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

CONSOLIDATION COAL COMPANY,  
CONTESTANT

Contest of Order

Docket No. WEVA 80-13-R

v.

Order No. 808268

September 5, 1979

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

Blacksville No. 1 Mine

DECISION

Appearances: Samuel Skeen, Esq., Pittsburgh, Pennsylvania,  
for Contestant Eddie Jenkins, Esq., Office of  
the Solicitor, U.S. Department of Labor,  
Arlington, Virginia, for Respondent

Before: Judge Edwin S. Bernstein

STATEMENT OF THE CASE

This is a proceeding for review of an order issued under  
Section 104(b) of the Federal Mine Safety and Health Act of 1977  
(the Act) on September 5, 1979, for an alleged failure to abate a  
citation.

The case was heard on the merits in Pittsburgh,  
Pennsylvania, on February 22 and 27, 1980. Following the  
hearing, the parties submitted briefs.

APPLICABLE STATUTE

Section 104 of the Act reads in applicable part:

(a) If, upon inspection or investigation, the Secretary  
\* \* \* believes that an operator \* \* \* has violated  
this Act,

or any mandatory health or safety standard, rule, order, or regulation \* \* \* he shall \* \* \* issue a citation to the operator. \* \* \*. [T]he 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shall \* \* \* promptly issue an order requiring the operator \* \* \* to immediately cause all persons \* \* \* to be withdrawn from, and to be prohibited from entering, such area \* \* \*.

#### FINDINGS OF FACT

The parties stipulated and I find:

1. Consolidation Coal Company (Consol) is the owner and operator of the Blacksville No. 1 Mine.
2. Consol and the Blacksville No. 1 Mine are subject to the provisions of the Federal Mine Safety and Health Act of 1977 and I have jurisdiction over this proceeding.
3. Mr. Ellis Mitchell, the inspector who issued the subject citation and order, was a duly authorized representative of the Secretary of Labor.
4. Copies of the citation and order are authentic copies and were properly served.

On August 30, 1979, Ellis Mitchell, an MSHA inspector, accompanied by Jim Bowman, a safety representative of the United Mine Workers of America, and Robert Gross, a Consol escort, inspected the 2 West 036 section of the

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Blacksville No. 1 Mine. Mr. Mitchell found that the roof in an area approximately 50 feet long was unsupported. The area consisted of a segment of an entry, or passageway, (FOOTNOTE 1) approximately 46 by 14-1/2 feet, which had been mined by a borer miner, and an adjacent area in an intersection which was approximately five feet long and of irregular width. The intersection area had been mined first by a borer miner and then rounded off on its corners by a ripper miner (sometimes known as a Heliminer). The intersection itself was a four-way intersection, approximately 6-1/2 to seven feet in height, and was heavily traveled. At one entry to the intersection was a power center and at another was an intake escapeway. The entry in question was little traveled and was about four to 4-1/2 feet in height. Both the intersection and the entry had been developed in 1970, although the area was still in an "advance" stage of mining. On August 30, 1979, there were no posts, roof bolts or other roof supports in the 50-foot area described above. All witnesses agreed that on that date there was some cracking in the roof, some falling coal, and lengths of coiled cables in the entry.

Mr. Mitchell issued Citation No. 808265 on August 30, 1979, for an alleged violation of 30 C.F.R. 75.200. The citation read:

In the 2 West, 036 section currently in the construction stages and idle this shift the roof in the old borer entry was not supported for a distance of about 50 feet, coal roof was cracked and spalled entire distance, beginning just to the right of the power center. The trailing cable to the auxiliary fan was placed in this unsupported area by miners who traveled under this roof.

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Mr. Mitchell directed that the condition be abated by 1300 hours that day. He served the citation at 1019 hours. Mr. Mitchell testified that he found the roof to be sagged down, deteriorated with fallen coal and cracked. He stated that he did not sound the roof because he felt that a visual inspection was sufficient. He also noted that all of the roof's rock dust had fallen. He testified that the existence of a cable in the entry indicated that men had been in the area recently. As was his practice, before fixing an abatement time, he discussed the matter with officials of the operator. Although the manner of abatement was not discussed, Mitchell testified that he assumed that the operator would abate either by installing posts or installing a barricade at each end of the area, and that he would have accepted either method.

Mr. Bowman confirmed Mr. Mitchell's testimony about the August 30 inspection. He indicated that neither he nor Mr. Mitchell entered the area in question, but that they inspected from each end by use of the spot lights on their hats. He confirmed that the floor was hooved(FOOTNOTE 2) and that the entry was not a heavily traveled route.

Mr. Gross disagreed that the roof was hazardous when he observed it with Mr. Mitchell on August 30, 1979. He acknowledged that the roof had deteriorated a little, that there was spalling, and that there were some cracks, but he concluded that this was normal for a ten-year-old entry, and that the

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roof was safe. He stated that most of the cracks were small pressure cracks and that only large cracks are dangerous. He testified that a roof crack one-quarter inch thick and three or four feet long would not alarm him. He stated that he did not discuss the method of abatement with Mr. Mitchell, although he told Mr. Mitchell that bolts could not be installed because the height was too low in the entry to accommodate a roof-bolting machine.

Mr. Gross expected that the citation would be abated by barricading both ends of the area and he was surprised to find a barricade at one end only when he returned on August 31, 1979. He then told the section foreman to barricade the other end also. This was not done.

Mr. Mitchell did not return to the area until 1725 hours on September 5, 1979. At that time, he was accompanied by Richard Green, a union representative, and James Turner, a Consol inspector-escort. They found that at the intersection side of the entry, two posts had been installed between the floor and the roof and a board had been wired between them with a warning written in yellow chalk. The warning sign faced the intersection. There was no such barrier or sign at the other end of the area. No other roof supports had been installed. The cable had been removed from the area, however, and near the other intersection at the back entrance of the area, the men found recently deposited human feces.

Mr. Mitchell was outraged that after six days only one barricade at one end had been installed. He testified that the two posts and sign would not prevent entrance into the area from that side. He believed that the human feces at the back entrance indicated that miners had been in the area

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recently. Although initially he would have accepted the installation of a barricade at each end as abatement, upon reinspection on September 5, he refused to allow this method of abatement.

Mr. Mitchell issued a Section 104(b) order which read:

In the 2 West, 036 section only two posts had been set near the power center in the intersection with a danger board hung between them. The other end of the unsupported loose roof was not endangered off or barricaded to prevent travel in this direction. Evidence of travel in the entry just inby this area was observed and miners could travel through under unsupported roof.

After Consol installed 19 additional posts in the area, Mr. Mitchell terminated the withdrawal order at 2132 hours on September 5, 1979.

Mr. Green confirmed Mr. Mitchell's testimony that on September 5, 1979, when they visited the area together, they found loose coal and cracks on the roof in the area, human feces in the area and a barricade at only one end.

Mr. Turner testified that Mr. Mitchell had become angry about another violation en route to the area on September 5, 1979. He testified that when they arrived at the area, Mr. Mitchell stated "[t]hey still haven't set any God damn posts." Mr. Mitchell denied making that statement. According to Mr. Turner, Mr. Mitchell sounded the roof and said "[t]his is a bad top." Mr. Turner stated that six months earlier, when the entry had been an air passageway, he had walked the area weekly and had no concern about the roof. He stated that had Mr. Mitchell allowed the installation of a second barricade, this could have been done by three or four men in 45 minutes. The installation of the 19 posts took five men about four hours.

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Charles Bane, Consol's assistant superintendent, also visited the area on September 5, 1979, following Mr. Mitchell's inspection at 1725 hours. He confirmed that Mitchell was upset and refused to allow the construction of a second barricade. Bane acknowledged that there was some deterioration and spalling in connection with the roof in the area, but he denied that the roof was unsafe.

At the hearing, Consol moved to dismiss the citation and also moved to dismiss the withdrawal order. I reserved decisions on both motions.

I. Was the Citation Proper?

I find that Citation No. 808265 was properly issued because on August 30, 1979, Consol violated its roof-control plan in the 2 West 036 section as alleged.

Paragraph 2(c) at page 16 of that plan (Revised Plan No. 3, dated February 5, 1969), reads: "Where slips or clay veins are encountered, where the shale roof is exposed, or whenever hazardous roof is encountered during advance and persons must pass thereunder, the areas shall be bolted immediately or otherwise made safe."

It is undisputed that the area was in an advance stage of mining. It is also undisputed that on August 30, 1979, when Mr. Mitchell made his inspection, lengths of coiled cables were found in the entry. This indicates that persons had been in the entry recently and supports the conclusion that, although this entry was not heavily traveled, persons were required to pass under the unsupported roof.



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I also find that a hazardous roof existed in the 2 West 036 section during Mr. Mitchell's August 30, 1979, inspection. Mr. Mitchell testified that he found cracking and spalling in the roof; that all of the roof's rock dust had fallen in the area; and that, although the roof was hooved, the roof generally was sagged down and in a deteriorated condition. Mr. Bowman also stated that the roof was not good. He testified:

The top had some head coal where it was flaked off, and there also were cracks within this head coal that was still remaining there. It was just a bad situation there as far as my experience in the mine. If people are going to be there, it should have had some additional support.

Mr. Gross disagreed that the roof was in poor condition, although he admitted that the roof had deteriorated.

I find the testimony of Mr. Mitchell and Mr. Bowman to be more persuasive, and I conclude that on August 30, 1979, when Mr. Mitchell made his inspection, the roof in the 2 West 036 section was in a hazardous and unsafe condition.

At that time, Consol was also in violation of the requirements of page 5 of its roof-control plan. There, the plan stated that before an intersection is started a row of roof bolts must be installed (bolts "A" on a diagram) and after the crosscut is driven, an additional line of bolts perpendicular to the "A" row of bolts (bolts "B" on the diagram) "should be installed as soon as is practicable after machine has created intersection." A textual comment in paragraph 2(a) on page 16 of the plan adds: "All four-way intersections shall be bolted as soon as is practicable; bolts 'A' as shown on the sketches

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pages 5 and 6, should be installed prior to the creation of the intersection and the remaining "B" bolts installed as soon as is practicable thereafter." According to the diagram on page 5, at least one bolt of each line must extend in each direction past the intersection and into the adjacent entries or crosscuts. In failing to place bolts at 4.5-foot intervals past the intersection and into the entry, Consol again violated the requirements of its roof-control plan.

I do not agree with Consol that because the citation described the area as "the old borer entry," it precludes a finding that a violation also existed in the intersection. In my view, the term "entry" is broad enough to cover a distance approximately four feet into the intersection. Mr. Mitchell testified that the word "entry" can refer to an area extending into the intersection, and I accept that less restrictive meaning of the term. Furthermore, I believe that Consol had sufficient notice of the area referred to in the citation.(FOOTNOTE 3)

## II. Was the Withdrawal Order Proper?

Section 104(b) of the Act provides that if, upon a follow-up inspection, the Secretary's representative finds (1) that a violation described in a citation has not been totally abated within the period of time originally

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fixed or as subsequently extended, and (2) that the period of time for abatement should not be further extended, he shall promptly issue a withdrawal order with respect to the area covered by the citation. In the light of this statutory mandate, I find that the withdrawal order issued by Inspector Mitchell on September 5, 1979, was proper.

The time specified for abatement of the citation was two hours and 41 minutes. In fact, the Secretary's inspector did not return to reinspect until six days later, on September 5, 1979. At that time, the violation was still not abated, and no extension of time had been requested. Abatement would consist of bringing conditions in the affected area into compliance with Consol's roof-control plan. As indicated above, there were two violations. There was a violation of Section 2(c) at page 16 of the plan in the entry, and there was a violation of page 5 of the plan (elaborated upon in Section 2(a) at page 16) in the intersection. By installing a barricade between the entry and the intersection, Consol partially complied with page 5 of the plan in that it added some support to the roof, i.e., the two weight-bearing posts on which the barricade sign was hung. However, in failing to install additional roof bolts as required and described on page 5, it failed to comply with the plan.

With respect to the violation at Section 2(c) on page 16 of the plan, there also was partial but insufficient compliance. That portion of the plan required the areas described to "be bolted immediately or otherwise made safe." Although no bolting was done, a barricade was erected at one side of the entry. Inspector Mitchell stated that he would have accepted

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barricades at both ends of the entry as abatement of the citation. This barricading would have prevented people from entering the unsupported area. As indicated by the human feces near the unbarricaded end of the entry, people traveled in that area. MSHA contended that in barricading only one end, Consol failed to abate the citation. I agree.

Finally, I find that the period of abatement should not have been extended. The testimony indicated that two barricades could have been erected in less than two hours. The actual abatement, which consisted of installing 19 roof bolts, was performed by five men in about four hours. Consol had been afforded six days to abate the violation. Clearly, that time was sufficient and no reason was given for extending it. In fact, such an extension would hardly be justifiable in view of the uncorrected dangerous condition.

III. Was it Unreasonable for Inspector Mitchell to Refuse to Allow Abatement by Barricading on September 5, 1979?

Although it does not affect the validity of the withdrawal order, I believe that Inspector Mitchell acted unreasonably in not allowing Consol to abate the citation by barricading the entry on September 5, 1979. The inspector stated that he would have accepted such abatement prior to that time, and I do not think he should have restricted Consol's options on that date. These actions by the inspector were a manifestation of his anger at Consol's delay in correcting the roof condition. His actions took on a punitive aspect, as he was apparently attempting to punish Consol by making abatement more difficult. I can understand his exasperation, but I also believe he misconstrued the nature of a withdrawal order.

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Orders issued under Section 104(b) are intended to motivate an operator to abate a violation. By refusing to allow an operator access to that portion of his mine which is affected by a citation, the operator is given an added incentive to correct the condition. The order is not intended to punish the operator. The Act provides for civil penalties which may be assessed against operators who refuse to abate violations, but this is done in a separate proceeding. As indicated by Section 110(i) of the Act, one factor which may be taken into account in assessing such a penalty is the good faith exhibited by the operator in abating the violation. Inspector Mitchell's decision to insist upon a particular method of abatement at such a late date constituted a misuse of his authority to issue withdrawal orders. Admittedly, Consol could have proceeded to erect the second barrier and taken its chances on the inspector's resolve. However, as a practical matter, an operator runs the risk of having its operation closed down by attempting such challenges at the mine, rather than later in a proceeding provided for by the Act.

In conclusion, while I do not condone the inspector's misuse of his authority, I find that upon consideration of the facts of record and the criteria set forth in the Act, the withdrawal order was properly issued and I affirm both the citation and the withdrawal order.

Edwin S. Bernstein  
Administrative Law Judge

~FOOTNOTE 1

Mr. Mitchell testified that this area could be described either as an entry or a crosscut depending upon the direction in which mining was proceeding. I will refer to it as an entry for the sake of clarity.

~FOOTNOTE 2

"Hooving" is a condition in which the floor buckles or becomes raised in the center. This results from pressure transmitted from a roof to walls and through the floor. Mr. Bowman stated that this is normally a sign of good roof, since it shows that the roof pressure is being dissipated. However, he added that this is not always the case.

~FOOTNOTE 3

As the Commission stated in Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Jim Walter Resources, Inc., and Cowin and Company, Docket Nos. BARB 77-266-P and BARB 77X465-P, 1 FMSHRC Decs. No. 8 at 1827 (1979), a notice which is insufficiently specific may not be invalid if it allows the operator "to identify and thereby abate the allegedly violative condition."