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PONTIKI COAL V. MSHA  
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION  
WASHINGTON, D.C.  
October 25, 1979

PONTIKI COAL CORPORATION

v. Docket No. PIKE 78-420-P

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),

DECISION

This penalty proceeding arises under section 109(a) of the Federal Coal Mine Health and Safety Act of 1969. 30 U.S.C. §801 et seq (1969) (amended 1977).

The Secretary seeks penalties for violations alleged in three orders of withdrawal issued under section 104(c)(2) of the Act. 1/ The company did not seek review of the orders. At the hearing the Secretary offered evidence as to the existence of the violations and as to the statutory criteria to be considered when determining the amount of the civil penalties. The Secretary did not offer evidence as to the underlying section 104(c)(1) notice and order which served as a foundation for the three section 104(c)(2) orders. The judge found the violations occurred as alleged. However, due to the Secretary's failure to present evidence regarding the underlying notice and order, he vacated the three section 104(c)(2) orders. Because the orders were vacated he mitigated the penalties for the violations set forth in the orders.

We granted petitions for discretionary review filed by both parties. Two issues are before us: whether a violation of 30 CFR 75.200 occurred, 2/ and whether the validity of an order of withdrawal is properly at issue in a civil penalty proceeding.

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1/ Section 104(c)(2) of the Act provided, in relevant part:

"If a withdrawal order with respect to any area in a mine has been issued pursuant to paragraph (1) of this subsection, a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) of this subsection. ..."

2/ Review was not sought for the judge's finding that the two other violations existed.

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As to the first issue, the company's approved roof control plan allowed a maximum width of 20 feet for entries and crosscuts. 3/ The inspector testified that he measured widths exceeding 23 feet at six entries and one crosscut, with, as the judge found, "the longest measure averag[ing] 24 feet 9 inches." The company urges us to overturn the judge's finding of a violation because the measurements of the inspector were faulty. It argues that some of the inspector's measurements included the depth of undercuts which existed at the bottom of the ribs. 4/ The company asserts that entry and crosscut widths should be measured exclusive of such undercuts. The judge accepted the testimony of the company's assistant superintendent that the depths of the undercuts were 6 to 12 inches. If we assumed arguendo that the undercuts should be excluded, any measurement over 22 feet, (excluding two maximum undercuts of 12 inches each), would be in violation of the 20 foot width allowed by the approved plan. Thus, at least some of the widths exceeded those allowed in the approved plan even if undercuts are excluded. There is, therefore, substantial evidence to support the judge's finding that a violation of 30 CFR 75.200 occurred, and we affirm it. 5/

Next, we turn to the question of whether the validity of a withdrawal order may be at issue in a civil penalty proceeding. We decided this question in *Wolf Creek Collieries Company, PIKE 78-70-P* (March 26, 1979), where we concluded it was error to vacate a withdrawal order in a penalty proceeding. We therefore reverse the judge with respect to his vacation of the three withdrawal orders.

Accordingly, the finding of a violation of 30 CFR 75.200 as set forth in order No. 7-0106, 2 FDG, 12/06/77 is affirmed. The vacation of order Nos. 7-0106, 2 FDG, 12/06/77; 7-0081, 1 TE, 12/05/77; and 7-0088, 1 MM, 12/05/77, is reversed and the orders are reinstated. The case is

3/ 30 CFR 75.200 provides, in pertinent part:

A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted. ...

4/ The company used a conventional mining system. As its cutting machine moved across the face, the cutting bar at times protruded too far to the left or right and thus undercut the ribs.

5/ Because certain widths exceeded the maximum width permitted by the roof control plan in any event, we need not reach the company's argument that undercuts should not be included in measuring entry

and crosscut widths.

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remanded for reassessment of penalties for the violations contained in the reinstated orders without consideration of the vacated orders as a mitigating factor. 6/

6/ Because the trial judge retired on July 30, 1979, remand is directed to the Chief Administrative Law Judge so that the case may be reassigned.