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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

Contest of Order

v.

Docket No. WEVA 79-171-R

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

Order No. 0811292
May 15, 1979

McElroy Mine

AND

UNITED MINE WORKERS OF AMERICA,
(UMWA),
REPRESENTATIVE OF MINERS

DECISION

Appearances: Michel Nardi, Esq., Pittsburgh, Pennsylvania, for
Applicant
James H. Swain, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia, Pennsylvania
for Respondent
Richard L. Trumka, Esq., Washington, D.C. for
Representative of the Miners, the United Mine Workers
of America

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

The above case arose upon the filing of an application for
review (called a contest of order under the newly adopted rules
of procedure 29 CFR 2700.20) of an order issued under section
104(b) of the Federal Mine Safety and Health Act of 1977, 30
U.S.C. 814(b) on May 15, 1979.

Pursuant to notice, the case was heard on the merits in
Wheeling, West Virginia, on September 5, 1979. Kenneth R.
Williams, a Federal mine inspector testified for Respondent;
William M. McCluskey and Robert J. Huggins testified for
Applicant; Daniel Lee Rine testified for the representative of
the miners. At the close of the hearing, the parties waived the
filing of written proposed findings and conclusions, and the
matter was submitted for decision.

ISSUES

1. On May 8, 1979, did a violation of 30 CFR 75.1403 exist in the subject mine as described in Citation No. 0811290?

2. If the answer to the first issue is in the affirmative, was the condition abated before order of withdrawal No. 0811292 was issued on May 15, 1979?

3. If the answers to the first two issues are in the affirmative, should the period of time for abatement have been further extended?

STATUTORY PROVISION

Section 104 of the Act provides in part as follows:

(a) If, upon inspection or investigation, the Secretary * * * believes than an operator * * * has violated this Act, or any mandatory health or safety standard, rule, order, or regulation * * * he shall * * * issue a citation * * * the citation shall fix a reasonable time for the abatement of the violation. * * *

(b) If, upon any follow-up inspection * * * an authorized representative of the Secretary finds (1) that a violation described in a citation * * * has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall * * * promptly issue an order requiring the operator * * * to immediately cause all persons * * * to be withdrawn from, and to be prohibited from entering, such area. * * *

REGULATORY PROVISION

30 CFR 75.1403 provides: "Other safeguards, adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided."

FINDINGS OF FACT

1. On May 8 and 15, 1979, and on all other dates pertinent to this proceeding, Applicant was the operator of a coal mine in Marshall County, West Virginia, known as the McElroy Mine.

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2. On March 15, 1973, Charles B. Sturn, a Federal coal mine inspector issued a notice to provide safeguards under 30 CFR 75.1403 to the operator of the subject mine. The notice was issued because the main haulage track was not being maintained in a safe workmanlike manner. It directed that "all haulage tracks shall be maintained in a safe workmanlike manner."

3. On May 8, 1979, the supply track from the junction of 4 left off 2 North to the working section in the subject mine had numerous kinks, high and low joints and grease on two curves to compensate for an improperly maintained gage between the rails.

4. The track described in Finding No. 3 was a haulage track. It was not being maintained so as to minimize hazards and not being maintained in a safe workmanlike manner.

DISCUSSION

William McCluskey, Applicant's safety supervisor at the subject mine, testified that the track in question "was as good or better as any supply track in the McElroy Mine." He implied that supply tracks because they were primarily constructed of 40 pound iron (mainline tracks were made with 60 or 80 pound iron) always had kinks and loose joints. However, he also admitted that he had reports (after the citation was issued) that derailments had occurred. It is clear and I find that the supply track in question was not being safely maintained on May 8, 1979.

5. On May 8, 1979, Federal mine inspector Kenneth Williams issued Citation No. 0811290 alleging a violation of 30 CFR 75.1403 because of the condition described in Finding No. 3. He fixed the time for abatement at 9 a.m. May 15, 1979.

6. After the citation was issued, two crews were assigned to abate the condition. A crew under the supervision of assistant mine foreman Ivan R. Blake worked on the abatement as follows: On May 9, 1979, three men worked an entire shift; on May 10, three men worked one shift; on May 11, four men worked one shift; and on May 14, three men worked one shift. Under maintenance foreman Chester Nadolski, three men worked on May 9; five on May 10; two on May 11. On May 12, a Saturday, six people worked an entire shift, four of them working 2 hours overtime. On May 14, two men worked all shift and on May 15, two men worked all shift. The work of these two crews consisted in leveling and blocking track, replacing broken rails, bent ties, angle bars and missing bolts.

7. When Inspector Williams arrived at the section on May 15, 1979, foreman Nadolski's crew was working on the curve where the gage had been cited as too narrow.

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8. When Inspector Williams arrived at the section the narrow gage on the curve had not been corrected. The other conditions described in the citation had been corrected.

DISCUSSION

Although Inspector Williams indicated that other areas of the track needed more work, his testimony was somewhat vague and unconvincing. The only work done after the issuance of the order other than widening the gage at the curve was the replacement of an angle bar and a bolt on a joint.

CONCLUSIONS OF LAW

1. The condition described in Finding of Fact No. 3 taken in conjunction with the notice to provide safeguards referred to in Finding No. 2 constituted a violation of 30 CFR 75.1403.

2. The violation referred to in Conclusion No. 1 was not totally abated within the period of time originally fixed in Citation No. 0811290.

3. In view of the substantial work done to abate the condition as described in Finding of Fact No. 6 and the fact that this work was continuing, the period of time for abatement should have been further extended.

4. The order of withdrawal 0811292 of May 15, 1979, was not properly issued.

ORDER

Based on the above findings of fact and conclusions of law order of withdrawal 0811292 is VACATED.

James A. Broderick
Chief Administrative Law Judge