CCASE:
SOL (MSHA) V. METTIKI COAL
DDATE:
19890523
TTEXT:

~914

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. YORK 88-30 A. C. No. 18-00621-03624
v.	Mettiki Mine
METTIKI COAL CORPORATION, RESPONDENT	

DECISION

Appearances: Anita D. Eve, Esq., Office of the Solicitor, Department of Labor, Philadelphia, Pennsylvania, for the Secretary;
Susan E. Chetlin, Esq., Jane C. Baird, Esq., Crowell & Moring, Washington, DC, for Respondent.

Before: Judge Weisberger

Statement of the Case

In this case, the Secretary (Petitioner) seeks a Civil Penalty for an alleged violations of the Operator (Respondent) of 30 C.F.R. 75.326. Pursuant to notice, this case was heard in Falls Church, Virginia, on February 14, 1989. At the hearing, Philip Martin Wilt, Barry Lane Ryan, and Dennis Deaver testified for Petitioner. John Pritt, Carl Randal Johnson, and Mark Carpenter testified for Respondent. Proposed Findings of Fact and Briefs were filed by Petitioner and Respondent on April 24, 1989. Respondent's filed a Reply Brief on May 12, 1989.

Respondent, on April 24, 1989, filed a Motion to Correct Hearing Transcript. Respondent, in its Motion, indicated the Petitioner did not object to the Motion, and it is hereby granted.

Stipulations

At the hearing, the following stipulations were entered into:

1. That Mettiki Coal Corporation is the owner and operator of the Mettiki Mine located in Deer Park, Garrett County, Maryland.

2. That Mettiki Coal Corporation and Mettiki Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. That the Mettiki Mine was opened after March 30, 1970.

4. The Administrative Law Judge has jurisdiction over this case pursuant to section 105 of the Act.

5. A copy of the Order was properly served by Philip M. Wilt, a duly authorized representative of the Secretary, upon an agent of the Respondent at the date, time and place stated therein, and may be admitted into evidence for the purpose of establishing its issuance, and not necessarily for the truthfulness or relevancy of any statements asserted therein.

6. That the assessment of a civil penalty in this proceeding will not affect Respondent's ability to continue in business.

7. The appropriateness of the penalty, if any, to the size of the coal operator's business should be based on the fact that Respondent's annual production tonnage is 2,294,859.

8. That Mettiki Mine was assessed a total of 382 violations over 547 inspection days for a 24-month period immediately preceding the issuance of the order involved in this case.

9. That, in fact, air from the belt haulage entry was ventilating at the working face on February 22, 1988, at the time and place in which Philip Wilt indicated pursuant to Order No. 3115962.

Findings of Fact and Discussion

I.

On February 22, 1988, while inspecting the E2 Section of Respondent's Mettiki Mine, Philip Martin Wilt, a MSHA Inspector, noted that a check curtain at the feeder to the belt had an opening in the left bottom corner, which he measured as 5 square feet, and additionally had more than five openings. Wilt termed the curtain to be "very poorly" and "loosely" installed (Tr. 24), and said that he measured 1300 cubic feet of air going through the curtain's opening. He issued a 104(d)(2) Order, citing Respondent with allowing air from the conveyor belt entry to enter into and ventilate the active working section. Respondent concedes that air from the belt did enter the working section. Accordingly, it is found that Respondent herein did violate section 75.326, supra, which, in essence, provides that air from the belt entries shall not be used to ventilate active working places.

II.

According to Wilt, if an ignition would have occurred in the belt line, the resulting dark smoke and gases could have entered into the working areas causing "zero" (Tr. 39) visibility, and the possibility of miners working there being overcome by the gases. Barry Lane Ryan, a MSHA Supervisor, essentially agreed with Wilt's assessment, and in addition, indicated that in a belt entry there are ignition sources such as cables and belt rollers. Also, according to Ryan, a belt rolling over frozen rollers, or cutting into timbers that are too close to the belt line, creates friction which is a source of ignition. Ryan also indicated that coal dust is generated by the belt movement which would then, if air is flowing from the belt entry to the face, go to the face, exposing miners to coal dust.

At the time the Order in question was issued, there was no production on the section, although the belt was in operation. According to Mark Carpenter, Respondent's section foreman, who arrived on the section for the start of the shift along with Wilt and the other miners in the section, indicated that when he went to make his fire boss inspection, the miners on the shift were at the tool car, which was located one cross cut inby the face and between the intake entry and the number four return entry. As such, the weight of the evidence does not establish that at the time of the violation there were miners at the face exposed to air from the belt entry. Ryan's testimony with regard to the effect of the instant violation, was merely hypothetical, as he did not observe the conditions on the date in issue. Although, at best, the testimony of Petitioner's witnesses tends to establish that a health hazard to miners could have been contributed to by the violation herein, it fails to establish that there was any reasonable likelihood of a hazard occurring, nor a reasonable likelihood that it would result in injury of a reasonably serious nature. As such, I find it has not been established that the violation herein was significant and substantial (c.f. Mathies Coal Co., 6 FMSHRC 1 (January 1984)).

III.

Wilt indicated that when he observed the curtain in question on February 22, 1988, it was "loosely" installed (Tr. 24), had more than five openings, with one in the left hand corner being 5 feet square, and opined that it was an "old curtain", and in "poor" condition (Tr. 52). In this connection, Wilt indicated that he relied upon his review of a Daily Section and Time Report (Exhibit R-3), which indicated that on the previous shift a curtain was hung at the feeder in an "elapsed time" of 8 minutes. According to Wilt, he did not see any evidence of rocks or coal having fallen from the ridge of the roof in the area of the

feeder curtain. Essentially Wilt opined that the violation was due to Respondent's unwarrantable failure, based on ". . . the condition and in the way the curtain was installed" (Tr. 41). He also indicated, essentially, that he considered Respondent negligent based on the above factors, as well as the fact that in the preceding quarter he issued three citations for violations of the standard at issue.

Ryan indicated that he essentially agreed with Wilt's conclusions with regard to Respondent's negligence, and the fact that the violation resulted from its unwarrantable failure. Essentially, Ryan indicated that his opinion in this regard was based upon the same factors testified to by Wilt. He also considered that it was "unreasonable" for the "high" amount of air in the belt entry to be regulated through an 8 inch square regulator (Tr. 61).

According to the uncontradicted testimony of John Pritt, Respondent's section foreman for the day shift, the curtain in question was installed on February 22, 1988, at the commencement of the day shift at approximately 8:00 a.m., by being wired to roof bolts at the top of the roof, and was nailed to rib boards every 4 feet and to the coal in the rib. He indicated that there were no major tears in the curtain when it was installed. He indicated that he had installed the curtain because in the preceding shift the belt and its feeder was moved to a side dump position from an end dump position. According to Pritt, it took three persons to hang the curtain, and that the 8 minutes indicated on the Daily Section and Time Report was only an estimate which was arrived at after the shift was completed at 3:00 p.m. . Pritt indicated that when he left the section at about 2:30 p.m., on February 22, he did a preshift examination for the next shift and the curtain was tight without any major tears and "in good shape" (Tr. 114). He also indicated, essentially, that the air was checked at the feeder at that time and was going in the right direction. He described the curtain, when he left the section, as "hanging straight up and down" without any force of air in either direction (Tr. 128). He indicated that the belt was running when he left, and that power was subsequently shut off on the way out.

I have taken into account Wilt's testimony that he did not observe any evidence of rocks having fallen from the ribs or roof in the area of the feeder. I find this testimony insufficient to contradict the testimony of Pritt that when he left the section at the end of the day shift at approximately 2:30 p.m., the check curtain was "tight" and "in good shape" (Tr. 114). (In this connection I note that even Wilt agreed that a curtain could come

loose in seconds if there were rocks on the feeder or if people walk though the curtain. The evidence indicates that miners do indeed travel through the curtain feeder).

I also find no contradiction to Carpenter's testimony that upon arrival on the section in the afternoon shift along with Wilt, he went to perform his fire boss inspection, which usually includes the belt entry feeder area, and had not yet reached that area by the time Wilt issued the Order in question. Thus, it appears that the loosening of the curtain occurred between the time Pritt left the section at 2:30 p.m., and the time it was observed by Wilt at 3:45 p.m., and before Carpenter had a chance to discover it in the course of his fire bossing. Thus, Respondent had no opportunity to find and tighten the curtain before Wilt issued the Order in question.

Taking all the above into account, I conclude it has not been established that the condition, and specifically the air flow observed by Wilt at the beginning of the afternoon shift, was the result of any aggravated conduct on the part of Respondent. Accordingly, I find that it has not been established that the violation herein resulted from Respondent's unwarrantable failure. (Emery Mining Corp., 9 FMSHRC 1997 (1987).
IV. Inasmuch as the evidence establishes that as a consequence of the violation herein, an ignition in the belt area could result in miners at the working faces being subjected to gases and dense smoke, I find that the violation herein to be of a moderately serious nature. Based upon the testimony of Pritt, as discussed above, III., infra, I find that the violative condition did not exist at the end of the day shift when Pritt made the last examination. The record does not establish the cause of the violative condition, but it is clear that it occurred sometime between Pritt's last inspection, and the time it was noted by Wilt. It is significant to note that Carpenter, who had the responsibility of inspecting the section prior to the commencement of the afternoon shift, was on his round, and had not yet had an opportunity to inspect the feeder area before it was cited by Wilt. Taking into account all the above, I conclude that Respondent herein was negligent to only a low degree. I also have considered the various other factors set forth in section 110(i) of the Act, as stipulated to by the Parties, and I adopt their stipulations. Based on all the above, I conclude that a penalty of $100 is appropriate for the violation herein of section 75.326, supra.

ORDER

It is hereby ORDERED that Order No. 3115962 be amended to a section 104(a) Citation to reflect the fact that the violation cited therein was neither significant and substantial, nor was it the result of Respondent's unwarrantable failure. It is further ORDERED that Respondent shall pay $100, within 30 days of this Decision, as civil penalty for the violation found herein.

It is further ORDERED that the Transcript of the hearing in this matter be amended to reflect the changes set forth in Respondent's Motion to Amend Transcript filed on April 24, 1989.

Avram Weisberger
Administrative Law Judge