

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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April 24, 1997

APEX MINERALS, INC.,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. KENT 96-143-R
	:	Citation No. 4011717; 1/29/96
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Apex No. 1 Mine
ADMINISTRATION (MSHA),	:	Mine ID 15-02096
Respondent :		

DECISION

Appearances: John T. Bonham, Esq., Jackson & Kelly, Charleston, West Virginia for contestant;
Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of
Labor, Nashville, Tennessee for Respondent.

Before: Judge Fauver

This is a contest proceeding under section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. Apex Minerals, Inc., contests Citation No. 4011717, which was issued by MSHA on January 29, 1996.

The case arises from a water outburst through a mountain side in January, 1996. The key question is whether the water outburst occurred within Apex No. 1 Mine and, if so, whether it rendered Apex No. 1 unsealed within the meaning of 30 C.F.R. ' 75.334(b)(2), which provides:

After pillar recovery a bleeder system shall be maintained to provide ventilation to the worked out area, or the area shall be sealed.

Hearings were held in Pikeville and Prestonsburg, Kentucky.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following facts and further findings in the Discussion below:

FINDINGS OF FACT

1. Shortly before January 29, 1996, an outburst of water erupted from the side of a mountain above Blackberry Creek, near the community of Ransom, Pike County, Kentucky.

2. MSHA Inspector Garrett Robinson, who is a ventilation specialist and mining engineer, investigated the outburst on January 29, 1996. He described it as a water flow that pushed through the surface out of an old mine entry. He estimated the outburst hole to be 15 feet wide, 4 feet high. After observing the outburst, talking to local residents, including a former miner who had worked in the mine where the water outburst occurred, and reviewing old mine maps, Inspector Robinson concluded that the water outburst came from the old works of Eastern Coal Corporation's Mine No. 7, which had been shut down in 1978.

3. After the hearing in Pikeville, Inspector Robinson used an altimeter to locate the elevation of the seam where the outburst had occurred. He determined that the outburst was in the Pond Creek Coal seam. This finding confirmed his conclusion that it had occurred in Eastern Mine No. 7.

4. Eastern Coal Corporation had operated mines in this area for several decades, including Eastern Mines Nos. 4 and 7, both of which were in the Pond Creek seam. Mine No. 7 was shut down by Eastern in 1978, and Eastern continued to operate Mine No. 4 until June 1992, when it was shut down.

5. In February 1993, Apex acquired mineral rights to coal reserves in a part of Eastern Mine No. 4. Within the boundaries of Eastern Mine No. 4, there are currently at least two separate owners of the coal reserves, i.e. Berwind Land Company and Pocahontas Land Company. Apex has mining rights to the coal reserves owned by Berwind Land Company within the Eastern Mine No. 4 boundaries. Apex has no mining agreement with respect to any part of Eastern Mine No. 7. The other coal reserves in Eastern Mine No. 4, and all the coal reserves in Eastern Mine No. 7, appear to be owned by Pocahontas Land Company.

6. At the time of Apex's application to MSHA, in 1993, to operate Apex No. 1 Mine, Eastern Mines Nos. 4 and 7 were connected underground. There were a number of entries through both mines, and the mines shared ventilation controls and air.

7. Eastern Mine No. 7 was never permanently closed and sealed. Eastern apparently treated Mine No. 7 as part of its No. 4 Mine after it shut down Mine No. 7.

8. When Apex applied to MSHA for an operator I.D. to operate Apex No. 1 Mine, it was given the same I.D. number as Eastern Mine No. 4 because it was using a Mine No. 4 portal and did not open a new portal for its mining operations. It submitted a rehabilitation and a ventilation plan, which were approved by MSHA. Under the rehabilitation and ventilation plans, Apex would ventilate Eastern Mine Nos. 4 and 7 for a short period in the same manner as they had been ventilated, but then (September 1993) Apex would seal off all entries near the boundaries of its mining rights in Eastern Mine No. 4. The plans were carried out and after September 1993, Apex Mine No. 1 did not ventilate or have any physical connection with areas outside its seals, and had no connection with any part of Eastern Mine No. 7.

9. The outburst occurred in Eastern Mine No. 7, which had been assigned MSHA I.D. 15-04315. Eastern Mine No. 7, although inactive, had never filed an abandonment notice or final map in accordance with the applicable regulations. Nor had the mine been sealed as provided by the regulations.

10. MSHA issued Citation No. 4011717, on January 29, 1996, to Apex No. 1 Mine, charging a violation of 30 C.F.R. 75.334(b)(2). Apex contested the citation, which is the subject of this proceeding.

11. At the time of the water outburst, January 1996, there were only two active mine operations in that part of the Pond Creek seam. Apex Mine No. 4 was mining in a part of Eastern Mine No. 4. It was sealed off from the rest of Mine No. 4 and had no connection with Eastern Mine No. 7. The second operator was Narrows Branch Coal, Inc., which was mining coal reserves in Eastern Mine No. 2, which had no connection with Eastern Mine No. 4 or 7.

12. Narrow Branch Coal, Inc., began mining in Eastern Mine No. 2 in February, 1992. It was given a new MSHA I.D. (No. 15-17164) because it developed a new portal in Mine No. 2. It does not have the right to mine coal reserves in Eastern Mine No. 4 or 7.

13. MSHA issued to Narrows Branch Coal, Inc., Citation No. 4011716, on January 29, 1996, which alleges the same type violation as that alleged against Apex concerning the water outburst.

14. Citation No. 4011716 was terminated by MSHA on May 1, 1996, upon Narrow Branch's sealing the area of the outburst.

15. Apex had no contractual dealings with Eastern Coal Corporation concerning Eastern Mine No. 4 or 7 or any other mine.

DISCUSSION WITH FURTHER
FINDINGS, CONCLUSIONS

The basic question is whether Apex No. 1 Mine includes the area of Eastern Mine No. 7 where the outburst occurred, and if it does, whether the outburst caused Apex Mine No. 1 to be unsealed in violation of ' 75.334(b)(2).

The term Acoal mine@is defined in section 2(h)(2) of the Act as follows:

(2) For purposes of titles II, III, and IV, Acoal mine@means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities.

ACoal mine@is further defined in Title III, ' 318(1) of the Act as follows:

For the purpose of this title and title II of this Act, the term---

(1) ACoal mine@includes areas of adjoining mines connected underground.

These definitions, which were first enacted in the Federal Coal Mine Health and Safety Act of 1969, was not changed by the 1977 Amendments, which renamed the statute the Federal Mine Safety and Health Act of 1977.

In 1970, the Secretary promulgated Part 75 - Mandatory Safety Standards - Underground Coal Mines, 30 C.F.R. The definition of a Acoal mine@in section 318(1) of the 1969 Act was adopted as section 75.2 in the regulations, and provides: ACoal mine. Includes areas of adjoining mines connected underground.@

The 1977 legislative history calls for a liberal interpretation of the definition of a mine, as stated in Senate Report 95-181:

The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possibly [sic] interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

1977 U.S. Code and Ad.News 3414 (S.Rep 95-181).

The legislative history of the 1969 Act does not elaborate on the meaning of

section 318(1), other than to add the words "physically connected." As stated in House Report 91-563 (1969):

Section 318. Definitions

Subsection (e) further defines the term "coal mine." The term "coal mine" is broadly defined in section 3(h) of the Act to cover all coal mines whether underground or not. In addition, this section [enacted as section 318(1)] would further define the term, in the case of underground adjoining mines physically connected underground.

1969 U.S. Code Cong. And Ad.News 2562 (H.Rep. 91-563).

**Physical Connections Between
Apex Mine No. 1 and Eastern Mines Nos. 4 and 7**

MSHA Inspector Garrett Robinson, who is a ventilation specialist and a mining engineer, testified that the maps he reviewed, including Exhibit G-2, which was provided by Apex, show that Eastern Mine No. 7, in which the water outburst occurred, was connected underground through Eastern Mine No. 4 to Apex Mine No. 1. He identified 11 entries on Exhibit G-2 that show this connection. He concluded that Eastern Mine No. 7 was a part of Apex Mine No. 1 under the Secretary's regulations and, therefore, that the outburst occurred in Apex Mine No. 1. He found that the outburst caused the worked out areas in Apex Mine No. 1 to be "unsealed" within the meanings of section 75.334(b)(2).

The Secretary presented further proof of a physical connection between Apex Mine No. 1 and Eastern Mine No. 7 in the representations by Apex in 1993, before its seals were installed, that Eastern Mine Nos. 4 and 7 were being ventilated by Apex Mine No. 1. Also, Eastern represented to MSHA in 1985 that it was ventilating Mine Nos. 4 and 7 together.

The mine maps that Apex provided to MSHA to show its ventilation controls and the extent of its mining in Apex Mine No. 1 (Exhibits G-3, G-14, and G-15) show no demarcation between Eastern Mines Nos. 4 and 7. Apex's witness Darrell Hinley, Superintendent of Apex Mine No. 1, who had also been superintendent of Eastern Mine No. 4, agreed that the maps showed that Eastern Mine Nos. 4 and 7 Mine were connected underground.

I find that Apex Mine No. 1 was connected underground with Eastern Mine Nos. 4 and 7 prior to Apex's sealing of the boundary of its mining operations in Eastern Mine No. 4, in September 1993.,

**Effect of Sealing the
Boundary of Apex's Mining Rights**

Apex sealed the boundary of its mining rights in Eastern Mine No. 4 in September 1993, under a mine ventilation plan approved by MSHA. Thereafter, Apex Mine No. 1 was not connected with the part of Eastern Mine No. 4 beyond the Apex seals or any part of Eastern Mine No. 7, which is entirely outside the Apex seals.

Disposition of Issues

The Apex seals raise the legal issue whether a mine that is connected underground with another mine may seal off its connections and thereby become a separate mine with no responsibility for the adjoining mine.

Section 318(1) extends the definition of a coal mine to include areas of adjoining mines connected underground. Connections of mines may be changed, and with those changes the application of the definition must change accordingly. The definition does not provide or imply that a mine having under-ground connections with an adjoining mine may not seal off those connections (with a plan approved by MSHA) and thereby become a separate mine with no responsibility for the adjoining mine. If construed otherwise, the definition would permit the anomalous situation in which one mine could be held liable for the conditions and practices in another mine despite the fact that it has sealed off any underground connections with the other mine and has no legal or contractual right to enter the other mine to change conditions or practices.

Accordingly, I hold that when Apex, with a plan approved by MSHA, sealed off all physical connections with the part of Eastern Mine No. 4 that is beyond Apex's mining rights, Apex Mine No. 1 became legally separated from Eastern Mine No. 7, and had no responsibility or liability for events and conditions in Mine No. 7. The same ruling applies to the areas of Eastern Mine No. 4 beyond the Apex seals.

So long as the former physical connections between Apex Mine No. 1 and Eastern Mine No. 7 (through Eastern Mine No. 4) remain permanently sealed, Apex Mine No. 1 is legally separated from Eastern Mine No. 7 and has no responsibility or liability for the conditions in Eastern Mine No. 7. This same ruling applies to the areas of Eastern Mine No. 4 that are beyond the Apex seals.

This holding is consistent with the responsibilities that are imposed on an operator, such as Eastern Coal Corporation, that abandons or closes a mine.

30 C.F.R. ' 75.1711, ASealing of Mines,@provides:

On or after March 30, 1970, 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. Openings of all other mines shall be adequately protected in the manner prescribed by the Secretary to prevent entrance by unauthorized persons.

30 C.F.R. 75.1204, AMine Closures; Filing of Map with Secretary,@provides:

Whenever an operator permanently closes or abandons a coal mine, or temporarily closes a coal mine for a period of more than 90 days, he shall promptly notify the Secretary of such closure. Within 60 days of the permanent closure or abandonment of the mine, or, when the mine is temporarily closed, upon the expiration of a period of 90 days from the date of closure, the operator shall file with the Secretary a copy of the mine map revised and supplemented to the date of the closure. Such copy of the mine map shall be certified by a registered surveyor or registered engineer of the state in which the mine is located and shall be available for public inspection.

The regulations continue to apply to a former operator after the mine is closed or deactivated. For example, with reference to section 105(b)(1) actions for civil penalties, the MSHA Policy Manual states that such actions may be used Awhere the imposition of a withdrawal order is ineffective to correct existing violations* * * [e.g.,] where an operator that has abandoned a mine has been issued a citation for failure to seal (or properly seal) it and the operator has permitted the abatement time to expire without making any effort to properly seal the mine.@ MSHA PPM, Vol. I, Sec. 105 (July 1, 1988; release I-1). Reopening of an abandoned or deactivated mine is governed by section 75.1721, which requires, among other things, that MSHA approve any proposal for the rehabilitation of the mine. In the instant matter, the plan for reentering the Eastern works and creating Apex Mine No. 1 was approved by MSHA without any mention of sealing or maintaining a sealed area in Eastern Mine No 7.

MSHA's announced policy with regard to the assignment of legal identity numbers is inconsistent with the Secretary's contention that there was a Amerger@of Apex Mine No. 1 and Eastern Mine No. 7. Program Policy Letter No. P89-III-10¹ states that an operator reactivating a

¹Although Program Policy Letter No. P89-II-10 shows an expiration date of March 31, 1991, a thorough review of

subsequent publications by MSHA does not reveal any rescission or modification of its stated policy. Therefore, absent any contradictory statement of policy on the subject, the procedures outlined in PPL, P89-III-10 are considered applicable.

closed mine assumes the legal identity number of the closed mine, unless an existing mine is divided into two or more separate mines. In such a case, P89-III-10 provides that if certain conditions are met the applicant may be assigned a new ID number.

All of the conditions for a new ID number were met by Apex. First, the mine seeking a new identity number must have an easily identifiable division between it and other mines. Apex Mine No. 1 is readily identifiable by the seals separating it from the Eastern works beyond Apex's mining rights. Secondly, the mine must not share haulage or ventilation with any part of another mine. Apex Mine No. 1 has no physical connection with Eastern Mine No. 7. Finally, Apex Mine No. 1 is a separate entity from Eastern Coal Corporation and has no common employees or economic interests with Eastern Coal Corporation. Accordingly, had this policy been followed by MSHA when it approved the establishment of Apex Mine No. 1, Apex would have received a new ID and the remaining areas of Eastern Mine No. 4 would have retained Eastern No. 4 Mine's ID.

However, whether MSHA assigns a new operator a new ID or the ID of an abandoned, closed, or deactivated mine, the ID is not a substitute for the definition of a coal mine under the Act and regulations. An operator is not responsible or liable for another mine merely because MSHA uses the same ID for both mines.

If Eastern Coal Corporation failed to comply with applicable regulation when it abandoned or deactivated its Mine No. 7 that fact did not alter Apex's right to seal off its mining rights boundary and thereby become a separate mine without responsibility or liability for conditions in Eastern Mine No. 7. Apex had no contract with Eastern Coal Corporation and did not assume Eastern's liability for any past or future violations respecting Mine No. 7.

CONCLUSIONS OF LAW

1. Apex Mine No. 1 is subject to the Act.
2. The water outburst involved in this case did not occur in Apex Mine No. 1 or in an area connected underground with Apex Mine No. 1.
3. The Secretary failed to prove that Respondent violated 30 C.F.R. ' 75.334(b)(2) as alleged in Citation No. 4011717.

ORDER

WHEREFORE IT IS ORDERED that Citation No. 4011717 is **VACATED** and this proceeding is **DISMISSED**.

William Fauver
Administrative Law Judge

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