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

CONSOLIDATION COAL COMPANY, CONTESTANT	CONTEST PROCEEDING
v.	Docket No. WEVA 84-2-R Citation No. 2001967; 9/12/83
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Rowland No. 3 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEVA 84-62 A.C. No. 46-01986-03511
v.	Rowland No. 3 Mine
CONSOLIDATION COAL COMPANY, RESPONDENT	

DECISION

Appearances: Robert M. Vukas, Esq., Pittsburgh, Pennsylvania, for Contestant/Respondent;
Kevin C. McCormick, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner/Respondent.

Before: Judge Steffey

A hearing in the above-entitled consolidated proceeding was held on June 13, 1984, in Beckley, West Virginia, pursuant to section 105(d), 30 U.S.C. 815(d), of the Federal Mine Safety and Health Act of 1977. At the conclusion of presentation of evidence by both parties, I rendered a bench decision, the substance of which is set forth below (Tr. 216-235).

This proceeding involves a notice of contest filed on October 12, 1983, in Docket No. WEVA 84-2-R by Consolidation Coal Company, seeking vacation of Citation No. 2001967 issued on September 12, 1983, pursuant to section 104(a) of the Federal Mine Safety and Health Act of 1977, alleging a violation of 30 C.F.R. 75.200. This proceeding also pertains to a petition for assessment of civil penalty filed on January 11, 1984, in Docket No. WEVA 84-62 by the Secretary of Labor, seeking to have a civil penalty assessed for the violation of section 75.200 alleged in Citation No. 2001967.

In the notice of contest case, the issues are whether a valid citation was issued and whether it should be sustained or modified. In the civil penalty case, the issues are whether a violation occurred and, if so, what civil penalty should be assessed, based on the six criteria set forth in section 110(i) of the Act.

Before I formulate a conclusion as to whether a violation occurred, it is necessary that I make some findings of fact which will be set forth in enumerated paragraphs.

1. On September 12, 1983, Inspector Rosiek went to the Rowland No. 3 Mine of Consolidation Coal Company. At the mine he met a State inspector by the name of Lonnie Christian. Since Inspector Rosiek had come to the mine for the purpose of checking the provisions of the roof-control plan to determine whether they were appropriate for the mining conditions that then prevailed, it was the practice for a West Virginia inspector and an MSHA inspector to make the determination jointly because the roof-control plan filed by the operator with MSHA is also the one which West Virginia recognizes. They were accompanied on the inspection by the mine foreman, Jerry Toney.

2. They proceeded to the No. 3-C Section of the mine where the mining crew was engaged in pillaring operations, specifically Pillar No. 6. A cut through the center of the pillar had already been taken, and while the inspectors were observing the mining crew, an additional amount of coal, or lift as they call it, was taken from the right corner of the left wing. The inspector, at that point, indicated to the mine foreman that he believed a violation had occurred of the provisions of Drawing No. 4, page 21, of the roof-control plan then in effect (Exh. 3).

3. The inspector remained in the vicinity of the No. 6 pillar until the miners began taking lifts in the sequence shown on Drawing No. 4, according to which lifts marked as two, three, four, five, and the pushout at the most outby portion of the right wing are removed. Then the continuous-mining machine is moved up the left entry and used to take lifts six, seven, eight, nine, and the final pushout at the most outby portion of the left wing.

4. The inspector marked the block on the citation which is labeled "significant and substantial" (FOOTNOTE 1) because he believed

that removal of the right corner of the left wing would weaken the support provided by the left wing and cause a redistribution of weight. His reason for that belief was based on the fact that the lift taken from the right corner was about 12 feet wide at its inmost point and left only about 3 feet of coal standing at the extreme end of the left wing. He felt that if he remained in the vicinity of active mining operations until lifts six and seven had been taken, the danger would be eliminated.

5. Testimony was also given in this proceeding by an inspector named Darlie F. Anderson. Both Inspector Anderson and Inspector Rosiek are what is known as coal mine inspectors specializing in roof control. The difference between Inspector Anderson and Inspector Rosiek lies in the fact that Inspector Anderson has had a lot more practical experience than Inspector Rosiek, and apparently another reason for Inspector Anderson's testifying, in addition to giving his opinion based on his practical experience, was that he had participated in a revision or modification of the roof-control plan which occurred after Inspector Rosiek's Citation No. 2001967 was issued. The inspector had stated in Citation No. 2001967 (Exh. 4):

> The approved roof control plan Permit No. 4-RC-12-70-1141-14 was not being complied with in the No. 6 pillar on the 3-C(008-0) Section in that a lift was taken from the left rib after the split had holed through prior to mining the right wing. The section was supervised by Rodney Reed, section foreman.

The change that was made in the roof-control plan, and this change was made under the supervision and investigation of Inspector Anderson, related to a change in Drawing No. 4 which is shown on page 21 of the roof-control plan introduced as exhibit 5 in this proceeding. That change allows Consolidation Coal Company to remove the right corner from the left wing of a pillar after the split has been taken from the middle, and that portion is to be no wider than seven feet at the inmost point of the left wing. An additional change in the modification is that instead of inserting eight breaker posts at point "E" shown on Drawing No. 4 of exhibit 5, only four breaker posts are set prior to the taking of the right corner of the left wing. After the right corner has been removed, then the four breaker posts on the left of the letter "E" are installed, together with five additional breaker posts, before the lift on the right wing is taken.

6. A great deal of opinion testimony was necessarily involved in the proceeding, and both inspectors agreed that roof conditions in this particular instance were good. Of course,

Inspector Anderson was not present on September 12, but he was given the fact that the roof conditions were good, and it was his opinion that removal of the right corner of the left wing was not a particularly dangerous act of mining. Inspector Rosiek's opinion was, as I have previously indicated, that removal of the right corner of the left wing did subject the miners to additional danger as compared with not removing the right corner.

7. Consolidation Coal Company presented several witnesses, the first one being Basil Green, who was the operator of the continuous-mining machine on the day that the inspector wrote the citation. He testified that it had been a question in his mind as to whether it was permissible to remove the right corner of the left wing in the situation that he encountered on September 12, but that he had been assured by management that it was in compliance with the roof-control plan for him to do so. Consequently, he had been taking the right corner of the left wing if a situation prevailed which he felt required him to do so. The condition which Green believed to be necessary before he would remove the right corner of the left wing was that there be some indication of an override of the breaker posts which are placed at the inmost portion of the left entry beside the left wing of the pillar that is being removed. On September 12 he had found that the first four of the eight breaker posts which are shown at the letter "A" on Drawing No. 4 of exhibit 3 had been broken, and therefore he installed four additional breaker posts outby the four remaining posts. As a result of that change in the location of the breaker posts, he said that it was not possible to get the continuous-mining machine up the left entry to the left of the left wing and still remove all of the pillar because his access to the inmost portion of the left wing would be blocked by the additional breaker posts which had been set. And he also had the ability, because of his experience, to evaluate the entire mining situation that prevailed at that time, and he said that there had not been enough of an override to cause a redistribution of weight, so that he did not encounter or see any evidence of a sloughing off of the coal on either the left or the right wing, and that since he did not see or hear any signs of a change in the weight distribution of the roof, he thought it was entirely safe to remove the right corner of the left wing. That is what he did on September 12, and he did so even though the mine foreman, Jerry Toney, was present, and he believed that he was proceeding in accordance with the roof-control plan. He testified that he would not take the right corner if he felt that there was a redistribution of weight as a result of the breaking and resetting of the breaker posts in the left entry as described above.

8. Jerry Toney, the mine foreman, also testified, and it was his belief that he was proceeding in accordance with the roof-control plan. He said that he would not have allowed the continuous-mining machine to take the right corner of the left wing in the presence of a Federal and a West Virginia inspector if he had not believed that it was appropriate, safe, and in compliance with the roof-control plan, and that he felt that no hazard existed because of the way they proceeded in this instance.

Another witness who appeared on behalf of Consolidation Coal Company was the superintendent of the mine, Norman Blankenship. He testified that he believed that he was entirely within compliance of the roof-control plan because of the second paragraph on page five of the roof-control plan. That provision appears in both exhibits 3 and 5 and provides as follows:

> Where second mining is being done, management shall show on a mine map the sequence of recovering pillars. Pillaring methods shall maintain a uniform pillar line that eliminates pillar points and pillars that project inby the breakline. When conditions dictate that changes be made in the sequence of pillar recovery, such changes shall be authorized by the superintendent or designated mine foreman for the shift involved and shall include additional precautionary measures to be taken to compensate for the abnormal conditions encountered.

It was Blankenship's opinion that the abnormal condition which warranted deviation at the time the citation was written was the breaking of the posts, or the indication of some override, and that it was necessary that the right corner of the left wing be removed because if that were not done that it would be difficult, if not impossible, to get the inmost portion of the left wing removed without having the continuous-mining machine proceed inby permanent supports. Consequently, if they could not remove the last portion of the left wing by using the sequence of mining shown on Drawing No. 4 of the roof-control plan in effect on September 12, 1983, sufficient coal would be left standing to interfere with the normal dropping of the roof as retreat mining occurred. Blankenship's testimony regarding the adverse effect of leaving coal is supported by Jerry Toney's and the inspector's testimony. In fact, all witnesses agreed that leaving coal in a pillaring section is as dangerous a situation as taking too much coal at a given point. Blankenship also explained that he had made a request for a change in the roof-control plan after Inspector Rosiek had written Citation No. 2001967 because he had not previously been cited for having removed, or for having allowed the removal of the

right corner of the left wing, and as far as he was concerned, he had been in compliance, but having been cited for something which had been the practice at Rowland No. 3 Mine for anywhere from 5 to 10 years, he then concluded that it was necessary to request a modification of the roof-control plan.

9. The request for the modification probably can best be summarized by referring to exhibit A in this proceeding which is a letter showing the type of change that Blankenship thought was essential. That particular exhibit also has the signature of both the day-shift and the evening-shift miners who worked on the 3-C Section, including the signatures of not only the section foremen and the mine foreman, but also the rank and file miners who ran the continuous-mining machine and the helpers of the operators of the continuous-mining machine. The theory behind the request for the modification of the roof-control plan lies in the fact that all of the miners apparently prefer to have all of the coal removed any time a pillar is removed so that there will not be a residue of coal left to interfere with the smooth falling of the gob area as the pillars get pulled in the retreat-mining process.

Those findings summarize the testimony and exhibits which have been presented in this proceeding. Counsel for the Secretary and for Consolidation made concluding arguments. The Secretary's counsel asserts that there was a violation of the roof-control plan and he argues that it was improper for the mine superintendent to rely upon the second paragraph on page five of the roof-control plan as a device for saying that a different sequence could be used from that shown in the drawing in the roof-control plan in effect on September 12, 1983.

The provision on which the superintendent relied has been quoted in finding No. 8 above, and it appears to me that the superintendent is not entitled to rely upon that provision for the purpose of changing the sequence of the removal of the lifts that are shown in the roof-control plan. The reason for my ruling is based on the third sentence in that paragraph which provides, "When conditions dictate that changes be made in the sequence of pillar recovery, such changes shall be authorized by the superintendent or designated mine foreman for the shift involved and shall include additional precautionary measures to be taken to compensate for the abnormal conditions encountered."

I interpret the quoted sentence to mean that the changes must be made because of some very unusual circumstance that has arisen, because the sentence states that the changes shall be made "for the shift involved and shall include additional precautionary measures". I believe that the situation that

brought about the removal of the right corner of the left wing in pillaring was something that occurred so frequently that it would not be the type of abnormal condition that is contemplated by the third sentence of that paragraph on page five.

I think that when there is a condition which required a routine deviation from a particular provision of the roof-control plan, that the operator is required to get the change formalized in the way that was done after the citation was written. The operator of the continuous-mining machine said that if he removed 10 pillars, he might feel that it was desirable to remove the right corner of the left wing two times out of 10. I believe that that is such a common occurrence that "the abnormal conditions" do not exist which would permit the superintendent to rely on the second paragraph on page five of the roof-control plan. Since on September 12, 1983, there was not any outstanding provision in the plan which permitted the taking of the right corner of the left wing, as was done at that time, I believe that there was a violation of the roof-control plan as alleged by the inspector.

The other point made by both counsel is that there is a question as to whether the inspector properly checked on exhibit 4, which is the citation itself, the provision "significant and substantial". Of course counsel for the Secretary argues that Inspector Rosiek properly checked S & S, while counsel for Consolidation argues that he should not have checked S & S.

A decision as to whether a violation has been properly designated as being significant and substantial must be made in light of the Commission's rulings in that area. The term "significant and substantial" was first defined by the Commission in National Gypsum Co., 3 FMSHRC 822 (1981) at page 825, where the Commission stated:

> We hold that a violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety and health hazard if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or an illness of a reasonably serious nature.

As indicated in footnote 1 above, the Commission recently held in a Consolidation Coal case that an inspector may check the words "significant and substantial" on a citation issued under section 104(a) despite the fact that that particular language is actually taken from section 104(d)(1) of the Act. Therefore, it was legally permissible for the inspector to check the words "significant and substantial" on the citation here involved which was issued under section 104(a) of the Act.

In both the Consolidation case I just mentioned and in Mathies Coal Co., 6 FMSHRC 1 (1984), the Commission applied the definition of significant and substantial in four steps. The first step was whether a violation occurred, and I have already dealt with that by finding that a violation of the roof-control plan occurred. The second step in the definition of significant and substantial is whether the violation contributed a measure of danger to a discrete safety hazard. In this instance, there was an alleged discrete safety hazard in that Inspector Rosiek, who wrote the citation, believed that the miners had been subjected to an additional hazard because a certain amount of support that would have been on the left wing had been removed, thereby leaving less area to support the roof on the left side of the pillar. So there was a discrete safety hazard.

The third step in applying the definition is whether there is a reasonable likelihood that the hazard contributed to will result in injury. The testimony is equivocal on whether the removal of that right corner of the left wing really did bring about a reasonable likelihood that the hazard contributed to would result in an injury, because it is a fact that Consolidation Coal Company was using 4-foot resin bolts in the split which had been taken up through the middle of the pillar, although its roof-control plan provided for a minimum use of only 30-inch conventional bolts. Consol had used the secure 4-foot resin bolts because it wanted to provide maximum safety in the pillar removal operation which is necessarily hazardous work.

The inspector, despite the fact that he wrote a violation for the taking of that right corner of the left wing, still allowed the continuous-mining machine to proceed in the normal course of removing the pillar going through lifts two through 10, as shown in the drawing in the roof-control plan, and the inspector believed that by the time the lift at the most inby portion of the left wing had been taken, the danger had been so minimized, that there was no longer any hazard. At that point he left the section.

I cannot find on a preponderance of the evidence in this case that there was a reasonable likelihood that the hazard contributed to would result in an injury, because the only act which had been done here was the removal of the right corner of the left wing of the pillar, and there had been additional breaker posts set before the other lifts were removed. I cannot distinguish the claimed likelihood of injury in this instance on September 12 from the fact that subsequently to the occurrence of the instant violation, Consol was allowed to modify the roof-control plan to insert a provision which allows Consol, on a routine basis, to take the right corner of the left wing in almost exactly the same way it was being done on

September 12, but under the new and current modification of the roof-control plan, Consol is permitted to omit the setting of four of the eight breaker posts that had been set on the day that the inspector wrote the citation. So there has been a modification of the roof-control plan to allow, on a routine basis, almost exactly the same procedure that was used on September 12. The only difference now is that it is currently permissible under the roof-control plan to take the right corner of the left wing, but on September 12 it was not permissible to do so.

The fourth step in application of the significant and substantial definition is whether there is a reasonable likelihood that the injury in question will be of a reasonably serious nature. Here again, I have to evaluate the seriousness and the likelihood of injury on the basis of the type of work being performed. I think all witnesses agreed that removing pillars is a hazardous mining procedure. The people who do it have to be trained and experienced to watch for all sorts of indicators of what hazards exist. Green, who was the operator of the continuous-mining machine, testified that he did take into consideration the question of whether there had been a weight distribution, whether there was sloughing of coal from the remaining wings on each side, and he made a determination that the No. 6 pillar could be removed by taking the right corner of the left wing without exposing him or the other men on the crew to any reasonable likelihood of a roof fall which would cause an injury.

Inspector Rosiek, who wrote the citation, allowed them to finish the taking of the No. 6 pillar, and while he asserted that he felt that there was a very serious exposure to injury, he also conceded and acknowledged the fact that if coal were left on the inby portion of the left wing, rather than allowing the miners to go in and take the right corner of the left wing, a safety hazard will occur from the standpoint of future removal of other pillars because there might not be the necessary uniform dropping of the gob area as retreat mining continued.

There has to be in retreat mining an overall consideration of so many different factors, that I cannot find that the removal of the right corner of the left wing was a matter which had a reasonable likelihood of injuring anyone in the way that this particular operator of the continuous-mining machine proceeded on September 12. Therefore, I find that the inspector improperly checked S & S on Citation No. 2001967, and I find that Consolidation Coal Company's notice of contest should be granted to the limited extent that the citation should not show a designation of "significant and substantial".

Having found a violation, however, it is necessary that a civil penalty be assessed. In order to do that, I have to consider the six criteria listed in section 110(i) of the Act.

The parties have stipulated to certain facts which deal with several of the six criteria. It has been stipulated that the Rowland No. 3 Mine is owned and operated by Consolidation Coal Company and that Consol showed a good-faith effort to achieve rapid compliance after the citation was written.

As for the criterion of the size of the company, it was stipulated that Consol's annual production is about 45,000,000 tons and that the Rowland No. 3 Mine produces about 199,000 tons per year. Those figures support a finding that Consol is a large operator. There was no stipulation as to whether the payment of a penalty would cause Consol to discontinue in business, but the Commission held in Sellersburg Stone Co., 5 FMSHRC 287 (1983), aff'd Sellersburg Stone Co. v. FMSHRC, --- F.2d ----, 7th Circuit No. 83-1630, issued June 11, 1984, that when no financial evidence is presented in a given case, a judge may presume that a company is able to pay a penalty without causing it to discontinue in business. Therefore, I conclude that payment of a penalty will not cause Consol to discontinue in business.

The fourth criterion to be considered is history of previous violations. Exhibit 7 is a computer printout of the history of previous violations at the Rowland No. 3 Mine for the 24 months preceding the writing of the citation here involved. That exhibit shows that Consol has been cited for three previous violations of section 75.200. All three violations were alleged in citations written pursuant to section 104(a) of the Act. All three violations were cited on March 12, 1982, and MSHA proposed a penalty of $112 for each violation. Those facts support a conclusion that Consol has not been cited for a particularly serious previous violation of section 75.200 at its Rowland No. 3 Mine. While the legislative history shows that Congress intended for the criterion of history of previous violations to be applied so as to increase the penalty progressively for each repeated violation of the same standard, (FOOTNOTE 2) Congress was concerned about repetitious violations which had occurred within a few months of the violation under consideration at a given time. The evidence in this instance shows that Consol has not violated section 75.200 at all during the 18 months preceding the occurrence of the violation here under consideration. In such circumstances, I find that Consol has a favorable history of previous violations which supports a conclusion that no portion of the penalty should be assessed under the criterion of history of previous violations.

The fifth criterion is negligence. As to that criterion, the inspector checked the word "moderate" in item 20 on Citation No. 2001967. The evidence shows that Consol's negligence

is even less than the inspector indicated because Consol's management believed that the company had a right under the roof-control plan in effect when the citation was written to extract pillars in the way the miners were operating on September 12, 1983. The argument made by Consol in support of its having proceeded the way it did is logical and it is a position which had some merit, particularly in view of the fact that the taking of the right corner of the left wing was a practice which had been followed for from 5 to 10 years prior to the writing of the citation involved in this case. Consequently, I find that the degree of negligence associated with the violation was very low, bordering on none. For the aforesaid reasons, I conclude that no portion of the penalty should be assessed under the criterion of negligence.

The sixth and final criterion to be considered is gravity. I have already indicated above in my discussion of the term "significant and substantial" that there was no reasonable likelihood that anyone would be injured from the cut that was taken off the right corner of the left wing. In such circumstances, there is hardly any reason to assess a penalty apart from the fact that assessment of a penalty is mandatory under the Act once a violation is found to have occurred. Tazco, Inc., 3 FMSHRC 1895 (1981). In view of the fact that a large operator is involved, I believe that a minimal penalty of $25 should be assessed for the violation of section 75.200 alleged in Citation No. 2001967.

The Commission held in C.C.C.-Pompey Coal Co., Inc., 2 FMSHRC 1195 (1980), that a judge is obligated to reconsider any rulings made in a bench decision if, during the interim between the rendering of the bench decision and its issuance in final form, the Commission issues a decision establishing a precedent which conflicts with the rulings made by the judge in his bench decision. The holding in the Pompey case applies to the bench decision set forth above because the Commission issued a decision in United States Steel Corp., 6 FMSHRC 1423 (1984), after I had rendered the bench decision in this proceeding, in which the Commission majority reduced one of my civil penalties from $1,500 to $400 and another penalty from $80 to $70. I have carefully reviewed the findings made in the bench decision and I do not believe that they conflict in any way with the holdings made by the Commission majority in the U.S. Steel case. Therefore, I do not think that the penalty of $25 assessed in the bench decision needs to be further reduced in light of the Commission's U.S. Steel decision.

WHEREFORE, it is ordered:

(A) Consolidation Coal Company's notice of contest filed in Docket No. WEVA 84-2-R is granted to the extent of modifying Citation No. 2001967 issued September 12, 1983, to delete

the checking of the term "significant and substantial" in item No. 11a of the citation. The notice of contest is otherwise denied and the citation is otherwise affirmed.

(B) Within 30 days after issuance of this decision, Consolidation Coal Company shall pay a civil penalty of $25.00 for the violation of section 75.200 alleged in Citation No. 2001967 issued September 12, 1983.

Richard C. Steffey
Administrative Law Judge

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~FOOTNOTE_ONE
1 In Consolidation Coal Co., 6 FMSHRC 189 (1984), the Commission held that an inspector may properly designate a violation cited pursuant to section 104(a) of the Act as being "significant and substantial" as that term is used in section 104(d)(1) of the Act, that is, that the violation is of such nature that it could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

~FOOTNOTE_TWO
2 LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 631 (1978).