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

CONSOLIDATION COAL COMPANY, CONTESTANT	Contest of Order
v.	Docket No. WEVA 80-110-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Shoemaker Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. WEVA 80-361 A.C. No. 46-01436-03086V
v.	Shoemaker Mine
CONSOLIDATION COAL COMPANY, RESPONDENT	

Appearances: Michel Nardi, Esq., Pittsburgh, Pennsylvania, for Consolidation Coal Co.;
David Street, Esq., Philadelphia, Pennsylvania, for Secretary of Labor

DECISION

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This action was commenced on November 23, 1979, when Consolidation Coal Company (hereinafter Consol) filed a notice of contest of an order of withdrawal issued on November 1, 1979, under section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 814(d)(1) (hereinafter the Act). On June 16, 1980, the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA) filed a proposal for assessment of a civil penalty against Consol for violation of 30 C.F.R. 75.400. On July 11, 1980, I ordered these cases consolidated under Procedural Rule 12 of the Federal Mine Safety and Health Review Commission (hereinafter Commission) 29 C.F.R. 2700.12.

A hearing was held in Pittsburgh, Pennsylvania, on June 17, 1980. Charles Coffield, Michael Blevins, and Frank Cicholski testified on behalf of MSHA. Charles Adams, Lloyd Behrens, Jerry Pack, Jerry Ernest, and Randy Nolte testified on behalf of Consol. Both parties submitted posthearing briefs.

MSHA alleged that Consol is chargeable with unwarrantable failure to comply with the regulation concerning accumulation of combustible materials and that a civil penalty should be assessed. Consol denies the allegations.

ISSUES

The first general issue is whether the order under section 104(d)(1) was properly issued. The second general issue is whether Consol violated the Act or regulations as charged by MSHA and, if so, the amount of the civil penalty which should be assessed.

APPLICABLE LAW

Section 104(d)(1) of the Act, 30 U.S.C. 814(d)(1), provides 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. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, 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.

30 C.F.R. 75.400 provides as follows: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

Section 110(i) of the Act, 30 U.S.C. 820(i), provides in pertinent part as follows:

> In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

STIPULATIONS

The parties stipulated the following:

1. Shoemaker Mine is owned and operated by Consol.

2. Consol and the Shoemaker Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The administrative law judge has jurisdiction over this proceeding pursuant to Section 105 of the 1977 Act.

4. The inspector who issued the subject order was a duly authorized representative of the Secretary of Labor.

5. A true and correct copy of the subject order was properly served upon the operator in accordance with Section 104(a) of the 1977 Act.

6. Copies of the subject order and termination are authentic and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

7. The alleged violation was abated in a timely fashion and the operator demonstrated good faith in attaining abatement.

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 order in controversy, was a duly authorized representative of the Secretary of Labor at all times pertinent herein.

3. On November 1, 1979, Inspector Coffield performed a regular inspection of the Shoemaker Mine and, at 10:55 a.m., issued Order No. 0808600 pursuant to section 104(d)(1) of the Act for a violation of 30 C.F.R. 75.400 in that there were accumulations of float coal dust in numerous locations along and under the coal conveyor mother belt, the 2-D5 north section belt, and the structures and machinery in the vicinity of those belts.

4. The evidence of record established the existence of piles of combustible materials as follows:

a. Numerous areas of float coal dust and coal dust along the conveyor belts which extended up to 4 feet in width, hundreds of feet in length, 10 inches in depth and which were black in color.

b. Float coal dust up to 12 inches in depth on the overcasts containing the mother belt.

5. Immediately before the order in question was issued, the 2-D5 north section belt was out of alignment and was smoking and the belt was de-energized by Consol prior to the issuance of the order.

6. The preshift examiner's report for this section prior to the issuance of the order in question noted that the mother belt needed to be dusted and drug but no action had been taken by Consol prior to the issuance of the order.

7. Prior to the issuance of the order, Inspector Coffield observed two miners cleaning under the intersection of the mother belt and the longwall belt (not cited in the order) but those miners stated that they were only there to shovel a large pile of coal and then were to return to their section.

8. MSHA established that the coal dust and float coal dust accumulated along the conveyor belts as set forth above.

9. The accumulation of coal dust and float coal dust in the active workings of the Shoemaker Mine did not constitute an imminent danger because there was no immediate source of ignition at the time the order was issued.

10. The accumulation of coal dust and float coal dust in the active workings of the Shoemaker Mine had been present for more than one working shift at the time the order was issued.

11. The accumulation of coal dust and float coal dust in the active workings of the Shoemaker Mine created a safety hazard because, in the event of a fire or explosion, it would propagate such fire or explosion.

12. Consol is a large operator and the assessment of a civil penalty herein will not affect its ability to continue in operation.

13. The condition cited in the order was abated in a timely fashion and Consol demonstrated good faith in attaining abatement.

DISCUSSION

Contest of Order

After the instant action was commenced, the Commission issued two decisions construing the applicable regulation in controversy. On December 12, 1979, the Commission adopted a new standard for determining when a violation of 30 C.F.R. 75.400 occurs. In Old Ben Coal Company, 1 BNA MSHR 2241, Docket No. VINC 74-111 (December 12, 1979), the Commission disagreed with the former standard announced by the Interior Board of Mine Operations Appeals that a violation of the mandatory standard did not occur even though an accumulation of combustible materials was present where the operator commenced abatement within a reasonable time after it had notice of the existence of the accumulation. The Commission held that the existence of an accumulation was a violation of the mandatory standard and that the action of the operator thereafter to abate this condition was irrelevant to the issue of whether a violation occurred.

On October 24, 1980, the Commission in Old Ben Coal Company, Docket No. VINC 75-180-P, etc. (October 24, 1980), stated as follows:

> We have recognized that some spillage of combustible materials may be inevitable in mining operations. However, it is clear that those masses of combustible materials which could cause or propagate a fire or explosion are what Congress intended to proscribe. Thus, we hold that an accumulation exists where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it likely could cause or propagate a fire or explosion if an ignition source were present.

Id. at 3.

The issue of whether the standard was violated in this case was vigorously contested at the hearing. Consol called five witnesses in its case. Charles Adams, who conducted the preshift examination of the mother belt, testified that it was in good condition but required one area of rock dusting and another area of dragging. He reported this condition in the preshift book. He did not travel the overcasts during his examination. Lloyd Behrens, Consol's escort during this inspection, testified that he saw one pile of coal dust near a scraper board and some other areas that needed rock dusting and dragging. He testified that this condition would have been corrected during the shift if no order were issued. Jerry Pack, the section foreman, stated that although the order in question was issued approximately 3 hours after the shift began, he had not had an opportunity to make an on shift examination of the area because "I had my hands full up at the face." He saw an area along the belt which was approximately 150 feet long and covered with float coal dust which looked dark. He conceded that in the event of a fire that float coal dust would speed the ignition of the fire. Jerry

Ernest, the mine foreman, testified that he saw approximately 60 feet of float coal dust but that it was

"nothing to worry about" because it was only a thin film of float coal dust on top of 4 inches of rock dust. He stated that there were four men assigned to work on the belt at the time the order was issued. As its last witness, Consol called Randy Nolte, a UMWA member, who was assigned to clean the belt. He admitted that there was more float coal dust in the area around the belt than usual, but he could not estimate the depth or extent of this coal dust.

MSHA inspector Charles Coffield testified that he observed and measured accumulations of float coal dust up to 30 inches deep on overcasts and up to 12 inches deep on the floor of the mine. He described areas 200, 250, and 1500 feet long and 4 to 15 feet wide which were black in color. The float coal dust completely covered the bottom, cribbing, pumps, pipeline, and belt structures. There were electric motors and power wires in the area which were ignition sources. He smelled smoke coming from the 2-D5 north belt in an area where there was 12 inches of float coal dust on the bottom. He stated that he saw more than 50 locations along the belts where there were accumulations 8 to 18 inches deep, 3 to 4 feet wide, and 2 to 5 feet long. He decided to issue an unwarrantable failure order pursuant to section 104(d)(1) after Consol deenergized the 2-D5 north belt and no imminent danger existed. In his opinion the unwarrantable failure order was properly issued because of the following factors: (1) the extent of the area of violation and the depth of float coal dust; (2) the accumulations he observed would have taken at least 1-1/2 to 2 days to accumulate and could have been present for up to 1 month; (3) the preshift examiners should have seen and reported this condition; and (4) in the event of an ignition in the area, the accumulation of float coal dust would have caused a mine explosion. Inspector Coffield talked to two miners who were shoveling a pile of loose coal by the belt. They told him that they were only assigned to shovel that pile of coal and then were to return to their section.

Michael Blevins, the UMWA walkaround on this inspection, also testified on behalf of MSHA. He stated that he accompanied Inspector Coffield throughout the inspection in question. The deepest accumulation of float coal dust he observed was approximately 12 inches deep at an overcast. He specifically denied seeing any accumulation 30 inches deep. The overall condition of the belts was that rock dusting was needed on certain portions and the majority of the belts needed to be shoveled. He stated, "I thought the belt line was a mess." However, Mr. Blevins disagreed with Inspector Coffield concerning the depth of the accumulations. While the inspector testified that the average depth was 8 to 12 inches, Mr. Blevins estimated only 4 to 5 inches. Specifically he denied any accumulations up to 12 inches on the bottom, belt structures, and pumps. MSHA called Frank Cicholski, a UMWA safety committeeman, as a rebuttal witness. He testified that he observed the belts approximately 5 hours after the order of withdrawal was issued. He observed 10 to 15 locations of coal dust which were approximately 10 inches deep. He denied seeing any accumulations deeper than that. He estimated that there were another 15 to 20 locations where there

was a moderate amount of accumulation of coal dust up to 2 inches in depth.

In the instant case, I find that the testimony of the witnesses called by MSHA concerning the amount and extent of float coal dust and coal dust was more credible than the testimony of the witnesses called by Consol. While

it appears that some of the testimony of Inspector Coffield was exaggerated, e.g., finding 30 inches of float coal dust on an overcast and an 8- to 12-inch average depth of the numerous accumulations on the floor, the preponderance of the evidence establishes that there were numerous areas along the conveyor belts in question where float coal dust and coal dust accumulated for hundreds of feet, several inches deep, and were black in color. The amount and extent of the combustible float coal dust and coal dust established that this was an accumulation in violation of 30 C.F.R. 75.400 rather than a mere spillage which would not constitute a violation. Therefore, I find that Consol violated 30 C.F.R. 75.400 as alleged by MSHA.

The order in question also alleged that the violation was due to the "unwarrantable failure" of Consol to comply with the mandatory standard. The term "unwarrantable failure" was defined by the Interior Board of Mine Operation Appeals as follows:

> [A]n inspector should find that a violation of any 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 which 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 1977 Act. S. Rpt. No. 95-181, 95th Cong., 1st Sess. 32 (1977). In the Old Ben Coal Company decision issued in December, 1979, the Commission upheld an order of withdrawal based upon the operator's unwarrantable failure to comply with 30 C.F.R. 75.400. The Commission found that the violation was an unwarrantable failure even though the evidence established that the spillage occurred during the previous shift.

In the instant case, the preponderance of the evidence establishes that the accumulation of float coal dust and coal dust had been present for more than one working shift. Although the need to rock dust and drag the mother belt was reported on the preshift examination, Consol failed to conduct an on shift examination of this condition or establish that it had taken the necessary action to correct this condition. Even if Consol is correct in its assertion that this entire condition would have been corrected in the normal course of operations during the shift on which the order was written, this fact does not negate a finding of a violation of the mandatory standard or the fact that such a violation was unwarrantable. The extent and depth of the accumulation in question, as established by the evidence of record, shows that Consol knew or should have known of the accumulation and failed to exercise reasonable care to abate the condition. Therefore, the violation was caused by Consol's unwarrantable failure to comply with the mandatory standard.

Assessment of Civil Penalty

MSHA proposed that a civil penalty in the amount of $3,500 be assessed for this violation. Consol's history of assessed violations at this mine in the 2 years prior to this order shows 937 violations of the Act or mandatory standards. Seventy-one of these violations were of the same standard, 30 C.F.R. 75.400, cited in this case. This history is significant in that there was almost one violation per week of the regulation proscribing the accumulation of combustible materials.

I have previously found that Consol was negligent in that it knew or should have known of the accumulation in question. MSHA has failed to establish its claim of gross negligence since there was no evidence of a reckless disregard of the mandatory standard or reckless or deliberate failure to correct an unsafe condition which was known to exist. Although Consol was working on the general area of the conveyor belts prior to the issuance of the order in question, it failed to take necessary action to correct this condition. Thus, Consol is chargeable with ordinary negligence.

The witnesses for both sides agreed that an accumulation of combustible materials could propagate a mine fire or explosion. Thus, a serious safety hazard was present.

However, I find that the description of the extent of the accumulation was exaggerated by Inspector Coffield. Since the proposed assessment of a civil penalty was based upon the inspector's description of the extent of the accumulation - which description, according to all of the other witnesses in the case, was substantially exaggerated - it follows that the proposed assessment was based upon a more extensive accumulation than was established by the evidence of record.

Based upon all of the evidence of record and the criteria set forth in section 110(i) of the Act, I conclude that a civil penalty in the amount of $1,750 should be imposed for the violation found to have occurred.

CONCLUSIONS OF LAW

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

2. Consol negligently permitted coal dust and float coal dust to accumulate in the Shoemaker Mine on November 1, 1979, in violation of 30 C.F.R. 75.400.

3. The violation of the above mandatory standard was caused by the unwarrantable failure of Consol to comply with the mandatory standard.

4. At the time Order No. 0808600 was issued, there was in existence a valid citation pursuant to section 104(d)(1) of the Act on October 30, 1979, and, hence, Order No. 0808600 was

properly issued.

5. Consol's contest of Order No. 0808600 is denied.

6. Under the criteria set forth in section 110(i) of the Act, a civil penalty in the amount of $1,750 shall be imposed for a violation of 30 C.F.R. 75.400.

ORDER

WHEREFORE IT IS ORDERED that the contest of Order No. 0808600 is DENIED and the subject order is AFFIRMED.

IT IS FURTHER ORDERED that Consol pay the sum of $1,750 within 30 days of the date of this decision as a civil penalty for the violation of 30 C.F.R. 75.400.

James A. Laurenson, Judge