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MARTINKA COAL V. SOL (MSHA)
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December 21, 1993

MARTINKA COAL COMPANY :
:
v. : Docket Nos. WEVA 93-45-R
: WEVA 93-46-R
SECRETARY OF LABOR :
MINE SAFETY & HEALTH :
ADMINISTRATION (MSHA) :

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

DECISION

BY THE COMMISSION:

This civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq. (1988)("Mine Act" or "Act"), presents the issue of whether two withdrawal orders were validly issued to Martinka Coal Company ("Martinka") under section 104(b) of the Mine Act, 30 U.S.C. 814(b).(Footnote 1) Administrative Law Judge Avram Weisberger upheld the withdrawal orders. 15 FMSHRC 99 (January 1993)(ALJ). The Commission granted Martinka's petition for discretionary review, which challenged the judge's findings. For the reasons that follow, we affirm the judge's decision.

1 Section 104(b) of the Mine Act states, in pertinent part:

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) of this section has not been totally abated within the period of time as originally fixed therein or 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 ... to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

I.
Factual and Procedural Background

On October 21, 1992, Inspector Robert Blair of the Department of Labor's Mine Safety and Health Administration ("MSHA") inspected the No. 4 Flyte Belt Line ("belt line") at Martinka's Tygart River Mine. He observed accumulations of coal and coal dust mixed with water under the belt line. He determined that, in some places, belt rollers were running in dry coal accumulations. He also observed haystack-shaped accumulations of loose coal under the belt. The inspector determined that the violative conditions existed along the entire 5,200 foot length of the belt line. He issued a citation alleging a violation of 30 C.F.R. 75.400 for these accumulations.(Footnote 2)

Inspector Blair also observed that several belt rollers were stuck or frozen, that bottom belt rollers were missing for a distance of about 100 feet, and that the belt was rubbing against the structure that supports its rollers. Inspector Blair issued a citation alleging a violation of section 75.1725(a) for these conditions.(Footnote 3)

Daniel Conaway, the mine's safety manager, advised Inspector Blair that it would take Martinka several days to abate the violations. The inspector allowed Martinka five days, including a weekend, for abatement.

On Monday October 26, Inspector Blair returned to the mine and, accompanied by John Metz, the mine manager, and David Kincell, the miners' representative, inspected the belt line. The belt was operating and carrying coal. Inspector Blair determined that some of the accumulations he had observed on October 21 were still present along the belt. Specifically, he found combustible materials under the belt tail piece and in several other places under the belt line. Accordingly, he issued a section 104(b) order of withdrawal.

Inspector Blair also determined that some of the other safety problems he had cited on October 21 continued to exist. Specifically, he observed frozen rollers at the tail piece, frozen or missing rollers at several other places, and the belt rubbing against the supporting structure. As a

2 Section 75.400 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.

3 Section 75.1725(a) provides:

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.

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consequence, he issued a second section 104(b) order of withdrawal. Martinka contested both section 104(b) orders, but did not contest the underlying citations.

The judge upheld both orders. He concluded that the inspector acted reasonably in not extending the period of time for abatement of the violations. 15 FMSHRC at 101-02.

With respect to the order based on coal accumulations, the judge found that the Secretary established a prima facie case that at least some of the violative conditions described in the citation had not been totally abated by October 26. 15 FMSHRC at 104-05. He further found that Martinka's evidence had not rebutted the Secretary's evidence that the accumulations had not been completely removed. 15 FMSHRC at 105-06.

With respect to the order regarding the belt rollers, the judge determined that the Secretary established a prima facie case that some of the cited rollers were still frozen or missing on October 26. 14 FMSHRC at 106-07. He found that Martinka had not offered any specific evidence to rebut the Secretary's evidence. 15 FMSHRC at 107. He determined that, while Martinka may have replaced some of the frozen or missing rollers cited by the inspector, it had not replaced or repaired all of them. Id.

II. Disposition

On review, Martinka contends that the inspector should have extended the abatement time because it had made diligent, good faith abatement efforts. Martinka maintains that it devoted 40 man-shifts to abating the violations and had applied 60 tons of rock dust. It contends that it totally abated the coal accumulation violation and that all that remained on October 26 was incombustible muck. It also contends that it totally abated the belt roller violation, but that some of the violative conditions reoccurred on October 26. Martinka argues that neither its conduct in response to the citations nor any hazards justified the issuance of withdrawal orders. The Secretary contends that substantial evidence supports the judge's finding that the violations had not been totally abated at the time the orders were issued. He contends further that the judge correctly determined that the inspector had acted reasonably in not extending the abatement time.

In *Mid-Continent Resources, Inc.*, 11 FMSHRC 505 (April 1989), the Commission established the following analytical framework for the adjudication of section 104(b) orders:

[W]hen the validity of a section 104(b) is challenged by an operator, it is the Secretary, as proponent of the order, who bears the burden of proving that the violation described in the underlying citation has not been abated within the time period originally fixed or as subsequently extended. We hold, therefore, that the Secretary establishes a prima facie case that a section 104(b) order is valid by proving by a

preponderance of the evidence that the violation described in the underlying section 104(a) citation existed at the time the section 104(b) withdrawal order was issued. The operator may rebut the prima facie case by showing, for example, that the violative condition described in the section 104(a) citation had been abated within the time period fixed in the citation, but had recurred.

Id. at 509 (emphasis in original).

A. Abatement of 75.400 violation

It is undisputed that Martinka attempted to clean up at least some of the accumulations cited by the inspector. The judge, however, credited the testimony of Blair and Kincell that not all the accumulations had been removed.

Substantial evidence supports the judge's findings(Footnote 4). Both Blair and Kincell testified that dry accumulations were present under the tail piece on October 26. Inspector Blair testified that these accumulations had not been deposited recently because they were dull in appearance. He also testified that there were accumulations of hard packed coal dust on the belt structure under the top center rollers. Finally, he testified that Martinka had flattened out some of the accumulations and covered them with rock dust and that some haystack accumulations remained. As noted by the judge, the inspector's contemporaneous notes support his testimony.

Martinka argues that the high moisture content of the accumulations rendered them incapable of combustion by any ignition source that was present. The Commission has held that a "construction of the standard that excludes loose coal that is wet or that allows accumulations of loose coal mixed with noncombustible materials, defeats Congress' intent to remove fuel sources from mines and permits potentially dangerous conditions to exist." Black Diamond Coal Mining Co., 7 FMSHRC 1117, 1121 (August 1985). Inspector Blair testified that the wet accumulations could dry out. Moreover, the judge found that the accumulations observed by Blair and Kincell at the tail piece on October 26 were dry. 15 FMSHRC at 103-04. Thus, substantial evidence supports the judge's finding that "at least some of the violative conditions described in the 104(a) citation ... existed at the time the 104(b) order was issued." 15 FMSHRC at 105.

Martinka contends that its alleged failure to abate did not create a safety hazard because air ventilating the belt is coursed directly into the

4 The Commission is bound by the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989), quoting Consolidation Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

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return airway, and not, as Inspector Blair testified, into the working sections. It maintains that the degree of the hazard created by the failure to abate should be the most important factor in determining whether the abatement time should be extended. Martinka argues that the judge erred in relying on Inspector Blair's testimony to find that a fire in the area could send smoke into the working sections and trap miners working in by the fire. 15 FMSHRC at 102.

The record supports the judge's finding that combustible materials created a fire hazard along the belt line, even if the hazard was not as great as Inspector Blair believed. While the degree of the hazard is a relevant factor, it is not the sole factor to be considered. Thus, the record supports the judge's finding that Inspector Blair acted reasonably in determining that the time for abatement should not be extended.

B. Abatement of 75.1725(a) violation

Martinka argues that it had abated the conditions observed by Inspector Blair on October 21 and that any violations found on October 26 were the result of a recurrence of the cited condition. Martinka points to Mine Manager Metz's testimony that, when he personally inspected the belt line on October 23, all rollers were in operating condition. Metz also testified that many of the rollers that Inspector Blair thought were frozen on October 26 were, in fact, operational. He stated that these rollers were simply not being turned by the moving belt at the time of the inspection.

Substantial evidence supports the judge's findings. The judge credited the testimony of Blair and Kincell that some of the violative conditions cited on October 21 continued to exist on October 26. 15 FMSHRC at 107-08. Inspector Blair testified that, when he returned to the mine on October 26, two rollers near the tail piece that had been frozen on October 21 were still frozen. In addition, the inspector observed that many of the missing bottom rollers were still missing on October 26. As a consequence, the belt was still rubbing against the belt structure, although at a different place.

The judge determined that Metz's testimony concerning the replacement or repair of rollers was too vague to rebut the testimony from Blair and Kincell that some of the violative conditions continued to exist on October 26. Id. He concluded that Martinka failed to demonstrate that the violative conditions described in the section 104(a) citation had been abated within the required time but had recurred. Id.

Martinka argues that it had substantially abated the violation by October 26 as a result of its diligent, good faith efforts and, thus, that the inspector's failure to grant an extension was unreasonable. Martinka says that it replaced 15 to 18 belt rollers after being cited, but was required to replace only two additional rollers to terminate the withdrawal order. The judge concluded that the presence of combustible accumulations and ignition sources, such as frozen rollers and the belt rubbing against the belt structure, created a hazard on October 26. 15 FMSHRC at 102. Substantial evidence also supports the judge's finding that Inspector Blair acted reasonably in determining that the abatement time should not be extended.

III.
Conclusion

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

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner