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MSHA V. MID-CONTINENT RESOURCES
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-5266/FAX (303) 844-5268

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 91-429
Petitioner : A.C. No. 05-02342-03509
:
v. : Coal Basin Mine
:
: Docket No. WEST 91-595
MID-CONTINENT RESOURCES, INC., : A.C. No. 05-00351-03501
Respondent :
: Bear Creek Mine

DECISION

Appearances: Tandra Leonard, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Edward Mulhall, Jr., Esq., DELANEY & BALCOMB, P.C.
Glenwood Springs, Colorado,
for Respondent.

Before: Judge Morris

These cases are civil penalty proceedings initiated by Petitioner, the Secretary of Labor, against Respondent, Mid-Continent Resources, Inc. ("Mid-Continent"), pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq. (the "Act"). The civil penalties sought here are for the violation of mandatory regulations promulgated pursuant to the Act.

A hearing on the merits was held in Glenwood Springs, Colorado, on February 26, 1992. The parties filed post-trial briefs.

Docket No. WEST 91-429 contains a 104(a) Citation and a Section 104(b) order for failure to abate.

Citation No. 3410979 alleges Mid-Continent violated 30 C.F.R. 75.1711. The Citation reads as follows:

Work to seal this inactive mine was not commenced promptly after a 90-day period elapsed during which the mine was not ventilated by means of the main fan.

The regulation provides as follows:

75.1711 Sealing of mines.

[STATUTORY PROVISIONS]

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 a manner prescribed by the Secretary to prevent entrance by unauthorized persons.

Docket No. WEST 91-595 involves a Section 104(a) Citation.

Citation No. 3410732 alleges Mid-Continent violated 30 C.F.R. 75.1204. The Citation reads as follows:

A revised mine map was not filed with the Secretary after a 90-day period elapsed from the date the mine was permanently closed.

The regulation provides as follows:

75.1204 Mine closure; filing of map with Secretary.

[STATUTORY PROVISIONS]

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 lo-

cated and shall be available for public inspection.

ISSUES

The issues are whether Mid-Continent violated the regulations. If so, what penalty is appropriate?

BRIEF SUMMARY OF THE EVIDENCE

Phillip R. Gibson, Jr., Gary K. Frey, and Lee H. Smith testified for the Secretary.

James E. Kiser testified for Mid-Continent.

On September 29, 1989, MSHA Inspector Gibson inspected the Coal Basin Mine. The mine was not mechanically ventilated and the coal silo had been removed. (Tr. 35, 57, 58). Further, daily examinations were not being made and no coal was being produced. Mr. Gibson issued Citation No. 3410979. Extensions were also granted.

On July 8, 1991, one of the portals had not been sealed.

Mid-Continent had ceased all operations in its mines on January 25, 1991. (Tr. 77, 78).

According to MSHA's Supervisor Lee H. Smith, Mid-Continent did not ventilate the two mines involved here mine after 1983. The company's equipment had been removed. (Tr. 94, 95). There was no employment nor was any coal being produced according to Mid-Continent's reports. (Tr. 97).

The Coal Basin Mine was taken off 103(i) status on October 1, 1981. (Tr. 106).

In concluding the mines were abandoned, Mr. Smith considered the physical condition of the mines, the removal and reassignment of miners, and the cannibalizing of equipment. (Tr. 128, 129, 181; Ex. P-4).

DISCUSSION AND FURTHER FINDINGS

The evidence here is essentially uncontroverted.

MSHA's position is that the mines in question should be sealed since they were "abandoned" by the operator. Mid-

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Continent takes a contrary view and urges the operator did not "abandon" the mines.

The regulations, 30 C.F.R. 75.1711 and 75.1204 both use the term "abandon," although in slightly different fashion. A resolution of the meaning of the term would appear to resolve the conflict.

It is appropriate to place certain uncontroverted evidence in focus:

After 1981 and 1982, the operator removed the face-mining equipment, the continuous miner, loading machines, and shuttle cars from the Coal Basin and Dutch Creek mines. In addition, Mid-Continent removed the main fans, a conveyor belt, the coal silo and the diesel equipment. It was basically a salvage operation.

Further, all personnel were removed, daily examinations were not made, and no coal was produced. After 1983 Mid-Continent was no longer mechanically ventilating the mines.

On September 29, 1989, Mr. Gibson an MSHA Inspector, confirmed the lack of activity and the failure of Mid-Continent to seal the mine.

Section 75.1711 does not define the term "abandoned" or "abandoned mine," but the definitional section of Part 75 does contain a definition of "abandoned area" in Section 75.2(h), which provides:

"Abandoned areas" means sections, panels, and other areas that are not ventilated and examined in the manner required for working places under Subpart D in this Part 75.

Mid-Continent argues a finding of abandonment must be based on the congruence of two elements: non-use together with a concurrent intention by the operator to abandon.

I find Mid-Continent's evidence concerning its intentions to be credible but such future intentions cannot override the objective facts. These facts clearly establish that the operator had, at least on a prima facie basis, abandoned the Coal Basin Mine and the Bear Creek Mine.

In support of its views, Mid-Continent cites the definition from the American Heritage Dictionary, Second College Edition 66 (Houghton Mifflin Co., 1976), wherein "abandoned" is defined as:

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- [Abandoned ... 1. Deserted or forsaken,
2. Recklessly unrestrained; shameless.

The dictionary definition cannot take precedence over the technical definition in Section 75.2(h). The evidence established the Coal Basin and Bear Creek Mines were neither ventilated nor examined as required by the Part 75 definition. Accordingly, they were "abandoned."

In Sewell Coal Company, 1 MSHC 1641, March 30, 1978, Judge Richard C. Steffey reached a similar result ruling the operator's failure to properly ventilate renders the unit "abandoned" within the meaning of 30 C.F.R. 75.2(h). Further, in Sewell, the operator raised as a defense and relied on the definition of "given up, forsaken, or deserted." 1 MSHC at 1642; Judge Steffy rejected this contention.

Citation 3410979 should be affirmed.

Order No. 3586533 was issued by Inspector Gary K. Frey for the failure of Mid-Continent to abate Citation No. 3410979. The Inspector testified as to the issuance of the Order (Tr. 67-72) and the parties addressed the Order in their post-trial briefs; however, the Order does not appear in the Commission files.

The parties were so advised and counsel for the Secretary forwarded the Judge a facsimile of the Order and its modifications. They further agreed the Judge could consider the Order and its modifications in rendering the decision in this case.

The record reflects that Inspector Frey issued the Order on July 8, 1991, when he was told by Mid-Continent representatives that the mine was not completely sealed. (Tr. 67, 70). The Order was for a failure to abate Inspector Gibson's Citation No. 3410979. The Order read "no apparent effort was made by the operator to seal the mine." On July 10, 1991, Inspector Frey modified the Order to read from "no apparent effort" to "little effort."

The uncontroverted evidence establishes the Section 104(b) Order was properly issued and Order No. 3586533 should be affirmed. Since no penalty was sought in the penalty proposal, none will be assessed.

Citation No. 3410979 issued for the Bear Creek Mine alleged the operator violated 30 C.F.R. 75.1204 in that a final mine map was not filed with MSHA.

I again reject Mid-Continent's renewed argument concerning the operator's future intentions to operate these mines.

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Mid-Continent contends that the Secretary's arguments are based on the mistaken assumption that MSHA has the ultimate authority to determine whether a mine operator has, in law and in fact, abandoned or temporarily closed a mine. I disagree with this argument. The facts and not MSHA determine whether an operator has abandoned a mine. In this case, there were more than sufficient facts to justify MSHA's conclusions.

Mid-Continent states that Judge Steffey's decision in Sewell Coal Company, supra, correctly applied section 75.2(h) in relation to 74.316-2(c). The latter section applies to discrete areas that are being abandoned in a working mine. However, when the entire mine which is unconnected to other mines is idled, there is no threat to the ventilation.

Contrary to Mid-Continent's views, I conclude other hazards exist besides lack of ventilation. In fact, the very lack of ventilation could cause oxygen deficiency and methane accumulation - both serious mine hazards. In sum, "abandoned area" within the meaning of 75.2(h) means "areas not ventilated and [not] examined." The definition is broad enough to include an entire mine.

The Secretary urges the Commission to analogize to the definition of "abandoned mine" found in 30 C.F.R. 57.2 which provides:

[A]n [a]bandoned mine means all work has stopped on the mine premises and an office with a responsible person in charge is no longer maintained at the mine.

I decline to make such an analogy. Section 57.2 has no relationship to underground coal mines which are controlled by Part 75 of 30 C.F.R.

Mid-Continent further asserts the Commission should define "abandonment" in accordance with its historical and traditional meaning. For example, it refers to the U.S. Department of Interior Volume A, Dictionary of Mineral and Related Terms (DMMRT) 1968). Respondent's Exhibit R-1 indicates that both non-use and intention to abandon are required. The DMMRT at page 2 defines abandoned workings as follows:

Abandoned Workings: Excavations, either caved or scaled, that are deserted and in which further mining is not intended and opening workings which are not ventilated and inspected regularly. U.S. BuMines Federal Mine Safety Code--Bituminous Coal and Lignite

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Mines, Pt. Underground Mines, October 8,
1953. (Ex.-R-1).

It is true that the Commission frequently refers to DMMRT. However, as previously noted, a definition of "abandon" already is contained in the definition section of Part 57. It is unnecessary to explore elsewhere for other definitions.

Mid-Continent states that abandonment is a question of fact to be determined from all the evidence. *United States v. Eaton Shale Co.*, 433 F. Supp. 1256, 1274 (D. Colo. 1977). Further, the burden rests on the party asserting it. Finally, the burden of proving an intention to abandon must be by clear and convincing evidence and rests upon the party asserting it.

I disagree with Mid-Continent's statement that "clear and convincing evidence" is required. The burden of proof rests on MSHA but the burden is a preponderance of the evidence. *Brennan v. OSHRC*, 511 F.2d 1139 (9th Cir. 1975); 5 U.S.C. 556(d).

Mid-Continent further compares abandonment of an underground mine to abandonment of a water right under Colorado law, citing 15 Colo. Rev. Stat. 37-92-103(2) (1990 Real. Vol.). Such comparison is not warranted. Part 75 C.F.R. regulates underground mines. On the other hand, the law of Irrigation and Water Rights of Colorado seeks to accomplish other objectives much broader than regulating coal mines.

I agree MSHA's supervisor, Lee Smith, did not contact Mid-Continent's management to learn their intentions. However, given the objective uncontroverted evidence, MSHA could only have concluded that the two mines has been abandoned irrespective of management's future intentions.

A portion of the Secretary's evidence deals with Mid-Continent's possible motives for claiming the Coal Basin and Bear Creek Mines have not been abandoned. It was stated that a declaration of abandonment would require Mid-Continent to reclaim and restore the area to its natural state and abandonment may result in the loss of Mid-Continent's federal coal lease. (Tr. 177-178).

I am not persuaded by the foregoing evidence. Mr. Smith was not qualified as an expert on either the Colorado Mined Land Reclamation Act, 14 Colo. Rev. Stat. 34-32-101 to 125 (1984 and Supp. 1991) or on the federal mineral leasing program.

Mid-Continent further argues Citation No. 3410732 alleges the mine was permanently closed. Accordingly, Mid-Continent advances the argument that the Secretary cannot prevail because she states the mine was abandoned or temporarily closed.

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Section 75.1204 requires the filing of a map under various circumstances. Since the parties litigated and briefed the issue of abandonment, it is appropriate to amend the Citation to conform to the evidence.

Both citations herein should be affirmed.

CIVIL PENALTIES

The statutory criteria to assess civil penalties are contained in Section 110(i) of the Act, 30 U.S. C. 820(i).

Mid-Continent must be considered a small operator especially since the company is no longer producing coal and only a small crew remains at the mine.

The operator is no longer in business and the \$20 penalties assessed in this decision are the same as those proposed by the Secretary.

By way of previous history the evidence indicates the company had no violations in the two years ending November 4, 1990, and for the two years ending September 28, 1989. (Exs. P-1, P-2).

The company was negligent in that it failed to seal the mine and file a mine map.

The gravity of the violations was low as no miners were placed at risk.

Mid-Continent did not promptly seal the mine but it promptly filed the mine map.

Payment of the penalties herein are subject to the approval of the Bankruptcy Court.

For the above reasons stated herein I enter the following:

ORDER

DOCKET NO. WEST 91-429

1. Citation No. 3410979 and the proposed penalty are AFFIRMED.
2. Order No. 3586533 for a failure to abate is AFFIRMED.

DOCKET NO. WEST 91-595

3. Citation No. 3410732 and the proposed penalty are AFFIRMED.

4. Respondent filed a case under Chapter 11 of the Bankruptcy Code and is operating its bankruptcy estate as a debtor-in-possession. Accordingly, upon approval of the United States Bankruptcy Court in Case No. 91-11658 PAC, it is ordered that civil penalties will be assessed against the Respondent in the amount of \$40 and Petitioner is authorized to assert such assessment as a claim in Respondent's bankruptcy case.

John J. Morris
Administrative Law Judge

Distribution:

Tambra Leonard, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Office Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

Edward Mulhall, Jr., Esq., DELANEY & BALCOMB, P.C., Drawer 790, Glenwood Springs, CO 81602 (Certified Mail)

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Tambra Leonard, Esq.
Office of the Solicitor
U.S. Department of Labor
1585 Federal Office Building
Denver, CO 80294
Edward Mulhall, Jr.
DELANEY & BALCOMB, P.C.
Drawer 790
Glenwood Springs, CO 81602