**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 Skyline, Suite 1000
5203 Leesburg Pike
Falls Church, Virginia 22041

July 10, 2002

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| CANNELTON INDUSTRIES, INC., | : | CONTEST PROCEEDINGS |
| Contestant | : | |
| | : | Docket No. WEVA 2002-111-R |
| | : | Citation No. 7191145; 5/15/2002 |
| v. | : | |
| | : | Docket No. WEVA 2002-112-R |
| | : | Citation No. 7191146; 5/15/2002 |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Shadrick Mine |
| ADMINISTRATION (MSHA) | : | Mine ID 46-08159 |
| Respondent | : | |

## DECISION

Appearances: David J. Hardy, Esq., Heenan, Althen and Roles, LLP, Charleston, West Virginia, for Contestant;
M. Yusuf M. Mohamed, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on Notices of Contest brought by Cannelton Industries, Inc., against the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The company contests Citation Nos. 7191145 and 7191146, which allege violations of the Secretary's mandatory health and safety standards. A hearing was held in Charleston, West Virginia, on June 12, 2002. For the reasons set forth below, I vacate Citation No. 7191145 and affirm Citation No. 7191146.

## Background

Cannelton Industries, Inc., operates the Shadrick Mine, an underground coal mine, in Kanawha County, West Virginia.[1] On May 3, 2002, the mine was idled and put into non-producing status because it was unable to sell its coal and its stockpiles were growing too large. All, or most, of the miners were laid off.

[1] The mine is also referred to as the "Stockton" mine in the testimony. (Tr. 34.)

Since the mine is still capable of producing coal, the company plans to reactivate it in the event that coal sales improve. To be able to do this it is necessary to keep the pumps running or the mine will flood. Consequently, beginning on May 6 or 7, the company started having certified personnel, mostly management employees, go into the mine on each shift to check the pumps. For example, on May 15 Jeff Styers, an electrician, was assigned to go underground with Dan Baker, a foreman, to check "pemissibility," maintain the pumps and test the circuit breakers on the transformers to make sure that they were properly ground faulted.

On May 15, MSHA Inspector Gilbert L. Young went to the mine to investigate a complaint that the mine was not conducting required weekly examinations. After talking to Styers, Jimmy Nottingham, a company safety engineer, and Baker, and examining the company's preshift and on-shift examination books, Young issued two citations.

The first citation alleges a violation of section 75.360(a)(1) of the Secretary's regulations, 30 C.F.R. § 75.360(a)(1), because: "A pre-shift examination within 3 hours preceding the beginning of an 8 hour intervals [*sic*] was not conducted by a certified person during which a person was schedule [*sic*] to work or travel underground." (Govt. Ex. 1.) The second citation charges a violation of section 76.364(b), 30 C.F.R. § 75.364(b), in that: "An examination every 7 days for hazardous condition [*sic*] has not been conducted since 5-03-2002 as recorded in the approved recorded [*sic*] book, miners have been working during this period of time." (Govt. Ex. 2.)

Cannelton contested the citations and requested an expedited hearing on the matter. Cannelton contends that section 75.360(a)(2), 30 C.F.R. § 75.360(a)(2), the "pumpers exception," is applicable in its case and that the company is complying with it. With regard to the weekly examination, it believes that it does not have to conduct one because its employees are not "working" in the mine, they are "patrolling." On the other hand, it is the Secretary's position that the "pumpers exception" does not apply in this case, or if it does, that the company has not met the conditions for it to be pertinent. The Secretary also contends that Cannelton's employees are "working" in the mine.

## Findings of Fact and Conclusions of Law

*Citation No. 7191145*

Section 75.360(a) requires that:

> (1) Except as provided in paragraph (a)(2) of this section, a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval. The

> operator must establish 8-hour intervals of time subject to the required preshift examinations.
>
> (2) Preshift examinations of areas where pumpers are scheduled to work or travel shall not be required prior to the pumper entering the areas if the pumper is a certified person and the pumper conducts an examination for hazardous conditions, tests for methane and oxygen deficiency and determines if the air is moving in its proper direction in the area where the pumper works or travels. The examination of the area must be completed before the pumper performs any other work. A record of all hazardous conditions found by the pumper shall be made and retained in accordance with § 75.363.

The operator sends a certified pumper into the mine on all three shifts. According to the company, the pumper's main function is to maintain the pumps so the mine does not flood. MSHA's position is that a preshift examination must be performed before the pumper can go into the mine. Cannelton argues that section 75.360(a)(2) permits the pumper to conduct an examination for hazardous conditions, test for methane and oxygen deficiency and determine if the air is moving in the proper direction as he goes into the mine because that is the area in which he is working or traveling, and no one else is going into the mine. While it is a close question, I find that the "pumpers exception" is applicable to this situation and, thus, the company is not in violation of the regulation.

Section 75.360(a)(2) did not exist until the rule was amended in March 1996. In adopting the change, MSHA stated, in the preamble to the regulation, that: "This standard recognizes that pumpers travel to remote areas of the mine to check on water levels and the status of pumps, making regular preshift examinations impractical." *Section 75.360 Preshift Examination*, 61 Fed. Reg. 9790, 9792 (Mar. 11, 1996). It went on to state:

> Under a previous standard replaced in 1992, persons such as pumpers, who were required to enter *idle* or abandoned areas on a regular basis in the performance of their duties, and who were trained and qualified, were authorized to make examinations for methane, oxygen deficiency and other dangerous conditions for themselves. Under the final rule, *either* a preshift examination must be made in accordance with paragraph (a)(1) before a pumper enters an area, *or* certified pumpers must conduct an examination under paragraph (a)(2).

*Id.* (emphasis added).

In this case, where the whole mine has been idled, and the pumper is the only one going into the mine, he will be examining the area where he travels and works. As MSHA indicated

when the rule was promulgated, in such a situation *either* type of examination is satisfactory. Furthermore, from a practical standpoint, it makes little sense to double the exposure to possible hazards in the mine, by requiring another examiner to preshift those areas where the pumper is going to travel and work. *See Rawl Sales & Processing Co.*, 23 FMSHRC 463, 471 (May 2001) (Commissioner Verheggen, concurring).

Counsel for the Secretary and the inspectors who testified expressed concern that all of the records resulting from a preshift examination, such as the locations of air and methane measurements and the results of methane tests, would not be logged by the pumper. However, MSHA rejected the same concern when it adopted the rule by stating that: "In the case of the pumper-examined area, the records required under paragraph (a)(2) will assure that mine management is made aware of any condition which results in a hazardous condition and will facilitate corrective action being taken." 61 Fed. Reg. at 9792.

In a case such as this, where the mine has been idled and the only person entering the mine is examining the places he travels as he goes in, and the places he works, as he gets to them, it is apparent that the "pumpers exception," as described by MSHA when it enacted the rule, provides the safeguards that a preshift examination would provide.[2] Accordingly, the citation will be vacated.

<u>*Citation No. 7191146*</u>

There is no similar exception to the required weekly examination for hazardous conditions. Section 75.364(b) requires that: "At least every 7 days, an examination for hazardous conditions. . . shall be made by a certified person designated by the operator . . . ." Nevertheless, the company argues that this examination need not be made based on an excerpt from an MSHA training manual, concerning section 75.364(f), 30 C.F.R. § 75.364(f), which states that, "the entrance of examiners or other certified persons, into the mine for the purpose of examination or patrol does not require a weekly examination." (Cont. Ex. 3.) This document was faxed by Inspector Jerry Richards, to Jack Hatfield, Cannelton's Safety Manager, as a result of questions by mine management concerning what examinations had to be performed at the idled mine. (Tr. 311.) The Respondent reads more into this language than it says.

Section 75.364(f)(1), 30 C.F.R. § 75.364(f)(1), provides that: "The weekly examination is not required during any 7 day period in which no one enters any underground area of the mine." Since someone is entering the mine three times a day during the workweek, this section clearly does not apply in this case. Section 75.364(f)(2), 30 C.F.R. § 75.364(f)(2), states that: "Except for certified persons required to make examinations, no one shall enter any underground area of the mine if a weekly examination has not been completed within the previous 7 days." Thus, it is apparent that, if a weekly examination has not been performed, the only person who can go into

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[2] The mine is keeping records of the pumper's examinations as required by section 75.363(b), 30 C.F.R. § 75.363(b). (Tr. 373-74, 437, 38.)

the mine is the person who is performing the examination. The company does not contend that that is what they are doing.

Instead, the operator claims that they are "patrolling." The term "patrol" does not appear in the regulation. Since it is not in the regulation and is not further defined in the training excerpt, it is not clear exactly what "patrol" was intended to convey. While there are several definitions in the dictionary, the only one that appears pertinent to this situation is to "make routine observations of for purposes of defense or protection." *Webster's Third New International Dictionary* 1656 (1993). Consequently, I find that "patrol" refers to making routine observations of the mine for the purposes of protecting it, in this case, from flooding.

I further find that Cannelton was doing more than making routine observations. It is clear that pumps were being turned on or off, pumps were being moved on occasion and electrical examinations were being performed on the power centers which powered the pumps. While this may not seem to be much, it is significant. Any one of those activities could precipitate a dangerous situation, a spark, a shock or a methane explosion, just to name a few possibilities, for the miner performing them. If the intake and return air courses or the escapeways are not examined for hazardous conditions, and hazardous conditions had developed in them, such as bad air, roof or rib falls, flooding or other blockages, a dangerous situation could turn into a fatal one.

Therefore, I conclude that even though the mine was idled, since the operator had three people going into the mine every day, not just to make an examination or to make routine observations, but to activate and move pumps and to perform electrical tests on power centers, the weekly hazardous condition examination was required to be performed. Since it was not being performed, I conclude that the Respondent was in violation of section 75.364(b).

*Significant and Substantial*

The Inspector found this violation to be "significant and substantial." A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts

surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (December 1987).

In order to prove that a violation is S&S, the Secretary must establish: (1) the underlying violation of a safety standard; (2) a distinct safety hazard, a measure of danger to safety, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3-4.

Taking the *Mathies* criteria in order, a violation of a safety standard has been found. On the second issue, Inspector Young testified that failure to conduct the weekly hazardous condition examination could result in the failure to detect dangerous roof conditions, blocked or improperly maintained air courses and escapeways and bad air, among other things. (Tr. 184-87.) Accordingly, I find that the violation created a distinct safety hazard. With regard to the third and fourth requirements, the inspector testified that these hazards were reasonably likely to result in head injuries or broken bones. (Tr. 184.) Clearly, they could also result in death. Therefore, I find that the third and fourth criteria are present.

Finding that all of the *Mathies* criteria have been met, I conclude that the violation is "significant and substantial."

## Order

Based on the above, it is **ORDERED** that the contest in Docket No. WEVA 2002-111-R is **GRANTED** and Citation No. 7191145 is **VACATED** and that the contest in Docket No. WEVA 2002-112-R is **DENIED** and Citation No. 7191146 is **AFFIRMED**.

T. Todd Hodgdon
Administrative Law Judge

Distribution: (By Fax and Certified Mail)

David J. Hardy, Esq., Heenan, Althen & Roles, LLP, P.O. Box 2549, Charleston, WV 25349

M. Yusuf M. Mohamed, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., 22nd Floor West, Arlington, VA 22209