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SOUTHERN OHIO COAL V. SOL (MSHA)
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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

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

CONTEST PROCEEDING

Docket No. WEVA 88-144-R
Order No. 2895540; 1/27/88

Martinka No. 1 Mine
Mine ID 46-03805

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

v.

SOUTHERN OHIO COAL COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEVA 88-212
A.C. No. 46-03805-03852

Martinka No. 1 Mine

DECISION

Appearances: Joseph T. Crawford, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for Respondent/Petitioner;
David A. Laing, Esq., Porter, Wright, Morris &
Arthur, Columbus, Ohio, for Contestant/Respondent.

Before: Judge Maurer

STATEMENT OF THE CASE

Contestant, Southern Ohio Coal Company (SOCCO), has filed a notice of contest challenging the issuance of Order No. 2895540 at its Martinka No. 1 Mine. The Secretary of Labor (Secretary) has filed a petition seeking civil penalties in the total amount of \$1700 for the violations charged in the aforementioned contested order as well as the unrelated, uncontested 104(d)(2) Order No. 2895348 which was also issued on January 27, 1988.

At the hearing on these cases, which was held on June 28, 1989, in Morgantown, West Virginia, the parties jointly moved for approval of their settlement of that portion of the civil penalty case that pertained to Order No. 2895540. I approved a reduction from \$900 to \$500 of that part of the civil penalty assessment and granted the motion on the record (Tr. 4-7). That settlement proposal, once approved, effectively mooted out the contest proceeding docketed at WEVA 88-144-R.

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The aforementioned partial settlement did not include Order No. 2895348, which alleges a violation of 30 C.F.R. 75.1403-9(a) and proposes a civil penalty of \$800. That alleged violation was tried before me at the hearing on June 28, 1989.

The general issues before me concerning this remaining order and its accompanying civil penalty proposal are whether the order was properly issued, including an examination of the validity of the underlying notice to provide safeguards, whether there was a violation of the cited standard, and, if so, whether that violation was "significant and substantial", and caused by the "unwarrantable failure" of the mine operator to comply with that standard. Additionally, should a violation be found, an appropriate civil penalty must be assessed.

Order No. 2895348, issued pursuant to 104(d)(2) of the Federal Mine Safety and Health Act of 1977 (the Act), alleges a violation of the regulatory standard at 30 C.F.R. 75.1403-9(a) and charges as follows:

A shelter hole is not provided along the E4 section supply track for a distance of 170 feet when measured. The area is between No. 1 block and No. 3 block. Overcast walls are in the crosscuts left and right of the track. Notice to provide Safeguard was issued No. 1JF 5/23/75.

Notice To Provide Safeguard No. 1JF, issued on May 23, 1975, states in pertinent part:

Shelter holes are not provided at 105 foot intervals on the 1 Left section supply track for a distance of 400 feet.

Shelter holes shall be provided on all track haulage roads in this mine.

Both parties have filed post-hearing proposed findings of fact and conclusions of law, which I have considered along with the entire record herein. I make the following decision.

STIPULATIONS

The parties have agreed to the following stipulations, which I accept:

1. SOCCO and its Martinka No. 1 Mine are subject to the provisions of the Federal Mine Safety and Health Act of 1977.

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2. This administrative law judge has jurisdiction over these proceedings pursuant to Section 105 of the Act.
3. Order No. 2895348 was properly served by a duly-authorized representative of the Secretary on the date reflected therein.
4. SOCCO is a large operator, and the assessment of a civil penalty in this proceeding will not affect SOCCO's ability to remain in business.
5. The alleged violation set forth in Order No. 2895348 was abated in good faith by SOCCO.

FINDINGS OF FACT

1. Order No. 2895348 was issued on January 27, 1988, by Inspector Charles J. Thomas during a AAA inspection of the Martinka No. 1 Mine.
2. Inspector Thomas observed, representatives of SOCCO essentially admitted, and I so find as a fact that shelter holes had not been provided every 105 feet along the E-4 Section supply track haulage. More particularly, the inspector located an area along that track haulage, 170 feet in length, that did not contain a shelter hole.
3. On May 23, 1975, a notice to provide safeguards was issued for this mine concerning shelter holes. This safeguard essentially stated that shelter holes shall be provided on track haulage at intervals of not more than 105 feet.
4. Inspector Thomas has inspected approximately 30 underground coal mines during his 20 year tenure as an MSHA inspector. Of these 30 underground coal mines, approximately 21 utilize track haulage. All of these 21 mines have a safeguard requiring that shelter holes be located every 105 feet on the track haulage. Inspector Thomas could not recall any underground coal mine with track haulage that did not have a safeguard requiring shelter holes every 105 feet.
5. A similar safeguard requiring shelter holes every 105 feet on track haulage has been issued at SOCCO's Meigs No. 1, Meigs No. 2 and Raccoon No. 3 mines located in Ohio. In addition, a similar safeguard has been issued at the Windsor Coal Company in Moundsville, West Virginia. Windsor Coal Company, like SOCCO, is part of the American Electric Power system.

DISCUSSION

The Secretary bears the burden of proof to demonstrate that the violation occurred as alleged in the instant order. Since this is a "safeguard" case, SOCCO argues that that burden includes establishing the validity of the underlying safeguard at issue. I agree. Secondly, given that burden, SOCCO argues that the Secretary has failed in this instance to demonstrate the validity of Safeguard No. 1JF in that there is no evidence in this record that the safeguard was issued because of any peculiar circumstance or configuration existant in the Martinka No. 1 Mine. To the contrary, the operator states that the record evidence clearly demonstrates that the subject safeguard has been issued in a blanket manner at every underground coal mine that utilizes track haulage.

If the safeguard is not valid, then the section (d)(2) order which purports to enforce it would likewise be invalid.

30 C.F.R. 75.1403-2 through 75.1403-11 set out the criteria by which an MSHA inspector is guided in imposing safeguards on a mine-by-mine basis under section 75.1403, which repeats section 314(b) of the Act. These criteria are not enforceable as mandatory standards but become enforceable when the operator is issued a notice to provide safeguards.

Section 314(b) of the Act grants the Secretary the extraordinary authority to essentially create mandatory safety standards on a mine-by-mine basis without resorting to the normal rulemaking procedures contemplated by the Act. Normally, mandatory safety standards are developed and promulgated in accordance with section 101 of the Act and the rule-making provisions contained in the Administrative Procedure Act, 5 U.S.C. 551, et seq. SOCCO maintains that the requirements set forth in the instant safeguard should have properly been the subject of such rule-making, rather than a safeguard notice issued under section 314(b) of the Act, inasmuch as the safeguard was not issued on a mine-by-mine basis and not due to any particular circumstances or configuration of the Martinka mine.

In Southern Ohio Coal Company, 10 FMSHRC 963 (August 1988), the Commission discussed the issue of the general application of safeguards, but declined to rule on the specific issue of whether a safeguard of general applicability could pass muster and be enforceable under the Act, due to the inadequacy of the trial record before it in that case.

The identical issue resurfaces repeatedly at the trial level and is the major issue before me in the instant case.

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Subsequent to that Commission decision, Commission Judge Weisberger, in Southern Ohio Coal Co., 10 FMSHRC 1564 (November 1988) vacated a citation alleging a safeguard violation because of the Secretary's failure to establish that the underlying safeguard was mine-specific to the Martinka No. 1 Mine.

Similarly, in Beth Energy Mines, Inc., 11 FMSHRC 942 (May 1989) Commission Judge Melick vacated a citation premised on a safeguard violation when he held that safeguards cannot be used to impose general requirements on all mines throughout a district without regard to the circumstances of the specific mines. Conversely, Judge Melick noted that MSHA may legitimately use safeguards to "impose requirements on an operator on a mine-by-mine basis subject to the specific conditions and requirements necessitated by the peculiar circumstances at a particular mine". Id. at 948.

See also, U.S. Steel Mining Co., Inc., 4 FMSHRC 526 (March 1982) where Commission Chief Judge Merlin vacated a similar citation on the basis that the underlying safeguard had nothing to do with the conditions peculiar to that mine as opposed to all other mines.

In this case, Inspector Thomas testified that he cannot recall a single instance where an underground coal mine that utilizes track haulage does not also have a safeguard requiring shelter holes every 105 feet along that track haulage. Furthermore, all of the approximately 21 underground coal mines that he personally has inspected that have track haulage also have this same safeguard requiring shelter holes every 105 feet.

Moreover, similar safeguards requiring shelter holes every 105 feet along track haulage have also been issued at SOCCO's Meigs No. 1, Meigs No. 2 and Raccoon No. 3 mines in southern Ohio. Additionally, a similar safeguard has also been issued to the Windsor Coal Company, in West Virginia.

The evidence in this case could hardly be stronger that the safeguard at bar as well as those widespread similarly worded safeguards that apparently are prevalent throughout the industry are issued without regard to the conditions at any particular mine as long as that mine has track haulage. For all intents and purposes, these safeguards are an across-the-board mandatory safety standard requiring shelter holes every 105 feet along track haulage, period. If that is what the Secretary believes is necessary in the interest of mine safety, and it may very well be an essential rule, then it is incumbent upon her to promulgate that standard in accordance with the rule-making procedures contained in Section 101 of the Act.

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The Secretary clearly has the burden of proving every element of her case necessary to establish the violation alleged and I believe that includes the validity of the underlying safeguard in this type of a case which involves enforcing a safeguard.

I conclude that in this case, the Secretary has failed to demonstrate that Safeguard No. 1JF was issued on a "mine-by-mine" basis and more particularly, has failed to demonstrate that it was issued at the Martinka No. 1 Mine because of any peculiar circumstances or physical configuration of that mine. The safeguard had nothing whatsoever to do with conditions peculiar to that mine as opposed to other mines that also have track haulage. For these reasons, I find it to be an invalid safeguard.

Therefore, I find that Order No. 2895348, being based on an invalid safeguard, was improperly issued and must be vacated.

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. 2895540 is MODIFIED to a Section 104(a) citation.
2. Order No. 2895348 is VACATED.
3. Docket No. WEVA 88-144-R is GRANTED in part insofar as it contests the finding of unwarrantability in Order No. 2895540.
4. The Southern Ohio Coal Company pay a civil penalty of \$500 within 30 days of the date of this decision for the violation found in Citation No. 2895540.

Roy J. Maurer
Administrative Law Judge