

CCASE:

BCNR MINING V. SOL (MSHA)

DDATE:

19850325

TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

BCNR MINING CORPORATION,
CONTESTANT

CONTEST PROCEEDINGS

v.

Docket Nos. PENN 83-1-R
PENN 83-4-R

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

Order Nos. 2012610: 9/16/82
2012602: 9/8/82

Clyde Mine

Appearances: Bronius K. Taoras, Esq., BCNR Mining Company,
Meadow Lands, Pennsylvania, for Contestant;
David T. Bush, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for Respondent.

DECISION

Before: Judge Fauver

These proceedings involve review of two withdrawal orders issued at BCNR Mining Corporation's Clyde Mine, under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq. The cases were consolidated and heard in Pittsburgh, Pennsylvania.

Having considered the testimony, exhibits, and the record as a whole, I find that a preponderance of the substantial, probative, and reliable evidence establishes the following:

FINDINGS OF FACT

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1. The Clyde Mine is an underground coal mine that produces coal for sale or use in or affecting interstate commerce.

2. On September 8, 1982, while inspecting the Clyde Mine, MSHA Inspector John Poyle attempted to determine whether a pre-shift examination had been performed in One West Section. When the inspector was unable to locate dates, times, or initials by a pre-shift examiner, he brought the shift foreman to the section to help search but they found nothing. By an entry recorded in the "State Book," the

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inspector determined that a pre-shift examination had been made. The inspector decided that a violation of 30 C.F.R. 75.303 had occurred because the pre-shift examiner had not marked the date, time and his initials at the places examined.

3. The inspector believed the citation was unwarrantable because the examiner knew or should have known that the date, time, and initials were required to be placed in the areas examined. He therefore issued a section 104(d)(2) order (No. 2012602). The inspector did not look into or consider the reasons for the violation at the time he issued the unwarrantable failure order. His trip back into the area with the dayshift foreman was to verify that the date, time, and initials were not there.

4. The pre-shift examiner, Kevin Warchol, had lost his chalk in the course of the midnight shift prior to doing the pre-shift examination in question. A loading machine had gotten stuck in a wet, muddy, area and Mr. Warchol had worked in the mud under the machine while trying to free it. Later he tried to use his pen to write on canvas, but that did not work. The immediate face area had not been rock-dusted at that time so rock dust could not be used to mark the faces.

5. Upon completing his pre-shift examination, Mr. Warchol was called to the scene of a haulage problem where he stayed until the end of the shift, when he went to the surface. By the time he was finished, the day shift, which started at 8:00 a.m., had gone into the mine.

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6. On September 16, 1982, Inspector John Poyle, accompanied by his supervisor, Eugene Beck, and BCNR's representative, George Comadena, conducted a regular surface inspection at the Clyde Mine.

7. Inspectors Poyle and Beck followed fresh vehicle tracks to the mine's refuse dump. Before entering the dump, the inspectors stopped on the roadway leading into the dump when they observed a highwall on a refuse pile. Mr. Poyle was concerned with the height of the highwall and so he, Mr. Beck, and Mr. Comadena went to the mine's safety department to review the mine's ground control plan. Following their review of the ground control plan, the party returned to the dump, this time going farther into the refuse area. While

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inspecting the highwall, which exceeded the 12-ft. height permitted by the ground control plan, Mr. Poyle observed an overhang of approximately five feet protruding from the highwall. The inspectors found this condition to be an imminent danger because they believed the overhang was likely to fall if hit or bumped by equipment and could cause death or serious injury. Inspector Poyle issued a section 107(a) withdrawal order (No. 2012610).

DISCUSSION WITH FURTHER FINDINGS

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On September 8, 1982, Inspector Poyle issued section 104(d)(2) Order 2012602 citing a violation of 30 C.F.R. 75.303. He alleged that the violation (failure to place time, date and initials at places examined) was "unwarrantable" and "significant and substantial," but at the hearing the Secretary conceded that this was not a "significant and substantial" type violation.

BCNR concedes that there was a violation of 30 C.F.R. 75.303, but seeks to vacate the order on the grounds that (1) the violation was not "unwarrantable," and (2) there was no proof that a complete "clean" inspection of the mine had not occurred since the last section 104(d) order.

First, I find that the pre-shift examiner's failure to place the time, date and his initials at the places examined was not "unwarrantable" in the circumstances of this violation. He had lost his chalk, conditions were wet and he could not write with his pen. Hindsight may point to other things he might have tried, such as marking a brattice curtain with his thumbnail or a tool edge, but they did not occur to him and, overall, I find that the evidence does not establish an "unwarrantable" violation.

Secondly, the Secretary offered no evidence that there had not been a complete "clean" inspection of the mine since the last preceding section 104(d) order.

For the above reasons, the 104(d)(2) order should be changed to a section 104(a) citation. It should be thus modified, instead of being vacated, because there was a violation of the standard cited.

This case involves an order of withdrawal for a condition which Inspectors Poyle and Eugene Beck found to be an imminent danger.

Inspectors Poyle and Beck followed fresh vehicle tracks to the refuse dump. Before entering the dump the inspectors stopped on the roadway leading into the dump when they observed a highwall on a refuse pile. Mr. Poyle was concerned with the height of the highwall and so he, Mr. Beck and Mr. Comadena went to the mine's safety department to review the mine's ground control plan. Following their review of the ground control plan, the party returned to the dump, this time going into the refuse area. Inspector Poyle estimated that the highwall was about 25 feet high. While inspecting the highwall, Mr. Poyle observed an overhang of about five feet protruding from the highwall, caused by extracting material from the bottom of the refuse pile. The overhang was about 18 to 20 feet wide.

I find that a preponderance of the reliable evidence establishes that the overhang constituted an imminent danger. The inspectors reasonably surmized from their observation of highlift tracks leading into the refuse area that red dog was being removed from the bottom of the pile. Red dog is slate and burned coal which can be used for laying driveways. Although Mr. Comadena told them no one worked in that area, they reasonably concluded that a highlift was being used to extract red dog from the refuse pile. By following the highlift tracks the inspectors observed a highwall that proved to be in violation of the ground control plan (by exceeding the 12-ft. limit). Later, when they moved closer to inspect the highwall, they became aware of the overhang condition, which they determined to be an imminent danger. As Mr. Beck described the condition, the highwall was not at an angle of repose or rest (the maximum angle at which a heap of any loose or fragmented solid material will stand without sliding) and the overhang was sticking out. It was clear that work was being done in this area, i.e., the removal of red dog from the bottom of the pile. Indeed, it was the removal of red dog that created the overhang. The inspectors' concern was that during a future extraction the overhang could collapse causing death or serious injury. As Inspector Poyle testified: "My opinion was if someone came in that was removing this red dog and would hit it, that whole lap could collapse on top of them (Tr. 81)." Mr. Beck testified: "When he [Inspector Poyle] said he was going to close it down I said I would back him up a hundred percent. If he didn't do it I would have instructed him [to issue a closure order] at that time (Tr. 132)."

The presence of highlift tracks leading into the refuse area combined with the loose material made it obvious that mining was going on and that there was no reason to believe it would not continue. Upon close observation, at a more favorable angle, the inspectors discovered that the undermining of the refuse pile created an overhang of unmined material. The inspectors' concern that the overhang might collapse if struck by a vehicle during future extraction was justified by the facts. If material is removed from the bottom of pile, there is a clear risk that the material above will lose support and hence stability. The inspectors acted with reasonable care and judgment by not waiting for another extraction to see if the undermined pile would continue to hold.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in these proceedings.
2. On September 8, 1982, BCNR Mining Corporation violated 30 C.F.R. 75.303 in that the pre-shift examiner did not mark the time, date, and his initials at the places he examined. However, the Secretary did not meet his burden of proving that the above violation was "unwarrantable" and that a "clean" inspection had not occurred since the last section 104(d) order. Therefore, section 104(d)(2) Order No. 2012602 should be converted to a section 104(a) citation.
3. The Secretary met his burden of proving an imminent danger as alleged in section 107(a) Order No. 2012610.

ORDER

WHEREFORE IT IS ORDERED that:

1. The Secretary's Order No. 2012602, dated September 8, 1982, is MODIFIED as follows:
 - a. It is changed from a section 104(d)(2) order to a section 104(a) citation.
 - b. The allegations of "unwarrantable" and "significant and substantial" are deleted from the citation.

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c. The period at the end of the first sentence in the condition or practice section of the citation is deleted and the words "in that" are substituted, and the next word, "There," is changed to lower case: "there."

2. As so modified, Citation No. 2012602, dated September 8, 1982, is AFFIRMED.

3. The Secretary's Order No. 2012610, dated September 16, 1982, is AFFIRMED.

William Fauver
Administrative Law Judge