

CCASE:
KITT ENERGY V. SOL (MSHA)
DDATE:
19840511
TTEXT:

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

KITT ENERGY CORPORATION,
CONTESTANT

CONTEST PROCEEDING

v.

Docket No. WEVA 84-92-R

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

Citation 2262913; 11/29/83

Kitt No. 1 Mine

DECISION

Appearances: Bronius K. Taoras, Esq., for Kitt Energy Corporation, Contestant;
Jonathan Kronheim, 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 27, 1983, by Kitt Energy Corporation under Section 105(d) of the Act, 30 U.S.C. 815(d) to review a citation dated November 29, 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 January 13, 1984, this case was set for hearing on March 13, 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 order was a duly authorized representative of the Secretary of Labor.

- (5) A true and correct copy of the subject order was properly served upon the operator in accordance with the 1977 Act.
- (6) A copy of the subject order is authentic and may be admitted into evidence for the purpose of establishing its issuance, but not for the truthfulness or relevance of any statement asserted therein.
- (7) Inspector Tulanowski conducted an inspection of the Kitt No. 1 Mine on November 29, 1983.
- (8) In the course of his inspection, Mr. Tulanowski discovered two areas as described in the subject order along the C Mains No. 2 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 order constituted a violation of 30 C.F.R. 75.400.
- (11) The subject mine is classified as a gassy mine, liberating 2,400,000 cubic feet of methane per 24 hours.
- (12) Section 104(d)(1), Citation No. 2263047, issued on November 2, 1983, is the procedural basis for the order which is the subject of this proceeding.

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 Order No. 2262913 describes the violative condition or practice as follows:

There was float coal dust (black in color) deposited on the rock-dusted surface of the mine floor, beginning at survey station No. 48 á 39.83 C-Mains No. 2 Conveyor belt, and extending for a distance of approximately 600 feet inby and beginning at the tailpiece and extending for a distance of approximately 600 feet outby. This condition was reported in the preshift examiner's book since the 11-14-83. John Helms, Mine Foreman.

~1291

The validity of the underlying citation was upheld in a decision dated March 23, 1984 (WEVA 84-60-R). As set forth above, the parties have stipulated that a violation existed as described in the order. The issue remaining for resolution with respect to the validity of this (d)(1) order is, therefore, unwarrantable failure. Old Ben Coal Company, 1 FMSHRC 1954, 1959 (1979). Unwarrantable failure exists where the operator failed to correct conditions it knew or should have known existed or which it failed to correct because of a lack of due diligence or because of indifference or lack of reasonable care. Zeigler Coal Company, 7 IBMA 280 (1977).

It was reported in the preshift books that from November 14 to November 28 the belt needed dusting (Tr. 15). The operator's witnesses allege that the entry "needs dusted" in the preshift and onshift reports did not refer to float coal dust. However, this entry was the only one ever made to describe the condition of the belt. The onshift report for the very shift on which the order was issued contained an entry "needs dusted". The operator has stipulated the existence of float coal dust in this instance. (Tr. 6) A review of all of the evidence renders more persuasive the inspector's testimony, that based upon his experience the entry "needs dusted" in the preshift and on shift books indicated the presence of float coal dust (Tr. 60-66).

In addition, in more than three fourths of the reports, it was also recorded that there was work in progress (Tr. 16-17, 60). Mr. Phares, the belt cleaner who was working the midnight shift when the subject order was issued, testified about his work on the belt during this two week period (Tr. 126, 158-161). Each day he dragged the belt and worked on the areas which needed float dust cleared away (Tr. 126). He also checked the drive for splices, rock dusted the drive, checked the take up rollers, and made sure that the drive was running safely and water was correctly put on the belts (Tr. 134). Mr. Phares testified that there was a belt cleaner on another shift, Mr. Carr, who had been working the afternoon shift before the order was issued (Tr. 127, 149). Mr. Phares and Mr. Carr rotated shifts (Tr. 127). Mr. Carr did not testify and the witnesses who did testify did not know exactly what his duties were or how much time he spent cleaning the belt (Tr. 127, 149-150, 249-250).

As demonstrated by the preshift books and the testimony at the hearing, this is not a case where the operator did not work on the belt. The record shows that work was done on the belt throughout the period, but it also shows that the work done was never enough to entirely clean up the belt. Mr. Phares testified that on one occasion, he had been able to clean the entire belt up to the tailpiece in

~1292

one day's time but only on the clearance side (Tr. 158-161). Moreover, Mr. Phares told the mine foreman and the section foreman that the belt was in bad condition, it was hard for him to keep up with the amount of dust on the belt, pod dusting was needed and it would be nice if he had some help (Tr. 138-142, 166-167). The mine foreman came by nearly every day so he actually knew the condition of the belt (Tr. 162). The section foreman admitted that prior to November 28, Mr. Phares had said a number of times he could not do the belt by himself (Tr. 238). The section foreman testified that he did not give Mr. Phares any help because he thought Mr. Phares was doing a good job (Tr. 239). Mr. Phares may have been doing a good job in that he was doing all that could reasonably be expected of him. However, as shown by the condition found by the inspector and admitted by the operator, and as demonstrated by Mr. Phares' testimony, he was not able to clean the entire beltline by himself. Despite the fact that Mr. Carr may have spent some time cleaning the belt on another shift, the entire length of the beltline was not cleaned. The operator should have put men on the belt, in addition to Mr. Phares and Mr. Carr, sufficient to completely clean it. The operator's failure to do so in the face of its actual knowledge of the belt's condition constituted unwarrantable failure.

A separate and distinct basis for finding unwarrantable failure exists because of the operator's failure to clean up the belt on November 28. Mr. Phares testified that at the end of the November 28 midnight shift, i.e. 8:00 a.m. on that morning, he told the mine foreman the belt was in bad shape and needed dusting (Tr. 28-29, 141). There is some conflict in the evidence over what, if anything, the operator did in the intervening two shifts to clean up the belt. Mr. Phares testified that when he returned the next night, it looked like very little had been done (Tr. 145-146, 164). The operator's evidence indicated that some portion of the belt may have been cleaned between Mr. Phares' work on the November 28 midnight shift and his work on the November 29 midnight shift (Tr. 225-229). But this evidence is not clear because there was confusion between the witnesses over the location of certain points in the belt entry (Tr. 79-83, 189-191). Moreover, the only work that could have been done in the interval between Mr. Phares' two midnight shifts would have had to have been done by Mr. Carr on the afternoon shift of November 28, but the operator's section foreman did not know what Carr did on that shift (Tr. 250). In any event, on the morning of November 28, management personnel were told by Mr. Phares that the belt was in bad shape and needed dusting. In light of this information, the operator should have investigated the situation and taken

~1293

action to have it completely cleaned up once and for all. Here again, Mr. Phares may have had some help from Mr. Carr, the extent of which cannot be determined on this record, but whatever the extent of such help, it was insufficient because the belt was not completely cleaned. Old Ben Coal Corporation, supra.

In light of the foregoing, the subject order is Affirmed and the operator's Notice of Contest is Dismissed.

Paul Merlin
Chief Administrative Law Judge