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

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

CIVIL PENALTY PROCEEDING

Docket No. YORK 86-11
A.C. No. 18-00621-03553

v.

METTIKI COAL CORPORATION,
RESPONDENT

METTIKI COAL CORPORATION,
CONTESTANT

CONTEST PROCEEDING

Docket No. YORK 86-5-R
Citation No. 2701541; 5/5/86

v.

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

"A" Mine

DECISION

Appearances: Susan Chetlin, Esq., and Timothy Biddle, Esq.,
Crowell & Moring, Washington, DC, for Contestant;
Susan M. Jordan, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia, Pennsylvania,
for Respondent.

Before: Judge Melick

These consolidated cases are before me under section 105(d)
of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.
801 et seq., the "Act," to challenge the issuance by the
Secretary of Labor of a citation under section 104(d)(1) of the
Act, (FOOTNOTE 1) and for review of civil penalties proposed by the
Secretary for the violation alleged therein.

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The general issues before me are whether Mettiki has violated the cited mandatory standard and, if so, whether that violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard i.e., whether the violation was "significant and substantial." If a "significant and substantial" violation is found it will also be necessary in order to sustain the citation as a citation under section 104(d)(1) to determine if the violation was caused by the "unwarrantable failure" of the operator to comply with cited standard. Finally if a violation is found it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

The citation at bar, No. 2701541, charges a "significant and substantial" violation of the regulatory standard at 30 C.F.R. 75.400 and states as follows:

Float coal dust, coal spillage, rock and a mixture of fire clay, was allowed to accumulate on the back side of the longwall shields. The accumulation [sic] were 0 to 12 inches deep, 1 foot wide and approximately 18 inches in length on all shields. Most of the accumulations were damp and no source of ignition was present. John Morgan, longwall foreman, and John Sisler responsible. The condition found at the BÄPortal.

The cited standard provides that "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."

Charles Wotring, an inspector for the Federal Mine Safety and Health Administration (MSHA), was conducting a regular inspection of the Mettiki "A" mine on May 5, 1986, accompanied by another inspector, Mine Foreman Dennis Dever and Mine Manager William Pritt. According to Wotring there were coal accumulations around the shields along the entire 650 foot length of the longwall face with the blackest accumulations lying between shields number 83 and 126. Float dust and fine ground-up coal mixed with some coal and rock were also present. Wotring measured several of the accumulations and found them to be 12 inches wide, 18 inches long and "most were" 12 inches deep. Wotring also found float coal dust on the jacks and shields.

The accumulations were admittedly damp and no methane gas or ignition sources were present. Wotring opined that while a methane or dust explosion could trigger an explosion

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of even this damp material, there was "little likelihood" of such an explosion. He further acknowledged that the accumulations on shields number 1 to 83 were not hazardous because they were mixed with fire clay to the point of incombustibility.

Mettiki witnesses, Foreman John Morgan and General Mine Foreman Dennis Dever, agreed that there were accumulations around the longwall shields but testified that those accumulations consisted primarily of noncombustible fire clay, soapstone, and slate. These witnesses also acknowledged however that a fine mist of float coal dust appeared on those longwall shields which had not been hosed down before the longwall broke down earlier that morning.

In rebuttal Inspector Wotring observed that the areas depicted in the photographs in evidence (Exhibits CÄ1 through CÄ5) indeed contained primarily rock as alleged by Mettiki's witnesses but he pointed out that the area in which he found the violative coal accumulations were not depicted in any of the photographs. Wotring noted without contradiction that the cited accumulations were located in the area depicted in Exhibit CÄ6 cross-hatched in blue. Within this framework it is clear that coal dust, including float coal dust, loose coal and other combustible materials had not been cleaned up and were permitted to accumulate in violation of the cited standard. Accordingly the violation is proven as charged.

In light of Wotring's admission however that "there was little likelihood of an explosion" I cannot find that the violation was "significant and substantial" or of high gravity. In order for a safety violation to be "significant and substantial" there must be a reasonable likelihood that the hazard contributed to will result in an injury and a reasonable likelihood that the injury will be of a reasonably serious nature. Secretary v. Mathies Coal Co., 6 FMSHRC 1 (1984). Under the circumstances the citation at bar, issued under section 104(d)(1) of the Act, must be modified to a citation under section 104(a) of the Act. The issue of whether or not the violation was caused by the "unwarrantable failure" of the operator to comply with the cited standard is therefore moot. fn. 1 supra.

In evaluating the civil penalty negligence criteria I accept the undisputed testimony of inspector Wotring that from the compactness of the accumulated coal spillage it was reasonable to infer that the accumulations had existed since the previous shift. Accordingly those accumulations should have been discovered during the preshift examination or the onshift examination which had already been conducted that morning by Foreman Morgan. The failure to have removed the accumulations was therefore the result of operator negligence. It is noted that Mettiki easily removed the coal dust accumulations by merely attaching a hose to the water line and washing them down.

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In determining the amount of penalty herein I have also considered that the operator is medium in size and has a moderate history of reported violations. The condition was in fact abated in a timely and good faith manner. Accordingly a civil penalty of \$250 is deemed appropriate.

ORDER

Citation No. 2701541 is modified to a citation issued under section 104(a) of the Act and, as modified, is affirmed. The Mettiki Coal Corporation is order to pay a civil penalty of \$250 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

FOOTNOTE START HERE-

1 Section 104(d)(1) provides as follows:

"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."