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

WESTMORELAND COAL COMPANY,  
CONTESTANT

v.

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

CONTEST PROCEEDING

Docket No. WEVA 83-266-R  
Order No. 2147593; 8/19/83

Hampton No. 3 Mine

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

v.

WESTMORELAND COAL COMPANY,  
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEVA 84-76  
A.C. No. 46-01283-03532

Hampton No. 3 Mine

DECISION

Appearances: Kevin McCormick, Esq., U.S. Department of  
Labor, Office of the Solicitor, Arlington,  
Virginia, for Petitioner/Respondent;  
F. Thomas Rubenstein, Esq., Westmoreland  
Coal Company, Big Stone Gap Virginia,  
for Contestant/Respondent.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern a proposal for  
assessment of a civil penalty filed by MSHA against Westmoreland  
Coal Company pursuant to section 110(a) of the Federal Mine  
Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking a civil  
penalty assessment for an alleged violation of mandatory

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safety standard 30 CFR 75.301. The alleged violation was stated in a section 104(d)(2) Order served on Westmoreland by MSHA Inspector Vaughan Gartin on August 19, 1983.

Westmoreland Coal Company contested the civil penalty proposal, and also filed a separate Notice of Contest pursuant to Section 105(d) challenging the legality of the order. The cases were consolidated for trial in Madison, West Virginia, and were heard at the conclusion of a consolidated trial of two other docketed cases concerning these same parties.

#### Discussion

Section 104(d)(2) Order No. 2147593, 1:50 a.m., August 19, 1983, cites a violation of 30 CFR 75.301, and the condition or practice is described as follows:

The required minimum amount of air 9,000 CFM, could not be obtained with an approved anemometer on the return side of the last open crosscut between the No.'s 4 and 5 entries of the 019-0 8 Right section in that when measured only 5,850 CFM was present. Coal was being mined in the No. 5 entry. Said section supervised by Russell Welch.

The inspector found that the violation was "significant and substantial," and he ordered the withdrawal from the 019-0 8 right section.

The inspector cited a previous order, No. 2140708, issued on February 18, 1983, as the "initial action," underlying the order which he issued on August 19, 1983.

Order No. 2147593 was abated at 3:00 p.m., August 19, 1983, and the abatement action states:

23,400 CFM was obtained in said last open crosscut.

On September 28, 1983, the inspector modified Order No. 2147593, to delete the "significant and substantial" finding, and to delete his previous gravity finding of "Reasonably Likely," to reflect a finding of "unlikely." The modification notice reflects that these corrections were the result of a "violation conference held in this office on this date."

Findings and Conclusions

When these proceedings were called for hearing, the parties advised me that they proposed to dispose of these cases by mutual consent and agreement of the parties, and they presented their arguments on the record for my consideration.

MSHA's counsel asserted that during his interview with Inspector Gartin in preparation for trial the inspector informed him that he had made a mistake in the method he used to determine his allegation that only 5,850 CFM's of air was present at the time he took an air reading with an anemometer in the cited crosscut as stated in his citation. The inspector conceded that had he correctly computed the amount of air present in the area, the respondent/contestant would have been in compliance with the requirements of section 75.301. In short, the inspector conceded that the order was mistakenly issued, and he produced a copy of a modification of the order which indicates that he has vacated it.

In view of the foregoing, MSHA's counsel moved to withdraw and dismiss its proposal for assessment of civil penalty filed in the penalty case. At the same time, Westmoreland's counsel moved to withdraw its notice of contest.

After due consideration of the oral joint motions filed by the parties, they were granted from the bench.

ORDER

MSHA's motion to withdraw its proposal for assessment of civil penalty IS GRANTED, and the case is dismissed.

Westmoreland's motion to withdraw its notice of contest IS GRANTED, and it is dismissed.

In view of the foregoing, the contested section 104(d)(2) order, No. 2147593, issued on August 19, 1983, IS VACATED.

George A. Koutras  
Administrative Law Judge