

CCASE:

EMERALD MINES V. SOL (MSHA) & UMWA

UMWA & SOL (MSHA) V. EMERALD MINES

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

EMERALD MINES CORPORATION,
CONTESTANT

v.

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

CONTEST PROCEEDING

Docket No. PENN 84-191-R
Citation No. 2253632; 6/15/84

Emerald No. 1 Mine

UNITED MINE WORKERS OF
AMERICA (UMWA),
REPRESENTATIVE OF MINERS

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

v.

EMERALD MINES CORPORATION,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. PENN 84-206
A.C. No. 36-05466-03543

Emerald No. 1 Mine

DECISION

Appearances: R. Henry Moore, Esq., Rose, Schmidt, Dixon & Hasley,
Pittsburgh, Pennsylvania for Contestant/Respondent
Emerald Mines Corporation (Emerald);
Covette Rooney, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia, Pennsylvania,
for Respondent/Petitioner,
Secretary of Labor (Secretary);
Earl R. Pfeffer, Esq., Washington, D.C., for United
Mine Workers of America (UMWA).

Before: Judge Broderick

STATEMENT OF THE CASE

Emerald initiated a contest proceeding contesting the
citation issued on June 15, 1984, on the grounds that the
violation alleged in the citation did not occur, and that the
special findings in the citation of unwarrantability and
significant and substantial were improper. The

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Secretary denied the allegations, and the UMWA filed an appearance as representative of the miners in support of the citation. The Secretary subsequently filed a proposal for a penalty. The two proceedings were consolidated by Order issued October 15, 1984.

Pursuant to notice, the consolidated cases were called for hearing in Pittsburgh, Pennsylvania, on December 12, 1984. James S. Conrad and Harry Porter testified on behalf of the Secretary. Martin Doney, J.D. Russell, and Anthony Robert Dean testified on behalf of Emerald. No witnesses were called by the UMWA. All parties have filed posthearing briefs. I have considered the entire record and the contentions of the parties, and make the following decision.

FINDINGS OF FACT

1. At all times pertinent to these proceedings, Emerald was the owner and operator of an underground coal mine in Greene County, Pennsylvania, known as the Emerald No. 1 Mine.

2. Emerald's mining operations affect interstate commerce.

3. Emerald is a medium sized operator, and the subject mine is a large mine, producing approximately one million tons of coal annually.

4. In the 24 months preceeding the issuance of the subject citation, there were 294 violations cited at the subject mine. Three of the prior violations cited were of 30 C.F.R. 75.303.

5. The ability of Emerald to remain in business will not be affected by the assessment of a penalty in this case.

6. Emerald showed good faith in promptly abating the violation charged in the contested citation.

7. The area of the mine involved in this case is the 6 Right haulage entries, No. 3 entry of which was an old intake

escapeway. Coal was not being produced in this area at the time involved in these cases. It was described as "more or less a construction area that is being set up for a new section" (Tr. 21).

8. On June 13, 1984, Harry Porter, a miner working at the subject mine, was assigned to work in the 6 Right section No. 3 entry to put up guarding on a cable. He was unable to find evidence that a preshift examination had been made and told management of this. After the shift was completed, he checked the mine examiner's book and found no entries for June 12 or June 13 to show that preshift examinations had been performed.

9. In fact, the area had been examined on June 13, by section foreman Marty Doney who made a notation of the examination in his section book. No hazardous conditions were found. Doney called shift foreman Don Zitko who was on the surface and told him of the examination. However, the examination was not recorded in the mine examiner's book kept on the surface.

10. On June 14, 1984, at the beginning of his shift, Porter asked Doney whether the area had been preshifted and Doney assured him that it had. Federal Mine Inspector James Conrad arrived at the scene and at Porter's request, Conrad explained to Doney that all areas where men are being sent to work must be preshifted and the results recorded.

11. On the following morning, (this was the morning of June 15), Porter checked the mine examiner's books, and there was no record of a preshift examination having been performed of the area in question on June 14.

12. In fact, the area was not preshift examined on June 14. Doney had been under the mistaken impression that the third shift foreman Bobby Dean had performed the examination.

13. It was the practice at the subject mine for the foremen to indicate in a report made at the end of the shift what areas they expect to work in the following day. Doney was asked: "Q. Did you expect that that area would be pre-shifted on the fourteenth? A. It usually is. If we tell people they are going to work in an area, the areas usually are examined." (Tr. 102).

14. On June 15, 1984, Inspector Conrad issued a citation under section 104(d)(1) of the Act for a violation of 30 C.F.R. 75.303 because "a preshift examination of the 6 Right haulage old intake escapeway No. 3 entry from the No. 29 crosscut to 10 crosscut had not been performed by a certified person prior to sending two union employees into said area. The employees were sent to perform work on a deenergized high voltage cable on the day shift of June 14, 1984."

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15. At the time the citation was issued, the condition of the roof in the area in question was good. There was some coal sloughage of the ribs, the entry was on intake air, and no methane was found. There was no electrical power in the No. 3 entry, and coal was not being produced.

STATUTORY PROVISION

Section 104(d)(1) of the Act provides in part as follows:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act.

REGULATORY PROVISIONS

30 C.F.R. 75.303 provides as follows:

(a) Within 3 hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative. Each such examiner shall examine every working section in such workings and shall make tests in each such working section for accumulations of methane with means approved by the Secretary for detecting methane, and shall make tests for oxygen deficiency with a permissible flame safety lamp or other means approved by the Secretary; examine seals and doors to determine whether they are functioning properly; examine and test the roof, face, and rib conditions in such working section; examine active roadways, travelways, and belt conveyors on which

men are carried, approaches to abandoned areas, and accessible falls in such section for hazards; test by means of an anemometer or other device approved by the Secretary to determine whether the air in each split is traveling in its proper course and in normal volume and velocity; and examine for such other hazards and violations of the mandatory health or safety standards, as an authorized representative of the Secretary may from time to time require. Belt conveyors on which coal is carried shall be examined after each coal-producing shift has begun. Such mine examiner shall place his initials and the date and time at all places he examines. If such mine examiner finds a condition which constitutes a violation of a mandatory health or safety standard or any condition which is hazardous to persons who may enter or be in such area, he shall indicate such hazardous place by posting a "danger" sign conspicuously at all points which persons entering such hazardous place would be required to pass, and shall notify the operator of the mine. No person, other than an authorized representative of the Secretary or a State mine inspector or persons authorized by the operator to enter such place for the purpose of eliminating the hazardous condition therein, shall enter such place while such sign is so posted. Upon completing his examination, such mine examiner shall report the results of his examination to a person, designated by the operator to receive such reports at a designated station on the surface of the mine, before other persons enter the underground areas of such mine to work in such shift. Each such mine examiner shall also record the results of his examination with ink or indelible pencil in a book approved the Secretary kept for such purpose in an area on the surface of the mine chosen by the operator to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons.

(b) No person (other than certified persons designated under this 75.303) shall enter any underground area, except during any shift, unless an examination of such area as prescribed in this 75.303 has been made within 8 hours immediately preceding his entrance into such area.

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30 C.F.R. 75.2(g) provides in part as follows: "(4) 'Active workings' means any place in a coal mine where miners are normally required to work or travel;"

ISSUES

1. Whether the condition cited was a violation of the mandatory standard as alleged?

(a) Did the area involved constitute "active workings?"

2. If so, whether the violation was significant and substantial?

3. If so, whether the violation was caused by the operator's unwarrantable failure to comply with the standard?

4. If so, what is the appropriate penalty for the violation?

CONCLUSIONS OF LAW

Emerald is subject to the Act in the operation of the mine and I have jurisdiction of the parties and subject matter of these cases.

THE VIOLATION

Emerald concedes that the area in question, the No. 3 entry of the 6 Right section, was not examined within 3 hours preceding the beginning of the day shift on June 14, 1984. There is no dispute that miners were assigned to work and did actually perform work in the area on the day shift on June 14. Emerald takes the position, however, that the area did not constitute "active workings," because miners were not "normally" or "regularly" assigned to work or travel in the area. I interpret the preshift examination requirement to apply to any area in the mine where miners work or travel. The definition in 30 C.F.R. 75.2(g)(4) does not limit but rather expands the areas: a preshift examination is required in an area where miners normally are required to work or travel even though they do not in fact work or travel there on the shift in question. The purpose of the standard is to detect hazards which might result

in injury to miners. The purpose would be ill served if it included only areas where miners regularly worked or travelled and excluded areas where they in fact worked or travelled at the time of a citation but did so in an irregular manner. It is clear that the preshift examination requirement is not limited to coal producing areas: conveyor belt entries are active workings. Jones & Laughlin Steel Corp., 3 FMSHRC 1721 (1981), 5 FMSHRC 1209 (1983), UMW v. FMSHRC, 3 BNA MSHC 1289 (D.C.Cir.1984); as are escapeways, Old Ben Coal Co., 3 FMSHRC 608 (1981); and return air courses, Kaiser Steel Corp., 3 IBMA 489 (1974); and high voltage cable entries, Mid-Continent Coke & Coal Co., 1 IBMA 250 (1972). The second sentence in the standard requires specific examinations and tests to be performed in "every working section in such workings." It is clear that the area involved herein is not a working section. Does this limit or delineate the term active workings used in the first sentence? I think not. It merely elaborates and makes more specific the kind of preshift examination required to be made in working sections. It would be illogical, and would render the first sentence meaningless, to conclude that the only examinations required were examinations of working sections. I hold that any area in an underground coal mine to which miners are assigned to work or through which they are required to travel constitutes active workings and a preshift examination is mandated by 30 C.F.R. 75.303. Therefore, I conclude that a violation of the standard has been established in this case.

SIGNIFICANT AND SUBSTANTIAL

The Commission has grappled with the question of how to determine whether a violation is significant and substantial in National Gypsum Co., 3 FMSHRC 822 (1981) and Mathies Coal Co., 6 FMSHRC 1 (1984). In the latter case, the Commission held that:

[I]n order to establish that a violation of a mandatory safety standard is significant and substantial . . . the Secretary . . . must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard - that is ,a measure of danger to safety-contributedto by 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. Mathies, 3-4.

The violation found in this case is the failure to perform a required inspection. How is the seriousness of such a violation to be evaluated? How does one evaluate the hazard to which the violation contributes? By what is disclosed on an examination of the area after the examination? Emerald contends that this is the test. But the hazard and the violation here involve, not the condition of the area as such, but rather the assigning of miners to work in an uninspected area. 30 C.F.R. 75.300-4 requires daily inspection of main fans; 75.304 requires onshift examinations for hazardous conditions including methane and oxygen deficiency; 75.306 requires weekly ventilation examinations; 75.314 requires special inspection of idle and abandoned areas; 75.800-3 requires testing and examination of circuit breakers. There are other similar requirements. Can it seriously be argued that failure to perform one of these examinations is not significant and substantial if a post-violation examination does not show hazardous conditions? The whole rationale for requiring preshift examinations is the fact that underground coal mines are places of unexpected, unanticipated hazards: roof hazards, rib hazards, ventilation and methane hazards. I conclude that failure to make the required preshift examination of active workings in an underground coal mine contributes to "a measure of danger to safety" which is reasonably likely to result in a reasonably serious injury. The violation was significant and substantial.

UNWARRANTABLE FAILURE

The Interior Board of Mine Operations Appeals interpreted the term unwarrantable failure under the Coal Act in Zeigler Coal Co., 7 IBMA 280 (1977). A violation is caused by unwarrantable failure, according to the Board, if the operator "has failed to abate the conditions or practices constituting [the] violation . . . [which it] 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." Id. at 295-96. See also United States Steel Corporation, 6 FMSHRC 1423, 1436-37 (1984); Secretary v. U.S. Steel Mining Company, Inc., 6 FMSHRC 310, 313 (ALJ 1984). The facts of the present case show (1) miners worked in the area in question on at least 2 days prior to the violation; (2) the examination on June 13 (the day prior to the violation) was made only after the foreman was reminded of it by a miner, and it was not entered in the mine examiner's book. (3) At the beginning of the shift on June 14, the same miner asked whether the area had been preshifted and the federal inspector reminded the foreman of the requirement for conducting preshift examinations; (4) the failure to examine was not intentional. It resulted from a misunderstanding by the foreman on the previous shift. These facts persuade me that the failure to conduct the preshift examination resulted from a lack of reasonable care: reasonable care would have made the operator devise a more efficient system for scheduling preshift examinations in areas where miners are scheduled to work. The operator was given sufficient notice to inform him that the current practice was not working. Therefore, I conclude that the violation was caused by Emerald's unwarrantable failure to comply with the regulation.

PENALTY

The above discussion demonstrates, I think, that the violation was serious and was caused by the operator's negligence. The operator is of moderate size and the mine is a large mine. The history of previous violations is

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moderate. There is no evidence that the imposition of a penalty in this case will have any effect on the operator's ability to continue in business. The violation was abated promptly and in good faith. Based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is \$150.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED that the contested Citation No. 2253632 is AFFIRMED, including its special findings of a significant and substantial violation and an unwarrantable failure to comply.

IT IS FURTHER ORDERED that Emerald shall within 30 days of the date of this decision pay the sum of \$150 as a civil penalty for the violation found herein.

James A. Broderick
Administrative Law Judge