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SOL (MSHA) V. DKT COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding
	Docket No. KENT 79-349
	A/O No. 15-11001-03005
v.	No. 3 Mine
DKT COAL COMPANY, RESPONDENT	

DECISION

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner Roy Darrell Coleman, Co-Owner, DKT Coal Company, Elkhorn City, Kentucky, for Respondent

Before: Judge Cook

I. Procedural Background

On October 15,, 1979, the Mine Safety and Health Administration (Petitioner) filed a proposal for a penalty in the above-captioned case pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1978) (1977 Mine Act), alleging five violations of various provisions of the Code of Federal Regulations as set forth in citations issued pursuant to section 104(a) of the 1977 Mine Act. DKT Coal Company (Respondent) filed an answer on October 31, 1979.

The hearing was held on July 16, 1980, in Pikeville, Kentucky. Representatives of both parties were present and participated. An oral motion was made requesting approval of settlement as relates to Citation No. 706588, and evidence was presented as relates to the four remaining citations.

The parties waived the filing of posthearing briefs and proposed findings of fact and conclusions of law.

II. Violations Charged

Citation No. 706554, February 26, 1979, 30 C.F.R. 75.523-1
Citation No. 706555, February 26, 1979, 30 C.F.R. 75.316
Citation No. 706556, February 26, 1979, 30 C.F.R. 75.1722
Citation No. 706558, February 27, 1979, 30 C.F.R. 75.316
Citation No. 706559, February 27, 1979, 30 C.F.R. 75.400

III. Witness and Exhibits

A. Witness

Petitioner called Federal mine inspector Franklin Goble as a witness. Respondent did not call any witnesses.

B. Exhibits

1. Petitioner introduced the following exhibits in evidence:

M-1 is a copy of Citation No. 706554, February 26, 1979, 30 C.F.R. 75.523-1, and a copy of the termination thereof.

M-2 is a copy of the inspector's statement pertaining to M-1.

M-3 is a copy of Citation No. 706555, February 26, 1979, 30 C.F.R. 75.316, and a copy of the termination thereof.

M-4 is a copy of the approved ventilation system and methane and dust control plan for the 001-0 working section of Respondent's No. 3 Mine, in effect on February 26, 1979.

M-5 is a copy of the inspector's statement pertaining to M-3.

M-6 is a copy of Citation No. 706556, February 26, 1979, 30 C.F.R. 75.1722, and a copy of the termination thereof.

M-7 is a copy of the inspector's statement pertaining to M-6.

M-8 is a copy of Citation No. 706558, February 27, 1979, 30 C.F.R. 75.316, and a copy of the termination thereof.

M-9 is a copy of the inspector's statement pertaining to M-8.

M-10 is a copy of Citation No. 706559, February 27, 1979, 30 C.F.R. 75.400, and a copy of the termination thereof.

M-11 is a copy of the inspector's statement pertaining to M-10.

2. Respondent did not introduce any exhibits in evidence.

IV. Issues

Two basic issues are involved in the assessment of a civil penalty: (1) did a violation of a mandatory health or safety standard occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the

penalty to the size of the

operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V. Opinion and Findings of Fact

A. Stipulations

1. Respondent's No. 3 Mine is subject to the provisions of the 1977 Mine Act (Tr. 8-9).

2. Franklin D. Goble is an authorized representative of the Secretary of Labor for the purpose of conducting inspections under the 1977 Mine Act (Tr. 8-9).

3. Respondent's No. 3 Mine produced approximately 40,000 tons of coal in 1979 (Tr. 8-9).

4. The company controlling the No. 3 Mine produced approximately 112,000 tons of coal in 1979 (Tr. 8-9).

5. Respondent has no history of previous violations at the No. 3 Mine for the 24-month period prior to February 27, 1979 (Tr. 8-9).

6. The conditions cited in the five citations at issue in this proceeding were terminated within the time period allotted (Tr. 8-9).

B. Occurrence of Violations, Negligence of the Operator, and Gravity of the Violations

1. Citation No. 706554, February 26, 1979, 30 C.F.R. 75.523-1

Citation No. 706554 was issued at Respondent's No. 3 Mine by Federal mine inspector Franklin Goble at approximately 12 noon on February 26, 1979. The citation alleges a violation of mandatory safety standard 30 C.F.R. 75.523-1 in that the emergency deenergizing device on the Lee Norris roof bolter (Serial No. 22092), located on the 001-0 section, was not in operating order (Exh. M-1). The cited mandatory safety standard provides as follows:

> (a) Except as provided in paragraphs (b) and (c) of this section, all self-propelled electric face equipment which is used in the active workings of each underground coal mine on and after March 1, 1973, shall, in accordance with the schedule of time specified in paragraphs (a)(1) and (2) of this section, be provided with a device that will quickly deenergize the tramming motors of the equipment in the event of an emergency. The requirements of this paragraph (a) shall be met as follows:

(1) On and after December 15, 1974, for self-propelled cutting machines, shuttle cars, battery-powered machines, and roof drills and bolters;

(2) On and after February 15, 1975, for all other types of self-propelled electric face equipment.

(b) Self-propelled electric face equipment that is equipped with a substantially constructed cab which meets the requirements of this part, shall not be required to be provided with a device that will quickly deenergize the tramming motors of the equipment in the event of an emergency.

(c) An operator may apply to the Assistant Administrator-Technical Support, Mine Safety and Health Administration, Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 for approval of the installation of devices to be used in lieu of devices that will quickly deenergize the tramming motors of self-propelled electric face equipment in the event of an emergency. The Assistant Administrator-Technical Support may approve such devices if he determines that the performance thereof will be no less effective than the performance requirements specified in 75.523-2.

The testimony of Inspector Goble is in accord with the allegations set forth in the citation (Tr. 16-18). His testimony further reveals that the cited roof-bolting machine was self-propelled face equipment within the meaning of the regulation, and that the machine was canopy-equipped, not cab-equipped (Tr. 16-17, 27). In view of the latter consideration, the exemption set forth in 30 C.F.R. 75.523-1(b) is inapplicable. Additionally, no evidence was presented by Respondent establishing the applicability of the exemption set forth at 30 C.F.R. 75.523-1(c).

In view of the foregoing, it is found that a violation of 30 C.F.R. 75.523-1 has been established by a preponderance of the evidence.

No evidence was presented establishing how long the condition had been in existence prior to the issuance of the citation. However, the machine was in the face area of a coal-producing section, and the foreman, Mr. James Coleman, was in the face area with the crew (Tr. 20, 59-60). Accordingly, Respondent knew or should have known of the condition. Ordinary negligence has been established by a preponderance of the evidence.

An occurrence of the event against which the standard is directed was probable. In the event of an occurrence, one person would have been exposed to physical injuries resulting in lost work days or restricted duty. The low mining height, i.e, 40 inches, might have increased the likelihood or severity of the event (Tr. 21-23, Exh. M-2). Accordingly, it is found that the

violation was accompanied by moderate gravity.

2. Citation No. 706555, February 26, 1979, 30 C.F.R. 75.316

Citation No. 706555 was issued at Respondent's No. 3 Mine by Inspector Goble at approximately 12:30 p.m. on February 26, 1979. The citation alleges a violation of mandatory safety standard 30 C.F.R. 75.316 in that: "The approved ventilation system, dust and methane control plan was not being complied with in that the air ventilation was not being controlled on the 001-0 section by means of check curtains and the wing curtain was 30 feet back from the face where coal was being mined" (Exh. M-3, Tr. 29-30). The cited mandatory safety standard provides as follows:

> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

The portion of the regulation at issue in the instant case requires the mine operator to adopt a ventilation system and methane and dust control plan approved by the Secretary. The mine operator violates 30 C.F.R. 75.316 by failing to comply with the approved plan. Peabody Coal Company, 8 IBMA 121, 84 I.D. 469, 1977-1978 OSHD par. 22,111 (1977); Zeigler Coal Company, 4 IBMA 30, 82 I.D. 36, 1974-1975 OSHD par. 19,237 (1975); aff'd. sub nom. Zeigler Coal Company v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976). The inspector's testimony reveals that the citation alleges the existence of two separate conditions that fail to comply with two separate provisions of the approved plan.

As relates to the first condition, the inspector's testimony establishes that the wing curtain terminated at a point 30 feet outby the face (Tr. 29-30, 38). The continuous miner was cutting coal from the face mentioned in the citation when the inspector observed the condition (Tr. 40-41). The applicable provision of the approved plan required the curtain or other approved device to "be installed and maintained to within ten feet of the point of deepest penetration where coal is being cut, drilled, mined, or loaded unless otherwise specified by the District Manager" (Exh. M-4, p. 4; Tr. 31-32). The district manager had not specified otherwise, and no other approved devices were in use at the time (Tr. 32). Accordingly, it is found that the wing curtain terminated at a point 30 feet outby the face where coal was being mined, and that such condition violated the applicable provision of the plan.

The second condition cited is the failure to use check curtains to control the ventilation. In fact, Respondent was not

using any check

curtains (Tr. 40), and it was the inspector's opinion that the failure to use such curtains violated the provisions of the approved plan. The inspector's testimony reveals that check curtains are those curtains used outby the last open crosscut to maintain proper air flow from an intake to a return (Tr. 38-40), and that a map or sketch should have been attached to the approved plan designating their location (Tr. 38-40). Such map or sketch is not attached to Exhibit M-4. Without the map or sketch, the inspector was unable to point to a provision in the approved plan specifically requiring the use of check curtains outby the last open crosscut as a ventilation control device. Accordingly, it is found that Petitioner has failed to establish by a preponderance of the evidence that the absence of check curtains violated the approved plan.

In view of the foregoing, the discussion of the statutory penalty assessment criteria will be confined to the condition constituting a proved violation of the approved plan.

Respondent knew or should have known that the wing curtain terminated at a point 30 feet outby the face. Such actual or constructive knowledge is attributable to the presence of Mr. James Coleman, the foreman, in the area (Tr. 33). Accordingly, it is found that Respondent demonstrated ordinary negligence.

The occurrence of the event against which the standard is directed was probable. The possible events included a methane or dust ignition, or inhalation of the dust. Two persons would have been exposed to injuries resulting in lost work days to restricted duty (Exh. M-5, Tr. 34). Accordingly, it is found that the violation was accompanied by moderate gravity.

3. Citation No. 706556, February 26, 1979, 30 C.F.R. 75.1722

This citation was issued at Respondent's No. 3 Mine by Inspector Goble at approximately 1 p.m. on February 26, 1979. The citation alleges a violation of mandatory safety standard 30 C.F.R. 75.1722 in that the blower motor belts on the Lee Norris roof bolter (Serial No. 220092) were not properly guarded (Exh. M-6). The cited mandatory safety standard provides, in pertinent part, as follows: "(a) Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings, shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded."

The inspector's testimony reveals that the blower motor belts on the machine were not properly guarded, and that such belts were exposed moving machine parts which could have been contacted by, and which could have caused injury to, the operator of the machine. The blower motor and belts were located inside a 6- to 12-inch opening in the structure of the machine. The opening was located near the seat on the operator's side. While tramming the machine, the machine operator would have been within 6 to 12 inches from the pulley and belts. A hand, an arm or clothing could have achieved physical contact with, and could

have been caught by, the belts (Tr. 41-42). Yet, no

guard was present (Tr. 45). Accordingly, it is found that a violation of 30 C.F.R. 75.1722 has been established by a preponderance of the evidence.

The condition should have been detected during the weekly examination of electric equipment required by 30 C.F.R. 75.512 and 75.512-2. Furthermore, the machine was in operation at the time (Tr. 43) and the condition should have been detected by supervisory personnel on the section. Accordingly, Respondent knew or should have known of the condition. It is therefore found that Respondent demonstrated ordinary negligence.

The occurrence of the event against which the standard is directed was probable. In the event of an occurrence, one person would have been exposed to physical injuries resulting in lost work days or restricted duty (Tr. 44, Exh. M-7). Accordingly, it is found that the violation was accompanied by moderate gravity.

4. Citation No. 706559, February 27, 1979, 30 C.F.R. 75.400

This citation was issued at Respondent's No. 3 Mine by Inspector Goble at approximately 1 p.m. on February 27, 1979. The citation alleges a violation of mandatory safety standard 30 C.F.R. 75.400 in that "loose coal and coal float dust has been allowed to accumulate along the No. 1 conveyor belt in depth of [sic] 1/4 to 6 inches in depth. This condition existed from 300 feet inby the drift to the dump, approximately 600 feet" (Exh. M-10, Tr. 46). The cited mandatory safety standard provides as follows: "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."

The accumulation of loose coal extended for a distance of 600 feet along the No. 1 conveyor belt. It was piled up along side the belt and under the belt, and was approximately 42 inches wide. A 6-inch depth measurement could be obtained at the bottom of the belt stands, i.e., at approximately 12-foot intervals. At such locations, the accumulations of loose coal measuring 6 inches in depth were approximately 3 to 4 feet long, and the 6-inch depth was as wide as 42 inches in places (Tr. 50-52).

The float coal dust accumulation along the No. 1 conveyor belt was approximately 600 feet in length, approximately 20 feet wide and approximately one-fourth of an inch in depth (Tr. 50, 52-53).

In view of the foregoing, it is found that accumulations of loose coal and float coal dust existed in the active workings of Respondent's No. 3 Mine. The existence of such accumulations in the active workings was a violation of 30 C.F.R. 75.400. Old Ben Coal Company, 1 FMSHRC 1954, 1979 OSHD par 24,084 (1979).

The active workings of a coal mine must be examined by a certified person, designated by the operator, within 3 hours preceding the beginning

of any shift and before any miners in such shift enter the mine's active workings, and belt conveyors on which coal is carried must be examined after each coal-producing shift has begun. 30 C.F.R. 75.303. The loose coal could have accumulated in one shift but the accumulation of float coal dust would have required at least 1 month to reach the level observed by the inspector (Tr. 48, 54-55). The condition should have been detected during the aforementioned required examinations, and therefore Respondent knew or should have known of their existence. Accordingly, it is found that Respondent demonstrated ordinary negligence as relates to the accumulation of loose coal, and gross negligence as relates to the accumulation of float coal dust.

The conveyor belt was in operation and was transporting coal when the citation was issued. Accumulations were present around the idlers and pulleys (Tr. 47). Float coal dust has a recognized potential for causing explosions, and coal and float coal dust can cause the belt rollers to heat up and thereby precipitate a fire (Tr. 47-48). The occurrence of the event against which the standard is directed was probable (Tr. 49, Exh. M-11). The inspector was of the opinion that an occurrence would result in "no lost workdays" (Exh. M-11) because the belt line was well ventilated up to the dump and up to the face. In his opinion, a fresh air escapeway would have been present in the event of fire, thus enabling the men to escape from the mine without "being in smoke" (Tr. 49). However, this does not end the inquiry because the accumulation of float coal dust was extensive. It is well known that float coal dust has the potential to cause or extend an explosion. The presence of loose coal and float coal dust around the idlers and pulleys indicates that a potential ignition source, i.e., friction, was present. An occurrence would have affected all men on the section (Tr. 49).

Accordingly, it is found that the violation was serious.

C. Good Faith in Attempting Rapid Abatement

The parties stipulated that all cited conditions were terminated within the time period provided therefor (Tr. 8-9). Accordingly, it is found that Respondent demonstrated good faith in attempting rapid abatement.

D. History of Previous Violations

The parties stipulated that Respondent has no history of previous violations at the No. 3 Mine for the 24-month period to February 27, 1979 (Tr. 8-9). No evidence was presented establishing a history of previous violations for which assessments have been paid at any of Respondent's other mining operations.

Accordingly, it is found that Respondent has no history of previous violations cognizable in this proceeding.

E. Size of the Operator's Business

The parties stipulated that the No. 3 Mine produced approximately 40,000 tons of coal in 1979, and that the controlling company produced approximately 112,000 tons of coal in 1979 (Tr. 8-9). Accordingly, it is found that Respondent is a small operator.

F. Effect of a Civil Penalty on Respondent's Ability to Remain in Business

No evidence was presented establishing that the assessment of civil penalties will affect Respondent's ability to remain in business. Accordingly, it is found that civil penalties otherwise properly assessed in this proceeding will not impair Respondent's ability to remain in business. See, Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1971-1973 OSHD par. 15,380 (1972).

VI. Motion to Approve Settlement

The proposed settlement is identified as follows:

Citation No.	Date	30 C.F.R. Standard	Assessment	Settlement
706558	2/27/79	75.316	$ 98	$ 98

The citation alleges a failure to comply with the approved ventilation system and methane and dust control plan in that the 001-0 section had been advanced seven crosscuts inby permanent stoppings. The approved plan required permanent stoppings up to, and including, the third crosscut (Tr. 12, Exh. M-8).

Information as to the six statutory criteria contained in section 110 of the Act has been submitted, which includes a copy of the inspector's statement describing the violation in terms of negligence, gravity and good faith (Exh. M-9). This information has provided a full disclosure of the nature of the settlement and the basis for the original determination. Thus, the parties have complied with the intent of the law that settlement be a matter of public record.

The motion to approve settlement was set forth on the record orally, and states as follows:

> JUDGE COOK: This Hearing will come to order.
>
> Now, did you Mr. Stewart, have a chance to discuss with Mr. Coleman a settlement?
>
> MR. STEWART: Yes, Your Honor. My understanding we agreed to settle the contested citation #706-558 in that as previously stated, DKT Coal Company admits the facts

of violation in that citation. After discussing the matter with Mr. Coleman move to approve the settlement, approve the assessment in the amount of Ninety-eight ($98.00) Dollars which was the original penalty.

JUDGE COOK: Is that agreeable, Mr. Coleman?

MR. COLEMAN: It wasn't agreeable but we settled on it.

(Tr. 64-65).

After according the information submitted due consideration, it has been found to support the proposed settlement. It therefore appears that a disposition approving the settlement will adequately protect the public interest. An order will be issued approving the proposed settlement.

VII. Conclusions of Law

1. DKT Coal Company and its No. 3 Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to this proceeding.

2. Under the 1977 Mine Act, the Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.

3. Federal mine inspector Franklin Goble was a duly authorized representative of the Secretary of Labor at all times relevant to this proceeding.

4. The violations charged in Citation Nos. 706554, 706556, 706558, and 706559 are found to have occurred as alleged. One of the violations charged in Citation No. 706555 is found to have occurred as alleged.

5. All of the conclusions of law set forth previously in this decision are reaffirmed and incorporated herein.

VIII. Penalty Assessed

Upon consideration of the entire record in this case and the foregoing findings of fact and conclusions of law, I find that the assessment of civil penalties is warranted as follows:

Citation No.	Date	30 C.F.R. Standard	Penalty	
706554	2/26/79	75.523-1	$ 70.00	
706555	2/26/79	75.316	45.00	
706556	2/26/79	75.1722	65.00	
706558	2/27/79	75.316	98.00	(settlement)
706559	2/27/79	75.400	150.00	
			$428.00	

ORDER

The proposed settlement outlined in Part VI, supra, is APPROVED.

Respondent is ORDERED to pay civil penalties in the total amount of $428 within 30 days of the date of this decision.

John F. Cook
Administrative Law Judge