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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 81-106-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Order No. 845125 Renton Mine

DECISION

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

Before: Judge Melick

On March 4, 1981, MSHA inspector Gerald Davis issued Order of Withdrawal No. 845125 pursuant to section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act" for an alleged violation at the Consolidation Coal Company (Consolidation) Renton Mine. (FOOTNOTE 1)

Consolidation thereafter filed a notice of contest under section 105(d) of the Act and a motion for summary decision under Commission Rule 64, 29 C.F.R. 2700.64, challenging the validity of that order. Hearings were conducted in this case on December 2, 1981, in Pittsburgh, Pennsylvania, at which I issued a bench decision granting a partial summary decision modifying the order to a citation under section 104(d)(1) of the Act. Following hearings on the merits of the case, I issued a bench decision upholding that citation. Those decisions, which appear below with only nonsubstantive changes, are affirmed at this time.

Partial Summary Decision

On March 4, 1981, MSHA inspector Gerald Davis issued Order No. 845125 pursuant to section 104(d)(1) of the Federal Mine Safety and Health Act of 1977 for an alleged violation at the Consolidation Coal Company Renton Mine. Consolidation thereafter filed a notice of contest and a motion for summary decision arguing therein for the vacation of the order.

It is undisputed that the section 104(d)(1) citation set forth in the order at bar, as the precedential citation required by that section, had been modified to a section 104(a) citation as a result of a final decision of this Judge on September 24, 1981. (FOOTNOTE 2) In an effort to salvage the order in this case, the Secretary has in effect moved to amend or modify the order to substitute another section 104(d)(1) citation for the one held invalid. In order to establish such a substitute citation, the Secretary also now seeks to amend or modify an earlier section 104(d)(1) order (Order No. 843499 issued February 26, 1981), to a section 104(d)(1) citation. It is undisputed, however, that Order No. 843499 had previously, on July 10, 1981, been the subject of a valid settlement agreement between the parties.

Now, a settlement agreement is actually a contract and the construction of such an agreement is accordingly governed by the same legal principles applicable to the construction of any other contract.(FOOTNOTE 3) In construing and determining the effect of a valid settlement, just as with any contract, the primary objective is to effectuate the intention of the parties and in determining the intention of the parties past practices between them are a relevant consideration. (FOOTNOTE 4) In this regard, I find that there was certainly no express reservation in the settlement agreement to allow MSHA to

subsequently reinstate or modify that order to a section 104(d)(1) citation, and no such reservation can be implied from past practices. To the contrary, it was understood by Consolidation officials at the time that they entered into this settlement agreement (and MSHA agrees that the practice was indeed uniformly followed in the past) that MSHA would not and had never previously modified a settled section 104(d)(1) order to a section 104(d)(1) citation. MSHA had, at most, converted those settled section 104(d)(1) orders to section 104(a) citations and this was the practice that Consolidation officials understood and had relied upon in their settlement of Order No. 843499.

It is, of course, well established law that a valid settlement agreement is final, conclusive, and binding on the parties. It is just as binding as if its terms had been embodied in a final judgment of the court. (FOOTNOTE 5) Under the circumstances, it would be a violation of that agreement for the Secretary to now modify Order No. 843499 to a section 104(d)(1) citation.

The Secretary's reliance on the decision of Commission Judge Cook in the Youngstown Mines case (Youngstown Mines Corporation v. Secretary, 3 FMSHRC at pp. 1807 and 1808) is misplaced. In that case, Judge Cook modified a section 104(d)(1) order to a section 104(d)(1) citation but the order there at issue, unlike the order herein, had not been settled by the parties. Under all the circumstances, I find that Order No. 845125 is without an essential precedential section 104(d)(1) citation and therefore cannot be sustained as a valid order. To the extent that I find Order No. 845125 invalid, I grant the motion for summary decision filed by Consolidation. Commission Rule 64, 29 C.F.R. 2700.64. The order is accordingly modified to a section 104(d)(1) citation. Inasmuch as there does remain a factual dispute concerning the validity of this citation, however, which can only be resolved through an evidentiary hearing, the motion for summary decision in that regard is denied.

Decision on the Merits

This case is before me upon the notice of contest filed by Consolidation under section 105(d) of the Federal Mine Safety and Health Act of 1977 in which Consolidation had challenged the validity of a section 104(d)(1) order of withdrawal. Since that order has been modified to a section

104(d)(1) citation as a result of my partial summary decision in this case, it is the validity of that remaining citation that is now at issue.

In contesting that citation, Consolidation now admits that there was indeed a violation as alleged and claims now only that: (1) 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 (2) the violation was not due to the unwarrantable failure of the operator to comply with the standard.

The citation before me alleges a violation of the standard at 30 C.F.R. 75.701-3. In relevant part, that standard reads as follows:

> For the purpose of grounding metallic frames, casings and enclosures of any electrical equipment, the following methods of grounding will be approved * * * (b) a solid connection to the grounded power conductor of the system, * * *.

More specifically, the citation before me alleges that "the ten Labour 300 Volt DC pump in the rock dust chute [was] not properly frame grounded [and] the return feeder was corroded into where the pump return conductor clamped to the DC return feeder." As I have already noted, Consolidation has conceded that the violation did in fact occur as alleged. Whether that admitted 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 822at 825. The test essentially involves two considerations, (1) the probability of resulting injury, and (2) the seriousness of the resulting injury.

It is undisputed in this case that in order for an electrical shock or electrocution to have occurred under the situation presented by the admitted violation, there must in addition have been some electrical failure in the system. MSHA inspector Gerald Davis testified without contradiction that the most likely source for such a failure would have been from uninsulated and exposed wiring contacting metal on the pump frame. In this regard, Davis had indeed found that the 300-volt power cable on the very same pump cited herein had pulled out of its clamp at the point where it entered the metal connection box on the pump motor and that, as a result, some tape insulation on one of the wires spliced

inside that box had been partially stripped. A portion of that wire was thereby exposed. If this exposed wire were to come into contact with the small metal frame of the connection box, it is clear, based on the undisputed testimony of Inspector Davis, that a hazard of serious shock or electrocution did exist.

Now, there is also undisputed testimony that the primary wire entering the connector box was at about knee level in an area where at least one miner would be present each shift. It is reasonable to infer from that evidence that at least one person could accidentally brush against those wires or trip over those wires and, in any event, come into contact with those wires sufficiently to cause the exposed wire inside the box to come into contact with the box itself thereby creating the shock hazard. Indeed, there is also undisputed evidence in this case that the vibration in the pump itself could have caused the exposed wire to come into contact with the metal box.

Now, the operator's chief witness on this issue, Stanley Kretoski, claims that the pump was situated on a metal grate which, in turn, was attached to a metal rail embedded into the mine floor. He further asserts that this arrangement provided enough grounding to prevent any serious shock. Kretoski admits, however, that in order to be certain of the sufficiency of the grate and rail system, it would be essential to know its actual resistance. He further admits that he does not know what that resistance was. Indeed, Kretoski, as with the other witness presented by Consolidation, was not present at the time of the issuance of the citation, and relies primarily on his understanding of the cited conditions from other persons. Inspector Davis also testified that even if the grate and rail system had existed, that would not in itself have been sufficient to prevent serious shock. In light of Mr. Davis' well established credentials as a skilled and experienced electrician and the fact that he has been qualified and certified at both the Federal and state level in the field of electrical maintenance, I find his testimony on this point to be the more credible.

The undisputed facts in this case warrant a conclusion, in my opinion, that serious shock was reasonably likely to occur under the circumstances. I find, moreover, that the hazard of shock or electrocution was reasonably serious. Under the circumstances, I conclude based on my own de novo analysis of the facts, that the violation was "significant and substantial" under the National Gypsum test.

Determination must next be made then as to whether the instant violation was a 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 was 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.

For the reasons that follow, I find that the violation here was one which the operator should have known existed. Indeed, I find it quite likely that one of the operator's agents had actual knowledge of the corroded and deteriorated condition of the return feeder wire. The operator's electrician, identified here only by the name of Jerry, who accompanied Inspector Davis on the inspection, admitted that the new feeder wire that was found lying adjacent to the old corroded one had been lying there for several weeks. The company maintenance foreman or safety inspector, Bill Simpson, admitted to Mr. Davis that they had simply not gotten around to hooking up the new wire. I find that it may be inferred from this evidence that the operator knew of the deteriorated condition of the cited grounding wire for at least that 2 weeks before the citation was issued.

When that evidence is considered with Mr. Davis' testimony that it would have taken at least 6 weeks for the cited wire to have reached the condition of deterioration found by him, the conclusion is inescapable that the operator indeed had actual knowledge of the violative condition, and when I say operator, I am talking about one of the operator's responsible agents.

Now, I find in any event that the operator should have known of the condition even if it did not have actual knowledge. Consolidation, at the time of this violation, was admittedly performing inspections of all its pumps on each shift, and these inspections were admittedly being conducted by qualified electricians who were to determine the safety of these pumps on each shift. It is apparent that Inspector Davis was readily able to discover the cited defects in the grounding system visually and by simple common sense techniques without the use of any sophisticated instrumentation. It may be inferred therefore that the operator's inspections were either not being performed as required or that they were being sloppily or negligently performed. Thus, I find that Consolidation should, for this additional reason, have known of the violative condition. Indeed, the condition here cited was apparently so obvious that Mr. Simpson himself admitted to Inspector Davis that he was embarrassed by it.

I also consider in this case that Consolidation officials had twice before, on February 10 and February

26, only a few

weeks before the citation here, been alerted to deficiencies in their pumps, and that therefore should have heightened their awareness of any problems with the pumps.

Under all the circumstances, I find that the violation was one which the operator knew or certainly should have known of and therefore the violation was the result of the unwarrantable failure of the operator to comply with the law. The section 104(d)(1) citation before me must accordingly be affirmed.

ORDER

Order No. 845125 is MODIFIED to a citation under section 104(d)(1) of the Act and that citation is AFFIRMED.

Gary Melick
Assistant Chief Administrative Law Judge

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~FOOTNOTE_ONE

1 Section 104(d)(1) of the Act reads 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. 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 the 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_TWO

2 Consolidation Coal Company v. Secretary of Labor, 3 FMSHRC 2207.

~FOOTNOTE_THREE

3 15A Am.Jur.2d, Compromise and Settlement,   23.

~FOOTNOTE_FOUR

4 3 Corbin on Contracts 556; 15A Am.Jur.2d, supra.

~FOOTNOTE_FIVE
5 15A Am.Jur.2d, Compromise and Settlement, 25.