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RUSHTON MINING v. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

RUSHTON MINING COMPANY, CONTESTANT	CONTEST PROCEEDINGS
v.	Docket No. PENN 85-253-R Order No. 2403926; 6/11/85
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. PENN 85-254-R Order No. 2403927; 6/14/85
	Docket No. PENN 85-255-R Order No. 2403928; 6/17/85
	Rushton Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING
	Docket No. PENN 86-1 A.C. No. 36-00856-03548
v.	Rushton Mine
RUSHTON MINING COMPANY, RESPONDENT	

DECISION

Appearances: David T. Bush, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor (Secretary); Joseph T. Kosek, Esq., Dennis Govachini, Esq., and Joseph Yuhas, Esq., Ebensburg, Pennsylvania, for Rushton Mining Company (Rushton).

Before: Judge Broderick

STATEMENT OF THE CASE

In the penalty case, the Secretary seeks penalties for five alleged safety standard violations, three of which grew out of orders which are contested in the contest proceedings. Therefore, all of the cases were consolidated for the purposes of hearing and decision. At the commencement of the hearing, the parties submitted, and I stated I would approve, a settlement of one of the alleged violations (that one charged in the order contested in PENN 86-255-R). Following the hearing, the

Secretary filed a motion to withdraw the Petition and vacate the order which is contested in PENN 86-253-R. Three violations remain, including that alleged in the order contested in PENN 86-254-R.

Pursuant to notice, the case was heard in Pittsburgh, Pennsylvania on November 6, 1986. Donald Klemick testified on behalf of the Secretary. Raymond Roeder, Lemmel Hollen and Kenneth Fenush testified on behalf of Rushton. Rushton filed a post hearing brief directed to an evidentiary ruling I made at the hearing. The Secretary did not file a post hearing brief. I have considered the entire record and the contentions of the parties and make the following decision.

FINDINGS AND CONCLUSIONS

At all times pertinent to this case, Rushton was the owner and operator of an underground coal mine in Centre County, Pennsylvania, known as the Rushton Mine. Rushton is a large operator. The history of previous violations is not such that penalties otherwise appropriate should be increased because of it. There is no evidence that the imposition of penalties will affect Rushton's ability to continue in business.

ORDER NO. 2403926

Order 2403926, issued under section 104(d)(1) of the Act, charged a violation of 30 C.F.R. 75.326 because an intake trolley haulage secondary escapeway entry was not separated from a parallel belt haulage entry. Testimony was taken at the hearing on the order and alleged violation. On February 5, 1987, the Secretary filed a motion to withdraw its penalty petition insofar as it was based on the order. The motion requested that the order be vacated. Rushton does not object to the motion. Therefore, the motion is GRANTED; the order will be VACATED; the petition will be DISMISSED insofar as it charges a violation of 30 C.F.R. 75.326 described in Order 2403926, and the Contest proceeding Docket No. PENN 85-253-R will be DISMISSED.

ORDER NO. 2403928

Order 2403928, issued under section 104(d)(1) of the Act, charged an unwarrantable failure violation of 30 C.F.R. 75.316 because the ventilation plan was not being complied with in that idled rooms were not being travelled and examined weekly. At the commencement of the hearing, the Secretary proposed a settlement of the penalty case related to this violation. The Secretary stated that he could not establish that the violation resulted from Rushton's unwarrantable failure. The violation was originally assessed at $400, and the parties agreed to settle for

$100, on the basis that the negligence was less than originally believed. I have considered the motion in the light of the criteria in section 110(i) of the Act and conclude that it should be approved. Therefore, IT IS ORDERED that the motion is GRANTED; Rushton shall pay $100 within 30 days of the date of this decision; the order is MODIFIED to a 104(a) citation; the contest proceeding Docket No. PENN 85-255-R is DISMISSED.

CITATIONS 2403922 AND 2402923

The above citations were issued on June 4, 1985 at about 10:00 a.m. and 11:40 a.m. respectively, by Mine Inspector Donald J. Klemick. The conditions cited were the factors that led to the issuance of an imminent danger withdrawal order the same day. The imminent danger withdrawal order was not contested, and its validity is not an issue in this case.

At the hearing, Rushton offered testimony of an alleged admission by an MSHA official (no longer with MSHA) at a manager's conference following the issuance of the order and citations that he did not believe an imminent danger existed. I excluded the testimony as irrelevant. Rushton's post hearing brief argues that the testimony should have been received on the ground that "it is certainly relevant to the issue of whether an imminent danger did in fact exist." Unfortunately that "issue" is not an issue in this proceeding. Whether an imminent danger existed or not has no bearing on the issues before me, which are (1) did the violations charged occur, and (2) if so, what are the appropriate penalties based on the criteria in section 110(i) of the Act. If I concluded that an imminent danger did not exist, this conclusion would not in any way affect my determination of the above issues. A fortiori, the opinion of an MSHA official (who was not even present at the mine) that an imminent danger did not exist would not affect my determination.

The citations were issued during a health and ventilation inspection by Inspector Klemick who is a ventilation specialist. I find that the following conditions were present in the W-4, 001 Section of the subject mine: accumulations of loose coal and coal dust were present along each of the five entries for a distance of approximately 90 feet outby the face, and in the first crosscut connecting the entries, and at the section dumping point. The accumulations varied from one to six inches in depth with deeper accumulations against the rib of the Number 1 and 2 entries, and at the dumping point. Equipment tire marks were seen in the travel ways and at the dumping point. One percent methane was detected at the face. Power was energized to the section, but the continuous miner was not operating, nor was the scoop, but the roof bolter was operating in the number 2 entry.

The mine is a wet mine, but the section in question was relatively dry. The loose coal and coal dust cited by the inspector were dry. The accumulation was black in color. The ventilation in the section was good and the section had no significant history of methane liberation. The mine, however, has had prior ignitions. The coal mined at the subject mine contains a substantial percentage of rock. In abating the violation, six shuttle cars of coal, totally about 30 tons were removed from the area. The cleanup took about 4 hours. Because of the extent of the accumulations, I find that substantial accumulations were present in the area for more than one shift, probably for two shifts. The preshift inspection book shows that the section was inspected between 5 a.m. and 7 a.m. and was reported in safe and healthful condition.

Rushton does not dispute the fact that the accumulations existed. It admitted the violations, but contends that the gravity and negligence were exaggerated. I conclude that a violation of 30 C.F.R. 75.400 occurred. The extent of the accumulations, the presence of energized machinery and the existence of minimal methane make the violation a serious one. Loose coal and coal dust can propagate an explosion or mine fire. I conclude that the accumulations had been present for more than one shift and that Rushton knew of them prior to the preshift inspection and was negligent in failing to clean them up. I further conclude that the failure to record the condition in the preshift examiner's book was a violation of 30 C.F.R. 75.303(a). I conclude that this violation was serious and resulted from Rushton's negligence. Based on the criteria in section 110(i) of the Act, I conclude that a penalty of $1000 for the violation of 30 C.F.R. 75.400 and a penalty of $400 for the violation of 30 C.F.R. 75.303 are appropriate.

ORDER NO. 2403927

On June 14, 1985, Inspector Klemick issued a withdrawal order under section 104(d)(1) of the Act charging an unwarrantable failure violation of 30 C.F.R. 75.316. The order charged that Rushton failed to comply with its approved ventilation system and methane and dust control, plan because the periphery of certain idle rooms in 2nd left north mains were not being travelled and examined weekly. In fact the rooms were filled with water, the pumps having been pulled and the area intentionally flooded. Rushton intended to use the area as a sump for the mine.

The revised ventilation plan in effect on June 14, 1985, had been approved by MSHA on March 7, 1985 subject to Rushton's complying with certain "items" including the following:

3. Since a method was not established to evaluate the bleeder system for the idled rooms on the right of the 2nd left north mains the periphery of those rooms shall be traveled and examined weekly.

Prior to that Rushton had on September 26, 1984 sent to MSHA a letter and a map of the area in the 2nd left north mains "that we intend to flood" (Rx9). The letter further informed MSHA that ventilation would be maintained by regulators along the edge of water. On October 22, 1984 MSHA "accepted" the "plan" submitted with the September 26 letter "provided inlet and bleeder evaluation stations are established and maintained at the water's edge . . . " (Rx10). On October 26, 1984, Rushton reported the air quantities at the water's edge and this was "accepted" by MSHA on November 7, 1984 (Rx11, 12).

On June 11, 1985, Rushton referred to the March 7, 1985 letter of approval and informed MSHA that all power and equipment have been removed from the 2nd left north mains and the area is being used as a sump. Rushton requested that it be permitted to take weekly ventilation and methane readings "at the edge of the water."

On June 25, 1985, MSHA granted Rushton's request and accepted the plan showing ventilation to the water's edge on the completed 2nd left north mains section. Examinations had in fact been performed at the water's edge on May 30, June 5 and June 12, 1985.

At the hearing Rushton proposed to submit evidence that Earl McMasters, Supervising Inspector, stated at a manager's conference that "he did not see a violation in this case." (Tr. 253). He is said to have stated further that he would not vacate the order because it would cause him a lot of difficulty with the subdistrict and "that's why we have administrative law judges." (id.). I excluded the evidence at the hearing, but will now assume that the evidence contained in the offer of proof is part of the evidence in the case and will consider Mr. McMaster's statements.

I conclude that the conditions contained in the MsHA approval letter of March 7, 1985 were part of the approved ventilation plan in effect on June 14, 1985. Therefore, Rushton was required to travel and examine weekly the periphery of the idled rooms on the right of the 2nd left north mains. As of June 14, 1985, Rushton was not travelling and examining weekly the periphery of those idled rooms, indeed it could not do so, because it had flooded them. Therefore, a violation of the plan and thus of 30 C.F.R. 75.316 was established. The fact that a change in the plan had been requested does not make it less a

violation. Because the area had been flooded, all power and equipment had been removed, and ventilation was maintained to the water's edge, the violation was not serious. Because of the confusion shown in the correspondence between Rushton and MSHA between September 26, 1984 and June 25, 1985 (Respondents Exhibits 9-13-A and Government's exhibits 1 and 2), I conclude that the Secretary has not established that the violation resulted from Rushton's unwarrantable failure to comply with the standard. The order should be modified to a 104(a) citation. The contest proceeding Docket No. PENN 85-254-R contesting the order will be granted in part insofar as it contests the finding of unwarrantability. Based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is $100.

ORDER

Based on the above findings of fact and conclusions of law, and on the motion to withdraw and the motion to approve settlement, IT IS ORDERED:

1. Order No. 2403926 is VACATED; no penalty is assessed for the violation charged in the order.

2. Docket No. PENN 85-253-R contesting Order No. 2403926 is DISMISSED because the order is vacated.

3. Order No. 2403928 is MODIFIED to a 104(a) citation.

4. Docket No. PENN 85-255-R contesting Order No. 2403928 is DISMISSED.

5. Order No. 2403927 is MODIFIED to a 104(a) citation.

6. Docket No. PENN 85-254-R is GRANTED in part insofar as it contests the finding of unwarrantability in Order No. 2403927.

7. Rushton shall pay the following civil penalties within 30 days of the date of this decision:

CITATION/ORDER NO.	30 CFR STANDARD	PENALTY
2403928	75.316	$ 100
2403922	75.400	1000
2403923	75.303(a)	400
2403927	75.316	100
	Total	$1600

James A. Broderick
Administrative Law Judge