

CCASE:
SOL (MSHA) V. TRIPLE S & BELINDA COALS
DDATE:
19830128
TTEXT:

~101

if so, what monetary penalties should be assessed, based on the six criteria set forth in section 110(i) of the Act. Respondents' sole defense in their answers to the Petitions for Assessment of Civil Penalty and in the testimony of their witness at the hearing is that no violations of section 75.1204 occurred. Therefore, the first question to be determined in this proceeding is that of whether either respondent violated section 75.1204.

Docket No. PIKE 79-7-P

Notice No. 2 TLA (7-3) 12/13/77 75.1204 (Exhibit 5)

Findings. Section 75.1204, to the extent here pertinent, provides that when an operator permanently abandons a coal mine, he shall within 60 days after such abandonment file with the Secretary a copy of the mine map revised and supplemented to the date of abandonment or closure. Respondent Triple S Coal Company abandoned its No. 1 Mine in March or May 1977 and, within 2 weeks after such abandonment, one of its copartners personally took copies of the final map to MSHA's Pikeville Office and gave them to an inspector named Doug Fleming who gave the copartner no receipt showing that the final map had been submitted (Tr. 41).

When Triple S Coal Company received Notice No. 2 TLA alleging that the final map had not been submitted, the copartner who had delivered the map to Mr. Fleming called MSHA's Pikeville Office. Someone in that office stated that there had been some confusion regarding the map and that the matter would be taken care of. The copartner subsequently examined his old records and found two additional copies of the final mine map which were sent to MSHA and received by the Pikeville Office on January 20, 1978 (Tr. 33-34).

MSHA presented two witnesses in support of Notice No. 2 TLA. The first witness was Mr. Thomas L. Adams who wrote the notice. Notice No. 2 TLA alleges that respondent did not submit a final map of its No. 1 Mine although the mine had been abandoned for more than 90 days. Mr. Adams testified that he issued Notice No. 2 TLA on the basis of information supplied to him by MSHA's Ventilation Department at the Pikeville Office, but Mr. Adams did not know the date on which the No. 1 Mine had been abandoned. Mr. Adams visited the site of the No. 1 Mine on or about December 1, 1977, and again about a week later. Since he found no one on the mine property on either occasion, he concluded that the mine was abandoned at that time, but he did not know how long the mine had been abandoned before he issued Notice No. 2 TLA (Tr. 30-31).

MSHA's other witness was Mr. Elmer Fuller who wrote on February 7, 1978, a notice of termination of Notice No. 2 TLA after he had been given a copy of the final map showing that it had been received on January 20, 1978 (Tr. 34-36). Mr. Fleming, to whom respondent's copartner gave the final maps, was unable to attend the hearing to state whether or not he agreed that respondent's copartner had submitted the final map within 2 weeks after the mine was closed (Tr. 11).

Conclusions. In my notice of hearing issued in this proceeding, I referred to the fact that respondent's defense was that it had submitted the final maps as required by section 75.1204. My notice then stated that MSHA should try to present as a witness the person to whom respondent allegedly gave the maps so that he could state whether or not he agreed or disagreed with respondent's claim that the final map had been submitted. MSHA did not have that person present at the hearing and gave no reason for his unavailability as a witness other than indicating through Mr. Adams' testimony that Mr. Fleming "* * * was unable to attend this hearing this morning" (Tr. 11).

Since respondent's witness testified under oath that he submitted the final map within 2 weeks after Triple S Coal Company's No. 1 Mine was abandoned, his testimony is entitled to more weight than MSHA's testimony because neither of MSHA's witnesses had personally examined MSHA's files in order to determine for certain that no final map had been submitted (Tr. 31; 36). They based their allegations that the final map had not been submitted solely on a list of companies which had been given to them by their supervisor. That list included respondent's No. 1 Mine, but neither of MSHA's witnesses was able to rebut with any personal knowledge respondent's claim that the final map had been submitted (Tr. 31-38). MSHA's Pikeville Office no doubt processes a large number of filings. Even the most competent employees occasionally make mistakes. In the absence of some evidence showing that a mistake was not made in processing respondent's maps, I believe that respondent's claim that it submitted the required map should be upheld.

Inasmuch as MSHA's evidence fails to show that respondent's copartner incorrectly alleged that the final maps were submitted within 60 days after respondent's No. 1 Mine was abandoned, I find that no violation of section 75.1204 was proven as alleged by Notice No. 2 TLA dated December 13, 1977. Therefore, MSHA's Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-7-P will hereinafter be dismissed.

Docket No. PIKE 79-24-P

Notice No. 1 BHT (8-1) 1/30/78 75.1204 (Exhibit 2)

Findings. Notice No. 1 BHT alleged that respondent had violated section 75.1204 by failing to submit a final map for its No. 1 Mine which had been abandoned since June 23, 1975. Belinda Coal Company's witness agreed that the No. 1 Mine had been abandoned on June 23, 1975, but he insisted that he had personally, within 1 or 2 days after abandonment, submitted to Mr. Rick Keene in MSHA's Pikeville Office copies of the final map (Tr. 20; 27). Respondent's witness stated that he lives 30 miles from Pikeville and that it was his practice to come to Pikeville and fill out abandonment papers for both Federal and State agencies because "* * * I think practically everyone knows you have to have final maps before you can abandon mines" (Tr. 20).

MSHA's first witness in support of Notice No. 1 BHT was Mr.

Billy H. Tackett. He stated that he had issued the notice after his supervisor gave him a "big list" of mines which had been abandoned without submission of final maps. Mr. Tackett did not check any files to determine whether Belinda

~103

Coal Company had submitted a final map (Tr. 8). Another of MSHA's witnesses, Mr. Thomas Adams, testified that a final map was eventually submitted for Belinda's No. 1 Mine but that he did not know the date on which such a map was submitted (Tr. 13).

Conclusions. Apparently Mr. Adams was confused about the submission of a final map by Belinda in response to Notice No. 1 BHT because Belinda's witness stated that he never did submit a final map in response to Notice No. 1 BHT because he knew that he had already done so and that he had declined to do so after receiving Notice No. 1 BHT (Tr. 45). Nevertheless, Belinda's witness agreed at the hearing that he would submit a final map for a second time in order that MSHA's records could be completed with respect to Belinda's No. 1 Mine (Tr. 45).

MSHA's evidence in support of Notice No. 1 BHT was inadequate. Although MSHA did know when Belinda's No. 1 Mine had been abandoned, MSHA was unable to present as a witness Mr. Rick Keene or anyone else who had personal knowledge about Belinda's claim that copies of the final map had been submitted to Mr. Rick Keene (FOOTNOTE 1) (Tr. 10; 32; 36). MSHA's witnesses had not examined any files pertaining to Belinda Coal Company and could not personally state what specific information had been used to prepare the "big list" alleging that Belinda Coal Company had failed to submit a final map (Tr. 5-13).

Belinda's witness testified under oath that he had submitted the final map within 1 or 2 days after the No. 1 Mine had been abandoned and that he had done so because both MSHA and the State of Kentucky require that a final map be submitted at the time a mine is abandoned. The witness also recalled specifically that he had handed the final map to Mr. Rick Keene who then worked in the Ventilation Department in MSHA's Pikeville office (Tr. 19).

I cannot find that the testimony of MSHA's witnesses who possessed only a "big list" of abandoned mines prepared by other personnel in the Pikeville Office can be used to prove a violation of section 75.1204 when the company charged with such violation introduces the testimony of a credible witness to the effect that the final map was submitted within 60 days after abandonment as required by section 75.1204. I find that MSHA failed to prove that the violation of section 75.1204 alleged in Notice No. 1 BHT occurred. Therefore, I shall hereinafter dismiss MSHA's Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-24-P.

Ultimate Findings and Conclusions

For the reasons hereinbefore given, MSHA failed to prove that the violation of section 75.1204 alleged in Notice No. 2 TLA (7-3) dated December 13, 1977, and the violation of section 75.1204 alleged in Notice No. 1 BHT (8-1) dated January 30, 1978, occurred. Since no violations of the mandatory safety standards were proven, it is unnecessary for me to consider the six criteria under which civil penalties are assessed if violations are found to have occurred.

WHEREFORE, it is ordered:

MSHA's Petitions for Assessment of Civil Penalty filed in Docket Nos. PIKE 79-7-P and PIKE 79-24-P are dismissed for failure of MSHA to prove that the violations of section 75.1204 alleged therein actually occurred.

Richard C. Steffey
Administrative Law Judge

~FOOTNOTE 1

Belinda's witness claimed that he had given the map to Mr. Keene in this instance, instead of to Mr. Fleming as was the case with respect to Triple S Coal Company, supra. Moreover, there is doubt in the record as to when Mr. Keene actually stopped working for MSHA because one witness testified that he left in late August or early September 1976, while another of MSHA's witnesses stated that Mr. Keene left on April 8, 1976 (Tr. 32; 36). Regardless of whether Mr. Keene left in April or September 1976, he would have been working in the Pikeville Office in 1975 at the time Belinda's witness claimed he gave the final map to Mr. Keene.