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

CONSOLIDATION COAL COMPANY,
CONTESTANT

v.

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

Contests of Order

Docket No. PENN 32-64-R
Order No. 1143777 1/12/82

Docket No. PENN 82-66-R
Order No. 1142981 1/13/82

Renton Mine

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

v.

CONSOLIDATION COAL COMPANY,
RESPONDENT

Civil Penalty Proceedings

Docket No. PENN 82-184
A.C. No. 36-00807-03112V

Docket No. PENN 82-109
A.C. No. 36-00807-03109V

Renton Mine

DECISION

Appearances: David T. Bush, Esq., Office of the Solicitor, U.S. Department
of Labor, Philadelphia, Pennsylvania, on behalf of the
Secretary of Labor
Robert M. Vukas, Esq., Pittsburgh, Pennsylvania, for
Consolidation Coal Company

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

Docket No. PENN 82-64-R is a contest of Order of Withdrawal
No. 1143777 issued January 12, 1982, under section 104(d)(1) of
the Act. The order refers back to Citation No. 1143669 issued
December 18, 1981. Docket No. PENN 82-184 is a civil penalty
proceeding seeking a penalty for the violation alleged in Order
No. 1143777.

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Docket No. PENN 82-66-R is a contest of Order No. 1142981 issued January 13, 1982, under section 104(d)(1) of the Act. This order refers back to Citation No. 1143669 issued December 18, 1981. Docket No. PENN 82-109 is a civil penalty proceeding seeking a penalty for the violation alleged in Order No. 1142981.

Citation No. 1143669 was issued under section 104(d) of the Act. It was contested before Judge Gary Melick who found that the violation charged occurred, but that it was not "significant and substantial." Consolidation Coal Co. v. Secretary of Labor, 4 FMSHRC 1533 (1982). This decision in effect converted the 104(d)(1) citation to a 104(a) citation.

Consolidation Coal Co. moved for summary decision vacating the two orders contested herein on the ground that there is no longer a valid underlying 104(d)(1) citation to support them. The Secretary moved to modify Order No. 1143777 issued January 12, 1982, to a 104(d)(1) citation which would then serve as the underlying 104(d)(1) citation for Order No. 1142981. I reserved decision on the motions.

Since the cases involve a common issue of law and all arose in the same mine at about the same time, they are hereby CONSOLIDATED for the purpose of decision.

Pursuant to notice, the cases were heard on the merits in Pittsburgh, Pennsylvania, on October 13, 14 and 15, 1982. Dennis J. Swentosky and Richard J. Silka, Federal coal mine inspectors and Daniel Fitzroy testified for the Secretary of Labor. Larry Cuddy, Randy Debolt, Melvin Burkes and John Koma testified for Consolidation Coal Company.

The parties waived the right to file written proposed findings of fact and conclusions of law. Based on the entire record, and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT COMMON TO ALL DOCKETS

1. At all times pertinent to these proceedings, Consolidation Coal Co. (Consol) was the owner and operator of the Renton Mine in Allegheny County, Pennsylvania. Consol is a large operator, and the imposition of a penalty will not affect its ability to continue in business.

2. In the 20-month period prior to the date of the orders contested herein, the operator had a history of 595 assessed violations.

3. The operator demonstrated good faith in abating the conditions alleged in the contested orders.

1. On January 12, 1982, Richard Silka, a Federal coal mine inspector and a duly authorized representative of the Secretary of Labor, issued an order of withdrawal to Consol under section 104(d)(1) of the Act, charging a violation of 30 C.F.R. 75.400.

2. On January 12, 1982, there were accumulations of fine powdered coal, fine coal and lump coal along the tracks and between the tracks outby the loading ramp of the 14 and 15 South sections of the subject mine. The accumulations extended for a distance of approximately 75 to 100 feet along and between the rails, and for an additional 100 feet along the tight side rail. The accumulations for the first 75 - 100 feet were approximately 4 feet in width and from 6 to 8 inches deep. The accumulations along the tight side rail were 1 to 2 feet wide and 6 to 8 inches deep. There was a D.C. car haul unit between the rails extending for about 40 feet in the affected area. This was a steel structure which occupied most of the area between the rails and extended from the floor almost as high as the rails. The accumulations between the rails in this area therefore, were not as great as they appeared, and were not as deep as in other areas cited.

3. Mine cars were present on the track along the area cited. The cars were approximately 7 feet wide, and extended out over the tracks about 18 inches on each side. The accumulations between the rails were therefore largely under the cars. The cars were described as "possum bellies" and the bottom of the car came down almost to the level of the track. Therefore, it was difficult to see under the cars.

4. The ground wire was not properly connected to the return feed wire to the radio unit just outby the belt entry along the track approximately 2 to 3 feet from the accumulations of coal and coal dust.

5. The conduit switch to the pump was not properly entered into the pump box and the frame was not connected to the feed wire. This was approximately 2 to 3 feet from the accumulations of coal and coal dust cited herein.

6. There was a 250 Volt D.C. trolley wire hung from the roof about 6 feet above the track on the tight side. The trolley motor does not normally come within 600 to 1,000 feet from the accumulations cited herein.

7. Inspector Silka arrived at the area in question about 1:50 p.m. on January 12, 1982. The area had been inspected by company mine examiners at 5:20 a.m. and at 1:20 p.m. on the same day.

8. In the 15 months prior to the issuance of the order challenged herein, 26 violations of the standard in 30 C.F.R. 75.400 were issued to the subject mine, nine of them involving ramp areas.

STATUTORY PROVISION

Section 104(d)(1) of the Act provides as follows:

(d)(1) 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.

REGULATORY PROVISION

30 C.F.R. 75.400 provides as follows: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

ISSUES - DOCKET NOS. PENN 82-64-R AND PENN 82-184

1. After an order issued under section 104(d) has been contested before the Commission, may MSHA or an administrative law judge modify it to a 104(d)(1) citation?
2. Was a violation of the standard in 30 C.F.R. 75.400 established?
3. If a violation occurred, was it of such a nature as could significantly and substantially contribute to the cause and effect of a coal mine safety or health hazard?

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4. If a violation occurred, was it caused by an unwarrantable failure of the operator to comply with the standard in question?

5. If a violation occurred, what is the appropriate penalty?

CONCLUSIONS OF LAW - DOCKET NOS. PENN 82-64-R AND PENN 82-184

1. Consol was subject to the provisions of the Federal Mine Safety and Health Act in the operation of the Renton Mine at all times pertinent hereto, and the undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

2. The Secretary's motion to modify the 104(d)(1) order contested herein to a 104(d)(1) citation is hereby GRANTED.

DISCUSSION

Subsequent to the hearing in these cases, the Commission upheld the action of Judge Gary Melick in modifying an invalid 104(d)(1) withdrawal order to a 104(d)(1) citation. Secretary of Labor v. Consolidation Coal Company, 4 FMSHRC 1791 (1982). That case was similar to the present one in that the 104(d)(1) citation underlying the contested order had been modified by the Judge to a 104(a) citation in a prior proceeding, and Consol moved for summary decision on the ground that the order lacked the required underlying 104(d)(1) citation. Prior to the hearing, the Judge modified the contested order conditioned on evidence showing a significant and substantial violation and an unwarrantable failure to comply.

In the present case the necessary special findings ("S&S") were contained in the order when it was issued. Consol argues that it contested a withdrawal order which required immediate abatement and that it is not fair to permit the modification sought here, since it must in effect contest a citation with immediate withdrawal, an entity not recognized in the Act. There was no showing, however, of prejudice or surprise, no showing that its defense to a (c)(1) citation would differ from its defense to a (c)(1) order. See 4 FMSHRC at 1795. The modification here was accomplished on motion of the Secretary, although the Secretary also issued and submitted in evidence a copy of the modification form it issued to Consol. The Commission held that the proper procedure for modification after a notice of contest has been filed is by motion. *Id.* On the authority of the Commission decision, I am granting the motion to modify the contested order to a 104(d)(1) citation.

3. On January 12, 1982, a violation of 30 C.F.R. 75.400 was established in that loose coal and coal dust was permitted to accumulate in active workings along and between the tracks outby the loading ramp of the 14 and 15 South sections of the subject mine. The operator did not present any evidence to contest the fact of violation.

4. The violation referred to above was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

DISCUSSION

The test for a "significant and substantial" violation, laid down by the Commission in *Secretary v. Cement Division, National Gypsum Company*, 3 FMSHRC 822, is the reasonable likelihood that the hazard contributed to will result in injury or illness of a reasonably serious nature.

The hazard contributed to by accumulations of loose coal and coal dust is a mine fire or explosion. Whether it is reasonably likely to occur depends upon (1) the nature and extent of the accumulations; and (2) the existence of sources of ignition. If a fire or explosion occurred it is clearly likely to cause injuries or illnesses of a reasonably serious nature.

The accumulation cited here was substantial -- it extended a distance of almost 200 feet, was 2 to 4 feet wide and 6 to 8 inches deep. The top 2 inches was fine powdered dust or float dust. Approximately 25 percent of the total accumulation consisted of coal dust; the remainder was loose coal. The testimony is conflicting as to whether there was an ignition source in the area of the accumulations. I find that the trolley wire was not a potential source of ignition, since the motor did not come closer than 700 feet from the accumulations. However, I regard the improperly connected ground wire to the radio, and the ground wire not connected to the pump as potential sources of ignition especially in the presence of float coal dust. The float coal dust in itself has the capacity to propagate a mine fire or an explosion. Because of these factors, I find the violation was significant and substantial.

5. The violation resulted from the unwarrantable failure of the operator to comply with the standard.

DISCUSSION

The extent of the accumulation was such that it had to have been there for at least half a shift or 4 hours prior to the inspector's arrival. The operator had been cited on many prior occasions for violations of the standard in question. Because of this, special care should have been taken to avoid repetition. The mine examiners who examined the area prior to the inspection testified that they did not observe the accumulations, and I accept their testimony as truthful. In fact, when walking along the wide side of the tracks, the accumulation, which was between the tracks and on the tight side, was difficult to see. It clearly could have been seen if the examiner was instructed to look between the cars or get down and look under the cars. I find that the condition was such that the operator could have and should have known of its existence.

6. The violation was serious, and was caused by the operator's negligence. The operator is a large operator and has a substantial history of prior violations. I conclude that an appropriate penalty for the violation is \$750.

FINDINGS OF FACT - PENN 82-66-R AND PENN 82-109

1. On January 13, 1982, Dennis Swentosky, a Federal coal mine inspector, and a duly authorized representative of the Secretary of Labor, issued an order of withdrawal under section 104(d)(1) of the Act to Consol charging a violation of 30 C.F.R. 75.1002-1(a)

2. On January 13, 1982, two non-permissible breaker boxes for shuttle cars were located 118 feet and 120 feet respectively from the outby corner of the pillar block being mined. The boxes were approximately 160 feet and 175 feet from the two places in the pillar which were being mined or the active cuttings.

3. In the coal mining industry, the term pillar workings refers to the gob area and the pillar or pillars being mined.

4. In retreat mining, when a pillar is mined out and the roof collapses, the air including possible methane from the gob area is forced outby.

5. Mining had been done on the shift prior to that during which the order was issued. This mining involved the pillar in question and the breaker boxes were in the same location. One split had been mined through the pillar and a cut had been taken from a second split. The mining was being done with a continuous miner equipped with a methane monitor.

6. No methane was detected by the inspector at the pillar split at the time the order was issued.

7. The subject mine does liberate methane and is considered a gassy mine. Methane is more likely to be encountered in retreat mining than it is in development mining.

8. The nonpermissible breaker boxes are used to turn power on and off the shuttle cars and an arc can occur when this is done. An arc can also occur in the event of a short in the box.

9. The air readings taken in the section in question showed good ventilation. The bleeders were functioning properly and breaker posts were set to limit the area of the roof fall.

REGULATORY PROVISION

30 C.F.R. 75.1002-1(a) provides as follows:

- (a) Electric equipment other than trolley wires, trolley feeder wires, high-voltage cables, and transformers shall be permissible, and maintained in a permissible condition when

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such electric equipment is located within 150 feet from pillar workings, except as provided in paragraphs (b) and (c) of this section. [Paragraph (b) provides an exception for certain nonpermissible equipment prior to March 30, 1974; paragraph (c) excepts equipment for which a permit for non-compliance has been issued.]

ISSUES

1. Were the nonpermissible breaker boxes involved herein within 150 feet of "pillar workings" on January 13, 1982?

(a) Should the measurement to the nonpermissible equipment be taken from the outby corner of the pillar being mined or from the actual place of the cut?

2. If a violation was established, was it of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard?

3. If a violation occurred, was it caused by an unwarrantable failure of the operator to comply with the standard in question?

4. If a violation occurred, what is the appropriate penalty?

CONCLUSIONS OF LAW - DOCKET NOS. PENN 82-66-R AND PENN 82-109

1. Consol was subject to the provisions of the Federal Mine Safety and Health Act in the operation of the Renton Mine at all times pertinent hereto, and the undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

2. There is a valid underlying 104(d)(1) citation for the contested order, namely the one referred to in Docket No. PENN 82-64-R.

3. On January 13, 1982, a violation of 30 C.F.R. 75.1002-1(a) was established in that two non-permissible breaker boxes for shuttle cars were located within 150 feet of pillar workings in the subject mine.

DISCUSSION

The term "pillar workings" is not defined in the regulations. The MSHA underground inspector's manual directs that the 150 foot distance be measured from the non-permissible equipment in question to the nearer of (a) the outby edge of the pillar being mined, or (b) the inby edge of the solid pillars immediately outby the previously pillared area. The inspector testified that this has long been MSHA's policy and that the policy is well known in the industry. He further testified that the term pillar workings is a

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broad term and includes the gob area and the entire block or blocks being mined. Consol's Safety Department had been given a copy of the MSHA Inspector's Manual. Citations have been issued to Consol previously for violations of the standard in question. The State of Pennsylvania standard requires measurement from the electrical equipment to the actual working face. Consol's general mine foreman was aware of the MSHA policy and knew that the breaker boxes were within 150 feet of the outby corner of the pillar being mined. He disagreed with the definition of pillar workings, however, and stated that he would consider it as referring to the actual working face.

It would clearly be preferable to have the term pillar workings defined in the regulations. The definition assumed by MSHA, however, seems to me to be a reasonable one, and much more satisfactory and practical than any other definition suggested. If the distance is measured from the working face to the electrical equipment, it would change as the block was being mined and might require shutting off the power and moving the equipment before the pillar was completely mined. I accept the testimony of the inspector that the term pillar workings means the gob and the entire pillar or pillars being mined, and that this definition is known and followed in the mining industry.

4. The violation referred to in Conclusion of Law No. 3 was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

DISCUSSION

The hazard which the standard is designed to prevent is an ignition or explosion which could result from methane being forced back over electrical equipment which may arc. Although methane was not detected at the time of the citation, the mine is a gassy mine, and methane is likely to be encountered in retreat mining. If methane was forced back over non-permissible electrical equipment, and an ignition or explosion occurred, serious injuries to miners would be likely. My conclusion is based in large part on the inspector's testimony, but I have considered the testimony of Larry Cuddy to the effect that the bleeder system would prevent methane buildup in the gob and the breaker posts would prevent a running fall. The hazards of methane in underground mining are too well known to require documentation, as is the unpredictability and suddenness of its appearance.

5. The violation referred to in Conclusion of Law No. 3 resulted from the unwarrantable failure of the operator to comply with the standard.

DISCUSSION

Randy Debolt, General Mine foreman of the Renton Mine, recognized before the order was written that there was a violation of the standard. Larry Cuddy, section foreman, stated

that he made a mistake by measuring from the working face to the shuttle car boxes. He testified that he did so because

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the State of Pennsylvania requires measurement from that point. I accept Mr. Cuddy's testimony as truthful, but I conclude that he should have known that the condition constituted a violation of the Federal standard. On that basis, I conclude the violation was unwarrantable.

6. The violation was serious, and was caused by the operator's negligence. The operator is a large operator and has a substantial history of prior violations. I conclude that an appropriate penalty for the violation is \$750.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, IT IS ORDERED:

1. Order of Withdrawal No. 1143777 issued January 12, 1982, modified herein to a 104(d)(1) citation, charging a significant and substantial violation and an unwarrantable failure to comply is AFFIRMED as modified.

2. Order of Withdrawal No. 1142981 issued under section 104(d)(1) on January 13, 1982, is AFFIRMED.

3. Consolidation Coal Company shall within 30 days of the date of this decision pay the sum of \$1,500 for the two violations found herein to have occurred.

James A. Broderick
Administrative Law Judge