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

CONSOLIDATION COAL COMPANY, CONTESTANT	CONTEST PROCEEDING
	Docket No. WEVA 86-61-R
v.	Order No. 2711581; 10/23/85
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Blacksville No. 1 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEVA 86-115 A.C. No. 46-01867-03669
v.	Blacksville No. 1 Mine
CONSOLIDATION COAL COMPANY, RESPONDENT	

DECISION

Appearances: Linda M. Henry, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor (Secretary); Michael R. Peelish, Esq., Pittsburgh, Pennsylvania for Consolidation Coal Co. (Consol).

Before: Judge Broderick

STATEMENT OF THE CASE

In the Contest proceeding, Consol challenges the propriety of Order No. 2711581 issued on October 23, 1985 pursuant to section 104(d)(2) of the Act. In the penalty proceeding, the Secretary seeks a civil penalty for the violation charged in the contested order. Pursuant to notice, the case was heard in Morgantown, West Virginia on September 3, 1986. Federal Mine Inspector Joseph Baniak and miner Clarence Shaffer testified on behalf of the Secretary. Robert W. Gross, John Weber, Willis Fansler and John Tharp, all supervisory Consol employees, testified on behalf of Consol. The parties waived their right to file post hearing briefs, but each argued its position on the record at the close of the hearing. I have considered the entire

record, and the contentions of the parties and make the following decision.

FINDINGS OF FACT

1. At all times pertinent to these proceedings, Consol was the owner and operator of an underground coal mine in Monongalia County, West Virginia, known as the Blacksville No. 1 Mine. The mine produces coal which enters interstate commerce and its operation affects interstate commerce.

2. Consol's annual production tonnage is approximately 41,000,000. The subject mine produces approximately 1,775,000 tons annually. Consol is a large operator.

3. Consol demonstrated good faith in abating the cited violation after the order involved herein was issued.

4. The imposition of a civil penalty in this proceeding will not affect Consol's ability to continue in business.

5. The subject mine was assessed a total of 645 violations in the 24 months immediately preceding the issuance of the order involved herein. Citations for absent fire sensors were issued to Consol on October 9, 1985 and October 17, 1985.

6. Order No. 2261971 was issued under section 104(d)(1) of the Act on March 6, 1984. There was no "clean inspection" of the mine between March 6, 1984 and October 23, 1985, the date of the order contested herein.

7. On October 23, 1985 at 12:01 p.m., automatic fire sensors were absent on the 3ÄSouth Mother belt conveyor from the tail piece extending approximately 700 feet outby. The belt services the PÄ1, PÄ2 and PÄ3 sections. It was operating at the time.

8. Inspector Baniak issued a 104(d)(2) order because of the above described condition covering the entire 3ÄSouth Mother belt conveyor.

9. At the time the order was issued, a crew was working inby the area affected by the order. The air was ventilated to the return air course, but the ventilation was not completely effective, and up to 40% of the air was going to the working sections.

10. When Inspector Baniak began his inspection of the subject mine on October 3, 1985, he had a discussion with mine management concerning fire sensors because he heard from miners

that belt moves were being made without fire sensors being installed.

11. On October 17, 1985 Inspector Baniak met with management after the issuance of a citation for absent fire sensors on that day. Baniak suggested that one person be made respnsible for seeing that fire sensors were properly installed. When Baniak was told that the mine did not keep sensors in the warehouse, but recovered them from the long wall section, he criticized this practice. Management representatives said they would order sensors.

12. Following the issuance of the citation for absent fire sensors on October 9, 1985, Consol's safety supervisor directed the safety escort Willis Fansler to inspect all the mine belts for sensors. He checked all the belts on PÄ1, PÄ2, PÄ3 and the 3ÄS Mother belt on October 14, 1985. All the fire sensors were in place.

13. The 3ÄS Mother belt was not advanced between October 14 and October 23, 1985.

14. Consol's section foreman John Tharp performed preshift examinations of the 3ÄS Mother belt on October 21, 22 and 23. Tharp's examinations showed that fire sensors were present on the 3ÄS belt on each of these days. He was aware of the citations which had been issued for absent fire sensors on October 9 and 17, 1985.

DISCUSSION

The inspector concluded that fire sensors had never been on the 3ÄS Mother belt in the area cited. He based this conclusion on the fact that there was no evidence of lubricant along the wire to which the sensors were to be attached, and no evidence that the wire had been pricked. Sensors have a thick lubricant and are attached to the wire by a clasp which cuts into the wire. I have carefully considered the Inspector's testimony, but am unable to disregard, and there is no reason to discredit, the positive testimony of Consol's witnesses that the sensors were in fact on the wire on the morning of October 23 and prior thereto.

REGULATION

30 C.F.R. 75.1103Ä4(a) provides in part:

> (a) Automatic fire sensor and warning device systems shall provide identification of fire witnin each belt flight (each belt unit operated by a belt drive). (1) Where used, sensors resonding to temperature rise

> at a point (point-type sensors) shall be located at or above the elevation of the top belt, and installed at the beginning and end of each belt flight, at the belt drive, and in increments along each belt flight so that the maximum distance between sensors does not exceed 125 feet, except as provided in paragraph (a)(3) . . . .
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> * * *
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> (3) When the distance from the tailpiece at loading points to the first outby sensor reaches 125 feet when point-type sensors are used, such sensors shall be installed and put in operation within 24 production shift hours after the distance of 125 feet is reached.
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> * * *

ISSUES

1. Whether the evidence establishes a violation of 30 C.F.R. 75.1103Ä4(a)(1)

2. If so, whether the violation was significant and substantial?

3. If so, whether the violation resulted from Consol's unwarrantable failure to comply with the standard?

CONCLUSIONS OF LAW

1. Consol is subject to the provisions of the Mine Safety Act in the operation of the subject mine. I have jurisdiction over the parties and subject matter of this proceeding.

2. The evidence shows a violation of 30 C.F.R. 75.1103Ä4(a)(1). I have found (finding of fact 7) that there were no fire sensors on the 3ÄS Mother belt conveyor for a distance of 700 feet outby the tailpiece. This is a violation. The reason for the absence of the sensors is not relevant to the issue whether a violation occurred.

3. The violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard.

Discussion

Fire sensors are designed to provide early warning of a fire to miners on the working section. I have found (finding of fact 9) that a crew was working inby the area affected by the order, and that some of the air from the belt was going to the

working sections. In the event of a fire the miners on the section would not receive timely warning so that they could get to the escapeway. Therefore I conclude that the violation contributed to "a measure of danger to safety" reasonably likely to result in serious injury to miners. See Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984). I therefore conclude that the violation was serious.

4. The violation was not the result of Consol's unwarantable failure to comply with the standard violated.

Discussion

The Commission apparently construes the term unwarrantable failure to comply to refer to a violative condition which resulted from indifference, willful intent, or a serious lack of reasonable care. United States Steel Corporation, 6 FMSHRC 1423 (1984). This construction differs from that set out in Ziegler Coal Co., 7 IBMA 280 (1977), and imposes a greater burden on the Secretary than merely establishing the operator's negligence. In view of my findings that Consol examined all belts for fire sensors on October 14, 1985, and on the morning of October 23, 1985, and found them in place, I cannot conclude that the violation resulted from Consol's indifference, willful intent or a serious lack of reasonable care. There is no evidence of the cause of the missing sensors at the time of the inspection. Consol witnesses speculated that the condition resulted from employee sabotage, but it did not present any evidence of such sabotage. In view of the previous citations and the problems Consol has had with keeping sensors on the belts, greater than ordinary vigilance was required to see that the sensors were in place. I conclude that the violation resulted from ordinary negligence.

5. Based on the criteria in section 110(i) of the Act, and my findings and conclusions set out above, I conclude that an appropriate penalty for the violation is $750.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. The order contested in Docket No. WEVA 86Ä61ÄR properly charged a violation of 30 C.F.R. 75.1103Ä4(a)(1), and properly found that the violation was significant and substantial.

2. The contested order improperly concluded that the violation resulted from Consol's unwarantable failure to

comply with the safety standard involved. Therefore the violation was not properly cited in a section 104(d)(2) withdrawal order, see Old Ben Coal Company, 1 FMSHRC 1954 (1979); Itmann Coal Company v. Secretary, 2 FMSHRC 2193 (1980) (ALJ), since it was not a "similar violation" to that charged in the prior 104(d)(1) order. Therefore, the order is MODIFIED to a 104(a) citation.

3. Respondent shall pay a civil penalty of $750 within 30 days of the date of this decision for the violation described in conclusion of law No. 2.

James A. Broderick
Administrative Law Judge