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

CONSOLIDATION COAL COMPANY, APPLICANT	Application for Review
v.	Docket No. WEVA 79-115-
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Order No. 813952 April 20, 1979 Loveridge Mine
UNITED MINE WORKERS OF AMERICA, INTERVENOR	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. WEVA 80-26 A/O No. 46-01433-03054V
v.	Loveridge Mine
CONSOLIDATION COAL COMPANY, RESPONDENT	

DECISION

Appearances: David E. Street, Esq., and Barbara Krause Kaufmann, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Mine Safety and Health Administration Rowland Burns, Esq., and Samuel P. Skeen, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Consolidation Coal Company

Before: Judge Cook

The above-captioned application for review proceeding was filed by Consolidation Coal Company (Consol) on May 9, 1979, pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1978) (1977 Mine Act). Answers were filed by the United Mine Workers of America (UMWA) and the Mine Safety and Health Administration (MSHA) on May 10, 1979, and May 24, 1979, respectively.

The above-captioned civil penalty proceeding was filed by MSHA on November 23, 1979, pursuant to section 110(a) of the 1977 Mine Act. Consol filed an answer on November 28, 1979.

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Both proceedings address Order No. 813952, issued at Consol's Loveridge Mine on April 20, 1979, pursuant to section 104(d)(2) of the 1977 Mine Act. The order cites Consol for an alleged violation of 30 C.F.R. 75.400 as follows:

An excessive accumulation of float coal dust (black to dark gray in color) was allowed to accumulate on top of rock dusted surfaces located on the roof, ribs and floors of the crosscuts and entries Nos. 5 and 6. Starting 200 feet outby the last open crosscut at spad No. 6/46 a distance to 6/34 of about 1,260 feet. Located in the 7 North, 9 Left Section (017). Mining was being done on the left split of air at the time of the order. Samples were collected at 6/43 and 6/40 station Nos. to show the float coal dust was present on top of rock dust.

On March 18, 1980, the cases were consolidated for hearing and decision. Notices of hearing were issued at various stages of the proceedings which ultimately scheduled both the above-captioned cases, and several additional cases involving MSHA and Consol, for hearing on the merits beginning at 9:30 a.m., on June 17, 1980, in Washington, Pennsylvania.

The above-captioned cases were called for hearing on June 18, 1980, in Washington, Pennsylvania, with representatives of MSHA and Consol present and participating. MSHA thereupon made an oral motion in Docket No. WEVA 80-26 for approval of settlement in the amount of \$500. The Office of Assessments had proposed a civil penalty in the amount of \$2,000. In view of both the significant reduction proposed and the state of the record at that time, MSHA was requested to file a written settlement motion and to submit certain additional information necessary to properly evaluate the proposed settlement.

It should be noted that a copy of the inspector's statement, describing the alleged violation in terms of negligence, gravity and good faith, was attached to the proposal for a penalty filed by MSHA on November 23, 1979. As relates to the issue of operator negligence, the inspector indicated: (1) that the condition cited should have been known to the mine operator because the "immediate right return is part of the active working section and is to be examined;" (2) that the condition cited was known by the mine operator and should have been corrected because "300 feet was drug outby the last open crosscut;" and (3) that "Jimmy Woods, union fireboss, examined the (said) area on [April 19, 1979] at 10:20 a.m." As relates to gravity, the inspector classified the occurrence of the event against which the cited standard is directed as "probable" because the "float coal dust, if ignited, could cause a mine explosion or mine fire," and identified the fact that the "section is very dry and liberates methane" as a condition or circumstance which might have increased the likelihood or severity of the event. The inspector's statement indicated that the injury resulting from or contemplated by the occurrence of the event could reasonably be expected to be (1) lost workdays or restricted duty, or (2)

permanently disabling; and

that seven or more miners would be affected if the event were to occur. Counsel for MSHA was informed that an affidavit would have to be obtained from the inspector changing these statements before a \$500 settlement could be approved.

On July 10, 1980, MSHA filed its written motion requesting approval of the \$500 settlement and dismissal of the proceeding. MSHA advanced the following reasons in support of the proposed settlement:

* * * * *

3. A reduction from the original assessment is warranted under the unique circumstances of this case.

This case involves a 104(d)(2) order issued for a violation of 30 CFR 75.400. Further investigation into the facts surrounding issuance of this order discloses that the order should not have been issued under Section [104](d) of the Act. The Secretary is unable to prove an unwarrantable failure in this case. However, a violation does exist. The inspector who issued the subject order agrees with this analysis and has modified the 104(d)(2) to a 104(a) citation. A copy of the modification is attached hereto. Also, attached is the affidavit of coal mine inspector David Workman. This affidavit verifies the facts of the violation and the fact that the condition does not constitute an unwarrantable failure.

A \$500 penalty is appropriate for this violation. The operator's negligence was considerably less than originally calculated. The Office of Assessments viewed this condition as an unwarrantable failure. As is evidenced by the "Narrative Findings for a Special Assessment" form which is attached hereto, the Assessment Office believed that the operator could easily see the accumulations. Mr. Workman's affidavit clarifies that the area of accumulations was not visible from traveled areas of the mine. Moreover, it was in an area which was required to be inspected only one time per week. The Secretary does contend that the operator has a duty to see that there is compliance with the clean-up plan. However, in this particular situation, the operator's negligence is rather slight. The probability of occurrence is also not large as there were no ignition sources in the area of accumulation. There was no methane found. Therefore the probability of a spontaneous ignition is also low. For all of the above stated reasons, in conjunction with the operator's prior history and the size of the operator, the Secretary urges the Administrative Law Judge to find that \$500 is a reasonable penalty for this violation. Consolidation Coal Company is a wholly owned subsidiary of Conoco, Inc. The size of the company is 34,945,989 production tons or man hours per

year.

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This tonnage includes all of Conoco's operations with the exception of one uranium mine, the Conquita Mine. The annual man hours of this mine is 1,000,000. The size of the Loveridge Mine is 1,241,697 production tons or man hours per year.

The "affidavit" referred to is acutally a memorandum dated July 3, 1980, from Federal mine inspector David E. Workman characterizing the alleged violation as follows:

On April 20, 1979, I issued violation No. 013952 [sic]. At that time I observed accumulations of float coal dust in the immediate return air course of the 7 North 9 Left section. This area is one, that is required to be examined weekly for hazardous conditions. The (said) area was not visible from a regular traveled area of the mine or working section. The area inby the float coal dust accumulation had been drug (mixed coal dust and rock dust); however, the float coal dust accumulation could not be seen from the last open crosscut.

I believe the operators [sic] negligence is low, also the probability of the occurrence is moderate.

There was no methane present and no ignition source present in the immediate (said) area of the violation.

On August 4, 1980, the motion to approve settlement was denied because the information submitted was insufficient for the purpose of determining that approval of the proposed settlement would protect the public interest, and a notice of hearing was issued scheduling the cases for hearing on the merits beginning at 9:30 a.m., on September 18, 1980, in Washington, Pennsylvania.

On August 14, 1980, Consol filed a petition for interlocutory review with the Federal Mine Safety and Health Review Commission (Commission) pursuant to 29 C.F.R. 2700.74 (1979), contending: (1) that it was adversely affected and aggrieved by the undersigned's August 4, 1980, determination; (2) that the undersigned erred in denying the motion to approve settlement and in finding that insufficient information had been furnished to permit approval of the proposed settlement; and (3) that immediate review of the ruling might materially advance final disposition of the proceedings and establish guiding principles to facilitate settlement in future cases. On September 3, 1980, the Commission denied Consol's petition for interlocutory review.

The hearing convened as scheduled on September 18, 1980, in Washington, Pennsylvania, with representatives of MSHA and Consol present and participating. Counsel for MSHA made an oral motion for approval of settlement which is identified as follows:

Citation No.	Date	30 C.F.R. Standard	Settlement	Assessment
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813952

4/20/79

75.400

\$750

\$2,000

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The following discussion took place on the record:

[MR. STREET:] Now, at the time the motion for decision and order approving settlement was submitted, the parties had agreed on a penalty of \$500. Since the time this motion has been submitted, I have had discussions with attorneys for Consolidation Coal, and I have learned that Consolidation is agreeable to paying a penalty of \$750 in this case.

I have learned that Consolidation is prepared to have witnesses testify who would call into dispute the length of the accumulations which were referred to in the order of withdrawal, and the witnesses for Consolidation also would be disputing the color of the accumulations which is evidence of their depth.

In summary, Your Honor, I believe with the representations that already have been set forth in the earlier motion to approve settlement, when you combine those representations with the fact that a conflict as to the evidence of the violation, itself, would be expected if the case were heard, I believe that it would be appropriate that this case be resolved for a penalty of \$750.

THE COURT: Is there anything that you wanted to say?

MR. BURNS: Well, there are a couple things I want to add. I would certainly not dispute anything that Mr. Street has said, but not only when the area in question was inspected, not only was there no appreciable methane found, there was also a ventilation check of the area and the ventilation was, I believe, at 21,600 feet per minute which, I have had represented to me, is a fairly good ventilation.

I also have a witness present today who would be in a position to testify that as the fireboss who checked the return in question the day before the citation in question was issued, or the order that was later modified to a citation, the area in question was completely clear of coal dust accumulation, and that was his check in accordance with the one-week check regulation that Mr. Street cited in part, I believe, [30 C.F.R. 75.305].

Those two additional facts I would add in support of the motion for settlement and the penalty of \$750.

THE COURT: You see, Mr. Burns, that is the very point which created one of the serious problems about settlement in this case, because here we have all these statements by MSHA saying this didn't have to be examined more than once a week. Was that right?

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MR. STREET: That's right.

THE COURT: Here we have a man who saw it the day before and that was the whole point about negligence, this large amount of dust as stated in the record at this moment. That was the whole point as to why a settlement couldn't be approved. It was obviously seen by your people the day before, yet all the way through this case, the real -- one of the biggest reasons why a settlement has been proposed was that you didn't have to examine it more than once a week, and here you had examined it the day before. Now, I cannot really comment very much more about this, because I don't really know what the facts are. I understand some of these things that you people have set forth as proposals of what might be presented, but I am more concerned about what the real facts are from the witnesses in this case at this point, because at this point with the information that is in the record now, it still is a serious matter.

As I say, I don't know what the facts will produce in the event of a hearing. It may be that the facts will convince me that this is not as serious as it appears to be on the record at the moment. But I am afraid that what you are presenting to me at this stage is not -- has not really changed the picture from what it was the last time this settlement was proposed at \$500, and \$750 is hardly much of a change in view of the seriousness of what appears in the record at this moment.

As I say, I have no idea what the evidence ultimately will produce, and I might agree with you that that is a proper figure if I hear all the evidence. But at this stage, I do not approve a settlement of that type.

MR. BURNS: Can we go off the record for just a second, Your Honor?

THE COURT: Yes, certainly.

(Discussion off the record.)

(Recess taken.)

THE COURT: The hearing will come to order. Now, Mr. Street, I believe that you have had a chance to consult with your witnesses, and you wanted to make a statement at this time as to some of the facts that you feel should be applied to consideration of a settlement in these cases.

MR. STREET: Yes, Your Honor, we do. Your Honor, while we were off the record, I spoke with the union fireboss, who examined the area in question in this case. That is the area which is referred to in the order of withdrawal on 813952 which was later modified by the inspector to be a section 104(a) citation. When the union fireboss examined the area in question 24 hours prior to the issuance of the order in this case, he found that the area was well rockdusted and that there were no accumulations of float dust in that area.

The inspector was conducting the weekly inspection required by 30 CFR Section 75.305. When the inspector returned to the area 24 hours later he found -- when the inspector went to the area 24 hours after the area had been examined by the union pre-shift examiner, he found that there were float coal dust accumulations in the No. 6 entry and to a lesser extent in the No. 5 entry. Now, to provide Your Honor with a graphic, which would be of assistance in your evaluation of [the] motion to approve settlement, I have a drawing of the section where the violation occurred. The drawing was made by Inspector David Workman yesterday, and I would, with the consent of the operator's counsel, move this drawing into evidence. I would submit it as part of the record.

THE COURT: Just make it M-1.

(Thereupon, Exhibit M-1 was marked.)

MR. STREET: And as Your Honor can see from looking at the exhibit, there was a gas well on the right side of the section just outby the third crosscut outby the face. And the gas well blocked the view of the area which the section foreman otherwise would have had. And the presence of the gas well blocked his view of the area. He was not able to see that there were violative conditions outby the gas well. The area from the gas well to the face in the No. 6 entry was well rockdusted, was white in color and in fact, all areas which were inby the tail piece in the section, all areas in all entries were properly rockdusted.

The section which is depicted in M-1, and which, of course, includes the area of the violation was a very heavily ventilated section. We are informed that 26,000 cubic feet -- over 26,000 cubic feet per minute of air was ventilated through that section. It is our belief that it is entirely possible that the float dust had accumulated during the 24-hour period between the time that the union fireboss conducted his required weekly examination of the area and the time of the inspection in this case.

There were no ignition sources in the Nos. 5 or 6 entry where the violation occurred, and as is indicated in the earlier motion to approve settlement, there were no accumulations of methane in that area or in any area in the section.

At the time the violation was cited, mining was taking place in the area which is depicted in the upper left-hand corner of the graphic. That would be in entry No. 1. Rowland? Anything more?

MR. BURNS: I wish I could think of something.

MR. STREET: So, Your Honor, these are the additional facts which we would like to -- which we have put forward. They are all the facts that we can think of that would relate to our proposal to settle this case for \$750.

THE COURT: All right. Now, are you saying that you, yourself, as representative of MSHA subscribe to the statements that were made to you by the pre-shift examiner as to what he observed the day before?

MR. STREET: Yes, Your Honor. I spoke with the man and I am convinced he is telling the truth.

THE COURT: All right. Now, how large an area, though, was actually black as opposed to gray?

MR. STREET: Your Honor, this morning I spoke with an employee who would be our witness if this case were tried, and he informed me that there was an area approximately 200 feet long that was black in color. The remaining areas were gray in color. And to be truthful, I can't remember whether he told me whether they ranged from light gray to dark gray, what gradations of gray they were, but the remaining areas were gray in color.

THE COURT: Can you give me an idea where this 200 feet of black area was?

MR. STREET: Your Honor, the area which was black was the area immediately -- just a moment, please -- the area which was black was -- began to the left of the gas well which is depicted in Exhibit M-1, and it extended back down entry No. 6 behind the gas well and down the entry.

THE COURT: Now, was there some remark during the discussion before we went back on the record about some automatic rockdusting equipment? Can you tell us something about what that is, how this area is rockdusted?

MR. STREET: As I understand it, and as the inspector understands it, when the area is ventilated, when the section is ventilated, normally rockdust is added -- okay. When the section is ventilated, Your Honor, there is an attachment to the fan which contains rockdust, and which introduces rockdust into the stream of ventilation so that as the coal dust is ventilated out the return entries, rockdust also is mixed in with the coal dust and ventilated back through the mine. There is some speculation on our part, although we don't know it, but there is some speculation that this rockdusting system was not working, but we don't know that.

THE COURT: At what place is the rockdust actually introduced? Is it introduced near the face area?

MR. WORKMAN: At the last open crosscut, Your Honor, where the last open crosscut is considered to be, the last row of crosscuts connected to the cross. So we are looking at the extreme right entry where the little line is, where the fan sits, normally down in that entry.

THE COURT: Perhaps you should identify that gentleman.

MR. STREET: The gentleman who just spoke was the inspector, David Workman.

THE COURT: Now, do you happen to know anything about the fan, this system, how this thing works?

MR. BURNS: Absolutely nothing.

THE COURT: Could you ask some of your people? I am just curious about what they know about where this fan, and where the rockdust is introduced.

MR. BURNS: This is Dick Turner, who is our chief safety inspector at the mine.

MR. TURNER: Your Honor, normally the normal procedure, the rockdust is introduced into the airstream. We have rubber tired exhaust fans that we use to ventilate the working face where the miner is extracting coal from. On these fans we have what we call a trickle duster. It is a separate piece of machinery that is mounted onto the back of the exhaust fan. We normally keep them full of rockdust, and on the bottom of each one of these, we have a plate that works back and forth on a cam or what have you, and as it works back and forth, it discharges a slow amount of rockdust that is picked up from the air exhaust from the exhaust fan. It, in turn, puts it into suspension in the air right at the discharge end of our exhaust fans and it, in turn, mixes with the coal float dust and is carried down the entry.

THE COURT: And where would that be located if you are looking at this M-1 that's been put in evidence? Can you tell us where it would be?

MR. TURNER: Normally it would be -- if we were mining on the right side going down that entry, it would be at the top right-hand part. If you will notice, there is one line of full blocks going straight across. It would be just outby the No. 6 entry down there so that the air would exhaust down our main returns.

THE COURT: Do you get enough rockdust from that procedure to solve normally your problem?

MR. TURNER: Yes, we do. It is one of the best ones that we have found. We just started using it approximately two years ago in our mines and they are doing one heck of a job for us.

THE COURT: Apparently where you have got a gas well, there are problems?

MR. TURNER: Well, Your Honor, in projecting around gas wells we are required to leave 100 feet from the gas well in all directions. In order to go around these wells we have to project our mine around these gas wells to maintain our ventilation.

THE COURT: What I am saying, though, apparently you have got some problem about whether it is being done adequately, where you do have something which cuts into the entry, isn't that true? Do you have any idea why the rockdusting just wasn't working well this day?

MR. TURNER: I have no idea why it shouldn't be working. Of course, that's our normal procedure that when we do go on a section, my men and myself, we always check ventilation, rockdusting before we go on the sections, and their orders are if they aren't working that we use other corrective measures to take care of it.

THE COURT: Well, it seems to me, gentlemen, that when you have got a problem of this kind with obstruction in an entry, that this system -- perhaps the Secretary, perhaps MSHA should require more often examinations of those returns so you don't have a problem like this developing this badly, if it happened in one day. If they didn't examine it for five days later, let's say, there would be a tremendous amount of float coal, apparently. In fact, I would assume it would be about as bad as you would ever find, if it kept on like this for, say, five days of this blocking up.

MR. TURNER: Your Honor, if I might add one other thing. I wasn't in the area when the citation or the order was written, but it is policy that the safety supervisor, whenever you have a 104(d)(2) order or any type of order that we visit that area before anything is done to it. One thing I can say about the area is that it was damp and wet in spots. You can take rockdust and even though it is white in color when it is dry, if you wet it or it is on a wet surface, without any coal float dust on top of it, it will turn a gray color.

So depending on the conditions, whether it is wet or dry will have a lot of bearing on the color of it.

THE COURT: True, excepting, of course, now as I understand it there were samples taken in this case, weren't there?

MR. STREET: Yes, sir.

THE COURT: Do you have any idea how those samples -- what they showed as to content?

MR. STREET: They showed, Your Honor -- the samples were taken for the purpose of demonstrating that there was float dust on top of rockdust, and they showed that the first sample was 95 percent incombustible material. The second sample showed as 87 percent incombustible material. So in one instance we had 5 percent combustible and the other 13 percent combustible, but they were taken to show that there was combustible material on top of rockdust.

THE COURT: What is the required percentage? What is the regulation? What does the regulation say?

MR. STREET: The regulation, which you are speaking of, Your Honor, talks -- I believe addresses itself to rockdust which has been mixed with float dust. In this instance, there was float dust on top of rockdust, but that's, what? 65 percent? It says 80 percent has to be incombustible in the return areas.

THE COURT: All right. So actually, your tests, though, did not give us then the combined figure? Is that what you are saying? That this test was only for the surface?

MR. STREET: Go ahead and explain how you took it.

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MR. WORKMAN: No, Your Honor. You want me to state my name.

THE COURT: You have already said what your name is. Your are Mr. Workman, right?

MR. WORKMAN: The samples were collected purely not to state that the rockdusting in the return was not adequate; the samples were collected to show that float coal dust was present on top of rockdust in the immediate return.

THE COURT: But not to claim that the percentages were --

MR. WORKMAN: -- inadequate.

THE COURT: Inadequate?

MR. WORKMAN: Right.

THE COURT: So now, of course, this regulation which is [30 C.F.R. 75.403] talks about the combined -- the incombustible content of the combined coal dust, rockdust and other dust shall be not less than 65, or 80 percent in the return. Now, did you have a test of combined coal dust, rockdust and other dust?

MR. WORKMAN: Yes, sir.

THE COURT: And it actually didn't show that it was less than 80 percent incombustible, did it?

MR. WORKMAN: No, sir.

THE COURT: So that regulation certainly wasn't violated?

MR. WORKMAN: No, that regulation wasn't cited.

THE COURT: I understand that. And I think that's pretty significant in this situation. Now, the only thing that I do want to say about this is that I think that MSHA has a responsibility to look at situations like this and determine whether, in fact -- I am not saying, because I don't honestly know all the facts, because we haven't taken all the testimony here, but if, in fact, this kind of problem of a gas well creates a problem so that the rockdusting system is not really doing the job properly, and I am not saying it wasn't, I just don't know, but assume for the sake of argument that it is not doing it properly, and that this violation just occurred inside of

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one day, I think that the Secretary of Labor has a duty to see if under those circumstances more [frequent] examinations should be required instead of just once a week.

I think, Mr. Street, you have got an obligation to go back to MSHA and mention this.

MR. STREET: Yes, sir.

THE COURT: Because if it really was a concentration as it appeared on the citation, it should not be permitted to go unnoticed that long. Now, in view of all the facts that have been set forth here at this point, and particularly this one about the samples, and I won't just base it upon that, but on the entire picture here, particularly also the statements which have been made about the pre-shift inspector's knowledge the day before, I will approve the settlement of \$750 in this case.

MR. STREET: Thank you, Your Honor.

MR. BURNS: Thank you, Your Honor.

(Transcript of September 18, 1980, proceedings, pgs. 6-22).

The oral determination made during the hearing on September 18, 1980, approving the proposed \$750 settlement in Docket No. WEVA 80-26 will be affirmed.

On October 1, 1980, Consol filed a motion to withdraw in Docket No. WEVA 79-115-R stating as follows:

COMES NOW, the Applicant, Consolidation Coal Company, and moves the Court to permit it to withdraw its Notice of Contest heretofore filed herein pursuant to 29 C.F.R. 2700.11.

WHEREFORE, Applicant prays that its Motion be granted and that its Notice of Contest be withdrawn and this case be dismissed.

The motion will be granted.

ORDER

IT IS ORDERED that the determination of September 18, 1980, approving the proposed settlement of \$750 in Docket No. WEVA 80-26 be, and hereby is, AFFIRMED.

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IT IS FURTHER ORDERED that Consol pay a civil penalty in the agreed-upon amount of \$750 within 30 days of the date of this decision.

IT IS FURTHER ORDERED that Consol's motion to withdraw in Docket No. WEVA 79-115-R be, and hereby is, GRANTED, and that such application for review proceeding be, and hereby is, DISMISSED.

John F. Cook
Administrative Law Judge