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

HELVETIA COAL COMPANY,  
CONTESTANT

v.

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

CONTEST PROCEEDING

Docket No. PENN 83-229-R  
Citation No. 2111785; 8/5/83

Lucerne No. 8 Mine

DECISION

Appearances: Jerome H. Simonds, Esq., Freedman, Levy,  
Kroll & Simonds, Washington, D.C. and  
William M. Darr, Esq., Indiana,  
Pennsylvania, for Contestant;  
Catherine Oliver Murphy, Esq., Office of  
the Solicitor, U.S. Department of Labor,  
the Solicitor, U.S. Department of Labor,  
Philadelphia, Pennsylvania, for Respondent.

Before: Judge Merlin

This case is a notice of contest originally filed by Helvetia Coal Company for review of a citation dated August 5, 1983, issued by an inspector of the Mine Safety and Health Administration (hereafter referred to as MSHA) under section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 814(a), alleging a violation of 30 C.F.R. 75.200, incident to a roof fall which killed a miner. The citation was vacated on September 12, 1983. Pursuant to a motion to withdraw filed by the operator on September 20, 1983, I dismissed the case on October 5, 1983.

On October 26, 1983, the citation was modified to restore the original citation and change it to one issued under section 104(d)(1) of the Act, 30 U.S.C. 814(d)(1). The operator again filed a notice of contest. The Solicitor filed an answer asserting the citation was properly issued under section 104(d)(1). By Notice of Hearing dated December 6, 1983, I set the case for hearing on February 1, 1984, and directed the filing of prehearing statements. Both parties filed such prehearing statements.

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Thereafter on January 26, 1984, the Solicitor advised me by telephone that MSHA again had decided to vacate the citation. Because MSHA's actions were so unusual I directed both parties to appear at the hearing as scheduled. At the hearing the Solicitor submitted a notice dated January 30, 1984, vacating the section 104(d)(1) citation. In addition, five MSHA officials testified. The operator appeared but submitted no evidence.

30 C.F.R. 75.200, which appears in the Act as section 302(a), 30 U.S.C. 862(a) provides as follows:

Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives.

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Citation No. 2111785 dated August 5, 1983, describes the violative condition or practice as follows:

The roof in the working place of the No. 3 entry of 2 Left South Mains 017 working section was not being adequately supported or otherwise controlled to protect the miners under the supervision of Steve Lenosky, Section Foreman, in that additional safety precautions were not taken to assure the safety of the miners after a bad roof condition was observed by the Section Foreman who had related the conditions to the roof bolting crew. The roof in the affected area fell while only a minimum amount of temporary support was being installed. This violation was revealed during a fatal roof fall accident investigation.

The order of vacation dated September 12, 1983, states:

September 12, 1983 at 1:50 p.m. As a result of a manager's conference held on 9-8-83, new information was presented by the operator and UMWA Local 3548 committeemen, a violation did not exist. The citation No. 2111785 issued on 8-5-83 is hereby vacated.

The order of modification dated October 26, 1983, states:

104(a) Citation No. 2111785 issued 8/5/83 for a violation of 75.200 and vacated 9/12/83 is modified to restore the original citation, change type of action to a 104(d)(1) citation, negligence from low to moderate. The modification is a result of additional information received after the manager's conference and as a result of a re-evaluation of the condition. The citation had been previously terminated on 8/5/83.

The order of vacation dated January 30, 1984, states:

104(a) Citation No. 2111785 issued on 8-5-83 for a violation of Section 75.200 vacated on 9-12-83 as a result of a Health and Safety conference and later modified on 10-26-83 to reinstate the violation as a 104(d)(1) citation is vacated because of confusion and facts surrounding this citation.

An Accident Report dated September 8, 1983, signed by MSHA inspectors Donald J. Klemick and Michael Bondra recites that a roof fall accident occurred on August 2, 1983, at approximately 10:30 p.m. resulting in multiple injuries to Frank F. Sorbin, a roof bolter helper and causing his death on August 4, 1983. According to the report mining was going on in the belt entry. The coal seam was 4 feet high but because this was the belt entry, an extra 2 feet of top rock was being taken down. On the prior shift, however, the left side of the place had been mined to a height of 7 feet so that when mining continued at the proper 6 foot height a brow of one foot was created. Coal was mined on the right side for 20 feet and then 3 or 4 temporary supports were installed. The continuous miner then moved to the left side mining coal and top rock, and 3 posts were installed. The roof was chipping near the brow in the center of the place so the miner moved back to the right, knocked out the posts and cut down more top. After 10 feet of top rock had been cut down, additional chipping was scaled down with the head of the miner. A cutter (crack) appeared after two or three shuttle cars of rock had been cut down from the right side. The section foreman cautioned the men to be careful and to install roof jacks on both sides of the cutter. After some jacks were installed, the rock fell on Mr. Sorbin. The Accident Report states in its opening paragraph that the rock fell as Mr. Sorbin was preparing to install a temporary roof support, but in paragraph 8 of the Discussion and Evaluation, the report states that it was not established what Mr. Sorbin was doing at the time of the accident. The report concludes that the roof was not supported or controlled adequately to protect miners from a roof fall, that the accident occurred because management failed to have a roof supported adequately after a known bad roof condition was observed, and that failure to maintain a uniform roof horizon at the working face may have been a contributing factor.

Although, as already noted, the citation had been vacated on September 12, 1983, the operator through Mr. Edward J. Onuscheck, Vice President-Safety and Training, wrote Mr. William R. Devett, the MSHA sub-district manager, on September 20, 1983, objecting to various statements in the report. Mr. Devett responded by letter dated October 28, 1983, agreeing to certain changes, but concluding that there was a lack of additional supports where needed adjacent to the cutter and that the placement of temporary supports was near the minimum. As appears above, two days previously on October 26, the citation was reinstated as a section 104(d)(1) citation.

At the hearing several witnesses testified to explain the various actions MSHA had taken. Harry Thompson, a supervisory coal mine safety and health inspector with responsibility for the subject mine, testified that on the morning of August 3, 1983, he accompanied Michael Bondra, one of the inspectors under his supervision, on the continuation of a regular inspection they were conducting at the mine (Tr. 16). Mr. Thompson stated that at 9 a.m. he and Mr. Bondra looked at the area and that Mr. Bondra measured the distances between roof supports in the subject area, but according to Mr. Thompson they were not on an investigation (Tr. 17, 23-24). Neither he nor Mr. Bondra talked to anyone who had been at the scene at the time of the accident and at that time he did not know when the foreman became aware of the cutter (Tr. 23, 27, 32, 37). He also stated he did not know any of the circumstances surrounding the accident such as when the cutter appeared (Tr. 35). He and Mr. Bondra did not evaluate the situation beyond taking the measurements. Mr. Thompson was of the opinion that when the accident occurred the operator was in the process of setting temporary supports, although he spoke to no one who was there and although other witnesses indicated that no one knew for sure what the decedent was doing when he was killed (Tr. 35-37, 39-40, 70-72, 158-159). Despite the fact that his knowledge of what happened on the prior night was limited in the manner he described, Mr. Thompson expressed the view at the hearing that there was no violation because the roof was supported adequately and the requirements of the plan were met (Tr. 26, 31, 33, 39). Moreover, Mr. Thompson told company officials on the morning of August 3 that there had been no violation at the time of the fall (Tr. 20-21, 42).

Note must also be taken of Mr. Thompson's telephone call at 3 p.m. on August 3, to Mr. Lenyo, the acting sub-district manager. Mr. Thompson told Mr. Lenyo there were no violations and he told him about the cutter, but not about the brow (Tr. 21-22, 24-25, 26-28, 160). Mr. Thompson also advised Mr. Lenyo that the decedent was setting temporary supports when he was killed although as pointed out above, Mr. Thompson did not speak to anyone who was there at the time and others thought there was no way to tell what the decedent was doing (Tr. 35-36, 70, 148, 158-159).

Finally, Mr. Lenyo testified that he spoke to Mr. Thompson at 2 a.m. on August 3, before Mr. Thompson went to the mine at which time they both agreed it would be good if they knew exactly what happened there in case something should develop (Tr. 147-148). This earlier call renders untenable Mr. Thompson's assertion that he was just on a regular inspection and not conducting an investigation. In his testimony Mr. Thompson did not mention the 2 a.m. phone call.

Mr. Bondra, the MSHA inspector who visited the area with Mr. Thompson on August 3, testified that he took measurements and saw no violation (Tr. 44-45, 57-58). He also told everyone concerned at the mine that he was there as a regular inspector and was not on an investigation (Tr. 44). Mr. Bondra was of the opinion that the roof had been adequately supported and that additional supports would not have helped (Tr. 58, 62, 69-70). He believed roof conditions were good although a brow and cutter were present (Tr. 73). Mr. Bondra stated the brow might or might not have contributed to the instability of the roof (Tr. 86). He further admitted that it would have been better to set additional supports as soon as the cutter was seen and that reducing the distance between supports is good practice, under circumstances such as were present here (Tr. 74, 79-80).

After the decedent died, Mr. Bondra was appointed to the 3-man investigation team (Tr. 46-47). The investigation began on August 4 (Tr. 47). After the investigation was completed, a 104(a) citation was issued on August 5 (Tr. 48). Mr. Bondra stated that he did not believe a citation should have been issued although the other team members thought it should (Tr. 60). The citation was issued by

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Mr. Rine, another member of the team (Tr. 50, 151-152). However, Mr. Bondra signed the Accident Report dated September 8, 1983, which as set forth above, blamed the operator for not supporting the roof adequately after a known bad roof was observed and for failing to maintain a uniform roof horizon (Tr. 61).

Moreover, on the same date as the Accident Report, a manager's conference was held at the request of the operator to discuss the validity of the citation issued on August 5, 1983. Mr. Robert Nelson, a supervisory coal mine inspector in the Indiana, Pennsylvania Field Office, the same office as Mr. Thompson, was assigned by the District Manager one or two days previously to handle the conference (Tr. 92-93). As set forth above, the supervisory inspection of the subject mine was Mr. Thompson's responsibility (Tr. 16, 137). Mr. Nelson had the same duties with respect to other mines covered by the office (Tr. 137). At the conference Mr. Nelson was told by company and union people that the operator was in the process of starting to correct the situation by setting temporary supports (Tr. 97-98, 102-103). Mr. Nelson was also "acutely aware" that Mr. Thompson and Mr. Bondra believed there was no violation and had issued no citation on August 3 (Tr. 101). According to Mr. Nelson, Mr. Bondra was not in the conference room but when company and union people said he was in the subject area on August 3 doing an investigation, Mr. Bondra was called into the room and at that time stated he was there to get information (Tr. 96). This is, of course, at variance with the descriptions of a regular inspection given by him and Mr. Thompson in their testimony (Tr. 23, 44). As a result of what he was told, Mr. Nelson decided the citation should be vacated (Tr. 102-103). He wrote the wording and Mr. Bondra, as the regular inspector for the mine signed it (Tr. 103).

Thus, on September 8, 1983, Mr. Bondra's name appeared as co-author of the Accident Report, which places responsibility upon the company for the accident. Just a few days later, Mr. Bondra's name also appeared on an order vacating the citation. Mr. Bondra admitted he was wrong to sign the Accident Report since he did not agree with it (Tr. 62-69). Moreover, Mr. Nelson's decision to vacate was based on incomplete information. Mr. Nelson knew about the chipping and the cutter but not about the brow (Tr. 115). In addition, he did not know the distances between the roof supports (Tr. 116-117). All he had was a rough sketch drawn by the company (Tr. 116-117). He was thinking the supports were 3 feet



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apart and testified that 55" inches (5" less than the 5p required by the plan) meant nothing (Tr. 117). Finally, Mr. Nelson did not see the Accident Report before he decided to vacate (Tr. 107). He telephoned Mr. Lenyo, the acting sub-district manager, to see if the Accident Report could be held up, but Mr. Lenyo said it was being printed and that corrections would have to be made afterwards (Tr. 103-104, 157). Mr. Nelson did not question this (Tr. 104). Mr. Lenyo testified he had no problem with Mr. Nelson's vacation because Mr. Nelson would have to justify it in writing to Mr. Devett, the sub-district manager (Tr. 152). From this scenario it appears that this is not a case of the left hand not knowing what the right hand is doing. Everybody knows what is going on but nobody seems to care.

When Mr. Devett, the sub-district manager, returned from his vacation, he was concerned because the September 8 manager's conference had been held without any of the accident investigation team being present (Tr. 180). Another meeting was held on October 25 as a result of which it was decided to reissue the citation under section 104(d)(1) charging unwarrantable failure by the operator (Tr. 180-182). Mr. Nelson testified that at the meeting of October 25 he learned for the first time that chipping had been going on while the operator had been mining, that the foreman did not give specific instructions to support the place, and that after looking at the distances MSHA believed the operator was setting supports only a little closer than normal (Tr. 120-121). Mr. Lenyo believed that after the cutter appeared, spacing was inadequate and that there should have been supports outby the cutter (Tr. 166-168). Mr. Devett said much the same thing (Tr. 189).

The final turnabout occurred two days before the hearing when the citation was vacated again (Tr. 51). Once again, Mr. Bondra, the regular inspector, issued the vacation order but he did not participate in the decision to vacate (Tr. 51-52). He just wrote it and issued it (Tr. 52, 84-85). That this might be confusing and misleading to the operator and others apparently did not occur to MSHA officials. But in his testimony Mr. Bondra touched upon what appears to have been one of the principal reasons for the final vacation of the order, i.e. he and Mr. Thompson who were first on the scene did not issue a citation (Tr. 52). Mr. Nelson testified that Mr. Thompson wanted the re-issued citation vacated and spoke to Mr. Devett about it (Tr. 136). Mr. Lenyo stated

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that he agreed with the second vacation because he thought MSHA had created a hardship on the company in that Mr. Thompson and Mr. Bondra had not recognized a violation on August 3 (Tr. 155). After referring to the fact that on August 3 Mr. Thompson and Mr. Bondra told the company there were no violations and mentioning all the subsequent confusion, Mr. Devett said that he came to believe that in fairness to the company the citation should be vacated (Tr. 182-184, 186-187). After going back and forth and back and forth, MSHA apparently decided it was stuck with what had been done in the first instance.

It is not surprising that MSHA officials should have differing opinions about a case such as this. The facts are exceedingly complex and as might be foreseen, give rise to varying conclusions. The record is replete with differences over the effect of the brow, use of the continuous miner to cut down top that had been chipping, etc. This is to be expected. What is disconcerting is that in a fatality case such as this, MSHA apparently had no mechanism for resolving such differences, thereby enabling it to make a definitive and reasoned decision about how to proceed and present a consistent position to the operator and everyone else involved.

The operator has been treated unfairly. But not because it was cited for a violation it did not commit. That is a question which will not be answered because of the way this case has been handled. This independent Commission cannot now decide whether the operator violated the Act since there is no outstanding citation. It may well be that if MSHA had proceeded with the case, the operator would have successfully defended. Or after MSHA properly considered the matter those in authority might have determined on the merits that there was no violation. What transpired in this case is set forth herein only to demonstrate how MSHA acted. First exonerated, then cited, then exonerated, then cited again, and finally relieved of responsibility for any violation, the operator was made to go around in circles. This is the unfair treatment of the operator which this record demonstrates.

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But this case has another, even more unfortunate consequence. A miner is dead. Because the government agency charged with enforcing mine safety has not properly discharged its statutory responsibilities, the public interest, as expressed in the enactment of the Mine Safety Act, has been frustrated.

The operator has moved to withdraw its notice of contest. The motion is Granted.

This case is DISMISSED.

Paul Merlin  
Chief Administrative Law Judge