

CCASE:
SOL (MSHA) v. CONSOLIDATION COAL
DDATE:
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TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, Virginia 22041

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

CIVIL PENALTY PROCEEDINGS
Docket No. WEVA 91-49
A. C. No. 46-01867-03866

v.

CONSOLIDATION COAL COMPANY,
RESPONDENT

Docket No. WEVA 91-50
A. C. No. 46-01867-03867

Docket No. WEVA 91-62
A. C. No. 46-01867-03869

Blacksville No. 1 Mine

Docket No. WEVA 91-3
A. C. No. 46-01968-03881

Docket No. WEVA 91-51
A. C. No. 46-01968-03885

Blacksville No. 2 Mine

DECISION

Appearances: Page H. Jackson, Esq., Office of the Solicitor,
U. S. Department of Labor, Arlington, Virginia,
for the Secretary of Labor, (Secretary);
Walter J. Scheller III, Esq., Pittsburgh,
Pennsylvania, for Consolidation Coal Company
(Consol).

Before: Judge Broderick

STATEMENT OF THE CASE

Pursuant to notice, the above cases were called for hearing in Morgantown, West Virginia, on April 17, 1991. Counsel for the Secretary made an oral motion on the record to approve settlements of the violations charged in Docket Nos. PENN 91-3, 91-49, 91-51, and 91-62. He also moved to approve settlements in three of the four citations included in Docket No. PENN 91-50. The remaining 104(d)(2) Order in PENN 91-50 was heard on the merits. Dale R. Dinning and Raymond L. Ash testified on behalf of the Secretary. John M. Morrison and John M. Weber testified on behalf of Consol. Both parties filed post hearing briefs with respect to the contested order.

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PROPOSED SETTLEMENTS

Docket No. WEVA 91-3 includes two 104(a) citations, one alleging a violation of 30 C.F.R. 75.1725(a), the other a violation of 30 C.F.R. 75.303(a). They were assessed at \$292 and \$227 respectively, and Consol agrees to pay the assessed amount. I have considered the motion in light of the criteria in Section 110(i) of the Act, and conclude that it should be approved.

Docket No. WEVA 91-49 includes four citations, two of which charge violations of 30 C.F.R. 75.303(a). The Secretary moves to vacate one of these, Citation No. 3314125 on the ground that the area covered by the citation overlaps with that covered by Citation No. 3314130. With respect to remaining three citations, Consol agrees to pay the assessed amounts, \$434 for Citation No. 3314124, \$434 for Citation No. 3314129, and \$276 for Citation No. 3314130. I have considered the motion in the light of the criteria in Section 110(i) of the Act, and conclude that it should be approved.

Docket No. WEVA 91-50. With respect to three of the four citations in the docket, the Secretary moves to approve settlements in which Consol will pay the assessed amounts, \$355 for Citation No. 3314121, \$355 for Citation No. 3314122 and \$276 for Citation No. 3314123. I have considered the motion in light of the criteria in Section 110(i) of the Act, and conclude that it should be approved.

Docket No. WEVA 91-51. This docket contains a single violation of 30 C.F.R. 75.1003(c) charged in a 104(a) citation. It was originally assessed at \$292. The violation involved an unguarded trolley wire at a mantrip station. The motion proposes that the citation be modified to a nonsignificant and substantial one and the penalty be reduced to \$176. The portal buses used at the mine have a covered top and are insulated with rubber. The only practical way in and out of the mantrip is from the wide side of the track away from the wire. I have considered that motion in the light of the criteria in Section 110(i) of the Act, and conclude that it should be approved.

WEVA 91-62. This docket contains a single violation of 30 C.F.R. 75.303(a) alleged in a citation charging an inadequate preshift examination. The motion proposes that Consol will pay the assessed amount of \$276. I have considered the motion in the light of the criteria in Section 110(i) of the Act, and conclude that it should be approved.

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FINDINGS OF FACT with respect to Order No. 2708208.

1. Consol was at all pertinent times the owner and operator of an underground coal mine in Monongalia County, West Virginia, known as the Blacksville No. 1 Mine.

2. The imposition of civil penalties in this proceeding would not affect Consol's ability to continue in business.

3. Consol is a large operator.

4. Between July 31, 1988 and July 30, 1990, there were 686 paid violations of mandatory standards at the subject mine (this history, of course, extends beyond the date of the violation involved in this proceeding). Included in this number are 32 violations of 30 C.F.R. 75.202 prior to the violation contested here. This history is average for a mine of this size. It is not such that a penalty should be increased because of it.

5. The violation involved in this proceeding was promptly abated in good faith.

6. The subject mine has a history of roof falls; it has the worst roof conditions of any mine in the Morgantown, West Virginia area.

7. The subject mine liberates approximately 3 million cubic feet of methane in a 24 hour period.

8. A roof fall occurred in the 4 South Left Return entry prior to March 1, 1990. The roof was 12 feet to 14 feet high and the fall caused a cavity 20 feet long, 14 feet wide, and about 6 feet high. The area was "dangered off" with a rope and a danger sign on both sides of the fall.

9. In early March 1990, the 4 South belt regulator was moved to the 4 South Left return aircourse. The air passed through the regulator and crossed an overcast to the return entry. Consol explained that it moved the regulator because of the large number of citations for float coal dust on the regulator at its former location.

10. The air velocity in the area of the roof fall was approximately 50,000 cubic feet per minute.

11. The entry was about 16 feet wide. The distance between the danger signs was between 70 and 80 feet.

12. There is no evidence that any miners travelled past the danger sign on either side of the roof fall. Consol's evidence establishes that it is highly unlikely that a Consol miner would travel into a dangered-off area.

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13. The mine weekly examination record indicates that an examiner had been in the vicinity of the 4 South belt regulator on April 25, 1990. There is no evidence that the examiner traveled past the danger sign.

14. Methane is lighter than air and tends to migrate to the higher places in a mine, and specifically to roof fall cavities.

15. MSHA Program Policy Manual relating to 30 C.F.R. 75.305, issued 7-1-88 (GX 3), requires weekly examinations of air courses. It provides that modification of this requirement where a roof fall has occurred, or where an area is unsafe for travel can be achieved only by a petition for modification under Section 101(c) of the Act. It does not specifically require that the air course be traveled in its entirety, contrary to MSHA's argument in this case.

16. Federal Mine Inspector Dinning issued a 104(d)(2) Order on April 30, 1990, charging a violation of 30 C.F.R. 75.202(a). The order found that additional roof support was needed at the No. 16 crosscut where the 4 South belt regulator crosses over the equalizing overcast to the 4 South Left return. The roof fall exposed the roof bolts so that they were hanging 3 to 4 feet from the roof. The order found that the area could not be traveled safely.

17. The order originally found that the violation was significant and substantial and was reasonably likely to cause an injury. The MSHA conference officer modified the order deleting the significant and substantial finding and indicating that an injury was unlikely to result.

18. Because of the height of the roof fall cavity and its distance from the danger signs it was not possible to adequately examine the area in question for the presence of methane on April 25, 1990.

19. Because of the distance of the roof fall from the danger signs, and the necessity of examining the edges of the roof fall for further deterioration by a sound and vibration test, it was not possible to adequately examine the roof conditions of the area in question on April 25, 1990.

DISCUSSION

My findings of fact 18 and 19 are based largely on the testimony of Raymond Ash, supervisor coal mine health and safety inspector. The contrary testimony of Consol Safety Supervisor John Morrison and John Weber, I find less persuasive. Morrison admitted that he "could not see the entire top of this cavity" (Tr. 58). I do not accept Weber's conclusion that a methane check of the cavity could be performed with a probe.

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Despite the presence of cribs, further deterioration of the roof could occur and not be visible to an examiner standing at either of the danger signs. Whether such further deterioration took place could only be adequately determined by a sound and vibration test.

20. Should a further roof fall occur, it could damage an overcast and disrupt the mine ventilation.

21. The violation was abated and the order terminated on April 3, 1990, on the grounds that the 4 South belt regulator was removed from the No. 16 crosscut, and therefore the area of bad roof would not have to be traveled through by a mine examiner.

REGULATIONS

30 C.F.R. 75.202(a) provides:

(a) The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock burst.

30 C.F.R. 75.305 provides:

In addition to the preshift and daily examinations required by this Subpart D, examinations for hazardous conditions, including tests for methane, and for compliance with the mandatory health or safety standards, shall be made at least once each week by a certified person designated by the operator in the return of each split of air where it enters the main return, on pillar falls, at seals, in the main return, at least one entry of each intake and return aircourse in its entirety, idle workings, and insofar as safety considerations permit, abandoned areas. Such weekly examinations need not be made during any week in which the mine is idle for the entire week, except that such examination shall be made before any other miner returns to the mine. The person making such examinations and tests shall place his initials and the date and time at the places examined, and if any hazardous condition is found, such condition shall be reported to the operator promptly. Any hazardous condition shall be corrected immediately. If such condition creates an imminent danger, the operator shall withdraw all persons from the area affected by such condition to a safe area, except those persons referred to in section 104(d) of the Act, until such danger is abated. A record of these examinations, tests, and actions taken shall be recorded in ink or indelible pencil in a book approved by the Secretary kept for such purpose in

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an area on the surface of the mine chosen by the mine operator to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons.

ISSUES

1. Whether the area cited was one where persons work or travel?

2. If a violation of 30 C.F.R. 75.202 is established, whether it resulted from Consol's unwarrantable failure to comply with the standard?

3. If a violation of 30 C.F.R. 75.202 is established, what is the appropriate penalty therefor?

CONCLUSIONS OF LAW

1. Consol is subject to the provisions of the Mine Act in the operation of the Blacksville No. 1 Mine, and I have jurisdiction over parties and subject matter of this proceeding.

2. In the case of Cypress Empire, 12 FMSHRC 911 (1990), the Commission implied that the phrase in 75.202(a), "where persons work or travel" includes not only areas where persons actually work or travel, but also areas where persons are required to travel. 12 FMSHRC 917.

3. 30 C.F.R. 75.305 provides that return aircourses must be examined in their entirety at least once each week. Findings of Fact 18 and 19 establish that such examinations in the subject maine would require the examiners to travel under unsupported roof to adequately examine the area for hazardous conditions.

4. Therefore, since persons are required to travel the cited area, a violation of 30 C.F.R. 75.202(a) is shown, even though there is no evidence that in fact anyone did travel the area after the danger signs were in place.

5. Because there is no evidence that persons did travel the area, and because the evidence shows that it was highly unlikely that anyone would travel the area, the violation (of 75.202(a); the question whether 75.305 was violated is not before me) was unlikely to result in injury to miners. I conclude that it was not a serious violation.

6. In Emery Mining Corp., 9 FMSHRC 1997 (1987) the Commission held that unwarrantable failure means "aggravated conduct, constituting more than ordinary negligence in relation to a violation of the Act." I conclude that the evidence in this record shows that Consol in good faith believed that endangering

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off the area of the roof fall constituted compliance with the standard. This was erroneous, but was not aggravated conduct. I conclude that the violation did not result from unwarrantable failure to comply with the standard.

7. Considering the evidence in the light of the criteria in Section 110(i) of the Act, I conclude that a penalty of \$200 is appropriate for the violation.

ORDER

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

1. Citation Nos. 3314013 and 3314014 (Docket No. WEVA 91-3) are AFFIRMED.

2. Citation Nos. 3314124, 3314129, and 3314130 are AFFIRMED. Citation No. 3314125 is VACATED (Docket No. WEVA 91-49).

3. Citation Nos. 3314121, 3314122, and 3314123 are AFFIRMED. Order No. 2708208 is MODIFIED to a 104(a) Citation and, as modified is AFFIRMED. (Docket No. WEVA 91-50).

4. Citation No. 3314272 is MODIFIED to delete the significant and substantial finding and, as modified is AFFIRMED. (Docket No. WEVA 91-51).

5. Citation No. 3314138 is AFFIRMED. (Docket No. WEVA 91-62).

6. Consol shall within 30 days of the date of this Decision pay the following civil penalties:

CITATION/ORDER	30 C.F.R.	AMOUNT
3314013	75.1725(a)	\$ 292
3314014	75.303(a)	227
3314124	75.1403-8(a)	434
3314129	75.202(a)	434
3314130	75.303(a)	276
3314121	75.1704	355
3314122	75.1704	355
2708208	75.202(a)	200

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3314123	75.305	276
3314272	75.1003	176
3314138	75.303(a)	276

TOTAL \$3301

James A. Broderick
Administrative Law Judge