

In the matter of
RAG Emerald Resources, LP
Emerald Mine
I.D. No. 36-05466

Petition for Modification

Docket No. M-2001-010-C

PROPOSED DECISION AND ORDER

On January 29, 2001, a petition was filed seeking a modification of the application of 30 CFR 75.360(b)(10) to Petitioner's Emerald Mine, located in Green County, Pennsylvania. Instead of conducting a preshift examination within three hours of the beginning of the shift at "other areas where work . . . during the oncoming shift is scheduled", petitioner seeks to permit certified examiners who will be performing such work to examine the area immediately prior to performing the work. The petitioned areas where work is scheduled consist of areas that have been previously examined during a weekly examination under 75.364 and found to contain hazardous conditions which need to be corrected. The Petitioner alleges that the alternative method outlined in the petition will at all times guarantee no less than the same measure of protection afforded by the standard.

MSHA personnel conducted an investigation of the petition and filed a report of their findings and recommendations with the Administrator for Coal Mine Safety and Health. In addition, extensive comments were received from the United Mine Workers with regard to the petition. After a careful review of the entire record, including the petition, MSHA's investigative report and recommendation, all comments received, the preamble discussion for the preshift examination standard, and the decision in MSHA v. RAG Emerald Resources, Corp., 22 FMSHRC 519 (April 4, 2000) on whether the areas now petitioned were subject to preshift examination under 75.360(b)(10) which preceded this petition, this Proposed Decision and Order is issued.

Finding of Fact and Conclusion of Law

30 CFR 75.360 essentially restates the requirements of §303(d)(1) of the Federal Mine Safety and Health Act (Mine Act), 30 U.S.C. §863(d)(1). Under section 75.360(a), a certified examiner must conduct a preshift examination within three hours before "the beginning of any shift and before anyone of the oncoming shift . . . enters any underground area of the mine . . ." Subsections (b) through (g) of §75.360 set forth the required elements of the examination. Subsection (b)(10) specifically requires that a preshift examination be performed in areas "where work or travel

during the oncoming shift is scheduled prior to the beginning of the preshift examination."

The preshift examination requirement "is of fundamental importance in assuring a safe working environment underground." Secretary of Labor v. Enlow Fork Mining Co., 19 FMSHRC 5, 15 (January 1997) citing Secretary of Labor v. Buck Creek Coal Co., 17 FMSHRC 8, 15 (January 1995). Congress explicitly acknowledged the importance of the preshift examination by making it a long-standing statutory mandate, dating back to the Federal Coal Mine Safety Act of 1952, 30 U.S.C. §471 et seq. (1955). Enlow Fork Mining Co., supra at 15. These provisions were strengthened in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 303(d)(1) and (2)(1976), and carried over in identical fashion to the Mine Act. The purpose of the required preshift examination is to "prevent loss of life and injury." See S.Rep. No. 411, 91st Cong., 1st Sess. 65 (1969), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 183. This is achieved by the preshift through preventing hazardous conditions from developing.

The preshift examination is an accepted safety practice in the industry and is a primary means of determining the effectiveness of the mine's ventilation system and of detecting developing hazards, such as methane accumulations and problems with the roof, face or ribs. Generally, a preshift examination is necessary in areas where persons will work or travel during the oncoming shift and other locations where potential hazards can develop that likely to threaten the safety of miners in active working areas. An examination of these areas before a shift begins allows miners on the oncoming shift to be notified if hazards exist and allows corrective actions to be taken. In addition to methane accumulations and oxygen deficiency, other hazards that can be detected during the preshift are loose roof and ribs, water accumulation that affects air courses or escapeways, electrical hazards from trolley wires, and fire hazards from damaged or improperly operating belt conveyors.

The petitioner, however, does not want to perform a preshift examination in areas where work has been scheduled for the oncoming shift to correct existing hazards already discovered and recorded during a prior weekly examination under 75.364. Rather, the petitioner proposes to require the examiners, sent to perform this scheduled corrective work, to examine the area upon arrival in the area and immediately preceding performance of the work to correct already recorded hazards. This alternative method proposed by the Petitioner will not at all times guarantee no

less than the same measure of protection afforded the miners under 30 CFR 75.360(b)(10).

In support of its position, petitioner argues that examination of out-of-the-way places could cause the examiners to deviate from their normal routes and fail to examine some parts of the active areas, resulting in the mine not being fully examined. This argument, however, is rejected. Under 75.360 RAG Emerald must perform all preshift examinations and assign a sufficient number of examiners to ensure that all areas are examined in the time allotted.

The petitioner also asserts that the proposed alternative method should be permitted since it is similar to the preshift examination exception granted to pumpers in 75.360(a)(2). Under that provision, a preshift examination of areas where a pumper is scheduled to work or travel is not required if the pumper is a certified person and conducts an examination for hazardous conditions for only himself prior to performing any other work. This is because pumpers travel in remote areas, perform more limited work activities such as determining water levels and cleaning pump screens, and normally work alone. If work by other persons, in addition to the pumper, was scheduled in the same area a regular preshift examination under 75.360(a)(1) would still be required. On the other hand, the situations which could be covered under the proposed alternative method, would usually involve a crew of miners scheduled to work to correct a broader range of hazardous conditions already discovered during a prior weekly examination.

The purpose of the preshift examination, as stated above, is to identify hazards that could affect the safety and health of the miners. Under petitioner's alternative method, hazards may not be adequately identified if the examiners' attention is diverted by the repair activity they were sent to perform. Moreover, since the examiners may be responsible for ultimately correcting any hazards that they report, there may be an incentive not to report some hazards if the examiners would have to return to the area again to perform further corrective action.

Further, a proper preshift examination ensures that miners are prepared to address and correct hazards in a safe manner. Necessary tools and supplies as well as adequate manpower can be made available by the operator to correct hazards based on the conditions the examiner finds in the preshift examination. This reduces the possibility that miners assigned to correct hazards will face conditions that have deteriorated since the time that they were initially reported. The proposed alternative method,

however, would not ensure this. For example, if it were determined that the hazardous roof conditions in an area reported during the weekly examination could be repaired by setting a certain number of additional posts, the examiners, who would also be assigned to do the corrective work, would arrive at the area with that number of posts. But if the roof conditions had deteriorated, from the time the roof hazards were first identified to the time the examiners arrived at the area to perform the repairs, and now more posts were needed to properly repair the roof than originally anticipated, the examiners would not have the necessary supplies to correct the hazardous conditions. But, if the area where the work had been scheduled had been preshift examined, then those sent to make the repairs would know of the deteriorated conditions and could take with them the necessary number of posts now needed to fully correct the hazard. Thus, the proposed alternate method would not provide miners the same measure of protection afforded by the standard.

For the reasons expressed above, RAG Emerald Resources, LP is not granted a modification of the application of 30 CFR 75.360(b)(10) to its Emerald Mine.

ORDER

Wherefore, pursuant to the authority delegated by the Secretary of Labor to the Administrator for Coal Mine Safety and Health, and pursuant to Section 101(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C., sec. 811(c), it is ordered that RAG Emerald Resources, LP's Petition for Modification of the application of 30 CFR 75.360(b)(10) in the Emerald Mine is hereby:

DENIED.

Any party to this action desiring a hearing on this matter must file in accordance with 30 CFR 44.14, within 30 days. The request for hearing must be filed with the Administrator for Coal Mine Safety and Health, 4015 Wilson Boulevard, Arlington, Virginia 22203.

If a hearing is requested, the request shall contain a concise summary of position on the issues of fact or law desired to be raised by the party requesting the hearing, including specific objections to the proposed decision. A party other than Petitioner who has requested a hearing shall also comment upon all issues of fact or law presented in the petition, and any party to this action requesting a hearing may indicate a desired hearing site. If no request for a hearing is filed within 30 days after

service thereof, the Decision and Order will become final and must be posted by the operator on the mine bulletin board at the mine.

Allyn C. Davis
Acting Deputy Administrator
for Coal Mine Safety and Health