CCASE:
MARTIMKA COAL V. SOL (MSHA)
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

MARTINKA COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. WEVA 93-45-R
	:	Order No. 3720402; 10/26/92
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEVA 93-46-R
	:	Order No. 3720403; 10/26/92
	:	Tygart River Mine
	:	
	:	Mine ID 46-03805

DECISION

Appearances: Thomas L. Clarke, Esq., Charleston, West Virginia, for Contestant;
Glenn Loos, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for Respondent.

Before: Judge Weisberger

Statement of the Case

These cases are before me base on an Application for Review and Motion to Expedite filed by Martinka Coal Corporation (Operator) on November 12, 1992, challenging the issuance of a Section 104(b) Withdrawal Order. The Secretary (Respondent) opposed the Motion to Expedite and in a telephone conference call on November 13, 1992, with the undersigned and counsel for both parties, argument was heard regarding Contestant's Motion to Expedite. The Motion was granted and the case was set for hearing on November 24, 1992, in Morgantown, West Virginia. At the hearing Robert A. Blair, and David Kenneth Kincell, testified for the Secretary. John Metz, David Kevin Conaway, and Joseph Anthony Keener, testified for the Operator. After the hearing was concluded the parties requested the opportunity to file proposed findings of fact and memorandum of law two weeks after receipt of the transcript of the hearing. This request was granted and it was so ordered. The parties further indicated that they did not wish to file any reply briefs.

The transcript was received in the Office of the Administrative Law Judges on December 3, 1992. On December 23, 1992, counsel for Contestant called the undersigned with the

permission of counsel for Respondent and advised that both counsel had agreed to file briefs by December 31, if it was

amendable to the undersigned. The request was granted.

Respondent filed a post hearing brief on December 24, 1992, Contestant filed its brief on January 8, 1993.

Findings of Facts and Discussion

1. Introduction

On October 21, 1992, Mine Safety and Health Administration (MSHA) Inspector Robert A. Blair inspected the four flyte belt line at the Operator's Tygart River Mine. He observed an accumulation of coal dust and float coal dust that had accumulated under the belt, belt drive, belt rollers and on the belt structure along the entire belt line. He also noted the existence of haystack forms, and the fact that at several points rollers were running in the accumulation. He issued a citation alleging a violation of 30 C.F.R. 75.400 which in essence, provides that, "coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal and other combustible materials shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein." The Operator indicated at the hearing that it does not contest the fact of the violation as well as the allegations set forth in paragraph 8 of the citation.

Blair discussed with Daniel Kevin Conaway, the Operator's Safety Manager for the Tygart River Mine, the time to be allowed for the Operator to abate the violative conditions. Blair allowed until October 26, 1992, for abatement. In essence, Conaway and Wesley Dobbs who works for Conaway, indicated that it would take about two days to clean and fix the beltline. On that date, Blair returned to the belt line in question. He indicated that although the most serious conditions were cleaned up, there was an accumulation of combustible material in the same location as was observed on October 21, 1992. He issued a Section 104(b) order which states as follows:

> An effort to totally abate the citation No. 3107658 was not made. Conditions that still exist include was combustible materials still under the No. 4 flyte tail piece area under the belt, also the combustible materials was still on the belt top rollers and bottom rollers in several locations along the belt outby 151, inby 145, inby 148 to 149 and 145 block outby their was haystack forms under the belt, at 139 block inby the bottom rollers was running in muck, inby 124 block bottom roller was running in muck. At No. 133 block the belt was rubbing against the structure of the bottom roller. The belt is operating and no one was observed working on the condition this shift. [sic]

In addition, on October 21, 1992, Blair observed several rollers missing as well as several broken rollers, and that the belt was rubbing against the belt structure. He concluded that the belt was not maintained in a safe condition and issued a Citation No. 3107659 alleging a violation of 30 C.F.R. 75.1725(a). When Blair returned on October 26, 1992, the dat set for abatement of Citation No. 3107659, he observed frozen rollers. He noted that there were hangers missing. He also observed the belt rubbing against the belt structure.

He issued a Section 104(b) order which states as follows:

> An effort to totally abate the Citation No. 3107659 was not made. Conditions that still exist include frozen roller was still existing at the tail piece. 151 block outby to 152 top rollers was still bad. Inby 146 block the bottom roller was stuck, and the belt hanger was missing. 139 block inby belt hanger missing, 133 block inby the belt was rubbing the bottom roller structure, outby 124 block a frozen roller, the belt is operating and no one was observed working on the condition this shift. [sic]

None of Contestant's agents stated that the abatement time for either citation previously issued on October 21, 1992, was too short. Nor did any of Contestant's agents request an extension of time to abate the violative conditions. Blair indicated he did not consider extending the abatement time, "Because I gave them adequate time in the beginning" (Tr.51)

II. Extension of the Time for Abatement

Essentially it is Contestant's argument that Blair did not consider extending the abatement, and that there were no hazards posed to miners by the granting of an extension. Contestant, in arguing that the 104(b) order was improperly issued, also refers to its abatement efforts. Contestant cites the fact that 40 man-shifts were expended in abatement efforts, and 60 tons of rock dust were applied. I do not accept Contestant's argument for the reasons that follow.

Section 104(b) of the Federal Mine Safety and Health Act of 1977 ("the Act") provides, in essence, that a withdrawal order shall be issued if an inspector finds that a violation described in a previous citation has not been totally abated within the period set for abatement, and "that the period of time for the abatement should not be further extended".

In issuing the two Section 104(b) orders at issue, Blair indicated he did not consider extending the abatement time, "Because I gave them adequate time at the beginning" (Tr.51). The critical issue is thus whether Blair acted reasonably in not

extending the time for abatement (Peabody Coal Company, 11 FMSHRC 2068, 2100 (October 27, 1989) (Judge Koutras)).

At the time the citations were written on October 21, 1992, Blair asked the mine management how long they needed to abate the violations. Management stated that two days should be enough time. Blair then allowed five days, including a weekend, for abatement.

In addition, the Contestant's failure to timely correct the violations posed hazards to miners. The combination of combustible accumulations together with possible ignition sources such as frozen rollers and the belt rubbing the structure of the belt line, producing heat and friction, created a fire hazard which could send smoke down onto the sections and trap men working inby the fire. Dry and drying coal, and coal dust present behind the tail roller and on the center rollers of the belt line was in contact with the belt and rollers, and presented a fire hazard.

Hence, for all the above reasons, I conclude that Blair acted reasonably in determining not to extend the time to abate the violations previously cited on October 21.1

II. The validity of the Section 104(b) orders

The Commission, in Mid-Continent Inc., 11 FMSHRC 505, at 509, held that when an operator challenges the validity of a section 104(b) order,

> ...it is the Secretary, as the proponent of the order, who bears the burden of proving that the violation described in the underlying citation has not been abated within the time period originally fixed or as subsequently extended. We hold, therefore, that the Secretary establishes a prima facie case that a section 104(b) order is valid by proving by a preponderance of the evidence that the violation described in the underlying section 104(a) citation existed at the time the section 104(b) withdrawal order was issued. The operator may rebut the prima facie case, by showing, for example, that the violative condition described in the section 104(a) citation had been abated within the time period fixed in the citation, but had recurred.

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1The case cited by Contestant did not adjudicate the specific issue presented herein, i.e., whether considering the set of facts in this record the inspector's decision not to extend the time for abatement was reasonable. Thus, to the extent that these cases decided by Commission Judges are inconsistent with my decision, I choose not to follow them.

A. Order No. 3720402

1. The Secretary's prima facie case

As set forth by the Commission in Mid-Continent Resources, supra, at 509, the Secretary has the burden of proving that the "violation described in the underlying citation has not been abated within the time period originally fixed, or as subsequently extended."

The "violation described" in the underlying citation was an accumulation of coal dust and float coal that was combustible. According to Blair, on October 21, 1992, there was loose coal, dry loose coal, and dust that was "not wet" packed under the tail piece (Tr. 25). Also, Donald Keith Kincell, a union walk around who accompanied Blair, indicated the presence of dry material at the back of the tail piece.

On October 26, 1992, Blair returned to reinspect the area. He indicated that he noted the continued presence of combustible material at the tail such as loose coal, and coal dust, which was packed and "dull", and had been there for "a while" (Tr.44).2 He also observed dry loose coal and dust on top of the rollers at the tail. He indicated that the material was shiny but underneath it was dull. Kincell testified that at the back end of the tail there was still a build-up that was dry to partially wet. He indicated it was in contact with the back rollers, and was approximately 8 inches deep by 15 inches wide. He said that it was damp to dry and was "drying out" (Tr. 85). He was asked whether he observed this same material on October 21, and he said: "Yes, basically all of it was still there" (Tr. 85). He said that behind the tail piece "the coal was more of in the dry stage" (Tr.96). He indicated that under the tail piece the material was in contact with the belt and with the rollers where the belt rubbed the structure.

John Metz, the manager of the mine, indicated that every shift subsequent to October 21, men were assigned to clean the structure, rock dust, and wet the area. According to his testimony approximately 60 tons of rock dust were used. He indicated that on October 26, the material at the tail was "extremely wet" (Tr. 136) and not in contact with either the belting or any rollers.

Contestant does not challenge validity of the citation issued on October 21, 1992, i.e., the presence of an accumulation of combustible material. The testimony of Blair and Kincell

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2In general, according to the uncontradicted testimony of Blair, a fresh spill of coal is "shiny", whereas an "old" accumulation is "dull" (Tr.40).

indicates that the violative condition at the tail i.e., coal that was not wet under the tail piece and the back of the tail, was in existence on October 26. I find that the testimony of Metz that the material at the tail was "extremely wet", insufficient to rebut the more specific testimony of Blair that the coal in the tail area was dull, and the testimony of Kincell which in essence indicates the existence of the same conditions noted by Blair on October 21. I thus find, that, at the tail, the Secretary has established a prima facie case that the violative conditions there had not been abated. I find the Operator's evidence inadequate to defeat this prima facie case.

According to Blair, on October 21, he observed loose coal dust all along the belt line, and haystacks. Also, at several locations he observed that the belt and rollers were in contact with material. He said that the material consisting of loose coal, was dry, and was not muck. According to Kincell along the entire length of the beltway there was a build-up of coal between the rollers and the structure, and the rollers were running in haystacks.

Metz indicated that he walked from the head to the tail on October 21, and that he did not observe any dry material. He described the material he observed in as being non-combustible, wet, mucky, and watery. However, it is significant to note that the operator has not contested the fact of the violation i.e. in accumulation of combustible material, as set forth in the citation initially issued.

Further, in this connection, Blair's notes, taken on October 22, 1992, indicate an accumulation on the belt top roller and bottom roller at several locations outby block 151, inby block 145, inby block 148 to 149, and that outby block 145 there were haystacks under the belt. The notes also indicate that at the 139 block inby, rollers were running in muck which was described as being wet to dry and inby block 145 the bottom was running in muck. Due to the fact that these notes were written contemporarious with the issuance of the 104(b) order, I accord them considerable weight.

According to Blair, on October 26, in general, the area was cleaned up, haystacks were removed, and the walkside of the beltway was cleared. However, he indicated that accumulations were the same as on October 21, in the same locations, and were dull not shiny, indicating an accumulation which was not fresh. Kincell indicated that on October 26, there was fine coal in contact with the belt for the full length of the beltway. He further indicated that under the center rollers, there was the same accumulation that had existed on October 21. He indicated the center roller "was drying material out" (Tr. 86). He said the accumulations in the area of the bottom roller were, "more to the dry stage" (Tr. 95). He also indicated that "The build-up on

the structure, the center roller or the towing roller was dry" (Tr.101), and for the entire of the belt length there was an accumulation under the center rollers.

Based on the above, I conclude that the Secretary has established a prima facie case that at least some of the violative conditions described in the 104(a) citation, as elaborated upon in the testimony of Blair and Kincell, existed at the time the 104(b) order was issued.

2. The Operator's Rebuttal

It appears to be Operator's position that: (1) on October 23, 1992 the violative conditions were abated; and (2) any accumulations of materials present on October 26, 1992, were not combustible, and thus their accumulation does not constitute a failure to abate.

Metz testified that on October 23, 1992, he examined the entire belt structure, although not each individual piece. He said that the material that was present was wet, and not capable of being burnt. He said that he examined the material with his hand, and in some location it ran through his fingers. He said that at other locations he was able to squeeze water out of the accumulation, and no accumulation was any dryer. According to Metz, on October 23, 1992, no material was in contact with the belt roller or any moving parts. He also said that at the tail piece there was no material in contact with any moving parts, and there was no accumulation at the tail.

At best, Metz' testimony tends to establish that the material observed by him on October 23, was wet and non-combustible. However, Metz did not compare the conditions that he observed on October 23, to that to which he had observed on October 21, shortly after the initial citation was issued. I accordingly find that his testimony is insufficient to predicate a finding that as of October 23, 1992, the violative conditions set forth in the citation and elaborated upon in the testimony of Kincell and Blair, were no longer in existence.

Metz indicated, in essence, that the material that he observed on the belt line on October 26, was muddy and wet. He said that he touched haystacks a couple of times and the material ran through his fingers. He also said that a couple of times he picked up material from the floor under the belt. He said he made mud balls, and as he squeezed them the material oozed through his hand. He described this material as non-combustible. According to Blair, he did not observe Metz picking up any material in his presence, and that although he was walking in front of Metz "when I walk I constantly turn my head" (Tr. 265). Due to the fact that Blair was walking in front of Metz, and thus had his back to Metz, I find Blair's testimony insufficient to

contradict the testimony of Metz with regard to his having felt the material in issue.

It is clear that on October 26, 1992, there still was an accumulation of material. The issue from the operator's perspective, appears to be whether that material still be considered combustible. However, according to Mid-Continent, supra, the key issue is whether the violative conditions which were initially cited continued in existence when the 104(b) order was issued i.e. on October 26. Clearly, by all accounts, on October 26, 1992, there continued to be an accumulation of coal in the belt line. Only the Secretary's witnesses compared the accumulations on October 26, 1992, to that which were in existence on October 21. Their testimony indicates, in essence, that in some respects, the accumulations were the same. The fact that some of the accumulations on October 26, were very wet does not negate the existence of the conditions initially cited by Blair on October 21, to be violative of Section 75.400 and not contested by the Operator. It would appear to be the thrust of the Operator's case to challenge determination by Blair that the accumulations were "combustible". It would appear that such a challenge is germane to a contest of the initial citation. However, such a challenge does not appear relevant when the only issue is the validity of 104(b) order, which in turn depends upon a resolution of only whether the conditions originally cited were still in existence at the time of the issuance of the 104(b) order (See Mid-Continent, supra). In this connection I find that the weight of the evidence establishes that the cited violative conditions were still in existence on October 26, and that this conclusion has not been rebutted by the Operator. For these reasons I conclude that Order No. 3720402 was properly issued, and the contest to its issuance is to be dismissed.

B. Order No. 3720403

1. The Secretary's prima facie case

Essentially, according to Blair, on October 21, 1992, the conditions that he observed which caused him to issue the initial citation consisted of several missing bottom rollers, a 100 foot length of the belt where roller were missing, and that the fact that several frozen rollers were observed. In addition, he noted that some bearings were bad, and the belt was rubbing against the structure causing rubber to flake.

Blair indicated that on October 26, the same rollers that were frozen on October 21, were also frozen on October 26, although he did not know how many were frozen. He also said that although some of the bottom rollers at the head were repaired, the bottom rollers that were missing on October 21, were still missing on October 26. In this connection, he indicated that along 100 foot area all bottom rollers were still missing.

Kincell indicated that the rollers that he observed missing on October 26, were also missing on October 21. He thought that they were in the area of blocks 137 to 138. Notes taken by Blair on October 26, indicate that the top roller 151 outby to 152 is still bad. Kincell indicated that October 26, within 25 feet of the tail piece on he observed two stuck rollers, one on top and one on the bottom. He said that these were among those that he had observed on October 21.

Metz indicated that on October 23, he spent "probably" two hours looking for frozen rollers (Tr.180). He said he inspected all the rollers, i.e. 2,800, and did not observe any frozen rollers along the belt line. He said that there were no frozen rollers at the tail piece. It was further Metz' testimony that between October 21 and October 26, 15 to 18 rollers were replaced.

According to Metz, on October 26, Blair pointed out to him rollers that he (Blair) said were frozen. Metz indicated that some of the rollers Blair had pointed to were not in contact with the belt, and the others which were in contact with the belt did turn when Metz reached in and turned them. Blair, in rebuttal, indicated that on October 26 when he pointed out frozen rollers to Metz, Metz did not demonstrate that they were not frozen, and instead said they were trying to change them. In this connection, Blair testified that after the two 104(b) orders in question were issued, Daniel Kevin Conaway the safety manager at the Tygart Mine to whom he spoke, said "we just failed to correct them more properly" (Tr. 60). Conaway, who testified, did not specifically rebut this testimony.

I conclude, based on all the above, that the Secretary has established a prima facie case that some of the rollers that were observed missing on October 21, were still missing on October 26. Metz testified that 15 to 18 rollers were replaced, however there is no evidence in the record as to the locations where these were replaced. Nor is there any evidence as to the total number of rollers that had been observed missing on October 21, aside from the testimony of Blair, that for 100 feet rollers were missing, and the testimony of Kincell that at a point 10 feet removed from block No. 133 for a distance of 120 feet, there were no rollers. Accordingly, I find that based on the testimony of Blair and Kincell that the Secretary has established a prima facie case that some of the rollers observed missing on October 26, were the same that had been missing on October 21.

2. The Operator's Rebuttal

There is not any specific testimony to rebut the specific testimony of Kincell that two of the rollers that he observed frozen or not turning on October 21, where in that same condition on October 26. I thus conclude that a prima facie case has been

established that some of the violative conditions cited on October 21 continued to exist on October 26 with regard to defective or inoperative rollers. The operator has not introduced any specific evidence to rebut this prima facie case such as evidence of missing rollers which had been replaced. Nor is there any evidence that any missing rollers which had been replaced after October 21, subsequently were no longer in place. (See Mid-Continent, supra). Therefore I find the Operator's challenge to this order to be without merit.

Therefore for all the above reasons, I order that these cases be DISMISSED.

Avram Weisberger
Administrative Law Judge

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