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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)  
Office of Administrative Law Judges

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

v.

CYPRUS EMERALD RESOURCES  
CORPORATION,  
RESPONDENT

CIVIL PENALTY PROCEEDINGS

Docket No. PENN 88-220  
A.C. No. 36-05466-03644

Docket No. PENN 88-221  
A.C. No. 36-05466-03645

Emerald Mine No. 1

DECISION

Appearances: Thomas A. Brown, Esq., Office of the Solicitor,  
U.S. Department of Labor, Philadelphia,  
Pennsylvania for the Petitioner;  
R. Henry Moore, Esq., Buchanan Ingersoll, P.C.,  
Pittsburgh, Pennsylvania for Respondent.

Before: Judge Melick

These cases are before me upon the petitions for civil penalties 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 Cyprus Emerald Resources, Corporation (Emerald) with three violations of regulatory standards. The general issues before me are whether Emerald violated the cited regulatory standards and, if so, whether those violations were of such a nature as could have significantly and substantially contributed to the cause and effect of a mine safety or health hazard, i.e. whether the violations were "significant and substantial". If violations are found, it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

Docket No. PENN 88-220

Citation No. 241935 alleges a "significant and substantial" violation of the regulatory standard at 30 C.F.R. 75.1400-3 and charges as follows:

An adequate daily examination of the elevator located at No. 1 portal is not and cannot be performed due to the excessive amounts of dirt and

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grease on the ropes. Also the termination of the governor rope has not been performed properly. The governor rope has been bent through the termination socket on the down side and bent above in the arm above the socket. (Footnote 1)

The cited standard provides in relevant part as follows:

Hoists and elevators shall be examined daily and such examinations shall include, but not be limited to, the following: (a) elevators. A visual examination of the rope for wear, broken wires, and corrosion, especially at excessive strain points such as near the attachments and near where the rope rests on the sheaves...

MSHA Inspector James Bandish, found on January 21, 1988, that the seven 3/4 inch wire ropes to the elevator at the No. 1 portal of the No. 1 mine were covered with excessive dirt and grease. He was therefore unable to perform a proper inspection for possible breaks in the rope valleys. Bandish opined that about 1/2 to 3/4 of the 600 foot-long ropes were in that condition. He later testified that the rope crowns were also obscured by grease and dirt therefore also preventing proper examination for crown wear. According to Bandish such conditions would have taken "weeks and weeks" to develop.

The log books for the daily elevator examinations in fact had handwritten entries showing that examinations were being performed but the entries did not reflect any evidence of grease and dirt on the ropes. While Bandish conceded that he too was unable to perform a proper examination of the wire ropes because of the dirt and grease he nevertheless permitted the elevator to return to service without the ropes being cleaned. He also acknowledged that the system had an 8 to 1 safety ratio thereby indicating that 1 rope would be sufficient to hold the elevator. He was not however concerned with cable breakage but of excess slippage of the ropes around the traction drum that drives the elevator car. This drum depends on friction for grip and according to Bandish, excess grease could result in the elevator sliding back into the pit from a height of 25 to 30 feet. It could then hit the buffers and "knock people over" in the elevator resulting in lost workdays or disabling injuries.

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Respondent's witnesses, General Maintenance Foreman Terry Coss and Elevator Examiner, Scott Kramer, both had inspected the wire ropes at issue--Coss at the same time as Inspector Bandish and Kramer two days earlier--and both admitted there was some dirt and grease in the valleys of the ropes. Coss specifically denied however that the crowns were dirty or greasy. Coss also felt that an adequate examination could be performed in any event because broken wires would "ordinarily" protrude through the grease and dirt. Kramer thought that grease and dirt in the valleys would not "ordinarily" cover a defect because a break would protrude outward and excess wear would appear on the crowns which, according to Kramer, were plainly visible.

Within the framework of the undisputed evidence I find that there was indeed dirt and grease in significant areas of the valleys of the cited wire ropes. In addition, I find that such grease and dirt could very well obscure examination of defects in the valleys such as small breaks and corrosion. Inspector Bandish clearly was of this view. Even Respondent's own elevator inspector could state only that such grease and dirt would not "ordinarily" obscure rope defects. In any event, it may reasonably be inferred that dirt and grease in the valleys of the wire ropes would obstruct visual examination of such defects as corrosion.

Since it is also undisputed that the grease and dirt had taken "weeks and weeks" to develop it may also reasonably be inferred that the requisite daily examinations of the ropes could not properly have been made. The violation is accordingly proven as charged. However, in light of the evidence that Inspector Bandish allowed the elevator to return to service without requiring cleaning or further inspection of the ropes, I cannot find that the violation was either "significant and substantial" or serious. See Mathies Coal Co., 6 FMSHRC 1 (1984). Clearly if the violation presented a serious and "significant and substantial" hazard the inspector would not have allowed it to return to service.

In addition, since Emerald itself had ceased operation of the elevator some two days before the MSHA inspection, and was prepared to keep the elevator out of service until new wire ropes arrived, I find Emerald chargeable with but little negligence. Since it is also apparent that the inspector himself did not believe there was a serious hazard (because he allowed the elevator to return to service without cleaning or further inspection of the ropes) it would be difficult to

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conclude that the operator should have been aware of any serious hazard.

Citation No. 2938166 alleges a "significant and substantial" violation of the mine operator's ventilation plan under the regulatory standard at 30 C.F.R. 75.316, and charges as follows:

The approved ventilation plan was not being complied with in the 16 right (007) section in that a hole measuring 7 inches x 15 inches was present in a stopping between the No. 1 return entry and the No. 2 intake entry at the No. 32 crosscut. The approved plan requires permanent stoppings to be maintained between the intake and return air courses.

In particular the Secretary maintains that the following provisions of the operator's ventilation plan (Government Exhibit 5) were violated:

Location of all stoppings, overcasts, regulators, seals, airlock doors and man doors are shown on the mine map. At this time, man doors in permanent stopping lines are projected at 450p Å 650p , or greater intervals at management's discretion. These permanent ventilation controls shall be constructed of solid, substantial materials. List of materials used in constructing the following:

Permanent stopping (between intake and return):  
cinder, concrete Omega Block 384 or limestone blocks, mortar, stopping sealant, micon krush bloc, metal and steel doors. Airlock doors constructed either "plywood or 1" x 6" , lumber, also several are constructed out of steel. Overcasts, undercasts: cinder, concrete, Omega Block 384, limestone block, mortar, stopping sealant, micon krush bloc, metal, and complete metal overcast (galvanized steel sheeting.)  
Section intake regulators require approval prior to their installation. Section return regulators and temporary section intake regulators will be constructed the same as permanent stoppings with metal frame adjustable doors. Shaft partitions: concrete steel.

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Permanent stoppings shall be erected between the intake and return air courses and shall be maintained to and including the third connecting crosscut outby the faces of entries except for Exhibit EMMVÄ15.

Emerald does not deny that the hole, approximately 7 inches by 15 inches in size, did exist in the stopping at the No. 32 crosscut and admits the violation as charged. Emerald argues however that the violation did not involve any "discrete safety hazard" and accordingly that it was not "significant and substantial". I agree. It is undisputed that the hole in the stopping had been used to ventilate a charging station at that location as recently as the previous Friday, January 8, 1988, and that the hole was permissible at that time when used in that fashion. It is also undisputed that on the Friday before the violation the charging station had been moved several blocks away but the subject hole had not yet been patched as of the following Monday when the condition was cited.

The Secretary admits that it would be permissible to maintain two such holes in the stoppings to ventilate two separate charging stations and, in that case, the same amount of air would leak from the intake into the return air course as was caused by the instant violation. It is also acknowledged that the stopping was structurally sound and there were no sources of ignition in the cited crosscut. No air readings were taken at the hole so the amount of leakage could not be determined. Moreover according to the undisputed testimony of Construction Foreman Albert Giacondi, the small amount of leakage had no affect upon the face ventilation.

Accordingly I find that the violation involved little hazard and was not "significant and substantial". See Mathies Coal Company, supra. I agree however with the inspector's assessment that the operator is chargeable with moderate negligence. The undisputed testimony of General Mine Foreman Steve Medve was that at the time of the violation the practice at the mine was to patch such holes within a "reasonable" time as the masons made their rounds for repairs. According to Medve the company now pays "much closer attention to patching holes".

In assessing civil penalties for the above citations I have also considered evidence of the history of violations at Emerald, the size of its business, and its abatement efforts. Under the circumstances penalties of \$75 for each of these citations is appropriate.

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Docket No. PENN 88A221

Order No. 3086725, issued pursuant to section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the mine operator's roof control plan under the regulatory standard at 30 C.F.R. 75.200 and charges as follows:

The approved roof control plan was not being complied with in that two rows of breaker posts were not set inby the cut being mined for the construction of the overcast in the Two East Section at No. 20 crosscut into the intersection of the belt entry. Two rows of posts were not set at 20 crosscut at the track entry where the mining had been in progress at an earlier time. The entrance inby, and outby the No. 20 cross track entry was not provided with a physical barrier to keep people out of the area.

The parties agree that the relevant roof control plan (Government Exhibit No. 3) permits either one of two methods for protecting miners during the process of cutting overcasts or boom holes in a previously supported area. One method, and the method admittedly not followed here, is set forth in the roof control plan as follows: "(1) two rows of posts shall be installed at each approach of the roof area to be removed except the approach where the machine will start cutting". The alternative method is stated in the plan as follows:

5) Note: Two roof trusses may be utilized as additional roof support in place of the two rows of posts as stated in item No. 1. The first roof truss installed in the approach shall be located approximately four feet from the roof strata to be mined and the second roof truss shall be installed approximately three feet from the first. In addition, the unused approaches to the overcast or boom hole shall be fenced off with adequate physical barriers to prevent persons from inadvertently entering the area before the mined out area has been permanently supported.

In this case Emerald had provided "superbolting" to comply with the requirement in this part of the plan for two roof trusses. At issue is whether it was also necessary for Emerald to then have in place "adequate physical barriers to prevent persons from inadvertently entering the area before the mined out area has been permanently supported." Emerald

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argues that it was not necessary because the mined-out area had already been permanently supported.

At the conclusion of the Secretary's case-in-chief Emerald filed a Motion for Directed Verdict and Motion for Summary Decision. The Motion for Directed Verdict (See FED.R.CIV.P. 41(b) applicable hereto by virtue of Commission Rule 1(b), 29 C.F.R. 2700.1(b) was granted at hearing and that decision appears as follows with only non-substantive corrections:

Judge Melick: I am going to grant the motion. First of all, we have the allegation of violation as clarified and amended -- let me refer to that momentarily. The allegation as it stands before me now is an alternative pleading, as I understand it, that in order to comply with this Roof Control Plan (that's Government Exhibit No. 3) you must comply either with Provision 1, which states, "Two rows of posts shall be installed at each approach of the roof area to be removed except the approach where the machine will start cutting," or comply with Provision 5, which requires roof trusses or as it is acknowledged, in the alternative, superbolting, plus, in addition to the superbolts, a requirement which is stated in these words, "In addition, the unused approaches to the overcast or boom hole shall be fenced off with adequate physical barriers to prevent persons from inadvertently entering the area before the mined-out area has been permanently supported." It is conceded and acknowledged that Provision 1 was not met in this case, that is that the two rows of posts were not installed. However, it is alleged and maintained by the Operator that it complied with Provision 5, in essence, that it did have superbolting but that it was not required yet to have the physical barriers present because the mined-out area was, indeed, permanently supported. I agree with that statement.

The evidence shows, and this is from the mine inspector himself, that the mined out areas, specifically those areas shown on Joint Exhibit No. 1 with shading, were permanently supported. The evidence also shows that the area in the No. 20 crosscut between the shaded areas still had roof bolts in it from the regular mining process. Those roof bolts had not been removed and no cutting or mining had commenced in that portion of the No. 20 crosscut. Now, I am limiting my decision to the



