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CONSOLIDATION COAL v. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
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CONSOLIDATION COAL COMPANY, CONTESTANT	CONTEST PROCEEDING
v.	Docket No. WEVA 90-223-R Citation No. 3312467; 5/30/90
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Robinson Run No. 95 Mine Mine ID 46-01318

Appearances: Walter J. Scheller III, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Contestant;
Wanda M. Johnson, Esq., Office of the Solicitor, of Labor, Arlington, Virginia, for the Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon an application for review filed by Consolidation Coal Company (Operator) on June 22, 1990, challenging the issuance of a section 104(b) withdrawal order. On July 6, 1990, the Secretary (Respondent), filed an answer and the motion for continuance. The motion for continuance was not objected to by Contestant and a stay order was issued on July 27, 1990, staying proceedings in this case pending the filing of the corresponding civil penalty petition. Subsequently, Respondent filed a statement on March 5, 1991, indicating that no civil penalty would be proposed for the violation set forth in the section 104(b) order. The statement further indicates that the issues involved in the underlying section 104(a) citation had been settled by the parties, and the settlement was approved in a decision issued by Commission Chief Judge Paul Merlin on February 13, 1991, (Docket No. WEVA 91-25). Subsequently, in a telephone conference call with both parties, Contestant indicated its intention to litigate the issues raised by the 104(b) order in issue.

Pursuant to notice the case was heard in Morgantown, West Virginia, on May 14, 1991. At the hearing, James A. Young, Robert Toth, Robert L. Kniesely, and Philip Edward Morgan, testified for Respondent. Timothy T. Underwood, Denver A.

Johnson, and Philip Edward Morgan, testified for Contestant. The parties were granted time to file post hearing briefs. On August 5, 1990, the parties filed posthearing briefs containing proposed findings of fact.

Upon review of the transcript of the hearing, counsel for both parties agreed that two corrections should be made to the transcript. I agree. It is ORDERED that the transcript of the hearing be amended as follows:

1. Page 126 at line 15 should be amended to read as follows:

"The trolley wire was six inches outby, approximately six inches outby the rail."

2. Page 16 at line 22 should be amended to read as follows:

". . . would you please tell us the name of the mine in which you were?"

Findings of Fact and Discussion

I. Introduction

On May 22, 1990, MSHA Inspector James A. Young inspected the coal haulage track located in the main north area of Operator's Robinson Run No. 95 Mine. Young indicated that from a point outby block No. 124 and continuing approximately 600 feet to block No. 129, the haulage track was sunk in mud. He indicated that the track had shifted to the wire side and, as a consequence, the trolley wire at the 127 block, which should have been between the rail and the rib on the right side, was located over the center of a motor and two cars which were in that area. He further indicated that while walking the ditch side of the track, water reached the top of his 12 inch boots, and that the water was at a depth of 4 to 5 inches in the middle and on the walk side of the track. Young also noted that the rail joints and fish plates of the track were loose, and there were belts missing. Young issued a section 104(a) citation which states as follows:

> The loaded track side on the coal haulage track, located on main north from 129 blk. outby to 123 blk. and including the 124 blk. switch and around the curve to the tail truck switch was not being safely maintained. The truck has low/loose joints mud, water, and debris on the sides and middle of the truck to the point that haulage equipment is being raised off the rail. Coal haulage cars in one place are actually rubbing the rib on a turn. The truck sinks below the mud and water level that is present.

Young discussed with one of the Operator's safety officers, Richard Moats, the time to be allowed for the Operator to abate the violative conditions. Moats indicated that he would need 5 days, and Young set the abatement for 0900 on May 29, 1990. On May 30, 1990, Young returned to the area in question and indicated that the conditions were the same, but that some areas were worse. He issued a section 104(b) order which states in part as follows:

> On this day a [sic] area 30 feet in length on 127 block side loaded track has been raised, but has since deteriorated to almost its original condition. One other area approximately 6 ties in length was raised. The close clearance has become worse since the area was cited. Motors were observed only inches from striking the rib and rolling track equipment including loaded coal cars have packed the debris even higher. Loads are still badly rubbing the rib, and no mud and water has been removed. (sic).

The Commission, in Mid-Continent Resources, Inc., 11 FMSHRC 505, at 509, held that when an operator challenges the validity of a section 104(b) order, ". . . it is the Secretary, as the proponent of the order, who bears the burden of proving that the violation described in the underlying citation has not been abated within the time period originally fixed or as subsequently extended. We hold, therefore, that the Secretary establishes a prima facie case that a section 104(b) order is valid by proving by a preponderance of the evidence that the violation described in the underlying section 104(a) citation existed at the time the section 104(b) withdrawal order was issued. The operator may rebut the prima facie case, by showing, for example, that the violative condition described in the section 104(a) citation had been abated within the time period fixed in the citation, but had recurred."

II. The Secretary's prima facie case

As set forth by the Commission in Mid-Continent Resources, supra, at 509, the Secretary has the burden of proving that the "violation described in the underlying citation has not been abated within the time period originally fixed, or as subsequently extended." The "violation described" in the underlying citation is that the track in the area in question "was not being safely maintained." (Secy. Ex. 1). According to Young, on May 22, he observed mud and water in the track and ditch, and these were still present in the area on May 29, except for a 60 foot long area of the track that was dry. He also indicated that the debris that he had observed on May 30, looked identical to that seen by him on May 22. He further indicated that on both May 22 and May 29, he straddled the rail in order to observe the location of the trolley wire, and on both times, the

wire was located between the rails, rather than between the rail and the rib on the right side, indicating that the track had not been removed to its original position from where it had shifted. He also indicated that on May 22, he made notches with his hammer on one of the broken ties, and he observed these notches on the same tie on May 30.

Robert Toth, a bolter who accompanied Young on May 22, and May 30 essentially corroborated the testimony of Young with regard to his observations on May 22. Toth indicated that he observed the same situation on May 30, as he had seen on May 22, with the exception of a 30 to 40 foot area in length around block 127 that had been jacked and blocked.

The Operator did not offer the testimony of any witnesses to compare the conditions that existed on May 30, with those that had existed on May 22. Denver Johnson, the Operator's super-intendent, and Philip Edward Morgan, one of the Operator's mine escorts, observed the area in question on May 30. The gravamen of their testimony is that on May 30, the conditions on the track with regard to mud, were worse, and also that had been braces were torn out, and pump lines were damaged. However, their testimony did not contradict the specifics of Young's testimony with regard to what he had observed on May 30. Specifically, the citation alleges that the track has "low/loose joints, mud, water and debris." Young testified that on May 30, mud was still present, the debris packed against the rib was higher, water was still 4 to 5 inches deep, and at the 124 switch at the curve, the track had sunk down farther. He also indicated that the first of the fish plates was loose.

The citation alleges that coal cars "in one place are actually rubbing the rib on a turn." In this connection, Young testified that on May 22, "I could take my hand and put it between the 50 ton and the edge of the rib," (Tr. 26) (sic) whereas on May 30, he could not get his hand between them. He said that the track had moved closer to the wire side on May 30.

Accordingly, I find that the Secretary has established a prima facie case, in that the evidence establishes that the violations described in the original citation existed on May 30, when the citation 104(b) order was issued.

III. The Operator's Rebuttal

Essentially, it is the Operator's position that, in the time period set for abatement, the violative conditions cited on May 22, had been abated, but, due to intervening circumstances, had recurred by May 30. Underwood testified as follows, with regard to abating the violative conditions cited on the day shift: "And on the afternoon shift we started working on this particular violation. We talked to the shift foreman, told him

exactly what we wanted done in the area, how to attack the problem, then he put his people on the violation." (Tr. 71)

It is a practice for the Operator's foremen to make daily entries in a "construction book," setting forth the work performed by miners on their sections during each shift. The entries for the various shifts in the time period between May 22 and May 25, indicate that at various locations in the area in question, the track was blocked, cleaned, raised, and shovelled. No testimony was proffered by the Operator from any witness who had personal knowledge as to specifically what work had been performed, and more importantly, whether such work cured the violative conditions described in the underlying citation. Underwood stated that he went through the area prior to May 26, and in his opinion, the area "was ready for abatement" (Tr. 116). (Footnote 1) Not much weight was accorded his conclusion with regard to the conditions on May 25, as his testimony did not describe in any detail the conditions that he had observed. Further, the only work that he observed in connection with the abatement was at either block 128 or 129 where he saw three persons jacking and blocking the track. Johnson testified that when he was in the area on May 25, there was not any water above the rails. He said that although the area was a little wet, "it wasn't real bad" (Tr. 126). On cross-examination, he testified that there was not any water on the tracks, but there was water in the ditches and the sumps. He further said that the area was only a "little" muddy, but that the pumps were pumping (Tr. 126). He said that the track was blocked and braced and that there was a brace at the 124 block between the rib and the rail. He also said that there were new wood ties. In his opinion, on May 25, the area was "ready for abatement" (Tr. 138).

According to Underwood, a train derailment occurred some time during the midnight shift, on Friday, May 26. However, he did not observe the accident, and when he was at work in the area the following day, the wreckage had already been removed. No evidence was presented from any witnesses who observed the derailment. Nor was there any specific evidence adduced as to the specific damage that the derailment had caused. Underwood testified that a derailment could tear out blocking that had already been installed. He also said that cars that have been derailed would cover the ditch alongside the track, causing water to go on the tracks.

Morgan was in the area for the first time before noon on May 29. He indicated that there was "no problem" from the tail track to the empty track switch (Tr. 144). According to Morgan,

a 50 foot area at the 124 switch had to be cleaned, and a pump needed to be changed. He also said that there was mud and debris in the same areas, but he did not observe any broken tracks, loose joints, or loose fish plates (Tr.65). When Morgan visited the site again on May 30, he said that the 124 block switch "looked worse, much worse" (Tr. 149). He said that there was more mud, the pavement had torn at the 124 switch, and that a brace bar at block 126, which had been in place on the day before, was torn out. In the same fashion, Johnson testified that the conditions on May 30, were generally worse. He stated that the ditches were full of mud, a pump line was broken, and braces were torn out. He opined that these conditions occurred as a consequence of a wreck that had taken place on May 27.

For the reasons that follow, I conclude that the Operator has failed to rebut the prima facie case. Johnson's testimony indicates that on May 25, the track was blocked and braced, there was a new wood tie at 124, there was no water above the rails, and the track was replaced in its original position with the trolley wire being 6 inches outby the rail. (Tr. 126). However, there is no evidence that the violative conditions of debris and loose joints noted in the citation were abated. Further, although Johnson indicated that there was no water above the rails, and that the area was a little muddy, he noted that there was water in the ditches and the sumps. Also, he did not specifically indicate that the tracks were no longer below the mud as described in the citation.

Johnson indicated that on May 30, the conditions were worse and that the braces were torn out, the pipeline had broken, and the ditches were full of mud. He opined that the damage occurred as a consequence of a derailment, which, according to Underwood's testimony, had occurred during the midnight shift of May 26. On the other hand, Morgan indicated that on May 30, the switch looked worse than it had the day before. He also said there was more mud, pavement had been "torn up" (Tr. 149) and a brace bar had been torn.

The record does not contain testimony from witnesses who have personal knowledge as to what caused these conditions between May 29 and May 30. I find the opinion testimony as to the cause of the conditions to be too speculative to be relied upon, especially in light of the absence of testimony from persons who actually observed the train wreck on May 27.

Based on all the above, I conclude that Contestant has not adduced sufficient evidence to establish that it had abated all the violative conditions described in the citation. Nor has it established that the conditions observed by Jones on May 30, constituted a recurrence. Hence, I conclude that the section 104(b) withdrawal order is valid.

ORDER

It is ORDERED that the notice of contest be dismissed.

Avram Weisberger
Administrative Law Judge

Footnote starts here:-

1. In earlier testimony on direct examination, Underwood was unable to indicate when he was in the area subsequent to May 22, but that he was not there on May 29 and May 30.