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MSHA V. BETHENERGY MINES  
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION  
WASHINGTON, D.C.  
September 10, 1990

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

v. Docket No. PENN 89-222  
BETHENERGY MINES, INC.

BEFORE: Backley, Acting Chairman; Doyle and Nelson, Commissioners

ORDER

BY THE COMMISSION:

In this matter pending on review, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988) ("Mine Act" or "Act"), counsel for the Secretary of Labor has filed a motion requesting vacation of the citation and its associated civil penalty assessment and dismissal of the proceeding. BethEnergy Mines, Inc. ("BethEnergy") has filed a response indicating that it has no objection to the granting of the Secretary's motion. For the following reasons, we grant the motion.

On March 14, 1989, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued BethEnergy two citations alleging violations of 30 C.F.R. 75.301 and 75.316 in connection with a sudden release of methane at the face area of a longwall section. Section 75.301, in part, requires that a sufficient volume and velocity of air be ventilated in active working to dilute and render harmless dangerous or harmful gases, such as methane. 1/ Section

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1/ Section 75.301, which repeats the statutory standard at 30 U.S.C. 83(b), provides in pertinent part

All active workings shall be ventilated by a current of air containing not less than

19.5 volume per centum of oxygen, not more than 0.5 volume per centum of carbon dioxide, and no harmful quantities of other noxious or poisonous gases; and the volume and velocity of the current of air shall be sufficient to dilute, render harmless, and to carry

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75.316 requires mine operators to adopt ventilation system and methane and dust control plans approved by the Secretary. The citations alleged that the current of ventilating air at the face was insufficient to dilute the methane, in violation of section 75.301, and that BethEnergy was not complying with certain requirements of its ventilation plan. BethEnergy contested the citations, the Secretary proposed civil penalties for the alleged violations, and the matter proceeded to hearing before Commission Administrative Law Judge Avram Weisberger.

In his decision, the judge vacated the citation alleging a violation of section 75.316 (12 FMSHRC 975, 981-85 (May 1990)(ALJ)), and no issue pertaining to that aspect of the judge's decision is before us on review. With respect to the alleged violation of section 75.301 (n.1 supra), the judge noted BethEnergy's position that, at the time of the citations, it was meeting or exceeding the minimum air flow required at the last open crosscut by the second sentence of section 75.301, which requires an airflow of 9,000 cubic feet a minute ("C.F.M."). BethEnergy argued that it could not be cited under the first sentence of section 75.301 for failure to provide adequate ventilation to dilute the sudden release of methane if it were exceeding the airflow set forth in the second sentence. 12 FMSHRC at 979. The judge rejected this position, concluding that an airflow meeting or exceeding the 9,000 C.F.M. requirement does not comply with the first sentence of section 75.301 if it is nevertheless insufficient to dilute and render harmless dangerous or harmful gases. *Id.* We granted BethEnergy's subsequent petition for discretionary review.

After the submission of BethEnergy's brief on review, the Secretary filed with the Commission her present Motion to Vacate Citation and to Dismiss Proceeding ("Motion"). In this motion, the Secretary notes that she argued to the judge, and the judge held, that "Section 75.301 requires that harmful concentrations of methane not occur in the first instance [and] the second sentence of that section sets forth the minimum means which in all events must be followed in seeking to achieve this result...." Motion at 3 (emphasis in original). However, the Secretary states that, "upon further review," MSHA has determined that its position before the judge "is not its preferred interpretation in the circumstances present in this case, and is not consistent with its historic and ongoing enforcement position pertaining

away, flammable, explosive, noxious, and harmful gases, and dust, and smoke and explosive fumes. The minimum quantity of air reaching the last open crosscut in any pair or set of developing entries and the last open crosscut in any pair or set of rooms shall be 9,000 cubic feet a minute, and the minimum quantity of air reaching the intake end of a pillar line shall be 9,000 cubic feet a minute. The minimum quantity of air in

any coal mine reaching each working face shall be 3,000 cubic feet a minute. The authorized representative of the Secretary may require in any coal mine a greater quantity and velocity of air when he finds it necessary to protect the health or safety of miners.

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to the liberation of unexpected quantities of methane in a working place." Motion at 4. The Secretary further notes her "recognition that the liberation of methane is a natural phenomenon which occurs when coal is cut from its natural deposit, and that such occurrences are not readily predictable." *Id.* Based on the foregoing considerations, the Secretary restates her legal position in this matter as follows:

It is, therefore, the Secretary's position that compliance with the ventilation quantity requirements of section 75.301, as implemented through an operator's approved ventilation plan, together with the remedial requirements of sections 75.308 and 75.313, [2/] constitute the appropriate enforcement mechanisms with respect to unexpected methane liberation in working places (i.e., areas inby the last open crosscut; see 30 C.F.R. 75.2(g)(2)). Thus, a violation of the first sentence of section 75.301, as cited ... below, does not occur when methane unexpectedly is encountered in excessive concentrations in working places. Applying this interpretation to the facts in this case, a violation of 30 C.F.R. 75.301 did not occur.

*Id.* (emphasis in original).

In light of this position, the Secretary now moves for vacation of the citation and dismissal of the proceeding. After receipt of the Secretary's motion, the Commission issued an order on August 8, 1990, directing BethEnergy to file a written response to the motion. On August 17, 1990, the Commission received BethEnergy's Response to Motion to Vacate ("Response"), indicating that it does not object to vacation of the citation and dismissal of the proceeding. BethEnergy notes in its response, however, that its position "does not, under any circumstances constitute an admission by BethEnergy of the validity of the Secretary's assertions set forth in its Motion to Vacate." Response at 2.

As we have held, our "responsibility under the Mine Act is to ensure that a contested case is terminated, or continued, in accordance with the Act." *Youghioghny & Ohio Coal Co.*, 7 FMSHRC 200, 203 (February 1985). A motion by the Secretary to vacate a citation or withdrawal order and to dismiss a proceeding will be granted if "adequate reasons" to do so are present. *Southern Ohio Coal Co.*, 10 FMSHRC 1669, 1670 (December 1988) ("SOCCO"), and authorities cited. Here, the Secretary has disclaimed reliance on the legal position that she advocated successfully before the judge. Instead, the Secretary states that, applying her "preferred interpretation in the circumstances present in this case," it now appears

to her that the alleged violation

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2/ 30 C.F.R. 75.308 specifies the remedial actions to be taken when excess concentrations of methane occur in working places, and 30 C.F.R. 75.313 provides for the installation of approved methane monitors on specified kinds of mining equipment.

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of section 75.301 did not occur. As the prosecutor responsible for enforcement of the Act, the Secretary has concluded that she should seek dismissal of this proceeding, and that prosecutory determination is entitled to special weight. SOCCO, 10 FMSHRC at 1670. The operator has not objected to the granting of the Secretary's motion and will not be prejudiced by the requested action. No reason otherwise appears on this record as to why the motion should not be granted.

The Commission expresses no view as to the merits of the judge's determination that BethEnergy violated section 75.301 or the Secretary's present interpretation of that standard as applied to the circumstances involved in this case.

Accordingly, upon consideration of the Secretary's motion and the operator's response, the Secretary's motion is granted. The citation and assessed civil penalty are vacated. The Commission's direction for review is vacated and this proceeding is dismissed. 3/

Richard V. Backley, Acting Chairman

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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3/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. 823(c), we have designated ourselves a panel of three Commissioners to exercise the powers of the Commission in this matter.