CCASE: CONSOLIDATION COAL CO. V. SOL (MSHA) DDATE: 19870414 TTEXT: Federal Mine Safety and Health Review Commission Office of Administrative Law Judges

| CONSOLIDATION COAL COMPANY, CONTESTANT | CONTEST PROCEEDING |
|---|----------------------------|
| | Docket No. WEVA 86-210-R |
| v. | Order No. 2713402; 3/10/86 |
| SECRETARY OF LABOR, | Osage No. 3 Mine |
| MINE SAFETY AND HEALTH | |
| ADMINISTRATION (MSHA), | |
| RESPONDENT | |
| SECRETARY OF LABOR, | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | |
| ADMINISTRATION (MSHA), | Docket No. WEVA 86-481 |
| PETITIONER | A.C. No. 46-01455-03640 |
| ν. | |
| | Osage No. 3 Mine |

CONSOLIDATION COAL COMPANY, RESPONDENT

DECISION

Appearances: William T. Salzer, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor; Michael R. Peelish, Esq., Consolidation Coal Co., Pittsburgh, Pennsylvania, for Consolidation Coal Company.

Before: Judge Melick

These consolidated cases are before me pursuant to 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 under Section 104(d)(1) of the Act and charging a violation of the standard at 30 C.F.R. 75.1105 (FOOTNOTE 1) The general issue before me is whether Consolidation Coal Company (Consol) violated the cited regulatory standard, and, if so, whether the violation was the result of "unwarrantable failure" and whether the violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety and health hazard, i.e., whether the violation was "significant and substantial." If a violation is found, it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with 110(i) of the Act.

The order at bar, No. 2713401, reads as follows:

The 7 West belt drive power center was not adequately ventilated to the return. When chemical smoke was released at the front of, 3 feet back, and 6 feet back, over the electrical box the smoke was carried out into the track entry and no smoke could be seen traveling toward the 8 inch by 8 inch vent hole.

The cited standard, 30 C.F.R. 75.1105, provides in relevant part that "air currents used to ventilate structures or areas enclosing electrical installations shall be coursed directly into the return."

The essential facts in this case are not in dispute. Lynn Workley, an experienced inspector for the Mine Safety and Health Administration (MSHA), was performing a regular inspection of the 7 West section of the Osage No. 3 Mine on March 10, 1986, when he noticed warm air coming out of a crosscut containing an energized power center. There is no dispute that the power center was an "electrical installation" within the meaning of the cited standard. Workley observed that there were no stoppings or ventilation curtains to direct the air ventilating the power center through the small vent hole leading to the return. He also observed little air movement through that vent hole. Under the circumstances, he considered it necessary to conduct further tests by releasing smoke from a smoke tube.

Thereafter, in the presence of John Morrison, the Consol safety escort, and Joseph Jimmie, the Union escort, Workley released smoke at four locations over the power center (Ex. GÄ3, p. 2, positions A, B, C and X). It is not disputed that when the smoke was released from positions A, B, and C, it proceeded

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toward the haulage or track entry (depicted as position RÄ2, Ex. GÄ3) and away from the vent hole ventilating the power center into the return. Workley acknowledged that he did not see any of the smoke actually move into the haulage entry but saw the smoke pass in that direction through the cap light beams of Morrison and Jimmie. Both Jimmie and Morrison told Workley that none of the smoke passed into the haulage and Morrison so testified at hearing. Both Morrison and Workley agreed that the smoke dissipated and neither was able to ascertain whether it thereafter passed back over the power center and through the vent hole. (FOOTNOTE 2)

Within this framework of evidence, I have no difficulty in finding that the violation is proven as charged. The definition of the word "directly" taken from Webster's Third New International Dictionary, (1981 Edition Unabridged), is not contested. "Directly" is therein defined as "in a straight line without deviation of course; by the shortest way." Using this definition, it is clear from the undisputed evidence that the air currents being used to ventilate the power center at issue were not coursed directly through the vent hole and into the return.

According to Inspector Workley, the violation was "significant and substantial" because of the danger of fire and smoke from the power center to employees operating in the haulage entry. It is not disputed that should smoke exit the power center into the haulage entry it would travel approximately 300 feet over the track area before exiting into the bleeder system. It is also undisputed that the track was used to transport workers, inspection parties, and supplies several times a shift thereby exposing those persons to serious and potentially fatal injuries from smoke (carbon monoxide) inhalation. Accordingly, I find the violation to be serious and "significant and substantial." Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984).

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I also conclude that the violation was the result of "unwarrantable failure" and operator negligence. I observe initially that it is the operator's contention that so long as the power center was eventually ventilated to the return there was no violation even though it was not "directly" ventilated into the return. This interpretation is clearly contrary to the plain language of the cited regulation yet the operator allowed these violative conditions to continue. Accordingly, I find that the operator violated the standard because of indifference, willful intent, or a serious lack of reasonable care. United States Steel Corp. v. Secretary, 6 FMSHRC 1423 (1984); Zeigler Coal Co., 7 IBMA 280 (1977).

In determining an appropriate civil penalty to be assessed in this case, I have also considered that the operator is large in size and has a substantial history of violations. I have also considered that the cited condition was promptly abated within time set forth by the Secretary.

ORDER

Order No. 2713402 is affirmed and the Contest Proceeding Docket No. WEVA 86Ä210ÄR is denied. The Consolidation Coal Company is directed to pay a civil penalty of \$700 within 30 days of the date of this decision.

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, the shall include such finding in any citation given to the operator under this Act."

~FOOTNOTE_TWO

2 While Inspector Workley "inferred" that the smoke continued into the haulage entry based on his observation that the smoke was passing in the direction of Morrison and Jimmie, I do not find that inference to be reasonable under the circumstances. Jimmie and Morrison were certainly in a better position (at the mouth of the crosscut where it joined the haulage entry) to observe whether the smoke passed into the haulage entry and both told Workley that it did not. Morrison testified at hearing, moreover, that the smoke did not pass into haulage entry.

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