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SOL (MSHA) V. PYRAMID MINING INC.
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SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

PYRAMID MINING INCORPORATED

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Docket No. KENT 93-184

BEFORE: Jordan, Chairman; Doyle and Holen, Commissioners(Footnote 1)

DECISION

BY THE COMMISSION:

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988) ("Mine Act"), presents the issue of whether Pyramid Mining Incorporated ("Pyramid") violated 30 C.F.R. 77.1505 by failing to block auger holes.(Footnote 2) Administrative Law Judge Avram Weisberger determined that Pyramid was not required to block the holes because they had not been "abandoned" within the meaning of the standard. 15 FMSHRC 1950 (September 1993) (ALJ). For the reasons that follow, we vacate the judge's decision and remand.

I.

Factual and Procedural Background

Pyramid owns the Hall No. 2 Mine, a surface coal mine in Ohio County, Kentucky.

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Commissioner Marks assumed office after this case had been considered at a decisional meeting and a decision drafted. In light of these circumstances, Commissioner Marks elects not to participate in this case.

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30 C.F.R. 77.1505 provides that, "[a]uger holes shall be blocked with highwall spoil or other suitable material before they are abandoned."

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The mine is "L"-shaped, with sections A and C at the ends and section B between the two. A haul road is located around the perimeter of the pit and a ramp in section A is used to transport coal by truck from the pit to a preparation plant.

In November 1991, Pyramid's contractor began mining the highwall in Section A. A continuous highwall miner, or auger, approximately 55 feet wide and 28 feet high, extracted coal by drilling holes into the highwall, approximately 4 feet high, 10 to 11 feet wide, and up to 420 feet long. Although Pyramid had instructed its contractor to fully penetrate the auger holes, maximum penetration was not reached if adverse geological conditions were encountered or mechanical problems developed. 15 FMSHRC at 1952; Tr. 48-49.

On March 20, 1992, when Darold Gamblin, an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA"), inspected the mine, the auger was mining section C and moving along the highwall toward section B. Inspector Gamblin observed 35 to 40 unsealed auger holes in section A and concluded that they had been abandoned because section A was no longer being mined. 15 FMSHRC at 1951; Tr. 30-31. He believed that the auger holes presented hazards associated with high methane and low oxygen levels and with unsupported roof and that such hazards could be fatal to anyone entering the holes. Id. Inspector Gamblin also believed that, because the pit was unguarded and there were no barriers or warnings around the holes, a possibility existed that someone could enter the pit and the auger holes. Tr. 20, 30. He had seen children playing in a residential area approximately one-quarter mile from the mine. Tr. 30. Accordingly, he issued a citation pursuant to section 104(a) of the Act, 30 U.S.C. 814(a), alleging a significant and substantial ("S&S") violation of section 77.1505.

A few days later, Pyramid's safety and reclamation supervisor, James Michael Hollis, informed MSHA that Pyramid did not consider the cited auger holes to be abandoned and that it intended to redrill them to "full penetration." Tr. 75-76. Nonetheless, in order to abate the citation, Pyramid filled the mouths of the holes with spoil. Pyramid contested the citation and the matter was heard by Judge Weisberger.

The judge concluded that Pyramid had not violated section 77.1505 by failing to block the auger holes because the holes had not been "abandoned" within the meaning of the standard. The judge relied on the dictionary definition of "abandoned," i.e., "to cease to assert or exercise an interest, right or title to esp[ecially] with intent of never again resuming or [re]asserting it." 15 FMSHRC at 1952 (citations omitted). He reasoned that the record did not establish when Pyramid had ceased working on the cited holes and credited the testimony of Pyramid witnesses that Pyramid intended to resume drilling them. Id. Accordingly, the judge concluded that the Secretary had not established a violation and vacated the citation. Id. at 1953.

The Secretary filed a petition for discretionary review challenging the judge's decision, which the Commission granted.

II.

Disposition

The Secretary argues that auger holes are "abandoned" within the meaning of section 77.1505 when "the evidence shows that the operator is no longer present at the site, and does not show that the operator intends to return to the site in the near future." S. Br. at 5. He contends that Pyramid was required to block the holes because they had been left unmined for three to five months, there was no operator activity in section A, that section was not visible from the nearest mining activity, there were no warning signs placed around the holes, and Pyramid had no identifiable intent to return to section A in the near future. S. Br. at 8. The Secretary asserts that his interpretation of the standard is entitled to deference and that the judge's interpretation renders the safety purpose of the standard meaningless.

Pyramid responds that the judge correctly considered the plain meaning of section 77.1505 and that an operator's intent is the governing factor in determining abandonment. Pyramid contends that it had not intended to abandon the holes but, rather, intended to redrill them to obtain full penetration.

The term "abandoned" is not defined in Part 77, nor does the regulatory history of the standard elucidate its intended meaning. See, e.g., 36 Fed. Reg. 9364 (May 22, 1971). It is recognized that, in the absence of express definitions, terms in regulations should be defined according to their "commonly understood definitions." See, e.g., *Tenneco Oil Co. v. Federal Energy Admin.*, 613 F.2d 298, 302 (Temp. Emer. Ct. App. 1979); *Colorado Dep't of Labor & Emp. v. U.S. Dep't of Labor*, 875 F.2d 791, 797 (10th Cir. 1989). In interpreting such terms, however, reviewing bodies "cannot concentrate on individual terms and ignore a consideration of the context in which the term appears." *Colorado Dep't of Labor & Emp.*, 875 F.2d at 797 (citations omitted). A safety standard must be interpreted to effectuate its purpose and to further the objectives of the statute it implements. See *Dolese Bros. Co.*, 16 FMSHRC 689, 693 (April 1994), quoting *Emery Mining Co. v. Secretary of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984); *Arch of Kentucky, Inc.*, 13 FMSHRC 753, 756 (May 1991).

The legislative histories of the Mine Act and the Federal Coal Mine Health and Safety Act of 1969 recognize the hazards presented by abandoned mining areas and address the health and safety of non-miners as well as miners. See 123 Cong. Rec. 19,960 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 997 (1978); S. Rep. No. 411, 91st Cong., 1st Sess. 85 (1969), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., *Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 211 (1975). The conditions giving rise to the subject citation, unblocked holes, could have posed a significant hazard to anyone entering them.

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The judge, relying on a dictionary definition, determined that the holes had not been "abandoned" because Pyramid asserted an intent to resume drilling them. We agree with the Secretary that the judge's reliance on a narrow meaning of "abandoned" thwarts the standard's protective purpose and does not serve the safety objectives recognized in the legislative history. Cf. Consolidation Coal Co., 15 FMSHRC 1555, 1557 (August 1993). Under the judge's interpretation, auger holes may remain unblocked based entirely on an operator's asserted intent to resume mining them at an unspecified future time. Holes could remain unsealed indefinitely if an operator expressed an intent to attempt extraction of the additional coal an auger were capable of extracting. (Footnote 3)

Moreover, the judge failed to give adequate consideration to the context in which the term "abandoned" appears. Section 77.1505 expressly requires that auger holes shall be blocked before, rather than after, they are abandoned. Accordingly, we conclude that the judge misconstrued section 77.1505.

The standard suggests that auger holes be blocked at the earliest reasonable time, taking into account the hazards associated with open holes as well as an operator's mining intentions. A determination of whether an operator has violated section 77.1505 requires consideration of the following factors, in addition to the operator's statement of intent: 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.

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Although Pyramid initially planned to mine lengths of 420 feet, it had begun considering the possibility of mining up to 1,000 feet. Tr. 70.

III.

Conclusion

For the reasons set forth, we vacate the judge's determination that Pyramid did not violate section 77.1505 and remand for reconsideration consistent with this decision. On remand, the judge should consider whether Pyramid violated the standard by failing to block the cited holes at the earliest reasonable time, taking into consideration the factors set forth above. He may take such additional evidence as he deems necessary. If the judge determines that Pyramid violated the standard, he should also consider whether the violation was significant and substantial and assess an appropriate civil penalty.

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner