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

KITT ENERGY CORPORATION,  
CONTESTANT

v.

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

Contest of Citation

Docket No. WEVA 83-65-R  
Citation 2020054 12/1/82  
Order No. 2020054-1 12/22/82

Kitt No. 1 Mine

Appearances: B. K. Taoras, Esq., Meadow Lands, Pennsylvania, appeared  
for Contestant  
Howard Agran, Esq., Office of the Solicitor, U.S.  
Department of Labor, Philadelphia, Pennsylvania,  
appeared for Respondent

DECISION

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

Contestant filed a notice of contest on December 10, 1982, contesting a citation issued on December 1, 1982, by MSHA charging a violation of 30 C.F.R. 75.1722. The notice contended that the Contestant did not violate the standard as alleged, that the violation charged could not have significantly and substantially contributed to the cause and effect of a mine health or safety hazard and that it was not caused by the unwarrantable failure of the operator to comply with the standard. Contestant filed a motion for an expedited hearing with its notice of contest. Respondent filed a statement in opposition to the motion for expedited review, but the parties subsequently agreed that a hearing be called for January 12, 1983. Pursuant to notice, the case was heard in Washington, Pennsylvania on January 12 and 13, 1983.

On January 12, 1983, prior to the commencement of the hearing, Contestant filed a supplement to its notice of contest challenging the "modification" of the contested citation on December 22, 1982, (the supplement erroneously states that the modification was issued December 28, 1982), whereby the citation was changed to an order of withdrawal issued under section 104(d)(2) of the Act. The order was itself modified on January 10, 1983, to delete the "significant and substantial" finding. The parties agreed that this case now involves the propriety of the order of withdrawal.

John Paul Phillips, a federal mine inspector, Michael Niggemyer, and James Lloyd Davis testified on behalf of the Secretary-Respondent. Joseph D. Mock, Kirby Smith, and Robert McAtee testified on behalf of the Operator-Contestant. Two miners at the subject mine, Franklin D. Raddish and Gregory A. Riley, filed requests prior to the hearing that they be recognized as parties to this proceeding. At the hearing they explained that they wished to be present for the hearing but did not wish to take part in examining witnesses or introducing evidence. Contestant moved for the sequestration of witnesses. In granting the motion, I permitted one of the above miners to remain in the hearing room as a representative of the miners at the subject mine, even though the Solicitor stated he might call them as witnesses. Contestant objected, but since neither miner was in fact called as a witness, the objection is moot. The parties waived their right to file written briefs.

Based on the entire record and considering the contentions of the parties, I make the following decision.

#### FINDINGS OF FACT

1. At all times pertinent to this proceeding, Kitt Energy Corporation was the owner and operator of a coal mine in Barbour County, West Virginia, known as the Kitt No. 1 Mine.

2. The operation of the subject mine affects interstate commerce.

3. MSHA began a complete quarterly inspection ("AAA inspection") of the subject mine on July 2, 1982, and completed it on September 28, 1982. Another quarterly inspection was begun on October 14, 1982. This inspection continued until December 17, 1982. During the former inspection a withdrawal order was issued under section 104(d)(2) of the Act on July 14, 1982, alleging a violation of 30 C.F.R. 75.1704.

4. A special technical inspection ("CEF investigation") was commenced on July 19, 1982 and completed on August 6, 1982.

5. All the active sections of the mine were visited by MSHA inspectors (in either the regular inspection or the technical inspection) between July 19, 1982 and September 28, 1982.

#### DISCUSSION

The operator's safety supervisor, Robert McAtee, testified that a new regular inspection was commenced on July 19, 1982, and completed ("closed out") on September 28, 1982. It appears from Inspector Phillip's testimony that McAtee is mistaken. The regular inspection which commenced on July 2, 1982, was not completed until September 28, 1982. The inspection which began on July 19, 1982, was a technical inspection. During such an inspection the inspector can issue citations for any violation he encounters. However, he is concentrating on the technical problems which prompted the investigation.

6. The bin area of the subject mine contains a large bin holding many tons of coal into which the belts coming from the face-areas dump. A vibrator screen starts the flow of coal and a scalping screen separates the smaller from the larger pieces. The former area sent to the slope belt and thence to the surface; the latter are fed into a crusher. The vibrating machine has an "eccentric," also called a balance wheel, which turns and is attached to a shaft which causes the vibrating machine to vibrate. There was an on-off switch in the bin area, but the scalping screen can be turned on from the preparation plant even though the switch in the bin area is off.

7. The belt drive between the motor and the eccentric was covered with a guard -- an 8 inch wide sheet metal frame on top and on both ends to which a screen was attached on the front (away from the eccentric). The right upper corner of the screen was torn away from the frame as of December 1, 1982, and the screen, which had been welded to the frame, was loose. It was not anchored to the floor.

8. The lower frame of the guard was 23 inches above the floor, and the upper frame was 49 inches from the floor, on December 1, 1982. Thus, there was an area of 23 inches from the floor not covered by the screen.

9. The floor in question consisted of metal grating.

10. On December 1, 1982, the eccentric did not have a guard affixed to it. The eccentric turns at approximately 735 revolutions per minute. On December 1, 1982, its highest point when turning was approximately 4 inches above the top of the frame of the belt drive guard.

#### DISCUSSION

Inspector Phillips and Mr. Niggemyer both testified that the eccentric came above the belt drive guard when it revolved. I found their testimony more persuasive on this point than the contradictory testimony of Mr. Mock.

11. A guard had been attached to the eccentric but was damaged and loosened in approximately September, 1982. The operator fabricated a replacement in its shop and installed it on October 2, 1982. The guard lasted less than one day. A replacement was made and reinstalled but it too did not last. On October 25, 1982, a wire or rope was stretched around the scalping screen area and a guard was ordered from the equipment manufacturer. This wire was present 4 or 5 days prior to December 1, 1982, but was not present on December 1. The wire did not contain a "danger" sign and there is no indication that the people working in the bin area were instructed by the operator to avoid the area.

12. Normally, three men work in the bin area--one on each shift. The duties of a bin man include cleaning up coal spillage. There is generally some spillage in the area of the

screen and it often extended under the guard screen in front of the pulley. The bin man was required to shovel fine coal spillage from under the screen.

13. The preshift examiners report book ("fireboss book") maintained at the subject mine contained references to the shaker balance wheel beginning on November 19, 1982. On November 20, there is a notation that it was "guarded and cleared." On November 22, the absence of a guard was noted on the day shift and afternoon shift. On November 23, 24, 25, 26, 27, 28, 29 and 30, it was noted on all three shifts that the balance wheel needed a guard. On the midnight shift, December 1, the absence of a guard was also noted.

14. A preshift examiner is a certified employee and in the subject mine is a member of the Union and not considered part of management. He is required to note in the preshift report all health and safety violations and other hazardous conditions. He has the authority to "danger off" an area which he deems hazardous.

15. The chairman of the Union Safety Committee told the operator about the unguarded eccentric on a number of occasions in September and October, 1982.

16. On December 1, 1982, Federal coal mine electrical inspector John Paul Phillips inspected the bin area of the mine accompanied by Joseph D. Mock, the operator's chief electrician, and Michael Niggemyer, the union walkaround representative. Niggemyer was told by the fireboss about the guard being missing from the eccentric and so informed the inspector. Niggemyer was employed as an electrical trainee and had worked as a bin man in the area in question.

17. On December 1, 1982, Inspector Phillips issued a citation under section 104(d)(1) charging a "significant and substantial" violation of 30 C.F.R. 75.1722(a) because a guard was missing from the eccentric on the scalping screen and the guard over the belt drive was not adequate. The citation was terminated by the erection of a screen and barrier preventing employees from entering the area. This was accomplished the same day. Later in early December the eccentric guard was received from the manufacturer and installed the same day. The screen in front of the pulley was extended to the floor and bolted to the frame.

18. Inspector Phillips issued a citation because he was not aware that a 104(d) series was in effect at the subject mine. He was not the regular inspector and was apparently misinformed by the regular inspector.

19. After returning to his office Inspector Phillips learned that the mine was on a "(d) series." He then "modified" the citation to a 104(d)(2) order and, apparently under instructions from his superiors, deleted the significant and substantial finding.

20. On December 1, 1982, the eccentric or balance wheel in the subject mine was unguarded. This was a moving machine part. Since it turned above the belt drive screen it was such that it

might be contacted by employees in the bin area and cause injury. The belt drive screen had a broken area in its upper right corner and did not extend to the floor. The screen did

extend to the bottom of the belts and pulleys. However, it is possible that an employee could contact the belt or pulley if he shovelled under the screen. The broken area in the upper right hand corner did not directly expose the belts or pulleys but an employee could accidentally reach through this area and contact the moving machinery. This resulted in the possibility of employees contacting the belt drive through the opening or under the screen and sustaining injuries. Further, the screen was loose and could have been pushed into the moving pulley.

#### STATUTORY PROVISIONS

Section 104(d) of the Act provides as follows:

(d)(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (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.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who find upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.



REGULATORY PROVISION

30 C.F.R. 75.1722(a) provides 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."

ISSUES

1. Was the 104(d)(2) order challenged in this proceeding invalid because it was not issued "promptly?"
2. Was there an inspection of the mine disclosing no similar violations between the 104(d) order issued July 14, 1982, and the order challenged herein?
3. Was a violation of 30 C.F.R. 75.1722(a) established as of December 1, 1982?
4. If the answer to question 3 is affirmative, was the violation caused by the unwarrantable failure of the operator to comply with the applicable safety standard?

CONCLUSIONS OF LAW

1. Contestant was subject to the provisions of the Federal Mine Safety and Health Act in the operation of Kitt No. 1 Mine at all times pertinent hereto, and the undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.
2. The withdrawal order issued under 104(d)(2) of the Act which is challenged in this proceeding is not invalid because it was not issued "promptly."

DISCUSSION

Section 104(d)2) of the Act provides that when a withdrawal order has been issued under 104(d)(1), another withdrawal order "shall promptly be issued" if an inspector finds a violation similar to that which resulted in the first order. The inspector here found what be considered such a violation on December 1, 1982. He issued the withdrawal order (by a "modification" of a citation) on December 22, 1982. The delay was occasioned by the fact that the inspector (a special electrical inspector) was unaware on December 1 that the mine was under a "(d) series." He therefore issued a citation. He later (after this proceeding was instituted) checked the records and found that the mine was on a "(d) series," and issued the modification. The condition had long since been abated and there was in fact no withdrawal or closure of any part of the mine. The modification was a bookkeeping matter, and, although the government has not shown why it took 3 weeks to determine the true facts, Contestant has not shown that the delay prejudiced it in any way.

3. A complete inspection of the mine showing no "similar violations" had not occurred between the withdrawal order issued under 104(d)(2) on July 14, 1982, and the finding of the violation on December 1, 1982, which resulted in the order challenged in this proceeding.

#### DISCUSSION

The antecedent 104(d)(2) order was issued on July 14, 1982, during the course of a regular inspection which took place between July 2, 1982 and September 28, 1982. Another regular inspection was begun October 14, 1982. It was completed on December 17, 1982. Although the order contested herein was issued after that date, it resulted from conditions found (and cited) prior to that date. Therefore, there was no intervening complete inspection between the conditions resulting in the two orders. I conclude that the fact (Finding of Fact No. 5) that all of the sections of the mine were visited by inspectors, regular or technical, between July 14, 1982 and September 28, 1982, does not establish "an inspection of such mine" as that term is used in section 104(d)(2). I conclude that the term contemplates a regular inspection of the entire mine.

5. The condition cited in the bin area of the subject mine on December 1, 1982, the absence of a guard on the eccentric and the inadequate guard on the belt-drive, constituted exposed moving machine parts which might be contacted by persons and cause injury to persons. Therefore, a violation of 30 C.F.R. 75.1722(a) was established.

#### DISCUSSION

I accept the inspector's testimony that the eccentric, in the course of its revolution, extended above the screen guarding the belt drive. An employee in front of the screen could accidentally reach over the frame and be struck by the eccentric. Should he do so he would certainly sustain injury. It would be less likely but not impossible, that an employee shovelling under the screen or falling against the damaged part of the screen could contact the belt drive with his hand, foot or shovel, and sustain injury. At least one miner was in the area each shift. The rope or wire stretched across the area was not adequate to keep employees away from the scalping screen and, in any event, it was not there on December 1, 1982 (Finding of Fact No. 11).

6. The violation referred to in conclusions of law No. 5 was caused by the unwarrantable failure of the operator to comply with the standard.

#### DISCUSSION

There is no doubt that Contestant was aware of the absence of a guard on the eccentric, since attempts were made to repair it, and finally a replacement was ordered. Further the absence of the guard was continually noted in the fireboss book. The placing of a wire across the walkway to the area was too

ambiguous a signal to keep miners out, but does show that

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Contestant recognized the danger. The area should have been dangered off to prevent miners from approaching the exposed moving machine parts. The inadequate guard on the belt drive was not noted in the fireboss book but was clearly visible and Contestant, whose chief electrician visited the area monthly, should have been aware of it. If a violation results from an operator's failure to correct conditions or practices which it knew or should have known existed, the violation is caused by the operator's unwarrantable failure to comply with the standard. Zeigler Coal Company, 7 IBMA 280 (1977); Cleveland Cliffs Iron Company v. Secretary, 4 FMSHRC 171 (ALJ).

ORDER

Based upon the above findings of fact and conclusions of law, IT IS ORDERED that the contest is DENIED and the order contested is AFFIRMED.

James A. Broderick  
Administrative Law Judge