

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 5, 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. PENN 94-333  
Petitioner : A.C. No. 36-06967-03832  
v. :  
: Taronia Mine  
TARONIA MINING COMPANY, :  
Respondent :

DECISION

Appearances: Susan M. Jordan, Esq., Office of the Solicitor, U.S. Department of Labor,  
Philadelphia, Pennsylvania, for the Petitioner;  
Joseph A. Yuhas, Esq., Barnesboro, Pennsylvania, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) seeking a civil penalty assessment of \$3,000 for an alleged violation of mandatory safety standard 30 C.F.R. § 75.325(b). A hearing was held in Indiana, Pennsylvania, and the parties filed posthearing briefs which I have considered in my adjudication of this matter.

Issues

The issues presented in this proceeding are (1) whether the condition or practice cited by the inspector constituted a violation of the cited mandatory safety standard, (2) whether the violation was "significant and substantial," (3) whether the violation resulted from the respondent's "unwarrantable failure" to comply with the cited standard, and (4) the appropriate civil penalty to be assessed for the violation, taking into account the statutory civil penalty criteria found in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 .S.C.' 801 et seq.
2. Commission Rules, 29 C.F.R.' 2700.1, et seq.
3. Mandatory safety standard 30 C.F.R'. 75.325(b).

### Stipulations

The parties stipulated to the following (Exhibit G-8):

1. The Taroma Mine is owned and operated by the respondent, and it is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
2. The presiding Administrative Law Judge has jurisdiction over the proceeding pursuant to section 105 of the Act.
3. Section 104(d)(2) "S&S" Order No. 395~~7~~21, and its two modifications and termination were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the respondent at the dates, times, and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance.
4. The parties stipulate to the authenticity of their exhibits but not to the relevance or the truth of the matters asserted therein.
5. The alleged violation was abated immediately after issuance of the order.
6. The total annual production of the Taroma Mine is approximately 600,000 tons of coal, making it a medium-sized mine. The respondent, Taroma Mining Company, Inc., is considered a small-sized operator.
7. The computer printout (Exhibit G-7), reflecting the respondent's history of violations is an authentic copy and may be admitted as a business record of the mine Safety and Health Administration.
8. Taroma Mine had a history of 653 assessed violations in the 24-month period from October 12, 1991 to October 12, 1993.
9. The imposition of the proposed civil penalty will have no effect on the respondent's ability to remain in business.
10. There was no intervening clean inspection between Order No. 3955721 and previously issued section 104(d)(1) citations or orders.

11. The check that was part of the permanent stopping line in the first crosscut between L1 and L2 had been taken down by the respondent to facilitate the transportation of coal to the belt feeder.

12. Coal had been mined in L3 during the midnight shift on October 12, 1993 while the check was down.

13. There was not sufficient air movement in the crosscut between L1 and L2 on October 12, 1993 to turn the vanes of the anemometer at the time the MSHA inspector took his reading.

14. There was methane in the amount of 0.1 percent detected in the last open crosscut between L1 and L2 on October 12, 1993.

15. On October 12, 1993, Tampa Mine was on a 10-day section 103(i) spot inspection program for methane liberation over 500,000 cubic feet per 24-hour period.

### Discussion

Section 104(d)(2) "S&S" Order No. 3955721, issued at 10:05am., on October 12, 1993, cites an alleged violation of 30C.F.R. 75.325(b), and the cited condition or practice is described as follows:

When checked with an approved anemometer(s) the air in the last open crosscut located between L1 and L2 entries could not be measured due to the lack of air. The air in the last open crosscut could not be measured with an anemometer (s) due to the next crosscut outby being open. Evidence in the form of tracks and a discussion with the mine foreman indicate the second crosscut back had been open to accommodate transportation of coal on the previous shift. The section was not producing coal on this shift, and when checked the methane in the last open was 0.1 ch4. This condition was present in the main C, left side section 007. The faces of L1 and L2 entries were in approximately 10 feet.

## Petitioner's Testimony and Evidence

M SHA Inspector Lewis E. Kish testified that he has served in that capacity for 16 years and he described his duties and training, including 8 years of mining experience in private industry (Tr. 17-20). He confirmed that he inspected the mine on October 12, 1993, and issued the violation in question because he found an insufficient amount of air in the last open crosscut in violation of mandatory safety section 75.325(b) (Exhibit G-1, Tr. 21-23). He reviewed a map of the Main C mine area and confirmed that it accurately depicted the development of the section on the day of his inspection (Exhibit G-2; Tr. 24-25).

Mr. Kish stated that he inspected the faces on the right side of the section and then proceeded to inspect across the faces of the left side and took an air reading in the last open crosscut, and he marked the location between the L1 and L2 entries with a red "X" on the map (Tr. 27). He stated that he used an approved and calibrated hand held anemometer that measures the velocity of air passing through the moveable vanes of the instrument but he obtained no reading because the velocity of air was less than 50 revolutions per minute and the vanes would not turn. He took the measurement at the last cut-through in the line of pillars where permanent stoppings were installed between the intake and return air (Tr. 28).

Mr. Kish stated that he informed foreman Ed Stine, who was with him, that the air movement was not sufficient to turn the anemometer in the last open crosscut, and Mr. Stine stated that he knew there was no air in the last open crosscut because a curtain was down in the next crosscut outby and that this was normal because coal was hauled through the crosscut (Tr. 29).

Mr. Kish stated that he checked for methane at the same location where he made his air test and found one-tenth of one percent (Tr. 30). He then informed Mr. Stine that he would issue an order, and they proceeded to the area where the curtain was down and he marked the location with a black circle on the map (Tr. 30). He observed a check curtain that appeared to have been purposely placed against the left rib and he observed equipment tracks through that crosscut (Tr. 31). He further stated as follows at (Tr. 31-32):

A. Mr. Stine told me that this was a normal procedure for them to run coal through this crosscut, that they had been doing it rather than installing a run through check curtain, which is a curtain installed with slits in it to permit travel of equipment through this area without adversely effecting the ventilation.

Q. Did Mr. Stine indicate to you at all when coal had last been mined or run through there?

A. Yes, he indicated that coal had been run through that shift prior, which would have been on the midnight shift.

Q. The midnight shift of October 12th?

A. Yes.

Mr. Kish stated that the check curtain was reinstalled within 2 to 3 minutes and he took a methane test and found none present, and another check with his anemometer indicated there was sufficient air in excess of 15,000 cfm (Tr. 33). He confirmed that no mining was going on while he was on the section, and that it was a maintenance shift. However, mining would normally again resume on the afternoon second shift (Tr. 34).

Mr. Kish confirmed that he took notes regarding the violation (Exhibit G-3), and that he cited section 75.325(b), because it requires 9,000 cfm of air in the last open crosscut regardless of whether the unit is in production or not. He explained why he believed that his air reading was made in the last open crosscut (Tr. 35-36).

Mr. Kish stated that Mr. Stine did not indicate to him that the location where he checked the air and methane was not in the last open crosscut and the preshift examination book indicated that the preshift examiner made an air reading at the last open crosscut between the L1 and L2 entries, as he did, and recorded 15,120 cfm of air. Since the location of the crosscut was shown as L1 to L2, Mr. Kish assumed that was the correct place to take the air readings (Tr.38).

Mr. Kish stated that he reviewed the preshift and onshift mine examiner reports for October 12, 1993, and the air readings on both reports for the last open crosscut is shown as 15,120 cfm (Exhibits G-5 and G-5). The mine examiner stated that these air readings were taken at crosscuts L1 and L2, and Mr. Kish believed that these air readings were for the last open crosscut "because that's where the last open crosscut is located" and the operator "would have no reason to take an air reading at that location if it was not the last open crosscut" (Tr. 62). He stated that these air readings were taken between 5:00 and 6:00 a.m., and he was of the opinion that the check curtain was down at that time because "once that machine was moved over to the right side, I see no reason why they would have reinstalled it and taken it back down. It doesn't make sense" (Tr. 61-62).

On cross-examination, Mr. Kish referred to the mine map (Exhibit G-2), and stated that for some purposes of the Mine Act, the last open crosscut extends from the R3 entry to the L3 entry, and "that is the line of last open crosscut across, yes" (Tr. 72). For purposes of the definition of "working place area in by the last open crosscut," that entire area would be the last open crosscut (Tr. 72). The cited "last open crosscut" at issue in this case is a particular location in that area that is given for an air measurement, and on the day the order was issued there were two last open crosscuts for purposes of air measurement in the main C section. The "gist" of the violation is that the last open crosscut on the left side did not have

9,000 cfm of air. In his opinion, the location for the air measurement was the areas between the L1 and L2 entries (Tr. 73).

Mr. Kish stated that if the respondent's use of the check curtain in question to ventilate the main C section was part of its approved ventilation plan there would still be a violation of section 75.325(b) "because a statutory provision cannot be superseded with a plan that will undermine that statutory provision" (Tr. 74). He confirmed that the location of the last open crosscut for air measurement purposes can change when the miner is in the L3 entry, and in that case, the last open crosscut would be between the L2 and L3 entries (Tr. 74).

Mr. Kish confirmed that there are two MMU (mechanized mining units) sections shown on the mine map, and he identified them as the 001 and 007 that coincide with the continuous mining machine. He believed this was the only mine area that had two MMU's. He further stated that other mine sections were ventilated the same as the main C section with a double split of air, but they were continuous haulage sections that loaded on bridge conveyors and did not use shuttle cars (Tr. 77-78).

Mr. Kish stated that he did not know the volume of air passing thru the 6-1/2 x 19 foot cited crosscut area where he took his air reading and he did not check the air direction because he did not have a chemical smoke tester with him. Although he could have checked the air direction by emitting dust from his gloves, he did not do so (Tr. 80). He stated that the L2 entry was a return, and confirmed that the two checks located between the L2 and L3 entries out by the last open crosscut as shown on the map were in compliance with the ventilation plan (Tr. 82).

Mr. Kish confirmed that there is no requirement that 9,000 cfm's of air be maintained in the entire last open crosscut from R3 to L3, and that the applicable 9,000 cfm pursuant to section 75.325(b), would only be at a specific location in that area (Tr. 89).

On further redirect Mr. Kish confirmed that regulatory section 75.360(c)(1), states where the location of the last open crosscut is in relation to the taking of an air measurement during the preshift examination. The regulation states that the last open crosscut "is the crosscut in the line pillars containing the permanent stoppings that separate intake air courses and the return air courses." He identified this location as the area marked with an "x" in the yellow area shown on map Exhibit G-2 (Tr. 92).

Mr. Kish testified about alternate methods of ventilating the face areas, and he stated that the air passing through the last open crosscut between L1 and L2 was insufficient, but he did not know if there was positive air movement (Tr. 93-98). He stated that in the split system of ventilation in use there are two crosscut locations where the air must be measured and where 9,000 cubic feet of air must be maintained (Tr. 99).

On further cross-examination Mr. Kish identified Exhibit R6, at pgs. 49 and 50, as an MSHA "question and answer" document compiled to clarify and interpret the new

November, 1992 ventilation regulations. He stated that the document reflects that the definition of "last open crosscut" for purposes of an air reading was not changed. He confirmed that there was such a definition in the old regulations but did not know where that might have been (Tr. 101-103).

Inspector Kish confirmed that he initially issued the order as a non-"S&S" violation, but modified his finding to "S&S" the following day after having "second thoughts about the circumstances involved." He stated that "in hindsight, I figured that it was S&S, and I also checked with the supervisor to see what his feelings were on it and he agreed with it" (Tr. 40).

Mr. Kish stated that in making his "S&S" determination he considered the fact that the mine was on a 10-day section 103(i) spot inspection cycle for at least 2 years because it liberated 500,000 to a million cubic feet in a 24-hour period, and that production equipment would be passing through the cited area during normal production and he believed this presented an ignition hazard because of the methane accumulation (Tr. 40). He further stated as follows at (Tr. 40-41):

Q. Did you believe that a methane accumulation in the explosive range was reasonably likely?

A. Yes, I did.

Q. Why?

A. Because this air in the last open crosscut, there was a minimal amount of air passing through this area.

\* \* \* \* \*

A. Because of the equipment passing through that area, also.

Q. But my question right now is about the methane accumulation?

A. Okay. The methane accumulation --- there was an accumulation of one-tenth of one percent, which was diluted and carried out when we did re-install the check the next crosscut outby. Therefore, I have to say that an accumulation was possible to continue growing in that area had there not been sufficient ventilation to render a dilutant.

Mr. Kish stated that the mine had a prior methane ignition in 1985. The approximate methane liberation for the C main section at the time of inspection was 18,000, and although 0.1 methane was detected, he believed it was likely that methane would continue to accumulate

because "this is a virginial area of the mine, there's nothing mined out around it. So it would be assumable that you would either maintain that or possibly go up in methane" (Tr. 45-46).

Mr. Kish believed that a methane ignition was reasonably likely to occur "if the conditions were left go" because of equipment such as scoops, shuttle cars, roof bolters, and continuous miners normally passed through and operated in the area. The scoops were used as part of the clean-up cycle and when the metal bucket is pressurized against the rock-based mine floor sparks can be created. Other potential ignition sources included the mining machine and shuttle cars used in cleaning up and loading rock, permeability equipment faults that may occur, and roof sparks generated by the roof bolter bits when drilling into the roof (Tr 47-57). Mr. Kish confirmed that in his experience, he was aware of permeability problems and violations connected with shuttle cars and scoops (Tr. 55, 58).

Mr. Kish stated that he never examined any of the mining equipment used in the cited area prior to his inspection, but that a week later during an inspection he found permeability violations on the shuttle car, scoop, and roof bolter. He did not know whether these violations existed during his October 12, 1993, inspection (Tr. 59). He believed that three people were exposed to the cited hazard, and they would likely be the miner operator, helper, and shuttle car operator (Tr. 59-60).

Mr. Kish confirmed that at the time he issued the order he was aware that the mine was on a 103(i) spot inspection cycle and that equipment traveled through to the L1 to L2 areas. When asked if his supervisor told him to modify the order to "S&S" the next day, Mr. Kish responded "not that I'm aware of. I don't recall that" (Tr. 77). He explained his initial non-"S&S" determination as follows at (Tr. 76):

A. Mainly because I wanted to be fair with the company. Basically, I didn't have the time to investigate that --- I really didn't know at that time for positively what was really scrambled in my head at that time. If anything, I was more lenient. Like I say, I don't like to wham the company. But then on reviewing it again, it just was too overwhelming for me to let go as a non S&S.

Mr. Kish stated that the explosive range of methane is 5 to 15 percent and that the two MMU's on the cited section were liberating 18,000 cubic feet of methane per 24-hour period (Tr. 48). He confirmed that he cited no equipment permeability violations on the section at the time of his inspection and he believed that during the course of mining at the L3 face there would not have been any problem with air quantities at the face. The L3 face would have been the face that was mined on October 12, and even if one were to assume that the check curtain was down, there would still be sufficient air to ventilate the L3 working face (Tr. 85).

Mr. Kish did not believe that any mining was taking place on the left side of the section between 5:00 a.m. and 6:00 a.m., or that the air reading at the crosscut between



L1 and L2, was over 15,000 cfm 's because there was no reason to reinstall or take down the curtain once it was installed, and Mr. Stine told him the curtain was taken down while the area was mined (Tr. 121). Mr. Kish could not state that preshift examiner McGary fabricated the air readings recorded in his report (Tr. 125).

Inspector Kish stated that there were a number of reasons for his unwarrantable failure finding, including previously issued citations for having less than 9,000 cfm of air in a last open crosscut, and foreman Stine's "directress" in telling him that it was "a normal practice" to move the curtain to facilitate coal haulage through the area (Tr. 60). Mr. Kish stated that it was not possible to maintain 9,000 cubic feet of air in the last open crosscut when the air is short cutting through the outby crosscut (Tr. 61).

Mr. Kish confirmed that he was aware of the previously issued citations of section 75.325(b) at the time he issued his order "mainly through conversations with our inspectors out in the field offices and overhearing them talk about them" (Tr. 65). He reviewed MSHA's records for copies of the prior citations after he issued the order (Exhibit G-6).

Mr. Kish confirmed that foreman Stine did not hesitate or in any way try to cover up the fact that the curtain was removed while mining, and that he indicated that this was normal loading procedure on the left side (Tr. 86). Mr. Kish stated that the prior citations were "a large factor" in his unwarrantable failure determination, as well as his belief that Mr. Stine should have been aware that 9,000 cfm 's of air was required in the last open crosscut (Tr. 87). Mr. Kish confirmed that his belief in this regard was based on the assumption that the L1 to L2 area was the last open crosscut (Tr. 87). He believed that one prior citation not included among those in Exhibit G-6, was issued on the main C section. He further stated that there is no prohibition against simultaneous preshift and onshift examinations (Tr. 90). He subsequently confirmed that prior Citation No. 3955590, for only 5,832 cfm of air thru the last open crosscut between the belt and track entry was issued on the left side of the C main section, but was subsequently modified to reflect it was issued on the right side (Exhibit G-6; Tr. 100).

In response to bench questions, Mr. Kish stated that based on the 15,120 and 14,320, air readings recorded in the preshift report and examination book the ventilation curtain in question would have had to been up. He confirmed that foreman Stine told him that it was a practice to take the curtain down, and although this purported admission is not recorded in his notes, he reiterated that Mr. Stine stated that it was a practice to take the curtain down to allow the shuttle car to haul through the crosscut (Tr. 109-110).

#### Respondent's Testimony and Evidence

Walter McGary testified that he has 20 years of mining experience and has served as a supervisor at the mine for the past 10 years and holds mine examiner and assistant mine examiner's papers. He was the section foreman on the main C section on the third shift from

11:00 a.m., October 11, 1993, to 7:00 a.m., October 12, 1993. He confirmed that the section map (Exhibit G-2), represents the section as he remembered it at that time (Tr. 127).

Mr. McGary explained the mining that was taking place on October 12. After completing mining on L3 left side, the shuttle cars moved to the right side and the roof bolter moved to the left side to bolt the L3 area, and the crew had problems "getting the machines squared around." He returned to the right side to check on a rock that had rolled out of the rib and hit one of the men. While he was being transported out, the roof bolters from the left side informed him that the bolter was stuck and could not be moved. The check curtain was taken down to allow a shuttle car to go in and pull out the bolter, but the shuttle car operator forgot to put the curtain back up, and by the time the bolter was taken out of the area "it was quitting time and we man tripped out" (Tr. 128-130).

Mr. McGary confirmed that the check curtain was down when the L3 entry was being mined, and he stated as follows at (Tr. 131):

Q. And why did you mine with that check out?

A. In order to run two shuttle cars, we run one in the top side and one on the bottom side and we took it down. Once we were done mining, we come back out and we put that check back up to take care of our areas.

Q. Are you permitted to mine in that fashion?

A. I never thought any other way. I was always mining that way. I've mined that way with other Federal inspectors in there with me and there was nothing said about it.

Q. The same way you would be mining on the L3 entry on that particular day?

A. The same way I was mining on the left side, yes.

Mr. McGary stated that the production report for October 12, reflects that he was loading coal in L3 from 2:05 to 3:30 a.m. He left the section at 6:30 a.m., and no one was there when he left. Mr. Stine and Mr. Kish were never in the section during his shift (Exhibit R-2; Tr. 133).

Mr. McGary stated that his preshift report for October 12, 1993, reflects that he measured 15,120 cfm of air "on my last open crosscut which was taken between L1 and L2" (Exhibit R-3, Tr. 134). He took the reading between 5:00 and 6:00 with an anemometer and "the check was up down below" because it is always put back up when mining is finished and when mining and the equipment moved from the left side to the right side, the check curtain

goes back up again (Tr. 134). He found no methane at the faces or at the last open crosscut (Tr. 135).

On cross-examination Mr. McGary explained the location of the bottom and top crosscut routes, and he stated that the top crosscut route from L2 to L1 on map Exhibit G-2, passes through the crosscut where the curtain was down (Tr. 138). He stated that shuttle car operator Andy Scott put the check curtain back up at 3:30 a.m. when the L3 mining was completed and he knew this because his air reading in the last open crosscut showed 15,120 cfm of air. He did not personally see Mr. Scott put the curtain up, but he would not have obtained the air reading if it were down. He confirmed that except for taking the curtain down while mining is taking place, it always remains up so that adequate air readings may be taken in the last open crosscut, L1 to L2 (Tr. 139-140).

Mr. McGary reiterated why the curtain was taken down during his shift, and he explained the route of travel for the shuttle car that went to the L3 area to pull out the roof bolter (Tr. 140-144).

Mr. McGary stated that when he took his air reading at crosscut L1 to L2, as recorded in his preshift report, (Exhibit G-4), he considered that location to be the last open crosscut, and he agreed that 9,000 cfm of air is required to be maintained in the last open crosscut (Tr. 145). He denied that he may have taken his air reading in the crosscut between L2 and L3 because there was equipment in that area (Tr. 145-147).

Mr. McGary stated that he only learned that the violation was a (d)(2) order "a couple of weeks ago," and that the only discussion he had with Mr. Kish was after the violation was issued when he told him that "I didn't think that I did anything wrong." He further stated as follows at (Tr. 148-149):

Q. Do you recall telling Mr. Kish that the mine was going to install run through checks on the section now?

A. No. I told Mr. Kish that the way we run that is so we wouldn't have to operate with run through checks. But after that violation we had to use run through checks or else not run through it after that. But prior to that, we didn't have to use run through checks.

Q. You never brought to Mr. Kish's attention the allegations that the shuttle car operator had put the check back up and then taken it back down, did you?

A. I don't recall. I don't know if I did or I didn't. I honestly couldn't. But I'm telling you that I did so what --- would that have any bearing on Mr. Kish?

Q. Thank you, sir. You've answered my question. Thank you.

Mr. McGary stated that shuttle car operator Scott never indicated to him that after the check curtain had been reinstalled he took it down again. He stated that Mr. Scott "told me on the way going out that he forgot to put the check back up" (Tr. 150).

When asked in response to a further question by the petitioner's counsel if he ever informed foreman Stine or anyone else that Mr. Scott forgot to put the check curtain back up, Mr. McGary stated as follows at (Tr. 159):

A. No, I did not. There was so much confusion outside with him being hurt and I was talking to the State inspector at the time and he asking me questions. I never got around to him.

Thomas Nalisnick testified that he has been employed by the respondent for 12 years and has served as its chief mining engineer since 1988. His duties include the submission of ventilation and roof control plans, and the drawing of mine maps and projections. He holds a B.S. degree in mining engineering and is a professional engineer. He is personally involved with the submission of mine plans to MSHA and deals directly with the District Two office in connection with the development and submission of ventilation plans (Tr. 159-161).

Mr. Nalisnick identified Exhibit R-4 as a typical face print that "roughly" shows the mining method used on the main C section on October 12, 1993, and he confirmed that this was part of the approved plan in effect that day (Tr. 163). He believed that the mining of the L3 entry, with the check curtain down one crosscut out by the last open crosscut between the L1 and L2 entries presented no problem and that the plan permitted mining and ventilating in that fashion (Tr. 163). He agreed that not all of the 15,000 cfm of air would travel up the L2 entry, through the crosscut L2 to L3, and to the working face, and he explained the air direction and mining method (Tr. 164-166). He stated that the mining method was safer because it eliminates the "run through" check curtains while still diluting gases.

Mr. Nalisnick identified Exhibit R-5, as a letter dated December 13, 1993, to him from MSHA District Manager Joseph J. Garcia relating to ventilation drawing Exhibit R-4 (Tr. 167). Mr. Nalisnick stated that he spoke with MSHA's district ventilation representative Zilko on December 8, 1993, and he explained as follows at (Tr. 167-168).

A. Actually, I talked to Mr. Zilko on December 8th. We had our first conversation. He called me up and he was told that we had to reevaluate our main C face ventilation with these check curtains and that. And we discussed it and we both agreed that the best way is the way we have it worded now since the main ventilation is more not typical or there's more variables in the main ventilation. You want to have some flexibility in

moving the canvases. You just can't make a plan and say, these canvases will be right here. It's not practical and I think it's.

Mr. Nalisnick believed that the mining conducted on the midnight shift on October 12, and the ventilation method used at that time, was in compliance with the ventilation plan and regulations and that the section was being ventilated (Tr. 186).

On cross-examination, Mr. Nalisnick stated that the L2 location on map Exhibit R-1 is a projected return air course and that the designated stoppings are for the purpose of separating the intake from the return. He confirmed that it was necessary to take the check curtain down across the crosscut between L1 and L2 so that a shuttle car would not have to go through a run-through check. He confirmed that the purpose of the typical face ventilation print, Exhibit R-4, is to minimize the need for run-through checks, but he acknowledged that under the type of mining in question there was no need for run-through checks (Tr. 192).

Mr. Nalisnick confirmed that L1 and L2 are working places, and that the ventilation method used on the section at the time of the inspection was the safest way of doing it (Tr. 193). Mr. Nalisnick stated as follows with respect to the December 13, 1993, letter from Mr. Garcia (Exhibit R-5; Tr. 194-195):

Q. Looking at the letter that you received on the 13th of December, I point you to the third paragraph. It's a one-sentence paragraph. Would you read that sentence aloud, please?

A. The location of the stopping line is used to determine the quantity of air in the last open crosscut. Reference 30 C.F.R. 75.325(b) and 75.360(c)(1).

Q. And do you happen to know what these two sections of the regulations are, sir?

A. 75.325(b) I know for sure and 360(c)(1) I'm not quite positive on that.

Q. Would it surprise you if I told you that the 75.325(c) points out the need for maintaining --- or 325(b), excuse me, points out the need for maintaining 9,000 cfm in the last open crosscut and the 75.360(c)(1) designates where the last open crosscut is and that, in fact, on that map there under 75.360(c)(1) it is between L1 and L2?

A. If you're going by the definition of stopping lines, I would assume that's where the law states it's at.

### Petitioner's Arguments

The petitioner argues that the cited section 75.325(b), requires at least 9,000 cubic feet of air per minute at the last open crosscut in any pair or set of developing entries, and that the term "last open crosscut," for purposes of air readings is defined by sections 75.360(c)(1) and 75.362(c)(1), as "the crosscut in the line of pillars containing the permanent stoppings that separate the intake air courses and the return air courses."

The petitioner asserts that the location where Inspector Kish took his air reading between the L1 and L2 entries was the last open crosscut and proper location for determining compliance with section 75.325(b). In further support of its argument, the petitioner points out that the respondent's pre-shift and on-shift examination books showed that air readings were taken at that same location by section foreman McGary, that Mr. McGary acknowledged that the last open crosscut between the L1 and L2 entries was the location where 9,000 cubic feet of air per minute was required, and that mine foreman Stine, who was with Mr. Kish during his inspection, never indicated that the area between the L1 and L2 entries was not the proper location for taking an air reading.

## Respondent's Arguments

The respondent argues that the phrase "last open crosscut" has several meanings, and for permissibility purposes, the entire width of the section from the R-3 entry to the L3 entry could be considered the last open crosscut for purposes of defining a working place area by the last open crosscut. In the instant case, the respondent asserts that it is undisputed that the "last open crosscut" for purposes of taking an air reading pursuant to section 75.325(b), is a point within that line of crosscuts, and that the critical issue is the location of that point in the Main C left side at the time of the inspection on October 12, 1993.

The respondent takes the position that the L1 to L2 crosscut area identified and cited by the inspector is not necessarily the last open crosscut, and that for purposes of an air measurement pursuant to section 75.325(b), the L2 to L3 area can also be the last open crosscut. In support of this argument, the respondent relies on the inspector's acknowledgment that it was possible for the last open crosscut location to change to the area between L2 and L3 when the mining machine is in L3, and that the stopping line as shown in Exhibit G-2, does not always separate the intake air courses from the return air courses.

The respondent argues that Inspector Kish failed to consider the following language in the November 9, 1992, Ventilation Questions and Answers, published by MSHA to interpret section 75.325 (Exhibit R-6): "Section 75.325(b) does not require that previously accepted development systems be abandoned, does not require new or additional ventilation controls, and does not require additional or duplicative locations where 9,000 cfm must be maintained."

The respondent argues that this language clearly grand-fathers all existing, approved ventilation plans that were in effect in August of 1992, when section 75.325, became effective, and that it had a plan provision that became a part of its 1982 plan that was updated in 1989 and is part of its currently approved plan. That provision, which depicts the mining system in place in the Main C section on October 12, 1993, and shows checks directing air to the working faces, states as follows (Exhibit R-4): "The location of these checks may vary, so as to provide positive ventilation to all working places and minimize the need for run through checks, depending on the place being mined."

The respondent maintains that it has always construed this plan provision to permit it to take down the check curtain that was taken down while mining the L3 entry, and that this was obviously the opinion of many other MSHA inspectors who have observed the

section foreman ventilate in this manner while mining the Main C section, and never indicated that taking the curtain down to eliminate the use of a run through check was a violation of the plan or section 75.325(b).

The respondent states that as a result of the order issued in this case, the aforementioned ventilation plan provision and mining procedure was revisited by its Chief Engineer Nalisnick and MSHA district office ventilation representative Zilko, and the plan provision was not changed and is still a part of its approved plan.

The respondent points out that even though foreman Stine and McGary readily admitted that the L3 entry would have been mined with the check removed, the respondent was not cited for violating its plan because taking down the check while mining is the L3 entry was not a plan violation. The respondent further points out that the undisputed result of removing the check is that the majority of the air would move over one crosscut and travel through the L2 to L3 crosscut rather than the L1 to L2 crosscut, and if that crosscut remained the last open crosscut for purposes of an air measurement pursuant to section 75.325(b), it would never be in compliance while mining the L3 entry. The respondent concludes that the proper location for the last open crosscut air reading pursuant to section 75.325(b), while the check is removed, is the L2 to L3 crosscut, and it is undisputed that it had well over the required 9,000 cfm of air at that location.

Relying on the inspector's agreement that the L2 to L3 crosscut can be the last open crosscut, and that the location of the last open crosscut for taking an air reading can change, the respondent argues that if the check is up, the proper air reading location is the L1 to L2 crosscut, and if the check is down, the proper air reading location is the L2 to L3 crosscut. The respondent concedes that its ventilation plan does not permit less than 9,000 cfm in the last open crosscut. However, it believes that its plan does permit the location for an air reading to move, and that MSHA recognized this fact in its previously cited ventilation "questions and answers."

The respondent concludes that since the L2 to L3 area was the last open crosscut while the check curtain was down, and that it had more than the required 9,000 cfm of air, the petitioner has failed to prove a violation of section 75.325(b).

### Findings and Conclusions

#### Fact of Violation

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. ' 75.325(b), which provides as follows:



' 75.325 Air quantity.

\* \* \* \* \*

(b) In bituminous and lignite mines, the quantity of air reaching the last open crosscut of each set of entries or rooms on each working section and the quantity of air reaching the intake end of a pillar line shall be at least 9,000 cubic feet per minute unless a greater quantity is required to be specified in the approved ventilation plan. This minimum also applies to sections which are not operating but are capable of producing coal by simply energizing the equipment on the section.

In Secretary of Labor v. Peabody Coal Company 11 FM SHRC 4, (1989), the Commission stated in regard to the term "last open crosscut" that:

Although 'last open crosscut' is not defined in the Mine Act or the Secretary's regulations, the Act and regulations contain repeated references to the term. [Footnote reference omitted.] As noted, a 'crosscut' is a passageway or opening driven across entries for ventilation and haulage purposes. In general, the last open crosscut thus refers to the last (most irby) open passageway between entries in a working section of a coal mine. [Footnote reference omitted.] The last open crosscut "is an area rather than a point or line . . . Henry Clay Mining Co, 3 IBM A 360, 361 (1974).

Sections 75.360(c)(1), and 75.362(c)(1) covering preshift and onshift examinations, requires the persons conducting the examination to determine the volume of air at the following areas if anyone is scheduled to work in the areas during the oncoming shift:

(1) In the last open crosscut of each set of entries or rooms on each working section . . . . The last open crosscut is the crosscut in the line of pillars containing the permanent stoppings that separate the intake air courses and the return air courses.

The evidence establishes that Inspector Kish arrived at the Main C section at approximately 9:00 a.m., on October 12, 1993, and accompanied by mine foreman Edward Stine, started his inspection in the right side, taking air readings between the R2 and R3 entries, and then proceeding to the left side where he continued across the faces until he reached a location that he believed was the last open crosscut between the L1 and L2 entries. He marked the location with a red "X" on a mine sketch of the area (Exhibit T-2), and his inspection notes reflect that he reached that location at 10:05 a.m. (Exhibit G-3).

After reaching the cited crosscut location, Mr. Kish tested for methane with his hand-held methane detector and found 0.1percent methane. He then took an air reading with an

a anemometer at that same location and could not get a reading because the anemometer vanes would not turn. Since the anemometer was calibrated to measure a minimum of 50 cubic feet of air per minute, Mr. Kish concluded that the air current was less than that. His inspection notes state that "veins in anemometer will not turn. No air movement." Under these circumstances, Mr. Kish cited a violation of section 75.325(b), which requires that a minimum of 9,000 cubic feet of air per minute be maintained at the last open crosscut of each set of entries or rooms on each working section and the intake end of a pillar.

Mr. Kish concluded that the cited location was the last open crosscut as described by the regulation because it was the last cut through in the line of pillars where permanent stoppings were installed between the intake and return air (Tr. 28, 35-36). He also relied on the preshift and onshift examination records of examiner Walt McGary who recorded air readings at the L1 and L2 crosscut, and he confirmed that mine foreman Stine did not deny that the cited location was in fact the last open crosscut (Exhibits G-4, G-5; Tr. 36-37). Mr. Kish further confirmed that preshift and onshift air readings are required to be taken at the last open crosscut, and since Mr. McGary noted his readings at the L1 and L2 crosscut, he (Kish) assumed that this was the correct location to take the required air reading (Tr. 38).

Mine foreman Stine did not testify in this case. Mine examiner Walter McGary, who was the third shift section foreman on October 12, 1993, agreed that the mine map sketch (Exhibit G-2), was an accurate representation of the section on that day. He also confirmed his air reading at the "last open crosscut which was taken between L1 and L2" (Tr. 134). He further referred to that location at L1 to L2 as the "last open crosscut" (Tr. 139), and agreed that when he made his air reading he considered that location to be the last open crosscut and that 9,000 cubic feet of air per minute was required at that location (Tr. 144-145).

Respondent's chief mining engineer Thomas Nalisnick confirmed that locations L1 and L2 were working places, and he "assumed" that the cited location between L1 and L2 was the last open crosscut pursuant to section 75.360(c)(1), where 9,000 cubic feet of air per minute must be maintained pursuant to the cited section 75.325(b) (Tr. 194-195).

After careful review and consideration of all of the credible evidence and testimony in this case, including the arguments advanced by the parties in support of their respective positions, I conclude that the petitioner's position is correct and that its credible testimony and evidence supports a violation of section 75.325(b).

As noted earlier, section 75.325(b) requires a mine operator to maintain at least 9,000 cubic feet of air per minute at the last open crosscut of a working section. This minimum amount of air quantity is required even though the section is not operating but is capable of coal production by simply energizing the equipment. In this case, even though the section was not in production at the time of the inspection, it was in a "production-ready" mode within the language of the regulation that clearly applies in this case.

Having viewed Inspector Kish in the course of his testimony, and considering his 16 years of inspector experience and 8 years of experience in the private coal mining sector, including employment as a state certified mine examiner and assistant mine foreman, I find him to be a credible witness with respect to the interpretation and application of the requirements found in section 75.325(b).

It appears to be undisputed in this case that the lack of perceptible air movement at the cited crosscut location was the result of a ventilation curtain located outby being taken down to allow for shuttle cars to move through the crosscut. The curtain was not re-installed at the end of the production shift, but the air was immediately restored by re-hanging the curtain to abate the violation on the ensuing maintenance shift.

The critical issue here is whether or not Inspector Kish took his supporting air reading at the proper crosscut location where 9,000 cfm of air was required to be maintained. For compliance purposes pursuant to section 75.325(b), the definition of the "last open crosscut" location for air readings by the preshift and onshift mine examiners to insure at least 9,000 cfm of air at that location is found in sections 75.360(c)(1) and 75.362(c)(1), which define the term "last open crosscut" as "the crosscut in the line of pillars containing the permanent stoppings that separate the intake air courses and the return air courses."

Inspector Kish was most specific in pinpointing and defining the location of the "last open crosscut" area where he took his air reading and where he believed 9,000 cfm of air was required to be maintained in order to comply with section 75.325(b). I find his testimony to be credible with respect to the line of stoppings between the pillars located between the L-1 and L-2 entries on the left side of the section separating the intake and return air courses, and I conclude that his explanations are in accord with the aforementioned regulatory definition of "last open crosscut" for purposes of compliance with section 75.325(b).

I also find support for Mr. Kish's determination in the testimony of mine examiner McGary, including his examination reports, which support Mr. Kish's location of the L1 and L2 crosscut location, and Mr. Kish's un rebutted testimony that foreman Stine did not object or voice any difference of opinion with respect to the proper place for taking an air reading. I further find no credible or probative testimony by respondent's engineer Nalisnick that persuades me that Inspector Kish was incorrect in his determination of the critical "last open crosscut" issue in this case.

The respondent's reliance on its ventilation plan as a defense to the violation is rejected. I also reject its "estoppel" theory that numerous MSHA inspectors approved of its method of mining which resulted in the violation in this case. I have, however, considered these arguments in my findings and conclusions regarding the inspector's "unwarrantable failure" finding.

I conclude and find that the evidence adduced by the petitioner in this case supports a violation of section 75.325(b), and the inspector's finding and citation in this regard IS AFFIRMED.

### Significant and Substantial Violation

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30F.R. 814(d)(1). A violation is properly designated significant and substantial, "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Element Division, National Gypsum Co. 3 FM SHRC 822, 825 (April 1981).

In Mathies Coal Co. 6 FM SHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under the National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to be the violation, (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc. 7 FM SHRC 1125, 1129, the Commission stated further as follows:

We have explained further that the third element of the Mathies formula 'requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.' U.S. Steel Mining Co. 6 FM SHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FM SHRC 1866, 1868 (August 1984) U.S. Steel Mining Co., Inc., 6 FM SHRC 1573, 1574-75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texas Gulf, Inc., 10 FM SHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FM SHRC 2007 (December 1987). Further, any determination of the significant nature of a violation must be made in the context of continued normal mining operations.

Inspector Kish initially determined that it was unlikely that the violation would result in an injury or illness, or any lost work days, and he concluded that the violation was non-"S&S". However, "in hindsight" and after having "second thoughts about the circumstances involved," he modified his finding to "S&S" the next day after consulting with his supervisor who agreed with his re-evaluation.

In making his revised "S&S" determination, Mr. Kish stated that he considered the fact that the mine was on a 10-day 103(i) spot inspection cycle because of methane liberation, and that the equipment passing through the cited area presented an ignition hazard because of methane accumulation. He admitted that he was aware of these facts when he made his initial non-"S&S" finding, and denied that his supervisor ordered him to modify his finding to "S&S". He commented that he was trying to be fair with the respondent, but did not have time to investigate "what was really scrambled in my head at that time." After reflection, he concluded that "it was too overwhelming for me to let go as a non-"S&S".

Confirming the fact that he detected only 0.1 percent methane at the cited crosscut, and that the main C section was liberating an estimated 18,000 cubic feet of methane at the time of his inspection, Mr. Kish pointed out that the methane he detected was diluted and carried out after the check curtain in question was re-installed.

Mr. Kish expressed concern that with the check curtain down during the resumption of mining, there would be insufficient ventilation at the cited crosscut areas to dilute any accumulated methane. Since that location was in a virgin coal area, with little mining around it, he believed that in the normal course of mining, methane would continue to accumulate in the absence of ventilation, and that a methane ignition was reasonably likely because of the potential ignition sources from the scoop, bolter and continuous miner that would be operating in the cited area once normal mining operations were continued. He believed that an equipment permissibility problem or sparks from the scoop bucket striking the mine floor, or from the roof bolter drilling into the roof, could spark a methane ignition, and that the scoop, miner, and roof bolter operators would be at risk and exposed to a methane explosion hazard.

The petitioner argues that a violation of section 75.325(b) has been established, and that the safety hazard contributed to was a methane accumulation and ignition, and that a methane accumulation in an active working place where potential ignition sources exist present a "measure of danger" to the safety of miners.

The petitioner asserts that there was a reasonable likelihood that methane would have accumulated and become ignited had the condition continued to exist. Conceding that the methane level detected by the inspector was clearly not yet in the explosive range, the petitioner finds it significant that methane was detected in measurable amounts, even though no mining was taking place, and there was no measurable amount of air going through the cited area to dilute the methane which was beginning to accumulate.

The petitioner further points out that the mine was on a 10-day section 103(i) spot inspection cycle because of high methane production levels. The petitioner argues that methane is unpredictable and can be encountered at any time, and that this concerned the inspector because the main C section was "virgin" mining territory where methane can be more unpredictable and more likely. Under the circumstances, the petitioner concludes that continued liberation and accumulation of methane was reasonably likely, and that the respondent's chief engineer, Nalisnick, confirmed the inspector's concerns in this regard (Tr. 192-193).

The petitioner asserts that a continuous miner, roof bolter, shuttle car, and scoop were on the left side of the section, and were the most likely potential ignition sources working or traveling through the face areas because such equipment "can be faulty through defects or problems with permissibility." The petitioner suggests that sparks generated by hot bits of the ripper type mining machine would have ignited any explosive amounts of methane accumulations, particularly in an area where a large rock had fallen and needed to be broken up and removed before further mining could be done at the mouth of the L2 to L3 entries.

The petitioner further asserts that the roof bolting machine also presented a potential ignition source while drilling and it points out that it was located in the last open crosscut between the L2 and L3 entries when the violation was issued and was at the face of the L3 entry at the end of the last shift.

The petitioner believes that the shuttle cars presented potential ignition sources in the event of trailing cable defects and that the scoop buckets which cleaned up the floors could create sparks which would ignite any methane. The petitioner believes that all of the mining equipment on the section could have caused an ignition through a permissibility problem, and states that the inspector had observed permissibility defects in his past experience. Although the inspector did not examine the equipment in question when he issued the violation, he did so at a later time and found permissibility violations on the roof bolter, scoop and a shuttle car.

The petitioner concludes that in the event of a methane ignition, it was reasonably likely that there would have been very serious injuries to the miners on the section resulting from an explosion or fire. Given the unpredictable and constant threat of methane and the fact that there were potential ignition sources in the area, the petitioner further concludes that the likelihood of a methane ignition was reasonable on the day of the inspection, and that in the event of an explosion, serious injuries would have resulted.

The respondent points out that the inspector made an initial finding of non-"S&S" but modified the order to "S&S" the next day after consulting his supervisor. The respondent suggests that the inspector was told by his supervisor to modify the order to "S&S" even though the supervisor had no opportunity to observe and evaluate the conditions. Further, the respondent points out that the facts relied on by the inspector to justify his modification of the order to "S&S" were known to him when he made his initial non-"S&S" finding.

The respondent asserts that there is no evidence that a reasonably serious injury was reasonably likely to occur during the course of normal mining operations. In support of this conclusion, the respondent argues that only 0.1 percent methane was detected in the cited crosscut, which was well below the combustible range of 5 to 15 percent, and that no equipment was operating in the area at that time. The respondent concludes that there was no possibility of methane being ignited by equipment, and that in the context of continued mining operations, there was no reasonable likelihood of methane accumulating to explosive levels and being ignited by equipment.

The respondent points out that the L2 to L3 area was not an area of concern, and that there was sufficient air volume and no detectable methane in that area. The respondent asserts that even though the inspector's anemometer vanes would not turn when he measured the cited crosscut, he did not deny the existence of air movement and chief engineer Nalisnick believed that even with the check curtain down, crosscut L2 to L3 would have more than the minimum amount of air, and the other areas would receive enough air to dilute any methane (Tr. 185-186).

The respondent maintains that the only requirement for air volume in the cited crosscut area would be the amount sufficient to dilute and render harmless any liberated methane, and concludes that the 0.1 percent found by the inspector is ample evidence of this.

The respondent asserts that under normal mining conditions, the check curtain is replaced when mining is completed in the L3 entry, and that this results in the majority of the air being directed again through the L1 to L2 crosscut and results in undetectable levels of methane. The respondent suggests that the inspector observed "a worst case scenario" because the check curtain was left down for as much as five hours after the shuttle car operator forgot to replace it after it was taken down to facilitate the removal of an inoperative roof bolter. Even though the check curtain remained down much longer than normal during mining, the respondent asserts that methane had not accumulated to any levels even approaching explosive ranges, and the facts show that methane was being diluted and carried away, rather than accumulating.

The respondent argues that the inspector's assertion that the mine liberates between 500,000 and one million cfm of methane in a 24-hour period does not support his S&S finding because the cited main C section only liberated 18,000 cfm in a 24-hour period (Tr. 45), and liberates very little methane as compared to the overall mine.

The respondent believes that the inspector's perm issibility violation concerns are based on pure speculation, and it points out that no perm issibility violations were cited, and that in the course of continued mining operations, perm issibility checks are made on a weekly basis. Further, the respondent states that there is no evidence of any methane ignitions originating at the continuous miner or at any place because of a scoop bucket spark, and it views these events as speculative.

After careful review and consideration of all of the evidence adduced in this case, including the arguments advanced by the parties, I conclude that the petitioner has the better part of the argument and has established by a preponderance of the credible evidence that the violation was significant and substantial (S&S).

I have concluded that a violation of section 75.325(b) has been established. I further conclude and find that the failure by the respondent to maintain the required air ventilation at the cited crosscut location would reasonably likely result in a continued build-up and accumulation of methane were mining to continue on the ensuing shift, and that this condition presented a discrete hazard of a methane ignition, fire or explosion, and exposed at least three miners who would be working at the cited location to these hazards.



Although it is true that the methane level of 0.1 percent detected by the inspector at the cited crosscut was well below the explosive range, I find credible and un rebutted his testimony that the area was a virgin coal area where methane emissions are unpredictable. Without adequate ventilation to remove and/or dilute such methane, and in the presence of potential ignition sources, such as scoops, roof bolters and continuous mining machines operating during the normal mining cycle, I conclude and find it was reasonably likely that a methane ignition, fire, and possibly an explosion, would occur. This is particularly true in this case where it is un rebutted that the respondent routinely took down the check curtain and someone forgot to re-install it before leaving the area at the end of the shift. Since the curtain was left down between shifts, it is just as likely as not that it may not be re-installed before the oncoming shift resumed production, and any accumulation of methane would still be present and would present a potentially serious ignition and explosion hazard.

The respondent's reliance on the fact that the L2 to L3 area was not a problem, and its suggestion that some of the air at that location would somehow find its way to the cited crosscut area and provide adequate ventilation to sweep away any methane from that area is rejected as speculative and unsubstantiated. I also reject the respondent's suggestion that the 0.1 percent methane found by the inspector when he issued the violation proves that there was sufficient air to dilute methane and that the air that was present complied with the requirements of section 75.325(b). It is undisputed that the methane reading by the inspector was taken when no mining was taking place, and I do not find his concern that the lack of the minimum required ventilation would allow the methane to continue to accumulate unabated to be unreasonable.

I further conclude and find that if a methane ignition were to occur and result in a fire or explosion, it would be reasonably likely that the miners working in or around the cited crosscut location would suffer injuries of a reasonably serious nature, including fatal injuries, depending on the severity of those events. Under all of the aforementioned circumstances, I conclude and find that the violation in question was significant and substantial (S&S), and the inspector's finding in this regard SAFFIRMED.

### Unwarrantable Failure Violation

The governing definition of unwarrantable failure was explained Zeigler Coal Company, 7 IBM A 280 (1977), decided under the 1969 Act, and it held, in pertinent part, as follows at 295-96:

In light of the foregoing, we hold that an inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care.

In several decisions concerning the interpretation and application of the term "unwarrantable failure," the Commission further refined and explained this term, and concluded that it means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Energy Mining Corporation, 9 FM SHRC 1997 (December 1987); Youghiogheny & Ohio Coal Company 9 FM SHRC 2007 (December 1987); Secretary of Labor v. Rushton Mining Company 10 FM SHRC 249 (March 1988). Referring to its prior holding in the Energy Mining case, the Commission stated as follows in Youghiogheny & Ohio at 9 FM SHRC 2010:

We stated that whereas negligence is conduct that is 'inadvertent,' 'thoughtless' or 'inattentive,' unwarrantable conduct is conduct that is described as 'not justifiable' or 'inexcusable.' Only by construing unwarrantable failure by a mine operator as aggravated conduct constituting more than ordinary negligence, do unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme.

In Energy Mining, the Commission explained the meaning of the phrase "unwarrantable failure" as follows at 9 FM SHRC 2001:

We first determine the ordinary meaning of the phrase 'unwarrantable failure.' 'Unwarrantable' is defined as 'not justifiable' or 'inexcusable.' 'Failure' is defined as 'neglect or an assigned, 'expected, or appropriate action.'Webster's Third New International Dictionary (Unabridged) 2514, 814 (1971) (Webster's). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by 'inadvertence,' 'thoughtless,' and 'inattention.' Black's Law Dictionary 930-11 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention. \*\*\*

Although Inspector Kish alluded to "a number of reasons" in support of his unwarrantable failure finding, he admitted that the prior citations were "a large factor" in his determination. He also relied on his belief that foreman Stishou ~~ld~~ have been aware that 9,000 cfm of air was required in the last open crosscut, and Mr. Stire's candid admission that check curtains are taken down as a normal and routine practice to permit the passage of equipment.

With regard to Mr. Kish's belief that foreman Stine was aware of the requirement for 9,000 cfm of air at the last open crosscut, Mr. Kish qualified his testimony when he stated that his belief was based on the assumption that the L1 and L2 area was in fact the last open crosscut.

With regard to the prior citations relied on by Mr. Kish, he admitted that at the time he issued the order, he had no personal knowledge that they had in fact been issued and was aware of them only through overhearing conversations by other field office inspectors. More importantly, he admitted that he found records of these citations after he issued the order in this case. Further, although Mr. Kish alluded to another prior citation that was issued on the main C section, that citation was not produced and it is not in evidence in this case. Mr. Kish also confirmed that one of the prior citations issued on the left side of the C main section was later modified to cite the right side.

Although the issuance of prior violations of section 75.325(b) may be a relevant factor in any "unwarrantable failure" determination, the weight to be ascribed to these prior events must be based on credible, relevant, and probative facts. In the instant case, it is undisputed that the lack of perceptible air movement at the cited crosscut in question and the failure to maintain the required 9,000 cfm of air at the cited crosscut were the direct result of the taking down of the ventilation check curtain on one crosscut outby. However, there is no evidence that the failure to maintain 9,000 cfm in connection with the five prior violations relied on by the petitioner to support the inspector's unwarrantable failure finding involved the deliberate removal of any ventilation check curtains. I take note of the fact that all of these prior violations were issued as section 104(a) citations, with "low" negligence findings in two instances and "moderate" negligence findings in three instances. Further, two of the prior citations were terminated after the existing check curtains were tightened, one was terminated after the existing check curtain was repaired, one was terminated after a new curtain was apparently installed, and there is no indication as to what was done to restore the air with respect to the remaining citation.

The record reflects that the five prior citations were issued in February, March, April, and August 1993. I find it rather inconsistent that none of the inspectors who issued these series of section 104(a) citations did not consider the later ones to constitute "aggravated conduct" based on the issuance of the earlier ones.

Mr. Kish conceded that even if the respondent's use of the check curtain in question to ventilate the main C section was part of its approved ventilation plan, the respondent cannot rely on a plan provision that undermines regulatory section 75.325(b). However, since the requirement for maintaining 9,000 cfm of air at the last open crosscut depends on that precise location at any given time, and given the definitional language found in regulatory sections 75.360(c)(1) and 75.362(c)(1), Inspector Kish's testimony that the location of the last open crosscut can change from circumstance to circumstance, and

M SHA 's additional references to regulatory sections 75.333(b)(1) and 75.371(f), in determining the locations for maintaining 9,000 cfm of air, I find merit in the respondent's suggestion that the requirements of section 75.325(b), are less than crystal clear.

I take note of the last sentence of the following explanatory answer stated on page 49 of M SHA 's "Ventilation Questions and Answers," November 9, 1992, cited and relied on by the respondent in this case (Exhibit R-6):

Section 75.325(b) does not require that previously accepted development systems be abandoned, does not require new or additional ventilation controls, and does not require additional or duplicative locations where 9,000 cfm must be maintained.

I also take note of the last sentence of the paragraph that follows on page 50, that states as follows:

Where hybrid or unusual room development systems are used where confusion may exist regarding the examination location, the mine ventilation plan may specify a location under 75.371(f).  
(Emphasis added)

I conclude and find that respondent's simultaneous mining of the left and right areas of the C main section presented a rather unusual mining situation at the time of the inspection. Mr. Kish admitted as much when he confirmed that a split ventilation system was in use, that the cited area was the only mine area where two mechanized mining units were in use, and that the location of the last open crosscut for air measurement purposes can change depending on the location of the continuous miner. Under these circumstances, I conclude and find that the respondent was not unreasonable in believing or relying on M SHA 's "Questions and Answer" advise that it need not abandon its previously accepted mine development system and that additional ventilation controls would not be required.

Citing the "reasons" set forth in section IIB, page 7, of her posthearing brief, petitioner's counsel contends, at page 6, that "the respondent was not permitted to remove the ventilation curtain without some other ventilation control." Aside from the apparent recognition that the curtain could possibly be removed under certain conditions, such as additional controls, I find nothing in the cited arguments that constitute any "reasons" alluded to by counsel.

Section foreman McGary confirmed that 9,000 cfm of air was required to be maintained in the last open crosscut. He also readily admitted that the check curtain outby the cited crosscut was taken down to facilitate the passage of equipment, and he explained that it was taken down in this case by the shuttle care operator when he traveled through the area to remove a roof bolting machine, and that he forgot to re-install it after the bolter was removed and the working shift had ended.

Mr. McGary also confirmed that check curtains were routinely taken down when the shuttle cars were moving through the curtain areas, and they were always re-hung when mining was completed. He found nothing wrong with this practice, and stated that he has always mined in this fashion while in the presence of other inspectors who did not question the practice. He also believed that the mining procedure he was following was proper in that it eliminated the need to use "run through" check curtains. These types of curtains apparently remain in place while equipment passes through them through openings in the curtain.

Respondent's chief engineer Nalisnick, whose duties included the submission of mine ventilation plans to MSHA, and personal contacts with MSHA's district ventilation personnel, believed that the respondent's approved plan permitted mining with the outby check curtain down one crosscut outby the cited crosscut in this case. He believed the method of mining followed by Mr. McGary was safer because it eliminated the need for "run through" check curtains, provided more flexibility for the moving of curtains, and was more practical given the variables in the main ventilation system.

With regard to Mr. Nalisnick's understanding that 9,000 cfm of air was required to be maintained at the "last open crosscut" pursuant to section 75.325(b), and as determined by section 75.360(c)(i), Mr. Nalisnick assumed that this is what is required if one considered the definition of stopping lines.

In reply to the petitioner's assertion that the respondent's admission that the check curtain would be down while mining the entry indicates aggravated conduct or an ignorance of the requirement for 9,000 cfm of air in the last open crosscut, the respondent argues that the inspector did not issue a citation for a plan violation and that he was obliged to do so if he believed that was the case. Respondent suggests that no ventilation plan violation was issued because it was permitted to take the curtain down under its plan. With respect to the petitioner's suggestion that Foreman Stire did not know that the regulation required 9,000 cfm of air in the last open crosscut, the respondent maintains that there is no dispute as to the amount of air required, and that the only dispute is to the location where the air is to be measured.

I find nothing in the respondent's ventilation plan (Exhibit-4) that clearly and directly states that ventilation check curtains may be taken down while mining is in progress. The plan language relied on by the respondent states as follows:

The location of the checks may vary, so as to provide positive ventilation to all working places and minimize the need for run through checks depending on the place being mined.

The petitioner has not rebutted the fact that this plan provision was in effect at the time the violation was issued. In addition, the petitioner has not rebutted Mr. Nalisnick's testimony that he spoke with a MSHA district ventilation representative after the violation was issued and was advised that its use of ventilation check curtains needed to be re-evaluated. Although Mr. Nalisnick conceded that there was no need for run through check curtains and undercuts the respondent's argument that the taking down of the curtain was to preclude the use of run through checks, the unrebutted testimony is that the ventilation plan was not changed, and is indeed still in effect.

Although I have concluded that the plan language does not specifically authorize the taking down of check curtains, it does state that the location of check curtains may vary in order to minimize the need for run through checks, depending on the place being mined. When this plan provision is read together with MSHA's "Question and Answer" advise, I cannot conclude that the respondent's belief that the taking down of the curtain was not prohibited is implausible or incredible.

I further find that the December 13, 1993, letter to Mr. Nalisnick from MSHA's district manager Joseph G. Garcia, which acknowledges in relevant part that "it has come to our attention that there has been a misunderstanding concerning the installation of check curtains" lends support to the respondent's suggestion that it was reasonable for it to conclude that it was authorized to take down the outby check curtain for the stated reasons, and seriously undercuts the petitioner's "aggravated conduct" argument. I take particular note of the fact that while the district manager's letter further stated that a revised plan print statement was necessary to correct the condition to insure that the proper stopping line location be used pursuant to sections 75.325(b) and 75.360(c)(1), there is no evidence that this was done. In the absence of a revised plan provision, the Garcia letter permits the respondent to continue following its approved face ventilation plan.

I conclude and find that the credible evidence in this case supports the respondent's assertion that it had a good faith belief that it was in compliance with the requirements of section 75.325(b), and that a reasonable misunderstanding existed with respect to the proper use of its check curtains. Under the circumstances, and based on the aforementioned findings and conclusions, I cannot conclude that the petitioner has established that the violation was the result of "aggravated conduct" amounting to an unwarrantable failure. Accordingly, the section 104(d)(2) order is MODIFIED to a section 104(a) citation.

Although I have modified the order, it should be clear to the respondent that if it continues to mine with a check curtain down, it again runs the risk of being out of compliance if it results in less than 9,000 cfm of air at the last open crosscut determined

by the prevailing facts at any particular point in time. In short, I reject the respondent's reliance on its ventilation plan provision as a defense to the violation of section 75.325(b), since the evidence in this case clearly establishes that it did not maintain 9,000 cfm of air at the cited crosscut location. I have, however, accepted as credible the respondent's reliance on the plan, and MSHA's recognition that there was a misunderstanding concerning the use of check curtains, in mitigation of the respondent's negligence, and supports its argument of no aggravated conduct amounting to an unwarrantable failure.

#### Size of Business and Effect of Civil Penalty Assessment on the Respondent's Ability to Continue in Business

The parties stipulated that the respondent is a small operator and that payment of the civil penalty assessment for the violation in question will not adversely affect the respondent's ability to continue in business. I adopt these stipulations as my findings on these issues.

#### History of Prior Violations

MSHA's computer printout for the subject mine for the period October 12, 1991 through October 12, 1993, reflects that the respondent paid civil penalty assessments for 588 violations. For an operator of its size, I cannot conclude that the respondent has a particularly good compliance record, particularly with respect to past ventilation and perm issibility violations. I have taken this into account in the penalty assessment that I have made for the violation that has been affirmed.

#### Good Faith Compliance

The record reflects that the required air ventilation was restored within minutes of the issuance of the order after Inspector Kish and foreman Stine re-installed the ventilation curtain that had been taken down, and the order was terminated 15 minutes after it was issued. I conclude and find that the cited condition was rapidly abated by the respondent in good faith.

#### Gravity

Based on my "S&S" findings and conclusions, I conclude and find that the violation that I have affirmed was serious.

Negligence

I conclude and find that the violation of section 75.325(b) was the result of the respondent's failure to exercise reasonable care amounting to a moderate degree of negligence.

Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that a civil penalty assessment of \$1,600 is reasonable and appropriate in this case.

ORDER

In view of the foregoing, IT IS ORDERED AS FOLLOWS

1. Section 104(d)(2) "S&S" Order No. 3955721, October 12, 1993, 30 C.F.R. 75.325(b), IS MODIFIED to a section 104(a) "S&S" citation, and as modified, IT IS AFFIRMED.
2. The respondent IS ORDERED to pay a civil penalty assessment in the amount of \$1,600 for the violation in question. Payment is to be made to MSHA within thirty (30) days of the date of this decision and order, and upon receipt of payment, this matter is dismissed.

George A. Koutras  
Administrative Law Judge

Distribution:

Susan M. Jordan, Esq., Office of the Solicitor, U.S. Department of Labor,  
14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Joseph A. Yuhas, Esq., 1809 Chestnut Avenue, Barnesboro, PA 15714 (Certified Mail)

/lh