

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 25, 1999

RAWL SALES & PROCESSING CO.,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. WEVA 99-13-R
	:	Citation No. 7175284; 10/1/98
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Rocky Hollow Mine
ADMINISTRATION (MSHA),	:	
Petitioner	:	

SUMMARY DECISION

Appearances: William K. Doran, Esq., Heenan, Althen & Roles, Washington, D.C.,
for the Contestant;
Douglas N. White, Associate Regional Solicitor, Yoora Kim, Esq.,
Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia,
for the Petitioner.

Before: Judge Feldman

Before me for consideration is a notice of contest with respect to Citation No. 7175284 filed by Rawl Sales & Processing Company (the contestant) against the Secretary of Labor (the Secretary) and the Mine Safety and Health Administration (MSHA) pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 815. The contestant challenges the applicability of the on-shift beltline examination provisions of the mandatory safety standard in section 75.362(b), 30 C.F.R. § 75.362(b), to an unattended underground beltline that is operating when no employees are working underground.¹

The parties have stipulated to all issues of material fact and have filed motions for summary decision. Oral argument was conducted on January 25, 1999, at the Commission's Office of Administrative Law Judges in Falls Church, Virginia. The parties' briefs that address issues raised during the oral argument have been considered in the disposition of this matter. As discussed below, the Secretary's application of section 75.362(b) to the facts in this

¹ For the purposes of this decision, reference to on-shift examination of the beltline includes examination of both the belt conveyor and the belt conveyor haulageway.

case must be rejected because it mandates the exposure of on-shift beltline examiners, who would otherwise not be required to go underground, to the hazards of underground mining. Accordingly, Citation No. 7175284 shall be vacated.

I. Statement of the Case

The contestant's Rocky Hollow underground mine is an idle mine. The Rocky Hollow beltline is used as a conduit beltline between the beltline of Sycamore Fuels Mine No. 1 (Sycamore Fuels), a separate and distinct adjacent underground coal mine from which coal is extracted, and the beltline of the Sprouse Creek Preparation Plant (Sprouse Creek), the coal's ultimate destination. Specifically, the coal from Sycamore Fuels is brought to the surface by beltline. The coal is then transported approximately 1 mile on a surface beltline whereupon it enters underground traveling approximately 5.2 miles through the idle Rocky Hollow mine. Upon surfacing from Rocky Hollow, the beltline runs approximately 100 feet to the Sprouse Creek Processing Plant.

Coal is extracted from Sycamore Fuels during two shifts, 7:00 a.m. to 4:00 p.m., and, 4:00 p.m. to midnight. Sycamore Fuels runs a non-production maintenance shift from midnight until 7:00 a.m. Each day from 7:00 a.m. until 11:30 p.m., coal is transported from Sycamore Fuels on the beltline to the processing plant, which includes the beltline through Rocky Hollow. Rocky Hollow's preshift examination begins at 3:30 a.m., and, Rocky Hollow operates one work shift from 7:30 a.m. until 3:30 p.m. There are seven hourly and two salaried supervisory personnel that work underground at Rocky Hollow during this shift. Their job duties consist of performing underground preshift and on-shift examinations, as well as examining, cleaning and maintaining the beltline and related areas of the mine. There are no personnel underground at Rocky Hollow from 3:30 p.m. to 11:30 p.m. when coal is transported on the beltline through Rocky Hollow from Sycamore Fuels.

At issue is the validity of Citation No. 7175284, issued on October 1, 1998, that seeks to apply the on-shift beltline provisions of section 75.362(b) to the Rocky Hollow beltline during the 3:30 p.m. to 11:30 p.m. shift, a period during which no personnel are assigned to work underground at Rocky Hollow. Citation No. 7175284 states:

Coal is being transported through the [Rocky Hollow] mine, from Sycamore Fuels to the Sprouse Creek Preparation Plant, on the 1530 to 2330 shift, an on-shift examination is not being conducted on this shift. **No one is underground at this time.** (Emphasis added).

Section 75.362(b) provides:

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 of the **oncoming shift.** (Emphasis added).

It takes approximately three to four hours to perform an on-shift examination

of the Rocky Hollow beltline. For the first eight weeks following the issuance of Citation No. 7175284, in order to abate the citation and continue operating after 3:30 p.m., the contestant extended the work shift of four Rocky Hollow miners for three to four hours to perform the on-shift examination required by MSHA. As of December 2, 1998, the contestant has stopped the belt at 3:30 p.m. to avoid paying overtime.

II. Pertinent Stipulated Facts

A. Rocky Hollow

1. Contestant operates the Rocky Hollow Mine which is an underground coal mine through which a conveyor beltline carries raw coal from Sycamore Fuels Mine No. 1 to the Sprouse Creek Preparation Plant.
2. Rocky Hollow was an actively producing coal mine from the mid-1970's until November, 1994. Today Rocky Hollow is classified BA AActive-Nonproducing@ because it is an underground coal mine in which no coal is being extracted from the earth.
3. Rocky Hollow is inactive and it exists solely as a tunnel mine C the purpose of which is to serve as throughway for the conveyor belt between Sycamore Fuels and the Sprouse Creek Preparation Plant.
4. Rocky Hollow's MSHA Mine Identification Number is 46-05195.
5. Sycamore Fuels, Inc. operates the Sycamore Fuels mine, MSHA Mine Identification Number 46-01756. Coal is currently being produced at Sycamore Fuels.
6. Rawl Sales & Processing Co. Operates the Sprouse Creek preparation plant, MSHA Mine Identification Number 46-05368. Coal from Sycamore Fuels is processed at Sprouse Creek.
7. Sycamore Fuels is located approximately 8 miles by road from the Sprouse Creek Plant.
8. A conveyor beltline carries raw coal from Sycamore Fuels to be processed at Sprouse Creek. The beltline runs approximately .75 mile above the surface at Sycamore Fuels, then runs approximately 5.5 miles underground through the idle Rocky Hollow mine. From Rocky Hollow, the beltline runs approximately 100 feet to Sprouse Creek.
9. Sycamore Fuels mines coal on two production shifts (7:00 a.m.- 4:00 p.m. and 4:00 p.m.- 12:00 a.m.) and runs a non-production maintenance shift from 12:00 a.m.- 7:00 a.m.

10. Ordinarily, the beltline from Sycamore Fuels to Sprouse Creek operates each day from approximately 7:30 a.m. until 11:30 p.m.

11. Rocky Hollow ordinarily operates one work shift from 7:30 a.m.- 3:30 p.m. A total of 7 hourly miners and 2 salaried supervisory personnel work at Rocky Hollow. Except for one hourly electrician, all personnel are certified to perform underground preshift and on-shift examinations. Their duties consist solely of functions related to examination, cleaning and maintenance of the beltline and related areas of the mine.

12. Each working day, three miners at Rocky Hollow perform a preshift examination beginning at approximately 3:30 a.m. The miners perform an on-shift examination of Rocky Hollow during the 7:30 a.m.- 3:30 p.m. shift.

13. Rocky Hollow is equipped with an automatic fire warning system which is active 24 hours per day. The conveyor belts are flame-resistance as required in MSHA regulations.

14. Methane levels at Rocky Hollow are such that Rocky Hollow is not required under Section 103(i) of the Federal Mine Safety and Health Act to undergo spot checks for methane.

15. The roof at Rocky Hollow is composed predominately of shale.

16. Rocky Hollow has an approved roof control plan and a ventilation plan.

17. There are four portals to Rocky Hollow. All four portals are intake air since there is no coal being produced at the mine. A mine fan operates 24 hours per day and is examined daily.

18. The hourly miners at Rocky Hollow are represented by the United Mine Workers of America and their terms and conditions of work are covered by a collective bargaining agreement.

B. Citation Number 7175284

19. On October 1, 1998, a Mine Safety and Health Administration Inspector issued Citation No. 7175284 to Contestant alleging a violation of 30 C.F.R. ' 75.362(b) as follows:

Coal is being transported through the mine from Sycamore Fuels to Sprouse Creek Preparation Plant, on the 1530 to 2330 shift, an on-shift examination is not being conducted on this shift. No one is underground at this time.

This was the first time Contestant had been cited for a violation of this standard.

20. On October 30, 1998, Contestant filed a Notice of Contest of Citation No. 7175284.

21. The approximately 5.5 miles long portion of the beltline which runs underground through Rocky Hollow is the subject of Citation No. 7175284.

22. If Contestant assigns miners to examine the beltline between 3:30 p.m. and 11:30 p.m., Contestant, among other things, would be required to perform preshift examinations of the areas the miners would have to enter to perform the on-shift examination of the beltline.

23. In addition, while miners are underground, the mine will have to assign a person to monitor the main mine fan on the surface, pursuant to 30 C.F.R. ' 75.311(e).

C. Summary Decision

24. The parties agree that there are no material facts at issue and this case may be resolved on summary decision.

III. Discussion and Evaluation

Ordinarily, when the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to an absurd result. *See, e.g., Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (October 1989) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)). However, regulatory provisions that were promulgated in contemplation of, and intended to apply to, routine mining operations such as those at Sycamore Fuels, may become contrary to legislative intent when applied to unusual circumstances such as those that exist at the unstaffed Rocky Hollow mine. In this regard, the Commission has stressed that Aa [regulatory] standard must be construed in accordance with the statutory language upon which it is based.@ *Consolidation Coal Company* 15 FMSHRC 1555, 1557 (August 1993).

The preshift regulatory provisions in section 75.360,² and the on-shift regulatory provisions in section 75.362, implement the statutory requirements for preshift and on-shift examinations set forth in sections 303(d)(1) and (e) of the Mine Act, 30 U.S.C. ' 863(d)(1)

² Section 75.360 specifies a preshift examination must be performed Awithin 3 hours preceding the beginning of any **shift during which any person is scheduled to work or travel underground.**@ (Emphasis added). 30 C.F.R. ' 75.360.

and (e). These statutory provisions require preshift and on-shift examinations in active workings and working sections.

The Mine Act and the Secretary's regulations define "active workings" as "any place in a coal mine where miners are normally required to work or travel." 30 U.S.C. ' 878(g)(4); 30 C.F.R. ' 75.2. "Working section" is defined in the Mine Act and the regulations as "all areas of the coal mine from the loading point of the section to and including the working faces." 30 U.S.C. ' 878(g)(3); 30 C.F.R. ' 75.2.

Section 303(d)(1), in pertinent part, provides:

[1] Within three hours immediately **preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine**, certified persons designated by the operator of the mine **shall examine such workings** and any other underground area of the mine designated by the Secretary or his authorized representative. [2] Each such examiner shall **examine every working section in such workings** and shall make tests **in each such working section** for accumulations of methane with means approved by the Secretary for detecting methane and shall make tests for oxygen deficiency with a permissible flame safety lamp or other means approved by the Secretary; examine seals and doors to determine whether they are functioning properly; examine and test the roof, face, and rib conditions **in such working section**; examine active roadways, travelways, and belt conveyors on which men are carried, approaches to abandon areas, and accessible falls in such section for hazards; test by means of an anemometer or other device approved by the Secretary to determine whether the air in each split is traveling in its proper course and in normal volume and velocity; and examine for such other hazards and violations of mandatory health or safety standards, as an authorized representative of the Secretary may from time to time require. [3] Belt conveyors on which coal is carried shall be examined **after each coal producing shift has begun**. (Sentence numbers added). (Emphasis added).

Section 303(e) of the Mine Act, in pertinent part, states:

At least once during each coal producing shift, or more often if necessary for safety, each **working section** shall be examined for hazardous conditions by certified persons designated by the operator to do so. (Emphasis added).

Under the facts of this case, there is a working section and there are active workings at Sprouse Creek during the period 3:30 p.m. through 11:30 p.m. However, the active workings at Sprouse Creek during this period do not provide the statutory predicate for preshift and on-shift inspections at Rocky Hollow.

There are no active workings at Rocky Hollow from 3:30 p.m. to 11:30 p.m. because there is no "oncoming shift" entering Rocky Hollow at 3:30 p.m. Moreover, the Commission has determined, and the Secretary has conceded, that coal carrying belt equipment, alone, as

referred to in the third sentence of section 303(d)(1) of the Mine Act, does not constitute an active working that requires an on-shift inspection. See *Jones & Laughlin Steel Corporation*, 5 FMSHRC 209, 1212 (July 1983).

However, the Secretary argues the Commission's *Jones & Laughlin* decision is not controlling because it only applies to belt conveyors while section 75.362(b) applies to belt conveyor haulageways. Thus, the Secretary, relying on *Southern Ohio Coal Co.*, 12 FMSHRC 1498, 1501 (August 1990), asserts areas or places in a mine are active workings even if miners are required to travel in such areas on an irregular basis. In *Southern Ohio* the Commission determined a tailgate entry that is only examined on a weekly basis is an active working area.

However, a tailgate is distinguishable from this case because the tailgate is in a mine with working sections and active workings. The tailgate can serve as an escapeway during any working shift. In short, *Southern Ohio*'s mine contained the missing link that is required to support the position taken by the Secretary in this case - - people. Consequently, the Secretary's reliance on *Southern Ohio* is misplaced.

In the present case, there are no miners exposed to a dangerous underground mine environment in the Rocky Hollow mine from 3:30 p.m. until 11:30 p.m. Moreover, at oral argument, the Secretary was unable to identify any mine personnel at Sycamore Fuels or the Sprouse Creek Preparation Plant who were, in any way, exposed to a hazard because of the contestant's failure to perform an on-shift inspection of the Rocky Hollow beltline during the hours from 3:30 p.m. to 11:30 p.m. In addition, counsel for the Secretary could not identify any Sycamore Fuels or Sprouse Creek employees who would be at risk even if an explosion occurred in the Rocky Hollow mine. In this regard, it is significant that the alleged violation in this case was designated as nonsignificant and substantial (not reasonably likely to contribute to injury).

Turning to the statutory language of the first sentence in section 303(d)(1) of the Mine Act, while it is true the Secretary may designate any area of a mine, such as a beltline, for special preshift examination, the anticipated presence of miners underground is a prerequisite to such special examination. The plain language of section 303(d)(1) makes clear that preshift examinations are required three hours preceding the beginning of any shift **only** when it is contemplated that a miner in such shift will enter the active workings of the coal mine. Logic dictates there is no need for a preshift examination if miners are not going underground.³

Similarly, if a preshift of Rocky Hollow is not required for the 3:30 p.m. to 11:30 p.m. period because no one is underground, there is no basis for requiring an on-shift examination. An on-shift examination would expose the on-shift examiners to significant mine hazards given the fact that they would be called upon to conduct a four hour examination of a beltline that is 5.2 miles long.

³ At the oral argument, the Secretary's counsel conceded a preshift examination at Rocky Hollow prior to 3:30 p.m. is not required by section 75.360 because no miners are going underground. (Tr. 55).

Ironically, although beltline examinations may serve the interest of preventing interruptions in production because such examinations may disclose conditions before it is necessary to deenergize the beltline, the Secretary has not articulated why such examinations would enhance safety given the absence of miners who could be exposed to any hazard. Moreover, even the mandatory on-shift examination sought by the Secretary would result in the unattended operation of the beltline after the on-shift examination was completed. Accordingly, it is not clear that the references to *leach shift that coal is produced* and *oncoming shift* in section 75.362(b) apply to the unstaffed Rocky Hollow mine during a period when there is no working section and no working place.

Having concluded that the plain meaning of section 75.362(b) does not support the Secretary's position, the focus shifts to whether deference should be accorded to the Secretary's statutory and regulatory interpretation. The Secretary asserts she should be accorded *great* deference to [her] interpretation of a regulation [she] has promulgated under a statute [she] is entrusted with administering. . . . (Sec. br. at p.3). While it is within this Commission's discretion to accord deference to the Secretary's reasonable statutory and regulatory interpretations when ambiguity exists, deference is particularly appropriate in matters where the regulation involves considerations that *require significant expertise and entail the exercise of judgment grounded in policy concerns.* (Thomas Jefferson Univ. v. Shalala, 129 L. Ed. 405, 415 (1994) (quoting Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 697 (1991))).

In essence, the Secretary asserts that it is safer to expose beltline examiners to the hazards of underground mining in an attempt to prevent a belt malfunction and possible fire. However, the Secretary has failed to identify any miners who would be exposed to any hazard if a fire occurred because the beltline was not routinely examined after 3:30 p.m. A fire or other smoke hazard could occur at any time, anywhere along this **5.2** mile belt, with or without the presence of belt examiners. In such event, it is more desirable to have personnel on the surface rather than underground.

In apparent recognition of the implicit underground safety hazards associated with on-shift examinations, the Secretary also argues that on-shift examinations during the eight hour period preceding the preshift examination will reduce the hazards faced by preshift examiners. However, the preshift examination begins at 3:30 a.m., four hours after the beltline is shut down.

The minimal risk, if any, posed to the preshift examiners does not justify exposing the on-shift examiners to the hazards associated with an operational beltline. Moreover, as noted above, even the Secretary would permit the beltline's unattended operation after the on-shift examination for a substantial part of the eight hour *shift* immediately preceding the 3:30 a.m. preshift examination.

Finally, the Secretary contends the failure to on-shift the beltline may contribute to a fire which would pose a hazard to firefighters. The potential hazard to victims trapped underground in the event of a fire, far outweighs the potential hazard to firefighters who would enter the mine from the surface fully prepared to extinguish a fire.

Admittedly, I am less than comfortable with the concept of an unattended beltline. I have been ready and willing to defer to the Secretary upon a showing of valid policy concerns. However, the Secretary's insistence on an on-shift examination during the period 3:30 p.m. to 11:30 p.m. cannot be reconciled with her conclusion that a preshift examination is not required. Moreover, notwithstanding the Secretary's failure to clearly identify anyone who is exposed to risk, the Secretary's vaguely expressed safety concerns are substantially undermined by the approximate four hour unattended operation of the beltline that would occur after the on-shift examination mandated by the Secretary is completed. Consequently, I am unable to defer to the Secretary because she has failed to advance any consistent, convincing policy concerns that justify interpreting the pertinent statutory and regulatory provisions in a way that prohibits unattended operation of the Rocky Hollow beltline.

ORDER

In view of the above, Rawl Sales & Processing Company's Motion for Summary Decision in this contest proceeding **IS GRANTED**. Consequently, Citation No. 7175284 **IS VACATED**.

Jerold Feldman
Administrative Law Judge

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