FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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September 27, 2010

MACH MINING, LLC,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. LAKE 2009-324-R
v.	:	Citation No. 8414214; 02/12/2009
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY & HEALTH	:	Mach #1 Mine
ADMINISTRATION, (MSHA)	:	Mine ID 11-03141
Respondent	:	

DECISION

Appearances: Christopher D. Pence, Esq., and David J. Hardy, Esq., Allen, Guthrie, McHugh & Thomas, PLLC, Charleston, West Virginia, for the Contestant.
Barbara M. Villalobos, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Respondent.

Before: Judge Weisberger

I.
Introduction

This case is before me based on a Notice of Contest filed by Mach Mining, LLC, ("Mach") challenging the issuance of Citation No. 8414214, which alleges a violation of 30 C.F.R. § 75.364[1].

[1]This matter was initially consolidated with a contest of Citation No. 8414211 (Docket No. LAKE 2009-323-R), which alleged a violation of 30 C.F.R. § 75.380(d)(1), requiring that escapeways be maintained in a safe condition. Citation No. 8414214, the citation contested in the present matter, originally alleged a violation of 30 C.F.R. § 75.363(a), and was subsequently modified to a violation of 30 C.F.R. § 75.364(b)(5), which requires an examination of an escapeway for hazardous conditions. At the conclusion of the hearing held on May 14, 2009, the Secretary made a motion to amend Citation No. 8414214 again by changing the alleged violated standard to 30 C.F.R. § 75.364(h), which requires that a record be made of hazardous conditions found during weekly examinations. After the parties argued the merits of the motion, it was granted.

Pursuant to notice, a hearing was initially held in St. Louis, Missouri, on May 14, 2009.[2] The parties were directed to file briefs addressing the limited issue of whether the cited area was a "working section", and thus triggering the requirements of escapeways.[3] Each party subsequently filed a brief, and a reply. On July 15, 2009, the undersigned issued a partial decision determining that the cited area was a "working section."

A conference call was held on November 9, 2009; the parties indicated that they did not seek an opportunity to present additional evidence relating to the remaining issues regarding Citation No. 8414211 (Docket No. LAKE 2009-323-R). Subsequently, the parties each filed a brief and a reply addressing these issues. The parties agreed that if it was found that the Contestant violated Section 75.380(d)(1), *supra*, then a hearing should be scheduled regarding the remaining citation (No. 8414214).

The undersigned issued a decision on February 24, 2010, *Mach Mining LLC,* 32 FMSHRC 213 ("Mach I") (2010) finding that the Contestant violated Section 75.380(d),[4] and dismissing the contest. On May 13, 2010, pursuant to the agreement of the parties, a hearing was held on the issues presented in Mach's Notice of Contest (Citation No. 8414214). Each party submitted a post-hearing brief, and Contestant filed a response in opposition to the Respondent's brief.

II.
Stipulations

At the May 14, 2009 hearing, the parties filed 44 Joint Stipulations, which were initially included, in part, in the undersigned's July 14, 2009 Partial Decision. The stipulations, as pertinent to the issue at bar, are set forth as follows:

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9. On February 12, 2009, MSHA Inspector Bobby F. Jones conducted a

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[2]The record was kept open to allow for the possibility of an additional evidentiary hearing.

[3]Pursuant to 30 C.F.R. § 75.380(b)(1), an operator is required to provide an escapeway "for each working section." Thus, the existence of a working section is a predicate for the imposition of all regulatory mandates relating to escapeways, including those set forth in Sections 75.380(d)(1), and 75.364(h).

[4]Specifically, I found that the combination of items present in the escapeway would thwart the clear purpose of Section 75.380(d) *supra* (*i.e.*, to allow persons to escape quickly in the event of an emergency). I also found that the violation was significant and substantial.

regular quarterly inspection of Mach #1 Mine, operated by Mach Mining, LLC. ["Mach"]

10. While conducting his inspection, Mr. Jones inspected the primary escapeway to the Headgate (hereinafter "HG") #4.

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35. Contestant began weekly examination of the primary escapeway at HG #4 five weeks prior to the issuance of the subject citations.

36. Contestant assigned Mine Examiner Dave Adams the task of conducting the weekly examinations at HG #4 from January 8, 2009, through February 12, 2009.

37. The concrete blocks existed in the escapeway outby the regulator since on or about January 6, 2009, when the regulator was created, through February 12, 2009, when the subject citations were issued.

38. The pile of gob existed in the escapeway since on or about January 6, 2009, when the regulator was created through February 12, 2009, when the subject citations were issued.

39. The take-up track existed in the escapeway since on or about January 6, 2009, when the regulator was created through February 12, 2009, when the subject citations were issued.

40. The pallet of crib ties existed in the escapeway since on or about January 6, 2009, when the regulator was created through February 12, 2009, when the subject citations were issued.

41. Mine Examiner Adams last conducted a weekly exam of the primary escapeway prior to the issuance of Cit. No. 8414211 on or about February 9, 2009.

42. The concrete blocks outby, pile of gob, take-up track, and pallet of crib ties were present in the primary escapeway at HG #4 since January 6, 2009, when the regulator was created through February 12, 2009, when the subject citations were issued.

43. Mine Examiner Dave Adams did, in fact, conduct weekly examinations for hazardous conditions at the primary escapeway at HG #4 from January 8, 2009, through February 12, 2009.

44. Mine Examiner Dave Adams did not note any hazardous conditions in the weekly examination records for the primary escapeway at HG #4 during the period from January 8, 2009, through February 12, 2009.

III.

Testimony of the Witnesses and the Parties' Positions

On February 12, 2009 MSHA Inspector Bobby Jones inspected the primary escapeway to the headgate ("HG") #4 at the Mach #1 mine, an underground coal mine. In testimony adduced at the initial hearing on May 14, 2009,[5] he described various hazardous items in the escapeway. Jones testified at the May 13, 2010 hearing that these items were not noted in the weekly examination book although they were obvious, extensive, and had existed since HG #4 went into production. Jones issued a citation alleging a violation of Section 75.364(h),[6] that was significant and substantial and resulted from Mach's unwarrantable failure.

Essentially, it is Mach's position that it was not in violation of Section 75.364(h), *supra*, because it had a "good faith" belief that the cited accumulated materials were not "hazardous conditions", and therefore were not required to be recorded under the terms of Section 75.364(h), *supra*.

Mach relies on the testimony of David L. Adams, the examiner who conducted the weekly examinations at issue. Adams was asked whether he believed that the cited material constituted a hazard. He answered as follows: "[n]o, because there was a clear walkway, there was a lifeline through there that was accessible to the miners. All the materials that's stated in the citation is nothing that's abnormal for a mine, including the piece of belt structure." [sic] (Tr. 82).[7]

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[5] At the hearing held on May 13, 2010, the transcript and record of the initial proceeding (docket No. LAKE 2009-323-R) were incorporated into the record of the instant proceeding.

[6] Section 75.364(h), as pertinent, provides as follows:

> At the completion of any shift during which a portion of a weekly examination is conducted, a record of the results of each weekly examination, including a record of hazardous conditions found during each examination and their locations, the corrective action taken, and the results and location of air and methane measurements, shall be made...The record shall be made by the person making the examination or a person designated by the operator...

[7] Unless otherwise noted, all transcript page citations refer to the May 13, 2010 hearing.

In further explanation, Adams testified that:

> [t]he area that was in question here, the overcast work, the construction work had just recently been completed. The people that worked this section that would be escaping through that area, if need be, were familiar with the area. They built it, so they - - you know, if they had to come through the regulator to escape to the stairway, they knew the walkway, they knew it was clear. Their biggest obstacle would be the stairs on the overcast, not the materials that were to the side. (Tr. 82-83).

Also, he indicated that there was a clear path "from the opening in the regulator along the rib line, for the distance from the regulator to the stairs to the first overcast." *Id.* At 83. Last, Adams opined that in the event of smoke and poor visibility miners could pull down a lifeline and "...[t]hey would follow the rib line, because if you're lights go out in your house, instead stumbling through the dark, you're going to find a wall. You're going to find something familiar. They would follow the same path as what the lifeline would carry them to the staircase." [sic] (Tr. 84).

Anthony Webb, Mach's Mine Manager testified that no one at the mine felt the conditions present in the escapeway constituted a hazard. He stated that prior to February 12, 2009, no MSHA official had advised him that the mine's escapeways were not maintained safely, or that they believed Mach's examiners failed to note hazardous conditions in their reports, or that its examinations were inadequate.

Webb added that he had inferred that the type of materials found in the escapeway did not present a hazardous condition because the "same condition existed at the regulator at Headgate #3 in two previous quarters," which did not result in a citation from two other inspectors. (Tr. 62-63). Upon further questioning, Webb admitted that he was specifically referring to several blocks on both sides of the base of the regulator, but he was not aware of any of additional materials present at Headgate #3 in those previous inspections. Webb asserted that no one from MSHA had previously advised him that such items were a hazard.

IV.

Discussion

A. Violation of Section 75.365(d), *supra*

The parties stipulated that the escapeway included a number of items, including a gob pile, loose concrete blocks, a take-up track, and a pallet of crib ties that had been present in the escapeway since January 6, 2009. Moreover, the parties previously stipulated that Adams conducted weekly examinations of HG #4 from January 8, 2009, through February 12, 2009.

I previously found a violation of Section 75.380(d) due to the combination of the pallet of crib ties, take-up track, pile of gob, loosely strewn concrete blocks on either side of the regulator, and the presence of water on the floor, which would hinder and delay the emergency evacuation of miners, especially any who were injured.[8] This finding becomes the law of the case. Despite the presence of these items in the escapeway for approximately five weeks, the mine examiner failed to note any of these conditions in his weekly reports. I have taken into account the opinions of Adams and Webb, that they did not believe the accumulated items constituted hazardous conditions. However, it is well established that the standards set forth in Title 30, Code of Federal Regulations ("CFR") impose strict liability upon an operator. *Western Fuels - Utah Inc.,* 11FMSHRC 278 (Mar. 1989); *ASARCO Inc.,* 8 FMSHRC 1632 (Nov. 1989).

Based on all the above, I find that Mach did violate Section 75.364(h), *supra*.[9]

B. Significant and Substantial

The violation in the present case was designated "significant and substantial". As set forth in *Elk Run Coal Co., Inc.* 27 FMSHRC 899, 904-905 (2005), a violation is "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." *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In *Elk Run, supra,* at 905 the Commission quoted the following further explanation it previously provided in *Mathies Coal Co.*, 6 FMSHRC 1-3 (1984):

> 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

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[8] Mach I, *supra*.

[9] I take cognizance of Mach's argument that a proper examination was conducted under Section 75.364(h) *supra,* if an examiner reasonably believed that the conditions he observed were not hazardous. In support of this proposition, Mach cites the following cases: *Secretary v. Arch of Wyoming, LLC*, 32 FMSHRC 568 (May 2010) (ALJ); *Dumbarton Quarry Associates*, 21 FMSHRC 1132, 1134-36 (Oct. 1999) (ALJ); *Lopke Quarries, Inc.*, 22 FMSHRC 899. 911-12 (July 2000) (ALJ).

All these cases were decided by Commission Judges. These do not have precedential value, and I am not bound by them. To the extent that they are not consistent with my decision, I choose not to follow them.

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.

I previously found a violation of a mandatory safety standard due to the hazardous conditions that existed in the escapeway.[10] Also, I found that the conditions of the escapeway constituted a discrete safety hazard. Similarly, I found that based on the combination of accumulated items in the escapeway, the hazard of stumbling and tripping, and the resultant impediment to a prompt evacuation in an emergency, especially in the presence of smoke and low visibility, that it was reasonably likely that a reasonably serious injury to a miner was reasonably likely to have occurred. I concluded that the materials in the escapeway constituted a significant and substantial violation of Section 75.380(d)(1), *supra*.

Accordingly, I conclude that if the condition of the escapeway was itself a significant and substantial violation, then for the same reasons the failure to document and report such conditions constitutes a significant and substantial violation.

C. Unwarrantable Failure

The citation at issue identified the violation to be an unwarrantable failure due to the "extensiveness of these hazardous conditions [which] were obvious to the most casual observer." Further, according to Jones, the hazardous conditions were not reported in five weekly examination reports preceding the inspection.

In essence, it is Mach's position that the Secretary was not able to establish that the violation herein was as a result of it's unwarrantable failure. Mach argues that it acted under a "good faith" belief by Adams that the cited conditions were not hazardous, and thus were not required to be recorded. Also, that the citation at bar was the first instance that MSHA had raised any issue with regard to material in Mach's escapeways.

In *I.O. Coal Company, Inc.,* 31 FMSHRC 1346, 1350-1351 (Dec. 2009) the Commission set forth the following analysis with regard to unwarrantable failure:

> The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by and operator in connection with a violation. In *Emery Mining Corp*., 9 FMSHRC (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id*. at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," or a "serious lack of reasonable care." *Id*. at 2003-2004; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. MSHA,* 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

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[10] Mach I, supra

The Commission has recognized that whether conduct is "aggravated" in the context of unwarrantable failure is determined by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstance exist. Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidated Coal Co.,* 22 FMSHRC 340, 353 (March 2000) (*"Consol"*); *Cyprus Emerald Res. Corp.,* 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. Corp., 1999); *Midwest Material Co.,* 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.,* 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.,* 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEngery Mines, Inc.,* 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.,* 10 FMSHRC 705, 709 (June 1988).

1. Extent of the violative condition.

Mach argues that any alleged violation was not extensive. Mach relies on the fact that Jones had inspected all of Mach's escapeways which totaled approximately 16 miles without issuing any citations for obstructions, whereas the cited area constituted only 60 feet. However, according to Jones' testimony that was not impeached, the entire area that he cited was 100 or 120 feet in length. I find that due to the combination of the various accumulated materials that extended 100 to 120 feet in an escapeway to have been extensive.

2. The length of time that the violative condition existed.

In essence, it appears to be Mach's position that the fact that the cited conditions have existed for five weeks should not cause the unwarrantable finding to be applied because Mach had not been given any notice [11] that the materials constituted a violation. There is not any dispute that the cited conditions had existed for five weeks prior to their having been cited by Jones. I thus find that the violative conditions had existed and had not been reported for five weeks prior to Mach's inspection that resulted in the citation at issue.

3. Whether the operator was placed on notice that greater efforts were necessary for compliance.

The record does not contain any evidence that MSHA had placed Mach on notice that greater efforts were necessary for compliance. There is not any evidence of any discussions that MSHA officials had with Mach concerning greater efforts in this regard, prior to the issuance of

[11]The issue of notice is discussed below, IV(C)(3) *infra*.

the citation at issue. Nor is there any evidence in the record that Mach had previously been cited for existence of materials in the escapeway that would impede a speedy evacuation. I therefore find that it has not been established that Mach was placed on notice that greater efforts were necessary for compliance.

4. Whether the violation posed a high degree of danger.

Mach argues that it did not perceive the conditions as hazardous. In this connection, Webb, who opined there was not a high degree of danger to miners, presented his reasons as follows:

> ...[I]f a guy went through that area and he would be feeling along the rib, he would be going slow anyway. And something like that, if the guy bumps up against the block with his foot he's going to know to pick his foot and step over it. That's just the nature of coal mining. The guys are prepared for that. (Tr. 68).

He opined further as follows:

> The people that worked this section that would be escaping through that area, if need be, were familiar with the area. They built it, so they - - you know, if they had to come through the regulator to escape to the stairway, they know the walkway, they knew it was clear. Their biggest obstacle would be the stairs on the overcast, not the materials that were to the side. (Tr. 82-83)

Lastly, Adams testified that in the event of low visibility and smoke "...[t]he lifeline is overhead. They would bring the lifeline - - pull it down to them. They would follow the rib line, because if you're lights go out in your house, instead stumbling through the dark, you're going to find a wall. You're going to find something familiar. They would follow the same path as what the lifeline would carry them to the staircase." [sic] (Tr. 84)

On the other hand, I found that the record establishes that the violation was significant and substantial due to the failure to report the existence of a combination of accumulated items in the escapeway creating tripping and stumbling hazards that would impede a prompt evacuation in an emergency. (IV(B)*, infra*.) For essentially the same reasons, I find that the violation posed a high degree of danger.

5. The operator's efforts in abating the violative conditions.

As set forth in *I.O. Coal, supra,* at 1356, the focus on the operator's abatement efforts is on those efforts made prior to the citation or order. In this connection, the record does not contain any evidence of any abatement efforts made by Mach prior to the issuance of the citation therein by Jones.

However, it is significant to note that, as set forth in *I.O. Coal*, *supra* at 1356, "[a]n operator's effort in abating the violative condition is one of the factors established by the Commission as determinative of whether a violation is unwarrantable. Where an operator has been placed on notice of a problem, the level of priority that the operator places on the abatement of the problem is relevant. *Enlow Fork*, 19 FMSHRC at 17. Previous repeated violations and warnings from MSHA should place an operator on 'heightened alert' that more is needed to rectify the problem. *New Warwick Mining Co*, 18 FMSHRC 1568, 1574 (Sept. 1996). As set forth above, (IV(C) (3) *supra*)), the record does not establish that Mach had been placed on notice that it had a problem with hazardous items in escapeways.

Moreover, as set forth in *I.O. Coal, supra*, abatement efforts relate to Mach's good faith belief that the accumulated items were not hazardous. For the reasons discussed below, (IV(C)(6)), the record establishes that the "good faith" belief was reasonable. Accordingly, I conclude that the record establishes the existence of significant mitigating factors lowering the level of Mach's negligence relating to non-abatement of the violative condition.

6. Mach's knowledge of the existence of the violation, whether the violative conditions were obvious, and the reasonableness of the "good faith" belief that the cited items in the escapeway were not hazardous.

a. good faith

The Secretary argues, based on the uncontradicted testimony of Jones, that the items he cited were immediately obvious. Next, the Secretary argues that Mach's "good faith" belief that these materials were not hazardous, was not objectively reasonable considering the combination of obstructions in the escapeway. Therefore, it is maintained, that Adams should have recognized the hazard presented.

As set forth above, (III *infra*), Adams explained, based on his experience, the basis for his belief that the materials cited were not hazardous. He referred to the presence of a lifeline that was "accessible" to miners and a clear walkway or path. "...from the opening in the regulator along the rib line, for the distance from the regulator to the stairs to the first overcast" (Tr. 83). He also described the materials in the escape as "not normal" and testified as follows: "There was nothing in the area that wasn't present throughout the mine. Many places in escapeways you're going to find block, you're going to find crib ties. In your secondary escapeways, belt lines are present, belt structures are present." (Tr. 86) It is significant to note his testimony that, prior to February 12, no one from MSHA had told him that the accumulated items in the escapeway constituted hazardous conditions.

In further support of his belief that there were not hazardous conditions in the escapery that needed to be reported, he indicated that at the time the conditions were cited he had a son working on the sections whose "safety depends on me." (Tr. 87). I observed his demeanor, and

find his testimony credible in all these regards. Thus an inference might be drawn that he would not have been motivated to disregard hazardous conditions in the area.

Therefore, I find that Adams, in "good faith," was of the opinion that the cited materials did not constitute a hazardous condition that had to be reported

b. objectively reasonable under the circumstances.

In evaluating an operator's "good faith" belief, a determination must be made whether it was "objectively reasonable under the circumstances" *I.O. Coal, supra,* at 1357. In *I.O. Coal, supra,* at 1359 in remanding the judge's determination that the condition was not as a result of the operator's unwarrantable failure, the Commission directed the judge to consider "... the issues of the operator's knowledge of the existence of the violation and whether the violation was obvious." While it is clear that the existence of the cited material was patently obvious, the issue for resolution is whether the hazard was obvious, and whether Mach should reasonably have known of the hazard. In *I.O. Coal, supra*, one of the errors cited by the Commission as having been made by the Judge was that "...[he] did not pose the question of whether IO's conduct was 'reasonable' under the circumstances after it had received four MSHA citations on this very issue." Thus it is most significant to note that in the case at bar, as set forth above IV(C), *infra,* Mach had not been placed on notice by MSHA that there was a problem with the materials in escapeways.

I find, considering the lack of notice from MSHA, that the level of MSHA's negligence is mitigated regarding what it reasonably should have known concerning the existence of a hazard.

For all the above reason, I find that it has not been established that the level of Respondent's negligence relating to the violation at bar reached the level of aggravated conduct. Accordingly, I find that it has not been established that the violation was a result of Mach's unwarrantable failure.

Conclusion

For all the above reasons, I conclude that the Respondent established that Mach violated Section 75.364(h), *supra,* and that the violation was significant and substantial. I also conclude that it has not been established that the violation was a result of Mach's unwarrantable failure.

ORDER

It is **Ordered** that Citation No. 8414214 be amended to reflect the fact that the operator's violation of Section 75.364(h), *supra*, was not the result of its unwarrantable failure. It is further **Ordered** that Docket No. LAKE 2009-324-R be **Dismissed**.

Avram Weisberger
Administrative Law Judge

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