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KANAWHA COAL V. SOL (MSHA)  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

KANAWHA COAL COMPANY,  
CONTESTANT

v.

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

CONTEST PROCEEDING

Docket No. WEVA 86-96-R  
Order No. 2581293; 12/19/85

Madison No. 2 Mine

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

v.

KANAWHA COAL COMPANY,  
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEVA 86-256  
A.C. No. 46-02844-03562

Madison No. 2 Mine

DECISION

Appearances: Edward N. Hall, Esq., Robinson & McElwee, Lexington, Kentucky, for Contestant/Respondent Kanawha Coal Company (Kanawha); Jonathan M. Kronheim, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for Respondent/Petitioner Secretary of Labor (Secretary).

Before: Judge Broderick

STATEMENT OF THE CASE

Kanawha filed a Notice of Contest challenging the withdrawal order issued on December 19, 1985 under section 104(d)(2) of the Federal Mine Safety and Health Act of 1977 (the Act). The Secretary subsequently filed a Petition for the assessment of a civil penalty for the violation of a mandatory safety standard charged in the contested order. The two cases were consolidated for the purposes of hearing and decision. Following pretrial discovery, the consolidated cases were heard pursuant to notice in Charleston, West Virginia on September 11, 1986. Dennis Cooke and Edward White testified on behalf of the Secretary. Troy

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Morris, David Sprouse, Robert Dotson, Ricky Spurlock, Virgil Martin, and Roy Purdue testified on behalf of Kanawha. Both parties have submitted post hearing briefs. Based on the entire record, and considering the contentions of the parties, I make the following decision.

#### ISSUE

The issue in this case is primarily a factual one: whether a miner proceeded under unsupported roof in the subject mine on December 18, 1985. (FOOTNOTE 1) If he did, a violation is established, and the further issues whether the violation was significant and substantial, and whether it resulted from Respondent's unwarrantable failure to comply with the standard arise. Respondent has also raised the issue whether a "clean inspection" took place between the time the underlying (d)(1) citation was issued (March 29, 1984) and the date of the order contested herein. Finally, if a violation is established, an appropriate penalty must be assessed.

#### FINDINGS OF FACT

##### PRELIMINARY FINDINGS

Kanawha was the owner and operator of an underground coal mine in Boone County, West Virginia, known as the Madison No. 2 Mine. Kanawha produced 1,303,284 tons of coal in 1985; the subject mine produced 335,542 tons. In the 24 months prior to the contested order, there were 293 paid violations cited at the subject mine, including 39 violations of 30 C.F.R. 75.200. This is a moderately serious history of prior violations considering the size of the mine.

The coal seam in the area of the mine involved in this case was approximately 40 inches high. The roof was hard sandrock and was considered "good top."

A citation was issued on March 29, 1984 under section 104(d)(1) of the Act for failure to guard a tail pulley. A

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withdrawal order was issued the same day under 104(d)(1) for an accumulation of loose coal. Government's Exhibit 4 establishes prima facie that a clean inspection was not conducted at the mine between the date of the above citation and order and the date of the order contested herein. Kanawha did not submit any evidence to refute the prima facie case.

#### THE CONTESTED ORDER

On December 19, 1985, Federal Mine Inspector Cooke came to the subject mine at approximately 7:15 a.m. to perform a regular inspection. He went into the mine with the day shift mantrip and proceeded to the 3 left section. He observed that the crosscut between entries one and two had been mined through and was partially roof bolted. Inspector Cooke measured the distance from the next to the last row of roof bolts in the crosscut inby the No. 2 entry to the deepest penetration of the continuous miner in the crosscut left off the No. 2 entry. He found the distance to be 23 feet 4 inches. He then measured the distance from the cutting bits of the miner to the controls, and found this to be 20 feet 3 inches. He therefore concluded that the continuous miner on the previous shift had proceeded 3 feet 1 inch under unsupported roof. Inspector Cooke testified that the row of bolts inby the row (toward entry No. 1) from which he measured was not used because he concluded that it had been installed after the crosscut was mined through. He based this conclusion on the fact that the bolts and cover plates had an oily film present and had no coal dust deposits on them.

Inspector Cooke then issued a 104(d)(2) withdrawal order on December 19, 1985 at 10:00 a.m. for an alleged unwarrantable failure to comply with the roof control safety standard. He made the unwarrantable failure findings because he concluded that the section foreman should have been in the area while the crosscut left off the No. 2 entry has been mined, and should have prevented the miner from proceeding under unsupported roof.

The order was terminated on December 19, 1985 at 10:00 p.m. when the roof control plan was fully explained to all employees on the working section by the company Safety Director.

The section foreman, the continuous miner operator, and the roof bolter who worked the evening shift on December 18, 1985, all testified on behalf of Kanawha. No mining was performed on the subsequent midnight shift. Their testimony was consistent and tends to establish the following sequence of mining. The miner had begun cutting during the day shift in the crosscut right from entry No. 1. The evening shift completed the cut and backed the miner out of the crosscut back down the No. 1 entry to

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the outby crosscut to the No. 2 entry then back up No. 2 to the crosscut where it began mining in the crosscut right between entries 2 and 3. The miner pushed through the crosscut. In the meantime, roof bolts were installed in the crosscut right between entries 1 and 2 where the cut had been made. When this was completed, the roof bolter was turned around, and its cable was damaged leaving the bolter inoperative in the No. 1 entry. The scoop was also broken down in the No. 1 entry. For these reasons, it was decided to begin to cut the crosscut left from the No. 2 to the No. 1 entry. However, the miner was unable to push through the crosscut without another row of bolts. The miner backed into the crosscut between entries 2 and 3. The roof bolting machine was repaired and installed an additional row of bolts in the crosscut left off No. 2 entry. It backed out and the miner finished cutting the crosscut. This occurred at the end of the shift. No further bolting was done in the crosscut during the evening shift, and no bolts were installed prior to the inspector arriving during the day shift. I have no reason to disbelieve the eyewitness testimony as to what happened on the evening shift of December 18, 1985, and, therefore, I accept it as factual. The absence of dust on the bolts and cover plates is not sufficient to establish that the bolts were not installed prior to the push through. The distance between the last row of bolts installed in the crosscut right off No. 1 and the last row installed in crosscut left off No. 2 was 19 feet 3 inches. I therefore find as a fact that the continuous miner did not proceed under unsupported roof in the crosscut between entries 2 and 1 on December 18, 1985.

The Secretary argues that a violation occurred because the last bolt in the disputed row of bolts was 6 feet from the rib. This was not charged in the order and not raised until the hearing. In any event, I accept the testimony of the members of the crew on December 18 that a complete row of bolts (5) was installed in the crosscut.

#### CONCLUSIONS OF LAW

Kanawha was subject to the Act in the operation of the Madison No. 2 Mine, and I have jurisdiction over the parties and subject matter of this proceeding.

The evidence does not establish that Kanawha was in violation of 30 C.F.R. 75.200 as charged in the order. Therefore, the order was issued in error, and no penalty can be assessed.

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ORDER

Based on the above findings of fact and conclusions of law,  
IT IS ORDERED:

1. Kanawha's contest of order of withdrawal 2581293 is  
GRANTED.

2. Order 2581293 is VACATED.

3. The Secretary's Petition for the Assessment of a civil  
penalty is DISMISSED.

James A. Broderick  
Administrative Law Judge

FOOTNOTE START HERE-

1 Respondent did not raise the issue whether it was proper to issue an order under section 104(d)(2) of the Act for an alleged violative condition that had been terminated prior to the inspection .. See Emery Mining Co., 7 FMSHRC 1908 (1985); Nacco Mining Company, 8 FMSHRC 59 (1986), review pending; Emerald Mines Corp., 8 FMSHRC 324, review pending; White County Coal Corp., 8 FMSHRC 921 (1986), review pending; Greenwich Collieries, 8 FMSHRC 1105 (1986), review pending. Since the issue was not raised or briefed, I do not decide it here.