

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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January 20, 2009

BLACK CASTLE MINING CO., Contestant	:	CONTEST PROCEEDING
	:	
v.	:	Docket No. WEVA 2006-891-R Citation No. 7247101; 07/12/2006
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Black Castle Mining Co. Mine ID: 46-07938
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	
v.	:	Docket No. WEVA 2007-288 A.C. No. 46-07938-109302
	:	
BLACK CASTLE MINING CO., Respondent	:	Mine: Black Castle Mining Co.
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v.	:	CIVIL PENALTY PROCEEDING
	:	
	:	Docket No. WEVA 2007-421 A.C. No. 46-07938-115566A
	:	
MICHAEL VIRA, employed by BLACK CASTLE MINING CO., Respondent	:	Mine: Black Castle Mining Co.

**DECISION**

Appearances: Robert S. Wilson, Esq., and Lucy C. Chiu, Esq., Office of the Solicitor, Arlington, Virginia, for Petitioner;  
Carol Ann Marunich, Esq., and Robert M. Stonestreet, Esq., Dinsmore & Shohl, LLP, Morgantown and Charleston, West Virginia, for Respondent Black Castle Mining Company;  
David J. Hardy, Esq., and Christopher D. Pence, Esq., Allen, Guthrie, McHugh & Thomas, PLLC, Charleston, West Virginia, for Respondent Michael Vira.

Before: Judge Hodgdon

These consolidated cases are before me on a Notice of Contest, brought by Black Castle Mining Co., and two Petitions for Assessment of Civil Penalty, brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Black Castle Mining Co., and Michael Vira, an employee of Black Castle Mining, pursuant to sections 105 and 110(c) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. §§ 815 and 820(c). The cases involve an alleged violation of the Secretary's mandatory health and safety standards and seek penalties of \$60,000.00 from Black Castle Mining and \$9,000.00 from Michael Vira. A trial was held in Charleston, West Virginia. For the reasons set forth below, I vacate the citation, grant the contest and dismiss the proceedings.

### **Background**

Black Castle Mining Company operates a large surface coal mine in Boone County, West Virginia. Black Castle is a subsidiary of Massey Coal Services, Inc., and Massey Energy Company. On Wednesday, February 1, 2006, Paul Moss was fatally injured when the bulldozer he was operating, in the East of Stollings Amendment area of the mine, contacted and ruptured a 16-inch low-pressure, high-volume natural gas line which burst into flames. The parties have stipulated to the basic facts surrounding the accident, which are set out below in narrative form. (Tr. 48-58.)

On the morning of Monday, January 30, 2006, a planning meeting was held at which the start of benching operations in the East of Stollings Amendment site was discussed. The meeting was attended by William Marcum, Production Manager for Black Castle, and Michael Boothe, Drill and Blast Foreman. They decided to assign bulldozer operator Paul Moss to clear an area known as the Judy Low Gap area for an access road to lead to where Moss would clear a drill bench for mining the Clarion coal seam. The fact that a gas line, owned and operated by Equitable Gas, was buried in the area of East of Stollings Amendment site was discussed at the meeting.

On Tuesday morning, Moss began constructing an access road uphill from the Judy Low Gap area to locate the Clarion coal seam outcrop. Once he reached the seam, he was to construct a drill bench to allow drilling equipment to be brought to the site to start a new highwall. By 3:30 p.m. that afternoon, Moss had roughed in an access road in close proximity to the Stockton coal seam, which was located below the Clarion coal seam. He had not reached the Clarion seam when he stopped for the day.

On Wednesday morning, Moss returned to the area to continue construction of the access road and drill bench. Boothe observed Moss' arrival at the site and asked him over the CB radio if he was "okay." Moss replied that he was fine. Shortly after 8:30 a.m., Michael Vira, Mine Superintendent, spoke to Moss over the CB and told him to stay 100 feet away from the gas line. Later that morning, Mike Black, General Mine Foreman, called Moss on the CB as he drove through the East of Stollings Amendment and asked Moss if he was alright. Moss responded

that he was doing fine. At approximately 11:30 a.m., Boothe spoke to Moss on the CB and then went to see him where he was working. Boothe and Moss talked about how far off of the coal seam Moss was currently working and Moss told Boothe that his progress would be a little slow. The accident occurred sometime after 2:00 p.m. that afternoon.

The accident was investigated by MSHA Inspector James R. Humphrey. At the conclusion of his investigation, some five months after the accident, he issued a citation to Black Castle which is the subject of this proceeding. Sometime later, a section 110(c) special investigation, 30 U.S.C. § 820(c), resulted in Vira being charged personally with the same violation.<sup>1</sup>

### **Findings of Fact and Conclusions of Law**

Inspector Humphrey issued Citation No. 7247101 to Black Castle on July 12, 2006. It alleges a violation of section 77.1713(a), 30 C.F.R. § 77.1713(a), of the Secretary's regulations because:

An adequate daily examination for hazardous conditions was not made of the active working area in the East of Stollings area of the mine. A bulldozer operator was working in this area, developing a drill bench at the Clarion coal seam level. The area was not adequately examined by a certified person for hazardous conditions and an existing hazardous condition, which was neither reported nor corrected, contributed to a fatal accident.

An active 16-inch diameter gas line was buried and was not adequately marked in the area where the bulldozer was being operated. The area was not adequately examined to determine the location and extent of the gas line. Mine management knew that the gas line was located in the general area where the bulldozer was being operated and knew that the gas line was not marked. The presence of the unmarked gas line constituted a hazardous condition which should have been reported and corrected during the required daily inspection. Although management conducted an onshift examination of the general area, this hazardous condition was neither reported nor corrected. Management instructed the bulldozer operator to locate the Clarion coal seam crop and to develop a drill bench at that level. While carrying out this task, the

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<sup>1</sup> Section 110(c) provides that: "Whenever a corporate operator violates a mandatory health or safety standard . . . any director, officer or agent of such corporation who knowingly authorized, ordered or carried out such violation . . . shall be subject to the same civil penalties . . . that may be imposed upon a person under subsection[] (a) . . ."

bulldozer contacted the gas line causing it to rupture. The natural gas ignited, flames engulfed the bulldozer and the operator received fatal injuries.

This violation is an unwarrantable failure to comply with the cited mandatory standard.

(Govt. Ex. 1.)

Section 77.1713(a) requires that:

At least once during each working shift, or more often if necessary for safety, each active working area and each active surface installation shall be examined by a certified person designated by the operator to conduct such examinations for hazardous conditions and any hazardous conditions noted during such examinations shall be reported to the operator and shall be corrected by the operator.

The Secretary argues that the company and Vira did not conduct an adequate on-shift examination of the access road and drill bench area because they did not mark the gas line more specifically than it was marked. It is the Secretary's position that they failed to do this despite the fact that Moss had expressed concern about the location of the gas line which should have put them on notice that additional action was necessary. It is the Respondents' view that the access road and drill bench were not active working areas within the meaning of the regulation and, even if they were, the gas line was adequately marked and the on-shift examination was satisfactory. As discussed below, I conclude that Vira's on-shift examination of the area on behalf of the company was adequate and that no violation occurred.

#### Active Working Area

The main thrust of the Respondents' defense in this matter is that section 77.1713(a) is not applicable because the accident did not occur in an "active working area" of the mine. The argument is based on the findings and decision in *Central Ohio Coal Co.*, 12 FMSHRC 1014 (May 1990) (ALJ). Acknowledging that section 77.2(a), 30 C.F.R. § 77.2(a), states that "*active workings* means any place in a coal mine where miners are normally required to work or travel," the judge held that that was not the definition of "active working area" in section 77.1713(a). *Id.* at 1017-18. He concluded that "'active working area' in § 77.1713(a) means the 'pit' or 'mining area' of a surface coal mine and not simply any location where miners are normally required to work or travel." *Id.* at 1019. Consequently, he found that a 16-mile-long railroad that generally ran through a remote area of the mine was not an "active working area" of the mine requiring

daily examination. *Id.* at 1021. Relying on this decision, the Respondents' contend that the pipeline right-of-way is analogous to the railroad track. (Black Castle Br. at 12., Vira Br. at 24.)

This argument is not persuasive. As the Secretary correctly notes, the Commission's rules state that: "A decision of a Judge is not a precedent binding on upon the Commission." 29 C.F.R. § 2700.29(d). Furthermore, even if *Central Ohio* were binding, it would not be applicable in this case since the bulldozer operator was working on a bench for drilling so that mining could be performed and thus the area was clearly a "mining area." The pipeline right-of-way was obviously close enough to the access road in the low gap area to be included in the "active working area." Whether it was close enough to the area where Moss was cropping the bench when the accident occurred is a closer question. Nevertheless, for the purposes of this decision, I will assume that it was part of the "active working area."

#### The preshift and on-shift examinations

Michael Vira conducted both preshift and on-shift examinations of the area on January 31, 2006, and February 1, 2006, the day of the accident.<sup>2</sup> (Stip. 47, Tr. 57.) He did not note any hazardous conditions on any of the examination reports for any of the examinations. (Govt. Ex. 6.) According to the Secretary, his examinations were inadequate because he neither mentioned nor additionally marked the gas line.

Brian Miller, Superintendent of pipelines for Equitable Resources, testified that the 32 mile pipeline had been on the north section of the Black Castle mine, going east to west, since at least the 1940's. (Tr. 80-81.) He said that the pipeline was marked with "paint, ribbons, flags or sometimes carsonite markers that stay permanent." (Tr. 83.) He stated that the pipeline was also marked by mowing the vegetation along it and for a distance on either side of it. (Tr. 99, 107.) In addition, Rejean Boulet, the owner/foreman for East Cumberland, the contractor hired by Black Castle to cut trees on the property, testified they left a row of trees on each side of the gas line right-of-way to further mark it. (Tr. 286.) Marcum testified that the gas line was marked with a clear right-of-way, cleared path down to the natural ground, as well as by yellow stakes. (Tr. 624.) He also said that this particular right-of-way was used by members of the public on all-terrain vehicles (ATV), so that the center four feet of the right-of-way was usually muddy. (Tr. 625-27.)

According to Vira, who had been at the mine since 1989, Black Castle had been mining near the gas line throughout the last ten to twelve years before the accident. (Tr. 772-73.) Marcum, who had only been at the mine since August or September 2005, testified that: "We were always mining in the vicinity of the gas line." (Tr. 610.) Never had it occurred to anyone to note the gas line as a hazardous condition in the preshift or on-shift book. (Tr. 772-73.)

Marcum testified that in performing a preshift or on-shift examination, he would be "looking for anything that substantially could cause imminent harm or serious injury, a bad highwall, insufficient berm roadways, grade elevation, those types of major issues." (Tr. 604.)

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<sup>2</sup> The Secretary's regulations only require an on-shift examination. However, the state regulations require a preshift examination, so Vira conducted both.

Specifically, with regard to bench areas he would be examining for hazards “against potential bodily harm, an example may be a low berm or a break or a wash out, something we trim over or fall into that would get you in trouble, a weak berm. Something of that nature.” (Tr. 604.) He said he would also make sure that the ground control plan was being followed. (Tr. 605.) Vira agreed that he “would look over for any kind of abnormalities or anything that would be a hazardous situation.” (Tr. 781.) In other words, the examiner would be looking for changes in conditions from the previous examination of the area which could be hazardous.

In fact, not only was the gas line not a new condition or presence, but all of the miners were aware of it. Vira acknowledged that the presence of the gas line was a well-known fact and talked about on the job. (Tr. 147-48.) Kenneth Smith, an excavator and bulldozer operator at Black Castle, related that the gas line had been brought up in safety meetings for the five and one-half years he had worked for the company prior to the time of the accident. (Tr. 206.) Boulet stated that he knew there was a gas line on the property and where it was. (Tr. 285.) Marcum agreed that the presence of the gas line on the East of Stollings Amendment was common knowledge at the mine. (Tr. 327.) Boothe testified that “everybody at Black Castle knew the gas line was there . . . .” (Tr. 380.)

Inasmuch as the gas line had been present on the mine, in the vicinity of mining operations, for at least the last ten years, was marked, at a minimum, by a mowed or muddy right-of-way edged by trees, and everyone at the mine was aware of it, it is not surprising that prior to the accident it was not perceived as an hazardous condition necessary to report on daily examinations. Accordingly, I find that the preshift and on-shift examinations conducted by Vira were adequate and did not violate section 77.1713(a).

#### More Often if Necessary for Safety

This does not end the inquiry, however. The regulation requires examinations be conducted more often than once a shift, “if necessary for safety.” Therefore, the evidence must be examined to determine whether Vira and/or Black Castle were subsequently put on notice that the pipeline could be an hazardous condition.

Marcum met Moss in the Judy Low Gap area on Monday, January 30, prior to his commencing work on Tuesday. (Tr. 328, 330.) He testified that:

We walked over to this area near this vicinity [the area between the access road and the gas line right-of-way in Govt. Ex. 4-28] and we looked at it. I said, Paul, here’s your [gas]line, this is your line, this is your right-of-way. I said, I need you to take your tractor travel through right here. Don’t even drop your blade. Just travel through here, get up here on top where the line will veer up the mountain away from us, start your cut, come around through here [the access road at the top of the hill in Govt. Ex. 4-28] and go down the mountain.

(Tr. 330.) The road on the left in Govt. Ex. 4-28 is the road Marcum was telling Moss to create. (Tr. 331.) Marcum said that Moss never asked any questions about the gas line. (Tr. 633.) He insisted that: “Mr. Moss never showed any concern at all about the gas line.” (Tr. 634.)

Boothe, Moss’ immediate supervisor, also met with Moss at the Judy Low Gap site. (Tr. 666.) The purpose of the meeting was to show him where the gas line was. (Tr. 667.) He testified that:

I showed him where he was entering. I actually took my arms and I said, the right-of-way, Paul. I said, the right-of-way for the gas line is on the ridge. And we were sitting in my truck and he looked out of the windshield, and I told him — I said we’ll be entering here, varying levels. I said once you get through the low gap, I said you’ll be fine. And I said the right-of-way is the top of the ridge, so the gas line is in the right-of way.

(Tr. 669.) According to Boothe, Moss did not ask any questions about what he was to do or about the gas line. (Tr. 669-70.)

Moss began working on the access road on January 31. He had not completed it when he had problems with his bulldozer and shut down for the day. (Tr. 674.)

On the morning of the accident, Moss and Kenneth Smith rode to work together as they did everyday. (Tr. 198.) They left Smith’s house around 4:15 a.m. (Tr. 198.) Smith testified that, as they were getting close to work, Moss said that “he [was] going to be working in a new area and he believed there was a gas line over there and he wasn’t sure where it was.”<sup>3</sup> (Tr. 199-200.) Smith said, “I told him if he didn’t know where it was to get a hold of someone to show him where it was at.” (Tr. 200.)

Later that morning, around 9:00 a.m., Smith said that he heard Moss calling on the CB radio for Boothe. (Tr. 207.) He related that the call was answered not by Boothe, but by Vira. (Tr. 209.) With regard to their conversation, he testified that: “I heard part of it and the part that I heard was that Paul was concerned he might be getting too close to the gas line.” (Tr. 209.) He said that Vira “told him to stay 100 feet from it.” (Tr. 209.)

On that same morning, Jackson Woodard, a Black Castle bulldozer operator, was working on a hill opposite from Moss, but from where he could see him. (Tr. 233.) He testified that:

When Paul got up on the bench he called me on the CB and asked

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<sup>3</sup> The phrasing of this statement is curious, if it took place on the day of the accident, since Moss had already worked on the day before right next to the gas line.

me about the level that he needed to start benching on. I told him that I wouldn't — haven't been up that high on the hill[,] I mean where he was at I could see him, but there was no way I could tell him exactly the coal seam level that he should be benching on, but I told him that I can call one of the foreman and have them get with him and I had a coal operator to call Mike Boothe which was Paul's immediate foreman at the time. That was at 7:00, 7:30 or it was even earlier. I'm not exactly sure, but it was in that time frame. Paul went ahead and worked until a little while later and Mike Boothe had gone down to talk to Paul at the time. Mike Vira came by to take my preshift on my dozer and I told Mike to call Paul. They talked a minute. Mike told Paul to make sure that he stayed at least 100 feet away from that gas line and that was basically all of the conversation that they had.

(Tr. 234.)

Elmer Bishop, an East Cumberland employee, testified that he was running an excavator on the day of the accident. (Tr. 294.) He testified that at around 8:00 a.m. he heard Moss call Vira. (Tr. 296.) He stated that Moss "hollered at Bubba [Vira] and told him he didn't know where the gas line was at, or he didn't have no idea where it was at." (Tr. 296.) He said Vira responded, "just take your time and be careful, I'll send a surveyor there. As far as I recall that's what was said." (Tr. 297.)

Lonnie L. Wood testified that he was a survey lineman for Black Castle on February 1 and was assigned with another man to mark 400 or 500 feet of the gas line in the low gap area. (Tr. 563-64.) He said when they first showed up in the area, they encountered Moss who asked them to call Boothe. (Tr. 571.) He related that Moss asked if they were marking the gas line and they responded that they were. (Tr. 565.) He testified that:

We told him we was setting — we was standing right in the way of the gas line when we had our conversation. We told him it was about 10 or 15 feet behind us, and it was going in each direction, going left and right, just follow the ridge line. It just went on across the property. We didn't say how far it went. It just went across the ridge line.

(Tr. 565.)

Wood said that they had a second conversation with Moss about an hour later when they finished their work at the "top of the mountain." (Tr. 573.) He claimed that he did not remember making a statement to the accident investigator that he told Moss in the second conversation that he was not sure in which direction the gas line was going, but agreed that it was his voice on a recording, made by the investigator, making such a statement. (Tr. 566-71.)



Vira testified, with regard to his conversation with Moss, that: “Paul asked me how far he needed to stay away from the gas line. I told him a hundred feet.” (Tr. 177, 768.) He also testified that Moss asked to see Boothe that morning and he told Boothe that Moss wanted to see him. (Tr. 179-80, 770, 775.) Moss did not say why he wanted to see Boothe. (769-70.) Vira denied that he had a conversation with Moss as described by Bishop. (Tr. 769.)

Boothe testified that Vira told him at the foremen’s meeting that Moss wanted to talk to him. (Tr. 392.) He said that Vira did not tell him why Moss wanted to talk to him. (Tr. 392-93.) He said that he met Moss on the Clarion level, where he was cropping the Clarion seam, while Moss had stopped for lunch. (Tr. 393.) He stated that Moss did not say anything to him about the gas line at the meeting. (Tr. 394.) He testified that the conversation occurred as follows:

When I got there he was talking to the surveyors, the surveyors were going back to their vehicle. I got out. He climbed down off his dozer, come out on the ground and came back to me and we just talked about general stuff for a moment and I asked him what was going on, and we walked to the front of the dozer. He was on the clearing crop. I was always joking with him, telling him good job and all that. I told him, I says, this is great. I said, you know, what do you need? And he said, well, we’re getting, you know — as I progressed, he says, rocks getting a little harder. I want you to know it’s going to be slow. I said, no problem. He said, you know, just want you to know with the high wall, you know, it’s going to be a slow process. And I told him, I said, again, don’t worry about it. I said stay on the clearing and no problem. I’m not going to get on you for going slow.

(Tr. 396-97.)

In analyzing these statements, the first one is Moss remarking to Smith on the way to work that he was not sure where the gas line was in the area he was working. This is properly characterized as a remark rather than an expression of serious concern because of the following exchange:

Q. I just want to ask you a little bit more about your conversation that morning. You said you talked about his concern of the gas line. Did that stand most of the time you were driving to work?

A. No. In fact we were probably getting pretty close to work when he brought that up.

Moreover, however the statement is characterized, it did not put Vira or anyone else in management at Black Castle on notice of any concerns Moss might have had.

Next is the CB conversation with Vira. Vira said that Moss asked how far he should stay from the gas line. Smith overheard the conversation on the radio and, without stating exactly what Moss said, recounted that Moss was concerned he might be getting too close to the gas line. Bishop also overheard a conversation between Moss and Vira and claimed that Moss said that he did not know where the gas line was. Vira testified that Moss asked him how far he should stay from the gas line and he told him to stay 100 feet away from it. Smith heard Vira tell Moss to stay 100 feet from the gas line. Woodard, who did not hear what Moss said, heard Vira tell Moss to stay at least 100 feet from it. Bishop contended that Vira told Moss to be careful and he would send a surveyor there.

With the exception of Bishop's, it is easy to reconcile the statements. It does not strain credulity to conclude that when Smith heard Moss ask how far he should stay from the gas line, he inferred that Moss was concerned that he was getting too close to the gas line. It is also plausible that Bishop interpreted the statement as Moss saying he did not know where the gas line was. What is not reconcilable is Bishop's declaration that Vira said that he would send a surveyor over. There is no doubt that Vira told Moss to stay 100 feet from the gas line. Two witnesses who have no apparent interest in the outcome of this case, Smith and Woodard, verified that that was what was said. No one has made the claim that there was more than one conversation between Moss and Vira concerning the gas line and, other than Bishop's curious statement, there is no evidence of more than one. Accordingly, I find that Moss asked Vira how far he should stay from the gas line and Vira told him to stay at least 100 feet away. To the extent that Bishop's statements cannot be reconciled with the other witnesses, I find that he is not credible.

Wood testified that the surveyors pointed out the gas line to Moss. He did not describe any particular concerns or uncertainty about the gas line on the part of Moss.

Finally, Boothe testified that at their last meeting, he and Moss did not discuss the gas line at all.

Considering all of this, I find that Moss did not give Vira or Black Castle management any reason to believe that the gas line needed to be marked better than it was. Moss' remark to Smith on the way to work was apparently just that. If it was an expression of serious concern, he certainly did not take Smith's advice to ask someone to show him where the gas line was. Instead, he asked Vira how far from the gas line he should stay. When Vira told him 100 feet, he apparently was satisfied. There certainly is no evidence that he said anything to the effect of – "I don't know where the gas line is, how can I stay 100 feet from it?" or, "Have someone mark it for me," or anything like that. Later, when Black asked him if he was all right, Moss said he was doing fine and did not mention the gas line. Still later, when he talked with the surveyors, while he expressed some curiosity about where the gas line went, he did not state any concerns or ask them to proceed to where he was working and show him where the gas line was.

The Secretary's case depends on finding that Moss expressed considerable concern about the location of the gas line and that the company did not adequately address his concern.

However, as noted above, he really did not express concern or ask many questions. The Secretary's case also relies heavily on the assumption that Boothe did not tell the truth when he testified that he had no discussion of the gas line with Moss at their last meeting. That assumption further depends on the previous contention that Moss was very concerned about the location of the gas line, so he *must* have asked Boothe about it.

The Secretary is viewing the case through the emotions of the accident. Prior to the accident, there was no reason, other than being aware of the gas line, for Black Castle or its employees to be particularly concerned about the gas line. They had worked around it for years. Everyone knew where it was. Everyone knew it was marked by the right of way, even if they did not know the exact location of the gas line within the right of way. Based on the evidence in this case, there was no reason for Boothe to suspect that Moss was concerned about the gas line. Furthermore, it was not unusual for Moss to talk to Boothe during the day. The fact that he wanted to tell Boothe the job was going to be slow, rather than ask him about the gas line, is perfectly reasonable under the circumstances. There is nothing in this case which leads to the conclusion that Boothe was not credible.

Moreover, if Moss had followed Vira's guidance and stayed 100 feet from the right-of-way, this unfortunate accident would not have happened. (Tr. 498.) The closest Moss' job called for him to work to the gas line was in the low gap area. Both Marcum and Boothe made clear to him where the gas line was located in that area and he obviously had no problems. Phillip Marsh, who was president of Black Castle at the time the accident, testifying based on a scale map of the area, noted that Moss was approximately 75 feet from the gas line when he began cropping the Clarion seam. (Tr. 735, Resp. Ex. 3.) The map indicates that as Moss cropped the seam he was moving away from the gas line. (Resp. Ex. 3.) Based on the map and Marsh's testimony, Moss was 265 vertical feet from the seam when he struck the gas line. (Tr. 711, Resp. Ex. 3.) However, because he apparently could not go straight uphill, Moss had actually trammed 500 feet from the Clarion seam when he struck the gas line. (Tr. 711, Resp. Ex. 3.)

No one knows why Moss took the bulldozer where he did. (Tr. 495.) The Secretary speculates that he may have been removing loose material from the bench, removing cut trees or creating an access road to the next higher coal seam. (Sec. Br. 30-32.) There is no evidence to support these theories. The pictures of the scene, while they show material in the blade of the bulldozer, do not show loose material or trees being moved, or the necessity for such activity. (Govt. Exs. 4-3, 4-14.) As Marcum testified:

Q. During your investigation of the accident site after this accident, did you have a chance to see whether there was any loose material that needed to be taken down for safety purposes?

A. I've been all over that area, and again, I saw no reason that he was there for any productive issue.

Q. After this accident, did you know whether there were any trees lying on the ground near this area?

A. There were trees all over the area.

Q. And in performing the benching area on the Clarion Seam, would Mr. Moss have had to remove any of those trees for safety purposes?

A. Not in this area, no.

Q. And why not?

A. Much higher than the bench and completely out of the way.

(Tr. 645-46.)

Black Castle had no reason to anticipate that Moss would go above the Clarion seam because it had nothing to do with his work assignment. (Tr. 641.) In fact, the supervisors were not the only ones who were surprised by the location of the bulldozer at the time of the accident. Woodard testified that:

I'm not exactly sure what time the accident was, but it was in the neighborhood of 2:30, in that ballpark. I looked over there and Paul was coming down towards that gas line at that time and distance wise he would have probably been, I'm just guessing, maybe 75 feet before he hit that line. I called Paul on the CB because it struck me funny that he would have been as far away from the place that he was benching and I wasn't sure what was going on[.] I was just going to ask him. Paul did not answer me  
.....

(Tr. 235-36.) Bishop also testified that he was surprised to see Moss up on the ridge because he knew the gas line was up there. (Tr. 300-01.)

I find that up until the time of the accident, neither Moss nor anyone else had given Vira or any other Black Castle person in authority an indication that marking of the actual gas line was necessary. Accordingly, I conclude that conducting an additional on-shift examination or further marking the gas line was not necessary for safety.

#### Conclusion

No one knows why this tragic accident occurred. But the Secretary has not proven that it

occurred because of an inadequate on-shift examination or a failure to mark the gas line better than it was. The evidence is clear that the Black Castle miners and the employees of the company's contractors were aware that the gas line was on the property and that it was marked by the right-of-way. Had Moss followed Vira's instructions to stay 100 feet from the gas line by staying 100 feet from the right-of-way, the accident would not have happened. Had he remained on the Clarion seam, the accident would not have happened. Black Castle's belief that the right-of-way sufficiently marked the gas line, based on the facts available at the time, was certainly reasonable. Accordingly, I conclude that neither the company nor Vira violated section 77.1713(a).

### **Order**

In view of the above, Citation No. 7247101 is **VACATED**, the contest in Docket No. WEVA 2006-891-R is **GRANTED**, and the proceedings in Docket Nos. WEVA 2007-288 and WEVA 2007-421 are **DISMISSED**.

T. Todd Hodgdon  
Senior Administrative Law Judge

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