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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No: LAKE 82-79 A.C. No: 11-00590-03145
v.	
OLD BEN COAL COMPANY, RESPONDENT	
OLD BEN COAL COMPANY, CONTESTANT	Contest Proceeding
v.	Docket No: LAKE 82-67-R Order No: 1222 940; 3/15/82
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) AND UNITED MINE WORKERS OF AMERICA, RESPONDENTS	No. 26 Mine

DECISION

Appearances: Mark M. Pierce, Esq., Chicago, Illinois, for Old Ben Coal Company Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois for Secretary of Labor

Before: Judge Moore

This consolidated review and penalty proceeding was tried in Evansville, Indiana, on October 19-20, 1982. Final briefs for the parties were submitted on January 25, 1983. The parties have been advised that the cases were reassigned to me and, by their silence, are deemed to have waived any objections to my deciding the case on the basis of the record already made.

The controversy involved here stems from a withdrawal order issued on March 15, 1982, charging an unwarrantable failure pursuant to section 104(d), of the Mine Safety Act, for an alleged violation of 30 C.F.R. 75.1722(a).

On the date in question, MSHA Inspector Wolfgang Kaak, accompanied by his supervisor Michael Wolfe, and Deputy Inspector Gary Brandon, conducted a spot inspection on respondent's No. 26 mine, (Tr. 272). They proceeded underground, and at approximately 10:30 a.m., they arrived at the 12CM-5 area in the 16th East section (Tr. 274).

Once there, Inspector Kaak noticed the belt drive head was not guarded as required in the standard. He then issued Withdrawal Order No. 1222940, which reads in part as follows: "The belt drive for the 12CM-5 belt was not adequately guarded to prevent persons from coming in contact with the moving drive. The guarding had been removed and was lying along the ribs and on the floor." (Tr. 274).

The area that needed guarding was approximately 6 to 8 feet in length along each side of the belt drive. However, other than one 4 foot by 6 foot section on the east side, no guarding was installed. This one installed section matched the pieces of guarding lying on the floor. (Tr. 278, 279, 280, 290-292).

Inspector Kaak's decision to issue the order was based in part on the conditions present at the belt head drive. He determined an accident was likely because the working section was ready to load coal; the belt was energized with the remote control switch in operation; there were repairmen working in the area and the floor was slippery. Voltage on belt starter boxes is usually about 480 volts, the starter box was about five feet from the belt drive. (Tr. 281, 283-284, 292, 293, 295, 310,311).

The belt transported coal from the working unit to a main line belt which then transported the coal out of the mine. When in operation, the belt ran at 350 to 400 feet per minute. If a miner or other person brushed against these rollers while the belt was operating, it was likely they would become caught and injured or killed. Because the belt was in a highly accessible area, and it was common for those in the area to walk close by or underneath the belt, rather than going around it, the chance of such an accident assuming the belt was running, was likely. In fact, Inspector Kaak had been personally involved in one such accident. (Tr. 275-277, 295-297, 307-308, 334.)

Based on these considerations and his determination, caused by his belief that an accumulation of at least one inch of float coal dust covered the sections of guarding on the floor, that the guard had been off for at least one week, Inspector Kaak issued the order. Inspector Wolfe concurred with Inspector Kaak's decision that a 104(d) violation was warranted. (Tr. 282, 310, 314, 332, 337-338, 349).

Respondent asserted that the sections of guarding lying on the floor had been there several months and were not part of the guarding that was supposed to be installed around the 12CM-5 belt drive. (Tr. 366,367, 381). While Old Ben concedes a violation in that at the time of the inspection the drive was not properly guarded, several of its employees denied allegations concerning

the duration that the drive was inadequately guarded.

On March 16, 1982, Kenny Kondoudis, a belt shoveler and UMWA Safety Committeeman, told Inspector Kaak that the guarding was on the belt drive in question the night before and that he had not taken the guarding off to clean the drive. (Tr. 363-365, 376-77). Kondoudis had, Inspector Wolfe claimed, reported to him during the hearing that he had been confused about which belt drive the citation had been written on. (Tr. 351-3). However, he was not called as a witness and as Old Ben pointed out, Kondoudis was very familiar with the areas of the mine. (Tr. 399).

Later, on the day the citation was issued, Old Ben had a crew reinstall guarding on the 12CM-5 belt drive. In place of the hog wire type screen that the old guarding and sections on the floor were made of, a new wire mesh type guarding was installed. (Tr. 386-387, 390-303).

One additional fact concerning the Pre-Shift Report deserves mention. Normally, the preshift examiner for the 8:00 a.m. shift would have observed the belt drive at approximately 5:00 a.m. (Tr. 379). However, the Pre-Shift Exam Book (Exhibit R-4), contained no reference to the missing guard. (Tr. 377-379, 391).

Old Ben concedes and the evidence clearly establishes that a violation of 30 C.F.R. 75.1722(a), did occur. Old Ben contends that Withdrawal Order No. 1222940 was improperly issued under Section 104(d)(1) and should be vacated and "declared void ab initio" for three reasons:

(1) It is not based on a valid underlying citation issued under Section 104(d)(1). This citation (No. 1222597 dated 3/11/82) was upheld in the bench decisions in related dockets numbered LAKE 82-85 and LAKE 82-66-R.

(2) That the conditions cited in Order No. 1222940 did not meet the significant and substantial criteria of 104(d), the conditions then in existence "did not pose a reasonable likelihood that an injury would occur."

This argument is rejected for two reasons. First, the facts in existence when the subject order was issued did show that this was a significant and substantial violation. Second, Old Ben's attorneys have demonstrated in their West Virginia Law Review article (attachment 2 to the brief) "significant and substantial" is not a necessary finding for a 104(d)(1) order.

(3) The final argument is that the cited violation did not constitute an unwarrantable failure under 104(d)(1). In order to be considered unwarrantable, Old Ben's failure to comply with the mandatory safety standard must have been a result of its negligence, or attributable to it through the negligence of its

As stated, there was a clear violation of 30 C.F.R. 75.1722(a), a mandatory safety and health standard. However, fo such violation to be unwarrantable the violative condition must have been one that the operator knew or should have known existed or which the operator failed to correct through indifference or lack of reasonable care.

The determination of whether Old Ben should have known about the violation largely depends on how long it was in existance. If, as Inspectors Kaak and Wolfe represented, the guard on the 12CM-5 belt had been off "for at least one week", it would be easy to infer that Old Ben "knew or should have known" about the violation. The belt drive was in an easily accessible working area of the mine.

However, this inference can not be so easily drawn if the guard had been in place during the previous shift as Old Ben contends. At best, the circumstances surrounding the guarding's removal are questionable. There is no evidence to support Inspector Kaak's assumption that the pieces of guarding on the floor were part of the missing guarding. In fact, when later on that day the guarding was reinstalled, a new wire mesh type, different from what was found on the floor, was installed. The discovery of these sections and the Inspector's determination that they had been there for at least one week forms the basis of the Secretary's contention that the guarding had been off for a period long enough for Old Ben to have known about the violation.

This evidence is not strong enough to rebut Old Ben's contrary evidence. This contrary evidence consists of:

(1) The direct testimony of Donald Kellerman, the belt supervisor, that the 12CM-5 belt drive was properly guarded at 3:30 a.m. the morning the citation was issued.

(2) UMWA Safety Committeeman Kenny Kondoudis' report to his supervisors and Inspector Kaak that the 12CM-5 belt drive had been properly guarded that morning.

(3) The failure of the Pre-Shift Exam Report, filled out at approximately 5:00 a.m. that morning, to indicate any irregularity in the guarding on the 12CM-5 belt drive.

The only rebuttal to this evidence was Inspector Wolfe's assertion that Kenny Kondoudis admitted to him that he had been confused about which belt drive was in question. However, Kondoudis was thoroughly familiar with the mine. Additionally, several persons had heard him say that the guard had been up. (Tr. 351, 364, 398). Inspector Wolfe's assertion that Kenny Kondoudis was confused stands alone.

The weight of evidence points in favor of Old Ben and its contention that the belt drive had been properly guarded earlier that morning. Thus, since the circumstances surrounding the occurrence of this violation are unknown, the Secretary's determination that the violation occurred as a result of Old Ben's unwarrantable failure to comply with the relevant safety standard is found to be unsupportable. The inference that Old Ben "knew or should have known" of the violation can not stand based on the evidence as presented. In this case, it has been found that the violation did not occur as a result of the unwarrantable failure of the mine operator to comply with the cited standard, thus failing the (d)(1) criteria. However, the significant and substantial finding as well as the underlying (d)(1) citation have been upheld. Accordingly, Withdrawal Order No: 1222940 is modified to reflect that it is a citation issued pursuant to 104(a) of the Act.

As to the penalty, there was no negligence proved and based on prior findings with respect to the likelihood of an accident occurring due to the violative condition, and the injuries which could have resulted therefrom, I conclude that the violation was serious.

I find that Old Ben is a large coal mine operator but not one of the giants of the industry; it has an unsatisfactory history of previous violations; and Old Ben proceeded in good faith to achieve compliance with the violated safety standard after receiving notification of the violation.

Weighing these various factors, it is concluded that a penalty of $300 is appropriate and the same is assessed.

ORDER

(1) Old Ben is ordered to pay a civil penalty of $300 to the Secretary of Labor within 30 days of the issuance of this decision.

(2) All proposed findings of fact and conclusions of law not incorporated herein are rejected.

Charles C. Moore, Jr.
Administrative Law Judge