

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 5, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 98-39
Petitioner	:	A. C. No. 44-06795-03524
v.	:	
	:	Sargent Hollow Mine
ANR COAL COMPANY LLC,	:	
Respondent	:	

ORDER DENYING MOTIONS FOR SUMMARY DECISION AND NOTICE OF HEARING

In this civil penalty proceeding brought under section 105(d) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 815(d) (the Act)), the Secretary of Labor (Secretary) on behalf of her Mine Safety and Health Administration (MSHA) seeks the assessment of civil penalties against ANR Coal Company (ANR or the company) for three alleged violations of mandatory safety standards for underground coal mines. The Secretary charges the violations occurred at the company's Sargent Hollow Mine, an underground bituminous coal mine located in Wise County, Virginia. The Secretary proposes total civil penalties of \$824.

In answering the petition, ANR denies the violations or in the alternative argues that if they did occur, the inspector's findings regarding negligence and gravity are wrong.

The case was scheduled to be heard and the parties engaged in prehearing discovery, including the deposition of potential witnesses. Shortly before the hearing counsels advised me they intended to submit the case for summary decision. Counsels then filed stipulations, cross motions for summary decision, and replies.

THE CONTROVERSY'S BACKGROUND

Although three violations are charged in the case, the parties are at odds over only one -- an alleged violation of 30 C.F.R. §75.334(b)(1) set forth in Citation No. 4566305.¹ As explained

¹The parties agree that ANR will pay in full the proposed penalties for the violations alleged in the other two citations (Stips. 48, 49). The agreement effectively settles the parties' differences regarding the two citations, and I will approve the settlement when I issue a final

more fully below, section 75.334(b)(1) requires in areas where pillars are being recovered that the operator ventilate the areas with a bleeder system that will "continuously dilute and move methane-air mixtures away from active workings and into a return air course". The Secretary maintains ANR failed to comply with this requirement in that "methane being liberated on the . . . 001 . . . section [was] not being diluted, rendered harmless, and carried away during normal production operations" (Stip. 46; see also Gov. Exh. 1).

THE FACTS

The parties' agreements with regard to the relevant facts are set forth in 49 stipulations. They establish that between March 8, 1999, and the late night-early morning hours of March 13-14, methane exceeded 1% of the mine atmosphere in the No. 10 entry on the 001 section on four occasions — March 8, March 10, March 12, and March 13-14 (Stips. 13 - 16). They also establish that on each of these occasions management authorities made adjustments to the ventilation and that the methane levels soon fell to under 1% (Id.).

Around 9:30 p.m. on March 14, the roof fell in an area of the section where five or six pillars had been previously mined and a crack developed in the roof outby the pillar line in the No. 10 entry. The section foreman detected methane of up to 5%. Most of the methane seemed to be coming from the crack and the surrounding area (Stip. 18). The section foreman shut off the power, de-energized the equipment and withdrew the men. He also adjusted the ventilation in order to dilute the methane (Stips 19-20).

About an hour and ten minutes after the roof fell, MSHA Inspector Charles Reece arrived at the mine to conduct an inspection. Reece went to the No. 10 entry and he too detected methane coming from the crack and adjacent area. He measured the methane and found it had reached levels of 10% or more. Therefore, at about 11:30 p.m., Reece issued an imminent danger order of withdrawal under section 107(a) of the Act (30 U.S.C. §817(a)). The order required the withdrawal of miners from the entire mine (Stips 22, 24-25; Gov. Exh. 7). Reece then left the mine.

Approximately an hour after the order was issued, ANR's Manager of Mine Operations, Paul Campbell, arrived and went underground. Campbell knew the mine had been encountering methane due to the mining method the company was utilizing (Stip. 30). Campbell went to the No. 10 entry where he hung a curtain to redirect the air and to facilitate sweeping the methane from the entry. The methane was diluted to acceptable levels within 10 minutes. Campbell also adjusted the ventilation outby the No. 10 entry. All of this work was completed within approximately six hours of the fall, and once it was completed, no methane was detected in the entry (Stips. 26, 30).

decision and order in this case.

Campbell expected that the imminent danger order would be terminated. After it was, he intended to resume mining in the No. 10 entry. However, he did not plan to begin where mining had left off. Rather, he decided he would leave the curtain in place and pull back several pillars so that mining would resume several breaks outby the area last mined (Stip. 29). Campbell then left the mine. When he returned after daybreak on March 15, he found that methane levels in the No. 10 entry measured at most a few tenths of one percent. The levels were acceptable (Stips. 29, 31).

On the afternoon of March 15, Inspector Reece came back to the mine. He was accompanied by two other inspectors, Douglas Carico and James Hicks. The inspectors talked to Campbell about what ANR had done to adjust the ventilation. Campbell believed he also told them about his plan to resume mining several blocks outby the area last mined. However, neither Reece nor Hicks remembers Campbell discussing the subject (Stip. 32-33).

After talking to Campbell, the inspectors went to the 001 section. Reece and Hicks saw the curtain that Campbell had erected to help dilute the methane. It was on the left side, along the rib. To conduct pillar mining, the curtain had to be on the right side. Therefore, Reece and Hicks had the curtain taken down and re-erected as it would have been if mining had continued in the area. As soon as it was taken down and re-erected, methane levels increased to over 1% . However, as long as the curtain remained where Campbell had positioned it, the methane levels were acceptable (Stip. 35).

While the inspectors were underground they met Darrell Holbrook, the mine superintendent.² The inspectors and Holbrook had occasion to visit the No. 6 entry of the 001 section. Holbrook detected air moving from the gob into the entry. The air flow was opposite the direction it was supposed to move. The purpose of the bleeder system was to sweep methane and other gases into and over the gob and out the return. Air flowing from the gob into the entry meant that methane might be coming into the entry. However, Holbrook detected only .2% methane in the No. 6 entry. This was an acceptable level. Holbrook suggested to Hicks that he erect a curtain in the No. 6 entry to insure air would flow from the entry into the gob, and Hicks said that was not a big concern and the condition was not a violation (Stip. 37).

²In addition to meeting Holbrook underground, the inspectors met him again after they returned to the surface. Holbrook believes that during both meetings he told the inspectors that ANR was going to pull back several blocks before it resumed pillaring operations and that it was going to leave Campbell's curtain in place when it pulled back. Reece and Hicks do not recall discussing these matters with Holbrook (Stip. 36).

Reece too noted the direction of the air in the No. 6 entry. In his deposition Reece testified that the roof in the crosscut between the No. 6 and No. 7 entries had fallen "tight," meaning that it almost blocked the crosscut. Reece believed this was why the air was flowing from the gob into the entry. Reece testified this lead him to believe the bleeder system for the 001 section was inadequate and that the volume of air on the section needed to be increased to "force" the air flow to change direction (ANR Exh. 1 at 44, 45, 65-67, 69-70). However, Reece made no specific references to the No. 6 entry when he issued Citation No. 4566305.

While Reece and Hicks were in the No. 6 and No. 10 entries of the 001 section, Inspector Carico traveled to the bleeder entries on the back side of the gob and evaluated the bleeder system at its specified measurement locations. He found nothing to indicate the system was functioning improperly (Stip. 38).

All of the inspectors and Holbrook returned to the surface and Hicks called the MSHA office. Hicks advised Holbrook that MSHA was not going to terminate the section 107(a) order as it related to the 001 section, although MSHA did agree to modify it so that mining could resume on the 002 section (Stip. 39).

In an attempt to have the order terminated, ANR presented MSHA with a modified ventilation plan that indicated ANR would resume mining outby where the methane was detected in the No. 10 entry and that it would leave two rows of pillar blocks intact where the cracks emanating methane had formed. However, MSHA refused to terminate the order (Stips. 40-41). The agency feared the curtain positioned by Campbell would be knocked down by subsequent roof falls and the methane levels immediately would rise (see ANR Exh. 1 at 53). Rather than delay production while it contested the order, the company chose to remove the equipment and seal the 001 section (Stip. 41).

In the meantime, on March 16, Reece issued Citation No. 4566305 alleging a violation of section 75.334(b)(1). The citation states:

The bleeder system for the second mined area (gob) of the . . . 001 . . . section is inadequate in that the methane being liberated on the . . . 001 . . . section is not being diluted and rendered harmless, and carried away during normal production operations. Methane is presently being liberated through cracks and fissures in the mine roof in the No. 10 entry, 20 feet inby Survey Station No. 1850. This methane cannot be diluted, rendered harmless and carried away by the present bleeder system through normal ventilation methods and procedures. This citation was a factor that contributed to the Issuance of . . . Order No. 4566579 dated 4/14/98, therefore no abatement time was set (Gov. Exh. 1).

The citation and the order were terminated when the area was finally sealed (Stip 43; Gov. Exh. 7).

SUMMARY DECISION

Under the Commission's rules, a motion for summary decision shall be granted if the entire record shows: (1) No genuine issue as to any material fact, and; (2) The moving party is entitled to summary decision as a matter of law (29 C.F.R. §2700.67). Summary decision is only authorized "upon proper showings of a lack of a genuine, triable issue of material fact" (Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986)). If material facts are disputed, incomplete, or missing, a hearing is necessary, but the hearing may be limited to the issues contingent upon the disputed, incomplete, or missing facts (29 C.F.R. §2700.67(d)).

THE ISSUES

The issues are whether the agreed upon facts establish a violation of section 75.334(b)(1) as set forth in Citation No. 4566305; or, if not, whether they preclude finding a violation. In order to resolve the issues it is necessary to understand the meaning of section 75.334(b)(1), which in turn requires a review of the standard's derivation. Also, it is necessary to understand the place of section 75.334(b)(1) in the regulatory scheme and the elements necessary to prove a violation of the regulation.

SECTION 75.334(b)(1)

Section 75.334(b)(1) is a subsection of section 75.334, a regulation that mandates how areas where pillars have been and are being mined are to be ventilated. Section 75.334(b)(1) states in part:

During pillar recovery a bleeder system shall be used to control the air passing through the area and to continuously dilute and move methane-air mixtures . . . from the worked-out area away from active workings and into a return air course or to the surface of the mine.^{3]}

³Neither the regulations nor the Dictionary of Mining, Mineral, and Related Terms (DMMRT) define "bleeder system". However, the DMMRT defines "bleeder entries" as "panel

Section 75.334 was promulgated in 1992 (57 FR 20869 (May 15, 1992)), and has remained in effect without substantive change (see 61 FR 9828 (March 11, 1996)). The section is derived from previous sections 75.328 and 75.329, and from ventilation plan approval criteria then found in section 75.316-2. In promulgating the standard, the Secretary stated that these predecessor standards “specif[ied] use of bleeder entries, bleeder systems or an equivalent means in pillared areas to control the accumulation of methane” (57 FR at 20866). The Secretary explained:

During and after pillar recovery, methane . . . is liberated from the coal and strata. When this occurs, bleeder systems route gases away from worked-out areas and areas where pillars are being mined. [Section 75.334] . . . revises the requirements for bleeder systems and establishes ventilation standards for control of methane . . . in worked-out areas and for areas where pillars are being mined.

* * * * *

Where pillars are being fully or partially recovered, paragraph (b)(1) requires the bleeder system to be used to control the air passing through the area and to continuously dilute and move methane-air mixtures . . . from the worked-out area away from active workings and into a return air course or to the surface MSHA generally consider[s] bleeders to be a system of entries that form special air courses designed, developed, and maintained to continuously move gases from retreat mining areas.

* * * * *

[A]ny bleeder system used must continuously move gases from the mined-out area and away from active working into a return air course or to the surface (57 FR at 20886-87).

entries driven on a perimeter of a block of coal being mined and maintained as exhaust airways to remove methane promptly from the working faces to prevent buildup of high concentrations either at the face or in the main intake airways.” It states that bleeder entries are “[w]idely used for draining methane in coal mines . . . where the room-and-pillar method [of mining] is employed” (American Geological Institute DMMRT 451 (2nd ed. 1977)).

The specifics of a bleeder system are determined on a mine-by-mine basis and are specified in the mine's approved ventilation plan (57 F.R at 20886). This is because the system is tailored to the conditions in the particular mine. The system "[d]epend[s] on particular mining conditions" because "[d]ifferent mines have different conditions and methane liberation rates" (Id.). The utility of the system is gauged by evaluating the system pursuant to section 75.364 (57 FR at 20886), a regulation that states the frequency, type, and location of measurements that are made to establish the system's effectiveness.

As the Secretary's regulatory comments make clear, because the release of methane may be an unavoidable consequence of mining, especially during pillaring operations, the goal of the system is to reduce the level of methane on active workings by moving it out of the workings, into and over the gob, and out the return. Continuous movement of the gas is intended to keep it from building to a hazardous level. However, the Act and the regulations also recognize that there may be instances when methane inevitably will build to hazardous levels and that these instances do not necessarily represent violations of the Act or its standards.

In order to establish a violation of section 75.334(b)(1), the burden is on the Secretary to show that a cited bleeder system did not continuously dilute and move methane-air mixtures away from the worked-out areas into a return air course or to the surface of the mine. One way the Secretary could meet this burden would be to show that the bleeder system ceased to function. For example, if the Secretary found methane in areas where pillars were being extracted and she also found no ventilation when she took measurements at the system's evaluation points, she could establish that methane was not being diluted and moved without interruption — that is, it was not being moved "continuously". However, violations such as this would be unusual because bleeder systems rarely stop working altogether. Rather than allege the system suffered a total breakdown, the Secretary's theory usually is that the bleeder system did not function effectively enough to meet the intent of the regulation.

As stated previously, the Act and the regulations recognize the presence of methane may be inevitable when coal is mined, and that accumulations of methane do not represent per se violations of the regulations.⁴ Nevertheless, the Act and the regulations also recognize that there is a point at which methane becomes a potential hazard. Therefore, in addition to maintaining a bleeder system that continuously dilutes and moves methane, an operator is required to test for methane and to take action of reduce the level of methane when the tests show the methane at a level of 1% or more (see 30 C.F.R. §75.323).

Section 75.334 (b)(1) does not specifically state methane is to be diluted so as to rendered it harmless, but such clearly is the standard's purpose. Considering a level of methane of 1% or

⁴The Secretary has acknowledged this by noting that "Neither the Act nor the regulations provide that a mere presence of methane gas in excess of 1[%]. . .is per se a violation" (U.S. Department of Labor, Mine Safety and Health Administration, V. *Program Policy Manual* 34 (1996)).

more to be an objective indicator that the system may not be “continuously dilut[ing] and mov[ing]” the gas is a reasonable interpretation of the standard. Therefore, a finding of 1% or more of methane may be a signal to a reasonable operator that adjustments are needed in the bleeder system to keep it effectively diluting and moving methane. If an operator fails to make such adjustments to the system (as opposed to palliative "fixes" to the individual incident or incidents of excessive accumulations), the operator may have violated the standard.

In such a case, the existence of a violation ultimately turns upon whether the Secretary can establish that under all of the circumstances present a reasonable operator, familiar with the conditions in its mine, including but not necessarily limited to the miner’s history of methane liberation and the capacity of its ventilation system, would have made adjustments to the miner’s bleeder system so as to ensure that methane continuously, and effectively, was diluted and moved away from active workings and into the return.

THE SECRETARY’S MOTION AND THE STIPULATIONS

Although the citation was issued on March 16, 1998, it was apparently based on conditions that existed from at least March 8, up to and following the roof fall of March 14 (Reece Dep.17, 45, 59, 65-67).

The Secretary states that “[t]he bleeder system . . . that was in place on the 001 section allowed excessive levels of methane to be present on the active section on at least five occasions in the week prior to when . . . [the citation] was issued[.]” and argues therefore “[i]t was reasonable . . . to expect that . . . continued mining on the 001 section, without fundamental adjustments being made to the bleeder system, would have resulted in further instances of excessive levels of methane in the active areas of the section” (Sec’s Mot. 5; see also Sec’s Resp. 1-2). Simply put, the Secretary maintains the instances of excessive methane “demonstrate the bleeder system was not adequate to dilute and carry away the methane during . . . normal operations” (Sec. Resp. 4).

To agree that the instances of methane (Stips. 13-16, 19, 24; Gov. Exh. 6) in and of themselves establish the bleeder system was not adequate, would be to make repeated instances of excessive methane tantamount to a violation, something which neither section 75.334 nor any other standard provides. While the instances of methane may be evidence that the system was not functioning as intended, they also may represent a series of singular occurrences that would not have alerted a reasonable mine operator of the need for adjustments in its overall bleeder system.

The Secretary must present testimony from the inspector who issued the citation, and perhaps from others, as to why the methane accumulations found by the company and the inspector (see Reece dep. at 38-39, 45) indicate the bleeder system was not being maintained in compliance with section 75.334(b)(1). The Secretary also needs to establish clearly just when the violation came into existence and what caused the violation to exist at that particular time.

Further, the inspector stated in his deposition that following the March 14 roof fall, the way the air moved in the No. 6 entry lead him to believe the bleeder system was inadequate (Reece Dep. 45). On the face of the citation there is no obvious link between the citation and the conditions in the No. 6 entry that the inspector referenced. If there is a link, the Secretary needs to present testimony establishing what it is. In other words, the Secretary needs to demonstrate that the conditions in the No. 6 entry were connected with the accumulations in the No. 10 entry, if in fact they were, and why the conditions should have signaled to ANR that the bleeder system was inadequate. In so doing, it would behoove the Secretary to explain why Inspector Hicks told Holbrook the air on the No. 6 entry was "not a big concern" and the "condition was not a violation" (Stip. 37).

Because I cannot conclude the stipulations and supporting materials establish the alleged violation, the Secretary's motion for summary judgement must be denied.

ANR'S MOTION AND THE STIPULATIONS

Essentially, ANR argues that because in each instance it was able to reduce the concentration of methane to below 1%, the bleeder system was adequate and did not fail. ("Each time an unacceptable level of methane was detected, the bleeder system carried away the methane in a matter of minutes. The bleeder system was adequate" (ANR Rep. 4, see also ANR Mot. 2-5).) In a variation on this theme, the company also asserts that because mine personnel were able to eliminate hazardous levels of methane in relatively short periods of time by adjusting existing curtains or by erecting new curtains, the system was doing what it was designed to do — move methane away from working places, into the gob, and out a return (ANR Mot. 4). Finally, it maintains the fact that the inspector detected air moving from the gob into the No. 6 entry is irrelevant. The company points out the inspector did not mention the condition in the body of the citation, nor did he mention it to anyone at the mine (Id. 8).

Taken together, the company's arguments, the stipulations, and the supporting documents, do not preclude finding a violation. The allegation of a violation pertains to the bleeder control system. "The bleeder system for the second mined area (gob) of the . . . 001 . . . section is inadequate in that the methane being liberated on the . . . 001 . . . section is not being diluted, rendered harmless, and carried away during normal production operations" (Gov. Exh. 1). The corrective measures instituted by ANR to eliminate individual instances of excessive methane did not necessarily affect the overall system. Conceivable there was a continuing defect in the entire system, despite the individual corrections. I cannot conclusively determine from the stipulations whether or not this was so. Further, the fact the methane levels were reduced by the adjustments does not answer the fundamental question of why they occurred in the first place, and the stipulations and supporting materials do not offer a definitive answer.

Moreover, that the citation does not specifically reference the direction of air flow on the No. 6 entry does not mean that the information is irrelevant. After all, the citation charges the system was inadequate, and air flow on the No. 6 entry was part of the system.

Nor can I find that conditions on the No. 6 entry should be excluded from consideration because they are not mentioned specifically in the citation. While it is true section 104(a) of the Act requires a citation to "describe with particularity the nature of the violation" (30 U.S.C. §814(a)), the purpose of this specificity requirement has been met in that the citation as worded allowed ANR to discern the conditions requiring abatement (Stip. 43), and is allowing ANR adequately to prepare for a hearing (see Cyprus Tonopah Mining Corp., 15 FMSHRC 365, 379 (March 1993)).

Finally, because in deciding this case it will in all likelihood be important to determine whether given the conditions that existed at the mine a reasonable operator would have made adjustments to the bleeder system, ANR may want to offer testimony explaining why, if its Mine Operations Manager knew before the events of March 13-14 that the mining method being utilized was likely to produce the methane levels that resulted (Stip. 30), it did not make changes in its bleeder system to prevent the hazard.

RULING ON THE MOTIONS

Because I cannot find the undisputed material facts establish that the bleeder system for the 001 section was not continuously diluting and moving methane-air mixtures away from active workings and into a return or to the surface, or that the undisputed material facts make such a finding impossible, the parties' motions for summary decision are **DENIED**.

NOTICE OF HEARING

The stay order entered in this case is **DISSOLVED**, and the parties are advised the matter will be **CALLED FOR HEARING** in Abingdon, Virginia at 8:30 a.m., on June 9-10, 1999.⁵ (A specific hearing location will be designated later.) Because many of the relevant facts have been

⁵In *Consolidation Coal Company*, 20 FMSHRC 227 (March 1998), the Commission divided equally over whether Commission Administrative Law Judge George Koutras properly held the Secretary did not prove a violation of section 75.334(b)(1), despite the fact methane accumulated on a pillar section to the point where a fatal explosion occurred (17 FMSHRC 1982 (November 1995)). The result of the Commission's decision was to let the judge's decision stand as if affirmed. The decision was appealed to the United States Court of Appeals for the Fourth Circuit, and ANR requests that if I believe the Commission's decision is not entitled to precedential benefit, I stay this matter until the Court rules (ANR Rep. 1).

ANR's request is respectfully denied. Judge Koutras' decision was highly fact specific. It seems probable to me that the forthcoming decision of the Court of Appeals also will be fact specific, making it unlikely to provide any precedent directly applicable to this case.

stipulated, extensive testimony is unnecessary. Therefore, each side will be afforded four hours to present direct testimony regarding its case in chief. Cross examination will be limited to 40 minutes per witness. Rebuttal will be limited to one hour.

David Barbour
Administrative Law Judge

Distribution:

Robert S. Wilson, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Room 516, Arlington, VA 22203 (Certified Mail)

Julia Shreve, Esq., Jackson & Kelly, 1600 Laidley Tower, P .O. Box 553, Charleston, WV 25322 (Certified Mail)