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SOL (MSHA) v. SOUTHERN OHIO COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER v. SOUTHERN OHIO COAL COMPANY, RESPONDENT	CIVIL PENALTY PROCEEDING Docket No. LAKE 90-53 A.C. No. 33-01173-03825 Meigs No. 2 Mine

DECISION

Appearances: Patrick M. Zohn, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio for the Secretary of Labor (Secretary);
David M. Cohen, Esq., Lancaster, Ohio for Southern Ohio Coal Company (SOCCO).

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks a civil penalty for an alleged violation of 30 C.F.R. 75.1403-10(h), charged in a section 104(a) citation issued January 5, 1990. The violation was designated as significant and substantial. It was based on a safeguard notice issued on March 31, 1989, pursuant to section 314(b) of the Mine Act.

Pursuant to notice, the case was called for hearing in Columbus, Ohio on September 26, 1990. Patrick H. McMahon testified on behalf of the Secretary. John Moore and Jon Merrifield testified on behalf of SOCCO. At the conclusion of the hearing, the Secretary argued her position on the record, and waived her right to file a post-hearing brief. SOCCO has filed a post hearing brief. The case was ably tried on both sides, and the issues are sharply defined. I have considered the entire record and the contentions of the parties in making this decision.

FINDINGS OF FACT

I

At all times pertinent to this proceeding, SOCCO was the owner and operator of an underground coal mine in Meigs County, Ohio, known as the Meigs No. 2 Mine. SOCCO is a large operator. There is no evidence that a penalty assessed in this case will have any effect on SOCCO's ability to continue in business, and I find that it will not. During the period from January 5, 1988 to January 4, 1990, the subject mine had 596 paid violations, of which 30 were violations of 30 C.F.R. 75.1403. Considering the size of the subject mine, this history is not such that a penalty otherwise appropriate should be increased because of it.

II

During an inspection on March 31, 1989, Federal Mine Inspector Patrick H. McMahon discovered a rubber scoop being operated along the supply track in the subject mine with only 6 inches of side clearance. The scoop was taking on supplies from the supply cars, and was bumping the sides of the supply cars. Inspector McMahon issued a notice to provide safeguards requiring that a total of at least 36 inches side clearance (both sides combined) be provided for all rubber tired haulage equipment operated along the supply tracks in the subject mine. In issuing the safeguard notice, the inspector was primarily concerned that the scoop operator could be injured if the scoop struck the rib or a supply car. He also considered the fact that the track was a walkway, and miners using it as such could be injured.

III

On January 5, 1990, Inspector McMahon was conducting a regular inspection at the subject mine. He walked up the track entry in the 001 section and observed a scoop tractor parked between the coal rib and the supply cars. The scoop operator was loading supplies. The inspector measured the distance between the scoop operator's compartment and the coal rib which he found to be 24 inches. He then measured the distance from the other side of the scoop to the supply car, which he found to be 4 inches.

The rib line was uneven, and the bottom was rutted from vehicles operating in the area. There was a downhill slope toward the face area. The scoop operator's view was partially obstructed by the supplies which were on the scoop, some of which were stacked on the battery compartment with no structure to hold them in. Scoops are equipped with "articulated steering," which the inspector believed rendered them less controllable by the scoop operator. Inspector McMahon issued a citation charging a violation of 30 C.F.R. 75.1403-10(h) referring to the prior safeguard notice.

REGULATION

30 C.F.R. 75.1403 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.

30 C.F.R. 75.1403-10(h) provides as follows:

> 75.1403.10 criteria-haulage; general
>
> * * *
>
> (h) A total of at least 36 inches of unobstructed side clearance (both sides combined) should be provided for all rubbertired haulage equipment where such equipment is used.

ISSUES

1. Whether the safeguard notice issued March 31, 1989, is valid?

2. If so, whether the evidence shows a violation of the safeguard as charged in the citation issued January 5, 1990?

3. If it does, whether the violation was properly designated significant and substantial?

4. If it does, what is the appropriate penalty for the violation?

CONCLUSIONS OF LAW

I

SOCCO was subject to the provisions of the Mine Act in the operation of the Meigs No. 2 Mine, and I have jurisdiction over the parties and subject matter of this proceeding.

II

SOCCO challenges the safeguard notice on the ground that it is not mine-specific, that is, it is not directed to hazards peculiar to the subject mine. Safeguard notices are authorized by section 314(b) of the Mine Act which provides: "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."

The Commission discussed safeguard notices and contrasted them with mandatory health and safety standards in Southern Ohio Coal Co., 10 FMSHRC 963 (1988). However, it declined to decide whether a safeguard notice must be mine-specific to be upheld.

In the case of Southern Ohio Coal Company, 9 FMSHRC 273 (1987), petition for discretionary review granted March 1987, Commission Judge Roy Maurer concluded that a safeguard "not issued under any of the specific criteria for safeguards contained in 30 C.F.R. 75.1403-2 through 75.1403-11" is invalid unless "demonstrably related to same mine-specific hazard or unsafe condition sought to be corrected". The safeguard in Judge Maurer's SOCCO case was issued under 30 C.F.R. 75.1403 and was not related to a mine-specific hazard. Therefore, it was held invalid.

In Southern Ohio Coal Company, 10 FMSHRC 1564 (1988), Judge Avram Weisberger concluded that a safeguard notice requiring that all track haulage in the mine be properly maintained and aligned, was not mine-specific and was therefore invalid.

In the case of Beth Energy Mines, Inc., 11 FMSHRC 942 (1989), Judge Gary Melick found invalid a safeguard notice issued pursuant to 30 C.F.R. 1403-10(e) which provides that positive active stopblocks or derails should be used to protect persons from danger of runaway haulage equipment. Judge Melick concluded that safeguards may not be used to impose general requirements on mines without regard to the circumstances present in the mine in question.

In Southern Ohio Coal Company, 11 FMSHRC 1992 (1989), petition for discretionary review granted November 1989, Judge Maurer concluded that a safeguard notice issued pursuant to 30 C.F.R. 75.1403-9(a) which provides that shelter holes be provided on track haulage roads at intervals of not more than 105 feet was not issued on a "mine-by-mine" basis because of any peculiar circumstance in the subject mine, and was therefore invalid.

In Beth Energy Mines, Inc., 12 FMSHRC 761 (1990), petition for discretionary review granted May 1990, Judge William Fauver upheld a safeguard notice though the hazard was of a general rather than a mine-specific nature, when the safeguard was based on one of the criteria in 30 C.F.R. 75.1403-2 through 75.1403-11.

Judge Fauver's decision relied on the Court of Appeals decision in the case of United Mine Workers of America v. Dole, 870 F.2d 662 (D.C. Cir. 1989), which held that MSHA's implementing regulations including promulgated general criteria (not limited to mine-specific conditions) for roof control plan approval constituted a mandatory standard. Following the reasoning in the UMWA decision, Judge Fauver concluded that the published criteria for safeguard notices (1403-2 through 1403-11)

since they were promulgated pursuant to section 101(a) may be used as valid safeguard notices even though the hazards to which they apply are general and nonspecific.

The SOCCO cases before Judges Maurer and Weisberger, and the Beth Energy case before Judge Melick were following the rationale in the case of Zeigler Coal Co. v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976) which held that a ventilation plan could not be used to impose general ventilation requirements on a mine. According to the Court, the latter should be the subject of a mandatory standard promulgated under section 101 of the Act. In the UMWA decision, the Court of Appeals, according to Judge Fauver, "clarified" the Zeigler decision when it held that the Secretary may require generally applicable plan approval criteria in mine plans. Since the criteria are promulgated pursuant to notice and comment requirements, incorporating them in a mine plan makes them mandatory standards. Similarly, incorporating published criteria in a safeguard notice, makes it in effect a mandatory safety standard.

I agree with the reasoning in Judge Fauver's decision, and conclude that the notice challenged in this case is valid since it cited and tracked the criterion in 30 C.F.R. 75.1403-10(h).

III

SOCCO argues that the safeguard is invalid because it does not minimize but increases hazards with respect to the transportation of men and materials. The evidence does not support this contention. In fact the safeguard addresses and attempts to minimize hazards to the scoop operators and miners using the track entry as a walkway to the face. I accept the inspector's testimony on this issue. The fact that alternative means of transporting materials (e.g., carrying them by hand) might pose other hazards is not a defense to the violation of the safeguard notice. I conclude that the failure to maintain a total of at least 36 inches of clearance for the scoop being operated along the supply track was a violation of the safeguard notice issued April 14, 1989, and of 30 C.F.R. 75.1403-10(h).

IV

A violation is properly cited as significant and substantial if there is a hazard contributed to by the violation and a reasonable likelihood that the hazard will result in an injury of a reasonably serious nature Cement Division/National Gypsum Co., 3 FMSHRC 822 (1981); Mathies Coal Co., 6 FMSHRC 1 (1984). Inspector McMahon testified that the scoops operated in the haulage entry for only a "couple of minutes" per shift. A cage was present on the scoop operator's compartment and he was "probably fairly well protected, yes." (Tr. 52) Shelter holes were provided in the vicinity of the supply cars for miners walking toward the face. I conclude that the Secretary has failed to establish that the violation was reasonably likely to

result in injury. Therefore it was not properly denominated significant and substantial.

V

Although I have concluded that a serious injury is not likely to result from the violation, if an injury did occur, whether to the scoop operator, or to a miner walking the entry, it could be serious. I conclude that the violation was moderately serious. SOCCO has been cited for this violation previously, and has received 44 citations or orders under part 75.1400 during the prior 12 month period. I conclude that the violation resulted from SOCCO's moderate negligence. Considering the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is $150.

ORDER

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

1. Safeguard Notice 3124669 is AFFIRMED.

2. Citation 3323861 is MODIFIED to delete the significant and substantial finding and, as modified, is AFFIRMED.

3. SOCCO shall pay a civil penalty in the amount of $150 within 30 days of the date of this decision.

James A. Broderick
Administrative Law Judge