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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

v.

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

UNITED MINE WORKERS OF AMERICA,
RESPONDENT

Application for Review

Docket No. MORG 79-70

Order No. 012744
December 28, 1978

Shoemaker Mine

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, 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. 5-46). 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 parties agree that the issues are (1) the existence of a violation and, (2) unwarrantable failure.

> The order recites that the distances between the nearest roof bolt and the three corners in question exceeded the 5 feet specified by the roof control plan. The inspector's testimony concerning his measurements of these distances and his conclusion regarding a violation of page 12 of the roof control plan are undisputed. I accept this evidence and based upon it I find a violation of section 75.200. Counsel for the operator during oral argument conceded the existence of a violation.
>
> The inspector also testified that these excess distances existed for several days, during which the area in question had been idle but had been preshifted. The inspector's conclusions in this respect were based upon the appearances of the area, consisting of footprints and rock dust. The inspector also relied upon the presence of many dates left by preshift examiners during the several days in question. This testimony also is undisputed, and I accept it. The fact that the cited violations existed for several days justifies the inference, without more, that the operator knew or should have known about the violation. I hold that this alone constitutes unwarrantable failure.
>
> I note that during oral argument counsel for the operator conceded that the operator should have known about the existence of the violation. However, I further accept the testimony of the inspector to the effect that the operator's superintendent told him that he, the superintendent, knew about the violations, but because men were on vacation and because the section was idle, the condition had not been corrected. I hold this actual knowledge further demonstrates the existence of unwarrantable failure. I note that during oral argument counsel for the operator conceded the existence of actual knowledge on the part of the operator.
>
> The operator's defense apparently is based upon the section foreman's action in allegedly beginning to abate the violations upon the morning in question, shortly before the order was issued. Even if this testimony regarding the initiation of abatement is accepted, I hold that it makes no difference. In my opinion, it does not matter that the operator may have

started to correct the violation a few hours before the order was issued. The violations already had existed for several days and remained in existence when the order was issued. The fact that the operator may have recently begun abatement does not therefore preclude issuance of the order. Even if the inspector had ascertained what the operator was doing, it would not have made any difference. The order still should have been issued. The violation existed just too long.

Even assuming that pursuant to section 301(c) of the 1977 Amendments, the decision of the former Board of Mine Operations Appeals of the Department of the Interior in Zeigler Coal Company, 7 IBMA 280 (1977), remains in effect, it does not help the operator here. The Board in Zeigler defined unwarrantable failure as conditions or practices the operator knew or should have known existed and therefore should have abated prior to discovery by the inspector. The evidence in this case makes clear that the cited violation should have been abated long before discovery by the inspector. The operator exhibited a lack of due diligence, indifference, and a lack of reasonable care in this instance. Accordingly, under the Zeigler decision the order is valid.

In light of the foregoing, the order is upheld and the application for review is dismissed.

ORDER

The bench decision is hereby AFFIRMED. Accordingly, it is ORDERED that Order No. 012744 be UPHELD and that the operator's application for review be DISMISSED.

Paul Merlin
Assistant Chief Administrative Law Judge