

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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July 28, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 98-109
Petitioner	:	A. C. No. 46-01318-04347
v.	:	
	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	Robinson Run No. 95 Mine

DECISION

Appearances: Melonie J. McCall, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, on behalf of Petitioner;
 Elizabeth S. Chamberlin, Esq., Consol Inc., Pittsburgh, Pennsylvania, on behalf of Respondent.

Before: Judge Melick

This case is before me upon a petition for civil penalty filed by the Secretary of Labor against the Consolidation Coal Company (Consol) pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.*, the "Act" alleging three violations of mandatory standards and seeking a civil penalty of \$4,350.00 for those violations. The general issue before me is whether Consol committed the violations as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

At hearing the parties agreed to settle Citations No. 3322514 and 3495715 by reducing the civil penalty to \$1,588.00. The proposed settlement was supplemented post-hearing and is acceptable under the criteria set forth in Section 110(i) of the Act. An order directing payment of the agreed penalty will be incorporated in this decision.

The citation remaining at issue, No. 3322516, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 360(a)(1) and charges as follows:

An adequate preshift examination was not conducted on the Nos. 13 and 14 belt conveyers, in that two violations were issued on loose coal and float coal dust on these two belt conveyors. These conditions were very obvious and should have been reported or corrected. Citations No. 3322514 and 3322515 were issued for the loose coal and float coal dust. The mine examiner shall be instructed on the proper way to preshift the belt conveyors.

The cited standard, 30 C.F.R. § 75.360(a)(1), provides as follows:

Except as provided in paragraph (a)(2) of this section, a certified person designated by the operator shall make a preshift examination within 3 hours preceding the beginning of any shift during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the shift.

Inspector Walter Daniel of the Department of Labor's Mine Safety and Health Administration (MSHA) cited the underlying violative accumulations at the Robinson Run No. 95 Mine on April 14, 1998. The citations corresponding to those violations and the conditions cited therein are not disputed (Gov't Exhs. No. 2 and 3). The first of these underlying citations, No. 3322514, was issued at 6:10 p.m., on April 14, 1998 and alleges as follows:

Loose coal and rock was allowed to accumulate under and in contact with the bottom belt under the tail piece in the 13D (O81) Section. Float coal dust had accumulated on the tail piece and structure of the tail piece. This was in an area of approximately 20 feet in length and 10 feet wide. The company's clean up plan was not being followed on this section.

The second citation, No. 3322515, was issued at 7:45 p.m., on the same date and alleges as follows:

Loose coal was allowed to accumulate under, around and in contact with the bottom belt and bottom belt rollers at the 5 north No. 3 belt drive. The loose coal was in an area of approximately 45 feet in length, and 10 feet wide. The loose coal ranged from 1 inch to 12 inches in depth. The company's clean up plan was not being followed on this belt line.

It is not disputed that the failure to report hazardous conditions in the preshift examination report may constitute a violation of the cited standard. While acknowledging that the violative conditions existed at the time they were cited, i.e., at 6:10 p.m. at the 5 North No. 3 belt drive and at 7:45 p.m., near the 9D belt transfer and box check, Consol maintains that these violative conditions did not exist at the time of the preshift examination for the corresponding shift. In this regard, it is significant that the issuing inspector candidly acknowledged at hearing that he did not know how long the coal accumulations he cited at 6:10 p.m. and at 7:45 p.m. had been present nor how bad the conditions were when the preshift examiner conducted his examination.

The only direct evidence of conditions extant at the time of the relevant preshift examination is the first-hand observation of the examiner himself, Ray Oldaker. Oldaker has significant mining experience and has worked at the Robinson Run Mine for 27 years. On April 14, 1998, he was foreman in charge of all the mine's belts. He has been performing preshift examinations since 1975 and has never been charged with performing an inadequate examination. Oldaker's reputation as an extremely conscientious mine examiner is also

unchallenged. His reports of preshift examinations also appear to be clear, detailed and meticulous (See Oldaker's reports in Resp.'s Exh. No. 2). In particular, his report of the preshift examination at issue in this case conducted between 1:00 p.m. and 3:30 p.m., on April 19, 1998, cites a number of hazardous conditions including apparent accumulations in areas other than those subsequently cited by Inspector Daniel in this case. These factors serve to underscore Oldaker's credibility.

Oldaker began the preshift examination for the oncoming shift on April 14, 1998, at 1:30 p.m. At the transfer point at the 100 crosscut, he stopped to talk with belt cleaner Jody Dodd. Dodd had then finished cleaning this area which was the same area as cited in Citation No. 3322514 and referenced by inspector Daniel in the citation at bar. (See Gov't Exh. No. 2). Oldaker testified credibly that the area was then clean. There was no accumulation of coal spillage or coal dust. As he proceeded with his examination he found an area of unrelated coal spillage. He reported this in the preshift examiner's report as located between the No. 87 and No. 92 blocks (See Resp.'s Exh. No. 2).

Oldaker testified that he then proceeded to the box check at the 9D location where he saw no hazardous conditions. He did observe at that time, however, two garbage bags containing used rock dust bags nearby. The practice at the mine was to fill the garbage bags with the rock dust bags before removing them from the mine. He did not report these two bags as he did not find them to be hazardous. The Secretary likewise does not consider these bags to have been hazardous. Oldaker saw no rollers in coal spillage nor rock dust bags in contact with rollers at this location. The rollers at that location also are situated three feet off the floor. I find Oldaker's testimony credible and conclude that, indeed, the hazardous conditions found and later cited by Inspector Daniel were not present at the time of Oldaker's pre-shift exam.

As Consol notes the most likely source of the cited accumulations was the coal spill at the 5 North, No. 3 belt drive which occurred at about 2:30 p.m. - - well after Oldaker's examination of the area. In addition, the area of the accumulation at the 9D box check was an area of high turbulence where float coal dust, fine coal and rock dust bags were continually blown off of the belt. Finally, it is undisputed that coal had been transported from four continuous miner sections and a longwall section by the conveyor belt through this area between the time of the preshift exam and the inspector's observations. I find that, indeed, these factors most likely account for the buildup of accumulations after the preshift exam.

Under all the circumstances, I find that the conditions cited by Inspector Daniel at 6:10 p.m. and at 7:45 p.m. on April 14, 1998, did not exist at the time of Oldaker's preshift examination. Citation No. 3322516 must accordingly be vacated. In reaching this conclusion I have not disregarded the testimony of union walkaround Joseph Spadafore. Spadafore accompanied Inspector Daniel during the subject inspection. While recognizing his long underground mining experience, his conclusion that it had taken several days or eight or nine shifts for the cited coal dust, etc. to accumulate, is without adequate foundation. Indeed, his conclusion appears to be based on nothing more than conjecture and speculation and therefore is entitled to but little weight.

ORDER

Citation Nos. 3395715 and 3322516 are affirmed as modified and Consolidation Coal Company Inc. is directed to pay civil penalties of \$794.00 for each of the violations charged therein within 40 days of the date of this decision. Citation No. 3322516 is hereby vacated.

Gary Melick
Administrative Law Judge

Distribution: (Certified Mail)

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