

CCASE:
SOL (MSHA) V. GREEN COAL
DDATE:
19871020
TTEXT:

~1780

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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS Docket No. KENT 86-142 A.C. No. 15-13469-03564
v.	Docket No. KENT 87-32 A.C. No. 15-13469-03575
GREEN RIVER COAL COMPANY, INC., RESPONDENT	Docket No. KENT 87-33 A.C. No. 15-13469-03579 Docket No. KENT 87-79 A.C. No. 15-13469-03588 Green River No. 9 Mine

DECISIONS

Appearances: Mary Sue Ray, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for the Petitioner;
Flem Gordon, Esq., Gordon & Gordon, Owensboro,
Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for 11 alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations, and one alleged violation of the accident reporting requirements of 30 C.F.R. 50.12.

The respondent filed timely answers and notices of contests challenging the alleged violations and MSHA's "special assessments" which formed the basis for the proposed civil

~1781

penalty assessments filed by the petitioner in these proceedings.

The respondent's answers also included challenges to the merits of a section 107(a) imminent danger order upon which three violations in issue were based (KENT 86Ä142); the merits of two section 107(a) imminent danger orders issued in conjunction with four section 104(a) citations (KENT 87Ä79); the merits of a section 104(d)(1) order on which the petitioner's civil penalty proposal is based (KENT 87Ä32); and the merits of a section 104(d)(1) Order No. 2216256, included as part of the petitioner's proposals for assessment of civil penalties.

These cases were scheduled for hearings on the merits in Owensboro, Kentucky, during the hearing term September 1Ä3, 1987. In Docket No. KENT 86Ä142, the parties filed a pretrial motion proposing a settlement disposition of the case pursuant to Commission Rule 30, 29 C.F.R. 2700.30. However, in view of the failure by the parties to submit full information regarding the six statutory civil penalty assessment criteria found in section 110(i) of the Act, a dispositive ruling on the motion was held in abeyance, and the parties were afforded an opportunity to present the information on the record at the hearings.

With regard to the remaining cases, when the dockets were called for trial, respondent's counsel informed me that upon further consultation with a representative of the respondent who was present in the courtroom, the respondent decided not to go forward with the cases and decided to settle the matters with the petitioner. The parties were afforded an opportunity to present their arguments in support of their settlement proposals on the record in each of the cases. The violations, initial assessments, and the proposed settlement amounts are as follows:

DOCKET NO. KENT 86Ä142

Citation No.	Date	30 C.F.R.		
		Section	Assessment	Settlement
2214778	04/16/86	75.400	700	700
2214779	04/16/86	75.1725	700	700
2214780	04/16/86	75.1722	400	400
			\$1,800	\$1,800

DOCKET NO. KENT 87Ä79

Citation No.	Date	30 C.F.R.		
		Section	Assessment	Settlement
2216502	10/21/86	75.301	800	500
2216503	10/21/86	75.308	800	500
2216504	10/21/86	75.403	600	500
2216514	11/17/86	75.316	600	500
			\$2,800	\$2,000

DOCKET NO. KENT 87Ä32

Order No.	Date	30 C.F.R. Section	Assessment	Settlement
2216241	07/15/86	75.400	800	800

DOCKET NO. KENT 87Ä33

Citation/Order No.	Date	30 C.F.R. Section	Assessment	Settlement
2216247	07/28/86	75.400	\$1,000	\$1,000
2216814	08/02/86	50.12	100	50
2216816	08/02/86	75.400	700	700
2216256	08/05/86	75.200	600	600
			\$2,400	\$2,350

Issues

The issues presented in these proceedings are whether the respondent violated the cited mandatory safety standards as stated in the contested citations and orders, and if so, the appropriate civil penalty assessments which should be assessed for those violations based on the criteria found in section 110(i) of the Act. Additional issues raised by the parties are discussed and disposed of in the course of these decisions.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub.L. 95Ä164, 30 U.S.C. 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).
3. Commission Rules, 20 C.F.R. 2700.1 et seq.

~1783

Procedural Rulings

The parties were advised that the issues raised as part of the respondent's answers with respect to the merits of the previously mentioned section 107(a) imminent danger orders, and the "unwarrantable failure" section 104(d)(1) orders were not viable issues in these civil penalty proceedings. The parties acknowledged their understanding of my bench ruling, and no objections or exceptions were noted.

With regard to the respondent's challenge to MSHA's "special assessment" civil penalty procedures found in Part 100, Title 30, Code of Federal Regulations, the parties were advised that MSHA's Part 100 civil penalty procedures are not controlling in these de novo civil penalty proceedings, and that any civil penalty assessments levied by me will be on the basis of the record made in these cases, including any credible testimony or evidence presented with respect to the alleged violations, and the information and evidence presented with respect to the six statutory civil penalty assessment criteria set forth in section 110(i) of the Act.

Preliminary Matter

With regard to Dockets KENT 87Ä32 and KENT 87Ä33, the parties were advised that according to a memorandum dated August 19, 1987, from MSHA's Civil Penalty Compliance Office, to the Commission's Docket Office, MSHA's records reflect that it has received payment from the respondent for the proposed civil penalty assessments made in these two cases.

Upon consultation with the respondent's assistant Safety Director, Grover Fishbeck, who was present at counsel table, respondent's counsel confirmed that the respondent had in fact tendered payment to MSHA for the civil penalties in Dockets KENT 87Ä32 and KENT 87Ä33. Counsel asserted that he was unaware of the payments, that they were made in error, and that the mistaken payments should not be construed as a waiver of the respondent's rights and intentions to contest the violations in question.

Stipulations

With regard to Dockets KENT 87Ä32, KENT 87Ä33, and KENT 87Ä79, the parties submitted the following written relevant stipulations:

~1784

1. For the calendar year 1986, respondent produced 1.7 million tons of coal.
2. Respondent currently has 384 employees.
3. The proposed civil penalty assessments for the violations in question will not seriously affect the respondent's ability to continue in business.
4. The respondent acted in good faith in correcting or abating all of the alleged violative conditions.

The parties also agreed that notwithstanding the settlements which have been approved in all of the cases, all of the citations and orders which are the subject of these proceedings will stand as issued, including the inspector's "S & S", negligence, and gravity findings. They also agreed that I may properly consider the information concerning the respondent's history of prior violations as reflected in the pleadings filed by MSHA, namely the information which appears on MSHA's Proposed Assessment Form 100-179, with regard to the number of prior assessed violations and the number of inspection days during which those violations were issued.

Discussion

DOCKET NO. KENT 86-142

This case concerns three section 104(a) "significant and substantial" (S & S) citations issued by MSHA Inspector George W. Siria on April 16, 1986. The citations relate to the accumulation of loose coal and coal dust, inoperative conveyor belt rollers, and an inadequately guarded tail roller on the slope belt conveyor of the subject mine. In particular, the inspector cited violations of mandatory safety standards 30 C.F.R. 75.400, 75.1725 and 75.1722. He also found that the cited conditions, taken collectively, constituted an imminent danger, and he issued a section 107(a) order on April 16, 1986, withdrawing miner's from the cited slope belt areas.

By motion received August 10, 1987, respondent's counsel filed a request to dismiss this case on the ground that the respondent agreed to pay the proposed civil penalty assessments in full. On August 13, 1987, I issued an order denying the motion, and directed the parties to file an appropriate

~1785

settlement motion pursuant to Commission Rule 30, 29 C.F.R. 2700.30.

On August 25, 1987, the parties filed a joint motion for approval of a proposed settlement of the case, and the respondent agreed to pay the proposed civil penalty assessments in full. The parties stated that the cited conditions were corrected and abated at 5:00 p.m., April 17, 1986, and that the imminent danger order was lifted at that time. They also agreed that the citations should be affirmed without further modification.

In view of the fact that the settlement motion failed to include any information with respect to the six statutory criteria set forth in section 110(i) of the Act, my dispositive ruling was held in abeyance in order to afford the parties an opportunity to present the information on the record during the course of the scheduled hearings.

During the course of the hearings, the parties stipulated to the following:

1. The violations occurred as stated in the subject citations.
2. For the calendar year 1986, the respondent produced 1.7 million tons of coal.
3. For calendar year 1986, the respondent had approximately 384 employees.
4. The proposed civil penalty assessments will not adversely affect the respondent's ability to continue in business.
5. The respondent exhibited good faith in timely abating the cited conditions.

Since the parties have agreed that the citation may be affirmed as issued, I adopt the inspector's negligence, gravity, and "S & S" findings on these issues, and take note of the respondent's history of prior violations as stated in the petitioner's pleadings reflecting 127 prior assessed violations during 450 inspection days during the 24-month period prior to the issuance of the citations in question.

This case concerns four section 104(a) "significant and substantial" (S & S) citations issued by MSHA Inspector James E. Franks on October 21, and November 17, 1986. The three citations issued on October 21, relate to an inadequate quantity of air, excessive levels of methane, and inadequate rock dusting. The inspector cited violations of mandatory safety standards 30 C.F.R. 75.301, 75.308, and 75.403. He also found that the cited conditions, taken collectively, constituted an imminent danger, and he issued a section 107(a) order withdrawing miners from the cited areas.

The remaining citation issued by the inspector on November 17, cites a violation of mandatory safety standard 30 C.F.R. 75.316, and relates to a violation of the respondent's approved mine ventilation plan in that the inadequate ventilation resulted in the presence of excessive methane levels in an abandoned area of the mine. In conjunction with this citation, the inspector issued a section 107(a) imminent danger order on November 17, ordering the withdrawal of miners from the areas where methane was detected. The record reflects that the citation was terminated on the same day that it was issued after adequate ventilation was restored, and the inspector subsequently modified the citation to change the number of mine personnel exposed to the hazard from 24 to 12.

The respondent asserted that the imminent danger order issued by the inspector was invalid in that the air bottle sample taken by the inspector to support the order, when tested, reflected the actual presence of only a maximum of 1.3 percent methane, which was well within MSHA's standards. Since MSHA's proposed civil penalties for the three citations which the inspector believed collectively constituted an imminent danger were "specially assessed" because of the issuance of the order, respondent's counsel disputed the validity of those assessments based on an "invalid order."

Petitioner's counsel agreed that the bottle sample reflected the presence of 1.33 percent methane in the affected areas. In further mitigation of the citations, counsel stated that the respondent cooperated fully with the MSHA inspector in conducting an evaluation of the ventilation in the affected areas.

With regard to Citation No. 2216514, petitioner's counsel introduced a copy of the mine map confirming the fact that the methane found in the inadequately ventilated area was in fact found in an abandoned area of the mine (exhibit GÄ1). Counsel

~1787

also confirmed that no methane accumulations were reaching the working face areas of the mine.

In mitigation, respondent's answer to the petitioner's civil penalty proposal includes notes by the respondent's Assistant Safety Director Grover Fishbeck reflecting that the assistant mine foreman and another employee were in the cited area at the beginning of the shift and were attempting to deal with the ventilation problem when the inspector arrived at the scene, and that a recent fall had blocked the air course.

Mr. Fishbeck, who was present in the courtroom, stated that the ventilation problem was corrected shortly after the citation was issued, and that a telephone call was placed to MSHA between 2:30 and 3:00 p.m., that same day, reporting the fact that corrective action had been taken to restore the ventilation, and requesting that an inspector come to the mine to terminate the citation.

Petitioner's counsel did not refute Mr. Fishbeck's assertions, and the record reflects that the citation was terminated by MSHA Inspector Ronald D. Oglesby at 5:00 p.m., on November 17, 1986.

The parties proposed to settle all of the citations in this case, and they agreed that civil penalty assessments of \$500 for each of the citations was reasonable and appropriate. Respondent agreed to pay civil penalty assessments totaling \$2,000 in satisfaction of the four citations in question.

DOCKET NO. KENT 87A32

This case concerns a section 104(d)(1) "significant and substantial" Order No. 2216241, issued by MSHA Inspector L. Cunningham on July 15, 1986, citing a violation of mandatory safety standard 30 C.F.R. 75.400. The inspector issued the order after finding accumulations of loose coal and float coal dust alongside and under a belt conveyor in "spot locations" on the mine floor and walkway. He also found float coal present in the crosscuts adjacent to the belt, and that the belt bottom and rollers were running in the loose coal at three locations. He noted that the fire boss records for July 12-15, 1987, included notations that certain locations along the belt were in need of cleaning and dusting.

The record reflects that the inspector modified his order approximately 3 hours after it was issued to allow normal production to begin as long as miners were assigned to clean

~1788

and re-rockdust the cited areas. The record also reflects that the order was terminated at 11:30 a.m., on July 17, 1986, after the cited areas were cleaned up and re-rockdusted.

The parties proposed a settlement of this case, and the respondent agreed to pay the full amount of the proposed civil penalty assessment of \$800 for the violation in question.

DOCKET NO. KENT 87Ä33

This case concerns two section 104(d)(1) "significant and substantial" (S & S) orders issued at the mine on August 2 and 5, 1986, one "S & S" section 104(a) citation issued on August 2, 1986, and one non-"S & S" section 104(a) citation issued on August 2, 1986. The citations and orders relate to accumulations of loose coal and float coal dust on the mine floor along a belt conveyor, the failure to preserve an "accident site" where a methane ignition occurred, accumulations of loose coal and dust along a belt feeder, and a failure to follow the roof-control plan with respect to the installation of roof timbers. The inspector cited violations of mandatory safety standards 30 C.F.R. 75.400, 50.12, and 75.200.

The parties agreed to settle all of the violations, and the respondent agreed to pay the full amount of the proposed civil penalty assessments for three of them. With regard to Citation No. 2216814, for a violation of 30 C.F.R. 50.12, the parties agreed that a civil penalty assessment of \$50 is reasonable and appropriate for the violation, and the respondent agreed to pay that amount.

Citation No. 2216814, concerns a non-"S & S" violation of 30 C.F.R. 50.12. This section prohibits a mine operator from altering an "accident site or an accident related area" until the completion of an MSHA investigation. The standard contains certain exceptions which do not apply in this case.

The inspector issued the citation after finding that a face methane ignition had occurred. Production was stopped, but a shot firer shot the area where the purported ignition occurred, thereby "altering" the location of the ignition. By definition found in section 50.2, an "accident" includes an unplanned methane gas ignition, and the parties agreed that the purported ignition is within that definition.

The parties explained the circumstances connected with the incident which resulted in the issuance of the citation. They agreed that the section foreman acted properly and in good faith by immediately taking appropriate action to report

~1789

the ignition to MSHA and to preserve the site. However, the shot was fired inadvertently before this could occur, and it was not the result of any or intent by the respondent to avoid compliance with the standard.

With regard to the coal accumulation violation, No. 2216816, the respondent submitted an affidavit from Face Boss Robert Sandidge, stating that at the time the violation was issued, the unit was idle due to the ignition, and that the cited area would have been cleaned during the normal mining cycle but for the ignition.

With regard to coal accumulation violation No. 2216247, the respondent submitted an affidavit from foreman Finis Todd, stating that at the time the violation was issued, three men were cleaning the belt during all hours of the working shift in question. In addition, the respondent's Assistant Safety Director Grover Fishbeck, produced copies of certain mine records for July 25-28, 1986, supporting the respondent's contention that the belt was being cleaned.

Findings and Conclusions

After review of the pleadings filed by the parties in these proceedings, and upon careful consideration of the arguments advanced in support of the proposed settlement disposition of these cases, I conclude and find that the proposed settlements are reasonable and in the public interest. I also conclude and find that the parties have presented reasonable justifications for the reduction of the civil penalty assessments as noted above. Accordingly, pursuant to 29 C.F.R. 2700.30, the settlements ARE APPROVED.

ORDER

The respondent IS ORDERED to pay civil penalty assessments in the settlement amounts shown above in satisfaction of the violations in question within thirty (30) days of the date of these decisions and order, and upon receipt of payment by the petitioner, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge