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EMERALD MINES V. SOL (MSHA)  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

EMERALD MINES COMPANY,  
CONTESTANT

CONTEST PROCEEDINGS

v.

Docket No. PENN 86-133-R  
Order No. 2536796; 4/8/86

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
RESPONDENT

Emerald Mine No. 1

UNITED MINE WORKERS OF  
AMERICA (UMWA),  
INTERVENOR

DECISION

Appearances: R. Henry Moore, Esq., Rose, Schmidt, Chapman,  
Duff & Hasley, Pittsburgh, Pennsylvania, for  
Contestant;  
James B. Crawford, Esq., Office of the  
Solicitor, U.S. Department of Labor, Arlington,  
Virginia, for Respondent;  
Tom Shumaker and Larry Steinhoff, United Mine  
Workers of America, Local 2258, Waynesburg,  
Pennsylvania, for Intervenor.

Before: Judge Melick

This case is before me under section 105(d) of the Federal  
Mine Safety and Health Act of 1977, 30 U.S.C. 801 et. seq., the  
"Act," to challenge a withdrawal order issued to Emerald Mines  
Company (Emerald) by the Secretary of Labor under section  
104(d)(1) of the Act.(FOOTNOTE 1) Hearings held May 1986, and this  
decision were expedited pursuant to Emerald's request. See  
Commission Rule 52, 29 C.F.R. 2700.52.

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The general issues before me are whether there was a violation of the cited standard and if so whether that violation was "significant and substantial" and caused by the "unwarrantable failure" of the mine operator to comply with that standard.

The order at bar, No. 2536796, alleges a violation of the mine operator's fan stoppage plan under the regulatory standard at 30 C.F.R. 75.321(FOOTNOTE 2) and charges as follows:

The fan stoppage plan was not followed on 4/5/86 in that the No. 4 Mine fan was down more than 15 minutes and the persons underground were not removed from the mine. The fan went down approximately 13:51 and restarted approximately 14:18.

As relevant hereto the fan stoppage plan provides that "if the fan is down for more than 15 minutes, all personnel will be withdrawn from the mine in an orderly manner."

During relevant times the Emerald No. 1 Mine was equipped with an alarm system which, when properly functioning, would trigger an alarm on the surface in the computer room and in the lamp room when any of the mine ventilation fans failed to function. It was the established procedure for the lampman to make a written notation of the time such an alarm would sound and to alert responsible mine officials of a fan stoppage and the precise time of stoppage. Prompt corrective action could then be taken and, upon the lapse of the 15 minute time period set forth in the plan, evacuation effected.

On April 6, 1986, however, the No. 4 fan stopped but the alarm system failed to function. Based on computer records it is not disputed that the fan stopped operating at 1:50 and 50 seconds "computer time." There is no computer record of the time the fan resumed operation. The specific issue before me is whether or not that fan resumed operation prior to the expiration of the 15 minute time period set forth in the fan stoppage plan. If it did not then there was a violation of the plan since a timely evacuation of the mine was not made.

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The Secretary urges as the best evidence of this time interval the testimony of maintenance foreman Charlie Buttermore. Buttermore testified that according to his watch the power went off at 1:59 p.m. (FOOTNOTE 3) It is not disputed that the subject fan stopped at the same time the power went off. Buttermore further testified that he restarted the No. 4 fan at 2:14 p.m. according to his watch. Buttermore later compared his watch to the computer clock and found his watch to be 7 minutes faster than the computer clock.

In sum the Secretary argues that the fan must have gone off at 1:57 and 50 seconds (i.e. 1:50 and 50 seconds plus the 7 minute correction to Buttermore's watch). Implicit in the Secretary's argument is that Buttermore's testimony that the power (and thus also the fan) went down at 1:59 p.m. was erroneous. According to the Secretary, therefore, the fan was down for 16 minutes and 10 seconds, exceeding the 15 minute time frame set forth in the fan stoppage plan by 1 minute and 10 seconds.

Emerald argues on the other hand that Mr. Buttermore's testimony of his time recordation standing alone is the best evidence of the elapsed time. According to this view the fan was down from 1:59 p.m. to 2:14 p.m., and was within compliance of the 15 minute time frame in the fan stoppage plan. Buttermore's testimony is not however consistent. It is not disputed that the fan went down at 1:50 p.m. and 50 seconds "computer time" and that Buttermore's watch was 7 minutes faster than that. Accordingly Buttermore's estimate that the power went off (and the fan went down) at 1:59 p.m. was clearly erroneous. Since the time recordation was within the complete control of the mine operator the proffered times should also be construed strictly against the operator. Under the circumstances I accept the Secretary's reconstruction of the time interval and find that there was a violation of the fan stoppage plan by 1 minute and 10 seconds.

I cannot however find on the facts of this case that exceeding the 15 minute time period by 1 minute and 10 seconds was a "significant and substantial" violation of the plan. See Secretary v. Mathies Coal Co., 6 FMSHRC 1 (1984).

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The reasoning and conclusions of the MSHA inspectors that the violation was "significant and substantial" were based on their assumption that the plan had been violated by 12 to 15 minutes not 1 minute and 10 seconds. Clearly the potential hazard of methane being drawn from the gob area would be greatly reduced by this significant factual change. Under the circumstances there is simply insufficient evidence to find that the violation was "significant and substantial."

I further find that the violation was not caused by "unwarrantable failure." In Zeigler Coal Company, 7 IBMA 280 (1977). The Interior Board of Mine Operations Appeals interpreted the term "unwarrantable failure" as follows:

An inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of lack of due diligence, or because of indifference or lack of reasonable care.

The Commission has concurred with this definition to the extent that an unwarrantable failure to comply may be proven by a showing that the violative condition or practice was not corrected or remedied prior to the issuance of a citation or order, because of indifference, willful intent, or serious lack of reasonable care. United States Steel Corp., v. Secretary of Labor, 6 FMSHRC 1423 at 1437 (1984).

It is clear in this case that the failure to precisely record the time of the fan stoppage was the result of an unanticipated failure in the alarm system.(FOOTNOTE 4) The designated employee, the lampman, was therefore unable to precisely record the time the fan went down. Since this time was, due to this unexpected failure, erroneously recorded and that erroneous information was conveyed to mine management it cannot be said that management knew or even should have known of the violation.

In addition, I find that the manager having what was then the best available information, Charlie Buttermore, determined in good faith that he restarted the subject fan within the 15 minute time frame. Furthermore as soon as higher managers realized that the 15 minute time frame might have been exceeded they promptly evacuated the mine and

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performed a special inspection in accordance with the fan stoppage plan. These actions are not consistent with an "unwarrantable failure" determination.5

Under the circumstances Order No. 2536796 is modified to a citation under section 104(a) of the Act.

Gary Melick  
Administrative Law Judge

1 Section 104(d)(1) provides as follows:

"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act."

2 The cited standard is construed to require the operator to comply with the fan stoppage plan approved by the Secretary, i.e., the provisions of the plan are enforceable as though they were a mandatory standard. See Zeigler Coal Co. v. Kleppe, 536 F.2d 398 (D.C.Cir.1976); Secretary v. Carbon County Coal Co., 7 FMSHRC 1367 (1985).

3 The MSHA Investigators also relied upon markings on the fan charts (Exhibits GÄ3 and GÄ4) to conclude that the No. 4 fan had actually been stopped for 30 minutes. Other witnesses examining the same records with a magnifying glass concluded however that the No. 4 fan had been down for less than 15 minutes. From my own examination of those charts with a magnifying glass I am unable to ascertain, with any degree of certainty, the time interval during which the fan was stopped. Under the circumstances I accord but little weight to this evidence.

4 I note in this regard that MSHA does not contend that the alarm failure was the result of operator negligence and acknowledges that the alarm had been inspected in compliance with the regulatory requirements.

5 Since I have found on the facts of this case that an "unwarrantable failure" did not exist it is not necessary to consider Emerald's objections to such findings on the grounds that the findings were based on an "investigation" rather than an "inspection" and that the alleged violation was abated before the order was issued.

