

CCASE:

KITT ENERGY V. SOL (MSHA)

DDATE:

19840323

TTEXT:

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 PROCEEDING

Docket No. WEVA 84-60-R

Citation No. 2263047; 11/2/83

Kitt No. 1 Mine

DECISION

Appearances: Bronius K. Taoras, Esq., for Kitt Energy Corporation, Contestant;
Leo J. McGinn, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent.

Before: Judge Merlin.

This case is a Notice of Contest filed on December 1, 1983, by Kitt Energy Corporation under Section 105(d) of the Act, 30 U.S.C. 815(d) to review a citation dated November 2, 1983, issued by an inspector of the Mine Safety and Health Administration (hereinafter referred to as "MSHA") under Section 104(d)(1) of the Act, 30 U.S.C. 814(d)(1). By Notice of Hearing dated December 22, 1983, this case was set for hearing on February 8, 1984. The hearing was held as scheduled.

At the hearing, the parties agreed to the following stipulations:

- (1) The applicant is the owner and operator of the subject mine.
- (2) The mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
- (3) The Administrative Law Judge has jurisdiction of this case pursuant to Section 105 of the 1977 Act.
- (4) The inspector who issued the subject citation was a duly authorized representative of the Secretary of Labor.

(5) True and correct copies of the subject citation and termination were properly served upon the operator in accordance with the 1977 Act.

(6) Copies of the subject citation and termination are authentic and may be admitted into evidence for the purpose of establishing their issuance, but not for the truthfulness or relevance of any statement asserted therein. The probative weight to which the citation is subject will be determined in light of all the evidence of record.

(7) Inspector Tulanowski conducted an inspection of the Kitt Number 1 on November 2, 1983. The inspection that day began at approximately 11:45 p.m. on November 1, and continued into the early morning of November 3, 1983.

(8) In the course of his inspection, Mr. Tulanowski discovered four areas as described in the subject citation along the D-11 belt where float coal dust was present in the belt entry.

(9) The float coal dust was present only on the floor, and not on the roof or ribs or on the equipment in the entry.

(10) The float coal dust described in the citation constituted a violation of 30 C.F.R. 75.400.

(11) The subject mine is classified as a gassy mine, liberating two million 400,000 cubic feet of methane per 24 hours.

Section 304(a) of the Act, 30 U.S.C. 814(a), which also appears in 30 C.F.R. 75.400, 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 subject citation No. 2263047, describes the violative condition or practice as follows:

Beginning on the left side of the D-11 coal conveyor belt, between No. 1 and No. 2 block (approximately 50 feet) from No. 3 block to No. 4 block, (approximately 60 feet) from No. 8 á 80 block to No. 11 á 50

block on both sides of the conveyor belt (approximately 300 feet) and from No. 13 á 50 block to No. 26 block, (approximately 1,000 feet) there was float coal dust (black in color) deposited on the rock-dusted surface of the mine floor. Rock-dust was not available on the D-11 section to dilute the float coal dust at the time the citation was issued. This condition was recorded in the preshift mine examiner's report since the 10-17-83, John Helms, mine foreman and his assistants has [sic] countersigned the preshift mine examiner's report since the 10-17-83. One 107(a) order and 3 citations has [sic] been issued on float coal dust on belt conveyors at this mine since 10-28-83.

At the hearing the inspector described the violative areas the same way he had in the citation. He testified that walking inby along the belt entry, he cited four areas. The first area was fifty feet long with black float dust on the tight side of the entry but well rock-dusted on the clearance side (Tr. 26-30) (D-E on Jt.Exh. No. 1). The second was 60 feet long with float dust again on the tight side (Tr. 30-31) (F-G on Jt.Exh. No. 1). The third was 300 feet long with black float coal dust present on both sides and underneath the conveyor belt (Tr. 31-32) (H-J on Jt.Exh. No. 1). There were footprints on the clearance side where people had walked and it was white underneath (Tr. 34). The final area cited was one thousand feet long with float coal dust on both sides and underneath the belt (Tr. 35-37) (K-L on Jt.Exh. No. 1). Footprints again were visible on the wide side (Tr. 37). The operator's mine examiner who had accompanied the inspector specifically stated that he did not disagree with the inspector's description of the areas with float coal dust (Tr. 195). I accept the descriptions given by the inspector in the citation and testimony.

As set forth in Stipulation No. 10, it is agreed that a violation existed. The issues presented are therefore, whether the violation was significant and substantial and whether it resulted from an unwarrantable failure on the part of the operator.

In National Gypsum Company, 3 FMSHRC 822 (April 1981), the Commission first considered what would constitute a violation which "could significantly and substantially contribute to the cause and effect of a coal or other mine

~751

safety or health hazard." The Commission held that a violation was of such a 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 that violation, there existed a reasonable likelihood that the hazard contributed to would result in an injury or illness of a reasonably serious nature. 3 FMSHRC at 825. In addition, the Commission expressed its understanding that the word "hazard" denoted a measure of danger to safety or health and that a violation significantly and substantially contributed to the cause and effect of a hazard if the violation could be a major cause of a danger to safety or health. 3 FMSHRC at 827.

More recently, in Mathies Coal Company, FMSHRC Docket No. PENN 82-3-R etc., Slip Op. (January 6, 1984), the Commission 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; (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. As a practical matter, the last two elements will often be combined in a single showing.

See also Consolidation Coal Company, FMSHRC Docket No. WEVA 80-116-R etc., Slip Op. (January 13, 1984), and Consolidation Coal Company, FMSHRC Docket No. PENN 82-203-R etc., Slip Op. (February 21, 1984).

The record demonstrates that the admitted violation presented a discrete safety hazard, that of explosion and fire. I accept the inspector's testimony that float coal dust is light, easily put into suspension, and has a high burning rate (Tr. 77). According to the inspector, a rock falling on and smashing a power cable could provide the spark which would ignite the float coal dust and cause an explosion (Tr. 77-78). In addition, the running of the belt itself could start a fire if there were a stuck or frozen roller creating heat to ignite the float coal dust which is easily combustible (Tr. 80-82, 126-127). The operator's shift foreman also stated that belt rollers running in float coal dust could ignite if they got hot enough and he agreed that float coal dust would intensify and magnify the danger from ignition or heat in a conveyor belt entry (Tr. 247-

~752

248). The Commission has recognized the explosive character of float coal dust. Old Ben Coal Company, 1 FMSHRC 1954, 1956 - 1957 (1979).

I further find there was a reasonable likelihood that the hazard of fire or explosion would result in an injury. As set forth above, the inspector testified that an ignition could result if a falling rock broke a cable, thereby creating a spark to ignite the float coal dust. The record shows that the roof was very bad in this area (Tr. 129, 207). The inspector stated that although the area was adequately posted, rocks could fall in between the posts (Tr. 129). He believed it would not be unlikely for a large rock to fall (Tr. 129). The operator's shift foreman also described the roof as really bad and fractured, saying that it fell as it was cut and that the unit could advance only ten feet at a time (Tr. 251-252). At one point, the foreman stated that it was very unlikely a rock would rupture a cable but he agreed that it depended on how the rock fell (Tr. 219-221). The foreman knew of instances in the belt entry of this mine where rocks had fallen on power cables (Tr. 218). In addition, with respect to the belt power cable which ran to the center of the entry at one hundred foot intervals, he agreed there was certainly a likelihood the cable would be ruptured or cause an arc or spark from a falling rock (Tr. 249). The operator's mine examiner expressed the view that the chances of a rock hitting a cable were not reasonably likely but he also stated it depended upon the size of the rock (Tr. 193). He admitted the roof was scaling and chipping because it was winter (Tr. 200J-200K). After reviewing all the evidence, I conclude that because of the very bad nature of the roof, the weight of the evidence indicates that there was a reasonable likelihood of a fire or an explosion due to an arc from a ruptured cable igniting the float coal dust.

The record provides an additional basis for demonstrating the reasonable likelihood that the hazard involved would result in an injury. As set forth above, the belt itself could be an ignition source. The inspector testified that although the belt was not actually running, the belt starter box was energized, preparations were being made to run coal, and then the belt would be started (Tr. 72-73, 79-80). The inspector's testimony that this was a production shift is persuasive. The operator's witnesses appeared somewhat evasive on the point, either saying it might have been a production shift or they were not sure (Tr. 200J, 237). I accept the inspector's opinion that friction or heat from a belt in motion is a fairly common occurrence as a cause of ignition and I therefore credit his view that some type of ignition from the float coal dust he saw under the belt was likely. It is not necessary that the belt be in motion because as the inspector stated, this might be considered an

~753

imminent danger. I reject the shift foreman's opinion that there was no reasonable likelihood of belt rollers causing an ignition of float coal dust because his opinion was based only upon the fact that he did not receive any information of rollers actually running in spillage or float dust (Tr. 226-227). The foreman did not see the condition.

Finally, I conclude that there was a reasonable likelihood that the injury which would result would be of a reasonably serious nature. The inspector explained that the belt entry was an escapeway, belt air was vented directly to the return, and a fire in the belt entry could contaminate all the entries with smoke (Tr. 82-83, 132-133). There was a danger of injury or illness from smoke inhalation (Tr. 84-86). Moreover, if escapeway entries were filled with smoke, there was a hazard from falling or tripping due to lack of visibility (Tr. 86-87).

In light of the foregoing, I decide that this violation was significant and substantial in accordance with the tests adopted by the Commission.

There remains for consideration the issue of unwarrantable failure. The inspector testified that before he went underground, he looked at the pre-shift and on-shift book for the period October 27 to November 13 (Tr. 15-17, 43-47). A photocopy of this book was accepted into the record as Joint Exhibit No. 2. The inspector testified that he looked at the on-shift report for the afternoon of November 1 which stated that the belt need to be cleaned and dusted and for "Action Taken" listed only "Reported" (Tr. 65). The inspector did not remember how far back he went into the book before he went underground (Tr. 15-17). However when he came above ground, he went through the entire book (Tr. 96). As the inspector testified, from the beginning of the book starting with the 6:15 A.M. pre-shift on October 27, there are repeated reports that the belt needed cleaning and dusting (Tr. 58-65). The inspector looked at the prior book and found such reports beginning on October 17 (Tr. 67). The books indicated that no action was taken until the 6:30 A.M. pre-shift for November 1 and the 10:00 A.M. on-shift on November 1 reports listed "Work in Progress" under "Action Taken" (Tr. 64). Until then, the only action taken was listed as "none" or "reported" (Tr. 58-65). It appears therefore that for two weeks beginning on October 17, the operator did nothing to correct this condition. On October 31, the union conducted its quarterly inspection and Item No. 17 of its report dated October 31, 1981, reported "The entire D-11 belt conveyor line needs the spillage removed underneath of several (12) rollers, float dust removed from the tight side, clearance side and underneath of the beltline" (Tr. 55). As a result of the union's report, the operator began to clean up the spillage (Tr.

~754

161). However, as the inspector's uncontradicted description demonstrates, the belt still needed to be cleaned and dusted in extensive areas.

The inspector testified that he relied upon the pre-shift and on-shift books in finding unwarrantable failure (Tr. 106). After returning above ground, he also examined the pre-shift and on-shift book for the period October 8 through October 26 (Tr. 65-67). Based upon them, he concluded that for a period of two weeks, the operator knew or should have known of the violative condition cited by the inspector. This was more than enough time to completely correct the violation.

The operator's safety supervisor and section foreman testified that the books were inaccurate because work was done to clean up the belt on October 31 and on the afternoon shift of November 1 (Tr. 279-281). Even if this testimony is accepted as correct, it cannot change the result. First, the operator has the responsibility to make sure its pre-shift and on-shift books are correct and if they are not, the operator must bear the consequences. That the operator recognizes this is demonstrated by the testimony of its safety supervisor to the effect that after the issuance of this citation, it improved its books because they were what the inspector had to rely upon (Tr. 280). Secondly, the operator's witnesses indicated that after the union's quarterly inspection, men were assigned to clean up the belt for a few more shifts than the books show. However, there is no dispute that the cited condition had existed since October 17, nor is there any dispute as to what the inspector saw or his description of it. The operator's witnesses said only that the men had cleaned up the spillage and had done some cleaning and rock dusting (Tr. 294-296). This does not detract from the inspector's actions because he made it clear that he saw no spillage (Tr. 112-113). What is crucial is that although some float coal dust may have been taken care of, it remained present for a long time over very extensive areas of the belt entry. It is this essential circumstance relied upon by the inspector which is not contradicted by anything offered by the operator. Similarly, the operator's evidence confirms that although some rock dust had been used on the section, it was not enough to do the job and there was no rock dust available on the section when the inspector issued the citation (Tr. 187-189). The existence of unwarrantable failure was confirmed by the inspector and the operator's witnesses who explained how easy it would have been to bring adequate rock dust onto the section (Tr. 122-123, 190-191). Finally, the operator's

~755

shift foreman explained that he took two men from the six man crew of the idle 2A section and that the remaining four men were setting up a longwall (Tr. 255). The shift foreman could have quickly cleaned up all the cited float coal dust if he had taken additional men from the 2A section. So too, he could have used additional men from the D-11 section itself, instead of having them continue to advance that section. Accordingly, I conclude that the operator's evidence not only fails to cast any doubt upon the inspector's finding of unwarrantable failure, but rather lends it further support.

The parties were ordered to file post hearing briefs. On March 19, 1984, the Solicitor filed his brief, which was most helpful. Counsel for the operator requested an extension until March 20, 1984, which was granted, but has filed no brief.

In light of the foregoing, Citation No. 2263047 is Affirmed. The Notice of Contest is Dismissed.

Paul Merlin
Chief Administrative Law Judge