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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

CONSOLIDATION COAL COMPANY,
APPLICANT

Application for Review

Docket No. PITT 79-168

v.

Order No. 231633

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

January 26, 1979

Westland Mine

UNITED MINE WORKERS OF AMERICA,
RESPONDENT

DECISION

Appearances: James T. Hemphill, Jr., Esq., Rose, Schmidt, Dixon,
Hasley, Whyte & Hardesty, Washington, D.C., for
Applicant;
Barbara K. Kaufmann, Esq., and Sidney Salkin, Esq.,
Office of the Solicitor, U.S. Department of Labor,
Philadelphia, Pennsylvania, for Respondent MSHA

Before: Judge Merlin

Statement of the Case

This is a proceeding filed under section 105(d) of the
Federal Mine Safety and Health Act of 1977 by Consolidation Coal
Company for review of an order of withdrawal issued by an
inspector of the Mine Safety and Health Administration (MSHA)
under section 104(d)(2) of the Act.

Pursuant to a notice of hearing issued April 6, 1979, this
case was set for hearing on June 5, 1979, in Pittsburgh,
Pennsylvania. The hearing was held as scheduled. The operator
and MSHA appeared and presented evidence (Tr. 5-55). At the
conclusion of the taking of evidence, the parties waived the
filing of written briefs, agreed to have a decision rendered from
the bench, and set forth their positions in oral argument.

Bench Decision

The decision rendered from the bench is as follows:

This case is an application for review of an order issued under section 104(d)(2) of the Act.

The order recites that in violation of section 75.1707 air was escaping from the track haulageway to the intake escapeway through three man doors and through a hole in a permanent stopping, which hole had been covered with a brattice cloth.

After the testimony of the inspector, the Solicitor moved to have the order vacated with respect to the three man doors on the grounds that the inspector's own statements made a finding of unwarrantable failure impossible. The Solicitor's motion was well taken under the circumstances and from the bench the order was vacated in part in accordance with the motion.

This leaves for consideration the air which was coming through the hole in the damaged stopping from the track haulageway to the intake escapeway. The operator's inspector-escort agreed with the inspector that air was coming through the hole from the track haulageway to the intake escapeway. Accordingly, the existence of a violation under section 75.1707 is undisputed and I find it existed as alleged.

There remains for consideration unwarrantable failure with respect to this aspect of the order. It appears that the hole in the stopping had been caused by a roof fall on the track haulage side of the stopping. Falling material apparently knocked out some of the blocks in the stopping. The inspector believes the operator was guilty of unwarrantable failure because the debris from the fall was covered with some rock dust. The area had been rock dusted on January 20, and the intake escapeway had been subject to its weekly examination on January 22. Accordingly, the inspector believed that the hole already existed before rock dusting had been done on January 20 and therefore before the fire boss examination on January 22. The order was, of course, issued on January 26. The inspector testified he had been told by a man in the mine that the hole had been there on January 22, but the inspector did not take the man's name and does not know who he is.

Contrary to the inspector's testimony is the testimony of the fire boss, a union member, who stated that when he saw the stopping on January 22 during his fire boss run there was nothing wrong

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with it, and that no brattice curtain was even there at that time. After due consideration, I accept the testimony of the fire boss. The testimony of the fire boss is especially persuasive because as the mine map demonstrates, his route of travel inby meant that he was directly facing the stopping in question. Indeed, he could not miss it. I found him a credible witness. Accordingly, I must reject the inspector's inference that the hole existed as far back as January 20 and January 22.

Insofar as the record before me is concerned, the inspector's finding of unwarrantable failure is based solely upon his conclusion that the fire boss either missed or failed to report the stopping which was already damaged. This is a conclusion I do not accept. I have not overlooked the inspector's reliance upon the presence of rock dust on the fallen debris. However, the direct testimony of the fire boss is simply more persuasive to me than the inferences to be drawn from the presence of rock dust.

Whether the brattice cloth was put up at some undefined later time after January 22 is not before me. The Solicitor has presented no evidence for such a theory to support a finding of unwarrantable failure. The inspector's opinion was not asked about this issue. I can only decide this case on the evidence presented, and I cannot supply evidentiary gaps.

Here the most probative evidence before me demonstrates that the inspector's theory of unwarrantable failure, however well-intentioned, cannot be sustained.

The order is therefore vacated, and the application for review is granted.

I express my appreciation to both counsel for a very helpful oral argument.

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ORDER

The bench decision is hereby AFFIRMED. Accordingly, it is ORDERED that Order No. 231633 be VACATED and that the operator's application for review be GRANTED.

Paul Merlin
Assistant Chief Administrative Law Judge