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SOL (MSHA) V. BUCK CREEK COAL
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 93-241
	:	A.C. No. 12-02033-03593
v.	:	
	:	Buck Creek Mine
BUCK CREEK COAL COMPANY, INC., Respondent	:	

DECISION

Appearances: Lisa A. Gray, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois for Petitioner;

Patrick A. Shoulders, Esq., Ziemer, Stayman, Weitzel & Shoulders, Evansville, Indiana for Respondent.

Before: Judge Hodgdon

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor against Buck Creek Coal Company, Inc. pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815 and 820. The petition alleges a violation of Section 75.360(a), 30 C.F.R. 75.360(a), of the Secretary's mandatory safety standards. Fo the reasons set forth below, I find that Buck Creek committed the violation alleged, that the violation was not of such nature as could significantly and substantially contribute to the cause and effect of a coal mine safety hazard, but that the violation was caused by Buck Creek's unwarrantable failure to comply with the mandatory safety standard.

The case was heard on October 26, 1993, in Sullivan, Indiana. Inspectors John D. Stritzel and Michael A. Bird testified on behalf of the Petitioner. Mr. H. Michael McDowell, Vice President of Human Resources, testified for the Respondent. The parties have also filed post hearing briefs which I have considered in my disposition of this case.

FINDINGS OF FACT

The essential facts are not contested. Mine Safety and Health Administration Inspectors Stritzel and Bird arrived at

Respondent's Buck Creek mine in Sullivan County, Indiana, at 6:45 A.M. on Monday, April 26, 1993, for the purpose of making a ventilation technical investigation. The mine had been idle since the completion of the day shift at 3:30 P.M. on Saturday, April 24, 1993.

On arriving at the mine office, the inspectors discovered that the next shift did not begin until 9:00 A.M. While waiting, they checked Buck Creek's preshift book and noted that the preshift examination for the next shift had not been recorded.

Further investigation indicated to the inspectors that there were miners in the mine other than the preshift examiners. The preshift examination of the north side of the mine had begun at 6:22 A.M., was completed at 7:22 A.M. and was called to the surface at 7:30 A.M. The examination of the south side began at 7:00 A.M., was completed at 7:30 A.M. and was called out at 7:35 A.M.

Inspector Stritzel spoke on the phone with Charles Austin, the mine manager and one of the preshift examiners, when Austin called out at 7:35 A.M., and asked him who was in the mine. When Austin acknowledged that there were miners in the mine in addition to the preshift examiners, Stritzel told him to come out of the mine and to "bring everyone in the mine with you out." The inspector also told Austin that he was "issuing a 104-D code order."

Inspector Stritzel interviewed everyone who had been in the mine: Austin and Charles Chin, who were performing preshift examinations of the north and south sides of the mine, and Carlos Maggard, Dave Sales and Terry O'Bannon, who were performing maintenance on a disabled mantrip at the foot of the slope of the mine. The maintenance crew had gone into the mine at 6:45 A.M.

Inspector Stritzel issued a withdrawal order under Section 104(d)(2) of the Act, 30 U.S.C. 814(d)(2),(Footnote 1) alleging a

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1 Section 104(d)(2) provides in pertinent part:

> If a withdrawal order with respect to any area in a coal . . . mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations.

violation of Section 75.360(a) of the Regulations in that "[t]hree miners entered the mine at 6:45 A.M. without a valid pre-shift examination of the mine being completed" (Joint Ex. 1, Tr. 31-34). The order was terminated at 9:00 A.M. when "all miners were instructed by Gary Timmins, Safety Dir. to not enter [the] mine until the pre-shift exam for the on coming shift is completed and the results called out and entered into book" (Joint Ex. 1, TR. 39).

Respondent argues in his Proposed Findings (RPF) and Memorandum in Support (Memo) that the maintenance crew was not part of the "coal mining" shift beginning at 9:00 A.M., entered the mine during "idle hours" and was working in an "idle" area of the mine so that no preshift examination was required (RPF 7-9, Memo 2). This argument, with its references to "every working section" and "active workings" of the mine, apparently relies on a former version of the Regulations. At any rate, the argument does not hold up under either the old or the new Regulation.

FURTHER FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 75.360(a) provides that:

> Within 3 hours preceding the beginning of any shift and before anyone on the oncoming shift, other than certified persons conducting examinations required by this subpart, enters any underground area of the mine, a certified person designated by the operator shall make a preshift examination.

Section 75.360 is similar, but not identical, to Section 303(d)(1) of the Act, 30 U.S.C. 863(d)(1). It replaced Section 75.303(a), 30 C.F.R. 75.303(a), in 1992, when subpart D was revised. Section 75.303(a) was identical with the Act.(Footnote 2)

"Shift" is not defined in Part 75 or anywhere else in the Regulations or the Act. However, it seems apparent that just because the men were entering to perform maintenance rather than

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2 The main differences between the new regulation and the old regulation and the Act are that Section 75.360 is separated into various subsections while Section 75.303(a) and the Act consisted of one continuous paragraph, some of the language in the new Regulation has been updated and changed and the new regulation is more specific and requires more areas of the mine to be inspected.

to mine coal does not mean that they were not part of the shift.(Footnote 3) Nor does the fact that they began work before the official start of the shift mean that they were not part of the shift. They were undoubtedly part of the group of miners coming to work that morning and would be working during the shift (Tr. 214). In fact, the evidence indicates that the repair of the mantrip was necessary before the rest of the shift could go into the mine (Tr. 167). Moreover, any doubt whether the crew was part of the shift must be resolved in favor of inclusion since the purpose of the Act and the Regulation is to insure as nearly as possible that the mine is safe to enter. Secretary of Labor & UMWA v. Jones & Laughlin Steel Corp. & Vesta Mining, 7 FMSHRC 1058, 1062 (July 1986).

Respondent both at the hearing and in his Findings and Memo argues that the maintenance crew were not in the "active workings" of the mine, apparently in the belief that such areas were the only areas into which entry was prohibited prior to completion of the preshift examination. A superficial reading of Section 75.303(a) could lead to that conclusion, however, under Section 75.360(a) there is no question of distinguishing between "active workings" and "idle" areas of the mine. It prohibits entry into any underground area of the mine.

Furthermore, even under the old regulation, Respondent's argument fails because when Section 75.303(a) was in effect, Section 75.2(g)(4), 30 C.F.R. 75.2(g)(4), defined "active workings" as "any place in a coal mine where miners normally work or travel" (emphasis added).(Footnote 4) It is undisputed that the three maintenance men were at the foot of the slope, a place where anyone entering or leaving the mine had to travel (Tr. 171-172, 207). Thus, they were in an area into which entry was prohibited prior to completion of the preshift examination even under the old rule.

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3 Section 70.2(l), 30 C.F.R. 70.2(l), defines "production shift" in terms of the work done on the shift and not the crew make-up of the shift. This would argue against Respondent's assertion that there is a distinction between coal producers and others as to whether they are part of a "shift," since it is undisputed that the oncoming shift in this case was going to be producing coal.

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4 Section 75.2 was revised, effective August 16, 1992. "Active workings" is defined exactly the same in the revised section. See also Section 318(g)(4) of the Act, 30 U.S.C. 878(g)(4), ("`active workings' means any place in a coal mine where miners are normally required to work or travel").

Having concluded that the maintenance crew was part of the oncoming shift, Respondent's argument that the crew entered the mine during "idle hours" and, therefore, that no preshift examination was required before entering need not be addressed. According to Respondent, this contention is based on Section 303(d)(2) of the Act, 30 U.S.C. 863(d)(2), (RPF 9-11, Memo 2).(Footnote 5) However, it is noted in passing that it is undisputed that an examination satisfying the requirements of Section 303(d)(2) had not been made within eight hours of the crew's entry (Tr. 209). Consequently, this argument must rest on the inconsistent premise that an uncompleted preshift examination, which does not permit entry into the mine until it is completed, can satisfy the requirements of Section 303(d)(2) and permit entry into the mine before it is completed.

Fact of Occurrence

Section 75.360(a) provides that "before anyone on the oncoming shift, . . ., enters any underground area of the mine" (emphasis added) a preshift examination must be made. Section 75.360(g) further requires that:

> A record of hazardous conditions and their locations found by the examiner during each examination and of the results and location of air and methane measurements shall be made in a book provided for that purpose on the surface before any persons other than certified persons conducting examinations required by this subpart enter any underground area of the mine. (Emphasis added).

Obviously then, a preshift examination has not been completed and miners cannot enter the mine until the results of the preshift examination have been entered in the preshift book on the surface. It is unchallenged that Maggard, Sales and O'Bannon entered the mine before the results of the preshift examination had been recorded. Therefore, I conclude that Respondent violated Section 75.360(a) as alleged. See Secretary of Labor v. Birchfield Mining Company, 11 FMSHRC 31, 35 (January 1989).

Significant and Substantial

The violation was cited as being "significant and substantial." A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the

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5 Section 303(d)(2) provides: "No person . . . shall enter any underground area, except during any shift, unless an examination of such area as prescribed in this subsection has been made within eight hours immediately preceding his entrance into such area."

cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon 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., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

> 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 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 (August 1985), the Commission stated further as follows:

> We have explained further that 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.' 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 a particular violation is significant and substantial must be based on the particular facts surrounding the violation. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 1007 (December 1987).

In his Brief in Support of Proposed Findings (Sec. Brief), the Secretary takes the position that a violation of Section 75.360 is per se a "significant and substantial" violation because "[i]t stands to reason that until a preshift examination has been conducted to prove otherwise, the mine contains

conditions which could reasonably be expected to cause an injury of a reasonably serious nature to anyone who enters those areas unaware" of the conditions present (Sec. Brief 14). While this may be true as a general proposition, based on the facts of this case and existing case law, I cannot agree that the violation in this case was "significant and substantial."

Applying the Mathies formula, I have already found that there was (1) a violation of a mandatory safety standard. I also find that there was (2) a discrete safety hazard in that the mine had been idle since Saturday, April 24 and had a history of roof falls and high methane levels (Tr. 35, 118).

However, I do not find (3) a reasonable likelihood that the hazard contributed to would result in an injury because: (a) two of the three men on the maintenance crew were certified preshift examiners (Tr. 164-65) who, it can be inferred, would have been more acutely aware of potential hazards than the average miner; (b) they only entered the mine as far as the foot of the slope; and (c) the preshift examination of the north side of the mine began at 6:22 A.M. so that when the three men entered at about 6:45 A.M. the area into which they went had already been examined and no hazards were noted.(Footnote 6) Accordingly, I conclude that the violation was not "significant and substantial." Birchfield, supra, at 34-5.

Unwarrantable Failure

The violation was cited as having been caused by Buck Creek's unwarrantable failure to comply with the mandatory safety standard. The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987).

In Emery Mining, supra at 2001, the Commission stated that:

> "Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect of an assigned, expected, or appropriate action." Webster's Third New International Dictionary (unabridged) 2514, 814 (1971) (Webster's). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence,"

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6 Mr. McDowell's testimony that the area at the foot of the slope had been examined at 6:10 A.M. (Tr. 177) is clearly erroneous. Despite that, I am satisfied that the area had been examined by the time the three maintenance men entered the area.

> "thoughtlessness," and "inattention." Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness or inattention.

A preshift examination of a mine has been required at least since the 1952 Coal Act. 30 U.S.C. 479(d)(7)&(8) (1964)(repealed 1969). Entry into the mine of persons, other than the preshift examiners, before the results of the examination are recorded in the preshift book at the surface has also been prohibited since the 1952 Coal Act. Id. In fact, the preshift examination is so fundamental to mine safety and such an established requirement that it would be astonishing to find any miner who was not aware of it. Certainly the miners at Buck Creek were aware of the requirement (Tr. 186-87, 210). Accordingly, I conclude that failure to follow the requirement in this case was the result of more than inadvertence or thoughtlessness and, thus, the result of an unwarrantable failure on Buck Creek's part.(Footnote 7) Cf. Birchfield, at 38 (finding a violation of 30 C.F.R. 75.303(a) to have resulted from the operator's unwarrantable failure).

CIVIL PENALTY ASSESSMENT

The Secretary has proposed a penalty of $5,500.00 in this case. In making my own assessment, I have considered the criteria set forth in Section 110(i) of the Act, 30 U.S.C. 820(i). The pleadings indicate that as of July 12, 1993, the mine had an annual production of 1,126,362 tons which was the overall production of Respondent's mines. I conclude that Respondent is a large operator and that imposition of a civil penalty will not affect its ability to continue in business. In view of its size, I cannot conclude that Respondent's 317 violations in the past two years is excessive. Based on my finding that the violation was not "significant and substantial" I conclude that the gravity of the violation was not high, however, I do find that Respondent demonstrated a high degree of negligence in allowing the violation to occur. Finally, I find that the Respondent demonstrated good faith in abating the violation. Under these circumstances, I find that a civil penalty of $3,000.00 for the violation is appropriate.

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7 In reaching this conclusion, I do not decide what difference, if any, McDowell's self-serving, uncorroborated, hearsay testimony that the three men called into the mine before entering to determine if it was safe to go in (Tr. 180, 195) makes, since I do not credit that testimony.

ORDER

Buck Creek Coal Company is ORDERED to pay a civil penalty of $3,000.00 for a violation of Section 75.360(a) of the mandatory safety standards within 30 days of the date of this decision. Upon receipt of payment, this proceeding is DISMISSED.

T. Todd Hodgdon
Administrative Law Judge
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