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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

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

v.

QUARTO MINING COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. LAKE 85-51
A.C. No. 33-01157-03697

Powhatan No. 4 Mine

DECISION APPROVING SETTLEMENT

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner has filed a motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from \$1,500 to \$200 and modification of Section 104(d)(2) Order No. 2331243 to a Section 104(a) citation is proposed. In addition, Petitioner seeks to vacate citation No. 2331244, which was premised on the validity of the preceding order.

As grounds for the motion Petitioner states as follows:

ORDER NO. 2331243

This order was issued for a violation of 30 C.F.R. 75.301 which states that:

All active workings shall be ventilated by a current of air containing not less than 19.5 volume per centum of oxygen not more than 0.5 volume per centum of carbon dioxide, and no harmful quantities of other noxious or poisonous gases; and the volume and velocity of the current of air shall be sufficient to dilute, render harmless gases, and dust, and smoke and explosive fumes. The minimum quantity of air reaching the last open crosscut in any pair or set of developing entries and the last open crosscut in any pair or set of rooms shall be 9,000 cubic feet a minute, and the minimum quantity

of air reaching the intake end of a pillar line shall be 9,000 cubic feet a minute. The minimum quantity of air in any coal mine reaching each working face shall be 3,000 cubic feet a minute. The authorized representative of the Secretary may require in any coal mine a greater quantity and velocity of air when he finds it necessary to protect the health or safety of miners. In robbing areas of anthracite mines, where the air currents cannot be controlled and measurements of the air cannot be obtained, the air shall have perceptible movement.

During an inspection on November 15, 1984 at Quarto's No. 4 Mine a ventilation inspector from MSHA and his supervisor were examining the 9 and 10 Right off 2 North (hereinafter referred to as the "2 North Section") 9, 10 and 11 Right of 2-1/2 North (hereinafter referred to as the "2 1/2 North Longwall Section") of the mine (a map of the affected area is attached as Exhibit "A"). This part of the mine bordered on the abandoned areas and had been a source of chronic ventilation problems. To remedy this condition Quarto had met several times with MSHA officials in the St. Clairsville, Ohio subdistrict office and jointly with officials from the Vincennes, Indiana district office to arrive at a workable plan that would resolve the chronic ventilation problems in their abandoned areas that bordered on active workings.

In late August of 1984 a modification of Quarto's ventilation plan for abandoned areas was approved by MSHA that contained inter alia the drilling of two boreholes from the surface into the abandoned area to alleviate the ventilation problems. The boreholes were to be sunk within sixty (60) days from the date of approval and the modification would be terminated upon the completion of active mining in the 2 1/2 North Longwall Section.

Implementation of the plan was impeded by problems in gaining surface easement rights from the State of Ohio in order to move the drilling machinery onto the land above the abandoned areas. Quarto was monitoring the condition in the 2 North Section at an intake evaluation point (Point 04 on map) where the air from the abandoned areas entered into an active bleeder entry (see map).

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Although Quarto would occasionally get oxygen deficient or impermissible methane readings for brief periods at the 04 Evaluation Point from August to November, the condition was not presenting a particularly hazardous problem because poor quality air from the abandoned area would mix with good quality air and bleed off down the 9 right entry.

Prior to entering the mine on November 15, 1984 the inspector checked Quarto's weekly Bleeder Evaluation book and discovered that poor air quality and impermissible methane readings had been recorded on two occasions prior to this inspection. The inspector had not been apprised as to the agency's depth of involvement in working with the operator in attempting to resolve the ventilation problem in this abandoned area or that these condition had been quickly corrected on each occasion and had not persisted throughout the period.

When the inspector arrived on the 2 North Section he discovered deficient oxygen readings at four locations in the Section. The inspector also discovered impermissible methane levels at five locations in the area (the amounts ranged from 1.07% to 4.67% including readings taken in the abandoned areas). As a result of these findings the inspector decided to issue a 104(d)(2) order for a violation of 30 C.F.R. 75.301.

After a close review by MSHA of the operator's ongoing efforts prior to the violation to work with the agency to correct the chronic ventilation problems and the vigilant monitoring by the operator of the area even before it was cited, it is the Petitioner's position that a technical violation of 30 C.F.R. 75.301 was present on November 15, 1984 but there was no unwarrantable failure and the circumstances merit a modification from a 104(d)(2) order to a 104(a) citation.

The probability of the occurrence of an event against which the cited standard is directed was unlikely because the operator was in the process of complying with an MSHA-approved modification to its ventilation plan to eliminate the problem at the time of the inspection. Furthermore, the operator was closely monitoring the affected area. The gravity of projected injury had an incident occurred may have resulted in lost workdays or restricted duty however the cited area was only travelled once a week by a union fireboss and by a supervisory official for the very purpose of checking air quality at the 04 Evaluation Point.

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The operator exhibited no negligence because it was aware that the area cited was the subject of ventilation problems; had arrived at a workable solution with the agency and was closely monitoring the area. The operator exhibited good faith by immediately increasing its current of air on the section and changing the 04 Evaluation Point from an intake point to an exhaust point.

A review of Quarto's history at this mine indicates that it had 813 assessed violations during 1,870 inspection days in the preceding twenty-four month period. This results in a average of .43 assessed violations during an inspection day. The agreed penalty of \$200.00 will not affect the operator's ability to continue in business.

The parties urge that reconsideration of the six statutory criteria is justified in light of Quarto's excellent efforts to deal effectively with a problem area in its mine and its lack of negligence. Reassessment of the criteria justifies the penalty amount of \$200.00 and the modification from a 104(d)(2) order to a non-significant and substantial 104(a) citation.

CITATION NO. 2331244

This citation was issued for an alleged violation of 104(d)(2) of the Federal Mine Safety and Health Act of 1977 which states that:

If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), 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) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

During the November 15, 1984 inspection that resulted in the issuance of order No. 2331243 (previously addressed hereinbefore) one of the consequences of that order was to include the longwall mining crew

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as being within the affected area of order No. 2331243 (see Exhibit "A").

The air readings at the longwall were acceptable; well within permissible limits for oxygen content and methane content. However because the longwall section was considered by the inspector to be part of the affected area under order number 2331243 mining operations were halted. When it was determined that order number 2331243 would be modified to allow the 04 Evaluation Point to be an exhaust point rather than an intake point it was further determined by the inspector that the longwall crew could go back to work. Although the inspector had not physically returned to the longwall to remove his closure tag, one of the operator's employees interpreted the verbal affirmation that the longwall crew could resume mining as sufficient notice that the closure order had been removed and resumed mining. The citation was issued for this reason.

Most importantly as explained above the Secretary has determined that the closure order should not have been issued, but only a nonsignificant and substantial 104(a) citation. Thus citation number 2331244 was based on an improperly issued order and was defective for this reason.

In evaluating the propriety of this settlement it should also be noted for the Court that one of the consequences of order number 2331243 was the loss of a day's longwall production while the order, which should have been a citation, was in effect.

I have considered the representations and documentation submitted in this case, and I conclude that the proffered disposition is appropriate under the criteria set forth in Section 110(i) of the Act.

Wherefore, the motion for approval of settlement is GRANTED. Order No. 2331243 is hereby MODIFIED to a non "significant and substantial" citation under section 104(a) of the Act and it is ORDERED that Respondent pay a penalty of \$200.00 within 30 days of this date. Order No. 2331244 is hereby VACATED.

Gary Melick
Administrative Law Judge

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EXHIBIT "A"