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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. WEVA 82-134-R Citation No. 862499 12/14/81
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRTATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEVA 82-271 A.C. No. 46-01453-03153
v.	Humphrey No. 7 Mine
CONSOLIDATION COAL COMPANY, RESPONDENT	

DECISION

Appearances: Robert M. Vukas, Esq., Pittsburgh, Pennsylvania for Consolidation Coal Company
Aaron Smith, Esq., Office of the Solicitor, 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 (Consol) pursuant to section 104(d)(1) of the Act (FOOTNOTE 1) and for review of a civil penalty proposed by the Mine Safety

and Health Administration (MSHA), for the violation charged in that order. Since there is no dispute that a valid precedential section 104(d)(1) citation was issued within 90 days before the Order at bar, the general issues before me are limited to whether Consol violated the regulatory standard at 30 CFR | 75.403 as alleged in Order No. 862499 and, if so, whether the violation was caused by the "unwarrantable failure" of the operator to comply with the cited standard. Note (FOOTNOTE 1) supra. An appropriate civil penalty must also be assessed if a violation is found and a determination must be made as to whether that violation was "significant and substantial." Evidentiary hearings on these issues were held in Wheeling, West Virginia, on June 29, 1982.

The subject order, issued by MSHA inspector Paul Mitchell on December 14, 1981, reads as follows:

> The number three entry of the 4-East (041) section is not adequately rock dusted (also cross cuts), in that black coal dust, loose coal, and float coal dust is on the floor with no rock dust starting 6 feet outby stations spad no. 8606 for a distance of approximately 500 feet in length and 35 feet outby spad S.T.A.T. 9122 where power cables (miner and loader cables) are piled. This area was examined by Terry Monas (section foreman) and he said that he was looking up. In the Number 3 entry of the 4-East section, there were 3 samples taken of this area.

The cited regulatory standard, 30 CFR | 75.403 provides 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 in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 65 percentum * * * .

During the course of a regular inspection of the Humphrey No. 7 Mine on December 14, 1981, inspector Mitchell discovered an area in the No. 3 entry of the 4-East section with what appeared to be inadequate rock dusting. According to Mitchell, 500 feet of the floor of the 14- to 16-foot wide entry consisted of "pure coal". It contained black coal dust, loose coal, and float coal dust. As a result of these observations Mitchell collected three samples from the mine floor and sent them to the MSHA laboratory for analysis. The first sample was taken at the entry, the second sample 100 feet further down, and the third sample another 100 feet further down.

Eldon Haggerdorn, the general mine foreman, watched as Mitchell took his samples. Haggerdorn admitted that Mitchell obtained the samples across the width of the mine floor from rib to rib. The sampling technique, the chain of custody of the samples, and the analysis of the samples are not in dispute. The test results were as follows: Sample No. 1, 54% incombustible material, Sample No. 2, 37% incombustible material, and Sample No. 3, 32% incombustible material. Since the incombustible content of the samples was well below the 65 percentum required by the cited standard, it appears that the standard has been violated as charged.

Consol nevertheless attempts to defend on the grounds that the samples taken by Mitchell were not representative of the "average" conditions in the cited area. In evaluating this contention, I am mindful of the absence of any evidence that such complaints were made at the time Mitchell was collecting his samples. In any event, I find the proferred defense to be less than convincing. Even assuming, arguendo, that the "average" conditions of the mine floor were in compliance with the cited standard, that of course does not preclude the existence of the cited violation. I observe, moreover, that even Consol's section foreman, Terry Monas, conceded that when he "firebossed" the cited area at 8:40 that morning there were "a few bad places" where coal had sloughed off the ribs at the corners. He further recognized that conditions were "bad" in the area being set up for long wall operations. Shortly before the inspection, his men were setting up pan liners with the aid of a scoop. Monas conceded that the floor was "pretty well torn up" by the operation of the scoop.

In furtherance of its defense, Consol produced at hearing several, samples purportedly taken from the cited mine floor. The samples were obtained out of the presence of Inspector Mitchell, suffered certain custodial deficiencies, and were not subjected to laboratory analysis for incombustibility. In any event, regardless of these potential deficiencies and regardless of the appearance of the samples, that evidence would not of course preclude the existence of the cited violation. Under all the circumstances, I find that the cited violation is proven as charged.

Whether that violation was "significant and substantial" 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 v. Cement

Division, National Gypsum Company, 3 FMSHRC 822 at 825. The test essentially involves two considerations, (1) the probability of resulting injury, and (2) the seriousness of the resulting injury. In this case, it is not disputed that within the cited area, a panline was being set up for the longwall system. A battery powered scoop was also operating in the area, crushing the coal on the mine floor into a fine powder. According to Inspector Mitchell, these conditions were particularly dangerous since the longwall system was being erected over that loose material. It may reasonably be inferred that miners would be working with cutting and welding torches on the longwall system which could result in undetected fire. The dryness of the floor would have, according to Mitchell, contributed to the hazard of fire or explosion. While there is no dispute that there were no immediate ignition sources found when the order herein was issued and that regulations require the presence of fire extinguishers, water, and rock dust when torches are being used, I nevertheless find on the basis of the aforesaid evidence the existence of a reasonable likelihood of fire or explosion resulting in serious injuries or fatalities. Accordingly, the violation is "significant and substantial." For the same reasons, I find a high degree of gravity associated with the violation.

Whether the instant violation was the result of the "unwarrantable failure" of the operator to comply with the standard depends on whether 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 reason able care. Zeigler Coal Company, 7 IBMA 280. For the reasons that follow, I find that MSHA has sustained its burden of proof in this regard. While it is true that union firebosses (who had presumably inspected the cited areas around 4 p.m. on the previous day and from 5:00 a.m. until 8:00 a.m. on the same day the order was issued) did not report the same conditions cited in the order by MSHA inspector Mitchell, it is apparent that conditions could have changed between the time of those inspections and the time of Mitchell's inspection around 10:25 that morning. Consol's section foreman, Terry Monas, also admitted that when he firebossed the cited area around 8:40 that morning, there were indeed "a few bad places" where coal had come off the ribs. Monas further conceded that the area of floor where the pan liner was being set up was torn up from the operation of the scoop. The fact that Monas told inspector Mitchell that he had examined only the top conditions in the section also indicates that Monas was negligent in his inspection. Finally, I accept the credible testimony of inspector Mitchell that the floor conditions were obviously deficient because of the black coloration of the cited area. This testimony is corroborated by the lab results showing a significantly low incombustible content. Under all the circumstances, I am convinced that the section foremen knew or should have known of the violative condition. The violation was therefore the result of "unwarrantable failure". The above analysis also suggests that the operator was negligent in allowing these conditions to exist.

The evidence shows that the operator abated the cited conditions in a timely manner. The operator is large in size and the mine at issue has a fairly substantial history of violations. Under all the circumstances, a civil penalty of $400 is appropriate.

ORDER

Order No. 862499 is affirmed and the contest of that order (Docket No. WEVA 82-134-R) is dismissed. The Consolidation Coal Company is ordered to pay a civil penalty of $400 within 30 days of the date of this decision.

Gary Melick
Assistant Chief Administrative Law Judge

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~FOOTNOTE_ONE

1 Section 104(d)(1) 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 violations 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."