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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 Orders and Citation
v.	Docket Nos. WEVA 80-116-R WEVA 80-117-R WEVA 80-118-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Shoemaker Mine

DECISION

Appearances: Anthony J. Polito, Esq., Rose, Schmidt, Dixon, Hasley, Whyte & Hardesty, Pittsburgh, Pennsylvania, for Contestant, Consolidation Coal Co. David E. Street, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent, Secretary of Labor

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

On November 26, 1979, Consolidation Coal Company (hereinafter Consol) filed these three actions to contest the validity of two orders of withdrawal pursuant to section 104(b) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 814(b) (hereinafter the Act) for failure to abate citations and the validity of a citation issued under section 104(d)(1) of the Act, 30 U.S.C. 814(d)(1). Consol's motion to consolidate the three proceedings was granted.

Upon completion of the prehearing requirements, a hearing was held in Pittsburgh, Pennsylvania, on April 22-24, 1980. The following witnesses testified on behalf of Consol: Peter J. Dominick, Bill Zamski, Willard E. Behrens, Jr., Matthew Matkovich, Bill Newman, Ronald G. Stovash, Charles Causey, and Thomas W. Duffy. The following witnesses testified on behalf of the Secretary of Labor, Mine Health and Safety Administration (hereinafter MSHA): Michael Blevins, Dennis Pickens, Charlie Pyle, Charles Coffield, Howard Dabrowsky, and Charles A. Pettit. Consol and MSHA submitted posthearing briefs.

ISSUES

Whether the orders and citation were properly issued.

APPLICABLE LAW

Section 104(b) of the Act, 30 U.S.C. 814(b) provides as follows:

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) 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 determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

Section 104(d)(1) of the Act, 30 U.S.C. 814(d)(1), provides in pertinent part as follows:

If, upon inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act.

STIPULATIONS

The parties stipulated the following:

1. Shoemaker Mine is owned and operated by Consol.
2. Consol's operations at Shoemaker Mine are covered by the Act.
3. The presiding administrative law judge has jurisdiction to hear the case.
4. The following citations and orders issued under the Act were properly served by a duly authorized representative of the Secretary of Labor upon an agent of Consol at the dates, times and places stated therein: Citation No. 0808594; Order of Withdrawal No. 0808596; Citation No. 0808599; and Order of Withdrawal No. 0808606.

FINDINGS OF FACT

I find that the evidence of record establishes the following facts:

1. Shoemaker Mine is owned and operated by Consol.

2. Inspector Charles Coffield, who issued the citations and orders in controversy, was a duly authorized representative of the Secretary of Labor at all times pertinent herein.

3. On October 26, 1979, Inspector Coffield performed a regular inspection of the Shoemaker Mine and, at 6:15 p.m., issued Citation No. 0808594 under section 104(a) of the Act for a violation of the operator's approved roof control plan in the 4 right, 5 north section of the mine in that approximately 150 roof bolts were spaced from 4 feet 7 inches to 6 feet 2 inches apart whereas the approved roof control plan required that roof bolts be spaced 4 feet 6 inches apart. Consol does not challenge the validity of this citation. Consol's section foreman, Charles Causey, testified that he assumed that the roof control plan in this section called for the spacing of roof bolts at 5 foot intervals like the rest of the mine when, in fact, the approved roof control plan required the spacing of roof bolts at 4 feet 6 inch intervals in this section.

4. At all times and places relevant herein, the condition of the roof was good in that there was no evidence of recent falls of supported roof and no evidence of cracks, splits, or loose bolts. At all times and places relevant herein, there was only minimal sloughage of the ribs.

5. The existence of wide spaced roof bolts, in contravention of the approved roof control plan, increased the hazard of roof falls.

6. Upon issuing this citation, Inspector Coffield met with with Consol's general superintendent, Ronald Stovash, and told him that there was also a problem with improperly spaced roof bolts in the track supply area of this section even though that area was not included in the citation.

7. Citation No. 0808594, issued on Friday, October 26, 1979, at 6:15 p.m., set a termination due date of Monday, October 29, 1979, at 8:00 a.m. Consol's escort, Peter J. Dominick, was unable to give Inspector Coffield a specific estimate of the amount of time necessary for abatement but rather requested "as much as you can give me." Inspector Coffield believed that the condition cited could be abated during two working shifts.

8. On October 26, 1979, after being served with the citation, Consol management voluntarily closed the 4 right, 5 north section to evaluate and correct the cited condition. No coal was produced on this section after the citation was issued. Consol management determined that part of the area cited required resin roof bolts and the remainder required mechanical roof bolts. Although a mechanical roof bolting crew was on the section

at the time the citation was issued, there were no resin roof
bolt supplies. Consol

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management ordered the mechanical roof bolting crew out of the section because it determined that the resin roof bolts should be installed first, but Consol offered no explanation or justification for this action.

9. Roof bolters were working at Shoemaker Mine on Saturday, October 27, and were instructed to begin abatement of this citation upon completion of their other work. The roof bolters did not complete their other work and did not perform any abatement work of the citation in issue on Saturday, October 27, 1979.

10. Consol management could have called in additional roof bolters to abate the citation on Saturday, October 27, or Sunday, October 28, but elected not to do so because management determined that the citation could be abated during the midnight to 8:00 a.m. shift on Monday, October 29.

11. Consol management believed that if it voluntarily closed the section, the time for abatement of the citation would be extended by Inspector Coffield on Monday, October 29, 1979.

12. Inspector Coffield returned to the Shoemaker Mine on Monday, October 29, 1979, and found that only 15 roof bolts had been installed to abate the cited violation when more than 100 roof bolts were required to totally abate the cited violation.

13. Consol management did not inform Inspector Coffield of any alleged problems with supplies or equipment prior to the issuance of the section 104(b) order on Monday, October 29, 1979.

14. On Monday, October 29, 1979, Inspector Coffield rejected Consol's request for an extension of time within which to abate the citation issued on Friday, October 26, 1979, and, instead, issued Order of Withdrawl No. 0808596 under section 104(b) of the Act for failure to abate the citation because little work had been performed to abate the violation during the six shifts after the citation was issued.

15. On Tuesday, October 30, 1979, Inspector Coffield returned to the mine to continue his regular inspection. He again went to the 4 right, 5 north section and issued Citation No. 0808599 under section 104(d)(1) of the Act for an area which was not included in his prior citation or order. The citation alleged that there were approximately 350 locations where roof bolts were spaced between 4 feet 7 inches and 7 feet 6 inches in rooms 31, 32, and 33 and for a distance of approximately 1,500 feet along the supply track.

16. Citation No. 0808599 issued on Tuesday, October 30, 1979, at 11:55 a.m., set a termination due date of Friday, November 2, 1979, at 8:00 a.m.

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17. Consol knew or should have known of the violation cited on October 30, 1979, because the supply track was in an area which had been subjected to preshift examinations for more than 6 months, and Inspector Coffield advised Consol management on October 26, 1979, that there appeared to be a problem of wide spaced roof bolts in this area but Consol had taken no action to correct this condition by October 30, 1979.

18. All persons who walked under the wide spaced roof bolts were exposed to the danger of a roof fall.

19. Inspector Coffield did not return to the mine on Friday, November 2, 1979, but did return on Monday, November 5, 1979.

20. On Monday, November 5, 1979, Inspector Coffield returned to the area in question to determine whether the violation cited on October 30, 1979, had been abated. At that time, more than 400 roof bolts had been installed to abate the condition but the violation was not totally abated.

21. On November 5, 1979, at 9:45 a.m., Inspector Coffield refused to extend the time for termination of Citation No. 0808599 and thereupon issued Order of Withdrawal No. 0808606 under section 104(b) of the Act for failure to abate the citation.

22. Order No. 0808596 issued on October 29, 1979, was terminated on November 2, 1979.

23. Order No. 0808606 issued on November 5, 1979, was terminated on December 14, 1979.

DISCUSSION

Background

This controversy arises out of the fact that Consol management at the Shoemaker mine failed to follow its approved roof control plan pursuant to 30 C.F.R. 75.200. The approved plan for the 4 right, 5 north section required that roof bolts be installed at 4 feet 6 inch intervals. The roof control plan for most of the mine required roof bolts to be installed at 5 foot intervals. Consol does not challenge Inspector Coffield's initial citation issued on October 26, 1979, under section 104(a) of the Act for violation of the approved roof control plan. However, Consol challenges the inspector's decision to refuse an extension of time for abatement and the issuance of a section 104(b) order on October 29, 1979. It also challenges his citation issued on October 30, 1979, under section 104(d)(1) of the Act for the same violation in a different area of the same working section of the mine, his subsequent refusal on November 5, 1979, to extend the time for abatement of this citation, and his issuance of another order of withdrawal on October 5, 1979, for failure to abate the citation under section 104(b) of the Act.

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During the hearing, Consol challenged the credibility and impartiality of Inspector Coffield by adducing testimony concerning disciplinary action taken against the inspector by his supervisor. It was alleged that this disciplinary action resulted from the inspector's refusal to return to the Shoemaker Mine in December, 1979, to terminate an order. Inspector Coffield was interrogated extensively concerning this matter and the effect, if any, which it had upon his testimony at the hearing. Since the incident in question arose after all of the citations and orders in controversy here were issued, I find that this allegation is irrelevant to the action taken by the inspector in this case. I find no reason to question the inspector's credibility as a witness at the hearing. I also note that Consol has not addressed this matter in its brief.

Order No. 0808596

On October 26, 1979, at 6:15 p.m., Inspector Coffield issued Citation No. 0808594 to Consol for a violation of its approved roof control plan in that roof bolts in an area of the 4 right, 5 north section were spread farther apart than the 4 feet 6 inches required under the plan. This citation was issued under section 104(a) of the Act and Consol does not challenge the validity of this citation. The citation required that the 150 wide spaced roof bolts be corrected by 8:00 a.m., on Monday, October 29, 1979. Although Consol now contends that the inspector did not provide a reasonable period of time for abatement of the violation, it did not claim that it could not correct the violation within the period of time allotted when the citation was issued.

The evidence established the facts as follows: (1) Although Consol had a mechanical roof bolting crew in the section which could have commenced abatement of the citation immediately after it was issued, Consol management ordered that crew out of the section because it wanted to install resin roof bolts before installing mechanical roof bolts; (2) Consol management could have called roof bolters to work during the intervening Saturday and Sunday but decided not to do so because it determined that the entire violation could be abated during the midnight to 8:00 a.m. shift on Monday, October 29, 1979; (3) roof bolters assigned to other duties in the mine on Saturday, October 27, 1979, were told to commence abatement work on this citation after they completed their other duties but did not complete those duties in time to perform any abatement work; (4) only 15 roof bolts were installed during the midnight to 8:00 a.m. shift; and (5) although Consol alleged supply and mechanical problems during the midnight to 8:00 a.m. shift, it did not assert these problems to Inspector Coffield at the time it requested an extension of time to complete abatement.

The sum and substance of this matter is that Consol management made a calculated decision that the cited violation could be totally abated during the shift immediately preceding the termination time and, in the event of failure to totally abate, assumed that if it voluntarily closed the section, the

inspector would extend the period of time for abatement. Consol
failed

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to establish that supply and mechanical problems prevented its timely abatement because it presented only hearsay evidence of such purported problems without documentation. Moreover, I find that Consol did not assert supply or mechanical problems as bases for its request for an extension of time on October 29, 1979. When Inspector Coffield returned to the mine at about 8:00 a.m., on October 29, he was confronted with the fact that only 15 roof bolts had been installed to correct 150 wide spaced bolts and that abatement work had only been performed during one shift after issuance of the citation.

I find that Inspector Coffield correctly concluded that Consol failed to exercise good faith to achieve timely abatement of the citation and failed to establish a valid reason for an extension of time. While the condition of the roof did not constitute an imminent danger to miners, the evidence established that the existence of wide space roof bolts herein increased the hazard of roof falls. The fact that Consol voluntarily closed the section after the citation was issued is entitled to little weight. To hold otherwise would sanction the tactic of voluntary closure of cited areas to indefinitely postpone abatement of safety and health violations. Such a course of conduct would be contrary to the intent of Congress when it enacted section 104(b). In this regard, the Senate Committee on Human Resources stated as follows:

The Committee believe that rapid abatement of violations is essential for the protection of miners. A violation of a standard which continues unabated constitutes a potential threat to the health and safety of miners. Therefore, if the violation is not eliminated by abatement in the specified period of time the miners should be withdrawn from the area affected by the violation until the violation is abated.

S. Rpt. No. 95-181, 95th Cong., 1st Sess. 30 (1977)

Hence, I find that the evidence establishes that the inspector acted properly in refusing to extend the time for abatement and in issuing Order No. 0808596 requiring the withdrawal of miners from the affected area. Consol's Contest of Order No. 0808596 is denied.

Citation No. 0808599

On October 30, 1979, Inspector Coffield returned to the section of the mine affected by the prior citation and order to determine whether the violation had been abated. After determining that the violation had not been abated, he continued with his regular inspection. He proceeded to inspect the supply track entry and rooms 31, 32, and 33 which area was adjacent to the area affected by the prior citation and order. Thereafter, he issued Citation No. 0808599 pursuant to section 104(d)(1) charging Consol with an unwarrantable failure to comply with its roof control plan in that approximately 350 roof bolts were not within 4 feet 6 inches of each other or the rib. The citation

alleged that the space between roof bolts varied from 4 feet 7 inches to 7 feet 6 inches. The citation, issued at 11:55 a.m., on Tuesday, October 30, 1979, set a termination due date of Friday,

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November 2, 1979, at 8:00 a.m. Consol does not dispute the fact that some violations of the roof control plan existed in the area covered by this citation. However, it contends that the violation was not due to its unwarrantable failure and that the violation could not significantly and substantially contribute to the cause and effect of a coal mine safety hazard.

The term "unwarrantable failure" was defined by the Interior Board of Mine Operations Appeals as follows:

[A]n inspector should find that a violation of a mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or a lack of reasonable care. Zeigler Coal Company, 7 IBMA 280 (1977).

This definition was approved in the legislative history of the Act. S. Rpt. No. 95-181, 95th Cong., 1st Sess. 32 (1977).

Consol contends that the violation was not due to unwarrantable failure because of the following: (1) Roof bolters had been working in one of the rooms cited prior to the issuance of the citation but had been moved to the area of the prior citation and ordered to effect abatement of the prior violation; (2) the condition cited herein is identical to the violation in the prior citation which was issued under section 104(a) of the Act and which did not allege unwarrantable failure; (3) the section in which the violation had occurred had been voluntarily closed by Consol prior to the issuance of the citation.

Consol's evidence concerning the fact that roof bolters had been working in room 31 just prior to the time this citation was issued is entitled to little weight. There was no probative evidence that those roof bolters were attempting to abate the violation in controversy. Although Consol knew that it had probable violations of its approved roof control plan in the area covered by this citation, the evidence fails to establish that Consol exercised due diligence or reasonable care to abate this condition. The fact that the section was voluntarily closed at the time this citation was issued is irrelevant to the issue of unwarrantable failure as that term is defined under the Act. Likewise, Consol's claim that the condition of this area was the same as the area cited in the citation issued under section 104(a) on October 26, 1979, is of no moment. The validity of a citation must stand or fall on its own merits. If MSHA has established the required findings of unwarrantability at the time this citation was issued, the operator cannot escape a finding of an unwarrantable failure violation by showing that the condition was the same as a prior citation which did not allege an unwarrantable failure.

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The evidence in the instant case establishes that the wide spaced roof bolts in question in this citation had been installed at least 6 months prior to the date the citation was issued. They were in an area which was subject to preshift examinations and, hence, Consol knew or should have known of this condition. Moreover, Consol was given notice on October 26, 1979, by Inspector Coffield that there may be violations involving wide spaced roof bolts in the supply track area. It follows that Consol failed to exercise due diligence and reasonable care to abate this condition prior to the time this citation was issued. I conclude that MSHA has established that the violation cited herein was the result of unwarrantable failure of Consol.

In *Alabama By-Products*, 7 IBMA 85 (1976) the Interior Board of Mine Operations Appeals held that the term "significantly and substantially contribute to the cause and effect of a coal mine safety or health hazard" means all violations of mandatory standards except "violations posing no risk of injury at all, that is to say, purely technical violations, and violations posing a source of any injury which has only a remote or speculative chance of coming to fruition." (Emphasis in original) Id. at 94. Consol concedes that this citation does not allege a purely technical violation but contends that the occurrence of any injury is only remote or speculative.

We are here concerned about the possibility of miners being injured by a roof fall. Although the roof in question was generally acknowledged to be in good condition, there was evidence of at least one prior fall of supported roof in this section. Even Consol's general mine foreman, Bill Zamski, conceded that wide spaced roof bolts increased the possibility of roof falls. While the approved roof control plan required that roof bolts be spaced 4 feet 6 inches apart, the credible evidence established that at some locations there were roof bolts 7 feet apart. The preponderance of the credible evidence establishes that the possibility of a roof fall injury in the cited area was neither remote nor speculative. I find that the violation could significantly and substantially contribute to the cause and effect of a coal mine safety hazard.

Therefore, the evidence establishes that Citation No. 0808599 was properly issued under section 104(d)(1) of the Act and Consol's contest of that citation is denied.

Order No. 0808606

On Tuesday, October 30, 1979, at 11:55 a.m., Inspector Coffield issued the citation for approximately 350 roof bolts that were in violation of the spacing requirements of the approved roof control plan. He set the termination due date at Friday, November 2, 1979, at 8:00 a.m. Consol superintendent Ronald Stovash protested the termination due date at the time the citation was issued. He stated that Consol would be required to close the entire mine and move all roof bolters into this section to abate this citation in the time allowed. Inspector Coffield did not return to the mine on November 2, 1979.

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On Monday, November 5, 1979, Inspector Coffield returned to the mine and examined the preshift books. He noted that the condition of this violation was reported during seven shifts but there was no indication of work being performed. When he went underground to determine the extent of abatement of the violation, he walked the area cited and reported finding only 155 new roof bolts. He denied Consol's request for an extension of time and issued Order No. 0808606 pursuant to section 104(b) of the Act for failure to abate the violation.

Consol admits that the violation was not totally abated on November 5, 1979, but contends that it made a good faith effort to abate this citation by installing a total of more than 400 roof bolts in the cited area by working every shift between the time the citation was issued and the time the order was issued except for the three shifts on Sunday, November 4, 1979. In support of its contention that more than 400 roof bolts had been installed, Consol submitted documentary evidence concerning the number of roof bolters per shift and the number of roof bolts installed per day during the interval between the citation and the order (Exhibit 10). On this issue, I find that Consol's evidence is more credible and probative than the testimony of Inspector Coffield. Inspector Coffield admitted that it was sometimes difficult to distinguish between new bolts and old bolts. Consol did make a bona fide effort to abate this citation in a timely manner. Obviously, Consol found more than 350 roof bolts that were not in compliance. Consol was obligated to abate each violation whether or not it happened to be among those cited by the inspector. Consol's records show that more than 1,000 roof bolts were added to this section before the citation was terminated. In light of the fact that the inspector cited 350 roof bolts in violation of the approved plan on October 30, 1979, and Consol had installed more than 400 roof bolts by November 5, 1979, I find that the inspector failed to give proper credit to Consol for its abatement activities and erred in refusing to extend the time for abatement of this violation.

Therefore, Order No. 0808606 is vacated and Consol's contest of this order is granted.

CONCLUSIONS OF LAW

1. This administrative law judge has jurisdiction over this proceeding pursuant to section 105 of the Act.

2. On October 29, 1979, Consol failed to totally abate the violation in Citation No. 0808594 issued on October 26, 1979, or to establish that the period of time for abatement of this citation should be extended.

3. On October 29, 1979, Order No. 0808596 was properly issued under section 104(b) of the Act and Consol's contest of that order is denied.

4. On October 30, 1979, Consol violated its approved roof control plan, 30 C.F.R. 75.200, in the 4 right, 5 north section

and that violation was

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caused by the unwarrantable failure of Consol to comply with the mandatory standard and could significantly and substantially contribute to the cause and effect of a coal mine safety hazard.

5. On October 30, 1979, Citation No. 0808599 was properly issued under section 104(d)(1) of the Act and Consol's contest of that citation is denied.

6. On November 5, 1979, Consol failed to totally abate the violation in Citation No. 0808599 issued on October 30, 1979, but established that the period of time for abatement should have been further extended.

7. On November 5, 1979, Order No. 0808606 was improperly issued under section 104(b) of the Act; Order No. 0808606 is vacated; and Consol's contest of that order is granted.

ORDER

WHEREFORE IT IS ORDERED that the contests of Order No. 0808596 and Citation No. 0808599 are DENIED. And the subject order and citation are AFFIRMED.

IT IS FURTHER ORDERED that the contest of Order No. 0808606 is GRANTED and said order is VACATED.

James A. Laurenson
Judge