

CCASE:
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

v.

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

CONTEST PROCEEDING

Docket No. PENN 85-279-R
Citation No. 2403981; 7/17/85

Rushton Mine

CIVIL PENALTY PROCEEDING

Docket No. PENN 86-113
A.C. No. 36-00856-03557

Rushton Mine

DECISION

Appearances: Covette Rooney, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia, Pennsylvania,
for the Secretary of Labor (Secretary);
R. Henry Moore, Esq., Buchanan Ingersoll Professional
Corporation, Pittsburgh, Pennsylvania, for Rushton
Mining Company (Rushton).

Before: Judge Broderick

STATEMENT OF THE CASE

Rushton filed a notice of contest challenging a citation issued July 17, 1985, alleging a violation of 30 C.F.R. 75.301Å5. On July 22, 1985, the citation was modified to charge a violation of 30 C.F.R. 75.316 rather than 75.301Å5. After a number of extensions, an order was issued on November 13, 1985 under 104(b) of the Act because of Rushton's failure to abate the alleged violative condition. The Secretary filed a petition for the assessment of a civil penalty for the violation charged in the contested citation. Because the two cases involve the same citation and order, they were consolidated for the purposes of hearing and decision.

Pursuant to notice, the case was called for hearing in State College, Pennsylvania on November 18, 1986. Donald J. Klemick and Alex O'Rourke testified on behalf of the Secretary. Raymond G. Roeder and Lemuel Hollen testified on behalf of Rushton. Both parties have filed post-hearing briefs. I have considered the entire record and the contentions of the parties and make the following decision.

FINDINGS OF FACT

Rushton is the owner and operator of an underground mine in Centre County, Pennsylvania, known as the Rushton Mine. The mine has 260 employees and an annual production of 660,000 tons of coal. The annual dollar volume of sales in 1984 exceeded 22 and one-half million. Rushton is a subsidiary of Pennsylvania Mines Corporation. On the basis of the foregoing, I find that Rushton is a large operator. Rushton had a history of 257 violations in the two years prior to the violation involved here, 12 of which were violations of 30 C.F.R. 75.316. This history is not such that a penalty otherwise appropriate should be increased because of it.

Rushton had an approved ventilation system and methane and dust control plan in effect for the subject mine. The basic plan was not introduced into evidence, nor were any revisions or Secretary-imposed additional requirements except those directly involved in this proceeding. Rushton is required to submit ventilation plans for MSHA's review every 6 months. Such plans were submitted in June 1985, December 1985, and June 1986. None of these plans contained provisions related to the installation of a CO monitor in the intake shaft. However, it is common to submit proposed additions or modifications to the plan between the regular 6 month submissions. When approved they are generally incorporated in the mine map accompanying the next 6 month submission. The CO detector, however, does not appear in the mine map as part of the ventilation plan.

Rushton had problems during the winter months with its intake air shaft in that the concrete lining of the shaft was deteriorating because of acidic water dripping into the shaft and freezing. Rushton decided in early 1985, to reline the shaft with an insulating material to prevent the freezing and ice buildup. Its intention was to have the work performed in July during the miners' vacation.

On April 6, 1985, Rushton wrote to MSHA District Manager Donald Huntley seeking approval of a proposal to reline the shaft using a sandwich-type panel composed of a corrugated FRP sheet against the wall, a sheet of heavy gauge polyethylene film, a

~632

4 inch thick polyisocyanate foam sheet, and a 28 gauge corrugated steel sheet to complete the panel. The request indicated that the work could be done only during the miners' vacation period in July. On April 10, 1985, MSHA declined to approve the plan on the ground that combustible material is not permitted in an intake air shaft. This referred to the polyisocyanate foam sheet. The MSHA letter of disapproval was signed by Alex O'Rourke for District Manager Huntley. On April 24, 1985, MSHA and Rushton officials met in Pittsburgh to discuss the problem. An MSHA Tech Support chemical engineer recommended using a polystyrene foam insulating material. On May 22, 1985, Rushton submitted a revised plan, proposing the use of a foam panel fabricated from modified polystyrene beads instead of the polyisocyanate. On June 4, 1985, MSHA approved the revised plan with the additional requirements that a continuously monitoring carbon monoxide detector be installed in the shaft bottom area, and a plan detailing what action Rushton will take if carbon monoxide is detected. This plan was required prior to completion of the shaft work. On July 8, 1985, Rushton submitted a letter enclosing a copy of its plan for installation of the carbon monoxide monitor and a copy of the purchase order for the monitor. The letter stated that the monitor would be installed as soon as it is received.

On July 17, 1985, Inspector Donald Klemick issued a citation charging a violation of 30 C.F.R. 75.301-5 because "the approved plan for repairing the intake shaft was not being followed A continuously monitoring carbon monoxide detector was not installed nor were precautions being taken to test for carbon monoxide while work was being conducted in the shaft and men were underground." The citation fixed the time for abatement as August 9, 1985. It also required that Rushton test for CO on each shift and record the results. The record is not clear as to the dates the construction began and was completed. The work was in progress when the citation was issued (Wednesday, July 17), and the Inspector was under the impression that it was to be completed by the end of the week (July 20). Rushton's Mine Superintendent Raymond Roeder stated that he believed the work was performed during the last two full weeks in July. At any rate, it is clear that the relining was being performed on July 17, and was completed on or before July 27, 1985. There were miners working underground on July 17, changing a belt drive unit near the bottom of the slope.

On July 22, 1985, after discussion with his supervisor, Inspector Klemick modified the citation to charge a violation of 30 C.F.R. 75.316. On the same day, MSHA wrote to Rushton "to clarify the portions of the Law that were reviewed in approving [the] plan submitted on May 22, 1985, and approved on June 4, 1985." The letter stated that the work and materials in the

~633

shaft were covered under 30 C.F.R. 77.1900 and the requirements for a CO detector were covered under the mine ventilation system and methane and dust control plans, 30 C.F.R. 75.316. This was the first notice to Rushton that the CO plan was required under 75.316.

On July 30, 1985, MSHA approved the plan for the installation of a CO detector with certain stipulations. On August 16, 1985, the time for abatement was extended to October 23, 1985, because a revised plan for the installation of a CO monitor was submitted for approval, and the detector had been ordered but had not arrived at the mine. On September 16, 1985, Rushton submitted a revised plan for installing the CO monitor after discussing the prior plan with Inspector Klemick. On October 28, 1985, MSHA wrote that the revised plan "is not acceptable in the present form." Further information concerning the protection of the miner who will test for CO if the CO detector becomes inoperable was required. On October 29, 1985, the abatement time was further extended to November 8, 1985, because the CO detector had arrived and "installation procedures are in effect."

On November 13, 1985, Inspector Klemick issued an order of withdrawal under 104(b) of the Act because the condition cited had not been abated. The order stated that "the revised plan submitted September 16, 1985, was not acceptable per the District Manager's letter of October 28, 1985, which requested a response from the operator to complete the evaluation of the plan. Since a response had not been submitted another extension of time cannot be justified." The order directed that testing with an approved CO detector be continued and the results recorded.

On November 15, 1985, a revised plan for the installation of the CO monitor was submitted to MSHA by Rushton. On December 2, 1985, MSHA notified Rushton that the revised plan was acceptable. On December 13, 1985, Inspector Klemick terminated the order because the CO detector was installed and a plan was approved by MSHA on December 2.

REGULATION

30 C.F.R. 75.316 provides as follows:

[STATUTORY PROVISIONS]

A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The

plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

ISSUES

1. Does the evidence establish a violation of 30 C.F.R. 75.316?
2. If a violation is established, was it abated timely?
3. If a violation is established, was it significant and substantial?
4. If a violation is established, what is the appropriate penalty?

CONCLUSIONS OF LAW

JURISDICTION

Rushton was subject to the provisions of the Mine Act in the operation of the subject mine. I have jurisdiction over the parties and subject matter of this proceeding.

VIOLATION

A mine operator is required to adopt and have approved by the Secretary a ventilation system and methane and dust control plan suitable to the conditions and the mining system of the mine in question. The Secretary may require "additional or improved equipment" and "other information" before approving a submitted plan. When a plan has been approved, the mine operator is required to follow it, and failure to do so may be cited as a violation of a mandatory standard. Ziegler Coal Company, 4 IBMA 30 (1975), aff'd sub. nom. Ziegler Coal Company v. Kleppe, 536 F.2d 398 (D.C.1976); Mid-Continent Coal and Coke Company, 3 FMSHRC 2502 (1981). Because a ventilation plan creates, in effect, mandatory health and safety standards, and possible penalties, it is imperative that the scope and meaning of the plan be clear and unambiguous. In this case, on the day the citation was issued, neither Rushton nor the Inspector considered the shaft repair work to be covered under the approved ventilation plan. Although MSHA officials apparently treated it as a ventilation matter, none of the correspondence or

~635

discussions between MSHA and Rushton prior to the date of the citation referred to the ventilation plan. Because of these facts, I conclude that as of July 17, 1985, the Secretary's requirements concerning the relining of the intake air shaft and the installation of a CO detector were not made part of the approved ventilation plan: adequate notice was not given to the mine operator that the requirements were imposed as part of the ventilation plan. Therefore, the citation did not properly charge a violation of 30 C.F.R. 75.316 and must be vacated. I am not holding that the relining of the shaft and the installation of the CO detector could not properly be brought within the ventilation plan requirements, but only that notice to the mine operator of MSHA's intention to do so is a prerequisite to enforcement of the requirement by citation and imposition of a penalty. Because such notice was not given in this case, the citation was issued in error, and no penalty may be imposed. Because I am vacating the citation, the issues with respect to the 104(b) order are moot.

ORDER

Based on the above findings of fact and conclusions of law, citation 2403981 issued July 17, 1985, charging a violation of 30 C.F.R. 75.316 is VACATED. No penalty is assessed. The proceedings are DISMISSED.

James A. Broderick
Administrative Law Judge