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

COMMONWEALTH MINING CO., INC., APPLICANT	Notice of Contest
v. SECRETARY OF LABOR, RESPONDENT	Docket No. KENT 81-96-R KENT 81-97-R
	No. 1 Surface Mine

DECISION

Appearances: Mr. Michael Templeman, for Applicant  
Carole M. Fernandez, Esq., for Respondent

Before: Judge Fauver

These proceedings were brought by Commonwealth Mining Company, Inc. ("Commonwealth") to review and have vacated two citations issued under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq.

The cases were consolidated and heard in Louisville, Kentucky.

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. Commonwealth is the operator of No. 1 Surface Mine in Pike County, Kentucky, which produces coal for sale or use in or substantially affecting interstate commerce.
2. On December 31, 1980, Mine Safety and Health Administration (MSHA) Inspector B.G. Cure issued a citation to the operator for failure to provide berms or guards along the entire length of the elevated roadway and pit area. According to the citation, the distance of roadway concerned was about 3/4's of a mile beginning at the entrance of the roadway and running to the end of the 001-0 pit area.
3. At the time the citation was issued the operator had built or was in the process of building a roadway along a coal seam, at an elevation higher than the existing public road, which ran into a creek bed. Berms were not adequately provided along this new roadway and elsewhere, including along the top of the pit area.

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4. On January 9, 1981, Inspector Cure issued a citation to the mine operator for failure to maintain an accurate up-to-date mine map. The "relocated" roadway was not shown on the map, and a projected roadway was shown but had not been built.

5. By letter of February 23, 1981, Commonwealth filed a notice of contest of the citations, which states that it had placed berms on the roadway that has not been designated a public road and that the map presented at the time the citation was issued meets all the requirements of 30 CFR 75.1200. Further, the operator states that it was upgrading the road before mining operations began.

6. When the mine inspector arrived at the mine on December 31, 1980, he observed the operator building an elevated roadway along a coal seam.

7. The operator admits that the road was built for the purpose of mining coal, as an access and haulage road.

8. Commonwealth was under an agreement with the surface owner, Arnold Thacker, to remove the coal seam where the road was being built and to give it to Thacker. Commonwealth had in fact already broken up some of the coal and delivered it to Thacker.

9. At the time the citation regarding the berms was issued, Commonwealth intended to remove the coal at the road construction site.

#### DISCUSSION WITH FURTHER FINDINGS

##### The Citation Concerning Berms

The operator is required by 30 CFR 77.1605(k) to provide berms or guards on the outer bank of elevated roadways. In his testimony the inspector identified several locations where there were missing or inadequate berms -- beginning along the top of the pit down to and including the roadway, marked number one on the mine map, which the operator had constructed along the coal seam.

Commonwealth does not deny that the berms were inadequate in the pit area. There is, therefore, no question that there was a violation of the regulation in that area. However, Commonwealth contends that it was not required to provide berms on the elevated roadway marked number one on the map because the roadway was a public road.

The Act defines a "coal or other mine" to include not just the area of land from which the minerals are extracted but also "private ways and roads appurtenant to such area." In determining what will be considered a "private" road as opposed to a "public" road for purposes of the Act, the fact that the County Judge (in letters introduced by Commonwealth) has declared the road to be a public road is not the determining factor. Nor is the Department of Interior's exercise of jurisdiction over

roads determinative in this case.

The jurisdiction of the Act extends over counties and other political subdivisions. In *Secretary v. Salt Lake County Road Dept.*, WEST 79-365-M (Nov. 25, 1980), where a governmental entity was operating a gravel pit, the pit was found to be subject to MSHA regulation on the basis that the operation of a gravel pit is not an integral government function.

If a county operates a mine and builds a road for the sole purpose of operating that mine, the road should not be considered a public road because the county built it; therefore, a road built by a private mine operator for the sole purpose of access to a mine and haulage should not be considered a public road for the purposes of the Act, merely because a county official has declared it "public" for county purposes.

Several factors should be considered in determining the nature of the roadway involved in this case.

First, the operator built the road. There was no evidence that the county had requested the construction or paid for it. The operator built the road for its own purpose, not for the county's purposes.

Second, the letters from the County Judge submitted in evidence by the operator indicate that the county considered the new roadway to be a public road in the sense that the county has required the company to comply with its standards in constructing the road. The county placed the burden on the operator to maintain the road. No evidence was presented that the county would not allow berms to be constructed on the roadway.

Third, we should consider the "public" that will be making use of the road. The surface owner is Thacker. The portion of the road that was built by the operator and that the mine inspector considered to be in violation begins at the last dwelling house. There is no dwelling located on the new road. Except for Commonwealth's mining operations, the only persons who would normally use the road would be the surface owner and his family and, if necessary, those seeking access to the gas well on the property.

Commonwealth has not presented a letter from the county stating that Commonwealth cannot limit access to the road. Instead, it has presented letters from the private surface owner and his family stating that Commonwealth cannot deny them access to their property.

The record indicates that Commonwealth had to obtain Thacker's permission to build the road on his property. There is no evidence of a public condemnation or a public easement. Rather, Commonwealth pays "royalties" to the Thackers to mine the coal, so there is a financial arrangement with regard to the coal whereby the surface owner profits from the mining operation.

An issue similar to the one involved here arose in *Harmon Mining Corporation v. Secretary of Labor*, Docket No. VA 80-94-R, where a mine operator argued that the area on which N & W Railroad tracks were located was not part of the mine. Employees of the railroad company were on the property where the tracks were located on a daily basis. There was a fatal railroad haulage accident involving a railroad employee. In charging the mine operator, MSHA argued that a deed and agreement between the operator and the railroad granted an easement or license to the railroad for "the purpose of providing a mutually beneficial and convenient method of transporting coal off mine property." The mining company could not have operated without the services of N & W. The judge found that the railroad track was an "integral and indispensable part of contestant's mining operations" and rejected the attempt to divorce the track from the normal mining operations based on what he termed "a somewhat artificial and semantical interpretation" of the old deed and agreement "entered into by the contestant and the railroad for their mutual benefit."

The analysis used in *Harmon* should be applied here, along with the concept of private as opposed to governmental function in the *Salt Lake County* case. In the instant case, the coal operator could not use the existing county road to haul coal, so it built a new road along a coal seam, for the sole purpose of access and haulage. The county required it to maintain the road to county standards. The road is located on land owned by Thacker, the surface owner who is under a contractual agreement with Commonwealth whereby the surface owner obtains a direct financial benefit from the mining of the coal. The road under these circumstances is a private-purpose road and should therefore be considered a part of Commonwealth's mining operation, subject to the Act.

#### The Citation Concerning the Mine Map

Section 77.1200,30 CFR, requires a mine operator to "maintain an accurate and up-to-date map of the mine," and lists items that the map should include. Among these are "the location of railroad tracks and public highways leading to the mine." A reading of the list indicates that it is not an exclusive list. The fact that it mentions only public roads and railroad tracks does not mean that the location of roads within the mine are not required to be shown.

The evidence establishes inaccuracies in the mine map as cited. As to one of these -- the failure to show a roadway -- Commonwealth contends that a hollow fill is shown on the map and that, where one sees a hollow fill one knows that there are "going to be roads all over" (Tr. 72, 106). The fact that one may assume that there will be roads does not mean that the location of the road actually used was properly shown on the map.

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MSHA regulations require that an accurate, up-to-date map be available. Although Commonwealth argues that this is a difficult requirement, the testimony indicates that an engineer or surveyor had apparently already prepared an amendment for submission to the State Department of Reclamation, but there is no reason given why the map provided at the mine could not have been changed or amended at the same time.

If the mine operator had amended the map there was no evidence that the amendment was available at or near the mine to meet the requirements of 77.1200. No amendment was provided to the mine inspector. Although 30 CFR 77.1201 requires that mine maps be made by a registered engineer or surveyor, this does not guarantee that a map that is accurate when made will remain accurate and up-to-date.

ORDER

WHEREFORE IT IS ORDERED that Citations 953348 and 953357 are AFFIRMED and the above proceedings are DISMISSED.

WILLIAM FAUVER  
JUDGE