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SOUTHERN OHIO COAL V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SOUTHERN OHIO COAL COMPANY,
CONTESTANT

v.

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

CONTEST PROCEEDING

Docket No. WEVA 87-166-R
Order No. 2699493; 4/9/87

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

v.

SOUTHERN OHIO COAL COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEVA 87-306
A.C. No. 46-03805-03806

Martinka No. 1 Mine

DECISION

Appearances: W. Henry Lawrence, Esq., Steptoe & Johnson, Clarksburg, West Virginia, for Contestant/Respondent; Susan M. Jordan, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent/Petitioner.

Before: Judge Maurer

STATEMENT OF THE CASE

These consolidated cases concern the contest pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (the "Act"), challenging the legality of a section 104(d)(2 order issued to the contestant at its Martinka No. 1 Mine on April 9, 1987. The captioned proceedings have been consolidated for hearing and decision because the order contested in the contest proceeding charges a violation of a mandatory safety standard for which the Secretary seeks a penalty in the civil penalty proceeding.

Pursuant to notice, the cases were heard in Morgantown, West Virginia, on November 16, 1987. The parties filed post-hearing proposed findings of fact, conclusions of law, and briefs which have been considered by me in the course of making this decision.

Section 104(d)(2) Order No. 2699493, which is the subject of this proceeding, was issued by an MSHA inspector on April 9, 1987. The order alleges a violation of the mandatory safety standard found at 30 C.F.R. 75.507Ä1(a) and the condition or practice alleged by the inspector to be a violation of that standard states as follows:

> After making a 103(g)(1) inspection of the complaint alleging the continuous mining machine was trammed down the No. 2 entry return air course in the 1 north 017 section on the afternoon 4Ä3Ä87, it was revealed that Joe Metz, mechanic found 3 openings in junction boxes on the continuous mining machine and reported this to Tom Permo (sic) prior to the machine being moved down the return, this was heard by Fred Shingleton who was present in the area at the time. Tom Permo (sic) was present during the time the continuous miner was being tramed. Tom Permo (sic) was the foreman in charge of the area at this time. To terminate this Order all Foremen shall be instructed to see that all electrical equipment taken into the return air course outby the last open crosscut be in an permissible condition, and a list of Foremen instructed given to MSHA.

30 C.F.R. 75.507Ä1(a) provides in pertinent part as follows:

> All electric equipment . . . used in return air outby the last open crosscut in any coal mine shall be permissible . . . .

STIPULATIONS

The parties stipulated to the following:

1. The Southern Ohio Coal Company owns and operates the Martinka No. 1 Mine and both are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

2. The presiding Administrative Law Judge has jurisdiction over this proceeding pursuant to section 105 of the Act.

3. The subject Order No. 2699493, its modification and termination were properly served by duly authorized representatives of the Secretary upon an agent of the contestant at the dates, times and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance.

4. The assessment of a civil penalty in this proceeding will not affect contestant's ability to continue in business.

5. The appropriateness of the penalty, if any, to the size of the contestant's business should be determined based on the fact that the Martinka No. 1 Mine has an annual production of approximately 2.5 million tons of coal and the Southern Ohio Coal Company has an annual tonnage of approximately 7.3 million.

6. There was no intervening clean inspection between the 104(d)(2) order being contested and the previous 104(d)(1) citation.

ISSUES

The ultimate question presented is whether or not the cited condition or practice constitutes a violation of 30 C.F.R. 75.507Ä1(a). Included as part and parcel of any determination of that question is whether or not the violative act took place in "return air outby the last open crosscut" as stated in section 75.507Ä1(a). Additional issues are whether the cited violation was of such a nature as would significantly and substantially contribute to the cause and effect of a coal mine safety hazard and whether the cited violation was caused by an unwarrantable failure to comply with the standard in question. Also, an appropriate penalty must be assessed in the event that a violation is found.

FINDINGS OF FACT

1. MSHA Inspectors Wayne Fetty and Frank Bowers issued the subject order on April 9, 1987, subsequent to their investigation of a section 103(g) complaint. The order and the complaint concern an incident that occurred on the afternoon shift of April 3, 1987, in the 1 North Section of the mine.

2. The crew assigned to the 1 North Section on the afternoon shift of April 3rd consisted of section foreman Tom Premo, mechanic Joe Metz and general inside laborers Tim Dotson, Fred Shingleton and Joe Hardesty. Joe Metz actually worked for maintenance supervisor Bud Boone. His particular assignment that afternoon was to perform permissibility checks on a miner, roofbolter, flight pump and two shuttle cars that were physically located in the 1 North Section, and also to repair any nonpermissible conditions he found. The crew's assignment from Shift Supervisor Fred Rundle was to move the roofbolter, one of the shuttle cars and the mining machine from their then existing locations in the section to a fall area in the No. 2 entry, so that the roof fall could be cleaned up.

3. An unintentional roof fall had occurred in the No. 2 entry as depicted on Government Exhibits 1 and 2, some weeks prior to April 3, 1987.

4. No mining occurred in the 1 North Section on April 3, 1987, active mining having ceased two shifts earlier. The face areas were left squared off and "faced-up." Mining subsequently resumed in the section after the fall area was cleared.

5. Mechanic Metz began his permissibility checks with the roofbolter. Metz detected a nonpermissible condition on the roofbolter's lighting system and unplugged it, placed a danger tag on the plug and placed the plug in a lockbox. Foreman Premo asked Metz if the lights could be turned out and the machine moved anyway, but Metz opined that it could not. Premo then called Shift Supervisor Rundle, told him the bolter was not permissible, and asked if he could move it. Rundle told Premo not to move the bolter, but rather to move the miner instead at that time.

6. At the start of the shift, the continuous miner was located in the No. 6 entry up towards the face. The crew's mission then was to move the miner from there to the fall area in the No. 2 entry. In the process of doing that, Dotson, Hardesty, and Shingleton had trammed the miner as far as the No. 5 entry, marked with an "X" on Government Exhibits 1 and 2, when they had to stop because of a line curtain fastened across the entry.

7. At this point in time and space, Metz arrived and informed the crew that he would perform his assigned permissibility checks on the miner while the miner was stopped and the crew was removing the curtain. In the process of making these checks, he found three junction boxes on the miner that his five thousandths (.005) of an inch feeler gauge would penetrate. Metz thereupon told and showed Dotson, who was operating the miner, what he had found. At this point, Premo arrived on the scene and was told by Metz that there were permissibility violations on the miner. There followed an exchange between Premo and Metz, the substance of which I find to be that Premo felt Metz was being an obstructionist on the issue of moving the miner and responded with words to the effect that he had a job to do and that he was not going to lose his job over something as minor as these openings.

8. Following the discussion between Metz and Premo, Premo ordered the crew to move the miner to the fall area. At that time, Shingleton expressed his concern to Premo that the crew would get into trouble for moving the miner in a nonpermissible condition. Premo responded to the effect that if anyone got into trouble it would be him, not them. I find the sense of the situation to be that Premo clearly understood that the miner was in a nonpermissible condition, but he ordered it moved anyway in order to accomplish his assigned mission.

9. Prior to moving the miner, Shingleton took methane readings with a methane detector at the faces of the Number 5, 4, and 1 entries and at the fall area and did not detect methane. Premo had earlier checked all the faces for methane without detecting any.

10. The miner was then trammed from the No. 5 entry across the faces and then down the No. 2 entry to the fall area.

11. The curtain at the intersection of the No. 2 entry and the face was taken down to allow the miner and later the shuttle car to enter the No. 2 entry, but it was replaced after each piece of equipment entered the entry. Nevertheless, there was some degree of air movement in that entry moving away from the faces.

12. After the miner was moved to the fall area, Metz completed his permissibility checks on the miner and corrected the nonpermissible conditions. He also recorded the violative conditions in the permissibility book on the surface at the end of the shift.

13. On April 3, 1987, the 1 North Section had eight (8) entries. The No. 1 and 2 entries were the returns on the right side of the section and the No. 6, 7, and 8 entries were the return airways on the left side of the section. The No. 3, 4, and 5 entries were the intake airways with the No. 3 entry as the main intake escapeway and the No. 4 and 5 entries as the belt and track entries, respectively.

DISCUSSION WITH FURTHER FINDINGS

Reduced to its essentials, the Secretary's position in this case is that (1) the miner was in a nonpermissible condition and (2) it was used in return air outby the last open crosscut in the No. 2 entry.

30 C.F.R. 18.31(a)(6) provides that the allowable limit for the openings in the junction boxes on the continuous miner is .004 of an inch. Metz' unrefuted testimony on this point was that there were three such openings in the junction boxes that were in excess of this limit. Dotson directly corroborates this testimony at least as to the one junction box on the operator's side of the miner. Furthermore, Metz and all the other miners who testified stated that the permissibility violations were discovered while the miner was stopped at the No. 5 entry before it was moved into the No. 2 entry, and that Premo was advised of the nonpermissible conditions found on the miner at that time. More specifically, Dotson, Shingleton, and Hardesty, as well as Metz himself, all

stated that Metz informed Premo that he had found permissibility violations on the continuous miner and that it should not be moved in that condition.

In making these credibility findings in favor of the Secretary, I am aware that Premo testified that no one reported any impermissible conditions on the miner to him when the miner was stopped in the No. 5 entry and in fact he maintains that he first learned of Metz' allegations that the miner was moved in a nonpermissible condition three days later on April 6.

The operator points out that on February 16, 1987, Metz had received a two week suspension for refusal to wear his safety glasses, and had only returned to work on February 26, 1987, five weeks prior to this incident. The operator urges that this suspension angered Metz and provided the motivation for him to fabricate this violation out of whole cloth. He could use MSHA to take his revenge against the company. This argument might have some appeal if it was only Metz' word against Premo's, but in this case all the percipient witnesses to the incident with the exception of Premo tell the same tale. To be sure there are minor variations in their testimony, but no more than might be expected. In fact, I would be very surprised if four individual witnesses to an incident related their impressions and recollections of that event in exactly identical terms. The argument also overlooks the difficulty Metz might have in convincing three other miners who had not been suspended to commit perjury on his behalf. Metz did not even have the luxury of being able to choose which miners he would have corroborate his complaint. He was stuck with the crew at hand. It is simply too far fetched to believe that a single individual with his own personal grievance against the company could convince three out of three witnesses to the incident to go along with a completely fabricated version of events and stick by it for the next seven months through various and sundry investigations, interrogations, and hearings. A more plausible explanation is that Premo, who was assigned to move three pieces of equipment that evening, had already failed to move the first and didn't want to have to call Rundle back again to report he also couldn't move the second. There was testimony at the hearing from Premo's supervisors to the effect that Premo was overly cautious and indecisive and that had a question arisen about the miner, he would have passed it to them. These characteristics had been adversely commented upon in his annual job performance reviews, and in my view, Mr. Premo was attempting to correct this flaw on the evening of April 3. He made the decision to get the miner to the fall area in spite of the fact that it was not in a permissible condition and he knew it was not.

Before there could be a violation though, the nonpermissible miner must have been used in return air outby the last open crosscut. The term "return air" is not specifically defined in the Act or regulations. It is defined, however, in the Dictionary of Mining, Mineral and Related Terms (1968) published by the Department of the Interior simply as "Air traveling in a return." "Return" is then defined by the same dictionary as "any airway which carries the ventilating air outby and out of the mine." In my opinion, therefore, since the No. 2 entry was a designated return airway and the testimony of the miners was that there was a detectable current of air flowing from the face area down the No. 2 entry toward the mine exit, this entry would constitute "return air" as that term is used in the mandatory standard.

I specifically reject the proposition that since there was no coal actually being mined at the time, there could be no return air. Both Windsor Power Coal Co. v. Secretary, 2 FMSHRC 671 (1980), an ALJ decision by Judge Melick; and MidÄContinent Coal and Coke Co. v. Secretary, 3 FMSHRC 2502 (1981) involved temporary delays or halts in production, similar to the instant situation, that were found not to affect the ventilation requirements. In all three cases, including this one, coal production had recently ceased and other work was being performed to prepare the section for resumed production.

Lastly, I find as a fact and conclude as a matter of law that the miner was "used," i.e., trammed into and down the entry to the fall area, which area was "outby the last open crosscut." See Government Exhibits No. 1 and 2.

I therefore conclude that a violation of 30 C.F.R. 75.507Ä1(a) has been established.

A "significant and substantial" violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981).

In Mathies Coal Co., 6 FMSHRC 1, 3Ä4 (1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574Ä75 (July 1984).

While it is true that no active coal mining was taking place and no methane was detected at the time the miner was being moved, it is also true that the 1 North Section is the gassiest section in the Martinka No. 1 Mine and has been known to liberate methane in the explosive range. Furthermore, I take administrative notice that methane can be liberated at any time.

The safety hazard contributed to by the violation was an explosion. The nonpermissible miner was a potential ignition source for any methane that would have been present in the return entry. Because of the three openings in the junction boxes, methane could enter those electrical compartments and any spark or electrical arc could become an ignition source. Given these facts and circumstances, it was reasonably likely that an ignition or explosion would occur. In the event that an ignition or explosion did occur, it was reasonably likely that there would have been at least serious injury, such as smoke inhalation, burns, cuts, and/or lacerations.

I therefore conclude that the violation was "significant and substantial" and serious.

The Secretary further urges that this violation was caused by the operator's "unwarrantable failure" to comply with the mandatory standard, and I agree.

In Zeigler Coal Company, 7 IBMA 280 (1977), the Interior Board of Mine Operations Appeals interpreted the term "unwarrantable failure" as follows:

> An inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of lack of due diligence, or because of indifference or lack of reasonable care.

The Commission has concurred with this definition to the extent that an unwarrantable failure to comply may be proven by a showing that the violative condition or practice was not corrected or remedied prior to the issuance of a citation or order, because of indifference, willful intent, or serious lack of reasonable care. United States Steel Corp. v. Secretary of Labor, 6 FMSHRC 1423 at 1437 (1984). And most recently, in Emery Mining Corp. v. Secretary of Labor, 9 FMSHRC 1997 (1987), the Commission stated the rule that "unwarrantable failure" means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act.

In this case, foreman Premo knew of the impermissible condition of the miner, yet ordered it taken into the No. 2 return entry in violation of the mandatory standard. This action demonstrates aggravated conduct that is clearly imputable to the operator. Accordingly, I conclude and find that this violation resulted from gross negligence and this is reflected in the civil penalty assessed by me for this violation.

In assessing a civil penalty in this case, I have also considered the foregoing findings and conclusions and the requirements of section 110(i) of the Act, including the fact that the operator is large in size and has a substantial history of violations. Under these circumstances, I find that a civil penalty of $1,000, as proposed, is appropriate.

ORDER

Order No. 2699493 IS AFFIRMED, and Southern Ohio Coal Company is hereby directed to pay a civil penalty of $1,000 within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge