CCASE:
PONTIKI COAL V. SOL (MSHA)
DDATE:
19840330
TTEXT:

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

PONTIKI COAL CORPORATION,
CONTESTANT-RESPONDENT

v.

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

CONTEST OF CITATION
AND COMPANION
CIVIL PENALTY PROCEEDING

Docket No. KENT 83-181-R
Citation No. 2052746; 3/1/8

Docket No. KENT 83-262
A.C. No. 15-09571-03527

CONTEST OF ORDERS
AND COMPANION
CIVIL PENALTY PROCEEDINGS

Docket No. KENT 83-182-R
Order No. 2052747; 3/1/83

Docket No. KENT 83-183-R
Order No. 2052748; 3/1/83

Docket No. KENT 83-184-R
Order No. 2052750; 3/1/83

Docket No. KENT 83-256
A.C. No. 15-09571-03526

No. 2 Mine

DECISION

Before: Judge Kennedy

For twenty-four (24) production shifts worked during the period February 3 through February 28, 1983, the operator, Pontiki Coal Corporation, failed to make or record preshift

and onshift examinations of its main belt entries in flagrant violation of section 303(d)(1), 30 C.F.R. 75.303 of the Mine Safety Law.1 On February 28, 1983, five MSHA inspectors were sent to inspect the mine for the existence of imminent dangers and other violations of the law. They noted the failure to report the results of preshift and onshift examinations on the beltlines. This should have alerted them to conduct a physical examination of these areas. Instead, they inspected only the area from the bottom of the slope entry to the main beltline outby for 100 feet and then proceeded to the track entry where they rode a personnel carrier to the end of the beltline and then inspected another 300 to 500 feet of the area inby the beltline.

As a result of this dereliction, the inspectors failed to observe or cite the operator for what they later described as an "enormous" accumulation of float coal dust, much of it in suspension, amidst a chaotic scene of worn, stuck and damaged rollers, worn and broken suspension brackets and bottom belts lying on the floor in excessive accumulations of loose coal and coal dust. These conditions, which existed for some 4,800 feet of the main beltline presented a condition of imminent danger of a disasterous fire or explosion in a mine described by the operator's counsel as "one of the gassiest in Eastern Kentucky."

The record strongly suggests that the reason the inspectors were "persuaded" to tour around the main beltline and ignore the "message" of the omitted preshift and onshift reports was to permit the operator to run coal for one more shift and management to "voluntarily" idle the mine and begin cleanup operations. Indeed, the record shows that in return for the "advance notice" of the "spot" inspection that did not begin in earnest until March 1, 1983, the operator idled its production at 3:30 p.m., on Monday, February 28 and began cleanup. The record also shows that in return for the operator's "cooperation" the inspectors expected to issue only 104(a) citations but were so appalled by the conditions actually encountered they felt compelled to issue unwarrantable failure citations and closure orders.2

It is undisputed that the conditions found significantly and substantially contributed to the hazard of a mine fire or explosion that could have killed all 21 miners and the five inspectors in the mine on February 28 when the beltline was energized. Nevertheless, the operator's vice president for operations, Dennis Jackson, felt he had been double crossed or "doubled barrelled" as he put it. For this reason, he abruptly terminated the closeout conference and thereafter filed his notice of contest of the citation, orders, and proposed penalties.3

Counsel for the operator readily admitted the conditions cited existed 4 but raised in mitigation of gravity and culpability the fact that (1) MSHA had condoned the conditions when it inspected the mine on February 28 and (2) that the operator had "voluntarily" idled the mine and set the production crews to work cleaning up the mess. MSHA was sympathetic to these pleas. The Assessment Office declined to specially assess any of the violations choosing instead to treat them separately and in isolation rather than as an intertwined and interconnected whole. This meant that the matter did not have to be referred to the office of special investigation for a determination of whether responsible members of management should be prosecuted for "knowingly" authorizing these imminently dangerous and hazardous conditions or criminally for "willfully" violating the law. In addition, the Assessment Office granted the operator a gratuituous 30 percent discount for prompt abatement of the most serious 75.400 violation. This mystified everyone since the conditions were so bad it took the operator five working days to cleanup, repair and rock dust the belt entries.

The record shows the MSHA inspectors expected the cleanup to be completed by March 3 but when they returned on Thursday, they found that while over 10 tons of highly combustible materials had been removed, the work was still only half done. The cleanup was not completed and the orders terminated until the following Monday, March 7, 1983.

The Assessment Office proposed initial penalties of $2,294 for the four violations charged or an average of $574 per violation. As a reward for the operator's challenge, the Solicitor offered to settle the four violations at a discount of some 18 percent or a total of $1,900.5

By the time this matter came on for a prehearing/settlement conference on February 7, 1984, MSHA knew or should have known that the operator had knowingly, if not willfully, created and maintained an imminently hazardous condition in this mine for over 2 weeks. Yet here is nothing in the record to suggest that anyone in authority in MSHA ever took note of the seriousness of

this case or sought to hold accountable those in positions of authority in the Pikeville or Paintville, Kentucky offices of MSHA for ignoring the conditions of wanton, if not criminal, endangerment that existed on February 28, 1983. It was this type of callous indifference and dereliction on the part of the Pikeville district that led to the Scotia disaster in which 26 miners and inspectors lost their lives on March 9 and 11, 1976.

Section 103(a) of the Mine Act prohibits giving advance notice of any enforcement inspection and section 110(e) provides that "any person who gives advance notice of any inspection to be conducted under this Act shall, upon conviction, be punished by a fine of not more than $1,000 or by imprisonment of not more than six months, or both."

The true circumstances surrounding the truncated inspection of the beltline on February 28 cry out for investigation and explanation. The public is entitled to know what occurred on that date that later led the operator's vice president for operations to feel he had been "spun" or "double barrelled" by MSHA. Was there a hidden quid pro quo for the abbreviated inspection of the beltline on February 28, and, if so, what was it? Was the abbreviated inspection of the beltline designed to alert the operator to the real inspection that commenced the next day? Or was MSHA innocent to the point of naivete? And, if so, what is the public to conclude about MSHA's capacity to serve as a sophisticated enforcement agency? I believe these and other questions deserve an answer. I recommend, therefore, that this matter be referred to the inspector general of the Department of Labor for a full and true disclosure of the facts relating to MSHA's failure to inspect the beltlines in question on February 28, 1983.

I also recommend that this case be referred to the MSHA's office of special investigations for a determination of liability on the part of the operator or any its employees under sections 110(c) and/or (d) of the Act. I do this because I have probable cause to believe the operator's vice president in charge of operations knew or was aware of facts relating to the existence and gravity of these violations on February 28, 1983, and for some indefinite time prior thereto. This, ironically, is the same individual whom counsel represented would take disciplinary action against the mine foreman allegedly responsible for these violations. While I assume counsel was not aware of the extent of Mr. Jackson's involvement at the time this proposal was made, I cannot help but observe that if Mr. Jackson took the disciplinary action claimed, it must have been done with tongue-in-cheek.

Suffice it to say that after reviewing this matter at some length, I refused the proffered basis for settlement, namely, $1,900, and suggested $10,500. At the request of counsel, I remitted $3,000 in return for a letter from the operator's vice president in charge of operations, setting forth the disciplinary action taken against those allegedly responsible for these violations. The letter was to be furnished in 10 days. When it was not forthcoming, I contacted counsel who said he would send it in immediately. After a further delay, all I received was the attached letter, not from Mr. Jackson, but from counsel.

It is time I terminated my consideration of this matter and let it pass into the hands of those with the necessary investigatory manpower and resources to complete the enforcement action. I shall, however, follow the sequel with interest.

Accordingly, it is ORDERED that the settlement approved at the prehearing/settlement conference of February 7, 1984, be, and hereby is CONFIRMED, and that the settlement amount agreed upon and paid, $7,500, be allocated equally among the four violations found. It is FURTHER ORDERED that upon expiration of the time for own motion or other review by the Commission, the Commission take such action as it deems appropriate to refer this matter to the Assistant Secretary for Mine Health and Safety, Department of Labor for such action as he deems appropriate to initiate the two investigations called for.

Joseph B. Kennedy
Administrative Law Judge

1 On March 9, 1984, the United States Court of Appeals for the District of Columbia Circuit reversed the Commission's decision of July 15, 1983, upholding a clearly erroneous decision by Judge Laurenson that issued July 1, 1981. Jones & Laughlin Steel Corporation, 3 FMSHRC 1721 (ALJ, 1981), affirmed, 5 FMSHRC 1209 (Comm'n, 1983); (Commissioner Lawson dissenting), reversed at instance of United Mine Workers of America on March 9, 1984, --- F.2d ---- (D.C.Cir). The action by the court of appeals, dispelled the cloud of confusion cast over the enforcement of 75.303 by the ALJ's obviously inept understanding of the plain language of the standard. In finding "no basis for the Commission's senselessly narrow construction of the" standard, the court held that the statute and its congruent regulation require both preshift and onshift examinations of belt entries. The court was especially concerned over the hazards of fire and explosion to which miners are exposed when operators fail to make preshift and onshift examinations of belt entries "for several days."

2 Because of the stigma that attaches to the unwarrantable failure citation, management begged the inspectors to issue 107(a) imminent danger closure orders. In the response, the lead inspector said "I explained that the conditions I found were unwarrantable and significant and substantial, but did not constitute an imminent danger because there is no immediate

source of ignition for the float dust. They offered to start the belt to create an imminent danger to keep off the unwarrantable failure sequence. Mr. Adams stated "We'll start the belts if that's what it takes to get a 107(a) imminent danger order issued.' I replied that the belts were already under closure orders" and therefore could not be started until the conditions were abated. It seems clear that by this time the MSHA inspectors were no longer willing to turn a blind eye to the conditions encountered. Apparently, there are limits beyond which inspectors will not go to honor the administration's pledge of "cooperative enforcement."

3 The record of the closeout conference of March 1, 1983 states:

"During this closeout conference, Dennis Jackson, stated that he felt we were being unfair to the company and that he felt we had "doubled barrelled' them in reference to the citations on records of belt examinations and citations and orders written on the conditions found in the belt line. Dennis left the conference abruptly and we felt it was best to leave at this time."

4 Indeed, while counsel said his client would not like it, he felt enforcement action was badly needed at this mine and that "it was the best thing that ever happened to this mine * * * because they were operating pretty lax."

5 Under MSHA's "cheaper by the dozen" policy, the thirty occurrences observed were lumped into just four violations. Thus, from the operator's standpoint, the one that counts, the Solicitor was offering to settle the over two dozen violations observed for $63.30 each, a bargain by any standard.

~787

Hon. Joseph B. Kennedy
Administrative Law Judge
Federal Mine Safety and Health Review Commission
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, Virginia 22041

Dear Judge Kennedy:

I am writing this letter at the request of Dennis Jackson, Vice President of Operations of Pontiki Coal Corporation.

Mr. Jackson and I personally conferenced with Ronnie Goble, Mine Foreman of Pontiki Coal Corporation, No. 2 Mine regarding the violations on March 1, 1983 concerning the beltline conditions and preshift-onshift inspections. At that conference Dennis Jackson expressed to Mr. Goble his extreme displeasure with those conditions. Additionally, Mr. Goble was made aware of the fact that if this situation reoccurs it may result in discipline under Pontiki's progressive disciplinary procedurewhich includes discharge.

Additionally, as a result of your ruling in this matter our entire procedure for handling violations has been changed. Briefly, all S & S violations are conferenced between the safety department and legal staff and if the legal staff, which is independent of mine management, determines that an individual is responsible for the violationthey may conference with the individual and indicate that conference in that individuals personnel file. I think this will aid our safety efforts. It is because of the adoption of this policy and our desire to communicate it to you that this letter is arriving late.

I am having the draft in the amount of $7500.00 sent under seperate cover from Tulsa, Oklahoma.

Sincerely,
Nick Carter