CCASE:
SOUTHERN OHIO COAL V. SOL (MSHA)
SOL (MSHA) V. SOUTHERN OHIO COAL
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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	CONTEST PROCEEDINGS
v.	Docket No. WEVA 86-190-R Order No. 2705915; 2/19/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. WEVA 86-194-R Order No. 2705881; 2/20/86 Martinka No. 1
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEVA 86-254 A.C. No. 46-03805-03723
v.	Martinka No. 1
SOUTHERN OHIO COAL COMPANY, RESPONDENT	

DECISION UPON REMAND

Before: Judge Maurer

These cases are before me upon remand by the Commission on August 19, 1988, to consider Southern Ohio Coal Company's (SOCCO's) contest of the Secretary's findings that the violation charged in Order No. 2705915 was significant and substantial and resulted from the operator's unwarrantable failure to comply with the notice of safeguard and to assess an appropriate civil penalty. Southern Ohio Coal Co. v. Secretary, 10 FMSHRC 963 (August 19, 1988), reconsideration denied, 10 FMSHRC ___ (September 19, 1988).

After these matters were remanded to me, SOCCO filed a motion with the Commission, essentially for reconsideration, but more specifically to enter a new decision in SOCCO's favor or in the alternative to expand the remand order to me to allow for the taking of further evidence on the general applicability of the subject safeguard. That motion was denied.

I now have before me SOCCO's motion to reopen the proceedings for the introduction of further evidence on the issue of whether Safeguard No. 2034480 sets forth requirements that are generally applicable to coal mines, rather than mine-specific.

The Secretary opposes the motion to reopen. I believe I am bound by the Commission's remand order which was reiterated by the Commissioners in their order of September 19, 1988, denying SOCCO, in the alternative, the more expansive remand order it sought. Therefore, the instant motion to reopen is denied.

As a further housekeeping matter, Docket No. WEVA 86Ä194ÄR was disposed of by my decision reported at 9 FMSHRC 273 (February 1987) (ALJ) and was not at issue on review and therefore also pursuant to the Commission's order of September 19, 1988, "need not be subject to further proceedings on remand."

The Significant and Substantial Violation Issue

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).

Starting from the proposition that I have been handed down, i.e., that the safeguard at bar is valid, then it is really uncontested that it and 30 C.F.R. 75.1403 were violated on the occasion in question.

The safeguard itself is remarkably simple. It flatly states that in this mine (Martinka No. 1), there shall be 24 inches of clearance on both sides of the coal feeders. On February 19, 1986, when Inspector Delovich saw it, there were only 12 inches of clearance between the left coal line rib and the coal feeder for a distance of some six feet. This much is admitted by SOCCO.

The hazard presented by the violation is that there is a reasonable likelihood that an individual walking between the coal feeder and the left rib line while coal was being dumped into the feeder could be crushed between the coal feeder and coal rib if the car dumping coal into the feeder hit the feeder and moved it towards the left rib line. This is precisely the situation the operator contends accounts for the coal feeder being within twelve inches of the rib line in the first instance. I find it to be a reasonably likely occurrence and the most probable cause of the violation itself. I also find that the likely injury to an individual, if the incident occurred, would be of a reasonably serious nature. Accordingly, I find that the violation is a "significant and substantial" one.

The Unwarrantable Failure Issue

In Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987), appeal dism'd per stip., No. 88Ä1019 (D.C.Cir. March 18, 1988), and Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987), the Commission held 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, the Secretary argues that SOCCO demonstrated a high degree of negligence. I disagree.

The most likely scenerio that led to this violation and the one that I find credible is that the coal feeder was initially set on cribs in the middle of the entry with approximately 24 inches of clearance on each side, in compliance with the safeguard. At some point between the afternoon of February 18, 1986 and the morning of February 19, 1986, when the inspector

observed the violation, the feeder was inadvertantly knocked or pushed towards the left rib line. There were fresh marks on top of the crib blocks which indicated that the back end of the feeder had been moved approximately 12 inches from its original location on the crib blocks. A reasonable assumption is that a shuttle car dumping coal into the feeder, accidently bumped the feeder, moving it approximately twelve inches.

Assuming that this is in fact what happened, there is no evidence of how long before the order was issued that the incident occurred. It might well have been only shortly before the order was issued at 10:00 a.m. on the morning of February 19.

Therefore, I find that the record will not support a finding of aggravated conduct or "high negligence" on the part of SOCCO with respect to this violation. Accordingly, I will modify the 104(d)(2) order at bar to a citation issued under 104(a) of the Act, and affirm the significant and substantial violation of 30 C.F.R. 75.1403 as such.

Civil Penalty Assessment

I conclude and find that the violation was serious, and that the operator's failure to exercise reasonable care to insure compliance with the safeguard constitutes a moderate degree of negligence. I further find that SOCCO exhibited good faith in timely abating the violations.

On the basis of the foregoing findings and conclusions, and taking into account all of the civil penalty assessment criteria found in section 110(i) of the Act, I conclude that an appropriate penalty for the violation found herein is $400.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. Order No. 2705915 properly charged a violation of 30 C.F.R. 75.1403 and properly found that the violation was significant and substantial. However, the order improperly concluded that the violation resulted from SOCCO's unwarrantable failure to comply with the mandatory safety standard involved. Therefore, the violation was not properly cited in a 104(d)(2) order. Accordingly, Order No. 2705915 IS HEREBY MODIFIED to a 104(a) Citation and AFFIRMED.

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2. The Southern Ohio Coal Company IS HEREBY ORDERED TO PAY a civil penalty of $400 within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge