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

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

CIVIL PENALTY PROCEEDING

Docket No. WEVA 87-272
A.C. No. 46-07273-03501

v.

No. 1 Mine

BIRCHFIELD MINING INCORPORATED,
RESPONDENT

DECISION

Appearances: Mary K. Spencer, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia
for Petitioner;
William D. Stover, Esq., Beckley, West Virginia
for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et. seq., the "Act," charging Birchfield Mining Incorporated (Birchfield) with one violation of the mandatory regulatory standard at 30 C.F.R. 75.303(a). The general issue before me is whether Birchfield violated the cited regulatory standard and, if so, whether the violation was the result of the "unwarrantable failure" of Birchfield to comply with the standard and whether the violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, i.e., whether the violation was "significant and substantial." If a violation is found, it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of Act.

The citation at bar, issued pursuant to section 104(d)(1) of the Act, charges as follows:

An inadequate preshift examination was made in the 001Ã0 graveyard main section in that the results of the examination was [sic] not reported 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 area of such mine to work in such shift. The

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results were not recorded in the approved record book and a [sic] examination of the cited MMU showed no dates, times or initials have been placed in conspicuous locations.

The cited standard, C.F.R. 75.303(a) provides as follows:

[w]ithin 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 test 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 by 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.

John Baugh, a Coal Mine Inspector for the Federal Mine Safety and Health Administration (MSHA) arrived at the Birchfield No. 1 Mine at about 7:20 a.m. on April 2, 1987, in conjunction with his work as a ventilation specialist. At that time Baugh observed several miners, who had just changed into work clothes, proceed underground. It is not disputed that these miners were part of the 8:00 a.m. to 4:00 p.m. day-shift crew. Apparently concerned that the day shift crew was entering the mine before the completion of the preshift examination, Baugh checked the mine examiner's books and found no entry for the corresponding preshift exam. Baugh then proceeded underground and found no initials, dates or times evidencing a preshift examination. A "fire boss board" outside the mine portal did show that the mine had been "cleared" but only for the preceding midnight shift. Thus it appeared to Inspector Baugh that the day shift employees had gone underground before the preshift examination had been reported out.

Richard Henderson, the midnight shift section foreman, was told of the alleged violation and reportedly then agreed to perform a preshift exam and report it in the examination book. According to Baugh, Henderson later reported the results into the book at 8:45 that morning. Henderson disagreed however that there was any violation, maintaining that it was not a violation so long as the examination was reported by the beginning of the shift at 8:00 a.m. Accordingly he felt that the day shift miners could report into the mine before 8:00 a.m. and before the completion of the examination without violating the cited standard.

Baugh deemed this violation to be "significant and substantial" and a serious hazard for several reasons. He first noted that the Birchfield No. 1 Mine was located as close as 20 feet from a bleeder system in an adjacent mine having a high concentration of methane. Moreover Birchfield was not drilling the required test holes 20 feet in advance of mining to prevent an unexpected inundation of black damp (oxygen deficient air) or methane. Baugh also observed that the Birchfield mine itself liberated methane and that one of the fans ventilating the mine was not then functioning thereby causing excessive dust to be blown across the working miners. He opined that the excessive dust presented a health threat in the form of respirable dust as well as an explosive hazard. Under the circumstances Baugh concluded that there was a serious hazard to both the health and

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safety of the seven miners in the mine at the time of the issuance of the citation.

Richard Henderson, Birchfield's midnight shift section foreman on April 2, 1987, was in charge of the five member production crew on that shift. He acknowledged that 3 or 4 day shift employees went underground as early as 7:30 that morning before he was able to make the preshift examination entries. He could not recall whether he had talked to Inspector Baugh before he had completed the report and could not recall whether Baugh observed him make the entry. In addition Henderson could not remember whether he had completed the preshift examination before the day shift miners entered the mine. He does remember, however, that when the day shift miners did enter the mine he had not yet completed the reports for either the on-shift exam for the midnight shift or the preshift exam for that day shift and that he was the person designated to perform that preshift exam. Henderson also believed that he completed his preshift mine examination report between 7:30 and 8:00 a.m. on the morning of the 2nd and more likely between 7:45 a.m. and 8:00 a.m. He recalled that he found no methane at the faces after checking with a methane detector at the last row of roof bolts. He claims he was not aware of the citation for inadequate preshift examination until later but he could not recall when.

Avery Bailey, Birchfield's General Mine Forman, also disagreed with Inspector Baugh. Bailey felt that it was proper to allow the day shift miners to proceed underground before reporting the preshift exam results because the mine had already been preshifted before the midnight shift and because all of the day shift miners were certified fire bosses. Bailey acknowledged however that only Henderson was the fire boss designated to perform the examination to be reported out. Bailey thought that the preshift book was completed prior to the 8:00 a.m. shift change because he recalled Henderson come out of mine and fill out the book.

In summary, it is undisputed that 3 to 4 day shift miners went underground into the active workings of the Birchfield No. 1 Mine around 7:30 on the morning of April 2, 1987, and that the day shift did not commence until 8:00 a.m. The credible evidence also shows that at the time these miners entered the mine, the designated preshift examiner had not reported the results of any preshift examination to the surface of the mine. I am also persuaded by the affirmative testimony of Inspector Baugh that the preshift examination had not been completed at the time these miners entered the mine. Preshift examiner Richard Henderson could not even remember whether he had completed the exam. It is also not disputed that when the day shift miners entered the

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mine, no dates, times or initials "had been placed in conspicuous locations" to evidence the completion of a preshift examination.

Birchfield argues that the cited standard is ambiguous and maintains that so long as the preshift examination is completed and properly reported by the commencement of the shift at 8:00 a.m. it is in full compliance and it is therefore immaterial that miners in the shift had entered the mine before the completion of such examination.

The regulation requires however that the preshift examination be completed "within three hours immediately preceding the beginning of any shift and before any miner in such shift enters the active workings of a coal mine" (emphasis added). The regulation also requires that the mine examiner 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 mines to work in such shift" (emphasis added). There is no ambiguity in this language and the plain meaning must prevail. The preshift exam must therefore be completed and reported to the surface before any miner in the oncoming shift enters the active workings or the underground areas to work in that shift, respectively.

Under the circumstances I find that the violation is proven as charged. Since the requirement of the standard is set forth in plain and unambiguous language I also find that the operator's agents should have known of the violation. Accordingly I find that the violation was the result of inexcusable aggravated conduct, constituting more than ordinary negligence, and therefore the result of the "unwarrantable failure" of the operator to comply with the law. *Emery Mining Corporation v. Secretary*, 9 FMSHRC 3333, Docket No. WEST 860350R (December 11, 1987); *Zeigler Coal Corp.*, 7, IBMA 280 (1977); *U.S. Steel Corp.*, 6 FMSHRC 1423 (1984). For the same reasons I find that the violation was the result of significant operator negligence.

Within the framework of the evidence herein I also find that the violation was "significant and substantial" and a serious hazard. *Secretary v. Mathies Coal Company* 6 FMSHRC 1 (1984). In reaching this conclusion I have not disregarded the evidence that no methane was found during the inspection at issue and that mining was not then progressing toward the adjacent bleeder. However the operative time frame for determining the reasonable likelihood of an injury includes the expected continuance of normal mining operations. *Secretary v. Halfway Incorporated*, 8 FMSHRC 8 (1986).

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In assessing a civil penalty in this case I have also considered that the operator is relatively small in size, promptly abated the violation, and had no history of violations. Accordingly I find that a civil penalty of \$400 is appropriate.

ORDER

Citation No. 2909257 is affirmed as a citation under section 104(d)(1) of the Act. Birchfield Mining Incorporated is directed to pay civil penalties of \$400 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge
(703) 756-6261