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SOL (MSAH) V. SOUTHERN COAL
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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 PROCEEDINGS Docket No. WEVA 84-166 A.C. No. 46-03805-03570
v.	
SOUTHERN OHIO COAL COMPANY, RESPONDENT	Docket No. WEVA 84-325 A.C. No. 46-03805-03585
SOUTHERN OHIO COAL COMPANY, CONTESTANT	CONTEST PROCEEDINGS
v.	Docket No. WEVA 84-94-R Citation No. 2260722; 11/30/83
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. WEVA 84-96-R Order No. 2260729; 12/7/83 Martinka No. 1 Mine

DECISION

Appearances: William M. Connor, Esq. and Mark V. Swirsky, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor;
David A. Laing, Esq., Alexander, Ebinger, Fisher, McAlister and Lawrence, Columbus, Ohio, for the Southern Ohio Coal Company.

Before: Judge Melick

These consolidated cases are before me pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., the "Act", to contest citations and orders issue to the Southern Ohio Coal Company (SOCCO) and for review of civil penalties proposed by the Mine Safety and Health Administration (MSHA), for the violations charged therein.

A motion for approval of a settlement agreement was considered at hearing with respect to Docket No. WEVA 84-325. A reduction in penalty from $800 to $700 was proposed for the violation charged in Order No. 2260729--a violation of the standard at 30 C.F.R. 75.400 for alleged accumulations of loose, dry coal in the return air course of the North Main Section. Accumulations were found by the MSHA inspector in three different locations and

each was eight feet in length, twelve feet in width, and five feet high. It is stipulated that in view of the location and size of the accumulations, the section foreman should have known of their existence and had them removed. Ten employees were considered exposed to the explosion and fire hazard created by the accumulations. The Secretary suggested that the small reduction in penalty was appropriate in light of the absence of any ignition sources within the cited areas. The nearest source was alleged to have been cables approximately three hundred feet inby. Considering the size of the operator, its prior history of violations, and the good faith abatement of the cited condition, I conclude that the proposed penalty of $700 is appropriate. I therefore approve the settlement proposal. The request of the mine operator to withdraw the corresponding contest proceeding, Docket No. WEVA 84-96-R, is also approved. 29 C.F.R. 2700.11.

The remaining citation at issue, Citation No. 2260722, alleges a violation, under the standard at 30 C.F.R. 75.1403, of a safeguard notice issued at the Martinka No. 1 Mine on September 14, 1978. The safeguard notice required that all conveyor belts in the mine have at least twenty four inches of clearance on both sides of the belt. The citation alleged that a clear travelway of twenty four inches was not provided along the 1-1 east conveyor belt for a distance of fifteen feet because of water lying ten inches deep from rib to rib at the No. 7 stopping.

The evidence is not disputed that a pool of water fifteen feet long did in fact lie in the travelway at the No. 7 stopping. According to Inspector Harry Markley, Jr., the water was ten inches deep at the one location where he measured it with a steel tape and that the ground beneath the water presented a serious slipping and stumbling hazard. He observed that the area under water was slippery from rockdust and muck and that rock could be expected to fall into the walkway. Because of the close proximity of the conveyor belt and its exposed rollers he thought that injuries were likely to people traveling through the cited area. The belt and its moving rollers were not guarded and preshift examiners, belt maintenance men, shift foremen, inspectors, and any member of the belt crew carrying supplies were exposed to the hazard. Markley opined that the water came from seepage over a period of days and he observed that some water had already been pumped out of the travelway.

Joseph Pastorial, chairman of the Union Safety Committee accompanied Inspector Markley on his November 30, 1983, inspection. He testified that the water in the pool came within one inch of entering his twelve inch high boots. According to Pastorial, the water extended from rib to rib for a distance of fifteen feet. He observed that the wet fireclay bottom at that

location was very slippery and created a particular hazard because of its location adjacent to the belt structure and rollers.

Jon T. Merrifield, Safety Director for the Martinka No. 1 Mine, did not directly contradict the government witnesses. Rather he testified only that in the areas he tested, the bottom of the pool of water was smooth, firm and not slippery and that in the area he measured, the water was not deeper than seven inches. It was Merrifield's opinion that even if someone did slip in the water it would be unlikely for him to fall into the belt because the momentum of the fall would cause him to fall forward into the water and not sideways into the belt. Under the circumstances, however, it is clear that the terms of the safeguard notice were violated.

The mine operator nevertheless argues that the citation was erroneously issued because conveyor belts carrying coal are not within the purview of the safeguard notice provisions of the standard at 30 C.F.R. 75.1403. The standard provides as follows: "[o]ther safeguards, adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and material shall be provided." SOCCO argues that coal is not a "material" within the scope of the cited standard and that accordingly the safeguard notice herein was issued without a proper legal foundation. In furtherance of its position it cites the decision of Commission Judge Koutras in Monterey Coal Company v. Secretary, 6 FMSHRC 424 (1984).

Whether or not coal is a "material" is in any event irrelevant since it is clear that the safeguard standard applies as well to minimizing hazards associated with the transportation of men and materials by foot, in this case miners traveling along the walkway adjacent to the moving conveyor belt. Accordingly the safeguard notice was within the statutory and regulatory authorization under 30 C.F.R. 75.1403.

SOCCO argues, secondly, that even if the condition cited herein was hazardous it did not come within the safeguard notice alleged to have been violated. The safeguard provides as follows:

> A clear travelway at least 24 inches along the no. 1 conveyor belt was not provided at three (3) locations, in that there were fallen rock and cement blocks.
>
> All conveyor belts in this mine shall have at least 24 inches of clearance on both sides of the conveyor belt.

This is a notice to provide safeguards.

It maintains that the safeguard should be strictly construed and that accordingly should be held to apply only to "tripping and stumbling" hazards and not to the slipping hazard allegedly presented by the cited pool of water. However even assuming that safeguards are to be strictly construed there is ample credible evidence in this case that the cited pool of water presented a tripping and stumbling as well as a slipping hazard. Even though "fallen rock", "cement block", and other similar debris may not have been found in the water, it may reasonably be inferred from the evidence that such debris could very well come to rest under the water from the adjacent ribs.

SOCCO also argues that the safeguard requires only "24 inches of clearance" and that such clearance was provided in this case in spite of the presence of water. As the Secretary points out, however, the essence of the safeguard is that a "clear travelway [of] at least 24 inches" must be provided. The travelway cited herein was not clear in that it was obstructed by a pool of water some 10 inches deep, 15 feet long, and extending from rib to rib. SOCCO's arguments are accordingly rejected and the citation is upheld.

I find, moreover, based on the undisputed facts that a serious falling hazard existed as a result of the cited conditions and that with only a 24-inch clearance between the rib and walkway and the exposed rollers on the adjacent conveyor there was an added grave hazard from pinch points. Serious injuries and even fatalities were reasonably likely and under the circumstances the violation was also "significant and substantial". Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984). From the undisputed evidence, I also find that this serious hazard was the result of operator negligence in failing to correct conditions that were undoubtedly known but which in any event should have been observed during the required preshift examination. In determining the amount of penalty herein, I have also considered that the operator is large in size and abated the cited violation within the prescribed time. The operator has a considerable history of violations and indeed had previously been cited for the same violation as charged herein based on similar circumstances.

Order

Citation No. 2260722 and Order No. 2260729 with their attendant findings are upheld. The Southern Ohio Coal Company is Ordered to pay the following civil penalties within 30 days of the date of this decision:

Docket No. WEVA 84-166 (Citation No. 2260722)	$300
Docket No. WEVA 84-325 (Order No. 2260729)	700

Contest Proceedings Dockets No. WEVA 84-94-R and WEVA 84-96-R are Dismissed.

Gary Melick
Assistant Chief Administrative Law Judge