# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 18, 1998

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| CLARK ELKHORN COAL COMPANY, | : | CONTEST PROCEEDINGS |
| Contestant | : | |
| v. | : | Docket No. KENT 97-77-R |
| | : | Citation No. 4495292; 11-26-96 |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Sunset Mine No. 1 |
| ADMINISTRATION, | : | Mine ID: 15-11905 |
| Respondent | : | |
| | : | Docket No. Kent 97-176-R |
| | : | Citation No. 4224867; 03/12/97 |
| | : | |
| | : | Ratliff Mine No. 110 |
| | : | Mine ID 15-16121 |

## DECISION

Appearances: William C. Miller, Esq., Jackson & Kelly, Charleston, West Virginia, for the Contestant;
Thomas A. Grooms, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for Respondent.

Before: Judge Barbour

These contest proceedings arise under section 105(d) of the Federal Mine Safety and Health Act of 1977 (Mine Act or Act) (30 U.S.C. ' 815(d)) and involve two citations issued pursuant to section 104(a) of the Act (30 U.S.C. ' 814(a)). Each citation alleges Clark Elkhorn Coal Company (Clark Elkhorn) violated a mandatory safety standard for underground coal mines. Clark Elkhorn contested the validity of the citations, the Secretary answered, the matters were assigned to me, and I consolidated them for hearing and decision. Upon the parties= joint motion, the proceedings were continued pending the decision of Commission

Administrative Law Judge William Fauver in *Apex Minerals, Inc.*, 19 FMSHRC 796 (April 1977).[1] The parties hoped the decision would provide them with a basis to resolve their differences. It did not, and the hearing was rescheduled. At the hearing, counsels announced the Secretary had vacated the citation contested in Docket No. KENT 97-77-R and Clark Elkhorn

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[1]/ *Apex*, involved two mines, Mine No. 4 and adjacent Mine No. 7. In the past both mines had been operated by Eastern Coal Corporation. Apex Minerals, Inc. (Apex) purchased the mining rights to Mine No. 4 and applied to MSHA to operate the mine. At that time, Mine No. 7 and Mine No. 4 were connected underground. Mine No. 7 mine had been used as part of a bleeder system to ventilate Mine No. 4, but Mine No. 7 long had been shut down when Apex took over Mine No. 4.

Once Apex was in control of Mine No. 4, it completely separated the two mines by installing underground seals between them. Subsequently, water burst from a surface opening of Mine No. 7, and MSHA cited Apex for a violation of 30 C.F.R. ' 75.334 (b)(2), a mandatory safety standard requiring, in part, that worked-out areas be sealed. Apex contested the citation, arguing that after the underground seals were installed, Mine No. 7 was not a part of Mine No. 4 and Apex was not responsible for the outburst or for failing to seal the opening.

Judge Fauver agreed. He stated the construction of the underground seals raised Athe legal issue whether a mine that is connected underground with another mine may seal off its connection and thereby become a separate mine with no responsibility for the adjoining mine@ (19 FMSHRC at 801). He concluded Apex had a Alegal right to seal off its mining rights boundary and thereby become a separate mine without responsibility or liability for conditions in . . . Mine No. 7@ (19 FMSHRC at 803). The Secretary did not appeal the decision.

had withdrawn its contest (see Joint Exh. 1; Tr. 8).[2] Thus, the only issue at trial was the validity of Citation No. 4224867, as contested in Docket No. KENT 97-176-R.

**DOCKET NO. KENT 97-176-R**
**THE CITATION**

| Citation No. | Date | 30 C.F.R. ' |
|---|---|---|
| 4224867 | 3/12/97 | 75.1711-2 |

The citation states:

> The mine operator has failed to seal all mine openings. There are three openings located on Rockhouse Fork and there are seven openings on Greasy Creek that are not sealed. All these openings are . . . interconnected with the mine. The mine was abandoned on November 20, 1996 (Gov. Exh. 1).[3]

[2]/ I accepted the withdrawal and advised the parties I would dismiss Docket No. KENT 97-77-R in this decision (Tr. 9) .

[3]/ The Secretary gave the company until April 14, 1997, to abate the alleged violation. Subsequently, the Secretary agreed to extend the time at least until this decision issued (Tr. 113).

## THE STANDARDS

30 C.F.R. ' 75.1711 states:

> [T]he opening of any coal mine that is declared inactive . . . or is permanently closed, or abandoned for more than 90 days, shall be sealed by the operator in a manner prescribed by the Secretary.

Section 75.1711-2 implements section 75.1711, and specifies the manner in which slope or drift mine openings shall be sealed. It requires they be Asealed with solid, substantial, incombustible material, such as concrete blocks . . . or . . . be completely filled with incombustible material for . . . at least 25 feet into such openings.@

## THE ISSUES

The fundamental issues are whether the cited openings were part of a mine that was abandoned by Clark Elkhorn for more than 90 days; and, if so, whether the openings were sealed or completely filled as required. As in *Apex*, the key to resolving the issues is to determine whether works that had been connected underground were part of the single mine after they were separated by the installation of underground seals.

## THE EVIDENCE

MSHA Inspector Douglas Looney was the Secretary=s first witness. He testified the company abandoned the Ratliff No. 110 Mine in late 1996. (The mine is located in MSHA District 6.) On March 12, 1997, more than 90 days after the mine was abandoned, Looney went to the mine Ato check all openings within [its] boundaries@ (Tr. 15). At the mine, he met with John Swiney, the mine operations manager. Looney advised Sweeney that he, Looney, needed to travel to all of the mine openings to determine if they had been sealed in accordance with section 75.1711-2 (Id.). Looney and Swiney traveled together. As Looney described it, Awe . . . [rode] in a vehicle to a certain point. Then we . . . park[ed] the vehicle, [got] out and walk[ed] up on the mountain to where the old openings were@ (Tr. 16).

Looney identified a copy of the Ratliff No. 110 Mine map. For all intents and purposes it was the same as the map he used when conducting the inspection (Gov. Exh. 2; Tr. 18-19). The map showed the mine=s ventilation system (Tr. 19). It also showed two different and adjoining mined areas. Looney believed the Ratliff No. 110 Mine consisted of these two areas. One area, the Aold works,@ had been developed and mined several years ago by a company other than Clark Elkhorn. The other area, the Anew works,@ had been developed and mined relatively recently by Clark Elkhorn.

Originally, the two areas had been completely separate mines. However, when retreat mining began in the new works, the company chose to cut into the adjacent old mine and to use the old works as part of a bleeder system ventilating the retreat mining. Return air from the new works circulated through the old works and exhausted through several of the openings of the old mine (Tr. 45). Before the company cut into the old workings, it obtained approval from MSHA (Tr. 38-39).

The old works had constituted a drift mine, and the old mine openings were parallel to, or practically level with, the coal seam (Tr. 46). The company tested the effectiveness of the bleeder system at some of the old openings (Tr. 21, 23-25). The company referred to these openings as evaluation points or AEPs.@[4]

Clark Elkhorn was not required to cut into the old works in that there were alternative ways to establish the bleeder system (Tr. 25). However, it was safer to use the old works for ventilation and to evaluate the bleeder system from the surface EPs (Tr. 39). It was also cheaper. Indeed, according to Clark Elkhorn=s Safety Coordinator Roger Cantrell, because of safety considerations, MSHA encouraged the use of surface EPs (Tr. 103). Looney agreed it was Afairly common@ in District 6 to use adjacent old works as part of a mine=s ventilation system (Tr. 38-39).

There came a time, however, when the company finished retreat mining and no longer needed to use the old works for ventilation. The company therefore installed underground seals between the new and old works (Tr. 31, 45; see Gov. Exh. 2 at yellow line labeled AUnderground Seals J.S.@). The underground seals completely separated the old and new works and nothing **C** neither miners, nor equipment, nor air **C** could pass between. Functionally, it was as though the old mine had been reconstituted. Once the seals were installed, Clark Elkhorn stopped using the surface openings as evaluation points (see Tr. 32, 101).

In Looney=s opinion, even though the underground seals completely separated the new and old works, Clark Elkhorn remained responsible for the old works (Tr. 32.). He believed the new and old works together constituted one mine (Tr. 32-33). He stated, AI see [the old works] as just a continuation of the mine@ (Tr. 41). In other words, Clark Elkhorn=s use of the old works and of their openings made the old works a permanent part of the Ratliff No. 110 Mine.

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[4]/ When asked to describe the tests conducted at the EPs, Looney stated, AThey made methane tests, [and] determine[d] if air was moving in the proper course and velocity and oxygen tests and stuff like that@ (Tr. 22). The tests were conducted weekly (Tr. 23, 49-50).

With regard to the openings he inspected on March 12, Looney acknowledge he and Swiney did not travel to all of the openings of the old mine because of Atime restraints@ (Tr. 27, 28). Therefore, Looney testified specifically about two openings, EP1 and EP2. Both were on the Greasy Creek side of the mine (see Gov. Exh. 2; Tr. 21, 25). EP1 was partially filled with dirt and debris. Ventilation pipes (18 inch corrugated plastic pipes) protruded out of the opening through the dirt (Tr. 21, 36). The pipes, which were 10 to 12 feet long, also extended back from the opening, through the dirt, and into the atmosphere of the old works (Tr. 64). The Afill@ that partially closed the opening did not extend from the mouth of the opening into the mine for 25 feet as required by section 75.1711-2. EP2 also had 18 inch ventilation pipes protruding from the dirt and debris that partially closed the opening.[5] EP2 also had Afill@ that did not extend 25 feet into the mine (See Gov Exh 2; Tr. 26, 36-37).

Looney believed that to comply with section 75.1711-2 the company should have packed dirt or other fill from the mouths of the openings at least 25 feet into the old works. He also believed the ends of the ventilation pipes should have been sealed or guarded (Tr. 36-37, 47). Looney acknowledged to seal or properly fill some of the openings it might have been necessary to alter the surface of the land (Tr. 44, 46).[6] Looney did not know if the company had Asurface rights@ to make necessary alterations, nor did he consider whether or not the company had such rights when he issued the citation (Tr. 44). Looney also thought he and Swiney visited openings other than EP1 and EP2 that had not been used as EPs and that had not been sealed as required, but Looney could not specify on the mine map where these other openings were (Tr. 27, 29).

In Looney=s opinion the company=s failure to comply was not a hazard to underground miners. The only persons endangered were those who, for whatever reasons, might try to crawl into the openings (Tr. 42, 48). Looney considered this unlikely because the openings were Apretty much in isolated areas@ (Tr. 46).

Looney testified, the company was at most moderately negligent in failing to seal the openings (Tr. 42-43). He did not know of anyone who told the company it was responsible for sealing the openings prior to him issuing the citation (Tr. 45). Nevertheless, the citation was not

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[5]/ According to Swiney, the pipes extended out from the openings so miners did not have to go under overhanging highwalls to evaluate the bleeder system ventilation. Rather, they conducted the bleeder system tests at the outby end of the pipes (Tr. 62).

[6]/ Cantrell asserted the company would have had to build roads to get needed personnel and materials to the sites (Tr. 105).

unique. Looney stated he issued similar citations for similar conditions, although he could not recall when, where, or their number (Tr. 40-41).

Swiney, who testified for Clark Elkhorn, worked for the company for 23 years. He explained the Ratliff No. 110 Mine started operating in 1987 and the old works were then in existence (Tr. 52, 61). (According to Cantrell, the old works were cut Ain the 40s or 50s, maybe early 60s@ (Tr. 103).) Swiney testified the company submitted to MSHA plans to cut into the old works and establish the EPs for the bleeder system (Tr. 52). The plans were approved, but prior

to cutting into the works no one from MSHA told Swiney the company would have to seal the openings to the old works. Nor could he recall hearing of a situation where an operator had been required to seal such openings (Tr. 53).

As best Swiney could remember, the underground seals separating the new and old works were constructed in 1995 (Tr. 54). Before constructing the seals, it was again necessary to receive MSHA=s approval. Nothing in the submission the company made to MSHA to obtain approval indicated the company was going to seal the surface openings after the underground seals were constructed; nor was the company advised it would have to do so (Tr. 54-55).

As opposed to Swiney, Cantrell testified he was aware MSHA believed the openings would have to be sealed. It was during Athe latter part of >95 or first part of >96'" that Cantrell Aencountered MSHA saying that [it] would require EPs where we=d used old mines to be sealed@ (Tr. 100). Cantrell recalled a person from the MSHA ventilation department Astarted talking about the EP would have to be sealed@ (Tr. 105).[7] This was after the company had cut into the old works (Tr. 108). However, no one from MSHA indicated sections 75.1711 and 75.1711-2 required the openings to be sealed (Tr. 102).

MSHA Inspector Thomas Griffith, who was called as a witness by Clark Elkhorn, has been employed by MSHA for 22 or 23 years, the past 8 as a District 6 specialist in coal mine ventilation. As a ventilation specialist he is responsible for reviewing operators= ventilation plans (Tr. 76). If an operator is going to use old works as part of a ventilation system, MSHA has not required the operator=s ventilation map to indicate that the surface openings of the old works will be sealed (Tr. 78, 80-81). Griffith could not recall ever telling anyone at Clark Elkhorn the openings had to be sealed (Tr. 82). On the other hand, Athree and four and five year[s] ago@ he advised several other companies that section 75.1711-2 required the sealing of such openings, but he only gave the advice to operators whose mines liberated high volumes of methane (Tr. 81-82, 93).

William Simpkins, a former MSHA ventilation specialist in District 6, also testified for Clark Elkhorn. When he retired from MSHA in September 1994, he had been a ventilation specialist for 16 years (Tr. 110). Simpkins could not remember any time the agency used section 75.1711 to require an operator to seal openings in old works when the openings had been used as part of another mine=s ventilation system (Tr. 111).

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[7]/ Q. So you were on notice as of the last part of >95 or early >96 that MSHA was changing its policy, is that correct?

A. That=s the first time I heard of those EP=s had to be sealed (Tr. 106).

## RESOLUTION OF THE CONTEST

In resolving the question of whether Clark Elkhorn was properly cited for a violation of section 75.1711-2, heed must be paid first to the wording of sections 75.1711 and 75.1711-2 in order to determine what was required of the company. If the language is clear, the standards= terms must be enforced as written. (*Island Creek Coal Co.*, 20 FMSHRC ____, Docket No. KENT 95-214, slip op. 5 (January 30, 1997). If the language is not clear, if it is ambiguous, deference must be given to the Secretary=s interpretation of the regulations (*Island Creek*, slip op. 5-6; citing to *Energy West Mining Co.* v. *FMSHRC*, 40 F.3D 457, 463 (D.C. Cir. 1994); *Secretary of Labor* v. *Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990)). While at first blush the requirement to defer seems to ordain the Secretary always will prevail, the requirement comes with a concomitant responsibility that offers a constitutionally-based protection to the operator. The Secretary must afford fair notice of her interpretation. If she does not, the operator cannot be held liable (*General Electric Company* v. *E.P.A.*, 53 F.3d, 1324, 1328-29 (D.C. Cir. 1995); *Island Creek*, slip op. 11).

## THE SECRETARY=S INTERPRETATION OF SECTION 75.1711-2

To establish noncompliance with section 75.1711-2, the Secretary must prove the existence of openings Arequired to be sealed under ' 75.1711.@ Section 75.1711, restates section 317(k) of the Act (30 USC ' 877(k)) in requiring Athe opening of any coal mine that is . . . abandoned for more than 90 days, [to] be sealed . . . in a manner prescribed by the Secretary.@ Looney=s testimony regarding the openings at EP1 and EP2 was detailed. He described how he and Swiney visited the openings, how the openings had 18 inch, open-ended ventilation pipes protruding through the dirt, how the dirt did not completely close the openings, and how the Afill@ did not extend 25 feet back into the mine (Tr. 23, 26, 36-37, 47, 49-50). There is no dispute the Ratliff No. 110 Mine was abandoned on November 20, 1996 (Gov. Exh. 1, 4). There also is no dispute Looney visited the mine more than 90 days later. Looney=s testimony amply demonstrates, and I find, that at the time of the visit, EP1 and EP2 were not Asealed . . . in a manner prescribed by the Secretary@ (30 C.F.R. ' 75.1711) in that neither was Asealed with solid incombustible material@ or Acompletely filled with incombustible material for a distance of at least 25 feet@ (30 C.F.R. ' 75.1711-2).

In contrast to the detailed descriptions of EP1 and EP2, Looney=s testimony regarding the other openings of the old works was not sufficiently precise to allow findings concerning compliance with the standard. Although he initially testified he went to the mine to Acheck all openings within [the mine=s] boundaries@ (Tr. 15), Looney modified his testimony from Aall openings,@ to the openings he and Swiney could see on the day of the inspection, and agreed they did not see them all (Id., Tr. 28, see also Tr. 48). Further, when cross examined concerning the ten openings he listed specifically on the citation, he stated Ait could have been one or two less than ten@ (Tr. 43). Finally, although he stated Aaccording to [his] notes@ (Tr. 27) other openings not used as EPs were in violation of section 75.1711-2, the notes were not introduced and Looney provided no further description of the Aother openings.@

Despite these deficiencies, proof EP1 and EP2 were not Asealed with solid incombustible material@ or Acompletely filed with incombustible material for . . . at least 25" is sufficient to establish noncomplicance with section 75.1711-2, provided EP1 and EP2 were Aopenings of a coal mine declared abandoned for more than 90 days@ (30 C.F.R. ' 75.1711); in other words, provided they were openings of the Ratliff No. 110 Mine.

Section 3(h)(2) of the Act defines Acoal mine@ as Aan 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 . . . coal@ (30 U.S.C. ' 802(h)(2)). Section 318(l) includes in the definition of Acoal mine,@ Aareas of adjoining mines connected underground@ (30 U.S.C. ' 878(l)), and this definition is repeated in the regulations (30 C.F.R, ' 75.2). When uncut coal and rock physically separated the works of the old mine from the new works it is certain the old and new works were not Aconnected underground@ and the openings of the old mine were not part of the Ratliff No. 110 Mine. Just as certain, when the coal and rock were cut through and the old works were joined to the new works as part of the ventilation system for the new works, the old works became Ashafts, slopes, tunnels, [or] excavations . . . used in the work of extracting . . . coal.@ They were Aconnected underground,@ and they were part of the Ratliff No. 110 Mine.

When the old works again were physically separated from the new works **C** albeit by underground seals, not by coal and rock **C** and the openings no longer were used for any purpose connected with the new works, did the openings continue to be a part of the Acoal mine@ the company subsequently abandoned? The Act and regulations are ambiguous.

The definitions of Acoal mine@ can be read as including openings previously Aused in . . . or resulting from the work of extracting . . . coal@ because the statutory and regulatory definitions of Amine@ never have been interpreted only on the basis of present use. Clark Elkhorn made the openings part of the ventilation system of the Ratliff No. 110 Mine, controlled the openings, and used them to mine coal. In so doing, the company assumed responsibility for the openings. It is reasonable to read the statutory and regulatory definitions to prohibit Clark Elkhorn from abandoning this responsibility simply because it chose physically to wall-off the openings from the rest of the mine, and it is reasonable to conclude the statutory and regulatory definitions do not permit a company to segment its responsibility by making Ashafts, slopes, tunnels, [or] excavations@ parts of the mine when it suits the company=s convenience and by disowning them when it does not.

On the other hand, it is equally reasonable to read the definitions of Acoal mine@ in section 318(l) of the Act and section 75.2 of the regulations to warrant Clark Elkhorn=s belief the openings were not parts of the mine it abandoned . As noted, the Act and regulations define Acoal mine@ as including Aareas of adjoining mines connected underground@ (emphasis supplied). AConnected@ is defined as being Ajoined or linked together@ (*Webster=s Third New International Dictionary* (1986) at 480). The underground seals physically severed all that had joined or linked

the old and new works (Tr. 32, 55, 82, 100-101, 107-108). Once the underground seals were in place, Clark Elkhorn, or any company in its position, reasonably and in good faith could have concluded the adjacent old works no longer were Aconnected underground@ with the new works and no longer were a part of the of the Ratliff No. 110 Mine.[8]

As I have stated, where both the Secretary and Clark Elkhorn could have read the Act and the regulations and in good faith reached reasonable but opposite conclusions, I must defer to the interpretation of the Secretary unless it is Aplainly erroneous or inconsistent with the regulation@ (*Hazardous Waste Treatment Council* v. *Reilly*, 938 F.2d 1390, 1395 (D.C. Cir. 1991); see also, *Island Creek*, slip op. at 5-6). I would be remiss if I did not recognize that ultimately what is at stake is responsibility for compliance at mines whose original operators have departed leaving potentially hazardous conditions in their wake. The Secretary=s interpretation assigns responsibility for those conditions and in so doing furthers the overall purpose of the Act. Because the Secretary=s interpretation of the regulation is not plainly erroneous or inconsistent with the Act and its purpose, it is permissible and is affirmed.

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[8]/ The Secretary argues Clark Elkhorn should have concluded from 30 C.F.R. ' 75.335, Athat it was not the Secretary=s intent for there to be a disconnection of the worked-out areas from active workings when seals are constructed@ (see Sec. Br. 10, see also Sec. Br. 8). Sections 75.334 and 75.335 require, in part, the insertion of pipes through underground seals to allow sampling for atmospheric gases and water in worked-out areas behind the seals. The Secretary reasons if the old, worked out areas were a separate mine over which Clark Elkhorn had no responsibility, insertion of the pipes into the worked-out areas would constitute a trespass by Clark Elkhorn, something the Secretary could not have intended.

This argument is too convoluted to accept. It is much more likely Clark Elkhorn, or any operator in its position, would have concluded sections 75.334 and 75.335 had no bearing on the meaning of Aadjoining mines connected underground,@ but rather presupposed a situation where a single operator mined both the worked-out areas behind the seals and the active areas outside the seals and where the inby and outby areas always were parts of a single mine.

## FAIR NOTICE

Where affirmance of the Secretary=s interpretation means a civil penalty may be assessed against the operator for a violation of the regulation, due process requires the operator receive fair notice of what the Secretary believes is required. In this way, due process Aprevents . . . deference from validating the application of a regulation that fails to give fair warning of the conduct it . . . requires@ and prevents regulation by fiat (*Gates & Fox Co.* v. *OSHRC*, 790 F.2d 154,156 (D.C. Cir. 1986)).

Just as an operator faces an uphill battle in proving the Secretary has invoked an arbitrary and capricious interpretation when the relevant statutory and regulatory language lacks clarity (*General Electric Co.*, 53 F.3d. At 1327), so too the Secretary faces an uphill battle in proving fair notice when she lacks evidence of a clear and direct announcement of her interpretation. In this way, the doctrines of deference and fair notice balance one another and require the Secretary=s actions to be reflected by rational, principled, and clear decision making.

The testimony reveals significant lapses by the Secretary in meeting her obligation to provide fair notice. The agency, which approved the bleeder system and the company=s plan to cut into the old works, had ample warning the company intended to use the openings as part of its ventilation system (Tr. 39, 54-55, 99-100). Yet, there is no evidence that either prior to or during the approval process MSHA advised the company it would be responsible under sections 75.1711 and 75.1711-2 for sealing the openings if the company installed underground seals and abandoned the Ratliff No. 110 Mine (Tr. 45, 82, 99). And this was so even though the practice of using adjacent old works as part of bleeder systems was Afairly common@ in MSHA District 6 (Tr. 38-39, see also Tr. 79). It is certain as well the lack of notice was not because MSHA believed Clark Elkhorn voluntarily would seal the openings. The company never mislead MSHA in this regard (Tr. 73-74, 80-81).

I conclude there simply was no clearly defined and applied MSHA policy in District 6, or elsewhere, interpreting sections 75.1711 and 75.1711-2 to require the sealing of openings like those at issue.[9] Looney testified he issued other citations for similar conditions, but he could not recall where, when, or the number of citations he issued (see Tr. 40-41). Griffith testified

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[9] The obscurity of MSHA=s policy on the question is exemplified by the only comment regarding section 75.1711 in the agency=s Program Policy Manual. The comment provides guidance concerning the timing of sealing activities, but does not address the circumstances under which adjacent old works are considered part of a mine that has been closed or abandoned:

AWork to seal inactive or permanently closed mines shall commence promptly after ventilation is discontinued and shall be carried out with reasonable diligence . . . . For the purpose of this standard, a mine or opening to a mine is inactive, closed or permanently abandoned when ventilation by means of the mine fan or fans is intentionally discontinued@ (*Department of Labor, Mine Safety and Health Administration*, v. *Program Policy Manual* 140 (4/1/96)).

A3 and 4 and 5 year[s] ago@ he advised several companies that openings in mines the companies cut into had to be sealed, but he agreed he did not so advise Clark Elkhorn (Tr. 82). Further, he admitted whether or not he gave such advise depended upon the volume of methane liberated at the mine, a condition wholly extraneous to sections 75.1711 and 75.1711-2 (Tr. 82-83).

I fully recognize Roger Cantrell testified he knew during Athe latter part of >95 or first part of >96" (Tr. 100), MSHA would require openings of the old works to be sealed. (This was after the underground seals were in place and before Clark Elkhorn abandoned the Ratliff No. 110 Mine). The question is whether the safety coordinator=s knowledge constituted fair notice, and I conclude it did not. Critically, the record does not reveal whether Cantrell was told the requirement to seal the openings related to sections 75.1711 and 75.1711-2. As is evident from Judge Fauver=s decision in *Apex*, the agency has been casting about for a standard to Acure@ the problem of the unsealed openings of old works. What Cantrell was told might have related to section 77.334(b)(2) (the standard cited in *Apex)*, to sections 75.1711 and 75.1711-2, to some other standard, or no standard.

Here, where the Secretary offered no evidence of any consistently applied policy with regard to MSHA=s interpretation of the cited standard, or indeed, of any standard; where the Abest@ she could do was offer vague testimony the cited standard was used before in similar situations, but not with regard to Clark Elkhorn (noticeable, the citations were not introduced), and where, in at least some situations use of the standard was based upon a wholly extraneous condition (Tr. 40-41, 81-82), I cannot find the Secretary provided Clark Elkhorn fair notice of what was required. (*Compare U. S.* v. *Hoechst Celavesc Corp.*, 128 F.3d, 216, 227, 228 (4th Cir. 1997) (letter from regional office advising regulated party of agency=s interpretation of regulation establishes fair notice)).[10] Therefore, I conclude the Secretary may not hold Clark Elkhorn responsible under section 75.1711-2 for failing to seal EP1 and EP2.

## ORDER

Citation No. 4495292 has been vacated by MSHA, and Clark Elkhorn has withdrawn its contest. Docket No. KENT 97-77-R is **DISMISSED.**

Because Clark Elkhorn may not be held responsible for the violation charged in Citation No. 44224867, Clark Elkhorn=s contest is **GRANTED,** the citation is **VACATED**, and Docket No. KENT 97-176-R is **DISMISSED**.

David Barbour
Administrative Law Judge

[10]/ There are may ways the Secretary may choose to afford operators fair notice of her interpretation; written notification being one, but whatever method she chooses, it must meet the standard **C** not met here **C** of providing a clear and direct announcement of her interpretation.

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Given the lack of a consistent application of the standard in the District to require the sealing of openings under circumstances like those at issue, and given the lack of apparent pre-citation contact by MSHA with Clark Elkhorn to advise the company section 75.1711 required sealing of the openings, the issue is whether Aby reviewing the regulation ... a regulated party acting in good faith would be able to identify, with Aascertainable certainty@ the standards by which the agency expects parties to conform@ (See Diamond Roofing Co. V. OSHRC, 528 F.2d 645, 649 (5th Cir. 1976). For, as Judge Tatle observed, when an agency provides no pre-enforcement warning, and uses a citation as an initial means for announcing a particular interpretation of a regulation, A[W]e must ask ourselves whether the regulated party received, or should have received, notice of the agency=s interpretation in the most obvious way of all: by reading the regulations@ (General Elec. Co. 53 F.3d at 1329). .

In my view, it should not. Rather, I conclude that Clark Elkhorn, or any other operator who read the Act and the Secretary=s regulations in good faith could have concluded sealing of the surface openings was not required. In restating section 317(k) of the Act, section 75.1711 requires the sealing of the openings of Aany coal mine ... that is abandoned for more than 90 days.@ The Act, as noted defines, Acoal mine@ in pertinent part as Aan area of land and all shafs, slopes, tunnels, [or]excavations ... used in the work of extracting ... coal.@ While this definition clearly would have brought the openings within the requirements of section 75.1711 prior to the underground seals being in place, once they were in place and the old works were separated form the new works, were the surface openings that had been used for ventilation purposes part of the mine that had been abandoned?

. Moreover, and as Judge Fauver pointed out, this conclsion could have been bolstered by the fact the PPM states the original operator of the old works may be held liable for its failure to seal openings after it has abandoned them (Apex, 19 FMSHRC at 802 (quoting I PPM.Sec. 105 at 20)). Therefore, I conclude Clark Elkhorn reasonably could have believed it was not subject to 75.1711 and therefore was not required to comply with section 75.1711-2.

Accordingly, while, in my view, MSHA=s interpretation of the regulation is permissible, because MSHA did not provide Clark Elkhorn with fair warning of what it believed the regulations required and because Clark Elkhorn reasonably could have believed it was not under an obligation to comply, MSHA cannot impose administrative and civil penalty sanctions on the company in this instance.

## ORDER

Citation No. 4495292 has been vacated by MSHA., and Clark Elkhorn has withdrawn its contest. Therefore, Docket No. KENT 97-77-R is **DISMISSED.**

Because I have concluded Citation No. 44224867 was not validly issued, it too is **VACATED**, Clark Elkhorn=s contest is **GRANTED**, and Docket No. KENT 97-176-R is **DISMISSED.**

The parties agree Clark Elkhorn abandoned the Ratliff No. 110 Mine on November 20, 1996 They also agree that one hundred and twelve days after the mine was abandoned, openings to what formerly had been considered a part of the mine were found to be improperly sealed, that is, the openings were not closed as required by section 75.1711-2. They do not agree whether at the time of the alleged violation the openings were to the Ratliff No. 110 Mine, or whether they were openings to another coal mine for which Clark Elkhorn had no responsibility? If the improperly sealed openings were to the Ratliff No. 110 Mine, a violation of the standard occurred, but in that case a second question upon which the parties disagree is whether Clark Elkhorn is excused of liability for the violation because the standard was impermissibly interpreted and applied by MSHA (see e.g. Tr. 12)?

Such a map is not required to carry markings for evaluation points, and, in fact, the closure map Looney carried with him when he inspected the subject openings did not carry them (Tr. 31; Gov. Exh. 3). The Secretary offered into evidence a copy of the closure map Looney carried during the inspection, and Looney marked the openings he inspected on the map (Gov. Exh. 3; Tr. 35-36). These openings were the same as the evaluation points shown on Gov. Exh. 2.

The testimony establishes the Secretary, through MSHA, did not notify Clark Elkhorn prior to issuing the citation that she was going to require the openings be sealed, and this was so despite the fact

Because MSHA viewed the old and the new works as constituting a single mine, Griffith understood section 75.1711 did not require the sealing of the surface openings in the old works until the entire mine (old works plus new works) was Adeclared inactive or the ventilation has been removed@ from the entire mine (Tr. 90, see also Tr. 91).