

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 28, 1995

WHITAKER COAL COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. KENT 94-975-R
	:	Citation No. 4243171, 6/2/94
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	EA S No. 1 Mine Mine ID 15-02085
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. KENT 95-65
	:	A.C. No. 15-02085-03635
	:	EA S No. 1 Mine
WHITAKER COAL COMPANY, Respondent	:	

SUMMARY DECISION

Appearances: Thomas A. Stock, Esq., Crowell & Moring, Washington, D.C., for the Contestant/ Respondent;
Brian W. Dougherty, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Respondent/ Petitioner.

Before: Judge Feldman

This consolidated contest and civil penalty proceeding is before me as a result of Citation No. 4243171 issued on June 2, 1994, pursuant to section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 814(a). The Secretary seeks to impose a \$50 civil penalty for this citation that was designated as nonsignificant and substantial. The citation alleges a violation of Whitaker Coal Company's (Whitaker's) smoking control plan approved by MSHA in accordance with the provisions of section 75.1702, 30 C.F.R. ' 75.1702, of the Secretary's mandatory safety standards.

Citation No. 4243171 was issued because the Secretary has interpreted the provisions of the smoking control plan as prohibiting any systematic underground searches for smoking materials. The operative provision in the smoking control plan, approved by MSHA on February 5, 1987, imposes an obligation on the operator to perform "[a] systematic search for smokers' articles of all persons entering the mine . . . at

least weekly at irregular intervals (emphasis added)." Thus, the issue for resolution is whether the operator's periodic random searches of personnel for smoking materials both above and below ground violates this provision. Alternatively stated, the question is whether the terms of the approved smoking control plan noted above mandate that the operator perform all random periodic searches above ground.

MSHA approved the smoking control plan in accordance with section 75.1702. This mandatory standard, which incorporates the provisions of section 317(c) of the Act, 30 U.S.C. ' 877(c), provides:

No person shall smoke, carry smoking materials, matches, or lighters underground, or smoke in or around oil houses, explosive magazines, or other surface areas where such practice may cause a fire or explosion. The operator shall institute a program, approved by the Secretary, to insure that any person entering the underground area of the mine does not carry smoking materials, matches, or lighters. (Emphasis added).

The parties filed cross-motions for summary decision on February 27, 1995. On March 7, 1995, I issued an Order scheduling the parties' motions for oral argument on March 10, 1995, at the Commission's Office of Administrative Law Judges in Falls Church, Virginia. Oral argument was scheduled on short notice with the agreement of the parties to accommodate counsel for the Secretary who had already traveled to Falls Church, Virginia, from Nashville, Tennessee, on another matter.

The Order requested the parties to address the following questions:

1. Whether the language of section 317(c) of the Mine Act, section 75.1702 of the regulations, and the provisions of the approved smoking control plan, is ambiguous with regard to the required location of the search, and, if so, how this ambiguity should be resolved.
2. Whether the primary purpose of the approved smoking control plan is detection or deterrence of violations of the mandatory safety standard in section 75.1702 which prohibits the carrying of smoking materials, matches, or lighters underground.
3. The method of the contestant's searches with regard to procedure, frequency and randomness, and whether such searches were effective or perfunctory in nature.
4. Whether permitting underground searches for smoking materials under an approved smoking control plan would render the smoking control plan unenforceable by MSHA thereby undermining its effectiveness.

STATEMENT OF FACTS

Prior to the June 1994 issuance of the citation in question, Whitaker's smoking control plan was in effect for more than seven years. Throughout this period Whitaker conducted its weekly smoking control searches in random locations. These searches were conducted both underground and on the surface. Whitaker recorded the date and location of each search in the Mine's weekly smoking material examination book. MSHA inspectors reviewed the examination book during this period. Therefore, MSHA inspectors were aware underground searches were being conducted. However, MSHA never previously cited Whitaker for violation of its smoking control plan.

The weekly systematic searches are searches of all personnel on a given shift. Whitaker's smoking control plan also requires "spot-check searches" of individuals to ensure compliance with section 75.1702. However, the "spot-check searches" of individuals are not substitutes for the systematic searches in issue as systematic searches are performed on all miners on a given shift. The plan also requires "no smoking" signs to be prominently displayed at all mine entrances. Whitaker has a strict policy prohibiting the carrying of smoking materials underground and considers such conduct to be a dischargeable offense. (Resp. Ex. 1). Prior to the issuance of Citation No. 42443171, Whitaker was never cited for a violation of section 75.1702. (Joint Ex. 1, Stipulation 13).

Whitaker's EA S No. 1 Mine is accessible through three separate portals, allowing miners to repeatedly enter, leave, and reenter the mine during a given shift. Whitaker implemented its systematic searches under the smoking control plan to best address the logistical difficulties presented by the mine's three portals. Whitaker believed weekly searches in random locations, including underground, was the best method to assure that smoking materials were not carried underground. The parties stipulated that Whitaker's searches consist of pat-downs and searches of personal articles such as lunch pails. (Tr. 17).

On June 2, 1994, MSHA Inspector Franklin Mayhew issued Citation No. 4243171 alleging a violation of Whitaker's smoking control plan approved by MSHA pursuant to section 75.1702. The citation stated:

The operator's approved . . . smoking program, which requires [at paragraph] no. 2 . . . [that] a systematic search for smoking articles of all persons entering the mine shall be conducted at least weekly at irregular intervals, was not being complied with in that the record of the weekly examinations for smoking materials showed [that] the men were searched inside the mine [during] the week [s] of May 23, May 16, May 9, May 2 and . . . April 25, 1994 [] and did not show the men being searched on the surface. (Emphasis added).

While Inspector Mayhew's citation gives the impression that the systematic searches were conducted exclusively underground for from April 25 through May 23, 1994, in fact,

many searches were conducted on the surface during this period. (Joint Ex. 2). For example, during the week of April 25, 1994, four searches were conducted underground and ten searches were performed on the surface.¹ (Joint Ex. 2, p. 2). One underground search cited by MSHA occurred in the elevator immediately after the miners had entered the mine.

FURTHER FINDINGS AND CONCLUSIONS

At the outset it is significant that this case involves an alleged violation of an approved smoking control plan rather than a mandatory safety standard. Pursuant to section 101 of the Act, 30 U.S.C. § 811, mandatory safety standards are promulgated through the rulemaking process and apply to all similarly situated mine operators. However, often such general industry standards are ineffective when applied to circumstances that are unique to a particular mine. Consequently, Congress provided for MSHA to require mine operators to adopt comprehensive plans tailored to each mine that address specific areas of health and safety such as roof control, ventilation or smoking control. 30 U.S.C. §§ 862(a), 863(a) and 877(c). These plans must be submitted to the MSHA District Manager for approval. While MSHA may consider conditions that are common to many mines in considering a proposed plan, MSHA is prohibited from imposing general rules applicable to all mines in the plan approval process. See Peabody Coal Company, 15 FM SHRC 381, 386 (March 1993) citing UMWA v. Dole, 870 F.2d 662, 669-72 (D.C. Cir. 1989); Carbon County Coal Company, 7 FM SHRC 1367 (September 1985); Zeigler Coal Co. v. Kleppe, 536 F.2d, 398, 406-07 (D.C. Cir. 1976).

Thus, Congress has mandated, through the provisions of section 317(c) of the Act, that the Secretary "insure" compliance with the prohibition of carrying smoking materials while underground through the flexibility of an "operator instituted" individualized smoking control plan rather than through explicit mandatory search procedures applicable to all mines. However, the provisions of individualized plans sometimes result in disagreements in interpretation. Therefore, the Commission, in Jim Walter Resources, Inc., 9 FM SHRC 903 (May 1987) developed the legal framework for resolving disputes involving mine specific plans. The Commission stated that the Secretary bears the burden of proving that a cited condition or practice violates an approved plan provision. The Commission further stated that a violation cannot be established when "the disputed language of the plan provision is ambiguous" and the Secretary cannot "dispel the ambiguity." Id. at 906-07.

¹ Although the plan only requires a minimum of one systematic search of all personnel each week, searching miners during different shifts, as well as crews at different locations, results in numerous searches each week.

A threshold question, therefore, is whether the operative provision in the smoking control plan requiring searches of "all persons entering the mine" is ambiguous. Webster's Third New International Dictionary, 1986 Edition (Webster's), defines "entering" as "to go or come into a material place, to make a physical entrance." Webster's defines "ambiguity" as "intellectual uncertainty; the condition of admitting of two or more meanings, of being understood in more than one way."

I am unconvinced by the Secretary's assertion that there is no ambiguity if his interpretation is reasonable even if there are other reasonable interpretations. (Tr. 28). A plan provision is ambiguous if it is amenable to two or more reasonable interpretations. The Secretary asserts that the search of "all persons entering the mine" must be construed to mean a search on the surface before entering the mine. On the other hand, Whitaker argues that this language can be interpreted as permitting searches before or after entering the mine. Disposition of the ambiguity question depends on whether the parties' interpretations are harmonious with the intended purpose of the plan. Emery Mining Corp. v. Secretary of Labor, 744 F.2d 1411, 1414 (10th Cir. 1984).

Here, the word "entering" must be interpreted in the context of the intended goal of section 75.1702 and the stated purpose of the operator instituted smoking control plan that is to "insure" that persons entering the mine do not "carry smoking materials" underground. In addition, the contextual meaning of "entering" must be viewed with the recognition that the plan only requires weekly searches of "all persons entering the mine." Therefore, the provision in question does not mandate daily searches before entrance and is not intended to make certain, through the act of searching, that smoking materials are not brought underground.

At best, the term "entering" is problematical as the act of entering is not accomplished until one crosses the threshold of the underground mine. This lack of clarity is highlighted by the Secretary's assertion that searches on the elevator before miners reach the underground level constitute a violation of the "entering the mine" provision. (Tr. 56). Moreover, if the term "entering" assumes searches conducted on the surface at the beginning of a shift, it is inconsistent with the plan language that the searches occur "at irregular intervals." (52-53, 56-57).

While "entering the mine" can be reasonably interpreted to mean before entering the mine, it is helpful to apply the reasonably prudent person test set forth by the Commission in Ideal Cement Co., 12 FM SHRC 2409, 2416 (November 1990), to determine if this is the only reasonable interpretation. Under the Ideal test, to ascertain whether the language of a standard is open to an alternate interpretation advanced by an operator, the Commission considers whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the requirement of the standard. The primary prohibition in section 75.1702 is the "carrying" of smoking materials underground. Thus, the situs of the violation is underground in that an individual violates section 75.1702 when he possesses smoking material underground even if he did not transport the material into the mine.

For example, smoking materials given to an individual underground, or, acquired by an individual from a supply of cigarettes previously smuggled into the mine, constitute violations of section 75.1702 although the individual acquired the smoking material after entering the underground mine. The Secretary's insistence on surface searches of all persons at least one day each week will not prevent miners from bringing smoking materials underground on non-search days. The Secretary agreed smoking materials could easily be smuggled into a mine on any day other than the weekly examination day.

(Tr. 72). The Secretary also conceded surface searches at the mine entrance could not detect violations associated with the acquisition of smoking material after mine entry or upon reentry.

(Tr. 73-76). It follows, as the Secretary also acknowledged, that underground searches of all personnel may be of greater value than surface searches in some instances. (Tr. 77).

As a general proposition, if searches were mandated on a daily basis, I would agree that underground searches would be self-defeating. Thus, it is important to identify whether the plan's primary purpose is detection or deterrence. Although the Secretary maintains the primary purpose of the systematic search is detection, the plan only requires weekly searches at irregular intervals. (Tr. 61). Moreover, the spot-checks of individuals sanctioned under the plan are not substitutes for the systematic search of "all persons" which is the subject provision in this matter. It is obvious, therefore, that a plan only requiring searches of all miners entering the mine 20 percent of the time (one search every five shifts assuming a five day work week) is not primarily intended for detection. By analogy, how effective would an airport detection program be if passengers were only required to pass through metal detectors one day each week? (Tr. 61-62). Rather, Whitaker's smoking control plan primarily relies upon the deterrent effect of surprise to encourage compliance.

Given the purpose of section 75.1702, the deterrent effect of the plan, and, the mine specific nature of the plan approval process, a mine operator should be afforded reasonable discretion to devise an effective method of irregular periodic searches that take into account the unique design or circumstances at its mine site. In the current case, Whitaker asserts that its three portal entries render exclusive surface searches ineffective since miners have access to come and go freely at all three portals. The Secretary has not argued that there are any material unresolved issues of fact with respect to Whitaker's assertion that the mine's three portal design renders exclusive surface searches ineffective. Consequently, Whitaker's implementation of its plan to include systematic searches underground is a reasonable interpretation of the plan's language.

Moreover, the Secretary does not contend that Whitaker's implementation of its smoking control plan is perfunctory in nature or otherwise ineffective. (Tr. 96). In fact, the Secretary has stipulated there is no history of section 75.1702 violations at Whitaker's mine site since MSHA's approval of its smoking control plan in February 1987. Consistent with Whitaker's apparent effective implementation of its smoking control plan, the Secretary is only seeking to impose a \$50 civil penalty in this matter.

While the Secretary is not estopped from his current interpretation of the plan's provisions, it is significant that there is no evidence of consistent enforcement in that Whitaker has not previously been cited despite its continuing practice of performing underground searches which were prominently documented in its smoking examination records. See Jim Walter Resources, 9 FM SHRC at 907. In addition, at oral argument, the Secretary failed to present any credible arguments to support his contention that permitting a combination of surface and underground searches would be unenforceable, as such searches are irregular and unscheduled regardless of where conducted. (Tr. 81-82).

Finally, it is significant that Whitaker is not alone in its interpretation that underground searches are permissible. Judge Morris recently addressed the identical issue in C.W. Mining Company, 17 FM SHRC 175 (February 1995). There, the operator occasionally conducted searches in the kitchen area, the first place miners went when entering the underground area. The operator believed occasional kitchen checks would discourage miners from hiding smoker's articles on the mantrip and removing them when they exited the mantrip at the kitchen. Although Judge Morris concluded the kitchen searches did not satisfy the plan provision of searching miners "entering" the mine, Judge Morris did conclude the "[e]xaminations for such [smoking] articles at such places as the kitchen are laudable." He, therefore, assessed a nominal civil penalty of \$10 for this infraction. Id. at 183-84.

While Judge Morris found a technical violation of the mandatory standard in section 75.1702, he did not specifically consider the operator's kitchen searches within the parameters of the approved smoking plan process and purposes. The mine specific plan approval process must encourage operators to conduct systematic searches that are appropriate to the conditions of their mines. The mine operator is in the best position to know how to address unique security problems at its mine. If an operator's interpretation and application of its smoking control plan is "laudable," it follows that such interpretation is reasonable. If the implementation of a smoking control plan is based on a reasonable interpretation of the plan's provisions, there is no violation of section 75.1702. Therefore, while I differ with Judge Morris in result, I concur with him in principle.

In summary, MSHA's attempt to impose standard smoking control provisions mandating only (1) aboveground systematic searches, (2) occurring on random days weekly, (3) at the beginning of a shift, and, (4) before miners enter the mine, on all underground mine operators, despite the conditions or practices in a particular mine, is contrary to the mine specific plan process. Moreover, this approach is contrary to the express provisions of section 317(c) of the Act, and, section 75.1702 of the regulations, which require the adoption of a plan instituted by the operator rather than mandatory search standards as the method for ensuring compliance.

Consequently, the Secretary has failed to carry his burden of establishing, by the preponderance of the evidence, that Whitaker's combined underground and surface searches are contrary to its obligation to search "all persons entering the mine," given its multi-portal entries and the deterrent nature of the searches. Rather, Whitaker's combined surface and underground searches are a reasonable interpretation and implementation of its smoking control

plan that seeks to insure compliance with section 75.1702. This standard prohibits miners entering the mine from carrying smoking materials while underground. Accordingly, Whitaker is entitled to summary decision as a matter of law.

As a final note, this decision should not be construed as trivializing the smoking materials search function. MSHA is free to cite operators who perform smoking inspections that are perfunctory in nature, inappropriate to the specific mine conditions, or otherwise ineffective. However, in the current case, Whitaker's underground searches are not perfunctory, inappropriate in view of its three portal configuration, or, ineffective.

ORDER

In view of the above, I conclude that there are no outstanding issues of material fact that require a hearing in this matter. The Secretary's Motion for Summary Decision IS DENIED. Whitaker Coal Company's Motion for Summary Decision IS GRANTED. Consequently, Whitaker's contest of Citation No. 4243171 IS GRANTED and this citation IS HEREBY VACATED.

Jerold Feldman
Administrative Law Judge

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