

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

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION, : Docket No. WEVA 92-1292  
Petitioner : A.C. No. 46-01455-03941  
v. :  
 : Osage No. 3 Mine  
CONSOLIDATION COAL COMPANY, :  
Respondent :

DECISION

Appearances: Heather Bupp-Habuda, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, Virginia, for  
Petitioner;  
Daniel E. Rogers, Esq., Consolidation Coal Company,  
Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Feldman

The above captioned proceeding is before me as a result of a petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., (the Act). This case was called for hearing on June 22, 1993, in Washington, Pennsylvania. The parties' stipulations concerning my jurisdiction to hear this matter and the pertinent facts associated with the civil penalty criteria contained in section 110(i) of the Act are of record.

This single citation proceeding concerns Section 104(d)(2) Order No. 3121636, which was issued to the respondent by Inspector Michael G. Kalich, at 10:30 a.m., on June 25, 1992. The subject order was issued for an alleged impermissible accumulation of combustible coal dust in violation of the mandatory health and safety standard contained in section 75.400, 30 C.F.R. 75.400.(Footnote 1) At the hearing, the respondent stipulated to the fact of the occurrence of the violation. (Tr. 7). Therefore, the remaining issues for resolution are whether the

1 Section 75.400 provides as follows:

"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 (emphasis added)."

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violation was properly designated as significant and substantial and whether the violation occurred as a result of the respondent's unwarrantable failure. As noted below, after hearing a significant portion of Inspector Kalich's testimony, I expressed my reservations about the sustainability of the unwarrantable failure allegation. The parties subsequently conferred and reached a settlement in this matter.

The dispositive facts are not in dispute. On June 24, 1992, at approximately 1:15 p.m., Inspector Kalich issued 104(a) Citation No. 3121633 for violation of section 75.400. This citation, which is not a subject of this proceeding, noted excessive accumulations of combustible materials, fine coal, coal dust, lumps of coal and oil in the vicinity of the continuous miner in the one left section at the respondent's Osage No. 3 Mine. Inspector Kalich established a termination deadline for removing the accumulations as 6:00 p.m., on June 24, 1992.

Kalich returned to the respondent's Osage No. 3 Mine the following morning on June 25, 1992. He returned to the one left section where he observed what he believed to be the same accumulations around the continuous miner that he had observed the previous day. (Tr. 39). However, for reasons best explained by Kalich, he issued Order No. 3121636, the subject of this proceeding, as a 104(d)(2) order for new accumulations rather than a 104(b) order for failure to timely abate the accumulations he had observed the previous day that were noted in Citation No. 3121633. In explaining his action in this regard Kalich stated:

I informed Mr. Renner at 10:30 a.m., on the 25th, that I was going to issue a (b) order, a 104(b) order, which is for failure to terminate and which would have been the appropriate piece of paper to issue in this case, since I believed that it was the same accumulations that were on the miner. But during the course of the day and in subsequent discussions with management personnel at the mine---and they basically begged me not to issue a (b) order because it's a lot more serious, you know, Consol takes a (b) order a lot more serious than a (d) order because it's [a] failure of someone, you know, to abate a citation. And they brought forth the afternoon section foreman that was basically going to say that, you know, that they had cleaned it up. So based on, you know, the story that I heard about, that it was cleaned up and that it reoccurred again, I terminated the citation and changed my mind and issued a (d) order on the 25th, instead of the (b) order that I originally told them that I was going to issue. (Tr. 40-41).

. . . I physically did not observe the miner cleaned, so I was basing the termination on the afternoon boss' statement that they had cleaned it up and that the accumulation had reoccurred. And based on that, that's why I changed my mind and issued a (d) order instead of a (b) order that I had originally told them I was going to issue on the 25th at 10:30 in the morning. . . (Tr. 41).

I believe [the accumulations observed on June 24 and June 25] to be the same accumulations. I still believe it was the same accumulations. But based on what the company told me, and you know, they're asking me not to write a (b) order, I issued a (d) order instead. (Tr. 44).

Kalich testified that he terminated both Citation No. 3121633 and Order No. 3121636 at 1:00 p.m., on June 25, 1992. However, he stated that Citation No. 3121633 was actually terminated at 6:00 p.m., on June 24, based on his decision to accept "the foreman's word" that the accumulations had been cleaned. (Tr. 43).

In order to prevail on the issue of unwarrantable failure, the Secretary must establish that the respondent's conduct constituted "aggravated conduct" characterized by conduct that was "not justifiable" or behavior that is "inexcusable". See Rushton Mining Company, 10 FMSHRC 249 (March 1988); Emery Mining Corporation, 9 FMSHRC 1977 (December 1987); Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007 (December 1987). In the case at bar, by issuing a 104(d)(2) order rather than a 104(b) order, Kalich, in effect, elected to credit the respondent with cleaning the accumulations observed on June 24, 1992. Having given the respondent credit for cleaning these accumulations, it cannot be said that the accumulations observed the following morning at the same location are attributable to aggravated conduct on the part of the respondent.

During a bench conference I expressed the above noted concerns and urged the parties to consider a settlement of this case.(Footnote 2) They conferred and informed me that settlement had been reached. A motion for approval of settlement was proffered on the record. The substance of the settlement agreement is that the Secretary has agreed to modify the 104(d)(2) order to a 104(a) citation thus reducing the underlying degree of negligence

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2 During this bench conference, counsel for the Secretary requested that I modify the 104(d)(2) order in issue to a 104(b) order. Counsel's request was denied as such a modification would be prejudicial to the respondent.

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from high to moderately high. As such, the unwarrantable failure designation is removed. The characterization of the violation of Section 75.400 remains as significant and substantial. The respondent has agreed to pay a civil penalty of \$1,300 for the citation in issue. Given the serious gravity associated with the underlying combustible dust accumulation violation and the civil penalty criteria contained in Section 110(i) of the Act, I concluded that the parties' proposed settlement of this matter was appropriate. Consequently, the motion for the approval of settlement was granted on the record. (Tr 63-65).

ORDER

Accordingly, Order No. 3121636 is modified to a 104(a) citation that is properly designated as significant and substantial. The respondent is ORDERED to pay a civil penalty of \$1,300 in satisfaction of the violation in issue. Payment is to be made within 30 days of the date of this Decision, and, upon receipt of payment, this matter is DISMISSED.

Jerold Feldman  
Administrative Law Judge

Distribution:

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