CCASE:
SOL (MSHA) v. BECKLEY COAL
DDATE:
19810930
TTEXT:

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

| | |
|---|---|
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>PETITIONER | Civil Penalty Proceeding<br><br>Docket No. WEVA 80-415-P<br>A.C. No.<br><br>Beckley Mine |
| v. | |
| BECKLEY COAL MINING COMPANY,<br>RESPONDENT | |
| AND | |
| BECKLEY COAL MINING COMPANY,<br>APPLICANT | Contest of Citation |
| v. | Docket No. WEVA 79-465-R |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>RESPONDENT | Citation No. 646219<br>September 7, 1979<br><br>Beckley Mine |

DECISION

Appearances: John H. O'Donnell, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Harold S. Albertson, Esq., for Respondent.

Before: Administrative Law Judge William Fauver

These proceedings involve the same citation. In WEVA 80-415 the Secretary seeks a civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. In WEVA 79-465-R, the company seeks review and vacation of the citation under section 105(d) of the Act. The cases were consolidated and heard at Charleston, West Virginia. The parties were represented by counsel, who have submitted their proposed findings, conclusions, and briefs following receipt of the transcript.

Having considered the contentions of the parties and the record as a whole, I find that the preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. At all pertinent times, Respondent, Beckley Coal Mining Company, operated a coal mine known as the Beckley Mine in Raleigh County, West Virginia, which produced coal for sales in or substantially affecting interstate commerce.

2. In the Second Northeast Section of the Beckley Mine, the return escapeway often alternated between the No. 1 and No. 2 entries to avoid adverse roof conditions or water accumulations.

3. The intake escapeway was through the track-haulage entry (No. 4), which ran parallel to Entries 1, 2 and 3, the belt entry.

4. Under Respondent's approved plan, escapeways had to be at least 6 feet wide, as high as the coal seam, and marked with one-fourth-inch lifelines with reflective material every 25 feet.

5. On August 22, 1979, federal inspector Chester D. Pennington, accompanied by Respondent's Safety Director, Ronald D. Scaggs, traveled the return escapeway on foot. At the No. 20 crosscut, the inspector observed 12 to 15 inches of water that prevented passage. The water extended from rib to rib for about 200 feet, or as far as the inspector could see with his cap lamp. As a custom and practice, if water was above "boot level" (about

12 inches), the escapeway was to be rerouted because passage in case of an emergency would be difficult or dangerous.

7. Mr. Scaggs suggested rerouting part of the escapeway into the belt haulage entry (No. 3), which was in a neutral air course between the return and intake entries. The inspector traveled to the belthead with Mr. Scaggs and waited there while Mr. Scaggs rerouted the escapeway. Mr. Scaggs cut the lifeline at the No. 25 break, crouched through a 30-inch square door into the belt entry, traveled to the No. 15 break, and cut the line there also. He then returned to the No. 25 break, pulled the piece of cut line through the water accumulation, tied it to the original line and took it through the door and down the belt entry until he reached the No. 15 break. He also marked the door at the No. 25 break with chalk to show that the escapeway passed through it and marked the cribs in the belt entry with chalk. He spent about 45 minutes rerouting the escapeway.

8. As rerouted, the return escapeway began in the No. 1 entry near the next to last crosscut. At the No. 35 break, it passed into the No. 2 entry, ran to the No. 28 break, and passed back to the No. 1 entry. At the No. 25 break, it passed through the 30-inch square steel door into the belt entry (No. 3). From there, it ran down to the No. 15 break and back into the return air course (Nos. 1 and 2 entries).

9. Inspector Pennington told Mr. Scaggs that he would first have to check with his supervisor about the rerouting plan, and that he doubted that

the supervisor would approve it because clearance in the belt entry was not as great as in the original escapeway. In the belt entry, timbers were set near the left rib; the width between the timbers and the right rib ranged from 3-1/2 to 5 feet. He did not issue a citation that day for the accumulation of water in the escapeway.

10. Mr. Scaggs told the evening and day shift company safety inspectors, and the section foreman, that the escapeway had been rerouted. He also posted the change on the chalkboard in the foremen's room.

11. That evening, Mr. Scaggs directed an employee to inspect the No. 1 entry from the No. 15 break to the No. 1 break to see if there were any more water accumulations. More water accumulations were discovered at the No. 12 break and other breaks further down the return escapeway. On the next shift, the escapeway was rerouted into the belt entry all the way to the No. 1 break. Inspector Pennington was not aware of this further change in the rerouted escapeway.

12. Emergency travel in the beltway would be difficult because of its narrow width where timbered and because of overcasts and beltheads. At various places, a stretcher-bearer would have to crouch beneath overcasts, lift the stretcher over a belthead, or stoop to pass under a belthead.

13. The inspector's supervisor, George S. Vargo, refused to approve the alternative route, on the grounds that clearance in the belt entry was insufficient and passage through the steel door was too narrow.

14. The inspector did not inform Mr. Scaggs of Mr. Vargo's decision. On September 7, the inspector returned to the mine and met Danny Miller, a safety inspector for Respondent. They traveled the return escapeway, and found that the accumulation of water was still present at the No. 20 crosscut. The inspector found that there had been no efforts to pump out the water. He observed chalk marks indicating that the escapeway had been rerouted. He did not ask Mr. Miller about a lifeline or travel the rerouted section to observe whether a lifeline had been installed. Based on the conditions he observed, Inspector Pennington issued Citation No. 646219 for a violation of 30 C.F.R. 75.1704. The citation reads in part: "Water approximately 15 inches deep was allowed to accumulate in the No. 1 and No. 2 entries at No. 20 crosscut in 2 northeast mains escapeway." This condition was abated on September 17 by pumping the water out of the escapeway.

## DISCUSSION WITH FURTHER FINDINGS

Based on the citation issued September 7, 1979, Respondent is charged with a violation of 30 C.F.R. 75.1704, which provides:

> Except as provided in 75.1705 and 75.1706, at least

two separate and distinct travelable passageways which are

> maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening, or continuous to the escape shaft or slope facilities to the surface, as appropriate, and shall be maintained in safe condition and properly marked. Mine openings shall be adequately protected to prevent the entrance into the underground area of the mine of surface fires, fumes, smoke, and floodwater. Escape facilities approved by the Secretary or his authorized representative, properly maintained and frequently tested, shall be present at or in each escape shaft or slope to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency.

Respondent contends, first, that the Secretary is estopped from bringing this action. It argues that Mr. Scaggs, Respondent's Safety Director, justifiably relied on Inspector Pennington's representation that he would first discuss the proposed alternative escapeway with the MSHA District Manager to find out whether the proposed route would be permitted, and then notify Mr. Scaggs of the District Manager's decision, before issuing a citation. The inspector returned to the mine about 2 weeks after the August 22 inspection and, without speaking with Mr. Scaggs, issued a citation. Respondent requests that the Commission accept the estoppel argument because the Government's conduct "threatens to work a serious injustice against Beckley Coal Mining Company" and because, although the Supreme Court has held that equitable estoppel generally does not apply against the federal government, opinions in lower federal courts have permitted estoppel in some circumstances. Respondent urges the Commission to follow the trend in the lower federal courts.

The Secretary argues that: Under the Act, an inspector is required to issue a citation upon observing a violation of a mandatory safety standard; on August 22 the water accumulation in the designated escapeway was a clear violation; and the inspector's discussions with Respondent's Safety Director amounted to determining an acceptable means of abatement. The Secretary argues that the inspector's failure to issue a citation on August 22 did not prevent him from issuing a citation for this violation at a later date or estop the Government from bringing this case. The Secretary also argues that anyone entering into an agreement with an agent of the Government assumes the risk that the agent has exceeded his authority and that the inspector exceeded his authority by agreeing not to issue the citation immediately.

The Secretary proposes a penalty of $500.

I conclude that the Secretary is not estopped from bringing this action. Secretary of Labor v. King Knob Coal Company, Inc., 2 FMSHRC 1417 (June 29, 1981), involved a defense of estoppel

based on the company's reliance on an MSHA inspector's manual. The Commission rejected this defense, stating:

> Absent the Supreme Court's expressed approval of that decisional trend, we think that fidelity to precedent requires us to deal conservatively with this area of the law. This restrained approach is buttressed by the consideration that approving an estoppel defense would be inconsistent with the liability without fault structure of the 1977 Mine Act. * * * Such a defense is really a claim that although a violation occurred, the operator was not to blame for it. Furthermore, under the 1977 Mine Act, an equitable consideration, such as the confusion engendered by conflicting MSHA pronouncements, can be appropriately weighed in determining the appropriate penalty * * *.

King Knob Coal Company, Inc., 2 FMSHRC at 1421-1422.

Since Respondent is charged with maintaining an unsafe escapeway as of September 7, 1979, rather than the date of the earlier inspection (August 22), the remaining issue is whether the Secretary has proved a violation as of September 7.

The cited standard (section 75.1704 of the regulations) requires that escapeways be safe, suitably marked, and adequate for persons, including disabled persons, to escape quickly to the surface. Escapeways must be approved by the Secretary or his authorized representative (i.e., the District Manager). The criteria for approval are in sections 75.1704-1 and 75.1704-2. Section 75.1704-1 provides that, where the height of the coal seam is at least 5 feet, "the travelway in such escapeway should be maintained at a width of at least 6 feet." Escapeways that do not meet the criteria may be approved provided "the operator can satisfy the District Manager that such escapeways and facilities will enable miners to escape quickly to the surface in the event of an emergency."

In approving Respondent's original escapeway plan, the District Manager applied the criteria in section 75.1704-1, including the criterion of a 6-foot width. The District Manager rejected the alternative plan, principally on the grounds of the narrow width in the belt entry and the 30-inch door leading from the original escapeway into the belt entry. I conclude that his decision conforms to the criteria in section 75.1704-1 of the regulations.

Because the alternative route was rejected, on grounds consistent with the regulation guidelines, the original escapeway had to be maintained in compliance with section 75.1704. However, it was not in compliance on September 7 because of the water accumulation, which I find was excessive and rendered the escapeway unsuitable under the requirements of section 75.1704. Even if it were found that the alternative escapeway should be considered despite the District Manager's decision, I conclude that the alternative escapeway did not meet the requirements of section 75.1704; the grounds for this conclusion include the narrow beltway width (a range of only 3-1/2 to 5 feet), the overcasts and beltheads, and the 30-inch door.

I conclude that Respondent's negligence was minimal, considering Respondent's discussion with the inspector on August 22 and the facts that: Respondent believed in good faith that the alternative route was safe and was pending approval by the District Manager; it adequately marked the alternative route with a lifeline and reflective markers; and it notified its employees of the changes in the escape route.

## CONCLUSIONS OF LAW

1. The undersigned judge has jurisdiction over the parties and subject matter of these proceedings.

2. Respondent violated 30 C.F.R. 75.1704 on September 7, 1979, by failing to maintain the return escapeway in safe condition at its Beckley Mine, as alleged in Citation No. 646219.

3. Based upon the statutory criteria for civil penalties, Respondent is assessed a penalty of $25 for this violation.

## ORDER

WHEREFORE IT IS ORDERED that:

1. The above-mentioned citation is AFFIRMED and the notice of contest is DISMISSED.

2. Respondent shall pay the Secretary of Labor the above-assessed civil penalty, in the amount of $25, within 30 days from the date of this decision.

WILLIAM FAUVER JUDGE