

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

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October 26, 2017

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2017-0222
Petitioner,	:	A.C. No. 36-10045-442362
	:	
v.	:	Docket No. PENN 2017-0223
	:	A.C. No. 36-10045-442362
CONSOL PENNSYLVANIA COAL	:	
COMPANY LLC,	:	Mine: Harvey Mine
Respondent.	:	

ORDER GRANTING MOTION TO CONSOLIDATE

Before: Judge Moran

The Secretary has filed a motion to consolidate these dockets.¹ Respondent, Consolidation Pennsylvania Coal Company LLC, (“Consol Penn”), has filed a response in partial objection. PENN 2017-222 involves two matters; a section 104(d)(1) citation and a section 104(d)(1) order. The first matter, Citation, No. 9076279, alleges an inadequate preshift examination under 30 C.F.R. §75.360(b).² That citation was issued on May 15, 2017 at Consol Penn’s Harvey Mine, by MSHA inspector Bryan Yates. In the body of that citation, the inspector states that the hazardous conditions constituting the basis for the inadequate preshift examination are referenced in Citation numbers 9076271, 9076272, 9076273, 9076274, 9076278, and Order number 9076280.

That last identified alleged violation, Order number 9076280, is the second matter within PENN 2017-222. It is a section 104(d)(1) order, citing 30 C.F.R. § 75.400. That standard, titled “Accumulation of combustible materials,” provides that “Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric

¹ It is **DETERMINED** that the CLR is accepted to represent the Secretary in accordance with his notice of appearance, filed September 11, 2017. *Cyprus Emerald Res. Corp.*, 16 FMSHRC 2359 (Nov. 1994).

² 30 C.F.R. §75.360 identifies the locations where “a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground.” Subsection (b) then lists 10 locations which are to be examined and an 11th provision within that subsection lists a number of standards that are to be included in making the preshift examination of the identified locations.

equipment therein.” 30 C.F.R. § 75.400. Inspector Yates issued the alleged violation identified in Order No. 9076280, the same day, May 15, 2017, as he issued the (d)(1) citation, No. 9076279.

The Secretary’s Motion states that “[s]everal of the citations in PENN 2017-223 are referenced and directly related to the citations within [docket no. PENN 2017-222].” Motion at 1. The Respondent’s Response concedes that five of the citations in PENN 2017-223 “either relate to the allegations in the Citation and Order in Docket No. PENN 2017-222, or were issued on the same date.” Response at 1. The five related citations are identified by the Respondent as Citation Nos. 9076271, 9076272, 9076274, 9076276, and 9076278. *Id.*

However, Respondent contends that “the remaining citations in Docket No. PENN 2017-223 (Citation Nos. 9076258, 9076263, 9076269, 9076268, 9076270, and 9075864) involve different dates, witnesses, facts and events which will distract from the issues in PENN 2017-222 and hamper the presentation of evidence as to the May 15, 2017 inspection.” *Id.*

Discussion

All of the citations and the one order involved in these two dockets were issued to Consol Penn’s Harvey Mine. In addition, all of the alleged violations were issued between May 8 and May 18, 2017, an 11 day span of time. Further, save one, all of the citations and the one order were issued by Inspector Yates and even for the one citation not issued by Yates, Citation No. 9075864, the termination of that citation, was issued by Yates.

As Administrative Law Judge Thomas P. McCarthy noted in *Shemwell v. Armstrong Coal*, “[g]iven the likelihood that these cases will involve similar or overlapping issues, witnesses, and evidence, . . . consolidation . . . would further the interests of judicial economy and efficiency.” *Shemwell v. Armstrong Coal Co., Inc.*, 36 FMSHRC 2352, 2353 (Aug. 2014) (ALJ McCarthy); 2014 WL 4273431, at *1 (FMSHRC August 20, 2014). He further noted that “Commission Rule 12 states that ‘[t]he Commission and its judges may at any time, upon their own motion or a party’s motion, order the consolidation of proceedings that involve similar issues.’” *Id.*, citing 29 C.F.R. § 2700.12. The Commission has held that “[a] determination to consolidate lies in the sound discretion of the trial judge.” *Id.*, citing *Pennsylvania Electric Company*, 12 FMSHRC 1562, 1565 (Aug. 1990).

The same principles apply in this matter. There will be no distraction or hampering of the issues because, although the two dockets will be scheduled to be heard together, they will be taken seriatim, beginning with PENN 2017-0223 and followed by PENN 2017-0222. A conference call will be held soon to set the hearing dates for these dockets.

Accordingly, upon consideration of the motion to consolidate and the response thereto, and in the interest of judicial economy and efficiency in resolving these dockets, it is **ORDERED** that the above-captioned dockets be **CONSOLIDATED**.

SO ORDERED.

William B. Moran

William B. Moran
Administrative Law Judge

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