CCASE:
YOUGHIOGHENY COAL V. SOL (MSHA)
DDATE:
19870605
TTEXT:

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

YOUGHIOGHENY & OHIO COAL COMPANY, CONTESTANT	CONTEST PROCEEDINGS
	Docket No. LAKE 86-25-R Order No. 2823823; 11/6/85
v.	
	Docket No. LAKE 86-60-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Order No. 2823753; 2/4/86
	Docket No. LAKE 86-120-R Order No. 2828630; 8/1/86
	Docket No. LAKE 86-121-R Order No. 2828634; 8/5/86
	Nelms No. 2 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS
	Docket No. LAKE 86-70 A.C. No. 33-00968-03634
v.	
	Docket No. LAKE 86-74
YOUGHIOGHENY & OHIO COAL COMPANY, RESPONDENT	A.C. No. 33-00968-03635
	Docket No. LAKE 87-9 A.C. No. 33-00968-03650
	Nelms No. 2 Mine

DECISION

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

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 the issuance by the Secretary of Labor of citations and withdrawal orders to the Youghiogheny & Ohio Coal Company (Y & O) and for

review of civil penalties proposed by the Secretary for the violations alleged therein. The general issues before me are whether Y & O violated the cited regulatory standards and, if so, whether those violations where of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, (i.e., whether the violations were "significant and substantial.") With respect to the withdrawal orders it will also be necessary to determine whether the violations were caused by the unwarrantable failure of the operator to comply with the cited regulation. If violations are found, it will be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

DOCKET NO. LAKE 86Ä74

At hearing, the Secretary moved to approve a settlement agreement with respect to Citation No. 2823824 proposing a $20 penalty for a non-"significant and substantial" violation. Y & O agreed to the proposed settlement. I have considered the representations and documentations submitted in support of the motion and conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

DOCKET NO. LAKE 86Ä70 and LAKE 86Ä25ÄR

The order at issue in these cases, Order No. 2823823, as amended, was issued under section 104(d)(1) of the Act, (FOOTNOTE 1) and alleges as follows:

Float coal dust was permitted by the operator to accumulate on the mine floor, roof and ribs, of the I return entry and left side connecting crosscuts from survey station 5 á 40 feet to 13 á 20 feet which was a linear distance of 780 feet. This condition had been recorded in the record book on 11Ä1Ä85 and 11Ä5Ä85 by G. Pepperling, fireboss. Foreman on this section on this shift were G. Torak and J. Corder.

The cited standard, 30 C.F.R. 75.400 provides that "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."

Y & O does not dispute that the violation occurred as alleged but maintains that the violation was neither "significant and substantial" nor due to the "unwarrantable failure" of the operator to comply with the cited standard. According to Inspector Frank Homko, of the Federal Mine Safety and Health Administration (MSHA), at the time of his inspection on November 6, 1985, approximately 450 to 500 feet of the return air course in the No. 2 section in the 2 East main North part of the Nelms No. 2 Mine was dark black in color and an additional contiguous 280 to 330 feet was black to dark gray in color from coal dust accumulations. Homko therefore found that approximately 780 linear feet of the floor, roof and ribs in the return air course and 11 connecting crosscuts were in violation of the cited standard.

Inspector Homko observed that electrical equipment was operating on the cited section including continuous-mining machines, ram cars and auxiliary ventilation fans. In addition, he noted that a battery-charging station that was

vented directly into the return air course at issue had exposed bare electrical power conductors. Homko opined that the float coal dust accumulations in the return air course could very well propagate fire or explosion particularly when considered in conjunction with the fact that the Nelms No. 2 Mine liberates over 1,000,000 cubic feet of methane per day.

Homko also observed that there had been a history of gas ignitions at this mine and that there was a potential for a hydrogen gas explosion from the battery-charging station with its exposed electrical wiring and that such explosion would be vented directly into the return air course. Homko observed that 14 miners worked on the section and would be exposed to the hazards. Within this framework, I am satisfied that the violation was "significant and substantial" and serious. Secretary v. Mathies Coal Co., 6 FMSHRC 1 (1984).

I also find that the violation was the result of "unwarrantable failure." In this regard, Inspector Homko testified that the company records of its inspections show that the cited area was "firebossed" on November 1, and November 5, 1985. Indeed, page 1 of the record book (Ex. GÄ5) shows that on November 1, 1985, 5 days before Homko's inspection of the same air course, Union fireboss Gary Pepperling had examined the return and reported that it needed rock dusting. In addition, Pepperling reported again on page 2 of that document that on November 5, 1986, 1 day before Homko's inspection, that the return needed dusting. These reports were countersigned by the mine foreman and mine superintendent. Under the circumstances, it is clear that Y & O management had advance notice of the violative conditions, yet had not corrected them by the time of Homko's inspection.

Y & O's former assistant safety director, Don Statler, who accompanied Homko on his inspection that day, acknowledged the existence of the cited coal dust but observed that they had been rockdusting up to the afternoon shift of the day before. Statler conceded that no rockdusting was being performed at the time he and Homko observed the cited conditions on November 6, 1985. Statler also observed that "action taken" to remedy hazardous conditions reported in the shift books are reported only in the "work assignments" book, so that no inference can be drawn from the absence of "remedial" entries in the shift books. Statler's testimony does not, however, negate the evidence that mine management knew of the violative coal dust, yet had discontinued corrective action to remedy this

serious hazard the day before it was cited. Under the circumstances, the violation was indeed the result of "the unwarrantable failure" of the operator to comply. Zeigler Coal Corp., 7 IBMA 280 (1977); United States Steel Corp., 6 FMSHRC 1423 (1984). For the same reasons it is apparent that the violation was the result of operator negligence.

Order No. 2823823 is accordingly affirmed and the contest of that order is denied.

DOCKET NOS. LAKE 86Ä74 AND LAKE 86Ä60ÄR

The order at issue in these cases, Order No. 2823753, issued pursuant to section 104(d)(2) of the Act (FOOTNOTE 2) charges a violation of the standard at 30 C.F.R. 75.301 and alleges as follows:

> The quantity of air reaching the last open crosscut separating the intake from the return, between Nos. H to I entries left side in 2 section 1 east main north was only 1,732 cubic feet a minute and the last open crosscut separating the intake from the return between Nos. B to A entries right side in 2 section 1 east main north was only 4,800 cubic feet a minute. The quantity of air was measured with a chemical smoke cloud. The last open crosscut left side between Nos. H to I entries had just been mined and a twin boom roof bolting machine was operating in this crosscut. This is a super section with two sets of equipment and operators alternating from the left side to the right side each cut of coal."

The cited standard provides in part as follows:

> The minimum quantity of air reaching the last open crosscut in any pair or set of developing entries, and the last open crosscut in any pair or set of rooms shall be 9,000 cubic feet a minute, and the minimum quantity of air reaching the intake end of a pillar line shall be 9,000 cubic feet a minute, and the minimum quantity of air reaching the intake end of a pillar line shall be 3,000 cubic feet a minute.

Again, Y & O does not dispute the violation, but maintains that it was neither a "significant and substantial" violation nor the result of "unwarrantable failure" to comply with the cited mandatory standard. MSHA Inspector Herbert Cook was conducting a spot inspection at the Nelms No. 2 Mine on February 4, 1986, when he noticed that little air was ventilating the last open crosscut. He attempted to use his anemometer between the A and B entries on the right side of the last open crosscut but found because of the minimal air flow he was unable to obtain any reading. Cook then performed a smoke tube test and found from the computed results only 4,800 cubic feet of air per minute.

Cook then proceeded to the left side where two miners were "sweating profusely" as they were working. They asked Cook to check the air because they felt it was insufficient. Cook again attempted to use his anemometer, but found that the blades would not turn. Cook again took smoke cloud readings, and the computed results showed only 1,732 cubic feet of air per minute in the last open crosscut, where 9,000 cubic feet per minute was required. Cook then found that only 9,500 cubic feet per minute of air was coming onto the entire section, whereas, 18,000 cubic feet per minute was the minimum necessary at the intake.

Cook observed that electrical equipment was operating on the section including roof bolters, continuous miners and two battery chargers. He opined that the condition was hazardous because the ventilation was insufficient to remove respirable dust and to dilute methane. Under the circumstances, it may be inferred that the violation was serious and "significant and substantial." Mathies, supra.

I do not, however, agree that the violation was the result of the "unwarrantable failure" of the operator to comply with the standard or of significant operator

negligence. It is undisputed that the preshift report shows that the section was properly ventilated when the readings were taken between 5 a.m. and 8 a.m. that morning. It is further undisputed that the section foreman had verified the adequacy of the ventilation shortly before 9:00 that morning. The mine fan gauge chart shows that the interruption of air flow began shortly thereafter and that the air deficiency was discovered by the inspector at around 9:25 that same morning. In addition, further investigation revealed that the air deficiency was primarily caused by a ventilation door being left open by an independent contractor who was constructing a new air shaft located some 2,000 feet from the section at issue. These mitigating circumstances clearly reduce the degree of negligence and negate an "unwarrantable failure" finding.

In reaching these conclusions, I have not disgregarded the testimony of Inspector Cook and union representative, Larry Ward, that the absence of air should have been known to the section foreman because of the absence of a "fresh breeze." However, I observe that Mr. Ward conceded on cross-examination that the difference between the required ventilation and that found by Inspector Cook was only about 1/2 mile per hourÄa difference not detectable by the amount of breeze on the skin. Under the circumstances, Order No. 2823753 is modified to a "significant and substantial" citation under section 104(a) of the Act. See Secretary v. Consolidation Coal Co., 4 FMSHRC 1791 (1982).

DOCKET NOS. LAKE 87Ä9, LAKE 86Ä120ÄR, AND LAKE 86Ä121ÄR

At hearing, the Secretary moved for settlement of Order No. 2828630 (Contest Docket No. LAKE 86Ä120ÄR) proposing a penalty of $500. Y & O agreed to pay the penalty in full. I have considered the representations and documentation submitted in connection with the proposal and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act. In light of the proffered settlement, Y & O also requested to withdraw its contest of said order. Under the circumstances, I accept the request to withdraw and Contest Proceeding LAKE 86Ä120ÄR is accordingly dismissed.

Order No. 2828634 alleges a violation of the standard at 30 C.F.R. 75.1710Ä1(a)(2) and charges as follows:

> During an inspection requested by a representative of the miners, it was determined that a battery powered scoop tractor (Serial No. 4881141) was used to clean

> up coal and other debris in and inby the last open crosscut in the main north section and the battery powered scoop tractor was not provided with a substantially constructed canopy or cab. The height of the coal bed was 62 inches. John Slates (section foreman) instructed David Parrish to operate the battery powered scoop in this area. 8Ä1Ä86.

The cited standard, 30 C.F.R. 75.1710Ä1(a)(2) provides, in relevant part, as follows:

> Except as provided in paragraph (f) of this section, all self-propelled electric face equipment, including shuttle cars, which is employed in the active workings of each underground coal mine on and after January 1, 1973, shall, in accordance with the schedule of time specified in paragraphs (a)(1), (2), (3), (4), (5), and (6) of this section, be equipped with substantially constructed canopies or cabs, located and installed in such a manner that when the operator is at the operating controls of such equipment, he shall be protected from falls of roof, face, or rib, or from rib and face rolls. The requirements of this paragraph (a) shall be met as follows: . . . (2) On and after July 1, 1974, in coal mines having mining heights of 60 inches or more, but less than 72 inches.

The violation is not disputed by Y & O. It acknowledges that the battery powered scoop tractor, absent the required canopy, had in fact been operated inby the last open crosscut on August 5, 1986. Y & O maintains in its posthearing brief, however, that the order, as an order under section 104(d)(1) of the Act, must fail because it cannot properly be issued on an "after-the-fact investigation." See fn. 1 supra. Whether or not this order was issued improperly in this regard is immaterial since I find for the reasons that follow that the order is in any event deficient.

The evidence shows that MSHA Inspector Ervin Dean was performing an inspection at the Nelms No. 2 Mine on August 4, 1986, when he was given a "section 103(g)" request-for-inspection by Union Safety Committeeman Larry Ward. In his request, Mr. Ward alleged that a battery powered scoop had been operated inby the last open crosscut of the main north section of the Nelms No. 2 Mine, without the use of a canopy on August 1, 1986. Based upon this request, Inspector

Dean convened a meeting in the office of Mine Superintendent Charles Wurschum. Present at that meeting were Inspectors Dean and Ohler, Mine Superintendent Wurschum, Safety Director John Woods, and Section Foreman John Slates.

The evidence shows that Slates was the section foreman in charge of the main north section on August 1, 1986, when the violation occurred. Slates admitted that he knew the subject scoop car did not have a canopy and knew that it was required to have a canopy under the pertinent standards. Slates further conceded that he ordered the scoop car to be operated without a canopy in the last open crosscut, and that he knew it was a violation.

On August 5, 1986, Inspector Dean returned to the Nelms No. 2 Mine and performed a physical inspection of the area in which the subject scoop car had been operated on August 1, 1986, and measured the mining height. The mining height in the cited area was found to be 62 inches thereby necessitating the use of a canopy by July 1, 1974, under the cited standard.

The only basis for Inspector Dean's conclusion that the violation was "significant and substantial" however was evidence that the roof in the cited area was "shaly" and that the area was being rehabilitated thereby allowing the roof an opportunity to "work." Dean's opinion that the employee working inby the last open crosscut would be in an area within 25 feet of the face "where most roof falls occur" adds little weight to his conclusion. The scoop was merely performing cleanup work in an area in which other miners could legally be performing other work without a cab or canopy. Accordingly I do not find that the Secretary has met the requisite burden of proof for establishing this as a "significant and substantial" violation. Mathies, supra.

Order No. 2828634 must therefore fail as an order under section 104(d)(1) of the Act, and is accordingly modified to a citation under section 104(a) of the Act. Consolidation Coal Co., supra. For similar reasons, I find that the Secretary has failed to prove the violation to be of high gravity.

I do find, however, that the violation was the result of gross operator negligence and indeed was a willful violation. The responsible section foreman readily admitted that what he did was a violation and that he nevertheless directed his employee to work in the last open crosscut on equipment not provided with the requisite canopy.

Civil Penalties

In assessing civil penalties for the contested violations herein, I have also considered the undisputed evidence of the operator's history of violations, size and good faith abatement of the cited conditions. Accordingly, the following civil penalties are found to be appropriate for the contested violations: Citation No. 2823753Ä$750; Order No. 2823823Ä$750; Citation No. 2828634Ä$400.

ORDER

The Youghiogheny & Ohio Coal Company is hereby ordered to pay the following civil penalties within 30 days of the date of this decision: Citation No. 2823824Ä$20; Citation No. 2823753Ä$750; Order No. 2823823Ä$750; Order No. 2828630Ä$500; Citation No. 2828634Ä$400. The Contest Proceedings are dismissed or granted in part in accordance with this decision.

Gary Melick
Administrative Law Judge

ÄÄ
~FOOTNOTE_1

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."

~FOOTNOTE_2

2 Section 104(d)(2) of the Act reads as follows:

"If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine."

It is not disputed that in this case there were no intervening "clean inspections."