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

CONSOLIDATION COAL COMPANY, APPLICANT	Contest of Citation and Order
v.	Docket No. PENN 80-254-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Citation No. 840658 May 8, 1980
AND	Docket No. PENN 80-255-R
UNITED MINE WORKERS OF AMERICA (UMWA), REPRESENTATIVES OF MINERS	Order No. 840659 May 9, 1980
	Renton Mine

DECISION

Appearances: William H. Dickey, Jr., Esq., Pittsburgh, Pennsylvania, for Applicant James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent

Before: Administrative Law Judge Melick

These cases are before me upon the application by Consolidation Coal Company (Consolidation) under section 105(d) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 801 et seq., hereinafter the "Act") to contest a citation and subsequent order of withdrawal issued by the Mine Safety and Health Administration (MSHA). At hearing held in Pittsburgh, Pennsylvania, on August 19, 1980, MSHA amended its pleadings in Docket No. PENN 8-254-R changing the citation therein from one issued under section 104(d)(1) of the Act to a citation under section 104(a) of the Act.(FOOTNOTE 1) Consolidation thereupon moved to withdraw its notice of contest of the amended citation which I approved at hearing and now affirm. The contest in Docket No. PENN 80-254-R is therefore dismissed with prejudice. The violation of 30 C.F.R. 75.400 (relating to accumulations of combustible materials) is thus proven as charged in Citation No. 840658. Consolidation also concedes in this case that the violation was not totally abated before the section 104(b) withdrawal order

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based on that citation was issued on May 9, 1980, but contends that under the circumstances of this case the time allowed for abatement should have been extended.

Section 104 of the Act provides in relevant part as follows:

(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 * * *. The 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. * * *.

Consolidation acknowledges that when the citation was issued, at 10 a.m. on May 8, 1980, accumulations of loose coal and float coal dust did in fact exist in the active workings of the No. 16 south section of the Renton Mine over approximately 750 feet of haulageways, and around and beneath the feeder and tailpiece of the conveyor belt. MSHA inspector Anthony Russo in consultation with a mine foreman set abatement to be completed by 8 a.m. on May 9, 1980. At 11 a.m. on May 8, all production on the affected section ceased and the abatement process commenced. The process continued utilizing 14 man-shifts, a continuous miner and a shuttle car over two shifts. Consolidation cleaned up not only the 750 feet of tram road cited, but also other tram roads totaling 1,150 feet.

When Inspector Russo returned to the section on May 9, 1980, around 8:20 or 8:25 in the morning he was satisfied with the results of the cleanup except for what he described as an accumulation about 20 inches high, 4 feet wide and 18 feet long remaining beneath the feeder. According to Russo, there was 3 inches of water at the bottom leaving about 16 inches of loose, dry coal exposed. Russo concluded that it was a hazard in light of its close proximity to electrical equipment. He estimated it would have taken at most an hour to clean this up.

Russo said that the Renton Mine safety supervisor, John Mlakar, could not explain why the remaining accumulation had not been cleaned up but Mlakar conceded that it should have been. According to Russo, Mlakar refused to clean up the pile before the other company safety people arrived. Concluding that he had no choice in light of Mlakar's conditional refusal, Russo thereupon said he would issue an order. The company safety

people arrived at the scene 10 to 15 minutes later. They agreed to clean up the subject pile and actually

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began the cleanup process but Russo nevertheless wrote up a withdrawal order. He terminated the order an hour and 15 minutes later.

Mlakar said that he was told by mine foreman John Dickens at 6:50 on the morning of May 9 that the accumulations were all cleaned up. According to Mlakar, Russo was satisfied with the cleanup except for the area beneath the crusher-feeder. Mlakar claims that he immediately sent orders for a work crew with shovels to clean it up. He was not sure that Russo heard him make this request but was confident that he made the request before Russo said he was going to issue the order.

Representative of miners, Louis Hilton, accompanied Inspector Russo that morning. According to Hilton, Mlakar was arguing with Russo that the area beneath the feeder had in fact been cleaned up and needed no further work. Hilton thought the remaining accumulation was not significant and when asked his opinion told Russo that the company should be allowed an extension. Even after Russo said he was going to issue an order, he continued to confer with the company safety people, including Allen Lander, and asked Hilton whether he thought an order should be issued. By the time Russo had decided to write up the order, the work crew had begun the cleanup process disposing of the 2 or 3 bushels of coal in only 10 or 15 minutes.

When Allen Lander, in charge of safety at the Renton Mine, arrived at the feeder, an order had not yet been prepared. He tried to convince Russo not to issue an order. According to Lander, the cleanup had already begun when the order was issued. The actual cleanup consisted of removing 1 or 2 bushels of "wet slop."

When an inspector finds that an operator has failed to abate a violation within the time originally fixed, he abuses his enforcement discretion by issuing a withdrawal order if, under the circumstances, the time for abatement should be further extended. Old Ben Coal Company, 6 IBMA 294 (1976). The overriding factor in reviewing the reasonableness of an inspector's refusal to extend the time for abatement is the degree of danger that any such extension would cause to miners. Consolidation Coal Company, BARB 76-143 (1976). In this case the evidence shows that, at worst, according to Inspector Russo, it would have taken no longer than 1 hour to clean up the remaining accumulation. Since production in the affected section had not resumed and since only the cleanup crew would in any event have been closely exposed to the hazard presented, no increase in the hazard would have resulted from the requested extension. In addition, the potential hazard was limited by the fact that much of the accumulation consisted of wet coal lying in 3 to 5 inches of water. Under these circumstances, the danger in permitting, at most, a 1-hour extension of the order would have been minimal. Moreover, the evidence indicating that the cleanup actually took only 10 to 15 minutes and that the "accumulation" consisted of only 2 or 3 bushels of "wet slop" suggests that indeed there may have been virtually no hazard at all.

A second factor to consider in reviewing the reasonableness of the inspector's refusal to extend the time for abatement is the disruptive effect it would have upon operating shifts. Consolidation Coal Company, supra.

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There is little evidence in this case of what disruptive effect the issuance of the order had on the operating shifts other than the fact that the order was terminated 1-1/4 hours after it had been issued.

A final factor to be considered is the diligence of the operator in meeting the time fixed for abatement. Consolidation Coal Company, *supra*. In this case, Consolidation clearly made extraordinary good faith efforts to accomplish the cleanup process within the time initially set for abatement. Men were immediately assigned to the cleanup task which continued through two workshifts. Fourteen man-shifts, a continuous miner and shuttle car were used to accomplish the task. Indeed, Inspector Russo even complimented Consolidation in this regard. Moreover, not only did Consolidation clean up the 750 feet of haul road initially cited but it also cleaned up an additional 400 feet of road not cited. The "accumulation" that remained was minute by comparison with the areas cleaned up and was obscured by its location between the tracks of the feeder. Moreover, once the condition was brought to the attention of Consolidation officials they made good faith diligent efforts to clean it up. Under all the circumstances, I conclude that the inspector here acted unreasonably in not extending the time for abatement. (FOOTNOTE 2) I therefore find that Order of Withdrawal No. 840659 was not properly issued and the order is therefore VACATED.

Gary Melick
Administrative Law Judge

~FOOTNOTE ONE

1 The effect of this amendment was to delete the special "unwarrantable failure" finding that is made in conjunction with a section 104(d)(1) citation. For the ramification of this amendment, see section 104(d) of the Act.

~FOOTNOTE TWO

2 In reaching this conclusion, I have necessarily found on the facts of this case that Inspector Russo did not actually issue the withdrawal order until he committed it to writing. Although he apparently stated at an earlier time that he was going to issue the order, it is apparent from the testimony of Allen Lander and of Miners' Representative Hilton that no final decision had been reached until after all the evidence that I have considered in my decision herein was available to Inspector Russo. Since the reasonableness of the inspector's actions in issuing such an order under section 104(b) of the Act must be determined on the basis of the facts confronting him at the time he issues the order, *United States Steel Corp.*, 7 IBMA 109 (1976); *Old Ben Coal Company*, *supra*, the result in this case may have been different had I found that Russo actually issued the order when he first contemplated doing so.