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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 88-6-R Order No. 2894708; 9/3/87
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. WEVA 88-7-R Order No. 2894711; 9/4/87 Martinka No. 1 Mine Mine ID No. 46Ä03805
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS Docket No. WEVA 88-88 A.C. No. 46-03805-03831
v.	Docket No. WEVA 88-104
SOUTHERN OHIO COAL COMPANY, RESPONDENT	A.C. No. 46-03805-03835 Martinka No. 1 Mine

DECISION

Appearances: David M. Cohen, Esq., Southern Ohio Coal Company, Lancaster, Ohio, for the Operator;
Evert H. VanWijk, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary.

Before: Judge Weisberger

Statement of the Case

In these consolidated cases, the Operator (Respondent) sought to challenge the following Citations/Orders issued to it by the Secretary (Petitioner):

2894708	alleged violation of 30 C.F.R. 75.316
2894711	alleged failure to timely abate Citation
2892710	
2894510	alleged violation of 30 C.F.R. 77.400(c)
22894518	alleged violation of 30 C.F.R. 75.1403.

The Secretary sought civil penalties for alleged violations by the Operator of the above cited sections except Order No. 2894711.

On February 22, 1988, Respondent filed a Motion for a Summary Decision concerning Docket No. WEVA 88Ä6ÄR (Order No. 2894708). This Motion was denied by Order dated June 3, 1988. On March 3, 1988, the Parties were notified that Docket Nos. WEVA 88Ä88, WEVA 88Ä6ÄR, and WEVA 88Ä7ÄR would be called for hearing on March 28, 1988, in Falls Church, Virginia. Subsequently, based upon a request from Counsel for both Parties, these cases were rescheduled for March 30, 1988, in Pittsburgh, Pennsylvania. On March 28, 1988, in a telephone conference call between Counsel for both Parties and the undersigned, Counsel for Petitioner requested an adjournment on the ground that one of its witnesses had to investigate a fire in a mine on the date the hearing was scheduled. The hearing set for March 30, 1988, was subsequently rescheduled for June 7, 1988, in Pittsburgh, Pennsylvania. On May 17, 1988, pursuant to Petitioner's Motion which was not opposed by Respondent, Docket No. WEVA 88Ä104 was consolidated for hearing with Docket Nos. WEVA 88Ä6ÄR, 88Ä7ÄR, and 88Ä88. Subsequently, pursuant to a request by Counsel for both Parties, the above cases scheduled for hearing on June 7, 1988, in Pittsburgh, Pennsylvania, were rescheduled and heard on that date in Morgantown, West Virginia. Homer W. Delovich, Joseph Gary Pastorial, David C. Workman, and James A. Tennant testified for Petitioner. Wesley H. Hough, James W. Latham, III, James David Gump, John Metz, Glenn Spitznogle, Ira McDaniel, and William Robert Laird testified for Respondent.

Petitioner filed its Post Hearing Memorandum and Proposed Findings of Fact on August 26, 1988, and Respondent filed its Post Hearing Briefs on August 25, 1988. A Reply Brief was filed by Respondent on October 4, 1988.

Findings of Fact and Conclusions of Law

Order No. 2894708 (WEVA 88Ä6ÄR)

On September 3, 1987, MSHA Inspector Homer W. Delovich issued a section 104(d)Ä2 Order alleging that Respondent had not complied with its ventilation plan in the DÄ3 longwall section, alleging, as pertinent, "... in that a check stopping curtain was not installed outby the longwall face at the tailgate entry to deflect or direct the air to the bleeder system along the gob and to the bleeder tap ...."

Delovich testified that, in general, in a longwall mining operation, when retreating, the procedure is to knock out the stopping between Entries 1 and 2, and then erect a curtain in the return entry immediately outby the crosscut in which the stopping had been knocked down. He testified, in essence, that when he

inspected the DÄ3 longwall section of Respondent's Martinka Mine No. 1 on September 3, 1987, he walked down the tailgate Entry No. 1 outby the face, and at a crosscut approximately 650 feet from the face, observed that there was no stopping between Entries 1 and 2. He indicated that no curtain had been installed outby this crosscut. He considered this to be a violation of the ventilation plan and issued Citation/Order 2894708. In support of its position, Petitioner submitted a diagram entitled Typical Longwall Ventilation, which was indicated to be part of Respondent's ventilation plan in effect on September 3, 1987, (Government Exhibit 2). This diagram indicates a curtain was placed in the No. 1 tailgate entry immediately outby a crosscut between Entries No. 1 and 2 without any stopping in the entry. Delovich indicated that MSHA had not approved any plans with regard to the ventilation of the working face since the last inspection in February 1987. Delovich, in essence, testified that prior to inspection, a review of the ventilation plan revealed no changes to the ventilation of the DÄ3 working face. Delovich further testified that on September 3, 1987, Respondent's Superintendent, Wesley Hough, told him that Respondent had submitted a revised plan for the swag area, but that the plan was not in effect as they were not yet in the swag area.

Joseph Gary Pastorial, a union fire boss employed by Respondent, indicated that he performs weekly examinations of the intake and return entries, and also is Chairman of the Union's Health and Safety Committee. He indicated that when the operator proposes revisions to a ventilation plan, the Safety Committee is notified. He indicated that in approximately 1978, the ventilation plan was revised to require that a curtain be built 500 feet outby the face, at a point outby a crosscut in which the stopping had been knocked down. He said that this revision was made as there was a dust problem. He said that this revision was in effect on September 3, 1987, and he was not aware of any revision to this plan. He said that a revision to the ventilation plan in order to cure a geological problem was submitted to him and was approved, but was limited to the DÄ1 and DÄ2 Sections.

In contrast, Wesley Hough, who indicated that he is responsible for Respondent's ventilation plan, testified that he told Delovich on September 3, that a revised ventilation plan for the DÄ3 Section had been approved on July 25, 1986. He indicated that the revision was submitted because there was a geological problem, and thus it superseded the typical longwall ventilation diagram (Government Ex. 2) for the DÄ3 Section, SOCCO Exhibit 1 documents that, on July 25, 1986, MSHA approved Respondent's proposed ventilation plan for longwall Panel DÄ3 as well as DÄ2 and DÄ4. Hough further indicated that a diagram of its proposed ventilation plan had been submitted to MSHA for its approval. This diagram shows the ventilation of the longwall

Panel DÄ3 and does not indicate any curtain in the tailgate Entry No. 1 outby the crossing between Entries 1 and 2 for which there is no stopping. (SOCCO Ex. 2) I find that Petitioner's evidence is insufficient to contradict a plain reading of SOCCO Exhibits 1 and 2, that the Phase II Ventilation Plan, including the DÄ3 longwall panel, was approved by MSHA on July 25, 1986. I also found Hough's testimony to the same effect to be persuasive.

The diagram of the plan (SOCCO Ex. 2), does not depict any curtain outby a crosscut not containing a stopping. Inasmuch as SOCCO Exhibit 2 is clearly labeled to pertain to the longwall Panel DÄ3, and had been approved on July 25, 1986, I find that it had the effect of amending the typical longwall ventilation (Government Ex. 2). As such, I find that on September 3, 1987, the approved ventilation plan (SOCCO Ex. 2) did not require the placement of a curtain immediately outby the face at the tailgate entry as alleged in the citation in issue. Accordingly, I find that it had not been established that the ventilation plan was not being complied with, and therefore, Citation No. 2894708 should be vacated, and the Petition of Assessment of Civil Penalty (WEVA 88Ä88) is dismissed.

Citation No. 2894711 (WEVA 88Ä7ÄR)

On September 3, 1987, at approximately 10:30 a.m., Delovich issued Citation No. 2894710 citing Respondent for having black coal float dust deposited on the floor of the return entry on the DÄ3 longwall section, approximately 600 feet from spad No. 34 á 20 to 28 á 20. In essence, Delovich said that after issuing the Citation, he met with Respondent's employees Hough, Jim Latham, Pastorial, Dave Workman, and Rick Flint and told them to abate the Citation, that 600 feet needed to be rock dusted by 4:00 p.m. that day. Delovich said that when he returned to the section on September 4, at 12:30 a.m., he observed that outby the curtain, that was being erected at the Entry No. 1 to 28 á 20, the floor was still black. Delovich said that he came upon crosscut 34 á 40 on the section, and asked two men who were building a stopping whether they were going to rock dust, and they said "no, we were just told to rock dust up to the stopping" (WEVA 88Ä7ÄR, Tr. 15). Delovich said that no request had been made to extend the time to abate the Citation, and he issued Citation No. 2894711 citing the Respondent as follows:

> "Little effort was made to abate the Citation No. 2894710 statement time was 1000 hours on 09Ä03Ä87, at 0130 hours on 09Ä04Ä87 only 200 feet of the 600 feet of coal float dust in the tailgate return of the DÄ3 longwall section was abated. The company rock dusted 200 feet over top the coal float dust outby the tailgate and then build a permanent stopping closing off the remaining 400 feet which still existed in the tailgate return." (sic.)

James David Gump, Respondent's Assistant Mine Supervisor, testified, in essence, that after the original citation had been issued, Delovich had indicated that approximately 600 feet had to be rock dusted, but that Delovich asked him why Respondent does not build a stopping in the entry to cut down the dust. Gump and John Metz, Respondent's General Supervisor, testified that after discussing the conversation that Gump had with Delovich with regard to abatement, the men presently working on the shift were told to rock dust as far as they could by the end of the shift, and then build a stopping across the entry.

I find that Delovich had indicated that in order for the original citation to be abated, approximately 600 feet would have to be rock dusted. The evidence establishes that when observed by Delovich at 12:30 a.m. on September 4, 1987, the area outby the stopping that was being erected to spad 28 á 20 had not been rock dusted. It is clear that abatement was not satisfied by erecting a curtain and not rock dusting outby that curtain. In this connection, I note that upon cross-examination, Gump agreed that Delovich had not said to just rock dust until the stopping. Also Metz acknowledged, upon cross-examination, that in the area outby the stopping, coal would have been a hazard if it was not rock dusted. Metz also indicated that it was intended subsequent to installing the curtain to rock dust outby that curtain, but that he was concerned with complying with the time limit to abate the citation.

When observed by Delovich on September 4, 1987, the violation previously cited on September 3, had not been totally abated, in that the area had not been completely rock dusted as previously directed by Delovich. Further, I find that Respondent had not requested an extension to fully rock dust the area. Indeed, I note that the workers, observed by Delovich on September 4, told him that they were just told to rock dust up to the stopping. Based on these circumstances, I can not conclude that Delovich acted unreasonably in not unilaterally extending the time to abate. Accordingly, I conclude that Order No. 2894711 was properly issued in that Citation No. 2894710 had not been abated within the time limits set in that Citation, and there was no unreasonableness in not extending the time to abate.

Order No. 2894510 (WEVA 88Ä104)

On September 10, 1987, David C. Workman, a Mine Safety and Health Administration Inspector, inspected Respondent's Preparation Plant at the Martinka No. 1 Mine and cited Respondent for a violation of 30 C.F.R 77.400(c). Workman alleged that "The guard is

missing off the head drum roller, river side, exposing the head roller and belt on the ninth floor of the Preparation Plant." Respondent acknowledges that the guard was not in place, but maintains that the violation herein was not the result of its unwarrantable failure, nor was it significant and substantial.

James A. Tennant, Respondent's Preparation Plant Mechanic, testified that approximately 1 to 2 weeks prior to the date the citation herein was issued on September 10, 1987, he was completing work on the belt brake or back stop which had been started the shift before. Tennant indicated, in essence, that the guard that had been taken off to perform the repairs was leaning against a tank. He was asked whether the guard was in plain sight or hidden behind the tank and answered that it was out in front between the tank and belt drum (WEVA 88Ä104, Tr. Vol I, P. 41). According to Tennant, before he had an opportunity to replace the guard, his foreman, Ira McDaniel, ordered him to go to another work assignment. Tennant did not indicate to his supervisor that the guard had not yet been replaced nor did he later on check to see if it had been replaced. Tennant further testified that a day or two before the citation was issued, he was in the area and saw the guard still on the floor, but did not replace it. Nor did he tell his supervisor that it still had not been replaced. David C. Workman, MSHA Investigator, entered Respondent's Preparation Plant on September 10, 1987, in response to a section 103(g)(i) complaint that various employees of Respondent had mentioned to Respondent's managers and supervisors that the guard in question had not been replaced. However, there is no documentary evidence or testimony which would indicate that any of Respondent's supervisors or managers knew that the guard in question was not in place. According to Tennant, the belt had to be shut down in order to replace the guard, and that shutting down the belt line was the responsibility of the supervisor. Glenn Spitznogle, Respondent's day shift foreman, and Ira McDaniel, Respondent's foreman, both testified that they did not know that the guard in question was not in place.

When Tennant was asked whether it was obvious that the guard was missing, he indicated that if one walked through the area and saw the guard on the ground "... you'd wonder where it went" (WEVA 88Ä104, Tr. Vol I, P. 46). However, Workman indicated that it was not obvious to him that the guard belonged where it did on the back stop. Although Spitznogle indicated on cross-examination that in the 2 years prior to July 1988, possibly he was on the 9th floor of the plant hundreds of times, he stated that he is not there daily, and specifically did not notice that the guard was missing from the cited area. It was McDaniel's testimony, in essence, that he never saw the guard up against the tank and did not know it belonged at the location from where it was missing. I

conclude that neither Spitznogle nor McDaniel actually knew that the guard in question was not in place. However, based upon the testimony of Tennant, and taking into account the size of the guard (estimated by Tennant to be 2 Ä 2 1/2þ x 3þ), I find that they each should have observed the guard in the area and should have realized that it was not in its proper place. Clearly Tennant was remiss in not reporting to his supervisor the fact that the guard had not been replaced, especially after he saw it again a day to two before the citation was issued, and approximately a week after he performed work on the belt. I find under the circumstances of this case, taking into account all the above, that Respondent's malfeasance herein amounted to an aggravated conduct. As such, I conclude that the violation resulted from Respondent's unwarranted failure. (See Emeory Mining Corp., 9 FMSHRC 1997 (Dec 1987)).

In essence, it was Workman's testimony that maintenance persons or others coming into the area could trip or fall with the risk of their hand or other limb being inserted in the area, unprotected by the guard, causing the whole body to be dragged in or causing the person to suffer bruises and the lost of a finger or limb. The unguarded area was located on a platform approximately 2 1/2 feet from the edge of the platform. Spitznogle admitted that one could get one's foot caught and trip on the edge of the 1 foot high platform. Also the platform is hosed daily, and the water is not cleared up as it is allowed to drain and evaporate. Spitznogle also indicated that oil has leaked from the gear case in the past. However, according to Workman there was neither an accumulation of oil or grease, nor were there stumbling hazards in the immediate area. Moreover, it has not been established that in the normal operations persons would climb up the platform. The only person regularly working on the 9th floor (the level where the cited condition is found) is a plant attendant. The evidence indicates merely that his job is to check the equipment, but there is no evidence establishing that in the normal course of his duties he would be in close proximity to the unguarded area. Nor has it been established that one hosing the platform would stand or walk on the platform. I further find the following facts, as set forth in Respondent's Brief at pages 11Ä12: (1) people fire boss the area and gas checks are needed to be taken somewhere on the 9th floor, but not necessarily at the location specified in the Order; (2) once every month or two the grease canister needs to be refilled and occasionally the oil needs to be changed in a gear box, but both the grease canister and the gear box are on the opposite side of the head roller from the location of the missing guard; (3) light bulbs might need to be changed, but these are not done in the immediate vicinity of the location in which the guard was missing.

Accordingly, I conclude that although there was a possibility of the violation herein of an unguarded area contributing to the hazard of some one falling or stumbling and being injured, I conclude that there was not a reasonable likelihood that the hazard contributed to would result in an injury, as it has not been established that it was reasonably likely for a hazard to occur. As such, the violation herein is not significant and substantial. (c.f. Mathies Coal Company 6 FMSHRC 1 (January 1984).

I find that Respondent herein was negligent to a high degree in that Tennant knew of the missing guard and did not communicate this to his supervisor, and that the latter should have known the guard was missing. Also I find that the gravity herein was moderately serious (although not significant and substantial), as in the event of a person inadvertently coming in contact with the unguarded portion of the belt, a reasonably serious injury could have resulted. Taking into account the remaining factors of section 110(i) of the Act, as stipulated to by the Parties, I conclude that a penalty herein of $200 is appropriate.

Order No. 289518 (WEVA 88Ä104)

On September 7, 1987, Inspector David Workman was told by Miner's Representative Pat Grimes of the existence of a broken switch on the 12Äleft track haulage of the North Mains. Upon arriving at the 12Äleft track, Inspector Workman noted that the barrel to the switch was disconnected, the bottom ear of the female joint C-bolt was broken, and the connecting bolt was lying in the adjacent dirt. Workman opined, in essence, that in light of the area being highly traveled by personnel carriers, locomotives, and jitneys, it was very likely that with the rail not being secured, vibrations could dislodge the alignment causing a derailment.

Workman testified that the miners' representative told him that he had reported this condition to three individuals who are a part of mine management. Workman said that he talked to two of these three individuals.

William Laird, Respondent's foreman on the midnight shift, testified that on October 5, 1987, 2 days before the date of the issuance of the Order, he signed a preshift report stating that the switch throw was broken and then corrected by installing the bolt in the switch barrel.

Laird said that on October 5, 1987, he also reported to the dispatcher the need for new ears or possibly a new barrel, and that on October 6, 1987, he repaired the switch. At the time he made the repairs, he checked at least five time to see if the switch would operate correctly and determined that it did.

Laird testified that he had repaired the broken switch by placing the bolt back through the barrel and that he did not observe a nut to be placed on the bottom of this bolt. It was his opinion that most of the track haulage switches do not have nuts that go with such bolts, but he conceded that most C-bolts do not have a broken C piece.

On October 7, 1987, Workman issued Order No. 2894518 which provides that "The 12Äleft track haulage switch in North Mains was found to be disconnected from the barrel, one ear was broken off the barrel, and the bolt and nut was found laying down under the throw part of the switch ...."

This Order essentially was issued based on Safeguard 814335 dated February 7, 1979, which states as follow:

> The track haulage set out switch for the superintendent's jitney is not properly aligned, causing track haulage equipment passing over it to whip sideways. This is a notice to provide safeguards requiring that all track haulage at this mine shall be properly maintained and aligned.

Respondent has challenged the validity of the instant safeguard upon which the Citation in question was issued. Respondent argues that the safeguard was improperly issued as its requirements should have been the subject of rule making. Subsequent to the hearing, the Parties, in a telephone conference call, initiated by the undersigned, on September 2, 1988, were allowed to file Supplemental Briefs on the applicability to the issues herein, of the recent Commission decision in Secretary v. Southern Ohio Coal Co, 10 FMSHRC 963, (August 1988). Briefs were filed by the Parties. Respondent filed a Reply Brief; none was filed by Petitioner.

In essence, it is Petitioner's position that the lack of maintenance of the equipment in question created a hazard that was not covered by mandatory standards, but which is addressed by the safeguard herein. In contrast, Respondent maintains that the safeguard requiring all track haulage to be properly maintained is of general applicability, and as such, is invalid as it was not promulgated pursuant to section 101(a) of the Act.

The Commission in Secretary v. Southern Ohio Coal Co., supra, at 967, noted that the Court of Appeals of the District of Columbia Circuit in Zeiglar Coal Co. v. Kleppe, 536 F2d 389 (D.C.Cir.1976) "has recognized that proof that ventilation

requirements are generally applicable, rather than mine-specific, may provide the basis for a defense with respect to alleged violations of mandatory ventilation plans." The Commission in Southern Ohio, supra at 967 further analyzed Zeigler as follows:

> . . . [T]he court considered the relationship of a mine's ventilation plan required under section 303(o) of the Act, 30 U.S.C. 863(o), to mandatory health and safety standards promulgated by the Secretary. The court explained that the provisions of such a plan cannot "be used to impose general requirements of a variety well-suited to all or nearly all coal mines" but that as long as the provisions "are limited to conditions and requirements made necessary by peculiar circumstances of individual mines, they will not infringe on subject matter which could have been readily dealt with in mandatory standards of universal application." 536 F.2d at 407; See also Carbon County Coal Co., 6 FMSHRC 1123, 1127 (May 1984) (Carbon County I); Carbon County Coal Co., 7 FMSHRC 1367, 1370Ä72 (September 1985) (Carbon County II).

In Southern Ohio, supra, the Commission did not resolve the question of whether a defense to a safeguard may be based on its being generally applicable, as it found that there was no evidence of whether the safeguard was general or mine-specific. In contrast, in the case at bar, I find the following evidence in the record, as summarized by Respondent in its Brief at page 3: "The inspector estimated that he had been in over 100 underground mines and that approximately 80% have tracks and track haulage switches. Further, the inspector testified that the problem with track haulage switches not being maintained did not pose a greater hazard or safety problem in the Martinka Mine that in other mines that have track haulage switches, that the associated hazards would be the same at other mines as in the Martinka Mine, and that there was no reason why the contents of the Safeguard would be more applicable to the Martinka No. 1 Mine than to other mine" (sic). In contrast, Petitioner did not offer any proof with regard to the circumstances under which the safeguard was issued, the specific need for the safeguard at the subject mine, or whether similar safeguards had been issued for other mines.

I find that generally, in allocating the burden of proof, one factor taken into account is which Party has the best knowledge of the particular disputed facts (Lindahl v. Office of Personnel Management 776 F2d 276 (Fed.Cir.1985). The burden is not placed upon a Party to establish facts particularly within the knowledge of its adversary. In this connection, it appears that Respondent would have particular knowledge as to the circumstances under which the safeguard was issued, and the existence

or need of similar safeguards at other mines (See Southern Ohio, supra, at 967Ä968. In addition, it has been held that generally MSHA has the burden of putting forth a prima facie case of a violation (Miller Mining Co, Inc. v. Federal Mine Safety and Health Review Commission 713 F2d 487 (9th Cir1983) See also Old Ben Coal Corp. v. IBMA 523 F2d 25, 39 (7th Cir.1975)). As such, it had the burden of establishing all elements of the citation including the validity of the underlying safeguard.

I thus conclude, based on all the above, that Petitioner has failed to establish that the safeguard in issue was mine-specific to the subject mine. As such, based on the rationale of Zieglar, supra, that I find applies with equal force to the case at bar, I conclude that because it has not been established that the safeguard was mine-specific, it therefore is invalid as it was not promulgated pursuant to the rule making procedures of section 101 of the Act. Accordingly, I find that the Order herein, should be dismissed inasmuch as it was predicated upon an invalid safeguard.

ORDER

It is ORDERED that:

1. The Notice of Contest, Docket No. WEVA 88Ä6ÄR is SUSTAINED.

2. Citation No. 2894708 be VACATED.

3. Docket No. WEVA 88Ä88 be DISMISSED.

4. Order No. 2894710 was properly issued.

5. Notice of Contest, Docket No. WEVA 88Ä7ÄR be DISMISSED.

6. Order No. 2894510 be AMENDED to reflect the fact that is is not significant and substantial.

7. Order No. 289518 be VACATED.

8. Respondent shall pay, within 30 days of this Decision, the sum of $200 as a Civil Penalty for the violation found herein.

Avram Weisberger
Administrative Law Judge