FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

OCT 4 1984

KITT ENERGY CORPORATION, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. WEVA 83-125-R
	:	Order No. 2115977; 3/24/83
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Kitt No. 1 Mine

DECISION

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

Before: Judge Fauver

This is a contest proceeding under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., to review a section 104(d)(2) order issued by a federal mine inspector at the Kitt No. 1 Mine on March 24, 1983. The order cites a violation of 30 CFR § 75.503 in that (1) unauthorized modifications were made to the longwall equipment in use at the mine, and (2) the equipment was not maintained in permissible condition.

The subject order is based upon a previous section 104(d)(2) order issued at Kitt Mine on December 1, 1982, during a previous regular quarterly inspection.

Kitt Energy contests the March 24, 1983, order on the ground that a clean inspection of the mine had occurred since the last preceding section 104(d)(2) order. Two other issues are (1) whether Kitt Energy's failure to obtain approval of mine equipment under 30 C.F.R. Part 18 was a violation of 30 C.F.R. § 75.503 and (2) whether its failure to maintain the equipment in permissible condition was unwarrantable.

The case was heard at Falls Church, Virginia.

Having considered the testimony, exhibits, and the record as a whole, I find that a preponderance of the reliable, substantial, and probative evidence establishes the following:

FINDINGS OF FACT

1. Kitt Energy Corporation is-the owner and operator of Kitt No. 1 Mine, located at Phillippi, Barbour County, West Virginia. At all relevant times the mine produced coal for sale or use in or affecting.interstate commerce.

2. A quarterly inspection by MSHA is a complete inspection of the mine and may involve a number of visits to the various sections of the mine.

3. MSHA's first quarterly inspection of Kitt No. 1 Mine for Fiscal Year 1983 began on October 14, 1982, and continued until its completion on December 17, 1982. During that inspection, on December 1, 1982, Inspector John Paul Phillips issued a section 104(d)(l) citation and modified it to a section 104(d)(2) order.

4. MSHA began its second quarterly inspection (FY 83) at Kitt No. 1 Mine on January 12, 1983, and completed it on March 29, 1983. On March 24, 1983, during the second quarterly inspection, MSHA Resident Inspector Frank Cervo made an inspection of the mine's surface area with Mining Engineer Barry Ryan to follow up on an employee complaint that there were hazardous chemicals in that area. Prior to March 24, 1983, Cervo had inspected everything on the surface but for the chemicals, which he had not previously inspected. His inspection on March 24 took about 8 hours to conduct including travel time.

5. On March 25, 1983, Assistant Resident Inspector Bretzel Allen conducted an inspection of the U Mains area of the mine to check on abatement of conditions cited the day before.

6. Frank Cervo and Bretzel Allen were assigned by MSHA to Kitt No. 1 Mine as resident inspector and assistant to the resident, respectively, because the Kitt No. 1 Mine is considered a more hazardous mine. The mine liberates about 3 million cubic feet of methane per day and is on the section 103(i) spot inspection list, which requires inspections every 5 days (for mines liberating more than 1 million cubic feet of methane per day).

7. Methane can be liberated at any time at the Longwall at the Kitt No. 1 Mine, but is liberated particularly during the extraction of coal. Sources of methane at the Longwall are the face itself and the gob area behind it.

8. On Monday, March 21, 1983 (during the 2nd quarterly inspection), Electrical Inspector Wayne Fetty began an

electrical inspection of Kitt No. 1 Mine. He had been assigned to assist fellow Electrical Inspector John Paul Phillipswho had conducted a required annual electrical inspection of the mine almost one year earlier.

9. During the evening of March 21, 1983, Fetty was contacted at his home by his supervisor, Paul M. Hall, Chief Electrical Engineer for Special Services, District 3, and advised that there may have been an unauthorized field change on the Section D-5 Longwall. In order to inspect the Longwall, Fetty arranged with Hall to obtain a copy of the electrical diagram for the Longwall kept in the Morgantown MSHA office on Wednesday, March 23, 1983.

10. On Tuesday, March 22, 1983, while at the mine, Fetty asked several miners if there had been any changes to the Longwall Mining Unit and was told that the Eickhoff Shearer had been removed and replaced with a Joy Shearer. The next day, while checking at the MSHA District office in Morgantown, he learned that no documents were on file showing a company application for field modification for the change of shearers.

11. On Wednesday, March 23, 1983, Inspector Fetty was instructed by his supervisor, Mike Lawless, not to issue an unwarrantable failure violation if he found a violation that involved merely a technical violation.

12. On March 24, 1983, Fetty returned to Kitt No. 1 Mine. Before entering the mine, Fetty, accompanied by fellow Electrical Inspector James Cross, met with Kirby Smith, General Maintenance Foreman, Roger Harris, Longwall Maintenance Foreman, and Bob Evans, Superintendent of Kitt No. 1 Mine, and others and asked them if the shearer in the Longwall operation had been changed from an Eickhoff to a Joy Model without making an application for a field change. The company representatives stated that they had changed shearers and had not made an application for a field change, but they believed it was not necessary. Fetty asked if any other changes had been made on the Longwall and was told by Smith, Harris and Evans, "No, none whatsoever."

13. In answer to questions as to what he would do underground, Fetty replied that he could not say until he had actually inspected the Longwall and had seen the conditions himself.

14. Following the meeting at the mine on the morning of March 24, 1983, Fetty, accompanied by James Cross, Ron Cross, Kirby Smith, Roger Harris and Union Representative Roger Mitchell, went underground to the Section D-5 Longwall, arriving at about 10:35 a.m.

15. On arriving at the Longwall, Kirby Smith instructed the Section Foreman to deenergize the Longwall. After this was done the inspection commenced.

16. The Longwall operation involves a number of machines which working together serve to cut coal along a 575 foot face and convey the coal onto conveyor belts. The shearer cuts the coal as it travels the length of the coal face. The coal is dumped onto the face conveyor (pan line), which is driven by motors at either end to convey the coal to the stage loader and onto the mine's belt system.

17. On examining the D-5 Longwall unit, Fetty observed that about 80% of the Longwall equipment had been changed. Specifically, he found that:

(1) The shearer had been changed from an Eickhoff to a Joy model.

(2) The pan line (conveyor line) had been replaced.

(3) The Siemons Allis motors that powered the pan line at the headgate and at the tailgate had been replaced by Reliance motors.

(4) The headgate and tailgate junction boxes had been replaced.

18. Kitt Energy had not applied to MSHA for approval of the above changes.

19. Fetty also observed the following conditions, which he found to be hazardous:

(1) The cable entering the head conveyor junction box was loose indicating that it was inadequately packed.

(2) The mid face junction box cable on the outby side was loose and could be worked in and out freely, indicating that it was inadequately packed.

(3) The cable entering the tail conveyor junction box had been pulled completely out of the packing gland. The outer jacket of the cable had been pulled back for 3 to 4 inches leaving the conductors and ground wire rubbing against the metal packing gland nut. There was no packing at all left in the junction box and the base conductor wires, pilot wire and grounding wire had all been left exposed.

(4) The inside of each of the junction boxes was rusted, wet and contained accumulations of coal dust.

(5) There was no clamping at all for the cables entering the head conveyor junction box and the tail conveyor junction box.

20. The loose and missing packing glands for the head face, mid face and tail gate junction boxes did not provide the flame path protection required to prevent the escape of flames from the junction boxes should an ignition occur inside. Thus, the junction boxes were not permissible.

21. The electrical cables linking the head face, mid face and tail gate junction boxes were subject to the movement inherent in the operation of the pan line. Since there were neither clamps nor packing glands to restrain movement of the cables, the cables were subject to rubbing against packing nuts and straining the internal connections within the junction boxes.

22. Sparks and ignitions are likely within the junction boxes if lead wires come into contact with the junction box frames. Loosening electrical connections within the junction boxes may generate heat causing the breakdown of the wires' insulation and thus cause bare wires to contact the box frames.

23. Each of'the junction boxes had become rusty, wet and had accumulated coal dust. Since the Longwall area was subject to the liberation of methane and the generation of coal dust, the junction boxes were hazardous, and lacked the protection that properly maintained packing glands would have provided to contain flames and explosions. A fire or explosion in one of the junction boxes could have easily spread outside the box to the surrounding atmosphere in the mine.

24. After Fetty had discovered the modifications to the Longwall unit and the hazardous conditions listed above, he issued a section 104(d)(2) withdrawal order, citing unauthorized modifications and permissibility violations.

25. Petitioner was aware of the official process by which approvals, certifications and modifications are to be obtained. For example:

(1) During the summer of 1981, prior to the startup of the mine's 1st Longwall operation on Section D-3, Inspectors Fetty and Shuttlesworth along with Electrical Engineer Hall

met with company personnel to discuss all aspects of Longwall certification and approval, including filing for modifications after approval. Also, they advised the Operator to contact MSHA's Approval and Certification office if they had any problems or questions.

(2) Before the 1981 meetings, in June 1979, General Maintenance Foreman Kirby Smith had filed modification requests with MSHA with respect to lights for 12 S&S Scoops at the Mine.

(3) On August 10, 1982, Longwall Maintenance Foreman Roger C. Harris filed a field modification request with MSHA for the Longwall stage loader.

26. Petitioner was aware of the need to properly maintain packing glands and strain clamps as these matters were listed as discrepancies and abated prior to the start-up of its D-3 Longwall system in January of 1982.

27. On March 24, 1983, at a meeting between Inspectors Fetty and Cross and management representatives, it was agreed: (1) the Longwall would be reinspected to determine whether the hazardous conditions cited had been corrected; (2) if other hazardous conditions were observed they would be cited; (3) the Operator would prepare an engineering drawing and letter requesting a field modification for all machinery changed on the Longwall; and (4) the section 104(d)(2) order would be modified permitting the Longwall Unit to operate pending approval of the modifications requested.

28. Inspectors Fetty and Cross reinspected the Longwall. In the process, they determined the abatement of the conditions previously cited and issued citations for additional violations noted. When all violations were found to be abated, Order No. 2115977 was "modified to permit the Longwall mining unit to be operated until MSHA provides formal approval for the modified mining unit," at 8:30 p.m., March 24, 1984.

DISCUSSION WITH FURTHER FINDINGS

I. Was there a "clean" inspection before the March 24, 1983 order?

The threshold issue is whether the Secretary of Labor met his burden of proving that a "clean" inspection of the mine had not occurred between the last preceding section 104(c)(2) order (December 1, 1982) and the date of the order at issue (March 24, 1983).

Section 104(d) 1/ of the Act creates an enforcement tool which-gives the Secretary increased sanctions in the form of withdrawal (closure) orders to operators who repeatedly allow violations to occur through an unwarrantable failure to comply with mandatory health and safety standards. In essence, it authorizes the Secretary to issue withdrawal orders for a certain chain of violations, the chain to be broken only by a "clean" inspection of the entire mine. The question here is whether such a complete inspection of the Kitt Mine took place between the date of the preceding 104(d)(2) order December 1, 1982, and March 24, 1983.

1/ Section 104(d) provides:

"(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 reperesentative 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 finds 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."

Although the Act does not define what constitutes a complete inspection of a mine, several Commission decisions have held that a complete inspection of a mine is not synonymous with a complete regular quarterly inspection.

In Secretary of Labor (MSHA) v. C F & I Steel Corporation, 2 FMSHRC. 3459 (1980), the Commission held that the burden of proving the absence of a clean inspection is on MSHA as part of its prima facie case to sustain the order. It went on to say that "nothing in the record ... suggests that the Secretary's position -- that only a complete regular quarterly inspection can constitute a 'clean' inspection of the entire mine -- is necessary" to further the public interest in promoting compliance with mandatory safety and health standards.

In Secretary of Labor (MSHA) v. United States Steel Corporation, 3 FMSHRC 5 (1981), the Commission again held that MSHA must establish the absence of a "clean" inspection after the issuance of a 104(d) (1) order as part of its prima facie case.

In Secretary of Labor (MSHA) v. Old Ben Coal Company, 3 FMSHRC 1186 (1981), the Commission upheld an administrative law judge's vacating of a 104(d)(2) order where the complete inspection of the mine was comprised of a series of spot inspections and regular inspections which were not a complete regular quarterly inspection.

In this case MSHA has established only that a complete regular quarterly inspection had not been finished by March 24, 1983. Mr. Cervo, the resident inspector, felt that until a closeout meeting was held and he completed his paper work, the regular quarterly inspection was not over and, therefore, the mine was not completely inspected. This is the position that MSHA took in the Old Ben case, supra, which the Commission rejected.

All areas of the Kitt No. 1 Mine had been inspected between December 2, 1982, and March 23, 1983. Only two regular "AAA" inspections were conducted after March 23, 1983, and both of those were to check on two specific items. They were Mr. Cervo's inspection of the suspected hazardous chemicals on the surface on March 24, 1983, and Mr. Allen's inspection of U-Mains on March 25, 1983, to check the abatement of a citation issued the previous day during a spot inspection. Both of the areas visited in those two inspections had been completely inspected earlier in the course of the regular quarterly inspection.

It was also brought out in testimony by Petitioner that numerous inspections had occurred between January 19, 1983, and March 23, 1983. Petitioner's Exhibits 6 and 7 show that the

entire mine was completely inspected through numerous visits by MSHA inspectors to all areas of the Kitt No. 1 Mine. This testimony was not disputed. In fact, Mr. Cervo's testimony supported it.

MSHA has failed to pass the threshold requirement of showing that a clean inspection of the mine had not occurred since the last preceding 104(d)(2) order on December 1, 1982. Therefore, the 104(d) (2) order by Inspector Fetty of March 24, 1983, must fail. The proper chain to support such an order was missing.

Independent of this holding, the underlying 104(d)(2) order of December 1, 1982, in this case, has recently been invalidated by the Commission because of an intervening clean inspection before December 1, 1982. Secretary of Labor v. Kitt Energy Corpcration, WEVA 83-65-R, decided July 18, 1984. Such holding is a further ground for invalidating the 104(d)(2) order at issue in this case.

Accordingly, the March 24, 1983, order will be invalidated. However, that does not end the case, because the Secretary charged violations in the order. The issues concerning'those allegations must be resolved and, if charges of violations are sustained, the 104(d)(2) order should be converted into a section 104(a) citation to the extent of the valid charges.

II. Did the.failure to obtain final approval of D-5 Longwall equipment pursuant to 30 CFR Part 18 constitute a violation of 30 C.F.R. §75.503?

Order No. 2115977 contains charges of violation of 30 C.F.R. §75.503 which include Petitioner's implementation of unauthorized modifications to its Longwall Mining Unit, the Operator's failure to maintain adequate packing to secure and provide protection for cables entering junction boxes and the Operator's failure to provide and maintain clamping for cables entering the head face and tail face motor junction boxes.

At the hearing Petitioner stipulated that certain charges listed in Order No. 2115977 constituted violations of 30 C.F.R. §75.503:

> It was also discovered that the following permissibility violations existed. (1) The 4/0 3/C type SHD-GC cable is not provided with an adequate amount of packing, where the cable is entering the head face motor junction box, the cable can be moved freely by hand. (2) The 4/0 3/C type SHD-GC trailing cable is not provided with adequate packing where

it enters the mid-face junction box XP 1665-25 on the outby side, the cable is loose and the packing nut can be turned freely by hand and the cable pulled in and out freely. (3) The 4/0 3/C type SHD-GC cable for the 250 HP reliance tail conveyor motor XP 1478-94 is pulled out of the junction box through the packing nut exposing the conductors in the cable. (Tr. 14.)

A main issue is whether the failure to obtain approval of changes in the Longwall equipment, as required by 30 C.F.R. Part 18, constituted a violation of section 75.503.

30 C.F.R. § 75.503 states:

Section 75.503. Permissible electric face equipment; maintenance

The operator of each coal mine shall maintain in permissible condition all electric face equipment required by §§75.500, 75.501, 75.504 to be permissible which is taken into or used inby the last open crosscut of any such mine.

Section 75.503 does not set the standards for permissibility; it requires only that certain equipment be maintained in permissible condition.

The Act, in section 318(i), defines "permissible" as follows:

"permissible" as applied to electric face equipment means all electrically operated equipment taken into or used inby the last open crosscut of an entry or a room of any coal mine the 'electrical parts of which, including, but not limited to, associated electrical equipment, components, and accessories, are designed, constructed, and installed, in accordance with the specifications of the Secretary, to assure that such equipment will not cause a mine explosion or mine fire, and the other feature of which are designed and constructed, in accordance with the specifications of the Secretary, to prevent, to the greatest extent possible, other accidents in the use of such equipment; and the regulations of the Secretary or the Director of the Bureau of Mines in effect on the operative date of this title relating to the requirements for investigation, testing, approval, certification, and acceptance of such equipment as permissible shall continue in effect until modified or superseded by the Secretary, except that the Secretary shall provide procedures, including,

where feasible, testing, approval, certification, and acceptance in the field by an authorized representative of the Secretary, to facilitate compliance by an operator with the requirements of section 305(a) of this title within the periods prescribed therein;

In order to meet the permissibility standard of 30 C.F.R. §75.503, the equipment must be built according to the requirements of Schedule 2G, which is set forth in 30 C.F.R. Part 18. See, e.g., Kaiser Steel Corporation, IBMA 75-15, 3 IBMA 489 (1974); and Eastern Associated Coal Corporation, IBMA 75-23, 75-25, 5 IBMA 185 (1975).

Accordingly, the requirement in 30 C.F.R. §75.503 that electric face equipment be maintained in "permissible condition" refers to the requirements of Schedule 2G which are set forth at 30 C.F.R. Part 18.

30 C.F.R. S18.15 requires that:

[i]f an applicant desires to change any feature of approved equipment or a certified component, he shall first obtain MSHA's concurrence pursuant to the following procedure: * * *.

Petitioner was an "applicant" because it was a "corporation" that controlled "the assembly of an electrical machine or accessory" (30 C.F.R. S18.2, definition of "Applicant") when it reassembled its Longwall Mining Unit at the D-5 location. As an "Applicant," Petitioner was required by 30 C.F.R. SS18.15 and 18.81 to apply in writing to the Approval and Certification Center, MSHA, in advance of making the changes to approved equipment so that MSHA could "determine whether inspection or testing will be required. .. if there is a possibility that the change(s) may adversely affect safety" (§18.15(b)). MSHA would also need to determine whether the "[p]roposed modifications . .. conform with the applicable requirements of Subpart B of this part [Part §18], and not substantially alter the basic functional design that was originally approved for the equipment" (Part 18,18(b)).

The Longwall Mining Unit with the original Eikhoff Shearer in place and the Siemons Allis Motors in place had been approved by MSHA under MSHA Approval No. 2G-3365A-0 (Exhibit G-l, Electrical Component Layout). The record establishes that Petitioner made changes to-its approved Longwall Mining Unit and operated the unit with those changes 'without complying with the requirements of 30 C.F.R. Part 18. I hold that the changes in the Longwall equipment without obtaining MSHA approval constituted a violation of 30 C.F.R. 575.503.

III. Failure to provide or to maintain clamps for the cable entering the Head face and Tail face Motor Junction boxes.

At hearing it was established that there were no clamps to protect the cables entering the head face conveyor junction box and the tail face conveyor junction box against strain from movement of the conveyor system.

Cable clamps are required by 30 C.F.R. §18.40 to be provided:

> for all portable (trailing) cables to prevent strain on the cable terminals of a machine. Also insulated clamps shall be provided to prevent strain on both ends of each cable or cord leading from a machine to a detached or separately mounted component.

At hearing, Inspector Fetty testified that the cables leading to the head face and tail face conveyor junction boxes were "trailing cables" and not inner machine cables because they are subject to the movement of the conveyor system during the mining process (Tr. pp. 117-118). I accept this definition and hold that Petitioner failed to comply with 30 C.F.R. 518.40. For the reasons set forth above, I hold that this violation of 30 C.F.R. §18.40 constituted a failure to "maintain . . . electric face equipment... in permissible condition" and thus is also a violation of 30 C.F.R. §75.503.

IV. Were the violations of 30 C.F.R. §75.503 "Unwarrantable"?

Petitioner's management officials intentionally modified the existing approved Longwall Mining Unit by changing the shearer, conveyor motors, pan line and accessories amounting to some 80% of the Longwall Mining Unit, without applying to MSHA for approval of the changes to the Longwall Mining Unit. The management officials were aware of the approval and modification processes required by MSHA, having discussed them-with MSHA representatives Fetty, Shuttlesworth and Hall in the summer of 1981, and having filed Field Modification requests concerning S&S Scoop tractors in June 1979 and the Longwall stage loader in.August 1982.

I hold that Petitioner's failure to comply with the application and certification procedures was "unwarrantable." If Petitioner had any question as to the requirement for an application for approval of the type modifications it planned, it could have resolved the question by contacting MSHA to see whether an application was needed. By acting without

inquiring into the legality of its actions, it showed a careless disregard for it statutory and regulatory duty as an operator.

As to the other violations of section 75.503, a thorough inspection of the Longwall Mining Unit conducted by MSHA in January 1982 produced a long list of items that needed correction by the operator prior to start up that included numerous references to improperly packed packing glands and cables not provided with adequate strain relief (i.e., strain clamps). I find that Petitioner knew or should have known of the packing gland and cable clamp violations and corrected them before the inspection on March 24, 1983. I therefore hold that these violations constituted an "unwarrantable" failure to comply.

CONCLUSIONS OF LAW

1. The judge has jurisdiction over this proceeding.

2. MSHA Order No. 2115977, March 24, 1983, is not valid because the Secretary has not met his burden of proving that an intervening "clean" inspection had not occurred. Order No. 2115977 should be converted into a section 104(a) citation.

3. The violations charged in Order No. 2115977 were proved by the Secretary, by a preponderance of the evidence, and each was proved to be an "unwarrantable" violation.

ORDER

WHEREFORE IT IS ORDERED that:

1. MSHA Order No. 2115977 is MODIFIED to change it from a section 104(d)(2) order into a section 104(a) citation.' As so modified, this citation including all the charges therein is AFFIRMED.

William Fauver
William Fauver
Administrative Law Judge

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