

CCASE:
MSHA V. SOUTHERN OHIO COAL
DDATE:
19900801
TTEXT:

FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
August 1, 1990

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

v.

Docket Nos. WEVA 89-124-R
WEVA 89-204

SOUTHERN OHIO COAL COMPANY

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

DECISION

BY THE COMMISSION:

The issue in this consolidated contest and civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988) ("Mine Act"), is whether Southern Ohio Coal Company ("SOCCO") violated 30 C.F.R. 75.400, the mandatory safety standard prohibiting accumulations of coal dust, loose coal and other combustible materials in active workings and, if so, whether it unwarrantably failed to comply with the standard. 1/ For the following reasons, we affirm Commission Administrative Law Judge James A. Broderick's finding of an unwarrantable violation. 11 FMSHRC 2018 (October 1989)(ALJ).

1/ 30 C.F.R. 75.400, which restates section 304(a) of the Mine Act, 30 U.S.C. 864(a), provides:

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) defines "active workings" as:

[A]ny place in a coal mine where miners are normally required to work or travel.

~1499

On January 30, 1989, Bretzel Allen, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), inspected the E-3 longwall section of SOCCO's Martinka No. 1 Mine, an underground coal mine located in Marion County, West Virginia. 2/ Allen was accompanied by MSHA supervisory inspector, Paul Mitchell, and by representatives of the miners and mine management.

After inspecting the longwall face and the longwall shields, Inspector Allen turned his attention to the tailgate entry. There, the inspector observed a "windrow" or ridge of loose coal variously estimated to measure from 58 to 70 feet long, six to eight feet wide, and four feet high. Gov. Exh. 1; Tr. I 24. Approximately 18 feet of this windrow was located in the intersection of the longwall face and the tailgate entry. The other 40 to 52 feet of the loose coal extended up the tailgate entry into the gob area. See Gov. Exh. 7. The accumulated coal had been deposited in the tailgate entry by the shearer as it reached the end of its cut along the longwall face.

Later that day, the MSHA inspectors met with company officials and discussed SOCCO's longwall cleanup plan. 3/ SOCCO's cleanup plan required that five bags of rock dust be spread in the tailgate entry after each cut of the coal by the shearer. Gov. Ex. 4, Item 30. Inspector Allen testified: "We ... discussed how [SOCCO] could reduce the amount of coal spillage into the tailgate entry, and we also recommended that [SOCCO] blanket dust the coal in the tailgate heading." Tr. I 27.

On the following day the inspector returned to the longwall section and observed that a small amount of rock dust had been applied to the ridge of coal in the tailgate entry. The inspector took a sample of the coal to establish its incombustible content. (The sample was later analyzed at an MSHA laboratory and was found to be 20.8% incombustible. Gov. Exh. 3.) Because of the extent of the loose coal and its lack of sufficient rock dust, the inspector believed that SOCCO had violated 30 C.F.R. 75.400. He also found that the violation was caused by SOCCO's unwarrantable failure to comply with section 75.400 and significantly and substantially contributed to a hazard. The inspector issued to SOCCO a section 104(d)(2) withdrawal order, 30 U.S.C. 814(d)(2), which states in part:

2/ The longwall section consisted of headgate and tailgate entries and the mining face. The mining face extended between the headgate and tailgate entries for approximately 700 feet. Coal was cut from the face by the longwall shearer. The roof in the mining face was supported by approximately 144 longwall roof support shields. Intake air coursed up the headgate entry, crossed the longwall face and returned down the tailgate entry. 11 FMSHRC 2019, 2021.

3/ 30 C.F.R. 75.400-2 requires an operator to maintain "[a] program for regular cleanup and removal of accumulations of coal and float coal dusts, loose coal, and other combustibles...." See Utah Power & Light Co., 12 FMSHRC 965 (May 1990).

~1500

Loose coal was accumulated 37 inches deep 7 feet wide for a distance of 18 feet in the tailgate entry of the E-3 longwall section from engineers spad station No. 18478 inby and extending an estimated distance of 40 feet ... into the gob area....

Gov. Exh. 1. 4/

SOCCO contested the validity of the withdrawal order and its associated special findings. SOCCO also challenged the civil penalty proposed by the Secretary for the violation of section 75.400. The contest and civil penalty proceedings were consolidated for hearing.

Before the administrative law judge, SOCCO maintained it had not violated section 75.400. SOCCO noted that section 75.400 prohibits the accumulation of loose coal in "active workings," and that section 75.2(g)(4) defines "active workings," as "any place in a coal mine where miners are normally required to work or travel." SOCCO argued that miners are not normally required to work or travel in the area where the alleged violative accumulation existed. SOCCO also argued that the accumulation did not result from an unwarrantable failure to comply with section 75.400. SOCCO stressed that due to the longwall mining process an accumulation of loose coal in the tailgate entry was inevitable. SOCCO also stressed that the instability of the roof in the intersection of the tailgate and face entries caused by the natural stresses resulting from longwall mining made it extremely dangerous to send miners into the unstable area to remove the coal which would, in any event, soon become part of the gob.

Crediting the inspector's testimony concerning the nature of the accumulation and the analysis of the inspector's incombustible content sample, the judge found that the accumulation consisted largely of combustible loose coal. 11 FMSHRC at 2021, 2022. The judge further held that the evidence established that the cited 18 feet of the accumulation (in the tailgate entry) existed in an area where miners were normally required to travel, making the area "active workings." Finally, because the accumulation in the tailgate entry had been pointed out to SOCCO and was not cleaned up or made inert by January 31, he held the violation resulted from SOCCO's unwarrantable failure to comply with the standard. 11 FMSHRC at 2022-23. 5/

Although SOCCO argues that the judge erred in holding that the accumulation existed in "active workings," we conclude that substantial

4/ The withdrawal order further alleged that SOCCO violated section 75.400 by permitting coal and emulsion oil to accumulate on parts of the longwall

roof support shields. The judge found that the Secretary failed to prove this violation. 11 FMSHRC at 2022. The Secretary did not seek review of this finding.

5/ The judge's additional conclusion that the Secretary failed to prove that the violation was of a significant and substantial nature is not at issue on review. 11 FMSHRC at 2022.

~1501

evidence supports the judge's finding. Three inspectors testified on behalf of the Secretary: Allen, Mitchell and Ronald Tulanowski. All agreed that the tailgate entry had to be examined regularly. Inspector Allen stated that the area in which the subject part of the accumulation existed "is required to be maintained open for travel for an escapeway off the longwall face" as part of SOCCO's approved roof control plan, and that "[a] fire boss has to travel out into there to make his examinations of his working section at different times." Tr. I 37. When asked how often such travel was required, he responded, "Once a week." Mitchell agreed that the tailgate entry had to be maintained and examined. He testified that "if anything were to occur on [the] longwall face those people have to have some way out." Tr. I 107. He further stated "the entry ... has to be supported in order to make a person safe to travel that area, and it is examined by certified people to see that it is maintained." Tr. I 107. Tulanowski testified that "Roof control law requires that entry to be open for [an] emergency escapeway. It has to be examined weekly." Tr. I 125; see also Tr. I 125-126.

SOCCO acknowledged that fire bosses examine and thus travel the tailgate entry on a weekly basis. SOCCO Br. to ALJ 21; PDR 6. SOCCO also acknowledged Mitchell's testimony that the section foreman regularly examined the area in the tailgate entry adjacent to the last shield (Tr. 119). SOCCO stated "other individuals do check more frequently [than weekly] to determine whether the route from the longwall face down the tailgate entry is passable." SOCCO Br. to ALJ 21. Nevertheless, SOCCO objects that although work or travel normally may have been required in various portions of the tailgate entry, the Secretary did not prove that work or travel was specifically required in the cited portion.

We note that Tulanowski, Ernest Weaver, SOCCO's section foreman, and Pat Zuchowski, SOCCO's general manager of longwalls, stated that miners do not normally work in the area. However, the standard also applies where miners are required to travel. Tr. I 132, Tr. I 175, Tr. II 14. As the inspectors all testified, the tailgate entry must be maintained as an escapeway off of the longwall face. Tr. I 37 Tr. I 107; 30 C.F.R. 75.215. 6/ Further, as even SOCCO agrees, the entry must be examined. To enter the tailgate entry from the longwall face, a person must pass through the intersection of the face and the tailgate entry, specifically through the area immediately adjacent to the outby end of the accumulation. Such normally required travel establishes the area as "active workings."

In addition, Mitchell testified without dispute that a ventilation curtain was maintained outby the end of the accumulation and that as the

6/ 30 C.F.R. 75.215 states in part:

For each longwall mining section, the roof control plan shall specify the methods that will be (a) used to maintain a safe travelway out of the section through the tailgate side of the longwall....

~1502

face advanced the curtain was moved further outby. He stated, "someone has to go back there to move that." Tr. I 118. It is not an unreasonable inference that miners would therefore normally travel through the intersection to reach the curtain. Compare *Cyprus Empire Corp.*, 12 FMSHRC 911 (May 1990); See *Mid-Continent Resources, Inc.*, 6 FMSHRC 1132, 1138 (May 1989).

Given the unanimous testimony of the inspectors that the tailgate entry area had to be maintained and inspected and the testimony of Mitchell that the outby check curtain had to be moved, we conclude that substantial evidence supports the judge's determination that the area was "active workings" within the purview of section 75.2(g)(4) of the Act where miners were normally required to travel. We agree with the judge that the existence of the accumulation in that area violated section 75.400. 7/

We turn now to the judge's finding that the violation resulted from SOCCO's unwarrantable failure to comply with the standard. In *Emery Mining Corp.*, 9 FMSHRC 1997, 2000-04 (December 1987), and *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010 (December 1987), we held 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 in the Mine Act, the Act's legislative history, and judicial precedent. We stated that while negligence is conduct that is "inadvertent," "thoughtless," or "inattentive," conduct constituting an unwarrantable failure is conduct that is "not justifiable" or is "inexcusable". *Emery*, supra, 9 FMSHRC at 200!.

The judge found that the accumulation in the tailgate entry was brought to SOCCO's attention on January 30, had existed for some time prior thereto, and had not been cleaned up or rendered inert by January 31. The judge concluded that SOCCO's allowing the accumulation

7/ In arguing in support of the judge's conclusion that the area constituted "active workings," the Secretary asserts that 30 C.F.R. 75.222(g)(1)(ii) requires miners to work or travel throughout the tailgate entry, including the cited area, to install supplemental roof supports. Sec. Br. 8. SOCCO objected to the Secretary's interpretation of the regulation and attached to its reply brief photocopied pages from a mine engineering textbook. SOCCO requested that we take official notice of the materials. SOCCO Reply Br. 8.

The Secretary has moved to strike all reference to the textbook arguing that the material is not a part of the evidentiary record below,

was not subject to cross-examination or rebuttal by the Secretary, and cannot be presented for the first time on review. Because we have concluded that substantial evidence supports the judge's finding that SOCCO violated section 75.400 without regard to the Secretary's argument with respect to 30 C.F.R. 75.222(g)(1)(ii) and the materials referenced by SOCCO in rebuttal of that argument, we need not reach the merits of the Secretary's motion to strike.

~1503

to continue to exist established its aggravated conduct in connection with the violation. 11 FMSHRC at 2023. We agree.

The presence of the accumulation was brought to SOCCO's attention on January 30. Inspector Allen testified that he was accompanied by David Stout, SOCCO's safety assistant, on that date and that he discussed the accumulation with Stout. Tr. I, 16, 25. Allen, Mitchell and Tulanowski also testified that on January 30, in a subsequent meeting, Allen and other MSHA officials discussed the accumulation with additional management personnel. Tr. I 27, I 103, I 123. Nevertheless, the accumulation continued to exist on January 31 and SOCCO had not, by complying with the provisions of its cleanup plan, lessened the hazard that the accumulation presented. Compare Utah Power & Light Co., Mining Division, *supra*, 12 FMSHRC at 971-72. Allen testified that by January 31 only a small amount of rock dust had been applied to the accumulation, perhaps one bag. Tr. I 30-31. He described the application as a "very small, minimum amount." Tr. I 30. Safety Committeeman Grimes described it as "very light" and "very little." Tr. I 86-87. The judge credited Allen's and Grimes' testimony. 11 FMSHRC at 2021. A judge's credibility findings and resolutions of disputed testimony should not be overturned lightly, and we find no basis for doing so here. See, e.g., *Secretary on behalf of Robinette v. United Castle Coal Co.* 3 FMSHRC 803, 813 (April 1981).

Given the continuing existence of the accumulation on January 31 and the judge's finding regarding SOCCO's noncompliance with its cleanup plan, we conclude that substantial evidence supports the judge's finding that the violation was the result of an unwarrantable failure to comply with the standard. 8/

8/ Responding to SOCCO's assertions regarding the technological inevitability of the accumulation because of the longwall mining process and the hazards of proceeding under unstable roof to remove the accumulation, the Secretary argues that application of rock dust in an amount sufficient to inert the accumulation and render it incombustible would constitute compliance with the cited standard. Sec. Br. 10 n.10. Such an interpretation may be a counterpart to the Secretary's policy on the enforcement of section 75.400 with regard to accumulations of loose coal caused by sloughing ribs. In the case of rib sloughage the Secretary has stated that, because removal of such coal amplifies the hazard of loose ribs, "such loose coal shall not be considered accumulations of combustible material if such material is rendered inert by heavy applications of rock dust." Department of Labor, Mine Safety and Health Administration, Program Policy Manual, Volume V, 52 (1988).

Because of the judge's finding that the accumulations here were not

rendered inert, we are not required to rule on the merits of the Secretary's interpretation of section 75.400 as expressed in the referenced footnote. We do note that tension may exist between the interpretation and the standard, which on its face requires that "loose coal and other combustible materials shall be cleaned up and not be permitted to accumulate." See also *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1121 (August 1985). The Secretary may wish to consider

~1504

For the foregoing reasons, we affirm the judge's decision.

whether the standard comfortably accommodates the longwall mining technology herein at issue.

Distribution

David M. Cohen, Esq.
Southern Ohio Coal Company
American Electric Power Service Corp.
P.O. Box 700
Lancaster, Ohio 43130

Eva L. Clark, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Administrative Law Judge James A. Broderick
Federal Mine Safety and Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041