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GOLDEN OAK MINING V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

GOLDEN OAK MINING, CO., L.P.,
CONTESTANT

CONTEST PROCEEDING

v.

Docket No. KENT 90-185-R
Citation No. 3370565;
4/12/90

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

Golden Oak No. 4 Mine

DECISION

Appearances: Teresa Taylor, Esq., Cook Law Office, Whitesburg,
Kentucky, for Contestant (Golden Oak);
W. F. Taylor, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for the Secretary of Labor (Secretary).

Before: Judge Broderick

STATEMENT OF THE CASE

Golden Oak filed a Notice of Contest on May 17, 1990, challenging a section 104(a) citation issued by MSHA on April 12, 1990, alleging a violation of 30 C.F.R. 75.1712-1. The citation required abatement of the violation by May 14, 1990. Because Golden Oak had been informed that a withdrawal order would be issued for failure to abate, it sought an expedited hearing on its notice of contest. After the case was assigned to me, MSHA extended the abatement time for 30 days. Pursuant to notice issued May 18, 1990, I called the case for hearing on June 12, 1990, in Hazard, Kentucky. Cecil Davis, Michael Keene, and John Hendley testified on behalf of the Secretary. Willard Back, Hiram Standifur, Jr., and Ross Keegan testified on behalf of Golden Oak. At the conclusion of the testimony, both parties argued their positions on the record. I considered the record and the contentions of the parties in issuing a bench decision in which I modified the citation and affirmed it as modified. I dismissed Golden Oak's contest. Pursuant to 29 C.F.R. 2700.65, I herewith reduce that oral decision to writing.

FINDINGS OF FACT

1. Golden Oak Mining Co., L.P., is the owner and operator

~1361

of an underground mine in Letcher County, Kentucky known as Golden Oak No. 4 Mine.

2. Golden Oak began operating the subject mine in April 1986 under the corporate name Golden Oak Mining Co., Inc. The company's ownership and legal structure were changed in about July 1989 to Golden Oak Mining Co., L.P.

3. The mine is about 3 to 3-1/2 miles deep and crosses a number of abandoned mines as well as a sandstone fault area. It has two mining sections and operates one maintenance and two production shifts.

4. On October 20, 1986, the MSHA District Manager, under 30 C.F.R. 75.1712-4, granted Golden Oak, upon its written application, a waiver of the requirements contained in 30 C.F.R. 75.1712-1 for surface bathing facilities at the No. 4 Mine. Approximately 23 miners were employed at the mine.

5. On May 31, 1988, the MSHA District Manager again issued a waiver under 75.1712-4 to Golden Oak for the No. 4 Mine. Approximately 105 miners were employed at the mine.

6. In about July 1989, after the ownership of Golden Oak and its company name and structure were changed, the mining permits were transferred to the new company. The MSHA mine I.D. number remained the same however.

7. On December 5, 1989, Golden Oak filed a request for waiver of the requirements for surface bathing facilities and clothing change rooms with the MSHA District Manager pursuant to 30 C.F.R. 75.1712-5. It submitted a petition signed by all the employees of the mine, 85 in number, stating that they did not desire that bathing facilities be made available. The request, on an MSHA form, indicated that the life of the mine is greater than one year, that an adequate source of suitable water is not available on mine property, and that centrally located bathing facilities would not be practical. The reason given for this last conclusion is that "employees prefer to bath at home at present time."

8. Federal inspector Cecil Davis made an evaluation of the request for waiver in January 1990. He determined that the mine had an adequate water supply, that it had a trailer used as a clothing change area, and that it had portable sanitary toilet facilities. He discussed mining projections with Golden Oak management officials and concluded that the mine had a remaining life of four years. Inspector Davis recommended that the waiver be denied.

9. In January 1990, Michael Keene was the Acting District Manager in MSHA District 6. He reviewed Golden Oak's application

~1362

and Inspector Davis' evaluation. On January 24, 1990, he denied Golden Oak's request for an extension of the waiver. The letter of denial stated that an investigation at the subject mine disclosed that it was practical to develop a private water supply, that an adequate supply of electricity existed, that there was an adequate area to construct or provide portable bathing facilities and that the life of the mine was approximately four years.

10. On April 12, 1990, Inspector Davis, in the course of a regular safety and health inspection of the subject mine, issued a 104(a) citation for a violation of 30 C.F.R. 75.1712-1 because bathing facilities, clothing change rooms and sanitary facilities were not provided at the mine and a request for a waiver of these requirements was denied on January 26, 1990. Abatement was required by May 14, 1990.

11. On May 7, 1990, Acting District Manager Keene met with Willard Back, Golden Oak's Safety Director. Back informed Keene that the life of the mine was approximately 2 years. He stated that Golden Oak drilled a well on the mine property but only obtained 5 gallons of water per minute. The mine was using water from an abandoned mine. It was believed that the source of this water was an underground stream. Nothing was brought up to Mr. Keene which in his opinion was sufficient to cause him to change his prior decision denying the waiver.

12. John Hendley, an industrial hygienist employed by MSHA, estimated that the subject mine used at least 36,000 gallons of water per day in its mining operation. Approximately 2700 gallons additionally per day would be needed for bathing facilities for 85 miners.

13. A water sample taken from the subject mine on May 31, 1990, showed that the water was not suitable for drinking, but was suitable for bathing. It could be made suitable for drinking with a slight chlorination treatment.

14. On May 17, 1990, Golden Oak's Vice President wrote to MSHA, asking for reconsideration of the waiver request. The letter estimated the life of the mine at 2 years.

15. At the hearing, Golden Oak's Manager of Engineering, Ross Keegan, estimated the mine life at a maximum of 16 months. He explained that as of May 29, 1990, the estimated life was 2 years, but that recent adverse conditions had resulted in the reduction to 16 months. He stated that although a small quantity of water was taken from a well and an erratic source of water was being used from an abandoned mine, Golden Oak still had to truck in water on occasion to supply the mining equipment. Keene had not been made aware of the fact that water was trucked in; in

~1363

fact, Golden Oak's Safety Director was not aware of it until the day before the hearing.

16. Keegan testified that it would take approximately 9 months to get government approval for a bathing facility and approximately 3 additional months to construct one. The estimated nine month period included environmental studies, and the approval of a sewage treatment facility. These allegations were not made to Mr. Keene at the time the waiver was sought, nor at the time reconsideration of the denial was requested.

17. On May 17, 1990, Inspector Davis extended the abatement time to June 18, 1990. The extension was granted because Golden Oak was looking into the feasibility of constructing bathing facilities and had water sampling tests performed.

REGULATIONS

30 C.F.R. 75.1712, 75.1712-1, 75.1712-4 and 75.1712-5 provide as follows:

75.1712 Bath houses and toilet facilities

[Statutory Provisions]

The Secretary may require any operator to provide adequate facilities for the miners to change from the clothes worn underground, to provide for the storing of such clothes from shift to shift, and to provide sanitary and bathing facilities. Sanitary toilet facilities shall be provided in the active workings of the mine when such surface facilities are not readily accessible to the active workings.

75.1712-1 Availability of surface bathing facilities; change rooms; and sanitary facilities.

Except where a waiver has been granted pursuant to the provisions 75.1712-4, each operator of an underground coal mine shall on and after December 30, 1970, provide bathing facilities, clothing change rooms, and sanitary facilities, as hereinafter prescribed, for the use of the miners at the mine.

75.1712-4 Waiver of surface facilities requirements.

~1364

The Coal Mine Safety District Manager for the district in which the mine is located may, upon written application by the operator, waive any or all of the requirements of 75.1712-1 through 75.1712-3 if he determines that the operator of the mine cannot or need not meet any part or all of such requirements, and, upon issuance of such waiver, he shall set forth the facilities which will not be required and the specific reason or reasons for such waiver.

75.1712-5 Application for waiver of surface facilities.

Applications for waivers of the requirements of 75.1712-1 through 75.1712-3 shall be filed with the Coal Mine Safety District Manager and shall contain the following information:

- (a) The name and address of the mine operator;
- (b) The name and location of the mine;
- (c) A statement explaining why, in the opinion of the operator, the installation or maintenance of the facilities is impractical or unnecessary.

ISSUES

1. Whether the Commission has jurisdiction to determine whether a waiver of the requirements of 30 C.F.R. 75.1712-1 was properly denied by MSHA.

2. Whether a violation of 30 C.F.R. 75.1712-1 was established:

(a) Whether MSHA's denial of a waiver was arbitrary or capricious.

3. Whether the abatement time for the violation charged in the contested citation is reasonable.

CONCLUSIONS OF LAW

I. JURISDICTION

The Secretary challenges the jurisdiction of the Commission to determine whether MSHA's District Manager properly denied a waiver of the surface bathing requirements of 30 C.F.R. 75.1712-1. The Secretary argues that this issue can be

~1365

considered only in a petition for modification of the standard under section 101(c) of the Act, and that the jurisdiction to consider such a petition is entrusted to the Secretary and not the Commission. I disagree. Golden Oak does not seek to modify a mandatory standard; it asserts that the mandatory standard was not violated because a waiver provided for in the standard was arbitrarily refused. This amounts to a contest of a citation. I conclude that the Commission has jurisdiction to consider such a challenge.

II. VIOLATION

A. 30 C.F.R. 75.1712-1 requires surface bathing facilities at all underground mines. No such facility has been provided at the subject mine.

B. Michael Keene testified that he was acting District Manager on January 24, 1990, when the waiver was denied. There is no contrary evidence of record. I conclude that his action in denying the waiver was the action of the MSHA District Manager.

C. Mr. Keene based his denial of the requested waiver on his conclusion that an adequate water supply was available at the mine, since substantial water was being used in the mining process. He concluded that Golden Oak could and should be held to the requirements of the standard. The regulations give the District Manager discretion to grant or deny such a waiver. In exercising that discretion the District Manager may not act arbitrarily or capriciously. I conclude that the evidence establishes that he did not act arbitrarily or capriciously, but, on the contrary, based his denial on substantial evidence before him that Golden Oak was able to meet the standard's requirements. In determining whether he abused his discretion, I have to look to the facts and circumstances which were made known to him at the time. Subsequent developments or changes in the mine situation cannot be used to show an abuse of discretion. I conclude that a violation of the standard was shown.

III. ABATEMENT TIME

Golden Oak was notified on January 24, 1990, that the requested waiver was denied. It took no steps to protest or to comply until after the citation was issued on April 12, 1990. The time for abatement was originally set at May 14, 1990, and later extended to June 18, 1990. So far as the record shows, Golden Oak's efforts to abate the violation have been minimal. I have further extended the abatement time to July 12, 1990. I conclude that under the circumstances the time for abatement is reasonable.

~1366

ORDER

Based on the above findings of fact and conclusions of law, citation 3370565 issued April 12, 1990 is MODIFIED to extend the termination date to July 12, 1990. As modified the citation is AFFIRMED. The notice of contest is DISMISSED.

James A. Broderick
Administrative Law Judge