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

SOUTH EAST COAL COMPANY, CONTESTANT	Contest of Citation
v.	Docket No. KENT 80-327-R Citation No. 720881
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	June 18, 1980 No. 8 Mine

DECISION

Appearances: James W. Craft, Esq., Polly, Craft, Asher & Smallwood, Whitesburg, Kentucky, for Contestant
George Drumming, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, for Respondent

Before: Administrative Law Judge Steffey

Pursuant to an order issued September 26, 1980, a hearing in the above-entitled proceeding was held on December 9, 1980, in Pikeville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(d).

After the parties had completed their presentations of evidence, I rendered the bench decision which is reproduced below (Tr. 77-86):

> This hearing involves a filing by South East Coal Company on August 4, 1980, of a Petition for Review or Notice of Contest of Citation No. 720881 dated June 18, 1980, alleging a violation of 30 C.F.R. 75.312. I have consolidated with this case the civil penalty issues that will be raised in the event that the Secretary of Labor files a Petition for Assessment of Civil Penalty with respect to the violation alleged in Citation No. 720881. If my decision is issued in final form prior to a receipt of such a Petition from the Secretary of Labor, I shall sever the civil penalty issues from the decision and the decision on the civil penalty aspect of the case will be issued at a subsequent time after I have received the Petition. It will, however, be decided on the basis of the record we have made here today without any additional hearing being provided for.

I shall make some findings of fact on which this decision will be based. Some of those findings of fact were the subject of stipulations entered into by the parties. The findings of fact will be given in numerical paragraphs.

1. South East Coal Company is subject to the Federal Mine Safety and Health Act of 1977. South East Coal Company is subject to the Commission's jurisdiction and to my jurisdiction for the purposes of deciding this case.

2. South East Coal Company operates a No. 8 Mine which produces on an annual basis approximately 60,000 tons of coal and has approximately 25 employees. South East Coal Company, on a company-wide basis, produces about 950,000 tons of coal annually and has approximately 600 employees. On the basis of such data, I find that South East Coal Company is a large operator.

3. From the standpoint of the history of previous violations, the stipulation of the parties indicates that South East Coal Company has not previously violated section 75.312.

4. Inspector Carlos P. Smith was asked to make a spot inspection of the No. 8 Mine of South East Coal Company on the afternoon of June 18, 1980. When he arrived at the No. 8 Mine, he went underground and met the crew that was then working, coming out of the mine because they had determined that no further work could be done until some additional equipment was obtained for the coal drill. The inspector was accompanied by another inspector at the time and they both went back out on the surface with the crew which was coming out of the mine. After the inspector had examined the books of the company, he went back underground for the second time to make his examination. He was accompanied on his inspection by Mr. Charles Holbrook, who worked for the company.

5. Inspector Smith's investigation was directed to a complaint MSHA had received by telephone. The complaint expressed a fear that the miners in the active workings of the mine might cut into an abandoned area and be exposed to possible hazards such as accumulations of water.

Inspector Smith went to an area of the mine which is shown on Exhibit 2 as being Survey Station No. A568 which is the same area shown in Exhibit 3. In that area, especially as shown on Exhibit 3, Inspector Smith found that three openings had been cut into an adjoining abandoned mine formerly owned by the Smith-Elkhorn Coal Company. Inspector Smith made a check of the air coming from the abandoned areas and he found that in two of the entries, the air was being

properly directed into a bleeder system and was going out of the mine, but as to the air in entry No. 1, Inspector Smith used smoke tubes to check the air, and he found by releasing successive amounts of smoke that the air was traveling down the No. 1 entry and into the No. 2 entry which was an active working place.

6. Inspector Smith, on the basis of his use of the smoke tubes, wrote Citation No. 720881 dated June 18, 1980, at 6 p.m., citing a violation of section 75.312 and describing the condition or practice observed as follows: "A substantial movement of air was detected using chemical smoke coming from the old abandoned Smith-Elkhorn Mine and this air was being coursed directly to the active working places of the 001-0 working section."

7. After Inspector Smith had indicated that the air from the abandoned mine was traveling to the working place, the representative of South East Coal Company, Mr. Holbrook, hung a curtain in the No. 1 entry at a point which would have kept the air from the abandoned mine from going into the working section, but Inspector Smith believed that a temporary curtain would not be substantial enough to satisfy the purposes of the Act in assuring that no air from the abandoned section came into the working place. Therefore, he concluded that the hanging of the curtain was not a sufficient act to abate the citation on a permanent basis.

8. The next day, an inspector by the name of Cecil Davis came to the mine because Inspector Smith had a different obligation on the next day. At that time, Inspector Davis wrote an extension of time on the basis that temporary seals had been constructed and that new ventilation proposals were being submitted by the company. The record does not show that Citation No. 720881 has been abated and Inspector Smith was unable to state today what the ultimate outcome of the effort to submit new ventilation plans had been.

9. The evidence submitted by South East Coal Company consists of two exhibits, A and B, taken from the preshift mine examiners' report and the primary purpose for submitting those two exhibits is that Exhibit A indicates that a volume of air of 20,000 cubic feet per minute was being delivered to the working place on June 18, 1980, when the last preshift examination was made. Inspector Smith did not take any readings with the use of anemometer at the time he wrote his citation on June 18, 1980, and Inspector Smith stated that he had no reason to doubt that a volume of 20,000 cubic feet per minute of air was flowing into the working place. Inspector Smith also testified that he had no reason to believe

other than that the fresh air going onto the section constituted the major portion of the air which was actually reaching the working face. In other words, there was a large amount of fresh air going into the working section at the same time some air from the abandoned area was being merged with the fresh air, or intake air, coming into the section.

10. Inspector Smith was unable to find or detect any methane in the air with a methane detector and his flame safety lamp indicated that oxygen was adequate in the air that was coming from the abandoned section. Inspector Smith took some samples of the air coming from the abandoned section and the analyses of those samples also indicated that the air did not contain methane and that the air was composed of a normal and adequate amount of oxygen.

I believe that those 10 findings of fact are sufficient for writing the decision in this case.

The issue, of course, is whether there was a violation of section 75.312. That section reads in pertinent part: "Air that has passed through an abandoned area or an area which is inaccessible or unsafe for inspection shall not be used to ventilate any working place in any mine." Counsel for the Secretary has argued that there can be no doubt but that there was a violation because the inspector's testimony is uncontroverted in the sense that he definitely was able to trace the air from the abandoned section or mine into the working section, which was in the No. 2 entry at that time.

Counsel for South East Coal Company, on the other hand, has taken the position that while there may have been some air from the abandoned section which was reaching the working place, that the amount of intake air being transmitted to the working face, as shown by Exhibit A, was 20,000 cubic feet per minute, and therefore would have been great in volume and able to carry away any toxic materials or methane which might have existed. Consequently, his conclusion is that it cannot be said that the air from the abandoned area was being used to ventilate the working place.

The finding of the violation of section 75.312 then turns on an interpretation of what the section means when it refers to the provision that air from an abandoned area shall not be used to ventilate any working place. I have had several cases involving this section and the first time that I ever considered that phrase, I had the same misgivings about it that counsel for South East has emphasized in this proceeding, because if you read that phrase all by itself, it sounds as if a company would have to be deliberately using

air from an abandoned area, and be consciously using it, to ventilate a working section, when as a matter of fact, the evidence in this case indicates that some air from the abandoned area was getting into the working place, but that the company was endeavoring to ventilate the working section, and was ventilating the working section, with a large amount of intake air, which the inspector agreed was much greater than the amount of air that was getting onto the section from the abandoned area.

It is possible that section 75.312 should have employed words similar to those which were used by Inspector Smith when he wrote Citation No. 720881, because in his citation, Inspector Smith refers to the air from the abandoned section as being coursed directly to the active working place, and I think that that would have been a better way to have expressed what was happening in this instance, but if you think about that phrase for awhile, I think that the words used in section 75.312 should be interpreted to mean that if air coming from an abandoned area is going into or being coursed into a working area, that becomes equivalent to using the air to ventilate, because the air does get there and it does have the effect of either ventilating or causing a problem, depending on what substances are being carried in the air from the abandoned area.

The fact that Mr. Holbrook was able to hang a curtain which had the effect of preventing the air from the abandoned section from going into the working face shows that the company failed to take an action which it could have taken to assure that no air from the abandoned area would get into a working place, so the failure of the company to prevent the air from the abandoned area from getting into the working place made it possible for air from the abandoned area to be used in the working place, even though the company did not set out to ventilate its mine in that manner whatsoever. Of course, the regulations and the Act are directed toward providing as safe working conditions as it is possible to provide, so I interpret this section as meaning that air from an abandoned area cannot be permitted to go into an area where the men are working, and if a company fails to prevent such air from going into such a working place, then the equivalent effect is that the air from the abandoned area is being used to ventilate.

From the standpoint of the civil penalty case, which may ultimately be before me, it is obvious that in this instance, no adverse effects on the miners would have occurred because the air from the abandoned mine contained no methane and did contain an adequate amount of oxygen.

For the reasons that I have just explained, I find that a violation of section 75.312 was proven.

WHEREFORE, it is ordered:

(A) The Notice of Contest filed on August 4, 1980, in Docket No. KENT 80-327-R is denied and Citation No. 720881 dated June 18, 1980, is affirmed.

(B) The civil penalty issues with respect to the violation of section 75.312 are severed from this proceeding and will be decided in a separate decision when and if a case is assigned to me in the future involving a Petition for Assessment of Civil Penalty in which the Secretary of Labor seeks to have a civil penalty assessed for the violation of section 75.312 alleged in Citation No. 720881.

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)