CCASE:
SOL (MSHA) V. STERLING ENERGY
DDATE:
19880329
TTEXT:

Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. KENT 87-205 A.C. No. 15-14587-03528
v.	
STERLING ENERGY, INCORPORATED, RESPONDENT	Sterling No. 5 Mine

DECISION

Appearances: Anne T. Knauff, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner; Kenneth R. Krushenski, Esq., Rogers, Hurst & Krushenski, LaFollette, Tennessee for Respondent.

Before: Judge Weisberger

Statement of the Case

The Secretary (Petitioner) filed, on August 14, 1987, a petition for assessment of civil penalty for an alleged violation by Respondent of 30 C.F.R. 75.319 on November 3, 1986. Pursuant to notice the case was heard in Knoxville, Tennessee, on October 20, 1987. J. Preston Payne, Sr. testified for Petitioner and Ralph Ball testified for Respondent.

Petitioner filed its Post Trial Memorandum on March 2, 1988, and the Respondent filed its Hearing Brief and Proposed Findings of Fact and Conclusions on February 1, 1988.

Issues

The issues are whether the Respondent violated 30 C.F.R. 75.319, and if so, whether that violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and whether the alleged violation was the result of the Respondent's unwarrantable failure. If section 75.319, supra, has been violated, it will be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et. seq., (the "Act").

Citation

Order No. 2801008, issued on November 3, 1986, alleges a significant and substantial violation in that:

> Two 101 Jeffery continuous miners, 2Ä506 Bridge carriers and a shuttle car were being used on the same split of air, one miner and two bridge carriers were being used on the 001 section and one miner and shuttle car were being used three crosscuts from the face on the return side.

Regulations

30 C.F.R. 75.319 provides as follows:

> Each mechanized mining section shall be ventilated with a separate split of intake air directed by overcasts, undercasts, or the equivalent, except an extension of time, not in excess of 9 months, may be permitted by the Secretary, under such conditions as he may prescribe, whenever he determines that this subsection cannot be complied with on March 30, 1970.

30 C.F.R. 75.319Ä1 provides as follows:

> The term "mechanized mining section" means an area of a mine in which coal is mined with one set of production equipment, characterized in a conventional mining section by a single loading machine, or in a continuous mining section by a single continuous mining machine, and which is comprised of a number of contiguous working places. Specialized mining sections, such as longwall mining sections, which utilize equipment other than specified in this section, may, if approved by the Coal Mine Safety District Manager, be ventilated by a single split of air.

Findings of Fact and Conclusions of Law

I

On November 3, 1986, the 001 section of Respondent's Sterling No. 5 Mine was ventilated with only one split of air. One intake air entry ventilated the face and air from the face was vented outby in a return air entry. The face area, which was stipulated to be a working section, contained one continuous miner, two bridge carriers, two roof bolters, and one scoop. In an area located three crosscuts outby the face there was located a continuous miner, a roof bolter, and a shuttle car. It was stipulated at the hearing that there was no power source on this

equipment and no power was hooked up to this equipment. However, in an area three entries to the right of this equipment and in the second crosscut outby the face there was located a power center, and it was stipulated at the hearing that the AC outlet was energized. I find, based on the uncontradicted testimony of J. Preston Payne, Sr., a MSHA Inspector, that a power cable was in place and it would have taken approximately 15 minutes for one worker to get power to the equipment located in the area three crosscuts outby the face.

Payne testified, in essence, that when he inspected the 001 section on November 3, 1986, he issued an order citing a violation of 30 C.F.R. 75.319. Section 75.319, supra, provides that each "mechanized mining section" shall be ventilated with separate split of intake air. Section 75.319Ä1, supra, provides that "The term "mechanized mining section' means an area of a mine in which coal is mined with one set of production equipment . . . ." This section further provides that the set of production equipment in a continuous mining section is characterized by ". . .a single continuous mining machine and which is comprised of a number of contiguous working places."

I find that the evidence clearly establishes that the 001 section, on the date in question, was ventilated with only one split of intake air, but had one set of production equipment at the face area and another separate set of production equipment in an area three crosscut outby the face. It is Respondent's position, in essence, that section 75.319, supra, is violated only if there are two sets of mechanized mining section actively operating and engaged in the mining of coal at the same time off the same split of intake air. In this connection, Respondent relies upon the testimony of its President, Ralph Ball, who indicated that the equipment located in the area three crosscut outby the face was "parked up" (Tr. 45, 64), and that coal from that area had been removed before the 001 section was moved in. He further indicated, in essence, that the equipment located three crosscuts outby the face was never run the same time that the equipment at the face was run. In this connection, Payne had indicated that when he made his inspection on November 3, the equipment located in the area three crosscuts outby the face was not working.

I find the interpretation of section 75.319, supra, and 75.319Ä1, supra, urged by the Respondent to be unduly restrictive. The area three crosscuts outby the face contained a set of production equipment and some coal had already been removed from that area. Accordingly, I find that area to be denominated a mechanized mining section. In reaching this conclusion, I note that although the equipment there was not energized, there was a cable present, which could have been hooked up to the nearby power center thus energizing the equipment.

II

The order in question alleges that the violation of section 75.319, supra, herein was "significant and substantial." However, Petitioner has failed to adduce proof on this issue. I therefore find that Petitioner has failed in its burden and that the violation herein can not be considered to be significant and substantial.

III

Payne testified that in his opinion the violation herein was caused by Respondent's unwarrantable failure, in that the equipment in the area three crosscuts outby the face could have been used any time and that management knew its location. In order to sustain Petitioner's position I must find that the violation herein resulted from Respondent's aggravated conduct which constitutes more than ordinary negligence (Emery Mining Corporation, 9 FMSHRC 1997, (December 1987)). Ball testified that, in essence, it was his understanding that to be in violation of section 75.319, supra, coal must be produced in two different areas in the same split of air, and that it is not a violation to have two sets of equipment as long as they are not being operated at the same time. I find the testimony of Ball credible in this regard and evidencing no bad faith on his part. Accordingly, I conclude that the violation herein was not the result of any aggravated conduct on the part of Respondent, as it resulted from his good faith interpretation of the controlling regulation. Hence, I conclude that the violation was not caused by Respondent's unwarrantable failure.

IV

In assessing a violation herein, I note the history of Respondent's violations as stipulated to at the hearing by the Parties. Further, inasmuch as the evidence fails to establish that the two mining sections, one at the face and the other three crosscuts out by the face, were ever engaged in active mining of coal at the same time, I conclude that the gravity of the violation herein was low. Further, inasmuch as the violation herein was as a result of Respondent's interpretation of the controlling regulation, and there was no evidence that this interpretation was made in bad faith, I conclude that negligence herein was low. Accordingly, taking these factors into account, as well as the other factors in section 110(i) of the Federal Mine Safety and Health Act of 1977, I conclude that a civil penalty herein of $50 is reasonable.

ORDER

It is ORDERED that Order No. 2801008 be modified to a Section 104(a) citation.

It is further ORDERED that Respondent pay the sum of $50, within 30 days of this decision, as a civil penalty for the violation found herein.

Avram Weisberger
Administrative Law Judge