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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Civil Penalty Proceeding
PETITIONER	Docket No. WEVA 80-677
v.	A.C. No. 46-01455-03055V
	Contest of Citation
CONSOLIDATION COAL COMPANY,	
RESPONDENT	Docket No. WEVA 80-109-R
	Osage No. 3 Mine

DECISION

Appearances: James P. Kilcoyne, Jr., Esq., Assistant Solicitor, Mine Safety and Health Administration, U.S. Department of Labor, for Petitioner
Samuel Skeen, Esq., Senior Counsel, Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent

Before: Judge Lasher

These proceedings arose under section 104(d)(1) of the Federal Mine Safety and Health Act of 1977. A hearing on the merits was held in Morgantown, West Virginia, on January 20, 1981, at which both parties were represented by counsel. After considering evidence submitted by both parties and proposed findings of fact and conclusions of law proffered by counsel during closing argument, I entered an opinion on the record. (FN.1) My bench decision containing findings, conclusions and rationale appears below as it appears in the record aside from minor corrections.

> These matters came on for hearing on January 20, 1981, in Morgantown, West Virginia, having arisen upon the filing of a petition for assessment of civil penalty by the Secretary of Labor on October 20, 1980, and the filing of a notice of contest by Consolidation Coal Company on November 21, 1979. The civil penalty proceeding is Docket No. WEVA 80-677, and the notice of contest is Docket No. WEVA 80-109-R. These

two proceedings were consolidated by me pursuant to Rule 12 of the Commission's Rules and Regulations, 29 C.F.R. 2700.12.

In the penalty proceeding, MSHA seeks that a penalty be assessed against Consolidation Coal Company for a violation of 30 C.F.R. 75.400. Consolidation seeks review of the subject Citation No. 0626780, issued pursuant to section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, hereinafter the Act, on the basis that the coal mine inspector who issued such citation, Paul A. Mitchell, was mistaken in concluding that an accumulation of float coal dust was present on rock-dusted surfaces of the roof and ribs of the right return entry starting at Spad Station 1871 outby to Spad Station 1561, a distance of approximately 300 feet, and from Spad Station 1871 to Spad Station 1932 in the crosscut from the No. 8 entry to the No. 6 entry, again a distance of approximately 300 feet.

In addition to the question whether or not the physical conditions of the area of the mine described in the citations did exist, the questions for resolution in this decision at the commencement of the hearing were whether or not the section 104(d)(1) citation was properly issued and, more particularly, whether or not any alleged violation which occurred resulted from an unwarrantable failure of the respondent coal operator to comply with the allegedly violated regulation, and, if so, whether the condition in question substantially and significantly contributed to the cause and effect of a safety or health hazard.

The general legal authorities establishing the parameters of the questions involved herein are section 104(d)(1) of the Act and 30 C.F.R. 75.400, which latter source provides:

> 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.

The parties have stipulated as follows:

(1) The Osage No. 3 Mine is owned and operated by Consolidation Coal Company.

(2) Consolidation Coal Company and the Osage No. 3 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 citation was a duly authorized representative of the Secretary of Labor.

(5) A true and correct copy of the subject citation and modification were properly served upon the operator in accordance with section 104(a) of the 1977 Act.

(6) Copies of the subject citation, modification, 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.

(8) The computer printout of the past history of violations for the Consolidation Coal Company may be entered into evidence as an official business record of the Mine Safety and Health Administration.

(9) Consolidation Coal Company is a large operator within the meaning of the Act, and assessment of a civil penalty in these proceedings will not adversely affect the operator's ability to continue in business.

The primary and critical factual issue involved in these cases is whether or not an accumulation of float coal dust was present on a rock-dusted surface in the area described by the inspector in the citation. All witnesses who testified concerning the same indicated that such was a judgment call and that the only means for ascertaining whether or not the presence of float coal dust amounted to an accumulation can be determinable only by a visual test and not by any other test. The witnesses of both parties, without contradiction, indicated that color alone was the determinative factor in determining whether or not an accumulation existed. In summary, the record indicates that if the color of the surface is dark gray to black, then a violation is properly found. Lighter shades of gray and white indicate that there is no accumulation so as to constitute a violation, according to the position advanced by Consolidation's witnesses. The Government's position whether or not a medium gray shade of surface would constitute an accumulation is not sufficiently clear for me to summarize.

Inspector Mitchell testified that on November 13, 1979, while conducting a section 103(i) "spot" inspection, he was in the 14-North section and in the return entry discovered the two areas described in the citation were in violation of section 75.400 of the regulations because in the two 300-foot areas mentioned he found the color of the surface of the roof and ribs to be black to "real dark gray". He indicated that the coal dust he observed covered the entire length of the rock dust and also that he saw float coal dust in other places in the general area, where the color ranged from gray to white. Inspector Mitchell testified that after going down the return, he noticed that other examiners of the section had been marking on the surface, that is, that they had placed their initials and dated the same. It appeared, however, that the citation contained the names of the initialers only insofar as they were so-called company personnel and that union employees who had also initialed in the area, while mentioned in the inspector's notes, were not mentioned in the citation.

Inspector Mitchell advised Walter Wymer, a regional inspector for Consolidation who was a walkaround on the November 13, 1979, inspection, that a violation of law existed. Wymer called for the section foreman, and then Joseph Pride, the superintendent of the mine, and Thomas Simpson, assistant superintendent of the mine, arrived. According to Inspector Mitchell, they admitted that the condition did exist but protested against the issuance of a section (d)(1) citation, which is the so-called unwarrantable failure citation provided for in the Act. According to the inspector, the coal operator had "drug" the floor of the area but not the roof and ribs. "Dragging" involves moving a piece of brattice cloth through the area where float coal dust is allegedly present for the purpose of removing it. The inspector indicated that the methane content of the air in the affected area was .4 of 1 percent and that there was 31,000 cubic feet of air going down the entry. Exhibit M-3 indicates that the velocity was 31,000 CFM.

Respondent was given until 12:30 p.m. to abate the citation, which was issued at 9:30 a.m. In a subsequent modification of the citation, the inspector corrected the original citation to show the abatement expiration time was 12:30 instead of 10:30, as shown on the citation, and also to correct the original citation, which showed that it was a 104(b)(1) citation instead of a 104(d)(1) citation, which the inspector intended. A final correction in the modification, which was issued on November 14, 1979, amended the citation to include the color of the float coal dust and show the same

as dark gray to black. The inspector indicated that he made these mistakes as a result of the pressure which personnel of Consolidation Coal Company placed on him after they were advised that he was going to issue a citation. The inspector indicated that he completed Exhibit M-3, the inspector's statement, after he went to his office.

The area in which the allegedly violative condition was seen had a height of 6 to 7 feet and was approximately 16 feet wide.

The risk from a section 75.400 violation would be an explosion or an ignition resulting in an explosion which could have fatal consequences for the employees working in the section, as well as the approximately 150 miners who constitute the total payroll at the Osage No. 3 Mine, should the explosion be of a sufficient degree of severity.

The inspector indicated that the initialling of the company personnel and union employees who initialed the area (at points marked "X" or "Z" in red on Exhibit A-1) stood out like a "sore thumb", and he indicated that there was no dust in the indentations where the initials were etched. The inspector said that in his conversation with Robert Cordwell, the section boss, on November 13, 1979, Cordwell indicated that he, Cordwell, saw the condition and did date it. Cordwell, who was the sixth of eight witnesses for the Respondent, in contradiction to the inspector, testified that he examined the area on November 13, 1979, as well as on November 7, 8, 9, and 11, and that he found no accumulations on any of those days.

I would footnote at this point that the presence of the initials etched in the surface of the area does not indicate a belief on the part of the person making his initials in the surface that a violative condition exists but is an indication that such person was fulfilling a duty to examine the area and had actually made an examination on the date indicated next to the initials.

As indicated in the citation, different persons had initialed the area on November 7, 8, and 9, as well as November 13, 1979, and, according to the overwhelming evidence presented by Consolidation, the area was checked 21 times during the period November 7, 1979, up to 9:30 a.m. on November 13 and some six separate people had made those checks, all of whom at all of the said times had found no violation. In addition, Walter Wymer testified that on November 9, 1979, he walked the area with Roger Hinkle, a mine inspector for the State of West Virginia, at which time no violation was discovered.

The record indicates that the Hinkle investigation was conducted on a Friday and that on the next 3 days, Saturday, November 10, Sunday, November 11, and Monday, November 12 (a holiday), the mine was not in production. Production resumed at 12:01 a.m. on November 13, 1979, and coal began being cut at approximately 6:30 a.m. (Testimony of mine superintendent Joseph Pride.) Pride indicated that the type of cutting which would have occurred between 6:30 a.m. and 9:30 a.m. on November 13, 1979, would not have created much coal dust since the continuous miner doing the same, a 12 CM, has some 56 water sprays. This is to be contrasted with an earlier version of the CM which had only 30 such sprays.

I would summarize at this point that the situation present on the morning of November 13, 1979, was one in which the mine had been examined by numerous persons, none of whom noted an accumulation of float coal dust in the area and apparently none of whom made entries in preshift examination reports and the like to the effect that such a hazardous violation was present in the area. The inspector took the position that the alleged violation had probably been in existence since November 7, 1979, based on the fact that there was no dust in the indentations made by the initials of those who had initialed the area on that date and by the fact that such initials had been placed in the surface of the ribs and roof, apparently without disturbance, as early as November 7, 1979.

In addition to the testimony of the inspector, the Secretary presented evidence in the form of an opinion from Edward Kawenski, a supervisory support engineer, who for some 15 years has been employed at the MSHA experimental mine, who has authored various publications and conducted various experiments relating specifically to coal dust explosions and related subjects, all specifically germane to this matter. Kawenski indicated that there was no sampling technique for the measurement of float coal dust and that while the determination whether or not an accumulation of float coal dust exists is a judgment call, the determination is not difficult. His opinion was that an accumulation should be easily recognizable. Kawenski indicated that rock dust and float coal dust, the former being in the form of slivers and the latter being spherical, travel approximately the same distances together under fixed velocity conditions. He emphasized that float coal dust is extremely volatile and is a special substance because of its easy susceptibility to ignition.

The Secretary's third witness, Robert C. Moore, who is not a certified fire boss, testified that he was the union walkaround with inspector Mitchell on the November 13 inspection. He supported the inspector by characterizing the color

of the surface substance as dark gray at the point where the initials were etched. Mr. Moore, when asked what the color of the surface was in other areas, engaged in a long hesitation, then indicated that he would say "probably yes" that there was a sufficient darkness in the other areas. He pointed out that "everybody sees it different", and that two people looking at the same condition may not see the same thing.

As I have previously noted, the fundamental determination in this matter is whether or not an accumulation of float coal dust existed on the rock-dusted surface described by the inspector and that visual observation is the customary, if not only, means of making such a determination.

The inspector thought this violation had existed going back to November 7, 1979. However, the numerous witnesses presented by Consolidation Coal Company who examined the area on November 7, such as Frank Denjen, a section boss (November 7, 1979); Nathan Lipscomb, assistant mine foreman, who signed the fire boss report after an inspection on November 10 and who, incidentally, was a union employee; and Kurt Zachar, who examined the area on the evening of November 11, 1979, all indicated that, based on their visual examinations, there was no accumulation of float coal dust in the area. I interpret their testimony in various contexts to mean that they did not make the visual determination that the rock-dusted surface was coated with a dark gray or black substance. Ronald L. Davis, a certified fire boss, examined the area on November 12, 1979, from 10:40 to 11:08 p.m. and indicated that the color he saw was "light gray".

Their testimony, as well as that of Robert Cordwell, who made the examination on November 13, and the unanimous opinion of the other seven witnesses for the Respondent coal operator cannot all be discounted--in the sense that they would all be mistaken as to the color of the surface of the are in question. On the other hand, I felt that when Inspector Mitchell was testifying he was entirely credible and was the type of an individual whose testimony would ordinarily be received and credited. In resolving the conflict in testimony, in view of the overwhelming evidence presented by Consolidation Coal Company, I have no alternative but to reject the inspector's opinion as to the color of the substance in question. I do so, however, not on the basis of rejecting the inspector's testimony in the ordinary sense of credibility.

One explanation which was presented in the record as to how a mistake can be made in evaluating or gauging color was that the floor of the area in question was especially clean

and was of a particularly and unusually white color, the explanation following is that in measuring the contrast between the color of the surface and the color of the floor, a distanct contrast was present which was not typical and that because of the great disparity, the surface color of the roof and ribs would seem darker than if the same were viewed with a darker floor being present to contrast with it. This is a subject upon which reasonable men can differ. I found Respondent's witnesses to be emphatic and, for the most part, entirely credible. I also credit the version of the color presented by Respondent's witnesses because in some instances their testimony was somewhat more detailed than that of the inspector. In this case, the inspector made several mistakes on November 13, 1979, which are not helpful to the possibility of having the conflict resolved in his favor. It is quite significant that the citation filled out at the time did not mention the color or specify the color observed since that is the primary means by which an accumulation of float coal dust is determinable. Although the Commission has held that the absence of evidence with respect to depth or extent of accumulations is not fatal to the Government's case, Old Ben Coal Company,(FN.2) Docket No. VINC 75-180-P (October 24, 1980), here the question is not as to depth or extent but as to the quantity of the float coal dust which was present. To be of a sufficient quantity to constitute an accumulation, the color must appear to be black or dark gray. Thus, this

fundamental point of proof has not been established by the Government as part of its prima facie case, and I must conclude, therefore, that a violation of 30 C.F.R. 75.400 did not occur.

Having concluded that Consolidation Coal Company did preponderate on the critical factual issue involved, I find no violation and Citation No. 0626780 is ordered vacated.

The relief requested in Consolidation's notice of contest is granted, and the remedy sought by the Secretary's petition for assessment of civil penalty is denied.

ORDER

(1) Citation No. 0626780 is VACATED.

(2) All proposed findings of fact and conclusions of law not expressly incorporated herein are REJECTED.

Michael A. Lasher, Jr. Judge

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~FOOTNOTE_ONE

1 Tr. 206-221.

~FOOTNOTE_TWO

2 In Old Ben Coal Company, supra, the Commission stated:

"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 could cause or propagate a fire or explosion or 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."

The Commission footnoted a reference to the above quotation to the effect that the validity of the inspector's judgment is subject to challenge before the administrative law judge. A bald reading of the first-quoted language would seem to indicate that the inspector's subjective opinion as to the presence of an accumulation and, as in this case, a conclusion which boils down to the color of the material characterized by the inspector would be binding. However, by its qualification that the inspector's opinion is subject to challenge before an administrative law judge, the Old Ben case I believe should be interpreted to indicate that (1) the inspector's opinion that an accumulation exists is subject to contradiction by witnesses called by the opposing party and (2) that in such event the resolution of the dispute must be made in accordance with the

established legal standards, i.e., which party establishes its case by a preponderance of the evidence.