**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSIOM**
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August 26, 2014

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | Docket Nos. WEST 2009-1323 |
| | : | WEST 2010-38 |
| v. | : | WEST 2010-578 |
| TWENTYMILE COAL COMPANY | : | |

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

## DECISION

BY: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"), and involve an order and a citation that were issued to Twentymile Coal Company by the Department of Labor's Mine Safety and Health Administration ("MSHA"). Order No. 8460435 alleges that Twentymile failed to conduct adequate on-shift examinations as required by the mandatory safety standard in 30 C.F.R. § 75.362(b). Citation No. 8457448 alleges that Twentymile failed to provide additional insulation at the point where a communication circuit contacted power cables as required by the safety standard in 30 C.F.R. § 75.516-2(c).

The Administrative Law Judge vacated the order alleging an inadequate on-shift examination, concluding that the Secretary failed to offer any proof of coal production during the shift as required by section 75.362(b). 34 FMSHRC 2138, 2171 (Aug. 2012) (ALJ). The Judge affirmed the citation issued for inadequate insulation. *Id*. at 2144.

We conclude that the Judge erred in his findings of fact concerning Order No. 8460435. He mistakenly ruled that the cited examination occurred during a non-production maintenance shift, for which no on-shift examination is required. In addition, the Judge erred in finding that Twentymile did not provide additional insulation to the cable as required by section 75.516-2(c). Accordingly, we vacate the Judge's decision with respect to the on-shift examination order (Order No. 8460435), vacate the additional insulation citation (Citation No. 8457448), and remand the cases for further proceedings consistent with our decision.

## I.

## The On-Shift Examination Order (Order No. 8460435)

### A. Factual and Procedural Background

Twentymile owns and operates the Foidel Creek mine, a large underground coal mine in Colorado. 34 FMSHRC at 2139. On August 11, 2009, at 11:30 a.m., MSHA Inspector Randy Gunderson arrived at the mine's 8 Main North belt conveyor to conduct an inspection. *Id*. at 2167; Gov. Ex. 2. The mine was on a maintenance shift, and the conveyor belt was not running. 34 FMSHRC at 2171; Tr. 317, 347-49.

Inspector Gunderson observed coal accumulations along the belt haulageway that measured approximately 600 feet long, 6 feet wide and 20 inches deep. 34 FMSHRC at 2168; Tr. 294-298; Gov. Ex. 2. The accumulations contacted the belt at 12 points. 34 FMSHRC at 2168; Tr. 294; Gov. Ex. 2. Gunderson noted that rock dust was layered between the coal accumulations, which included both loose coal as well as dry coal fines. Tr. 296-97, 301, 354. Where the accumulations contacted the belt, however, there was no rock dust. 34 FMSHRC at 2168; Tr. 298. Based on his observations, the inspector issued a citation alleging a violation of the safety standard in 30 C.F.R. § 75.400, which prohibits the accumulation of coal in active workings. Gov. Ex. 2. Twentymile admitted that these cited conditions constituted a significant and substantial violation of the safety standard in section 75.400. 34 FMSHRC at 2168 n.28 (citing Unpublished Order at 1 (Sept. 21, 2011)); Tr. 302; Gov. Ex. 2; Gov. Ex. 40.

As a result of the inspection, Gunderson also issued Order No. 8460435, which alleged a violation of the on-shift examination requirement in 30 C.F.R. § 75.362(b) and specifically cited the August 10 and August 11 examiner reports as inadequate.[1] Gov Ex. 1. The cited examination reports did not contain any mention of the coal accumulations in the belt haulageway. Gov Ex. 4 at 18-22. The most recent of the examinations had been conducted between 6:57 a.m. and 8:06 a.m on August 11. *Id*. at 22.

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[1] The standard requires that:

> *During each shift that coal is produced*, a certified person shall examine for hazardous conditions . . . along each belt conveyor haulageway where a belt conveyor is operated. This examination may be conducted at the same time as the preshift examination of belt conveyors and belt conveyor haulageways, if the examination is conducted within 3 hours before the oncoming shift.

30 C.F.R. § 75.362(b) (emphasis added).

Twentymile contested this order at a hearing on the merits. On August 9, 2012, the Judge issued a decision stating that while section 75.362(b) requires adequate examinations, this particular standard only applies "during each shift that coal is produced."[2] 34 FMSHRC at 2171. The Judge stated that the inspector testified that the operator's examination was conducted on August 11 between 6:57 a.m. and 8:06 a.m. (hereinafter referred to as "the operator's August 11 morning examination") during a "maintenance shift." *Id*. The Judge concluded that because the Secretary failed to offer any evidence of coal production during the shift when the order was issued, the Secretary had failed to prove that the standard was violated. Accordingly, the Judge vacated the order. *Id* at 2171-72.

On review, the Secretary argues that the Judge erred because the record demonstrates that the operator's August 11 morning examination actually was performed on a production shift – the shift that occurred directly before the "maintenance shift" during which the MSHA inspection occurred.

## B. Analysis

### 1. The operator's August 11 morning examination was not performed during the "maintenance shift," but was performed on the preceding production shift.

The threshold question in this case is whether the operator's August 11 morning examination occurred on a shift during which coal was produced. Specifically, we must determine whether this examination was performed during the production shift or the subsequent morning maintenance shift. Although the Judge found that the operator's August 11 morning examination was performed on the "maintenance shift" (34 FMSHRC at 2171 (citing Tr. 317)), we conclude that this finding is not supported by substantial evidence.[3]

The Judge relied on the testimony of Inspector Gunderson but appears to have misunderstood the inspector's statements. At the hearing, Inspector Gunderson testified as follows:

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[2] Conversely, the safety standard in 30 C.F.R. § 75.360 requires operators to conduct examinations at fixed intervals, regardless of whether coal is produced on a particular shift.

[3] The Commission applies the substantial evidence test when reviewing a Judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the Judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

Q: And was the belt running during your inspection?
A: No
Q: Why not?
A: It was a maintenance shift, is what I was told.

Tr. 317. In the cited portion of the transcript, Gunderson was referring to the production status of the mine *at the time of his inspection.* Gunderson inspected the mine and issued the order at 11:35 a.m. Gov. Ex. 1. Gunderson did not testify about the production status of the mine *during the time at which the operator's August 11 morning examination was performed* (between 6:57 a.m. and 8:06 a.m.).

Although the Secretary did not introduce specific evidence of the mine's shift schedules or production reports, an examination of the record fully demonstrates that the cited August 11 morning examination occurred during the shift that *immediately proceeded* the maintenance shift. 34 FMSHRC at 2172. Twentymile repeatedly represented that its August 11 morning examination qualified as both an on-shift examination for the shift on which it was performed and a pre-shift examination for the shift that was about to begin. T. Post-Hearing Br. at 37 (stating "[t]here is no dispute that there was a pre-shift/on-shift examination conducted [on the morning of] August 11, 2009"), *see also id.* at 39-40; Oral Arg. Tr. 141-44. Section 75.362(b) provides that the on-shift and pre-shift exams may be conducted simultaneously, if the examination is conducted within three hours before the start of an oncoming shift. Because the August 11 morning examination was a "pre-shift/on-shift examination," a shift change must have occurred at the mine within the three hours that followed the examination. Stated another way, the inescapable conclusion drawn from Twentymile's own representations is that a shift change occurred at the mine between 8:06 a.m. (the time the operator's morning examination concluded) and 11:06 a.m. (the end of the three hour window referred to in section 75.362(b)). Gov. Ex. 4 at 22.

The order was issued at 11:35 a.m. (Gov. Ex. 1) after the shift change occurred. The inspector testified that the mine was on a maintenance shift at the time the order was issued. Tr. 317. Accordingly, the operator's August 11 early morning examination qualified as an on-shift examination for the night shift ending on the morning of August 11 (the "graveyard shift"), and as a pre-shift examination for the subsequent maintenance shift.

**2. Twentymile conceded that coal was produced on the "graveyard shift."**

In its post-hearing brief, Twentymile stated that it produced coal after it conducted the cited August 11 on-shift examination. *See* T. Post-Hearing Br. at 39-40 (stating that the accumulations "could have occurred in a 'couple of hours' considering the amount of coal running over the belt during the time after the pre-shift/on-shift and [the inspector] issuing his order and citation."); *see also id*. at 41 ("[The accumulations] developed within the approximate

3-hour span between when the pre-shift/on-shift examination was performed and when the condition was observed by the MSHA inspector").

At oral argument before the Commission, counsel for Twentymile agreed that there would have been no reason to conduct an on-shift examination during the "graveyard shift" if the company had not been producing coal on that shift. Oral Arg. Tr. 144 (Commissioner Young: "[i]f you say it's an on-shift examination, there's no reason to do one unless you're running coal, right?" Counsel: "That's correct").

Significantly, Matt Winey, the shift foreman, testified that the mine was running two ten-hour production shifts per day in August 2009. Tr. 357-59. On a typical shift, the mine produced about 1,500 tons of coal per hour. Tr. 359. Neither Winey nor any of Twentymile's other witnesses suggested that production did *not* occur during the shift on which the cited on-shift examination was made.

Based on the foregoing, we conclude that Twentymile conceded that it produced coal on the "graveyard shift," the shift for which the cited examination was performed. Therefore, according to the safety standard in 30 C.F.R. § 75.362(b), it was required to perform an adequate on-shift examination.

As noted above, however, Twentymile argued that the accumulation might have occurred after the on-shift report was prepared. Obviously, the Judge made no finding regarding that argument. Therefore, we remand this matter to the Judge for a determination of whether the cited examinations of August 10 and 11 were inadequate as alleged, and, if so, whether the violation was significant and substantial and the result of an unwarrantable failure by the operator.

## II.

## The Inadequate Insulation Citation (Citation No. 8457448)

### A. Factual and Procedural Background

On June 23, 2009, MSHA Inspector Charles Bordea arrived at the Foidel Creek mine to conduct a regular inspection. Gov. Ex. 41 at 1-2. He traveled underground to Load Center No. 29, where he observed a communication cable contacting energized high voltage cables. *Id*. at 3. The communication cable consisted of two twisted pair wires, a ground wire, and shielding, all of which were wrapped in an outer jacket. *Id*. The power cables consisted of three power conductors, a ground monitor cable, and at least two ground wires, all of which were wrapped in an outer jacket. *Id*.

The mandatory safety standard in 30 C.F.R. § 75.516-2(c) requires that "[a]dditional insulation shall be provided for communication circuits at points where they pass over or under any power conductor." Inspector Bordea issued Citation No. 8457448 to Twentymile and alleged

that its failure to install an additional wrap of insulation at the point where the communication cable contacted the power cable constituted a non-significant and substantial violation of the standard. Gov. Ex. 33. Inspector Bordea determined that the violation was the result of moderate negligence on the part of the operator. *Id.*

Twentymile contested the citation, arguing that it did not violate the standard because it provided a communication cable that had been insulated, shielded, and jacketed by the manufacturer. Twentymile's Statement at 3.

In a previous Commission proceeding, Twentymile made the same argument to Administrative Law Judge Richard Manning when it contested two citations issued for violations of section 75.516-2(c). 33 FMSHRC 1885, 1945 (Aug. 2011) (ALJ). Judge Manning concluded that the meaning of the language in the safety standard was clear, i.e., mine operators are required to manually install additional insulation at the points where communication circuits pass power conductors no matter how well insulated the circuits may be. *Id*. Twentymile filed a petition for discretionary review of Judge Manning's decision with the Commission, which we granted.

On August 9, 2012, Judge David Barbour issued his decision on Citation No. 8457448. Judge Barbour adopted Judge Manning's analysis, concluding that the standard clearly required that an operator must install insulation on the cable in addition to the insulation that is provided by the manufacturer. 34 FMSHRC at 2144. He concluded that "because Twentymile did not add any insulation to the cited communication cable [at the point of contact] . . . the company violated the standard." *Id*. The Judge found that the violation was the result of low negligence on the part of the operator and assessed a civil penalty of $100. *Id.* at 2184.

### B. Analysis

Today, in a separate decision, the Commission is reversing Judge Manning's August 2011 decision on the requirements of section 75.516-2(c). 36 FMSHRC __, Docket Nos. WEST 2009-241 et al. (Aug. 26, 2014). In our concurrently issued decision, we conclude that the language of the safety standard in section 75.516-2(c) is silent or ambiguous with respect to how compliance with its requirements is to be achieved. Slip op. at 3. Specifically, we conclude that the phrase "shall be provided" does not plainly mean that the operator itself must install the "additional insulation." *Id*. at 3-4. In fact, we note that the phrase "shall be provided" is used elsewhere in the Secretary's regulations to describe equipment that is commonly provided by a manufacturer. *Id.* at 3 (*see, e.g.*, 30 C.F.R. § 56.14131 ("Seat belts shall be provided and worn in haulage trucks")). We further conclude that the Secretary's proffered interpretation – that the additional insulation must be manually installed over the manufacturers' cables regardless of the amount of pre-existing insulation – was not reasonable and thus should not be accorded deference.[4] *Id*. at 4-5.

[4] These issues are explored more completely in the simultaneously issued decision. *See* 36 FMSHRC __, Docket Nos. WEST 2009-241 et al. (Aug. 26, 2014).

The Commission holds that the safety standard in section 75.516-2(c) simply requires the presence of "additional insulation" at the points where the communication circuits pass over or under power conductors. *Id*. at 5. The insulation at those points must be greater than the insulation requirements of section 75.516-2(b), that is, the insulation must be at least as great as the dielectric strength of the voltage of the circuit. 30 C.F.R. §§ 75.516-2(b), 75.517-1.

The parties agree that the communication cable cited in Citation No. 8457448 is the same communication cable that was cited by the Secretary in the case before Judge Manning. Secretary's Statement at 1; Twentymile's Statement at 1. The communication cable consists of copper conductors that were covered in a layer of insulation, surrounded by foil shielding, and wrapped in a PVC jacket. Slip op. at 2 (citing 33 FMSHRC at 1941-43); *see also* Gov. Ex. 41 at 3.

The Secretary has not demonstrated that the insulation provided was less than the dielectric strength of the voltage of the circuit. Accordingly, the Judge's decision with respect to Citation No. 8457448 is reversed and the citation is vacated.

## III.

## Conclusion

We conclude that the Judge's decision regarding Order No. 8460435 is not supported by substantial evidence in the record. Therefore, the Judge's decision is vacated and remanded for analysis of whether the cited examinations were inadequate as alleged, and if so, whether the violation was significant and substantial and the result of an unwarrantable failure.

We further conclude that the Judge erred in his interpretation of the safety standard in section 75.516-2(c). Because the record lacks evidence that Twentymile violated the standard, the Judge's decision with respect to Citation No. 8457448 is reversed and the citation is vacated.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
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