CCASE:
RAVEN MINING V. SOL (MHSA)
DDATE:
19800123
TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

RAVEN MINING COMPANY, CONTESTANT	Contest of Citation and Order Docket No. NORT 79-78
v.	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Order No. 0678141 January 22, 1979 Citation No. 035139 January 8, 1979
UNITED MINE WORKERS OF AMERICA, (UMWA), RESPONDENT	No. 1 Mine

DECISION

Appearances: J. Perry Dotson, Esq., Norton, Virginia, for the contestant Leo McGinn, Trial Attorney, U.S. Department of Labor, Arlington, Virginia, for the respondent MSHA

Before: Judge Koutras

Statement of the Case

This proceeding concerns a contest filed by Raven Mining Company on March 2, 1979, challenging the legality of the issuance of the captioned citation and order. The notice of contest is in the form of a letter dated February 8, 1979, from contestant's attorney, challenging the fact of violation and requesting a hearing on the closure order for the purpose of "determining damages sustained" by Raven Mining Company.

Respondent MSHA filed an answer on March 28, 1979, and asserted that the order was properly issued after contestant failed to take reasonable steps to abate the citation after an extension of the original time for abatement had been granted by the inspector who issued the citation. By notice of hearing issued on July 11, 1979, the matter was scheduled for hearing in Bristol, Virginia, September 11, 1979. Thereafter, on August 23, 1979, MSHA filed a motion to dismiss on the ground that the Act does not provide a remedy for recovery of "damages" sustained by a mine operator as a result of a closure order, and that a final order assessing a civil penalty in the amount of $160 for the violation in question was entered on May 23,

1979, and upon subsequent non-payment, was forwarded to the Department of Justice for collection on July 12, 1979. The collection procedure initiated by MSHA pursuant to 30 CFR 100.5 and 100.6, resulted from contestant's failure to respond to the initial notice of assessment issued by MSHA. Since MSHA's motion to dismiss was filed well after the notice of hearing, no ruling was made and the parties were directed to appear at the hearing and MSHA was afforded an opportunity to be heard on its motion. A hearing was conducted on the merits of the withdrawal order and the parties were afforded a full opportunity to be heard on all issues presented in the proceeding. The parties were afforded an opportunity to file posthearing briefs but declined to do so.

Issues Presented

1. Whether the final disposition of the civil penalty proceeding pursuant to Part 100, Title 30, Code of Federal Regulations, which resulted from contestant's failure to timely challenge the issuance of the citation, precluded contestant from challenging the propriety and legality of the closure order which resulted from the failure to abate the citation within the time fixed by the inspector.

2. Whether the time fixed for abatement of the citation was reasonable and whether the closure order was properly issued.

Applicable Statutory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

2. Sections 104(a) and (b) of the Act, which states as follows:

> (a) If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.
>
> (b) If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within

the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

DISCUSSION

Background of the Controversy

On January 8, 1979, at approximately 9:45 a.m., MSHA inspector Joseph Tankersley issued Citation No. 035139 pursuant to section 104(a) of the Act charging a violation of 30 CFR 75.1713-2. He fixed the abatement time as 9 a.m., January 12, 1979, and the citation stated as follows: "A communications system was not provided at the mine where the nearest point of medical assistance in case of an emergency could be contacted. (The phone company had removed the phone from mine property)."

On January 12, 1979, the inspector extended the abatement time to January 19, 1979, and the reason given for the extension was stated as follows: "The mine foreman stated that the operator contacted the phone company, and they are going to install the phone as they could get to it. More time is needed for the telephone company to install the telephone."

On January 22, 1979, the inspector issued a section 104(b) order of withdrawal and the basis for this action is shown on the face of the order as follows: "A communication system has not been provided at the mine where medical assistance could be contacted in the event of an emergency."

The inspector modified the withdrawal order on January 23, 1979, to show that the entire mine and surface work areas were closed. He further modified the closure order on January 24, 1979, to allow mine operations to continue, and the reasons for this action are shown on the face of the modification order as follows: "This is a modification allowing the operator to resume operations due to the fact that Moss 3-A Mine, Clinchfield Coal Company is readily available (estimated five (5) minutes travel) and the operator is installing communications to the Moss 3-A Mine. Moss 3-A personnel have agreed to the communication system."

The order was subsequently terminated on January 26, 1979, after abatement of the cited conditions and after telephone communications were established between the Raven Mine and the Clinchfield Mine, and Clinchfield agreed to supply emergency ambulance service. The telephone communications between the two mines is the system presently in use and MSHA has now

accepted this arrangement as compliance with the requirements of section 75.1713-2 (Tr. 78-84).

Testimony and Evidence Adduced by MSHA

MSHA inspector Joseph R. Tankersley testified that he issued the citation and order in question, and he identified copies of the citation, order, the modification of the order, and the termination of the order (Exhs. G-4 through G-6). During his January 8th inspection, he noticed that the telephone which had been installed for emergency communication had been removed from the mine. Based on conversations with the mine foreman, he ascertained that the telephone was removed by the phone company for failure to pay delinquent bills. The phone jack was still on the wall of the mine office and he had observed the telephone during previous mine inspections. The phone was installed to comply with section 75.1713-2, and mine president James C. Scarborough, had previously submitted a letter to the MSHA district manager advising that the emergency communication system would be by telephone. The letter stated that the operator would contact the Dante Clinic by telephone in emergency cases (Tr. 37). Inspector Tankersley explained the requirement of the standard to the foreman, and when asked whether a CB radio was acceptable to meet the requirements of section 75.1713-2, he advised him that it was. However, a CB radio was not located on mine property during the January 8th inspection. The CB radio was kept in the mine foreman's personal vehicle which was being used by his wife on that day, and anytime miners or their wives used the vehicles, the CB's would be off mine property. When he inspected the mine on January 8, 1979, there was no automobile or CB radio on mine property, and there was no other form of communications available.

Inspector Tankersley testified that he fixed January 19 as the abatement time, but could not return to the mine until January 22, at which time he found that the mine phone had not been reinstalled because of non-payment of back bills. He modified his order on January 24, because Mr. Scarborough spoke with MSHA's subdistrict manager about providing an alternate communication system whereby Mr. Scarborough and the district manager agreed that a telephone line would be extended to the Clinchfield Mine, approximately 300 yards away, and Clinchfield Coal Company agreed to provide the Raven Mine with emergency ambulance service. Upon the subsequent installation of the telephone on January 26, he terminated the withdrawal order. Although he modified and terminated the withdrawal order, Mr. Tankersley did not believe that the contestant acted in a reasonable manner in abating the citation and withdrawal order because non-payment of bills is not a valid reason. The first time contestant attempted to negotiate with Clinchfield about a telephone line was January 24, 1979, and prior to this time contestant refused to pay the delinquent telephone bills, but the telephone was subsequently reinstalled at the mine (Tr. 33-43).

On cross-examination, Inspector Tankersley testified that section 75.1713-2 permits the use several means of

communications, such as a phone, CB, vehicle radio phone, or "any other means of prompt communcation to the nearest point of medical assistance." He stated that "any other means of

prompt communication" means some kind of positive communication between the medical facility and the mine, and it does not mean face-to-face vocal communication. He would not accept as compliance Mr. Scarborough running to the Clinchfield Mine to seek ambulance assistance in the event of an accident. Although the Dante Clinic is some 5 miles, or 20 minutes, from the mine, whereas the Clinchfield Mine is 5 minutes away and has an ambulance available, Clinchfield does not have the medical personnel as does the clinic, and the intent of section 75.1713-2 is to provide medical service. Further, even though Mr. Scarborough is a lessee of Clinchfield, it is debatable whether Clinchfield would render assistance (Tr. 43-47). At the time the telephone line to Clinchfield was being installed on January 25, a CB system would have sufficed as long as there were someone present all the time to answer it. He did not believe that someone running to Clinchfield would satisfy the requirement of promptness (Tr. 48). There have been no medical emergencies at the mine (Tr. 48).

Responding to a question about section 75.1713-1, Mr. Tankersley testified that it requires the mine operator to advise the district manager of the type of communication plan used at the mine so the district manager can determine whether it complies with the standard, and if there are changes, the operator is required to notify the district manager within 10 days. Section 75.1713-2 allows the operator to determine whether or not the change in communication complies with the requirements (Tr. 49).

On redirect examination, Inspector Tankersley testified that the "Paul Revere" type of communication, as opposed to the telephone line to the Clinchfield Mine, is not satisfactory because the 300 yard distance by foot is not easily traveled or accessible during snow or rainy weather. If an accident occurs on mine property, the operator is required to maintain a permanent telephone number for the emergency medical facilities posted (Tr. 50).

On recross-examination, Mr. Tankersley testified that the Clinchfield Moss 3A Mine is 300 yards higher on the mountain than the Raven mine, and the mines are connected by a haulage road. Miners frequently use a vehicle in traveling on the haulage road to and from both mines (Tr. 51-52). Responding to a bench question about whether he was aware of the existence of an alternate means of communication when he issued the citation on January 9, 1979, Inspector Tankersley stated that he was not (Tr. 55). Calls from the mine to the Dante Clinic were not made by CB radio, and the reason for issuing the citation was that he observed no telephone at the mine (Tr. 57).

On redirect examination, Inspector Tankersley testified that if the telephone had been replaced in the mine office by a CB radio, he would not have issued a citation, and had he observed any telephone communication between the two mines, he would have contacted personnel at the other mine to ascertain whether this arrangement was acceptable (Tr. 58).

On recross-examination, Inspector Tankersley testified that he does not inspect any mines that are using CB radios. In Kentucky, MSHA inspectors have accepted CB radios under section 75.1713-1 only if they are installed in the mine office, but a CB radio installed in a vehicle which is not on mine property at all times does not comply with section 75.1713-1 (Tr. 59).

Contestant's Testimony

James C. Scarborough, President of Raven Mining Company, testified that he probably wrote up a communication plan, but when he first started operations, he could not obtain telephones. In view of the fact that the C & P Telephone Company was slow in installing telephones, he installed a telephone line down the hill to the Clinchfield Mine and used that system as a mine telephone. Although Mr. Tankersley did not inspect the mine at that time, another inspector did and and he accepted the system. On January 8, the mine used a CB radio instead of a telephone, because the existing line to Clinchfield was broken by a truck. When the CB was being used he did not advise MSHA of the change because he was not aware that he had to, and he spoke to no inspector about it (Tr. 62). He could not recall whether the phone was out or in and indicated that he was experiencing difficulties in maintaining the phone in working order when it rained and that the phone company could not maintain it in operating order (Tr. 63).

Mr. Scarborough testified that his CB arrangements entailed arrangements with a Mr. Darrel Duty, who is home all the time working with CB's. In the event of the need for medical assistance, a call would be made to Mr. Duty from a CB in three trucks at the mine and he in turn would call the Coeburn Rescue Squad which was an hours drive away. There was no CB in the mine office. This plan never included the Dante Clinic, and Mr. Scarborough stated he did not know that the Dante Clinic had an ambulance service. This arrangement was the mine plan which was filed with MSHA in addition to the plan to run to the adjacent clinchfield mine to summon their ambulance in the event of an emergency. He then stated that the CB plan was not filed with MSHA's district manager, but that it was in use at the mine. The district manager was also not informed about the arrangements to use Clinchfield's ambulance, but frequent trips are made to that mine either by automobile over the road or on foot. In addition, he can yell down to the mine and can be heard. He has never discussed this plan with Inspector Tankersley (Tr. 63-68).

Mr. Scarborough stated that under his interpretation of section 75.1713-2, he can "holler at somebody and get communication, it's just as well as talking to somebody on the telephone." He was not at the mine when the inspector was there on January 8, but he set up a CB radio after that time and his employee assured him from that day on that the three vehicles with CB's would be at the mine at all times. He learned from his employee that when the inspector returned to the mine, he refused an offer to call Mr. Duty on the CB and issued his closure order (Tr. 69).

Mr. Scarborough stated that he is not protesting the fact that the inspector issued a citation on January 8 after he observed that there was no

phone in the mine office. His protest is of the closure order after he established CB communication and the procedure for running to the Clinchfield mine for assistance (Tr. 77).

On cross-examination, Mr. Scarborough testified that he did not know when the telephone was removed from the mine office, nor he know whether the foreman's truck with the CB radio was off mine property. Although he did not see or talk to Inspector Tankersley, he testified that Mr. Tankersley returned to the mine on January 12, the date on which the citation was scheduled to be terminated, and he spoke with foreman Gary Johnson, and granted an extension for abatement until January 19. He further testified that he did not see or talk to Inspector Tankersley during the citation closure stage, and Mr. Johnson informed him about the CB arrangements with Mr. Duty, but that he personally has never met Mr. Duty (Tr. 91-93). Although the mine was operating under two shifts when the citation was issued, all three employees with the CB's in their trucks were on mine property at all times even though they worked only one shift. Now that the mine is operating under one shift, all three employees are present (Tr. 94).

Responding to a question about the reinstallation of the telephone system between his mine and the Clinchfield Mine, Mr. Scarborough testified that he authorized the issuance of a telephone order on January 22, 1979. Although Inspector Tankersley granted respondent 3 days beyond the extension to January 22, he testified that it was unreasonable for him for not trying out the CB radio. If all three employees were there, a CB radio was guaranteed to be there. Foreman Gary Johnson has never been absent since the mine has been in operation, and Mr. Johnson told him that Inspector Tankersley was mistaken about the CB radio truck being taken away by his wife on January 8, 1979 (Tr. 96).

Findings and Conclusions

Reviewability of the Closure Order

During the hearing, MSHA reasserted its view that the contest should be dismissed because the pleadings filed by the contestant indicated a desire by contestant to be heard on the limited question of "damages" sustained by the closure order. Since the Act does not provide for monetary damages, and since a final default order assessing a civil penalty in the amount of $160 for the citation in question was entered on May 23, 1979, and forwarded to the Justice Department for collection on July 12, 1979, MSHA argues that the operator's opportunity for affirmatively pleading economic loss as a mitigating factor in the amount of any penalty assessed is irrevocably lost (Tr. 8-10; MSHA's Motion to Dismiss, filed August 23, 1979).

Contestant argued that its intent in filing its initial notice of contest on February 8, 1979, was to challenge both the fact of violation and the subsequent withdrawal order which issued. Contestant maintained that it should be given the

opportunity to establish and prove its contention that at the time the citation issued, contestant did in fact have a communications system in effect at the mine which met the requirements of

section 75.1713-2, that the issuance of the citation and the order were arbitrary, and that contestant should be entitled to present its case so as to avail itself of all available administrative, as well as economic remedies to which it is entitled under the Act (Tr. 12-14).

It would appear from the record in this case that no formal civil penalty proceeding has ever been filed by MSHA with the Commission, and this resulted from the fact that the contestant did not contest the initial proposed penalty issued by MSHA pursuant to 30 CFR 100.5 and 100.6, and the matter culminated in a default order being forwarded to the Department of Justice for collection of the $160 assessment for Citation No. 035139. Under the circumstances, I agree with MSHA's assertion that contestant is foreclosed from pleading any off-set resulting from the closure order in its current contest. However, it seems clear that in a civil penalty proceeding, the validity of the order is not in issue, and withdrawal orders are not subject to vacation, Buffalo Mining Company, 2 IBMA 327 (1973); Plateau Mining Company, 2 IBMA 303 (1973); Ashland Mining Company, 5 IBMA 259 (1975); Jewell Ridge Coal Company, 3 IBMA 376 (1974). The usual method for an operator to contest the propriety and legality of a withdrawal order is to seek review pursuant to section 105(d) of the Act, and the fact that the conditions cited have been abated and the order terminated does not warrant dismissal of the contest, Zeigler Coal Company, 1 IBMA 72 (1971). On the facts and circumstances presented in this proceeding, I conclude that contestant is entitled to an independent review of the validity and propriety of the closure order issued pursuant to section 104(b) of the Act, notwithstanding the fact that it did not contest the initial proposed civil penalty assessment. Under the circumstances, MSHA's narrow and restrictive reading of the notice of contest filed in this case is rejected and its motion to dismiss is DENIED. I conclude that contestant has a right to seek review of the reasonableness of the abatement time, and coupled with the fact that it may be liable to compensate miners under section 111 of the Act for the period of time the mine was closed as a result of that order, it is is entitled to its day in court, and MSHA conceded as much during oral argument (Tr. 20-23, 26). Although it is true the notice of contest filed by the contestant on February 8, 1979, makes reference to a desire for a hearing "to determine damages" sustained by the contestant as a result of the closure order, I believe that the pleadings should be broadly construed so as to protect not only the rights of miners, but mine operators as well.

Reasonableness of the Abatement Time

The underlying citation issued in this case charges the contestant with a violation of 30 CFR 75.1713-2, which provides as follows:

> (a) Each operator of an underground coal mine shall establish and maintain a communication system from the mine to the nearest point of medical assistance for use in an emergency.

> (b) The emergency communication system required to be maintained under paragraph (a) of this 75.1713-2 may be established by telephone or radio transmission or by any other means of prompt communicationi to any facility (for example, the local sheriff, the State highway patrol, or local hospital) which has available the means of communication with the person or persons providing emergency medical assistance or transportation in accordance with the provisions of 75.1713-1.

The citation was initially issued on January 8, 1979, and the original abatement time was fixed as January 12, 1979, and subsequently extended to January 19, 1979. The inspector did not return to the mine until January 22, 1979, and at that time made the determination that abatement had not been achieved and that the time should not be further extended. Under the circumstances, he then proceeded to issue his withdrawal order, and the issue presented is whether the inspector acted reasonably in light of all of the prevailing circumstances. In this regard, it seems clear that where an inspector finds that a violation has not been abated within the initial or extended time fixed by him, he is authorized to either grant another extension or issue a withdrawal order. The inspector must act reasonably on the basis of the facts confronting him at that time, United States Steel Corporation, 7 IBMA 109 (1976), and it is an abuse of discretion to issue a withdrawal order if the circumstances show that the time for abatement should have been further extended, Old Ben Coal Company, 6 IBMA 294 (1976). The contestant has the burden of establishing that the inspector acted unreasonably in fixing or failing to extend the abatement time, Freeman Coal Mining Corporation, 1 IBMA 1 (1970).

It seems clear from the record in this proceeding that the inspector issued the initial citation when he failed to find a telephone installed in the mine office. Although he observed a phone jack, the telephone was missing, and upon further inquiry he learned that the phone had been removed because of non-payment of past bills. Contestant has presented no evidence to dispute this fact, and Mr. Scarborough did not deny it. The inspector believed that a violation occurred because contestant failed to maintain its telephone communications between the mine and a local clinic, and this arrangement was the only one on file with the local MSHA district office. Further, during the course of oral argument at the hearing, contestant indicated that it was not challenging the initial citation issued by the inspector as a result of his failure to find a telephone installed in the mine office (Tr. 76). Contestant's defense to the order is based on the assertion that subsequent to the issuance of the citation, contestant did in fact establish a communications system which complied with section 75.1713-2, when it instituted a procedure for voice of foot communications with the adjacent Clinchfield Mine and a system for use of CB radios mounted on vehicles which were on mine property. In these circumstances, contestant argued that it was in compliance at the time the order issued and that the inspector acted arbitrarily and unreasonably in failing to accept these procedures as compliance and in issuing his closure

order (Tr. 75-80).

Although Mr. Scarborough alluded to the fact that he had somehow changed his communication plan which had been filed with MSHA, and intimated that MSHA had accepted something less than telephone communications, it seems clear from the abatement and the testimony presented by both Mr. Scarborough and the inspector, that abatement was achieved by the installation of a phone line between the Raven Mine and Clinchfield Mine so that emergency ambulance service could be provided, and that MSHA will not accept CB communications mounted in a mine vehicle or voice and/or foot communication as compliance (Tr. 79-85). It is also clear to me that contestant's attempt at compliance by utilizing means other than a telephone system took place during the abatement period (Tr. 89). Mr. Scarborough was not at the mine when the withdrawal order was issued on January 22, and he believed the inspector acted unreasonably by not trying out the CB radio arrangements (Tr. 95). Aside from the fact that it can be argued that contestant has waived its right to contest the fact of violation by not contesting the original civil penalty assessment and permitted that assessment to ripen into a default judgment, the facts and evidence adduced at the hearing in this contest proceeding supports a finding of a violation of the cited standard. It seems clear from the record that at the time the citation issued, contestant was not in compliance with section 75.1713-2, because it did not have the required operative telephone communications arrangements with respect to emergency medical assistance.

With respect to the reasonableness of the abatement time, I find and conclude that the record establishes that the inspector acted in more than a reasonable fashion in fixing the initial abatement time, as well as in the exercise of his discretion in not extending the abatement time any further. On the basis of the evidence adduced here, it seems clear to me that contestant's failure to maintain the required emergency telephone communications stems from the fact that contestant failed to pay its past due telephone bills. That is a matter solely within the contestant's control, and I can find no mitigating circumstances presented which detracts from that fact. The initial abatement time was more than ample for contestant to resolve the matter with the phone company. As a matter of fact, contestant was gratuitously given an additional period for compliance from January 19 to January 22. However, on the basis of the record here presented that time was apparently spent by contestant in an effort to convince MSHA that his alternative communications efforts were in compliance rather than to comply with the citation and timely reinstall the phone. Considering the totality of the circumstances presented, I conclude and find that the time fixed for abatement was reasonable and that the inspector was not arbitrary in failing to extend the abatement time further. The order is AFFIRMED.

ORDER

In view of the foregoing findings and conclusions, Citation No. 035139, issued January 8, 1979 and Order of Withdrawal No. 0678141, issued January 22, 1979, are AFFIRMED, and contestant's

request for any relief

with respect to the issuance of the citation and order pursuant to the Act is DENIED and this contest is DISMISSED.

George A. Koutras
Administrative Law Judge