FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JUL 13 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. KENT 80-330 Assessment Control No. 15-10872-03011
v.	:	
	:	No. 8 Mine
SOUTH EAST COAL COMPANY, INC., Respondent	:	

DECISION

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

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued March 12, 1981, a hearing in the above-entitled proceeding was held on May 7, 1981, in Prestonsburg, 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. 98-105):

> This hearing involves a Proposal for Assessment of Civil Penalty filed on September 8, 1980, in Docket No. KENT 80-330 by the Secretary of Labor seeking to have a civil penalty assessed for an alleged violation of 30 C.F.R. § 75.1701 by South East Coal Company.
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> In a civil penalty proceeding, the issues are whether a violation of a mandatory health or safety standard occurred and, if so, what penalty should be assessed, based on the six criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977.
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> I shall make some findings of fact on which my decision will be based.
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> 1. On June 19, 1980, Inspector.Cecil Davis went to the No. 8 Mine of South East Coal Company and made an inspection of the mine, during which he wrote Citation No. 720883, alleging a violation of section 75.1701. His citation stated that "two places have been advanced to within about 60 feet of an abandoned inaccessible area of an adjacent mine in the 001-O underground working section and test boreholes were not being drilled."
>
> Citation No. 720883 was terminated by a subsequent action sheet issued on June 20, 1980, which stated that test boreholes were being drilled in advance of the working section on the 001 section to insure that the continuous-mining machine did not cut into abandoned areas unexpectedly. That termination sheet was written by a different inspector from the one who wrote the citation.

2. At the hearing, Exhibit A was introduced. It is a map of the No. 8 Mine as well as a map that shows the Smith-Elkhorn Mine which was adjacent to the No. 8 Mine. The testimony of the inspector showed that several months prior to June 19, when Citation No. 720883 was written, the No. 8 Mine had cut into the Smith-Elkhorn Mine in what is referred to in this case as the first right section, and also in the second right section.

3. The testimony of Mr. Holbrook, who was the foreman on the night shift in the No. 8 Mine, indicated that boreholes had been drilled before the company penetrated the Smith-Elkhorn Mine which is adjacent to the No. 8 Mine. At the time those boreholes were drilled, some water was encountered 18 inches from the roof, and a pump was installed and the water was pumped out of the Smith-Elkhorn Mine through the boreholes, and the water then was pumped farther to the outside of the mine. After the water was cleared out, and other tests were made to make sure that it was safe to do so, the company mined into the Smith-Elkhorn, the adjacent mine, and through those holes did inspections. Those holes, as I recall, were 10 feet by 5 feet in size. Respondent thereafter treated the Smith-Elkhorn Mine as a part of its No. 8 Mine, and began to ventilate it, and Mr. Holbrook made trips clear around behind and to the side of the first right and second right sections where the original places had been cut through into the Smith-Elkhorn Mine.

Mr. Holbrook testified that he went to the place toward which they began to cut a room and inspected the adjacent mine, which had been made a part of the No. 8 Mine, at least twice a week, for hazardous conditions, and he states that no hazardous conditions existed, either in the form of methane or lack of oxygen or water.

4. The situation which prevailed on June 19, 1980, when Inspector Davis wrote Citation No. 720883 was that respondent's men were advancing two rooms to the left of the second right section, and it was the opinion of respondent's management at that time that they were advancing toward a part of their own mine which, under section 75.1701 would be considered "abandoned areas" in the mine, meaning the No. 8 Mine. Therefore, it was their contention that they were entitled to advance to within 50 feet of the abandoned portion under the first part of section 75.1701 before they had to drill test boreholes.

5. The inspector, in his testimony, stated that he believed the company had violated section 75.1701 because they were "within 200 feet of any other abandoned areas of the mine which cannot be inspected and which may contain dangerous accumulations of water or gas." That is a portion of section 75.1701. When it was pointed out to the inspector that the testimony indicated that the room which had been advanced was not an "other abandoned area", but was really in the No. 8 Mine, the inspector said that if respondent had not violated that provision, then he would say that respondent had violated the next provision in section 75.1701 which is, "or within 200 feet of any workings of an adjacent mine."

I believe that those are the basic facts which the testimony and the exhibits show. The problem then becomes whether the facts support a finding that a violation of section 75.1701 existed. That section reads as follows:

> "Whenever any working place approaches within 50 feet of abandoned areas in the mine as shown by surveys made and certified by a registered engineer or surveyor, or within 200 feet of any other abandoned areas of the mine which cannot be inspected and which may contain dangerous accumulations of water or gas, or within 200 feet of any workings of an adjacent mine, a borehole or boreholes shall be drilled to a distance of at least 20 feet in advance of the working face of such working place and shall be continually maintained to a distance of at least 10 feet in advance of the advancing working face."

There are other provisions in that section but they have to do with the manner in which boreholes will be made, and not with whether there is a necessity that they be drilled.

It so happens that the testimony shows that the inspector who wrote Citation No. 720883 relied on a certified map to determine that the company was cutting to within 60 feet of "an abandoned inaccessible area", as he referred to it in his citation, so that the first part of the section has been satisfied in that the company was relying on certified maps and the inspector was relying on certified maps for the purpose of determining how close they were to an abandoned area in the mine. The testimony in this case shows that if a company does cut into an abandoned mine, which it did in this case, and makes that abandoned mine a part of its own mine by commencing a ventilation system in the abandoned mine and also by making inspections in the adjacent mine, then it is considered to be the company's mine that is then being actively worked. Therefore, it would seem that respondent was correct in arguing that ***at*** the time the inspector wrote Citation No. 720883, the company was entitled to cut to within 50 feet of the abandoned area before it had to drill boreholes.

The inspector's belief that the company had violated the second portion of section 75.1701 was based on language in his citation to the effect that the company was within "60 feet of an abandoned inaccessible area of an adjacent mine". The testimony in this case shows that the company was not within 60 feet of "an abandoned inaccessible area of an adjacent mine". The inspector showed, by his more precise evaluation of Exhibit A in this case, which was made after there had been further mining and which was not available to him at the time he wrote the citation, that the place to which they had progressed at the time he wrote the citation was actually 100 feet from the mine which he referred to as abandoned and inaccessible.

The inspector, of course, was without the testimony of Mr. Holbrook in this case because Mr. Holbrook testified in this case that the area toward which they were mining was not abandoned and inaccessible in the sense that those terms are used in section 75.1701 because that area was being ventilated and was being inspected by Mr. Holbrook at least twice a week. So, it was not inaccessible, and it is not abandoned in the sense that that term is used in section 75.1701.

The other provision of section 75.1701 which is 'at issue here would be whether respondent had progressed to within 200 feet of any workings of an adjacent mine, and the facts in this case show that that portion of the section doesn't apply either because this was not, on June 19, 1980, an adjacent mine, because it had already been incorporated as part of the No. 8 Mine at that time, insofar as respondent was concerned.

Therefore, I find on the facts in this case that no violation of section 75.1701 was proven.

Now, I am aware that the Commission has said in many cases that the regulations are to be interpreted in the manner which will be the most likely to prevent accidents and injuries and the Commission has very recently so ruled in Secretary of Labor v. Ideal Industries, Cement Division. 3 FMSHRC 843 (1981). In that case, the Commission interpreted a section so as to require a company to correct equipment before it is even put in an area where it might be used, if it's defective in any way, even if the equipment has not been used at the time that it is examined by an inspector. The Commission said in that case that the primary goal of the Act is to prevent accidents; that an interpretation should be given to any regulations which would bring about safety and advance safety in the mines.

The interpretation that I place on this section is not as strict an interpretation as the inspector gave it, but I believe that the facts in this case support my finding because the inspector did not have in his possession the facts which have been introduced in this case. When the inspector wrote Citation 720883, he did think that the company was progressing toward an abandoned inaccessible area when, in fact, that was not the case. The area toward which the company was advancing had been inspected, and was known not to have any hazardous conditions in it, and the company was relying on certified maps and the foreman who testified here today said that he had made the determination that he was not within 50 feet of the abandoned area, if it can be called that, and therefore, that he did not feel that he had to drill boreholes. The testimony in this case shows that he was, in fact, not within 50 feet of the other area, and therefore there simply are not facts in this case to support a requirement that boreholes should have been drilled under the second two provisions of section 75.1701.

After I received the transcript in this proceeding, I was reminded that counsel for the Secretary had taken the position at the hearing that he did not wish to file a posthearing brief and that he would "just stand on the testimony that has been provided to the judge" (Tr. 95). If the Secretary should decide to file a petition for discretionary review, section 113(d)(2)(A)(iii) of the Act provides that "[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass." The Secretary's position before me was so broad that he could argue anything before the Commission and contend that I had had an opportunity to pass upon it. My bench decision did not discuss the unusual circumstances under which Citation No. 720883 was issued. If a petition for discretionary review should be filed, the Commission may well wish that I had explained my decision in light of some of the arguments which could be raised before the Commission.

The circumstances leading up to the writing of Citation No. 720883 began with an incident which occurred on or about June 18, 1980, when the men working on the 001 Section of respondent's No. 8 Mine on the night shift (4 p.m.-to-midnight) refused to work unless boreholes were drilled in advance of the place where they were working (Tr. 80; 87). The section foreman, Mr. Charles Holbrook, who testified for respondent in this proceeding, refused to drill boreholes because he had concluded from an examination of certified maps that he had not advanced to within 50 feet of an abandoned area (Tr. 86). He had also personally inspected the abandoned area toward which they were advancing and knew that it did not contain any dangerous accumulations of gas or water or air devoid of oxygen (Tr. 74-76; 85). Nevertheless, someone reported the matter to MSHA (Tr. 90) and an inspector named Carlos Smith came to the mine on the night of June 18, 1980 (Tr. 68; 79-80; 85). After inspecting the mine, Inspector Smith advised Mr. Holbrook and other personnel at the mine that they could make one more cut of coal in each room before they were close enough to the so-called abandoned area to require the drilling of boreholes (Tr. 82-83; 89-90).

Inspector Smith reported to his supervisor, Mr. Charles Miller, that he had examined the mine to determine whether a violation of section 75.1701 had occurred (Tr. 21). Mr. Miller wanted to follow up on Inspector Smith's report. Therefore, Mr. Miller and Inspector Cecil Davis, the inspector who wrote Citation No. 720883 here involved, drove to respondent's No. 8 Mine during the day shift on June 19, 1980 (Tr. 29). They examined the 001 Section. Then they reviewed respondent's certified maps showing the rooms being advanced and the so-called abandoned areas in the Smith-Elkhorn Mine, which had been integrated at that time with the No. 8 Mine, and Inspector Davis wrote Citation No. 720883 alleging that a violation of section.75.1731 had occurred because respondent was within 60 feet of an adjacent mine (Tr. 9-11; 22; 25; 34; 66).

The record also shows that some person or persons have filed a discrimination case against respondent under section 105(c) of the Act because of some of the events which occurred about June 18, 1980, when the men on Mr. Holbrook's night shift refused to work because boreholes were not being drilled (Tr. 91-93).

Additional matters mentioned by Inspector Davis include his statement that if he had seen anyone walking around in the Smith-Elkhorn Mine, which had been merged with the No. 8 Mine, he would have issued an imminent-danger order because, in his opinion, the roof had not been supported at the point where a person would have to enter the Smith-Elkhorn Mine from the No. 8 Mine (Tr. 28). Also, although respondent's map (Exhibit A) in this proceeding shows that respondent is ventilating the Smith-Elkhom Mine now that it has become a part of its No. 8 Mine, the inspector took the position that respondent may not be properly ventilating the Smith-Elkhorn Mine and that citations, not before me in this case, have been written with respect to respondent's alleged failure to get MSHA's approval for the way respondent is ventilating the Smith-Elkhorn Mine and for the failure to install roof bolts in the first and second right sections where the Smith-Elkhorn Mine was first penetrated about February of 1980 (Tr. 42-43; 45; 55; 60; 62-63; 65).

The fact that the miners on the second shift refused to work because boreholes were not being drilled, the fact that respondent may not have been ventilating the Smith-Elkhorn Mine properly, and the fact that respondent may not have installed roof bolts at the points where the first and second right sections penetrated the Smith-Elkhorn Mine all trouble me with respect to whether Mr. Holbrook should have gone into the Smith-Elkhorn Mine and whether the Smith-Elkhom Mine was being ventilated properly on June 19, 1980, when Citation No. 720883 was written. On the other hand, the inspector told me that the alleged issues as to respondent's roof bolting and ventilation of the Smith-Elkhorn Mine were not before me and that he did not think that I had to consider those matters in determining whether there was a violation of section 75.1701 (Tr. 45; 55).

Anyone who reads the first sentence of section 75.1701, quoted in my bench decision, will see that the requirement for the drilling of boreholes becomes increasingly necessary, depending upon the amount of information one possesses with respect to the "abandoned areas" toward which one is advancing. If one has certified maps showing the location of the abandoned areas, he is entitled, under the first part of section 75.1701, to advance within 50 feet of the "abandoned areas" before he has to begin drilling boreholes. The next step in the requirements of section 75.1701 refers to "other abandoned areas", meaning those which are not shown on certified maps. If one advances toward abandoned areas not shown on certified maps, he must start drilling boreholes when he is within 200 feet of such areas because he has less knowledge as to their exact location than he has when certified maps are available showing the location'of such abandoned areas.

In my bench decision, I referred to "abandoned areas" as that term is used in section 75.1701. That reference was based on the definition of "abandoned areas" given in section 75.2(h) which states that "'[a]bandoned areas' means sections, panels, and other areas that are not ventilated and examined in the manner required for working places under Subpart D of this Part 75." In my bench decision, I indicated that it was doubtful if the area toward which the rooms were bing driven constituted "abandoned areas" because they had been made a part of respondent's No. 8 Mine and were being ventilated and inspected. The question of whether respondent was ventilating and inspecting the Smith-Elkhorn Mine sufficiently to eliminate the Smith-Elkhorn Mine from the category of "abandoned areas" was not considered to be important in my bench decision because section 75.1701 does not require an operator to drill boreholes when approaching admittedly "abandoned areas", as defined in section 75.2(h), until an operator is within 50 feet of those abandoned areas as shown on certified maps.

It should be noted that the inspector conceded several times in his testimony that respondent had made the Smith-Elkhorn Mine a part of its No. 8 Mine (Tr. 23-24; 36; 57-58; 63). The inspector cannot state that the Smith-Elkhorn Mine is a part of respondent's No. 8 Mine and simultaneously argue that the Smith-Elkhorn Mine is an "adjacent mine" for the purpose of claiming that respondent had violated section 75.1701 by advancing to "within 200 feet of any workings of an adjacent mine" (Tr. 48).

In short, while I am concerned about the probable hazards which might have been associated with respondent's making the Smith-Elkhorn Mine a part

of its No. 8 Mine, I do not think that I can ignore the fact that the "abandoned areas" were shown on "surveys made and certified by a registered engineer" (Tr. 25). Since the "abandoned areas" toward which respondent was advancing were shown on a certified mine map, I cannot find that respondent was in error in relying on its certified maps and maintaining that it was entitled to approach within 50 feet of the "abandoned areas" before it began to drill boreholes. As to the inspector's claim that respondent's management didn't really know where the Smith-Elkhorn Mine was located (Tr. 59), the record shows that respondent's vice-president was the superintendent of the Smith-Elkhorn Mine when it was developed (Tr. 76; 97) and that Inspector Davis was told by respondent that the engineer who prepared the map for the Smith-Elkhorn Mine was the same engineer who prepared respondent's map (Tr. 62).

For the foregoing reasons, I believe that my bench decision reached the proper result when all of the evidence in this proceeding is considered. Therefore, my bench decision is affirmed.

WHEREFORE, it is ordered:

The Proposal for Assessment of Civil Penalty filed on September 8, 1980, in Docket No. KENT 80-330 is dismissed because no violation of section 75.1701, as alleged in Citation No. 720883 dated June 19, 1980, was proven.

Richard C. Steffey

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

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