

CCASE:
SOUTHERN OHIO COAL V. MSHA

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FMSHRC-WDC
February 10, 1988

SOUTHERN OHIO COAL
COMPANY

v.

Docket Nos. WEVA 86-35-R
WEVA 86-48-R
WEVA 86-102

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

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

DECISION

BY THE COMMISSION:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act") and presents three issues: (1) whether substantial evidence supports Commission Administrative Law Judge William Fauver's finding of a violation of 30 C.F.R. § 75.200; (2) whether the violation, alleged in a section 104(d)(2) withdrawal order, was caused by Southern Ohio Coal Company's ("Socco") "unwarrantable failure" to comply with section 75.200; and (3) whether the judge erred in failing to modify a second section 104(d)(2) withdrawal order to a section 104(a) citation. For the reasons that follow, we affirm the judge's finding of a violation of section 75.200, reverse the finding of unwarrantable failure, and modify the section 104(d)(2) withdrawal orders to citations issued pursuant to section 104(a).

I.

Socco's Martinka No. 1 Mine is an underground coal mine located in Fairmont, West Virginia. On the evening of October 10, 1985, David Workman, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted an inspection of the mine, during which he observed a recently excavated "boom hole" in the roof. 1/ The boom hole, located at the intersection of a crosscut and an entry, extended approximately three feet into the roof and was 15 1/2

1/ A "boom hole" is an area of the mine where a portion of the roof has been intentionally cut away in order to increase height or clearance. June 18 Tr. 134.

feet long by 19B feet wide. The hole was cut earlier that day by a continuous mining machine in order to prepare the area as a belt transfer or dumping point. As a result of the excavation, four "brows" or edges were created, one on each side of the boom hole. 2/ After excavating the boom hole Socco had installed bolts in the roof of the boom hole. The bolts that were in the brows were those that had been placed in the roof of the intersection prior to the excavation of the boom hole.

In Inspector Workman's view, two of the four brows of the boom hole were not adequately supported because roof bolts were located too far from the edges of the brows. The four bolts on one of the brows were 2', 2'5", 2'5" and 2'5" from its edge, while the four bolts on the other brow were 1'2", 2', 1'8" and 2'2" from its edge. The inspector testified that in this mine bolts average 12 to 14 inches from the edge of a boom hole brow and that he uses a two-foot standard as the point at which he considers bolts to be too far from the edge. June 19 Tr. 74, 77-78. The inspector further stated that the condition of the brows should have been observed by Socco's personnel during one of the required preshift or on-shift examinations conducted after the boom hole was cut. As a result of his observations the inspector issued an order of withdrawal to Socco (Order No. 2564613) pursuant to section 104(d)(2) of the Mine Act. 30 U.S.C. § 814(d)(2). 3/ The order alleged a violation of section 75.200 and that the violation was caused by Socco's unwarrantable failure to comply with that standard. 4/ Socco abated the

2/ "Brows" are the adjacent roof or sides of the boom hole that have not been cut away. Govt. Exh. 6, p. 2.

3/ A section 104(d)(2) withdrawal order is issued subsequent to an issuance of a section 104(d)(1) withdrawal order upon findings by an inspector of a violation of any mandatory health or safety standard caused by the unwarrantable failure of the operator to comply. Section 104(d)(2) of the Mine Act states:

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

30 U.S.C. § 814(d)(2).

4/ Section 75.200, which restates section 302(a) of the Mine Act,
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section 75.200 violation by installing additional bolts closer to the edges of the two brows.

Socco contested the order, asserting that it was not in violation of section 75.200 and that, in any event, the violation was not the result of its unwarrantable failure to comply with the regulation. Following an evidentiary hearing, the judge credited the testimony of the inspector and the miners' representative that the two brows should have been bolted closer to the edge to provide adequate support. 8 FMSHRC at 2011. The judge concluded that their testimony was sufficient to establish that the two brows were not adequately supported. 8 FMSHRC at 2012.

In concluding that the violation of section 75.200 was the result of Socco's unwarrantable failure to comply, the judge determined that debris from the excavation prevented the roof bolters from getting the roof bolting machine into position so as to install the bolts; that the foreman and roof bolters knew or should have known that additional bolts were needed closer to the brows' edges; and that there was no justification for leaving the job incomplete. 8 FMSHRC at 2013. In addition, the judge concluded that the "inadequate bolting pattern" should have been observed during one of the required preshift or on-shift examinations. 8 FMSHRC at 2013-14.

II.

Socco contends that the finding of a violation of section 75.200 is not supported by substantial evidence, since it did not violate any provision of its roof control plan and, in any event, it adequately supported the brows. Socco asserts that there is no common understanding within the mining industry as to how close to the edge the brows of a boom hole should be bolted. Furthermore, it submits that the witnesses for both parties agreed that the brows were stable at the time the order was issued and that the roof was above-average. The fact that Socco did not violate its roof control plan is not controlling for purposes of determining the existence of the violation U.S.C. § 862(a), provides in part:

Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system.

The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately

to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form.... (Emphasis added.)

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at issue. Section 75.200 requires both compliance with a roof control plan approved by the Secretary and that the roof be supported or otherwise controlled adequately. An operator's failure to comply with either requirement violates the standard. See North American Coal Corp., 3 IBMA 93, 103 (April 1974); Zeigler Coal Co., 2 IBMA 216, 222 (September 1973). Here, the violation of section 75.200 is predicated upon the standard's requirement that the roof and ribs be supported or otherwise controlled adequately. Liability under this part of the standard is resolved by reference to whether a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized that the roof or ribs were not adequately supported or otherwise controlled. Specifically, the adequacy of particular roof support must be measured against what the reasonably prudent person would have provided in order to afford the protection intended by the standard. Quinland Coals, Inc., 9 FMSHRC 1614, 1617-18 (September 1987); Canon Coal Co., 9 FMSHRC 667, 668 (April 1987). Cf. Ozark-Mahoney Co., 8 FMSHRC 190, 191-92 (February 1986); Great Western Electric Co., 5 FMSHRC 840, 841-42 (May 1983). Measured against this test, we hold that substantial evidence supports the judge's conclusion that two brows of the boom hole were not supported adequately.

In concluding that Socco violated section 75.200 the judge credited the testimony of the inspector and the miners representative. The inspector testified that the brows, being approximately 2 feet wide by 15B feet long on each side, needed additional bolting closer to the brow edges. June 18 Tr. 143. In reaching this determination, the inspector stated that he was influenced by the mine's history of roof falls and the fact that the roof material in this area of the Martinka No. 1 mine was slate, which lacks interlocking qualities. June 18 Tr. 134, 139, 142, 150, 159. 5/ The inspector was concerned that the weight of the slate on the brows, without additional support, could reasonably be expected to cause the brows to loosen, crack and fall. In this regard, the inspector stated that the cutting of the boom hole by the continuous mining machine had already subjected the roof to excessive vibration. June 18 Tr. 167. He testified that in situations such as the one cited roof bolts are "always [put] right along the edge of the brow" in order to provide adequate support.

June 18 Tr. 143.

The testimony of the roof bolter who served as miners' representative during the inspection corroborated that of the inspector. The miners' representative stated several times that Socco's foremen instruct the roof bolters of the mine to bolt as close to the brows' edges as possible, because "that is where they're supposed to be." June 18 Tr. 184. See also June 18 Tr. 179, 189. Testimony by Socco's safety director lends further support for the inspector's views. He stated that the average distance of bolts from the brow edges of other boom holes that he had observed was "around one foot, four inches" (June 19

5/ Slate is "[a] fine-grained metamorphic rock which breaks into thin slabs or sheets." U.S. Department of the Interior, *A Dictionary of Mining, Mineral, and Related Terms* 1024 (1968).

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Tr. 29-30). This distance is consistent with the inspector's belief that brows must be bolted within two feet of their edges to provide adequate support.

In view of the inspector's testimony, the testimony of the miners' representative that brows should be bolted as close to their edges as possible, and the safety director's acknowledgement that most brows observed by him had been bolted closer to their edges than the cited brows, we conclude that substantial evidence supports the judge's finding that the brows were not supported adequately and, consequently, that Socco violated section 75.200.

III.

In *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987), petition for review filed, No. 88-1019 (D.C. Cir. January 11, 1988), and *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010 (December 1987), we concluded that "unwarrantable failure means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." This conclusion was based on the ordinary meaning of the term "unwarrantable failure," the purpose of unwarrantable failure sanctions within the Mine Act, the Act's legislative history and judicial precedent. We stated that whereas negligence is conduct that is "inadvertent," "thoughtless," or "inattentive," conduct constituting an unwarrantable failure is conduct that is "not justifiable" or "inexcusable". Only by construing unwarrantable failure by a mine operator to mean aggravated conduct constituting more than ordinary negligence, can unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme. See *Emery*, at 2001. Applying these principles to the case at hand, we hold that substantial evidence does not support the judge's finding that the violation of section 75.200 was the

result of Socco's unwarrantable failure to comply.

Witnesses for both parties agreed that the roof control plan for the Martinka No. 1 mine did not address specifically the support required for the brows of boom holes, and that MSHA had not issued any policy memoranda on the proximity of roof bolts to the edges of brows. In addition, all witnesses, including the Secretary's, agreed that the brows appeared stable at the time that the order was issued.

Witnesses for Socco testified that at the Martinka No. 1 mine the support required for boom hole brows is determined on a case-by-case basis. The section foreman who supervised the excavation stated that the roof appeared to be hard, solid and stable, with no flaking or other adverse conditions, and that after he installed the bolts in the interior of the boom hole he recommended no additional bolting of the brows. June 19 Tr. 42-45, 46, 54. Socco's safety director agreed with the section foreman's evaluation of the roof conditions, testifying that the roof in the area was above average and was stable with no deterioration. June 19 Tr. 18, 29-30, 34, 38-39. The afternoon shift foreman at the time the order was issued also testified that the roof was solid, that the brows were firm, and that no additional bolting of the brows was necessary. June 18 Tr. 208, 211. Furthermore, the

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inspector and the roof bolter serving as the miners' representative also testified that the brows were stable at the time the order was issued. June 18 Tr. 157, 182.

Although the judge found that the brows were not bolted closer to their edges because debris prevented the roof bolters from getting the roof bolting machine into position, the undisputed testimony of Socco's personnel establishes that Socco failed to rebolt the cited brows, not because of the presence of the debris, but because Socco's supervisors uniformly believed that the brows were stable and needed no additional support to protect persons from roof falls. Given this testimony, the fact that the roof control plan does not specify how close to the boom hole brows roof support must be placed, and the agreement of all witnesses regarding the stability of the brows, we conclude that Socco's decision that bolting the brows closer to their edges was unnecessary, did not constitute aggravated conduct exceeding ordinary negligence. Cf. Emery, 9 FMSHRC at 2004-05.

This conclusion rests solely upon the testimony offered by the parties relating to the particular boom hole and brows observed by the inspector. It is apparent from the record, however, that a more inclusive approach to the issues of roof support for the brows of boom holes at this mine is desirable if future similar controversies are to be avoided. Section 75.200 requires the Secretary to approve

and the operator to adopt a roof control plan "suitable to the roof conditions and mining system of each coal mine." Approval by the Secretary and adoption by Socco of specific provisions for the support of a boom hole and its brows in the roof control plan of the Martinka No. 1 Mine will significantly enhance the miners' safety and lessen the chances for disagreement regarding what constitutes adequate roof support. As we have pointed out, coordination between the Secretary and the operator in developing conclusive and suitable plans is of paramount importance to insure the safety of the miners and to implement the policy of the Mine Act. Cf. *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 909 (May 1987).

IV.

The final issue concerns a second withdrawal order (No. 2706704) that was issued by Inspector Workman pursuant to section 104(d)(2). The parties stipulated that the cited conditions constituted a violation of section 75.200 and that the violation was of a "significant and substantial" nature. 30 U.S.C. § 814(d)(1). Therefore, the only issue to be decided by the judge was whether the violation was caused by Socco's unwarrantable failure to comply. 8 FMSHRC at 2016. The judge found that there was no evidence to support the allegation of unwarrantable failure, but did not modify the section 104(d)(2) order to a section 104(a) citation. 8 FMSHRC at 2021.

We agree with Socco's contention that the judge erred in failing to modify the order. In *Consolidation Coal Co.*, 4 FMSHRC 1791, 1793-94 (October 1982), the Commission noted that sections 104(h) and 105(d) of the Mine Act expressly authorize the Commission to "modify" any "orders" issued under section 104. 30 U.S.C. §§ 814(h), 815(d). The Commission pointed out that allegations of violation can survive vacation of an

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order, and that "modification is ... the appropriate means of assuring that they do [survive]." 4 FMSHRC at 1794 n.9. In *United States Steel Corp.*, 6 FMSHRC 1908, 1915 (August 1984), the Commission noted that "[i]f ... the judge determines that modification to a section 104(d)(1) order or citation is not possible then the violation should have been reduced to a section 104(a) citation." Thus, even without a finding of unwarrantable failure, the violation in this case survives. The order cannot be modified to a section 104(d)(1) order or citation, and as a result, must be modified to a section 104(a) citation.

V.

Accordingly, regarding Order No. 2564613, we hold that substantial evidence supports the findings of the judge that Socco violated section 75.200, but we reverse the judge's finding that

the violation was caused by Socco's unwarrantable failure to comply and modify the order to a section 104(a) citation. Regarding Order No. 2706704, we modify the section 104(d)(2) order to a citation issued pursuant to section 104(a).

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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