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SOUTHERN OHIO COAL V. MSHA
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
October 19, 1979

SOUTHERN OHIO COAL CO.

v. Docket No. VINC 79-98

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

DECISION

This case is before the Commission on interlocutory review. On June 19, 1979, we directed review of an order of continuance entered by the administrative law judge. We reverse and remand for further proceedings consistent with this opinion.

On December 5, 1978, the Secretary of Labor issued a citation under section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1978) ["the 1977 Act"] to Southern Ohio Coal Company. The citation alleged that Southern Ohio had drive the 008 Section of its Racoon No. 3 Mine adjacent to the abandoned Lawler No. 7 Mine in a manner that violated 30 CFR 75.1701. 1/ Later that same day, the Secretary issued to Southern Ohio a withdrawal order under section 104(b) when it allegedly failed to abate the violation alleged in the citation. 2/ Southern Ohio then closed the 008 Section in accordance with the order.

Southern Ohio sought review of both the citation and the withdrawal order. An administrative Law Judge held a pre-hearing conference with Southern Ohio and the Secretary on January 11, 1979. At the conference,

1/ That section requires in part the drilling and the maintaining of a "borehole or boreholes" in advance of a working face that

approaches (1) within 200 feet of an abandoned area of the mine that cannot be inspected and may contain dangerous accumulations of water or gas, or (2) within 200 feet of any workings of an adjacent mine.

2/ Section 104(b) provides for the issuance of a withdrawal order during a follow-up inspection of a mine where: (1) the violation described in the citation has been totally abated within the time period originally fixed, and (2) the inspector finds that the abatement time should not be further extended.

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the parties stipulated that Dr. Kelvin K. Wu, a technical expert from the Secretary's Mine Safety and Health Administration, would conduct an on site evaluation of Southern Ohio's Raccoon Mine, and that he would report his findings to Southern Ohio, the United Mine Workers, and the judge. On February 15, 1979, Dr. Wu submitted his report. The report stated that there was "no hard evidence" to indicate that the Raccoon Mine and the Lawler Mine were within 200 feet of each other. Dr. Wu's report also stated, however, that the 008 Section of the Raccoon Mine had a water problem and that, with respect to the water's source, the Lawler Mine was the "prime suspect".

On March 30, 1979, a status hearing was held. The hearing opened with the judge's recitation of the "understanding" reached during a preceding two hour off-the-record discussion before the judge. The judge stated that by a certain date Dr. Wu was to submit his proposal for the taking of core samples at the Raccoon Mine in order to determine the extent of the saturation of the coal in the 008 Section. The judge further stated that after Dr. Wu submitted his proposal, the parties would stipulate to a method for conducting the core sample testing, or that, in the alternative, Southern Ohio was to submit a counter-proposal. In the latter event, the judge stated that he would then determine the method for conducting the test. Following the judge's recitation of the agreement, counsel for both Southern Ohio and the Secretary stated that they understood its terms and that they had no objection to it. At the conclusion of the hearing, the judge ordered that the terms of the agreement were to be carried out by a designated time.

In early April of 1979, Dr. Wu submitted his proposal for the taking of the core samples. Dr. Wu proposed the horizontal drilling of four 60-foot probe holes into the working face of the No. 3 Entry of the 008 Section and one 60-foot probe hole into the right rib of that entry. In response to Dr. Wu's proposal, Southern Ohio notified the judge that it "elected not to undertake the drilling of [the probe holes]." Reiterating its earlier expressed views, Southern Ohio stated that the results of the core sample testing would be irrelevant to the issue of whether the two mines were within 200 feet of each other and that it had already provided substantial evidence that it was not in violation of the standard.

On April 26, 1979, the judge issued an order finding that Southern Ohio had "chosen to dishonor its commitment to cooperate in the development of a plan to test for saturation core samples". The judge continued the case until Southern Ohio "cures its delinquency".

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then sought interlocutory review of this order. We granted Southern Ohio's petition for interlocutory review to determine whether the judge erred in using an indefinite continuance as a sanction for a failure to comply with a discovery commitment. 3/

The last sentence of section 105(d) of the 1977 Act requires the Commission to "take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 104." This provision evinces a congressional concern that contests of withdrawal orders be expeditiously heard, at least where, as here, the underlying violation has not been abated. 4/ The congressional concern with prompt disposition of withdrawal order contests under the 1977 Act makes inappropriate the use of a continuance as a sanction here. We therefore conclude that the judge erred. In so concluding, however, we hold only that an indefinite continuance is not an appropriate sanction in contests of withdrawal orders. We leave to the judge the question of whether an other sanction may be imposed.

Accordingly, the judge's order of April 26, 1979, is reversed and the case is remanded for further proceedings consistent with this opinion.

3/ We do not at this time pass upon the other issues raised by the parties.

4/ See, also, S. Rep. No. 95-181. 95th Cong., 1st Sess. 48 (1977) ("Committee strongly believes that it is imperative that the Commission strenuously avoid unnecessary delay"), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of Federal Mine Safety and Health Act of 1977, at 636 (1978).