

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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Washington, DC 20001-2021

July 25, 2008

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2006-439
Petitioner	:	A. C. No. 15-18956-93047
v.	:	
	:	
NATIONAL COAL CORPORATION,	:	Miles Branch Mine
Respondent	:	
	:	

**DECISION**

Appearances: Christian P. Barber, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;  
Charles W. Kite, Esq., General Counsel, National Coal Corporation, Knoxville, Tennessee, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against National Coal Corporation, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815. The petition alleges a violation of the Secretary’s mandatory health and safety standards and seeks a penalty of \$625.00. A hearing was held in Maryville, Tennessee. For the reasons set forth below, I vacate the citation.

**Background**

National Coal Corporation (NCC) operates the Straight Creek #2 Mine, a surface coal mine, in Bell and Harlan counties, Kentucky. On Friday, March 17, 2006, the highwall at the mine collapsed in the late afternoon or early evening. Two pieces of equipment, a highwall miner and a front-end loader, were damaged in the collapse. Don McDaniel, NCC’s Safety Director, notified MSHA of the incident at around 6:00 p.m.

At about 7:30 a.m. the next day, McDaniel, Charles Asbury, NCC General Manager, and Bill Snodgrass, NCC Chief Operating Officer, among others, went to the mine to recover the damaged equipment. After a safety plan was developed and written up, the company began working.

MSHA Inspector Marvin Hoskins was directed by his supervisor to investigate the collapse on the morning of March 18. It took him awhile to find the mine and he did not arrive at the site until sometime after 2:00 p.m. As he drove up to the area of the highwall, it appeared to him that the company's excavator was operating within range of an unsupported highwall which had not been secured. After getting out of his car, he got his camera from the charger and met with Snodgrass, who had walked to meet him. The inspector walked over the grounds and took numerous pictures. As a result of his investigation, he issued the 104(d)(1) citation, 30 U.S.C. § 814(d)(1), being contested in this proceeding.<sup>1</sup>

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

This case is all about perspective. In the company's view, they were safely attempting to remove equipment damaged in the highwall collapse and committed no violation. From the Secretary's vantage point, NCC was removing equipment from within the potential falling distance of the remaining unstable portion of the highwall and, therefore, was working under a dangerous highwall. However, it the inspector's conclusions as he arrived on the scene which govern the outcome, and I find that his slanted perspective caused him to reach the wrong conclusions.

Inspector Hoskins issued Citation No. 7525907, alleging a violation of section 77.1006(a), 30 C.F.R. § 77.1006(a), because:

The mine experienced a failure of the highwall and miners were working under the highwall that was broken loose and had not fallen. The miners were not correcting the condition, they were recovering equipment that was damaged by the highwall failure. They used a bull dozer to remove the damaged forklift. They were also observed using an excavator[] to remove[] rock from the highwall miner beam and head.

(Govt. Ex. 3.) Section 77.1006(a) requires that: "Men, other than those necessary to correct unsafe conditions shall not work near or under dangerous highwalls or banks."

When McDaniel, who had been an MSHA inspector from 1975 through 2006, and Asbury arrived at the mine on Saturday morning, they drew up a written safety plan for removing the damaged equipment. (Tr. 80, 100-101, 117.) The plan provided that no one would work on the left side of the damaged highwall miner, that miners would be posted at different locations around the pit to watch for activity from the highwall and to warn the miners performing the

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<sup>1</sup> Section 104(d)(1) of the Act assigns more severe sanctions for any violation that is "of such nature as could significantly and substantially contribute to the cause and effect of a . . . safety or health hazard" and is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

recovery work of such activity, that the front-end loader would be recovered first and that the miner head would be disconnected from the highwall miner. (Resp. Ex. 2, Tr. 81, 101, 117-118.) The reason no one was to work on the left side of the miner was that the remaining unstable highwall was to the left of the miner. (Tr. 94-95.) The road coming into the mine from the left was blocked off. (Tr. 83.) Before beginning any work, NCC held a meeting with all miners to inform them that no one was allowed to be on the left side of the miner. (Tr. 88.)

The front-end loader (also referred to as a forklift by witnesses), which was on the right side of the highwall miner, was pulled from under the fallen rock by the boom of an excavator.<sup>2</sup> (Tr. 106.) After the front-end loader had been pulled out, it was hooked to a bulldozer and towed completely out of the way. (Tr. 106.) Then, the excavator cleaned the fallen rock off of the front of the highwall miner and the miner was started up and backed out of the area under its own power. (Tr. 95, 106.) After that, the only equipment remaining was the miner head which had broken off from the miner and was under a pile of fallen rock. (Tr. 106.)

The excavator was pulling the rock off of the miner head when McDaniel left the area at 2:10 p.m. (Tr. 86.) Once the rock was removed from the miner head, the plan was to pull the miner head out with the excavator. (Tr. 110-11.)

The excavator was still removing rock from the miner head when Inspector Hoskins arrived at around 2:30 p.m. (Tr. 107-8.) As he pulled up, Snodgrass went over to meet him. (Tr. 120.) The inspector testified that:

[A]s I was pulling up that I could see through the windshield clearly that there was an excavator was [*sic*] digging at a rock pile at the base of the highwall and there was [*sic*] some people on the right-hand side. I noticed a person distinctly had on a white hard hat was standing on the right-hand side. I could see him. As I pulled up I clearly saw him make a hand motion and he started proceeding walking towards me. And at that point I was calling my supervisor to let him know that I had found the operation . . . .

(Tr. 15-16.) Snodgrass arrived while he was still on the phone. (Tr. 16.) Inspector Hoskins got out of the car and told Snodgrass why he was there. (Tr. 16.) Then he got his hard hat out of the car and put it on, got his camera battery off of the charger and got his camera out of the car and the two men proceeded toward the pit area. (Tr. 17.) The inspector began taking pictures as he was walking toward the pit. (Tr. 17.)

Inspector Hoskins testified that he issued the citation because he believed miners were

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<sup>2</sup> An excavator is a backhoe on tracks. It has a boom with a reach of approximately 40 feet and a bucket on the end of the boom which is pulled back toward the excavator by the boom. (Tr. 75-76.)

working under a highwall which had broken loose, but had not fallen and

[t]he miners were not correcting the condition. They were recovering equipment that was damaged by the highwall failure. They used a bulldozer to remove the damaged forklift, and that is per discussion with them on Saturday. And they were observed using an excavator to remove rock from the highwall miner and the head, and that's what I observed them doing when I arrived.

(Tr. 40.) He went on to state that: "The operator was not supporting the highwall. He was actually destabilizing the highwall by prying loose rubble loose from the base of it. And that made it a very hazardous condition . . ." (Tr. 41.) In fact, the inspector did not see either the front-end loader or the highwall miner removed. (Tr. 55-57, 65-66.)

More importantly, although Inspector Hoskins took numerous photographs during his investigation, 12 of which were put in evidence, there is no photograph of the excavator, either in operation or at rest. That is because when the inspector met Snodgrass, he told Snodgrass that the excavator should not be in the pit and Snodgrass signaled for it to be removed. (Tr. 52, 121.) Nonetheless, the inspector testified, and indicated on one picture, that the excavator was located to the left of the miner head. (Govt. Ex. 7, Tr. 22.)

I find that Inspector Hoskins was mistaken in his location of the excavator. In the first place, all of the company witnesses testified that the excavator was operating well to the right of the miner head. (Tr. 81-82, 102-03, 123.) While their relationship with NCC could provide a motive for not telling the truth, the facts corroborate them. The safety plan, drawn up before any work began, specifically provided that all work would be done to the right of the highwall miner. Further, the sole purpose of the work being performed was to recover the damaged equipment and there was no damaged equipment to the left of the miner head. There was no reason for the excavator or any part of it to be to the left of the miner head. Finally, the company's stake in this case is not significant enough to justify inducing its employees to contrive evidence.

On the other hand, the only view that Inspector Hoskins got of the excavator was obtained while he was driving his car on a dirt road into the pit, parking his car, calling his supervisor, getting out of his car, putting on his hard hat, getting back in his car to get his camera battery and camera, and meeting Snodgrass. It is apparent from the first picture he took, another he took from the other side of the pit which shows the location of his red van and one from behind his van, that at best he was viewing the scene from a 30 degree angle. (Govt. Exs. 5, 14 & 15, Tr. 32.) From that perspective, it would difficult to place the excavator in its exact location. Indeed, the inspector admitted as much on cross examination:

Q. Let's look back at Seven. Can you testify with absolute certainty that that excavator was on the left-hand rather than the right-hand side of that beam that's clearly visible in Exhibit Seven?

A. What I can testify to is that I saw the excavator bucket touching rock. Now, whether it was on the left side of the beam or on the right side of the beam is irrelevant due to the height of the highwall, that it could have reaching from the left-hand side or the right-hand side of that beam.

(Govt. Ex. 7, Tr. 54.)

The location of the excavator is relevant, however. As the head-on picture of the miner head (also referred to as a beam) and highwall clearly shows, the head is several yards to the right of the unstable portion of the highwall that had not fallen. (Govt. Ex. 7.) There was no dangerous highwall to the right of the miner head.

Accordingly, I find that the excavator was not working under a dangerous highwall. Nor was it prying loose rubble from the base of the unstable highwall. Furthermore, I find the opinions of McDaniel, Asbury and Snodgrass, that if the remaining unstable highwall, which was leaning back against the wall from which it had become disconnected, did collapse, it would slide straight down the wall, more persuasive than the inspector's assumption that it would fall forward from the top. (Tr. 42, 85, 91, 105, 124.) Consequently, I find that the excavator was not working under an unstable highwall.

Further, the evidence does not support Inspector Hoskins' conclusion that the front-end loader was removed from under the unstable highwall. The Secretary's brief does not address this issue in its Conclusions of Law. (Sec. Br. 15-18.) Moreover, as previously noted, the inspector did not observe the removal, but based the charge on "the basis of the testimony that they had walked in there on foot. And the exact location of the forklift, I could not have determined at that time." (Tr. 56-57.) None of the miners who provided this information to the inspector testified at the trial. Even so, he placed the loader "between the highwall and the highwall miner on the right-hand side of the highwall." (Tr. 56.) This conforms to the testimony of McDaniel and Asbury that the front-end loader was well to the right of the hazardous highwall when it was removed. (Tr. 88, 106.) Therefore, I find that the loader was not removed from under a highwall that was broken loose and had not fallen.

In summary, the Secretary has not proven that NCC violated section 77.1006(a). The company reported the highwall collapse to MSHA as soon as it happened. Company employees arrived at the mine the next morning to begin cleaning up. They first drew up a safety plan to insure that no work was done under the remaining unstable highwall. As an additional safety measure, spotters were posted around the pit to sound the alarm in case the highwall started moving. They then began removing the damaged equipment and were almost finished when the inspector finally arrived on the scene. Based on a quick glimpse of the scene as he drove up, he concluded that work was being performed under an unstable highwall. However, his view was

made from a bad perspective and, thus, his conclusions were also bad. None of the other evidence supports his assumptions. Accordingly, I conclude that the Secretary has not met her burden of proof and the citation must be vacated.

**Order**

In view of the above, it is **ORDERED** that Citation No. 7525907 is **VACATED** and this proceeding is **DISMISSED**.

T. Todd Hodgdon  
Administrative Law Judge

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