

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
Washington, DC 20001-2021

October 12, 2005

D&D ANTHRACITE,	:	CONTEST PROCEEDINGS
	:	
Contestant	:	Docket No. PENN 2004-221-R
	:	Citation No. 7006460; 8/11/04
v.	:	
	:	Docket No. PENN 2004-227-R
	:	Citation No. 7006487; 8/11/04
SECRETARY OF LABOR,	:	
MINE SAFETY & HEALTH	:	Docket No. PENN 2004-230-R
ADMINISTRATION	:	Citation No. 7006490; 8/11/04
Respondent	:	
	:	Primrose Slope Mine:
	:	ID 36-08341
	:	
SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY & HEALTH	:	
ADMINISTRATION	:	Docket No. PENN 2005-113
Petitioner	:	A.C. No. 36-08341-49183
v.	:	
	:	
D&D ANTHRACITE	:	Primrose Slope
Respondent	:	

DECISION

Appearances: Earl W. Kieffer, 290 Swartara Road, Tremont, Pennsylvania, for the Operator;
Brian J. Mohin, Esq., United States Department of Labor, Office of the Solicitor,
Region III, Suite 630E, The Curtis Center, 170 South Independence Mall West,
Philadelphia, Pennsylvania, for the Secretary.

Before: Judge Weisberger

Statement of the Case

These consolidated proceedings are before me based upon Notices of Contest filed by D&D Anthracite (“D&D”) contesting citations issued by the Secretary of Labor (“Secretary”) alleging violations of various mandatory safety standards set forth in Title 30, Code of Federal Regulations. In addition, the Secretary filed a petition seeking the imposition of a civil penalty based on D&D’s alleged violation of the standards at issue. The cases were heard on September 14, 2005 in Harrisburg, Pennsylvania.

I. Citation No.s 7006726 and 7007496 and Order No.s 7006487 and 4371417

At the hearing, the Secretary indicated that it had vacated Citation No.s 7006726 and 7007496 and Order No.s 7006487 and 4371417. Accordingly, these Citation and Order No.s are dismissed, and Docket No. PENN 2004-227, is **Dismissed**.

II. Citation No. 4371411

At the hearing, after both parties rested, a bench decision was rendered which is set forth below, with the exception of corrections not relating to matters of substance.

D&D Anthracite Mine is an underground coal mine. The operator is David A. Lucas.

On August 11, 2004, the mine was inspected by MSHA Inspector, Ronald Pinchorski accompanied by his supervisor, Lester Coleman. According to the Inspector, he and his supervisor arrived at the mine at approximately 9 a.m., at which time they observed some men at the portal. At approximately 9:15 a.m., Pinchorski and Coleman met with Lucas in the latter's office. According to the Inspector, he asked Lucas if he had done a pre-shift examination. Pinchorski testified that he was positive that Lucas said "not yet". (Tr. 14, 36) According to Pinchorski, he thought Lucas had also said, "[s]omething about going down and doing it now or something like that." (Tr. 15) According to the Inspector, Lucas then stood up, put on his gear and went underground. Pinchorski assumed that Lucas went underground to make an inspection, that he went underground alone, and that the other men were already underground. While Lucas was underground, the Inspector checked the pre-shift examination book and saw that there was not any notation with regard to a pre-shift examination having been performed on August 11, 2004.

At approximately 9:45 a.m. after Lucas returned, the Inspector went underground to the working areas of the mine along with Lucas and Coleman. They went below in a buggy that was operated from above by the hitch operator, Darryl Lucas. When the Inspector arrived below ground, he observed two men digging hitches. The Inspector opined that these men had been working prior to Lucas' inspection. He indicated that this opinion was based upon the fact their clothing were dirty and they had been underground before Lucas had gone underground to perform his inspection.

The Inspector indicated that when he was underground, he did not observe any markings of any pre-shift examination having been made on August 11, 2004.

On cross examination, the Inspector indicated that he had difficulty remembering the statements that Lucas made to him because the incidents at issue occurred over a year ago. Pinchorski indicated that Lucas, who was approximately 10 feet away, during the conversations, was not directly facing him. Also, the Inspector indicated that he did not understand every word spoken by Lucas due to a combination of factors, including Lucas' accent, the speed of his speech, and the fact that there were times that he did not talk with his mouth open. Pinchorski indicated that, on a scale of one to ten, with ten able to understand every word and one being unable to understand any word at all, his understanding of the words enunciated by Lucas were at the level of seven.

Coleman testified and confirmed that he was present during the conversation between Lucas and the Inspector. He also confirmed that in response to a question as to whether a pre-shift examination had been performed, Lucas responded "[n]ot yet," (Tr. 49) and that he was going to do it shortly. Coleman indicated that he did not have any difficulty understanding Lucas. Coleman also corroborated the Inspector's testimony that he did not observe any markings of a pre-shift having been performed on August 11, 2004.

On the other hand, Lucas testified that when he arrived at the mine early in the morning of August 11, there was no one else there. According to Lucas, at approximately 8:15 a.m, he entered the mine by being lowered with the hoist. The only other person at the mine was the hoist operator, Darryl Lucas. Lucas¹ indicated that he checked the gangway overcast, measured the air flow, checked ribs, top rock, and checked for the presence of methane and black damp.

Lucas placed his initial in markings that he made at four locations. He indicated that he also placed a marking on a diagonal set of timbers at the gangway face. According to Lucas, there were approximately 40 to 50 markings that had been placed at that location. He testified that he made a marking on a set of column lines approximately 1 inch x 8 inches x 10 feet, which were

¹In this decision, David Lucas is referred to as "Lucas".

diagonal, and indicated that this area was also filled with markings. According to Lucas, he made markings on timbers that also were slanted diagonally, at a pump, by the switch boxes that were 30 to 40 other markings at that site. He indicated that the last marking that he made was on a board (that was approximately 1 inch x 6 inches and 1 foot long, that was at approximately a 15-degree pitch) was laying on the floor. Lucas further explained that he completed his inspection at approximately 8:45 a.m., when he arrived back on the surface from the hoist. According to Lucas, he did not make any entry in the pre-shift book because he had just learned of the presence of inspectors, which caused him some anxiety, and he decided to deal with them first. Lucas indicated that subsequently, at approximately 9:15 a. m., he took Gurney Bixler and Jeff Dinger underground.

Regarding the conversation that he had with the Inspector that morning, Lucas indicated that when he was asked whether he had done a pre-shift examination, he answered, "You bet." (Tr. 73) Lucas indicated that when he was asked whether he had filled out a pre-shift report entry in the pre-shift book, he answered, "Not yet." (Tr. 74) According to Lucas, at approximately 10 a.m., he entered the mine with the Inspector.

Darryl Lucas testified and, in essence, corroborated David Lucas' testimony that at approximately 8:15, he lowered David Lucas in the buggy or hoist; that there was no one else there; that in lowering the hoist with David Lucas, he made three stops going down and three stops coming back from the lowest level, and that the total time that elapsed was approximately 45 minutes. Dinger also corroborated Lucas' testimony that he went on the hoist underground with Bixler and Lucas at approximately 9:15 a.m.

The Inspector issued a citation under 30 C.F.R, Section 75.360(a)(1), which in essence provides that a pre-shift examination must be performed, and that no persons are allowed underground unless the pre-shift examination has been completed.

The Secretary appears to assert the position that this standard has not been complied with; that an inspection had not been done prior to employees going underground. This appears to be based on statements attributed to Lucas by the Inspectors that when asked whether a pre-shift examination had been performed, he told them "Not yet." This was the testimony by the Inspector

and corroborated by Coleman. Also, the Secretary's position appears to be based upon the fact that the Inspector and Coleman did not observe any examiner markings which indicated to them that a pre-shift examination had not been done on August 11 and that there was not any entry in a pre-shift examination report. Also, the Secretary appears to infer that when Lucas left, after discussing the pre-shift examination with the Inspector, he went to do a pre-shift examination. Also, the Secretary would infer that men were already underground. This appears to be based upon two factors, 1) that when they were observed later on, they were working and were dirty, and 2) that when the Inspectors saw the men at 9 a.m., they were at the portal, which would appear to raise an inference that they were ready to go underground at that time.

The Secretary's case appears to be, in large part, based upon inferences to be drawn regarding the critical issues here and a time line relating inspections to men below. I considered the Secretary's case, but I place more weight on the testimony of the Company's witnesses. I note, first of all, that with regard to the critical issue as to the time line or relationship between a pre-shift examination and employees being below, neither of the Secretary's witnesses had any personal knowledge of these events. They did not observe the employees in question going down to the mine. Instead, I place most weight on the Company's witnesses with regard to the time line of events, as their testimony is based upon their actions, and, hence, based upon personal knowledge. In this sense, I note that the testimony of Lucas with regard to the time line and the performance of a pre-shift examination between approximately 8:15 and 9 a.m., that morning was based upon his personal knowledge. I observed his demeanor, and found him to be a credible witness in this regard. Also, his testimony was corroborated by Darryl Lucas, relating to the question as to when the men went below in relation to this pre-shift examination. Lucas' testimony was corroborated by Dinger. Also, although Lucas testified as to having made some markings with his initials and the Inspectors testified that they did not observe any markings for August 11, I do not find the general testimony of the Secretary's witnesses to outweigh the specific testimony of Lucas. In this regard, I note the detailed testimony of Lucas with regard to the positions where he made the markings.

For all these reasons, I find that the Secretary has not established that there was not a timely pre-shift examination done

in this case. I find, therefore, that the Secretary did not establish a violation of Section 75.360(a)(1), and that accordingly, the Order No. 70060071 shall be **Dismissed**.

III. Citation No.s. 7006460, 7006490 and 4371416

At the hearing the parties negotiated a settlement regarding these citations. Subsequent to the hearing, the Secretary filed a Motion to Approve the Settlement. These citations were originally assessed at \$2, 635 and the parties propose to have the penalties reduced to \$825. Based on the representations in the Motion, and the record in these matters, I find that the settlement is appropriate and within the framework of the Federal Mine Safety and Health Act of 1977, and I **Grant** the motion.

Order

It is **Ordered** that 1) Citation No.s 7006726 and 7007496 and Order No.s 7006487 and 4371417 are **Dismissed**, and Docket No. PENN 2004-227 is **Dismissed**, that 2) Citation No. 4371411 is **Dismissed**. It is further **Ordered** that 3) Respondent pay a total civil penalty of \$825 within 30 days of this decision.

Avram Weisberger
Administrative Law Judge

Distribution List:

Earl W. Kieffer, 290 Swartara Road, Tremont, Pennsylvania 17981

Brian J. Mohin, Esq., United States Department of Labor, Office of the Solicitor, Suite 630E,
The Curtis Center, 170 South Independence Mall West, Philadelphia, Pennsylvania 19106-3306

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