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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	CONTEST PROCEEDING
v.	Docket No. WEVA 89-124-R Order No. 3117373; 1/31/89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Martinka No. 1 Mine Mine I.D. 46-03805
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEVA 89-204 A.C. No. 46-03805-03916
v.	Martinka No. 1 Mine
SOUTHERN OHIO COAL COMPANY, RESPONDENT	

DECISION

Appearances: Mark R. Malecki, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Secretary of Labor (Secretary); David M. Cohen, Esq., Lancaster, Ohio for Southern Ohio Coal Co. (SOCCO).

Before: Judge Broderick

STATEMENT OF THE CASE

In the contest proceeding, SOCCO contests the validity of an order of withdrawal issued under section 104(d)(2) of the Federal Mine Safety and Health Act (the Act). In the penalty proceeding, the Secretary seeks a civil penalty for the violation charged in the contested order. The cases were consolidated for the purposes of hearing and decision. Pursuant to notice, the consolidated cases were heard in Morgantown, West Virginia, on June 13 and 14, 1989. Bretzel Allen, Patrick Grimes, Paul Mitchell and Ronald Tulanowski testified on behalf of the Secretary; David Stout, Ernest Weaver, Frank Zuleski, Wesley Dobbs, Pat Zuchowski, Michael Miano, Wesley Hough and Charles Arnold testified on behalf of SOCCO. Both parties have filed posthearing briefs. I have considered the entire record

and the contentions of the parties, on the basis of which I make the following decision.

FINDINGS OF FACT

SOCCO is the owner and operator of an underground coal mine in Marion County, West Virginia known as the Martinka No. 1 Mine. The mine produces approximately 2 million tons of coal annually; the operator produces slightly less than 12 million tons annually. During the past three years, SOCCO has had approximately one significant and substantial violation per inspection date. I have no reason to conclude that this is a substantial history of prior violations, and therefore will not increase any appropriate penalty because of it. Prior to the order contested herein, the subject mine has not had "an intervening inspection free of unwarrantable failure violations since September 1, 1989." The violation cited in the order contested herein was abated in a timely fashion.

I

On January 30, 1989, during the day shift Federal coal mine Inspector Bretzel Allen was making a triple A inspection of the subject mine. He was accompanied by a union representative, a company representative and an MSHA supervisory inspector Paul Mitchell. Inspector Mitchell was present for the purpose of evaluating and rating the quality of Allen's inspection. The party travelled to the E-3 longwall section. The longwall face was about 700 feet long. There were about 144 roof support shields on the longwall, each with two pontoons at the base of the shield. The pontoons had coal, rock and emulsion oil packed on them and between and behind the pontoon jacks. Some of the pontoons contained packed coal, some mixed coal and rock. Most were mixed with oil but some were dry. Mitchell states that this was about the shoddiest longwall that he had been on in a while: there was coal and grease on and in the shields and there were cans and boards lying in the area.

There was an accumulation of loose coal, resulting from spillage off the longwall face, in the tailgate entry. This was in a "wind-row" about 7 or 8 feet wide, 4 feet high and 60 or 70 feet long. About 52 feet was toward the gob area from the longwall ("inby" see R. 33); about 18 feet extended outby, toward the block of coal being cut. No rock dust had been applied to the coal accumulation.

The MSHA inspectors and company officials discussed SOCCO's longwall clean-up program. No citations or orders were issued for the accumulations seen on the E-three longwall section. When it appeared that SOCCO did not have a written clean-up plan, a

section 104(d)(2) withdrawal order was issued for failure to have such a plan. Before the order was served, a copy of a clean-up plan was found, and the order was withdrawn.

II

During the afternoon of January 30, 1989, the longwall supervisor, Ernest Weaver, assigned six people to clean the shields from number 96 to 48 (the shields were numbered 1 to 144). The crew completed cleaning shields 96 to 58. A later shift apparently cleaned shields 48 to 58. SOCCO officials estimated that of the 144 shields approximately three quarters had been cleaned and one quarter not cleaned prior to the inspector's return to the area on January 31. The inspector testified that 4 or 5 pontoons had been cleaned, but most of them still had a mixture of coal, rock, and emulsion oil packed on the faces of the pontoons of the shields. He issued a section 104(d)(2) withdrawal order citing the accumulations on the pontoons and an accumulation in the tailgate entry of the longwall section which will be discussed hereafter. I find as a fact that SOCCO cleaned shields 96 through 48, and few if any others. Thus 48 shields were cleaned and 96 were not. On January 31, SOCCO took samples of the material on the shields, beginning with shield one and every fifteenth shield thereafter. The combustible matter in the samples ranged from 15.05 percent (No. 30 shield) to 45.22 percent (No. 1 shield). (SOCCO Ex. 17). SOCCO had a chemical auto-ignition point test performed on shields 1, 15 (29.12% combustible), 45 (18.34% combustible), 120 (28.49% combustible) and 144 (34.81% combustible). Autoignition point is defined as the temperature required to initiate or cause self-sustained combustion in any substance in the absence of a spark or flame. (SOCCO Ex. 19). Bituminous coal has an autoiognition point of 765 degrees Fahrenheit. The test of the five samples raised the temperature to 900 degrees Fahrenheit without producing any flame. The foregoing establishes that the samples tested consisted of noncombustible material. I find that the samples were fairly representative of the material on all the shields. Therefore, I find that the accumulations on the shields on January 31, 1989, were not combustible.

III

In the tailgate entry on January 31, 1989, there was a wind-row of coal approximately 37 inches deep, 7 feet wide, extending 18 feet from the longwall face inby to the yielding point of the shield and 40 feet back into the gob line. Rock dust had been applied since the inspection of January 30. The inspector testified that a small amount of rock dust had been scattered over the accumulation, perhaps one bag. SOCCO's witnesses testified that the area was heavily rockdusted and that

five bags of rock dust had been applied, the same amount normally applied after a pass of the longwall. The inspector took a sample from the accumulation. The sample was analyzed at an MSHA laboratory and found to be 20.8 percent incombustible. (Govt. Ex. 3). Based on the sample, on the testimony of Inspector Allen and UMWA walkaround miner Grimes, and on the photographs of the area (SOCCO Ex. 4-9), I find as a fact that the accumulation in the tailgate entry consisted largely of loose coal and was combustible.

IV

The tailgate entry outby the longwall shields is a return air entry and an alternate escapeway from the longwall face. A fireboss must examine this area weekly. On January 31, 1989, two miners were cutting at the No. 10 shield with an open flame torch. An electrical cable travels the length of the longwall face during production. The loader on the tailgate is an electrically operated motor.

REGULATIONS

30 C.F.R. 75.400 provides as follows:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

30 C.F.R. 75.2(g)(4) provides as follows:

> "Active workings' means any place in a coal mine where miners are normally required to work or travel.

ISSUES

1. Whether on January 31, 1989, there was loose coal and other combustible materials on the longwall shield pontoons, or in the tailgate entry of the E-3 longwall section of the subject mine?

2. Whether the tailgate entry of the longwall section constitutes active workings?

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

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

5. If a violation is established, what is the appropriate penalty.

CONCLUSIONS OF LAW

I

SOCCO is subject to the provisions of the Act in the operation of the Martinka No. 1 Mine and I have jurisdiction over the parties and subject matter of this proceeding. SOCCO is a large operator.

II

The Secretary has failed to establish that the accumulations on the longwall shield pontoons on January 31, 1989, consisted of combustible material. Therefore, she has failed to establish that this condition was violative of 30 C.F.R. 75.400.

III

The evidence does establish that the loose coal in the tailgate entry of the E-3 longwall section was combustible. It was not cleaned up and was permitted to accumulate. The evidence further establishes that the 18 feet of such accumulations outby the longwall shield line existed in an area where miners are normally required to travel. Therefore it was in active workings. A violation of 30 C.F.R. 75.400 is established.

IV

A violation is properly designated as significant and substantial if there is a reasonable likelihood that the hazard contributed to would result in serious injury. Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981); Florence Mining Co., 11 FMSHRC 747 (1989). Although the accumulation could provide fuel for a fire, and although there are potential ignition sources on the longwall, there is no evidence as to the "likelihood" of a fire, nor is there evidence from which I reasonably could infer that a fire is reasonably likely. The Secretary has failed to carry her burden of establishing that the violation was significant and substantial.

V

A violation is caused by unwarrantable failure if it results from aggravated conduct, constituting more than ordinary negligence. Emery Mining Corp., 9 FMSHRC 1997 (1987). The accumulation in the tailgate entry existed and was pointed out to

SOCCO on January 30, and had obviously existed for some time prior thereto. Despite these facts, SOCCO failed to clean up or inert the accumulations before the inspection on January 31. I conclude that this establishes aggravated conduct, constituting more than ordinary negligence. The violation was the result of SOCCO's unwarrantable failure to comply with the standard.

VI

SOCCO is a large operator; its history of prior violations will have no effect on the penalty. The violation was moderately serious, and resulted from SOCCO's unwarrantable failure. The violation was abated in a timely fashion. I conclude that $700 is an appropriate penalty.

ORDER

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

1. Order No. 3117373 issued January 31, 1989, is MODIFIED to remove the designation of significant and substantial and, as modified, is AFFIRMED.

2. The Notice of Contest is GRANTED in part and DENIED in part.

3. SOCCO shall within 30 days of the date of this order pay the sum of $700 as a civil penalty for the violation found herein.

James A. Broderick
Administrative Law Judge