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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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December 14, 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. CENT 92-124-M A.C. No. 05-04055-05507
v.	:	Hopemore Shaft
LEADVILLE MINING & MILLING CORPORATION, Respondent	:	

DECISION

Appearances: Tambra Leonard, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
George E. Reeves, Esq., Denver, Colorado, for Respondent.

Before: Judge Lasher

In this matter, MSHA, proceeding pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeks assessment of a civil penalty for an allege violation of 30 C.F.R. 57.11050(a) pertaining to escapeways in underground mines. This standard provides:

> Every mine shall have two or more separate, properly maintained escapeways to the surface from the lowest levels which are so positioned that damage to one shall not lessen the effectiveness of the others. A method of refuge shall be provided while a second opening to the surface is being developed. A second escapeway is recommended, but not required, during the exploration or development of an ore body.

Contentions of the Parties

Respondent (herein "LMMC") contends that it was engaged in exploration or development of the ore body and thus was not "required" to have a second escapeway, although such is "recommended" by the regulation.

Petitioner (herein "MSHA") contends that LMMC was not engaged in exploration or development but rather was engaged in actual mining operations. MSHA also contends that the alleged violation was "Significant and Substantial."

Findings

The Section 104(a) Citation in question (No. 3633365) was issued by MSHA Inspector Ronald L. Beason on July 3, 1990, during a regular inspection, and described the alleged violation as follows:

> A separate escapeway to the surface was not provided at the mine. A method of refuge was provided; but, development towards a second escapeway was not being conducted at the time of this inspection. The employees were working on the 740 West Vent drift. Blasted a slab round in the 640 Zinc Stope. 1990.
>
> In 1989 Mining was conducted on the 500 and 700 level. In 1988 Drifting 700 level.
>
> An active development program must be established to comply with the standards and provide a second escape to the surface.
>
> (Ex. R-4).

Although the allegedly violative condition was never actually abated, MSHA does not contend that LMMC did not proceed in good faith to achieve abatement. The mine was closed in November 1990.

The parties have stipulated (Court Ex. 1; T. 36-37) that the mine did not, on July 3, 1990, have two or more separate escapeways to the surface. The record is clear that the mine did have one escapeway--the Hopemore Shaft itself, and that a method of refuge was provided on the inspection day (T. 95). The second escapeway, contemplated by Respondent, was called the Hunter Shaft. (T. 94-95).

During his inspection of the Hopemore Shaft [an underground gold and base metals mine (T. 60, 68-69)] on July 3, Inspector Beason was accompanied underground by lead miner Robert Calder and by Oliver Jeter on the surface. The mine (Hopemore Shaft) had been in existence since 1985 (T. 44; Ex. 6-7). Two miners were working underground on the day of the inspection. (T. 59, 60, 72).

After Inspector Beason entered the mine, he rode the "skip" to the 700 level, and then went to the 740 "raise" and on to what is called the "640 stope" (T. 26-28, 35-36). He said a "stope" is not development work. (T. 42, 43, 49; Ex. G-2). He testified he saw men working, but not on the second escapeway:

> I seen [sic] that they were working in the 500 (Footnote 1) and 700 levels and he 600 level. I observed that they were working in the 640 zinc stope while I was there and the 740 west drift. I did not observe any work towards a second escape. I didn't see in the previous reports and the previous citations issued for radon that they were in the 500 level working toward a second escape. (T. 36).

I conclude from the entire record on this point that while miners previously may have done some work in the 500 level, they had not been engaged in developing a second escapeway for at least a year (T. 37-39, 65).

The mine layout is shown in Exhibit R-1. The Hopemore Shaft (a vertical shaft) is shown thereon as a rectangle on the edge of square 427. The Hopemore Shaft is intersected by four different horizontal tunnels called the 5 level, 6 level, 7 level, and 8 level, and such are indicated respectively on R-1 by the colors yellow, green, brown, and red.

The Inspector's testimony relating to whether LMMC was engaged in production (mining) was first stated in the form that it was his "understanding" (T. 71) that such was the case:

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1 The Inspector said that, to "gain access" to a second escape, the work would have to be performed from the 500 level, and that "they were not working on the 500 level" (T. 36), contradicting what he said in the testimony quoted above. He said, in further explanation, that work would have to be done on the 500 level to be "toward the Hunter shaft" (T.37, 42) which he was told was developed down 24 feet from the surface (T. 37) but was unable to confirm since it was timbered over (T. 38). This contemplated second escapeway, the Hunter Shaft, would have been 500 feet top to bottom, i.e., from the surface to the 500 level (T. 63-64).

A. The 740 raise, they had completed that. And from my discussion with them, I determined that they had made a slab round and was in the process of using a slusher to move that down the stope, or down the raise into the skip.

Q. So where was this slab round?

A. In the 640 stope.

Q. And could you describe what a slab round is and what its significance is, if it has any?

A. Normally when you drive a drift, you drive it through an ore-bearing area or waste rock, that type of thing. If there's some ore or something where you want to widen it or some-thing like that, you drill into the side of your drift and blast that off. And that's a slab.

Q. Did this seem like an occasion where they wanted to widen it? Did it seem like they were blasting for the ore?

A. It was my understanding that they were blasting for the ore, the skip--the car at the bottom of the 740 raise, we discussed that and how he moved the car of ore out to the shaft. And he told me he had to do it by hand. And we discussed that some.

So it was my understanding that they were blasting or putting it in the raise, and he was pushing this car to the shaft and hoist-ing it to the surface. (T. 27-28).

The Inspector said that "When they leave the levels and start pulling ore out of the shaft in the 640 stope, they were "mining." (T.43). He said he was told that ore had been hauled up with the skip out of the shaft and taken to the mill where it was stored in stockpiles (T. 45, 79, 99, 102). He did not see the stockpile. There were three such stockpiles (T. 162). Moreover, Donald Wilson, the President of LMMC, confirmed that there were stockpiles of gold ore which would have been salable after milling and that there were approximately 15 to 20 tons of such ore in the stockpiles. (T. 137-138, 193, 222-223, 224).

Inspector Beason said that the way LMMC was interpreting the regulation, "you'd have the mine mined out or have a cave-in before you ever got a second escapeway in." (T. 101-102) (Footnote 2)

Inspector Beason said development and exploration are the same thing:

> What you do is you drive a drift in a spe-cific part of the mine to determine the ore value. You long-hole it to determine how much you may have in that mine. And that's development and exploration. (T. 46).

In determining whether exploration or development was being conducted, Inspector Beason relied (T. 47) on MSHA's Program Policy Manual, Subpart J, pertaining to "Escapeways" (Ex. G-3) which provides, inter alia:

> This standard requires two or more separate escapeways to the surface for every under-ground mine. However, a second escapeway is recommended, but not required, during the exploration or development of an ore body. In this connection, "exploration or develop-ment of an ore body" should be used in its narrowest sense, i.e., while an ore body is being initially developed, or development or exploration work is being conducted as an extension of a currently producing mine. Where mining occurs along a mineralized zone and production and development are indisting-uishable as separate activities, the standard shall be applied as it would to a producing mine.

Inspector Beason inspected the mine's ventilation plan (Ex. G-6) and determined that LMMC was not ventilating the 500 level and therefore could not have been working on the 500 level. (T. 54). He also reviewed the locations where the last inspector had taken radon samples and noticed that no samples had been taken on the 500 level where the second escapeway would come down to (T. 36) and concluded that work was not being performed on that level

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2 LMMC contends that the regulation does not require a second escape to be developed at all during the exploration or development of an ore body (Brief, pg. 17). But see T. 73, 74, 79, 84, 99, 102, 107-109, 137-140, 156, 162, 168-169, 193, 222-224, indicating that mining (extracting ore) was being conducted.

because federal mining inspectors are required to take radon sam- ples in all areas men are working. (T. 36). Inspector Beason reasonably concluded from so-called "contract" information (T. 37; Ex. G-2) and observations at the mine on inspection day that work had not been performed on the second escapeway for at least one year. (T. 37-38, 39).

On cross-examination, Inspector Beason pointed out the sig- nificance of determining where the miners had been working.
(T. 73-74). He stated:

> The work in the 500 drift toward the Hunter shaft would be to establish a second escape. Any work off of the main levels, such as the stopes, the raises, where you're into min- eralized areas or working in those areas is mining. (T. 74).

There is no question but that ore was extracted from the mine and placed in stockpiles near the mill (T. 27-28, 45, 71-72, 79, 99, 107-108, 137-140, 141, 193, 222-224), that the concen- trate therefrom could be sold after milling (T. 141, 192-193, 222, 223), and that the President of LMMC intended to sell it ultimately (T. 141, 192-194, 220-224).

The ore and other material removed from the mine was dumped on the ground and separated after a distinction was made whether it was "waste" rock or was mineralized (T. 107, 155-156, 161, 164, 214-215). None of the material put in the stockpiles has ever been milled by LMMC (T. 164) other than for test runs of approximately 10 tons (T. 168-169).

Inspector Beason identified the hazard involved as follows:

> ... if there's one escape, you only have one way out if you have a cave-in in any of your drifts, that prevents you from going out, or you lose your shaft, or if your skip gets hung up in there and drops, that type of thing, in the shaft. Or fire can occur in the shaft. Those types of things can create real hazards to the miners underground.
> (T. 59).

The Inspector felt that this exposure to miners had endured from 1988 to 1990 (T. 61) and that if one of the contemplated events occurred and the main shaft was blocked, and fire oc- curred, then fatal injuries could occur (T. 63). He acknowl-

edged that the existence of a refuge chamber could lessen the likelihood of a fatality (T. 63, 95).

Inspector Beason concluded that LMMC was moderately negli- gent on the basis of this rationale:

> Well, at previous times they had done some work in the 500 level. You see, on the con- tract report, I show that they had been in the 500 level, 527 level at one month--I think it was two months that they were there. So they were throughout that period of time in the 500 level. I'm assuming that the only reason they were doing that is to make their second escape.
>
> Then they had done the head frame and they claimed to be down 24 feet there, and they put the head frame in at that point. So, in that respect, they have mitigating circum-stances that they have done some work, so I determined it to be moderately negligent. (T. 65).

LMMC established, contrary to Inspector Beason's assertion that blasting slab rounds in the stope constitutes "pulling ore out," that:

1. The mere fact that such occurs in a stope does not necessarily mean that production (mining) is ongoing (T. 42, 78-79).

2. The mere fact that LMMC was in the stope and blasting a slab round does not establish that LMMC was pulling out ore, i.e., extracting mineral (T. 85).

3. That the slab round which Inspector Beason thought was blasted on July 2, 1990 (the day before the inspection) in the 640 stope, was actually blasted on the 5 level drift (T. 27 71, 85, 154; Exs. R-2 and R-6; See LMMC's Brief, pp. 5-7, 15).

4. That the purpose of blasting the slab round in question, as stated by Mr. Calder, the miner who performed the task, was to turn a drift, which he explained as follows:

> I had to go at an angle with the drift so it enabled me to have more time to turn around to put a car in mud, car and track." (T. 154).

5. That the mere existence of the muck chute does not warrant the inference that such was being used by LMMC for removal of ore (T. 57, 58, 72, 79).

DISCUSSION

A. Occurrence

This matter calls for interpretation of the standard. I construe the cited regulation, and conclude therefrom, as follows:

The first of the three sentences requires, without qualifi-cation, that every "mine" have two escapeways. Reference to the Act itself reveals that a "coal or other mine" is "... an area of land from which minerals are extracted ... ." Thus, it would seem that if minerals are being extracted, for whatever reason, from an area of land, as here (T. 222-224), then the operation is a mine and the first sentence of the regulation applies so as to require two escapeways.

The second sentence of the regulation, requiring a "method of refuge while a second opening to the surface is being devel-
oped" was being complied with on the day the citation was issued. Respondent had put in such method of refuge (T. 95, 207).

The third sentence states that a second escapeway is recom- mended but not required during the exploration or development of the ore body. I construe this third sentence to be an exception to the requirement of the first sentence and concur with MSHA's position (stated in its Program Policy Manual) that the exception should be construed narrowly. (Footnote 3) So read, the regulation requires that when mining, extracting mineral, is ongoing, two escapeways

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3 The Mine Act and the standards promulgated thereunder are to be in-terpreted to ensure, insofar as possible, safe and healthful working conditions for miners. Westmoreland Coal Co. v. FMSHRC, 606 F.2d 417, 419-420; (4th Cir. 1979). The conclusion reached here would prevent a mine operator from extracting ore and conducting mining under the guise of development by rejecting an "either-or" analytical approach and recognizing that development (or exploration) work and mining can be carried on simultaneously.

are required. (Footnote 4) Carrying this construction to finality, I conclude: (1) If such mining is incidental, in combination with, or part of exploration or development, it nevertheless is mining; (2) As mining, it is covered by the general rule of the regula- tion requiring two escapeways; (3) LMMC was required by the regulation to first install the second escapeway before engaging in other exploration or development work in which minerals were extracted; (4) If mineral extraction occurs as a direct result of the work involved in developing the second escapeway, no vio- lation occurs; (5) If mineral extraction occurs as a result of work performed in other development not related to installation of the second escapeway, a violation does occur; and (6) If exploration or development work not related to installation of the second escapeway does not entail extraction of minerals, no violation is committed.

In this matter, LMMC was engaged in development work which did involve extraction of mineral and was not part of the work necessary to install the second escapeway. While such was development work, it also was mining (production). As mining, it was covered by the regulation and two escapeways were required to have been in place before such work was commenced.

Accordingly, it is concluded that a violation did occur.

B. Significant and Substantial

LMMC's position that this violation was not "Significant and Substantial" is found meritorious and is here adopted.

A violation is properly designated "Significant and Substantial" if, based on the particular facts surrounding that 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, 825 (April 1981). In Mathies Coal Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

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4 At page 9 of its Brief, LMMC argues "... the mere fact that the material excavated in a particular operation is ore or mineralized rock does not prevent that operation from being exploration or development." When such ore or mineralized rock is extracted and stockpiled for future sale, is this not "mining" also? Is the regulation to be construed narrowly in a manner adverse to safety, or broadly to cover its obvious intent to require two escapeways when mining is going on?

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secre- tary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of anger 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 reason- ably serious nature.

Accord, Austin Power v. Secretary of Labor, 861 F.2d 99, 103 (5th Cir. 1988).

The third element of the 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, and that the likelihood of injury must be evaluated in terms of continued normal mining operations. U.S. Steel Mining Co., 6 FMSHRC 1573, 1574 (July 1984). See also Monterey Coal Co., 7 FMSHRC 996, 1001-1002 (July 1985). The operative time frame for determining if a reasonable likelihood of injury exists includes both the time that a violative condition existed prior to the citation and the time that it would have existed if normal mining operations had continued. Halfway, Inc., 8 FMSHRC 8, 12 (January 1986); U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985). The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved. Texas-gulf, Inc., 10 FMSHRC 498, 500-501 (April 1988); Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007, 2011-2012 (December 1987). 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 Co., 6 FMSHRC 1834, 1836 (August 1984).

During Inspector Beason's direct testimony regarding whether the alleged violation was "Significant and Substantial," he tes-tified in broad general terms regarding cave-ins, fire, and col-lapse of the shaft (T. 59) and then concluded that these events were "reasonable and likely," based on his experience in other mines (T. 62). His testimony on both direct and cross-examina-tion is devoid of any mention of the particular facts surround- ing the violation (Cement Division, National Gypsum Company, 3 FMSHRC 822 (April 1981) which would support his conclusion. Even from the record as a whole (including MSHA's evidence) it must be concluded that Petitioner established only a possibility (T. 62-63, 91) that the hazard contributed to by the violation would come to fruition so as to result in an injury or fatality. Since the "reasonable likelihood" requirement of Mathies, supra, has

not been satisfied, it is determined that the "Significant and Substantial" designation of this violation should be stricken.

C. Penalty Assessment (Footnote 5)

LMMC is the owner and operator of the Hopemore Shaft, a small underground gold and base metals mine. It had a history of seven violations in the pertinent two-year period preceding the issuance of the citation. LMMC's ability to continue in business will not be placed in jeopardy by the payment of a reasonable penalty in this matter. MSHA does not contend that LMMC, after notification of the violation did not proceed in good faith to promptly abate the same (T. 67). Based on the evidence previous- ly discussed, LMMC is found to be but moderately negligent in the commission of this violation.

In view of the failure of the evidence with regard to the alleged "Significant and Substantial" nature of this violation, the paucity of the evidence bearing on whether there was a rea- sonable likelihood that the hazard envisioned would occur as a result of the violation's contribution, and the Inspector's opi-
nion that the existence of the refuge chamber would lessen the likelihood of the occurrence of a fatality should a contemplated hazard come to fruition, the violation is found to be of only a moderate degree of gravity. Weighing these criteria, a penalty of $100 is here assessed.

ORDER

1. Citation No. 3633365 is MODIFIED to delete the "Significant and Substantial" designation thereon and is otherwise AFFIRMED.

2. Respondent LMMC SHALL PAY to the Secretary of Labor within 40 days from the date hereof the sum of $100 as and for a civil penalty.

Michael A. Lasher, Jr.
Administrative Law Judge

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5 Petitioner seeks a penalty of $85 in this matter.

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