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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

CONSOLIDATION COAL COMPANY,
APPLICANT

Application for Review

Docket No. WEVA 79-351-R

v.

Ireland Mine

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

DECISION

Appearances: Michel Nardi, Esq. Consolidation Coal Company,
Pittsburgh, Pennsylvania, for Applicant
Barbara K. Kaufmann, Esq., Office of Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for Respondent

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This a proceeding filed by Consolidation Coal Co. (hereinafter "Consol") under section 107 (e) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 817(e), to vacate an order of withdrawal due to imminent danger issued by a federal mine inspector employed by the Mine Safety and Health Administration (hereinafter "MSHA") pursuant to section 107 (a) of the Act. The parties filed prehearing statements and the case was heard in Pittsburgh, Pennsylvania, on January 8, 1980.

This matter involves a "fall" or "sag" of a concrete floor supporting an elevated conveyor belt in the preparation plant at the Ireland Mine. Consol concedes that there was a structural failure but contends that it had voluntarily corrected or abated the condition prior to the issuance of the order of withdrawal. Hence, Consol asserts that no imminent danger existed at the time the inspector issued the order in question.

ISSUES

The general issue is whether the issuance of the order of withdrawal due to imminent danger was proper. The specific issue is whether the voluntary correction or abatement of the condition by the operator prior to the issuance of the withdrawal order precludes a finding of imminent danger.

APPLICABLE LAW

Section 107(a) of the Act, 30 U.S.C. 817(a), provides as follows:

If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

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Section 3(j) of the Act, 30 U.S.C. 802(j), states: "'imminent danger' means the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

STIPULATIONS

The parties stipulated the following:

1. Ireland Mine is owned and operated by Applicant, Consolidation Coal Company.
2. Consolidation Coal Company and the Ireland Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
3. The Administrative Law Judge has jurisdiction over this proceeding pursuant to Section 105 and Section 107 of the 1977 Act.
4. The inspector who issued the subject Order was a duly authorized representative of the Secretary of Labor.
5. A true and correct copy of the Subject Order was properly served upon the operator in accordance with Section 107(d) of the 1977 Act.
6. Copies of the Subject Order and Termination 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.
7. The alleged violation was abated in a timely fashion and the operator demonstrated good faith in attaining abatement.

8. Consolidation Coal Company agrees that a violation of the cited standard, 30 C.F.R. 77.200 did exist on July 31, 1979.

SUMMARY OF THE EVIDENCE

The undisputed evidence shows that Consol operated a refuse conveyor belt through a gallery in its coal preparation plant at the Ireland Mine. The gallery in question was 23 years old and ran a distance of sixty feet from one wing of the plant to another on a grade which caused the gallery to be elevated between 10 feet and 27 feet above ground. The conveyor belt carried refuse and the structure was hosed down twice a day. The conveyor belt was 30 inches wide and was contained in an 8-1/2-foot wide gallery structure. All four sides of that structure were enclosed. The floor of the structure consisted of concrete reinforced with corrugated steel and steel wire mesh. On each side of the floor was a series of channels joined by plates which gave the appearance of an I beam. The channels were connected to steel angle bars which formed the sides of the gallery. The angle bars were covered with Transite which enclosed the structure.

Sometime between 1:55 a.m. and 2:10 a.m. on July 31, 1979, a "fall" or "sag" occurred in the gallery structure. All witnesses agreed that approximately 15 feet of the 60-foot structure "fell" or "sagged" approximately 1 foot. Shortly thereafter, Leon Heck, general foreman of the preparation plant was called to the site. He testified that he arrived at the plant at about 2:30 a.m. The conveyor belt was running but there was no material on the belt at the time of the occurrence. As to the structural failure itself, Mr. Heck observed that the channels forming one joint of the bottom

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I beam failed. Six angle bars on each side of the structure separated from the floor during the occurrence. The area of the sag was identified as beginning approximately 10 feet from one wing of the plant and extending for a distance of approximately 15 feet. The sag was readily visible from the ground outside the structure. The I beam, constructed out of channels and cover plates, appeared to be bent.

Mr. Heck testified that after he inspected the structure he thought that the condition was serious and he turned off the conveyor belt and called the general superintendent of the mine. Thereafter, a conference occurred between Mr. Heck, the general superintendent, the master mechanic, and the shop foreman. It was agreed that a crib should be constructed under the sagged area. The conferees felt that the remainder of the structure had stabilized. Although Mr. Heck conceded that other angle bars were rusted or deteriorated at the floor level, he thought that they were sufficiently strong to support the remainder of the structure.

A work crew then constructed a crib out of 6-foot railroad ties. At the top of the crib, 10 foot railroad ties were used. A hydraulic jack was used to raise the structure 6-inches and lower it onto the crib. Although the inspector recalled seeing only one crib under the structure, Mr. Heck testified that a second smaller crib was constructed out of 30 inch railroad ties and situated adjacent to the first crib. Both cribs were constructed in approximately two hours.

After the cribs were constructed, the miners expressed concern to Mr. Heck about the possibility of Transite falling from the sides of the

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structure and falling debris from a hole in the wall of the structure. The hole in the wall occurred when the structure sagged. Mr. Heck agreed with the miners and ordered that the area under and around the structure be roped and "dangered off." However, he left a walkway in the area under the structure so that miners could enter and leave the plant. The gallery and conveyor belt were not "dangered off." At approximately 7:30 a.m. a Consol vice-president arrived at the site and ordered the employment of a structural engineer and contractor to determine what permanent repairs were necessary. Upon completion of construction of the cribs and "dangerring off" the area under the gallery structure, normal operations were resumed.

At approximately 9:30 a.m. on the morning of July 31, 1979, MSHA inspector, Kenneth Williams, arrived at the Ireland Mine to conduct a regular inspection. At that time, two members of the union safety committee approached him, informed him that there was problem in the preparation plant and asked him to inspect it. These men informed him that the structure containing the conveyor belt fell during the prior shift and that although some repairs had been made, they were afraid of another fall. Thereupon, he entered the preparation plant and inspected the interior of the gallery. The conveyor belt was operating. He observed 20 angle irons on each side of the structure which formed the walls. Ten of these supports on the left side were deteriorated and separated from the beam at floor level. The walkway on each side of the conveyor belt was covered with wet debris of up to 1 foot in depth. The bottom support I beam appeared to be badly deteriorated as it was rusty and corroded. He entered the gallery from low side of the structure and he walked up to the high side on the left of the conveyor belt. He

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testified that he did not cross over to the right of the conveyor belt but that side appeared to be worse than the left side. There is evidence that two angle bars on the left side had been recently welded to the beam. However, 10 other angle bars had deteriorated to the point that they were no longer attached to the beam. He spent approximately 20 minutes inside the gallery and walked back and forth several times. He testified that he did not feel safe inside the gallery but that he is exposed to hazards as part of his job.

Upon completion of his inspection of the interior of the building, inspector Williams went outside to complete his inspection. He observed that the I beam supporting the structure was bent. The structure had sagged to a depth of approximately 1 foot in an area extending for approximately 15 feet of the 60-foot structure. He observed one crib constructed out of railroad ties which was under part of the sagged area but not totally supporting it. The crib did not appear to eliminate the sag. There may have been two cribs close together but, if so, they gave the appearance of one crib. He denied the fact that the area under the structure had been "dangered off." The conveyor belt was operating at this time and the gallery structure was visibly vibrating. Although some vibration can be expected for a structure housing a conveyor belt, the inspector believed that the vibration he observed at that time was excessive and abnormal. He was afraid that the vibration would cause the crib to shake loose and of a total collapse of the structure due to its overall deteriorated condition. Inspector Williams testified that, "This is the worst deteriorated building that I've ever seen." If the structure collapsed, it would result in death or serious injury to miners. At that time he issued the order of withdrawal.

Consol called Leon Heck, general plant foreman, as its first witness. Mr. Heck testified that when he arrived at the preparation plant at about 2:30 a.m. on July 31, 1979, he inspected the area that had sagged and concluded that the problem was serious and could not be corrected immediately. He closed down the conveyor belt. He observed that both ends of the structure were still tightly connected to the walls of the building. Although he agreed that many of the angle bars were deteriorated, he believed that there was sufficient strength to support the structure. He also believed that the collapse was due to the deterioration and rusting of the gallery. He made no notes or drawings covering the number of angle bars that were separated or deteriorated. None of the miners complained to him about the safety of operating the conveyor belt after the cribs were installed. The only safety concerns expressed by any of the miners related to a fear of falling refuse from a 6 to 8 inch hole in the wall of the structure and falling Transite from the wall itself. Mr. Heck also testified that the conveyor belt was closed down during part of inspector Williams inspection and that the inspector walked on both sides of the belt. Thereafter, it was reactivated when the inspector went outside. Mr. Heck acknowledged the fact that the structure vibrated but stated that he had seen other galleries vibrate more than the one in controversy here. In any event, Mr. Heck stated his opinion that the structure was not dangerous at the time the withdrawal order was issued.

Consol next called Alan T. Olzer, an inspector escort employed by Consol, as a witness. Mr. Olzer essentially corroborated the testimony of Mr. Heck and added his opinions that the structure appeared to be stable prior to the arrival of the inspector and that he didn't believe anyone would be seriously injured.

The withdrawal order was terminated at 5:00 p.m. on July 31, 1979, after another crib was erected in the middle of the structure and two 85 pound rails were erected and welded under the higher side of the structure. On direct examination, Mr. Heck testified that the structure was subsequently replaced.

EVALUATION OF THE EVIDENCE

All of the testimony, exhibits, stipulations, and arguments of counsel have been considered. The evidence shows that in the early morning hours of July 31, 1979, the elevated structure housing the refuse conveyor belt at Consol's Ireland Mine failed. At a point approximately 20 feet above ground level, the concrete floor of the structure "fell" or "sagged" about 1 foot for one quarter of the length of the structure. The initial status of this condition was described by Consol's general plant foreman as serious. After consultation with other Consol employees, it was decided to support the structure by constructing two cribs under the structure. One crib was constructed out of 6 foot railroad ties and the adjoining crib was constructed out of 30-inch railroad ties. Since the overall appearance of the cribs was that of a single crib, I do not find any significant inconsistency in the inspector's testimony that he saw only one crib.

The issue is whether an "imminent danger" existed after Consol completed voluntary repairs. It should be noted that for the purposes of this case, the definition of "imminent danger" in section 3(j) of the 1977 Act is identical to the definition of that term in the same section of the 1969

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Federal Coal Mine Health and Safety Act. Therefore, it is appropriate to look to decisions of the Circuit Courts and the Interior Board of Mine Operations Appeals which have construed that term.

The Interior Board of Mine Operations Appeals, in a decision affirmed by the Seventh Circuit Court of Appeals, construed "imminent danger" as being a situation in which "a reasonable man would estimate that, if normal operations designed to extract coal in the disputed area should proceed, it is at least as probable as not that the feared accident or disaster would occur before elimination of the danger." *Freeman Coal Mining Company*, 2 IBMA 197, 212 (1973), *aff'd Freeman Coal Mining Company v. Interior Board of Mine Operations Appeals*, 504 F.2d 741, 745 (7th Cir. 1974).

In a case involving an imminent danger order, the Fourth Circuit Court of Appeals stated: "[t]he Secretary determined and we think correctly, that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated.'" *Eastern Associated Coal Corporation v. Interior Board of Mine Operations Appeal*, 491 F.2d 277, 278 (4th Cir. 1974), *aff'g Eastern Associated Coal Corporation*, 2 IBMA 128 (1973). See also *Old Ben Coal Corporation v. Interior Board of Mine Operations Appeals*, 523 F.2d 25 (7th Cir. 1975).

In *UMWA District No. 31 v. Clinchfield Coal Company*, 1 IBMA 31 (1971), the coal mine operator asserted that since it had voluntarily closed its mine prior to the issuance of an order of withdrawal, the order was of no

moment. This argument was rejected by the Board which stated, "The purpose of a withdrawal order is not only to remove the miners but also to insure that they remain withdrawn until the conditions or dangers have been eliminated." Id. at 41.

In *Eastern Associated Coal Corporation*, 3 IBMA 303, 305 (1974), the Interior Board of Mine Operations Appeals held that "initiation of the abatement process on a voluntary basis, while laudable, does not in itself preclude the issuance of a section 104(a) [now section 107(a) under the 1977 Act] closure order where an inspector observes a condition or conditions constituting imminent danger, as that term is defined in the Act."

In the instant case, Consol had completed its voluntary temporary repairs to the gallery structure prior to the arrival of the MSHA inspector. The question to be decided is whether the condition of the structure, as repaired by Consol, constituted an imminent danger at the time the order of withdrawal was written. However, in order to properly evaluate the voluntary repairs, the underlying condition must be assessed. The undisputed evidence shows that there was a failure, "fall", or "sag" of the floor of an elevated structure at a coal preparation plant. This failure was initially evaluated by Consol's general plant foreman as serious. He ordered temporary repairs prior to an assessment by an engineer and a contractor whose employment was authorized by a Consol vice-president. The general plant foreman conceded that the failure was caused by deterioration and rusting inside the structure. Although two angle bars had been welded to the I beam after the failure, he admitted that there was additional deterioration to other joints of angle bars and the I beam. Inspector Williams was more

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precise in his testimony that of the 20 angle bars on the left side of the structure, half were deteriorated to the point that they had separated from the I beam on the floor. The cribs which had been constructed voluntarily by Consol did not fully support the sagged area. Inspector Williams testified to excessive vibration which was visible from ground level. During the initial failure, the wall of the structure broke causing a hole to open in the wall. There was a danger that refuse from the conveyor would fall through this hole. There was further danger that pieces of the Transite wall might fall. Inspector Williams testified that he believed the excessive vibration combined with the deteriorated condition of the structure could result in a total collapse. He did not believe that the cribbing constructed by Consol would prevent such a collapse.

It is conceded that in normal operation of the plant, employees frequently are inside and under the structure. Consol agrees that it did not "danger off" the interior of the structure but asserts that it "dangered off" most of the area underneath the structure. However, it concedes that a walkway was maintained through the "dangered off" area so that miners could enter and leave the plant. Whether Consol "dangered off" the area as it alleged is not dispositive of the instant case. This is so because the test to be applied is whether "the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." (Emphasis supplied.) *Eastern Associated Coal Corporation v. Interior Board of Mine Operations Appeals*, 491 F.2d 277, 278

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(4th Cir. 1974). Thus, "if normal mining operations were permitted to proceed in the area," miners going under the structure would be exposed to debris falling from a height of approximately 20 feet.

The evidence establishes that a sudden and unexpected structural failure occurred in the early morning of July 31, 1979 at the Ireland Mine preparation plant. Consol voluntarily made some interim repairs pending a subsequent study by an engineer and a contractor. After completion of the repairs the condition of the structure was as follows: (1) ten of twenty welds between the angle bars and the beam on the left side of the gallery were broken; (2) the interior of the gallery was deteriorated and rusted; (3) there was a hole in the side wall of the gallery through which refuse from the conveyor could drop for a distance of twenty feet to the ground; (4) there was excessive vibration of the structure when the conveyor was operating; and (5) miners were required to be in and under the structure during normal mining operations.

The MSHA inspector testified that the structure in question was the worst deteriorated one that he had seen. Because of the overall poor condition of the structure, the excessive vibration during operation, and the failure of the voluntary repairs to provide adequate support, he concluded that an imminent danger existed. Consol did not present any expert testimony to rebut these charges. Its primary witness, Leon Heck, testified that he had experience as an electrician but not as a construction engineer. While Leon Heck and Alan Olzer testified that, in their opinion, the crib which Consol constructed provided adequate support for the structure, I find

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that the physical facts support the opinion of the MSHA inspector that it was just as likely as not that death or serious physical harm would occur due to a total collapse of the structure or from falling debris.

In conclusion, I find that MSHA has established, by a preponderance of the evidence, that an imminent danger existed at the time the order of withdrawal was issued.

ORDER

WHEREFORE, IT IS ORDERED that the Application for Review is DENIED and the subject withdrawal order is AFFIRMED.

James A. Laurensen
Judge