# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

July 25, 1989

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| **SECRETARY OF LABOR, MINE SAFETY AND HFALTH ADMINISTRATION (MSHA), Petitioner** | **CIVIL PENALTY PROCEFDINGS** |
| | Docket No. WEVA 89-119 |
| | **A. C. No.** 46-01433-03863 |
| v. | Loveridge No. 22 Mine |
| **CONSOLIDATTON** COAL COMPANY, Respondent | Docket No. WEVA 89-120 |
| | A. C. No. 46-01453-03845 |
| | Docket No. WEVA 89-121 |
| | A. C. No. 46-01453-03846 |
| | Humphrey No. 7 Mine |
| | Docket No. WEVA 89-122 |
| | A. C. No. 46-01968-03794 |
| | Blacksville No. 2 Mine |
| | Docket No. WEVA 89-132 |
| | A. C. No. 46-01867-03789 |
| | Elacksville No. 1 Mine |
| | Docket No. WEVA 89-133 |
| | A. C. No. 46-01454-03771 |
| | Pursglove No. 15 Mine |
| | Docket No. WEVA 89-136 |
| | A. C. No. 46-01318-03866 |
| | Robinson Run No. 95 Mine |

DECISION

Appearances: Nanci A. Hoover, Esq., Office of the Solicitor u. S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner; Michael R. Peelish, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Respondent.

**Before:** Judge Merlin

The above-captioned cases were the subjects of prehearing and hearing orders. Preliminary statements were filed and a

prehearing conference was held on July 10, 1989. When the cases came on for hearing on July 11, 1989, counsel for both parties advised that in one instance the citation was being vacated and that in the others approval *for* recommended settlements was being sought. Cases other than those captioned above were heard on the merits at the same time.

WEVA 89-119

Section 104(d)(2) Order No. 3106488 was issued for a violation of 30 C.F.R. § 75.303. A preshift examination of a belt conveyor was inadequate. At the hearing the Solicitor advised that evidence at trial would support the MSHA evaluation of high gravity and negligence. The solicitor further advised that the proposed settlement was for the original assessment of $1,000. Operator's counsel did not object. The settlement was approved from the bench.

Section 104(d)(2) Order No. 3105859 was issued for a violation of 30 C.F.R. § 75.202. A utility man was observed under unsupported roof in the 4 left longwall section. The original assessment was $900 and the recommended settlement was $500. The Solicitor explained that the order was being modified to a 104(a) citation and that negligence was reassessed as moderate. According to the Solicitor she could not prove the existence of aggravated conduct as required by Commission precedent for "unwarrantable failure". Quinland Coals, Inc., 10 FMSHRC 705 (June 1988), Southern Ohio Coal Co., 10 FMSHRC 138 (Feb. 1988), Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007 (Dec. 1987), Emery Mining Co., 9 FMSHRC 1997 (Dec. 1987). The operator's foreman had given the utility man instructions regarding his work and had left the area, for a few minutes, which was when the inspector arrived. The foreman's instructions were general in nature, but could have been carried out by the utility man without exposing himself to the unsupported roof. In light of the foregoing circumstances and mindful of Commission precedent regarding "unwarrantable failure", the recommended settlement was approved from the bench.

WEVA 89-120

Section 104(d)(2) Order No. 3113143 was issued for a violation of 30 C.F.R. § 75.1403. Intermittent locations between shields of a longwall face where men traveled were not kept free of obstructions. Gravity and negligence were rated as high. At the hearing the Solicitor advised that the proposed settlement was for the original assessment of $850. Operator's counsel did not object. The settlement was approved from the bench.

Section 104(d)(2) Order No. 3103486 was issued for a violation of 30 C.F.R. § 75.220(a)(1). The approved roof control plan was violated because supplemental supports were not *in*stalled where bad roof conditions were present at a return entry.

The original assessment was $750 and the recommended settlement was $550. The Solicitor explained that the reduction from the original assessment was justified because evidence at trial might not support the inspector's initial evaluation of high operator negligence. The inspector thought that chalk marks on broken timbers in the area indicated the preshift examiner's knowledge of the missing supports, but other individuals also had chalk and the examiner-denied making these marks on the broken timbers. Based upon the foregoing, I approved the recommended settlement from the bench.

Section 104(d)(2) Order No. 3103488 was issued for a violation of 30 C.F.Q. § 75.1103-4(a)(1). Automatic fire sensors were not provided on the 7 North belt for a length of about 450 feet. The original assessment was $750 and the recommended settlement was $170. The Solicitor explained that the order was being modified to a 104(a) citation and chat negligence was reassessed as moderate. Further investigation disclosed that the sensors had been deliberately removed from their locations above the belt line and thrown into adjacent crosscuts by unknown persons. The inspector could not establish how long the sensors had been missing and the operator was prepared to offer the testimony of the preshift examiner that all fire sensors were in place when the preshift examination was performed. Accordingly, negligence was less than initially thought and "unwarrantable failure" could not be found in accordance with Commission precedent. In addition, gravity was somewhat less than the inspector first estimated because the operator had in place another system which could detect the by-products of combustion in very small quantities and give a warning to miners working inby the location of the combustion. Based upon the foregoing, I approved the recommended settlement from the bench.

WEVA 89-121

Citation No. 3103498 was issued for a violation of 30 C.F.R. § 75.1403-10(e). This section provides that positive-acting stopblocks or derails should be used where necessary to protect persons from the danger of run-away haulage equipment. Pursuant to an underlying Notice to Provide Safeguards first issued in 1972, MSHA declined to allow a skid to be used as a positive-acting stopblock. In the cited condition three mine cars parked in the fire spur at portal bottom area were blocked with a skid. At the hearing the Solicitor pointed out that a series of administrative law judge decisions over the last several years have been adverse to MSHA on the way it issues safeguards: Beth Energy Mines Inc., 11 FMSHRC 942 (May 1989), Southern Ohio Coal Co., 10 FMSHRC 963 (Aug. 1988), U. S. Steel Mining Co., 4 FMSHRC 526 (March 1982). The Solicitor stated that as a result MSHA is reexamining its policy in this area. In light of the foregoing, the citation was vacated from the bench. The penalty petition is dismissed insofar as this item is concerned.

WFVA 89-122

Section 104(d)(2) Order No. 2708034 was issued for a violation of 30 C.F.R. § 75.1105. The air ventilating the energized power center on an old longwall section was not coursed directly into the return. Gravity and negligence were rated as high. At the hearing the Solicitor advised the proposed settlement was for the original assessment of $950. Operator's counsel did not object. The settlement was approved from the bench.

section 104(d)(2) Order No. 2944372 was issued for a violation of 30 C.F.R. § 75.400. Float coal dust had accumulated on a belt structure and on the water line, and fine coal and dust had accumulated under the bottom belt of the automatic take up unit. The original assessment was $950 and the recommended settlement was $400. The Solicitor explained that the reduction was justified because although the inspector estimated that the conditions took over a month to develop, the operator was prepared to offer evidence that the condition was not present during the preshift and that several MSHA personnel recently had been in the immediate area. The Solicitor did not agree with all the operator's assertions, but she stated she could not dispute the fact that several inspectors had passed through the area within the proceeding few weeks. In addition, the Solicitor could not dispute that the operator was able to abate the violation within 25 minutes of the issuance of the order. Operator's counsel advised that the case was essentially a factual judgment call and not of any precedent-setting nature. In light of the foregoing, the settlement was approved from the bench.

WFVA 89-132

Section 104(d)(2) Order No. 2943736 was issued for a violation of 30 C.F.R. § 75.316. 4 bleeder evaluation point on a longwall previously approved by a district manager had been changed and relocated by the operator approximately 1000 feet inby. The original assessment was $700 and the recommended settlement was $500. The Solicitor advised that she probably could not prove that the violation was significant and substantial. She stated that the evidence at trial would demonstrate that the district manager eventually approved the new location used by the operator as the bleeder evaluation point. Although there is uncontroverted evidence that the gob on the longwall was not being ventilated as intended by the ventilation plan and that the direction of the airflow had reversed, the Solicitor stated she could not demonstrate the failure of the operator to obtain the district manager's approval for the new bleeder evaluation point resulted in a reasonable likelihood of the hazard resulting in an injury. In light of the foregoing, the settlement was approved from the bench.

## WEVA 89-133

Section 104(d)(2) Order No. 3103459 was issued for a violation of 30 C.F.R. § 75.400. Combustible material in the form of loose coal, coal dust, and float coal dust had accumulated under the bottom belt between the tension rollers and under the drive unit of a drive belt. Gravity and negligence were rated as high. At the hearing the Solicitor advised that the proposed settlement was for the original assessment of $900. Operator's counsel did not object. The settlement was approved from the bench.

Section 104(d)(2) Order No. 3103460 was issued for a violation of 30 C.F.R. § 75.303. Adequate preshift examinations had not been made on certain belts. The original assessment was $1,000 and the recommended settlement was $700. The Solicitor advised the reduction was justified because evidence at trial might not support the inspector's evaluation of the operator's negligence. Although there is no doubt that there were hazardous conditions and violations, MSHA's witness had no first hand knowledge of the extent of these hazardous conditions during the preshift examination and could only have expressed the opinion that the conditions were obvious at the time of the preshift examination. The operator would offer testimony of the preshift examiner to controvert the Secretary's opinion evidence. In light of the foregoing, the settlement was approved from the bench.

## WEVA 89-136

Section 104(d)(2) Order No. 3119427 was issued for a violation of 30 C.F.R. § 75.202(b). According to the Solicitor the approved roof control plan was not being complied with because supplies were being stored in the face of the heading by persons who traveled under unsupported roof. Operator's counsel expressed the view that miners were not under unsupported roof but he did not believe this case was an appropriate vehicle to test this issue -which is being presented in other cases. The solicitor advised that the proposed recommended settlement was for the original assessment of $1,000. Operator's counsel did not object. The settlement was approved from the bench.

## ORDER

It is ORDERED that Order Nos. 3105859 and 3103488 be MODIFIED to 104(a) citations.

It is iurther ORDERED that Citation No. 3103498 be VACATED.

Tn light of the foregoing, it is further ORDERED that the proposed settlements be APPROVED and the following amounts be ASSESSED:

| Citation or Order Mo. | Amount |
|---|---|
| 3106488 | $1,000 |
| 3105859 | $ 500 |
| 3113143 | $ 850 |
| 3103486 | $ 550 |
| 3103488 | $ 170 |
| 3103498 | VACATED |
| 2709034 | $ 950 |
| 2944372 | $ 400 |
| 2943736 | $ 500 |
| 3103459 | $ 900 |
| 3103460 | $ 700 |
| 3119427 | $1,000 |
| | $7,520 |

It is further ORDPRFD that the operator PAY $7,520 within 30 days from the date of this decision.

Paul Merlin
Chief Administrative Law Judge

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