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SOL (MSHA) V. PYRAMID MINING
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 93-184
Petitioner : A.C. No. 15-11620-03533
: :
v. : No. 2 Hall
: :
PYRAMID MINING INCORPORATED, :
Respondent :

DECISION

Appearances: Darren L. Courtney, Esq., U.S. Department of
Labor, Office of the Solicitor, Nashville,
Tennessee for Petitioner;
Carl B. Boyd, Jr., Esq., Henderson, Kentucky.

Before: Judge Weisberger

Statement of the Case

This case is before me based on a Petition for Assessment of a Civil Penalty filed by the Secretary (Petitioner) alleging a violation by the Operator (Respondent) of 30 C.F.R. 77.1505. Pursuant to Notice, the case was heard in Evansville, Indiana, on July 8, 1993. At the hearing, Darold Gamblin testified for Petitioner. Joe Clark, and James Michael Hollis, testified for Respondent. The parties filed Briefs on August 23, 1993.

Findings of Fact and Discussion

Respondent operates a coal mine known as Hall No. 2. Respondent arranged for a contractor to extract coal from an above ground seam by use of a continuous miner, or auger. The seam was developed in sections commencing November 1991. (Footnote 1) In normal operations the miner excavated a hole 10 to 11 feet wide, approximately 4 feet, high and 420 feet in length. Once a hole was excavated the miner was moved 3 to 4 feet, and another hole was excavated. This cycle continued as the section was

The sequence in which the sections were developed, the month and year in which they were developed, and their relative locations, are depicted on Respondent's Exhibit No. 2.

~1951

developed. In November 1992, 4 Sections had been excavated, and one was being mined.

On March 20, 1992, the subject site was inspected by MSHA Inspector Darold Gamblin. Approximately 35 to 40 holes were not blocked. These were located in an area 2,000 feet from the area that was being mined. In the normal course of mining, no one enters unblocked auger holes. However, according to Gamblin, children from a nearby residential area might enter these unblocked holes. A person entering an auger hole would be exposed to the hazards of unsupported roof, methane, or insufficient oxygen. Exposure to these hazards could result in a serious injury or fatality.

Gamblin issued a citation alleging a violation of 30 C.F.R. 77.1505, which provides as follows: "Auger holes shall be blocked with highwall spoil or other suitable material before they are abandoned."

Respondent did not impeach or contradict Gamblin's testimony regarding the existence of auger holes that were not blocked. The issue for resolution is whether the holes were abandoned.

Gamblin determined that the holes were abandoned because no mining was taking place in the sections at issue. The only area being mined was located 2,000 feet away from the cited holes. In this connection, Gamblin opined that it would take the miner 2 to 3 days to travel from the area where it was mining on March 20, to return to the holes that had not been blocked. He indicated that he had seen the same holes in January 1992 (Footnote 2), during a previous examination. (Footnote 3) Gamblin noted that he does not know of any reason why an operator would leave an area where they were drilling auger holes, and go to a different section of the mine, and then return later to the original area.

According to Joe Clark, Respondent's ground manager, in the normal course of mining, auger holes are developed to a length of

2 There is no clear convincing evidence to establish when the open holes cited in March 1992, had been augered. Joe Clark, Respondent's ground manager, when asked when they were originally drilled answered as follows: "They would have been drilled between November and March." (Tr. 58) (Emphasis added).

3 In response to questions from counsel, Gamblin indicated that, to his "knowledge" Respondent did not ever go back and "redrill" those holes (Tr. 35) (sic). The record does not establish the basis for Gamblin's "knowledge". Also, there is no evidence in the record from anyone who had personal knowledge as to whether Respondent returned to further excavate the holes in issue after they had been initially augered.

~1952

420 feet. However, according to Clark, at times, either due to geological conditions, or more commonly due to mechanical problems with the miner, an auger hole was not drilled to the full length of 420 feet. He indicated that the miner at issue had lots of mechanical problems. He indicated "we" (Tr.49) were not satisfied with the performance of the contractor, who did not want to re-enter holes that had not been completed. He said that "we were going to insist that they go back and get full penetration" (Tr. 55). He said that Respondent did not consider the holes to be abandoned.

James Michael Hollis, Respondent's safety and reclamation supervisor testified that as far as Respondent was concerned the holes were not abandoned, and it was the "intent" of Respondent to get full penetration (Tr.70). He said that "...we were going to go back and try to go back to those holes to get full penetration". (Tr. 75-76) (sic)

There is no definition in Part 77 of volume 30 of the Code of Federal Regulations, of the word "abandoned." (Footnote 4) Hence, reference is made to the common meaning of the word "abandoned." In Webster's Third New International Dictionary, (1986 ed.) ("Webster's"), "abandon" and the transitive verb "abandoned", are defined as "1: to cease to assert or exercise an interest, right or title to esp. with intent of never again resuming or asserting it; 2: to give up (as a position, a ship) by leaving, withdrawing, ceasing to inhabit, to keep, or to operate often because unable to withstand threatening dangers or encroachments" "abanadoned", when used as an adjective, is defined in Webster's, supra as "1: given up: DESERTED, FORSAKEN... ."

The record does not convincingly establish the exact dates when the contractor stopped the initial drilling of the holes in issue. Hence, I cannot make a finding as to the specific length of time Respondent had ceased working on these holes when cited by Gamblin on March 20, 1992. On the other hand, I find the testimony of Gamblin insufficient to rebut the testimony of Respondent's witnesses, whom I found credible, regarding Respondent's intent to go back and get full penetration of the holes in question. In this connection I note that on March 20, 1992, when the unblocked holes were cited, the mine site at issue was still being mined.

4 Petitioner cited the definition of "abandoned areas" as set forth in 30 C.F.R. 75.2(h). This definition is not relevant to the case at bar. Part 75 of 30 C.F.R. supra, pertains to underground mines only. In contrast Part 77, which governs this proceeding, pertains to surface mines, and surface areas of underground mines. There is no evidence of any regulatory intent that definitions set forth in Part 75 supra, are to be applied to Part 77 supra.

~1953

Within the above framework, I conclude that Respondent, on March 20, 1992, had not "abandoned" the cited holes as that term is commonly defined. Accordingly, Respondent was not in violation of Section 77.1505, supra, and the Citation issued by Gamblin is ordered to be VACATED.

ORDER

It is ORDERED that this case be DISMISSED.

Avram Weisberger
Administrative Law Judge

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