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

CONSOLIDATION COAL COMPANY, APPLICANT	Application for Review
v.	Docket No. PENN 79-38-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Order No. 620483; April 30, 1979 Westland Mine
UNITED MINE WORKERS OF AMERICA (UMWA), RESPONDENT	

DECISION

Appearances: William H. Dickey, Jr., Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Consolidation Coal Company
Barbara Krause Kaufmann, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Mine Safety and Health Administration
Richard L. Trumka, Esq., United Mine Workers of America, Washington, D.C., for the United Mine Workers of America

Before: Judge Cook

I. Procedural Background

On May 23, 1979, Consolidation Coal Company (Consol) filed an application for review in the above-captioned proceeding pursuant to section 105(d) (FN.1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

(1978) (1977 Mine Act), to obtain review of Order of Withdrawal No. 620483. The order was issued at Consol's Westland Mine on April 30, 1979, pursuant to the provisions of section 104(d)(2) (FN.2) of the 1977 Mine Act.

The application for review states, in part, as follows:

> 1. At or about 1030 hours on April 30, 1979, Federal Coal Mine Inspector, Eugene W. Beck, (A.R. 0321),

representing himself to be a duly authorized representative of the Secretary of Labor (hereinafter "Inspector") issued Order No. 0620483 (hereinafter "Order") pursuant to the provisions contained in Section 104(d)(2) of the Act to Richard Wotkowski, Inspector's Escort, for a condition he allegedly observed during an "AAA" inspection (safety and health inspection) in the Westland Mine, Identification No. 36-00965 located in Pennsylvania. A copy of this Order is attached hereto as Exhibit "A" in accordance with 29 C.F.R. Section 2700.12(b).

2. Said Order under the heading captioned "Condition or Practice" alleges that:

"The designated return escapeway out of 2 Right section was not maintained in a safe condition to insure passage of persons at all times including disabled persons, there was a body of water more than 13 inches deep for a distance of approximately 70 feet near Engineer spad 11+30.5. Water was being discharged into the area from other pump located along the haulage. The record book for the weekly examination showed water in the escapeway and management knew that water was being discharged in the area."

3. Said Order contains the allegation that the above condition or practice constituted a violation of 30 C.F.R. 75.1704, a mandatory health or safety standard, but that the violation has not created an imminent danger. Further, the Inspector determined that the alleged violation was of such a nature that it could significantly and substantially contribute to the cause and effect of a mine safety or health hazard and was caused by an unwarrantable failure to comply with the stated standard.

4. Said Order additionally contained the allegation that the violation is similar to the violation of the mandatory health or safety standard which resulted in the issuance of Withdrawal Order No. 236380 on September 10, 1978. A copy of Order No. 236380 and termination thereof issued under Section 104(d)(1) of the Act is attached hereto as Exhibit "B".

5. At or about 1155 hours on April 30, 1979, Inspector Beck issued a termination of said Order. A copy of this termination is attached hereto as Exhibit "A".

6. Consol avers that the Order is invalid and void, and in support of its position states:

> (a) That the Order fails to cite a condition or practice which constitutes a violation of mandatory health or safety standard 30 C.F.R. 75.1704;
>
> (b) That the Order fails to state a condition or practice caused by an unwarrantable failure of Consol to comply with any mandatory health or safety standard; and
>
> (c) That the Order fails to state a condition or practice which could significantly and substantially contribute to the cause and/or effect of a mine safety or health hazard.
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> * * * * * * *
>
> WHEREFORE, Consol respectfully requests that its Application for Review be granted for all of the above and other good reasons; Consol additionally requests that the subject Order be vacated or set aside and that all actions taken or to be taken with respect thereto or in consequence thereof be declared null, void and of no effect.

The United Mine Workers of America (UMWA) and the Mine Safety and Health Administration (MSHA) filed answers on May 29, 1979, and June 7, 1979, respectively. In its answer, MSHA: (1) admitted the issuance of Order No. 620483 and stated that it was properly issued pursuant to section 104(d) of the 1977 Mine Act; (2) submitted that there was a violation of a mandatory safety standard which was caused by Consol's unwarrantable failure to comply with the cited standard; and (3) denied all other allegations set forth in Consol's application for review. Accordingly, MSHA prayed that Consol's application for review be denied and that the withdrawal order be affirmed. The UMWA's answer admitted the issuance of the withdrawal order, but denied all other allegations contained in the application for review.

Various notices of hearing were issued at various stages of the proceeding which ultimately scheduled the hearing for June 18, 1980, in Washington, Pennsylvania. The hearing convened as scheduled with representatives of Consol, MSHA and the UMWA present and participating.

Following the presentation of the evidence, a schedule was established for the filing of posthearing briefs and proposed findings of fact and conclusions of law. The UMWA filed its posthearing brief on August 8, 1980. MSHA and Consol filed posthearing briefs on August 13, 1980. Additionally, MSHA filed a reply memorandum on August 18, 1980.

II. Witnesses and Exhibits

A. Witnesses

MSHA called as its witness Federal mine inspector Eugene Beck.

Consol called as its witnesses Richard Wotkowski, inspector escort at the Westland Mine; Frank Cass, the mine foreman at the Westland Mine; and Robert Brezinski, an assistant foreman at the Westland Mine.

The UMWA did not call any witnesses.

B. Exhibits

1. MSHA introduced the following exhibits in evidence:

M-1 is a copy of Order No. 620483, April 30, 1979, 30 C.F.R. 75.1704.

M-2 is a copy of a diagram of the area affected by the withdrawal order.

2. Consol introduced the following exhibits in evidence:

0-1 is a blowup diagram of the subject portion of the 2 Right section as it appeared on April 25, 1979.

0-2 is a blowup diagram of the subject portion of the 2 Right section as it appeared on April 30, 1979.

0-3 contains copies of pages from the mine foreman's book.

3. The UMWA did not introduce any exhibits in evidence.

III. Issues

In general, the issue is whether the withdrawal order was validly issued. (FN.3) The specific issues are:

1. Whether the condition cited in Order No. 620483 constituted a violation of mandatory safety standard 30 C.F.R. 75.1704.

2. If the condition cited in Order No. 620483 constituted a violation of 30 C.F.R. 75.1704, then whether the violation was caused by the mine operator's unwarrantable failure to comply with such mandatory safety standard. (FN.4)

IV. Opinion and Findings of Fact

A. Stipulations

1. Consolidation Coal Company and its Westland Mine are subject to the provisions of the 1977 Mine Act (Tr. 21-22).

2. Federal mine inspector Eugene Beck was an authorized representative of the Secretary of Labor when the subject order of withdrawal was issued (Tr. 22).

3. Consolidation Coal Company was properly served with the order (Tr. 22).

B. Standards Governing the Validity of Section 104(d)(2) Orders

Section 104(d)(1) of the 1977 Mine Act provides for the issuance of both citations and withdrawal orders. This section of the 1977 Mine Act provides for the issuance of a citation when an authorized representative of the

Secretary of Labor, upon any inspection of a coal or other mine, finds: (1) that there has been a violation of any mandatory health or safety standard; (2) that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard; and (3) that such violation was caused by the mine operator's unwarrantable failure to comply with such mandatory health or safety standard. The section also provides for the issuance of a withdrawal order if, during the same inspection or any subsequent inspection of the mine within 90 days after the issuance of the citation, an authorized representative of the Secretary of Labor finds another violation of any mandatory health or safety standard caused by the mine operator's unwarrantable failure to comply.

If a withdrawal order has been issued pursuant to section 104(d)(1) with respect to any area in a mine, then section 104(d)(2) authorizes the issuance of a withdrawal order by an authorized representative of the Secretary of Labor who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the 104(d)(1) withdrawal order until such time as an inspection of such mine discloses no similar violations.

Section 104(d)(2) of the 1977 Mine Act imposes no requirement of substantive similarity of violations. Accordingly, a 104(d)(2) withdrawal order is not invalid because the underlying violation, as set forth in the underlying 104(d)(1) withdrawal order, involves a different mandatory health or safety standard. See Eastern Associated Coal Corporation, 3 IBMA 331, 346, 351-352, 81 I.D. 567, 1974-1975 OSHD par. 18,706 (1974), aff'd on rehearing, 3 IBMA 383, 81 I.D. 627 (1974), overruled in part by Zeigler Coal Company, 6 IBMA 182, 83 I.D. 232, 1976-1977 OSHD par. 20,818 (1976) and Alabama By-Products Corporation, 7 IBMA 85, 83 I.D. 574, 1976-1977 OSHD par. 21,298 (1976) and Zeigler Coal Company, 7 IBMA 280, 84 I.D. 127, 1977-1978 OSHD par. 21,676 (1977). Additionally, no consideration need be given to the significant and substantial criterion of the violation giving rise to the 104(d)(2) withdrawal order in order to determine its validity. To be validly issued, a 104(d)(2) withdrawal order must be based upon a violation of a mandatory health or safety standard caused by the mine operator's unwarrantable failure to comply with such mandatory health or safety standard. Zeigler Coal Company, 6 IBMA 182, 188-190, 83 I.D. 232, 1976-1977 OSHD par. 20,818 (1976). Since the gravamen of the application for review in this case is directed to a challenge of the order itself, the issue as to the significant and substantial criterion cited in the order will not be discussed in this decision; particularly since all discussions of that issue by the parties were related to the challenge of the order rather than for any other purpose. A violation of a mandatory standard is caused by an unwarrantable failure to comply with the standard where "the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should

have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care." Zeigler Coal Company, 7 IBMA 280, 295-296, 84 I.D. 127, 1977-1978 OSHD par. 21,676 (1977).

C. Consol's Motion to Dismiss

Consol made a motion to dismiss at the close of MSHA's case-in-chief arguing that MSHA had failed to prove: (1) that the condition cited in Order No. 620483 was a violation of mandatory safety standard 30 C.F.R. 75.1704, and (2) that the alleged violation was caused by Consol's unwarrantable failure to comply with such mandatory safety standard. Consol advanced various arguments in support of its motion, and has reasserted those arguments in its posthearing brief. The undersigned Administrative Law Judge made a determination that the evidence adduced by MSHA during its case-in-chief was sufficient to establish a prima facie case as to the issues raised by Consol. Accordingly, Consol's motion to dismiss was denied. However, the undersigned Administrative Law Judge indicated that the motion would be reconsidered at the time of the writing of the decision. (See Tr. 93-102).

All of the evidence contained in the record when the motion was made has been considered fully, and has been found more than sufficient to establish a prima facie case as relates to both issues raised by Consol. Accordingly, the determination made during the hearing denying Consol's motion to dismiss will be affirmed. (FN.5)

D. Occurrence of Violation

The subject 104(d)(2) withdrawal order addresses an accumulation of water existing along a portion of the designated return escapeway leading out of the 2 Right section of the Westland Mine. It is alleged by MSHA that the condition cited therein constitutes a violation of mandatory safety standard 30 C.F.R. 75.1704, and that such violation was caused by Consol's unwarrantable failure to comply with the mandatory safety standard. The order, (FN.6) issued at approximately 10:30 a.m. on Monday, April 30, 1979, by Federal mine inspector Eugene Beck, states that:

> The designated return escapeway out of 2 Right section was not maintained in a safe condition to insure passage of persons at all times including disabled persons. There was a body of water more than 13 inches deep for a distance of approximately 70 feet near Engineer spad 11+30.5. Water was being discharged into the area from other pumps located along the haulage. The record book for the weekly examination showed water in the escapeway and management knew that water was being discharged in the area.

(Exh. M-1, Tr. 91-92).

The cited mandatory safety standard provides, in part, as follows:

> Except as provided in 75.1705 and 75.1706, at least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening, or continuous to the escape shaft or slope facilities to the surface, as appropriate, and shall be maintained in safe condition and properly marked. [Emphasis Added.]

Three maps or diagrams were placed in evidence by MSHA and Consol which provide a graphic representation of the general physical layout of the area in question (Exhs. M-2, O-1, O-2). (FN.7) These exhibits represent the cited

portion of the return escapeway (area between points B and F on Exh. M-2) as being part of an area roughly corresponding in shape to a right triangle, located on the left hand side of the mouth of 2 Right section, the mouth being the area in which 2 Right section joined the North Mains at a right angle. (FN.8) The cited portion of the designated return escapeway is along the hypotenuse of the triangle. An entry from 2 Right section and an entry from North Mains comprise the base and the height of the triangle, respectively.

The escapeway ranged from 6 to 7 feet in height (Tr. 57), and was in compliance with the 6-foot width requirement set forth at 30 C.F.R. 75.1704-1(a) (Tr. 57). However, the evidence does not disclose the precise width of the escapeway. The body of water was approximately 70 feet long and rib-to-rib wide. The water had collected in a swag, or depression (Tr. 40-41, 196, Exh O-2). When measured at a point approximately 10 to 20 feet from either end of the body of water, a 13 inch depth measurement was obtained (Tr. 29, 35-36, 40, 107). The water exceeded 13 inches in depth for a distance of approximately 30 feet (Tr. 110). At its deepest point, the body of water measured approximately 16 to 17 inches in depth (Tr. 138-139, 195). The water was muddy, and this condition prevented an individual from seeing the bottom (Tr. 135). However, it does not appear that any actual accumulations of mud were present on the bottom (Tr. 196).

Water from the North Mains track haulage was being discharged into a sump area located along the height of the triangle. The water was pouring into the sump area through a discharge line installed through one of the stoppings. (Point E on Exh. M-2, Tr. 37-38, 76, 89, 142). However, the water was not being discharged into the cited portion of the designated return escapeway (Tr. 74-76). The area along the base and height of the triangle was characterized by the presence of water and relatively deep mud which made passage through such areas difficult (Tr. 35-37, 42-130, 180).

The presence of the 70-foot long body of water in the designated return escapeway is the basis for the charge that a violation of mandatory safety standard 30 C.F.R. 75.1704 occurred. The cited mandatory safety standard requires the mine operator to provide at least two safe and well maintained designated escapeways to insure passage at all times of any person, including disabled persons. The question presented in the instant case is whether the presence of the 70-foot long body of water in the return escapeway on April 30, 1979, constituted a violation of this requirement. For the reasons set forth below, I answer this question in the affirmative.

The evidence presented establishes that the cited portion of the return escapeway was not safe and well maintained, particularly as relates to insuring the passage of disabled persons in the event of an emergency. The return

escapeway is the designated escape route if the intake escapeway is obstructed. A fire in the intake escapeway would render it highly probable that the miners would have to use the designated return escapeway in order to reach safety, and the smoke generated by such fire would be drawn from the section through the same return escapeway used by the retreating miners (Tr. 78). It is highly conceivable that, given the proper circumstances, a disabled miner would have to crawl through the escapeway and, consequently through the body of water. If the self rescuer became wet, it would be rendered ineffective (Tr. 45, 79). Additionally, if the escapeway filled with smoke, the fresh air would be toward the bottom. There could be times when miners, whether disabled or not, would crawl on their hands and knees. Once again, the self rescuer could become wet and, consequently, ineffective (Tr. 79).

The inspector also identified water in the boots impeding travel, slip and fall occurrences, and possible drowning as potential hazards posed by the accumulation of water (Tr. 43, 78). A convincing argument can be made for the proposition that such hazards were not present, in a realistic sense, in nonemergency situations. A miner could safely ford the body of water at a leisurely pace, carefully probing the bottom for debris, depressions or projections. But it must be remembered that the regulation in question is directed toward securing a safe avenue of exit from the mine's underground workings in the event of an emergency, and that during an emergency a hasty retreat is often necessary to assure survival. In the frenzied atmosphere generated by an emergency, in which the thought of death descends upon the minds of the miners, some of the foregoing hazards identified by the inspector could foreseeably impair the odds of survival.

Consol's witnesses sought to establish that walking through the cited body of water posed no hazard (Tr. 108-109, 111-113, 165-166). Their testimony on this point is not deemed persuasive. Their opinions tend to show only that the area afforded reasonably safe passage in nonemergency situations. At such times, an individual could carefully walk through the water and perhaps not sustain injury. Such evidence, however, does not tend to show that the area was well maintained so as to insure safe passage in the event of an emergency.

It is significant to note that Consol's witnesses indirectly confirmed the inspector's opinion that the area was unsafe. Mr. Wotkowski testified that walking through the water slowed his progress (Tr. 133), and the testimony of Messrs. Cass and Brezinski indicates that the water would have posed a hazard to those miners working on the bridge (Tr. 161, 187). The fact that such impediments or hazards existed in the absence of an emergency strongly implies that conditions in the cited area would pose significant hazards to men retreating through the area during an emergency.

Consol argues that it cannot be found to have violated 30 C.F.R. 75.1704 because MSHA was applying an unwritten 12-inch

depth standard to determine whether the accumulation of water constituted a violation of the regulation. According to Consol, (1) a mine operator cannot be found in violation of an unwritten enforcement policy when it has not been apprised of

the existence of such policy, and (2) a policy pertaining to the depth of water, particularly in a wet mine, must be promulgated pursuant to the rulemaking provisions set forth in the 1977 Mine Act (Consol's Posthearing Brief, pgs. 7-9). MSHA disagrees, arguing that MSHA does not have such an unwritten enforcement policy (MSHA's Posthearing Brief, pgs. 10-11). For the reasons set forth below, I conclude that the evidence fails to support the contention that an unwritten 12-inch standard existed.

Consol argues that Inspector Beck's conduct belies the existence of a 12-inch standard because: (1) he began measuring only when the depth of the water approached 12 inches and ceased measuring when the water depth reached 13 inches; (2) he terminated the order when the water level had been reduced to a depth of 9 to 11 inches; and (3) the entry contained on Exhibit M-1, under "action to terminate" states that ". . . the water level was reduced to less than 12 inches." However, the inspector's testimony resolves this ambiguity in a way that rebuts the conclusion proffered by Consol. His testimony reveals that the 12-inch figure merely reflects the fact that he was wearing 12-inch boots (Tr. 35-36, 40, 64-65). It does not reflect an enforcement policy. The evidence presented clearly shows that Inspector Beck erred by terminating the order prematurely. But such error in judgment forms no foundation for the assertion that an unwritten 12-inch guideline existed. In fact, his testimony indicates that, under the proper circumstances, 4 inches of water would be sufficient to establish a violation (Tr. 60).

Additionally, Consol points to the enforcement policy set forth in the MSHA inspection manual in reference to 30 C.F.R. 75.1704-2(a) which states, in part, that the "presence of roof falls does not necessarily indicate that the passageway would not be suitable for evacuation" (Tr. 57-58), and, by analogy, argues that the mere presence of water does not indicate that the passageway would not be suitable for evacuation (Tr. 96, Consol's Posthearing Brief, pg 10). Consol's reliance on this analogy is misplaced. 30 C.F.R. 75.1704-2(a) requires that escapeways "be located to follow . . . the safest direct practical route to the nearest mine opening suitable for the safe evacuation of miners," and the enforcement policy set forth in the manual must be interpreted in accordance with this mandate. It appears that the statement is intended to indicate that the mere presence of roof falls does not necessarily identify the passageway as unsuitable for evacuation if the roof conditions in the area can be controlled. It does not countenance permitting the passageways to remain in an unsafe or poorly maintained condition.

In view of the foregoing, it is found that the body of water in the cited portion of the designated return escapeway constituted a violation of mandatory safety standard 30 C.F.R. 75.1704.

E. Unwarrantable Failure

As noted previously, a violation of a mandatory safety standard is caused by an unwarrantable failure to comply where "the operator involved has failed to abate the conditions or practices constituting such violation,

conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care." 7 IBMA at 295-296. For the reasons set forth below, I find that the violation of 30 C.F.R. 75.1704 cited in Order No. 620483 was caused by Consol's unwarrantable failure to comply with such mandatory safety standard.

It is important to bear in mind, as general background information, that the Westland Mine is a wet mine (Tr. 66). The testimony of Mr. Frank Cass, the mine foreman, indicates that at all times relevant to the instant case, the area along the height of the triangle (Exh. O-2, between points C and A) was used as a sump to gather water. In fact, the use of the area as a sump predated development of 2 Right section. The portion of the return escapeway along the hypotenuse of the triangle, described by Mr. Cass as a chute, was driven to circumvent the sump area and prevent water from entering the escapeway. According to Mr. Cass, the chute served its purpose until problems developed with the Thro-Mor pump, the pump used to remove water from the sump. The water level would have to rise substantially to enter the cited portion of the return escapeway (Tr. 142, 152).

The evidence presented reveals that Mr. Larry Stipson, the union fire boss, examined the subject return escapeway on April 11, 1979, April 18, 1979, and April 25, 1979. On each of those dates, he made entires in the record book recording the presence of excess water in the subject return escapeway (Exh. O-3, Tr. 31-34). Each time Mr. Stipson reported the presence of water, Mr. Cass assigned Mr. Alex Nackoneczny and/or Mr. Fred Bazzoli, pumpers, the task of removing the water. Each time Mr. Nackoneczny was assigned, he would subsequently report to Mr. Cass that the problem had been corrected and Mr. Cass would sign the examination book as mine foreman (Tr. 152-153).

After April 18, 1979, Mr. Nackoneczny started to check the Thro-Mor pump twice daily to make certain that it was operating at all times (Tr. 153).

On the April 25, 1979, 8 a.m. to 4 p.m. shift, Mr. Cass visited the 2 Right section during the course of his routine. When he reached the face area, he discovered the crew and the foreman at the dinner hole. He thereupon asked the foreman what the problem was and why he wasn't loading coal. The foreman responded that the fire boss had come onto the section and informed him that deep water was present in the return escapeway. Mr. Cass testified that he instructed those present to remain where they were, and that he and one of the mine committeemen proceeded to the return escapeway to check on the water (Tr. 153-154).

Mr. Cass testified that the water was, indeed, deep. Water was present along all three sides of the triangle (Exh. O-1). It appears that the excessive amount of water accumulated in the area because the Thro-Mor pump was not functioning properly (Tr. 158). In fact, Consol had been experiencing difficulties with the

pump prior to April 25, 1979 (Tr. 152). Mr. Cass

returned to the face area, evacuated the miners and idled the section (Tr. 154-155). The section was reopened on the Thursday, April 26, 1979, 4 p.m. to midnight shift (Tr. 155-156).

On April 25, 1979, after examining the return escapeway and upon returning to the section, Mr. Cass instructed the general assistant foreman to install another pump in the return to clear the escapeway (Tr. 154). A Flygt pump was installed (Tr. 154-155), not in the cited portion of the return escapeway, but along the triangle near the intersection of the entry from North Mains and the entry from 2 Right section (Exh. O-1). Mr. Cass testified that people were assigned to constantly monitor the pumps until the water was pumped out (Tr. 155), and that the pumpers were ordered to operate the pumps continuously between April 25, 1979, and April 30, 1979, (Tr. 160). However, the evidence reveals that the water in the cited portion of the designated return escapeway was not pumped out because of: (1) the presence of the swag, or depression, in the escapeway, and (2) the fact that the escapeway was at a slightly higher elevation than the area along the base and height of the triangle (Tr. 40-41, 142).

At approximately 7:45 a.m. on Friday, April 27, 1979, Inspector Beck, while at the mine, received a written complaint pursuant to section 103(g) of] the 1977 Mine Act from the chairman of the mine health and safety committee (Tr. 30-31). The complaint, dated April 24, 1979, requested an inspection of the intake and return escapeways in the 2 Right section, contending that high water was present (Tr. 49-50). However, the press of other duties prevented the inspector from inspecting the escapeways that day (Tr. 30-31).

Additionally, on the morning of Friday, April 27, 1979, Mr. Cass talked to John Golanka, the general assistant foreman, and Robert Brezinski, an assistant foreman. It was decided that a bridge would have to be built in the area to prevent the problem from recurring. A supply order was placed to obtain the necessary building materials and Mr. Brezinski was instructed to begin construction at 8 a.m. on Monday, April 30, 1979 (Tr. 156-159, 184).

It appears that one of the principal reasons that construction was not scheduled to commence until April 30, 1979, was the need to reduce the water level in the escapeway to the point where it posed no hazard to the bridge builders (Tr. 161, 163). Mr. Fred Bazzoli was ordered to move the Flygt pump into the cited portion of the return escapeway on Saturday, April 28, 1979 (Tr. 169). However, Mr. Bazzoli failed to follow the instructions (Tr. 169). Although Mr. Cass worked on Saturday, he did not visit the area that day (Tr. 177-178).

Mr. Brezinski arrived in the area between 8:30 a.m. and 8:40 a.m on april 30, 1979, and discovered that Mr. Bazzoli had not moved the pump. Accordingly, Mr. Brezinski, Mr. Nackoneczny, and Mr. Larry Wall, a general assistant foreman, undertook the task of moving it. This entailed not only physically moving the pump,

but also extending the electrical cable and obtaining discharge hose (Tr. 187-188). They were still in the process of moving the pump when the order was issued (Tr. 41, 54, 72-74, 105-106, 164),

and it appears that the bridge building supplies were arriving in the area at approximately the same time (Tr. 113-114, 116-119, 149, 150, 190-191). As noted previously, water was being discharged into the sump area when the order was issued, but not into the cited portion of the escapeway. Bridge construction began at approximately 11:15 a.m. (Tr. 120), and the bridge was completed at approximately 3:30 p.m. (Tr. 192).

Consol states in its posthearing brief that "[i]t cannot be denied that mine management was aware of the water present in the escapeway," but points to the efforts made by management to correct the problem and argues that these efforts precluded the valid issuance of a 104(d)(2) order (Consol's Posthearing Brief, pgs. 10-11). I disagree with Consol's proferred conclusion.

Management's actions between April 11, 1979 and April 30, 1979, point unmistakably to an unwarrantable failure. Management was first apprised of the water problem in the return escapeway on April 11, 1979, but did not begin to undertake truly effective steps to correct the condition until April 25, 1979, when Mr. Cass visited 2 Right section, discovered the crew at the dinner hole and subsequently idled the section. When the section was reopened on April 26, 1979, water was still present in the cited portion of the return escapeway and, in fact, management did not even make a decision until the morning of April 27, 1979 to move a pump into that area. The pump had not been installed as of 8:30 a.m., on Monday, April 30, 1979.

Therefore, it must be concluded that mine management knew the condition existed, and that management failed to abate the condition in a timely and expeditious fashion due to a lack of due diligence. Accordingly, it is found that the violation of April 30, 1979, was caused by an unwarrantable failure to comply with the standard. (FN.9)

V. Conclusions of Law

1. Consolidation Coal Company and its Westland Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to this proceeding.

2. Under the 1977 Mine Act, the Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.

3. Federal mine inspector Eugene Beck was a duly authorized representative of the Secretary of Labor at all times relevant to this proceeding.

4. Order No. 620483 was properly issued under section 104(d)(2) of the 1977 Mine Act.

5. All of the conclusions of law set forth in Part IV of this decision are reaffirmed and incorporated herein.

VI. Proposed Findings of Fact and Conclusions of Law

MSHA, Consol, and the UMWA submitted posthearing briefs. MSHA submitted a reply memorandum. Such filings, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

ORDER

A. The oral determination made at the hearing denying Consol's motion to dismiss is AFFIRMED.

B. The application for review is DENIED and Order No. 620483 is AFFIRMED.

John F. Cook
Administrative Law Judge

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(FOOTNOTES START HERE.)
~FOOTNOTE_ONE

1 Section 105(d) provides as follows:

"If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 104, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 104, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its

issuance. The rules of procedure prescribed by the Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section. The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 104."

~FOOTNOTE_TWO

2 Section 104(d) provides as follows:

(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(2) 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.

~FOOTNOTE_THREE

3 A mine operator's section 105(d) application for review or notice of contest must contain, amongst other things, a short and plain statement of the mine operator's position on each issue of law and fact that the mine operator contends is pertinent. 29 C.F.R. 2700.20(c) and 2700.21(b) (1979) (Commission's Rules of Procedure, effective July 30, 1979); 29 C.F.R. 2700.21(a) (1978) (Commission's Interim Procedural Rules, effective March 10, 1978). MSHA has the obligation of presenting a prima facie case, with respect to each issue raised by the mine operator, that the order or citation in question was validly issued. Kentland-Elkhorn Coal Corporation, 4 IBMA 166, 82 I.D. 234, 1974-1975 OSHD par. 19,633 (1975); Zeigler Coal Company, 4 IBMA

88, 82 I.D. 111, 1974-1975 OSHD par. 19,478 (1975). In CF & I Steel Corporation, Docket No. DENV 76-46 (FMSHRC, filed December 2, 1980), the Commission held that the absence of an intervening "clean" inspection of the entire mine was a prerequisite to the issuance of a withdrawal order under section 104(c)(2) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1970). Such orders are equivalent to section 104(d)(2) orders under the 1977 Mine Act. The Commission also held in CF & I that the government was under an obligation to present a prima facie case of such fact in order to sustain the withdrawal order.

The Administrative Law Judge's decision in CF & I, issued on November 3, 1976, indicates that the issue of the intervening "clean" inspection was specifically raised by the mine operator. See also, United States Steel Corporation, Docket No. HOPE 75-708 (FMSHRC, filed January 9, 1981).

In the instant case, Consol did not raise this issue in its May 23, 1979, application for review and did not raise the issue during the hearing. Accordingly, it must be concluded that Consol's failure to raise the issue relieved MSHA of its burden of adducing evidence as to the absence of an intervening "clean" inspection. Additionally, it is significant to note that Consol did not address the issue in its posthearing brief.

~FOOTNOTE_FOUR

4 The issue as to the significant and substantial criterion cited in the order will not be discussed in this decision because the gravamen of the application for review is directed to a challenge of the order itself. It has been held by the Board of Mine Operations Appeals of the Department of the Interior (predecessor to the Federal Mine Safety and Health Review Commission) that no consideration need be given to the significant and substantial criterion of the violation giving rise to a 104(a)(2) withdrawal order to determine its validity.

~FOOTNOTE_FIVE

5 Consol did not argue that MSHA had failed to establish a prima facie case as to the absence of an intervening "clean" inspection in support of its motion to dismiss. See n. 3, supra.

~FOOTNOTE_SIX

6 In a section 105(d) proceeding to review a section 104(d)(2) withdrawal order, MSHA must establish a prima facie case with respect to each issue raised by the mine operator. Kentland-Elkhorn Coal Corporation, 4 IBMA 166, 82 I.D. 234, 1974-1975 OSHD par. 19,633 (1975); Zeigler Coal Company, 4 IBMA 88, 82 I.D. 111, 1974-1975 OSHD par. 19,478 (1975). The issues which can be raised include: (1) the existence of the underlying 104(d)(1) citation and order, (2) the fact of violation, (3) unwarrantable failure, (4) the occurrence of an intervening "clean" inspection of the entire mine, and (5) the other requirements for issuance of a section 104(d)(2) order. See CF & I Steel Corporation, Docket No. DENV 76-46 (FMSHRC, filed December 2, 1980); Kentland-Elkhorn Coal Corporation, supra.

With respect to issue No. 1, the order of withdrawal at

issue in the instant case was based upon underlying Order No. 236380, issued on September 10, 1978 (Exh. M-1). Paragraph No. 4 of Consol's application for review states that:

"[Order No. 620483] additionally contained the allegation that the violation is similar to the violation of the mandatory health or safety standard which resulted in the issuance of Withdrawal Order No. 236380 on September 10, 1978. A copy of Order No. 236380 and termination thereof issued under Section 104(d)(1) of the Act is attached hereto as Exhibit B." The copy of Order No. 236380 filed by Consol states that it is based upon Citation No. 234029, issued on September 6, 1978. In view of the statements contained in paragraph No. 4 of the application for review, and the entries contained in Exhibit B of the application for review, I conclude that Consol admitted the existence of the underlying 104(d)(1) citation and order, and thus relieved MSHA from its obligation to present evidence as to their existence as part of its prima facie case.

Consol never raised issue No. 4 and, accordingly, relieved MSHA of its obligation to present a prima facie case as to the absence of an intervening "clean" inspection of the entire mine. See n. 3, supra.

~FOOTNOTE_SEVEN

7 Exhibits M-2 and O-2 also show specific conditions existing on April 30, 1979, and Exhibit O-1 shows specific conditions existing on April 25, 1979.

~FOOTNOTE_EIGHT

8 A copy of Exhibit M-2 has been appended to this decision as Appendix A so as to provide the reader with a graphic representation of the general layout of the area in question. Exhibit M-2 has been selected for this purpose because of its physical dimensions. Consol's exhibits measure approximately 28 inches by 40 inches and are thus unsuited for this purpose.

~FOOTNOTE_NINE

9 There is an apparent conflict in the evidence as to whether the miners on the 2 Right section exercised their individual safety rights under the National Bituminous Coal Wage Agreement of 1978. Unidentified hearsay declarants informed Inspector Beck that on April 26, 1979, such rights had been exercised on the section (Tr. 46-47). However, Mr. Cass testified that he was not aware of the exercise of personal safety rights with respect to the return escapeway (Tr. 155-156). It is unnecessary to resolve this apparent conflict in the evidence in order to decide the issues presented in this case, and, accordingly, no opinion is expressed on this subject.

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APPENDIX A
M-P EXH 2
TABLE