

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

July 3, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2003-43
Petitioner	:	A.C. No. 36-07059-03562
	:	
v.	:	
	:	
CHESTNUT COAL COMPANY,	:	
Respondent	:	No. 10 Slope

DECISION

Appearances: Maureen A. Russo, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner;
 Joseph E. Shingara, Chestnut Coal Company, Sunbury, Pennsylvania, for the Respondent.

Before: Judge Feldman

This proceeding concerns a petition for assessment of civil penalty filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 820(a), by the Secretary of Labor (the Secretary), against the respondent, Chestnut Coal Company (Chestnut). Chestnut is a very small mine operator that is a general partnership consisting of seven brothers in the Shingara family. The petition sought to impose an \$8,000.00 civil penalty for two alleged violations of the mandatory safety standards in 30 C.F.R. Part 75 of the Secretary’s regulations governing underground coal mines, and, for an alleged violation of a 104(d) withdrawal order. All of the alleged violations were characterized as significant and substantial (S&S) in nature. This matter was heard on May 6, 2003, in Harrisburg, Pennsylvania.

The Secretary alleged violations of the provisions of 30 C.F.R. § 75.302 that require operational main mine fans, and 30 C.F.R. 75.360(a)(1) that require a preshift inspection to be performed by a “certified person.” The Secretary contends that these alleged violations occurred on April 10, 2002. The cited violations were attributable to Chestnut’s unwarrantable failure. Consequently, the mine fan violation was the subject of a 104(d)(1) Citation No. 7004326, and the preshift examination violation was the subject of a 104(d)(1) Order No. 7004337. The remaining 104(a) Citation No. 7004340, alleging a violation of the 104(d)(1) withdrawal order, was issued on May 16, 2002, after the Mine Safety and Health Administration (MSHA) determined that Chestnut resumed operations before 104(d)(1) Order No. 7004337 was formally terminated, although its preshift examinations were then being performed by a “certified person.”

At the hearing, Chestnut did not deny that its east section mine fan was not operational on April 10, 2002. With respect to its preshift examinations, a “certified person” is defined in 30 C.F.R. § 75.2 as an individual who has been designated as a certified mine foreman by the State of Pennsylvania. Although, several of the Shingara brothers who were performing the preshift inspections were not state certified on April 10, 2002, the Secretary concedes they were qualified, by virtue of their numerous years of mining experience, to be state certified mine foremen. In fact, at the hearing it was evident that these brothers now possess their state certification.

At the culmination of the hearing, I provided the opportunity for the parties to file post-hearing briefs. At that time, I identified the weaknesses in the parties’ cases that should be addressed. For example, I noted that although the preshift requirements of section 75.360(a)(1) apparently were not satisfied because none of the Shingara brothers had been certified, there was no evidence that preshift examinations had not been performed, or, that such examinations were inadequate given the Shingara brothers’ longstanding mining experience. Thus, I questioned the unwarrantability of the section 75.360(a)(1) violation. With respect to 104(a) Citation No. 7004340 alleging a violation of the 104(d)(1) order, assuming the 104(d)(1) order was affirmed, I expressed doubt regarding whether Chestnut had “fair notice” that it could not resume mining even though its preshift examinations after April 10, 2002, were conducted by a “certified person.” See *Energy West Mining Co.*, 17 FMSHRC 1313, 1317-18 (August 1995).

On June 27, 2003, the Secretary filed a Motion for Decision and Order Approving Settlement. A reduction in the total civil penalty from \$8,000.00 to \$500.00 is proposed. Although the unwarrantable designation for the mine fan violation remains, the Secretary has agreed to reduce the proposed penalty for 104(d)(1) Citation No. 7004326 from \$1,000.00 to \$350.00 because of a reduction in gravity. The gravity reduction is based on the fact that normal mining operations had been suspended on April 10, 2002, when MSHA observed that the main mine fan was not operational. The Secretary also has agreed to modify the 104(d)(1) Order No. 7004337 to a 104(a) citation to reflect that Chestnut’s preshift examinations were not a reflection of unwarrantable conduct since several Shingara brothers had the requisite qualifications to be “certified persons.” Consequently, the Secretary has agreed to a reduction in civil penalty from \$1,500.00 to \$150.00 for this preshift examination citation. Finally, in light of the modification of the 104(d)(1) Order No. 7004337 to a 104(a) citation, the Secretary has agreed to vacate 104(a) Citation No. 7004340 that alleged a violation of a 104(d) withdrawal order.

I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(I) of the Act. **WHEREFORE**, the motion for approval of settlement **IS GRANTED**, and **IT IS ORDERED** that Chestnut Coal Company pay a total civil penalty of \$500.00 in satisfaction of the citations in issue **within 30 days of this decision**, and, upon receipt of timely payment, this case **IS DISMISSED**.

Jerold Feldman
Administrative Law Judge

Distribution: (Certified Mail)

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