

CCASE:
MSHA V. HALFWAY
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FMSHRC-WDC
JAN 29, 1986

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

v. Docket No. WEVA 85-15

HALFWAY, INCORPORATED

BEFORE: Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

The issue in this civil penalty proceeding is whether a violation of a mine's roof control plan properly was found to be "significant and substantial" within the meaning of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Mine Act"). A citation, issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), alleged that the mine operator, Halfway, Incorporated ("Halfway"), violated 30 C.F.R. § 75.200 by failing to comply with the minimum requirements of its approved roof control plan. Halfway contested the inspector's actions and the jurisdiction of the Commission, an independent adjudicatory agency, attached. Following a hearing on the merits, Commission Administrative Law Judge James A. Broderick affirmed the citation and assessed a civil penalty of \$1,000. 7 FMSHRC 884 (June 1985)(ALJ). We granted Halfway's petition for discretionary review. For the following reasons, we affirm the judge's decision.

Halfway operated the No. 1 Mine, an underground coal mine located in Raleigh County, West Virginia. The mine was a "hilltop" mine, in which entries are driven through the coal seam from the

interior of the mountain towards the outcrop. 1/ Is part of a regular mine inspection

1/ The term "outcrop" is defined as "[t]he part of a rock formation that appears at the surface of the ground" or "[c]oal which appears at or near the surface; the intersection of a coal seam with the surface." Bureau of Mines, U.S. Department of the Interior, A Dictionary of Mining, Mineral, and Related Terms 778 (1968).

~9

conducted on June 20, 1984, MSHA Inspector James Ferguson examined the mine map. It showed that mining operations had advanced within 150 feet of the outcrop on the 001 Second South Section. The inspector asked mine management whether supplemental support had been used in advancing the entry, as required by the mine's approved roof control plan when mining within 150 feet of the outcrop. 2/ He was informed by Donald Hughes, Halfway's general mine foreman, that no supplemental support had been used.

After proceeding underground to inspect the area in question, the inspector observed that the entries had been driven at widths of 20 feet. Room No. 9 had been advanced for a distance of 150 feet beyond the point 150 feet from the outcrop. The last 20 feet of top in that room had deteriorated to such an extent that it had fallen. Similarly, Room No. 8 had been advanced 100 feet beyond the point 150 feet from the outcrop. The inspector also observed deterioration of the roof in that room. Roof bolting provided the sole means of roof support in these areas. At the time of his inspection, the inspector observed no miners in the particular rooms.

Because of these conditions, the inspector issued Halfway a citation alleging a violation of 30 C.F.R. § 75.200. 3/ Pursuant to section 104(d)(1)

2/ Safety Precaution on NO. 15 of Halfway's Minimum Roof-Control Plan provides:

Roof bolts shall not be used as the sole means of roof support when underground workings, approach and/or mining is being done within 150 feet of the outcrop or highwall. Supplemental support shall consist of at least one row of posts on 4-foot spacing, maintained up to the loading machine operator, limiting roadway widths to 16 feet. This does not apply to new openings being developed from the surface.

Ex. G-3 at 11.

3/ 30 C.F.R. § 75.200 provides:

[STATUTORY PROVISIONS]

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

(footnote 3 continued)

~10

of the Act, the inspector found that the violation was of such nature as could contribute significantly and substantially to the cause and effect of a mine safety hazard. The inspector terminated the citation after Halfway abated the condition by dangering-off Room Nos. 8 and 9 and agreed to use supplemental support in the remaining rooms as specified in the roof control plan.

The judge found that Halfway violated 30 C.F.R. § 75.200 by mining within 150 feet of the outcrop without the supplemental support required by its roof control plan. 7 FMSHRC at 885. He found the violation to be serious because roof conditions can deteriorate as mining operations approach the outcrop, and referred to the deterioration of the roof in Room Nos. 8 and 9 as evidence supporting his conclusion. *Id.* The judge stated, "A serious injury or fatality would have been reasonably likely had mining continued." 7 FMSHRC at 885-86. He determined that the violation was therefore of such nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard. 7 FMSHRC at 886.

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard[.]" 30 U.S.C. § 814(d)(1). The Commission first interpreted this statutory language in *Cement Division, National Gypsum Co.*, 3 FMSHRC 822 (April 1981):

[A] violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, if based upon the particular facts surrounding the

Footnote 3 end.

conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form.... The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy

of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives.

~11

violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.

3 FMSHRC at 825. In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission reaffirmed the analytical approach set forth in *National Gypsum*, and stated:

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor 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 contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC at 3-4 (footnote omitted). Accord, *Consolidation Coal Co.*, 6 FMSHRC 34, 37 (January 1984). The Commission has explained further that 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).

On review, Halfway concedes a violation of its roof control plan, but contests the finding that the violation was significant and substantial. It argues that the violation did not contribute to a discrete safety hazard and that no reasonable likelihood existed for an injury. We disagree.

By mining the subject entries within 150 feet of the outcrop without supplemental support and in widths in excess of 16 feet, Halfway violated its roof control plan and, hence, 30 C.F.R. § 75.200. There is ample record evidence to support the judge's finding that this conceded violation contributed to the discrete safety hazard of a roof fall. MSHA Inspector Ferguson testified that the mine had a massive roof structure, which diminished and deteriorated as mining approached the outcrop. He explained that near the outcrop roof conditions could change without warning, and that the deterioration created a danger of roof falls, which could occur suddenly. Clearly, the roof control provision requiring supplemental support within 150 feet of the outcrop was included in the roof control plan in contemplation of those dangers. The inspector confirmed that the

purpose of the supplemental support was to replace some of the roof support lost in driving 20-foot wide entries, by effectively limiting the width of the entries to 16 feet, and to serve as a visual indicator of potential roof movement. Tr. 38-39. This evidence provides substantial support for the judge's finding that the failure to provide the required supplemental support contributed to a discrete hazard of roof falls in the deteriorating mining conditions encountered near the outcrop.

~12

Halfway further challenges the judge's finding that the hazard contributed to by the violation was reasonably likely to result in injury. It argues that the judge improperly assumed the existence of a "continuing violation" because he conditioned his conclusion regarding the likelihood for injury on continued mining activity, and, at the time that the citation was issued, mining in Room Nos. 8 and 9 had already been discontinued.

This argument misconstrues the importance of the timing of the issuance of a citation in the significant and substantial violation context. The fact that a miner may not be directly exposed to a safety hazard at the precise moment that an inspector issues a citation is not determinative of whether a reasonable likelihood for injury existed. The operative time frame for making that determination must take into account not only the pendency of the violative condition prior to the citation, but also continued normal mining operations. *National Gypsum*, supra, 3 FMSHRC at 825; *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984).

It is undisputed that Halfway's miners advanced Room Nos. 8 and 9 for distances of 100 feet and 150 feet, respectively, beyond the point 150 feet from the outcrop without the supplemental support mandated by the mine's roof control plan. This was a major, not minor, departure from the roof control plan and, during that phase of active mining, this violation exposed miners to a roof fall hazard. The undisputed testimony of MSHA Inspector Ferguson clearly supports this finding. The inspector testified that the roof near the face area in the cited rooms had deteriorated to the point that a roof fall was likely to occur. Tr. 41, 53, 70, 77. He also testified that roof bolts would not anchor and that the roof had fallen, exposing mud, dirt, and the roots of grass and trees. Tr. 84-85. The testimony of Halfway's own witness supports the inspector's testimony. See e.g., Tr. 106. This constitutes substantial evidence supporting the conclusion that a reasonable likelihood for injury existed as the cited entries approached the outcrop.

We find further support for the conclusion that it was reasonably likely that the roof fall hazard contributed to by the violation would result in injury had normal mining operations continued because Room Nos. 8 and 9 remained accessible until Halfway abated the citation by dangering-off the entries. Tr. 44. 4/ Active mining was taking place

4/ The evidence is conflicting as to whether Room No. 9 was

dangered-off at the time of the inspection. Compare Tr. 44 with Tr. 94. However, in finding that the violation" was abated by dangering off rooms 8 and 9," 7 FMSHRC at 885, the judge appears to have implicitly credited the MSHA inspector+s testimony and found that Room No. 9 had not been previously dangered-off.

~13

in Room Nos. 3-7 and travelways to the cited areas could have been used by miners. Tr. 29, 43-44, 74. In the absence of any affirmative measures by Halfway to prevent miner exposure to the roof fall hazard found to exist in Room Nos. 8 and 9, a roof fall with resulting injury to a miner remained a reasonable possibility.

Finally, Halfway does not dispute on review that any actual injury from a roof fall would be reasonably serious in nature. Our decisions have stressed the fact that roof falls remain the leading cause of death in underground mines. See e.g., Consolidation Coal Co., supra, 6 FMSHRC at 37-38 & n. 4.

Accordingly, we conclude that the violation in this case properly was found to be "significant and substantial" in that there was a reasonable likelihood that Halfway's noncompliance with the supplemental support requirements of its roof control plan could significantly and substantially contribute to the cause and effect of a roof fall hazard. The decision of the administrative law judge is affirmed. 5/

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

5/ Chairman Ford assumed office after this case had been considered at a Commission decisional meeting and took no part in the decision.

~14

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