in a dangered off Affected Area would be any different than the relatively benign concentrations historically experienced. There is also no evidence that sub-standard air has been found in areas adjacent to the Affected Area. Assuming that air temporarily displaced by a roof fall might be forced out of the Affected Area, it is highly unlikely that it would enter the working area of the face because of the relatively massive quantities of ventilation air flowing across the face and out the tailgate travelway, which would quickly dilute it and render it harmless.

All of the electrical and other equipment on the longwall face is maintained in permissible condition. Two AMS meters are mounted adjacent to the Affected Area, one behind the legs of the last shield and one in front of the legs of the second to last shield. Those meters continuously monitor the concentration of methane and alert when concentrations reach one percent. The alert is visible at the meter and on screens at the headgate controls, and in a control room on the surface. An alert requires that operations be stopped, and that measures be taken to address the presence of methane. If methane concentrations reach 1.5%, the longwall equipment is automatically deenergized. A similar meter is mounted on the shearing machine and deenergizes the equipment if the concentration of methane reaches 2%. Methane is explosive at concentrations of 5-15%. Tr. 243-45. One potential ignition source identified by the Secretary would occur if the shearer cut into the tailgate travelway and encountered roof bolts. However, San Juan's ventilation plan requires that the shearer be stopped ten shields from the tailgate entry, and that the air in the tailgate entry be checked for the presence of methane before cutting out to the travelway.

There is no question that roof falls occur, both in and adjacent to the Affected Area. As noted above, the supported roof of the tailgate travelway falls sporadically as the shields pass. Fortunately, the falls generally occur inby the Affected Area. There is no evidence that roof falls, even those that extended into the Affected Area, have ever resulted in sub-standard atmospheric conditions in the working face or outside of the Affected Area. Assuming that a roof fall could force air out of the Affected Area into working areas, there is no evidence that dangering off the Affected Area would increase whatever risk already exists.

The Secretary attempts to draw a comparison with the application of safety standards to mobile equipment, asserting that deenergizing or tagging out equipment is not sufficient to abate a violation, citing *Eastern Ass. Coal. Corp.*, 1 FMSHRC 1473 (Oct. 1979) (defective parking brake violation not abated by danger tag, where equipment was capable of operation and was located in work area - tag could have been ignored). However, the Commission has indicated that tagging out a piece of mobile equipment may be sufficient to effectively take the equipment

out of service and avoid a violation. *See Allen Lee Good*, 23 FMSHRC 995 (Sept. 2001); *Mountain Parkway Stone, Inc.*, 12 FMSHRC 960 (May 1996); *Ideal Basic Industries, Cement Div.*, 3 FMSHRC 843 (April 1981).

Dangering off an area may be similar, in some respects, to tagging out a piece of mobile equipment. However, danger signs are universally recognized as a means to identify and emphasize the existence of a hazardous condition, and are effective measures to bar access to unsafe areas, a concept recognized in the Secretary's regulations. For example, 30 C.F.R. § 75.208 provides that posting a "readily visible warning" (typically referred to as "dangering off") is sufficient to identify areas of a mine without permanent roof support. Here, Vetter verified the effectiveness of the danger off sign, and testified that it would have been unlikely that a miner would have entered the Affected Area on the date in question. Tr. 146-47. Of course, a miner might ignore a danger sign and proceed into a prohibited area, conceivably even beyond the imaginary line at the shield legs into the gob. That highly improbable possibility cannot transform the Affected Area, or the gob, into an area where persons work or travel.

I agree with the parties that the wording of the regulation is plain on its face. It mandates specified air quality in "areas where persons work or travel." I find that, on November 10, 2003, the Affected Area was effectively dangered off, and was not an area where persons work or travel, within the meaning of the regulation.[18]

Interpreting the plain meaning of the standard's language in this manner is consistent with both the design of the regulations and the objective of the Act. The parties have devoted considerable attention to the announced intent of the 1992 and 1996 amendments to regulations governing air quality, each arguing that its position is harmonious with that intent and that the other's is not. The most significant change occurred in 1992, when the Secretary re-formulated regulations governing air quality to assure that areas where persons worked or traveled were required to have an atmosphere with at least 19.5% oxygen, specifically extending that requirement to bleeder entries, which several administrative law judges had found to be not covered by the previous regulation. Requiring appropriate air quality wherever miners work or travel, even if infrequently, would be consistent with the regulatory scheme. However, imposing upon operators a requirement to maintain air quality in areas where no miner or other person

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[18] I reject the Secretary's "bootstrap" contention that the violation was established by Vetter's entry into the area and the subsequent entry of other persons to effectuate remedial measures dictated by the issuance of the citation. Certainly, MSHA inspectors and others are "persons" within the meaning of the regulation. However, I have found that, absent MSHA's intervention no one would have entered the Affected Area on November 10, 2003. MSHA cannot be allowed to create a violation of a standard and saddle Respondent with the consequences, including the imposition of a civil penalty. I also reject the Secretary's argument that the history of travel through the Affected Area renders the regulation applicable, even though it was effectively dangered off on November 10. That travel occurred under markedly different circumstances.

works or travels, would not be. As the Secretary recognized, in commenting on that part of the current rule addressing air quality in bleeder entries, "The purpose of this standard is to protect miners, not to regulate air quality where persons are not exposed." 61 Fed. Reg. 9764, 9776 (1996).

The overriding purpose of the Act is to protect the health and safety of miners. *E.g., Sec'y of Labor v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1437 (D.C.Cir. 1989). Finding the regulation inapplicable to the Affected Area on the date in question, when no miner or person would have worked or traveled in it, is consistent with the protective purpose of the Act. Under the Secretary's interpretation, which has been imposed by MSHA since the longwall began operating, a preshift examination must be conducted to assess, *inter alia*, the air quality in the Affected Area. If the air quality is found to satisfy the standard at the time of the examination, miners are free to enter the Affected Area during the subsequent shift, and it is clear that many have done so.[19] However, the air quality in the Affected Area is highly variable. Gibson testified that the air quality changes rapidly at times. The simple fact of a person stepping into the notch in the gob separation plate can reduce oxygen levels at points in the Affected Area. Tr. 63, 67, 76, 97. David Hales gave similar testimony, stating that a monitor held stationary in the Affected Area can go through a range of readings.[20] Tr. 344. During the period November 6 to 10, satisfactory oxygen levels were found during several preshift examinations. Tr. 111.

A finding of sufficient oxygen levels in the Affected Area during a preshift examination provides virtually no assurance that they will remain in compliance for the next hour, much less for an entire shift. Vetter testified that the fact that the air in the Affected Area was found to comply with the requirements of section 75.321(a)(1) during a preshift examination *did not mean that miners were free to enter the area on the subsequent shift.* "It may be okay at the conclusion of the pre-shift or the examination, but it doesn't necessarily mean it's going to remain that way." Tr. 140. While his position appears to be inconsistent with the preshift examination regulation, it does confirm the variability of air quality in the area. Categorizing the Affected Area as active workings, through which miners are free to pass once the preshift examination has been done, would pose a substantially greater risk of exposing them to sub-standard atmospheric conditions than if they were prevented from entering the area. The threat of roof falls in the Affected Area poses an additional danger that would be avoided if entry into the Affected Area were barred.

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[19] As noted above, the regulation addressing preshift examinations bars entry to areas that have not been successfully preshifted. See also the testimony of Gibson (Tr. 85) and David Hales (Tr. 298).

[20] The bottle samples taken by Vetter on November 10 produced different results than those shown only moments earlier on his hand-held monitor. Tr. 113. Gibson has vacated a citation he had issued for sub-standard air quality in the Affected Area when the air taken in a bottle sample was found to be in compliance with the standard, a result markedly different from that that had been shown a little earlier on his hand-held meter. Tr. 63.

Conclusion

I find that, on November 10, 2003, the Affected Area was not an "area where persons work or travel," within the meaning of section 75.321(a)(1). San Juan was not prohibited from dangering off the Affected Area. Having found a hazardous condition, it was compelled to do so.

ORDER

Citation No. 7605607 is hereby **VACATED**.

Michael E. Zielinski
Administrative Law Judge

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/mh

appendix: Exhibit C-4 (see footnote 5)