

CCASE:
SOL (MSHA) V. APOGEE COAL
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 93-217
Petitioner : A.C. No. 11-02790-03557
v. :
 : Kathleen Mine
 :
APOGEE COAL COMPANY, :
d/b/a ARCH OF ILLINOIS, :
Respondent :

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor,
Chicago, Illinois, for Petitioner;
Frenchette C. Potter, Esq., Arch Mineral
Corporation, St. Louis, Missouri, and David S.
Hemenway, Esq., St. Louis, Missouri, for
Respondent.

Before: Judge Amchan:

FACTS AND ISSUES PRESENTED

On the afternoon of February 19, 1993, Respondent conducted a fire or escapeway drill during its A shift at the Kathleen mine in southern Illinois, which on that day worked from 8:00 a.m. to 4:00 p.m (Tr. 109-114). During this drill all miners working in the third, fifth, and seventh west sections walked approximately 2,000 feet out from the working face (Tr. 55, 113). Then two miners and the foreman from each section walked out to the mine surface through the primary intake air escapeway. The rest of the crews returned to their sections (Tr. 55).

Although pre-shift examinations had been done of the working sections and areas travelled by miners to reach these sections-- prior to the start of the A shift at 8:00 a.m., no preshift examination was conducted in the primary intake air escapeway (Tr. 17). However, at about 1:00 p.m., just before the escapeway drill, Albert Dudzik, the shift manager of the A shift and a certified person for purposes of 30 C.F.R. 75.361, performed a "supplemental examination" of the primary escapeway (Tr. 111-112).

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On March 17, 1993, MSHA received a section 103(g) complaint regarding the lack of a preshift examination of the primary escapeway on February 19 (Tr. 14). The complaint was submitted by Local 16 of the United Mine Workers of America, which represents the employees at the Kathleen mine. The next day, inspector John Winstead visited the mine and interviewed representatives of management and the union. He also inspected pre-shift examination records and fire drill records. He then issued citation 4053762 (Tr. 14-16). The citation alleged a violation of 30 C.F.R. 75.360(a), in that "[a] planned fire drill was conducted on two (2) shifts on 2-19-93 (8-4 and 4-12 shifts) in the 3rd west and 5th west, and a pre-shift examination was not conducted. . ."

Section 75.360(a) requires that within 3 hours preceding the beginning of any shift, a preshift examination shall be performed by a certified person. Section 75.360(b) requires that the certified person look for hazardous conditions, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction in a number of different locations. The locations relevant to this case are those in 75.360(b)(1), "roadways, track haulageways, and other areas where persons are scheduled to work or travel during the oncoming shift." The issue in this case is whether the primary escapeway was an area in which persons were scheduled to work or travel during the 8:00 a.m. - 4:00 p.m. and 4:00-11:59 shifts on February 19, 1994.

MSHA contends that a preshift examination was required of the primary intake escapeway because the fire drills of February 19, 1994, were scheduled or planned prior to the beginning of the shift during which they were conducted. Respondent contends that the decision to conduct the fire drills on the A shift on February 19, 1994, was not made until midway through the shift and therefore it was not required to conduct a pre-shift examination. Further, Respondent contends that it complied with MSHA's regulations by conducting a supplemental examination pursuant to section 75.361. As to the later shift, Respondent contends that no escapeway drill was conducted in the third and fifth west sections as alleged in the citation.

Resolution of Disputed Facts

The testimony at hearing centered primarily on whether the escapeway or fire drill of February 19, 1994, was scheduled or planned prior to the commencement of the A shift at 8:00 a.m. that day. Stephen Sharp, the mine manager at Kathleen, and
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FOOTNOTE 1

This docket also includes citation 3037094 issued on May 4, 1993, by inspector Bill Henson (Exh. J-1, stipulation # 7). At hearing Respondent withdrew its contest of the \$50 penalty proposed for that citation (Tr. 131).

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Albert Dudzik, the A shift manager, testified that on Monday, February 15, 1994, the mine's safety manager informed them and other supervisory personnel that an escapeway (fire) drill had to be performed that week (Tr. 100-02, 108-09).

Dudzik testified that he did not decide to conduct the escapeway drill on his shift until noon on February 19 (Tr. 110-111). He then conducted his examination of the primary escapeway (Tr. 111). Upon reaching the mine surface he called his three section foremen and instructed them to conduct the drill, which they did almost immediately (Tr. 112-114). I find the testimony of Mr. Sharp and Mr. Dudzik credible and find that the timing of the drill was determined just as they stated.

However, Robert Caraway, a roof bolter on the 7th west section on the A shift, testified that he found out about the escapeway drill on the previous day when his foreman, Gary Culpepper told the section crew to pick two nonsupervisory employees to walk to the surface during the drill (Tr. 54-57). I find Caraway a credible witness and find that Culpepper did tell his crew to pick two men to walk to the mine surface with him the following day. In so doing I find his testimony more persuasive on this point than the testimony of Stephen Sharp. Sharp interviewed all his supervisors and each one, including Gary Culpepper, who did not testify at the hearing, denied that they had announced the escapeway drill on the previous day (Tr. 94, 103-04)

Although at first blush it appears inconsistent to credit Caraway as well as Respondent's testimony that no decision regarding the drill was made until the afternoon of February 19, these accounts are not necessarily inconsistent. February 19, 1994, was a Friday. In the time period of the alleged violation, it was apparently not uncommon for the mine to operate on Saturdays (Tr. 82). However, a decision to work on Saturday was generally not made until two days beforehand, on Thursday (Tr. 103).

Culpepper had been told that the escapeway drill would be performed the week of February 15-19, and may not have known whether the mine would operate on Saturday. Even if he did know

FOOTNOTE 2

Similar testimony was elicited from Eugene McCario, who testified that he was informed the day before the drill that it would be conducted the next day (Tr. 63-64). McCario worked in the 7th west section on the 4:00 p.m. to midnight shift. The citation does not allege a violation with regard to the 7th west section, only the 3rd and the 5th. Although Caraway also worked in the 7th west section, his testimony is relevant because it suggests that the A shift foremen knew on February 18 that an escapeway drill would be performed on the 19th.

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he may have guessed that Friday would be day of the drill. I find the fact that Culpepper told his crew Thursday that the drill would be conducted on Friday not necessarily inconsistent with Dudzik instructing his foremen on Friday that the drill was to be conducted that afternoon.

RESPONDENT DID NOT VIOLATE SECTION 75.360(A)

I conclude that Respondent did not violate section 75.360(a) because prior to the commencement of the A shift, employees were not scheduled to work or travel in the primary intake escapeway. Therefore, no preshift examination was required.

The Secretary suggests that Respondent was avoiding its obligations under the preshift examination regulation by waiting until the shift began to announce the exact timing of its escapeway drill, which had been planned the preceding Monday (Secretary's post-trial brief, pp. 5-6). However, MSHA's regulation regarding escapeway drills, section 75.383, does not require that an operator determine the timing of such drills prior to the beginning of the shift in which the drill is conducted.

Moreover, I conclude that Respondent's conduct in this matter is also consistent with the scheme of the Secretary's regulations regarding workplace examinations. The regulation on supplemental examinations, section 75.361, seems to give a mine operator a choice. Either the operator can decide before a shift to conduct a drill and do a preshift examination of the escapeway, or it can decide during the shift to conduct the drill and perform a supplemental examination of the escapeway.

There appears to be no difference with regard to safety and health between a preshift and a supplemental examination. The only apparent distinction in the requirements of sections 75.360 and 75.361 is that a preshift examination must be recorded in a book on the mine surface before non-certified persons enter the inspected areas (75.360(g)), while non-certified persons may enter an area subject to a supplemental examination without the recording of the results of the supplemental examination, 57 Fed. Reg. 20895 (May 15, 1992).

The preamble to MSHA's revised ventilation regulations suggests that a supplemental examination provides the same degree

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of protection to miners as does a pre-shift examination. Indeed, it raises a question as to what, if anything, was at stake in the instant litigation.

There is no need to require areas of the mine where persons are not scheduled to work or travel to be examined. . . the supplemental examination required by section 75.361 permits the certified person to perform examinations of his or her own working areas and requires a supplemental examination to be made by a certified person within 3 hours prior to any person's entering any underground area in which a preshift examination for that shift has not been made. 57 Fed. Reg. 20893 (May 15, 1992).

In light of the fact that Respondent complied both with the letter and spirit of the Secretary's regulations, I vacate citation 4053762.

ORDER

1. Citation 4053762 is VACATED.
2. Respondent is ordered to pay the \$50 civil penalty which was proposed for citation 3037094 within 30 days of this decision.

Arthur J. Amchan
Administrative Law Judge

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FOOTNOTE 3

Underlying the section 103(g) complaint which gave rise to the instant citation was a dispute between Respondent and UMWA Local 16 as to whether union employees or management employees should perform onshift examinations (Tr. 58-59, 71-72). The situation at the time of the inspection was that union employees conducted pre-shift examinations and management employees conducted on-shift and supplemental examinations.

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