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SOL (MSHA) V. CONSOLIDATION COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

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

Civil Penalty Proceedings

Docket No. WEVA 79-354
A.O. No. 46-01431-03026V

v.

Four States No. 20 Mine

CONSOLIDATION COAL COMPANY,
RESPONDENT

Docket No. WEVA 79-355
A.O. No. 46-01433-03044V

Loveridge No. 22 Mine

DECISION AND ORDER

Based on an independent evaluation and de novo review of the information furnished at the settlement conference of February 12, 1980 and in the conference call of March 13, 1980, I conclude the proposal to settle these two unwarrantable failure 75.400 violations should be approved even though MSHA's policy of charging multiple violations as a single violation is clearly contrary to section 110(a) of the Act.

The record shows that in Order 814147 the inspector charged the operator with failing to clean up combustibles in four separate and distinct areas on the numbers 1 and 2 conveyor belts and its contiguous crosscuts for a distance of 2,500 feet or approximately one-half mile. The inspector also charged the operator with failing to report the hazardous conditions in its preshift reports.

Despite this, it is the position of the Solicitor and MSHA that only one violation occurred because the inspector apparently has absolute and uncontrolled discretion to treat multiple violations relating to the "same area of the mine" as a single violation. See Memoranda to District Managers from Cook and Shepich dated October 29, 1976 and October 3, 1979, copies attached.

This policy of soft enforcement is, I submit, contrary to the best interests of the miners as well as the declared purposes and policy of the Act. Section 110(a) and its predecessor section 109(a) have always provided that "each occurrence of a violation" is to be treated as a separate offense, regardless of the area, and certainly violations of separate standards wherever found should be treated as separate offenses.

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Here four separate and distinct violations of 75.400 have been joined with a violation of 75.1802 in one order. And while I have no difficulty in reading the order as charging five separate and distinct violations, MSHA and the Solicitor claim that because the five occurrences are recorded on one piece of paper and on one order they must, regardless of the law and logic, be treated as one violation for the purpose of (1) assessing a penalty and (2) for recording the violations on the operator's history.

This may be good "policy" and even better "special interest" politics but I firmly believe it is weak enforcement. Small wonder that the operators consider the penalty assessment program little more than a "cheap nuisance".

The situation is even more aggravated with respect to Order 813910. There the inspector wrote one unwarrantable failure order to cover eight separate and distinct violations of 75.400 on a longwall conveyor belt, its auxiliary transport belt, and in adjacent return airways. As the mine maps submitted for both these orders show, it strains credulity to accept the view that "the same area of the mine" was involved in these thirteen violations. The flaw in this argument, however, is that this is not the relevant criterion. How Messrs. Cook and Shepich were ever advised that the law condones "multiple violations" of the same or different standards if they occur in "the same area of the mine" is difficult to understand. I can find nothing in the Act or its legislative history which indicates Congress intended violations to be cheaper by the dozen. I think the Labor Department's position is bad law and worse policy.

For these reasons, I refused to accept the parties original settlement proposal which was to reduce the total penalty as assessed from \$4,000 to \$1,750. The final agreement is to pay \$4,500.

Accordingly, it is ORDERED that the motion to approve settlement, as amended, be, and hereby is GRANTED. It is FURTHER ORDERED that the operator pay the settlement agreed upon, \$4,500, on or before Friday, April 4, 1980 and that subject to payment the captioned petitions be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

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Memorandum

To: District Managers, Coal Mine Health and Safety

From: Acting Assistant Administrator--Coal Mine Health
and Safety

Subject: Notices and/or Orders Citing Multiple Violations

During the past several months attorneys in the Associate Solicitor's Office, Mine Health and Safety, and Chief, Office of Assessments have expressed concern respecting the practice of citing multiple violations of mandatory health or safety standards in a single notice of violation (or a Section 104(c) Order) issued pursuant to Section 104 of the Act. Apparently such practices cause some problems in effectively implementing the Act. It makes it difficult for the Assessments Office, and in turn, the trial attorneys in the Associate Solicitor's Office, to identify and charge the operator with each violation observed and listed in the notice (or (c) order). In many instances where a single notice described or listed several violations there was only one inspector's statement and only one "reasonable time" for abatement. This practice has resulted in some violations not being recognized, assessed, or counted in the operator's history of violations.

Effective upon receipt of this memorandum, in order to more effectively administer the Act and its purposes, each violation observed by an inspector and cited pursuant to Sections 104(b), 104(c) or 104(i) shall be cited in a separate Notice of Violation or Order of Withdrawal.

The basic rule to be followed is that violations of separate standards on one piece of equipment or identical violations on separate pieces of equipment or identical violations in distinct areas of the mine be cited on separate notices. For example, if two shuttle cars each had the same violation it would be two separate violations charged. If two distinct areas of the mine were inadequately rock dusted there likewise would be two violations.

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However, this does not change our policy concerning situations where there are multiple violations of the same standard all of which are observed in the course of an inspection and all related to the same piece of equipment or to the same area of the mine. For example, "Twelve rail joints of the main line track along No. 4 north main entry were not welded or bonded beginning in by No. 2 southwest track switch and extending in by for approximately 800 feet (Sec. 75.514)", or, "Four permissibility defects, which included two openings in excess of 0.005 inch in the plane flange joint of the main contractor compartment, a loose headlight lens on the right (operator's) side headlight, and an unsecured inspection (handhold) cover for the conveyor motor, were detected in the 12 J.M. continuous mining machine in operation in No. 3 entry south mains section (Sec. 75.503)." In each of the above instances, where the occurrences are multiple violations of the same standard which are contiguous or related they may be treated as one violation.

Joseph O. Cook
Acting Assistant Administrator--
Coal Mine Health and Safety

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MEMORANDUM FOR: DISTRICT MANAGERS

FROM: THOMAS J. SHEPICH
Administrator for Metal and
Nonmetal Mine Safety and Health

SUBJECT: Citations and Orders Citing
Multiple Violations

Effective upon receipt of this memorandum, in order more effectively to administer the Act and carry out its purposes, each separate violation observed by an inspector and cited pursuant to section 104 of the Act shall, except as noted below, be cited in a separate citation or order of withdrawal.

The basic rule to be followed is that violations of separate standards on one piece of equipment, or violations of separate standards in a distinct area of a mine, or identical violations on separate pieces of equipment, or identical violations in distinct areas of a mine, shall be cited on separate citations. For example, if two haul trucks each had the same violation, there would be two separate violations charged. Likewise, if two distinct areas of a mine had loose rock in the back, there would be two separate violations charged.

However, where there are multiple violations of the same standard which are observed in the course of an inspection and which are all related to the same piece of equipment or to the same area of the mine, such multiple violations should be treated as one violation and one citation should be issued. For example, "Loose ground was observed in four places of the haulageway between 3 switch and No. 4 x-cut" (57.3-22); or, "At the crusher power control panel insulated bushings were not provided where insulated wires entered five of the metal switch boxes" (55,56, 57.12-8).