

CCASE:
MSHA V. SOUTHERN OHIO COAL
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TTEXT:

November 23, 1992

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. LAKE 91-650-R
	:	LAKE 91-664-R
SOUTHERN OHIO COAL COMPANY	:	

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

DECISION

BY THE COMMISSION:

This consolidated contest proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)(the "Mine Act" or "Act"). The Secretary of Labor alleges that Southern Ohio Coal Company ("SOCCO") violated 30 C.F.R. 75.1704-2(a), a mandatory underground coal mine safety standard requiring that escapeways follow "the safest direct practical" route out of the mine(Footnote 1) and failed to abate the violation, which resulted in a section 104(b) order.(Footnote 2) SOCCO contested the citation and order, and sought

1 Section 75.1704-2(a) provides:

In mines and working sections opened on and after January 1, 1974, all travelable passageways designated as escapeways in accordance with 75.1704 shall be located to follow, as determined by an authorized representative of the Secretary, the safest direct practical route to the nearest mine opening suitable for the safe evacuation of miners. Escapeways from working sections may be located through existing entries, rooms, or crosscuts.

2 Section 104(b) of the Mine Act provides, in pertinent part:

Follow-up inspections; findings; orders. If, upon any follow-up inspection of a ... mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to [section 104(a)] has not been totally abated within the period of time as originally fixed therein or

temporary relief from the order.

Commission Administrative Law Judge Avram Weisberger concluded that SOCCO violated section 75.1704-2(a), sustained the Secretary's section 104(b) failure to abate order, and denied SOCCO's application for temporary relief. 13 FMSHRC 1149 (July 1991)(ALJ). The Commission granted SOCCO's petition for discretionary review, which challenges (1) whether the Secretary had proved a violation of 30 C.F.R. 75.1704-2(a), (2) whether, in order to reduce the length of an escapeway, SOCCO can be required to construct an overcast, and (3) whether the judge erred in dismissing SOCCO's application for temporary relief. The Commission subsequently heard oral argument.

For the reasons set forth below, we reverse the judge's conclusion that SOCCO violated section 75.1704-2(a) and vacate the Secretary's section 104(b) order. We find the denial of SOCCO's application for temporary relief to be moot.

I.

Factual and Procedural Background

SOCCO owns and operates the Meigs No. 2 Mine. On June 11, 1991, Mine Safety and Health Administration ("MSHA") Inspector Charles Jones walked the designated primary escapeway from the mouth of the 3-South longwall section (the "mouth") to Air Shaft No. 2 (the "air shaft").(Footnote 3) From the mouth, the escapeway ran east parallel to the track and belt line entry for approximately 2,300 feet. The escapeway then turned north and traversed four entries by

2(...continued)

as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons 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 violation has been abated.

30 U.S.C. 814(b).

3 Air Shaft No. 2 was placed in operation on February 23, 1991 and it was constructed, on SOCCO's own initiative, in order to improve ventilation to the working faces. It became a mine opening suitable for the safe evacuation of miners when an escape capsule (hoist) was approved by MSHA on April 25, 1991, thus reducing the designated primary escapeway from the 3-South longwall section from 16,200 feet to 7,300 feet.

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means of an overcast, (Footnote 4) then turned west to the air shaft, a distance of approximately 2,500 feet. The length of the escapeway from the mouth to the air shaft was about 4,800 feet. (Footnote 5) Jones found the escapeway in good condition but was concerned about its length. Tr. 41, 113. Jones determined that the mouth was approximately 200 to 300 feet directly south of the air shaft and that a more direct route existed.

Jones issued a section 104(a) citation alleging a violation of section 75.1704-2(a) as follows:

The most direct practical route to the nearest mine opening was not provided from the 3rd South Longwall section in that miners were required to travel an additional 4,800 feet by traveling outby from the mouth of the section for 2,300 feet and traveling inby for about 2,500 feet. The emergency escape shaft is located at the mouth of the 3 South longwall section (across the track and belt entry).

The violation was designated as being of a significant and substantial nature.

Jones suggested that, in order to abate the violation, SOCCO could construct an overcast over the track and belt entry between the mouth and the air shaft, which would permit SOCCO to designate a more direct escapeway. (Footnote 6) Use of an overcast would reduce the length of the escapeway to approximately 200 to 300 feet from the mouth. Tr. 65-66, 304-05.

On July 3, 1991, SOCCO contested the citation and requested an expedited hearing, which was held on July 11. (Footnote 7) Prior to the hearing, SOCCO attempted

4 An overcast is "[a]n enclosed airway to permit one air current to pass over another one without interruption." Bureau of Mines, U.S. Dept. of Interior, Dictionary of Mining, Mineral and Related Terms at 780 (1968).

5 The designated escapeway contained four ninety degree turns but was roughly configured as three sides of a rectangle.

6 Under 30 C.F.R. 75.1707, the escapeway required to be ventilated with intake air must be separated from the belt and track haulage entries for their entire length to the beginning of each working section, except as permitted by the Secretary or her authorized representative. The purpose of the overcast was to separate the track and belt entry air from the intake air, allowing the track and belt entry air to pass under, and the intake air to pass through the overcast. Thus, a person walking the escapeway from the mouth to the air shaft could travel in intake air at all times.

7 At the July 11, 1991, hearing, SOCCO also filed an application for temporary relief, in which it requested that it be relieved from abatement until issuance of a decision as to the validity of the section 104(a) citation. The Secretary had modified the citation to extend the abatement date until July 16, 1991. The judge denied the motion.

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to abate the citation. SOCCO rerouted the escapeway and reduced its length by approximately 30 percent.

On July 16, 1991, MSHA Inspector Ronald Taylor issued to SOCCO a section 104(b) withdrawal order alleging that "little effort" had been made to abate the section 104(a) citation. On that same day, SOCCO filed a notice of contest and application for temporary relief seeking vacation of the section 104(b) order unless and until it was determined by the Commission that the citation was validly issued and that the time permitted for abatement was proper.

MSHA modified the withdrawal order on July 17 to permit mining on the 3-South longwall section based upon SOCCO's commitment to construct an overcast during the July 20 weekend. On July 19, the judge sua sponte consolidated the contest of the withdrawal order with the contest of the citation and issued his decision.

The judge determined that section 75.1704-2(a) is violated when the escapeway designated by the operator follows a route "that has not been determined by the Secretary's representative to be the safest direct practical route." 13 FMSHRC at 1151. Relying on his earlier decision in Rushton Mining Co., 10 FMSHRC 713, 716 (June 1988)(ALJ) aff'd on other grounds, 11 FMSHRC 1432 (August 1989), the judge held that, because the cited escapeway was not a "direct" route, SOCCO violated section 75.1704-2(a). 13 FMSHRC at 1151-52.

The judge noted Inspector Jones' suggestion that SOCCO construct an overcast so the escapeway could proceed more directly from the mouth to the air shaft. 13 FMSHRC at 1152. The judge also noted SOCCO's argument that section 75.1704-2(a) does not require an operator to engage in construction in order to designate a conforming escapeway and that it was not "practical" for the overcast to be constructed. Id. The judge concluded, however, that SOCCO's arguments concerned abatement, not the fact of violation. The judge reasoned that, since the Secretary had not mandated a specific escapeway route for abatement purposes, questions concerning the overcast, including its practicality, were beyond the scope of the proceeding. 13 FMSHRC at 1152 n.1. Consequently, the judge denied SOCCO's contest of the violation. 13 FMSHRC at 1152, 1154. He found, however, that the violation was not significant and substantial. 13 FMSHRC at 1153. The Secretary did not request review of that finding.

The judge also denied SOCCO's contest of the section 104(b) order and its July 16, 1991, application for temporary relief, reasoning that SOCCO's position was predicated on its argument that the cited escapeway was not violative of section 75.1704-2(a). 13 FMSHRC at 1153 n.2.

II.

Disposition of Issues

A. Section 104(a) Citation

The Secretary asserts that she is not required to designate a specific

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escapeway route in order to establish a violation of section 75.1704-2(a). See O.A. Tr. 25, 29-30. See also S. Br. 8-9. The Secretary argues further that it was SOCCO's burden not only to prove what it considers to be the safest direct practical route but also to prove, in the negative, that all other routes fail to meet those criteria. O.A. Tr. 25, 29-30; S. Br. 8-9. The Mine Act imposes on the Secretary the burden of proving a violation of a safety standard. See Garden Creek Pocahontas Company, 11 FMSHRC 2148, 2152 (November 1989); Consolidation Coal Company, 11 FMSHRC 966, 973 (June 1989). The Secretary's position evades her fundamental obligation in a contest proceeding to prove a violation by the operator.

Section 75.1704-2(a) requires that designated escapeways "be located to follow, as determined by an authorized representative of the Secretary, the safest direct practical route to the nearest mine opening suitable for the safe evacuation of miners." Accordingly, it is the Secretary's burden to prove that, as compared to the designated route, there is at least one other escapeway route that she has determined more closely complies with the standard's requirement of "the safest direct practical route." Thus, in order for the Secretary to establish a prima facie case of violation, she must show that the operator's designated escapeway is deficient because it is not "the safest direct practical route." It is insufficient for the Secretary to merely cite the designated route as being out of compliance with the regulation. She must present a specific escapeway alternative that she believes is more appropriate. The language of the regulation, "safest direct practical route," implies that there is one best route. Accordingly, the Secretary, in order to prove a violation, must show that there is a specific escapeway alternative that more fully complies with those criteria than does the cited route. The judge therefore erred when he found a violation absent proof of a specific safer direct practical route. See 13 FMSHRC at 1152 n. 1.

The Secretary also asserts that a violation was established by the very configuration of the cited escapeway. O.A. Tr. 42-43, S. Br. 8. Essentially, the Secretary is suggesting that for the purposes of this proceeding, the configuration of SOCCO's escapeway is a per se violation of section 75.1704-2(a). The Secretary's interpretation is clearly at odds with the wording of the standard and loses sight of the fact that directness is not the only factor to be considered in the designation of an escapeway. See Rushton Mining Co., supra, 11 FMSHRC at 1437.

Focusing on the language of the regulation, there are three considerations in designating escapeway routes: (1) "safest," (2) "direct", and (3) "practical." Accordingly, in the Secretary's determination of what is "the safest direct practical route" there must be a consideration of all three factors. No one factor may be used exclusively to determine the designated escapeway without taking into account the other two factors. The judge therefore erred when he based his finding of violation solely on his determination that "the escapeway was not 'direct'" (13 FMSHRC at 1152) without giving due regard to its practicality and its safety relative to other possible routes.

While the Secretary "suggested" the construction of an overcast over the belt and track entry, she failed to prove that there was a specific better

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route.(Footnote 8) The judge found that neither Jones nor any other representative of the Secretary mandated a particular route that was designated as an escapeway for the purpose of abating the violation. 13 FMSHRC at 1152 n.1. Jones conceded that he never gave SOCCO a specific escapeway route. Tr. 49. When asked to mark on a map an alternative for the safest direct practical route, he did not do so. Jones merely responded that "[a]nything can be used as an alternate route either inby or outby the mouth." Tr. 49, 50. Nor does the citation itself indicate a particular escapeway that Jones believed was the safest direct practical route.

Furthermore, the Secretary has taken the position throughout this proceeding that she has only suggested, but not required, construction of an overcast.(Footnote 9) See S. Br. 10-11; Tr. 14-15, 21, 23, 49, 51, 104, 132, 305, 307; O.A. Tr. 25, 29. If, indeed, construction of an overcast was not required, a route containing the overcast could not have been determined to be the safest direct practical route.(Footnote 10) We conclude that the judge erred in finding that the Secretary established a violation of section 75.1704-2(a).

B. Section 104(b) Failure to Abate Order and Application for Temporary Relief

Prior to the expedited hearing in this matter, SOCCO attempted to abate the violation alleged in the citation by designating a shorter route as its primary escapeway. In addition, SOCCO requested that the judge extend the time for abatement until after he issued his decision on the merits. SOCCO complied with the section 104(b) order, shut down the longwall, and constructed the "suggested" overcast. Under these circumstances, we vacate the section 104(b) order.

8 The record does not address whether the shorter escapeway designated by SOCCO after the citation was issued met the requirements of section 75.1704-2(a).

9 Even if the Secretary's "suggestion" is construed to have required the construction of an overcast, the Secretary at oral argument was equivocal as to her authority to require such construction. See O.A. Tr. 31-32, 35-36, 37-38. See also S. Br. 11-12 n.4. Counsel for the Secretary suggested that if "there was no other direct, safe and practical way out of the mine ... the Secretary under those circumstances could require construction to some extent." O.A. Tr. 32. When asked what the Secretary's position was on construction, counsel responded that she was "not going to totally preclude that possibility." O.A. Tr. 35-36. Pressed further, she responded that "we are not taking the position that the Secretary could never require construction." O.A. Tr. 37-38.

10 Finally, we note that SOCCO, on its own initiative, constructed the air shaft and the hoist. As a result, SOCCO was able to reduce its primary designated escapeway from the 3-South longwall section from 16,200 feet to 7,300 feet. It is noteworthy that, prior to voluntary action by SOCCO, which reduced the escapeway distance by 8,900 feet, the much longer escapeway was approved by the Secretary.

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SOCCO also asserted that the judge erred in denying its request for temporary relief from the section 104(b) failure to abate order. Since we have vacated the order, SOCCO's assertions with respect to the application for temporary relief are rendered moot.

III.

Conclusion

For the foregoing reasons, we reverse the judge's finding that SOCCO violated section 75.1704-2(a) and vacate the citation. We also reverse the judge's decision sustaining the section 104(b) failure to abate order and vacate that order.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner