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BETHEBERGT MINES V. SOL  
DDATE:  
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FMSHRC-FCV  
JUNE 10, 1988

BETHENERGY MINES, INC.,  
Contestant  
v.

CONTEST PROCEEDING  
Docket No. PENN 88-107-R  
Order No. 2878578; 12/8/87

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

Cambria Slope Mine No. 33  
Mine ID 36-00840

DECISION

Appearances: Howard K. Agran, Esq., Office of the Solicitor,  
U. S. Department of Labor, Philadelphia,  
Pennsylvania, for the Secretary; R. Henry Moore, Esq.,  
Buchanan Ingersoll, P.C., Pittsburgh, Pennsylvania.

Before: Judge Weisberger

Statement of the Case

In this proceeding, BethEnergy Mines, Inc., (Contestant) seeks to contest a section 104(d)(2) Order issued on December 9, 1987. The Notice of Contest was filed on January 4, 1988, and the Answer of the Secretary (Respondent) was filed on January 25, 1988. Pursuant to notice, the case was heard in Hollidaysburg, Pennsylvania, on February 25, 1988. Samuel J. Brunatti and Joseph D. Hadden, Jr. testified for Respondent. William H. Radebach and John Gallick testified for Petitioner.

Contestant filed its Brief on April 21, 1988 and the Respondent filed its Findings of Fact and Conclusions of Law on April 25, 1988.

Stipulations

The Parties stipulated the following facts as set forth in Contestant's Prehearing Memorandum:

1. The Cambria Slope Mine No. 33 is owned and operated by BethEnergy.

2. The Administrative Law Judge has jurisdiction over this proceeding; BethEnergy and Mine No. 33 are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§801 et seq.

3. The annual production of Mine 33 is approximately 1.7 million tons. The operator's annual production is approximately 6 million tons.

4. The authenticity of the exhibits at hearing is stipulated, but no stipulation is made as to the facts asserted in such exhibits.

5. The subject order was properly served by a duly authorized representative of the Secretary of Labor upon agents of BethEnergy and may be admitted into evidence for the purpose of establishing its issuance and not for the truthfulness or relevancy of any statement asserted therein. (Respondent's Prehearing Memorandum P. 2-3, Tr. 9-10.)

6. That no clean intervening inspection had occurred since the issuance of the June 25, 1985, section 104(d) Order on which the section 104(d)(2) Order was based. (This stipulation is contained in Contestant's Letter of March 1, 1988.)

#### Regulatory Provision

30 C.F.R. § 75.316 provides as follows:

"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 on or before June 28, 1970. 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."

Approved Ventilation Plan

Page 7 of the approved plan as pertinent provides as follows:

\* \* \*

In addition to the other information required to be shown on the map, the following shall also be shown:

\* \* \*

2. All stopping, regulators, overcasts, undercasts, air-lock and man doors.

Revision No. 29 approved August 24, 1987, provides as pertinent as follows:

Construction of Regulators

"Regulators are constructed of concrete blocks or steel or a combination of both."

Order No. 2878578

Order No. 2878578 issued on December 8, 1987, provides as follows:

The approved ventilation and methane and dust control plan was not being complied with in the 1 West C prime area of the mine in that an intake regulator constructed of brattice cloth was placed across the 1 West left side intake entry just inby the junction of the No. 7 entry of left. The operator has no approval to construct air intake regulators at this location. The operator was previously notified that prior to constructing intake regulators prior approval must be obtained from the District Manager. The operator's approved plan states regulators will be constructed of concrete blocks or steel or a combination of both, not canvas. This area is examined each week by a certified person.

Findings of Fact and Conclusions of Law

Based upon the stipulation of the Parties, I conclude that Contestant is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C § 801 et seq., and that I have jurisdiction over this proceeding.

I.

William H. Radebach, who was responsible for all the underground work at Respondent's C prime seam, testified, in essence, that sometime in September of 1987, there was too much air going up the No. 4 intake entry. Accordingly, he installed a curtain with an opening of approximately 2 feet by 3 feet in the upper right hand corner in order to decrease the amount of air going up this entry. The ventilation plan in affect, when the curtain was installed, and when it was observed by MSHA Inspector Samuel J. Brunatti, on December 9, 1987, did not indicate any regulator, door, or check curtain at the site where Radebach installed the curtain in question.

It is Contestant's position, as testified by Radebach, that the curtain in question was installed only as a temporary measure pending approval of permanent stoppings in entry No. 4, which had been submitted to MSHA for approval on October 29, 1987. John Gallick, the Director of Safety for Respondent's Pennsylvania Division, testified, in essence, that temporary curtain checks are usually installed at the discretion of the foreman, as there are always daily adjustments being made. Essentially he indicated that subsequent to the installation of temporary curtains, submissions are provided to MSHA at the next six month ventilation plan review. On cross-examination, Brunatti indicated that he agreed that temporary canvas curtains in the work face can be moved in the course of the day without prior approval, and that if a regulator would have to be repaired a temporary curtain could be installed without prior approval of MSHA.

The ventilation plan for Respondent, as indicated in Government Exhibit 2, required all regulators to be shown on the Ventilation Plan Map. The plan does not contain any definition of the term regulator nor is such a term defined in the regulations. The only definition in the record of the term regulator consists of the uncontradicted testimony of Brunatti and Joseph D. Hadden, Jr., MSHA's District Chief of Ventilation. Brunatti indicated that a brattice curtain or check redirects air from one entry to another, whereas a regulator is used to control the amount of air going through it by its opening and closing. (Tr. 24) In similar fashion, Hadden stated that a regulator provides an artificial resistance in an air course, (Tr. 127), and is designed to provide uniform distribution of air in sections (Tr. 139). Radebach also indicated that among other devices canvas checks are used to regulate air (Tr. 181). Also the MSHA Training Manual, Government Exhibit 8, indicates that a regulator can be made by tacking down one corner of a check curtain.

Accordingly, I find that the check curtain in question, installed with one corner down in order to decrease the flow of air in the No. 4 entry, was a regulator. Inasmuch as the curtain in question was placed at a position that was not approved for the placement of a regulator in the ventilation plan that was in effect, I find that there was a violation of the ventilation plan and hence of section 75.316, supra.

In reaching my decision, I did not place much weight upon Respondent's argument that the check curtain in question was only temporary, and that temporary curtains do not have to be shown on a ventilation plan. Gallick's testimony is to the effect that, in general, temporary checks are installed at the discretion of the foreman (Tr. 242), and thus are not required to be noted in a ventilation plan. I find that Brunatti's testimony clarifies that temporary curtains can be moved and installed on a regular basis when they are utilized at the working face where coal is actually being mined (Tr. 23, 57). He also indicated that temporary curtains could be installed at the site of a regulator if the latter is being repaired (Tr. 82, 87). In contrast, the curtain in question was installed approximately 5,000 feet from the working face. Also, there is a doubt as to whether the instant canvas curtain was only temporary. I note that Radebach indicated, on cross-examination, that it was intended to leave the curtain in question in place "forever" if necessary or until MSHA had approved his plan for a permanent stopping. (Tr. 203)

## II.

Brunatti also found the canvas curtain in question to be violative of a provision of the plan, Government Exhibit 4, which is headed "construction of regulators" and which provides that "Regulators are constructed of concrete blocks or steel or a combination of both." Radebach testified that MSHA employee Alex O'Rourke, upon reviewing Contestant's proposals concerning construction of regulators, indicated, in essence, that MSHA's concern was directed to the regulators used to control the return air on working sections. (Tr. 183) Gallick indicated when he met with O'Rourke, pursuant to a MSHA's request to present language concerning the construction of regulators, there was no discussion with regard to temporary regulators and the examples used at the discussion related to split regulators. He said that it was not contemplated that the language in Government Exhibit 4 was to include temporary regulators. However, for the reasons I set forth above, (infra I.), I have concluded that the curtain in question was a regulator. As such, the unqualified language of

the plan, as evidenced by Government Exhibit 4, required it to be constructed of either concrete blocks or steel or both. Inasmuch as the curtain in question was constructed of canvas it violated the approved ventilation plan.

III.

It is the position of the Respondent, that the violation herein was significant and substantial. Respondent's witnesses indicated that the installation of the curtain in question, with only an approximately 2 feet by 3 feet opening, along with the fact that the other entries in the section are closed off, could have the effect of decreasing the air in the gob area to the point where there would be insufficient air to vent the methane there. In this connection, reference is made to testimony that Contestant's mine produces the most methane in the State of Pennsylvania. Also, Respondent cites testimony to the effect that the curtain herein, due to its canvas construction, is susceptible of becoming dislodged or knocked down in a rib roll or roof fall. It thus is argued that should it be dislodged it would have the effect of reducing the air available to ventilate the gob area between No. 2 West and No. 1 West Sections.

I conclude that the hazard of an accumulation of methane from the gob area, is contributed to by the installation of the curtain herein. However, I find that there was insufficient evidence to conclude that there is a "reasonable likelihood that the hazard contributed to will result in injury." (Mathies Coal Company, 6 FMSHRC 1, 3-4 (January 1984); (See also, Texas Gulf, Inc., 10 FMSHRC (Slip. op. April 20, 1988)). I note, in this connection, that the Respondent has failed to introduce any evidence as to either the specific amount of methane in the gob area, or any measurement of air flow subsequent to the installation of the curtain in question. The only evidence with regard to methane, consists of Brunatti's statements, on cross-examination, that, based on an auto tester when he was in the area in question, he concluded that the methane was not in excess of one percent. He did not indicate the specific measurement of the methane. In addition, any likelihood of an explosion is minimized by the fact that on the date in question, mining was no longer being performed in the No. 1 West Main Section. I thus conclude that the violation herein was not significant and substantial (see Mathies Coal Company, supra).

IV.

Respondent's position, that the violation herein was caused by Contestant's "unwarrantable failure," appears to be predicated upon the opinion of Brunatti that, in essence, the installation of the curtain in question, was a device identical to that requested by Respondent in its letter of October 29, 1987, and not accepted by MSHA on November 19, 1987, (Government Exhibit 5).

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Also cited by Respondent is the testimony of Radeback agreeing that the regulators in use in No. 1 West Section on December 9, did not meet the terms of Government Exhibit 4, which sets forth the construction requirements of regulators (Tr. 200). Respondent avers that accordingly Contestant installed the curtain in question knowing it did not comport with Government Exhibit 4. In addition, Respondent argues that Contestant's witnesses acknowledged that the ventilation plan does not contain any provisions permitting the installation or erection of such a temporary curtain.

In the recent case of Emery Mining Corporation 9 FMSHRC 1997 (December 1987), the Commission held that "unwarrantable failure," is more than ordinary negligence and requires "aggravated conduct." I find the testimony of Contestant's witnesses to be credible and I conclude that they acted in good faith, although in error, in interpreting the ventilation plan in question as not requiring prior approval by MSHA of the installation of temporary curtains, such as the one in question. Accordingly, I find that Contestant's violation of the section 316, supra, and the ventilation plan was not as a result of its aggravated conduct. Further, I find the testimony of Contestant's witnesses to be credible and find that they acted in good faith in interpreting the ventilation plan herein as not requiring a temporary curtain regulator to be constructed of either concrete block or steel as set forth in Government Exhibit 4. Accordingly, I conclude that Contestant's action herein did not constitute an unwarrantable failure.

ORDER

It is ORDERED that Citation No. 2878578 issued on December 9, 1987, be modified to a section 104(a) Order and to reflect that it is not significant and substantial and is not caused by Contestant's unwarrantable failure. In all other respects the Citation is affirmed.

Avram Weisberger  
Administrative Law Judge

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