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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 89-87
A.C. No. 46-03805-03887

v.

Martinka No. 1 Mine

SOUTHERN OHIO COAL CO.,
RESPONDENT

DECISION

Appearances: Mark Malecki, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Secretary of Labor (Secretary); Rebecca J. Zuleski, Esq., Furbee, Amos, Webb & Critchfield, Morgantown, West Virginia, for Southern Ohio Coal Co. (SOCCO)

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary filed a Petition for the assessment of civil penalties for three alleged violations of mandatory safety standards promulgated under the Federal Mine Safety and Health Act of 1977 (Act). Pursuant to notice, the case was called for hearing on August 22, 1989, in Morgantown, West Virginia. At the hearing, the Secretary moved for the approval of an agreed upon settlement with respect to two violations, namely those charged in orders 3117591 and 3117599. Both citations changed violations of 30 C.F.R. 75.303. Both were designated as unwarrantable failure violations and each was assessed at \$650. The motion proposes that Respondent pay \$650 for each violation, but that the unwarrantable failure finding be withdrawn and the 104(d)(2) orders be modified to 104(a) citations. The basis for the modification is the difficulty in proving that the operator was aware of the locations of the violative conditions in the mine. I stated on the record that I would approve the settlement. In the hearing on the remaining alleged violation, Terry Palmer and Raymond Glaspell testified on behalf of the Secretary. Dan Conaway and Douglas McQuaid testified on behalf of SOCCO. The parties waived their right to file posthearing briefs and argued their positions on the record. I have considered the entire record and the contentions of the parties, on the basis of which I make the following decision.

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subject order, of which 20 were violations of 30 C.F.R. 75.316. This history is not such that penalties otherwise appropriate should be increased because of it.

ISSUES

1. Whether the evidence establishes a violation of the approved ventilation plan and therefore of 30 C.F.R. 75.316?

2. If a violation is established, was it significant and substantial?

3. If a violation is established, was it caused by SOCCO's unwarrantable failure to comply with the standard?

4. If a violation is established, what is the appropriate penalty?

CONCLUSIONS OF LAW

SOCCO is subject to the provisions of the Act in the operation of the subject mine, and I have jurisdiction over the parties and subject matter of this proceeding.

The evidence clearly establishes that SOCCO was not in compliance with its approved ventilation plan on October 12, 1988, in that it did not have completed permanent stoppings called for in the plan in crosscuts No. 3 and No. 4 outby the face, at the time the contested order was issued. Therefore a violation of 30 C.F.R. 75.316 is established.

A violation is properly designated as significant and substantial if there is a reasonable likelihood that the hazard contributed to by the violation will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981); Mathies Coal Co., 6 FMSHRC 1 (1984); U.S. Steel Mining Company, Inc., 7 FMSHRC 1125 (1985). The inspector was of the opinion that the violation was significant and substantial because it would result in a tendency to lose air from the intake aircourse, and because methane has been found in this section. However, the evidence shows that the air velocity was adequate and methane was negligible at the time the order was issued. The stoppings had been constructed and the absence of plaster on the stoppings would, according to SOCCO production engineer McQuaid, not cause any significant interruption in ventilation. I conclude that the Secretary has not established that there was a reasonable likelihood that the hazard contributed to by the violation would result in injury. The violation was not properly designated as significant and substantial.

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FINDINGS OF FACT

MSOCCO is the owner and operator of an underground coal mine in Marion County, West Virginia, known as the Martinka No. 1 Mine. Three shifts were working at the mine as of October 12, 1988, the day shift being a maintenance shift, and the other two being production shifts.

Federal mine inspector Terry Palmer conducted a ventilation technical inspection of the subject mine on October 12, 1988. He entered the mine at the beginning of the afternoon shift, and proceeded to the 1 North section after terminating previously issued violations in the 3 West section. At about 7:00 p.m. he issued order 2944386 charging a violation of 30 C.F.R. 75.316 because the approved ventilation plan was not being complied with. The ventilation plan required that permanent stoppings be maintained to and including the third crosscut outby the face. The miner was operating in the No. 2 entry and coal was being produced. The first crosscut outby was open, the second had a check curtain and the third and fourth had stoppings constructed of block, but were not plastered as the plan required. Plastering work had begun on the No. 4 crosscut stopping at the time the order was issued, but no plastering had been done on the No. 3 crosscut stopping. The section foreman told the inspector that the two stoppings were constructed on the afternoon shift the previous day. The midnight shift (a production shift) and the day shift (a maintenance shift) intervened before the inspection began.

The ventilation on the section was measured at 10,272 cubic feet per minute on the left return, and 22,344 cubic feet on the right return. This was in excess of the minimum requirement of 9,000 cubic feet per minute. A methane reading showed .1 percent in the right return, and .2 percent in the left return.

The condition was abated by finishing the plastering of the two stoppings and the order was terminated at 7:30 p.m. on October 12, 1988.

The production records (call out sheets and map) indicate that the section had advanced to the point where a permanent stoppings were required in the No. 3 and No. 4 crosscut on or about the midnight shift on October 10, 1988 and on or about the midnight shift on October 11, 1988.

Respondent is a large operator and the subject mine is a large mine. The history of prior violations shows 958 paid violations during the 24 months prior to the issuance of the

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A finding that a violation resulted from unwarrantable failure to comply with the standard is established if the evidence shows "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Emery Mining Corp., 9 FMSHRC 1997, 2004 (1987).

The evidence shows that SOCCO had partially completed the required stoppings. It also shows that seven or eight shifts, including four or five production shifts had occurred after the first stopping was required. The failure to plaster the stoppings was evident, and should have been observed by foremen on each intervening shift. The plastering could have been completed by a crew of three in 15 or 20 minutes. I conclude that the violation resulted from SOCCO's aggravated conduct constituting more than ordinary negligence. The violation was properly designated as significant and substantial.

Based on the above conclusions, I further conclude that the violation was moderately serious and was caused by a high degree of negligence. Under the criteria in section 110(i) of the Act, an appropriate penalty for the violation is \$400.

ORDER

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

(1) Order 3117591 is modified to a 104(a) citation, and the designation of unwarrantable failure is removed:

(2) Order 3117599 is modified to a 104(a) citation, and designation of unwarrantable failure is removed.

(3) Order 2944386 is modified to remove the designation of significant and substantial and, as modified, is AFFIRMED including the designation of unwarrantable failure.

(4) Within 30 days of the date of this decision SOCO shall pay the following civil penalties:

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CITATION OR ORDER

PENALTY

3117591

\$650

3117599

650

2944386

400

TOTAL

\$1700

James A. Broderick
Administrative Law Judge