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RUSHTON MINING V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
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 89-82-R
Citation No. 2889823; 1/17/89

Rushton Mine

DECISION

Before: Judge Broderick

STATEMENT OF THE CASE

Contestant Rushton Mining Company (Rushton) filed a Notice of Contest on February 8, 1989, contesting the validity of Citation 28809823 issued on January 17, 1989. The citation charged a violation of 30 C.F.R. 70.501 because an MSHA-conducted noise survey showed that the noise standard was exceeded in the environment of a roof bolter operator. The citation fixed March 20, 1989 for termination of the violation. The Secretary of Labor (Secretary) filed an answer and a motion for continuance on February 27, 1989. On March 3, 1989, Rushton filed a Motion for Summary Decision and a Motion for expedited consideration. Following a conference with counsel, the Secretary agreed to extend the time for abatement to April 3, 1989. On March 24, 1989, the Secretary filed a cross-motion for Summary Decision. I was orally informed by counsel for Rushton that the hearing conservation plan referred to in the citation has been submitted by Rushton to MSHA. The Secretary's cross-motion states that the citation did not require the submission of a hearing conservation plan in order to abate the citation. It further states that abatement was achieved by Rushton by lowering the noise levels in the affected area. On March 31, 1989, Rushton filed a response to the Secretary's cross-motion. The notice of contest challenged the designation of the violation as significant and substantial. However, neither motion has referred to this as an issue, and I have no factual basis to make a finding whether, if a violation is established, it was significant and substantial. Therefore, I will not make a ruling on this question.

FINDINGS OF FACT

The parties agree that there is no dispute as to any material fact in this proceeding. On January 10, 1989, Federal Coal Mine Inspector Donald Klemick conducted a noise survey in the 4th East 002 section of the subject mine. As a result of the survey, he determined that the noise standard had been exceeded in the environment of the roof bolter operator. Rushton does not contest the inspector's determination. Therefore, I find as a fact that the noise levels in the cited area exceeded the levels permitted by the regulation. The inspector issued a citation charging a violation of 30 C.F.R. 70.501. He directed that the violation be abated by March 20, 1989. The citation also states that "a hearing conservation plan, as required by section 70.510, shall be submitted to MSHA within 60 days from the date of this citation." As I mentioned above, the Secretary states in her motion that this language does not require submission of such a plan in order to abate the citation, but was only "a reminder" that the issuance of a citation under 70.501 "triggers" 70.510 which requires that such a plan be submitted within 60 days of the issuance of a citation. Therefore, I assume for the purposes of this decision that the citation has been abated. Rushton argues that the requirement to file a hearing conservation plan is triggered not by a violation of 70.501, but by excessive noise levels disclosed in a supplemental noise survey under 70.509. This issue is not presented in this case: MSHA concedes that the citation contested herein has been abated; the submission of a hearing conservation plan was not required to abate the citation. I am not ruling on the question whether 30 C.F.R. 70.510 requires the submission of an effective hearing conservation plan following the issuance of a citation under 70.501 because of excessive noise levels found on an MSHA conducted noise survey.

REGULATIONS

30 C.F.R. 70.501 provides:

Every operator of an underground coal mine shall maintain the noise levels during each shift to which each miner in the active workings of the mine is exposed at or below the permissible noise levels set forth in Table I of this subpart.

Section 70.502 sets forth a formula for computation of multiple noise exposure. Section 70.503 requires mine operators to measure noise exposures of each miner in the active workings of the mine. Section 70.504 directs that the measurement of noise exposure be made by qualified persons certified by MSHA as qualified. Sections 70.505 and 75.506 describe the necessary

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equipment and procedures for measuring noise exposure. Section 70.507 requires an initial noise survey be performed before June 30, 1971, and section 70.508 requires periodic noise surveys with the results reported to MSHA. Section 70.509 provides that if a noise exposure survey under 70.507 or 70.508 shows excessive noise levels, a supplemental survey shall be conducted by the operator within 15 days after notification by MSHA, and the results reported to MSHA. Section 70.510 provides that if the supplemental survey shows excessive noise, a citation shall be issued, and the operator shall promptly institute measures to assure compliance. The operator is also required by this subsection to submit within 60 days of the date of the issuance of the citation, a hearing conservation plan.

ISSUE

Whether a citation may be issued under section 104(a) of the Act for a violation of 30 C.F.R. 70.501 based on the results of a noise survey conducted by an MSHA inspector showing an excessive noise level?

CONCLUSIONS OF LAW

Rushton concedes that 30 C.F.R. 70.501 "seems to indicate that a noise survey indicating an excessive noise level is a violation of the regulations." It argues, however, that Subpart F of Part 70, 30 C.F.R. when read as a whole, indicates that noise surveys are to be conducted by mine operators. When an operator's survey shows excessive noise levels, it is required under 70.509 to conduct a supplemental noise survey. Only if the supplemental survey shows excessive noise, Rushton asserts, is a citation to be issued.

Section 103 of the Act requires authorized representatives of the Secretary to make frequent inspections of coal mines for the purpose, inter alia, of determining whether there is compliance with the mandatory health or safety standards. Section 104 directs the Secretary or her authorized representatives to issue a citation to the mine operator if she believes the operator has violated any mandatory health or safety standard. Section 206 of the act directs the Secretary to publish proposed mandatory health standards establishing maximum noise exposure levels for all underground coal mines. It also directs mine operators to conduct tests of the noise levels at their mines. This provision was originally enacted as part of the Federal Coal Mine Health and Safety Act of 1969. 30 C.F.R. 70.500-70.511 (Subpart F) contains the noise standard regulations. They were promulgated July 7, 1971, and amended September 12, 1978, September 11, 1979, and June 29, 1982. The regulations do not specifically provide that the Secretary's

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representative may issue a citation for excessive noise disclosed in an MSHA noise survey; neither do they forbid the issuance of such a citation. In view of the responsibility placed on the Secretary's representatives by 103 and 104 of the Act, to imply such a limitation on the Secretary's authority because the operator is also required to take noise samples, would be an extreme and unreasonable interpretation of the regulations. Furthermore, the Secretary has, in her Program Policy Manual issued July 1, 1988, specifically referred to MSHA-conducted noise surveys and the issuance of citations under 30 C.F.R. 70.501 for excessive noise exposures found in such surveys. This constitutes an official interpretation of the regulation which must be given deference.

Therefore, I conclude that the Secretary is authorized to issue a citation for the violation of 30 C.F.R. 70.501 based on the results of an MSHA-conducted noise survey showing an excessive noise level.

ORDER

Based on the above findings of fact and conclusions of law,
IT IS ORDERED:

1. Citation No. 2889823 as modified is AFFIRMED.
2. The Notice of Contest is DENIED.

James A. Broderick
Administrative Law Judge