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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

CIVIL PENALTY PROCEEDINGS

Docket No. PENN 89-5  
A.C. No. 36-00856-03615

v.

Rushton Mine

RUSHTON MINING COMPANY,  
RESPONDENT

DECISION

Appearances: Linda M. Henry, Esq., Office of the Solicitor,  
U.S. Department of Labor, Philadelphia,  
Pennsylvania for Petitioner;  
Joseph A. Yuhas, Esq., Greenwich Collieries,  
Ebensburg, Pennsylvania 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," in which the Secretary has charged Rushton Mining Company (Rushton) with two violations of regulatory standards. At hearings the parties submitted a Motion to Approve a Settlement agreement with respect to Order No. 2885754 in which Rushton agreed to pay a civil penalty of \$500 -- a reduction of \$100 from the initially proposed penalty. I have considered the evidence submitted in support of the motion and find that it comports with the requirements set forth under Section 110(i) of the Act. Accordingly the motion is approved.

Citation No. 2885977 remains at issue. The citation, issued pursuant to Section 104(d)(1) of the Act(FOOTNOTE 1), alleges a "significant and substantial" violation of the standard at 30 C.F.R. 75.303(a), and charges as follows:

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Preshift examinations of the N-14, No. 2 supply haulage entry were not being conducted. The supply haulage entry begins one crosscut in by station 8013 for a distance of approximately 2500 feet. No dates, times or initials were present in the entry to signify that examinations were conducted nor were [sic] any record of preshift examinations available. The No. 2 entry track-trolley haulage ends at station 8032 where the S&S rubber tired battery motor transports the supplies to the section. Within the 2500 feet there were 3 full rubber tired supply cars containing cement blocks, for permanent type stoppings, roof bolts and roof bolt plates. There were others supplies stored in crosscuts that had been removed from supply cars. It was necessary this shift for the S&S tractor to go off the section into the No. 2 entry for roof straps and it was necessary for the section foreman to conduct a preshift examination. This examination was conducted after a discussion about the situation with the safety inspector and section foreman. This entry was identified as the secondary escapeway from the N-14, 016 section, on all mine maps such as temporary notation map, section map, the map posted for the miners and the main map retained in the engineers office.

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The cited standard, 30 C.F.R. 75.303(a), provides in part as follows:

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.

\* \* \*

Such mine examiner shall place his initials and the date and time at all places he examines.

\* \* \*

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.

Rushton admits that its mine examiner did not in fact place his initials and the date and time of his examination within the cited No. 2 supply haulage entry and therefore admits to this extent that a violation of the cited standard was committed. Rushton denies however that a proper preshift examination was not performed and was not recorded in the preshift examination book. Rushton also argues that the violation was neither "significant and substantial" nor the result of its "unwarrantable failure" to comply with the cited standard.

According to the undisputed testimony of MSHA Inspector Donald Klemick, he was present in the cited No. 2 supply haulage entry on both May 8 and May 9, 1988. On May 8, 1988, neither Klemick nor the company representative, Safety Inspector Bob Crain, were able to locate any dates, times or initials within the entry. Again on May 9, 1988, neither Klemick nor Crain (nor on this occasion the miner's representative) were able to locate any evidence of dates, times or initials in the cited entry. According to Klemick there was no evidence of even old dates, times or initials evidencing earlier examinations of the entry.

Dennis Stoltz the section foreman responsible for performing the preshift examination in the cited entry within three hours of the commencement of the 8:00 a.m. to 4:00 p.m. shift on May 9, 1988, testified that he in fact did preshift the cited area between about 6:15 a.m. to 7:00 a.m. He explained at hearing why he was unable to place the date, times and his initials in the No. 2 entry as required by the cited regulation. His testimony was as follows:

All right. My normal routine because I had done this other, was to travel to the end. Well, I engaged in this pump by myself which weighs hundreds and hundreds of pounds and I got into a mess and got tied up. On the way back, I was negligent and I was in a hurry and did not stop and date my usual areas of datings. (Tr. 63)

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Stoltz was unable to satisfactorily explain why the inspection party had been unable to locate any older dates, times or initials anywhere in the cited entry.

I find Stoltz's testimony to be less than credible. He maintains that he conducted all of the examinations required by section 303(a) in the cited entry but was in too much of a hurry to place, the date, time and his initials in the entry. Section 303(a) requires, among other things, tests for accumulations of methane, oxygen deficiency, examination of seals and doors to determine whether they are functioning properly, examinations and testing of the roof and ribs examination of active roadways, etc. In particular I note that the regulation requires not only the examination but also the testing of roof conditions. Stoltz admitted that he was "negligent" and "in a hurry" and made only a visual examination of the roof as he rode through the entry. Thus even if he did perform a cursory observation of conditions while passing through the entry it is clear that he did not properly perform all of the required tests. Indeed I do not find credible that Stoltz had sufficient time to perform a proper preshift examination in the entry yet did not have sufficient time to place the time, date and his initials in that entry. Under the circumstances I cannot find that the a preshift examination was performed on May 9, 1988, in the cited entry.

The testimony of Inspector Klemick regarding gravity and negligence is however largely unhelpful. In this regard the record shows the following colloquy:

Q [By Government Counsel] Now, looking at what has been admitted as Government's Exhibit Number 1 under Section 10, Gravity. It is checked off as "Reasonably likely to result in lost work days of restricted duty." Could you explain the lost work days or the restricted duty injury that you were referring to in this citation?

A [Inspector Klemick] More likely from the fall of the roof and anything else. This, up near the section there was some roof that had been supported; however, it was a fall coming through there or a car. It was taking water and throughout the area that the pre-shift examinations are intended to preclude any hazardous situation which from day to day, shift to shift can occur.

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Q Why did you rate it as "reasonably likely."

A Because of the fact that as far as evident records or evident that people were in that area pre-shift, there was not any and this was a high negligent situation because the operator is well aware of his requirement.

Q You say that it was a high negligent situation. Why was it a high negligent situation?

A Because of the lack of the operator going into these areas and making pre-shift examinations.

Q Do you or do you not believe that the operator engaged in aggravated conduct in this violation?

A I do, because, I have never encountered a situation like this at Rushton Mine that they did make any examinations of this particular situation or area; especially, pre-shift as important as they are. (Tr. 37-38)

There is nevertheless sufficient evidence elsewhere in the record to conclude that the violation was the result of Rushton's "unwarrantable failure". The evidence is undisputed that company representative Bob Crain, accompanying Inspector Klemick, was unable to locate any dates, times, or initials within the cited entry on May 8, 1988, thereby placing management on notice that pre-shift examinations were probably not being conducted in that entry. On the following day when the citation was issued, again no dates, times or initials were found in the cited entry. It may reasonably be inferred from this evidence that even after notice the operator continued in its failure to conduct required pre-shift examinations in the cited entry. This is evidence of gross negligence and aggravated conduct sufficient to constitute "unwarrantable failure". Emery Mining Co., 9 FMSHRC 1997 (1987), appeal pending (D.C. Cir. No. 88-1019).

The violation was also serious and "significant and substantial". See Mathies Coal Co., 6 FMSHRC 1 (1984). I agree with the Secretary's analysis of this issue in her brief:

