

CCASE:  
BETH ENERGY MINES v. SOL (MSHA)  
DDATE:  
19910910  
TTEXT:

~1422

Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges  
2 Skyline, 10th Floor  
5203 Leesburg Pike  
Falls Church, Virginia 22041

BETH ENERGY MINES,  
INCORPORATED,  
  
CONTESTANT  
  
v.

CONTEST PROCEEDINGS  
  
Docket No. PENN 91-1334-R  
Citation No. 3486330; 7/9/91

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

Docket No. PENN 91-1335-R  
Citation No. 3486331; 7/9/91  
  
Cambria Slope Mine No. 33  
Mine ID 36-00840

DECISION

Appearances: R. Henry Moore, Esq., Buchanan Ingersoll,  
Pittsburgh, Pennsylvania, for the Contestant;  
John M. Strawn, Esq., Office of the Solicitor,  
U.S. Department of Labor, Philadelphia,  
Pennsylvania, for the Respondent.

Before: Judge Melick

These expedited contest proceedings were filed by Beth Energy Mines, Incorporated (Beth Energy), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," to challenge a citation and withdrawal order alleging violations of mandatory standards. The general issue before me is whether Beth Energy violated those standards, and, if so, whether the violations were "significant and substantial" and the result of "unwarrantable failure".

Citation No. 3486330 issued pursuant to section 104(d)(1) of the Act alleges a violation of the mandatory standard at 30 C.F.R. 75.202(a) and charges as follows: (Footnote 1)

~1423

The ribs on the tight side of the 3 left conveyor belt was [sic] not supported or otherwise controlled to protect persons who have to work along this conveyor shoveling coal spillage and changing belt rollers. This area is required to be examined by pre-shift and on-shift examiners and they should have seen these loose unsupported ribs. The following areas of loose ribs needs supported [sic] or taken down: 10' inby the #1 Rectifier sign along the 3 left track belt entry, a 15' long 3 feet high 12" thick. Between the 1st & 2nd x-cut outby this sign a 12' long, 3' high rib rock exist [sic]. Between the 3rd & 4th x-cut a gapped open 3' high 20' long rib rock exists. Between the 4th & 5th x-cut outby this sign, a gapped open 3 1/2 foot by 25' long rib rock exists. Between the 4th & 5th x-cut outby this sign a 2 1/2' high 10' long loose rib rock also exists. A 2 1/2' x 2 1/2' loose rib rock exists on the inby corner of the 7th x-cut from this sign, it needs [sic] supported or taken down. At the inby end of the 10th x-cut from this sign outby a 3' high 10' long rib rock exist [sic] that is broken and is only supported partially by coal that is slouthing [sic] away. All of these ribs mentioned were broken loose at the top and sides and were only partially supported with coal under these areas. These conditions existed in an area from 10 feet inby the Rectifier sign along the tight side rib outby to survey station # 6815.

The cited standard, 30 C.F.R. 75.202(a), provides that: "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs, and coal or rock bursts."

~1424

Withdrawal Order No. 3486331 issued pursuant to section 104(d)(1) of the Act (see footnote 1) alleges a violation of the mandatory standard at 30 C.F.R. 75.303(a) and charges as follows:

An adequate pre-shift examination was not conducted along the 3 left belt/track entry for the dayshift on 7-9-91. Loose hazardous unsupported ribs exist along the tight side of this conveyor belt entry from 10' in by a sign marked #1 rectifier outby survey station # 6815 along this belt/track entry. This examination was conducted for the dayshift by Thomas Korber on 7/9/91 and this hazardous condition was not mentioned in his report on the pre-shift examiners report.

The cited standard, 30 C.F.R. 75.303(a), provides 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. 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 persons, 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. (Footnote 2)

In essence, Beth Energy is charged in Citation No. 3486330 with failing to support or take down certain areas of loose rib and is charged in Order No. 3486331 with failing to have discovered the cited ribs during the preshift examination and to have reported in the preshift examination book the rib conditions noted in Citation No. 3486330.

Beth Energy notes in its posthearing brief that the cited standards must be reviewed in light of the reasonably prudent person test i.e. whether a reasonably prudent person familiar with the mining industry and the protective purpose of the standards, would have recognized the hazardous conditions that the standards seek to prevent. Canon Coal Co., 9 FMSHRC 667 (1987), Ozark-Mahoning Co., 8 FMSHRC 190 (1986). Under this standard of review the reasonably prudent person is also charged with knowledge of, and familiarity with, the factual circumstances surrounding the allegedly hazardous conditions. See Secretary v. Alabama By-Products Corp., 4 FMSHRC 2128 (1983). More particularly, this case involves the 3 Left area of the "C"

~1426

coal seam located between the 4 West Mains area and the 6 West Mains area of the Cambria Slope No. 33 Mine. One entry of the three designated as 3 Left contains both track and a conveyor belt. The entry is approximately 23 feet wide and slopes slightly down across the entry with the track being located on the higher side. There is approximately 7-1/2 feet between the higher rib and the track. The rails of the track are 3 feet apart and approximately 4 feet from a row of timbers, which separate the track and belt and which are spaced 5 feet apart throughout the entry. A row of timbers has also been installed next to the rib on the high side along the length of the entry. The belt conveyor is hung from the roof on chains and its assembly is 4-1/2 feet wide. There is approximately 3 feet between the tight side rib and the belt. The entry itself is approximately 6-1/2 feet high, the lower 40-45 inches of which is coal. The lower or return portion of the belt is approximately 12 inches off the mine floor.

Federal Mine Safety and Health Administration (MSHA) Coal Mine Inspector Leroy Niehenke testified that during the course of a July 9, 1991, regular inspection of the No. 33 Mine, accompanied by his Supervisor Paul Bizich, he observed as they proceeded along the tight side of the 3 Left conveyor belt entry, a rib roll some 15 to 20 feet long and 2-1/2 feet thick blocking the walkway. Niehenke testified that from that location he could observe areas of loose unsupported rib. Shifting to the track side of the entry, he observed additional areas of loose unsupported rib extending from an area 10 feet in by the rectifier sign along the tight side rib out by approximately 1000 feet to spad 6815. According to Niehenke there were seven to eight unsupported areas 10 to 20 feet long in this area. Niehenke testified that the conditions were "very obvious" in that you could see a definite separation between the roof and rib. It is not disputed that the area had been rock dusted some 3 to 4 weeks before and was white or gray in color, while the separations showed as a distinct black line against that white-gray color. The area of rib that had fallen had also been rock dusted thus indicating that it had been present for at least 3 weeks. None of these conditions had been reported in the preshift exam book.

Inspector Niehenke also testified that General Mine Foreman Fedorko told him regarding the ribs that "they knew they had a problem in this area on the tight side" and because of that they had been concerned about people working on the tight side. They were also "thinking about elevating this belt away from the bottom" to enable shoveling of rib material from under the belt. Fedorko could not recall this conversation, but did not clearly deny it. Particularly under these circumstances, I give the testimony of Inspector Niehenke on this significant point considerable weight.

~1427

Niehenke concluded that the condition was reasonably likely to cause a fatality to persons who might be shoveling, replacing rollers, splicing the belt, or performing similar work on the tight side of the belt. There is no dispute that such work, as well as repairs to the water valves, is in fact periodically performed from the tight side and that if a miner were struck with a rib roll such as found in this case he would be killed.

On exiting the mine, Niehenke found no report in the preshift examination book concerning either the cited hazardous rib conditions or the rib roll. It is not disputed that no such report had been made and that since the shift had begun at 6:30 that morning the preshift examination should have been completed the preceding 3 hours. Niehenke opined that particularly under these circumstances involving the cited rib hazards, such an inadequate preshift examination could result in a fatality. He observed that there had been increasing problems at the cited mine and indeed with the specific coal seam at issue, with roof falls and roof pressure.

Supervisory Coal Mine Inspector Paul Bizich accompanied Niehenke on his July 9 inspection and also observed the loose rib material. It was about 15 feet long and covered the water line. He noted that the cited separated ribs were so readily visible that "any other certified person traveling in that area, especially the preshift examiner, should have seen it." There was "no doubt" in his mind that the condition would likely have resulted in a fatality.

Within the framework of evidence presented at hearing, I am satisfied that the Secretary has sustained her burden of proving the violations charged and that those violations were "significant and substantial" and the result of Beth Energy's "unwarrantable failure." A violation is properly designated "significant and substantial" if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981).

In Mathies Coal Co., 6 FMSHRC 1 (1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a

mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety-contributed to 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.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

We have explained further that the third element of Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation. Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (1988); Youghioghney & Ohio Coal Company, 9 FMSHRC 1007 (1987).

The third element of the formula requires that the Secretary establish "a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury" and that the likelihood of injury must be evaluated in terms of continued normal mining operations. U.S. Steel Mining Co., 6 FMSHRC 1573 (1984); Monterey Coal Co., 7 FMSHRC 996 (1985). The time frame for determining if a reasonable likelihood exists includes the time that a violative condition existed or would have existed if normal mining operations continued. Rushton Mining Co., 11 FMSHRC 1432 (1989).

In addition, in Emery Mining Corporation, 9 FMSHRC 1997 (1987) and Youghioghney & Ohio Coal Company, 9 FMSHRC 2007 (1987), the Commission held that "unwarrantable failure" means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act. The Commission stated that while negligence is conduct that is "inadvertent," "thoughtless," or "inattentive," conduct constituting an unwarrantable failure is conduct that is "not justifiable" or "inexcusable." Emery, supra, 9 FMSHRC at 2001.



The credible testimony of experienced Inspector Niehenke which is fully corroborated in essential respects by Supervisory Inspector Bizich is sufficient in itself to prove these elements. In applying the reasonably prudent person test to the citation and order at bar it is also important to note that the circumstances include the knowledge that shortly before these violations i.e., between April 23, 1991 and June 5, 1991, MSHA found and cited five other violations of the roof and rib control standard (30 C.F.R. 75.202(a)) at this mine and that management admitted that they were aware of rib problems and concerned about workmen on the tight side. Mine officials and the preshift examiner in particular should therefore have been on heightened notice of the potential for dangerous rib and roof conditions and of the likelihood of injuries to miners at the time of the July 9, preshift examination. This evidence also supports a finding of aggravated negligence and "unwarrantable failure." The evidence that a large rib roll had obstructed the tight side walkway in the cited area for at least 3 weeks -- and had even been covered by rock dusting -- and that this condition also had never been reported in the preshift examination books further warrants the aggravated negligence findings in regard to the performance of preshift examinations and the failure to properly perform the preshift examination at issue.

In reaching my conclusions herein, I have also considered the testimony of Thomas Korber the Beth Energy Mine Examiner responsible for the preshift examination before the day shift on July 9, 1991. Korber testified that when he returned to the cited area on the following day, he observed cracks in the ribs with not more than 1 inch of separation, and that there was indeed some rib sloughage. He learned during abatement that at least one of the cited rib areas had been brought down with a bar. Korber also acknowledged that such rib separations should be tested to determine whether the ribs are solid or separated. He maintains that he did not see any of the gaps between the rib and roof during his preshift examination on July 9, but admitted that the rib on the tight side was not "my priority."

I have also considered the testimony of General Mine Foreman Edward Fedorko that he also observed during the abatement process coal sloughage along the cited rib area and 1/2 inch separation of the ribs. He acknowledged that such a separation warranted further examination of the rib and if it needed work it should be reported in the preshift examination books.

Steven Horvath, a graduate mining engineer and underground mine superintendent, took photographs after the abatement from various positions in the cited area and noted that ribs throughout had been scaled and taken down. This evidence indeed

~1430

tends to corroborate the extent of the cited hazard and its "significant and substantial" nature. Horvath also agreed that when certain cracks appear in the rib along the roof line they should be further tested by sounding and close observation.

It should be noted, however, that the Beth Energy witnesses are entitled to but little weight in expressing "reasonably prudent person" opinions because, aside from their obvious self-interest, there is no evidence that they considered the awareness of management of pre-existing problems with the tight side ribs and of its express concern for miners working in that cited area.

Considering that Beth Energy had five prior violations of the standard at issue herein over the preceding 4 months, that Beth Energy management admittedly knew that they had a rib problem in the same area cited herein, the undisputed testimony of Inspector Niehenke and Supervisory Inspector Bizich that the black rib separations were particularly visible against the gray-white background of the rock dust, the existence of another violative condition involving a rib roll obstructing the tight side walkway which had existed unreported in the preshift books for 3 to 4 weeks, the admission of belt-foreman Boyer that there was no need to closely inspect the tight side in spite of the potential fatal hazard to persons working there, the testimony of shift-mine foreman and preshift examiner Thomas Korber that the ribs on the tight side were not given a high priority during the examination process, and in light of the serious hazard presented by the separated ribs, I conclude that the failure to have observed, corrected, and reported these conditions in the preshift examination report constituted aggravated and gross negligence amounting to "unwarrantable failure." Emery Mining Corporation, *supra*; Youghiogheny & Ohio Coal Company, *supra*.

In addition, based upon the undisputed evidence that miners would be required to periodically work on the tight side of the belt, the clear evidence of rib separations of up to 1 inch, the evidence (particularly noted from the photographs in evidence taken after abatement) that many of the ribs in the cited area had been taken down or fallen and the evidence that a miner hit by a rib roll while working in the tight side would likely be killed, the failure to have supported or taken down the cited ribs and the failure to have properly examined and reported those conditions in the preshift examination process, constituted a "significant and substantial" violation. National Gypsum, *supra*, Mathies Coal Co., *supra*, U.S. Steel Mining Co., Inc., *supra*. Under all the circumstances the citation and order must be affirmed.

ORDER

Citation No. 3486330 and Order No. 3486331 are AFFIRMED and the contests of those are DISMISSED.

Gary Melick  
Administrative Law Judge

Footnotes start here:-

1. Section 104(d)(1) of the Act reads 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. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering such area until an authorized representative of the Secretary determines that such violation has been abated.

2. Beth Energy argues that this standard does not require testing of roof or ribs in travelways. While the language of the standard may not be the most artful in all respects it is quite clear in its requirements for the preshift examination for hazards in "active roadways [and] travelways." In light of this clear language there is no need to resort to other secondary rules of statutory /regulatory construction.