CCASE:
CONSOLIDATION COAL V. SOL (MSHA)
DDATE:
19800919
TTEXT:

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

CONSOLIDATION COAL COMPANY, CONTESTANT	Contest of Citation Docket No. WEVA 80-224-R
v.	McElroy Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	

DECISION

Appearances: Michel Nardi, Esq., Pittsburgh, Pennsylvania, for Contestant, Consolidation Coal Company
David Street, Esq., Philadelphia, Pennsylvania, for Respondent Secretary of Labor

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This action was commenced on February 4, 1980, when Consolidation Coal Company (hereinafter Consol) filed a notice of contest of a citation issued on January 8, 1980, under section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 814(d)(1) (hereinafter the Act). Upon completion of prehearing requirements, this matter was heard in Pittsburgh, Pennsylvania, on June 18, 1980. Charles Coffield, Terry Kirk, David McCray, and Ronald Anderson testified on behalf of the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA). William M. McCluskey and Grayson Heard testified on behalf of Consol. Both parties submitted posthearing briefs.

ISSUE

The issue in this case is whether the citation for violation of 30 C.F.R. 75.400 was properly issued.

APPLICABLE LAW

Section 104(d)(1) of the Act, 30 U.S.C. 814(d)(1), provides in pertinent part as follows:

> If, upon 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.

30 C.F.R. 75.400 provides as follows: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

STIPULATIONS

The parties stipulated the following:

1. McElroy Mine is owned and operated by Consol.

2. Consol and the McElroy Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction over this proceeding pursuant to section 105 of the 1977 Act.

4. The inspector who issued the subject citation was a duly authorized representative of the Secretary of Labor.

5. A true and correct copy of the subject citation was properly served upon the operator in accordance with section 104(a) of the 1977 Act.

6. Copies of the subject citation and termination are authentic and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of any statements asserted therein.

FINDINGS OF FACT

I find that the evidence of record establishes the following facts:

1. McElroy Mine is owned and operated by Consol.

2. Inspector Charles Coffield, who issued the subject citation, was a duly authorized representative of the Secretary of Labor.

3. On January 8, 1980, Inspector Coffield performed a spot inspection of the McElroy Mine which included an examination of the following conveyor belts which were in operation: Mother belt, No. 1, and No. 2 belts.

4. During the course of his inspection, Inspector Coffield observed and measured the following piles of coal and coal dust along No. 1 and No. 2 conveyor belts:

(a) A pile of coal and coal dust 3 to 4 feet wide, 22 feet long, and 4 to 7 inches deep;

(b) A pile of coal and coal dust 3 to 5 feet wide, 18 feet long, and 4 to 5 inches deep;

(c) A pile of coal and coal dust 3 feet wide, 15 feet long, and 4 inches deep;

(d) A pile of coal and coal dust 3 to 5 feet wide, 18 feet long, and 5 to 12 inches deep; and

(e) A pile of coal and coal dust 3 to 5 feet wide, 18 feet long, and 3 to 14 inches deep.

5. In addition to the foregoing piles of coal and coal dust, Inspector Coffield observed a distance of approximately 2,000 feet along No. 1, No. 2, and the Mother conveyor belts which was covered with float coal and coal dust and was black in color and a distance of approximately 1,000 feet along the same belts which was covered with float coal and coal dust and was gray in color. The total length of the three belts in issue was approximately 8,000 feet.

6. For approximately 3 weeks prior to the day before this inspection, the conveyor belts had been idle and no coal was mined in this area. Prior to the inspection, the conveyor belts operated during two working shifts during which coal was mined in this area.

7. MSHA established that coal dust, float coal dust, and loose coal accumulated along the conveyor belts as set forth above.

8. The accumulation of coal dust, float coal dust, and loose coal in the active workings of the McElroy Mine did not constitute an imminent danger because there was no immediate source of ignition.

9. The accumulations of coal dust, float coal dust, and loose coal in the active workings of the McElroy Mine could significantly and substantially contribute to a coal mine safety hazard because, in the event of a fire or explosion, they would propagate such fire or explosion.

10. The accumulations of coal dust, float coal dust, and loose coal in the active workings of the McElroy Mine had been

present for more than one working shift at the time the citation was issued.

DISCUSSION

Violation of 30 C.F.R. 75.400

At the outset, it should be noted that on December 12, 1979, the Federal Mine Safety and Health Review Commission (hereinafter Commission) adopted a new standard for determining when a violation of 30 C.F.R. 75.400 occurs. In Old Ben Coal Company, 1 BNA MSHR 2241, Docket No. VINC 74-111 (December 12, 1979), the Commission disagreed with the former standard announced by the Interior Board of Mine Operations Appeals that a violation of the mandatory standard did not occur even though an accumulation of combustible materials was present where the operator commenced abatement within a reasonable time after it had notice of the existence of the accumulation. The Commission held that the existence of an accumulation was a violation of the mandatory standard and the action of the operator thereafter to abate this condition was irrelevant to the issue of whether a violation occurred.

The issue of whether the standard was violated in this case was vigorously contested at the hearing. Consol's witnesses, William M. McCluskey and Grayson Heard, contended that the only coal dust or loose coal present along approximately 8,000 feet of conveyor belt consisted of a 14-inch high cone-shaped pile of fine coal by the tail roller of the No. 1 belt drive and an area 4 inches deep, 3 to 4 feet wide, and 20 feet long by the No. 2 belt which was covered with 2 inches of rock dust. Consol's witnesses testified that, at worst, the color of the material next to the belt was light gray. They also contended that some of the material identified by Inspector Coffield as coal dust was actually dried rock, dirt, and other noncombustible material. Consol put in evidence its preshift and onshift reports which showed that the No. 1 conveyor belt tailpiece had been dirty but that condition was corrected prior to the inspection. The Consol employees who conducted those examinations did not testify.

In support of Inspector Coffield, MSHA called the miner's representative on the inspection, Terry Kirk, as a witness. He testified that the area around No. 1 and No. 2 conveyor belts varied from black to light gray in color. He observed several piles of loose coal or coal dust along both of those conveyor belts. He observed Inspector Coffield make measurements and notes. He observed coal dust lying on the bottom and ribs along No. 1 and No. 2 conveyor belts. He testified that the float coal dust extended for a distance of approximately 2,000 feet along the above belts. While he saw one or two places along the Mother conveyor belt that required rock dusting, that belt was otherwise in good condition.

Consol, in its brief, complains about the absence of any objective criteria to distinguish between a "spillage" and an "accumulation" as follows:

> Certainly some coal spillage is inevitable, which the Mine Safety and Health Review Commission has wisely

acknowledged. Old Ben Coal, 1 MSHRC 2244, Vinc 74-1, 1 IBMA 75-52 (December 12, 1979). The question then becomes what

> distinguishes a coal "spillage" from an "accumulation" which is a violation under the Coal Mine Safety and Health Act of 1977. The Commission and courts have thus far failed to define an accumulation as a measurable entity. As the Commission stated in its recent decision, "Whether a spillage constitutes an accumulation under the standard is a question, at least in part, of size and amount." Old Ben Coal, supra. However, the Commission has not attempted to narrow the definition beyond suggesting what merits should be considered when making this evaluation. Consequently, the ambiguity persists, and what may be an illegal "accumulation" in the mind of one inspector may be a legal "spillage" in the mind of another. Thus, the operators are victimized by the lack of definitive law in this area resulting in total reliance on the individual inspector's discretion. For this reason, the operators continue to receive notices for something they cannot even identify.

In the instant case, I find that the testimony of MSHA's witnesses concerning the amount and extent of coal dust, float coal dust, and loose coal was more credible than the testimony of Consol's witnesses. The testimony of Inspector Coffield was generally corroborated by the miner's representative, Terry Kirk. Inspector Coffield made and recorded measurements of the various piles of coal dust and loose coal that he encountered. For these reasons, I find that the amount and extent of coal dust and loose coal existed as alleged in the citation.

Therefore, the issue is: whether the coal dust and loose coal constituted a spillage or an accumulation. In Old Ben Coal Company, supra, the Commission stated, "whether a spillage constitutes an accumulation under the standard is a question, at least in part, of size and amount." Id. at 1958. In the instant case, the preponderance of the evidence establishes the following: five separate piles of coal dust and loose coal as set forth in Finding of Fact No. 4; a distance of approximately 2,000 feet along the conveyor belts which were covered with coal dust and float coal dust which was black in color; and another distance of approximately 1,000 feet along the conveyor belt which was covered with coal dust and float coal dust which was gray in color as set forth in Finding of Fact No. 5. The above facts establish a great amount of spillage which amounts to an accumulation under 30 C.F.R. 75.400. Therefore, I find that Consol violated 30 C.F.R. 75.400 as alleged by MSHA.

Unwarrantable Failure to Comply

The next issue is whether the violation was due to the "unwarrantable failure" of Consol to comply with mandatory health or safety standards. The term "unwarrantable failure" was defined by the Interior Board of Mine Operation Appeals as follows:

> [A]n inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with

> such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices which 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 a lack of reasonable care. Zeigler Coal Company, 7 IBMA 280 (1977).

This definition was approved in the legislative history of the 1977 Act. S. Rpt. No. 95-181, 95th Cong., 1st Sess. 32 (1977).

In Old Ben Coal Company, supra, the Commission upheld an order of withdrawal based upon the operator's unwarrantable failure to comply with 30 C.F.R. 75.400. The Commission found that the violation was an unwarrantable failure even though the evidence established that the spillage occurred during the previous shift. In the instant case, Inspector Coffield testified that it would take a minimum of six shifts to accumulate the amount of coal dust that he observed. Miner's representative Terry Kirk testified that it would take several shifts to accumulate the amount of coal dust he observed. Consol's witnesses stated that the small amount of loose coal and coal dust that they observed must have been spilled shortly before the inspection because no spillage was reported on the preshift examiner's report. The preshift examiners did not testify.

Considering the size and amount of spillage involved, the preponderance of the credible evidence establishes that the accumulation had been present for more than one working shift before the citation was issued. Hence, Consol knew or should have known of the accumulations and failed to exercise reasonable care to abate the condition. Therefore, the violation was caused by Consol's unwarrantable failure to comply with the mandatory standard.

Significant and Substantial

In Alabama By-Products Corporation, 7 IBMA 85 (1976), the Interior Board of Mine Operations Appeals held that under the identical section of the Federal Coal Mine Health and Safety Act of 1969, all violations are significant and substantial except "violations posing no risk of injury at all, that is to say, purely technical violations, and violations posing a source of any injury which has only a remote or speculative chance of coming to fruition." Id. at 94 (emphasis in original). Since the violation in issue is not a technical one, the remaining question is whether the chance of injury is remote or speculative. In this regard, I accept the testimony of Inspector Coffield that the accumulations of coal dust and float coal dust create potential hazards of fire and explosion and these hazards are neither remote nor speculative. The violation was significant and substantial.

Assessment of a Civil Penalty

MSHA has requested that a civil penalty be assessed in this

proceeding even though it has not filed any such proposal. Since Consol has not consented to this expedited procedure, I will not assess a civil penalty at

this time. Consol may avail itself of the administrative remedies prior to the filing of a proposal for the assessment of a civil penalty with the Commission. However, as I stated at the outset of the hearing of this case, I am directing the attorneys herein to notify me promptly of the filing of a civil penalty proceeding.

CONCLUSIONS OF LAW

1. The Administrative Law Judge has jurisdiction of this proceeding pursuant to section 105 of the Act.

2. Consol permitted coal dust, float coal dust, and loose coal to accumulate in the McElroy Mine on January 8, 1980, in violation of 30 C.F.R. 75.400.

3. The violation of the above mandatory standard was caused by the unwarrantable failure of Consol to comply with the mandatory standard.

4. The violation of the above mandatory standard could significantly and substantially contribute to the cause and effect of a coal mine safety hazard.

5. Citation No. 0633622 was properly issued.

6. Consol's contest of Citation No. 0633622 is denied.

ORDER

WHEREFORE IT IS ORDERED that the contest of citation is DENIED and the subject citation is AFFIRMED.

James A. Laurenson
Judge