FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001-2021

August 12, 2004

SPEED MINING, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. WEVA 2004-187-R
	:	Citation No. 7232788; 07/19/2004
	:	
	:	Docket No. WEVA 2004-188-R
	:	Order No. 7232789; 07/19/2004
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2004-195-R
ADMINISTRATION (MSHA),	:	Citation No. 7220274; 07/22/2004
	:	
Respondent.	:	American Eagle Mine
	:	Mine ID 46-05437

DECISION

Appearances: Timothy M. Biddle, Esq., Daniel W. Wolff, Esq., Crowell & Moring, Washington, D.C., for the Contestant;
Mark Malecki, Esq., Timothy Williams, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, VA, for the Secretary.

Before: Judge Weisberger

I. Statement of the Cases

These contest proceedings, consolidated for a hearing, are before me based on two notices of contest contesting the issuance of citations alleging violations of 30 C.F.R. § 75.1700[1], and one notice of contest challenging an order issued under Section 104(b) of the Federal Mine Safety and Health Act of 1977 (the Act). Contestant also filed, along with these contests, a motion to expedite these cases.

> After the notices of contest and the motions to expedite were filed on July 21, 2004, a conference telephone call was convened with counsel for both parties. At that time, argument was presented on the motions to expedite, and the motions were granted. It was agreed at the time that the trial dates would be July 27 and July 28, 2004.

[1]Initially Contestant's petition for Modification of Section 75.1700 was granted in July 2001. It was amended in a Proposed Decision and Order, Docket No. 2002-082-C, May 23, 2003, ("Modification").

In a subsequent conference call at 11:00 the next morning, it was agreed by counsel that the only issue to be litigated was whether the violations have been established. Contestant made a request to start on July the 28th to allow additional time for preparation. There was not any objection, and the cases were rescheduled for trial commencing July 28 and continuing through July 29.

In addition, a conference call was scheduled for 11:00 a.m. July 26 to allow the parties to present oral argument regarding the Secretary's motion in liminie. A conference call was subsequently held on July 26 at 11:00 a.m., and after listening to argument, the motion was granted[2].

The cases were heard in Charleston, West Virginia, on June 28, 2004. The parties waived filing written briefs, and instead presented oral argument on June 29, 2004. The following bench decision was issued, with minor corrections of non-substantial matters.

II. Introduction

Contestant owns and operates an underground coal mine located in West Virginia, known as the American Eagle Mine. The area at issue involved a longwall operation.

The Eagle Coal Seam, in which the mine operates, intersects with the Cabin Creek Oil Field. Numerous oil and gas wells are located within the mine field. Most of these wells are inactive, and they range from a depth of approximately 3,000 feet to 6,000 feet.

The coal seam is approximately 1,000 feet below the surface. The wells initially contained outer and inner pipes or casings. Some of these have been removed, and the open spaces surrounding the casings[3] extend to the outer walls of the borehole.

At the hearing, the Parties filed, Stipulations of the Parties, appended to this decision as Appendix "A". The following paragraphs from the Stipulations are incorporated herein by reference: 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18.

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[2] An oral order was issued precluding the Contestant from raising any defense that its methods of sealing, plugging, and cleaning were the equivalent of the methods set forth in the Modification at issue, and proffering testimony in support of such defense. Upon reconsideration, the initial order was revised to allow the defense of equivalency regarding those wells that were that were cleaned and plugged after the Modification was issued.

[3] Each open space is known as an annulus.

III. Docket No. WEVA 2004-195-R

In essence, Citation No. 7220274, issued July 22, 2004, alleges, that relating to well No. 242, the company did not comply with the terms of paragraph 1(a)(1) of the Modification, supra, order which provides, as relevant, that "[a] diligent effort shall be made to clean the borehole to the original total depth." The next sentence contains the following critical language. "If this depth cannot be reached, the borehold shall be cleaned to a certain depth ... ." (Emphasis added.)

In essence, the parties agreed that in cleaning the area in question a 6 ½ inch diameter drill bit was used, and the diameter of that area had to be cleaned out, initially was 12 1/4 inches. This particular area was drilled to the center and filled with cement to a point 200 feet below the coal seam. The Secretary argues that not all material had been removed out of the 6 ½ inch cement drill hole.

In essence, it is the argument of the operator that it did comply with this section, as there is evidence that the well was cleaned out by the 6 1/4 diameter drill, furnished with a water spray, that removed the loose material from the borehole.

The evidence that the operator relies upon is the testimony of its expert witness, Joseph Pasini. He opined, based on his experience, that in order to clean a plugged well a vertical hole should be drilled with a six-inch bit, even if the hole is 12 inches in diameter. Also, it should be drilled with water; the water would clean material out of the hole.

The Secretary's witness Eric Sherer indicated, in contrast, that cleaning by using an approximately six-inch diameter drill in a borehole 12 inches in diameter could leave material. He further indicated that the use of water is not sufficient, and it could leave material behind.

I place more weight on his opinion, because it appears to be supported by the reasons that he proffered, which in the main have not been contradicted or rebutted. In this regard, he testified that the water jets that are used along with the drill, are directed at the bit to clean and cool it, and are directed downward.

Importantly, I note that after the well had been drilled to clean it, the well shaft was inspected, by MSHA Inspector Gilbert Young on July 26, 2004, after the longwall had intersected with the vertical shaft and opened it up.

He observed that material was taken from the area of the shaft that formerly had cement in it. He stated that the material was other than cement. In general, I find that the Secretary's position and argument in this case is consistent

with the clear language of the Modification, supra, which appears to require the shaft be cleaned before it is cemented.

As explained by Sherer, and in the main not contradicted or impeached, any unconsolidated material in the shaft should be dislodged before cement is placed in it, because any unconsolidated material compromises the integrity of the cement.

As a defense, the operator argues that Section 1(a)(1), supra, which was cited by the Secretary, is not applicable because it has not been contradicted that well no. 242 was plugged for use as a degasification borehole, and that accordingly Section 1(d) of the Modification, supra, applies.

The first sentence of Section 1(d), supra, states as follows: "Plugging oil and gas wells for use as degasification boreholes". Section 1(d), supra, in subsections one through eight, lists various procedures that should be followed and utilized when plugging oil or gas wells that are subsequently used as declassification boreholes.

The operator points out that it complied with all of these terms, and the Secretary has not challenged this claim. The Secretary has not alleged any violation of any of the terms or that the company did not follow any of the terms or that the company did not follow any of the requirements of Section 1(d), supra.

The operator further argues citing Sutherland on Statutory Construction that Section 1(d), supra, is to be read independently of the requirements of (1)(a), supra. In other words, that if Section 1(d), supra, is clear, then Section 1(a), supra, should not be applied.

The issue herein boils down to whether Section 1(a), supra, has been superseded by Section 1(d), supra, or whether the requirements of Section 1(a), supra, must be followed in the case at bar.

In this connection, I find more persuasive the arguments set forth by the Secretary, in the sense that in the main they refer to the language of the Modification itself. I note a number of factors in that regard.

First of all, at the beginning of the Modification, supra, at 2, under the heading **ORDER**, it is indicated that the petition is **GRANTED** allowing mining in conditions that would not be approved under Section 75.1700, supra , "... conditioned upon compliance with the following terms and conditions." A number of conditions follow. The first refers to "[p]rocedures to be utilized when plugging oil or gas wells." (Modification 1, supra.) A number of subparagraphs

follow including (a), supra, under which the operator was cited, and, (d), supra, which the operator alleges covers the conditions presented herein and supersedes (a), supra.

The Secretary argues that Section 1(a)(1), supra, is an antecedent to the rest of the subparagraphs that follow, including (b), supra, and (d), supra. I find the Secretary's argument persuasive. In this sense, Section 1(a), supra, whose first sentence refer to cleaning out and preparing oil and gas wells, contains the following last sentence, which I find very important. "Prior to plugging an oil or gas well, the following procedures shall be followed." (Emphasis added.) It then lists various procedures. It thus seems to set forth a sequence that has to be followed.

This interpretation is borne out by looking at Section 1(d), supra, which follows 1(a), supra, and refers to plugging, which takes place after cleaning and preparing.

The reading urged by the operator would appear to make Section 1(a), supra, somewhat superfluous, which would be contrary to legislative construction, which reasoning by analogy, I apply to modifications.

I also find it significant that the Secretary's witness Sherer, who indicated that he was the author of Section 1(d), supra, indicated that he did not intend for Section 1(d), supra, to supplant Section 1(a), supra. He indicated that Section 1(d), supra, was written to give the option to an operator to de-gas, but that the operator still needs to prepare a borehole pursuant to Section 1(a)(1), supra.

For all these reasons I find the operator did violate Section 1(a)(1), supra, of the Modification.

IV. Docket No. WEVA 2004-187-R

Citation No. 7232788, issued July 19, 2004, pertaining to well No. 384 alleges a violation predicated upon language set forth in Section 1(a)(2), supra, of the Modification. The operative language there is as follows: "If it is not possible to remove all casing" – and this is the critical language – "the casing which remains shall be perforated, or ripped, at intervals spaced close enough to permit expanding cement slurry to infiltrate the annulus ... ."

The operator argues that this requirement has been met because the two annulae had been filled with expanding concrete. In this connection, the operator argues that the requirement to rip or perforate is a means to an end, not an end in

itself – the end here being to ensure that the expending cement goes into the annulus, and, in the case at bar, that requirement had been met.

In resolving this issue, I focus, first of all, on the language and sentence structure of Section 1(a)(2), supra. I find the Secretary's argument persuasive, just focusing on the language of the Section. The sentence that I read earlier contains a comma after the phrase "casing which remains shall be perforated, or ripped," and then goes on to state "at intervals spaced close enough to permit expanding cement slurry to infiltrate the annulus ... ."

It is clear that the placement, in the sentence, of the comma signifies a pause at that point, and that the plain meaning is to relate the spacing of the intervals to the infiltration of the cement, i.e., that the intervals of the perforations or rippings are to be close enough to permit infiltration of the cement. The emphasis being on the closeness of the intervals as relating to the infiltration. It is clear, then, that the requirement to perforate or rip still remains. That phrase is not qualified. In the case at bar, it has been stipulated that neither perforation or rippings had been done.

The operator also argues that because well No. 384 was plugged to the surface, the requirements of Section 1(b), supra, apply rather than Section 1(a), supra. This argument is essentially the same as presented in regard to well No. 242, and my decision on this defense is the same for the reasons set forth above. (I, Infra).

Therefore, for all the above reasons, I find that the operator did violate Section 1(a)(2) of the Modification.

V. Docket No. WEVA 2004-188-R

On July 19, 2004, the Secretary issued Order No. 7232789 under Section 104(b), supra, of the Act, alleging a failure to abate Citation No. 7232788. An abatement time of 15 minutes was set starting from the time the citation was issued. The Secretary argues that the time limit and failure to extend was reasonable in order to prevent incursion by the operator's longwall operations into a restricted barrier area.

In determining whether the time set in the order was reasonable or an abuse of discretion, focus must be placed on the person who actually issued the order and his reasons for doing so. The evidence on that point is rather scanty.

Jesse Cole an MSHA district manager, who set the abatement time, indicated that he allowed only 15 minutes because there had been numerous

conferences, and MSHA had written a letter to the company setting forth what it had required.

However, I note there are a number of factors involved here. First of all, there was a history of both parties' actions that has to be taken into account. The longwall had intersected with various wells in addition to the two at issue. The situation at issue in not new, as there were many wells facing problems similar to the problems involved in the two wells at question. The Operator's allegation that

in the past it did not encounter any problems with MSHA with regard to its method of preceding has not been contradicted

Further, the parties stipulated that, regarding well No. 384, the District Manager had asked for various documentation. The company provided that document, and a permit was issued on November 13, 2003, to mine through well no. 384. Subsequent action was taken by another manager refusing permission, and that led to the instant litigation.

In light of this history, and in light of the seemingly contradictory actions by different district managers, I conclude it was not reasonable to set only 15 minutes for abatement. More time should have been set to allow this matter to be resolved at some administrative level by a person in authority superior to a district manager.

Further, the propriety of proposed action to abate the violative conditions prepared herein, is an issue is well beyond the scope of this hearing. It also is beyond the authority of a Commission judge to delve into this matter. However, because of all the above history, I cannot find that the time set and refusal to extend was reasonable. Hence, I am ordering the 104(b) order to be vacated.

ORDER

It is **Ordered** that the Notices of Contest regarding Citation Nos. 7220274 and 7232788 be **Dismissed**, and Docket Nos. WEVA 2004-187-R and 195-R be **Dismissed**. It is **further Ordered** that the Notice of Contest, regarding Order No. 7322789 be **Sustained**, and Order No. 7322789 be **Vacated**.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

	)	CONTEST PROCEEDINGS
SPEED MINING, INC.	)	
	)	DOCKET NO. WEVA 2004-187-R
Contestant	)	Citation No. 7232788
	)	Issued 7/19/04
v.	)	
	)	DOCKET NO. WEVA 2004-188-R
SECRETARY OF LABOR,	)	Order No. 7232789
MINE SAFETY AND HEALTH	)	Issued 7/19/04
ADMINISTRATION (MSHA),	)	
	)	American Eagle Mine
Respondent	)	Mine ID No. 46-05437

STIPULATIONS OF THE PARTIES

The parties hereto stipulate to the following:

1. Contestant Speed Mining, Inc. ("Contestant") owns and operates the American Eagle Mine in Dry Branch, West Virginia. The American Eagle Mine is an underground coal mine. Coal is mined at the mine by, *inter alia*, the longwall mining method.

2. The mine is subject to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq*.

3. The mine is subject to regulation by the Mine Safety and Health Administration, which regularly inspects the mine to assess compliance with the Act and its implementing safety and health standards.

4. The Federal Mine Safety and Health Review Commission has jurisdiction over the mine, the parties and the subject matter of this proceeding.

5. The citations and orders, and the amendments thereto, which

are at issue in this case, were properly served by a duly authorized representative of the Secretary of Labor ("Secretary") upon an agent of Contestant on the date and place stated therein and may be admitted into evidence.

6. The Proposed Decision and Order granting Contestant's petition for modification became effective in July of 2001. It was then amended. The Proposed Decision and Order dated May 23, 2003 in Docket No. 2002-082-C consisting of 12 numbered pages and an addendum labeled "Correction of Decision and Order" is now in effect. It is a binding modification of 30 C.F.R. § 75.1700 as applied to the mine. The terms and conditions in the Decision and Order constitute the standard applicable to the mine.

7. *All the wells which Contestant has sought approval to mine through are inactive wells.* (No. 7 was deleted from the Stipulation)

Well 384

8. On November 4, 2003, Speed sent a letter to the Acting District Manager requesting a permit to mine through well #384. The letter stated that "Well #384 has been plugged to 101c Petition standards." Accompanying the letter was a plugging affidavit purporting to show that the well had been plugged on August 15, 2003.

9. Based upon the representations and documentation provided by Contestant, MSHA issued a permit on November 13, 2003 to mine through well #384.

10. By letter of July 13, 2004, the district manager instructed

Contestant not to mine within 150 feet of well #384 until Contestant provided him with proof that the well was plugged in compliance with the modified standard.

11. By letter of July 16, 2004, Contestant explained its view that it was entitled to mine within 150 feet but asked that a citation be issued so that a ruling could be obtained from the Federal Mine Safety and Health Commission.

12. On July 19, 2004, Contestant advised the district manager that Contestant had mined within 150 feet of well #384.

13. At that time, Speed did not have permission from the district manager to mine within 150 feet of well #384.

14. The two outer casings in well #384 had been neither removed nor perforated at the time at which Contestant stated that it had mined within 150 feet of the well.

Well 242

15. In 1956, the casings were removed from well #242, and cement and clay were placed in the well. In 2003, Contestant removed some but not all of that material, prior to plugging the well with cement.

16. On November 4, 2003, Contestant sent a letter to the acting district manager requesting a permit to mine through well #242. The letter stated that "Well #242 has been plugged to 101c Petition standards." Accompanying the letter was a plugging affidavit purporting to show that the well had been plugged on October 9, 2003.

17. Based upon the representations and documentation provided by Contestant, MSHA issued a permit on November 13, 2003 to mine through well #242.

18. Speed mined through well #242 on July 22, 2004.

Respectfully submitted,

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