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

CONSOLIDATION COAL COMPANY, CONTESTANT	CONTEST PROCEEDINGS
v.	Docket No. WEVA 87-222-R Citation No. 2699139; 6/5/87
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Arkwright No. 1 Mine Docket No. WEVA 87-223-R Citation No. 2708499; 6/5/87 Humphrey No. 7 Mine Docket No. WEVA 87-224-R Citation No. 2902641; 6/5/87 Osage No. 3 Mine Docket No. WEVA 87-225-R Citation No. 2707824; 6/5/87 Pursglove No. 15 Mine Docket No. WEVA 87-226-R Citation No. 2902614; 6/5/87 Blacksville No. 1 Mine Docket No. WEVA 87-227-R Citation No. 2902888; 6/5/87 Blacksville No. 2 Mine Docket No. WEVA 87-228-R Citation No. 2699155; 6/5/87 Loveridge No. 22 Mine Docket No. WEVA 87-229-R Citation No. 2705133; 6/5/87 Robinson Run No. 95 Mine

DECISION

Appearances: Michael R. Peelish, Esq., Consolidation Coal Co., Pittsburgh,Pennsylvania, for Contestant; James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent.

Before: Judge Maurer

These cases are before me upon a notice of contest and motion to expedite filed by the Consolidation Coal Company (Consol) under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," and Commission Rule 52, 29 C.F.R. 2700.52, challenging the validity of eight 104(a) citations. One citation, as listed above, was issued to each of the eight Consol mines herein involved. A hearing was held in Morgantown, West Virginia, on June 16, 1987.

The issue in this case is whether a violation of the mandatory standard at 30 C.F.R. 75.1101Ä23(a) existed as alleged in the virtually identical eight citations. The model citation reads as follows:

> The program being used for instruction of all miners in the location and use of fire fighting equipment, location of escapeways, exits, and routes of travel to the surface and proper evacuation procedures to be followed in the event of an emergency has not been approved by the District Manager.

The cited standard at 30 C.F.R. 75.1101Ä23(a) provides as follows:

> Each operator of an underground coal mine shall adopt a program for the instruction of all miners in the location and use of fire fighting equipment, location of escapeways, exits, and routes of travel to the surface, and proper evacuation procedures to be followed in the event of an emergency. Such program shall be submitted for approval to the District Manager of the Coal Mine Health and Safety District in which the mine is located no later than June 30, 1974.
> (1) The approved program of instruction shall include a specific fire fighting and evacuation plan designed to acquaint miners on all shifts with procedures for:
> (i) Evacuation of all miners not required for fire fighting activities;

> (ii) Rapid assembly and transportation of necessary men, fire suppression equipment, and rescue apparatus to the scene of the fire; and
>
> (iii) Operation of the fire suppression equipment available in the mine.
>
> (2) The approved program of instruction shall be given to all miners annually, and to newly employed miners within six months after the date of employment.

FINDINGS OF FACT

1. Consol owns and operates the eight mines listed in the caption of this decision.

2. On or before June 30, 1974, Consol submitted a program for the instruction of miners in the location and use of fire fighting equipment, location of escapeways, exits, and routes of travel to the surface and proper evacuation procedures to be followed in the event of an emergency to the appropriate MSHA District Manager for each of the eight mines herein involved. These programs were approved by the appropriate District Manager between the first of May and the end of July 1974.

3. At the time of approval, it is generally agreed that each of these eight programs contained the current information with regard to the required emergency procedures including specific data concerning escape routes and locations of fire fighting equipment, as well as an evacuation and fire fighting plan.

4. By memorandum dated May 6, 1987, directed to all underground coal mine operators, Ronald Keaton, the District Manager for the Third District of MSHA, informed Consol of the following:

> Our records indicate that your approved Program of Instruction, Fire Fighting and Evacuation Plan, is outdated and needs to be updated. Please provide an updated program within seven days from receipt of this letter. Please include an updated map showing escapeways, exits, and routes of travel to the surface. In the future, this plan will be reviewed every six months. If you wish to include an updated escapeway system and any revisions to your program with your ventilation plan, please indicate so in your program submittal. Failure to respond could result in a violation of 75.1101Ä23.

5. On May 26, 1987, Consol responded to Mr. Keaton's memorandum of the 6th. They furnished the requested information, but only as a "courtesy" and for "informational

purposes only," specifically stating that "[I]t is not being submitted for approval."

6. On May 27, 1987, Mr. Keaton informed Consol by letter that failure to submit the required update data for amendment and approval purposes could result in withdrawal of the approval for the programs and plans then currently on file with MSHA. He further informed Consol that failure to have an approved plan could result in a violation of 30 C.F.R 75.1101Ä23(a).

7. Subsequently, Mr. Keaton ordered a review of the section 75.1101Ä23(a) programs for the eight mines herein involved. In general terms, he found them to be antiquated plans.

8. More specifically, for each of the eight mines enumerated above:

(a) The deficiencies noted in the approved 75.1101Ä23(a) programs and plans for the Robinson Run No. 95 mine included:

(1) Areas listed as active working sections which are currently abandoned and/or sealed.

(2) All current active mining sections are not contained in the plan.

(3) Designated escapeways have changed, several of those noted in the plan are inaccessible and those in use are not listed in the plan.

(4) The location of electrical equipment is different and all current locations are not listed.

(5) The location of firefighting equipment is different and all current locations are not listed.

(b) The deficiencies noted in the approved

75.1101Ä23(a) programs and plans for the Arkwright No. 1 mine included:

(1) Outdated locations for firefighting equipment are listed.

(2) Incorrect data regarding mine rescue teams is listed.

(3) Escape shafts are listed which no longer exist and current escapeways are not listed.

(4) Working sections are listed which no longer exist.

(5) Incorrect names and telephone numbers for mine officials to be contacted are listed.

(6) Longwall mining is done at this mine and the plan contains no firefighting procedures for longwall mining.

(c) The deficiencies noted in the approved 75.1101Ä23(a) programs and plans for the Loveridge No. 22 mine included:

(1) Several of the listed "fire areas" are in abandoned areas of the mine and/or sections which are no longer active.

(2) Several designated escapeways are no longer used or usable.

(3) Firefighting equipment locations are outdated.

(d) The deficiencies noted in the approved 75.1101Ä23(a) programs and plans for the Blacksville No. 1 mine included:

(1) The noted designation color key for intake escapeway on mine maps has changed.

(2) Escapeways are designated in the evacuation plan which no longer exist.

(3) Locations are noted for firefighting equipment which have changed.

(4) Locations are noted for telephones which have changed.

(5) Locations are noted for sealing (emergency) materials which have changed.

(6) Several working sections listed no longer exist.

(7) Longwall section firefighting programs are omitted despite the existence of longwall mining.

(8) Ventilation fans are listed which may no longer exist.

(e) The deficiencies noted in the approved 75.1101Ä23(a) programs and plans for the Blacksville No. 2 mine included:

(1) Areas designated as escapeways which are no longer used.

(2) Locations of firefighting equipment which have changed.

(3) Locations of sealing (emergency) materials which have changed.

(4) Ventilation fans are listed which no longer exist.

(5) Most working sections no longer exist as listed in the evacuation plan.

(f) The deficiencies noted in the approved 75.1101Ä23(a) programs and plans for the Osage No. 3 mine included:

(1) Working sections are listed which no longer exist.

(2) Ventilation fans are listed which no longer exist.

(3) Escape shafts are listed which no longer exist.

(4) The locations for fire outlets include areas which are no longer present and exclude areas which currently exist.

(5) The two currently active sections for the mine are not included in the plans.

(6) The names and telephone numbers of personnel to be contacted in emergencies are not accurate.

(7) The mine contains longwall mining areas but no longwall section fire fighting procedures are listed.

(g) The deficiencies noted in the approved 75.1101Ä23(a) programs and plans for the Pursglove No. 15 mine included:

(1) Working sections are listed which no longer exist.

(2) Ventilation fans are listed which no longer exist.

(3) Escape shafts are listed which no longer exist.

(4) Locations for fire outlets are not accurate in that some listed outlets no longer exist and other existing outlets are not listed.

(5) The current active sections of the mine are not listed.

(6) There are no longwall section firefighting procedures listed.

(7) The names and telephone numbers of personnel to be contacted in emergencies are not accurate.

(h) The deficiencies noted in the approved 75.1101Ä23(a) programs and plans for the Humphrey No. 7 mine included:

(1) Outdated locations were listed for firefighting equipment.

(2) Incorrect mine rescue team information was noted.

(3) Outdated listings of ventilation fans.

(4) Escape facilities and escape shafts are listed which no longer exist.

(5) Working sections are listed which no longer exist.

(6) The names and telephone numbers of personnel to be contacted in emergencies are not accurate.

9. None of the plans contained provisions detailing the location and use of self-contained self-rescuers, which are now an indispensable piece of equipment used in emergency evacuations.

10. Several of the programs included references to practices and procedures which have since been modified and/or made illegal by subsequent changes in MSHA regulations, such as the 15 minute fan shutdown removal from area provisions, the use of gas masks, and equipment movement provisions.

11. On June 4, 1987, Mr. Keaton notified Consol that the foregoing section 75.1101Ä23(a) programs were disapproved because they were out of date and inaccurate in the respects noted above and because the operator had not submitted relevant updated programs for approval.

12. On June 12, 1987, each of the above eight mines was issued a section 104(a) citation for a violation of 30 C.F.R. 75.1101Ä23(a).

13. In May of 1986, Mr. Keaton had written a similar memorandum to that in evidence as Exhibit No. JXÄ1 and dated May 6, 1987 (see Finding of Fact No. 4). There was a non-response to that earlier memo, but no follow-up enforcement was carried out. No citations were issued at that time or subsequently until June 12, 1987.

14. Consol conducts training for miners at each of these eight mines on a regular basis, giving instruction in fire fighting and evacuation procedures utilizing current information concerning escapeways, exists, routes of travel to the surface, etc. In this regard, I specifically find that Consol utilizes the old 1974 plans and programs for this purpose only to the limited extent that the more general portions of those documents are still applicable in 1987.

15. Consol also conducts fire drills and mock mine evacuations on a regular basis at these eight mines.

16. However, none of the evacuation and fire fighting plans actually being used today, in 1987, by Consol for new miner training or newly employed miner training or fire drills or evacuation drills have been approved by the District Manager under 30 C.F.R. 75.1101Ä23(a).

17. From MSHA's standpoint, the lack of up-to-date approved evacuation and fire fighting programs could conceivably in the event that that information was needed by MSHA personnel because of a mine fire or other evacuation emergency, hinder mine rescue or other emergency operations to the extent that those MSHA personnel were assisting with the emergency and needed current data.

18. Insofar as specific mine information is or was included in those plans and programs of 1974, which were on file with MSHA, I find that as generally acknowledged most of it is inapplicable to the current situation at the mines and would be of little or no use to MSHA in the event of an emergency.

19. These original section 75.1101Ä23(a) plans, which were submitted and approved by MSHA in MayÄJuly 1974 remained

in effect as the approved program until June of 1987, even though the specific details of these plans were outdated for many years. Mr. Keaton explained that they had their attention focused in other areas. It was just a matter of priorities.

DISCUSSION, FURTHER FINDINGS OF FACT, AND CONCLUSIONS OF LAW

On it's face, the cited regulation, 30 C.F.R. 75.1101Ä23(a), contains two requirements. The first requires the operator to adopt a program for the instruction of miners in the location and use of fire fighting equipment, location of escapeways, exists, and routes of travel to the surface and proper evacuation procedures to be followed in emergencies. The regulation also clearly requires that such a program, once adopted, be submitted for approval to the District Manager of the Coal Mine Health and Safety District in which the mine is located no later than June 30, 1974. Consol complied with this requirement in a timely fashion back in 1974. I note here that there is no stated regulatory requirement for this program ever to be submitted for approval again.

The second requirement contained in this subsection is that contained in (a)(2) wherein it requires that the approved program of instruction be given to all miners annually, and to newly employed miners within six months after they are employed. This plainly has not been done by Consol for many years, at least not in the particular mine specific areas of these programs for the simple reason that the specifics have changed many times over in the intervening thirteen years. It would be ridiculous for example to instruct a miner to go to a long-closed escape facility in the event of an emergency just because that was part of the approved plan (circa 1974).

MSHA's position in this case is that their interpretation of the regulatory requirements should prevail albeit that those "requirements" are admittedly not directly stated in so many words. That interpretation is, at least in the Third District of MSHA, and at least since May 6, 1987, that these plans and programs approved back in 1974 need to be reviewed and updated every six months, in order to retain their approved status. This has a lot of common sense appeal since there obviously are significant changes going on in an active, producing coal mine that would significantly affect fire-fighting and evacuation plans and procedures, at least insofar as specific particulars are concerned. However, one has to first wonder why MSHA doesn't require this review and updating by regulation rather than by District Manager memorandum, and secondly, why it took them thirteen years to get around to it.

It is a matter of hornbook law that courts must accord great deference to an agency's construction of regulations which it has drafted and continues to administer. See generally, Udall v. Tallman, 380 U.S. 1 (1965). To uphold the interpretation, a court need not find the agency's interpretation to be the only or the most reasonable one. City of Aurora v. Hunt, 749 F.2d 1457, 1462 (10th Cir.1984). "A regulation must be interpreted so as to harmonize with and further and not conflict with the objective of the statute it implements." Emery Mining Corp. v. Secretary of Labor (MSHA), 744 F.2d 1411, 1414 (10th Cir.1984); (quoting, Trustees of Indiana University v. United States, 223 Ct.Cl. 88, 618 F.2d 736, 739 (1980)). In Emery, the issue before the Court was the proper interpretation of the words "annual refresher training" found in 30 C.F.R. 48.8. While the Court found that it was possible to construe the words to permit training given up to 23 months apart on a calendar year basis, the Court emphatically rejected such construction as undermining the Act, concluding that it is "at odds" with the language and objective of the statute [to train each 12 months], "even if arguably consistent with the language of the regulation."

However, contrary to MSHA's "interpretation," with regard to the first requirement of 75.1101Ä23(a); that pertaining to the submission of programs and plans for the approval of the District Manager, on or before June 30, 1974, I specifically find that this is clearly a one-time requirement. It is not subject to any other interpretation because the wording is quite clear and incapable of being "interpreted" to mean something else. Further, the policy memorandum issued by the District Manager, which is in evidence as Exhibit JXÄ1 is not enforceable and its contents conflict with the plain meaning of 75.1101Ä23(a). There is no language in this regulation that would inform an interested party that periodic reviews at six-month intervals are required. If that is what was intended, the drafter could very easily have included a comma and a follow-on phrase after "June 30, 1974" to the effect "June 30, 1974, and thereafter, at intervals of at least every six months." But he didn't.

The Secretary is aware of similar regulatory language since two other regulations requiring the submission, review, and subsequent approval or disapproval of plans do include such language. The regulation at 30 C.F.R. 75.200 provides that "[A] roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970 Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs

or inadequacy of support of roof or ribs" And, in 30 C.F.R. 75.316, it is provided that "[A] ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970 Such plan shall be reviewed by the operator and the Secretary at least every 6 months."

This type of language establishing automatic review of approved plans is conspicuously missing in 30 C.F.R. 75.1101Ä23, and I find that Mr. Keaton and his memorandum of May 6, 1987, cannot now legally and belatedly supply the missing words.

That said, it is still incumbent upon Consol to comply with all of 75.1101Ä23(a), including subsection (a)(2), which states that the approved program of instruction be given to the miners in their employ. Therein lies the problem for Consol and that is the exact violation cited in the eight virtually identical citations. As I found in Finding of Fact No. 16, none of the eight mines involved herein are actually using the approved program of instruction that was submitted and approved back in 1974. Not that they should be under the circumstances, but the fact is, they are not. I accept as credible evidence the contestant's proffered testimony that the operator is still using the more general portions of those plans, but the fact remains that large portions, the majority of the plans, are simply out of date and unusable for emergency training. Thus, the paradoxÄthe operator need not by the stated terms of the cited regulation do anything to update or revise the once-approved program, however, since they must train their miners in accordance with 75.1101Ä23(a)(2) using an approved program, there is a de facto requirement to have a current, approved program. Neither a current, unapproved program or an approved, outdated program will suffice as a practical matter. Therefore, it follows that "something" has to be submitted to MSHA in order to make the actual program of instruction also the approved program of instruction, even though the regulation per se is silent on the subject.

At the hearing, and in their respective briefs, the parties argue the current status of the 1974 plans. The Secretary urges that those plans, once admittedly approved long ago are now disapproved by fiat of the District Manager. Consol, on the other hand, argues that the District Manager's actions were arbitrary and capricious and without the force and effect of law. After much reflecting I don't think that issue is particularly relevant to the alleged violation herein because regardless of whether or not Consol did or didn't

have an "approved" program filed with MSHA at the time the citations were issued, the fact is they were not actually using it to instruct their miners as required by 30 C.F.R. 75.1101Ä23(a)(2). The fact that Consol might very well have been using an adequate "unapproved" program or a "self-approved program" in some or all of their mines does not satisfy the regulatory requirement of subsection (a)(2). Therefore, I find a violation of 30 C.F.R. 75.1101Ä23(a)(2), as alleged, in each of the eight citations at bar.

A violation is properly designated significant and substantial "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." National Gypsum, 3 FMSHRC at 825. In Mathies Coal Co., 6 FMSHRC 1, 3Ä4 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazardÄthat is, a measure of danger to safetyÄcontributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

The Commission has explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). (Emphasis deleted). They have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. 6 FMSHRC at 1836.

In order to establish the significant and substantial nature of the violation, the Secretary need not prove that the hazard contributed to actually will result in an injury causing event. The Commission has consistently held that proof that the injury-causing event is reasonably likely to occur is what is required. See, e.g., U.S. Steel Mining Co., 7 FMSHRC at 1125; U.S. Steel Mining Co., 7 FMSHRC 327, 329 (March 1985).

The violation I have already found. The discrete safety hazard here is that miners could be inadequately trained if

the program of instruction under which they are actually trained in such important areas as fire fighting and evacuation procedures is inadequate. I do not make any finding that the program they actually use is inadequate, only that it is unapproved and might be inadequate. In this regard, I note that MSHA has not passed on the adequacy of the training program they actually use, primarily because Consol has not submitted it for approval, but has recently "disapproved" the 1974 program which they haven't used for years anyway.

It is axiomatic that an inadequate, incomplete or deficient program of instruction covering these important subjects could reasonably lead to injury and/or loss of life in the event that an emergency should occur requiring immediate action. Again, I do not know if the programs Consol is actually using are inadequate, incomplete or deficient, but I do know they are unapproved, and therefore could or might be all three. Also, as I set out in Findings of Fact Nos. 17 and 18, since MSHA's official file copies of the operator's fire fighting and evacuation plans and programs are out-of-date and generally inapplicable to the current situation at the mine, any assistance that MSHA personnel might provide in the mine rescue and/or fire fighting operations could conceivably be delayed while they sought current information to act on.

Accordingly, I find the instant citations to be properly designated "significant and substantial."

In light of the foregoing, it is ORDERED that Citation Nos. 2699139, 2708499, 2902641, 2707824, 2902614, 2902888, 2699155, and 2705133 ARE AFFIRMED and that the operator's notices of contest of same be DISMISSED.

Roy J. Maurer
Administrative Law Judge