

CCASE:  
KENTUCKY CARBON V. SOL (MSHA)  
DDATE:  
19800529  
TTEXT:

Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

KENTUCKY CARBON CORPORATION,  
APPLICANT

Application for Review

v.

Docket No. KENT 79-142-R

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

Order No. 704007  
May 9, 1979

Kencar No. 1 Mine

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

Civil Penalty Proceeding

Docket No. KENT 80-171  
Assessment Control  
No. 15-02107-03021 H

v.

Kencar No. 1 Mine

KENTUCKY CARBON CORPORATION,  
RESPONDENT

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
ON BEHALF OF ERNIE FULLER,  
FRANKIE PRATER, ERVIN HURLEY,  
DARRELL VARNEY, RONNIE RATLIFF,  
RONNIE CASEY, TERRY HAGER, AND  
DONALD EPLING,  
COMPLAINANTS

Complaint of Discharge,  
Discrimination, or Interference

Docket No. KENT 79-344-D

Kencar No. 1 Mine

v.

KENTUCKY CARBON CORPORATION,  
RESPONDENT

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
ON BEHALF OF LARRY SIMKINS,  
RICHARD A. DOTSON, DARRELL  
REYNOLDS, RICKY JUSTUS, AND  
GARY D. VARNEY,  
COMPLAINANTS

Complaint of Discharge,  
Discrimination, or Interference

Docket No. KENT 79-352-D

Kencar No. 1 Mine

v.

KENTUCKY CARBON CORPORATION,  
RESPONDENT

~1254

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
ON BEHALF OF LARRY SIMPKINS,  
COMPLAINANT

Complaint of Discharge,  
Discrimination, or Interference

Docket No. KENT 79-353-D

Kencar No. 1 Mine

v.

KENTUCKY CARBON CORPORATION,  
RESPONDENT

DECISION APPROVING SETTLEMENT

Appearances: C. Lynch Christian III, Esq., Jackson, Kelly,  
Holt & O'Farrell, Charleston, West Virginia,  
for Kentucky Carbon Corporation William F.  
Taylor, Esq., Office of the Solicitor, U.S.  
Department of Labor, for Complainants

Before: Administrative Law Judge Steffey

When the hearing in the above-entitled consolidated proceeding was convened in Pikeville, Kentucky, on March 25, 1980, counsel for the parties stated that they had been able to settle all of the issues involved and asked that I approve the settlement agreements which they had reached in the interrelated cases.

Docket No. KENT 79-142-R

The Application for Review filed in Docket No. KENT 79-142-R contended that Order No. 704007 issued May 9, 1979, under section 107(a) of the Federal Coal Mine Health and Safety Act of 1977 was invalid because no imminent danger existed at the time the order was issued. Order No. 704007 alleged the existence of an imminent danger because a portion of the roof in the No. 9 Longwall Section had dropped down and two miners were working on the roof near the No. 8 Chock.

Counsel for Kentucky Carbon stated that he wanted to withdraw his Application for Review of Order No. 704007 because MSHA had agreed that the two miners were not exposed to an imminent danger and that the violation of section 75.200 had been written because a danger board, posted by the company before the inspector's arrival, had been knocked down so that it was not apparent to the inspector that the company had recognized existence of the bad roof conditions and was correcting them at the time the order was written.

Docket No. KENT 80-171

The Proposal for Assessment of Civil Penalty filed in Docket No. KENT 80-171 seeks assessment of a civil penalty for the violation of section 75.200 alleged in Order No. 704007 which is the subject of the Application for Review filed in Docket No. KENT 79-142-R discussed above. Counsel for the parties stated that under the settlement agreement reached by the parties,

respondent had agreed to pay a penalty of \$50 for the violation

~1255

of section 75.200 alleged in Order No. 704007 instead of the penalty of \$563 proposed by the Assessment Office. In support of their settlement agreement, the parties presented the facts hereinafter discussed to show how they had considered the six criteria set forth in section 110(i) of the Act.

As to the size of respondent's business, the Kencar No. 1 Mine here involved produces about 1,700 tons of coal per day. Kentucky Carbon Corporation is a wholly owned subsidiary of Carbon Fuel Company which is a moderate to large-sized operator. Counsel for Kentucky Carbon stated that payment of penalties would not cause the company to discontinue in business.

Exhibit 1 was introduced at the hearing to present facts pertaining to Kentucky Carbon's history of previous violations. That exhibit shows that the company is endeavoring to reduce the number of violations of section 75.200 which have occurred at its Kencar No. 1 Mine. There were seven violations of section 75.200 in 1977, two in 1978, and 1 in 1979. That trend in the reduction of violations of section 75.200 justifies only a nominal penalty under the criterion of history of previous violations.

As to the criterion of negligence, the parties agreed that the roof had dropped down as stated in the inspector's order, but the condition of the roof did not occur because of any failure on the part of respondent to follow the roof-supporting provisions of its roof control plan. Kentucky Carbon was, therefore, not negligent with respect to occurrence of the violation.

With respect to the criterion of gravity, it must be borne in mind that the violation of section 75.200 related to the fact that the danger board had either fallen down or had been taken down. The parties agreed that regardless of the reason that the danger board was not in a proper position, the miners on the longwall section were aware of the condition of the roof and the two men described in the inspector's order were under the four legs of a longwall chock and were therefore not exposed to the dangers of the roof which did exist over the top tips of the chocks. The miners were working on the chocks to assist in correcting the conditions that existed.

With respect to the criterion of whether Kentucky Carbon demonstrated a good faith effort to achieve rapid compliance, the facts show that Kentucky Carbon's employees had discovered the condition of the roof, had posted the existence of the bad roof condition in the preshift book, had posted a danger board, had adopted a plan for correcting the roof condition, and were in the process of correcting the condition when the order was written.

I find that the parties presented facts showing adequate consideration of the six criteria and giving satisfactory reasons for approving the settlement agreement under which respondent will pay a penalty of \$50.

The complainants in Docket No. KENT 79-344-D alleged that they were illegally discharged because they withdrew from the No. 10 Longwall Section after finding equipment which would not deenergize when overloaded and after learning that the two-way communication facilities would not function.

~1256

Counsel for complainants stated at the hearing that he had agreed to withdraw the complaint in Docket No. KENT 79-344-D because the matters at issue in that docket have been the subject of an arbitration hearing which resulted in resolution of all issues in a manner satisfactory to the miners, namely, the payment to the miners of all back pay from the date of their suspension with intent to discharge.

Docket No. KENT 79-352-D

The complaint in Docket No. KENT 79-352-D contended that the miners had been illegally discharged when they objected to the unsafe manner in which management had instructed them to correct a hazardous roof condition in the No. 9 Longwall Section. Counsel for the complainants stated that he had agreed to withdraw the complaint in Docket No. KENT 79-352-D because Kentucky Carbon has agreed to pay each of the five complainants in this case back pay for 4 days, 2-1/2 hours representing one-half of the time they were off from work as a result of the activities which occurred on May 8, 1979, and which were the subject of their complaint.

Docket No. KENT 79-353-D

The complaint in Docket No. KENT 79-353-D alleged that management had ordered complainant to leave mine property and had refused to let him examine allegedly unsafe conditions in the No. 10 Longwall Section in his capacity as the representative of the miners. Counsel for complainant indicated at the hearing that he would withdraw the complaint in Docket No. KENT 79-353-D because Kentucky Carbon's management has recognized his right to act as a safety committeeman on the day in question, that is May 8, 1979.

With respect to all of the discrimination cases, Kentucky Carbon has agreed to remove from the personnel files of each of the complainants all references to the suspensions with intent to discharge which were the subject of the complaints.

I find that satisfactory reasons were given at the hearing to justify granting the requests to withdraw the three discrimination complaints. The complaining miners were present at the hearing and indicated that they were satisfied with the outcome of the settlement negotiations. I have been orally advised by the Secretary's counsel that the back pay which Kentucky Carbon agreed to pay the complainants has been received by the complainants.

WHEREFORE, it is ordered:

(A) The motion of Kentucky Carbon for withdrawal of its Application for Review in Docket No. KENT 79-142-R is granted and the Application for Review is deemed to have been withdrawn.

(B) The parties' motion for approval of the settlement agreement reached in Docket No. KENT 80-171 is granted and the settlement agreement is approved.

(C) Pursuant to the settlement agreement, Kentucky Carbon, within 30 days from the date of this decision, shall pay a civil penalty of \$50 for the violation of section 75.200 alleged in Order No. 704007 dated May 9, 1979.



~1257

(D) The requests by the Secretary's counsel for permission to withdraw the complaints filed in Docket Nos. KENT 79-344-D, KENT 79-352-D, and KENT 79-353-D are granted and the complaints in those dockets are deemed to have been withdrawn.

(E) All further proceedings in Docket Nos. KENT 79-142-R, KENT 80-171, KENT 79-344-D, KENT 79-352-D, and KENT 79-353-D are terminated.

Richard C. Steffey  
Administrative Law Judge  
(Phone: 703-756-6225)