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

CONSOLIDATION COAL COMPANY, APPLICANT	Application for Review
v.	Docket No. DENV 79-59
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Order No. 389458 October 17, 1978 Glenharold Mine

DECISION

Appearances: Karl T. Skrypak, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Applicant
Stephen P. Kramer, Esq., Office of the Solicitor, U.S. Department of Labor, for the Respondent

Before: Judge Cook

I. Procedural Background

On November 14, 1978, Consolidation Coal Company (Applicant) filed an application for review pursuant to section 105(d) (Footnote 1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(d) (1978) (Act).

The application seeks review of Order of Withdrawal No. 389458, dated October 17, 1978, issued pursuant to section 104(d)(1) (Footnote 2) of the Act. In the application for review, it was alleged:

> 1. At or about 1335 hours on October 17, 1978, Federal Coal Mine Inspector, Rudolph Isgler [sic] (A.R. 1639) representing himself to be a duly authorized representative of the Secretary of Labor (hereinafter "Inspector") issued Order No. 389458 (hereinafter "Order") pursuant to the provisions contained in Section 104(d)(1) of the Act to Joel Grace, Safety Inspector, for a condition he allegedly observed during a "CAA" inspection (spot inspection) at the Glenharold Mine, Identification No. 32-00042 located in North Dakota. A copy of this Order is attached hereto as Exhibit "A" in accordance with 29 C.F.R. Section 2700.21(b).
>
> 2. Said Order under the heading captioned "Condition or Practice" alleges that:
>
> > The trailing cable for the 1250 BE Dragline is not protected against damage from falling materials at 001 pit. The loaded bucket was being swung over the cable yesterday and now although not observed by this inspector, this practice was discussed with the operator during the last inspection, 09/13/78.

3. Said Order contains the allegation that the above condition or practice constituted a violation of 30 C.F.R. 77.604, a mandatory health or safety standard, but that the violation has not created an imminent danger. Further, the Inspector stated that the alleged violation was of such a nature that it could significantly and substantially contribute to the cause and effect of a mine safety or health hazard and was caused by an unwarrantable failure to comply with the stated standard.

4. Said Order additionally contained the allegation that the violation was found during a subsequent inspection made within ninety (90) days after Citation No. 389434 was issued on September 13, 1978, asserting that said Citation was caused by an unwarrantable failure of the operator to comply with a mandatory standard. A copy of this Citation issued under Section 104(d)(1) of the Act is attached hereto as Exhibit "B".*

5. At or abor [sic] 1400 hours on September 13, 1978, Inspector Isgler [sic] issued a termination of said Order. A copy of this termination is attached hereto as part of Exhibit "A".

6. Consol avers that the Order is invalid and void, and in support of its position states:

(a) That it did not violate 30 C.F.R. 77.512 as alleged in the underlying 104(d)(1) Citation;

(b) That the underlying 104(d)(1) Citation did not state a condition or practice which was of such a nature as could significantly and substantially contribute to the cause and/or effect of a mine safety or health hazard; and

(c) That underlying 104(d)(1) Citation did not state a condition or practice caused by an unwarrantable failure of Consol to comply with the mandatory safety standard cited in the Citation.

7. Consol further avers that the Order is invalid and void for the additional reasons as follows:

(a) That the Order fails to cite a condition or practice which constitutes a violation of mandatory health or safety standard 30 C.F.R. 77.604.

(b) That the Order fails to state a condition or practice caused by an unwarrantable failure of Consol to comply with any mandatory health or safety standard; and

(c) That the Order fails to state a condition or practice which could significantly and substantially contribute to the cause and/or effect of a mine safety or health hazard.

* * * * * * *

WHEREFORE, Consol respectfully requests that its Application for Review be granted and for all of the above and other good reason; Consol additionally requests that the subject Order and underlying Citation be vacated or set aside and that all actions taken or to be taken with respect thereto or in consequence thereof be declared null, void and of no effect.

In a footnote to paragraph 4 of the application, the Applicant states:

Said Citation under the heading "Condition or Practice" alleges that:

> The cover plate on the Brown and Sharpe Milling Lathe in use at the machine shop was removed by a certified Electrician about a week ago to remove a motor. It is an opening about 10 by 22 inches exposing conductors energized with 220 volts three phase power to two switches. The Electrician said it takes too long to replace cover. The machinist was aware of the condition.

On November 17, 1978, the United Mine Workers of America (UMWA) filed an answer, which states, in part, as follows:

1. The International Union, United Mine Workers of America, is the representative of the miners at the Glenharold mine for collective bargaining and safety purposes, and is therefore a party to this matter under 29 CFR 2700.10(a).

2. Issuance of the above-noted withdrawal order is admitted, but all other allegations contained in the application for review are denied.

The answer of the Mine Safety and Health Administration (MSHA) was filed on November 24, 1978. It states, in part, as follows: "MSHA admits the issuance of order No. 384458 dated 10/17/78 and citation No. 389434 dated 9/13/78. MSHA avers that both the order and citation were in all respects properly issued under Section 104(d)(1) of the Act."

MSHA then requested dismissal of the application for review.

The hearing was held on April 10, 1979, in Bismarck, North Dakota, pursuant to a notice of hearing issued on January 25, 1979. Representatives of the Applicant and MSHA were present and participated. No representative of the UMWA was present at the hearing (Tr. 4). (Footnote 3)

A schedule for the submission of posthearing briefs was agreed upon at the conclusion of the hearing. MSHA submitted its posthearing brief on May 23, 1979. On May 30, 1979, counsel for the Applicant requested an additional 30 days in which to file a posthearing brief, which request was granted on June 4, 1979. Under the revised schedule, the brief was due on or before June 24, 1979, and reply briefs were due on or before July 9, 1979. The Applicant did not file a posthearing brief. No reply briefs were submitted.

II. Issues

1. Whether the condition cited in Order No. 389458 existed and, if so, whether it constitutes a violation of 30 CFR 77.604. In this regard, the parties' joint statement of the issue is whether 30 CFR 77.604 requires that the trailing cable going from the substation to the dragline be protected in the area where the bucket swings over said cable to prevent damage caused by objects falling from the bucket of said dragline (Tr. 159).

2. If the condition cited in Order No. 389458 existed and constitutes a violation of 30 CFR 77.604, whether said violation was caused by the unwarrantable failure of the operator to comply with said mandatory safety standard.

3. Whether the conditions cited in Citation No. 389434, issued on September 13, 1979, existed and, if so, whether they constituted a violation of 30 CFR 77.512.

4. If the conditions cited in Citation No. 389434 existed and constituted a violation of 30 CFR 77.512, whether said violation was of such a nature as could significantly and substantially contribute to the cause and effect of a coal mine safety hazard, and whether said violation was caused by the unwarrantable failure of the operator to comply with said mandatory safety standard.

III. Evidence Contained in the Record

A. Stipulations

The parties entered into stipulations which are set forth in the findings of fact, infra.

B. Exhibits

1. MSHA introduced the following exhibits into evidence:

(a) M-1 is a copy of Citation No. 389434, September 13, 1978, 30 CFR 77.512, issued pursuant to section 104(d)(1) of the Act.

(b) M-2 through M-5 are photographs of the milling machine cited in Citation No. 389434.

(c) M-6 is a copy of Order No. 389458, October 17, 1978, 30 CFR 77.604, issued pursuant to section 104(d)(1) of the Act.

2. The Applicant introduced the following exhibits into evidence:

(a) O-1 is a photograph of the milling machine cited in Citation No. 389434.

(b) O-2 is a scale drawing of the dragline involved in Order No. 389458.

(c) O-3 is a drawing representing the arc that the boom of the dragline would follow if it were to swing over the trailing cable.

(d) O-4 is a page from MSHA's policy manual referring to 30 CFR 77.604.

C. Witnesses

MSHA called as its witness Rudolph Iszler, an MSHA inspector.

The Applicant called as its witnesses Philip Wanner, an electrical engineer and electrical foreman at the Applicant's Glenharold Mine; and Michael B. Quinn, the safety director at the Applicant's Glenharold Mine.

IV. Opinion

A. Stipulations

1. Consolidation Coal Company is the owner and operator of the Glenharold Mine located in North Dakota (Tr. 6).

2. Consolidation Coal Company and the Glenharold Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977 (Tr. 6).

3. The Administrative Law Judge has jurisdiction of the case pursuant to section 105 of the 1977 Act (Tr. 6).

4. The inspector who issued the subject order and citation was a duly authorized representative of the Secretary of Labor (Tr. 7).

5. A true and correct copy of the subject order and citation were properly served upon the operator in accordance with section 104(a) of the 1977 Act (Tr. 7).

6. Copies of the subject order and citation are authentic and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of any statements asserted therein (Tr. 7).

7. With respect to the subject 104(d)(1) citation and section 104(d)(1) order, an imminent danger did not exist (Tr. 7).

8. As relates to Citation No. 389434, a violation of 30 CFR 77.512 existed on September 13, 1978 (Tr. 7-8).

9. As relates to the condition cited in Order No. 389458, the operator knew that the dragline was operating without the protective covering that Inspector Iszler had requested over the trailing cable (Tr. 110).

B. Findings of Fact

MSHA inspector Rudolph Iszler visited the Applicant's Glenharold Mine on October 17, 1978, to conduct a health and safety inspection (Tr. 103). He traveled to the area of the 1250 dragline, accompanied by Joel Grace, the safety director for the Glenharold Mine, and Sam Drath, the union representative (Tr. 103). As they approached the dragline from the rear, the inspector observed the loaded bucket on the end of the boom swinging over the dragline's trailing cable (Tr. 103-106). Upon examining the area, the inspector observed chunks of "hard" clay lying on and beside the trailing cable (Tr. 104-105).

Exhibit 0-2 reveals that a dragline is essentially a large crane. The bucket is attached to a cable which runs from the bucket up to a pulley on the end of the boom and thereafter to the vicinity of what appears to be the dragline operator's compartment. A second cable runs from the vicinity of the bucket to what appears to be a drum located at or near the point at which the boom is attached to the main portion of the machine.

Inferences drawn from the testimony of the witnesses (Tr. 131-132, 139, 143), interpreted with reference to statements contained in the parties' joint statement as to the key issue in this proceeding (Tr. 159), indicate that the trailing cable ran from the dragline back to a substation. However, this was never stated directly by any of the witnesses. The only testimony as to the voltage passing through the trailing cable came from Inspector Iszler, who testified that he thought it was 7,200 volts (Tr. 108).

The testimony of Inspector Iszler and Exhibit 0-3 reveal that at the time of the order's issuance, the dragline was being used to uncover a seam of coal (Tr. 129, 149). Thus, the material being transported in the bucket was newly dug (Tr. 129). The dragline was positioned between the coal seam and some "spoils" piles (Exh. 0-3). The material was being taken from the vicinity of the areas denominated as "cut A" and "cut B" on Exhibit 0-3, swung over the trailing cable, and deposited in the area labeled "spoils" on Exhibit 0-3 (Tr. 104-105). The inference is that the material on or near the trailing cable had fallen from the bucket. Normally, the "cut A" material is not swung over the cable (Tr. 149).

According to Mr. Quinn, a second piece of equipment called a "loading shovel" is used to load the uncovered coal into trucks. These trucks approach their loading point by way of the coal seam level, not the level upon which the dragline is located. Mr. Quinn stated that the difference in elevation between these two levels is probably 30 to 40 feet (Tr. 151-152). Thus, the trucks could not have damaged the dragline trailing cable.

The subject order of withdrawal was issued at 1:35 p.m. (Exh. 0-6), citing the following "condition or practice" as a violation of the mandatory safety standard embodied in 30 CFR 77.604:

> The trailing cable for the 1250 BE dragline is not protected against damage from falling materials at 001 pit. The loaded bucket was being swung over the cable yesterday and now. Although not observed by this inspector, this practice was discussed with the operator during the last inspection, 09/13/78.

As relates to the phrase "[t]he loaded bucket was being swung over the cable yesterday and now," the inspector testified that he had not seen the bucket being swung over the cable "yesterday" (Tr. 106), but that this information was acquired from the dragline operator (Tr. 106).

As relates to the phrase "[a]lthough not observed by this inspector, this practice was discussed with the operator during the last inspection, 09/13/78," the inspector testified as follows:

Q. And this next sentence you state that "Although not observed by this inspector this practice was discussed with the operator during the last inspection--9-13-78." Now, this phrase "not observed by this inspector"--what dates were you referring to when you made that statement?

A. It had been brought to my attention that--that they were swinging a loaded bucket over the cable and dropping material on the cable occasionally, and it was also pointed out to me by a federal mine inspector who was stationed at Billings, Montana, that this was going on, and he alerted me to the fact, and he also told me that the company was notified of this during his inspection. I don't have the exact time, but it was, I believe, in May or June of 1978.

Q. And what was the name of that inspector?

A. Howard Clayton.

Q. Now, I don't believe you still quite answered my original question about dates. The statement "not observed by this inspector"--what dates does that refer to? Does that refer to some dates previous to the 17th?

A. Yes, sir, yes, sir.

Q. And what dates would those be?

A. It probably could have been the last inspection, because he mentioned this during several inspections. I asked whether they were making a practice of this here.

Q. Do you recall who you had discussions with concerning the subject during that inspection?

A. That was at a close-out conference, the one I am referring to there. That was at a close-out conference. It was a safety director, and--I am not certain, no, sir. It was a--I don't have my notes with me. I got them in Dickinson.

Q. Was this close-out conference the only time that you discussed this problem with the Management previous to the conditions of this Order?

A. No, sir. I mentioned that to the safety director previously.

Q. And this was an incident other than the close-out conference?

A. Yes.

Q. And who was that safety director? Do you recall?

A. Joel Grace.

(Tr. 106-108).

The mandatory safety standard embodied in 30 CFR 77.604 provides: "Trailing cables shall be adequately protected to prevent damage by mobile equipment." In determining whether the "condition or practice" cited in the subject order of withdrawal constitutes a violation of the mandatory standard, the parties are in agreement that the question presented is whether the regulation "requires that the trailing cable going from the substation to the dragline be protected in the area where the bucket swings over said cable to prevent damage caused by objects falling from the bucket of said dragline" (Tr. 159). For the reasons set forth below, I find that it does not. In resolving this issue, it has been necessary to interpret the regulation's requirements, determine whether the dragline was a piece of mobile equipment, and determine whether the manner in which the dragline was being used in relation to the cable is contemplated as a violation under the regulation.

At the outset, it is found that Inspector Iszler observed the dragline bucket swinging over the trailing cable on October 17, 1978, and that at the time the dragline's trailing cable was not protected so as to prevent objects falling from the bucket from damaging the cable.

A question is presented as to whether the dragline is a piece of mobile equipment. The regulations never specifically define the term "mobile equipment," perhaps because the drafters believed the definition to be self-evident. The following definition is found in Paul W. Thrush (ed.), A Dictionary of Mining, Mineral, and Related Terms (Washington, D.C.: U.S. Department of the Interior, Bureau of Mines) (1968) at page 719: "Mobile equipment. Applied to all equipment which is self-propelled or which can be towed on its own wheels, tracks, or skids." Accordingly, it is appropriate to use this accepted definition in determining whether the piece of equipment involved is mobile.

In view of Inspector Iszler's assertion that the dragline is self-propelled (Tr. 110-111), it is found that it is mobile equipment within the meaning of the subject regulation.

Exhibit 0-4, a page from an MSHA surface manual, contains a policy guide for the enforcement of 30 CFR 77.604, which states the following:

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77.604 Protection of trailing cables.

* * * * * * *

POLICY

Trailing cables shall be placed away from roadways and haulageways where they will not be run over or damaged by mobile equipment. Where trailing cables must cross roadways and haulageways they shall be protected from damage by:

1. Suspension over the roadway or haulageway;

2. Installation under a substantial bridge capable of supporting the weight of the mobile equipment using the roadway or haulageway; or

3. An equivalent form of protection.
When mobile equipment is observed running over unprotected trailing cables a violation of Section 77.604 exists. [Emphasis added.]

The policy guide refers to two specific situations. Generally, it provides that the cables be "placed away from roadways and haulageways where they will not be run over or damaged by mobile equipment." However, where they must cross such areas, one of the three designated methods must be employed to protect them from damage.

Although the language of the regulation, when taken in context, appears to refer to damage caused solely by physical contact by mobile equipment primarily by running over the trailing cable, a question is presented as to the meaning of the phrase "run over or damaged" contained in Exhibit 0-4. At first glance, it appears to reflect a recognition by MSHA that a trailing cable can be damaged by mobile equipment either by the equipment running over the cable or by some other means. This interpretation is supported by the testimony of Inspector Iszler (Tr. 114-117), who stated that the policy includes, but is not limited to, running over the cables (Tr. 115). A careful review of the policy statement, when taken as a whole, reveals that such an inference is unwarranted.

I conclude that the terms "run over" and "damaged," as contained in the policy statement are being used interchangeably to refer to the same thing, and that the damage referred to is of a type caused by mobile equipment running over the cable. Two considerations weigh heavily in this determination. First, the policy guide indicates that the trailing cables must be protected from "damage" where they must cross roadways and haulageways. The term "run over" is not specifically mentioned. Yet, the three forms of protection prescribed are

> designed to prevent mobile equipment from running over, and thus from damaging, the cable. In this context, it is clear that the terms "run over" and "damaged" are being used interchangeably. Second, Exhibit 0-4 states that when "mobile equpment is observed running over unprotected trailing cables a violation of Section 77.604 exists." (Emphasis added.) It does not state that when "mobile equipment is observed running over or otherwise damaging unprotected trailing cables a violation of Section 77.604 exists," or a statement to that effect. This fact, coupled with the fact that Exhibit 0-4 provides no guidelines for identifying other means of damaging the cable, further indicates that the word "damage" has been interpreted by MSHA to mean "run over."

Accordingly, I conclude that MSHA's interpretation as contained in Exhibit 0-4, provides that trailing cables be protected in such a manner so as to prevent damage from physical contact by mobile equipment running over the cables.

Above and beyond this policy statement by MSHA addressed to "running over" cables, it appears that the regulation does include damage caused by any physical contact of the piece of mobile equipment with the cable. This could be caused by the equipment actually running into the cable rather than over it. However, it must be recognized that MSHA's policy statement is as stated since in almost all instances the danger would be caused by the "running over" of the cable. However, it does not appear that the regulation or MSHA's policy statement ever contemplated the type of situation presented in this case which does not involve physical contact of the piece of equipment with the cable.

The question presented is whether the dragline's use in relation to the cable is the type of activity contemplated by the subject regulation. Once again, Exhibit 0-4, as interpreted in context, is instructive, revealing that MSHA has interpreted the regulation to require physical contact with the cable before a violation can be found to have occurred. In the instant case, the dragline bucket did not make physical contact with the cable.

Accordingly, I conclude that the "condition or practice" cited in Order No. 389458 did not constitute a violation of 30 CFR 77.604. It is therefore unnecessary to address the issue of unwarrantable failure.

It may well be that it is desirable that a regulation be enacted to protect against any possible damage which could be caused by the falling of material from a dragline bucket as it swings over a cable, but such was not contemplated by the subject regulation and its interpretation by MSHA.

In view of the foregoing, it is unnecessary to address those issues pertaining to Citation No. 389434, the 104(d)(1) citation underlying the subject 104(d)(1) order of withdrawal. The Applicant pleaded the invalidity of Citation No. 389434 solely as an incident to the determination of the validity of the subject order of withdrawal. See, generally, Zeigler Coal Company, 3 IBMA 448, 81 I.D. 729, 1974-1975 OSHD par. 19,131 (1974), reaffirmed on reconsideration, 4 IBMA 139, 82 I.D. 221, 1974-1975 OSHD par. 19,638 (1975).

In view of the foregoing findings of fact and conclusions of law, the application for review will be granted, and Order No. 389458 will be vacated.

V. Conclusions of Law

1. The Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.

2. Consolidation Coal Company and its Glenharold Mine have been subject to the provisions of the Federal Mine Safety and Health Act of 1977 at all times relevant to this proceeding.

3. MSHA inspector Rudolph Iszler was a duly authorized representative of the Secretary of Labor at all times relevant to this proceeding.

4. The condition cited in Order No. 389458 existed, but did not constitute a violation of 30 CFR 77.604.

5. All of the conclusions of law set forth in Part IV of this decision are reaffirmed and incorporated herein.

VI. Proposed Findings of Fact and Conclusions of Law

MSHA submitted a posthearing brief. Counsel for the Applicant made a closing statement, but did not submit a posthearing brief. The brief and the closing statement, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

ORDER

Accordingly, based on the above findings of fact and conclusions of law, the application for review is GRANTED, and Order No. 389458 is herewith VACATED.

John F. Cook
Administrative Law Judge

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1 Section 105(d) provides:

"If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 104, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 104, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The rules of procedure prescribed by the Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section. The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals or orders issued under section 104."

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2 Section 104(d)(1) provides:

"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been 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 coal or other 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 standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, 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 (c) 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."

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3 The Applicant thereupon moved to dismiss the UMWA as a party-Respondent (Tr. 4). This motion was considered in conjunction with this decision, but was disposed of in a separate order, issued immediately prior to the issuance of this decision, so that the caption on this decision would reflect only the remaining parties.