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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
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. PENN 91-1302-R
	:	Order No. 3690652; 6/24/91
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. PENN 91-1304-R
	:	Order No. 3702374; 7/2/91
	:	Docket No. PENN 91-1305-R
	:	Order No. 3690658; 7/3/91
	:	Dilworth Mine
	:	Mine ID 36-04281
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 91-1462
	:	A.C. No. 36-04281-03740
v.	:	Dilworth Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: Daniel Rogers, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Consolidation Coal Company.
Theresa Timilin, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania, for the Secretary of Labor.

Before: Judge Weisberger

These consolidated cases are before me based upon petitions for assessment of a civil penalty filed by the Secretary of Labor (Petitioner), alleging violations of various mandatory safety standards. Pursuant to notice, the cases were heard in Waynesboro, Pennsylvania, on October 28, 1992. George Rantovich, Randy Cunningham, Ronald Gossard, Ronald Hixson, Marlon Whoolery, James Samuel Conrad, Jr., and James W. Reed, testified for the Petitioner. James Hunyady, John Burr, Patrick M. Wise, and Robert Belesky, testified for Respondent.

Respondent filed a Post-Hearing Brief on January 11, 1993. Petitioner's Proposed Findings of Fact and Brief was filed on February 4, 1993.

I. Citation No. 3702400

A. Introduction

On June 5, 1991, on the 8-D Section during the evening shift, Paul Checoski, the mechanic on the section, locked and tagged the power center supplying power to a 7,200 volt cable. The cable was then moved, and another cable was attached to it by John Holonich, a roof bolter, and John Rerko, a miner operator. Neither of these was a qualified person meeting the requirements of 30 C.F.R. 75.153. In making the connection between the two cables, threaded ends are screwed together by hand and then tightened with a wrench if necessary. This is the only way for the cables to be connected to one another.

Randy C. Cunningham, a roof bolter, and Don Jones, a foreman, neither of whom is qualified pursuant to Section 75.153 supra, connected the extended cable to the load center. Cunningham indicated that when he made the connection to the load center, he and Jones "might have wiped some dirt out" (Tr. 56), but "it wasn't bad, it was just dry dirt." (Tr. 57) He also said that the area was damp, and there were mud puddles at various locations.

Once the connections were made, and before the power was restored, Cunningham asked Sam Basle, the section foreman, whether the connection should be inspected by a qualified person before the cable is energized. Basle checked with the maintenance foreman, Cy Wilson. According to Cunningham, Basle said that Wilson told him said that such an inspection is not necessary. When the cable was energized after the connections had been made, it functioned properly and there were no sparks.

On June 19, 1991, George Rantovich, an MSHA inspector, inspected the subject mine in response to Section 103(g) complaint that had been received in the MSHA office on June 13, or June 14, 1991. He issued a section 104(a) citation alleging a violation of 30 C.F.R. 75.511 based on the incident that had occurred on June 5, 1991. Specifically, the citation alleges as follows: "Evidence indicates that on the 8-D section 72.00 cable, an examination by a qualified person was not conducted on the additional cable connectors and plugs before the power was restored on cable." [sic]

30 C.F.R. 75.511, as pertinent, provides as follows: "No electrical work shall be performed on low, medium, or high-voltage distribution circuits or equipment, except by a qualified person or by a person trained to perform electrical work and to

maintain electrical equipment under the direct supervision of a qualified person."

As his rationale for the issuance of the citation at issue, Rantovich indicated that a person not qualified would not recognize the dangers presented by the presence by mud and water in the ends of the high voltage cables that had to be connected. He indicated that should such mud and water be present and not removed, there is a danger of an explosion causing injuries, once the cables are connected and energized. Ronald J. Gossard, an MSHA electrical supervisor corroborated Rantovich's testimony in this regard. Respondent has not impeached or contradicted this testimony.

B. Discussion

The record is clear that the persons who connected the extension to the cable, and the cable to the load center, were not qualified as that term is defined in Section 75.153, supra, nor were they performing this work under the direct supervision of a qualified person. However, in order for the activities at issue to be violative of Section 75.511 supra, they must fall within the ambit of that section i.e., they must be "electrical work". In this connection, Rantovich relied on the MSHA Program Policy Manual ("PPM"), dated April 1, 1991, which defines electrical work as "the work required to install or maintain electric equipment or conductors". The PPM lists as examples of work not required to be performed by a qualified person, inter alia, the following: "inserting low-and-medium-voltage cable couplers into receptacles or withdrawing low-and-medium-voltage cable couplers from receptacles". Rantovich and Gossard, in essence, argued that since coupling low and medium-voltage cables are examples of work not requiring a qualified person, then coupling a high voltage cable would be considered work requiring a qualified person. Although weight is to be accorded the Secretary's interpretation of her regulations, the interpretation is not binding where it goes beyond the plain meaning of the regulations especially, where the regulations, reiterate statutory language. (See, King Knob Coal Co., 3 FMSHRC 1417, 1420, N.3, (1981)).

Section 75.511 supra, contains the exact language found at Section 305(f) of the Federal Coal Mine Health Safety Act of 1969, (P.L. 91-173), ("the 1969 Act"), which has been incorporated in the Federal Mine Safety and Health Act of 1977 ("the 1977 Act"). Both the parallel language in the Senate version of the 1969 Act, S.2917, and the House Bill, H.R. 13950, provided that, "no work" shall be performed on high voltage circuit or equipment except by qualified persons." (emphasis added) The House of Representative Conference Report accompanying S. 2917 specifically qualified this provision by providing that, "no electrical work", is to be performed except

by a qualified person. (H.R. Rep. No. 91-761, 91st Cong., 1st Session, at 25, found in Legislative History of the Federal Mine Health and Safety Act of 1969, ("Legislative History of the 1969 Act"), at 1479 (emphasis added). This language was continued and enacted in Section 305(f) of the 1969 Act.

Neither the 1969 Act, nor the 1977 Act, nor the Code of Federal Regulations, defined the term "electrical work". Since the word "electrical" was added by the Conference Report, supra and enacted in Section 305(f) supra it must be concluded that it was meant to limit or to modify the type of work required to be performed by a qualified person or under his supervision. The term "electric" or "electrical" is defined in Webster's Third New International Dictionary, ("Websters") (1986), as "1a: of relating to, or produced by electricity... ." The activities at issue, connecting one end of the cable to another end by hand, are clearly physical or mechanical acts and not "electrical" work, although the activities are performed on electrical equipment.(Footnote 1) See, U.S. Steel Mining Co., 13 FMSHRC 1451 (Judge Koutras) (1991); Consolidation Coal Co., 12 FMSHRC 2643 (Judge Weisberger) (1990).I thus find that the activities at issue herein do not fall within the scope of section 75.511 supra, and hence the citation at issue is to be vacated.

II. Orders No. 3690652, 3690658, and 3702374, and Citation Nos. 3690660, 3690659, and 3702375

A. Order No. 3690652

Findings of Fact and Discussion

In the track haulage entry at Respondent's Dilworth Mine, power is supplied to the trolley wire by way of a 600 volt dc wire that is supported from the roof by being attached to wooden planks (hangers) which are installed at 10 foot intervals, and are bolted to the roof. An insulator attached by its top to the plank, and by its bottom to the trolley wire, serves to insulate the energized trolley wire from the wooden plank and the coal in the roof.

On June 24, 1991, Ronald Hixson, an MSHA inspector, while inspecting the track haulage entry at approximately 10:30 a.m., observed flames on one of the planks close to the No. 8 crosscut. The plank, was 2 to 3 inches thick, 14 inches long, and 10 inches wide. He said that the flames were 1 to 3 inches in height, and covered an 8 inch square area. He indicated that there were three different areas where the plank had been burnt. Also, he

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1To the extent that U.S. Steel Mining Co., Inc, 5 FMSHRC 1752 (Nov. 1983) (Judge Broderick) cited by Petitioner is inconsistent with my decision, I choose not to follow it.

said that the roof was warm. Power was then removed from the wire by a switching it off, and the flames went out.

On June 24, 1991, the miners at the Dilworth mine were on vacation, and accordingly there was no pre-shift examination of the area in question. Hixson indicated in this regard that had he not noticed the fire, it could have smoldered or developed into a large fire, as a few hours could have elapsed before someone entered the area. He noted the presence of combustible materials such as the planks, and sloughage, and the presence of heat in the roof. He indicated that, as a consequence, within minutes there could have been a major fire, or explosion, had he not immediately corrected the situation. He concluded that there was an imminent danger, and an order was subsequently issued under section 107 of the Federal Mine Safety and Health Act of 1977 ("the 1977 Act").

Once the power was removed and the flames went out, the trolley wire was removed from a clip which prevented electrical contact between the trolley wire and the plank. Also, the area of the roof that was warm was cooled with water. Subsequent to these actions, Hixson left the underground area and, once outside the mine, wrote and issued a section 107(a) withdrawal order (Government Exhibit No. 4).(Footnote 2)

Section 3(j) of the 1977 Act supra defines an imminent danger as "...the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated". (Emphasis added) It thus would appear that once the conditions constituting an imminent danger have been dealt with, and no longer constitute an imminent danger, the subsequent issuance of an order under section 107, is not proper.

The definition of imminent danger contained in Section 3(j) of the 1977 Act, supra is the same as that contained in the Coal Mine and Safety Act of 1969 ("the 1969 Act"), 30 U.S.C. 801 et seq. The Senate Report accompanying the 1969 Act states that once an inspector finds that an imminent danger exists, "...he

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2The following testimony of Hixson offers a possible explanation why he did not write a withdrawal order at 10:30 a.m. when he encountered the "situation" is as follows: "When we discovered the flame, the initial reaction was to get it out to find out exactly how much we -- how much of a problem we had. Probably in that hour time period where we discussed what kind of a violation or what kind of a citation that was going to be issued. But it was not of primary concern at the time that we found the situation." (Tr. 161).

would be required" to issue an order requiring the withdrawal of workers from the section of the mine where the danger exists "...until it is determined by an inspector that the condition no longer exist." (S. Rep. No. 411, 91st Cong. 1st Sess. at 37 (1969)), reprinted in Legislative History of the 1969 Act, supra at 163). To the same affect is the following language in the Section by Section Analysis, of the Senate Report, supra, with regard to the duration of the imminent danger order, "The order remains in effect until the inspector determines that there is no danger." (Legislative History supra at 215). The analysis further states that, "The concept of an imminent danger as it has evolved in this industry is that the situation is so serious that miners must be removed from the danger forthwith when the danger is discovered without waiting for any formal proceedings or notice. The seriousness of the situation demands such immediate action." (Legislative History, supra at 215).

The House Report accompanying H.R 13950, the House version of the Bill that became the 1969 Act, explains that subsection a of Section 104 deals with the finding of an imminent danger by an inspector and that "When this occurs, the representative will determine the area where the danger exists and immediately issue an order requiring the mine operator to withdraw all persons, except those necessary to take corrective action from the affected area until the danger is abated." (H.R. Rep. No. 91-563, 91st Cong., 1st Sess., at 8, reprinted in Legislative History, supra at 1038). (Emphasis added)

Hence, in requiring inspectors to issue withdrawal orders in the presence of an imminent danger, Congress clearly intended to have miners immediately withdrawn once the dangerous condition is discovered, and to remain withdrawn until there is no longer any danger as determined by the inspector. Thus, to effectuate this legislative intent, the withdrawal order should be issued during the time the conditions constituting the imminent danger are in existence. It does not serve any purpose to issue such an order once the conditions are no longer an imminent danger. (See, Utah Power and Light Co., 13 FMSHRC 1617 at 1621, wherein the Commission, after analyzing the legislative history of withdrawal orders for an imminent danger concluded as follows: "Thus, the hazard to be protected against by the withdrawal order must be impending so as to require the immediate withdrawal of miners.") Hence, it is clear that once the danger has been abated and is no longer in existence, the hazard is no longer impending, and as such, the withdrawal of miners is no longer required.

In the instant case, in the judgment of Hixson, an imminent danger presented itself because there were flames on the wooden plank, the roof was hot, combustible material such as coal sloughage, and wooden planks were present, and the mine was considered to be gassy. However, the imminent danger order was

not written (Footnote 3) and issued until Hixson was outside the mine, power to the wire had been turned off, the fire had been extinguished, and cold water had been poured on the hot area to cool it.(Footnote 4) Since there was no longer any imminent danger when the order was issued, it cannot be found to be valid.(Footnote 5) (See, Consolidation Coal Co., supra.

B. Citation 3690660

As a result of the conditions Hixson observed on June 24, 1991, he issued a section 104(a) citation alleging a violation of 30 C.F.R. 75.516 in that "...due to the breakdown of the insulator or dampness in the 8-D haulage at No. 8-D crosscut a proper insulator to insulate the 550 volt dc trolley wire from the mine roof and wooden planks was not provided."

30 C.F.R. 75.516 supra, as pertinent, provides that power

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3Section 107(d) of the 1977 Act, supra provides, in essence, that withdrawal orders shall be given "promptly" to the operator and "...shall be in writing" (emphasis added). Section 107(c) of the Act mandates that a withdrawal order "...shall contain a detailed description of the conditions or practices which cause and constitute an imminent danger and a description of the area of coal or other mine from which persons must be withdrawn and prohibited from entering." In the case at bar, the written order issued pursuant to Section 107 supra, was not issued until Hixson was outside the mine and there was no longer any imminent danger.

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4In some circumstances a timely verbal order of withdrawal is valid where it is subsequently committed to writing (See Consolidation Coal Co., 14 FMSHRC 2066 (Judge Melick) (1992)). However, the record does not convincingly establish that Hixson issued a verbal withdrawal order at a time when the perceived danger was in existence. On cross-examination, he indicated that he did not tell Respondent's representatives that he was going to issue a withdrawal order as he approached the burning hanger (wooden plank). He also indicated, on cross-examination, that he did not recall when he told Respondent's representative Patrick Wise, who was present, that "this was a 107(a) situation and people should be withdrawn" (Tr. 162).

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5In Complainant's brief it is argued, in essence, that the stipulation by the parties that the 107(a) order was properly served on Respondent, establishes that Respondent was given proper notice that there was an imminent danger. The key issue is not whether Respondent was aware of a dangerous condition, but rather, whether Complainant issued a withdrawal order during the time when an imminent danger existed. As set forth above, the record does not establish that the withdrawal order was timely issued.

wires "shall be supported on well-insulated insulators and shall not contact combustible material, roof, or ribs." 30 C.F.R. 75.516-1 defines the term "well-insulated" as follows: "well-insulated insulators is interpreted to mean well-installed insulators. .." Hixson explained that he issued the citation alleging a violation of Section 75.516 supra, as the failure of the insulation is a violation i.e., that the insulator did not do what is was designed to do i.e., to keep the electricity in the wire. Gossard testified that if the insulator fails, electricity from the wire will then ground to the plank and roof, causing heat, which could lead to combustion.

Gossard also indicated that the trolley wires at Respondent's mine were a 600 volt system, whereas the insulators at issue were not designed specifically for use with a 600 volt wire system. He said the insulators could be used with either a 300 or 600 volt wire system. He indicated, in essence, that accordingly, when the insulators are used with a 600 volt system, arcing is more likely to occur if the insulators are not functioning properly. In essence, he recommended using an insulator designed to be resistent to moisture in order minimize the risk of arcing.

Complainant cites the fact that combustion had occurred, (as described in II(A) infra) as evidence that the hangers and insulators failed to operate as designed. Complainant also refers to Hixson's testimony which sets forth his opinion that Section 75.516 supra is intended to prevent the hazards attendant upon contact between power wires and combustible materials. In this connection, Complainant argues that since combustion occurred, electrical current from the trolley wires came in contact with the combustible wooden plank. For the reasons that follows I find Complainant's arguments to be without merit.

Section 75.516 supra requires that wires such as the trolley wires in issue shall be supported on "well-insulated insulators and shall not contact combustible materials roof or ribs". Hence, the plain language of Section 75.516 supra indicates that this Section is violated only if, (1) the insulators are not "well insulated" or (2) the trolley wires contact combustible material, roof, or ribs.

1. Well-insulated insulators

Section 75.516-1 defines well insulated insulators as meaning, "well-installed insulators". At best, the evidence herein tends to establish that the insulators did not serve their intended purpose due perhaps to moisture. However, there is a lack of evidence to base a conclusion that the insulators were not "well-installed". There is no evidence in the record to base a conclusion as to the manner in which the insulators were installed. Indeed, the parties stipulated that the insulators at

issue were "well installed". (Tr. 115) Thus, I conclude that the trolley wires were well insulated.

2. Trolley wires in contact with combustible material

Also, Section 75.516 supra is violated if the trolley wire comes in "contact" with combustible material, roof or ribs. Section 75.516 supra contains the identical language that was set forth in Section 305(k) supra of the 1969 Act and which was incorporated in the 1977 Act. Neither the 1969 Act nor the regulations clarify as to whether section 305(k) (Section 75.516 supra) intended to prohibit physical or electrical contact between a trolley wire and combustible material. However, enlightenment as to as to Congressional intent is found in the legislative history of the 1969 Act. The Senate Report, in its section by section analysis, indicates that section 206(g) of the Senate Bill, whose language was reiterated in Section 305(k) of the 1969 Act, requires that all power conductors be "not allowed to touch combustible material, roof, or ribs." (Legislative History, supra at 193). To the same affect, the House Report in its analysis of Section 305(l) of the House Bill whose language was reiterated in Section 305(k) of the 1969 Act, states that Section 305(l) requires that all underground power conductors be "not allowed to touch combustible materials, roof or ribs". (Legislative History, supra, at 1079). Thus, I conclude that Congress intended that trolley wires not touch combustible material i.e. not come in physical contact with these materials .

There is insufficient evidence before me to conclude that the trolley wires were touching any combustible material. None of the witnesses who were present at the time, Hixson, Marlan Whoolery a union work-around, or Patrick M. Wise, Respondent's safety escort, provided any description of the spatial relationship of the wire to the combustible materials, roof, ribs or plank. Hixson indicated that once the power was off and the flames went out, he took the trolley wire out of the clip located at the bottom of the insulator between the insulator and the trolley wire (See Government Exhibit No. 5). This testimony does not establish that the wire was touching the plank or other combustible surfaces.

Whoolery, indicated that when he observed the plank burning, the hanger was no longer attached to the plank. After the power was turned off, he removed the hanger from the wire. If the wire was attached to the hanger, but the hanger was not attached to the plank, I cannot conclude that the wire was in contact and touching the plank or other combustible material.

Therefore, for all the above reasons, it is concluded that Petitioner has not established a violation herein of Section 75.516 supra as alleged.

C. Order No. 3690658

On July 3, 1991, Hixson, upon entering the 7-D track entry, observed smoke "billowing" from the base of a hanger (Tr. 149). He said that he then had the power turned off. Hixson said that the roof was extremely hot where the pipe hanger was attached to the roof. According to Hixson, there was a one-foot distance between the hanger and the roof. The hanger was attached to the roof by a pipe which was not insulated. An insulator separated the roof from the energized wire. Hixson said that the roof felt hot for about two feet around the pipe. According to Hixson, the roof consisted of coal, shale and rock, and sloughage was present.

After approximately an hour, the roof had cooled off, and there was no longer any smoke observed. Whoolery, who was present with Hixson, indicated that after the power was turned off, he was not part of a conversation between Hixson and Wise but heard "bits and pieces" and that "I think it was explained it was a 107-A" (Tr. 187). According to Hixson, "right after the power was removed", he told Respondent's personnel that he was going to issue an imminent danger withdrawal order (Tr. 169). Hixson issued a written imminent danger order outside the mine at 11:35 a.m., after a new hanger was installed to replace the one that had become hot.

The critical issue for determination is whether an imminent danger still existed when Hixson issued a 107(a) withdrawal order. The order was issued in writing at 11:35 a.m., outside the mine, clearly after the condition constituting on imminent danger was no longer in existence. The earliest that Hixson orally informed Respondent that he was going to issue a withdrawal order was after the power was removed from the mine hanger. Once power was removed, the "heavy" smoking stopped, but there was still smoking and "hot spots" (Tr.170). The roof was "extremely" hot around the area where the pipe entered the roof (Tr. 150). The order subsequently issued by Hixson cites the following conditions as constituting the imminent danger: "A hot hanger ... was found ... the hanger had gone to ground causing the mine roof to become hot with a large amount of smoke. The mine roof ... had coal in this area" [sic]. In his testimony, Hixson explained that the presence of smoke indicated a fire, and that he issued the 107(a) order because there was an "uncontrolled" fire that had a potential for disaster (Tr.159). Ron Gossard, an MSHA electrical supervisor testified, in essence, that smoke indicates that combustion was taking place. According to Gossard, the presence of smoke can lead to smoke inhalation, exposure to carbon monoxide, and the impediment of exit from the mine. He also indicated that the amount of heat in the coal roof is dependent on the amount of current that passes into the coal strata, as well as the passage of time. I accept his testimony due to his expertise and experience. Hence, I find that even

though power had been turned off when Hixson orally advised Respondent that he was going to issue a 107(a) order, there still was a fire in the coal roof. Gossard opined that given the combustion, the roof will fracture and "in all probability" drop out of the main mine roof (Tr. 237). When this occurs, particles of smoldering coal are exposed and "can very readily" burst into flames (Tr. 237). This "could happen quickly" (Tr. 237) Gossard also indicated that with the roof falling out, "there's a very distinct possibility that when this roof fractures it will bring a long section of trolley wire down with it" (Tr. 238). In this event trolley wire contacting the rail will cause arcing.

Within the framework of this testimony I affirm the oral notification of withdrawal issued by Hixson when the power was turned off, and subsequently committed to writing as Order No. 3690562.

D. Citation No. 3690659

On July 3, 1991, in addition to the imminent danger order, Hixson issued a Citation alleging a violation of Section 75.516 supra. According to Hixson, smoke was coming from the point where the pipe hanger was attached to the roof. He did not specifically indicate that the trolley wire was touching the roof, or any other combustible material. Whoolery indicated that there was a glow around the insulator, the plastic on the trolley wire was smoldering, and that coal in the roof was burning. He too did not specifically state that the trolley wire was touching any combustible material. Neither Whoolery nor Hixson nor any other witness or any other evidence has indicated the manner in which the insulators were installed. I thus find that it has not been established that the insulators were not well installed. It also has not been established that the trolley wire was in contact with any combustible material, roof or ribs. Thus, for the reasons set forth above, II (B) infra, I conclude that it has not been established that there was any violation of Section 75.516 supra, and thus Citation No. 3690659 must be dismissed.

E. Order No. 3702374

On July 2, 1991, James Samuel Conrad, Jr., an MSHA inspector, was at the subject mine to perform a methane spot inspection. At approximately 8:45 a.m., in the track haulage entry, he observed that the roof was smoldering and there was smoke around the metal rod in the roof. He said the roof was warm to touch for an approximately five foot radius around the smoke. He said that the only obvious reason for this heat was the failure of an insulator, as there was no other source to generate smoke out of a hole where the metal rod had been placed in the coal. He then cut off power to the trolley wire, removed the insulator from the rod, and proceeded to pick down coal from the roof. Water was applied for approximately 45 minutes to cool the roof. Also the hanger was replaced.

Conrad indicated that there was coal four inches into the roof. In addition, he said that sloughage was present, and there were wooden cribs in the intersection. He said that all these items were combustible.

James W. Reed, a union walk-around who was with Conrad, also observed a "good bit" of smoke coming out of the coal in a 4 foot wide area surrounding the pipe hanger (Tr. 224). He also said that the slate was hot to the touch above the coal. He indicated that the coal from the roof that had been "picked down" had fallen to the ground. (Tr. 226) He said that this coal was still "smoking" when it was on the ground (Tr.226). According to his testimony, the coal was hosed down for about a little more than 10 minutes, and "it was cooled down pretty much and we felt we had it pretty much in control" (Tr.227). [sic] He said that at approximately 9:35 a.m., the situation was "under control and we left...". (Tr. 229) Prior to that time, Conrad did not orally advise Respondent of any withdrawal order.

At about 10:35 a.m., after the imminently dangerous conditions ceased to exist, Conrad told Respondent's representative Robert Velesky, that he probably will issue a section 107 order with regard to the hot hanger.

At the end of the inspection at about 1:00 p.m., Conrad issued a written imminent danger order indicating that the order was issued 8:45 a.m., and terminated 9:35 a.m. In essence, Conrad said he did not issue the order earlier, because "I was more concerned with the facts of dealing with the condition at hand. And I felt the paperwork was just a preliminary thing, a follow-up." (Tr. 217) [sic]. He also indicated that he took into consideration the fact that Hixson had previously issued a 107(a) order "on very similar circumstances". (Tr.217).

I find that the evidence does not establish that the 107(a) order was issued at a time when the conditions constituting an imminent danger were still in existence. Therefore as explained above, II(A) infra, I conclude that the Section 107(a) order was not properly issued.

F. Citation No. 3702375

On July 3, Conrad issued a citation citing the conditions observed by him on July 2, and alleging a violation of 30 C.F.R. 75.516. In the citation he alleged that a "shorted ou insulator that was supporting the energized trolley and feed wire caused the roof coal in the immediate mine roof to catch fire." However, there is no evidence in the record with regard to the manner in which the insulators were installed. Specifically, there is no evidence that the insulators were not well installed. Also, there is no evidence that the trolley wire was touching the roof or any other combustible material.

Therefore, for the reasons set forth above, II(B) infra, I find that it has not been established that there was a violation of Section 75.316 supra. Accordingly the citation should be dismissed.

ORDER

It is hereby ORDERED that Order No. 3690658 be affirmed and Notice of Contest Docket No. PENN 92-1305-R be DISMISSED. It is further ORDERED that the following Orders and Citations be DISMISSED: 3690652, 3690659, 3690660, 3702374, 3702375 and 3702400.

Avram Weisberger
Administrative Law Judge

Distribution:

Daniel Rogers, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

Theresa C. Timilin, Esq., Office of the Solicitor, U. S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)
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