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

CONSOLIDATION COAL COMPANY,
CONTESTANT

v.

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

CONTEST PROCEEDING

Docket No. WEVA 86-153-R
Order No. 2713988; 2/13/86

Humphrey No. 7 Mine

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

v.

CONSOLIDATION COAL COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEVA 86-261
A.C. No. 46-01453-03689

Humphrey No. 7 Mine

DECISION

Appearances: Michael R. Peelish, Esq., Pittsburgh, Pennsylvania
for Consolidation Coal Company (Consol);
Therese I. Salus, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia, Pennsylvania,
for the Secretary of Labor (Secretary).

Before: Judge Broderick

STATEMENT OF THE CASE

Consol has challenged the issuance of an order of withdrawal on February 13, 1986, under section 104(d)(2) of the Federal Mine Safety and Health Act of 1977 (the Act). The Secretary seeks a penalty for the safety violation charged in the contested order. Because both dockets arose out of the same incident, they were consolidated for the purposes of hearing and decision. Pursuant to notice, the case was heard on October 7, 1986 in Morgantown, West Virginia. Joseph Baniak and David Laurie testified on behalf of the Secretary. Marvin Faulkner, Kent Isancnson, Stanley Brozik, and Harold Moore testified on behalf of Consol. Both parties were given the opportunity to file posthearing briefs. A brief was filed on behalf of Consol. The Secretary

~1983

did not file a brief. Based on the entire record, and considering the contentions of the parties, I make this decision.

FINDINGS OF FACT

1. At all times pertinent to this decision, Consol was the owner and operator of an underground coal mine in Monongalia County, West Virginia, known as the Humphrey No. 7 Mine.

2. Consol produces more than 37 million tons of coal annually. The subject mine produces almost 3 millions tons. Consol is a large operator.

3. During the 24 months preceding the order contested herein, there were 925 paid violations issued to the subject mine, 813 of which were designated significant and substantial. Included in that number were 130 violations of 30 C.F.R. 75.400. One hundred twenty-three of these were designated significant and substantial. Although the number of paid violations is substantial, in view of the size of the mine and the number of inspection days, I conclude that the history of prior violations is moderate and I will not increase any penalty assessed herein because of prior history.

4. An order was issued to the subject mine under section 104(d)(2) of the Act on August 23, 1985. Consol did not raise the issue of an intervening clean inspection; therefore, I conclude that there was not a clean inspection between August 23, 1985 and February 13, 1986.

5. On February 13, 1986, Federal Inspector Joseph J. Baniak conducted a regular inspection at the subject mine. He proceeded to the 6Ä Butt section belt conveyor drive and take up areas. At about 10:00 a.m. on February 13, 1986, Inspector Baniak issued an order of withdrawal under section 104(d)(2) of the Act alleging a violation of 30 C.F.R. 75.400.

6. I find that at the time the order was issued, the following conditions existed in the area: large accumulations of loose coal and coal dust, including float coal dust in suspension, existed under and around the belt and in and around the motor and electrical components. The accumulations extended approximately 100 feet in by the intersection and 50 feet out by. They were also present in 2 crosscuts. They extended from rib to rib along the entry. The accumulation around the belt drive motor was approximately 14 inches deep from the frames, and was packed up around the motor.

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7. The accumulations were very dark in color and for the most part were dry. The belt was energized and was running at the time the order was issued.

8. On February 13, 1986, the preshift mine examiner's report called out shortly after 7:00 a.m. indicated that the 6ÄButt drive needed additional dust.

9. The belt shoveler on the 6 Butt belt line read the preshift mine examiner's report and went into the mine to the 6ÄButt section. He was prepared to add rock dust when he saw that two belt men were engaged in adjusting the rollers on the belt. The belt shoveler (also a fire boss) told the beltmen to complete their work adjusting the belt and he would return to dust the area when they finished. This occurred between 8:00 and 8:30 a.m. The belt was running while it was being adjusted. The belt shoveler then proceeded to shovel coal spillage some 300 feet down the belt line.

10. The hazard created by the condition found to exist in finding of fact No. 6 was the possibility of a mine fire or explosion. The large amount of the accumulations, the existence of float dust on electrical equipment and suspended in the air, and the existence of ignition sources in the power cables and the drive motor made the occurrence of a fire or explosion reasonably likely if the condition were allowed to continue.

11. Because of the extent of the accumulation, especially the coal dust packed around the motors, it is clear that it had existed for some time prior to the preshift examiner's report referred to in finding of fact No. 8. Consol was aware or should have been aware of the condition prior to the preshift examiner's report.

12. The air in the area of the violation was largely coming off the working section to the regulator and out of the mine. In the event of a fire, however, the regulator would likely have been disrupted, and the fire and smoke could travel in all directions including in the direction of the face.

13. Fire extinguishers were present at the 6ÄButt belt conveyor drive. An automatic fire suppression unit was present over the belt drive. There was also a fire hose with a water outlet. Fire sensors were present over the belt drive and every 125 feet along the belt.

14. Methane is not liberated in the area of the mine where the violation was cited.

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15. A sample was taken by Consol from a trough in front of the belt drive motors. It was tested and found to be 70 percent incombustible.

16. After the order was issued, ten to twelve men were assigned to clean and rock dust the area. Some of the rock dusting was done by hand and some by machine. The condition was abated, and the order terminated at about 11:55 a.m., February 13, 1986.

REGULATION

30 C.F.R. 75.400 provides as follows:

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.

ISSUES

1. Whether the condition found to exist in finding of fact No. 6 was a violation of 30 C.F.R. 75.400?

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?

4. If so, what is the appropriate penalty for the violation?

CONCLUSIONS OF LAW

1. Consol is subject to the Act in its operation of Humphrey No. 7 Mine, and I have jurisdiction over the parties and subject matter of this proceeding.

2. The accumulation of loose coal and coal dust, including float coal dust referred to in finding of fact No. 6 was violative of 30 C.F.R. 75.400. Loose coal and coal dust was permitted to accumulate in active workings and on electric equipment, and was not cleaned up until after the withdrawal order was issued.

3. The extent of the accumulation, its proximity to ignition sources, and especially the extensive amount of float coal dust, made the occurrence of a fire or explosion reasonably

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likely. The violation was very serious. In the words of walk-around miner Laurie, "In my opinion it was pure gun powder on top of rock dust." (Govt.Ex. 4) I am accepting the testimony of Inspector Baniak and John Laurie over the conflicting testimony of Marvin Faulkner and Kent Isancnson regarding the extent of the accumulation. I discount the evidence of the incombustible content in the sample taken by Consol. It was a single sample taken by hand, and there is no evidence that it was representative of the acumulations in the area.

4. The condition had been present for some time-certainly during the prior shift. I conclude that Consol's failure to clean up the accumulations constituted a serious lack of reasonable care. See U.S. Steel Corp. v. Secretary, 6 FMSHRC 1423 (1984). Therefore the violation was the result of Consol's unwarrantable failure to comply with the standard.

5. There is no evidence that the imposition of a penalty will affect Consol's ability to continue in business.

6. Consol abated the condition promptly and in good faith after the issuance of the order.

7. Considering the criteria in section 110(i) of the Act, I conclude that a penalty of \$1000 is appropriate.

ORDER

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

1. The notice of contest of order No. 2713988 is DENIED.
2. Order No. 2713988 issued February 13, 1986, including the special findings that the violation was significant and substantial and caused by Consol's unwarrantable failure, is AFFIRMED.
3. Consol shall within 30 days of the date of this order pay \$1000 as a civil penalty for the violation found herein.

James A. Broderick
Administrative Law Judge