

CCASE:  
SOUTHERN OHIO COAL v. SOL (MSHA)  
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TTEXT:

Federal Mine Safety and Health Review  
Office of Administrative Law Judges  
2 Skyline, 10th Floor  
5203 Leesburg Pike  
Falls Church, Virginia 22041

SOUTHERN OHIO COAL COMPANY,  
CONTESTANT

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

CONTEST PROCEEDING

Docket No. WEVA 90-287-R  
Order No. 3111174; 7/10/90

Martinka No. 1 Mine

DECISION

Appearances: Rebecca J. Zuleski, Esq., FURBEE, AMOS, WEBB &  
CRITCHFIELD, Morgantown, West Virginia, for the  
Contestant;  
Glenn M. Loos, Esq., Office of the Solicitor, U.S.  
Department of Labor, Arlington, Virginia, for the  
Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a Notice of Contest filed by the  
contestant pursuant to section 105 of the Federal Mine Safety and  
Health Act of 1977, challenging the legality of section 104(b)  
Order No. 3111174, issued by an MSHA inspector at the captioned  
mine on July 10, 1990. A hearing was held in Morgantown, West  
Virginia, on March 21, 1991, and the parties appeared and  
participated fully there. They were also afforded an opportunity  
to file posthearing briefs.

Issue

The principal issue in this case is whether or not the  
contested order was properly issued and whether or not the  
inspector acted reasonably in not extending the abatement time.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C.  
801 et seq.

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2. Section 104(b) of the Act, 30 U.S.C. 814(b).

3. Commission Rule, 20 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated to the following (Exhibits ALJ-1 and ALJ-2):

1. Southern Ohio Coal Company is owner and operator of the Martinka Mine which is the subject of this proceeding.
2. Operations of the Martinka Mine are subject to the Mine, Safety and Health Act of 1977, as amended, 30 U.S.C. 801 et seq.
3. The Administrative Law Judge has jurisdiction to hear and decide this case.
4. The Federal Mine Safety and Health Inspector Charlie Thomas was acting in his official capacity when he issued Citation Number 3306619 and its modifications.
5. A true copy of Citation Number 3306619 and its modifications were served upon the Mine Operator or its agent as required by the Act.
6. Federal Mine Safety and Health Inspector Frank Bowers was acting in his official capacity when he issued Order Number 3111174 to Martinka Mine on July 10, 1990.
7. A true copy of Order Number 3111174 was served upon the Mine Operator and/or its agent as required by the Act.
8. The parties are in agreement that the issue to be established at the hearing is if a safety and/or health hazard was present due to the condition of the steel spool(s)/drum(s) on the Bucyrus-Erie dragline, Model Number 30-B, Serial Number H.D. 125739, owned by Bunner Construction Company and leased to Southern Ohio Coal Company-Martinka Mine. In light of said decision regarding said issue, if the Section 104(b), Order Number 3111174 was properly or improperly issued by MSHA Inspector Frank Bowers to Southern Ohio Coal Company-Martinka Mine on July 10, 1990.

Discussion

On June 11, 1990, MSHA Inspector Charles Thomas issued a section 104(a) "S&S" Citation No. 3306619, charging the contestant with an alleged violation of mandatory safety standard 30 C.F.R. 77.404. The cited condition or practice is described as follows:

On the surface the Bucyrus Erie dragline has two (2) cable (wire rope) spools cut into with a cutting torch. The wire rope for the left spool has a mashed place with severed wires and a cable strand of wire partially cut into. The machine was removed from service by Richard Haught, surface supt.

Inspector Thomas fixed the abatement time as 8:00 a.m., June 13, 1990. However, on June 15, 1990, he extended the abatement time to 8:00 a.m., June 18, 1990, and the justification for this extension states as follows:

A new wire rope has been installed on the left spool of the Bucyrus Erie dragline. There is a question as to whether the cable (wire rope) spools needs to be changed out at this time. Therefore, additional time is granted to investigate this matter.

On June 19, 1990, Inspector Thomas modified the citation and extended the abatement time to 8:00 a.m., June 28, 1990. Although the inspector makes reference to "Citation No. 3306620, issued 6/1/90," he was in fact modifying Citation No. 3306619. The modification notice reflects that the abatement time was extended so that the contestant could correct the following conditions which were observed by the inspector and included in the modified notice:

-- The steel rope that operates the gantry has broken wires at 2 locations. The Rope is pitted and has flat places. The gantry is a 5/8 inch rope and a 3/4 inch sheave.

-- The groved (sic) drums were so badly worn that the cable would not spool properly. Load line drum and bucket drum.

-- Bolts were being used in lieu of pins to secure the bucket. One of the bucket clevis (sic) pin is backed out and one is badly worn for the bucket line.

-- Wedges are not used where wire ropes are terminated on the bucket. Dump cable on bucket has 3 severed strands of wire.

-- Sheave wheel for bucket trip has the center bushing missing and securing pin badly worn. Cat tram chains have numerous keep (sic) missing on both sides.

On June 29, 1990, Inspector Thomas extended the abatement time to 8:00 a.m., July 9, 1990, for the following reasons: "The operator has parts on order to repair the Bucyrus Erie dragline, and should be on mine site the next few days, and repairs completed within a week once the parts are received."

On July 10, 1990, MSHA Inspector Frank D. Bowers, issued a section 104(b) Withdrawal Order No. 3111174, citing a violation of mandatory safety standard 30 C.F.R. 77.404, and ordering the withdrawal of the dragline in question. The inspector made reference to, and relied on, the previously issued section 104(a) Citation No. 3306619, issued on June 11, 1990, and his order states as follows: "Bunner Construction who owns and leases the Bucyrus Erie dragline to the Martinka #1 Mine will repair all the conditions found defective on the dragline except for the wire spool drums."

As part of its contest, the contestant took the position that the condition of the dragline wire spool drums did not result in the dragline being in an unsafe condition. The contestant noted that although the inspector cited a violation of section 77.404, it presumed that he intended to cite a violation of section 77.404(a), which provides as follows: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

In its answer, respondent MSHA took the position that the order was properly issued and that it "represents a violation of a mandatory safety standard."

MSHA Inspectors Thomas and Bowers were unavailable for the hearing. Mr. Thomas was in the hospital, and Mr. Bowers was attending a training session out of town. MSHA presented the testimony of Inspector Edwin W. Fetty, who accompanied Inspector Thomas during his inspections of June 18-20, and 29, 1990, in support of its case. The contestant presented the testimony of the mine accident prevention officer Paul S. Zanussi, and expert witness Frank Greb in support of its case.

With regard to the initial June 11, 1990, Citation No. 3306619, issued by Inspector Thomas, the evidence adduced at the hearing reflects that the two cited dragline cable spools were not "cut into with a cutting torch." The evidence establishes that the drum was cut into two separate pieces by the manufacturer, and then re-assembled according to the appropriate specifications. Inspector Fetty agreed that the separation and

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reassembly of the drum did not render it unsafe, and there is no evidence to the contrary. Accordingly, the only alleged violative condition with respect to the June 11, 1990, citation is that stated in the second sentence with respect to the condition of the wire rope.

With regard to the modified citation issued by Mr. Thomas on June 19, 1990, the evidence establishes that at the time the disputed section 104(b) order of July 10, 1990, was issued by Inspector Bowers, all of the enumerated cited conditions, except for the alleged condition of the drum, were corrected by the contestant.

Subsequent to the hearing, and after the close of the record in this matter, the parties initiated a conference with me and advised me that they reached a mutually agreeable settlement of this matter, and they filed a joint motion seeking approval of their proposed settlement disposition of the case. With regard to the settlement, the parties agree that the contested section 104(b) order should be vacated, and the contestant has agreed to withdraw its contest. The parties further agree that the modified citation issued by Inspector Thomas on June 19, 1990, will be further modified to delete the following alleged condition: "The grooved drums were so badly worn that the cable would not spool properly. Load line drum and bucket drum." The contestant agrees to accept the modified citation and to pay a civil penalty assessment of \$375, in satisfaction of the citation. Although a formal civil penalty proceeding has yet to be initiated and finalized, and jurisdiction has not vested in the Commission, the parties wish to memorialize their mutual understanding and agreement with respect to the civil penalty proceeding.

#### Conclusion

After careful review and consideration of the pleadings, the testimony and evidence adduced at the hearing, and the motion filed by the parties with respect to the proposed settlement disposition of this matter, I conclude and find that it is reasonable and in the public interest. Accordingly, the motion IS GRANTED, and the settlement IS APPROVED.

#### ORDER

IT IS ORDERED that:

1. The modified section 104(a) Citation No. 3306619, issued by Inspector Charles Thomas on June 19, 1990, is further modified in accordance with the agreement reached by the parties to delete any reference to the alleged violative condition of the cited dragline drums.

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2. Southern Ohio Coal Company will accept responsibility and liability for the aforementioned section 104(a) modified citation, as further modified pursuant to the agreement of the parties.

3. Section 104(b) Order No. 3111174, issued by Inspector Frank D. Bowers on July 10, 1990, IS VACATED.

4. The contestant's motion to withdraw its contest IS GRANTED, and this matter IS DISMISSED.

George A. Koutras  
Administrative Law Judge