

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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May 4, 1995

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: Susan E. Foster, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for the Petitioner;
Carl B. Boyd, Jr., Esq., Meyer, Hutchinson, Haynes
& Boyd, Henderson, Kentucky, for the Respondent.

Before: Judge Weisberger

On October 31, 1994, the Commission issued a decision that vacated my determination that Pyramid Mining Incorporated ("Pyramid") did not violate 30 C.F.R. ' 77.1505 by failing to block auger holes, because the holes had not been "abandoned" within the meaning of the standard (16 FMSHRC 2037 (October 1994)). In its decision, the Commission remanded the matter to me to consider whether Pyramid violated Section 77.1505, supra, by failing to block the cited holes at the earliest reasonable time, taking into account the following factors: the existence of any active mining in the area in question, the period of time that had passed since holes were created in the initial coal extraction, whether the operator has taken action to resume drilling, and the hazards presented by the holes" (16 FMSHRC supra, at 2040).

On November 2, 1994, I initiated a telephone conference call with counsel for both parties, to determine if counsel would seek an evidentiary hearing on the issues raised by the Commission's remand. Counsel were granted additional time to determine their positions. On November 15, 1994, in a subsequent telephone conference call, counsel advised that they each requested an evidentiary hearing, and it was mutually agreed that the matter be heard on February 1, 1995. In a subsequent telephone conference on December 15, 1994, Respondent requested an adjournment due to the scheduling of another trial on

February 1, and Petitioner did not oppose the request. The matter was rescheduled, and heard in Evansville, Indiana on February 16, 1995.

At the hearing, MSHA inspector Darold Gamblin testified for Petitioner, and James Michael Hollis, Respondent's Safety and Reclamation Supervisor, testified for Respondent. Both Gamblin and Hollis had testified at the initial hearing on July 8, 1993.

I. Findings of Fact

Based on evidence adduced at the initial hearing, and at the supplemental hearing held on February 16, 1995, I make the following findings of fact, in addition to those made in my initial decision of September 23, 1993 (15 FMSHRC 1950 (1993)):

1. On March 20, 1992, when Gamblin inspected the subject site, active mining was taking place in an area approximately 2000 feet from the area where the unblocked hose was located. There is no clear convincing evidence to establish the precise period of time that had passed since holes were created in the initial coal extraction. Gamblin indicated that he had seen the same holes in January 19, 1992, during a previous examination. Joe Clark, Respondent's Ground Manager, when asked at the initial hearing, when the holes were initially drilled answered as follows: "[t]hey would have been drilled between November and March" (Tr. 58, September 23, 1993) (Emphasis added). James Hollis, Respondent's Safety and Reclamation Supervisor, testified that he did not recall when the holes were created.

2. In discussions Hollis had with the contractor responsible for drilling the holes over the period November, December 1991 and January 1992, the contractor was informed that, regarding the holes that had not been fully penetrated, ". . . we were going to attempt at that time to re-enter (sic) them" (Tr. 133). However, there is no evidence that Pyramid had taken action to resume drilling.

3. There was no fence or other device physically blocking the entrance to any of the unblocked holes. Nor were there any signs specifically warning persons of the hazards involved in entering these holes and warning persons to stay out of them. Children from a nearby residential area might enter these holes. A person entering an unblocked auger hole could encounter the hazards attendant upon exposure to methane, unsupported roof, or accumulations of water.

II. Discussion

A. Violation

According to Hollis, Pyramid considers the area where holes had been augered and the area where mining was taking place on the date cited, to be "all one pit" (Tr. 130). However, the record is clear that at the date Pyramid was cited, active mining was taking place in a section approximately 2000 feet away from the cited auger holes. Although a finding cannot be made as to the precise amount of time that had elapsed from the time the holes were created until they were cited in March 1992, it appears that the cited holes were augered during the months of November 1991, December 1991 and January 1992 (See Exhibit R-2). Both Hollis and Clark testified at the initial hearing that, in essence, it was Pyramid's intent to have the holes redrilled to their full length. Hollis testified at the February 16 hearing that the contractor responsible for drilling the holes was informed in November and December 1991 and in January 1992, that Pyramid had decided to attempt to redrill the holes. However, there is no evidence that Pyramid has taken any action to resume drilling of these holes. Respondent has not impeached or contradicted Gamblin's testimony that the holes were not ventilated to their full depth, and that methane accumulates in the holes. Nor did Respondent contradict or impeach Gamblin's testimony that cave-ins could occur in the holes due to unsupported roof. Also, Gamblin's uncontroverted testimony establishes that the holes could become filled with water, which also would pose a hazard.

Following the dictates of the Commission in its decision in this matter, 16 FMSHRC supra, and considering the factors set forth in the Commission's decision, as discussed above, I conclude that Pyramid did violate Section 77.1505 supra, by failing to block the cited holes at the earliest possible time.

B. Significant and Substantial

According to Gamblin there had been three previous methane ignitions in auger holes on the cited property. He also referred to an accident that had occurred at another mine when methane was ignited in a drilling operation which lead to an explosion and injuries. There was no fence surrounding the pit area, and there were no signs warning persons not to go there or warning of dangers of the unblocked holes.

In order for a violation to be significant and substantial, it must be established that there was a reasonable likelihood of an injury producing event (U.S. Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (1985)). Hence, it must be established that there was a reasonable likelihood of a person being exposed to the hazards of the abandoned holes. It is clear that persons

could have entered the unblocked holes. However, there is insufficient evidence to predicate a conclusion that such an event was reasonably likely to have occurred. Indeed, on cross-examination, Gamblin was asked whether there was a reasonable likelihood of persons entering the holes. He indicated only that such an event was possible. For these reasons, I find that it has not been established that the violation was significant and substantial.

C. Penalty

In assessing a penalty, I find that the penalty to be imposed should be mitigated in that Respondent did not consider the holes to be abandoned and intended to have them redrilled. Hence, there was only a low level of negligence on its part in connection with the violation of Section 77.1505, supra, which requires the blocking of such holes before they are abandoned. I find that a penalty of \$100 is appropriate for this violation.

ORDER

IT IS ORDERED that the citation at issue be amended to a violation that is not significant and substantial. It is further ordered that Respondent shall, within 30 days of this decision, pay a civil penalty of \$100.

Avram Weisberger
Administrative Law Judge

Distribution:

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