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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 88-235
A. C. No. 46-03805-03854

v.

Martinka No. 1 Mine

SOUTHERN OHIO COAL COMPANY,
RESPONDENT

ORDER DENYING MOTION FOR SUMMARY DECISION

Statement of the Case

On February 17, 1988, Respondent was served with Order No. 2895699 which alleged as follows: "The 24 inches of unobstructed clearance is not being provided over the E2 track overcast where the long run coal conveyer belt cross's, (sic) due to no steps provided to cross safely over, concrete blocks, empty can being used on the inby side and a wooden pallet on outby side with broken runners being used to climb top of the overcast, creating a tripping, stumble or falling hazard. One person slipped while trying to cross this overcast on 2/16/88 also this has been reported for steps since 2/15/88. Safeguard issued 5/8/87 no. 2699584."

Safeguard No. 2699584, which was issued on May 8, 1987, and which was referred to in Order No. 2895699, provides as follows:

"The clearance space along the vacuum breaker located near the top of the hill is restricted with loose rock. This creates a tripping or stumbling hazard. This is a notice to provide safeguards requiring that all vacuum breakers, similar equipment and where miners are required to work or travel to complete their duties, shall be provided no less than 24 inches of unobstructed clearancspace."

On June 13, 1988, Petitioner filed a Petition for Assessment of Civil Penalty, and Respondent filed its Answer on September 19, 1988. A Prehearing Order was issued on September 26, 1988, directing the Parties to confer for the purpose of discussing settlement. The Parties advised that the case could not be settled, and pursuant to notice the case was set for hearing on

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June 7 - 8, 1989. On May 18, 1989, in a telephone conference call with the undersigned initiated by Counsel for both Parties, it was indicated by Counsel that the case might be settled or submitted on stipulated facts or a motion for summary decision. Counsel accordingly requested that the hearing set for June 7 - 8 be adjourned. The request was granted and the hearing previously set was adjourned.

On June 28, 1989, Respondent filed a Motion for Summary Decision, and Petitioner filed its Response on July 31, 1989.

Discussion

In order to prevail in its Motion, Respondent has the burden of establishing, pursuant 29 C.F.R. 2700.64(b), that, considering the entire record, there is no genuine issue of any material fact and that it is entitled to summary judgment as a matter of law.

I

Respondent has advanced a number of arguments in support of this Motion. It first argues that the safeguard herein is invalid as it is of general applicability. In essence, Respondent refers to the language of the safeguard requiring an unobstructed clearance space of not less than 24 inches with regard to "vacuum breakers," and "where miners are required to work or travel to complete their duties," and argues that all mines have areas where miners are required to work. Respondent also refers to Petitioner's admission that breakers are common in underground mines.

In order to prevail, and to justify a holding that the safeguard herein is invalid, Respondent must establish that there are no material facts at issue disputing its assertions that the safeguard is of general applicability. In order to resolve this issue an inquiry must initially be made as to whether there is any genuine issue as to the circumstances under which the underlying safeguard was issued, and the existence of or need for similar safeguards at other mines. (See Southern Ohio Coal Company, 10 FMSHRC 963, at 966, 967 (1988)). Petitioner in its response to Respondent's request for admissions, has specifically denied that the hazard of not having steps to the cross over at the overcast, was not greater at the subject mine than at other mines on the ground that the subject mine ". . . is known to have a greater amount of water seeping into the entries on the mine floor and equipment, thereby increasing the likelihood of slip, trip, and fall hazards." Respondent argues that the issue of the presence of water at the subject mine is not material on the ground that water is common in mines. Respondent also argues that the original safeguard was not issued because of any water accumulation.

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The initial sentence of the original safeguard indicates essentially that a "clearance space" along the vacuum breaker was restricted with loose rock thus creating a tripping or stumbling hazard. Nonetheless, I conclude that it would be unduly harsh at this juncture to deprive Petitioner of the opportunity to present evidence on the issue of the extent if any, of any water accumulation at the subject mine, and whether this was a factor peculiar to the subject mine which provided a hazard which the original safeguard was intended to cure.

II

In essence, it is Respondent's position, in the alternative, that if the safeguard in question is accorded a narrow construction, it does not encompass the conditions set forth in the Order. In this connection Respondent maintains that an overcast is clearly not a vacuum breaker, which was admitted to be an electrical device approximately 19 feet in length, 72 inches or more in width and 34 inches height. Respondent also argues that an overcast is manifestly not "similar equipment" as referred to in the safeguard which would relate to other electrical devices of the same approximate size as the breaker. Further, Respondent argues that the phrase in the safeguard "where miners are required to work or travel to complete their duties," cannot refer to all areas of the mine, but is to be limited to requiring 24 inches of clearance only in situations where vacuum breakers or similar pieces of equipment are placed in areas where miners are required to work or travel. Petitioner, on the other hand, has argued that there is a genuine issue as to whether a track overcast is "similar equipment" as envisioned by the safeguard. In this connection, Petitioner essentially indicates that the inspector who issued the safeguard in question will testify that the breaker in the safeguard and "inter alia" overcast present tripping or stumbling hazards unless they provide no less 24 inches of unobstructed clearance space. While it is clear that safeguards should be given a strict construction (See Southern Ohio Coal Company, 7 FMSHRC 509 (1985); Jim Walter Resources, Incorporated, 7 FMSHRC 493), it is premature to dispose of this issue presently without affording the Petitioner the opportunity to present evidence as to the applicability of the original safeguard to the cited condition.(FOONOTE 1)

III

Respondent next argues, in the alternative, that the safeguard should be declared to be invalid as it does not clearly set forth the conduct required by Respondent in order for it to comply with the safeguard. In this connection it argues that the phrase "similar equipment" is "indeterminately vague." Respondent also argues that the reference in the safeguard to areas where men are required to work or travel "compounds the problem of determining what the safeguard is addressing." Respondent is correct that under established case law, a safeguard is invalid if it does not identify with specificity the nature of the hazard at which it is directed and the conduct required of the Operator to remedy such hazard. (Southern Ohio, supra, at 512). However, Petitioner indicates that it intends to call at an evidentiary hearing the inspector who issued the underlying safeguard, and the inspector who issued the subject 104(d)(2) Order. Petitioner argues that the question as to whether the Respondent was on notice that the overcast was required to be maintained free of debris when miners regularly traveled over the overcast, is a issue that requires the taking of testimony with regard to conditions present at the overcast as well as the testimony of the inspector who issued the safeguard.

In general, Petitioner has the burden of establishing a prima facie case of a violation. (Miller Mining Company Incorporated v. Federal Mine and Health Review Commission, 713 F.2nd 487 (9th Cir. 1983. See also, Old Ben Coal Corporation v. IBMA, 523 F.2nd 25, 39 (7th Cir. 1975)). As such, Petitioner has the burden of establishing all elements of the Order including the validity of the underlying safeguard. Therefore, I find that it would be unfair at the juncture to deprive Petitioner of the opportunity to adduce evidence on the issue of whether the safeguard was sufficiently clear to have put the Respondent on notice that the alleged violative condition with regard to the overcast fell within the safeguard's prohibition.

IV

Lastly, Respondent argues, in the alternative, that the subject safeguard should be deemed invalid as it is inconsistent with the intent of section 314 of the Federal Mine Safety and Health Act of 1977 (the Act). In this connection, Respondent argues, in essence, that the authority to issue safeguards, contained in section 314(b), supra, pertains to components of mechanical devices similar to those enumerated in section 314(a), whereas in contrast the subject safeguard pertains to clearance next to an item of equipment. Petitioner, in its response to Respondent's Motion, indicates essentially that its position on this issue is predicated upon its argument that "Congress intended that individual inspectors would have broad authority to issue safeguards addressing hazards encountered by miners entering into, traveling in, and exiting mines." Petitioner's Response does not allege that there is any genuine issue as to any material fact with regard to this issue.

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The safeguard at issue was based on 30 C.F.R. 75.1403, but not on any of the criteria set forth in 30 C.F.R. 75.1403-1 through 75.1403.11. (Respondent's First Set of Admissions, Request N 7, admitted by Petitioner). The language in section 75.1403 is the same as that contained in section 314(b) of the Act. This section provides as follows: "Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided." (Emphasis added.)

The safeguard at issue requires that breakers, similar equipment "and where miners are required to work or travel" shall be provided with proper clearance. Respondent, in Section II of its Memorandum asserts that the safeguard should be read as requiring proper clearance for breakers and similar equipment when these items are located where miners work and travel. Should the safeguard be accorded this interpretation it would appear to regulate the clearance next to an item in a mine. As such, it would not regulate transportation, and would be beyond the grant of authority contained in section 314(b), supra.

Respondent, is the Party moving for Summary Decision, and as such has the burden of establishing its right to a summary decision. I find Respondent has not met this burden. The safeguard is somewhat ambiguous, but, on its face, relates to areas where miners travel, and thus might be within the grant of authority, set forth in section 314(b), supra, to issue safeguards relating to transportation of men and materials. At this stage of the proceedings, I can not conclude as a matter of law, that Respondent's interpretation of the safeguard is correct. Petitioner shall be allowed to present evidence on this issue.

Therefore, for all the above reasons, Respondent's Motion for Summary Decision is not allowed.

ORDER

It is ORDERED that Respondent's Motion for Summary Decision is DENIED.

Avram Weisberger
Administrative Law Judge
(703) 756-6210

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FOOTNOTES START HERE
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1. In this connection, I note that the record presently does not contain any evidence to a physical description of the overcast in question. Nor is there adequate evidence of its use and location.