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

PENN ALLEGH COAL COMPANY, INC.,
CONTESTANT

Contest of Citation

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

Docket No. PENN 80-271-R

Citation No. 840677
June 23, 1980

AND

Allegheny No. 3 Mine

UNITED MINE WORKERS OF AMERICA,
RESPONDENTS

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

Civil Penalty Proceeding

Docket No. PENN 80-275
A.C. No. 36-05691-03012

v.

Allegheny No. 3 Mine

PENN ALLEGH COAL COMPANY, INC.,
RESPONDENT

DECISION

Appearances: Ronald S. Cusano, Esq., Rose, Schmidt, Dixon, Hasley, Whyte and Hardesty, Pittsburgh, Pennsylvania, for Penn Allegh Coal Company, Inc.
Convette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor

Before: Judge Melick

Hearings were held on these cases in Pittsburgh, Pennsylvania, on November 18, 1980, pursuant to sections 105(d) and 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act". The general issue to be first resolved is whether Penn Allegh Coal Company, Inc. (Penn Allegh), violated the regulation cited in both cases, to wit: 30 C.F.R. 70.101. At hearing, Penn Allegh filed a motion for summary decision. My bench decision granting that motion appears below with only non-substantive corrections and is affirmed as my final decision at this time.

Under Commission Rule 64(b), 29 C.F.R. 2700.64(b), a motion for a summary decision shall be granted only if the entire record including the pleadings, depositions, answers to interrogatories, admissions and affidavits shows, (1) that there is no genuine issue as to any material fact and, (2) that the moving party is entitled to summary decision as a matter of law. Based on the agreed stipulation of facts submitted in this case, I conclude that, indeed, there is no genuine issue as to any material fact and that the operator in this case, Penn Allegh Coal Company, Inc., is entitled as a matter of law to a summary decision vacating the citations at issue.

There are two citations before me each charging one violation of the standard at 30 C.F.R. 70.101. That standard, which I will refer to as "the reduced dust standard," provides in part as follows:

When the concentration of respirable dust in the mine atmosphere of any working place contains more than five percent quartz, the operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere to which each miner in such working place is exposed at or below a concentration of respirable dust, expressed in milligrams per cubic meter of air, computed by dividing the percent of quartz into the number ten: [Emphasis added.]

I have emphasized the language "working place" as utilized in the standard because that language is critical to the decision in this case and it is the language upon which this case is to be decided. The term "working place" is defined in the regulations at 30 C.F.R. 70.2(e) as the area of a coal mine inby the last open crosscut. The term "working place" as used in the standard cited in these cases, that is, the reduced dust standard, is clearly governed by this definition. No one disputes this. I conclude, therefore, that the operator is required to maintain the reduced respirable dust levels required by section 70.101 only in that same specific area located "inby the last open crosscut" i.e., the same "working place" where the respirable dust has been found to contain more than 5 percent quartz.

The stipulated and agreed facts of this case show that the samples taken to establish that the concentration of respirable dust contained more than 5 percent quartz were taken between January 2 and January 9, 1980, in the north main section and specifically the area designated on the operator's mine map which is in evidence as Exhibit No. 1 as the working places in the area adjacent to the letter "A."

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On the other hand, the samples on which the violations cited in the two cases before me today were based were actually taken in the 2 right section which has been identified on the operator's mine map (Exh. No. 1) as the area designated with an orange color with the date February 1980, adjacent to it, the area designated by a green color with the date March 1980, adjacent to it, the area designated by the color red with the date April 1980, appearing adjacent to it, the color brown with the date May 1980, appearing adjacent to it, and the color yellow with the date June 1980, appearing adjacent to it.

According to the stipulation, the "working places" where the quartz concentration was determined and the "working places" where the alleged violations were found were no closer than 2,000 feet apart. Under the circumstances, it is clear beyond all doubt that the "working places" at which the respirable dust having more than 5 percent quartz content was found and relied upon in these cases were not the same "working places" at which the violations were cited. There has, therefore, been no violation of the cited standard and, accordingly, the citations before me must be vacated.

ORDER

Citation Nos. 9901143 and 840677 are hereby VACATED. The civil penalty proceeding, Docket No. PENN 80-275, is DISMISSED.

Gary Melick
Administrative Law Judge