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

COWIN AND COMPANY, INC.,
CONTESTANT

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

Contest of Citation

Docket No. CENT 81-250-RM
Citation No. 173604 6/8/81

Shafter Mine

DEICSION

Appearances: W. S. Pritchard, Jr., Attorney, Birmingham, Alabama for
the contestant George D. Palmer, Associate Regional Solicitor,
U.S. Department of Labor, Birmingham, Alabama, for the
respondent

Before: Judge Koutras

Statement of the Case

This proceeding concerns a contest filed by the contestant Cowin and Company (hereinafter Cowin) contesting the legality and propriety of a citation issued by an MSHA Inspector pursuant to section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, of June 8, 1981. At the time the citation was issued, Cowin was an independent contractor doing mine development work for Gold Fields (a corporation) at the Shafter Silver Mine located near Shafter, Persidio County, Texas. The work being performed by Cowin was a mucking operation at the bottom of a drilled shaft that was drilled to a seven foot diameter and to a depth of approximately 938 feet below the surface. The citation cites an alleged violation of mandatory safety standard 30 CFR 57.19-71, and it was alleged that during the mucking operation employees of Cowin were required to stand in a bucket of loose, slippery, muddy "muck" while being hauled approximately seventy feet up the shaft in question.

This case was originally assigned to former Commission Judge Forrest E. Stewart, and upon his subsequent transfer from employment with the Commission, the case was reassigned to me for further adjudication. It should be noted that subsequent to the docketing of this contest with the Commission, both Cowin and MSHA filed a number of motions, responses, and further pleadings dealing with certain procedural matters concerning

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the timely filing of the contest, and a subsequent civil penalty assessment for the violation. Included in these filings are motions to dismiss, amended motions, and responses filed by the parties. A summary of these procedural motions, including my rulings, are set out in a three page order issued by me on January 28, 1982. The Order is a matter of record and its contents need not be repeated herein.

The parties were served with a notice of hearing issued by me on February 26, 1982, advising them that a hearing would be conducted on the contest on May 5, 1982, in Birmingham, Alabama, the hearing location requested by the contestant. A subsequent amended notice of hearing which I issued on April 13, 1982, advised the parties of the specific hearing location in Birmingham for the scheduled hearing.

At the hearing, the parties tendered a motion for approval of a proposed settlement agreement for the citation in question. The proposal includes an agreement by the contestant for a payment of a \$210 civil penalty for the citation, a reduction of \$90 from the initial assessment of \$300. The proposed reduction was based on the assertion that the gravity of the conditions cited was substantially less than initially assigned in the initial assessment made by MSHA's Office of Assessments.

Discussion

The section 104(d)(1) citation issued in this case, No. 173604, cites a violation of mandatory safety standard 30 CFR 57.19-71, and the conditions or practices cited by the inspector states as follows:

Employees were required to stand on loose muddy muck and ride the muck bucket approximately 70 ft. to a landing. The muck being muddy caused the footing to be unstable. This company had previously been cited for men riding in the muck bucket with materials and the supervision was told along with employees that they were not to ride the buckets with materials or muck. Safety belts were used by the employees, attached to the rope hook.

The proposed settlement motion was rejected and denied. The parties were reminded of my previous rulings in this matter, and in particular the notice of hearing issued on February 26, 1982, stating that the issues to be tried in this contest were the fact of violation, whether it was "unwarrantable", and whether the conditions cited constituted a "significant and substantial" violation of the cited mandatory safety standard.

The parties were also reminded of my previous ruling of January 28, 1982, that since no civil penalty proceeding was filed by the Secretary in this matter, the normal civil penalty matters set out in section 110(i) of the Act are not in issue in these proceedings. Further, since the Secretary filed no proposal for assessment of a civil penalty in this

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case, it seems clear to me that I have no jurisdiction to consider the proposed settlement proposal tendered by the parties with respect to MSHA's initial penalty assessment. Accordingly, the proposed settlement for the penalty assessment, which apparently has never been contested by Cowin and for which no penalty proposal has been filed with the Commission, was rejected and denied. In view of my ruling in this regard, Contestant Cowin renewed its motion to withdraw its contest in this case and it was granted from the bench.

ORDER

Contestant's motion to withdraw its notice of contest filed in this case is GRANTED, and this case is DISMISSED.

George A. Koutras
Administrative Law Judge