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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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEVA 88-313 A.C. No. 46-03805-03863
v.	Martinka No. 1 Mine
SOUTHERN OHIO COAL COMPANY, RESPONDENT	

DECISION

Appearances: Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
David M. Cohen, Esq., American Electric Power Service Corporation, Lancaster, Ohio, for Respondent.

Before: Judge Maurer

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," for alleged violations of regulatory standards. The general issues before me are whether the Southern Ohio Coal Company (SOCCO) has violated the cited regulatory standards and, if so, what is the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act. Additional issues are also addressed in this decision as they relate to specific citations or orders.

The case was heard in Morgantown, West Virginia on February 2, 1989. Both parties have filed post-hearing proposed findings of fact and conclusions of law which I have considered along with the entire record in making this decision.

Prior to the hearing, petitioner filed a motion for partial decision and order approving settlement that would dispose of four out of the five citations/orders involved in this docket. A reduction in penalty from $4,050 to $3350 is proposed for those four only. I have considered the representations and documentation submitted by motion in this case, and have concluded that the proffered settlement is appropriate under the statutory criteria set forth in section 110(i) of the Act. I so

approved the petitioner's motion from the bench at the hearing. Pursuant to the Rules of Practice before this Commission, this written decision confirms the bench decision I rendered at the hearing, approving the partial settlement of this case.

The aforementioned partial settlement did not include Order No. 2895785, which alleges a violation of 30 C.F.R. 75.220 and proposes a civil penalty of $500. That alleged violation and "unwarrantable failure" special finding were tried before me at the hearing on February 2, 1989.

STIPULATIONS

The parties stipulated to the following (Tr. 7-9):

1. The Martinka Number 1 Mine is owned and operated by Respondent, Southern Ohio Coal Company.

2. The Martinka Number 1 Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction over these proceedings.

4. The subject order was properly served by a duly authorized representative of the Secretary of Labor upon an agent of the Respondent at the date, time and place stated therein and may be admitted into evidence for the purpose of establishing its issuance, but not for the truthfulness or relevance of any statements asserted therein.

5. The assessment of a civil penalty in this proceeding will not affect the Respondent's ability to continue in business.

6. The appropriateness of the penalty, if any, to the size of the coal operator's business should be based upon the fact that the Respondent's mine size is large and the Respondent's company size is large.

7. Martinka Number 1 Mine's history of violations was 946 violations over 1062

inspection days at the time the instant order was issued.

8. The parties stipulate to the authenticity of their exhibits but not to their relevance nor the truth of the matters asserted therein.

9. The parties stipulate that the violation existed as described in Order Number 2895785, which is the subject of this hearing.

10. The part and section of Federal Regulations, which was violated, is 30 C.F.R, Section 75.220, as opposed to 75.200, which was originally cited. This modification was issued by MSHA on 1/31/89.

11. With reference to the gravity of the instant violation, the parties stipulate that the gravity as indicated within the order was -- the injury or illness was unlikely but the injury or illness, which might have occurred anyway as a result of this violation, was no lost work days. The parties also stipulate that the violation was not significant and substantial in nature.

Order No. 2895785, issued pursuant to section 104(d) (2) of the Act alleges a violation of the regulatory standard at 30 C.F.R. 75.220 and charges as follows:

The following unused intersections along the mainline haulage are not timbered or posted along the rib lines according to the approved roof control plan no. 26 page 14 of the safety precautions to be taken. The intersections are No. 169 and 168 outby the 17 left track switch and 2 cribs at station No. 18906 are incomplete on the walkway side in that they are from 4" to 10" away from the mine roof and examination date on one of the crib ties is 12/22/87 initial SW 1:55 p.m.

MSHA Inspector Frank Bowers issued the instant order during a regular inspection of the Martinka No. 1 Mine on April 14, 1988.

At that time, the roof control plan required that "[a]long mainline track, all unused intersections . . . be timbered or posted along rib lines". Subsequent to the issuance of the order herein the requirement for additional support along the mainline

haulage was deleted from the roof control plan as no longer being necessary.

The inspector testified that the roof was good in these areas and that the violative conditions he cited were not likely to result in injury. However, he had spotted what perhaps could be characterized as "technical" violations of the roof control plan and he was not getting the kind of cooperation and corrective action he thought appropriate from mine management. He testified that he first brought the subject to the attention of mine foreman Metz on January 11, 1988, when he cited the operator for several loose cribs between the 15 and 17 Left sections along the North Main's haulage. He also specifically mentioned the missing cribs at intersection No. 168 and 169 to Metz at that time, as well as the incomplete cribs at station No. 18906. In fairness to Metz, however, the inspector did not tell him of those exact locations, but only the general area involved. Mr. Metz recalls their conversation as well, but only in general. Mr. Pastorial, who is Chairman of the UMWA Health and Safety Committee, was accompanying Inspector Bowers on January 11, 1988, and he also recalls Bowers' conversation with Metz. He testified that Metz assured them (he and Bowers) that these conditions would be taken care of. Metz, however, was apparently unsure of exactly what conditions the inspector was referring to.

Inspector Bowers was next back in the North Main's section on March 9, 1988. This time he was making a respirable dust inspection and Peggy Kaham of the operator's Safety Department was with him. Once again, he spotted the missing supports -- the same ones he had told Metz about or at least thought he had. He states he told Ms. Kaham to have those supports installed. She recalls no such conversation nor do her notes for that date mention that any crib work was necessary. She maintains that if he would have told her that such work was necessary, she would have put it in her notes.

The inspector was next on the North Main's haulage on April 6, 1988. At that time, he told Wes Hough, the mine superintendent, about the same area outby 17 Left. He informed Mr. Hough that there were six crosscuts which had no cribbing and that there were also two incomplete cribs. He states that Mr. Hough indicated that these conditions would be taken of. The inspector also reiterated that these conditions were readily observable from the mantrip. However, similarly to the conversation the inspector had with Metz, he did not tell Mr. Hough the particular intersection numbers in which crosscuts had not been timbered or the station number in which the two cribs did not go all the way to the roof.

When the inspector returned again on April 14, 1988, four of the six crosscuts had been cribbed but two still had not. Additionally, there were still the two incomplete or loose cribs he had previously alluded to in his discussions with management. He issued the admitted violation as an unwarrantable order because he felt he had brought this matter to the attention of management in January and now it was April and still the condition had not been completely corrected.

The problem here as I see it is one of perception and communication. The inspector knew exactly which particular crosscuts and cribs he was speaking to mine management about and he wanted to see those specific cribs installed or tightened, as the case may be. However, when he spoke to management personnel, he spoke only in very general terms about the location of the missing and incomplete cribs he was concerned about. Meantime, management knew there were loose cribs and new cribs to be installed all over the mine for which they had an ongoing program that would tighten and install cribs over a 3-4 month period. No special urgency was assumed by management to attach to the specific cribbing needs spotted by the inspector. Management could have interrogated the inspector more closely on exactly which cribs he was talking about or the inspector could have volunteered the exact locations he wanted to see properly cribbed immediately. However, as a matter of fact, neither did much of anything with regard to specifics.

The inspector did not cite the operator when he observed these admittedly violative conditions on January 11, 1988, March 9, 1988, or April 6, 1988, relying instead on general statements to the effect that they (management) would take care of it. Here again, the operator was speaking of the general winter program of tightening and installing cribs all over the mine, but he understood it to be a pledge that they would forthwith install and/or adjust "his" cribs. He understood this to be the case in spite of the fact that he had never identified to anyone with any ascertainable degree of specificity exactly which cribs were "his". There was testimony that there are some 1400 cribs existant in this mine along the main haulageway and perhaps 100 crosscuts in the area of the North Mains described by the inspector.

I should point out here the obvious fact that it is the duty of the operator to locate and correct violations of their roof control plan on their own. They cannot rely on the inspectors to ferret out all their loose and missing cribs and report the locations to them. In this case, however, I am satisfied that the operator had an ongoing, even if somewhat sporadic program, of locating cribbing problems and correcting them throughout the mine in an organized fashion.

Everyone agrees the roof in the North Main's area was good and bolted according to the roof control plan. The cited conditions created no hazard and was a non-significant and substantial violation of the roof control plan. This was another reason mine management attached no particular urgency to the inspector's information that he had found some cribbing work that needed to be done in this area. In fact, poorer roof conditions were more likely to be found in the older portions of the mine and thus those areas were scheduled for earlier attention. The last area of the mine to be done was the 17 Left section because this was the newest area of the mine and the roof was known to be good.

In Emery Mining Corp., 9 FMSHRC 1997 (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.

While I find that the violation was obvious, and readily observable from the main line haulage track that was frequently traveled by management personnel, I do not find the operator's conduct to be unwarrantable in this instance.

Nor do I find the inspector's three conversations with mine management personnel generally concerning missing and incomplete cribs particularly helpful to anyone. Management was already generally knowledgeable about the cribbing problem along the mainline haulageway and was taking steps to correct the problem.

Finally, at the time of the inspector's earlier visits in January, March and on April 6, I don't sense any urgency or serious concern conveyed by the inspector to the operator that would have reasonably led them to believe that immediate attention was required in the subsequently cited area.

For all the foregoing reasons, I find the operator to be guilty of only ordinary negligence with regard to the instant violation. Accordingly, the section 104(d)(2) order at bar will be modified herein to a citation issued pursuant to section 104(a) of the Act and affirmed as such.

Considering the statutory criteria contained in section 110(i) of the Act, I find that a civil penalty of $250 is warranted in these circumstances for this violation.

ORDER

Based on the above findings of fact and conclusions of law, and on the motion to approve settlement, IT IS ORDERED THAT:

1. Order No. 2895764 IS AFFIRMED and a civil penalty of $700 assessed.

2. Order No. 2895768 IS AFFIRMED and a civil penalty of $500 assessed.

3. Order No. 2895770 IS AFFIRMED and a civil penalty of $950 assessed.

4. Order No. 2895789 IS AFFIRMED and a civil penalty of $1200 assessed.

5. Order No. 2895785 is modified to a Section 104(a) citation and a civil penalty of $250 assessed.

6. The Southern Ohio Coal Company pay civil penalties of $3600 within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge