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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. PENN 81-132-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Order No. 1043545 Laurel Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. PENN 81-156 A.C. No. 36-03298-03037
v.	Citation No. 1043455
CONSOLIDATION COAL COMPANY, RESPONDENT	Laurel Mine

DECISION

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

Before: Judge Melick

These consolidated cases are before me pursuant to sections 105(a) and 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," to contest an order of withdrawal issued to the Consolidation Coal Company (Consolidation) pursuant to section 104(b) of the Act (Order No. 1043545) and for review of a civil penalty proposed by the Mine Safety and Health Administration (MSHA) for that order and the section 104(a) citation underlying that order (Citation No. 1043455).(FOOTNOTE.1)

An evidentiary hearing was held in Wheeling, West Virginia, on June 11, 1981.

The primary issue before me is whether Consolidation violated the regulatory standard at 30 C.F.R. 75.403 as alleged in Citation No. 1043455, and, if so, whether that violation was abated within the period of time set forth in the citation. If it is found that the violation was not timely abated, a further issue is whether the period for abatement should have been extended. Finally, if it is found that there was a violation of the cited standard, a determination must be made as to the appropriate civil penalty to be assessed for that violation considering the criteria under section 110(i) of the Act.

The Citation

The citation at bar was issued by MSHA inspector Earl Miller to mine foreman Tom Hofrichter at 8:30 a.m. on March 19, 1981, and alleged as follows:

> Based on laboratory analysis by MSHA all four of the rock dust samples that were collected in a rock dust survey during a health and safety inspection on 2/4/81 in the south east mains section contain less than the required amount of incombustible materials. They were as follows, (1) D12á00 intake 24 percent, 1E1 intake 2á00 19 percent, 1F1 2á00 intake 20 percent, 1E1 intake 2á00 19 percent.

The cited regulatory standard reads in relevant part as follows:

> Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained at such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall not be less than 65 percentum. * * *.

At hearing, MSHA inspector Charles Burk, Jr., testified concerning the regular inspection he performed at Consolidation's Laurel Mine on February 4, 1981, which eventually led to the issuance of the citation. During the course of that inspection, he performed a rock-dust survey in the Southeast Mains section. Following the MSHA band-sampling procedure, he collected four samples, one each from the No. 4 entry, the No. 5 entry, the No. 6 entry, and the No. 7 entry. Jeff Kozora, Consolidation's safety inspector for the Laurel Mine observed Burk collect these samples and offered no objection to the procedures followed.

There is no dispute that the areas cited were areas required to be rock dusted. Nor is there any dispute concerning the preservation of the samples collected by Burk, the chain of custody of those samples to the MSHA laboratory, or the laboratory procedures. The samples were found to have 24 percent, 19 percent, 20 percent, and 19 percent incombustible content, respectively. Accordingly, Citation No. 1043455 was issued for a violation of the standard at 30 C.F.R. 75.403.

In its defense, Consolidation appeared to contend at hearing (but did not argue in its brief) that MSHA had failed to establish the reliability of its dust-sampling procedures. In particular, it alleged that Inspector Burk actually gathered a 1-3/4-inch sample of material from the mine floor, whereas MSHA procedures apparently call for a 1-inch sample. Since no actual measurements were taken by anyone when the samples were collected and since the operator's representative who was present when the samples were taken did not then object to the sampling, I find no factual basis for the contention. Even assuming that a 1-3/4-inch sample was indeed taken from the mine floor, Consolidation presented no evidence that the sample would have accordingly been tainted. Moreover, MSHA expert witness John Nagy testified without contradiction that even if a 1-3/4-inch sample had been collected that procedure would not have compromised the test objectives. Particularly because of Nagy's undisputed expertise, I accord his testimony great weight. Accordingly, I find that the testing procedures here followed were sufficiently reliable to have provided valid test results. I find that the incombustible content of the dust samples taken at the Nos. 4 through 7 entries was as reported in the MSHA laboratory analysis (MSHA Exh. 1), i.e., 24 percent, 19 percent, 20 percent, and 19 percent, respectively. Since this incombustible content is less than the 65 percentum required under the provisions of 30 C.F.R. 75.403, I find that the violations have been proven as charged

The Withdrawal Order

The section 104(b) withdrawal order issued by MSHA inspector Earl Miller on March 24, 1981, alleged as follows:

> The operator did not make a reasonable effort to rock dust the area in the south east mains section. Rock dust had been applied in the No. 4 and No. 5 entries; however, No. 6 and No. 7 entries had not been rock dusted. No men were observed dusting in the area at the time of the inspection.

Since Consolidation has admitted that at least 240 feet of the areas initially cited had not been rock dusted even as of March 24, 1981, when Inspector Miller issued the order at bar, it is clear that the violation had not been abated within the time specified in the citation, i.e., by 4 p.m. on March 20, 1980. The question before me then is whether the inspector acted reasonably in refusing to extend the time for abatement. The reasonableness of his actions must be determined on the basis of the facts confronting him at the time he issued the order. United States Steel Corporation, 7 IBMA 109 (1976). Thus, the facts confronting Inspector Miller at 10:15 a.m. on March 24, 1981, when he issued the order, must be examined.

In determining whether the period for abatement should have been extended by Inspector Miller at that time, the following factors should be considered: (1) the degree of danger that any extension would have caused to miners, (2) the diligence of the operator in attempting to meet the time originally set for abatement, and (3) the disruptive effect an extension would have had upon operating shifts. Consolidation Coal Company, BARB 76-143 (1976).

The overriding consideration in this regard is, of course, the degree of danger that any extension would have caused to miners. It is undisputed that previous testing had demonstrated that over one 24-hour period, 4,300 cubic feet of methane had been liberated from the Southeast Mains section and 9,700 cubic feet of methane had been liberated from the entire mine. In addition, at the time Miller issued the order at bar, at least seven miners were working in active sections not more than 200 feet from the cited area and where ignition sources admittedly existed. Miller also found serious violations which could have resulted in the accumulation of explosive hydrogen gases at the battery-charging station 250 feet from the cited area. It is not disputed that under the circumstances a fire or explosion in either of these active areas could have traveled to the No. 6 and No. 7 entries and could have been perpetuated and magnified by coal dust in these entries. Miller thus correctly concluded that a hazardous condition from the exposed coal dust existed as a result of Consolidation's failure to complete the rock dusting as required in the original citation and would have continued to expose at least seven miners working nearby to fatal injuries. Any extension of the abatement period would, therefore, have commensurately extended the miners' exposure to these hazards.

The second consideration is the diligence of the operator in attempting to meet the time originally set for abatement. It is undisputed that when the underlying citation was issued at 8:30 on the morning of March 19, 1981, mine foreman Tom Hofrichter agreed that the cited condition could be abated by 4 p.m. the following day, March 20, 1981, and, accordingly, Miller allowed that much time for abatement. It is further undisputed that the condition could have been abated by two men working one 8-hour shift. It was nevertheless established that Consolidation had failed to complete abatement nearly 5 days after the citation had been issued and was at that time doing nothing to further the abatement process. Moreover, at the time the order was issued, Consolidation could offer no extenuating circumstances or justification for its failure to have fully abated the condition. While the area which had not yet been rock dusted, was, according to the inspector, nearly half of the area originally cited, even assuming that the area only consisted of the 240 linear feet admitted by Consolidation, it was substantial in relation to the total area cited and is persuasive evidence that little effort was made to correct the condition. Accordingly, I conclude that Consolidation did not make a diligent effort to abate the condition within the time originally established.

A third factor to consider is the disruptive effect that an extension of abatement time would have upon operating shifts. Consolidation claims that work in the mine was indeed disrupted as a result of the order since the areas subject to the order served as a return for the left split of air and the section foreman was accordingly told not to set up for mining on that split of air. Presumably, however, the men were assigned to work elsewhere during the 4-1/4 hours needed to complete abatement. Consolidation also asserts that production was further disrupted because a few men from a working crew had to be diverted to complete abatement. While the argument is certainly entitled to credit for its audacity, I find no merit to a contention of disruption based on its own intentional or negligent failure to have completed abatement within the time required. Under the circumstances, I conclude that the issuance of the withdrawal order had only minimal effect on operating shifts. I observe moreover that termination of the order was further delayed by the fact that the operator's rock-dusting equipment in the cited section was admittedly not functioning and other equipment had to be brought in. In any event, I find that any adverse effect the order had is far outweighed by the other factors considered herein. I therefore conclude that Inspector Miller did not act unreasonably in not extending the time for abatement. Accordingly, Order of Withdrawal No. 1043545 was properly issued and is affirmed.

Appropriate Penalty

Under section 110(i) of the Act, the following criteria are to be considered in assessing a civil penalty: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4)

the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of

the operator in attempting to achieve rapid compliance after notification of the violation. The operator and the mine here at issue are large in size. There is no contention that any penalty that might be imposed would affect the operator's ability to continue in business. A computer printout summarizing the history of violations at the Laurel Mine indicates a significant number of violations over a recent 2-year period but only one previous violation of the standard cited in this case. I find that the operator is chargeable with simple negligence in failing to detect and correct a condition which it should have known existed in the cited entries. An area of a coal mine that has been rock dusted is plainly visible. I find, however, that the operator was grossly negligent in failing to abate the cited conditions within the time specified for abatement after it knew of the cited hazard and indeed failed to correct the condition for nearly 5 days. It is obvious within this framework that Consolidation failed to exercise good faith to achieve timely abatement and indeed did not achieve abatement until an order of withdrawal had been issued. The hazard of fire and explosion here was aggravated by the fact that it was allowed to continue to exist for such a long period of time. Based on the undisputed testimony of MSHA's expert witness, John Nagy, it is apparent that the conditions did pose a danger of serious injury or death to at least seven or eight miners. Considering all of these factors, I conclude that a penalty of $2,000 is appropriate.

ORDER

Citation No. 1043455 and Order No. 1043545 are hereby AFFIRMED. Consolidation Coal Company is ORDERED to pay a penalty of $2,000 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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~FOOTNOTE_ONE

Section 104(a) of the Act provides as follows:

"If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act."

Section 104(b) provides as follows:

"If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) 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 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."