

CCASE:  
CONSOLIDATION COAL V. MSHA  
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CONSOLIDATION COAL COMPANY, : CONTEST PROCEEDING  
Contestant :  
v. : Docket No. WEVA 91-171-R  
: Order No. 3116965; 2/2/91  
SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH : Loveridge No. 22 Mine  
ADMINISTRATION (MSHA), :  
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEVA 91-1996  
Petitioner : A.C. No. 46-01433-03993  
v. :  
: Docket No. WEVA 92-232  
: A.C. No. 46-01433-04005  
CONSOLIDATION COAL COMPANY, :  
Respondent : Loveridge No. 22 Mine  
:  
: Docket No. WEVA 91-1834  
: A.C. No. 46-01452-03790  
:  
: Docket No. WEVA 91-1985  
: A.C. No. 46-01452-03793  
:  
: Arkwright No. 1 Mine  
:  
: Docket No. WEVA 91-1924  
: A.C. No. 46-01968-03928  
:  
: Docket No. WEVA 91-1967  
: A.C. No. 46-01968-03925  
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: Docket No. WEVA 91-1969  
: A.C. No. 46-01968-03966  
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: Docket No. WEVA 92-188  
: A.C. No. 46-01968-03944  
:  
: Blacksville No. 2 Mine  
:  
: Docket No. WEVA 91-1841  
: A.C. No. 46-01453-03966

: Docket No. WEVA 91-2038  
 : A.C. No. 46-01453-03973  
 :  
 : Humphrey No. 7 Mine  
 :  
 : Docket No. WEVA 91-1913  
 : A.C. No. 46-01318-04010  
 :  
 : Robinson Run No. 95 Mine

DECISION  
 AND  
 ORDER OF DISMISSAL

Appearances: Caryl Casden, Esq., U.S. Department of Labor,  
 Office of the Solicitor, Arlington, Virginia,  
 for Petitioner;  
 Walter J. Scheller III, Esq., Consolidation Coal  
 Company, Pittsburgh, Pennsylvania, for  
 Respondent.

Before: Judge Barbour

The captioned proceeding concerns one notice of contest and eleven civil penalty petitions filed by the parties pursuant to Sections 105(d) and 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(d), 820(a). The proceedings were noticed for hearing in Morgantown, West Virginia. Prior to the March 3, 1992 hearing, the parties stated that they had agreed to settle all matters, except contest proceeding, Docket No. WEVA 91-171-R, and its corresponding civil penalty proceeding, Docket No. WEVA 92-232. I advised the parties that I would hear their settlement motions on the record, at the close of the contested cases. I further advised them that rulings on the proposed settlements would be incorporated into a decision on the merits of the contested cases.

I.

Docket No. WEVA 91-171-R  
 Docket No. WEVA 92-232

The contested cases were heard as scheduled. Subsequent to the receipt by the parties of the transcript and to its review, counsel for the Secretary of Labor ("Secretary") informed me that she and counsel for Consolidation Coal Company ("Consol") had agreed to settle the contested matters, and, pursuant to Commission Procedural Rule 30, 29 C.F.R. 2700.30, counsel for

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the Secretary moved me to approve the settlement. At issue in the contested proceedings is an alleged violation of 30 C.F.R. 75.1106-3(a)(3), a mandatory safety standard involving the storage of liquified and nonliquified compressed gas cylinders in underground coal mines. The standard states in relevant part:

(a) Liquified and nonliquified compressed gas cylinders stored in an underground coal mine shall be:

\* \* \*

(3) Protected against damage...from contact with...electrical equipment.

On February 2, 1991, Federal Mine Safety and Health Administration ("MSHA") Inspector Homer W. Delovich issued an order pursuant to Section 104(d)(2) of the Mine Act, 30 U.S.C. 815(d)(2), alleging that two oxygen and two acetylene tanks were stored improperly at the corner of a track entry and a crosscut in active workings of Consol's Loveridge No. 22 Mine. According to the inspector, the crosscut was being used as a travelway by scoops bringing longwall shields from the longwall to the track loading point. The inspector believed the proximity of the tanks to the track and to the travelway subjected the tanks to damage from track equipment and, more importantly, from mobile equipment in the travelway.

The inspector further found that the violation was a significant and substantial contribution to a mine safety hazard (a "S&S" violation), that due to the failure to properly store the tanks an injury resulting in lost workdays or restricted duty was reasonably likely for up to seven miners and that the violation was the result of unwarrantable failure and "high" negligence on the part of mine management, whose foremen had regularly traversed the area in which the violative conditions existed. The inspector therefore issued to Consol Order of Withdrawal No. 3116965. Subsequently, Consol contested the validity of the withdrawal order, as well as the civil penalty of \$1,100 proposed by the Secretary for the alleged violation of 30 C.F.R. 75.1106-3(a)(3).

The Motion to Approve Settlement states that post-trial review of the testimony and documentary evidence convince the Secretary that while the fact of violation and the gravity of the violation have been established, the allegations of unwarrantable failure and "high" negligence alleged in the contested order and upon which the proposes civil penalty was, in part, based cannot be sustained. In essence, counsel for the Secretary asserts that, contrary to what the inspector believed, the evidence establishes that the intersection of the crosscut and the track entry had not been used repeatedly as a travelway because the particular mining process being undertaken--the moving of the longwall shields during recovery of the longwall--had only begun on the date the inspector issued the order, that the foremen in

charge of the work neither had used nor intended to use the subject intersection regularly, and that a scoop only once had passed close to the tanks.

Accordingly, counsel states that MSHA has agreed to modify the Section 104(d)(2) order to the Section 104(a) citation, 30 U.S.C. 814(a), alleging an S&S violation due to moderate negligence on Consol's part and that Consol has agreed to pay a civil penalty of \$700 for the violation.

I believe the settlement motion is well advised. The testimony of the inspector and of Consol's witnesses was in direct conflict regarding the use of the subject area by scoops removing shields from the longwall, as well as whether foreman had or would regularly traverse the area. Without implying any criticism of the inspector, who was acting in a forthright and conscientious manner to protect miners from the undoubted hazards presented by the improperly stored cylinders, the Secretary did not establish, in my opinion, that the intersection had been or would be subject to repeated use by the scoops as they shuttled between the longwall and the track loading point and thus was an area requiring repeated supervisory visits. Given this fact, I agree with the Secretary that mine management officials did not exhibit aggravated conduct in allowing the cylinders to be stored in the subject area.

II.

At the close of the testimony with regard to Docket Nos. WEVA 91-171-R and WEVA 92-232, counsel for the Secretary moved me to approve settlements or to stay, in part, the following civil penalty proceedings (Tr. 298-312):

Docket No. WEVA 91-1834

Citation No.	Date	30 C.F.R.	Proposed	
			Assessment	Settlement
3306395	3/7/91	75.601	\$329	\$329
3105723	3/11/91	75.1105	\$305	0
3307585	3/11/91	75.520	\$213	0

Counsel for the Secretary stated that Consol has agreed to pay in full the proposed civil penalty for Section 104(a) Citation No. 330695.

Regarding Section 104(a) Citation No. 33105723, counsel for the Secretary stated that the Secretary has agreed to vacate the citation because, on further investigation, the Secretary has found that there was no violation of the cited standard. Likewise, regarding Citation No. 3307585, counsel for the Secretary stated that upon further investigation it was determined that the equipment was in compliance with the standard and that there was no violation.

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Docket No. WEVA 91-1985

Citation No.	Date	30 C.F.R.	Proposed	
			Assessment	Settlement
3315732	6/14/91	77.404(a)	\$213	\$20

Regarding Section 104(a) Citation No. 3315732, counsel for the Secretary stated that subsequent to being assessed by MSHA, the citation was modified by the inspector to delete the "S&S" finding. As modified, the proposed penalty would have been \$20, and Consol has agreed to pay a \$20 penalty.

Docket No. WEVA 91-1967

Citation No.	Date	30 C.F.R.	Proposed	
			Assessment	Settlement
3315473	3/11/91	75.515	\$259	\$259
3315474	3/11/91	75.1405	\$259	stayed

Counsel for the Secretary stated that Consol has agreed to pay in full the proposed civil penalty for Section 104(a) Citation No. 3315473.

Regarding Section 104(a) Citation No. 315474, counsel for both parties requested this matter be stayed pending the decision of Commission Administrative Law Judge Avram Weisberger in Consolidation Coal Company, Docket No. WEVA 91-1833. Judge Weisberger has scheduled that case for hearing on May 18, 1992. The parties stated that the case contains several citations alleging violations of 75.1405 and arising under factual circumstances similar to the subject violation. They expect Judge Weisberger's decision to determine their resolution of the subject citation. I accept the parties' representations and, as ordered below, stay the proceeding.

Docket No. WEVA 91-1969

Citation No.	Date	30 C.F.R.	Proposed	
			Assessment	Settlement
3315486	3/20/91	77.512	\$259	\$155
3315487	3/20/91	77.505	\$259	\$155

Section 104(a) Citations Nos. 3315486 and 3315487, which respectively allege that the cover plate was missing from the electrical junction box of an overhead fan and that insulated wires were not in proper fittings in the metal junction box of an hot water heater, were both found by the inspector to be significant and substantial contributions to mine safety hazards. Counsel for the Secretary stated that MSHA has agreed to modify the citations to delete the S&S findings because the junction box to the overhead fan was 15 feet off the ground and unlikely to be

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contacted by anyone and the junction box for the hot water heater was unlikely to be subject to any vibration causing wear or stress to the insulated wires. Consol has agreed to pay civil penalties of \$155 for each violation.

Docket No. WEVA 91-1924

Citation No.	Date	30 C.F.R.	Proposed Assessment	Settlement
3306261	10/15/90	75.512	\$2,000	\$210
3306262	10/15/90	75.511	\$319	0
3306264	10/10/90	75.518	\$2,000	\$350

Regarding to Section 104(a) Citations Nos. 3306261 and 3306264, counsel for the Secretary stated that both violations had been specially assessed because of MSHA's belief that both violations contributed to an electrical short circuit accident that occurred on October 12, 1990 and that burned a miner. Counsel further stated the Secretary cannot prove the violations actually contributed to the accident.

Counsel for the Secretary stated that because the Secretary cannot establish the violation of Section 75.518 cited in Section 104(a) Citation No. 3306264, was reasonably likely to result in or contribute to a burn injury, MSHA has agreed to modify the citation to delete the "S&S" finding.

Finally, counsel for the Secretary noted that Section 104(a) Citation No. 3306262 was dismissed by Judge Weisberger on December 20, 1990, when he sustained a contest of the citation on the ground that the conditions cited did not constitute a violation of Section 75.511. Consolidation Coal Co., 12 FMSHRC 2643, 2650 (December 1990) (ALJ Weisberger).

Docket No. WEVA 91-1841

Citation No.	Date	30 C.F.R.	Proposed Assessment	Settlement
3314463	3/11/91	75.302-4(a)	\$192	\$192
3307587	3/13/91	75.1704	\$275	\$155
3314473	3/13/91	75.520	\$20	\$20
3307588	3/14/91	77.401(b)	\$20	0

Regarding Section 104(a) Citations Nos. 3314463 and 3314473 the Secretary's counsel stated that Consol has agreed to pay in full the proposed civil penalties.

Section 104(a) Citation No. 3307587 alleges that a violation of 75.1704 constituted a significant and substantial contribution to a mine safety hazard in that a gasoline leak in the vicinity of an emergency hoist (which served as an escapeway for active working sections) was reasonable likely to result in an accident

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causing lost or restricted workdays dates. Counsel for the Secretary stated that MSHA has agreed to modify the citation to delete the S&S finding because it has been determined that the gasoline leak was minuet, and Consol has agreed to pay a resulting civil penalty of \$192.

Section 104(a) Citation No. 3307588 alleges that a surface shop grinder was not labeled with its RPM value as required by Section 77.401(b). Counsel for the Secretary stated that MSHA has agreed to vacate the citation because the RPM values later were found on the machine.

Docket No. WEVA 91-2038

Citation No.	Date	30 C.F.R.	Proposed Assessment	Settlement
3316601	7/1/91	75.203(a)	\$227	\$50

Section 104(a) Citation No. 3316601 alleges a significant and substantial violation of 75.203(a) in that miners were exposed to hazards caused by faulty pillar recovery methods on a longwall section. Counsel for the Secretary stated the Secretary has concluded that extra precautions required by the roof control plan (and, apparently, not considered by the inspector) made the pillar recovery methods being followed decidedly less hazardous than found by the inspector and that, as a consequence, MSHA has agreed to modify the citation to delete the S&S finding. In turn, Consol has agreed to pay a civil penalty of \$50.

Docket No. WEVA 91-1913

Citation No.	Date	30 C.F.R.	Proposed Assessment	Settlement
3105284	1/17/91	75.605	\$241	\$241

Regarding Section 104(a) Citation No. 3105284, Counsel for the Secretary stated that Consol has agreed to pay in full the proposed civil penalty.

Docket No. WEVA 91-188

Citation No.	Date	30 C.F.R.	Proposed Assessment	Settlement
3105195	3/20/91	77.1605(d)	\$20	\$0
3105196	3/20/91	77.410	\$259	\$259
3315493	3/26/91	77.404(a)	\$259	\$155
3315236	5/31/91	75.1405	\$192	stayed

Regarding Section 104(a) Citations Nos. 3105195 and 3105196, counsel for the Secretary stated that MSHA has vacated the first citation and Consol has agreed to pay in full the proposed assessment for the second.



Section 104(a) Citation No. 3315493 alleges that a broken left front windshield, with inside and outside rough edges, on a blade roller machine violated the cited standard and constituted a significant and substantial contribution to a mine safety hazard. Counsel for the Secretary stated that MSHA has agreed to modify the citation to delete the S&S finding because the breaks in the windshield were minor and did not obstruct or obscure the equipment operator's vision. Counsel also stated that Consol has agreed to pay a civil penalty of \$155 or the violation.

Regarding Section 104(a) Citation No. 3315236, as with Citation No. 3315474 in Docket No. WEVA 91-1967, the parties have requested the matter be stayed pending the decision of Judge Weisberger in Consolidation Coal Co., WEVA 91-1833. As ordered below, I grant the parties' request.

Docket No. WEVA 91-1996

Citation No.	Date	30 C.F.R.	Proposed Assessment	Settlement
3116462	5/22/91	77.1605(a)	\$178	\$126

Regarding Section 104(a) Citation No. 3116462, counsel for the Secretary stated that the Secretary has concluded Consol's negligence in allowing the violation to exist was "low" rather than "moderate", as found by the inspector, and that Consol has agreed to pay a civil penalty of \$126, the amount that would have been proposed had "low" negligence been used in calculating the assessment.

Conclusion

In view of the foregoing and after reviewing the pleadings and arguments in support of the proposed settlements and requests for stay, as well as the relevant civil penalty criteria, I conclude that the settlements for which approval is sought are in the public interest and, therefore, they are APPROVED. In addition, I conclude that stays should be granted for the cases containing the two alleged violations of Section 75.1405 until Judge Weisberger issues a decision in Consolidation Coal Co., WEVA 91-1833, or until that matter is otherwise resolved, and they are STAYED.

III.

ORDER

Docket No. WEVA 91-171-R  
Docket No. WEVA 92-232

Consol is ordered to pay a civil penalty of \$700, and the Secretary is ordered to modify Section 104(d)(2) Order No. 3116965 to a section 104(a) citation.

Docket No. WEVA 91-1834

Consol is ordered to pay a civil penalty of \$329 for Citation No. 3306395, and the Secretary is ordered to vacate Section 104(a) Citation Nos. 3105723 and 3307585, if she has not already done so.

Docket No. WEVA 91-1985

Consol is ordered to pay a civil penalty of \$20 for Citation No. 3315732, and the Secretary is ordered to modify the citation to delete the inspector's S&S finding, if she has not already done so.

Docket No. WEVA 91-1967

This matter is ordered stayed. Consol is ordered to pay a civil penalty of \$259 for Citation No. 3315473. Consideration of Citation No. 3315474 in this case is held in abeyance pending Judge Weisberger's decision in Consolidation Coal Co., WEVA 91-1833, or until the case is otherwise resolved, and the parties are requested to advise me on or before July 1, 1992, and the first of each succeeding month, of the status of this citation.

Docket No. WEVA 91-1969

Consol is ordered to pay civil penalties of \$155 each for Citations Nos. 3315486 and 3315487, and the Secretary is ordered to modify each citation to delete the inspector's finding S&S finding.

Docket No. WEVA 91-1924

Consol is ordered to pay civil penalties of \$210 and \$350 for Citations No. 3306261 and 3306264, and the Secretary is ordered to modify Citation No. 3306264 to delete the inspector's S&S finding.

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Docket No. WEVA 91-1841

Consol is ordered to pay civil penalties in the amounts of \$192 for Citation No. 3314463, \$20 for Citation No. 3314473 and \$155 for Citation No. 3307587, and the Secretary is ordered to modify Citation No. 3307587 to delete the inspector's S&S finding. Further, the Secretary is ordered to vacate Citation No. 3307588, if she has not already done so.

Docket No. WEVA 91-2038

Consol is ordered to pay \$50 for Citation No. 3316601, and the Secretary is ordered to modify the citation to delete the inspector's S&S findings.

Docket No. WEVA 91-1913

Consol is order to pay \$241 for Citation No. 3105284.

Docket No. WEVA 92-188

This matter is ordered stayed. Consol is ordered to pay \$259 for Citation No. 3105196 and \$155 for Citation No. 3315493. The Secretary is ordered to modify Citation No. 3315493 to delete the inspector's S&S finding and to vacate Citation No. 3105195, if she has not already done so. Consideration of Citation No. 3315236 is held in abeyance pending Judge Weisberger's decision in Consolidation Coal Co., WEVA 91-1833, or until that case is otherwise resolved, and the parties are requested to advise me on or before July 1, 1992, and the first of each succeeding month of the status of this citation.

Docket No. WEVA 91-1996

Consol is ordered to pay \$126 for Citation No. 3116462.

IV.

As ordered above, payment is to be made to MSHA within thirty (30) days of the date of this decision and order, and upon receipt of payment all captioned civil penalty proceedings are dismissed except Docket Nos. WEVA 91-1967 and WEVA 92-188, which are stayed. In addition, in view of the settlement disposition of the companion civil penalty case, Docket No. WEVA 92-232, contest proceeding Docket No. WEVA 91-171-R is dismissed.

David Barbour  
Administrative Law Judge

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