

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

AUG 6 1981

COSSOLIDXTION COAL COMPANY,	:	Notice of Contest
Contestant	:	
v.	:	Docket No. WEVA 81-259-R
	:	
SECRETARY OF LABOR,	:	Loveridge Mine
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 81-414
Petitioner	:	A.O. No. 46-01433-03117V
v.	:	
	:	Loveridge Mine
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: James P. Kilcoyne, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for MSHA; Jerry F. Palmer, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Consolidation Coal Company.

Before: Judge Merlin

This consolidated proceeding is a notice of contest by the operator challenging a section 104(d)(2) withdrawal order and a petition for the assessment of a civil penalty filed by the Solicitor based upon the alleged violation set forth in the order. 1/

A hearing was held on July 7, 1981 at which the parties represented by counsel appeared and presented documentary and testimonial evidence.

1/ The petition for penalty assessment originally contained two violations. The Solicitor previously filed a motion to sever the second violation which did not involve the same condition as was contained in the notice of contest proceeding. I have granted the motion to sever in a separate order so that the notice of contest and penalty docket numbers herein only involve the same situation.

At the hearing the parties agreed to consolidate these cases for hearing and decision and to the following stipulations:

- (1) The applicant is the owner and operator of the subject mine.
- (2) The mine is subject to the jurisdiction of the Federal Mine Safety and health Act of 1977.
- (3) I have jurisdiction of this case pursuant to the 1977 Act.
- (4) The inspector who issued the subject order was a duly authorized representative of the Secretary, and all witnesses who will testify are accepted generally as experts in coal mine health and safety.
- (5) True and correct copies of the subject order, and termination thereof, were properly served on the operator in accordance with the Act.
- (6) There was no intervening clean inspection subsequent to the issuance of the underlying (d)(1) withdrawal order, and the subject (d)(2) withdrawal order.
- (7) There exists a validly issued (d)(1) citation and a validly issued (d)(1) order underlying the subject order.
- (8) Imposition of any penalty will not affect the operator's ability to continue in business.
- (9) The operator is large in size.
- (10) The alleged violation was abated in good faith.
- (11) The operator's history is average and non-contributory to the amount of any penalty that might be assessed herein (Tr. 4-5).

At the conclusion of the taking of evidence counsel waived the filing of written briefs and agreed instead to make oral argument (Tr. 130). Extensive oral argument was given (Tr. 130-171). I advised the parties that I would issue a decision after the administrative transcript was received (Tr. 169).

Discussion and Analysis of the Evidence

Findings and Conclusions

The order sets forth the condition or practice as follows:

Float coal dust black in color has been allowed to accumulate on the rock-dusted surface of the floor and ribs of the No. 8 immediate return entry for the 7 South mains (055) section and

crosscuts between the No. 8 and No. 9 entries for a distance of approximately 1,000 feet. The floor in middle of No. 9 entry had been dragged, but float coal dust was still on the sides of the floor and ribs of the No. 9 entry.

The key to understanding this case is operator's exhibit No. 2. This exhibit consists of ten strips of paper ranging in color from pure white (No. 1) to jet black (No. 10). The middle strips of paper are, therefore, varying shades of gray which become darker as the numbers go higher. The inspector testified that a violation exists when the float coal dust appears as either "9" or "10", i.e. black. He further testified that in all the areas described in the order which he traversed, the float coal dust was black except, as noted in the order, for the middle of the No. 9 entry which had been dragged. Accordingly, the inspector testified that he cited a violation.

The inspector's evaluation of the color of the float coal dust is contradicted by the operator's witnesses. First, and most persuasively, the UMW fire boss testified that when he was taking air readings he saw the entries shortly before the inspector and that they were only like the So. 5 or 6 strips, i.e., at most medium gray. The union fire boss is a man of many years experience and was a most believable witness. His statements alone would compel a finding of no violation and vacation of the order.

However, the testimony of the fire boss does not stand alone. The day shift section foreman testified that immediately after the order was issued he walked the entries and judged them to be about a "6" in color. When recalled to the stand he stated he did not see any footprints which had disturbed the float coal dust in the entries and diminished the degree of blackness of the float coal dust. Accordingly, the evidence of this witness also conflicts with the inspector's estimate of the color of the float coal dust.

So too, the midnight shift section foreman estimated the color as only a "7". Admittedly, he stated that he thought the color of the float coal dust at a "7" would be a violation whereas a "6" would not. With respect to the color of the float coal dust, this testimony is therefore, similar to that of the fire boss and the section foreman. Insofar as the degree of blackness which is necessary to constitute a violation is concerned, it is the inspector and not the operator's midnight shift section foreman who is charged with interpreting and applying the standard. And it most certainly is not my function to formulate and apply to the operator a more stringent test than the inspector did. As I advised counsel during oral argument, this estimate is germane because it is a measure of the truthfulness of the midnight shift section foreman that he set forth a tougher standard than did the inspector himself. But this does not mean that such a circumstance would constitute a violation where according to MSHA's own authorized representative it would not.

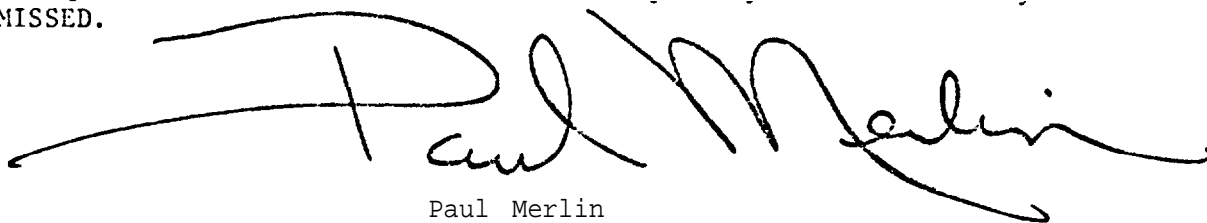
Three more witnesses also testified on behalf of the operator. They estimated the color of the float coal dust as ranging from "5" to "7" on the color scale. There was some suggestion that by the time some of these witnesses saw the area the float coal dust may have been churned up and thereby lightened by individuals walking on it, but there is no definitive evidence on this point and I find that this did not occur.

I recognize that the operator's witnesses did not agree exactly on the coloration of the float coal dust, but their estimates of from "5" to "7" are well within the range of judgment which could be expected since the gradations were so close. Indeed, I find the slight variations between the operator's witnesses enhanced rather than detracted from their credibility. It is to be remembered that at the hearing upon the Solicitor's request the operator's witnesses were sequestered.. When watching these men select the appropriate color, it appeared to me that **they were truly** trying to remember as best they could the way the float coal dust looked on January 12.

In light of the foregoing, I find the operator's evidence more credible and based upon it I conclude that at most the float coal dust was medium gray and that therefore under the standard as applied by the inspector a violation did not exist. 2/

ORDER

Accordingly it is hereby ORDERED that the subject order be and is hereby VACATED, that the notice of contest be and is hereby GRANTED and that the petition for assessment of a civil penalty be and is hereby DISMISSED.

A large, stylized handwritten signature in black ink, reading "Paul Merlin". The signature is written in a cursive, flowing style with a long horizontal stroke at the beginning and a long horizontal stroke at the end.

Paul Merlin
Assistant Chief Administrative Law Judge

2/ In may be that the standard for determining how dark or how black float coal dust should be in order to constitute an accumulation is too imprecise. It may also be that in this case the inspector used too restrictive a standard. However, I only can act on the record before me and in any event, as I have already stated, the formulation of guidelines for judging when an accumulation of float coal dust exists is beyond the purview of this case and beyond the authority of an administrative law judge. **What** is clear here is that under the standard used by the **inspector**, the great weight of evidence demonstrates that a violation did not exist.

Distribution:

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