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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 87-129-R Citation No. 2704568; 3/4/87
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), RESPONDENT	Robinson Run No. 95 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS Docket No. WEVA 87-193 A.C. No. 46-01318-03752
v.	Robinson Run No. 95 Mine
CONSOLIDATION COAL COMPANY, RESPONDENT	

DECISION

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

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 citation and order of withdrawal 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 violations alleged therein. (FOOTNOTE 1)

At hearing the Secretary moved for the approval of a settlement agreement with the respect to Withdrawal Order No. 2704572 proposing a reduction in penalty from $750 to $500. I considered the representations in support of the motion and determined that the profferred settlement was appropriate under the criteria set forth in section 110(i) of the Act. That determination is now confirmed. Commission Rule 65, 29 C.F.R. 2700.65.

The remaining citation at issue, No. 2704568, alleges a "significant and substantial" violation of the mine operator's ventilation plan under the regulatory standard at 30 C.F.R. 75.316 and charges as follows:

> The haulage doors located at No. 29 block that separated the 6 left, 4 North intake escapeway from the trolley haulage entry were not being maintained reasonably air tight and in a workmanlike manner as required by the approved ventilation plan. The haulage door beside the track was damaged to the extent there was a 22 inch opening across the top of the door, and the inby door was leaking air across the top and bottom of the door. The air being used to ventilate the trolley haulage entry was entering the intake escapeway through the doors. The haulage door beside the track was damaged on 02Ä28Ä87 and new doors were ordered 03Ä02Ä87 but there was no check curtain or stopping installed to stop the air from the trolley haulage entry from entering the intake escapeway.

In relevant part, the mine operator's ventilation plan provides that "intake escapeway areas being isolated shall maintain a constant air pressure from the intake escapeway to the track." The plan also provides that "all [haulage] doors will be substantially built and maintained in a workmanlike manner."

The Consolidation Coal Company (Consol) does not dispute the allegations set forth in the citation at bar nor does it dispute that such allegations constitute a violation of its ventilation plan. Consol maintains however that the violation was neither "significant and substantial" nor caused by its "unwarrantable failure" to comply with the ventilation plan.

Ronald Tulanowski, an inspector for the Federal Mine Safety and Health Administration, (MSHA), entered the subject mine on March 4, 1987, at about 12:10 a.m. accompanied by company safety representative Sandy Eastham and union safety committeeman, Cecil Wilson. Proceeding to the 6 left, 4 North longwall section the group exited the personnel carrier in the No. 3 (track) entry at the No. 29 block. As he walked toward the haulage doors Tulanowski saw that the first door was bent out of shape and knocked off a hinge. This left a large opening at the top some 22 inches wide and 14 feet long through which ventilating air was passing from the No. 3 entry to the No. 2 entry (the intake escapeway). On the No. 3 entry side of the haulage door closest to the No. 3 entry the words "danger bad door" were written in chalk but no other markings or warnings were noted on either of the two haulage doors. The damaged door could not be rehung so it was therefore necessary to erect a temporary check curtain. Union safety committeemen Cecil Wilson corroborated Tulanowski in essential respects.

Eastham reportedly told Tulanowski that that the haulage door had been damaged on February 28th and that a new door had been ordered. Safety Supervisor Richard Paugh also informed Tulanowski that while the door had been previously damaged, it had also been repaired and was not leaking air. Tulanowski concluded that the violation was serious and "significant and substantial" because, in the event of a mine fire, smoke would contaminate the intake escapeway and working faces so that persons trying to escape through the smoke could stumble for lack of visibility or be overcome by smoke inhalation. It was about 400 to 500 feet from the doors to the face.

Tom Harrison was Consol's longwall coordinator during this time. At hearing he reviewed the preshift and onshift examination books beginning with the February 28, 1987, midnight shift (12:00 a.m. to 8:00 a.m.). He noted that a preshift examiner who performed his exam between 5:00 a.m. and 7:15 a.m.

on that date, had written the words "air lock door knocked out". That defect was noted again on preshift examinations through March 1, 1987. The examination for the midnight shift on March 2, 1987, showed that the condition had been "corrected" (Joint Exhibit No. 2)

Harrison himself learned of the defective haulage door upon reviewing the examination books on March 2nd and went into the mine to see the condition himself. Harrison then made temporary repairs on the door and wired it shut creating a "temporary stopping". He confirmed that the air was moving in the right direction and then wrote the words "danger-bad door" on the No. 3 entry side of the damaged door. He examined the door again on March 3rd at about 9:15 a.m. and it was in the same condition. According to Harrison the purpose of the doors was to permit the scoop to enter the track entry to pick-up crib blocks. The scoop was normally kept in a cross-cut off the No. 2 entry when not in use.

Stanley Nicholas, the long wall foreman, testified that he performed the preshift examinations on March 3rd, between 9:00 p.m. and 11:00 p.m. He visually inspected the airlock doors and confirmed that the trackside door was sealed. He recalled seeing the notation "danger-bad door" chalked upon the door.

Consol argues that the admitted violation was not "significant and substantial" because it existed only briefly. It maintains that the subject door had been wired shut and sealed by Tom Harrison on March 2, 1987. Harrison examined the door again on March 3, 1987, around 9:15 p.m. and found that air was not leaking into the intake escapeway. Finally it is undisputed that that Foreman Stanley Nicholas performed a examination between 9:00 p.m. and 11:00 p.m. on March 3, 1987 and found the doors to be sealed with no air movement into the intake escapeway. Consol therefore maintains that the damage to the door cited by Inspector Tulanowski must have been new damage that occurred sometime after that preshift examination on March 3, 1987, and before the time of the inspection at approximately 12:45 a.m. on March 4th.

The evidence in support of Consol's argument herein is indeed undisputed and it may therefore be inferred that the damaged condition observed by Inspector Talanowski leading to his citation occurred sometime between 9:00 p.m. and 12:45 the next morning. However the fact that the inspector discovered the violative condition as soon as he did, does not negate the "significant and substantial nature of it. The operative time frame for determining the reasonable likelihood of an injury includes the expected continuance of normal mining operations. Secretary v. Halfway Incorporated, 8 FMSHRC8 (1986). The evidence is not sufficient to clearly establish when the new

replacement door would have been erected to correct the violative condition in this case. Thus the serious hazard of smoke from a fire in the track entry which would reasonably be likely to pass into the intake escapeway and to the face areas, would be expected to exist for some time. Under the circumstances the violation was indeed serious and "significant and substantial." Secretary v. Mathies Coal Co., 6 FMSHRC 1 (1984).

Consol also argues that the violation was not caused by its "unwarrantable failure" to comply with the cited standard. In Zeigler Coal Company, 7 IBMA 280 (1977) the Interior Board of Mine Operations Appeals stated as follows:

> [a]n Inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care.

The Commission has concurred with this definition to the extent it has found that an unwarrantable failure to comply may be proved by showing that the violative condition or practice was not corrected or remedied, prior to the issuance of a citation or order, because of indifference, willful intent, or a serious lack of reasonable care. United States Steel Corp., v. Secretary of Labor, 6 FMSHRC 1423 (1984). Upon the credible evidence in this case it is clear that the violative condition existed for such a brief period of time i.e. from sometime between the required pre-shift exam between 9:00 p.m. and 11:00 p.m. on March 3rd and 12:45 a.m. on March 4th that I cannot find that the violation was the result of indifference, willful intent, or a serious lack of reasonable care. The violation was not therefore caused by the "unwarrantable failure" of the operator to comply with the cited standard. For the same reasons I find Consol to be chargeable with lesser negligence.

In reaching this conclusion I have not disregarded the Secretary's argument that the violation had actually existed since February 28th when the damaged haulage door was first noted in the preshift book and that it remained uncorrected at least until the second shift on March 2nd, when Mr. Harrison testified that he sealed the door. The condition noted in the preshift book on February 28th has not been shown however to be the same condition that was cited on March 4th. The operator cannot fairly be charged with "unwarrantable failure" because of an earlier condition that has not been shown to have been the same or even similar to the condition cited five days later. It is

apparent moreover that the haulage door suffered additional damage in the few hours before the subject inspection and this was the damaged condition cited by Tulanowski on March 4th.

The Secretary also argues that since only the No. 3 entry-side-door was dangered off with the chalk sign "danger-bad door" and not the No. 2 entry door through which the scoop would be expected to first travel, there was insufficient warning to the scoop operator. In other words the Secretary argues that the No. 3 entry was not restricted effectively from use even after its temporary repair on March 2nd. Again however the failure to effectively restrict travel through the damaged haulage door for periods before the preshift exam between 9:00 p.m. and 11:00 p.m. on March 3rd cannot fairly be considered in relation to the citation at bar. The Secretary has not proven that a violation did in fact exist at any time before that preshift examination. Inasmuch as the evidence in this case shows that the specific violative condition cited herein did not occur until sometime after that preshift examination and before 12:45 a.m. on March 4th, the failure to have restricted travel during that relatively brief period of time was not therefore due to "indifference, willful intent or a serious lack of reasonable care".

Under the circumstances Citation No. 2704568 must be modified to a citation under section 104(a) of the Act. In assessing a civil penalty 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 abated as prescribed by the Secretary. Under these circumstances I find that a civil penalty of $400 is appropriate.

ORDER

Citation No. 2704568 is modified to a significant and substantial citation under section 104(a) of the Act. Order No. 2704572 is affirmed. Consolidation Coal Company is hereby directed to pay civil penalties of $900 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge
(703) 756Ä6261

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~FOOTNOTE_ONE

1 Section 104(d)(1) of the Act reads 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. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.