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PETER WHITE COAL MINIG V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

PETER WHITE COAL MINING CORP., APPLICANT	Applications for Review
	Docket No. HOPE 78-23 HOPE 78-41 HOPE 78-42 HOPE 78-48 HOPE 78-49
v.	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceedings Docket No. HOPE 78-615-P HOPE 78-616-P(FOOTNOTE 1)
v.	A.O. No. 46-04338-02021V 46-04338-02022V
PETER WHITE COAL MINING CORP., RESPONDENT	War Eagle No. 1 Mine

DECISION

The five applications for review were brought by Peter White Coal Mining Corporation under section 105(a)(1) of the Federal Coal Mine Health and Safety Act of 1969,(FOOTNOTE 2) 30 U.S.C. 801 et seq., to vacate five orders of withdrawal issued by Federal mine inspectors under sections 104(c)(2) and 104(b) of the Act.

The parties submitted prehearing statements pursuant to a notice of hearing and the hearing was held in these cases on April 6 and 7,

1978, in Bluefield, West Virginia. The United Mine Workers submitted a prehearing statement stating that it would not appear at the hearing and would rely on evidentiary presentations of the Mine Safety and Health Administration.

After the hearing, counsel for MSHA and the operator moved that the above two civil penalty petitions (then before other judges) be consolidated with the subject applications for review and submitted on the prior hearing record. An order granting the motion to sever was issued by Judge Charles Moore on December 8, 1978, to consolidate one of the penalty assessments at issue in HOPE 78-616-P with HOPE 78-41. On January 24, 1979, Judge Richard Steffey issued an order granting the parties' motion to sever Docket No. HOPE 78-615-P from a proceeding before him and to consolidate it with Docket No. HOPE 78-42.

The final submission in these cases was filed on April 9, 1979. MSHA has conceded in its brief that it was in error issuing the orders of withdrawal in Docket Nos. HOPE 78-23, and HOPE 78-49. The two withdrawal orders in those cases are therefore vacated and the applications for review in Docket Nos. HOPE 78-23, and HOPE 78-49 will be GRANTED.

Having considered the evidence and contentions of the parties, I find that the preponderance of the reliable, probative, and substantial evidence, establishes the following:

FINDINGS OF FACT

1. At all pertinent times, the Applicant, Peter White Coal Mining Corporation, operated an underground bituminuous coal mine, known as the War Eagle No. 1 Mine, in Mingo County, West Virginia, which produced coal for sales in or affecting interstate commerce.

2. Peter White is a medium-sized operator and the subject mine produces approximately 95,000 tons of coal per year. On September 30, 1977, a total of 166 union and salaried people were employed at the War Eagle No. 1 Mine with a total of 12 people employed in the No. 6 section on the day shift.

3. The assessment of a penalty in these proceedings will have no affect on Peter White's ability to continue in business.

4. Respondent demonstrated good faith in attempting to achieve rapid compliance after notification of the violations in the two cases in which civil penalties are being sought.

5. Further findings with conclusions as to allegations and defenses are set forth in the following numbered paragraphs (6 through 38):

6. Inspectors Edward M. Toler and Tom Goodman arrived at the War Eagle No. 1 Mine on September 30, 1977, around 7:30 a.m. The inspectors intended to investigate a union complaint concerning ventilation and electrical violations in the mine.

7. When they arrived at the mine, they met with Mr. Tim Maynard, a management representative, and informed him of the complaint. The inspectors, accompanied by Mr. Maynard, went underground about 10 a.m.

8. When the inspectors arrived underground, they announced the purpose of their investigation to the miners present on the section. About 10:30 a.m., Inspector Toler began to take air readings on the intake side and found that the ventilation was inadequate. After completing the investigation at 12:30 p.m., Inspector Toler orally issued a 104(c)(2) withdrawal order. The operator has not rebutted the existence of the violation as described in the order of withdrawal.

9. The fire boss reports indicated that air readings taken by management personnel showed adequate ventilation on September 28, 29, and 30. The amount of air required by the mine's ventilation plan was 9,000 cubic feet per minute, and the fire boss reports showed air circulation in excess of 10,000 cubic feet per minute. The fire boss inspection on September 30, 1977, was made prior to 7:30 a.m.

10. No coal was being produced at the time of the investigation in this section. The ventilation problem was due in part to faulty line curtains and the operator was in the process of installing line curtains to correct the deficiency at the time the inspector was taking air readings. Some of the men on the section were engaged in routine maintenance. Mr. Maynard testified that the lack of adequate ventilation was also due to a damaged stopping and gob in the main intake.

11. The preponderance of the evidence shows that the operator was aware of the inadequate ventilation in the section and was in the process of abating the problem before the inspectors arrived. Considering that the operator was aware of the violation, had stopped production, and was in the process of correcting the violation before the inspectors arrived in the section, I conclude that MSHA has not proved that the operator was negligent. I therefore find that there was no unwarrantable failure on the part of the operator regarding this violation.(FOOTNOTE 3)

12. The failure to provide adequate ventilation in a mine is ordinarily a serious violation. However, the miners were not producing coal in the section at the time the violation was discovered and they were working on improving the ventilation by tightening the check curtains to prevent leakage. Danger to the miners was possible, but not probable.

13. There had been one violation of 30 CFR 75.316-2(b) issued prior to September 30, 1977, at the War Eagle No. 1 Mine.

14. A section 104(c)(2) order of withdrawal is a part of a "chain" and the Act requires an underlying 104(c)(1) order as a prerequisite to a valid 104(c)(2) order. The inspector cited a notice of violation issued on May 5, 1977, as the underlying document to support the 104(c)(2) order. Under the Act, the cited notice could not support a valid 104(c)(2) order. Applicant based its application for review, in part, on the failure of Respondent to properly cite a valid underlying 104(c)(1) order.

15. Respondent attempted to modify the order on two occasions. Respondent issued the first modification on October 5, 1977, after the order was terminated, but before the filing of the subject application for review. This modification was for the purpose of changing the references to "velocity" in the order to "cubic feet per minute." Although the word "velocity" was originally used, it was clear from the figures and the context that volume was meant. It has not been shown that Applicant was prejudiced or misled by this error or the subsequent modification. I find that this modification should be allowed.

16. The second modification was issued on March 30, 1978, by Inspector Toler and was served on Applicant's counsel at the hearing on the application on April 7, 1978. This modification was an attempt to correct the mistaken reference to a notice as the underlying document for the 104(c)(2) order. The modification states:

> Order No. 1 EMT, dated September 30, 1977, is hereby modified to refer to Order No. 1 PT, dated May 5, 1977. This order was issued under the provisions of section 104(c)(2) of the Federal Coal Mine Health and Safety Act of 1969 and Title 30 CFR Section 75.316 on September 30, 1977, and is changed to section 104(c) to reflect the correct section under the 1977 Amendments Act.

The modification is not, as it states, a correction of the section number to conform to the 1977 Amendments Act. Instead, it is an attempt to provide a citation to a required underlying 104(c)(1)

order.(FOOTNOTE 4) The Applicant objected to this modification at the hearing at the time it was introduced.

17. MSHA contends that it has unlimited authority to modify an order and that Applicant was not prejudiced by either of these modifications. I find that Applicant was prejudiced by MSHA's failure to provide a proper citation to the underlying order prior to the hearing, in adversely affecting its ability to prepare the application for review and to prepare for the hearing thereon.

18. Applicant based its application for review, in large part, on the failure of the inspector to cite a required underlying order. The operator was prejudiced by MSHA's failure to timely modify this order. Applicant's objections to the order and to the attempt to modify the order should therefore be sustained. Furthermore, it was plainly the duty of MSHA to disclose any intention to modify the order in its prehearing submissions required by the notice of hearing. Failure of MSHA to meet this responsibility further misled and prejudiced the operator's rights.

19. For the above reasons, I conclude that Applicant's motion to exclude the attempted modification of Withdrawal Order No. 1 EMT issued on September 30, 1977, at its War Eagle No. 1 Mine, be granted, and the withdrawal order is therefore held to be invalid.

HOPE 78-42 and HOPE 78-615-P

20. After the meeting with the miners described in Finding 8, Inspector Goodman proceeded to the section power center. Inspector Goodman is a qualified electrical inspector. He was accompanied by Mr. Paul Blankenship, the chief electrician at the mine, and Mr. Jerry Halem, the section electrician.

21. When they arrived at the section power center they cut the power off, so that Inspector Goodman could check the section's circuit breakers.

22. The particular section was using three circuit breakers (two 400-amp Westinghouse circuit breakers and one 225-amp Westinghouse circuit breaker). When Inspector Goodman tested the circuit breakers they failed to deenergize under a fault condition.

23. Inspector Goodman informed management at that time that he was issuing a 104(c)(2) order. The operator did not introduce any evidence to show that the violation found by the inspector did not exist and I find that the violation was proven.

24. The reason the circuit breakers failed to operate was that the relays were missing and the sockets that the relays were supposed to be plugged into were bridged with No. 14 strand wires. The inspector testified that he believed the operator was aware of the condition because Mr. Halem immediately reached into the under-voltage relay and pulled out a piece of No. 14 strand wire that bridged the breaker socket.

25. Because of the above condition, none of the breakers in use could operate under a fault condition. Inspector Goodman testified that this condition would have been discovered by someone familiar with electricity who looked at the circuit breakers because the door covering the breakers was open and it was evident that the relays were missing. In addition, he gave his opinion that management should have discovered the condition when the section was deenergized between shifts.

26. The operator had instituted a program of weekly inspections to prevent this type of violation in February, 1977. The last such inspection prior to the discovery of the condition by Inspector Goodman was conducted by Mr. Macky May on September 22, 1977. Mr. May, a certified electrician, testified that all the breakers in use operated properly at that time. Nonetheless, I find that the operator should have been aware of the violation and I find it negligent in failing to have instituted a more effective method of correcting this pattern or practice of unlawfully bridging circuit breaker relays. Following this incident, the operator began installing a radio monitoring fail-safe system to detect and prevent this practice.

27. This violation was very serious. The failure to provide miners with the grounded phase protection afforded by operative circuit breakers could result in serious injury or death.

28. There had been no previous violations of 30 CFR 75.900 at the War Eagle No. 1 Mine.

29. The order of withdrawal indicated, as did the order in Finding 14 above, that the action supporting this order was a notice of violation issued on May 5, 1977. The attempted modification of this order, to reflect a valid 104(c)(1) order as the basis of the 104(c)(2) order as required by statute, was not issued until March 30, 1978, and was not served on Applicant's counsel until the date of the hearing.

30. Applicant included in its application for review of this order the same contention described in Finding 18. The Applicant demonstrated that it was prejudiced by MSHA's failure to timely modify this order. For the reasons discussed in Finding 18, I conclude that Applicant's objection to the attempted modification should be granted, and Withdrawal Order No. 1 TEG issued on

September 30, 1977, at its War Eagle No. 1 Mine is therefore held to be invalid.

HOPE 78-48

31. On October 10, 1977, Inspector Toler, accompanied by Mr. Maynard, came across a splice that was in violation of 30 CFR section 75.514. The notice of violation, issued about 10 a.m., described the violation as follows: "The power cable to the belt control line to the No. 4 pony belt conveyor was not provided with suitable connectors in that the leads were twisted together." The operator was given 30 minutes to abate the violation.

32. Upon leaving the mine, Mr. Maynard told Mr. Blankenship that the notice had been issued and described to him the location of the faulty splice. Mr. Blankenship assigned an electrician on the oncoming shift to repair the splice.

33. There was confusion among the witnesses regarding the location of the violation. In the notice, the inspector stated that the violation was at the No. 4 Pony Belt Conveyor. Mr. Maynard testified that the location of the violation was at the No. 16 section belt head. Mr. Blankenship testified that the No. 4 belt was also called the No. 11 belt.

34. Mr. Blankenship was told by the midnight foreman, on the morning of October 11, that the cable had been repaired. The electrician assigned to repair the cable apparently went to the next belt head past the site of the violation that was specified in the notice.

35. At 4 p.m. on October 11, 1977, Inspector Toler and Mr. Maynard returned to the section and found that the violation had not been abated. Inspector Toler issued a 104(b) order alleging "no attempt was made to splice the belt control line to the No. 4 Pony Belt and the wires were left exposed."

36. Inspector Toler was told by Mr. Maynard that an electrician had been assigned to make the repair on the cable and must have made a splice in another area of the mine. The inspector testified, and I find, that he did not give any consideration to extending the time for abatement.

37. Section 104(b) of the Act provides that an inspector shall issue an order of withdrawal if the time given for abatement in the underlying 104(b) notice expires and the violation is not abated, and "if he also finds that the period of time should not be further extended."

38. Inspector Toler did not comply with the provision of section 104(b) that requires that he make a finding that the period of time

allowed for abatement should not be extended. According to the inspector's testimony, he did not consider extending the time. Moreover, the inspector failed to check on the subsequently issued written order the box indicating that he had made a finding that the time allowed for abatement should not be extended. I therefore find that the subject 104(b) order is invalid and should be vacated.

DISCUSSION

HOPE 78-41 and HOPE 78-42

The primary issue in an application for review of a withdrawal order is whether the order is valid. Applicant failed to show that the violations described in the subject orders did not exist. However, Applicant did raise serious questions as to the validity of the orders.

The inspectors in both of these cases indicated in the orders of withdrawal that a 104(c)(1) notice supported the 104(c)(2) order. Section 104(c) of the Act provides:

> (c)(1) If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there is a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standard, he shall include such finding in any notice given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within ninety days after the issuance of such notice, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.
>
> (2) If a withdrawal order with respect to any area in a mine has been issued pursuant to paragraph (1) of this subsection, the withdrawal order shall promptly be

> issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) of this subsection until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) of this subsection shall again be applicable to that mine.

The Act requires a 104(c)(1) order to serve as the basis for a 104(c)(2) order. The inspectors instead cited a 104(c)(1) notice in the orders being contested.

Applicant contends that this failure to provide a correct citation could not be modified once the subject orders were terminated; however, that position does not have to be ruled on in disposing of these cases. The question presented here is whether an order that fails to provide a correct citation can be modified and rehabilitated a few days before a hearing on the application for review.

A review of the facts leads to the conclusion that in these circumstances the modification sought by MSHA should not be allowed. Applicant stated in its application for review of these orders filed on October 25, 1977, that the orders were invalid because they failed to indicate that a statutory prerequisite, a prior 104(c)(1) order, existed. MSHA, therefore, was aware of Applicant's basic contentions in these proceedings 7 months before the hearing.

MSHA did not try to correct these orders by moving to modify them in its answers to the applications for review filed in November 1977, or in its prehearing statement filed on March 6, 1978. MSHA did not issue the modifications until March 30, 1978, about 1 week before the hearing, and approximately 7 months after the orders were terminated. Notice of this action was not given to Applicant's counsel until the hearing on April 7, 1978.

I find that Applicant was entitled to notice of these attempted modifications of the 104(c)(2) orders prior to the hearing, and was prejudiced in preparing for the hearing by the failure of Respondent to timely inform Applicant of the modifications of the orders. A party has a right to know the basic facts in dispute prior to the hearing on an application for review. The Commission's rules provide for prehearing discovery and the parties in this case were required to exchange prehearing statements. MSHA has given no reason for its failure to include the proposed modifications in its prehearing statement.

An operator has the right to expect that information furnished by the Government in an order of withdrawal is accurate. In these

cases, Applicant determined, based on the information supplied by the Government, that a valid (c) chain did not exist, and exercised its right to file the subject applications for review. MSHA has prejudiced Applicant's rights by its 7-month delay in seeking a modification of the orders.

In a similar case, a (c)(2) order was vacated because of the Government's failure to properly document its action. The Judge stated:

> It is false reasoning for MESA to argue that the operator has already been served with the earlier (c) chain citation and that therefore, MESA does not have a responsibility for providing accurate citations. The Act clearly requires that notices and orders contain a detailed description of a condition or practice which constitute a violation. This includes proper and correct information on the underlying (c) sequence of citations.

Old Ben Coal Company v. MESA, VINC 76-56 (June 15, 1976) at p. 8.

In the instant cases, MSHA had an obligation to provide accurate information in the withdrawal orders or at least to correct any fundamental errors within a reasonable time. The attempted modifications on March 30, 1978, were not timely. Therefore, Applicant's objection to the modifications, issued on March 30, 1978, made at the hearing are SUSTAINED, and the instant orders are VACATED and the applications for review will be GRANTED.

HOPE 78-615-P and HOPE 78-616-P

Although the withdrawal orders in these proceedings have been found to be invalid, that finding does not constitute a bar to the civil penalty proceedings consolidated with the applications for review. The Commission has reaffirmed the Interior Department's former Board of Mine Operations Appeals' position that the invalidity of a withdrawal order may not be considered as a mitigating factor in a civil penalty proceeding under section 109 of the Act. MSHA v. Wolf Creek Collieries Company, Docket No. PIKE 78-70-P (March 26, 1979).

These civil penalty cases will therefore be considered for appropriate penalties in light of the six statutory criteria in section 109(a)(1).

In Docket No. HOPE 78-616-P, the operator failed to overcome MSHA's prima facie showing of a violation of the ventilation standard. However, the preponderance of the evidence showed that the operator was aware of the problem, had halted production in the affected section, and was in the process of correcting the problem when the inspectors arrived. MSHA did not prove that the operator was

negligent in regard to this violation and a substantial penalty is therefore not warranted.

In Docket No. HOPE 78-615-P, the operator failed to overcome a prima facie showing of the violation as described in the order. It is also evident from the facts that the operator knew or should have known that the violation existed. The failure to provide adequate protection against electrical shock is a very dangerous practice and warrants a substantial penalty. The Applicant has installed a fail-safe radio monitoring system to prevent a reoccurence of this practice, so it is unlikely to occur in the future.

HOPE 78-48

The parties in this case agreed that the primary issue is whether or not the time fixed in the notice should have been extended. A more basic question, though, is whether the inspector followed the statutory framework by failing to consider whether or not the time fixed in the notice should have been extended. Section 104(b) of the Act provides in part:

> If, upon the expiration of the period of time as originally fixed or subsequently extended, an authorized representative of the Secretary finds that the violation has not been totally abated, and if he also finds that the period of time should not be further extended, he shall find the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to cause immediately all persons except those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that the violation has been abated. [Emphasis added.]

The inspector testified that he gave no consideration at all to extending the time fixed for abatement. Mr. Maynard had told him that apparently the electrician had mistakenly repaired a different splice in another location in the mine. The inspector should have considered and weighed this explanation, and should have considered the confusion, evident on this record, regarding the location of the violation. Mr. Maynard, for example, called the location of the violation the No. 16 section while the inspector referred to it in the notice as the No. 4 Pony belt and Mr. Blankenship thought that No. 4 also was the No. 11 belt entry.

One of the basic requirements for the issuance of a 104(b) order is a reasonable determination by the inspector that the time should not be extended. Since the inspector did not give any consideration to this responsibility, the order should be vacated.

CONCLUSIONS OF LAW

1. The undersigned Judge has jurisdiction over the parties and the subject matter of these proceedings.

2. At all pertinent times, Applicant's War Eagle No. 1 Mine was subject to the provisions of the Act.

3. By concession of MSHA, the withdrawal orders in Docket Nos. HOPE 78-23 and HOPE 78-49 are VACATED and the applications for review are GRANTED.

4. In Docket Nos. HOPE 78-41 and HOPE 78-42, the Applicant showed that the orders issued were invalid because they failed to cite a required underlying 104(c)(1) order, and the attempted modifications made on March 30, 1978, were not timely. The Applicant also proved that the order issued on October 10, 1977, at issue in HOPE 78-48, was invalid because the inspector failed to consider whether the time allowed for abatement should be extended.

5. In civil penalty Docket No. HOPE 78-615-P, the operator violated the mandatory safety and health standard as alleged.

6. In civil penalty Docket No. HOPE 78-616-P, the operator violated the mandatory safety and health standard as alleged. However, no negligence was shown and the operator was in the process of abating the violation when the inspectors arrived in the section.

CIVIL PENALTIES

Based on the statutory criteria for assessing civil penalties, Respondent is assessed the following penalties for the violations found herein:

DOCKET NO.	30 CFR	CIVIL PENALTY
HOPE 78-615-P	75.900	$5,000
HOPE 78-616-P	75.316	$100

All proposed findings and conclusions inconsistent with the above are hereby rejected.

ORDER

WHEREFORE, IT IS ORDERED that the applications for review are GRANTED and the subject orders of withdrawal are hereby VACATED and IT IS FURTHERED ORDERED that Peter White Coal Mining Corporation

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shall pay MSHA the above civil penalties totaling $5,100 within 30 days from the date of this Decision.

WILLIAM FAUVER
JUDGE

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FOOTNOTES START HERE

~FOOTNOTE_ONE

1. Jurisdiction in this case is limited to the civil penalty based on Order No. 7-0127 issued on September 30, 1977. A case with the same docket number involving other issues is pending before Judge Moore.

~FOOTNOTE_TWO

2. In 1977, Congress passed the Federal Mine Safety and Health Amendments Act of 1977, (P.L. 95-164, 91 Stat. 1290), which supercedes the 1969 Act. The "Act" for the purpose of this decision, refers to the 1969 Act before amendment. Effective March 9, 1978, administration of the Act was transferred from the Department of the Interior to the Department of Labor, and administrative adjudications were transferred from the Interior Department to the newly created Federal Mine Safety and Health Review Commission.

~FOOTNOTE_THREE

3. If the subject order were not invalid for other reasons, it could be vacated for MSHA's failure to demonstrate that the violation was due to the operator's unwarrantable failure. See Zeigler Coal Co. v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976).

~FOOTNOTE_FOUR

4. The correct citation to the corresponding section in the 1977 Amendments Act is 104(d)(2).