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

CONSOLIDATION COAL COMPANY, CONTESTANT	Contest of Citation
v.	Docket No. PENN 81-92-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Citation No. 845008 Renton Mine

DECISION

Appearances: Jerry F. Palmer, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Contestant; David T. Bush, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent.

Before: Judge Melick

This case is before me upon the notice of contest filed by the Consolidation Coal Company (Consol) under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," challenging the validity of a citation issued by the Mine Safety and Health Administration (MSHA) on February 2, 1981, under the provisions of section 104(d)(1) of the Act.(FOOTNOTE.1) In contesting the citation, Consol specifically alleges that: (1) there was no violation of the cited mandatory standard, and, even assuming that there was a violation, that, (2) the violation was not one that could significantly and substantially contribute to the cause and effect of a coal mine safety or health hazard, and (3) the violation was not due to the unwarrantable failure of the operator to comply with the standard. At the request of Consol, an evidentiary hearing was held in Pittsburgh, Pennsylvania.

The citation at bar alleges a violation of the operator's ventilation plan under the mandatory standard at 30 C.F.R. 75.316. That standard has been interpreted as requiring the operator to comply with the ventilation plan approved by the Secretary. Zeigler Coal Company, 4 IBMA 30 (1975), aff'd., 536 F.2d 398 (D.C. Cir. 1976). More specifically, the citation alleges as follows:

> The ventilation plan was not being complied with on the 6 East active working section in that a room located 101 feet directly inby station No. 9098 was driven in (mined) approximately 39 feet. No ventilation devices, mine curtain or tubing, was [sic] installed at the time of inspection to ventilate the face. Two sets of examination dates and initials was [sic] on the left rib: 1-31-81, J.K.; 02-01-81, D.F.

The operator's ventilation plan then in effect provided in part as follows: "Crosscut is normally provided at face before room or entry is abandoned. However, if crosscut is not or cannot be driven at face, line brattice will be installed." I find that these provisions of the ventilation plan have indeed been violated.(FOOTNOTE.2) The essential facts in this regard are not in dispute. At the time MSHA inspector Lloyd Swayne issued the subject citation at about 9:30 a.m. on February 2, 1981, the cited entry was approximately 39 feet deep. No crosscut had been cut at the face and no ventilation device was present in the entry. The face of the entry was admittedly not then a "working face" since all phases of the mining cycle had terminated there on January 30, 1981, during the 8 to 4 shift and no additional mining in that entry was contemplated for the immediate future. Section foreman Richard Walker explained that he had decided instead to cut through a crosscut adjacent to the mouth of the cited entry and to continue mining in another entry before returning to work in the cited entry. It is not disputed that brattice curtain had previously been installed in the cited entry as mining progressed and remained in place as late as 7 a.m. on the day the citation was issued. The brattice had subsequently been removed, however, by persons not identified.

Within this framework of undisputed evidence, it is clear that the cited entry had been temporarily abandoned on January 30, 1981, after having been penetrated to a depth of 39 feet but before a crosscut had been driven from its face. The section foreman decided to abandon that entry for a short time in favor of mining coal in an adjacent crosscut and nearby entry. It is also

clear that under the cited provisions of the ventilation plan, line brattice was required under these circumstances to have been installed in the cited entry. Since brattice was admittedly not installed at the time the citation was issued, I find that the ventilation plan has been violated and that a violation of the cited standard has therefore been proven.

Whether that violation is "significant and substantial," however, depends on whether, based on the particular facts surrounding the violation, there existed a reasonable likelihood that the hazard contributed to would have resulted in an injury of a reasonably serious nature. Secretary of Labor v. Cement Division, National Gypsum Company, 3 FMSHRC 822 at 825 (1981). The test involves two considerations: the probability of resulting injury and the seriousness of the resulting injury. Inspector Swayne here concluded that the violation was "significant and substantial" because "it was evident that methane was accumulating" in the cited entry and because of the potential for nearby ignition sources. While Swayne had applied a different standard in reaching this conclusion, I find, based on a de novo analysis of the facts surrounding the violation, that it was nevertheless "significant and substantial" under the National Gypsum test.

In determining that "methane was accumulating," Inspector Swayne relied upon a methane test he performed in the cited entry at about 9:30 that morning showing a concentration of .3 percent methane and upon a determination that there was absolutely no movement of air in that entry. This evidence is not contradicted. The .3 percent methane then found was admittedly not of sufficient concentration to constitute an imminent danger of explosion or fire but, as Swayne pointed out, if that had accumulated to a concentration of 1 percent or more then an explosive concentration would have existed. While the records of daily inspections kept at the Renton Mine do show that with one exception no methane had been detected at the face of the subject entry from January 30, 1981, through 7:30 a.m. on February 2, 1981, the day the citation was issued, it is apparent from the testimony of Section Foreman Walker that during that same period line brattice was hung to within 15 feet of the face of that entry thereby providing ventilation to remove the methane from the face. When Swayne cited the condition at 9:20 on the morning of February 2, however, the brattice had been taken out leaving the entry without ventilation. Indeed, Swayne was unable to detect any movement of air at the face. The fact that Section Foreman Walker found more than the required ventilation at a point outby the cited entry is of little consequence since there was admittedly no ventilation in the entry itself where the methane was accumulating. Under the circumstances, I find that Swayne was correct in concluding that methane was accumulating in the cited entry.

Inspector Swayne further testified that before an explosion or fire could occur, in addition to an increase in the concentration of methane, an ignition source would also have to be present. He found that an energized roof-bolting machine

working some 75 feet from the mouth of the cited entry was one such potential ignition source. He opined that the electrical cables to that machine could be severed by a roof fall or from the operation of the machine itself. He surmised that the bolting machine could also strike the ribs or tools on the

machine could jostle about, thereby creating sparks. This testimony is not disputed by the operator. Within this framework of evidence, I am convinced that when the citation at bar was issued there indeed existed a reasonable likelihood that the hazard contributed to would have resulted in an injury of a reasonably serious nature. Thus, the violation was "significant and substantial."

A determination must next be made as to whether the instant violation was the result of the "unwarrantable failure" of the operator to comply with the law. A violation is the result of "unwarrantable failure" if the violative condition is one which the operator knew or should have known existed or which the operator failed to correct through indifference or lack of reasonable care. Zeigler Coal Company, 7 IBMA 280 (1977). In this regard, I find first that the operator may be presumed to know the clear requirements of its own ventilation plan and that accordingly in this case it may be presumed that Consol knew that line brattice was required to have been maintained in the cited entry. This presumption is reinforced by the undisputed testimony that such brattice had existed in the cited entry in apparent compliance with the ventilation plan until at least 7:00 that morning when Foreman Walker made his onshift examination in the subject entry. This was only 2 and 1/2 hours before the citation was issued by Inspector Swayne. There is no evidence before me, however, regarding the circumstances under which that brattice came to be removed between 7 a.m. and 9:30 a.m. Foreman Walker testified that he did not authorize its removal and did not know who actually removed it. Under these circumstances, I cannot find that a responsible agent of the operator knew or should have known of the violative condition, i.e., the removal of the brattice. Accordingly, I find that the violation was not one which the operator knew of or should necessarily have known of and therefore the violation was not the result of the "unwarrantable failure" of the operator to comply with the law. The section 104(d)(1) citation at bar must be accordingly modified to a section 104(a) citation.

ORDER

Pursuant to section 105(d) of the Act, I hereby modify the Secretary's citation in the captioned case from one issued under section 104(d)(1) of the Act to a citation under section 104(a) of the Act and affirm the latter citation and the "significant and substantial" findings attendant therewith.

Gary Melick
Administrative Law Judge

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~FOOTNOTE_ONE

Section 104(d)(1) provides in relevant part as follows:

"If, upon any 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 did 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."

~FOOTNOTE_TWO

While MSHA alleges that Consol actually violated the provisions of Drawing No. 12 incorporated as part of that plan, I disagree. Drawing No. 12 is inapplicable on its face because it applies only when a double split of air is utilized. Here, it is admitted that only a single split of air was in effect. Moreover, I do not find that mining was progressing at the time the citation at bar was issued and I therefore do not find that the requirement set forth as part of Drawing No. 12 that "line brattice or tubing [be] advanced to 10 feet of face as mining progresses" is applicable hereto.