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MSHA V. SOUTHERN OHIO COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
June 25, 1991

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

v. Docket No. WEVA 89-278

SOUTHERN OHIO COAL COMPANY

BEFORE: Backley. Acting Chairman; Doyle, Holen and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq (1988)(the "Mine Act"). The issue is whether Southern Ohio Coal Company ("SOCCO") violated 30 C.F.R. 77.404(a), a mandatory safety standard applicable to surface coal mines and surface work areas of underground coal mines. 1/ Also at issue is whether the alleged violation was of a significant and substantial nature and whether it was caused by SOCCO's unwarrantable failure to comply with the cited standard. Commission Administrative Law Judge George Koutras determined that SOCCO violated section 77.404(a), that the violation was of a significant and substantial nature, and that it was caused by SOCCO's unwarrantable failure to comply. 12 FMSHRC 1627, August 1990) (ALJ). The Commission granted SOCCO's Petition for Discretionary Review. For the reasons set forth below, we affirm the judge's decision.

1/ 30 C.F.R. 77 404 a) provides:

(a) Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

I.

Factual Background and Procedural History

The focus of the proceeding is on a D-7 Caterpillar bulldozer ("dozer") that SOCCO operated with two broken cat or track pads between May 15, 1989 and May 19, 1989, at the surface refuse dump of its Martinka No. 1 Mine in West Virginia. SOCCO operated the dozer during the day and at night to move waste product at the dump.

The dozer, which is approximately 13 feet long, moves on two crawler tracks (often called caterpillars) consisting of metal plates called track pads. There are 38-42 pads on each track and each pad is 32 to 36 inches wide. Four bolts attach each pad to the track. The top portion of the loop formed by the crawler tracks is often used as a walkway by the dozer operator to enter and exit the cab. This walkway is estimated to be 32 to 34 inches above the ground.

The dozer cab may be entered or exited from either side. Normally, the operator climbs onto the dozer from the back and walks on one of the crawler tracks to the cab. The distance from the back of the dozer to the cab door is approximately eight feet. There is a fender along each side of the cab, which acts as a platform above the track and may be used to step into the cab. The fender covers part of the track pads along the cab. It is also possible to reach the cab by climbing up onto one of the crawler tracks from either side of the dozer or by climbing up the front and walking on one of the crawler tracks to the cab. Travel on the dozer's left track is necessary to check the oil, transmission fluid, and water level. Similarly, travel on the dozer's right track is necessary to check the fuel.

The two broken track pads on the dozer had been reported to SOCCO management on Monday, May 15, 1989. Dozer operator Bill Jones reported in the "operator's check list of vehicle condition," dated May 15, 1989, that two pads were broken and needed replacement and SOCCO acknowledges that it first became aware of the defective cat pads on that day. See, Exh. 1 (SOCCO's Answer to Interrogatory 11). On May 16, 1989, dozer operators Delbert Barnett and Jones again reported in the operator's check list that two pads on the left side track of the dozer were broken. That same day Barnett tripped on and almost fell through, one of the broken pads but was able to catch himself. Replacement pads were ordered on May 15 and were received on or about May 17. Other operators reported the broken pads in the operator's check list on May 18th and before the replacements were installed, on May 19th.

Mine Safety and Health Administration ("MSHA") Inspector Bretzel Allen arrived at the mine site on May 23, 1989, to investigate a complaint made by a representative of miners under section 103(g), 30 U.S.C. 813(g), which alleged that SOCCO had been operating a D-7 Caterpillar dozer with two broken pads on the left track. Allen did not personally observe the violation because the track pads had been replaced before his inspection. Allen verified the accuracy of the complaint through discussions with SOCCO's equipment operators, Jim Richards (a SOCCO foreman), and Wesley Dobbs (SOCCO's accident prevention officer). He also reviewed SOCCO's daily "operator's

~914

check list," which contained the notation dated May 16, 1989, that Barnett had reported to mine management that two track pads on the left track of the dozer were broken. Allen determined that a broken pad would leave an opening approximately 9-1/4 inches wide by 12 inches long, based on the assumption that the pads normally break off at the bolts. Allen further found that several months earlier, on March 2, 1989, dozer operator Bill Bice, while exiting from a dozer cab, had stepped into a hole created by a broken pad, strained his back and lost one day of work.

As a result of his investigation, Allen issued a section 104(d)(2) withdrawal order charging a violation of section 77.404(a). The withdrawal order alleged that the D-7 dozer had been operated from May 15, 1989, to May 19, 1989, with two broken track pads, that these pads were part of a platform on which the machine operators walked to mount and dismount the machine, and that this condition had been known by Richards, the foreman in charge, and had been recorded in the operator's check list on May 16, 1989. Allen determined that the violation was significant and substantial, relying, in part, on Bice's March 2, 1989, accident. Allen also determined that the violation was the result of SOCCO's high negligence, because SOCCO's management knew that the pads were broken but nonetheless continued to operate the dozer.

Before the judge, SOCCO argued that it did not violate section 77.404(a) because the two broken track pads did not render the dozer unsafe to operate. SOCCO emphasized that the primary purpose of the track pads is to provide traction and the dozer's traction was not affected by the two broken pads. SOCCO argued that section 77.404(a) did not apply to a stumbling or tripping hazard created by the broken pads. In challenging the withdrawal order, SOCCO also contested Allen's significant and substantial and unwarrantable failure findings.

Judge Koutras found that SOCCO violated section 77.404(a) because the dozer tracks, including the pads, are an integral and functional part of the machine, and that the tracks were used by dozer operators to mount and dismount the machine and to service the machine as required. 12 FMSHRC at 1648-1649. He concluded that these uses could not be divorced from the safety requirements found in section 77.404(a). *Id.* He also found that the testimony of three of SOCCO's equipment operators, including Barnett and Bice, established that the broken pads on the cited dozer rendered it unsafe to operate, requiring its immediate removal from service. 12 FMSHRC at 1648-49. Judge Koutras also determined that the violation was of a significant and substantial nature. He credited the testimony of Inspector Allen and the dozer operators concerning the hazards created by broken track pads and their testimony about previous incidents involving broken pads. 12 FMSHRC at 1655-56. With respect to the

unwarrantable failure issue, Judge Koutras found that the violation was caused by SOCCO's aggravated conduct. 12 FMSHRC at 1659. He found that the broken pads were reported by Barnett to Richards, SOCCO's foreman, on May 16, 1989, that SOCCO continued to use the dozer with the broken pads and that the dozer was not repaired until May 19, 1989. 12 FMSHRC at 1658. He also relied upon the fact that SOCCO was aware of Bice's March 2, 1989, injury and Barnett's "near miss." Judge Koutras concluded that, under such circumstances, immediate action was necessary to fix the broken pads. 12 FMSHRC at 1658-59.

II.

Disposition of Issues

On review, SOCCO contends that: (1) it did not violate section 77.404(a); (2) the alleged violation was not significant and substantial; and (3) the alleged violation was not the result of SOCCO's unwarrantable failure. We consider each of these contentions in turn.

A. Whether there was a violation of section 77.404(a)

SOCCO takes the position that "the condition of two-half broken cat or track loads on the D-7 dozer does not render the machine inoperable." SOCCO Br. at 5-6 (emphasis in original). Hence, "the machine's condition ... would not render this equipment unsafe to operate and, therefore, would not require SOCCO to remove it from service under 30 C.F.R. 77.404(a)." Id. at 6. SOCCO asserts that citing a "stumbling and tripping hazard under 30 C.F.R. 77.404(a)," is an "inappropriate and incorrect utilization of said standard." Id.

Focusing on the word "operating" in the standard, SOCCO contends that, for section 77.404(a) to apply, the unsafe condition must render the equipment unsafe to operate. Since use of the tracks as a walkway does not involve the "operating condition" of the dozer any stumbling or tripping hazard created by broken pads is not within the scope of section 77.404(a).

In the Secretary's view, substantial evidence supports the finding that the broken track pads created a safety hazard. Citing *Ideal Cement Co.*, 12 FMSHRC 2409 (November 1990), the Secretary asserts that SOCCO's use of the equipment in such condition created a slip and fall hazard for miners using the track 'walkway' when mounting to or dismounting from the operator's compartment. and that such hazards are within the purview of the standard. We agree.

As the Commission observed in *Ideal Cement* "[t]he integrity of a machine is not defined solely by its proper functional performance but must also be related to the protection of miners' health and safety." 12 FMSHRC at 2414-15 (emphasis in the original). If a machine cannot be used safely by miners, the machine is not in "safe operating condition." Thus, a dozer is not in "safe operating condition" if miners are unable to enter and exit the dozer's cab without risking injury. Because the dozer's tracks serve as the only walkway for the operator to mount and dismount the dozer and to check the fuel, oil, transmission fluid and water level, we conclude that the dozer's track pads were within the scope of section 77.404(a) and that

the dozer was not in "safe operating condition." In so concluding we find that a "stumbling and tripping hazard" is covered by the standard.

Substantial evidence supports the judge's finding that the two broken

track pads presented an unsafe condition. 2/ Inspector Allen testified that the condition was unsafe. Tr. 28. Dozer operator Barnett testified that missing track pads pose a safety risk. Tr. 67, 93-94. Barnett also testified that sometimes the pads are so full of mud that the pads cannot be seen. Tr. 68. Bill Kincell, also a dozer operator, testified that a missing pad poses a safety risk and that when mud from the refuse area adheres to the tracks, he would be unaware of a broken pad unless he stepped on it or the mud fell out of it. Tr. 101. Dozer operator Bice testified that a broken track pad presents a risk or hazard. Bice also testified that sometimes it is not easy to see whether a track pad is broken when the dozer is covered with gob. Tr. 134.

We further note that Bice was injured on March 2, 1989, as a result of a broken track pad. Tr. 128. In response to his injury, SOCCO's safety department set forth a policy (not observed in this case) that dozers were not to be operated if a pad was broken, and that broken pads would be fixed before the dozer was put back into service. Tr. 61, 89, 99.100, 107, 131.32.

Accordingly, we affirm the judge's conclusion that SOCCO violated section 77.404(a).

B. Whether the violation was significant and substantial

We also affirm the judge's conclusion that the violation was of a significant and substantial nature. A violation is properly designated as significant and substantial "if, based on the particular facts surrounding that 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 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard .. that is, a measure of danger to safety .. contributed to by the violation; (3) a reasonable likelihood that the hazard

2/ The Commission has held that equipment is "unsafe" under 30 C.F.R. 75.1725(a), which is identical to section 77.404(a), when a "reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining

industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation." Alabama By.Products Corp. 4 FMSHRC 2128, 2129 (December 1982). Although the judge did not analyze this case using the "reasonably prudent person," analysis, we conclude that a reasonably prudent person familiar with the facts would recognize that the broken pads presented an unsafe condition.

contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

See also *Austin Power Co. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'd*, 9 FMSHRC 2015, 2021 (December 1987)(approving Mathies criteria). The third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury (U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984)), and also that the likelihood of injury be evaluated in terms of continued normal mining operations (U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984); see also *Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986).

At the outset, SOCCO argues that Allen did not satisfy MSHA's Program Policy Letter No. p. 89.I.3 for determining S&S violations. SOCCO raised this issue for the first time in its petition for review. Under the Mine Act and the Commission's regulations, "[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge ha[s] not been afforded an opportunity to pass." Section 113(d)(2)(A)(iii) of the Mine Act, 30 U.S.C. 823(d)(2)(A)(iii); see also 29 C.F.R. 2700.70(d). SOCCO has not proffered any reason way it did not present the argument before the judge. We therefore decline to consider whether Allen satisfied MSHA's Program Policy Letter No. P89-I-3. See *Midwest Minerals, Inc.*, 12 FMSHRC 1375, 1378 (July 1990); *Ozark-Mahoning Co.*, 12 FMSHRC 376, 379 (March 1990).

SOCCO also argues that the significant and substantial finding cannot stand because the inspector did not personally observe the alleged violation. In *Nacco Mining Co.*, 9 FMSHRC 1541, 1546 (September 1987), the Commission found that an inspector can issue a section 104(d)(1) citation notwithstanding the fact that the violation was not personally observed by the inspector. A section 104(d)(1) citation requires, as one of its elements, that the violation be of a significant and substantial nature. An inspector's personal observation is therefore not a predicate to a significant and substantial finding.

We now turn to the four elements of the Commission's significant and substantial analysis. With respect to the first Mathies element. we have concluded that the judge properly found that SOCCO violated section 77.404(a). The second element, that a measure of danger to safety was contributed to by SOCCO's violation is also established. The hazard of tripping or falling through a broken pad has been amply demonstrated. The testimony of the inspector and the dozer operators, discussed above.

confirms the hazard.

With respect to the third Mathies element' SOCCO argues that there was only one injury at this mine associated with this type of alleged violation, which occurred three to four years earlier to Bice. The record establishes, however, that on March 2, 1989, Bice also suffered a strained back when he stepped through a hole created by a partially broken pad. Tr. 23. 56; Sec. Exh. 4.D. Bice lost one work day as a result of the accident. On May 16, 1989, Barnett also tripped on and almost fell through one of the broken pads

but caught himself before going over the dozer. Tr. 64.65; Sec. Exh. 4.E.

The judge determined that the partially broken pads in question constituted a condition that would be reasonably likely to contribute to an injury, and that it was reasonably likely that the injury would be one of a reasonably serious nature. 12 FMSHRC at 1656. We find that substantial evidence supports the judge's conclusions.

In reaching those conclusions the judge relied, in part, upon the testimony of Inspector Allen, which he found to be credible. 12 FMSHRC at 1655. Allen testified that the presence of caked mud could fill the hole created by a missing pad to the point that one would not notice that it was missing. Tr. 21. The inspector analogized the hazard as similar to that created by removing steps from a stairwell. Tr. 19. Allen referred to the back injury incurred by one of SOCCO's employees in just such a track pad incident and believed that serious injuries such as sprains, strains and fractures could result. Tr. 22-23. The judge also found credible, and relied upon, the testimony of dozer operators Bice and Barnett that a broken pad exposed them to hazards. 12 FMSHRC at 1656.

With respect to the fourth Mathies element, the severity of Bice's recent accident provides substantial evidence to support the judge's finding. As previously indicated, Bice strained his back and lost one day of work. The inspector also testified that strains, sprains or fractures could result if someone slipped or fell because of a broken pad. As stated above, the judge credited the inspector's testimony. 12 FMSHRC at 1655.

We have considered other evidence in the record relied upon by SOCCO that mitigates the degree of danger created by the violation. We conclude, however, that substantial evidence supports the judge's finding that the violation was of a significant and substantial nature.

C. Whether the violation was unwarrantable failure

In *Energy Mining Corporation*, 9 FMSHRC 1997, 2004 (December 1987) and *Youghiogeny & Ohio Coal Company*, 9 FMSHRC 2007, 2010 (December 1987), this Commission held that "unwarrantable failure means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." The Commission stated that while negligence is conduct that is "inadvertent," "thoughtless," or "inattentive," conduct constituting an unwarrantable failure is conduct that is "not justifiable" or "inexcusable." *Energy*, supra. 9 FMSHRC at 2001.

SOCCO argues that it had a good faith belief that it was not

prohibited from using the dozer and that it attempted to replace the cat pads without undue delay. We reject SOCCO's arguments.

SOCCO's first argument is premised on the ground that an ambiguity in the regulation justifies its conduct. However, we conclude that a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific requirement of the standard. See *Ideal Cement Co.*, supra, 12 FMSHRC at 2416; n.2, supra.

The Commission has recognized that if an operator reasonably believes in good faith that the cited conduct is the safest method of compliance with applicable regulations, even if it is in error, such conduct is not aggravated conduct constituting more than ordinary negligence. Utah Power and Light Company, 12 FMSHRC 965, 972 (May 1990); Florence Mining Co., 11 FMSHRC 747, 752-54 (May 198); Helen Mining Co., 10 FMSHRC 1672, 1675-77 (December 1988); Southern Ohio Coal Co., 10 FMSHRC 138, 142.43 (February 1988). SOCCO's actions here, however, do not manifest safety consciousness. To the contrary, SOCCO knowingly permitted the dozer to continue operating from May 15, 1989, to May 19, 1989, with the two broken pads, even though it knew that, in addition to an earlier accident, there had been one recent accident caused by broken pads on March 2, 1989, and one close call on May 16, 1989.

We find that substantial evidence supports the judge's unwarrantable failure finding and that the violation was the result of SOCCO's aggravated conduct. SOCCO knew of the two defective cat pads on May 15 1989. The record also shows that five reports ("operator's check lists"), dated May 15 through May 19, 1989, made by at least three different operators, advised SOCCO that the pads were broken. SOCCO also knew of Bice's March 2, 1989, injury caused by a broken pad and Barnett's May 16, 1989, near miss. Replacement pads were received on or about May 17, 1989. Nevertheless, SOCCO continued to operate the dozer with knowledge of the two broken pads through the day shift on May 19.

Finally, the record establishes that replacement of the broken pads was not a complicated or time consuming operation. Tr. 72, 104.05. A mechanic could change a pad in three-quarters of an hour. Tr. 72, 104-05. SOCCO's witness Ware stated "[a]nybody can bolt on a track pad" and that "[t]here is nothing to it." Tr. 203. We therefore reject SOCCO's argument that it attempted to replace the track pads without undue delay.

3/ The judge found that Barnett reported the broken pads to his foreman, Richards, on May 16, 1989. 12 FMSHRC 1658. However, SOCCO acknowledges that it knew about the broken pads on or about May 15, 1989, and the record establishes that the broken pads were reported in the "operator's checklist" for the afternoon shift on May 15. SOCCO PDR at 8; SOCCO Br. on Rev. at 9; SOCCO Post H. Br. at 5; Sec. Exh. 1 (SOCCO's Answer to Interrogatory 11(a)); Sec. Exh. 4E.

III.

Conclusion

Accordingly, the judge's decision is affirmed.

Richard V. Backley, Acting Chairman

Joyce A. Doyle, Commission

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

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