CCASE:
ISLAND CREEK V. SOL (MSHA) AND UMWA
DDATE:
19930303
TTEXT:

March 3, 1993

ISLAND CREEK COAL COMPANY	:	
	:	
v.	:	Docket Nos. VA 91-47-R
	:	VA 91-48-R
SECRETARY OF LABOR, MINE SAFETY	:	VA 91-49-R
AND HEALTH ADMINISTRATION (MSHA)	:	
	:	
and	:	
	:	
UNITED MINE WORKERS OF AMERICA	:	

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

DECISION

BY THE COMMISSION:

This contest proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)("Mine Act" or "Act"). The issues are whether the presence of an explosive accumulation of methane behind stoppings along the bleeder entries of a gob(Footnote 1) in a longwall section presented an imminent danger and whether Island Creek Coal Company ("Island Creek") was complying with its VP-3 Mine ventilation plan in accordance with 30 C.F.R.

75.316.(Footnote 2) This case arose when inspectors of the Department o Labor's Mine Safety and Health Administration ("MSHA") issued two imminent danger orders and a citation to Island Creek after they measured the methane content of the air leaking from seals of three stoppings that separated the gob from the

_____

1 "Gob," in the context of this case, refers to the "space left by the extraction of a coal seam...." Bureau of Mines, U.S. Department of the Interior, Dictionary of Mining, Mineral, and Related Terms, at 497 (1968)(DMMRT). "Bleeder entries" are "panel entries driven on a perimeter of 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." DMMRT at 112.

_____

2 Section 75.316 provides in pertinent 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 and set out in printed form.... Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

bleeder entries and determined that an area within the gob contained an explosive accumulation of methane. Commission Administrative Law Judge George A. Koutras vacated both orders and the citation. Island Creek Coal Co., 13 FMSHRC 592 (April 1991)(ALJ). For the reasons set forth below, we affirm the judge.

I.

Factual and Procedural Background

The gob, known as the South Gob, is an inaccessible 1.75 square mile area resulting from the mining of ten longwall panels. Each panel is about 5,600 feet long and, taken together, the 10 panels are about 8,000 feet wide. The gob is ventilated by air entering at the tailgate end of the longwall face, flowing through the gob, and exiting at three designated areas into bleeder and return entries. Air also exits through bore holes drilled from the surface and equipped with exhaust fans. This ventilation system is designed to dilute and render harmless any methane emitted in the gob. The VP-3 mine is a gassy mine that liberates more than one million cubic feet of methane per day.

As mining has progressed, development entries have been established using a continuous mining machine in advance of each longwall panel. Each development entry consists of four individual entries, and serves as the headgate entry when the longwall equipment is moved into the panel and as the tailgate entry when the longwall is moved past the entry into the next panel. The development entries are consecutively numbered and, at the time the citation and orders were issued, the No. 12 development entry was the headgate and the No. 11 entry was at the tailgate. At the time they were built, each entry was connected to the bleeder entries at the back and was connected to the south main returns at the mouth. Island Creek had installed stoppings at the mouth of all of the development entries leading to the south returns except at the No. 1 entry and at the current headgate and tailgate entries (Nos. 12 and 11, respectively). MSHA has not challenged the placement of these stoppings. Island Creek also installed stoppings between the gob and the bleeder entries on the Nos. 5 through 10 development entries.

On December 5, 1990, MSHA Inspector Arnold D. Carico conducted a ventilation inspection of the area around the South Gob. He did not detect any violations of safety and health standards in the headgate and tailgate entries of the longwall panel or in the bleeder entries for the gob. As he was inspecting the bleeder entries, he observed that stoppings were present in all four entries of the No. 10 development at the point where they connected with the bleeder entries. He tested for methane behind one of these stoppings by using his hand to locate air leaking through cracks in the stopping. He placed the tube of a hand-held methane detector into the cracks and took several readings of air escaping from the interior of the gob. He recorded the highest reading obtained, which was 6.2% methane. Inspector Carico then proceeded to the area where the four No. 9 development entries intersected with the bleeder entries. He performed the same type of test with his methane detector and found 8.3% methane in the air leaking from a crack in a stopping. Inspector Carico then traveled to the intersection of the four No. 8

development entries and the bleeder entries and measured 7.6% methane from a stopping crack.

After taking the reading at the stopping in the No. 8 development entries, Carico inferred that tens of thousands of cubic feet of methane were present in the gob and that the gob was not being ventilated properly because these stoppings blocked the air flow into the bleeder entries. Carico believed that a roof fall could ignite the methane(Footnote 3) and, thus, that an imminent danger existed. Accordingly, he issued an order under section 107(a) of the Mine Act, 30 U.S.C. 817(a) ordering the withdrawal of all miners from the VP-3 Mine.(Footnote 4) Inspector Carico also issued a citation under section 104(a) of the Mine Act, 30 U.S.C. 814(a), because he believed that the stoppings in the Nos. 8, 9, and 10 development entries violated the mine's ventilation plan adopted and approved pursuant to 30 C.F.R. 75.316.(Footnote 5) The inspector believed

_____

3 Methane presents an explosion hazard when found in concentrations between 5% and 15%. Tr. Vol. I, 21; See also Wyoming Fuel Co., 13 FMSHRC 1210, 1213 n.3 (August 1991).

_____

4 Section 107(a) of the Mine Act provides, in pertinent part:

> If, upon any inspection or investigation of a coal or other mine which is subject to this [Act], an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section [104(a)], to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist.

The imminent danger order provided:

> Methane concentrations were detected coming through permanent stoppings erected across the bleeder entry connectors between the gob and the South main bleeders at the following locations and in the following concentrations (as indicated by a Riken methane indicator): No. 2 Entry of No. 10 Development South [6.2%]; No. 4 Entry of No. 9 Development South 8.3%; No. 4 Entry of No. 8 Development South 7.6%; Citation No. 3354743 is being issued with and as contributing factor to this order.

_____

5 The citation provided, in pertinent part:

> The Ventilation, Methane, and Dust Control Plan approved for

that these stoppings impeded the movement of methane from the gob into the bleeder entries.

On the following day, December 6, MSHA Inspector Clardy Scammell used the same technique to take methane readings at the same stoppings and detected methane concentrations in the gob of 3.6% or less. He terminated the order of withdrawal because the measured methane levels were below the explosive range.

On December 13, 1990, Inspector Scammell again checked the methane levels of air leaking from the stoppings in the Nos. 8, 9 and 10 development entries using the same technique that had been used on the previous two inspections. He found 6.2% methane at a crack in a No. 10 entry stopping, 6.3% at a crack in a No. 9 entry stopping, and 5.75% at a crack in a No. 8 entry stopping. Based on these readings, he issued an imminent danger order withdrawing all miners from the VP-3 Mine. The order was terminated on December 20, 1990.

Island Creek filed notices of contest of the citation and orders and an expedited hearing was held before Judge Koutras on December 19-20, 1990. The United Mine Workers of America ("UMWA") intervened in the proceeding. In his decision, the judge stated that, based on the record, "one may reasonably conclude that the potential for a methane explosion is dependent on several essential ingredients; namely, fuel, oxygen and a ready ignition source." 13 FMSHRC at 636. The judge questioned whether MSHA had established the existence of a substantial body of explosive methane in the gob. 13 FMSHRC at 632. He noted that the inspectors had concluded that such a substantial quantity was present by testing for methane through small cracks in one of four stoppings at each of three of the eleven development entries adjacent to the bleeders. 13 FMSHRC at 628-29. The judge determined that "the presence of any explosive methane levels in the gob areas behind the stoppings ..., standing alone, did not present an imminently dangerous condition." 13 FMSHRC at 636. The judge also stated he had "difficulty understanding how one may reasonably conclude that there was a reasonable likelihood of a roof fall in the gob area which would have sparked an ignition." 13 FMSHRC at 635.(Footnote 6) The

Footnote 5 contt.....
this mine was not being complied with. Item 10 of the Plan requires that "Bleeder entries shall be connected to those areas from which pillars have been wholly or partially extracted at strategic locations in such a way as to control air flow through such gob areas, ..." Permanent stoppings were erected across all connectors between the gob and the South main bleeders at Nos. 8, 9, and 10 Developments, and had been plastered to minimize leakage from the gob to the bleeders. Methane was detected ... leaking through these stoppings.... According to mine management the only locations where air is being intentionally regulated from the gob area are at No. 11 Development (tailgate) connectors and No. 1 Development connectors to the main bleeders and main returns.

_____
6 MSHA asserted that, to a lesser degree, other ignition sources, such as an ignition at the working face, welding or cutting at the face or in the bleeders, open flames or bolting in the face or bleeders, or the use of sparking

judge reviewed the Secretary's evidence concerning the history of roof falls at the mine, the presence of sparking minerals (quartzite) in the roof, the history of mine fires, and MSHA reports concerning prior ignitions at the mine. 13 FMSHRC at 630-35. The judge held that, although "the presence of explosive gas levels in a mine, under certain conditions, is dangerous, ... any determination as to whether an imminent danger existed must be made on the basis of the circumstances as they existed at the time the order is issued, or as they might have existed had normal mining operations continued." 13 FMSHRC at 637.

The judge stated that he could not conclude that "Mr. Carico's reliance on the MSHA reports [concerning prior methane ignitions] provides any credible or probative evidentiary support for any conclusion that ready ignition sources capable of propagating an explosion of the methane in the gob ... were present when he issued the order, or were likely to be present if normal mining operations were to continue." 13 FMSHRC at 637.(Footnote 7) He then stated:

> I recognize the fact that any judgment call by an inspector with respect to the existence of an imminent danger situation, when balanced against the safety of miners, must necessarily be made quickly and without delay. However, in any subsequent proceeding challenging the order, any imminently dangerous situation, which the inspector may have believed existed at the time he issued the order, must be proven. On the facts and evidence adduced in this case, I cannot conclude that MSHA has proven or established the existence of any ignition sources to support the inspector's imminent danger finding. I conclude and find that the inspector's speculative anticipation of a possible mine explosion, in the circumstances presented, falls short of the statutory requirement of reasonable expectation.

Id.

The judge noted that there was no evidence that explosive concentrations of methane were entering the bleeders or the working areas of the mine. 13 FMSHRC at 646. He also noted that neither the ventilation plan nor the Secretary's safety standards prohibit the existence of explosive concentrations of methane in the gob. Id. The judge found that Island Creek's evidence, which he found credible and supported in part by Inspector Carico, established that the gob was being adequately ventilated because the

Footnote 6 cont.....
tools in the face or bleeders, could propagate an explosion in the gob. The judge determined that the evidence in the record did not support a conclusion that any of these alleged ignition sources were present or would be present in the normal course of mining. 13 FMSHRC at 636. He also found that the inspectors' testimony concerning these alleged ignition sources was "less than credible and unsupported by any reasonably credible or probative evidence." Id.

_____

7 The judge analyzed each withdrawal order separately in his decision, but his conclusions were the same. 13 FMSHRC at 638-39.

"air flow through the cited development areas allowed for the mixing of the methane with the air coursing through those areas and ... the methane which was mixing, or being diluted by the air, was coursing through the gob areas behind the stoppings in question ... into the mine bleeder system and out of the mine." Id. The judge concluded that MSHA failed to establish that Island Creek violated its ventilation plan and he vacated the citation alleging a violation of 30 C.F.R. 316.

The Secretary filed a Petition for Discretionary Review of that part of the judge's decision vacating the imminent danger orders and the UMWA filed a Petition for Discretionary Review of the judge's vacation of the citation and the withdrawal orders. The Commission granted both petitions.

II.

Disposition of the Issues

Section 303(z)(2) of the Mine Act, 30 U.S.C. 863(z)(2), requires that all abandoned areas of underground coal mines and areas from which pillars have been extracted must be ventilated by bleeder entries or be sealed off from the rest of the mine. This provision further states that "ventilation shall be maintained so as continuously to dilute, render harmless, and carry away methane and other explosive gases within such areas and to protect the active workings of the mine from the hazards of such methane and other explosive gases." This section also provides that "[a]ir coursed through underground areas from which pillars have been ... extracted which enters another split of air shall not contain more than 2.0 volume per centum of methane, when tested at the point it enters such other split."

Island Creek contends that it fully complied with the Mine Act and the Secretary's safety standards because, pursuant to its ventilation plan, it provided sufficient ventilation in the gob to carry the methane away from the working areas of the mine through the bleeder entries. It maintains that the presence of methane in the bleeder entries at a level of less than 2% demonstrates that its ventilation controls were working and that no imminently dangerous conditions existed. Island Creek argues that explosive mixtures of methane are to be expected in the gob from time to time because the coal seam liberates large quantities of methane, but that the presence of methane in the gob does not, by itself, violate MSHA's safety standards or create an imminent danger. It maintains that the Secretary failed to prove the presence of an ignition source that could reasonably be expected to ignite the methane.

The Secretary and the UMWA contend that the mine's ventilation system did not induce the drainage of methane from all portions of the gob, in part, because the presence of the stoppings between the bleeder entries and the gob prevented the ventilation system from functioning properly. Both the Secretary and the UMWA argue that the methane accumulation in the gob created an imminent danger. The UMWA argues, in addition, that the presence of the methane demonstrated that Island Creek violated its ventilation plan.

A. Imminent Danger Orders

Section 3(j) of the Mine Act defines an imminent danger as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. 802(j). In Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989), the Commission noted that "the U.S. Courts of Appeals have eschewed a narrow construction and have refused to limit the concept of imminent danger to hazards that pose an immediate danger." (citations omitted). The Commission noted further that the courts have held that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." Id., quoting Eastern Associated Coal Corp. v. Interior Bd. of Mine Op. App., 491 F.2d 277, 278 (4th Cir. 1974). The Commission adopted the Seventh Circuit's holding that an inspector's finding of an imminent danger must be supported "unless there is evidence that he has abused his discretion or authority." 11 FMSHRC at 2164 quoting Old Ben Coal Corp. v. Interior Bd. of Mine Op. App., 523 F.2d 25, 31 (1975).

In Utah Power & Light Co., 13 FMSHRC 1617, 1627 (October 1991), the Commission reaffirmed that an MSHA inspector has considerable discretion in determining whether an imminent danger exists. The Commission held that there must be some degree of imminence to support an imminent danger order and noted that the word "imminent" is defined as "ready to take place[;] near at hand[;] impending ...[;] hanging threateningly over one's head[;] menacingly near." 13 FMSHRC at 1621 (citation omitted). The Commission determined that the legislative history of the imminent danger provision supported a conclusion that "the hazard to be protected against by the withdrawal order must be impending so as to require the immediate withdrawal of miners." Id. Finally, the Commission held that an inspector abuses his discretion, in the sense of making a decision that is not in accordance with law, if he issues a section 107(a) order without determining that the condition or practice presents an impending hazard requiring the immediate withdrawal of miners. 13 FMSHRC at 1622-23.

On review, the Secretary argues that the judge erred in finding that the MSHA inspectors did not reasonably conclude that explosive levels of methane in the gob created an imminent danger. The Secretary believes that his burden in an imminent danger case is to prove that the inspector "reasonably perceived" that the conditions at the mine created an imminent danger and that he is not required to show that an imminent danger "actually" existed. Sec. Br. 9 (emphasis in original). The Secretary contends that it was reasonable for the inspectors to rely on their knowledge that fires in the gob in 1972 and 1975 had been attributed to sparks caused by falls of quartzite roof and that two more recent fires in the gob were of an indeterminable origin, with quartzite a possible ignition source. The judge erred, the Secretary asserts, in failing to recognize that inspectors must be given "great latitude in making on-the-spot determinations of whether imminent dangers exist." Sec. Br. 11. The Secretary contends that in order to affirm the judge, the "Commission must determine that the inspectors acted irrationally, and abused

their discretion." Sec. Br. 14. The Secretary is asking the Commission to "independently examine the record evidence to determine whether a reasonable inspector could have reached the conclusions reached by Inspectors Carico and Scammell in this case." Sec. Br. 6.

The UMWA argues that the judge failed to focus on the potential risk of serious physical harm at any time. The UMWA asserts that whenever a large accumulation of an explosive mixture of methane is present, there is a potential that the methane will be ignited. Moreover, it contends that the MSHA inspectors were properly concerned that the methane could be ignited by a spark caused by a roof fall in the gob. The UMWA further argues that the judge placed an impossible burden on the Secretary in this case to pinpoint an exact ignition source in the inaccessible areas of the gob.

We conclude that the judge applied the appropriate analysis in his decision. The judge reviewed Commission and judicial precedent, including those decisions that stress the considerable discretion granted MSHA inspectors in issuing imminent danger orders. 13 FMSHRC at 626-28. He also specifically recognized that inspectors are required to decide whether a hazard presents an imminent danger "quickly and without delay." 13 FMSHRC at 637. He determined that it was not reasonable for the inspectors to have concluded that "there was a reasonable likelihood of a roof fall in the gob area which would have sparked an ignition." 13 FMSHRC at 635. The judge held that "the inspector's speculative anticipation of a possible mine explosion, in the circumstances presented, falls short of the statutory requirement of reasonable expectation." 13 FMSHRC at 637. These findings demonstrate that the judge concluded that the inspectors abused their discretion and authority because, based on the facts readily available to them, it was not reasonable for them to have concluded that the presence of the methane "could reasonably be expected to cause death or serious physical harm." The Commission has held that, in imminent danger cases, the judge must determine "whether a preponderance of the evidence showed that the conditions or practices, as observed by the inspectors, could reasonably be expected to cause death or serious physical harm, before the conditions or practices could be eliminated." Wyoming Fuel Co., 14 FMSHRC 1282, 1291 (August 1992)(emphasis added). We explained that, in making such a determination, a judge "should make factual findings as to whether the inspector made a reasonable investigation of the facts, under the circumstances, and whether the facts known to him, or reasonably available to him, supported issuance of the imminent danger order." 14 FMSHRC at 1292. Judge Koutras determined that the inspectors did not make a reasonable investigation of the circumstances and that the facts reasonably available to them did not support issuance of the imminent danger orders. 13 FMSHRC 629, 632, 635-36, 637.

While the crucial question in imminent danger cases is whether the inspector abused his discretion or authority, the judge is not required to accept an inspector's subjective "perception" that an imminent danger existed. Rather, the judge must evaluate whether, given the particular circumstances, it was reasonable for the inspector to conclude that an imminent danger existed. The Secretary still bears the burden of proving his case by a preponderance of the evidence. Although an inspector is granted wide discretion because he must act quickly to remove miners from a situation that he

believes to be hazardous, the reasonableness of an inspector's imminent danger finding is subject to subsequent examination at the evidentiary hearing.

It would be inappropriate for the Commission to reweigh the evidence in this case or to enter de novo findings based on an independent evaluation of the record. The Commission is bound by the substantial evidence test when reviewing an administrative law judge's factual determinations. U.S.C. 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." See, e.g., Rochester & Pittsburgh, 11 FMSHRC at 2163 quoting Consolidation Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

We conclude that substantial evidence supports the judge's findings of fact. The judge found that it was unreasonable for the inspectors to believe that methane at this location could be ignited given continued mining operations. He determined that, after the 1975 mine fire, Island Creek instituted a drilling program to locate sandstone formations containing quartzite. The judge examined the reports that had been issued by MSHA and its predecessor concerning earlier mine ignitions at the VP-3 mine. The judge found that, in these reports, MSHA had discounted roof falls as the source of the subsequent ignitions. 13 FMSHRC at 632-33, Exhs. G-8, G-9. The judge further concluded that ignitions possibly caused by roof falls prior to 1975 were "too remote in time to support any reasonable conclusion that [roof falls] pose a present ignition hazard." 13 FMSHRC at 633.

The judge found that the inspectors speculated that a large body of explosive methane was present in the gob and that such a condition presented an imminent danger based on their understanding of previous reports. 13 FMSHRC at 632. The judge also determined that the inspectors failed to make any effort to ascertain actual mining conditions or to evaluate the mine's ventilation system, and that the inspectors relied almost exclusively on the earlier MSHA reports to support the imminent danger orders. Id. As stated above, he determined that these reports indicated that quartzite was no longer a potential ignition source for methane at this mine. 13 FMSHRC 633-37. He then vacated the orders because he found that the reports did not provide "any credible or probative evidentiary support for any conclusion that ready ignition sources capable of propagating an explosion of the methane in the gob area in question were present." 13 FMSHRC at 637. The record as a whole contains substantial evidence to support the judge's findings. See, e.g., Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

While we recognize that the presence of an explosive concentration of methane in a mine presents a hazard, it is significant that the methane accumulation in this case was in a gob and not in an active area of the mine. At the hearing, the MSHA inspectors admitted that explosive levels of methane are to be expected in the gob at this mine. Counsel for the Secretary conceded that an explosive accumulation of methane in this gob would create an imminent danger "[o]nly if there's such a significant ignition source [that] there is a significant danger." Tr. Vol. I, 153. On review, counsel for the Secretary states that the primary point of contention is whether "it was reasonable to conclude that an ignition source was present that rendered the methane an imminent danger." Sec. Br. 9. Thus, the Secretary concedes that,

in the circumstances of this case, the methane that had accumulated in the gob did not create an imminent danger in the absence of an ignition source. In this case, we agree with the judge that the Secretary failed to prove that an ignition source existed. Therefore, we need not and do not reach the issue of whether, in another case, the Secretary may support an imminent danger order by showing that an explosive accumulation of methane is present without proving a specific ignition source.

We reaffirm our holding in Rochester & Pittsburgh that an inspector must have considerable discretion in issuing imminent danger orders. Our affirmance of the judge's decision in this case should not be construed as circumscribing an inspector's authority or indeed his obligation to issue a section 107(a) order whenever he finds that an imminent danger exists. We base our decision on the narrow ground that substantial evidence supports the judge's determination that MSHA failed to meet its burden of proving that it was reasonable for the inspectors, based on the information available at the time, to conclude that the conditions in the mine constituted an imminent danger.

B. Citation

The section of the ventilation plan at issue in this proceeding is, in all essential respects, identical to the language of 30 C.F.R. 75.316-2(e) & 75.316-2(e)(1).(Footnote 8) The UMWA contends that MSHA established that the sealed stoppings Island Creek had constructed in the Nos. 8, 9 and 10 development entries were inconsistent with the mine's ventilation plan. UMWA Br. 16-17.

_____

8 The relevant provisions of the mine's ventilation plan provides:

> 10. Bleeder entries, bleeder systems, or equivalent means shall be used in all active pillaring areas to ventilate the mined areas from which the pillars have been wholly or partially extracted so as to control the methane content in such areas. Bleeder entries or bleeder systems established after June 28, 1970, shall conform with the requirements of Section 75.316-2, 30 CFR 75.
>
> (a) Bleeder entries shall be defined as special air courses developed and maintained as part of the mine ventilation system and designed to continuously move air-methane mixtures from the gob, away from active workings, and deliver such mixtures to the mine return air courses. Bleeder entries shall be connected to those areas from which pillars have been wholly or partially extracted at strategic locations in such a way to control air flow through such gob area, to induce drainage of gob gas from all portions of such gob areas, and to minimize the hazard from expansion of gob gases due to atmospheric changes.

Exh. G-4.

The UMWA argues that the plan required Island Creek to place regulators at those locations in order to provide the flexibility needed to adjust the air flow to remove methane before it could accumulate.(Footnote 9) It contends that, because it would be impractical for the plan to identify where the bleeder entries must be connected to the gob, the operator is required to provide connections at locations that will induce drainage from all areas of the gob. UMWA Br. 18. The UMWA also asserts that, contrary to the findings of the judge, Inspector Carico testified that his method of testing for methane in the gob was sufficiently accurate to indicate that a large amount of explosive methane was present in the gob. UMWA Br. 20.

We affirm the judge's decision vacating the citation alleging a violation of 30 C.F.R. 75.316. Island Creek presented evidence at the hearing, credited by the judge, that the gob was being adequately ventilated in accordance with paragraph 10 of the mine's ventilation plan. MSHA witnesses admitted that whether the gob was connected with the bleeders at "strategic locations" is entirely dependent upon whether air was flowing through the gob to induce the drainage of methane from the gob into the bleeder entries. MSHA did not conduct a ventilation survey to determine the effectiveness of the mine's ventilation system. Island Creek did conduct such a survey, which it believes established that a satisfactory quantity of air was moving through the gob and adjacent bleeders, and that the gob atmosphere, including methane, was exiting the gob where intended. Island Creek's witnesses testified that it maintained the stoppings in the development entries so that it could control the air flow through the gob and that the ventilation survey demonstrated that its controls were working. Island Creek has been installing stoppings between the gob and the bleeder entries since at least 1987 and MSHA has never questioned their presence even though the ventilation plan has undergone semiannual review.

The judge credited the testimony of Island Creek expert witness Donald W. Mitchell that it is not unusual to find methane in a gob and that methane will gravitate to the higher elevations in the gob, which in this instance were the areas where the inspectors took the methane readings. 13 FMSHRC at 645. The judge noted that Inspector Carico conceded that explosive concentrations of methane are to be expected in some areas of a gob and that the area he tested for methane was one of "the highest elevations in the [gob] and that methane will go to that area even though it is enroute out of the mine." Id. Finally, the judge noted that Carico also conceded that the stoppings were installed to force the air to flow to another location where it would leave the gob and that, as the air flowed away from the stoppings, it would be picking up methane. 13 FMSHRC at 646. The ventilation plan, contrary to the assertions of the UMWA, does not require the installation of regulators at specific locations, other than between the headgate and tailgate entries and the bleeders. Exh. G-4. The record indicates that Island Creek had, in fact, installed regulators at those locations in the South Gob. Exh. C-2.

_____

9 A regulator is a door, that can be of any size, located in a stopping. The regulator can be opened or closed as needed. See DMMRT, at 910.

The judge concluded that the gob was being ventilated in a manner that mixed and diluted the methane with air and that this mixture was coursing through the gob into the bleeder system and out of the mine. 13 FMSHRC at 646. Substantial evidence supports the judge's findings and his conclusion that Island Creek was in compliance with its plan -- a finding the Secretary did not choose to appeal. If the Secretary believes that specific accumulations of methane create a hazard in gobs or other inactive areas of underground coal mines, he should consider promulgating safety standards to deal with this problem. If the Secretary believes that this mine requires special provisions regarding methane in the gob, such as the installation of regulators in the disputed stoppings, he should seek to amend the mine's ventilation plan to specifically address the issue.

III.

Conclusion

For the foregoing reasons, we affirm the judge's decision.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner