

CCASE:
RUSHTON MINING V. SOL
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FMSHRC-FCV
JUNE 6, 1988

RUSHTON MINING COMPANY,
Contestant
v.

CONTEST PROCEEDING

Docket No. PENN 88-99-R
Citation No. 2883649; 12/8/87

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

Rushton Mine
Mine ID 36-00856

DECISION

Appearances: Joseph Yuhas, Esq., Joseph T. Kosek, Esq., Rushton Mining Company, Ebensburg, Pennsylvania, for the Contestant; B. Anne Gwynn, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary.

Before: Judge Weisberger

Statement of the Case

On December 21, 1987, Rushton Mining Company (Contestant) filed a Notice of Contest contesting Citation No. 2883649 which had been issued on December 8, 1987. The Secretary (Respondent) filed its Answer on January 11, 1988, along with a Motion for Continuance. On January 21, 1988, a Prehearing Order was issued directing the Parties to inform the undersigned on or before February 1, 1988, if the Notice Contest will be withdrawn in view of the Commission's decision in Secretary v. Quinland Coals, Inc., 9 FMSHRC 1614 (Sept. 1987). It further directed the Parties, if the Notice of Contest will not be withdrawn, to confer on or before February 1, 1988, to attempt to settle this matter, and, in the alternative, to stipulate as to facts and issues concerning which there is no agreement, and complete discovery on or before February 1, 1988. On February 2, 1988, Respondent filed a Motion for Relief to File Interrogatories. On February 8, 1988, in a telephone conference call initiated by the undersigned, with attorneys for both Parties, Contestant indicated it did not have any objection to Respondent's Motion for Relief to File Interrogatories. The Attorneys indicated that they would be available the week of February 22, for trial of this matter.

~714

Pursuant to notice, the case was heard on February 24, 1988, in Hollidaysburg, Pennsylvania. Donald J. Klemick and Albert G. Gobert testified for the Respondent. Raymond J. Roeder, Horace C. Pysner, Jerome F. Hewitt, and Chester Switala testified for the Contestant.

Contestant filed its Proposed Findings of Fact and Conclusions of Law and Brief on April 20, 1988. The Respondent filed its Post Trial Findings of Fact, Conclusions of Law and Memorandum on April 25, 1988. Contestant filed a Reply Brief on April 29, 1988. Respondent did not file any Reply Brief.

Regulation

30 C.F.R. § 75.1704-2(a) provides as follows:

In mines and working sections opened on and after January 1, 1974, all travelable passageways designated as escapeways in accordance with § 75.1704 shall be located to follow, as determined by an authorized representative of the Secretary, the safest direct practical route to the nearest mine opening suitable for the safe evacuation of miners. Escapeways from working sections may be located through existing entries, rooms, or crosscuts. (Emphasis added.)

Citation

Citation 2883649 contains the following language:

The designated intake escapeway from the 2N-3 002 section to the intake shaft escape facility was not located to follow the safest, direct practical route. The escapeway was designated outby from the section to station 7737, through crosscuts to station 7792, then inby to the shaft a distance of about 2100 feet. The safest, direct practical route would be from the section traveling in a direct route to the shaft of about 500 feet.

Stipulations

At the hearing the following stipulations were entered into:

~715

1. This Administrative Law Judge has jurisdiction over this proceeding. Both the Rushton Mine and Rushton Mining Company are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

2. Pennsylvania Mines Corporation is the parent corporation of Rushton Mining Company. Rushton Mining Company operates one mine, Rushton Mine.

3. The subject citations were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the Contestant at the dates, times and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevance of any statements asserted therein.

4. The assessment of a civil penalty in this proceeding will not affect Contestant's ability to continue in business.

5. The annual production of Rushton Mine is six hundred seventy-six thousand two hundred and thirty-two tons.

6. The annual production of the Company is one million three hundred and eighty-one thousand three hundred and ten tons.

7. The Rushton Mine employs approximately two hundred and fifty-seven miners.

8. The Contestant demonstrated good faith in the abatement of the citation.

9. Rushton Mine was assessed two hundred sixty-nine violations over five hundred and eighty-three inspection days during the twenty-four months preceding the issuance of the subject citation.

10. The Parties stipulate to the authenticity of their exhibits, but not to their relevance nor the truth of the matters asserted therein. (Tr. 5-6.)

Findings of Fact and Discussion

I.

Based upon the Parties' stipulations, I conclude that I have jurisdiction to hear and decide this case, and that the Contestant is subject to the provisions of the Federal Mine Safety and Health Act of 1977 and regulations promulgated thereunder.

II.

Contestant at the 2N-3 section of its Rushton Mine designated an escapeway, hereinafter called the Rushton escapeway, to serve miners working in rooms 11 through 15. This escapeway runs in a northeasterly direction, makes a 90 degree turn to go in a northwest direction, makes a 90 degree turn to go in a southwest direction, makes a 90 degree turn to go in a northwest direction, and makes a 90 degree turn to go in a southwest direction to the No. 2 shaft which is the nearest shaft for exiting from the 2N-3 Section. The length of this escapeway is approximately 1700 feet. According to 40 C.F.R. § 75.1704-2(a), escapeways shall follow ". . . the safest direct practical route to the nearest mine opening suitable for the safe evacuation of miners." (Emphasis added.) Inasmuch as this escapeway heads in a northeasterly direction for 12 crosscuts turns left, and then subsequently returns in a southwesterly direction, parallel to the direction in which it started, and runs for approximately 15 crosscuts to the mine opening at shaft No. 2, it clearly can not be found to be a "direct" route. To find otherwise would violate the clear meaning of the word "direct" as defined in Webster's New Collegiate Dictionary, (1979 editions) as: "1a: proceeding from one point to another in time or space without deviation or interruption: straight b: proceeding by the shortest way . . ." As such, it must be found that Contestant herein violated section 75.1704 2(a), supra.

III

Contestant, in abatement, upon consultation with MSHA, designated the MSHA escapeway to be the escapeway for the 2N-3 Section. The MSHA escapeway runs for approximately 500 feet to the No. 2 shaft, and contains only one jog and this jog is less than 90 degrees. The MSHA escapeway has signs and was not noted to have any problems with its roof or floor.

In essence, Contestant maintains that the Rushton escapeway is the safest route to the nearest mine opening. The Rushton escapeway is located in an intake entry. In contrast, the MSHA escapeway depends for air upon leakage in a hole around a door located in the escapeway. The volume of air entering the MSHA escapeway, through the closed door, was measured by Donald J.

~717

Klemick, a MSHA Coal Mine Inspector, at approximately 1100 cubic feet. Klemick and Raymond G. Roeder, a professional engineer and Contestant's Mine Manager, disagreed as to whether the 1100 cubic feet a minute measured was enough air for the escapeway. However, although the Rushton escapeway would clearly have more air, I find that the MSHA escapeway satisfies the requirement of 30 C.F.R. § 75.1707, inasmuch as it is ventilated with intake air.

Roeder and Horace C. Pyscher, Contestant's Section Foreman and Safety Inspector Trainer, at the date the Citation was issued, testified, in essence, that in the event the door in the MSHA escapeway would be left open as the result of miners leaving in haste, this would have a substantial impact upon two other sections of the mine that depend upon the intake air from shaft No. 2. Klemick and Pyscher explained that with the door in the MSHA escapeway open, there will be much less resistance to intake air from the No. 2 shaft which is in very close proximity and which would reduce the flow to the other two sections. However, neither Klemick nor Pyscher nor any other witness stated with specificity the quantity of air that will be lost to the other sections as a consequence of a door being left open in the MSHA escapeway. I thus find that there was no basis to conclude that, with the MSHA escapeway door left open in an emergency, there would be either a substantial or significant reduction of air in other sections.

Respondent's witnesses, including miners Jerome F. Hewitt and Chester Switala, the UMW Mine Safety Committee Chairman and Mine UMW Safety Committeemen respectively, testified, in essence, that in all Contestant's other escapeways, miners are trained to escape in an outby direction. Thus, in their opinion, confusion would result at the MSHA escapeway which requires miners to escape in an inby direction. In their opinion, this problem was further exacerbated by the fact that miners are not assigned to 2N-3 section on a regular basis, and are sent there only when work is not feasible in their original sections. I find that the record is devoid of any empirical data to support this opinion testimony and accordingly find it to be speculative.

Roeder indicated that the MSHA escapeway is unsafe as it is routed through the working sections 11 to 15, which contain various equipment and where there is the potential for a fire. He thus opined that a miner would have to go through the smoke to get to the escapeway. In contrast, Roeder indicated that with the Rushton escapeway one would enter the air intake entry and thus escape from the smoke. However, as brought out in cross-examination, it is clear that a miner working in a room in this

~718

section would similarly have to traverse any working rooms that are positioned between his location and the Rushton escapeway, in order to enter the Rushton escapeway. It thus would appear that the same hazards of using the MSHA escapeway would apply equally to the use of the Rushton escapeway.

In addition, Roeder indicated that the Rushton escapeway is the shortest of all the escapeways at Contestant's mine and that Contestant has never been cited for the length of its escapeways, including those that are over 10,000 feet. Also, Pysner has noted that due to the proximity of the No. 2 shaft, the door in the MSHA escapeway would be difficult to open while carrying a stretcher, due to the pressure on the door. He also opined that the 6 inch pipe placed below the roof, which is 5 feet above the floor, would unduly impede the progress of a stretcher-bearer. Also, Switala asserted that the Rushton escapeway provides more alternative avenues of escape.

I conclude that the Rushton escapeway was violative of section 75.1704-2(a), as it was not a direct route to the shaft. In the event a hazard necessitating escape from the section, it is clear that an indirect route containing three 90 degree jogs and doubling back on itself, is a greater impediment to a speedy exit from a dangerous situation as opposed to the MSHA escapeway, which is direct and less than one third of the distance of the Rushton escapeway. As such, it must also be considered to be the "safest" within the purview of section 1704-2(a), supra.

IV.

Klemick testified that the use of the Rushton escapeway, as it is longer than the MSHA one, could result in a fatality by a miner being exposed to smoke or could result in falls occasioned by the rush to leave a dangerous situation. However, in essence, he indicated that in the absence of specific information, as to a specific hazard, it would be difficult for him to tell what would occur if one would have to use the Rushton escapeway. As such, I must find that the Respondent has not met its burden in establishing that the violation herein is to be considered significant and substantial (see Mathies Coal Co. 6 FMSHRC 1 (January 1984)).

~719

ORDER

Citation No. 2883649, dated December 8, 1987, is modified in that it is found to be not significant and substantial. In all other aspects it is affirmed.

Avram Weisberger
Administrative Law Judge

Distribution:

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