# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 22, 1995

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE AND SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDINGS<br><br>Docket No. WEVA 94-216<br>A.C. No. 46-01453-04117 |
| v. | : | |
| | : | Docket No. WEVA 94-328<br>A.C. No. 46-01453-04128 |
| CONSOLIDATION COAL COMPANY, Respondent | : | Humphrey No. 7 Mine |

**DECISION**

Appearances: Elizabeth Lopes, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for the Petitioner;
Elizabeth S. Chamberlin, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Feldman

These proceedings concern petitions for assessment of civil penalties filed by the Secretary of Labor against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. ' 820(a). Docket No. WEVA 94-216 involves a proposed civil penalty of $2596 for two 104(a) citations that were designated as significant and substantial. With respect to Docket No. WEVA 94-328, the Secretary has proposed a civil penalty of $21,500 for a 104(d)(1) citation and two 104(d)(1) orders allegedly attributable to the respondent's unwarrantable failure. Thus, the total proposed civil penalties in these matters is $24,096. As noted below, the parties have agreed to settle these proceedings for a total civil penalty of $11,445.

These matters were heard on May 11 and May 12, 1995, in Washington, Pennsylvania. At the commencement of the hearing, the parties informed me that they had settled the two citations in Docket No. WEVA 94-216 and 104(d)(1) Citation No. 3305270 in Docket No. WEVA 94-328.

Docket No. WEVA 94-216

The settlement motion presented on the record reflects that Citation No. 3304293 was issued on January 24, 1994, for a violation of the mandatory safety standard in section 75.333(b)(4), 30 C.F.R. ' 75.333(b)(4), This standard requires separation of the primary escapeway from the belt and trolley haulage entries. The citation was issued because of alleged defective permanent stoppings between the primary escapeway and the trolley haulage entry. The settlement terms include deletion of the significant and substantial designation from this citation because it was unlikely that smoke contamination would occur in the primary escapeway in the event of a fire given the conditions observed by the issuing MSHA inspector. Thus, the parties agreed to a reduction in the proposed penalty from $1,298 to $507.

Citation No. 3304294 was issued on January 24, 1994, for an alleged inadequate preshift examination in violation of section 75.360(a), 30 C.F.R. ' 75.360(a). The parties agreed to a reduction in civil penalty from $1,298 to $794 due to a reduction in the gravity associated with this violation. Consequently, the parties seek to reduce the total proposed civil penalty in Docket No. WEVA 94-216 from $2,596 to $1,301.

Docket No. WEVA 94-328

At the beginning of the hearing the parties informed me that the respondent has agreed to pay the $6,000 proposed penalty for 104(d)(1) Citation No. 3305270. 104(d)(1) Order Nos. 3305280 and 3305605 were issued between 10:30 a.m. and 12:30 p.m. on January 10, 1994, for violation of section 75.370(a)(1), 30 C.F.R. ' 75.370(a)(1), as a result of the respondent's alleged failure to follow its approved ventilation plan, and, for alleged impermissible accumulations of coal dust in violation of section 75.400, 30 C.F.R. ' 75.400. Both citations were issued shortly after the respondent had noted these violative conditions in its preshift examination book sometime before 7:00 a.m. on the morning of January 10, 1994.

After the presentation of the Secretary's direct case with respect to Order No. 3305605, I expressed concern regarding the issue of unwarrantable failure in situations where Mine Safety and Health Administration (MSHA) inspectors observe violative conditions during the shift immediately following the notation of such conditions by the preshift examiner. Obviously, an operator is subject to a citation if a mine inspector observes a violation shortly after the condition is noted by the preshift examiner. However, in such circumstances, an operator must be afforded a reasonable period of time to correct conditions observed during

the preshift examination before the failure to take remedial action can be construed as the requisite "inexcusable" or "unjustifiable" conduct necessary to sustain an unwarrantable failure charge. See Emery Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007, 2010 (December 1987).

For example, in the instant case, the respondent commenced cleanup of the coal dust accumulations at approximately 10:30 a.m. after notations made in the preshift examination book at approximately 7:00 a.m. The testimony did not establish the cleanup was motivated by the presence of the MSHA inspector on mine property. Moreover, there was no evidence that these accumulations had been ignored in that the preshift report reflected the area had been rock dusted on Friday, January 7, 1994, the preceding production shift prior to the pertinent Monday, January 10, 1994, preshift examination.

In addition, the thrust of the Mine Act's 104(d) unwarrantable failure provisions is to discourage repetition of an operator's high negligence by placing the operator on a probationary chain buttressed by the threat of a withdrawal order. Greenwich Collieries, 12 FMSHRC 940, 945 (May 1990). Thus, the withdrawal of miners pursuant to a 104(d) order is a consequence of the operator's repeated high degree of negligence rather than the existence of an extremely hazardous condition. In fact, operators responsible for violations cited in 104(d) orders would normally be permitted a reasonable abatement period without the necessity to withdraw or otherwise cease mining operations if the violative condition was cited under section 104(a) of the Act. Thus, 104(d) withdrawals must be distinguished from withdrawal orders under the imminent danger provisions of section 107(a) of the Act that relate to extremely hazardous conditions.

In this case, the absence of malfunctioning rollers, inoperable dust suppression water sprays, hot embers, or, an identifiable source of ignition in close proximity to the cited accumulations, are mitigating circumstances that do not add up to reckless continued mining operations in the face of an extreme danger. MSHA's use of the 104(d) withdrawal of personnel as evidence of a dangerous condition indicative of high negligence is the functional equivalent of the tail wagging the dog as a 104(d) withdrawal, alone, is not evidence of exigent circumstances warranting the immediate withdrawal of miners. Neither is the 2 1/2 hour delay in attempting to remove the accumulations necessarily indicative of aggravated conduct on the part of the respondent.

Upon expressing concerns regarding the applicability of the unwarrantable failure findings in this case, the parties were invited to confer for the purposes of settlement during a brief recess. Upon reconvening, the parties advised that they had reached an agreement on the remaining two orders. The parties agreed to retain the significant and substantial designations for the cited violations. However, the parties agreed to modify Order Nos. 3305280 and 3305605 to 104(a) citations thus removing the unwarrantable failure charges. Consequently, the parties seek to reduce the civil penalty from $6,500 to $2,072 for each of these modified citations.

## ORDER

This decision formalizes the approval of the parties' settlement motion with respect to all of the matters in issue. The motion was approved because the settlement terms are consistent with the civil penalty criteria contained in section 110(i) of the Act, 30 U.S.C. ' 820(i). Accordingly, **IT IS ORDERED** that the respondent, Consolidation Coal Company, pay a total civil penalty of $11,445 comprised of a civil penalty of $1,301 in Docket No. WEVA 94-216 and $10,144 in Docket No. WEVA 94-328. Payment shall be made to the Mine Safety and Health Administration within 30 days of the date of this decision. Upon timely receipt of payment, these docket proceedings **ARE DISMISSED**.

Jerold Feldman
Administrative Law Judge

Distribution:

Elizabeth S. Lopes, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Elizabeth S. Chamberlin, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241-1421 (Certified Mail)

```
/rb
```