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

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
PETITIONER

v.

STEMCO COAL COMPANY, INC.,  
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. KENT 85-156  
A.C. No. 15-13918-03522

Mine No. 2

DECISION

Appearances: Charles F. Merz, Esq., Office of the Solicitor,  
U.S. Department of Labor, Nashville, Tennessee,  
for Petitioner

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act" for a violation of the regulatory standard at 30 C.F.R. 75.1711.(FOOTNOTES.1) The general issue before me is whether Stemco Coal Company, Inc. (Stemco) has violated the cited regulatory standard and, if so, whether that violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard i.e., whether the violation

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was "significant and substantial". If a violation is found it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act. Under the authority of section 110(b) of the Act the Secretary also seeks a civil penalty of \$1,000 for each day Stemco purportedly continues to violate the cited standard. Because of the exigency of the circumstances presented at hearings held on November 13, 1985 this decision is being issued on an expedited basis.

The citation at bar, No. 2290849, as amended at hearing, alleges a "significant and substantial" violation of the regulatory standard at 30 C.F.R. 75.1711, and charges that "the subject mine was abandoned on September 28, 1984 and the drift openings were not sealed in a manner prescribed by the Secretary." The cited standard requires in relevant part that "the opening of any coal mine that is declared inactive by the operator, or is permanently closed, or abandoned for more than 90 days shall be sealed by the operator in a manner prescribed by the Secretary."

It is not disputed that on September 28, 1984, Stemco notified the Secretary through the Mine Safety and Health Administration (MSHA) that its No. 2 Mine had been abandoned, that the work of all miners had been terminated and production had ceased. The Secretary subsequently notified Stemco by letter dated October 29, 1984, of the prescribed manner for sealing the No. 2 Mine and informed Stemco that it had 60 days to comply with that notification. The Secretary's letter of October 29 prescribed in part as follows:

In accordance with section 75.1711, the mine shall then be sealed with solid, substantial, incombustible material, such as concrete material for a distance of at least 25 feet into such openings. A means to prevent a build-up of water behind the seals shall be provided in at least one of the seals. Metal pipes used for this purpose shall be a minimum of 4 inches in diameter and shall be installed a sufficient height above the bottom of the seal to prevent it from becoming blocked with mud or debris.

MSHA inspector William Hatfield testified at hearing that more than 2 months after the subject letter had been issued (in January or February 1985) he observed that none of the 11 entrances to the Stemco No. 2 mine had been sealed and accordingly he reminded one of the Stemco owners, Allen Stump, of the sealing requirements. Stump requested an extension to comply because of a strike then pending against its exclusive contractor, A.T. Massey Coal Company, and this

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request was granted. Hatfield later observed however that the Stemco owners were nevertheless continuing to mine coal at other locations in spite of the strike and accordingly he told Stump that no further delays in sealing the Stemco mine would be permitted. When no effort had been made to seal the mine by March 6, 1985, the citation at bar was issued requiring abatement by March 20, 1985.

At Stump's request and upon his representation that he could seal the mine if he had a few more days, an extension for abatement was granted to April 12, 1985. Since no work toward abatement had in fact been performed as of April 30, 1985, a section 104(b) order was then issued.(FOOTNOTE.2) Indeed, the evidence shows that until 2 weeks before the hearing in this case (held November 13, 1985) no work had been performed to abate the citation and order. According to Inspector Hatfield, at that time he observed that dirt had been pushed into the 11 mine entrances to form appropriate seals but inadequate drainage had been provided to prevent water build-up behind those entrances as required by the Secretary's letter of October 29, 1984. Hatfield explained that one drain pipe had been installed in what has been designated on the mine map (Government Exhibit G) as "Stemco Coal No. 2" but that no drainage or other means to prevent a build-up of water was provided for any of the seals in the area of the mine designated on the mine map as "Stemco Coal No. 1". Hatfield explained that the areas designated on the subject mine map as "Stemco Coal No. 1" and "Stemco Coal No. 2" constituted for purposes of MSHA regulation one mine designated as the Stemco No. 2 Mine. This was

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consistent with the requirements of the Commonwealth of Kentucky and Stemco's request to abandon its Stemco No. 2 Mine. The mine map required to be submitted on abandonment included both "Stemco Coal No. 1" and "Stemco Coal No. 2".

According to Hatfield the failure to provide proper drainage from the seals in "Stemco Coal No. 1" resulted in a serious hazard to residents and school children in the hollow or valley below. Hatfield explained that an elementary school was positioned only 3/4 of a mile and some houses were located as close as 1/4 of a mile below the subject mine entrances. Hatfield observed that while he did not believe that an "imminent danger" existed he believed that without proper drainage water seeping into the mine could build-up fairly rapidly behind the seals. Since the seals consisted only of dirt of unknown depth, eventually the water could push the dirt out and inundate the houses and elementary school below. Hatfield opined that such a build-up could occur as soon as within several weeks. Within the framework of this undisputed evidence it is clear that immediate remedial action must be taken.

Under section 110(b) of the Act I have authority to order civil penalties of "not more than \$1,000 for each day" during which the mine operator fails to correct a violation for which a citation had been issued under section 104(a) of the Act within the time permitted for its correction. The citation at bar was issued under section 104(a). For the reasons noted below, I also find that the mine operator has violated the cited standard and has failed to correct the violation therein within the designated extension of time i.e. April 12, 1985. While the mine operator has now provided seals composed of dirt of unknown depth for each of the 11 mine openings it has clearly not provided a "means to prevent a build-up of water" from what has been designated as "Stemco Coal No. 1". Because of the immediate and grave hazard presented by this situation and the demonstrated absence of efforts by the mine operator to properly abate the cited conditions, I am directing herein that the mine operator provide such means to prevent a build-up of water behind the seals in "Stemco Coal No. 1" within 2 days of receipt of this decision or be subject to civil penalties of \$1,000 a day for each day thereafter in which this condition is not fully abated.

I am also assessing a civil penalty of \$1,000 in this case based in part upon the failure of the mine operator to have provided any seals in the subject mine until only 2 weeks before the instant hearing. The mine operator was notified of the requirements for sealing its mine as early as its receipt of the letter from MSHA dated October 29, 1984. It was thereafter periodically notified of this requirement



related counsel for the Secretary informed Mr. Lester that he was prepared to present, and in fact, intended to present on behalf of the Secretary, evidence in support of the citation and civil penalty at issue. Mr. Lester reportedly stated that he understood that this would occur. Under the circumstances I found at hearing that the mine operator waived his right to appear and contest the matters presented at hearing.

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2 Section 104(b) provides as follows:

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or subsequently extended, and (2) that period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately to cause all persons, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.