

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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April 4, 2000

RAG EMERALD RESOURCES CORP.,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. PENN 99-2-R
	:	Citation No. 7013288; 9/29/98
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Emerald No. 1 Mine
Respondent	:	Mine ID No. 36-05466
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 99-201
Petitioner	:	A. C. No. 36-05466-04136
v.	:	
	:	
RAG EMERALD RESOURCES CORP.,	:	
Respondent	:	Emerald No. 1 Mine

DECISION

Appearances: R. Henry Moore, Esq., Buchanan Ingersoll Professional Corporation, Pittsburgh, Pennsylvania, on behalf of RAG Emerald Resources Corp.;
Andrea J. Appel, Esq., Office of the Solicitor, U.S. Dept. of Labor, Philadelphia, Pennsylvania, on behalf of the Secretary of Labor.

Before: Judge Melick

These case are before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.*, the “Act,” to challenge Citation No. 7013288 and the civil penalty assessed for the violation charged therein. The general issue before me is whether RAG Emerald Resources Corp. (RAG) violated the cited standard as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

Citation No. 7013288 was issued on September 29, 1998, pursuant to Section 104(a) of the Act. It alleges a violation of 30 C.F.R. § 75.360(b)(10) and charges as follows:

Certified persons were assigned to perform work in areas that did not have a pre-shift examination performed. The work was scheduled to the examiners prior to the mine being pre-shifted examined for the oncoming shift. These areas generally involved people being assigned to perform work in return air courses,

escapeway and bleeder entries.

The cited standard, 30 C.F.R. § 75.360(b)(10), provides as follows:

(b) The person conducting the pre-shift examination shall examine for hazardous conditions, test for methane and oxygen deficiency and determine if the air is moving in its proper direction at the following locations.

* * *

(10) Other areas where work or travel is scheduled prior to the beginning of the pre-shift examination.

The specific issue before me then is whether the areas that were the subject of the citation had to be pre-shift examined under 30 C.F.R. § 75.360(b)(10).

Stipulated Facts

The parties have reached multiple stipulations, the following of which are relevant to this issue:

The areas that are at issue in this proceeding, the work that was done and the dates on which it was performed are as follows:

August 27, 1998	218 left return	mopped float dust
August 27, 1998	H panel belt	set two posts
August 27, 1998	H panel belt	set two posts
September 2, 1998	218 right return	set post

The persons who performed the above-described work were certified mine examiners who conducted supplemental examinations before they began the work. Certified examiners are authorized to perform examinations under 30 C.F.R. § 75.360, § 75.361 and § 75.362.

Mine management did not have pre-shift examinations performed for such work.

Mine management was aware, prior to the start of the pre-shift examinations on the shifts in question, that the above-described work needed to be done. Such conditions had previously been reported during the weekly mine examinations conducted under 30 C.F.R. § 75.364.

Prior to the start of the specific shifts in question, Respondent's mine management expected this work to be performed during these shifts, provided that sufficient hourly

personnel reported for work in the shifts.

Sufficiently hourly personnel to accomplish the specific work in question did report for work on the two shifts on August 27, 1998 and September 2, 1998.

On the dates and shifts at issue, management had pre-shift examinations performed of the active working sections and other areas of the mine where miners work or travel on a regular basis on each shift. Such examinations are done regularly every eight hours seven days a week.

If a hearing were held in this matter, Emerald would offer evidence that it did not perform pre-shift examinations of the areas in questions for two reasons:

(a) it did not believe it was required to do so; and

(b) it did not want to interrupt the regular schedule of pre-shift examinations because it believed that any disruption in the schedule might result in a pre-shift examiner overlooking an area of the mine that was regularly scheduled to be pre-shift examined and it would reduce the amount of the time for the regularly scheduled pre-shift examinations in areas where miners work or travel on a regular basis on a particular shift.

In agreeing to this stipulation, the Secretary agrees only that Emerald would offer evidence at hearing as it is described herein. The Secretary does not agree as to the validity of Emerald's rationale and the Secretary does not stipulate to the relevancy of this paragraph with regard to the existence of a violation as the Act is a strict liability statute.

The issue in this proceeding is whether the areas that were the subject of the Citation had to be pre-shift examined under 30 C.F.R. § 75.360.

Analysis

Under the standard at 30 C.F.R. § 75.360(a) a certified examiner must conduct a pre-shift examination within three hours before "the beginning of any shift and before anyone on the oncoming shift . . . enters any underground area of the mine . . ." Section 75.360(b)(10), cited herein, specifically requires that a pre-shift examination be performed in areas where work or travel during the oncoming shift is scheduled prior to the beginning of the pre-shift examination. It has been stipulated in this case that RAG knew before the commencement of the pre-shift examination for the shifts in question that the specific work identified in the stipulations needed to be performed and that RAG management expected this work to be performed during the shifts at issue. It has been further stipulated that rather than conduct a pre-shift examination in those areas in which work was expected to be performed during the oncoming shift RAG had the same persons who performed the work, who were also certified mine examiners, conduct supplemental examinations before they commenced their work.

It is the well established law that if a regulation's meaning is plain on its face, the

regulation cannot be construed to mean something different from that plain meaning. *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Exportal LTDA v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990); *Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984). I find from the clear and unambiguous language of the cited standard that indeed, a pre-shift examination must be performed in areas “where work or travel is scheduled prior to the beginning of the pre-shift examination.” Accordingly, no further analysis is necessary and RAG’s failure in this case to have performed a pre-shift examination in those areas constituted a violation as charged.

In light of the agreed stipulations I conclude that RAG is large in size, has a substantial history of violations, that the civil penalty in this case would have no effect on RAG’s ability to remain in business, that RAG’s negligence was low and that an injury or illness was unlikely and therefore the violation was of low gravity. There is no dispute that the violation was abated appropriately. Under the circumstances the Secretary’s proposed civil penalty of \$55.00, is appropriate.

ORDER

Citation No. 7013288 is affirmed, Contest Proceeding Docket No. PENN 99-2-R is dismissed and RAG Emerald Resources Corp., is directed to pay a civil penalty of \$55.00 within 40 days of the date of this decision.

Gary Melick
Administrative Law Judge

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