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ARCH OF KENTUCKY v. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, Virginia 22041

ARCH OF KENTUCKY, INC.,
CONTESTANT

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

CONTEST PROCEEDINGS

Docket No. KENT 91-14-R
Order No. 3384420; 9/10/90

Docket No. KENT 91-15-R
Citation No. 3388902; 9/12/90

Mine No. 37
Mine ID 15-04670

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

v.

ARCH OF KENTUCKY, INC.,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. KENT 91-155
A.C. No. 15-04670-03633

No. 37 Mine

DECISIONS

Appearances: Mary Sue Taylor, Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for the Respondent/Petitioner;
Marco M. Rajkovich, Esq., Wyatt, Tarrant & Combs,
Lexington, Kentucky, for the Contestant/Respondent

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern a proposal for assessment of civil penalty filed by the Secretary of Labor (MSHA), against the respondent mine operator (Arch of Kentucky, Inc.), pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking a civil penalty assessment of \$390, for an alleged violation of mandatory safety standard 30 C.F.R. 75.202 (Docket No. KENT 91-155). Docket No. KENT 91-15-R, concerns a Notice of Contest filed by Arch challenging the legality and propriety of the citation, and Docket No. KENT 91-14-R, concerns a Notice of Contest filed by Arch challenging an imminent danger order issued by the inspector following the issuance of the contested citation.

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The contested citation and order were consolidated for hearing in Pikeville, Kentucky, on July 24, 1991, with two additional cases involving these same parties. The parties appeared and presented testimony and evidence with respect to these additional two cases. With regard to the instant dockets, the parties informed me of their mutually agreed upon settlement disposition of the cases without the necessity of a full hearing, and their arguments were heard on the record.

Stipulations

The parties stipulated in relevant part as follows (Tr. 5-6):

1. The contestant/respondent is a large mine operator.
2. The contestant/respondent is subject to the jurisdiction of the Act and the presiding administrative law judge.
3. Payment of the proposed civil penalty assessment will not adversely affect the respondent's ability to continue in business.

Discussion

KENT 91-155 and KENT 91-15-R

The contested section 104(a) "S&S" Citation No. 3388902, issued by MSHA Inspector Daniel L. Johnson at 10:50 a.m., on September 12, 1990, cites an alleged violation of mandatory safety standard 30 C.F.R. 75.202, and the cited condition or practice is described as follows:

The mine roof is not adequately supported on the empty track entry starting 50 feet outby the seventh crosscut and extending inby approximately 400 feet. An unintentional roof fall has occurred in the intersection of the seventh crosscut and the mine roof has broken and sagged along the left rib for a distance of approximately 220 feet on the inby side. The mine roof has also broken down the right rib for a distance of approximately 200 feet inby the left rib break.

This citation is issued as a contributing factor to 107-A Order No. 3384420. Therefore no termination time is set.

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KENT 91-14-R

The contested section 107(a) Imminent Danger Order No. 3384420, issued by Inspector Johnson at 4:50 p.m., on September 12, 1990, states in relevant part as follows:

An unintentional roof fall has occurred in the main empty track entry approximately seven-hundred and twenty feet inby the portal. The following conditions constitute an imminent danger. The mine roof, for a distance of approximately two hundred feet inby the fall area has cut down the left rib and is sagging. The right rib has also cut approximately the same distance but is not sagging. The operator does intend to recover the area. This order is issued to insure only those persons referred to in section 104-c of the Mine Act may work or travel in the area until the roof has been stabilized.

MSHA's counsel stated that after further consideration of all of the evidence in this case, including consultation with Inspector Johnson, who was present in the courtroom and available for testimony, MSHA has decided to vacate and modify the contested section 107(a) danger order to a section 103(k) order, and that Arch has agreed to withdraw its Notice of Contest challenging the section 107(a) order (Docket No. KENT 91-14-R).

With regard to the contested section 104(a) citation, MSHA's counsel asserted that MSHA has decided to vacate the citation, and counsel moved to withdraw its proposal for assessment of civil penalty, and Arch agreed to withdraw its contests.

In support of the motions for the aforementioned proposed dispositions of these cases, MSHA's counsel stated that the cited roof conditions resulted from an unintentional roof fall which occurred through no fault of the mine operator. Counsel pointed out that the operator barricaded the fall area and took immediate precautionary and corrective action, including the withdrawal of all mine personnel from the affected area. Counsel asserted further that under all of these circumstances, the inspector should have issued a section 103(k) control order rather than a section 107(a) imminent danger order, and that a violation of section 75.202, cannot be supported. Counsel confirmed that the proposed dispositions were made in consultation with the inspector and that he agreed that they were reasonable and proper in the circumstances (Tr. 6-8).

Conclusion

After careful review of the pleadings, and the arguments presented by MSHA's counsel, and taking into account the concurrence of the inspector who issued the contested citation and order, the proposed settlement disposition of these cases was approved from the bench. My bench decision is herein reaffirmed and I conclude and find that the dispositions made and approved are in the public interest.

ORDER

IT IS ORDERED THAT:

1. Docket No. KENT 91-14-R. The contested section 107(a) Order No. 3384420, September 12, 1990, IS VACATED AND MODIFIED to a section 103(k) order. The contestant's notice of contest is withdrawn and this case is dismissed.
2. Docket No. KENT 91-155. The contested section 104(a) "S&S" Citation No. 3388902, September 12, 1990, 30 C.F.R. 75.202, IS VACATED, the proposed civil penalty assessment is withdrawn, and this case is dismissed.
3. Docket No. KENT 91-15-R. The contestant's notice of contest is withdrawn and this case is dismissed.

George A. Koutras
Administrative Law Judge