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GREEN RIVER V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

GREEN RIVER COAL CO., INC., CONTESTANT	CONTEST PROCEEDINGS
	Docket No. KENT 87-13-R
v.	Citation No. 2216153; 9/18/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. KENT 87-14-R Citation No. 2216154; 9/18/86
	Docket No. KENT 87-15-R Citation No. 2216740; 9/18/87
	Docket No. KENT 87-16-R Order No. 2216023; 9/19/86
	Green River No. 9 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS Docket No. KENT 87-37 A.C. No. 15-13469-03581
v.	
GREEN RIVER COAL CO., INC., RESPONDENT	Docket No. KENT 87-67 A.C. No. 15-13469-03585
	Green River No. 9 Mine

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

DECISION

Before: Judge Weisberger

STATEMENT OF THE CASE

In these consolidated cases, the Operator (Respondent) sought to challenge the following Citations/Orders issued to it by the Secretary (Petitioner): 2216153 (alleged violation of 30 C.F.R. 75.400), 2216154 (alleged violation of 30 C.F.R.

75.316), 2216023 (alleged violation of 30 C.F.R. 75.0303), 2216024 (alleged violation of 30 C.F.R. 75.307Ä1), 2216025 (alleged violation of 30 C.F.R. 75.302Ä1), and 2216740 (alleged violation of 30 C.F.R. 75.0503). The Secretary sought civil penalties for alleged violations by the Operator of the above cited sections. On August 10, 1987, Respondent filed a Motion to Dismiss Order No. 2216023. On August 10, 1987, Respondent filed a Motion to Dismiss the Contest Proceeding and the Civil Penalty Proceeding involving Order No. 2216154 on the ground that it tendered payment to the Secretary of the proposed penalty on or about August 6, 1987.

Pursuant to notice, the remaining cases were scheduled for hearing in Nashville, Tennessee, on August 11, 1987. At the hearing, Counsel for both Parties indicated that a settlement had been reached in the Civil Penalty Proceeding, Docket No. KENT 87Ä67 (Citation Nos. 2216023, 2216024, and 2216025, (Docket No. KENT 86Ä16ÄR)). At the hearing, after argument, the Motion to Dismiss Order No. 216023 was denied. At the hearing, Counsel for both Parties indicated, in essence, that an agreement had been reached with regard to the relevant facts involved in Docket No. KENT 87Ä15ÄR, and that the legal issues involved in this case would be briefed. The remaining cases, KENT 87Ä37 and KENT 87Ä13ÄR, were heard in Nashville, Tennessee, on August 11, 1987. James Franks testified for Petitioner, and Grover Fischbeck testified for Respondent. Respondent submitted its Posthearing Brief and Memorandum of Authority on August 17, 1987, and Petitioner submitted its Post Trial Memorandum on August 31, 1987. On October 1, 1987, Petitioner filed three stipulations with regard to the criteria in Section 110(i) of the Act.

On August 31, 1987, Respondent filed a Joint Motion to Approve Settlement in Docket Nos. KENT 87Ä67 and KENT 87Ä16ÄR. Initially, the Secretary had proposed the following Civil Penalties for the following Citations: 2216023, $300; 2216024, $500, and 2216025, $700. The Parties proposed a settlement of the following Citations in the following amounts: 2216023, $100; 2216024, $700, and 2216025, $700. I considered the representations and documentation submitted in these cases, and I conclude that the proffered settlements are appropriate under the criteria set forth in Section 110(i) of the Act.

KENT 87Ä15ÄR (Citation No. 2216740)

On September 18, 1986, Citation No. 2216740 was issued alleging a violation of 30 C.F.R. 75.503 in that "a violation was observed on the long-airdox roof bolter (extra bolter on No. 7 Unit) in that an opening in excess of .004 inch was present between the main breaker box lid and breaker box. Also two bolts were missing from the main on and off switch box."

35 C.F.R. 75.503 provides as follows:

> The Operator of each coal mine shall maintain in permissible condition all electric face equipment required by Sections 75.500, 75.501, and 75.104 to be permissible which is taken into or used inby the last open crosscut of any such mine.

The Parties stipulated that there was an opening of .004 inch on the electrical switch box of the bolter in question, and that two bolts were missing from the on-off electrical switch box. It was further stipulated, that at the time of the alleged violation, the bolter in question was not energized, and was located outby the last open crosscut. In its Post Trial Memorandum, the Secretary has alleged that the roof bolter in question was operated as an alternate on the No. 7 Section, that it was available for use at the face area if one of the face roof bolters was inoperative, and that in fact it was intended to be used as a backup for the No. 7 Section. However, the record does not contain any evidence to support these allegations of the Secretary. Thus, inasmuch as there is no evidence which would tend to establish that the Respondent intended to use the bolter in question inby the last open crosscut, I conclude that a violation of Section 75.503, supra, did not occur (c.f. Secretary v. Solar Fuel Company 3 FMSHRC 1384 (June 1981). Hence the Notice of Contest is allowed.

KENT 87Ä14ÄR.

On August 10, 1987, Respondent filed a Motion indicating, in essence, that the violation which had been contested in KENT 87Ä14ÄR, had in fact occurred, and that Respondent has tendered payment of the proposed penalty. Accordingly, Docket No. KENT 87Ä14ÄR is dismissed.

KENT 87Ä37 (KENT 87Ä13ÄR, Citation No. 2216153)

On September 18, 1986, MSHA Inspector James Franks issued Citation No. 2216153, alleging a violation of 30 C.F.R. 75.400, and stating as follows:

> Accumulations of loose coal and coal dust (1/2 to 15 inches deep and averaging 15 ft. wide) was present around the tail piece long the belt and under the belt drive of the No. 3 Unit conveyor belt, beginning at the tail piece and extending outby approximately 800 feet.

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 an electric equipment therein.

MSHA Inspector James Franks testified that on June 18, 1986, when he inspected Respondent's No. 9 Mine, he found coal accumulations that ranged from 1/2 to 15 inches in depth, along and under the No. 3 Unit belt, from the tail piece to the belt drive. Franks said, in essence, that the accumulations appeared to have been in existence for several days, and that the physical appearance of the coal dust was not that of a recent spill. Preshift mine examiner's reports indicate that on September 17, in an examination, between 9:00 p.m. and 12:00 p.m., it was noted that " No. 3 Unit belt need to be cleaned." In an examination on September 18, between 5:00 a.m. and 8:00 a.m., it was noted that " No. 3 Unit belt needs cleaned (sic) and dusted."

Franks testified that no one was in the area working on cleaning the belt during his inspection. Grover Fischbeck, Assistant Safety Director for Green River Coal Company, stated, in essence, that he was not present during Franks' inspection, but that the foreman and the man who traveled with Franks told him that the belt was being cleaned prior to Franks' inspection. The latter two personnel were not present at the hearing. Preshift examination records indicate that the area was cleaned sometime during the 8:00 a.m. Ä 4:00 p.m. shift on September 18, 1986; however, these records do not establish the time of day during which the cleaning began.

The No. 3 Unit was idle on the shift during which Franks conducted his inspection on September 18, 1986. However, Fischbeck indicated it had run the preceding shift and the belt was dirty. (Tr. 61).

Franks testified that both the fire suppression spray system and the dust-control water spray system were inoperative at the time of the violation. (These conditions resulted in citations for which civil penalties were paid by the Operator.) Franks testified that on September 18, the return air from No. 9 Mine had .6 of methane gas, and that " . . . I have reports on at least five methane ignitions at the mine." (Tr. 30). He stated that in his opinion this indicates that the mine liberates gas. Franks testified that this condition could cause or contribute to a mine fire or explosion which would result in lost work days or a restricted duty accident involving six men working on the No. 3 Unit.

Based on the uncontradicted testimony of Franks, I find that on September 18, 1986, there was an accumulation of loose coal approximately 1/2 to 15 inches in depth from the tail piece to the belt drive along and under the No. 3 Unit conveyor belt. Section 75.400, supra, provides, in essence, that coal dust and loose coal shall be cleaned up and not be permitted to accumulate in "active workings." Essentially, it is Respondent's position that because the unit was not in operation when Franks observed the accumulation of coal, that the accumulation can not be considered to have occurred in a "active workings." In this connection, it should be noted that 30 C.F.R. 75.2(g)(4) defines "active workings" as " any place in a coal mine where miners are normally required to work or travel;". Applying this definition to the instant case, it is clear that the belt line at the No. 3 Unit is a place where the miners are normally required to work or travel. It thus is irrelevant that the unit was not in operation when Franks made his inspection and issued the citation in question. Thus, I conclude that Respondent did violate Section 75.400, supra.

It is the position of Respondent, as asserted in its Post Hearing Brief, that " a violation has not occurred as when the belt became dirty, no further mining actives were conducted in the area." There was no testimony offered by either side as to how long the coal accumulation in question had existed before it was cleaned by Respondent. However, Respondent's mine examiner's reports indicate that on September 17, between 9:00 p.m and 12:00 p.m., and again September 18, between 5:00 a.m and 8:00 a.m., it was noted that the belt in question had to be cleaned. Further, it does not appear to be contested that the unit was in operation the shift immediately proceeding the one in which Franks made his inspection. Fischbeck, who was not present at the No. 3 Unit when Franks made his inspection, testified that the foreman and the man who traveled with Franks told him that the belt was being cleaned prior to Franks' arrival at 10:30 in the morning. Rather than rely upon the out of court statements of two person who were not present to testify, I rely upon the testimony of Franks as to what he actually observed. Hence, I conclude, that when Franks made his inspection at 10:30 in the morning on September 18, the coal accumulation at the No. 3 belt line had not been cleaned and was not being cleaned. As such, I conclude that violation of Section 75.400, supra, was as the result of Respondent's "unwarrantable failure." (U.S. Steel Corporation, 6 FMSHRC 1423 (June 1974)).

I find, based upon the testimony of Franks, that there have been at least five methane ignitions at the subject mine. In addition, I adopt Franks' uncontradicted testimony that both the fire suppression spray system and the dust-control water spray system were inoperative at time of the violation. I further find, that the accumulation of coal up to 15 inches in depth under the belt line, did contribute to the possibility of a mine fire or explosion, especially taking into account the above factors. I adopt the opinion of Franks that such a fire or explosion would result in lost work days or restricted duty involving six men working on the No. 3 shift. In this connection, I find, based on Respondent's mine examiner's reports, and the testimony of Fishbeck, that the unit in question had been in operation the shift prior to Franks' inspection and that the belt area had an accumulation of loose coal or coal dust. As such, I find that the violation herein was significant and substantial (see Mathies Coal Company 6 FMSHRC 1 (January 1984)).

The Parties have stipulated that the total tonnage at the Green River No. 9 Mine is 2,440,390 tons for the year of 1986. I thus find that the Operator had a large sized business. Documentary evidence indicates that the condition giving rise to the violation herein was cleaned up in the shift in which the violation was first noted. The Order itself was terminated at 9:15 a.m. on September 19, 1986, by Franks who noted that the accumulation of loose coal and coal dust had been cleaned up and the area was rock dusted. Accordingly, I find good faith by the Operator in attempting to achieve compliance. Due to the likelihood of an explosion, and taking into account the history of methane ignitions at the mine as well as the fact that the suppression spray system and the dust-control water spray system were inoperative, I find that the gravity of the violation to be high. I also find that Respondent's negligence was high as, on two previous shifts, it was noted by examiners that the coal in question had to be cleaned. Accordingly, taking into account all the factors in Section 110(i) of the Act, I find that the proposed penalty of $700 is appropriate.

ORDER

It is ORDERED that Docket Nos. KENT 87Ä13ÄR and 87Ä14ÄR be DISMISSED. It is ORDERED that the Notice of Contest, KENT 87Ä15ÄR be allowed, and that Citation No. 2216740 be VACATED. It is further ORDERED that Order No. 2216023 be modified to a Section 104(a) Citation. As modified the Citation is affirmed. It is further ORDERED that the Motion to Approve Settlement in Docket No. KENT 87Ä67 is GRANTED, and it is ORDERED that Docket No. KENT 87Ä16ÄR be DISMISSED.

It is further ORDERED that the Operator pay the sum of $2,200, within 30 days of this Decision, as civil penalties for the violations found herein.

Avram Weisberger
Administrative Law Judge