

CCASE:
NORTH ENERGY V. SOL (MSHA)
DDATE:
19820329
TTEXT:

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

NORTH RIVER ENERGY COMPANY,
CONTESTANT

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

Contest of Citation

Docket No. SE 82-21-R

Citation No. 755885; 11/5/81

North River No. 1 Mine

DECISION

Appearances: Bronius Taoras, Esq., Assistant Counsel, Republic Steel Corporation, Meadow Lands, Pennsylvania, for Contestant
George D. Palmer, Esq., Associate Regional Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Respondent

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

North River Energy Company filed a Notice of Contest on November 25, 1981, alleging that a citation issued on November 5, 1981, was improperly issued. The notice also challenged the findings accompanying the citation that the violation significantly and substantially contributed to the cause and effect of a mine safety hazard and was caused by an unwarrantable failure to comply with the standard. Contestant filed a motion for an expedited hearing, and pursuant to notice, a hearing was held in Birmingham, Alabama, on December 3, 1981. Newell E. Butler, a Federal coal mine inspector, testified on behalf of the Secretary. Michael R. Vickers, Assistant Safety Supervisor for Contestant, Steve Green, Manager of Safety, and Jerry Omer, Assistant General Manager of Operations, all with North River Energy Company, testified on behalf of Contestant.

Both parties filed posthearing briefs on March 17, 1982. Based on the entire record, including the testimony and exhibits introduced at the hearing, and the contentions of the parties contained in their briefs, I make the following decision:

STATUTORY PROVISION

Section 104(d)(1) of the Act provides in part:

(d)(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.

REGULATORY PROVISION

30 C.F.R. 75.400 and 75.400-1 provide:

75.400 Accumulation of combustible materials.

[STATUTORY PROVISION]

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.

75.400-1 Definitions.

(a) The term "coal dust" means particles of coal that can pass a No. 20 sieve.

(b) The term "float coal dust" means the coal dust consisting of particles of coal that can pass a No. 200 sieve.

(c) The term "loose coal" means coal fragments larger in size than coal dust.

FINDINGS OF FACT

1. Contestant is the owner and operator of an underground coal mine located in Berry, Alabama.

2. Contestant's operation of said mine affects interstate commerce.

3. On or about October 1, 1981, Jerry Omer of North River asked Inspector Butler if the company would be permitted to stockpile coal in the face areas of the mine. Butler told him that this would constitute an accumulation of coal in active workings, and a citation would be issued if it were to occur.

4. On or about October 7, 1981, Inspector Butler and supervisory Inspector Mize discussed with Mr. Omer North River's request that it be permitted to stockpile coal within 40 feet of the face. Both Mize and Butler told Omer that coal could not be stockpiled underground.

5. On or about November 4, 1981, Contestant implemented a written plan called "Cutting Plan for Periods of Belt Down Time," under which it was proposed to store coal in adjacent supported face areas when the belt was not operating. The plan provided that the coal should not be placed outby 40 feet from the face; the coal was to be placed on the wide side away from the line curtain with sufficient area to allow for proper air flow; a minimum of 3,000 c.f.m. of air was to be maintained. (Joint Exh. 2). This plan was not submitted to MSHA.

6. On November 5, 1981, Inspector Butler issued a citation charging a violation of 30 C.F.R. 75.400. The condition or practice cited was described in the citation as follows:

Combustible material was allowed to accumulate in the 1 Right working entrie on the A-11 section. Coal was being stockpiled in the 1 Right entrie. Coal was being cut in the 1 left entrie with a Joy Miner and loaded in shuttle car and hauled to the 1 right entrie and dumped. Coal was 37 foot long and 12 foot wide and 4 foot 6 inches deep. Company officials had been told that coal could not be stockpile in mines.

7. On November 5, 1981, before Inspector Butler arrived at the section the belt was not operating. Contestant continued to cut coal and take it by shuttle car from the left to the right entry where it was stockpiled, in accordance with Contestant's cutting plan for periods of belt down time.

8. The pile of coal in the entry was approximately 37 feet by 12 feet and averaged about 4 and one-half feet deep, when the inspector issued the citation. It represented 10 to 15 shuttle car loads and totalled more than 80 tons of coal.

~536

9. Coal dust was present in the air while the coal was being dumped, and the dust travelled around the line curtain toward the miner crew. The amount of float coal dust was not substantial.

10. The subject mine liberates more than one million cubic feet of methane in a 24-hour period. At the time the citation was issued, a reading of .3 percent methane was recorded in the area of the mine involved herein.

11. When the coal was stockpiled as described in Finding No. 7, the shuttle car was driven into the coal already piled and the shuttle car cable was pushed up into the pile of coal dumped previously.

12. As the coal was piled in the right entry, it cut down the amount of air reaching the face area.

13. The coal and this area of the mine were moist.

14. There were approximately seven men working in the section: the shuttle car operator; the continuous miner operator and his helper working in the left entry; the roof bolting crew in the face area; the ventilation man; and the section foreman.

ISSUES

1. Whether the intentional stockpiling of coal within 40 feet of the face pursuant to a plan for doing so when the belt is not operating is a violation of 30 C.F.R. 75.400?

2. If it is a violation, do the facts in this case show that it was of such nature as could significantly and substantially contribute to the cause and effect of a coal mine safety hazard?

3. If it is a violation, was it caused by the unwarrantable failure of the operator to comply with the mandatory safety standard?

CONCLUSIONS OF LAW

A. Violation

The standard involved herein is a statutory standard, contained in section 304(a) of the Act. It clearly provides that loose coal shall not be permitted to accumulate in active workings. There is no dispute that the stockpile involved herein consisted of loose coal and that it was in active workings. Was it "permitted to accumulate?" The Commission has stated that "an accumulation exists where the quantity of combustible materials is such that, in the judgment of the authorized

representative of the Secretary, it likely could cause or propagate a fire or explosion if an ignition source were present." Secretary v. Old Ben Coal Company, 2 FMSHRC 2806, 2809 (1980), emphasis added. See also Secretary v. Old Ben Coal Company 1 FMSHRC 1954, 1958 (1977). Contestant seems to argue that only accidental or negligent accumulations are proscribed. I find no warrant in the language of the statute (regulation) for such an interpretation. Contestant also argues that in many situations in a mine, coal is unavoidably stockpiled without an operator being cited for an accumulation violation: coal held in shuttle cars, coal shot from the face in conventional mining, coal stored in a transfer point. These are not situations before me here, and do not help in determining the meaning of the regulation. It is clear to me and I hold that the coal stockpiled in 1 right entry of A-11 section in the subject mine was an accumulation of loose coal. Since it was an intentional accumulation, the condition or practice was a violation of the mandatory standard contained in 30 C.F.R. 75.400.

B. Significant and Substantial

The Commission has held that a violation significantly and substantially contributes to the cause and effect of a hazard, if (1) there exists a reasonable likelihood that the hazard contributed to will result (2) in an injury or illness of a reasonably serious nature. Secretary v. Cement Division, 4 FMSHRC 822, 825 (1981). The inspector pointed to two hazards here: a mine fire or explosion and an interruption of ventilation. This is a gassy mine and though no significant methane was detected at the time of the inspection, methane is a constant threat. Evidence was introduced of prior methane gas ignitions occurring at the mine. The area of the mine involved herein was damp, but, of course, damp coal can burn. There was an ignition source: the shuttle car cable which was subjected to abrasions as it was pushed into the pile of coal. Is there a "reasonable likelihood" that this will result in a fire or explosion? I find the question a close one, but on balance, I conclude that the conditions cited here are reasonably likely to cause or propagate a fire or explosion. The second part of the test is not so difficult: if a fire or explosion occurred, resultant injuries would certainly be of a reasonably serious nature. Therefore, I conclude that the violation found herein could significantly and substantially contribute to the cause and effect of a coal mine safety hazard.

UNWARRANTABLE FAILURE

The violation here was intentional in the sense that the condition was deliberately created. Contestant wished to test MSHA's interpretation of the Act and, so far as this record shows, did so in good faith. Is this an unwarrantable failure to comply? In an analogous situation,

~538

I found a deliberate violation to challenge an MSHA interpretation, "the equivalent of ordinary negligence" in a penalty case. Secretary v. Cleveland Cliffs Iron Company, 1 FMSHRC 1965, 1972 (1979). It would, I believe, be anomalous to treat a negligent violation as unwarrantable, and hold a deliberate violation not unwarrantable. I hold that a good faith challenge to a standard or an MSHA interpretation of a standard is, if a violation is found, an unwarrantable failure to comply with the standard.

ORDER

Based upon the above findings of fact and conclusions of law IT IS ORDERED that the Contest of the citation is DENIED and the citation 755885, November 4, 1981 is AFFIRMED.

James A. Broderick
Administrative Law Judge