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OLGA COAL CO. V. SOL (MSHA) & UMWA
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

OLGA COAL COMPANY, APPLICANT	Application for Review
v.	Docket No. HOPE 79-111
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Order No. 253669 October 24, 1978 Olga Mine No. 2
AND	
UNITED MINE WORKERS OF AMERICA, RESPONDENT	

DECISION

Appearances: Michael T. Heenan, Esq., and M. Susan Carlson, Esq., Kilcullen, Smith & Heenan, Washington, D.C., for Applicant
James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, Pennsylvania, for Respondent
Mary Lu Jordan, Esq., United Mine Workers of America, Washington, D.C., for Respondent

Before: Judge Forrest E. Stewart

Findings of Fact and Conclusions of Law

Olga Coal Company (Applicant) filed a timely application pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (hereinafter the Act), 30 U.S.C. 801 et seq., requesting review of Order No. 253669, issued October 24, 1978. Applicant also challenged the validity of the underlying citation which was issued under section 104(d)(1) of the Act.

A hearing was held on June 7 and 8, 1979, in Charleston, West Virginia. Applicant called three witnesses and introduced five exhibits. MSHA called three witnesses and introduced six exhibits. The UMWA called one witness. Each of the parties filed a posthearing brief.

Underlying Citation

Citation No. 253350 was jointly issued by Federal coal mine inspectors Robert Huffman and Lawrence Snyder on October 11, 1978, pursuant to section 104(d) of the Act. The inspectors alleged a violation of 30 CFR 75.326, and described the condition or practice at issue as follows: "The air passing over 10 Left section belt conveyor was being used to ventilate the active working section."

The inspectors also alleged that the condition was of such a nature as could significantly and substantially contribute to a mine safety hazard.

The event which led to the issuance of Citation No. 253350 occurred on October 9, 1978. The parties offered the following stipulation concerning that event:

> On October 9, 1978, there was a slippage of the fire resistant belt near the belt drive. This slippage caused intense smoke to permeate the 9 Left and 10 Left section entryways. These areas are marked by blue to indicate that they are in intake air. Smoke also permeated the face area. Seven men were working in this area on that day, five of whom used self rescuers to abandon this area.

On the following morning, Inspector Snyder was informed of this incident and, thereafter, he conducted an inspection of the 9 and 10 Left sections. The inspector examined the belt and ventilation on the 9 Left section but he did not have the time to check ventilation on the 10 Left section that day.

Inspector Snyder returned to this area on October 11 in the company of Inspector Robert Huffman. While Inspector Snyder continued his examination of the 9 Left section, Inspector Huffman proceeded to check ventilation on the 10 Left section.

As Inspector Huffman proceeded along the belt entry, he observed two stoppings which were leaking excessively. The inspector conducted smoke tests at these locations and observed that the air was traveling from the belt entry into the intake entry. He explained that a hole had been knocked out in one stopping to allow passage of a plastic pipe from one entry into the next. Leonard Sparks, the UMWA safety committeeman who accompanied Inspector Huffman, testified that this pipe had been installed "for quite sometime." He was aware of its presence because he had pumped water from the track through that particular pipe. The unsealed area around the pipe was clearly visible and was large enough to allow Mr. Sparks to place his fingers in the hole around the pipe. A hole had been placed in the second stopping to permit the passage of a rock dust hose.

Inspector Huffman also performed smoke tests at a diagonal door which separated the belt entry from the intake entry. He observed that the air migrated very rapidly into the intake escapeway. The inspector testified that the door was damaged and had been installed on the wrong side of the stopping. It remained open approximately 12 inches when he tried to close it.

After Inspector Huffman examined the diagonal door, he met Inspector Snyder, who also examined this area. Inspector Snyder agreed to sign the citation because his examination of the diagonal door convinced him that a violation existed. Mr. Sparks' testimony corroborated that of the inspectors.

To determine whether Citation No. 253350 was properly issued pursuant to section 104(d) of the Act, it must be determined (a) whether a violation of 30 CFR 75.326 existed as alleged and, if so, (b) whether the violation was such nature as could significantly and substantially contribute to the cause and effect of a coal mine safety hazard, and (c) whether the violation was caused by an unwarrantable failure of the operator to comply with section 75.326.

The applicable portion of section 75.326 reads as follows:

> Whenever an authorized representative of the Secretary finds, in the case of any coal mine opened on or prior to March 30, 1970, which has been developed with more than two entries, that the conditions in the entries, other than belt haulage entries, are such as to permit adequately the coursing of intake or return air through such entries, (a) the belt haulage entries shall not be used to ventilate, unless such entries are necessary to ventilate, active working places, * * *.

The parties stipulated at the hearing that the Olga Mine was opened prior to March 30, 1970, but that the particular working section opened after that date. This working section had been developed on four entries, one of which was the belt entry. It is clear that the belt haulage entry was not necessary to ventilate the active working places.

To establish a violation of section 75.326, the Secretary must also show:

(1) that an authorized representative of the Secretary had found that the conditions in the entries, other than belt haulage entries, are such as to permit adequately the coursing of intake or return air through such entries, and,

(2) that the belt haulage entries were being used to ventilate active workings.

With respect to the requirement that a finding be made, Applicant asserted the following:

> As a condition precedent to a showing of a violation of 30 CFR 75.326 with respect to any mine opened before March 30, 1970, it must be shown that a specific finding was made by the Secretary and communicated to the mine involved that "conditions in the entries other than belt haulage entries, are such as to permit adequately the coursing of intake or return air through such entries." The Secretary has failed to establish by a preponderance of the evidence in the present case that any such finding was ever specifically made and communicated to the Applicant so as to make this section applicable to Olga Coal Company.

The Secretary contended that an adequate finding had been made, asserting the following:

> Here, there is approval of a ventilation plan which does not call for the use of beltway air to ventilate the working areas of the 9 and 10 left sections of the mine. There is also the stipulation that the ventilation in this specific area was modified and determined to be adequate without the need for belt haulageway air. This constitutes adequate notice to the operator. The operator actively participated in the modification process, and submitted the ventilation plan for approval.

The citation did not contain the specific statement that the authorized representative had found conditions in the entries to be such as to permit adequately the coursing of intake or return air. The regulation, however, requires only that such a finding be made. There is no requirement therein that this finding be communicated to the operator. Certainly the regulation does not require that a formal finding be made pursuant to section 75.326 and then communicated to an operator before the section may be applied.

Applicant's argument is particularly weak in the case at hand because Applicant had actual knowledge that the entries on the affected sections were such as to permit adequately the coursing of intake or return air. The ventilation plan, to which Applicant had acquiesced, already called for the ventilation of working areas on these sections with air other than that of the belt entry. The effort to separate belt air from that of the other entries had been made by the Applicant prior to Mr. Caffrey's inspection. This effort was unsuccessful because of improperly maintained stoppings, not because of the condition of the entries on the section.

The conditions in these entries were such as to permit adequately the coursing of intake or return air. It is true that a preliminary finding to that effect had to be made before the inspector

could conclude that a violation of section 75.326 existed. This preliminary finding was made by the inspectors before they issued the subject citation. Two days had been spent inspecting the ventilation on sections 9 and 10. With regards to the requisite finding, the conditions in the entries were obvious enough that the inspectors did not have to enunciate that finding in the citation.

The belt entry was being used to ventilate the active working within the meaning of section 75.326. That belt haulage air entered working areas is uncontradicted. The smoke tests performed by Inspector Huffman indicated that air was traveling very rapidly from the belt entry into an intake entry, and from there to the active working places. This was not an instance of isolated, unsubstantial leakage, nor one in which the failure to separate the belt entry made it possible that leakage might occur. The October 9th contamination of the working places with smoke generated in the belt entry provides dramatic evidence that air from that entry had been used to ventilate the active workings.

Applicant asserted that the leakage of air from the belt entry was unintentional and that unintentional leakage does not constitute a use of belt air to ventilate active workings in violation of section 75.326. This contention is rejected. There is nothing in section 75.326 which requires that the use of belt entry air for such ventilation be intentional.

The condition which gave rise to Citation No. 253350 was a violation of 30 CFR 75.326 as alleged.

The condition described by the inspectors and the UMWA witness as existing on October 11 was more than a technical violation. That it had the potential to contribute to the creation of a serious mine hazard had been all too graphically demonstrated by the contamination of the section that had occurred 2 days earlier. Both inspectors testified that the leakage they observed between the belt and the intake entries could significantly contribute to a mine hazard. Each believed that, given the leaks that were present on October 11, another belt fire would have produced the same situation that had occurred on October 9, 1978. Had another fire occurred, the miners on the longwall face would have been enveloped once again in smoke. Neither inspector felt that the possibility of another fire was remote and Inspector Huffman described the conditions he observed on the 11th as "very near an imminent danger." The violation was clearly of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard.

A finding that a violation was caused by the unwarrantable failure on the part of the operator is proper if the inspector determines that: "The operator involved has failed to abate the 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." Ziegler Coal Company, 7 IBMA 280, 296 (1977).

This violation was caused by the unwarrantable failure of the operator. The operator demonstrated a lack of due diligence in its failure to discover and abate the conditions which caused the active working section to be ventilated with belt entry air. The October 9th contamination of the longwall face put the Applicant on notice that a hazard existed on the section. The doorway and holes in the stopping provided an obvious avenue for smoke from the belt to reach the working section. In view of the seriousness of the hazard, these apertures should have been detected and repair efforts undertaken.

The condition which existed along the belt entry on October 11, 1978, was in violation of section 75.326, was of such a nature as could significantly and substantially contribute to the cause and effect of a mine hazard, and was caused by unwarrantable failure on the part of the operator. It was, therefore, properly issued under section 104(d) of the Act.

Order No. 253669

Order No. 253669 was issued by inspector William Uhl on October 24, 1978, in the course of a regular inspection of Olga Mine. The inspector cited a violation of 30 CFR 75.400 and described the condition or practice at issue as follows:

> Loose coal, coal dust and float coal dust were permitted to accumulate along the active shuttle car haulageway, No. 3 entry, 3 North section, I.D. 031. These accumulations ranged in depths from 0-20 inches beginning at the section dumping point and extending inby to the Nos. 1 & 2 pillar blocks. A distance of approximately 600 feet.

To determine whether Order No. 253669 was properly issued, it must be determined (a) whether the violation of section 75.400 existed as alleged, and, if so, (b) whether the violation was caused by an unwarrantable failure on the part of the operator.

The elements of MSHA's prima facie case, as set forth in Old Ben Coal Company 8 IBMA 98 (1977), are as follows:

> (1) that an accumulation of coal dust, float coal dust deposited on rock dusted surfaces, loose coal, or other combustible materials existed in the active workings of a coal mine; (2) that the coal mine operator was aware, or, by the exercise of due diligence, should have been

aware of the existence of such accumulation; and (3) that the operator failed to clean up such accumulation, or undertake cleanup, within a reasonable time after discovery, or after discovery should have been made.

Evidence of record clearly establishes that accumulations of coal, coal dust and float coal dust existed along the shuttle car haulageway in the 3 North section on October 24, 1978. The witnesses for Applicant and Respondent differed as to the extent of these accumulations. Inspector Uhl testified that a reasonable man would have considered the accumulations excessive.

From the size of the accumulation, Mr. Uhl estimated that it had probably developed over a period of several shifts. The testimony of section foreman, Hubert Patterson, established that the accumulations had occurred during the three full mining shifts between October 19 and 24.

Mr. Uhl measured the accumulations he observed and determined that the accumulations ranged in depths from 0 to 20 inches. He testified that for the most part of the accumulations were 8 to 10 inches deep for the entire 600-foot length of the active shuttle car haulage road, and extended for 14 feet across the width of the entry.

Since the company officials apparently disagreed with his conclusion that a violation existed, Mr. Uhl decided to take dust samples to substantiate his order. Although this area is required to be maintained at a 65 percent incombustible level, the analysis of Mr. Uhl's samples indicated that the accumulation present in the 3 North section ranged from 10 to 25 percent incombustibility.

Applicant's witnesses testified that the accumulations were far less extensive than the inspector claimed. They agreed that there had been some spillage of coal at points along the entry, but that the only large accumulation existed at one particular corner. Mr. Smallwood, Applicant's safety director, testified that coal had accumulated at this corner to a depth of 8 to 10 inches for the entire width of the entry and a distance of 15 to 20 feet.

The conclusions of Inspector Uhl are accepted here. He based his finding that the accumulations existed and were excessive on measurements, dust samples and visual observation. Of Applicant's witnesses, only Hubert L. Patterson, a foreman on the 3 North section, took depth measurements. The three measurements taken by Mr. Patterson complemented, rather than contradicted, Inspector Uhl's findings.

The operator, through Section Foreman Patterson, was aware of the existence of the accumulation. Inspector Uhl testified that Mr. Patterson had stated that the foreman on the preceding shift had

mentioned the need for a cleanup. Mr. Patterson denied having spoken with the foreman from the previous shift and did not remember making any such statement to the inspector. However, he testified that he had observed the accumulations during an early shift inspection of the section and that he wanted to clean them up.

Moreover, the operator should have been aware of these accumulations of coal. They were visually obvious and had been building up for three production shifts.

Finally, the operator failed to undertake cleanup within a reasonable time after the accumulations were discovered or should have been discovered. The accumulations were extensive and had a high content of combustible material. In the opinion of the inspector, the condition was close to being an imminent danger. The accumulations presented a serious hazard and warranted immediate action. No such action was taken.

In addition, Applicant's cleanup program called for cleanup of the haulageway "as required." When the inspector arrived, shuttle car operators were cleaning their equipment in compliance with one of the provisions of the cleanup program. No effort had been undertaken, however, to clean the haulageway despite the fact that coal had been building up for three production shifts. Oden Strong, superintendent of the Olga Mine, testified that it was not the practice at the mine to fail to clean up a section for three working shifts.

The conclusion that the operator failed to undertake cleanup within a reasonable time is warranted in view of the seriousness of the hazard present, as well as its failure to comply with its own cleanup program.

MSHA has established that a violation of section 75.326 existed as alleged.

A finding that a violation was caused by the unwarrantable failure on the part of the operator is proper if the inspector determines that the operator failed to abate the conditions or practices constituting the violation, which it knew or should have known existed or which it failed to abate because of a lack of due diligence, indifference or reasonable care. As noted above, the operator had knowledge, or should have had knowledge of the excessive accumulations.

Applicant asserted that the key issue presented herein is "what was the proper way for the section to be mined considering all applicable safety concerns?" The Applicant contended that its foreman recognized the existence of two safety hazards on the section and attended to the more serious of the two. Because the section has a very hard top and is subject to substantial pressure, the ribs of

the pillars on the section are prone to bumping and its floors tend to heave or buckle upward. The foreman attempted to complete the mining of two pushouts, one on each of two pillars, in order to reduce pressure on the section and decrease the likelihood that heaving or bumping would occur. It was asserted that the mining of the pillar and a cleanup were mutually exclusive because it was difficult to clean the accumulations without recutting the buckled floors, and the continuous miner was the only piece of equipment available on the section which could perform both tasks.

Mr. Patterson offered somewhat contradictory testimony as to the length of time taken to remove the two pillars which were being mined at the time. At one point, he stated that it took 2-1/2 days. He also testified that the mining of those pillars began after the last cleanup had occurred on the section, three production shifts earlier. It is accepted that once mining of a pillar has begun, it should be mined to completion so as to minimize the occurrence of bumping or heaving. Yet, in the course of these three critical production shifts, coal had accumulated in hazardous amounts.

Applicant's "greater hazard" argument is rejected. Both conditions posed a hazard to those working on the section. The accumulation of coal was the result of a breakdown in Applicant's cleanup program which called for section cleanup "as required." As noted above, Oden Strong testified that it was not the practice at the Olga Mine to fail to clean up a section for three shifts. When cleanup was required on this section, mine personnel were either unwilling or unable to effect it. The operator failed to act when presented with a serious safety hazard, and failed to maintain its established cleanup procedure. The violation was, therefore, the result of an an unwarrantable failure on the part of Applicant.

Accordingly, Order No. 353669 was properly issued.

ORDER

The above-captioned application for review is hereby DISMISSED.

Forrest E. Stewart
Administrative Law Judge