

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 27, 2008

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2007-156
Petitioner	:	A.C. No. 12-02010-120893
	:	
v.	:	
	:	Air Quality #1 Mine
BLACK BEAUTY COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Travis W. Gosselin, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;
R. Henry Moore, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Black Beauty Coal Company (“Black Beauty”), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). An evidentiary hearing was held in Evansville, Indiana. The parties introduced testimony and documentary evidence and filed post-hearing briefs.

I. BACKGROUND AND SUMMARY OF THE EVIDENCE

Black Beauty is an underground coal mine in Knox County, Indiana. This case involves Citation No. 6666262, issued on January 17, 2007 under section 104(d)(1).¹ The citation was issued by MSHA Inspector David Cox and alleges a violation of section 75.360(b). The citation states, in part:

An adequate preshift examination of the #63 crosscut between the 4MNA belt and travelway (approach to 2L4N seal construction area) was not performed. An area of roof in this crosscut is loose and

¹ This citation was originally issued as a section 104(d)(2) order. This order was modified to a section 104(d)(1) citation by order of law. (Stips. ¶ 11 and ¶ 12).

broken (approximately 4 feet by 8 feet by 2 inches to 6 inches thick). Miners are required to travel through this area to the seal construction area.

Inspector Cox determined that an injury was reasonably likely and that any injury could reasonably be expected to be fatal. He determined that the violation was of a significant and substantial nature (“S&S”) and that the negligence was high. The safety standard provides that the person conducting a preshift examination “shall examine for hazardous conditions, test for methane and oxygen deficiency, and determine if the air is moving in the proper direction at the following locations: (1) roadways, travelways and track haulage ways where persons are scheduled, prior to the beginning of the preshift examination, to work or travel during the oncoming shift.” The Secretary proposes a penalty of \$10,300.00 for the violation.

Inspector Cox inspected the mine with David Wininger, a safety technician in Black Beauty’s safety department. Inspector Cox testified that during his inspection on January 17, he observed a large rock hanging off two straps that were “bowed down.” (Tr. 19). The inspector determined that the rock was loose and it posed a hazard to anyone who had to travel through the #63 crosscut. He observed the condition as the inspection party traveled in a vehicle after having been in the seal area. He did not observe the condition when they traveled under the rock to the seals. He is not sure why he did not see the cited condition as he traveled in by toward the seals. (Tr. 44-45). When the inspection party traveled away from the seals, Inspector Cox observed the rock “hanging there off these two 16 inch straps.” (Tr. 20). The straps were covered in rust and they were about six inches wide. The straps were bent down.

Any miners traveling to the seal area would have to travel through this crosscut. The inspector testified that the condition was obvious and it presented a hazard. The inspection party had already driven past the rock on the way out of the area when the inspector told Wininger to stop the vehicle. After walking back to the area, the inspector determined that he would issue a citation for failing to adequately support the roof. He also stated that he would look at the preshift examination books to see if the condition had been noted.

Inspector Cox testified that the rock was easy to see when traveling out of the seal area. (Tr. 22). The rock was not “supported or controlled.” The inspector believes that the crosscut was not required to be preshifted until miners began working on the seals because miners would otherwise not travel through the crosscut. Once work began on the seals, the preshift examiner should have regularly traveled through the crosscut and preshifted the area. The straps under the rock were supplemental support and they were not part of the roof control plan. (Tr. 25, 38; Ex. S-4). These straps are designed to control the thinner overlying strata that may break loose. The roof support used in the area were five feet long, fully grouted resin bolts. (Tr. 39). The loose rock was about four feet wide and eight feet long. It was six inches thick at one end and tapered down to about two inches thick. (Tr. 25). The straps were six inches wide and a sixteenth of an inch thick. He estimates that the rock weighed several hundred pounds. Inspector Cox determined that the straps were very distorted because they had been “pulled down” by the rock. (Tr. 26, Ex. S-4). He was

concerned that the rock could fall if the strap pulled through any of the roof bolt heads used to support the strap. A miner would likely suffer a fatal injury if the rock were to fall on him. Even if a small portion of the rock were to fall, it could seriously injure a miner.

Inspector Cox testified that the preshift examination book did not contain any notations about the cited rock. Miners rely on these books to assure themselves that everything in a given area is safe. If a hazard is noted, the condition can be corrected. There were two miners working at the seals at the time of this inspection. The inspector determined that the company's negligence was high because the condition was obvious and extensive. The preshift examiner should have noted the condition of the roof and reported it in the preshift book. (Tr. 31, 58). The inspector did not talk to the preshift examiner about the condition. (Tr. 47). Inspector Cox testified that he has issued numerous citations to Black Beauty for inadequate preshift examinations and he has talked to mine management about it. The inspector also believes that the cited condition must have existed for at least five shifts because there was "roadway dust" on the rock. (Tr. 33). Exposure to the mine environment increases the likelihood that the rock and straps will deteriorate and the rock will fall. (Tr. 34).

Inspector Cox also testified that the cited condition was a result the operator's unwarrantable failure to comply with the safety standard because this mine had been issued numerous citations by several inspectors for violations of section 75.360. The inspector has personally counseled management about improving preshift examinations at the mine. (Tr. 34-35). Inspector Cox testified that the condition was extensive and obvious. He said that the preshift examiner must have been "dreaming" when he conducted his examination in this area. The failure to report the cited condition in the record book constituted aggravated conduct.

David Winger testified that one of his duties is to travel with MSHA inspectors during their inspections. He has been a preshift examiner for about 18 years and he is a certified mine examiner. (Tr. 60-61). He was also a roof bolter for about five years. On the day of Cox's inspection, he was driving an open-topped, three-passenger diesel vehicle. (Tr. 62; Ex. BB-5). The mine roof is clearly visible from the vehicle. The inspection party traveled through crosscut #63 on their way to the seals. (Tr. 63, Ex. BB-1). The inspector did not make any comments about the cited rock on the way to inspect the seal project. Crosscut #63 is about two miles from the active areas of the mine. (Tr. 77).

On the way back out from the seals, Winger drove past the cited rock into the main travelway when the inspector asked him to stop because he wanted to go back and look at something. (Tr. 65-66). Inspector Cox walked back into the crosscut to observe the rock. Winger tried to pry the rock down with a bar for about five minutes but he could not get it to move. Winger testified that there were two straps across the rock plus at least one roof bolt through the rock. After he could not get any of the rock down, Winger was convinced that the rock was secure. (Tr. 67-69, 71). A roof bolting machine was subsequently brought into the area to get the rock down. Winger does not believe that the rock presented a hazard. (Tr. 68). He also believes that the straps were still viable despite any rust. He was not able to get the straps to break with his pry bar. Winger does

not believe that the rock needed to be recorded in the company's book because it did not create a safety hazard. (Tr. 76).

Thomas Burnett also testified for Black Beauty. At the time that citation was issued, he was on the outby crew building the seals. (Tr. 79). The seal construction project was scheduled to last a couple of weeks. He could not recall how long he had been constructing these seals but it would have been at least a couple of days. (Tr. 81). After Inspector Cox ordered that the rock be taken down, Burnett and his coworker at the seals, Emery Caine, tried to take it down with pry bars. They also tried to break the straps apart with the pry bars but "we couldn't do that either." (Tr. 84). It "didn't take long to figure out that we were not going to do anything with two pry bars," so a rock bolting machine was brought into the area. (Tr. 82-83). They used the bolting machine to break the rock into smaller pieces by slamming drill steel into the rock with the hydraulic boom. It took them about 45 minutes to an hour of actual work time to get all of the rock down. (Tr. 83). He believes that the rock would still be in the roof if it had not been taken down on January 17, 2007. (Tr. 86). Roof bolts and the straps were adequately supporting the rock. (Tr. 90). He does not believe that the effectiveness of the bolts and straps had been compromised. (Tr. 91-92). The rock had only separated from the top a small amount. (Tr. 94). He believes that the plates that were installed with the roof bolts to secure the straps were flush with the roof but he does not know how tight they were. (Tr. 95-96).

Craig House is the mine examiner who performed the preshift examination in the area of the seals on January 17, 2007, including crosscut #63. (Tr. 100; Ex. BB-3 p.20). House testified that he performs his examinations along roadways using a small, open-top vehicle. He did not see any hazards in crosscut #63 that day. (Tr. 103). He did note other hazards during his examination on the January 17, including loose roof bolts in other areas. (Tr. 104). House would have looked at the subject rock because he is constantly scanning the roof during his examinations, but he did not see any loose roof. (Tr. 110). House does not believe that the cited rock presented a hazard to miners. (Tr. 108, 111). The rock was held up by straps that were not loose. The rock was pushed up tight against the roof by the straps. (Tr. 112). He did not notice any changes in the rock or the straps over the period of time that he had been performing preshift examinations along crosscut #63. (Tr. 115).

Roland Madlem was a safety manager for Black Beauty in January 2007. He has held many jobs at the mine since he started working there in 1993. When he was a roof bolter, he developed a good feel for "what's actually in the roof." (Tr. 120). There have been no injuries from roof falls in outby areas of the mine in the past five years. Madlem testified that straps are used to help support the skin of the roof, but that straps are not the primary means to control the roof. The skin of a roof tends to weather and wants to fall away from the roof. The straps are designed to hold the deteriorating skin up against the roof. By examining the roof, a preshift examiner can determine whether a rock is weathering. (Tr. 128). He looks for rocks separating from the roof and folding around the straps. The roof control plan did not require straps but they were permitted in the plan. (Tr. 121). Straps were used when the mine opened in 1993. Since 2003, wire mesh has been used because it provides increased coverage. The straps bend to conform to the shape of the rock as the

roof bolts and plates used to install the straps are tightened against the roof. (Tr. 122). Mr. Madlem took photographs of the roof after the rock had been removed and additional bolts had been installed. (Tr. 123; Exs. G-3, G-4). The straps were significantly damaged during the process of taking down the rock.

Madlem also testified that Mr. House is a very competent examiner. (Tr. 124). He notices when bolts have been installed too far from the rib and when bolts are loose. Madlem testified that House did an adequate examination of crosscut #63 on January 17, 2007. The straps were doing their job in keeping the skin against the roof so it would not fall. *Id.* Rocks at the mine are frequently supported by straps. Mr. House did not see the rock in question as creating a hazard because the rock was not putting so much stress on the straps that it was actually “folding down away from the roof between the straps.” (Tr. 125). The fact that the rock was difficult to take down shows that it was not a hazard to miners. (Tr. 129). It is unlikely that a rock the size of the one at issue would fall without first putting heavy stress on the straps and separating away from the roof. In addition, the rock was not located in an active area of the mine. He does not believe that it was reasonably likely that the rock would fall or that anyone would be injured. It is extremely rare for straps to fail. Indeed, they usually only fail when they are struck by a piece of machinery. (Tr. 127).

II. BRIEF SUMMARY OF THE PARTIES’ ARGUMENTS

The Secretary argues that Black Beauty violated section 75.360(b) because it failed to conduct an adequate preshift examination of the #63 crosscut on January 17, 2007. Inspector Cox clearly testified that he observed a large rock hanging on two metal straps that were attached to the mine roof. The straps were about 1/16th of an inch and about 6 inches wide. The straps appeared to be distorted, bent, bowed down, and covered with rust. Although these straps are designed to bend, their integrity is compromised if they are twisted, bent, and distorted. The straps are designed to hold up the skin of the roof where needed but not to hold up large rocks.

Drawing on his 40 years of underground mining experience and his experience as a preshift examiner, Inspector Cox determined that the rock posed a hazard to miners and should have been noted on the mine’s preshift examination books. At least two miners were working at the seal construction site on the day of the inspection and they would have traveled through the #63 crosscut.

Preshift examinations are of fundamental importance in assuring a safe working environment. Preshift examiners must identify conditions that could pose a hazard to miners and record these conditions in the preshift book so that the condition can be eliminated. The Secretary contends that the preshift examiner’s failure to note the dangerous condition in the record book created a significant and substantial hazard and demonstrated aggravated conduct that is imputable to Black Beauty.

Black Beauty states that Craig House was an experienced miner who had been conducting

examinations for several years. He was also an experienced roof bolter, which increased his ability to understand and evaluate roof conditions. The evidence establishes that his examination that day had been thorough and complete. House did not believe that the conditions identified by the inspector created a hazard to miners. He observed the rock supported by roof-bolted straps and, based on his experience, determined that the rock did not present a hazard. He had examined the #63 crosscut over several weeks and he had not observed any changes in the roof.

Mr. House's judgment is confirmed by the amount of effort it took to take down the rock. The miners tried to bring down the rock using pry bars. These miners were unable to bring down the rock, break the rock apart, or tear open the straps. The rock was only brought down when a roof bolting machine was brought in. The boom was used to break the rock and bring it down. It took 45 minutes of continuous effort by the operator of the roof bolting machine to bring down the rock. The effort required to bring down the rock demonstrates not only that no hazard was present but that Mr. House's evaluation of the rock during his preshift examination was correct.

III. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

It is well recognized that roof falls pose one of the most serious hazards in underground coal mines. *United Mine Workers of America v. Dole*, 870 F.2d 662, 669 (D.C. Cir. 1989). The roof in underground coal mines is inherently dangerous and roof falls have historically been a leading causes of fatal accidents. A mine examiner must be unceasingly vigilant when inspecting the roof to protect miners who work or travel in the area. It is critical that preshift examiners conduct thorough and detailed examinations of the mine and that they pay particular attention to the condition of the roof.

The #63 crosscut where the rock was located was a roadway or travelway through which miners were scheduled to pass during the shift. Thus, the crosscut was required to be preshifted. There is also no question that Craig House conducted an examination in the #63 crosscut. The issue is whether the rock in question was a "hazardous condition" that was required to be recorded in the mine's record book.

Both Mr. House and Inspector Cox are experienced underground coal miners. In addition, they are both experienced mine examiners. Inspector Cox testified as to why he believes that the rock presented a hazard and Mr. House testified as to why he did not believe that the rock was hazardous. A review of the evidence is necessary to resolve this issue.

The rock in question was made up of laminated shale material. (Tr. 129, 133). It was supported by at least one roof bolt and two metal straps that had been installed when the area was developed. The rock was being held against the roof by these straps. Three different miners, together and individually, tried to pry down the rock without success. They also tried to break up the rock and tear open the straps. The rock was eventually brought down using a diesel roof bolter. The operator of the roof bolter fractured one end of the rock and then used the boom of the bolter to push the rock off the other straps. It took about 45 minutes of continuous work to bring down the

rock. (Tr. 83-84).

Mr. House testified that he had inspected the crosscut several times in the week prior to January 17, 2007, and he did not notice any changes in the roof. During his examination, House reported a rib roll and a loose roof bolt in other areas that he examined. (Tr. 104, Ex. BB-3, p. 20). On other days, Mr. House reported roof bolts that were too far from the rib. (Tr. 105, Ex. BB-3, p. 14). The evidence shows that Mr. House pays attention to detail when he conducts his examinations and the testimony of Mr. Madlem confirms this fact.

I find that the Secretary failed to establish a violation of section 75.360(b). I credit the testimony of Wininger, Burnett, House, and Madlem as to the condition of the rock and the efforts that the company took to bring down the rock. There was only a small gap between the rock and the roof because the roof-bolted straps were holding the rock against the roof. Witnesses for Black Beauty credibly testified that, when the straps were installed, they were bent to conform to the shape of the rock. Four rock bolts with plates were installed evenly along each of the 16 foot long straps. (Tr. 134). The straps bend to conform to the shape of the rock as the roof bolts are installed. I credit the testimony of Black Beauty's witnesses that the effectiveness of the roof bolts and the straps had not been compromised. Consequently, it does not appear that the straps had been "pulled down" by the weight of the rock. Although there was some rust on the straps, miners using pry bars could not get to straps to break. In addition, the rock in question was about two miles from the active areas of the mine. There is no evidence that the top in or around crosscut #63 was working or otherwise sloughing off. Mr. House credibly testified that the roof in the crosscut had not changed over the week or so that he had been conducting examinations in the area.

I find that the rock did not create a hazard to miners on January 17, 2007. It took a significant effort to remove the rock. As stated above, a rock bolting machine was brought in and the boom on the machine was used to thrust drill steel into the rock to break it. I credit the testimony of the company's witnesses that it was unlikely that the entire rock or pieces of the rock would have fallen on January 17 or at anytime soon thereafter. It may well be that at some time in the future the rock would have pressed down against the straps and presented a hazard that was required to be reported. I find, however, that the preponderance of the evidence establishes that on January 17, the rock did not present a hazardous condition. As a consequence, Mr. House was not required to report it in the mine's outby preshift record book.

I recognize that Inspector Cox has been a mine examiner and has worked in several underground coal mines, including the subject mine, but his inspection of crosscut #63 was, by necessity, short. He reached his conclusion that the rock posed a hazard after a brief look at the rock. I do not doubt that he genuinely believed that the rock posed a hazard to miners that should have been recorded. The evidence shows, however, that the rock was stable, was sufficiently supported, and did not present a hazard. The evidence also shows that Mr. House was a competent mine examiner and that he takes his responsibility seriously. It is crucial that preshift examinations at the mine be conducted in a thorough and competent manner so that hazardous roof conditions are promptly corrected.

IV. ORDER

For the reasons discussed above, Citation No. 6666262, issued on January 17, 2007, is **VACATED** and this proceeding is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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