

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

BLACK CASTLE MINING COMPANY and
MICHAEL VIRA, employed by
BLACK CASTLE MINING COMPANY

Docket Nos. WEVA 2006-891-R
WEVA 2007-288
WEVA 2007-421

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

DECISION

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

The Department of Labor’s Mine Safety and Health Administration (“MSHA”) cited Black Castle Mining Company and proposed penalties against the operator and its supervisor Michael Vira. The enforcement actions at issue here resulted from MSHA’s investigation into a fatal accident involving a bulldozer operator whose dozer came into contact with, and ruptured, a gas line. The citation alleged that Black Castle and Vira failed to adequately comply with the requirement to examine active working areas each shift for hazardous conditions.¹ These consolidated cases arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C § 801 et seq. (2012) (“Mine Act” or “Act”).

¹ 30 C.F.R. § 77.1713(a) provides:

At least once during each working shift, or more often if necessary for safety, each active working area and each active surface installation shall be examined by a certified person designated by the operator to conduct such examinations for hazardous conditions and any hazardous conditions noted during such examinations shall be reported to the operator and shall be corrected by the operator.

The administrative law Judge vacated the citation. He assumed the accident occurred in an active working area. 32 FMSHRC 132, 135 (Jan. 2010) (ALJ). He concluded, however, that: (1) because the gas line had been present on the mine for at least 10 years, was marked by a right of way edged by trees, and was well known by everyone at the mine, the gas line did not constitute a reportable “hazardous condition” under section 77.1713(a), and (2) neither the fatally injured miner nor anyone else had given Black Castle an indication that the actual location of the gas line needed to be marked. 32 FMSHRC at 137, 144. The Commission granted the Secretary’s petition for discretionary review and, for the following reasons, we affirm the Judge’s decision in result.

I.

Factual and Procedural Background

Black Castle is the operator of a large surface coal mine in West Virginia which contains a 16-inch-wide and 32-mile-long natural gas pipeline operated by Equitable Resources. 32 FMSHRC at 133, 136; Tr. 78-80. In early 2006, Black Castle began preparations to conduct additional mining operations at a location known as the East of Stollings Amendment area. 32 FMSHRC at 133. This site has five coal seams and Black Castle intended to mine the Stockton seam using a method known as contour mining. Tr. 137-38, 315-16. To accomplish this, Black Castle needed to build an access road from the Judy Low Gap area to the Clarion coal seam (the seam of coal above the Stockton in elevation), expose the Clarion seam around the hillside, and create a “drill bench” (a flat area on a hillside) along the Clarion seam. Tr. 131. From this bench, Black Castle intended to drill holes down to the Stockton coal seam, load the holes with explosives, and blast material to reach the Stockton coal. *Id.* at 140.

Black Castle identified Paul Moss, who was classified as a “master dozer operator,” as the individual to perform this work. Tr. 326, 614. Management officials subsequently met with Moss to explain the assignment, and during these meetings, the location of the pipeline right of way was also discussed.

On the morning of January 31, 2006, Moss began constructing the access road uphill from the Judy Low Gap area in order to locate the Clarion coal seam. 32 FMSHRC at 133. He had not reached the Clarion seam when he stopped for the day. *Id.* The following morning, February 1, Moss returned to the area to continue construction. *Id.* Tragically, sometime after 2:00 p.m. his bulldozer ruptured the gas line, which burst into flames, and Moss was fatally injured. *Id.* at 133-34. After conducting an accident investigation, MSHA issued a citation to Black Castle, alleging that it had violated section 77.1713(a) because, *inter alia*, “[a]n active 16-inch diameter gas line was buried and was not adequately marked in the area where the bulldozer was being operated” and “[t]he presence of the unmarked gas line constituted a hazardous condition which should have been reported and corrected during the required daily

inspection.” Gov. Ex. 1. A subsequent special investigation pursuant to section 110(c) of the Act resulted in Vira being charged personally with a knowing violation of the same standard.²

II.

Disposition

As a threshold matter, we conclude that the mere presence of a well-known gas pipeline at the mine is not necessarily a hazardous condition that must be regularly noted in the examination book pursuant to section 77.1713(a). The gas line at this mine had been in place for at least ten years, and the right of way containing the gas line was generally marked off with certain identifying features. As the Judge noted, everyone working at the mine knew that there was a gas line on the East Stollings Amendment area. 32 FMSHRC at 137, 142. Moreover, MSHA had never previously cited Black Castle for failing to report the presence of the gas line in an on-shift examination report.

Nonetheless, a hazardous condition may exist when markings fail to sufficiently indicate a gas line’s location - a situation which the Secretary argues was present here. The regulation the Secretary alleges Black Castle violated, however, imposes a requirement to examine for and correct hazardous conditions only as to “each active working area.” Therefore, to prove a violation of section 77.1713(a), the Secretary must demonstrate that the operator failed to examine, report or correct a hazardous condition in the “active working area.” See 30 C.F.R. § 77.1713(a). In other words, an examiner at this mine seeking to comply with section 77.1713(a) is not required to examine the entire gas pipeline; he or she need only determine whether the pipeline is adequately marked in the “active working areas.” Such examiner would be required to confirm that the markings sufficiently informed a miner of his or her location relative to the gas line. If the markings were not adequate, the examiner would be required to note that fact, and the operator would be required to take corrective action.

Although compliance with section 77.1713 is dependent upon an adequate examination of “the active working area,” that particular term is not defined in either the statute or

² Section 110(c) of the Mine Act, 30 U.S.C. § 820(c), provides that:

Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

regulations. In his post-hearing brief below, the Secretary urged that the term “active working area” should be read to include all areas where it is reasonably foreseeable that miners will work or travel when carrying out their work-related tasks. S. Post-Hearing Br. at 29. We also note that there is a definition of “active workings” at 30 C.F.R. § 77.2(a), which states that the term “means any place in a coal mine where miners are normally required to work or travel.” For the reasons set forth below, we conclude that the area in which the accident occurred was not an active working area under either Section 77.2(a) or the Secretary’s proffered definition.

Assuming *arguendo* that the gas line did constitute a hazardous condition at the accident site, one must still determine whether this hazard should have been detected and corrected during the February 1 examination required by section 77.1713(a).³ An affirmative answer would require a determination that the accident site was located in “the active working area.” Even were we to apply the Secretary’s suggested definition of that term, we must ask whether it was reasonably foreseeable that a miner would be in the accident area when carrying out his or her work related tasks during the shift(s) covered by the operator’s examination.

The Judge concluded that “Black Castle had no reason to anticipate that Moss would go above the Clarion seam because it had nothing to do with his work assignment.” 32 FMSHRC at 143. This finding is amply supported by the record.⁴

The evidence demonstrates that the accident location was not a part of Moss’ assigned work area and that management and miners alike were surprised that Moss had moved to the area where he struck the gas line. *Id.* At the time of the accident, Moss was 265 vertical feet from his assigned work area. *Id.* at 142. Moreover, because he could not go straight uphill, he had actually trammed 500 feet from the Clarion seam. *Id.*, citing Tr. 711, Resp. Ex. 3. In addition, Jackson Woodward, a dozer operator who was working on a hill opposite from Moss at the time of the accident, testified that he was surprised to see Moss moving toward the gas line around 2:30 p.m., because Moss was far away from the place that he was benching. 32 FMSHRC at 143.

Attempting to characterize the accident site as a place that Moss could be expected to work, the Secretary suggests that Moss might have been removing material such as felled trees from above the Clarion seam, possibly believing that such material might have posed a hazard to miners and equipment during the removal of coal from the Stockton seam. S. Br. at 26. The

³ Vira performed a preshift examination at approximately 4:30 am on February 1. Tr. 161. He performed a second examination around 8:30 am that morning. *Id.* The regulation only required the on-shift examination, but state regulations required a preshift examination, so Vira conducted both. 32 FMSHRC at 136 n.2.

⁴ The Judge nevertheless assumed, for purposes of his decision, that the accident location was part of the “active working area.” 32 FMSHRC at 136. He concluded, however, that the Secretary failed to prove the existence of a hazardous condition. *Id.* at 137.

Secretary also argues that it would have been an accepted practice for the bulldozer operator to create access roads to the next higher coal seam. *Id.* at 26-27.

The Judge rejected these contentions, stating “[t]here is no evidence to support these theories.” 32 FMSHRC at 142. He relied on production manager William Marcum’s testimony that in performing the benching area on the Clarion seam, Moss would have had no need to remove trees far above that seam for safety purposes. 32 FMSHRC at 143, *citing* Tr. 645-46. In addition, Michael Boothe, Moss’ immediate supervisor, testified that he did not anticipate that Moss would go to the area where the accident occurred because he and Moss decided that constructing an access road was not feasible at that time, and Moss knew that Boothe had no intention of creating a second access road. Tr. 679-80.

Lastly, the Secretary asserted that the material found pushed up in the blade after the explosion demonstrates that Moss was pushing material when the accident occurred. S. Br. at 26; S. Post-Hearing Br. at 29. This contention was rebutted by Marcum’s testimony that bulldozer operators will often drop their blades when preparing to go downhill to control the speed of the descent. Tr. 644-45.

It, thus, appears that even under the Secretary’s proposed interpretation of the term, the area in which Moss was working at the time of the accident could not reasonably be considered an “active working area” of the mine, so as to bring it under the purview of section 77.1713(a). That being the case, the area was not required to be examined for hazardous conditions as part of the on-shift inspection of February 1. Even assuming, therefore, that the pipeline was not sufficiently marked in the area of the accident, as the Secretary alleges, the operator was not required to detect and correct this condition in accordance with section 77.1713(a).

In maintaining that the gas line was not adequately identified, the Secretary’s case focused almost exclusively on the lack of identifying markers at the accident site. The Secretary presented evidence, for example, indicating that the closest carsonite marker was 250 to 300 feet away from the accident site, and that the orange pin flags were not visible from the accident site. S. Br. at 20, *citing* Tr. 85, 413, 730. Although Black Castle explained that it left a row of trees along the gas line right of way to help identify its location, the Secretary presented photographic evidence of the accident site showing no trees standing in the immediate area of the accident. S. Br. at 20, *citing* Tr. 122. Based on this evidence, one might well conclude that a miner located where Moss was when the accident occurred would not have been able to ascertain his or her location relative to the gas line, and this section of the gas line could, therefore, be considered a hazardous condition. However, as explained above, this evidence does not prove the existence of a hazard in an active working area.

Despite the Secretary’s emphasis on the presence of hazards near the scene of the accident, our inquiry does not end there. We have also reviewed the record evidence and the parties’ arguments regarding hazards in the area where Moss was assigned to work on February 1, before he moved to the accident site. This is the relevant inquiry, as it goes to the

question of whether there was a hazardous condition (such as an inadequately marked pipeline) in the active working area that Vira should have noted when he conducted his examinations that morning.

The Judge found that the gas line was marked, at a minimum, by a mowed or muddy right-of-way edged by trees, and that this was one reason why the pipeline was not perceived as a hazardous condition. 32 FMSHRC at 137. In effect, the Judge made a finding that the gas line was adequately marked. Although this finding did not pertain specifically to the area where Moss was working on February 1, before he left for the accident site, it is a finding that we view as pertaining to the gas line in its entirety on the mine property, and thus, encompasses this area. The Judge ultimately concluded that the Secretary failed to prove the existence of a hazardous condition.

The Judge's factual finding is reviewed under a substantial evidence standard of review. 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." *Consolidation Coal Co.*, 35 FMSHRC 2326, 2328 n. 3 (Aug. 2013) (citations omitted). In assessing whether a finding is supported by substantial evidence, the record as a whole must be considered, including evidence in the record that "fairly detracts" from the finding. *Prairie State Generating Co., LLC*, 35 FMSHRC 1985, 1991 n.9 (July 2013) (citations omitted).

We conclude that there is substantial evidence in the record to support the Judge's finding as it applied to the area where Moss was assigned to work on the morning of February 1 before he went to the accident site. First, William Marcum, the Black Castle production manager, testified that, as a general matter, such pipelines are marked with yellow stakes and a clear right of way. 32 FMSHRC at 136; Tr. 624. More specifically, Marcum testified that the gas line at issue had plastic markers staked in the ground by the gas company, and that some of those markers were in the area between the Low Gap area and the area where the dozer was located after the accident. Tr. 627.

Marcum also testified that there was a right-of-way along the pipeline approximately 30 or 40 feet wide with an all-terrain vehicle trail. Tr. 625-26. This is supported by the testimony of Rejean Boulet, a contractor from East Cumberland hired to cut trees along the pipeline. He testified that he left a row of trees on each side of it. Tr. 286. Brian Miller, superintendent of pipelines for Equitable Resources, also testified that there was a right of way with clear vegetation around the gas line. Tr. 99, 107. Miller testified that the entire pipeline had been mowed earlier that year and that the vegetation on the right of way was considerably smaller than any of the wood line on either side. Tr. 107.

In addition to the evidence regarding the presence of markers and a clear right-of-way, there was testimony regarding whether Moss was aware of the location of the pipeline (which could be an indication of whether it was adequately marked). Michael Boothe, the Black Castle drill blast foreman and Moss' supervisor, testified that on February 1, he spoke with Moss by CB radio and later went to see him. Tr. 390, 392-93. Boothe stated that during these conversations,

Moss did not mention the gas line and, in fact, never expressed any fear about the gas line to Boothe. Tr. 394, 673. The Judge noted that there was nothing to indicate that Boothe was not credible. 32 FMSHRC at 142.

The Secretary did elicit testimony from witnesses regarding a statement by Moss that he was not certain where the pipeline was located. While it might be possible to infer from such a statement that the pipeline was not adequately marked, we conclude that the record in this case does not suffice as a basis for us to overturn the Judge's finding to the contrary.

The evidence includes testimony from Kenneth Smith, who stated that as he and Moss were driving to work on February 1, Moss said he was not sure where the gas line was. Tr. 199-200. Smith also testified that he heard Moss talking on the CB radio to Vira around 9:00 a.m. that day and that Moss stated he was concerned he might be getting too close to the gas line. Tr. 207-09. The Secretary also offered the testimony of Elmer Bishop (an East Cumberland contract employee clearing trees at the mine). Tr. 291-307. He stated that around 8:00 a.m. on February 1, he heard Moss call Vira and that Moss hollered at Vira and told him he did not know where the gas line was, or he didn't have any idea where it was. Tr. 296. However, Vira categorically denied that Moss had asked him about the location of the gas line. Tr. 768-69. Moreover, the Judge found that "[t]o the extent that Bishop's statements cannot be reconciled with the other witnesses, I find that he is not credible." 32 FMSHRC at 141.

Finally, Lonnie L. Wood (survey lineman for Black Castle) testified that he was assigned to mark 400-500 feet of the gas line in the Low Gap area. Tr. 564. He stated that Moss asked him twice about the location of the gas line in the Low Gap area, although he was no longer working there. The second conversation took place at approximately 9:00 a.m. on February 1. Tr. 566-74. The Judge concluded that when Moss talked with the surveyors, "while he expressed some curiosity about where the gas line went, he did not state any concerns or ask them to proceed to where he was working and show him where the gas line was." 32 FMSHRC at 141.

In his decision, the Judge reviewed and discussed all of this testimony at length. 32 FMSHRC at 137-42. He made credibility determinations, either expressly or implicitly, and concluded that "[t]here certainly is no evidence that [Moss] said anything to the affect [sic] of - 'I don't know where the gas line is, how can I stay 100 feet from it?' or, 'Have someone mark it for me,' or anything like that." 32 FMSHRC at 141.⁵

Our inquiry is limited to whether it is reasonable to accept the operator's evidence (as set forth above) as sufficient to support the Judge's conclusion that the gas line was adequately marked (and that consequently there was not a need to report a lack of markings as hazardous, and that therefore the examinations conducted February 1 were adequate). Even considering the

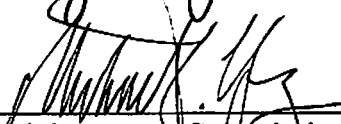
⁵ A Judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Consolidation Coal Co.*, 35 FMSHRC at 2329 (citations omitted).

Secretary's evidence that arguably "fairly detracts" from this finding, we nonetheless conclude that there is substantial evidence in the record to support the Judge's finding.⁶

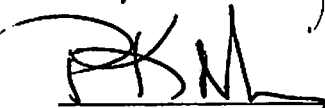
We also affirm the Judge's conclusion that Vira did not violate section 77.1713(a). *Id.* at 144. As discussed above, substantial evidence supports the Judge's finding on the adequacy of the on-shift examination. We therefore conclude that the civil penalty proceeding brought against Vira under section 110(c) was properly dismissed by the Judge.



Mary Lu Jordan, Chairman



Michael G. Young, Commissioner



Patrick K. Nakamura, Commissioner



William I. Althen, Commissioner

⁶ Besides a mandatory once a-shift examination, section 77.1713(a) also requires that inspections be conducted "more often if necessary for safety." 30 C.F.R. § 77.1713(a). Therefore, we have carefully considered the Secretary's argument that the Judge shifted the responsibility for preventing unsafe conditions from the operator to the miner. After finding that the on-shift examination was adequate because there was no need to report a hazardous condition that everyone was aware of and that was adequately marked, the Judge specifically considered whether Moss put Black Castle on notice of a need for another examination. He considered Moss' conversations with Marcum, Boothe, Smith, Vira, and surveyors who were marking the gas line in the Judy Low Gap area. 32 FMSHRC at 137-44. The Judge determined that "Moss did not give Vira or Black Castle management any reason to believe that the gas line needed to be marked better than it was." *Id.* at 141. He emphasized that "up until the time of the accident, neither Moss nor anyone else had given Vira or any other Black Castle person in authority an indication that marking of the actual gas line was necessary." *Id.* at 143. He concluded, therefore, that management had not been made aware of any reason to conduct an additional on-shift examination. *Id.* at 144. That decision is supported by substantial evidence.

The evidence supporting the Judge's determination that the pipeline was adequately marked also supports this additional finding. In particular, we note that the only assertion that Moss' concerns were expressed to mine management was the testimony regarding Moss' statements to Vira. This testimony, however, was contradicted by Vira, and the Judge made a credibility determination that Moss had expressed no such concerns to him. 32 FMSHRC at 141.

Commissioner Cohen, concurring:

I join my colleagues in result for the reason that as an appellate body, the Commission must affirm an administrative law judge's decision if it is supported by substantial evidence. In this case, I must conclude, albeit reluctantly, that the judge's findings, based on credibility determinations, are supported by substantial evidence. I write separately in order to address several lingering questions, as well as reservations I have about the accounts provided by certain Black Castle witnesses regarding the events leading up to Paul Moss' fatal accident.

On February 1, 2006, Paul Moss was fatally injured when the bulldozer he was operating at Black Castle Mining Company's surface mine in Boone County, West Virginia, contacted and ruptured a 16-inch low-pressure, high-volume natural gas line, which burst into flames. Following an investigation, MSHA found a violation of section 77.1713(a) of the regulations, 30 C.F.R. § 77.1713(a), alleging that "[a]n adequate daily examination for hazardous conditions was not made of the active working area . . . of the mine." Gov. Ex. 1. MSHA issued proposed penalty assessments against Black Castle, and also against its Mine Superintendent Michael Vira under section 110(c) of the Mine Act. The pivotal questions posed by this case are: (1) whether the site of the explosion was part of the "active working area", and (2) whether the gas line was "adequately marked". To answer the first question, it is important to know why Moss was so far from the Clarion seam when the accident occurred.

Active Working Area

The judge determined that the work being performed by Moss and the proximity of the gas line right-of-way to the access road, at least in the Low Gap area, was sufficient to deem the accident site part of the active working area. 32 FMSHRC 132, 136 (Jan. 2010) (ALJ). My colleagues, however, have concluded that because Black Castle had no reason to anticipate that Moss would travel above the Clarion seam, the accident site was not an "active working area" under 30 C.F.R. § 77.2 or the Secretary's proffered definition. Slip op. 4-5. I am not so convinced.

The explosion that killed Moss occurred some 265 vertical feet away from the outcrop of the Clarion coal seam where Moss had been assigned to construct a bench. Moss had actually trammed his dozer 500 feet from the Clarion seam to reach the place where he died. Tr. 710-11, Resp. Ex. 3. Although Black Castle management testified that Moss had no reason to tram so far away from the Clarion seam, it appears to me that the distance he traveled was too far to be inadvertent. There are three possibilities for why Moss was so far from the Clarion seam: 1) Moss was off on a lark, totally unrelated to his instructions from management; 2) (as the Secretary contends) Moss traveled above the seam to clear material from the top of the future highwall

which would be created when overburden was removed from above the Stockton coal seam,¹ or to carve an access road to another level; or 3) Moss was given direction by a supervisor that caused him to be up on the ridge near the gas line.

I find the first scenario unlikely. By all accounts, Moss, a master dozer operator, was highly experienced and safety conscious. Tr. 177-78, 217, 229-30, 294, 377. Production Manager William Marcum testified that he was probably the best dozer operator at the mine – a go-to guy and one of Black Castle’s best employees. Tr. 326. Michael Boothe, Moss’ immediate supervisor, and Michael Vira stated that Moss was probably the most experienced dozer operator at the mine. Tr. 177-78, 372, 376-77. Kenneth Smith and Jackson Woodard, fellow dozer operators, testified that Moss was safety conscious and not a risk taker. Tr. 217, 230. He was also known to follow directions. Tr. 217, 377. Therefore, in light of this overwhelming testimony, it is reasonable to conclude that reckless behavior – trampling 500 feet from where he should have been in defiance of his orders – would be out of character for Moss and, therefore, highly improbable.

The second scenario, however, is plausible, despite the judge’s rejection of this theory as speculative. 32 FMSHRC at 142-43. According to the Secretary’s theory, which is supported by Woodard’s undisputed testimony, it is not uncommon for dozer operators during the benching process to work outside of the coal seam to remove debris from the pathway, material from the highwall, or to create an access road. Tr. 244-49. Woodard testified that dozer operators are given wide discretion in the manner in which they complete their assigned tasks. Tr. 249-50. Thus, it would seem reasonably foreseeable that Moss might work above the Clarion bench as he deemed necessary, as part of his assignment. This would make the accident site part of the “active working area.”

The last scenario, that management directed Moss up on the ridge, is also possible. The judge’s statement that “no one knows why Moss took the bulldozer where he did,” may not necessarily be accurate. See 32 FMSHRC at 142. The evidence suggests that Moss may well have been directed to the ridge. Woodard testified that on the morning of the accident, Moss did not know on what level he was supposed to start benching, so Woodard sent a message to have Boothe “get with” Moss. Tr. 234. Boothe made a quick stop at Moss’ work site shortly thereafter, left, then returned just before noon. Tr. 234. Woodard stated that after a 15 minute meeting with Boothe, Moss made a ramp to a higher level where he began benching until sometime after 2:00 p.m. Tr. 235. Woodard then looked over and saw Moss coming towards the gas line, which struck him as “funny” that Moss was so far away from where he had been benching. Tr. 235-36, 255-56. Woodard, unsuccessfully, tried to call Moss because he wondered if his orders had been changed. Tr. 236, 255, 262. When questioned by Respondent’s counsel

¹ The reason Moss was constructing a bench at the Clarion coal seam outcrop was to enable Black Castle to bring in drilling equipment to blast away the part of the mountain overlying the Stockton coal seam (i.e., the “overburden”) so as to mine the coal in the Stockton seam. The blasting away of the overburden would create an 80-foot highwall. Tr. 139-41.

whether Woodard knew that Moss, being up on the ridge, was beyond his work area, Woodard answered:

Well, I did not know that. . . . I knew that he was supposed to be working up [on the Clarion seam], but I had no idea what conversation that he and Mike Boothe had. Mike Boothe could have changed his orders or --- I mean, I didn't know. That's the reason, you know --- I thought it was strange was the reason I called.

Tr. 262. Clearly, Woodard recognized that Boothe might have given Moss additional instructions that placed him at the accident site. However, the judge credited Boothe's account that Moss made no mention of the gas line during these conversations, and that only Moss' slow progress was discussed. Tr. 394, 396-97. Had the judge credited Woodard's testimony, it would not have been a leap to have concluded that Boothe, at the very least, instructed Moss on where to bench. Such a conclusion would also indicate that the two discussed more than Moss' slow progress.

However, we lack the testimony of Mr. Moss, who could have explained the circumstances leading to the accident that claimed his life. We also lack conclusive evidence that might explain why such an experienced dozer operator would apparently stray off course in a dangerous area of the mine. In view of the judge's finding that the Secretary's theory is "speculative", and without substantial record evidence to support the two most plausible scenarios, I am constrained to stand with the majority's determination that the area in question was not an active working area and, therefore, that no on-shift examination was required of that area.

Adequate Markings

I am not persuaded that the gas line beyond the Low Gap area was adequately marked. As set forth by the majority opinion, a hazardous condition exists when markings fail to sufficiently indicate a gas line's location in an "active working area." Slip op. at 3. Therefore, compliance with section 77.1713 here required that the on-shift examiner, Vira, determine whether the pipeline was adequately marked in the "active working area," and if not, to make a notation and take corrective action. See Slip op. at 3.

Although the judge found that the gas line was marked, at a minimum, by a mowed or muddy right-of-way edged by trees, 32 FMSHRC at 137, the Commission majority interpreted it as a finding that the gas line was "adequately" marked, and concluded that it applied to the entire gas line on mine property. Slip op. at 6. I not only question the judge's finding, but the majority's application of it to the pipeline.

Photographs of the accident site clearly show an absence of trees in the area where the dozer was found. Gov. Exs. 4-1, 4-3. They also show the dozer sitting just outside of the right-of-way, which indicates that the gas line did not actually run *within* the right-of-way at all times,

as generally believed by mine personnel. *Id.*; 32 FMSHRC at 142; Tr. 175. There is also no evidence that there were markers in the immediate area where the accident occurred. Slip op. at 6; Tr. 180-81; Gov. Ex. 4-3. In fact, the closest carsonite marker was 250 to 300 feet away, and the orange flags that were placed in the Low Gap area were not visible from the accident site. Tr. 85, 127, 182-83. In addition, the markers were located on the opposite side of the right-of-way from where Moss was operating the dozer. Tr. 183, 189; Gov. Exs. 4-28, 4-29. Boothe even admitted that beyond the Low Gap area, the exact location of the gas line was unknown. Tr. 386.

Perhaps the strongest indication that the markings may have been inadequate comes from the testimonial evidence that Moss was unclear about the location of the gas line. As we know, Vira denied that Moss ever expressed concern or asked about the gas line's location. Tr. 768-69. He testified that Moss only asked how far to stay away from the gas line, and that he, Vira, told him to keep a distance of 100 feet.² Tr. 768. However, according to Smith, Moss told him that he was not sure of the gas line's location when they were driving to work together on the day of the accident. Tr. 199-200. At around 9 a.m. that morning, Smith overheard Moss tell Vira over the CB radio that he "was concerned he might be getting too close to the gas line." Tr. 207-09. Similarly, Elmer Bishop, a foreman for East Cumberland, the contractor hired by Black Castle to cut and clear trees, testified that Moss called Vira that morning and "hollered at [Vira] and told him he didn't know where the gas line was at, or he didn't have no idea where it was at." Tr. 291-92, 296. Furthermore, Lonnie Wood, a survey lineman for Black Castle, stated that Moss asked him twice on the day of the accident about the location of the gas line.³ Tr. 573-74.

Although Vira's instruction to stay 100 feet away from the gas line was corroborated by Smith and Woodard, his description of what Moss initially expressed to him (i.e., "how far he needed to stay away from the gas line", Tr. 177, 768) was not. *See* Tr. 209, 234. In fact, Smith's and Bishop's testimony demonstrate that, contrary to Vira's account, Moss expressed confusion to Vira as to the location of the gas line. *Id.* Nonetheless, relying heavily on Vira's testimony, the judge found that Moss gave no indication to management that additional markings were

² The judge found that "if Moss had followed Vira's guidance and stayed 100 feet from the right-of way, this unfortunate accident would not have happened." 32 FMSHRC at 142. First, I reiterate that Moss was known to follow directions. Second, it was impossible for Moss to follow this guidance because from the start, his path of operation brought him within 75 feet of the gas line, a situation which Vira as Mine Superintendent should have known. Tr. 735; Resp. Ex. 3.

³ The judge concluded that Moss "really did not express concern or ask many questions." 32 FMSHRC at 142. He diminished Moss' concerns by characterizing his statement to Smith as a "remark" rather than "an expression of serious concern," and his questions to Wood as expressions of "curiosity." 32 FMSHRC at 138, 140-42. In light of the record in its entirety, I see no reason to doubt the seriousness or urgency of Moss' concern.

necessary.⁴ 32 FMSHRC at 141. He construed Smith's testimony as reconcilable with Vira's, and discredited the testimony of Bishop. 32 FMSHRC at 141.

Additionally, it does not follow that, because everyone knew the general location of the gas line, markers identifying its specific location were unnecessary.⁵ Even though Black Castle had mined coal within the vicinity of the gas line for years, it was well-known by management that mining in the East of Stollings Amendment Area, a virgin area of the mine, would bring miners in closer, more dangerous proximity to the gas line. This posed a hazard that required Black Castle to implement additional safety measures. At a minimum, the operator was required to ensure that the entire gas line was clearly marked before allowing miners to work in that area, especially because heavy equipment was involved. Moreover, ordinary human carelessness should not be ignored, which is all the more reason to clearly delineate the gas line.⁶ When a condition is so hazardous as to likely result in death, identification of that hazard must be indisputably clear.

As stated by my colleagues, "it might be possible to infer . . . that the pipeline was not adequately marked." Slip op. at 7. I think that such an inference makes sense from the evidence in the record. However, the judge saw it differently.

⁴ I do not agree that Moss should have done more to notify Black Castle that additional markers were necessary. See 32 FMSHRC at 141. Even if Moss had said nothing whatsoever, it was Black Castle's responsibility to ensure that the gas line was marked in such a way that any miner working in its immediate vicinity could safely avoid contact with it. As the Commission has stated, quoting the Congressional declaration in section 2(e) of the Mine Act, "the operators of . . . mines with the assistance of the miners have the primary responsibility to prevent the existence of [unsafe and unhealthful] conditions and practices in such mines. 30 U.S.C. § 801(e)." *Consolidation Coal Co.*, 16 FMSHRC 201, 205 (Feb. 1994).

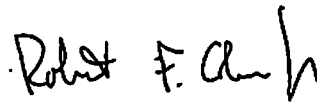
⁵ On some level management knew this because Marcum made the minimal effort of surveying the gas line and identifying it with orange flags in the Low Gap area. But even this was insufficient, because Moss' path of operation required that he bench the length of the Clarion seam, which moved beyond the Low Gap and through the greater East of Stollings Area. As such, Black Castle should have had the gas line surveyed and marked in the entire area, not just the Low Gap.

⁶ The Commission interprets mandatory safety standards to take into consideration "ordinary human carelessness." *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984). In *Thompson*, the Commission held that the guarding standard must be interpreted to consider whether there is a "reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." *Id.* An objective interpretation of such a standard cannot "ignore[] the inherent vagaries of human behavior. Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions. . . ." *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983).

The Test of Substantial Evidence

Under the Mine Act, the Commission must affirm the factual findings of the judge if they are supported by substantial evidence. Substantial evidence is “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) (citing *Consolidation Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Moreover, the Commission has recognized that a judge’s credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981).

The judge overwhelmingly credited the self-serving testimony of Vira and Boothe – both management representatives of Black Castle, and, in the case of Vira, the subject of the section 110(c) proceeding which is part of this case. On the contrary, he discredited the testimony of Bishop, and did not make what would have been reasonable inferences from the testimony of Smith and Woodard. However, the judge’s credibility determinations and the inferences he drew were not so unreasonable as to be reversible. The weight of the evidence supporting the Secretary’s position detracts from the evidence supporting the judge’s factual determinations, but not to the degree as to render them unsupported by “substantial evidence” within the scope of *Rochester & Pittsburgh Coal*. If the judge had made different credibility determinations, we could just as easily affirm the citations issued to Black Castle and Vira. However, under our substantial evidence standard of review, I must, with reluctance, stand with my colleagues in affirming the judge’s decision in result.



Robert F. Cohen, Jr., Commissioner

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