FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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MAY 28 1992

SOUTHERN OHIO COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. WEVA 91-1615-R Order No. 3105369; 5/22/91
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEVA 91-1616-R Citation No. 3105370; 5/22/91
	:	Docket No. WEVA 91-1617-R Citation No. 3105350; 5/22/91
	:	Mine ID 46-03805
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 92-740 A. C. No. 46-03805-04098
v.	:	Martinka No. 1 Mine
SOUTHERN OHIO COAL COMPANY, Respondent	:	

DECISION

Appearances: Rebecca J. Zuleski, Esq., Morgantown, WV, for SOCCO; Glenn M. Loos, Esq., Arlington, VA, for the Secretary of Labor.

Before: Judge Fauver

These proceedings involve contests by Southern Ohio Coal Company (SOCCO) seeking to vacate an order and two citations issued by MSHA inspectors and a petition by the Secretary for a civil penalty, under § 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S. § 801 et seq.

The parties stipulated that SOCCO's Martinka No. 1 Mine is subject to the Act. A motion to vacate Citation 3105350 and to delete any reference to it in Order 3105369 was granted at the hearing.

The order and citation requiring adjudication are as follows:

Order 3105369 alleges in part:

> Beginning at the B-12 Longwall Section No. 2 face conveyor motor and extending to No. 1 shield a distance of approximately 20 feet, the roof was inadequately supported along the walkway side of the stageloader where a roof cutter existed with loose broken and hanging material. A no walkway tight clearance sign was posted and the Section crew stated they were crossing the stageloader to the solid side to get to and from the longwall face. Additional roof supports such as post[s] or dukes were not installed on the solid side of the stageloader from the crossover extending 27 feet inby to the face.
>
> The distance from the tips of No. 2, 3 and 4 shields to the face averaged 6 to 10 feet during normal mining, in order for miners to travel to and from the longwall face the pan line had to be pushed in and No. 2, 3 and 4 shields had to be advanced within 5 feet of the face. 3 miners were observed on the longwall face at the time the Order was issued.
>
> 75-1403 A clear unobstructed 24 inch walkway is not provided on the track side of the B-12 longwall stageloader beginning at the tip at No. 1 shield and extending approximately 20 feet outby. The walkway is obstructed with loose roof rock, 2 pieces of pipe and 4 post[s] also the crossover at the stage loader from the solid side to the track side is obstructed with a hydraulic shield leg, hoses, and a piece of chain reducing the 24 inch travelway to 7 inches.

Citation 3105370 alleges in part:

> Beginning at the crossover on the solid side of the B-12 Longwall Stageloader and extending for a distance of approximately 27 feet inby, additional roof supports such as post[s] or dukes were not installed to support the roof. The solid side of the stageloader is being used as a travelway to and from the longwall face because of adverse

roof conditions on the track side of the stageloader.

A termination due date is not set due to this Citation being written in conjunction with 107a Order Number 3105369 issued May 22, 1991.

The parties stipulated that the judge has jurisdiction to assess a civil penalty under § 110(i) of the Act if he finds a violation as charged in Citation 3105370. After the hearing, the Secretary filed a petition for such a penalty, in Docket No. 92-740.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following Findings of Fact and additional findings in the Discussion that follows:

FINDINGS OF FACT

1. On May 22, 1991, Federal Mine Inspectors Ronald Tulanowski and Richard Jones went to the Martinka No. 1 Mine for a regular quarterly (or "AAA") inspection. Inspector Tulanowski was accompanied by company representative Gary Freeman and union representative James Tutalo. Inspector Jones was accompanied by company representative James Ice and union representative James Talerico. At the beginning of the afternoon shift, the inspection parties traveled together to the B-12 longwall section of the mine.

2. At the mouth of the B-12 longwall section, the inspection parties separated, walking different entries to the face. Inspector Jones and his party walked the return entry to the tailgate of the longwall. Inspector Tulanowski took his party up the belt entry to the headgate of the longwall.

3. At the headgate, Inspector Tulanowski observed adverse roof conditions in the belt entry. A crack in the roof, called a "ripper" or "cutter," on the track side of the stage loader, extended from the No. 1 shield of the longwall outby about 27 feet. It had been reported in the on-shift examination book on May 21, 1991. The crack in the roof was about two feet wide, and pieces of rock were actively falling out of the roof when the inspection party arrived. Water was dripping through the crack. The roof was sagging or leaning toward the track side of the entry. The floor on the track side was obstructed by various materials and debris, including four roof posts which had been knocked down by motors as the stage loader advanced. The advancing motors struck the posts because the entry had been cut too narrow.

4. Inspector Tulanowski saw three miners at the longwall face. He was informed that the track side of the stage loader was the crew's normal means of access to the face, but because of tight clearance and walkway obstructions on the track side, SOCCO had instructed its crews to use an alternative means of access to the face, requiring the miners to use the stage loader crossover and then travel up the solid side or coal side of the stage loader to get to the face. A sign was hung on the track side, stating, "Tight clearance, no walkway." It did not refer to the adverse roof conditions.

5. The belt entry was roofbolted according to the operator's roof support plan, and the required number of dukes (7 on each side of the stage loader) [1] were installed in the entry. The majority of the dukes were set outby the stage loader crossover. On the solid side of the entry, one duke was set directly at the crossover and the other six were set outby. The entry was a highly traveled walkway. Miners traveled through the entry several times a shift, e.g., at the beginning and end of the shift, on dinner runs, fireboss runs, maintenance runs and supply runs.

6. Based on the conditions observed by Inspector Tulanowski and reported to him by crew members, the inspector found that an imminent danger existed in the belt entry from the shields of the longwall outby to the stage loader crossover. He orally issued § 107(a) order and requested that Inspector Jones come from the tail of the longwall to observe the conditions and assist in the investigation. Inspector Jones arrived at the headgate in 20 or 25 minutes.

7. When he arrived at the headgate, Inspector Jones observed the same conditions seen by Inspector Tulanowski and agreed that an imminent danger existed. He observed the conditions from the face, on the side of the entry opposite Inspector Tulanowski's side. Two miners and their foreman were at the face of the longwall. An accumulation of water and mud was under the footing of the No. 1 shield, causing its roof support to tilt 8 to 10 inches down from the roof toward the track side. On the track side, the crack in the roof ran from the No. 1 shield to the first crosscut. The roof was jagged, hanging and broken. The plates on the row of roof bolts closest to the rib on the track side were buckling, showing pressure on the bolts. Four posts, two pieces of pipe, and loose rock (which appeared to have fallen from the roof) were lying on the track side of the stage loader, obstructing this former walkway.

8. After observing the area and making some measurements, Inspector Jones moved across the entry and met Inspector

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[1] A "duke" is a roof support jack post.

Tulanowski. They continued their investigation and discussed ways of correcting the hazardous conditions. The inspectors agreed with the operator that the roof on the track side could not be supported because of the tight area, the obstructions in the walkway, and the extent of the hazardous roof conditions. They also agreed that the solid side was the only possible access to the face at that time. The inspectors determined that the solid side needed additional roof support to make it safe as a walkway. To accomplish this, the operator moved dukes that were outby the stage loader on the solid side to positions inby the stage loader on that side. They were set at five foot intervals. The inspectors found that this provided adequate additional roof support for miners traveling in the new walkway, and terminated the § 107(a) order.

DISCUSSION WITH FURTHER FINDINGS

Order 3105369

Section 107(a) of the Mine Act provides:

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in Section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such an imminent danger and the conditions or practices which caused such imminent danger no longer exists. The issuance of an order under this subsection shall not preclude the issuance of a citation under Section 104 or the proposing of a penalty under Section 110.

Section 3(j) of the Act defines an imminent danger as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j). This definition is unchanged from that contained in the Coal Mine Health and Safety Act of 1969.

The Fourth Circuit has held that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area

before the dangerous condition is eliminated." Eastern Associated Coal Corporation v. IBMA, 491 F.d 277, 278 (4th Cir. 1974; emphasis in original). The Seventh Circuit adopted this interpretation in Old Ben Coal Corp. v. IBMA, 523 F.2d 25, 33 (7th Cir. 1975), and the Commission applied these holdings in Rochester & Pittsburgh Coal Company v. Secretary of Labor, 11 FMSHRC 2159, 2163 (1989), where it stated (quoting Senate Report 187, 95th Cong., 1st Sess. 38(1977)):

> [A]n imminent danger is not to be defined "in terms of a percentage of probability that an accident will happen." * * * Instead, the focus is on the potential of the risk to cause serious physical harm at any time." * * * The Committee stated its intention to give inspectors "the necessary authority for the taking of action to remove miners from risk." [Id. at 2164.]

The Commission recognized (in Rochester & Pittsburgh Coal Company, at 2164) that inspectors must be given wide latitude in making on-the-spot determinations of whether an imminent danger exists, quoting the following from the Seventh Circuit's decision in Old Ben (523 F.2d. at 31):

> "Clearly, the inspector is in a precarious position. He is entrusted with the safety of miners' lives, and he must ensure that the statute is enforced for the protection of these lives. His total concern is the safety of life and limb . . . . We must support the findings and the decisions of the inspector unless there is evidence that he has abused his discretion or authority."

Applying this controlling test, the Commission stated that "the question is whether [the inspector] abused his discretion when he determined [that an imminent danger existed]" (Rochester & Pittsburgh Coal Company, at 2164).

In Utah Power & Light Co., 13 FMSHRC 1617 (1991), the Commission clarified its decision in Rochester & Pittsburgh, by stating that the latter decision, which stated that the imminent danger focus is on the potential of a risk to cause harm "at any time" (11 FMSHRC at 2164), was intended to denote a potential to cause harm "at any moment," that is, "within a short period of time." 13 FMSHRC at 1622. The Commission did not depart from its previous conclusion that wide discretion must be given to inspectors to issue § 107(a) orders. Thus it stated, in Utah Power & Light:

> We reaffirm our holding in Rochester & Pittsburgh that an inspector must have considerable discretion in determining whether an imminent danger exists. This is because an inspector must act immediately to eliminate conditions that create an imminent danger. We also reiterate here that the hazardous condition or practice creating an imminent danger need not be restricted to a threat that is in the nature of an emergency, and that section 107(a) withdrawal orders are "not limited to just disastrous type accidents." Coal Act Legis. Hist. at 1599. [13 FMSHRC at 1627-1628.]

It must be emphasized that the inspector has to exercise his or her best judgment "on the spot" to protect the safety of miners. Accordingly, the issue in reviewing a § 107(a) order is not the objective accuracy of the facts found by the inspector, but whether the inspector acted reasonably in investigating the facts available to him and in evaluating the situation as an imminent danger. This boils down to an "abuse of discretion" test.

In Utah Power & Light, the Commission held that an inspector "abuses his discretion in the sense of making a decision that is not in accordance with law when he orders the immediate withdrawal of miners under section 107(a) in circumstances where there is not an imminent threat to miners" (Id., at 1622-1623). An error of law, of course, is one of the bases for finding an abuse of discretion. However, an abuse of discretion in the sense of evaluating facts "may be found only if there is no evidence to support the decision" (Bothyo v. Moyer, 772 F.2d 353, 355 (7th Cir. 1985); and see: Bosma v. United States Dept. of Agriculture, 754 F.2d 804, 810 (9th Cir. 1984).

On balance, the issue is whether the inspector reasonably evaluated the information available to him at the time he issued the § 107(a) order. That is, the controlling issue is not whether there was an imminent danger, but whether "there is evidence that he has abused his discretion or authority" in evaluating the conditions as constituting an imminent danger. Old Ben, supra, 523 F.2d at 31; Rochester & Pittsburgh Coal Company, 11 FMSHRC at 2164.

When Inspector Tulanowski arrived at the stage loader he saw the cutter (crack) in the roof and observed rocks actively falling from the roof. Water was dripping through the crack. The cracked area was unsupported. An accumulation of water and mud was under the footing of the No. 1 shield, causing its roof support to tilt 8 to 10 inches down from the roof toward the track side. On the track side, the crack in the roof ran from

the No. 1 shield to the first crosscut. The roof was jagged, hanging and broken. The slates on the row of roof belts closest to the rib were buckling, showing pressure on the bolts. Inspector Tulanowski believed that the roof was unstable, dangerous, and could fall at any time. He then learned that miners were crossing the stage loader crossover and using the solid side as a new walkway. He believed that additional roof support was necessary for the new walkway because a roof fall on the cutter side could extend to the solid side, and a roof fall causing death or serious injury could occur at any time. Also, he believed that if normal mining operations continued, as planned by the operator, the roof conditions would be worsened by the vibrations and stress of mining. He evaluated the available facts as showing an imminent danger.

Inspector Richard Jones agreed with Inspector Tulanowski's assessment of the situation and co-signed the written § 107(a) order. Inspector Jones, who has extensive experience on longwalls and working in the lower Kittaning coal seam, where the Martinka Mine is located, stated that he saw all the signs of deterioration and a failing roof and a danger that the roof could come down without warning. He stated that when a roof starts failing in that coal seam, it starts cutting and sagging, and the result could be a roof fall at any time. He stated that a fall could have occurred from rib to rib and that the tilting of the roof toward the track side was not due to the natural undulation of the roof but to deterioration, which increased the danger of a rib to rib fall. He also stated that this is an area of changing conditions, with the stage loader moving, the vibrations of the shearer, and the changing longwall supports as the face advances, so that if mining had continued as planned by the operator - - to "mine through" the adverse roof area - - the additional stress and vibrations created by the mining process would have worsened the roof conditions, increasing the danger to the miners in the new walkway. He believed a roof fall could occur at any time without warning.

The testimony of UMWA representative James Tutalo supports the findings of Inspectors Tulanowski and Jones. Mr. Tutalo, who was a roofbolter for about three years at the Martinka Mine, stated that the roof was showing signs of stress, the roof conditions were hazardous, and would have become more dangerous if mining were continued as normal.

I find that Inspectors Tulanowski and Jones made a reasonable investigation and evaluation of the facts under the circumstances and that the facts known to them and reasonably available to them supported the issuance of the § 107(a) order. The opinions of the operator's witnesses differed from the inspectors' evaluation of the facts, but the difference in opinions does not warrant a finding that the inspectors' finding of an imminent danger was an abuse of discretion. Indeed, the

reliable facts amply support the finding of an imminent danger. I therefore find that Order 3105369 was properly issued.

Citation 3105370

The citation charges a violation of 30 C.F.R. § 75.220, under which section 75.220(a)(1) provides:

> (a)(1) Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.

The Secretary does not contend that the operator violated its roof control plan, but that additional roof support was necessary to protect miners using the new walkway. Inspector Tulanowski's assessment that an imminent danger existed was corroborated by Inspector Richard Jones and UMWA representative James Tutalo.

The evidence preponderates in showing that additional roof support measures were required in the new walkway because of adverse roof conditions. Although the operator was complying with its roof control plan, the plan sets only minimal standards. Additional roof support in the new walkway was required because of unusual hazards, but the operator took no action to protect the miners traveling in the entry. The normal procedure at the Martinka Mine was merely to shift the walkway to the opposite side of the stage loader when adverse roof conditions were encountered on the track side. On the afternoon shift of May 22, the roof conditions had reached the point that the entry was threatened by a roof fall rib to rib, including the new walkway. The operator's failure to provide additional roof support in the new travelway constituted a violation of 30 C.F.R. § 75.220(a)(1).

The Commission has held that a violation is "significant and substantial" if, "based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981). In Mathies Coal Company, 6 FMSHRC 1, 3-4 (1984), the Commission delineated a four-prong test to prove a violation is significant and substantial: (1) an underlying violation of a mandatory safety standard; (2) a discrete safety hazard, i.e., a measure of danger to safety

contributed to by the violation; (3) a reasonable likelihood [2] that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Under the third prong of the Mathies test, the Secretary must establish that the hazard contributed to could result in an event in which there is an injury. U.S. Steel Mining, Co., 7 FMSHRC 1125, 1129 (1985). The time frame includes both the time that a violative condition existed prior to the citation being issued and the time that it would have existed if normal mining operations had continued. Halfway, Inc., 8 FMSHRC 8, 12 (1986).

The operator failed to take necessary additional roof support measures to protect miners from the adverse roof conditions at the headgate of the longwall. This constituted a violation of 30 C.F.R. § 75.220(a)(1).

The hazard presented was a roof fall, which could cause death or serious injury.

Without additional roof support, it was reasonably likely [3]

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[2] Analysis of the statutory language and the Commission's decisions indicates that the test of a "significant and substantial" violation is a practical and realistic question whether, assuming continued mining operations, the violation presents a substantial possibility of resulting in injury or disease, not a requirement that the Secretary of Labor prove that it is more probable than not that injury or disease will result. See my decision in Consolidation Coal Company, 4 FMSHRC 748-752 (1991). The statute does not use the phrase "reasonably likely" or "reasonable likelihood" in defining an S&S violation, but states that an S&S violation exists if "the violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard" (§ 104(d)(1); emphasis added). Also, the statute defines an "imminent danger" as "any condition or practice ... which could reasonably be expected to cause death or serious physical harm before [it] can be abated" (§ 3(j) of the 1969 Mine Act, unchanged by the Federal Mine Safety and Health Act of 1977), and expressly places S&S violations below an imminent danger (see § 104(d)(1)). It follows that the Commission's use of the phrase "reasonable likelihood" or "reasonably likely" in discussing an S&S violation does not preclude an S&S finding where a substantial possibility of injury or disease is shown by the evidence, even though the proof may not show that injury or disease was more probable than not.

[3] See Fn. 2 for a discussion of the practical application of the term "reasonably likely" concerning S&S violations.

that a roof fall would occur, causing in death or serious injuries. If mining had continued, as planned by the operator, the roof conditions would have worsened with greater danger to the miners.

The Secretary proposes a finding that the operator was moderately negligent concerning the violation cited in Citation 3105370. The operator was aware of the cutter on the track side of the entry. The adverse roof conditions were highly visible. The cutter had existed for some time and was reported in the examination books the day before the inspection. However, no additional roof support was provided by the operator. As the operator's warning sign and other facts indicate, the operator appears to have been more concerned with the "tight clearance" in the walkway rather than the adverse roof conditions. Following its normal procedure, when adverse roof conditions were encountered SOCCO merely moved the walkway to the opposite side of the stage loader without addressing the adverse roof conditions. Nothing was done on the track side of the entry. This inaction allowed the roof conditions to become worse, threatening a roof fall on the solid side. No additional roof support measures were taken on the solid side, yet miners were ordered to use it as a walkway.

I find that SOCCO was negligent in failing to provide additional roof support to protect miners using the new walkway.

SOCCO's motion for summary decision was taken under advisement. A summary decision is appropriate only when there is no genuine issue as to a material fact and the moving party is entitled to judgment as a matter of law. The testimony at the hearing reveals numerous disputes concerning facts and opinions material to a final resolution of the issues. Therefore, the motion for summary decision made by SOCCO at the end of the hearing will be denied.

Considering all the criteria for a civil penalty in § 110(i) of the Act, I find that a penalty of $800 is appropriate for the violation alleged in Citation 3105370.

CONCLUSIONS OF LAW

1. The judge has jurisdiction in these proceedings.

2. Order 3105369 was validly issued.

3. SOCCO violated 30 C.F.R. § 75.220(a)(1) as alleged in Citation 3105370.

ORDER

WHEREFORE IT IS ORDERED that:

1. SOCCO's motion for summary decision is DENIED.

2. Citation 3105350 is VACATED.

3. Order 3105369 is MODIFIED TO DELETE any reference to Citation 3105350.

4. Order 3105369 is AFFIRMED.

5. Citation 3105370 is AFFIRMED.

6. SOCCO shall pay a civil penalty of $800 within 30 days of the date of this Decision.

William Fauver
Administrative Law Judge

Distribution:

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