

CCASE:
SOL (MSHA) V. YOUGHIOGHENY & OHIO COAL
DDATE:
19860613
TTEXT:

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. LAKE 86-56
A.C. No. 33-00968-03629

v.

Docket No. LAKE 86-57
A.C. No. 33-00968-03630

YOUGHIOGHENY AND OHIO COAL
COMPANY,
RESPONDENT

Nelms No. 2 Mine

YOUGHIOGHENY & OHIO COAL
COMPANY,
CONTESTANT

CONTEST PROCEEDINGS

Docket No. LAKE 86-20-R
Order No. 2823802; 10/17/85

v.

Docket No. LAKE 86-21-R
Order No. 2823806; 10/28/85

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

Docket No. LAKE 86-30-R
Order No. 2823831; 11/19/85

Nelms No. 2 Mine

DECISION

Appearances: Patrick M. Zohn, Esq., Office of the Solicitor,
U.S. Department of Labor, Cleveland, Ohio for
the Secretary of Labor;
Robert C. Kota, Esq., St. Clairsville, Ohio for
Youghioghenny & Ohio Coal Company.

Before: Judge Melick

These consolidated cases are before me under section 105(d)
of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.
801 et. seq., the "Act," to challenge citations and withdrawal
orders issued by the Secretary of Labor to the Youghioghenny &
Ohio Coal Company (Y & O).

~949

Withdrawal Order No. 2823806 issued under the provisions of section 104(d)(1) of the Act, (FOOTNOTE 1) alleges violations of the mine operator's roof control plan under the regulatory standard at 30 C.F.R. 75.200. As subsequently modified the order charges as follows:

The roof control plan was again not complied with in the 3 section of main East at the following locations:

- (1) "A" Entry - the one row of temporary roof supports were installed 60 inches, 67 inches, 70 inches and 62 inches from the face and another row of temporary roof supports was required to be installed in this area prior to installing the last row of bolts in this entry at that time.
- (2) "D" Entry - the last temporary roof supports in the second row of supports which was in the right side of the entry was [sic] 90 inches from the right rib leaving unsupported roof 78 inches from the first row temporary roof support on the right side of the entry to the face (78 inches x 90 inch area) and requiring another temporary roof support prior to bolting.
- (3) D Ä E crosscut - in the second row of temporary row of roof support, one was 20 inches from the other, width wise, and the last support on the right side was 96 inches from the right rib leaving unsupported roof 22 inches from the first

~950

row temporary roof support to the face (72 inches x 96 inch area) and requiring another temporary roof support prior to bolting.

Y & O does not dispute the factual allegations set forth in the order nor that these facts constitute violations of its roof control plan page 57 (Appendix A).(FOOTNOTE 2) It argues only that the violations were not "significant and substantial" and were not caused by its "unwarrantable failure" to comply with the roof control plan.

A violation is "significant and substantial" if (1) there is an underlying violation of a mandatory safety standard, (2) there is a discrete safety hazard, (3) there is a reasonable likelihood that the hazard contributed to will result in injury, and (4) there is a reasonable likelihood that the injury in question will be of a reasonably serious nature. Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984).

In this regard MSHA coal mine inspector Franklin Homko testified that there had been 17 roof falls during 1985 at the Nelms No. 2 Mine and that two of those roof falls had occurred in the No. 3 section at issue. Based on this history and the noted deviations from the requirements of the roof control plan Homko opined that it was reasonably likely that a partial or complete roof fall could occur in the area cited. He further opined that should a roof fall occur it was reasonably likely that miners working beneath the roof would receive serious or fatal injuries.

Assistant Y & O safety director Lawrence Wehr acknowledged that the right side of the crosscut between the D and E Entries and the D Entry itself were not adequately supported and in fact were "dangerous". Under the circumstances I find that the violation was "significant and substantial" and serious.

Unwarrantable failure is defined as the failure by an operator to abate a condition that he knew or should have known existed, or the failure to abate because of indifference or lack of due diligence or reasonable care. Ziegler Coal Corp., 7 IBMA 280 (1977); United States Steel Corp., 6 FMSHRC 1423 (1984). In this regard it is not disputed that Inspector Homko had, only 3 days before the issuance of the

~951

order at bar, cited a similar violation of the operator's roof control plan in the same entries now at issue. The repetition of the same type of violation within such a short time shows indifference or lack of due diligence or reasonable care.

In addition Homko observed that the cited violative conditions had not been reported in the required on-shift and pre-shift reports from October 27, 1985, at 12 p.m. through the time he issued the order at bar on October 28. It is not disputed that the cited area was subject to pre-shift and on-shift examinations to be performed by state certified persons such as a section foreman or fire boss and that any defects in roof control must be documented in these reports. Homko also observed that notation cards placed in the section and initialed and dated by the certified inspectors showed that the inspections had been performed after 4:00 pm on the 27th of October. The failure of these certified inspectors to have discovered and reported these violative conditions that from their nature should have been fairly obvious, leads me to also conclude that the operator should have known of the cited violations.

Under the circumstances I find that the violation was caused by the "unwarrantable failure" of the operator to comply with the standard. Based on the same evidence I find that the mine operator was negligent. Even though some of the certified inspectors who failed to detect the violation may have been union employees they were clearly acting as agents of the operator while performing these pre-shift and on-shift inspections. The negligence is in any case therefore attributable to the operator.

Withdrawal Order No. 2823831, issued under section 104(d)(1) of the Act, footnote 1 supra, alleges 8 other violations of the operator's roof control plan under 30 C.F.R. 75.200 and charges as follows:

The roof control plan was not complied with in the following rooms off "E" Entry of 5 section: (1) 71 room - the last cut in this room had a cut taken on the straight and then cut to the left and right of the room for the width of the miner leaving an area of more than 20 feet wide inby the last row of bolts (Fan type cut at face). This type of side cutting is not supported on either side before work is done in or inby this area similar to an intersection but not mined to create one. (2) 72 room - same condition or practice as in No. 71 room, but the right cut holed into unsupported roof fan cut from the No. 71 room. There was only one post and a danger board installed outby the cut. (3) 73 room - the last cut in this room was also a fan

type cut from the straight to the left side leaving cut over 21 1/2 feet in width. There was only one post and danger board installed outby the cut. T. Carter, section foreman, supervised mining of the No. 73 room and J. Marshall, section forman, mined the the No. 71 and 72 room.

The Secretary contends that the order charges 8 separate violations of the plan, namely: (1) in room 71 the cut taken to the left off the last straight cut; (2) in room 71 the cut taken to the right off the last straight cut; (3) in room 72 in referring to the "same condition or practice as in No. 71 room" the order refers to the cut taken to the left off the last straight cut; (4) in room 72 the cut taken to the right off the last straight cut; (5) the right side cut in the 72 room was cut so that it holed into the 71 room into unsupported roof created by the left side cut taken in the 71 room; (6) in the 72 room only one post and a danger board were installed outby the cut; (7) in room 73 the cut taken to the left off the last straight cut; and (8) in the 73 room only one post and a danger board were installed outby the cut.

It is undisputed that the cited cuts were taken in a manner depicted on Exhibit GXÄ8 (Appendix B). Y & O acknowledges that it did not have a sufficient number of posts set with a danger sign in rooms 72 and 73 but maintains that it did have the requisite danger sign posted and that therefore this admitted violation constituted a mere technicality and a non "significant and substantial" violation. Y & O denies all other alleged violations of the roof control plan.

The Secretary first alleges that the cut taken to the left (violation No. 1) and the cut taken to the right (violation No. 2) in room 71 violated provisions 16 and 19 on pages 55 and 56 of the roof control plan and also violated the 20 foot room width requirments set forth on page 51 of the roof control plan. Provision 19 on page 56 of the roof control plan as clarified at hearing by agreement of the parties (Transcript 220Ä224) provides that "the last projected cut in room or crosscuts not to be used as travelways need not be supported if the entrance to such areas are [sic] posted off with one row of supports installed on a maximum of five (5) foot centers and "DANGER' signs placed." The Secretary argues in its post hearing brief that since the provision for the "last projected cut" is expressed in the singular only one cut is permitted and that the side cuts to the right and to the left were therefore in excess of the one allowed by provision 19.

Y & O points out on the other hand that provision No. 16 on page 56 of the roof control plan specifically allows fan or side cuts (in the plural) and only requires support if

~953

work is to be done in or inby. Provision 16 on page 55 of the plan reads as relevant hereto as follows:

Side cuts will be started only in areas that are permanently supported. The first side cut on either side of a room or entry will be supported by either temporary or permanent supports before any work is done in or inby the intersection.

Y & O maintains that it complied with provision No. 16 because the continuous miner operator was under supported roof when the sidecuts were made and no other work was to be done in or inby since mining had been completed in that area. Y & O also points out that the sidecuts were in fact begun in areas that were permanently supported as required by provision 16 and as evidenced by roof bolts shown in the diagrams in evidence.

The Secretary next maintains that if the operator intends to take a side cut it must support the roof not only in accordance with provision 16 but also in accordance with the instructions and diagram found on page 57 (Appendix A). Y & O counters however by pointing out that the diagram on page 57 is applicable only to advancing sections and is not applicable under the specific exceptions set forth in provision 16 on page 56 of the plan.

The Secretary argues, finally, that there was nevertheless a violation of the plan because Y & O exceeded the maximum room width allowance of 20 feet set forth on page 51 of the roof control plan. Y & O maintains on the other hand that the cited fan cuts were equivalent to crosscuts and accordingly the corresponding room size in those locations must necessarily exceed the 20 foot maximum width otherwise required by the roof control plan.

Upon my own independent examination of the provisions of the roof control plan I find that the interpretations place upon it by Y & O are the more rational and convincing. Accordingly the number 1, 2, 3, 4, and 7 violations have not been proven as charged.

The Secretary maintains that alleged violation No. 5 i.e., the right sidecut in the 72 room was cut so that it holed into the 71 room into unsupported roof created by the left side cut taken in the 71 room, was in violation of provision 15(a) on page 55 of the roof control plan. That provision requires that "mine openings will not be cut through to areas that are not totally supported by either temporary supports on maximum of five (5) foot centers or permanent supports installed on pattern as required by the approved plan.

It is not disputed that the right side cut in room 72

~954

had indeed been holed through into the left side cut of room 71 and that the left sidecut of room 71 had not been supported by either temporary or permanent supports. I do not find that provision 15(a) is limited to advancing sections and accordingly I find that the violation has been proven as charged. According to the undisputed testimony of Inspector Homko the greatest hazard of room falls was presented by this holed through area because it exposed a much larger area of unsupported roof. This testimony is not disputed and accordingly I find that the violation was "significant and substantial." Mathies Coal Company, supra.

I also find that this violation was caused by the "unwarrantable failure" of the operator to comply with the roof control plan. Indeed the operator's excuses that it was necessary to hole through to provide ventilation and that it did not intend to mine any additional coal after holing through provides no defense or justification for the clear violation. There are no exceptions for the requirements of provision 15(a) and the operator clearly should have known of the violation. Indeed it is not disputed that two section foremen were actually cutting the side cuts in the manner cited. The violation was thus caused by the "unwarrantable failure" of the operator to comply with the cited provisions of the roof control plan and was the result of a high degree of negligence. Ziegler Coal Corp., supra, United States Steel Corp, supra.

Inasmuch as Y & O has admitted to the number 6 and 8 violations in that it has conceded that it did not have the "row of supports installed on a maximum of 5 foot centers and 'DANGER' signs placed" thereon in the No. 72 and 73 rooms, those violations are proven as charged. It is conceded however that these "supports" are not designed for actual roof support but are intended only to warn persons from entering a dangerous area. It is also acknowledged that in this case one support had been placed at the center of the entrance to each of the rooms and that "danger" signs were hung on those supports warning persons not to enter the rooms. Under the circumstances I do not find that the violation was "significant and substantial" Mathies Coal Company, supra. Since the placement of the danger signs was also in substantial compliance with the requirements of the roof control plan, I do not find that the violation was caused by the "unwarrantable failure" of the mine operator to comply with the plan.

Since at least one of the eight cited violations (violation No. 5) has been proven as charged with attendant "significant and substantial" and "unwarrantable failure" findings, section 104(d)(1) order No. 2823821 is affirmed.

In determining the appropriate penalties to be assessed in this case I have also considered that the mine operator

~955

abated the cited conditions in a timely and good faith manner, that the mine operator is moderate in size and that it has a substantial history of violations. There is no evidence that the penalties I am assessing herein would have any effect on the operators ability to stay in business. Accordingly I find that a penalty of \$800 is appropriate for the violations found in Order No. 2823806 and a penalty of \$500 for the violations found in Order No. 28238031.

At hearing the parties agreed to settle the remaining citations at issue i.e., Citation Nos. 2823802 and 2825317. Y & O agreed to pay the penalty of \$147 initially proposed by the Secretary for the former citation and agreed to pay \$25 (a reduction of \$60) for the violation charged in latter citation. I have considered the documentation and representations presented in support of the settlement and find that the proposal is appropriate under the criteria set forth in section 110(i) of the Act.

ORDER

The Youghiogheny and Ohio Coal Company is hereby ordered to pay civil penalties of \$1,472 within 30 days of the date of this decision. Contest Proceedings Docket Nos. LAKE 86Ä20ÄR and LAKE 86Ä21ÄR are dismissed. Contest Proceeding Docket No. LAKE 86Ä30ÄR is granted in part and denied in part in accordance with the decision herein.

Gary Melick
Administrative Law Judge

FOOTNOTES START HERE-

1 Section 104(d)(1) of the Act reads as follows:

"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. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering such area until an authorized representative of the Secretary determines that such

violation has been abated."

2 Y & O understandably did not object to the multiplicity of charges set forth in the orders before me (16 separate violations charged in the two orders). To the extent that such multiple charges prevent separate "significant and substantial" and "unwarrantable failure" findings for each violation the practice may short circuit several important enforcement mechanisms created by the Act.

~956

APPENDIX A

~957

APPENDIX B