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

CONSOLIDATION COAL COMPANY, CONTESTANT	Notice of Contest
v.	Docket No. LAKE 80-352-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Citation No. 823213 June 9, 1980 Franklin Highwall No. 65 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. LAKE 81-67 A/O No. 33-01065-03028F
v.	Franklin Highwall No. 65 Mine
CONSOLIDATION COAL COMPANY, RESPONDENT	

DECISION

Appearances: Patrick M. Zohn, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for the Secretary of Labor
Jerry F. Palmer, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Consolidation Coal Company.

Before: Judge Cook

I. Procedural Background

On July 7, 1980, Consolidation Coal Company (Consol) filed a notice of contest in Docket No. LAKE 80-352-R pursuant to section 105(d) (FOOTNOTE 1) of the

Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (Supp. III 1979) (1977 Mine Act), to contest section 104(d)(1) (FOOTNOTE 2) Citation No. 823213. The notice of contest states, in part, as follows:

> 1. At or about 1200 hours on June 9, 1980, Federal Coal Mine Inspector, Jack C. Cologie, (A.R. 2-1548) representing himself to be a duly authorized representative of the Secretary of Labor (hereinafter "Inspector") issued Citation No. 0823213 (hereinafter "Citation") pursuant to the provisions contained in Section 104(d)(1) of the Act to Mike Torchik, Safety Supervisor, for a condition he allegedly

observed during an "AFB" inspection (accident inspection) in the Franklin Highwall #65 Mine, Identification No. 33-01065, located in Ohio. A copy of this Citation is attached hereto as Exhibit "A" in accordance with 29 C.F.R. Section 2700.20(c).

2. Said Citation under that heading captioned "Condition or Practice" alleges that:

> "An accident investigation revealed that work was being performed underneath an automobile in the outside maintenance shop on June 7, 1980. The automobile was raised with an electric hoist and was not blocked before the maintenance foreman began working underneath the vehicle. Ed Blazeski was the maintenance foreman. This was unwarrantable failure.

3. Said Citation contained the allegation that the above condition or practice constituted a violation of 30 C.F.R. 77.405(b), a mandatory health or safety standard and that the alleged violation was of such a nature that it could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. The Inspector further determined that the alleged violation was caused by an unwarrantable failure to comply with the stated standard.

4. At or about 0900 hours on June 10, 1980, Inspector Cologie issued a termination of said Citation. A copy of this termination is attached hereto as Exhibit "A1."

5. Consol avers that the Citation is invalid and void, and in support of its position states:

(a) That the Citation fails to cite a condition or practice which constituted a violation of mandatory health or safety standard 30 C.F.R. 77.405(b), and

(b) That the Citation fails to cite a condition or practice caused by an unwarrantable failure of Consol to comply with any mandatory health or safety standard;
(c) That the Citation fails to state a condition or practice which could significantly and substantially contribute to the cause and/or effect of a mine safety or health hazard;

(d) That several assertions contained in the Citation and upon which the Citation was based are inaccurate.

> 6. Consol requests an investigation of this Citation and further requests Cadiz, Ohio as the site for a public hearing on this Notice of Contest.
>
> WHEREFORE, Consol respectfully requests that its Notice of Contest be granted and for all of the above and other good reasons, Consol additionally requests that the subject Citation be vacated or set aside and that all actions taken or to be taken with respect thereto or in consequence thereof be declared null, void and of no effect.

An answer was filed by the Secretary of Labor (Secretary) on October 27, 1980. In his answer, the Secretary (1) admitted the issuance of Citation No. 823213 and stated that it was properly issued pursuant to section 104(d) of the 1977 Mine Act; (2) submitted that Consol violated a mandatory standard and that such violation was caused by Consol's unwarrantable failure to comply with the cited mandatory standard; (3) specifically denied the allegations set forth in Paragraph Nos. 5(a), 5(b), 5(c), and 5(d) of Consol's notice of contest; and (4) denied all other allegations set forth in Consol's notice of contest. The Secretary prayed for the entry of an order denying the relief requested by Consol and affirming the citation.

On November 10, 1980, Consol filed a motion requesting, amongst other things, the entry of an order continuing the proceeding pending the filing of the associated civil penalty case. The requested continuance was granted on December 9, 1980.

On January 26, 1981, the Secretary filed a proposal for a penalty in the associated civil penalty case, Docket No. LAKE 81-67, pursuant to section 110(a) of the 1977 Act praying for the assessment of a civil penalty for the alleged violation of mandatory safety standard 30 C.F.R. 77.405(b) set forth in Citation No. 823213. Consol filed an answer on February 13, 1981.

Rule 27(d) of the Rules of Procedure of the Federal Mine Safety and Health Review Commission, 29 C.F.R. 2700.27(d) (1980), requires that "[a] legible copy of each citation or order for which a penalty is sought shall be attached to the proposal [for a penalty filed by the Secretary]." The proposal for a penalty filed on January 26, 1981, failed to comply with this requirement in that a copy of section 103(k) Order No. 823212 was attached thereto instead of a copy of Citation No. 823213. On April 7, 1981, the Secretary filed a motion to amend the proposal for a penalty to substitute a copy of Citation No. 823213 and related attachments for those filed on January 26, 1981. The motion was granted on April 23, 1981.

Pursuant to various notices, the hearing was held on May 1, 1981, with representatives of both parties present and participating. Consol moved to dismiss the charge of violation at the close of the Secretary's case-in-chief. A ruling on the motion is set forth herein. Additionally, the record was left

open for the posthearing filing of a computer printout setting forth the

history of previous violations at Consol's Franklin Highwall No. 65 Mine. On May 27, 1981, the Secretary filed the computer printout, and on June 12, 1981, Consol filed a written communication stating that it had no objection to the document's receipt in evidence. Accordingly, on June 15, 1981, an order was issued receiving the computer printout, denominated as Exhibit M-1, in evidence.

At the conclusion of the hearing on May 1, 1981, a schedule was set for the filing of posthearing briefs and proposed findings of fact and conclusions of law. However, the schedule was later revised due to difficulties experienced by counsel. The Secretary and Consol filed posthearing briefs on July 7, 1981, and July 8, 1981, respectively. The Secretary filed a reply brief on July 27, 1981. Consol filed a reply brief and proposed findings of fact and proposed conclusions of law on July 27, 1981.

II. Violation Charged in Docket No. LAKE 81-67

Citation No.	Date	30 C.F.R. Standard
823213	June 9, 1980	77.405(b)

III. Witnesses and Exhibits

A. Witnesses

The Secretary called Federal Mine inspector Jack A. Cologie as a witness.

Consol called as its witnesses Mr. Ted Kovalski, superintendent of the Franklin Highwall No. 65 Mine; Mr. James M. Maynard, the mine engineer at the Franklin Highwall No. 65 Mine; and Mr. Michael A. Torchik, a safety supervisor at the Franklin Highwall No. 65 Mine.

B. Exhibits

1. The Secretary introduced the following exhibits in evidence:

M-1 is a computer printout compiled by the Directorate of Assessments setting forth the history of previous violations at Consol's Franklin Highwall No. 65 Mine, beginning June 6, 1978, and ending June 5, 1980.
M-2 is a diagram of the maintenance shop where the accident occurred.

M-3 is a copy of Citation No. 823213, June 9, 1980, 30 C.F.R. 77.405(b), and a copy of the termination thereof.

2. Consol introduced the following exhibit in evidence:
0-1 is a diagram styled "Franklin Highwall No. 65 Mine New Portal Facilities" which depicts the layout of the

mine showing the office, the parking lot, and the maintenance shop where the accident occurred.

IV. Issues

A. The general question presented in the above-captioned notice of contest proceeding is whether Citation No. 823213 was validly issued pursuant to section 104(d)(1) of the 1977 Mine Act. (FOOTNOTE 3) The specific issues presented as to the citation's validity are as follows:

1. Whether the condition or practice described in Citation No. 823213 occurred.

2. If the condition or practice described in Citation No. 823213 occurred, then whether such condition or practice constituted a violation of mandatory safety standard 30 C.F.R. 77.405(b).

3. If the condition or practice described in Citation No. 823213 occurred, and if such condition or practice constituted a violation of mandatory safety standard 30 C.F.R. 77.405(b), then whether such violation was caused by Consol's unwarrantable failure to comply with such mandatory safety standard.

B. Two basic issues are involved in the above-captioned civil penalty proceeding: (1) did a violation of mandatory safety standard 30 C.F.R. 77.405(b) occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V. Opinion and Findings of Fact

A. Stipulations

1. Consol is the owner and operator of the Franklin Highwall No. 65 Mine located in Harrison County, Ohio (Tr. 8-10).

2. Consol and its Franklin Highwall No. 65 Mine are subject to the jurisdiction of the 1977 Mine Act (Tr. 8-10).

3. The Federal Mine Safety and Health Review Commission has jurisdiction of this case (Tr. 8-10).

4. The inspector who issued Citation No. 823213 was a duly authorized representative of the Secretary (Tr. 8-10).

5. A true and correct copy of Citation No. 823213 was properly served upon the mine operator (Tr. 8-10).

6. The alleged violation was abated in good faith (Tr. 8-10).

7. Any civil penalty assessed in Docket No. LAKE 81-67 will not affect the mine operator's ability to continue in business (Tr. 8-10).

8. The size of Consol is rated at 44,855,465 tons annually and the size of the Franklin Highwall No. 65 Mine is rated at 409,437 tons annually (Tr. 9).

B. Consol's Motion to Vacate the Citation at the Close of the Secretary's Case-in-chief

Citation No. 823213 charges Consol with a violation of mandatory safety standard 30 C.F.R. 77.405(b) in connection with an accident which occurred at its Franklin Highwall No. 65 Mine on June 7, 1980. (FOOTNOTE 4) The citation alleges, in pertinent part, as follows:

> An accident investigation revealed that work was being performed underneath an automobile in the outside maintenance shop on June 7, 1980. The automobile was raised with an electric hoist and was not blocked before the maintenance foreman began working underneath the vehicle. Edmund Blazeski was the maintenance foreman.

(Exh. M-3).

Mandatory safety standard 30 C.F.R. 77.405(b) requires that "[n]o work shall be performed under machinery or equipment that has been raised until such machinery or equipment has been securely blocked in position."

Consol moved to dismiss the charge of violation at the close of the Secretary's case-in-chief and set forth two grounds in support thereof. The motion was taken under advisement to be ruled upon at the time of the writing of the decision based solely upon the evidence contained in the record when the motion was made.

Neither the Rules of Procedure of the Federal Mine Safety and Health Review Commission, nor the Administrative Procedure Act, nor the 1977 Mine Act set forth express standards governing the disposition of motions to dismiss at the close of an opposing party's case-in-chief. It is therefore appropriate to consult the Federal Rules of Civil Procedure for guidance. 29 C.F.R. 2700.1(b) (1980).

Rule 41(b) of the Federal Rules of Civil Procedure provides, in part, as follows:

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence.

In ruling upon a Rule 41(b) motion to dismiss, the trial court is empowered to weigh the evidence, consider the law, and find for the defendant at the close of the plaintiff's case-in-chief. 5 J. MOORE, FEDERAL PRACTICE, %57 41.13[4] at pp. 41-189 - 41-192 (1980). The trial court may grant the defendant's motion when the plaintiff fails to present sufficient evidence during its case-in-chief to satisfy its burden of proof. See Brennan v. Sine, 495 F.2d 875 (10th Cir. 1974); Woods v. North American Rockwell Corporation, 480 F.2d 644 (10th Cir. 1973); Pittston-Luzerne Corporation v. United States, 176 F. Supp. 641 (M.D. Pa. 1959).

The Secretary proved during his case-in-chief, and I find, that on Saturday, June 7, 1980, Mr. Edmond Blazeski, the master mechanic (FOOTNOTE 5) at Consol's Franklin Highwall No. 65 Mine, used the facilities at the maintenance shop to perform work on his personal 1974 Cadillac. He had previously welded

the muffler and was wiring it back to prevent it from rubbing against the drive shaft. The rear of the car was held in a raised position by a nylon sling attached to an overhead electric traveling hoist. Header blocks were placed in front of the front wheels to block the car against forward motion. However, the rear portion of the car was not blocked so as to prevent the car from falling on an individual performing work under it. At some point in time between 11 a.m. and 12:30 p.m., the nylon sling broke causing the car to fall on Mr. Blazeski. (FOOTNOTE 6) He died of his injuries on June 27, 1980. (FOOTNOE 7)

The first argument advanced by Consol in support of its motion to dismiss the charge of violation is that the Secretary failed to adduce reliable, probative, and substantial evidence to prove that the car was not securely and properly blocked. Consol's argument is without foundation. The evidence adduced by the Secretary and the rational inferences drawn therefrom prove that at the time of the accident, Mr. Blazeski was working under the car and that it was not properly and securely blocked. Accordingly, it must be concluded that the Secretary met his burden of proof on this issue during his case-in-chief. (FOOTNOTE 8)

The second argument advanced by Consol in support of its motion to dismiss the charge of violation is that the phrase "machinery or equipment" used

in mandatory safety standard 30 C.F.R. 77.405(b) does not encompass personal automobiles. According to Consol, the mandatory safety standard applies only with respect to machinery or equipment used in the operation of a coal mine. The Secretary disagrees, maintaining that the mandatory safety standard applies to any type of machinery or equipment, including personal automobiles, as long as such machinery or equipment is located on coal mine property.

Mandatory safety standard 30 C.F.R. 77.405(b) was originally promulgated pursuant to section 101(i) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1970) (1969 Coal Act); see 36 Fed. Reg. 9364, 9370 (May 22, 1971). (FOOTNOTE 9) The 1969 Coal Act was remedial legislation designed to secure a safe and healthful work environment for those miners working in coal mines which were subject to its provisions. See section 2 of the 1969 Coal Act. To this end, Congress set forth both a series of interim mandatory health and safety standards and procedures for the promulgation of new and improved mandatory health and safety standards. See sections 101, 201 through 206, and 301 through 317 of the 1969 Coal Act. The purpose of a mandatory safety standard was summarized on the floor of the United States Senate by Senator Harrison Williams as follows:

> To ward off the heavy toll of on-the-job fatalities and injuries, S. 2917 provides both a comprehensive set of interim safety standards and authority in the Secretary of the Interior to promulgate new and improved standards. The interim safety standards in the bill are directed at eliminating the extreme hazards of coal mining. [Emphasis added.]

LEGISLATIVE HISTORY OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF L969 at 244 (1975).

Although the terms "machinery" and "equipment" are not defined within Part 77 of Title 30 of the Code of Federal Regulations, it is clear that the mandatory safety standard in which they appear is propertly directed only towards the prevention of job-related injuries and fatalities. Therefore, I conclude that the phrase "machinery or equipment," as used in mandatory safety standard 30 C.F.R. 77.405(b), encompasses only machinery or equipment used in or to be used in the operation of a coal mine. A personal automobile, such as the one involved herein and in the status it then occupied, which has no functional relationship to the operation of a coal mine is not "machinery or "equipment" within the meaning of the standard.

In view of the foregoing, I conclude that the condition or practice cited in Citation No. 823213 does not constitute a violation of mandatory

safety standard 30 C.F.R. 77.405(b). Consol's motion to dismiss the charge of violation at the close of the Secretary's case-in-chief will be granted.

VI. Conclusions of Law

1. The Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, these proceedings.

2. Consolidation Coal Company and its Franklin Highwall No. 65 Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to these proceedings.

3. Federal mine inspector Jack A. Cologie was a duly authorized representative of the Secretary of Labor at all times relevant to these proceedings.

4. The condition or practice cited in Citation No. 823213 does not constitute a violation of mandatory safety standard 30 C.F.R. 77.405(b).

5. All of the conclusions of law set forth in Part V, supra, are reaffirmed and incorporated herein.

VII. Proposed Findings of Fact and Conclusions of law

The parties filed the posthearing submissions identified in Part I, supra. Such submissions, insofar as they can be considered to have contained proposed findings of fact and conclusions of law have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

ORDER

Accordingly, IT IS ORDERED that Consol's motion to dismiss the charge of violation at the close of the Secretary's case-in-chief be, and hereby is, GRANTED.

IT IS FURTHER ORDERED that the notice of contest in Docket No. LAKE 80-352-R be, and hereby is, GRANTED, and that Citation No. 823213 be, and hereby is, VACATED.

IT IS FURTHER ORDERED that the proposal for a penalty in Docket No. LAKE 81-67 be, and hereby is, DISMISSED.

John F. Cook
Administrative Law Judge

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~FOOTNOTE_ONE

1 Section 105(d) of the 1977 Mine Act provides as follows:

"If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 104, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 104, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The rules of procedure prescribed by the Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section. The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 104."

~FOOTNOTE_TWO

2 Section 104(d)(1) of the 1977 Mine Act provides 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 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."

~FOOTNOTE_THREE

3 Section 104(d)(1) of the 1977 Mine Act provides for the issuance of a citation when an authorized representative of the

Secretary of Labor, upon any inspection of a coal or other mine, finds: (1) that there has been a violation of any mandatory health or safety standard; (2) 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 mine safety or health hazard; and (3) that such violation was caused by the mine operator's unwarrantable failure to comply with such mandatory health or safety standard.

Consol's July 7, 1980, notice of contest specifically raised the issue as to whether the alleged violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. However, at the beginning of the hearing on May 1, 1981, counsel for Consol withdrew his challenge to the significant and substantial criterion by stating that he would not make it an issue. Accordingly, the Secretary was relieved of his burden of presenting a prima facie case as to such issue. See Youngstown Mines Corporation, 3 FMSHRC 1793, 1802-1803 (1981) (Cook, J.).

~FOOTNOTE_FOUR
4 The citation was issued on June 9, 1980, by Federal mine inspector Jack A. Cologie.

~FOOTNOTE_FIVE
5 The evidence shows that a master mechanic is a high-ranking supervisory employee. According to Inspector Cologie, a master mechanic is in overall charge of maintenance and equipment with a number of workers and foremen under him. Mr. Ted Kovalski, the superintendent of the Franklin Highwall No. 65 Mine, testified during Consol's case-in-chief that a master mechanic ranks higher than a maintenance foreman. According to Mr. Kovalski, Mr. Blazeski was in charge of five maintenance foremen and 15 to 20 union people. Mr. Blazeski, in turn, reported to Mr. Kovalski.

~FOOTNOTE_SIX
6 There were no eyewitnesses to the accident (Tr. 55).

~FOOTNOTE_SEVEN
7 The evidence presented during the Secretary's case-in-chief and the rational inferences drawn therefrom show that Mr. Blazeski was acting outside the scope of his employment duties at the time of the accident. Although not dispositve of the issues presented herein, the evidence presented during Consol's case-in-chief shows: (1) that Mr. Blazeski was off duty at the time of the accident; (2) that Mr. Blazeski was in violation of company policy at the time of the accident in that company policy prohibited the use of company facilities, supplies, or equipment for anything other than company business; and (3) that neither Mr. Kovalski, Mr. Blazeski's supervisor, nor Mr. James M. Maynard, the mine engineer, knew or had reason to know of Mr. Blazeski's unauthorized activities.

~FOOTNOTE_EIGHT
8 There was considerable conflict in the evidence on the

record as a whole as to whether suitable blocking material was present in or around the maintenance shop. Inspector Cologie testified during the Secretary's case-in-chief that a search was conducted during the Mine Safety and Health Administration's accident investigation but that no blocks suitable for blocking were found either inside or outside the maintenance shop. He reiterated this position when recalled as a rebuttal witness on behalf of the Secretary. However, Messrs. Kovalski and Torchik testified during Consol's case-in-chief that crib blocks were present at the maintenance shop.

It is unnecessary to resolve this conflict in the testimony. The evidence presented during the Secretary's case-in-chief and the evidence on the record as a whole shows that the car was not properly and securely blocked at the time of the accident. It should be noted that Consol failed to present persuasive evidence during its case-in-chief to rebut the Secretary's prima facie case on this issue.

~FOOTNOTE_NINE

9 Mandatory safety standard 30 C.F.R. 77.405(b) remains in effect as a mandatory safety standard under the 1977 Mine Act pursuant to the provisions of sections 301(b)(1) and 301(c)(2) of the Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, 91 STAT. 1290-1322.