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SOL (MSHA) V. CONSOLIDATION 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. WEVA 86-386
A.C. No. 46-01455-03630

v.

CONSOLIDATION COAL COMPANY,
RESPONDENT

CONSOLIDATION COAL COMPANY,
CONTESTANT

CONTEST PROCEEDING

Docket No. WEVA 86-339-R
Order No. 2713222; 4/22/86

v.

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

Osage No. 3

DECISION

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

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 a withdrawal order issued by the Secretary of Labor under section 104(d)(1) of the Act, and for review of civil penalties proposed by the Secretary for the violation alleged therein. For the reasons that follow I find that Consolidation Coal Company (Consol) did not violate the cited standard and accordingly that the withdrawal order and the civil penalty proceedings herein must be dismissed.

The order at bar, No. 2713222, alleges a violation of the standard at 30 C.F.R. 75.305 and charges as follows:

A weekly examination of the abandoned areas of 11 North inby the 1 West Junction, which, insofar as safety considerations permit are safe to be traveled by the weekly examiner are not being examined by a certified person as required by 30 C.F.R. 75.305 in

that, the intake and return airways which were safe to travel when inspected 4/21/86 showed no evidence that examinations have been being [sic] made. Last date observed in the return airways was September 1985.

The cited standard, as relevant hereto, provides as follows:

. . . examinations for hazardous conditions, including tests for methane, and for compliance with the mandatory health or safety standards, should be made at least once each week by a certified person designated by the operator . . . insofar as safety considerations permit, abandoned areas The person making such examinations and tests shall place his initials and the date and time at the places examined, and if any hazardous condition is found, such condition shall be reported to the operator promptly. Any hazardous condition shall be corrected immediately The record of these examinations, tests and actions taken shall be recorded in ink or indelible pencil in a book approved by the Secretary kept for such purpose in an area on the surface of the mine chosen to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons.

It is undisputed in this case that the cited areas were indeed "abandoned areas" within the meaning of the cited standard. The parties disagree however concerning whether "safety considerations permit[ed]" the examinations in the abandoned areas at issue. The Secretary argues that safety considerations did in fact permit such examinations and Consol argues that safety considerations did not permit such examinations.

The testimony of Inspector Lynn Workley of the Federal Mine Safety and Health Administration (MSHA) is inconsistent. On the one hand Workley testified that he walked, along with a representative of the mine operator, Don Morrison and a union representative, some 2 thousand feet into the abandoned area, and that it was not unsafe. On the other hand Workley maintained that it was hazardous for anyone to proceed in that area because of the likelihood of fatal roof falls from "bad roof" and the possibility of a trolley wire in the abandoned area becoming energized and causing a fire.

Mine Superintendant Joseph Pride agreed that the abandoned area was unsafe. According to Pride the cited area had been abandoned 5 years before and had not been inspected under the provisions of the cited regulation because it was deemed to be an unsafe area.

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John Morrison, Consol's mine safety escort who accompanied Workley on April 21, 1986, considered the abandoned area to be "highly unsafe." He observed that in many locations the bottom had "humped up" and that the roof and rib conditions were "bad." In some places rock had already fallen from the roof and ribs. Indeed, in order to penetrate the abandoned area it was necessary for the inspection party to "zig-zag" and "backtrack" around the most dangerous conditions.

Joseph Jimmie, a union safety escort accompanying Workley when he abated the order on April 26, 1986, also considered the abandoned area to be a serious hazard. He also found the "top" to be "bad" with evidence of roof falls in many of the headings. Jimmy recalled that the inspection party therefore had to "zig-zag" back-and-forth around the entries in order to penetrate the abandoned area.

Within this framework of evidence it is quite clear that the mine operator could reasonably have found that "safety considerations" did not permit the examinations set forth in section 75.305 to be conducted in the cited area. In reaching this conclusion I have not disregarded the Secretary's argument that one could infer from the fact that the operator did not "danger off" the cited area that it considered to be abandoned and not safe to inspect (under section 75.305), that it did not in fact consider that area unsafe. It is readily apparent however that the inspector himself did not deem it necessary that such abandoned area be "dangered off" since no such violation was cited and no such requirement was made a condition of abatement. Under the circumstances I find no violation and the order must therefore be vacated.

ORDER

Order No. 2713222 is vacated, Civil Penalty Proceeding Docket No. WEVA 86Ä386 is dismissed, and Contest Proceeding Docket No. WEVA 86Ä339-R is granted.

Gary Melick
Administrative Law Judge