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SOL (MSHA) V. SOUTHFORK COAL CO.
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 94-128
	:	A.C. No. 15-02363-03639
v.	:	
	:	Justus Mine
SOUTHFORK COAL COMPANY, Respondent	:	

DECISION

Appearances: Brian W. Dougherty, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
G.E. Chip Barker, Corporate Counsel, Sterns Coal Company, Bristol, Virginia, for the Respondent.

Before: Judge Barbour

STATEMENT OF THE CASE

In this proceeding the Secretary of Labor (Secretary), on behalf of the Mine Safety and Health Administration (MSHA) and pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (Mine Act or Act), filed a petition for assessment of a civil penalty against Southfork Coal Company (Southfork). The Secretary alleged that Southfork violated 30 C.F.R. 75.1711-3, a mandatory safety standard promulgated pursuant to the Act. The Secretary further alleged that the violation occurred at Southfork's Justus Mine and that the violation was a significant and substantial (S&S) contribution to a mine safety hazard. Southfork denied that it violated the cited standard.

The matter was heard in Somerset, Kentucky. The parties presented testimony and documentary evidence, and subsequent to the hearing counsels submitted helpful statements of position and briefs.

STIPULATIONS

The parties stipulated as follows:

1. Southfork is subject to the jurisdiction of the Act.

2. Southfork and the Justus Mine have an effect on interstate commerce within the meaning of the Act.

3. Southfork and the Justus Mine are subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and the administrative law judge has the authority to hear and decide this case.

4. During 1993 the Justus Mine was in active status but no coal was produced.

5. A reasonable penalty will not affect Southfork's ability to remain in business.

6. During the two years prior to May 20, 1993, nine violations of mandatory safety standards were cited and assessed at the Justus Mine during the course of four inspection days. (See Tr. 11-12).

THE ALLEGATIONS AND THE TESTIMONY

The alleged violation is described in a citation issued pursuant to section 104(a) of the Act, 30 C.F.R. 814(a), and in conjunction with an imminent danger order of withdrawal issued pursuant to section 107(a) of the Act, 30 U.S.C. 817(a). The order asserts that an imminent danger existed in that the doors of the building housing the main mine fan shaft were open and there was no protection against unauthorized persons entering he building (Gov. Exh. 4). The citation states:

> The doors of the main mine fan shaft [were] wide open. The amount of time this condition existed was undetermined, however, it appeared that it had been some time in that there was no evidence that anyone had checked the fan shaft in awhile.

(Gov. Exh. 5.) After the citation was issued it was modified in order to change the standard the Secretary alleged Southfork violated (Gov. Exh. 5). Initially, the inspector charged Southfork with a violation of the mine methane and dust control plan. Because of apparent uncertainty regarding the status of the plan, the inspector, at the direction of the MSHA conference officer, modified the citation to alleged a violation of section 75.1711-3 (Gov. Exh. 5; Tr. 65-55).

30 C.F.R. 75.1711-3 states:

> The openings of all mines not declared by the operator, to be inactive, permanently closed, or abandoned for less than 90 days shall be adequately fenced or posted with conspicuous signs prohibiting the entrance of unauthorized persons.

Peggy Langley, an MSHA inspector, testified she inspected the Justus Mine between December 1992 and May 1993 (Tr. 16).

Specifically, she inspected the mine in December 1992, March 1993 and May 1993 (Tr. 51). There is a fan house on the mine property. It encloses the opening of the main mine ventilation shaft.

Langley inspected the fan house on May 20, 1993. At that time there were persons working at the mine, but the mine was not producing coal (Tr. 16). Langley testified she had been inside the fan house previously, but not during an inspection she was conducting. Rather, she went inside when she was training to become an inspector and when she was accompanying another inspector (Tr. 51).

She stated that in September 1992, the Blue Diamond Coal Company, a prior operator of the mine, agreed to take specific steps in lieu of capping the shaft. The steps were contained in an amendment to the company's ventilation system and methane and dust control plan, which stated:

> 1. Fan building is locked with explosion doors left cracked open. No smoking signs are posted.
>
> 2. Elevator shaft has grating over opening, fence around opening and no smoking signs posted.
>
> 3. Both shafts are checked daily for methane and unsafe conditions. No methane is being detected at this time. Security people are on the property 24 hours a day (Gov. Exh. 3; Tr. 19-22).

Southfork took over the mine following the bankruptcy of Blue Diamond (Tr. 49). In addition to the mine, in MSHA's view, Southfork also took over Blue Diamond's commitments with respect to the fan house.

Langley and her supervisor went to the mine on the morning of May 20, 1993, and parked their automobile at the gate to the property. The gate (a tube-type gate) was locked, but Langley and the supervisor walked around it (Tr. 27). There was no fence surrounding the property. When she was asked whether a chain link fence would have kept unauthorized persons off the property, Langley stated that, although it would have made it more difficult for persons to get in, she did not know "if they could ever keep anybody out if they wanted in bad enough" (Tr. 83). To her knowledge the adequacy of the gate had never been questioned by MSHA (Tr. 84).

Langley could not recall if any signs were posted at the gate. However, she stated there might have been a no trespassing sign (Tr. 27, 56-57). About 200 yards down the road Langley noticed that all of the windows at the mine office were broken (Tr. 27, 57). (No one was in the office (Tr. 36.)) Langley

and her supervisor then proceeded to the rock dust hole where Langley sampled for methane and oxygen. Finally, the two walked to the building housing the main mine fan (Tr. 27).

Langley noticed that the outer and inner doors of the building were open. A padlock was hanging on one the doors. It had been pried loose, and where it had been pried, the metal had rusted (Tr. 28-29). As she stated, "it wasn't like a new skimp place" (Tr. 58). Although Langley believed that there may have been a "no smoking" sign posted on the door, she could not recall a sign warning of the dangers of the shaft or a no trespassing sign (Tr. 29, 40). She stated, "That's not to say they weren't there, but I don't recall them" (Tr. 52-53). During the course of the inspection Langley did not see any watchmen or security guards (Tr. 35).

Langley and her supervisor walked into the fan house and observed the open shaft. The shaft was located about 10 feet from the doors. Because it was dark in the building, Langley could only see a few feet into the shaft. However, from looking at the mine map she understood the shaft was approximately 650 feet deep (Tr. 29-30, 32-34). A handrail blocked access to the shaft (Joint Exh. 7). Langley believed a person who wanted to get to the edge of the shaft could crawl under, over or through the handrail (Tr. 30). However, she agreed that as far as she knew the hand rails never had been found inadequate by MSHA (Tr. 52).

On the floor of fan house Langley observed 20 to 30 cigarette butts, which indicated to her that people had been in the fan house (Tr. 32-33). Langley tested for methane and found none. Still, this was the same fan house where, in 1989, two teenagers had entered and received third degree burns caused by a methane ignition (Tr. 38).

Langley believed that the open doors failed to keep unauthorized persons out of the fan building and away from the open ventilation shaft. She feared "children, teenagers or even adults ... that might be adventurers" would enter the fan house and encounter the dangers presented by the open shaft (Tr. 39, see also 40, 55). Those dangers consisted of falling into the shaft or being burned by ignited methane.

She believed a fall into the shaft was the most likely thing to happen (Tr. 42). Because only 10 to 15 feet of the shaft were visible, anyone venturing near the shaft would not know how deep it really was (Tr. 39, 44). She also believed it "reasonably likely that serious physical harm or death could occur from a fall of 650 feet." Id.

Langley understood unauthorized persons came on mine property because she spoke with people who lived near the mine

and they told her people traveled the property to get to a pond (Tr. 40). The information about the pond was confirmed when Langley inquired at a business office located near the house (Tr. 42). She also noted a house located approximately a quarter of a mile from the fan house that had small children's toys in the yard (Tr. 41).

After finding the open door at the fan house, Langley and her supervisor returned to their car and drove to the mine office. When she arrived at the office the only person present was Sam Blankenship, Southfork's manager of operations, who did not realize there had been possible vandalism on the property (Tr. 42-43, 45). This, coupled with the fact there were no tire tracks on the road leading to the fan house, caused Langley to conclude the company had not been checking the fan house as it should (Tr. 59). Langley asked Blankenship if he had any records of when the fan house had been checked and he did not (Tr. 63).

Because of a prior accident when two teenagers who entered the fan house without authorization were burned, Southfork management should have realized that heightened surveillance of the fan house was needed. Indeed, as Langley noted, one of the provisions to which Blue Diamond and Southfork agreed to in lieu of capping the shaft was to provide around-the-clock security (Tr. 42-43). If security personnel had been at the mine, they might not have prevented a person or persons from prying the lock open, but they would have quickly observed the open doors and relocked them (Tr. 43). In Langley's opinion, 24 hour security meant that the company would check the fan house at least once an hour, or as often as required to take care of any problems (Tr. 62, 76).

After being cited for the condition, Southfork bolted the doors shut (Tr. 44).

Blankenship testified for Southfork. He stated that in August 1992, Blue Diamond Coal Company sold the property on which the mine is located to Stearns Coal Company and that Southfork operated the mine under a contract with Stearns (Tr. 68). The property consists of 27,000 acres. There are parts of the property where people live and Blankenship described the property by saying that "parts of it [are] populated and parts of it [are] remote" (Tr. 70).

There are eight areas on the property that are checked by security personnel. They include the operation facility, the pond, the slag dumps, the three office buildings, and the water tank (Tr. 70, 77). Company Employees are present on the property 24 hours a day (Tr. 70, 75). Security personnel check the eight areas for 11 hours during the day. Id.

"No trespassing signs" are posted throughout the property. They are posted at all entrances to the property. There is a gate that stays locked on the road leading to the fan house. In addition, there is a no trespassing sign posted at the gate (Tr. 71). Unless a person has a key to the gate, he or she must walk to the fan house, and there is another no trespassing sign along the road on the way to the fan house. The signs are of the standard "store bought" variety (Tr. 78).

The fan house is three-tenths of a mile from the gate. The closest houses to the fan house are located one half mile away (Tr. 72). The fan house completely encloses the fan shaft. The door is locked and there is no way to get into the house without breaking in (Tr. 72). On May 20, 1993, there was a no trespassing sign, a no smoking sign and a danger sign on the fan house (Tr. 72-73, 79). The trespassing sign was posted on the same side of the fan house as the doors (Tr. 80).

After receiving Langley's report that the fan house had been broken into, Southfork bolted the doors to the frame of the house. It would have required a hack saw and torch to cut off the bolts (Tr. 74). (In addition, and subsequent to the abatement of the alleged violation, the shaft was capped with concrete (Id.)).

Blankenship stated that the ignition at the fan house that involved the teenagers occurred when Blue Diamond owned the property and that he had no knowledge of the accident until Langley advise him of it (Tr. 75). Further, he had no knowledge of any current methane dangers at the fan house (Tr. 75-76).

THE VIOLATION

To determine whether the Secretary has proven the existence of the violation, it is first necessary to determine what the standard requires. On its face the standard seems clear, the operator must adequately fence or post with conspicuous signs prohibiting the entrance of unauthorized person into the openings of mines not declared permanently closed or abandoned for less than 90 days. Here, there is no question but that the mine was not declared permanently closed or abandoned for less an 90 days. Nor is there any question about the ventilation shaft being an opening of the mine. Thus, the shaft had to be "adequately fenced or posted."

The determinative question is what is meant by the phrase "adequately fenced or posted" and specifically what is meant by the word "or"? In common parlance, and as used normally, the word "or" connotes disjunction. However, this general rule of construction must yield, when a disjunctive reading frustrates a

clear statement of legislative intent. See U.S. v. Smeathers, 884 F.2d 363, 364 (8th Cir. 1989). In such a situation, "or" is read as meaning "and". Wiggins v. Secretary of DHHS, 17 Cl. Ct. 551,557 (1989).

Section 75.1711 restates section 317(k) of the Act, 30 U.S.C. 877(k). The section gives authority to the Secretary to prescribe how an operator shall seal the openings of inactive or abandoned mines and how an operator shall protect the openings of other mines. Section 317(k) was carried over unchanged from the Federal Coal Mine Safety and Health Act of 1969. In prescribing how the sealing and protection of mine openings was to be accomplished, the Secretary of the Interior promulgated, without comment, subsections 75.1711-1 through 75.1711-3. 35 Fed. Reg. 17890, 17926 (November 29, 1970). The subsections have not been revised since promulgation.

Initially, the Secretary of the Interior's instructions to his inspectors regarding how to interpret section 75.1711-3 indicated that in the Secretary's view "or" meant "and" and that both fencing and the posting of signs were required. The 1971 edition of the inspection manual of the Mining Enforcement and Safety Administration (MSHA's predecessor) stated:

> Isolated openings, such as intake or return airways in remote areas shall be fenced, and conspicuous signs prohibiting entrance of unauthorized persons shall be posted at all mine openings.

U.S. Dept. of Interior Bureau of Mines Coal Mine Safety Inspection Manual for Underground Mines 97 (December 1971) ("Coal Manual"). This same wording was carried forward into the 1972, 1973 and 1974 editions. Coal Manual (September 1972); Coal Manual (August 1973); Coal Manual (June 1974).

However, the instruction was dropped after the Mine Act took effect. The Secretary of Labor's first version of the manual simply restated verbum section 75.1711-3, thus eliminating the "and" when referencing fencing. U.S. Dept. of Labor Mine Safety and Health Administration Coal Mine Health & Safety Inspection Manual for Underground Coal Mines II-633 (March 9, 1978) ("Manual"). In his most recent version of the Manual, the Secretary has deleted all reverence to section 75.1711-3 and does not offer any guidance to his inspectors. V Manual 141.

The above history of promulgation and interpretation hardly provides that clear statement of intent necessary to override the common meaning of "or." As has been noted, in promulgating the regulation, the Secretary of the Interior provided not one clue that the regulation was couched in terms other than those in which it normally would be understood -- that is, in terms of disjunctive choice. While the Secretary

of the Interior's initial interpretation of section 75.1711-3 indicated the Secretary envisioned the operator as required to provide both fencing and signs to safeguard mine openings, the deletion of this interpretation, its replacement with the regulation and the regulation's subsequent deletion suggest to me that either the Secretary of Labor intends the usual disjunctive meaning to apply or that the Secretary is uncertain how the standard should be interpreted. In any event, I am compelled by the general rule of statutory and regulatory interpretation to find that the commonly understood meaning of the words applies, that is to say, that an operator must either fence or post with conspicuous signs the openings of mines that are not inactive, permanently closed or abandoned for less than 90 days.

Southfork did not meet the first of these requirements. The verb "to fence" is defined as "to keep in or out with or as if with a fence." Webster's Third New International Dictionary 837 (1986). No fence was present around the opening to keep unauthorized persons out. The gate at the entrance to the property did not bar access by pedestrians, as the Langley's inspection proved. Moreover, even if the fan house itself was an instrument of fencing in that it could keep out unauthorized persons "as if with a fence," it was inadequate for that purpose because the lock was broken and the doors were open.

Thus, the opening was not fenced as required by the standard. However, the Secretary also must establish that conspicuous signs prohibiting the entrance of unauthorized persons were not posted and this he has not done. Langley could not recall if a no trespassing sign was posted at or near the gate, although she acknowledged one might have been present (Tr. 27, 56-57). Blankenship, on the other hand, was certain a no trespassing sign was posted at the gate (Tr. 71). In addition, Blankenship stated there was a no trespassing sign along the roadway leading to the fan house (Tr. 78).

Langley also was uncertain whether there were no trespassing signs in or around the fan building. "[N]o trespassing signs[,] I don't recall. That's not to say they weren't there, but I don't recall them" (Tr. 52-53). Blankenship had no such doubts. He stated that a no trespassing sign was located on the same side of the fan house as the doors (Tr. 80). Despite the fact that Blankenship was unable to point out the sign on the photograph of the back side of the fan house (Joint Exh. 2), I credit Blankenship's testimony that the sign was in place as he testified. His certainty outweighs Langley's uncertainty and his explanation that "You couldn't see the sign with this picture." [referring to Joint Exh. 2] was not challenged (Tr. 81).

I therefore conclude that by posting the signs, especially the sign on the fan house itself, Southfork complied with section 75.1711-3. Accordingly,the citation must be vacated.

In reaching this conclusion I am mindful of the Secretary's argument that "the purpose of the ... regulation is to protect the public from the dangers of open mines by requiring operators to take adequate measures to prohibit entry into such dangerous areas" and consequently that section 75.1711-3 "should be interpreted broadly" (Sec. Br. 7). However, in light of both the Secretary's choice of wording of the standard and the Secretary's history of interpretation, I can, in all fairness, reach no other conclusion than that the words of the standard mean exactly what they say. If this is not the case and the Secretary wants the standard to mean that openings should be adequately fenced and posted, the Secretary should revisit the standard.

Finally, this result implies no criticism of Langley. In the face of conditions that clearly were dangerous, she took immediate action by issuing an imminent danger order of withdrawal. (The validity of the order is not before me in that Southfork did not seek its timely review.) While it is true the conditions did not constitute a violation of the standard that MSHA ultimately determined she should cite, it is equally true that she did not promulgate the standard.

ORDER

Citation No. 4042811 is VACATED. The Secretary's petition is DENIED and this matter is DISMISSED.

David Barbour
Administrative Law Judge

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