FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, NW, Suite 9500
Washington, D.C. 20001

August 28, 2003

MARTIN COUNTY COAL CORPORATION,	:	CONTEST PROCEEDINGS
Contestant	:	Docket No. CENT 2002-279-DM
	:	Citation No. 7144401;10/17/01
v.	:	
	:	Docket No. KENT 2002-43-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH	:	Citation No. 7144402;10/17/01
ADMINISTRATION (MSHA),	:	Docket No. KENT 2002-44-R
Respondent	:	Citation No. 7144403; 10/17/01
	:	
	:	Docket No. KENT 2002-45-R
	:	Citation No. 7144404; 10/17/01
	:	
	:	Preparation Plant
	:	Mine ID No. 15-05106
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH	:	CIVIL PENALTY PROCEEDINGS
ADMINISTRATION (MSHA),	:	Docket No. KENT 2002-261
Petitioner,	:	A.C. No. 15-05106-03570
	:	
v.	:	Docket No. KENT 2002-262
	:	A.C. No. 15-05106-03571
MARTIN COUNTY COAL CORPORATION,	:	Preparation Plant
Respondent.	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH	:	CIVIL PENALTY PROCEEDING
ADMINISTRATION (MSHA),	:	Docket No. KENT 2002-251
Petitioner	:	A.C. No. 15-05106-03501 WNH
v.	:	
	:	
GEO/ENVIRONMENTAL ASSOCIATES,	:	
Respondent	:	Preparation Plant

ORDER DENYING MOTION TO RECONSIDER DISMISSAL OF CITATIONS

These cases are before me both on Petitions by the Secretary for the assessment of Civil Penalties for alleged violations of mine safety regulations as well as on Petitions by the mine operator and by a consultant to the mine operator to contest the issuance of citations for the alleged violations. A hearing was held in these cases, beginning on June 9, 2003. At the virtual end of the case to be presented by the Secretary, I granted, in part, a motion by the operator and the consultant to dismiss the Petitions by the Secretary for failure to present a sufficient *prima facie* case. The Secretary filed a motion to reconsider the partial dismissal. I deferred ruling on the motion to reconsider until the completion of the presentation of evidence by both sides after the completion of the second phase of the hearing which began on August 4, 2003.

I indicated on the record at the close of the presentation of evidence that I would deny the motion to reconsider. I stated the basic reasons for my decision to deny the motion and indicated I would incorporate those reasons in a written order that would be available to the parties for the purpose of preparing post hearing written arguments. Those written arguments are now due on October 3, 2003. The purpose of this order is to provide an explanation of the reasons for my decision.

Citation No. 7144402

This Citation alleges Respondent Martin County Coal Company violated 30 C.F.R. §77.216(d) by failing to comply with the approved impoundment plan for the Big Branch slurry impoundment in that Respondent failed to periodically "redirect" the slurry discharge along the seepage barrier created around the impoundment.

Citation No. 7144409

This Citation alleges both Respondents, Martin County Coal Company and Geo/Environmental Associates, violated 30 C.F.R. §77.216-3(d) by failing to include in the weekly impoundment inspection report for October 12, 2000, a list of all measures taken to abate hazards at the Big Branch slurry impoundment. Both the operator and the technical consultant are responsible for the weekly inspection report.

Discussion

Slurry barrier sealing

The Regulation which is the foundation for Citation No. 7144402 is simple in concept and language. It says every mine slurry impoundment must have a plan that has received the approval of the District Manager. Once the plan is approved the plan must be followed. In some sense this regulation puts the District Manager in the position of umpire, calling balls and strikes as plans are submitted for approval, rather than an author or developer of plans. The fact remains, however, that MSHA is the regulator of slurry impoundments and the District

Manager's approval results in a regulation (also known as a plan) that imposes requirements and limitations on the construction, operation and maintence of the impoundment. The MSHA District Manager is not required to perform the detailed engineering work necessary to draft a plan, but is in a position to require changes in the plan down to size of pipe or placement of commas. The plan becomes the regulation for purposes of MSHA enforcement.

The Secretary, in requesting reconsideration of my initial dismissal of this Citation, has pointed to a decision by Judge Barbour in *Consolidation Coal,* 18 FMSHRC 1189, 1226 (July, 1996) as standing for a general rule that the operator that submits a plan for MSHA approval remains the author of the plan to the extent the language is unclear. Two problems are immediately apparent in the position taken by the Secretary. First, Judge Barbour's decision was subsequently vacated by the Commission, 20 FMSHRC 949 (Sept., 1998) albeit on other grounds. Second, Judge Barbour is clear in that case that he is applying an exception to the usual rule of interpretation of documents in order to prevent imprecise draftsmanship from producing a meaning to a document which is inconsistent with the overall safety objectives of the MSHA regulatory program. Only if it was clear that Martin County Coal Company's position was inconsistent with the overall safety objectives of the Mine Safety Act would Judge Barbour place the interpretative burden on the operator. As the ultimate approving authority for the impoundment plan, MSHA is responsible for any ambiguities it could have resolved prior to approval.

The theory of liability pursued by the Secretary under this Citation is very specific and detailed. The theory of liability is directly connected to the theory used by the Secretary to explain the impoundment failure of October 11, 2000. The Secretary's argument proceeds in these steps:

1. The regulation, 30 C.F.R. §77.216 requires the operator to comply with the approved impoundment plan;
2. The approved impoundment plan requires the operator, once the seepage barrier is completed, to direct fine coal refuse along the seepage barrier by periodically redirecting the discharge of the fine coal slurry;
3. The discharge of the fine coal slurry was not appropriately redirected along the seepage barrier so as to prevent the impoundment failure through piping internal erosion as the Secretary has hypostasized;
4. The impoundment failed on October 11, 2000, because fine slurry was not redirected along the seepage barrier as required by the regulation.

This argument requires, for it to be effective, that the phrase "periodically redirecting" had a meaning well understood by prudent mining engineers in 1994 that would require actions by the mine operator as now thought necessary by the Secretary. This is not a question of "notice" of the meaning asserted by the Secretary. Lack of notice would be an affirmative defense by the operator if the Secretary successfully completed a *prima facie* case. My conclusion was that the Secretary never completed a *prima facie* case because the Secretary never

established that prudent mining engineers in 1994 would have understood "periodically redirecting" the fine coal slurry discharge to mean the kind of impoundment operation which the Secretary now contends was necessary to prevent impoundment failure in the manner it occurred on the Big Branch portion of the Martin County Coal Company mine.

It is important that the Secretary's theory of how the impoundment failure of October 11, 2000, occurred implies a deficiency in the impoundment seepage barrier. But there was no evidence that anyone was contemplating this particular failure mechanism at the time the impoundment sealing plan was approved. Even the Secretary's impoundment design expert, Richard Almes, testified that the phrase "periodically redirect the slurry discharge" had no established technical meaning in 1994 or in 2000. The slurry discharge methods that the Secretary alleges were required under the 1994 plan were far from standard industry practice in impoundment management. His testimony is consistent with that of the MSHA impoundment inspector. The inspector testified he was familiar with the 1994 plan and had visited the impoundment 3 or 4 times a year between 1994 and 2000. It never occurred to him that the slurry discharge methods used by Martin County Coal Company were insufficient. This testimony represents interpretation of the 1994 plan through conduct rather than an attempt to estop the Secretary as a result of long delay in asserting an argument. The Secretary is not subject to estoppel in her pursuit of public safety.

The Secretary argues at some length that an operator of a coal slurry impoundment is obligated to produce the purpose of the impoundment plan through what ever means the operator may choose. Since the purpose of the 1994 plan was to prevent impoundment failures, goes the argument, the operator clearly did not do enough of the right things. Such an argument misstates both the general legal status of an approved impoundment management plan as well as the language of the plan approved for the Big Branch impoundment. The regulation requires an impoundment operator to manage the impoundment as specified in the approved plan as approved. If the plan is written in specific operational terms, the impoundment needs to be managed in those specific terms. On the other hand, if the plan is written in terms of goals and objectives without specific operational requirements, then the operator is free to use what ever methods are congenial so long as the goals and objectives are met. But here the plan was specific and operational. The Secretary failed to established a violation of those requirements and I have no choice but to dismiss the claim and vacate the Citation.

Inspection Report

The regulation concerning weekly inspection reports is likewise very simple. The regulation requires a report at least every seven days by a qualified person. The report must include, among other things, a report of the action taken to abate hazardous conditions. The day following the October 11, 2000, impoundment breakthrough the impoundment inspector that normally conducted the 7 day examinations visited the impoundment and prepared a report of his visit on the usual form. The Secretary contends the inspector did not satisfy the requirement of the regulation to report actions taken to abate hazardous conditions.

The only hazardous condition at the impoundment on the morning of October 12, 2000, established in this record was the impoundment breakthrough. The inspector's report notes very tersely that the impoundment breakthrough had been plugged. The Secretary utterly failed to offer any evidence that would tend to show this report was inadequate compliance with the regulation. Counsel for the Secretary "argued" at some length that the inspector could have said a great deal more than the hole had been plugged. But he did not offer record proof of any requirement for the inspector to have said more**.** I cannot find anything in the text or context of the regulation which suggests the inspector was required to do more than note the hazard abatement actions as he did. The record does not support a conclusion that the regulation was violated in any way of October 12, 2000. The Citation must be vacated.

Order

For the reasons given above, the motion to reconsider is denied and Citations 7144402 and 7144409 are vacated and the pending Civil Penalty Petitions to the extent based on those Citations are **DISMISSED**.

Irwin Schroeder
Administrative Law Judge

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