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MSHA V. FREEMAN UNITED COAL MINING
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
February 8, 1989

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. LAKE 86-67

FREEMAN UNITED COAL MINING
COMPANY

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

DECISION

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 et seq. (1982)("Mine Act"), the issue before us is whether Freeman United Coal Mining Company ("Freeman") violated 30 C.F.R. § 75.316 by failing to maintain an air velocity of at least 5,000 cubic feet per minute (cfm) at the end of a line curtain, as required by Freeman's approved ventilation system and methane and dust control plan ("ventilation plan"). 1/ Commission Administrative Law Judge John J. Morris held that the violation occurred as alleged and assessed a civil penalty of \$200 against Freeman.

1/ 30 C.F.R. § 75.316, a mandatory standard for underground coal mines, repeats section 303(o) of the Mine Act, 30 U.S.C. § 863(o), and provides in part:

A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine

and approved by the Secretary shall be adopted by the operator.... The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

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9 FMSHRC 1678 (September 1987)(ALJ). For the reasons that follow, we reverse Judge Morris' decision.

Freeman's Orient No. 6 mine is an underground coal mine located in Waltonville, Illinois. On December 11, 1985, John Stritzel, a ventilation specialist and inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") performed a ventilation inspection at the mine. Stritzel was accompanied by Mark Eslinger, his supervisor, Larry Eubanks, the miners' representative, and Howard Hill, a ventilation engineer for Freeman. When the inspection party arrived at the last open crosscut between two rooms in an intake entry of the mine, the party did not proceed into one of the rooms because a continuous mining machine was loading a shuttle car at the working face. 2/

While waiting for the shuttle car to move, Stritzel examined the plastic ventilation line curtain that was installed across the intake entry and directing intake air to the face. He observed that the curtain was down in the corner of the room, causing a gap of approximately three feet in the curtain. Eslinger asked Stritzel "do you see that curtain.... It looks like a violation." Stritzel replied "it's not a violation till I check the air." Tr. 26.

After the shuttle car left the room, Stritzel, Eslinger, and Eubanks proceeded toward the working face. Stritzel told the operators of the continuous mining machine that he needed to take an air reading and, therefore, they should turn on the machine's scrubber. 3/ Stritzel testified that the ventilation plan requires a minimum air velocity of 5,000 cfm at the end of the line curtain and that he believed that an air reading taken without the scrubber operating would be inaccurately low.

The scrubber was started. At about the same time, the trailing cable of the offside shuttle car became entangled in the line curtain, tearing an 18 to 20 foot gap in it. 9 FMSHRC at 1684. Robert Newton, another shuttle car operator, heard the curtain tear and, after seeing the large gap, immediately prepared to rehang the curtain as he had been properly trained by Freeman. Tr. 97-98. As Stritzel was preparing to take the air reading at the end of the line curtain at the face, someone informed him that he would not get an accurate reading because, outby in the entry, the line curtain was being rehung by someone. Stritzel testified that he walked back from the face, into the room, and told someone not to hang the line curtain. A miner that Stritzel could not identify responded that he worried about the velocity of air in the section just as much as

Stritzel did. Tr. 30. Stritzel stated that he

2/ A "room" is described as "space driven off an entry in which coal is produced." U.S. Department of the Interior, A Dictionary of Mining, Mineral, and Related Terms 941 (1968).

3/ The scrubber, which helps to remove respirable dust from the air in the room, affects the air velocity by pulling approximately 1,000 cfm of air to the end of the line curtain.

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answered the miner by stating that he had to take an air reading at the face before the curtain could be rehung. 9 FMSHRC at 1684, Tr. 30.

Newton testified that as he prepared to rehang the curtain, the inspector came up to him and directed him not to rehang it until Stritzel's air reading was completed. Tr. 98-99, 101-102. Newton testified that had he not been interrupted, it would have taken him about three or four minutes to rehang the curtain. Tr. 99-100.

Stritzel proceeded to take an air reading with an anemometer, a device that measures air velocity. Based upon the results of the air reading, Stritzel determined that the air velocity at the end of the line curtain was 1662 cfm. According to Stritzel, no more than three minutes elapsed between the time he ordered that the curtain not be rehung and his completion of the air velocity reading. Tr. 56-57. Stritzel informed Hill that the air velocity was not sufficient to comply with the mine's ventilation plan and that Freeman had violated section 75.316. Stritzel also found that the violation was caused by Freeman's unwarrantable failure to comply with the standard and significantly and substantially contributed to a mine safety hazard. Therefore, he issued an order pursuant to section 104(d)(2) of the Mine Act. 30 U.S.C. § 814(d)(2). 4/

Freeman's personnel immediately repaired, rehung, and repositioned the curtain. A second air measurement taken by Stritzel indicated an air velocity of over 5,800 cfm, and Stritzel terminated the order of withdrawal.

The Secretary proposed a civil penalty of \$950 for the violation and a hearing was held. Freeman argued that Stritzel's air measurement

4/ Section 104(d)(2) of the Mine Act, 30 U.S.C. § 814(d)(2), states in part:

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations....

Section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), requires that an inspector issue a citation if he finds that a violation is "of such nature as could significantly and substantially contribute to a mine safety or health hazard" and is caused by the operator's "unwarrantable failure ... to comply," and that an order of withdrawal be issued if, during the same inspection or any subsequent inspection within 90 days after the issuance of such citation, he finds another "unwarrantable failure" violation.

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did not establish a violation of the ventilation plan and that Stritzel had impermissibly interfered with the normal mining cycle at the Orient No. 6 mine when he directed Freeman's miner not to immediately repair the 20 foot gap in the line curtain.

The judge rejected Freeman's arguments. The judge concluded that although Freeman's witness testified that the three-foot gap in the line curtain would not have caused the air velocity to drop below 5,000 cfm, it was immaterial whether the inadequate velocity measured by the inspector was caused by a three-foot gap or a twenty-foot gap. 9 FMSHRC at 1684. He found the evidence uncontroverted that the air velocity measured 1662 cfm at the end of the line curtain and that a velocity of 5,000 cfm was required. Therefore, he held that the evidence established a violation of the ventilation plan and consequently of section 75.316. 9 FMSHRC at 1684. Regarding Freeman's argument that Stritzel had interfered with the mining cycle, the judge stated that it could not be considered part of any mining cycle for a shuttle car to tear down part of a line curtain. *Id.* Contrary to the inspector's findings, the judge held, however, that the violation was neither significant and substantial nor unwarrantable, and he lowered the civil penalty assessed to \$200. 9 FMSHRC at 1685-86.

We granted Freeman's petition for discretionary review. Freeman argues that the Secretary did not prove a violation of the standard, and we agree.

A ventilation plan is approved by the Secretary and adopted by the mine operator pursuant to section 75.316 and section 303(o) of the Mine Act. 30 U.S.C. § 863(o). Once the plan is approved and adopted its provisions are enforceable as mandatory standards. *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987); see also *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 409 (D.C. Cir. 1976); *Carbon County Coal Co.*, 7 FMSHRC 1367, 1371 (September 1985); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2771 (December 1981). In an enforcement action before the Commission, the Secretary must establish that the provision allegedly violated is part of the approved and adopted plan and that the cited condition violated the provision. *Jim Walter*, 9 FMSHRC at 907.

The Secretary has failed to establish this latter requirement. There is no dispute that the ventilation plan for the Orient No. 6 mine provides for a minimum air velocity of 5,000 cfm at the end of the line curtain. The plan states:

The minimum air quantities or velocities to be employed, and the maximum distance ventilating devices will be maintained from the deepest point of face penetration, where coal is being cut, mined loaded or drilled for blasting are outlined below.

A blowing line curtain in conjunction with a ... scrubber may be used. The blowing line curtain will deliver a minimum of 5,000 cfm with the scrubber

operating. The inby end of the curtain will be maintained to within 25 feet of the face.

P. Ex. 1 at III. However, the plan itself does not suggest that failure to deliver the minimum air velocity at all times and in all circumstances necessarily results in a violation of the plan. Indeed, when the plan is read together with other relevant mandatory ventilation standards for underground coal mines, it is clear that in certain circumstances, including the unique factual circumstances presented here, a temporary interruption in the minimum air velocity delivered can occur without a violation of the Act resulting.

While minimum air quantity or velocity requirements of ventilation plans and mandatory safety standards provide an objective test by which the adequacy of a mine ventilation system can be evaluated, other mandatory ventilation standards recognize that the dynamics of the underground mining environment occasionally interfere with attainment of constant minimum quantity or velocity levels. The other standards recognize that disruptions in mine ventilation inevitably occur and that the key to effective compliance lies in expeditiously taking those steps necessary to restore air quantity or velocity to the required level.

For example, it is obvious that an unplanned power outage and the temporary shutdown of the main fan will reduce the quantity and velocity of air delivered to the face areas. Such a contingency is anticipated in the mandatory standards, however, and procedures for the restoration of air and the steps to be taken if ventilation cannot be restored within a reasonable time are outlined accordingly. See 30 C.F.R. §§ 75.300-3(a)(2), 75.321, and 75.321-1.

Similarly, and directly on point with the situation presented in this case, there are mandatory safety standards that anticipate the possible diminution in ventilation caused by damaged or downed line brattice. 30 C.F.R. § 75.302, a standard drawn verbatim from the statute, 30 U.S.C. 863(c), requires that "[p]roperly installed and adequately maintained line brattice ... shall be continuously used from the last open crosscut of an entry or room of each working section to provide adequate ventilation.... When damaged by falls or otherwise, such brattice ... shall be repaired immediately." (Emphasis added.) Furthermore, 30 C.F.R. § 75.302-2 provides that, "[w]hen the line brattice ... is damaged to an extent that ventilation of the working face is inadequate, production activities in the working place shall cease until necessary repairs are made and adequate ventilation restored." These standards recognize that line

curtains may be damaged or torn down and that ventilation at the working face may, as a result, be diminished. They also make clear, however, that absent any unusual circumstances, it is the operator's failure to take immediate steps to repair or replace the downed line brattice that constitutes a violation.

Here, the second shuttle car operator stopped his machine and, consistent with the dictates of section 75.302, immediately began rehangng the downed line brattice. For purposes of section 75.302 2, production activities had ceased, since his was the next shuttle car to be loaded at the continuous miner and he would not have returned to the

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loading area until he had repaired the 20 foot gap. Thus, compliance with section 75.302-2 would have been achieved but for the inspector's order, mistaken as it may have been, to cease rehangng the line brattice. Had not the inspector intervened, the minimum air velocity would have been restored almost immediately. 5/ At the very least, the inspector's unwitting interference with Freeman's abatement skewed the results of the air measurement so as to render it invalid for purposes of establishing a violation insofar as the three foot gap initially observed by the inspector is concerned. Under these circumstances we conclude that Freeman did not violate its ventilation plan.

Accordingly, we reverse the decision of the administrative law judge.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

5/ We note, as did the judge, that Freeman's expert testified that the three foot gap in the line curtain would not have resulted in a drop in the air velocity below 5,000 cfm. 9 FMSHRC at 1684.

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Distribution

Harry Coven, Esq.
Gould & Ratner
222 N. LaSalle St.
8th Floor
Chicago, Illinois 60601

Vicki Shteir-Dunn, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Administrative Law Judge John Morris
Federal Mine Safety & Health Review Commission
1244 Speer Bldg., Room 280
Denver, Colorado 80204