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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 PROCEEDING
v.	Docket No. WEVA 88-56-R Order No. 2895233; 10/21/87
SECRETARY OF LABOR MINE SAFETY & HEALTH ADMINISTRATION (MSHA), RESPONDENT	Martinka No. 1 Mine Mine ID 46-03805
SECRETARY OF LABOR MINE SAFETY & HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEVA 88-166 A.C. No. 46-03805-03843
v.	Martinka No. 1 Mine
SOUTHERN OHIO COAL COMPANY, RESPONDENT	

DECISION

Appearances: B. Anne Gwynn, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary.
David M. Cohen, Esq., American Electric Power Service Corp., Lancaster, Ohio for the Contestant/ Respondent.

Before: Judge Maurer

These 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 legality of a section 104(d)(2) order issued to the contestant at its Martinka No. 1 Mine on October 21, 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 March 2, 1989. 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. 2895233, which is the subject of this proceeding, was issued by MSHA Inspector Homer W. Delovich on October 21, 1987. The order alleges a violation of the mandatory safety standard found at 30 C.F.R. 75.14031, and the condition or practice alleged by the inspector to be a violation of that standard, which pertains to safeguards, states as follows:

> In the D-3 Longwall sections, the 24 inch clearance was obstructed on the headgate operator's side for approximately 120 feet along the panline and for 10 outby the section belt tailpiece; obstructing the clearance was water, coal and coal dust mixed 6 inches to 18 inches in depth and in this accumulations were 3 cables, coal and rock, the accumulations existed between the coal rib and panline. No one working on conditions when observed, no pump provided for the water and two men were observed performing other work in this clearance. Condition presents a slipping and stumbling hazard. Safeguard issued 02-03-82, Number 863963.

Safeguard No. 863963 had been issued by Inspector Delovich on February 3, 1982. That safeguard notice provided that:

> Twenty-four inch clearance was not provided along the stage loader and chain conveyor at the headgate on the C2 longwall section. Obstructing the 24-inch clearance was a roof crib within 4 inches of the control station, large shale roof rock walkway where persons work along the panline and post laying on the floor of the clearance. All stage loaders and panlines at headgates in this mine shall have 24 inches of unobstructed clearance.

STIPULATIONS

The parties stipulated to the following, which I accepted (Tr 10-11):

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

2. The Martinka No. 1 Mine is owned and operated by the Southern Ohio Coal Company.

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

4. Safeguard No. 863963 was properly served by duly authorized representatives of the Secretary of Labor upon an agent of the Southern Ohio Coal Company on the date, time and place stated therein.

5. Safeguard No. 863963 had not been vacated or withdrawn at the time Order Number 2895233 was issued.

6. Order Number 2895233 was properly served by duly authorized representatives of the Secretary of Labor upon an agent of the Southern Ohio Coal Company on the date, time and place stated therein.

7. The assessment of a civil penalty in this proceeding will not affect Southern Ohio Coal Company's ability to stay in business.

8. The annual coal production of the Martinka No. 1 Mine in 1986 was one million one hundred seventy-seven thousand three hundred forty-seven tons.

9. There was no intervening clean inspection between September 1, 1981, when Order No. 859286 was issued and October 21, 1987, when Order No. 2895233 was issued.

10. There were approximately 346 inspection days at the Martinka No. 1 Mine in the 24 month period prior to the issuance of Order No. 2895233.

DISCUSSION AND FINDINGS

On October 21, 1987, Inspector Delovich conducted a regular quarterly inspection of the Martinka No. 1 Mine. In the D-3 longwall section, he found the travelway between the panline and the rib to be covered with water, mud, coal muck, etc. A "quagmire" in his words. This condition existed from 10 feet outby the tail piece to 120 feet inby along the panline, and ranged in depth from 6 to 18 inches. He issued the order at bar because of this condition, shutting down the longwall operation and withdrawing the 3 miners who had been working in this mess.

The inspector felt this was a significant and substantial violation because he believed it was highly likely that a miner

would slip, trip or fall in the muck and if a miner fell in the area between the panline and the rib, he could fall onto the moving panline, and serious injuries would be reasonably likely to occur.

The inspector also determined that this condition had existed for two to three weeks prior to the issuance of the instant order and at the time of the issuance, nothing was being done to correct this situation. The testimony of Messrs. Kirchartz and Yost established that mine management was aware of the condition for the entire 2-3 weeks of its existence, and graphically described the unpleasantness of working in these messy conditions.

It so happens that Inspector Delovich had also issued the underlying safeguard some five years earlier. He issued that safeguard in the C-2 longwall section because the travelway between the panline and the solid coal rib was obstructed by large stone and rock and had a crib built in close proximity to the stage loader. Miners were observed by him at that time to be walking through the obstructed area between the panline and the solid coal rib because this was the only entrance to the longwall face. They also had to bring supplies in through this area between the rib and the panline. His purpose in issuing this safeguard then was to alleviate the stumbling and tripping hazards he found and to provide for an unobstructed travelway between the coal ribs and the stage loaders and panlines.

In a previous case involving this same contestant, Southern Ohio Coal Co., 10 FMSHRC 963 (1988), the Commission discussed in general terms the safeguard issue. Therein they stated at 966-67:

> The Commission has previously had occasion to examine the Act's safeguard provision. The Commission has noted that the broad language of the provision "manifests a legislative purpose to guard against all hazards attendant upon haulage and transportation in coal mining." Jim Walter Resources, Inc., 7 FMSHRC 493, 496 (April 1985). The Commission has observed that while other mandatory safety and health standards are adopted through the notice and comment rulemaking procedures set forth in section 101 of the Act, section 314(b) extends to the Secretary an unusually broad grant of regulatory power -- authority to create what are, in effect, mandatory safety standards on a mine-by-mine basis without regard to the normal statutory rulemaking procedures. Southern Ohio Coal

> Co., supra, 7 FMSHRC at 512. The Commission also has recognized that the exercise of this unique authority must be bounded by a rule of interpretation more restrained than that accorded promulgated standards. Therefore, the Commission has held that a narrow construction of the terms of a safeguard and its intended reach is required and that a safeguard notice must identify with specificity the nature of the hazard at which it is directed and the remedial conduct required by the operator to remedy such hazard. Id.
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> These underlying interpretive principles strike an appropriate balance between the Secretary's authority to require safeguards and the operator's right to notice of the conduct required of him.

That earlier Southern Ohio Coal Company case cited in the above quotation is directly on point in this proceeding. In Southern Ohio Coal Co., 7 FMSHRC 509 (1985), the Commission held that notices to provide safeguards must be narrowly construed. In that case, the notice to provide safeguards referred to "fallen rock and cement blocks" in a travelway. These solid objects in the travelway presented a stumbling hazard, and depending on the amount of material present could have prevented passage in the walkway altogether. Abatement of this condition was accomplished by simply removing the discrete objects. The Commission specifically opined at 7 FMSHRC 513:

> [F]urther instances of physical obstructions in travelways, whether rocks, cement blocks, or other objects such as construction materials, mine equipment or debris would fall within the scope of the safeguard.

The obstruction cited as a violation of the safeguard in that instance, however, was not any of those objects. It was water, in combination with the clay bottom of this same Martinka No. 1 mine, rock dust and mud, which did create a serious slipping and stumbling hazard.

The holding in that case is also set out at 7 FMSHRC 513:

> The alleged obstruction cited in this case, an accumulation of water, was neither specifically identified in the safeguard notice, suggested thereby, nor in our opinion even contemplated by the inspector when he issued his safeguard notice. The presence of water in an underground coal mine is not an unusual condition; it sometimes results from its introduction into the mining process, but often it is caused by natural ground conditions. The record in this case indicates that natural water seepage was common at this

> mine, particularly at the location involved. Given the frequency of wet ground conditions in the mine, and the basic dissimilarity between such conditions and solid obstructions such as rocks and debris, we find that SOCCO was not given sufficient notice by the underlying safeguard notice issued in 1978 that either wet conditions in general or the particular conditions cited in 1983 by the inspector in this case would violate the underlying safeguard notice's terms.
>
> We do not hold that a safeguard notice pertaining to hazardous conditions caused by wetness could not be issued. Conditions such as those cited by the inspector here, if hazardous, can just as readily be eliminated by issuance of safeguard notices specifically addressing such conditions. By taking this approach rather than bootstrapping dissimilar hazards into previously issued safeguard notices, the operator's right to notice of conditions that violate the law and subject it to penalties can be protected with no undue infringement of the Secretary's authority or loss of miner safety.

Returning to the instant case, in the words of the MSHA inspector who issued it, he issued the notice to provide safeguards in February of 1982 because SOCCO had the cited travelway obstructed with large stones and rock and they had a crib block built right next to the stage loader.

In October of 1987, the same inspector testified he found a "quagmire", six to eighteen inches in depth, consisting of water, mud, coal lumps and dust and cables running through this "muck" in the cited area. He defined "muck" to be coal dust and water mixed to a consistency where it forms a mud.

Mr. Kirchartz, a safety committee member and employee of SOCCO at the Martinka No. 1 mine accompanied Inspector Delovich on October 21, 1987 during his inspection and witnessed the issuance of the order at bar as well as the conditions in the cited area. He testified that both sides of the panline were in a very muddy condition and that this area of the mine was a particularly wet one.

Mr. Yost, another SOCCO employee was called and he testified that he is a shear operator on the longwall and was knowledgeable about the conditions in the cited area at the time the order was issued. He described the conditions as being muddy and mucky on both sides of the panline. He had previously complained about the mud there. He stated that to work in eighteen inches of mud all day was a mess and definitely no fun.

Mr. Lane, a longwall foreman at Martinka No. 1, also testified that he was familiar with the conditions in the area at the time the violation was written and was present when the order was issued. He denies that any rock or large chunks of coal were present in this area at the time. He admits the muck existed, but denies that there were any cables laying in the muck on the operator's side of the stage loader between the face and the conveyor motor. The order states that there was an obstruction on the headgate operator's side for approximately one hundred and twenty feet along the panline and for ten feet outby the section belt tailpiece, but the cables were only involved within the ten feet outby the section belt tailpiece.

Mr. David Stout, a safety assistant employed by SOCCO, was also with the inspector at the time the order was issued and was aware of the conditions in the cited area at the time. He observed a mixture of water, small lumps of coal, small gravel-sized rock and clay bottom material. Most of this fine mixture was water in his opinion. With regard to the cables at issue herein, he testified that there were three cables coming from the stage loader area next to the tailpiece that were looped out of the motor, and were on the floor within the ten feet outby the section belt tailpiece.

The cited condition was abated by a dozen miners using buckets to put the muck onto the conveyor within the stage loader. Shovels were tried, but were found to be ineffective because the consistency of the material did not allow it to stay on the shovels.

The safeguard makes no reference to mud or water or muck, and the inspector somewhat incongruously states that if it wasn't for the muck that was present, he would not have written the alleged violation under the safeguard section of the mandatory standards. He testified that in 1982 the travelway was obstructed; there were obstructions on the floor and in his words, "it wasn't meant to be specific what kind of obstructions". Therefore, he issued the safeguard. Subsequently, in 1987, when he found the "quagmire", rather then issue a new safeguard notice to eliminate the conditions he believed to be hazardous, he attempted to include muck within the prohibitions of the existing safeguard which referenced only large rocks, a crib block and a post laying on the floor.

The order at bar which he issued in this instance alleged that the clearance was obstructed with a mixture of water, coal and coal dust (muck) in which there were located three cables, coal and rock. The three cables referenced in the order were part of the longwall unit and provide power for the longwall. These three cables were not on the mine floor between the panline

and the solid coal block within the 120 feet next to the panline, but rather were on the floor next to the solid coal block within the 10 feet outby the section belt tailpiece. The ten feet outby the section belt tailpiece, not being next to the stage loader or panline is not included in the area covered by the safeguard. That effectively eliminates the cables from any further consideration.

As far as any coal and rock that existed in the "quagmire", I find that the consensus of the evidence is that it was very small lumps of coal and rock along with clay or bottom material which formed a muck, some six to eighteen inches deep. I also find that it was solely this muck, rather then any discrete physical objects, that resulted in the issuance of the order at bar.

Commission precedent, Southern Ohio Coal Co., supra, is clear in this case. The safeguard must identify with specificity the class of obstructions prohibited. The obstruction cited by the 1987 order in this case was essentially muck. Muck was not mentioned in the 1982 safeguard notice that the order purportedly relies on and no reasonable construction of the underlying safeguard notice in this case could conceivably include it. Accordingly, the instant order must be vacated.

ORDER

On the basis of the foregoing findings and conclusions, SOCCO's contest IS GRANTED, Order No. 2895233 IS VACATED, and MSHA's related civil penalty proposal IS REJECTED. The civil penalty proceeding IS THEREFORE DISMISSED.

Roy J. Maurer
Administrative Law Judge

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FOOTNOTES START HERE

1. 30 C.F.R. 75.1403 repeats section 314(b) of the Mine Act, 30 U.S.C. 874(b), and states:

> Other safeguards adequate, in the judgement of an authorized representative of the Secretary [of Labor], to minimize hazards with respect to transportation of men and materials shall be provided.