

CCASE:
RIVCO DREDGING V. SOL (MSHA)
DDATE:
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

RIVCO DREDGING CORPORATION,
CONTESTANT

v.

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

CONTEST PROCEEDINGS

Docket No. KENT 88-25-R
Order No. 2985273; 9/29/87

Docket No. KENT 88-26-R
Order No. 2985274; 9/29/87

River Dredge Mine
Mine I.D. #15-12672

DECISION

Appearances: Gene A. Wilson, President, Rivco Dredging Corp.,
Louisa, Kentucky, for the Contestant
G. Elaine Smith, Esq., Department of Labor,
Office of the Solicitor, Nashville, Tennessee,
for the Respondent.

Before: Judge Maurer

Rivco Dredging Corporation (Rivco) has contested two section 104(b) orders issued by the Secretary of Labor (Secretary) on September 29, 1987. A hearing on this matter was held in Huntington, West Virginia on October 21, 1988.

This rather unusual case began when the original two section 104(a) citations, Citation Nos. 2985271 and 2985272 were issued on September 17, 1987 by the Secretary and 6 days were allowed for abatement of the violative conditions. Due to the fact that the contestant failed to abate these violations in a timely manner, i.e., within the 6 days allowed, the two section 104(b) orders at bar, Order Nos. 2985273 and 2985274 were then issued.

The underlying section 104(a) citations were not contested within 30 days of their issuance and therefore the Commission was without subject-matter jurisdiction to adjudicate Rivco's objections to these citations. Freeman Coal Mining Corp., 1 MSHC 1001 (1970); Alexander Bros., Inc., 1 MSHC 1760 (1979); Island Creek Coal Co., 1 MSHC 2143 (1979). Therefore the contest proceedings docketed at KENT 88-23-R and KENT 88-24-R, which concerned these section 104 (a) citations were dismissed at 10 FMSHRC 889 (July 12, 1988) (ALJ).

Accordingly, the factual and legal bases for these underlying section 104(a) citations are no longer at issue and the fact of violation of the mandatory standards cited therein is not subject to collateral attack in the contest proceedings concerning the section 104(b) orders at bar.

The remaining issues I will deal with in this decision are:

1. Are the violative conditions described in the two orders at bar abated?
2. Were the violations described in the underlying citations abated within the period of time originally fixed therein or as subsequently extended?
3. If the answer to No. 2, above, is "no," [which it is] was the time set for abatement reasonable or should the time set for abatement have been extended or further extended without issuing the instant section 104(b) orders?

The Secretary stipulates that the original citations are abated as of the date of the hearing in this matter, and the two section 104(b) orders at bar have been terminated.

The condition cited in Citation No. 2985272 is as follows:

A safe means of access is not provided to the shaker screens, motor and flywheels at the upstream screening plant, where workers are required to travel for maintenance, repair and/or examination in that no steps, platform nor hand rail is present thereon. A worker is required to climb up approx. 7-12p above ground on the plant structure for access and a fall therefrom can inflict serious injury.

When Inspector Hatter issued Citation No. 2985272 on September 17, 1987, he envisioned abatement to be construction of a catwalk around the shaker. He allowed six days for that abatement to take place; one day to order the materials, one day for delivery and four days to do the construction work. He considered this to be a reasonable amount of time based on his experience.

On September 29, 1987, section 104(b) Order No. 2985273 was issued by Inspector Hatter because the operator had still failed to provide a safe means of access to the coal shaker even though

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the time for abatement of Citation No. 2985272 had passed. He further testified that at the time of this visit, some eleven (11) days after he had issued the citation, nothing had been done to abate the condition, no additional time was requested by the operator to abate the condition and to the best of his knowledge, the operator has never alleged that the time given for abatement was inadequate.

Interestingly, the catwalk around the shaker was never built, but the citation was subsequently abated and the section 104(b) order terminated by a different inspector on June 21, 1988, upon the operator furnishing a Grove RT 518 "cherry-picker," equipped with a cage to safely perform maintenance, and assembly/disassembly of the coal shaker. Inspector Hatter disagrees with this method of abatement/termination, to say the least, but the order is nonetheless terminated and the citation abated.

In summary, the operator made no attempt to abate the citation within the six days allowed or in the eleven days that passed between the issuance of the citation and the section 104(b) order. Nor did the operator request any extension of the abatement period.

I conclude from my review of the record that the violative condition set out in the citation was abated on June 21, 1988, and the order was terminated at that time. The condition was obviously not abated in a timely fashion, but in fairness to the operator it should be pointed out that Inspector Hatter, who wrote the section 104(b) order would not have accepted the abatement method that was ultimately the basis for the abatement/termination. Nevertheless, I find and conclude that the original abatement period of six (6) days was reasonable, especially in light of the fact that the operator made no objection to this time limit set for abatement and did not request any enlargement of time in which to abate the cited violative condition. Therefore, the now terminated Order No. 2985273 will be affirmed.

The other condition we are concerned with in these cases is cited in Citation No. 2985271 and the violative condition is set out therein as follows:

The insulated conductor wiring providing power to the 240/480 VAC 30 fresh water pump is not properly maintained to assure safe operating condition in that it is not protected from moisture nor physical abuse. Such wiring is partially laid in a 15" casing pipe for about 100p , in the ground partially buried for about 41p , then through approx. 16p -15" CM pipe and then

approx. 40p is laid on the ground over the river bank to the pump, where it is subject to deterioration and contact by workers.

This citation was likewise issued on September 17, 1987 and once again, Inspector Hatter allowed six days for abatement. He reasoned that was sufficient time to make arrangements for an electrician to do the work and to obtain the necessary materials.

On September 29, 1987, eleven (11) days after issuing the underlying citation, Inspector Hatter issued section 104(b) Order No. 2985274 because the operator had still failed to protect the wiring to the fresh water pump from moisture and physical abuse even though the time for abatement of Citation No. 2985271 had passed. As before, the inspector also testified that no additional time was requested by the operator to abate the condition and to the best of his knowledge, the operator had never complained that the time allowed for abatement of the condition was unreasonable or inadequate.

On June 21, 1988, Inspector Thomas Goodman, an MSHA electrical inspector, inspected the Rivco Dredging Company location and spoke with Mr. Wilson, the President of the company, to determine if the cited condition had been abated and found that it still had not. He advised Mr. Wilson at that time that the Company needed to be in compliance with the standards for pump wiring set forth in the National Electrical Code or the applicable MSHA regulations.

On July 5, 1988, Inspector Goodman returned to the site to find the cited condition had still not been abated. A conference was held with Mr. Wilson, as a result of which he agreed to comply with the requirements of the National Electrical Code, which he subsequently did. Section 104(b) Order No. 2985274 was therefore finally terminated on July 25, 1988, with the notation that: "The pump circuit was installed in conduit."

I find and conclude from my review of the record that the violative condition set out in the citation was abated on July 25, 1988, and the order was terminated at that time. The condition was not actually abated until approximately 10 months after it was first pointed out to the operator. I find that abatement to be untimely in the extreme and furthermore conclude that the original abatement time of six days set by Inspector Hatter was reasonable and sufficient. Therefore, the now terminated Order No. 2985274 will also be affirmed.

ORDER

WHEREFORE IT IS ORDERED THAT:

1. Order Nos. 2985273 and 2985274 ARE AFFIRMED.

Roy J. Maurer
Administrative Law Judge