

CCASE:  
TUNNELTON MINING V. SOL (MSHA)  
DDATE:  
19890125  
TTEXT:

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

TUNNELTON MINING COMPANY,  
CONTESTANT

CONTEST PROCEEDING

v.

Docket No. PENN 88-10-R  
Citation No. 2881390; 9/10/87

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

Marion Mine  
Mine I.D. No. 36-00929

DECISION

Appearances: Joseph A. Yuhas, Esq., Ebensburg, Pennsylvania  
for Contestant;  
Evert VanWijk, Esq., Office of the Solicitor,  
U. S. Department of Labor, Philadelphia,  
Pennsylvania for Respondent.

Before: Judge Melick

This case is before me under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," for an expedited hearing to challenge the validity of Citation No. 2881390 issued by the Secretary of Labor against the Tunnelton Mining Company (Tunnelton) for one violation of the standard at 30 C.F.R. 75.305.

The citation, issued pursuant to section 104(a) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. 75.305 and, as amended, charges as follows: "[a] record of examination of the following main return aircourse, east mains (right left side) second south (right left side) are [sic] not being recorded in the approved book in that these aircourse [sic] are not being examined for hazardous conditions."

The cited standard provides in relevant part as follows:

In addition to the preshift and daily examinations required by this subpart D, examinations for hazardous conditions, including tests for methane, and for compliance with mandatory health or safety standards, shall be made at least once each week by a certified person designated by the operator in . . . at least one entry of each intake and return

aircourse in its entirety, idle workings, and, insofar as safety considerations permit, abandoned areas. . . . A record of these examinations, tests and actions taken shall be recorded in 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 mine operator to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons.

Since it is undisputed in this case that at least one entry of the cited return air courses was not being examined in its entirety (and no such examinations were being recorded in the examination books) as required by the cited standard, the violation is proven as charged. Even if the entries cited in this case were, as alleged by Tunnelton, considered to be "abandoned areas" within the meaning of 30 C.F.R. 75.305, and as such subject to inspection on a weekly basis pursuant to that regulation only "insofar as safety considerations permit", there was nevertheless a violation of the standard herein.

In this regard there is no dispute that on the date of the alleged violation there were indeed certain areas of the cited return aircourses that could have been safely inspected. These areas were the designated bleeder examination points and the travelways to those points. According to the undisputed testimony of Inspector George Tercine of the Federal Mine Safety and Health Administration (MSHA) the corresponding examination books maintained by Tunnelton did not reflect that the weekly examinations required by 30 C.F.R. 75.305 were being performed in these areas. While Tunnelton has argued that it had been recording examinations being made at the bleeder examination points pursuant to the requirements of 30 C.F.R. 75.316, the examinations required by this standard are not as broad as those required under section 30 C.F.R. 75.305. In addition, as Inspector Tercine observed, there was no record of examinations of the areas going into the bleeder evaluation points being made. Thus in any event the violation of failing to record examinations of the cited return aircourses pursuant to 30 C.F.R. 75.305 is proven as charged.

Whether the violation was "significant and substantial" depends on whether a discreet safety hazard existed, whether there was a reasonable likelihood that the hazard contributed to would result in injury and whether there was a reasonable likelihood that the injury in question would be of a reasonably serious nature. Secretary v. Mathies Coal Co.,

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6 FMSHRC 1 (1984). In this case the testimony of Bruce Bufalini Resident Mining Engineer at the Marion Mine, was undisputed that the areas traveled to the bleeder examination points were safe and maintained in a safe condition. Indeed Inspector Tercine acknowledged that when he traveled in the subject aircourses to the bleeder evaluation points prior to issuing his citation he found those areas safe to travel. I also observe that the Secretary had permitted Tunnelton not to examine at least one entry of each air course in its entirety until only recently i.e. December 1, 1988, requiring instead daily examinations at only the bleeder evaluation points. Under the circumstances I do not find that the Secretary has sustained her burden of proving that the violation herein was "significant and substantial".

ORDER

Citation No. 2881390 is modified to reflect that it is a non "significant and substantial" violation. The citation is however affirmed as modified and this Contest Proceeding is dismissed.

Gary Melick  
Administrative Law Judge  
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