FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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September 11, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket No. KENT 2022-0079
v.	Docket No. KENT 2022-0084
NALLY & HAMILTON ENTERPRISES, INC.	

BEFORE: Jordan, Chair; Baker and Marvit, Commissioners

DECISION

BY THE COMMISSION:

These matters, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2024) ("Mine Act"), concern a decision of an Administrative Law Judge to vacate an order issued by the Secretary of Labor's Mine Safety and Health Administration ("MSHA") to Nally & Hamilton Enterprises, Inc. ("Nally & Hamilton") for an alleged failure to comply with a mandatory on-shift examination requirement. The order was issued following an accident at a surface coal mine in which a tree fell from the edge of a highwall and crushed a truck traveling below. One miner was killed, and a second miner was seriously injured.

The order cites the mandatory safety standard at 30 C.F.R. § 77.1713(a), which states that "[a]t least once during each working shift . . . each active working area [of a surface coal mine] . . . shall be examined by a certified person . . . for hazardous conditions and any hazardous conditions noted during such examinations shall be reported to the operator and shall be corrected by the operator." After a hearing on the merits, the Judge found that the operator did not violate the safety standard. The Judge concluded that the area above the highwall where the trees were located was not an active working area at the time of the accident. Thus, the operator had no duty to examine the trees from the top of the highwall. He concluded that an examination conducted solely from the vantage point of the main mine road complied with the requirement of § 77.1713(a). Furthermore, because an examiner could only be required to report hazards that could be observed from the main mine road, and because the danger the trees created could not be perceived from the main mine road, the Judge held the failure to report that hazard did not constitute a violation of the inspection requirement in § 77.1713. 46 FMSHRC 209, 231 (Apr. 2024) (ALJ). Accordingly, the Judge vacated the order.

The Secretary filed a petition for review, which the Commission granted. For the reasons which follow, we reverse the Judge and conclude that an adequate examination under § 77.1713(a) must be capable of detecting conditions that could pose a danger to miners in the active working areas. In other words, at this mine, an adequate on shift examination had to be capable of assessing whether or not the stand of trees located on top of the highwall created a danger to miners traveling on the main haul road below.

I.

Factual and Procedural Background

The accident occurred on January 11, 2022, at Nally & Hamilton's Colmar Surface Mine in Bell County, Kentucky. Two miners were traveling in a truck carrying blasting materials on the mine's main haul road when a tree fell from the highwall and crushed the truck, killing one miner and seriously injuring the other. The tree on top of the highwall was approximately 67 feet tall. The highwall itself was adjacent to the haul road and was approximately 50 feet tall. 46 FMSHRC at 210-14. The fallen tree had been one of a small group of trees left standing between the edge of the highwall and an access road farther back from the edge. At the bottom of the highwall, material intended for reclamation formed an approximately 53-foot-wide berm between the base of the wall and the main haul road. The access road atop the highwall was no longer used regularly, and pit mining in the area below had concluded a few months prior to the accident. However, the main haul road was still traveled daily. *Id.*

A provision of the mine's approved ground control plan requires that "[u]nless a drop bench is provided, trees and other vegetation will need to be removed a safe distance from the top of the highwall." Ex. S-7 at 5. The operator was aware of the plan's requirements. Tr. I:193-94. Witnesses agreed that the tree stand was "close" or "fairly close" to the edge of the highwall. Ex. S-10; Tr. I:59 (dozer operator John Brown testified that he could see from the road that the trees were "close" to the edge); Tr. II:38-39 (Dayne Willis, consulting engineer agreed that the trees were "fairly close" to the edge); Tr. I:87 (MSHA inspector Silas Brock testified that the tree was "right on the edge"); Tr. I:191 (Foreman Jody Brock testified that the tree was "back five or six feet"). Foreman Brock, the mine's regular MSHA inspector David Faulkner, and the injured miner, Joshua Pendleton, testified that the stand of trees did not attract notice or raise concerns prior to the incident. Tr. I:37-38, 191, 213-19; II:78.

On-shift examination reports for the 11 days leading up to the accident marked the highwall as "stable." Ex. S-6. Foreman Brock explained that he would glance up at the highwall from the road as part of his regular on-shift examination of the area to check for loose rocks or material leaning over the wall but conceded that he paid more attention to active working areas.

As a result of the accident, MSHA issued Order No. 9138189, alleging a failure to "identify, report, and correct the trees that created hazardous highwall conditions" in on-shift examinations conducted between January 1-11, 2022. Ex. S-2. The violation was designated as significant and substantial, attributable to high negligence, and the result of an unwarrantable failure to

comply with a mandatory standard.[1] *Id.* After the hearing, the Judge vacated the order, concluding that "[t]here was no duty to include the area above the highwall in the operator's daily on-shift examinations, and there is no credible record evidence showing that the danger here could or should have been perceived from the main mine road where miners regularly travel[ed]." 46 FMSHRC at 230.

II.

Disposition

Section 77.1713(a) governs the on-shift examination requirement for surface coal mines and requires that a certified person examine "each active working area" for hazardous conditions at least once during each working shift, and that any such hazardous conditions be reported and corrected. 30 C.F.R. § 77.1713(a).[2]

In confining the on-shift examination requirement to active working areas, the Judge applied a narrow and literal reading of the regulation. In this case, that approach winds up undermining the very purpose of the standard.

Common sense dictates that the purpose of the standard in question is to identify and correct hazardous conditions that might harm miners in the active working areas. In most cases this goal is accomplished by conducting an examination focused on potential hazards located in those active working areas. However, sometimes miners cannot be assured of a safe work environment unless the on-shift examination is expanded to include a location that is outside the active working areas. Such is the situation in the case at hand.

At this mine, at the top of a highwall with no drop bench, there was a particular stand of trees that created a potential hazard for miners traveling on the main haul road below. The operator was aware of this potential danger, as its ground control plan specifically required that "trees and other vegetation will need to be removed a safe distance from the top of the highwall" unless a drop bench was provided. Ex. S-7 at 5; Tr. I : 193-94. Whether the trees were a safe distance from the top of the highwall could not be determined by an examination that was conducted solely from the vantage point of the active working areas below. Such examination

[1] The "significant and substantial" and "unwarrantable failure" terminology is taken from section 104(d)(1) of the Mine Act, which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard" and establishes more severe sanctions for any violation caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards." 30 U.S.C. § 814(d)(1).

[2] "Active working area" is not defined in the statute or regulations. However, as the Judge noted, the Secretary has previously suggested that "active working area" should be equated with "active workings," which is defined in 30 C.F.R. § 77.2(a) as "any place in a coal mine where miners are normally required to work or travel" (46 FMSHRC at 229 n.14). It appears the Judge treated the phrases as analogous and we will also do so for the purposes of this opinion.

did not include the top of the highwall, where the trees were located. Though there was an access road at the top of the highwall behind the trees, the location was not considered an active working area since miners did not work or travel there. Although the trees were not located in an active working area, there was a known danger that they could fall into the active working area, thereby posing a direct threat to miners in the active working areas. This would include the miners who traveled on the main haulage road adjacent to the bottom of the highwall.

Foreman Brock explained that he conducted his examination by glancing up at the highwall from the road below to check for loose rocks or material leaning over the wall. Tr. I:189-90; Tr. II:66. Conducting the examination this way is problematic because as the Judge concluded, "evidence presented at the hearing establishes a reasonably prudent miner could have not perceived the danger of the trees on the highwall from the vantage point of the mine road." 46 FMSHRC at 230.

Whether and to what extent the trees posed a danger could only be determined by an examination conducted from a vantage point that allowed one to assess the condition of the trees and their proximity to the edge of the highwall. Moreover, the record reveals that the potential hazard posed by the trees was not a static situation. Rain and snow fell in the subject area in the weeks leading up to the accident. Ex. 5-6. Witnesses consistently testified to the destabilizing effect that such freeze/thaw cycles can have on the integrity of the ground on and around highwalls: soil expands and contracts as it freezes and thaws, which can create fissures, separate soil from tree roots, and lead to mud slides. Tr. I:68-69, 182-84, 223; Tr. II:43-44. The foreman conceded that highwalls are more susceptible to damage in poor weather conditions and that he conducts a closer examination during the winter months. Tr. I:183-84. Nevertheless, the Judge held that "the area above the highwall where the trees were located is not an active working area under section 77.1713(a), and Respondent had no duty to examine the trees from the top of the highwall." 46 FMSHRC at 229.

The Judge explained that he reached his decision "under the logic of *Black Castle*." *Id*. at 229 (citing *Black Castle Mining Co*., 36 FMSHRC 323 (Feb. 2014)). We find *Black Castle* to be inapposite to the case at hand. Unlike the instant case, *Black Castle*'s holding, restricting the examination to active work areas, did not leave the miners in the active work area exposed to a potential hazard arising from outside the active work area.

In *Black Castle*, a bulldozer ran over and ruptured a buried unmarked gas line, fatally injuring the driver. MSHA issued the operator a citation alleging that the unmarked gas line was a hazardous condition which should have been reported and corrected as part of the on-shift examination. The Commission affirmed the Judge's decision to vacate the citation, finding that the record supported the Judge's conclusion that the accident site was not an assigned work area and the operator had no reason to anticipate that any miner would be in the proximity of the gas line. The Commission found the operator had "no reason to anticipate" that miners would be in the area where the accident occurred; therefore, it was not a working area and examiners were not required to note whether that portion of the gas line was adequately marked. 36 FMSHRC at 325-26. The Commission further held that if the miner had not unforeseeably gone to this non-working area, the gas line would have posed no risk to miners in the active working area. *Id*. at

326. Therefore, there was no corresponding obligation to perform an on-shift examination of the site for hazardous conditions.

We consider our decision in *Sunbelt Rentals, Inc.* to be a more relevant precedent for the case at hand. 38 FMSHRC 1619 (Jul 2016).[3] In *Sunbelt*, a cement plant contracted with a company to perform annual maintenance of its pre-heat tower. The maintenance company in turn contracted with another company to erect scaffolding within the pre-heat tower. While an employee of the scaffolding company was working in the tower, material fell from above, struck him, and knocked him unconscious. During the accident investigation, an MSHA inspector climbed an exterior staircase on the tower, looked through a door and observed a build-up of material on the tower walls directly above the area where the miner had been working. The on-shift examiner had not availed himself of this perspective and thus did not identify the hazardous condition during the examination.

The MSHA inspector issued citations alleging failures to perform adequate on-shift examinations. The Commission held that an examination "must be adequate in the sense that it identifies conditions which may adversely affect safety and health that a reasonably prudent competent examiner would recognize." *Id*. at 1627. In a subsequent decision after remand, the Commission held that when performing an on-shift examination an examiner must use the vantage points that are "reasonably necessary" to check the working area for hazards to miners—including, where relevant, the hazard of objects falling from above. *Sunbelt Rentals Inc.*, 42 FMSHRC 16, 24 (Jan. 2020) (separate opinion of Commissioners Young and Althen, joined by Commissioner Jordan). An examination of a working area is inadequate if it does not allow for

[3] We recognize that *Sunbelt Rentals, Inc*. concerned a metal/nonmetal examination standard (30 C.F.R. §56.18002(a)) rather than the surface coal standard at issue here. However, for the purpose of determining an operator's duty regarding examining hazards in active workings, we believe the precedent in *Sunbelt Rentals* is applicable. Commission case law supports, indeed dictates, such a parallel construction of coal and metal/non-metal regulations. The Commission has found that "[t]here is no logical reason why . . . coal mines would be subject to a regulation designed to be less protective . . . than the regulation governing other mines, and it would make little sense for MSHA or its predecessor agency to have intended such a result." *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1682 (Dec. 2010); *see also Solar Sources, Inc.*, 37 FMSHRC 218, 221 (Feb. 2015).

The legislative history of the Mine Act further confirms this approach. A fundamental purpose of the Act was to provide a standard for safety for metal/non-metal miners as comprehensive and protective as the standards provided for coal miners. The Senate Report on the Mine Act notes that the Coal Act was more comprehensive in scope and reach than the Metal Act. It states that one reason why enactment of the Mine Act was an absolute necessity was that there would be "one statute for both coal and metal/nonmetal mines, affording equal protection for all miners and a common regulatory program for all operators." S. Rep. No. 95-181, at 9 (1977), reprinted in S. Subcomm. on Labor, Comm. on Human Res., Legis. History of the Fed. Mine Safety and Health Act of 1977, at 597 (1978). Consequently, it would be illogical and at odds with the purpose of the Mine Act to construe coal regulations in a manner achieving less protection for coal miners than the protection afforded metal/nonmetal miners.

the evaluation of all the potential hazards to which miners in the active work areas might reasonably be expected to be exposed.

As demonstrated by the circumstances of the accident, conditions atop a highwall can create dangers for the miners working or traveling on the haul road below. There is no dispute that the haul road is an active work area that is regularly traveled. Tr. I:28. An adequate on-shift examination of the haul road therefore must include an evaluation of potential fall hazards from *all* vantage points reasonably necessary for the discovery and correction of those hazards. *See Sunbelt*, 42 FMSHRC at 24. Had that been done here, the operator would have identified and corrected the 67-foot-tall tree located close to the edge of the highwall.

Jody Brock, the mine foreman that conducted the examination, conceded that he was tasked with removing trees that were too close to the edge of the highwall. Tr. I:174. Furthermore, the witnesses agreed that the subject stand of trees was either fairly close to the edge or at most six feet away from the edge. *See* Ex. S-10; Tr. I:59; Tr. I:191; Tr. II:38-39, 68.

Foreman Brock acknowledged that freeze/thaw cycles were to be expected in January, and that he would look "closer" at the highwall during freezing and thawing conditions because material is more likely to fall. Tr. I:182-84. Indeed, such freeze/thaw cycles had in fact occurred in the days and weeks preceding the accident. A reasonably prudent examiner would have recognized (and sought to evaluate) the increased hazard of material falling from the highwall onto miners in the working area during the winter months.

Finally, as in *Sunbelt*, the examiner's vantage point here was insufficient to check for all hazards imperiling the working area. 42 FMSHRC at 24. Foreman Brock conducted his examination by observing the trees on the highwall from the haul road below. The mine foreman conducted daily on-shift examinations of the area where the accident occurred, which included glancing up at the highwall from the haul road to check for loose rocks or vegetation leaning over the wall. Tr. I:189-90; Tr. II:66. The Judge found that using this vantage point "a reasonably prudent miner could have not perceived the danger of the trees on the highwall."[4] 46 FMSHRC at 230; Tr. I:189-93. The examination reports did not identify the hazardous conditions in the days leading up to the accident. Ex. S-6. However, for the examination to be sufficient, the examination should have been conducted from a vantage point capable of discovering this foreseeable hazard.

It is axiomatic that when interpreting regulations, we take into account common sense, the purposes of statutes and regulations, and the practical consequences of those interpretations. *See Condon v. Bowen*, 853 F.2d 66, 72 (2nd Cir. 1988) (citations omitted); *see also Central Sand & Gravel Co.*, 23 FMSHRC 250 (Mar. 2001) (holding that a regulation must be read in accordance with the protective purposes of the applicable safety standards and the Mine Act—to

[4] There was an access road near the stand of trees atop the highwall. 46 FMSHRC at 210-14. Though we do not lay out any specific requirements for how the examiner should have conducted the examinations, other than to ensure he could reasonably perceive hazards to miners, we note that if the examiner could not view the hazard from the haul road he could have examined it from the access road above.

protect miners from hazards).[5] We find guidance in the Commission's previous holdings and determine that the Judge engaged in an improperly narrow reading of the regulation, which would lead to an absurd result.

III.

Conclusion

For the reasons above, we find that a violation of 30 C.F.R. § 77.1713(a) has been established. Accordingly, the Judge's decision vacating Order No. 9138189 is reversed. We remand for the determination of whether the violation was significant and substantial and caused by an unwarrantable failure to comply with the standard, and for the assessment of a civil penalty after application of the factors set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(i).

Mary Lu Jordan, Chair

Timothy J. Baker, Commissioner

Moshe Z. Marvit, Commissioner

[5] *Central Sand & Gravel Co.*, 23 FMSHRC 250 (Mar. 2001), involved a citation issued by MSHA to the operator for a failure to maintain adequate clearance under a high-voltage powerline in violation of the safety standard at 30 C.F.R. § 56.12045 ("[o]verhead high-potential powerlines shall be installed as specified by the National Electrical Code."). A sand and gravel stockpile stood 10 feet higher than powerlines and the west side was less than 2 feet from the lines. The citation was issued following the electrocution of an eleven-year-old child who reached out and touched a powerline while playing on the stockpile, after working-hours.

The Commission Judge determined that the operator violated the safety standard and the NEC, which required clearance of 8 vertical feet and 5-1/2 horizontal feet.

On review before the Commission, the operator argued that the literal terms of the safety standard only requires that the overhead power lines "be installed" in accordance with the NEC. The Commission rejected this construction finding that it "would negate much of [the safety standard's] protective intent" and "would lead to the plainly absurd result of permitting mining operations to take place without adherence to many provisions in the [Code] intended to safeguard persons from the obvious post-installation hazards of overhead high-potential powerlines." 23 FMSHRC at 254.

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