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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

CONTEST PROCEEDING

v.

Docket No. PENN 88-245-R
Citation No. 2885765; 6/2/88

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

Rushton Mine

DECISION

Appearances: Joseph A. Yuhas, Esq., Ebensburg, Pennsylvania,
for Contestant, Rushton Mining Company (Rushton);
Anita Eve, Esq., Office of the Solicitor, U.S.
Department of Labor, Philadelphia, Pennsylvania,
for Respondent, the Secretary of Labor (Secretary).

Before: Judge Broderick

STATEMENT OF THE CASE

Rushton filed a notice contesting the issuance of a citation on June 2, 1988, under section 104(a) of the Federal Mine Safety and Health Act of 1977 (Act), charging a violation of 30 C.F.R. 75.305. It also contests the designation of the violation as significant and substantial. The time for abatement was originally established at June 3, 1988, but this date was extended by a series of continuation orders to March 31, 1989. The record does not show whether the citation has been terminated. A penalty had not been assessed for the alleged violation as of the hearing date. Pursuant to notice, the case was called for hearing in Bellefonte, Pennsylvania on April 12, 1989. Inspector Donald Klemick testified on behalf of the Secretary. Raymond G. Roeder, James A. Strenko, Charles Hockenberry and Robert Supco testified on behalf of Rushton. The parties were afforded the opportunity to file posthearing briefs. Rushton filed such a brief; the Secretary did not. I have considered the entire record and the contentions of the parties and make the following decision.

FINDINGS OF FACT

1. Rushton is the owner and operator of an underground coal mine near Johnstown, Pennsylvania, known as the Rushton Mine. Rushton is a subsidiary of Pennsylvania Mines Corporation.

2. The Rushton Mine is a very wet mine and has always had water problems. Approximately 6 million gallons of water are pumped out daily, and in very wet weather as many as 12 million gallons are pumped out.

3. The return air courses in the subject mine contained at least three "water holes," i.e., areas where the mine floor was covered with water. The air courses had been mined between 1977 and the early 1980's.

4. The area marked as water hole No. 1 on the mine map (Joint Ex. 1) was covered with water approximately 16 inches deep. The water in the area of water hole No. 2 was somewhat more than 16 inches deep. At water hole No. 3, the water was approximately 4 feet deep.

5. The length of the area covered by water hole No. 1 was approximately 40 feet; that covered by water hole No. 2 approximately 40 feet; and that covered by water hole No. 3 approximately 150 to 180 feet.

6. The subject mine liberates methane, but there is no evidence in the record as to the amount. Since 1981, there has been one methane ignition at the mine, in July 1981.

7. The return air course is normally examined weekly by Rushton, using two examiners, each examining one portion of the air course. The area including water holes 1 and 2 is examined by one examiner; that including water hole 3, by another.

8. On May 30, 1988, (FOOTNOTE 1) mine examiner Charles Hockenberry examined the return air course from the West Main hill (near water hole No. 1) to the Two North Area (beyond water hole No. 2). The area that he examined covered four bleeder evaluation points (BE's).

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9. Hockenberry recorded his initials, the date and time at date boards located at BE 20, BE 21, BE 3, BE 4, and at an old regulator at or near water hole No. 2. All of these locations were in the return air course, and the initials, date, and time were intended to show that he examined the return air course and the bleeders.

10. Hockenberry was able to walk through water hole No. 1 which was of a depth that it reached the top of his boots. He walked into water hole No. 2 and examined the roof and ribs visually across the water hole. From where he stood, it was approximately 20 feet to the far water's edge. He examined the other side of the water hole at the water's edge.

11. On June 2, 1988 (during the midnight shift), mine examiner James Strenko examined the return air course from the Two North Switch to an area beyond water hole No. 3.

12. Strenko walked into the water at water hole No. 3, but the water was too deep to traverse the area. He tested the roof, did ventilation and methane tests, and checked for oxygen deficiency. He could see part of the way across the water (approximately 200 feet) and thought he could see across the entire surface.

13. Strenko failed to record his initials, the date and time at the No. 3 waterhole. He travelled around the area, came back to the return entry, and examined the other side of the water hole at the water's edge. He did not record his initials, the date and time at that side of the water hole.

14. On June 2, 1988, Federal Coal Mine inspector (ventilation specialist) Donald J. Klemick was assisting in the AAA inspection of the entire Rushton Mine. He was accompanied by Kent Fenush, company Safety Inspector and Greg Archer, representative of the miners. The inspection team proceeded down the return air course past three or four bleeder evaluation points to water hole No. 1. Fenush had been with Rushton only a short time. He was not familiar with the areas inspected. Neither Fenush nor Archer were called as witnesses.

15. Inspector Klemick found examiner's initials dated May 23, 1988, but did not find any initials dated after May 23, 1988. Nor were Fenush or Archer able to find any more recent initials. No initials were seen at the water's edge of water hole No. 1.

16. After by-passing the water hole, Klemick came back to the return air course. He found no initials at the other edge of the water. He did find a date, May 30, 1988, at bleeder

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evaluation point No. 4, but no initials. Bleeder evaluation point 4 is between water holes 1 and 2. The inspection team proceeded to water hole 2 which they found impassible, filled with water and "yellow boy." They went around the area and reentered the return proceeding to water hole No. 3.

17. Water hole No. 3 was very deep and extended a distance of about 180 feet.

18. After exiting the mine, Inspector Klemick checked the examination records at the mine office. These showed that the examinations had been made May 30, 1988, by Hockenberry.

19. After Klemick left, Rushton's Superintendent, Robert Supko, had his third shift foreman check for the initials. He was accompanied by a UMWA belt examiner. Five locations were found containing date boards with Hockenberry's initials, the date May 30, 1988, and the time written on them. The Superintendent had one board brought out of the mine to show Klemick when he returned.

DISCUSSION

Although the inspector did not find any evidence (initials, date and time), that the return air course had been inspected within the prior seven days, I accept the testimony of Hockenberry and Strenko that such inspections were actually made, Hockenberry's on May 30, 1988 and Strenko's before 8 a.m., on June 2, 1988. I further accept the testimony of Hockenberry, corroborated by Superintendent Supko, that he placed his initials, the date and time at five locations along the return aircourse on May 30, 1988. Strenko was uncertain as to whether he placed his initials and the date and time of his examination on June 2, 1988. I find that he did not.

20. On October 29, 1987, MSHA Administrator for Coal Mine Safety and Health issued a memorandum to MSHA District Managers which, among other things, stated:

Section 75.305 requires weekly examinations of air courses and other areas by a certified person. Modification of these requirements where a roof fall has occurred, or where an area is unsafe for travel, can be achieved only through the petition for modification procedures (GX 2).

21. Inspector Klemick issued a citation alleging a violation of 30 C.F.R. 75.305 because the West Mains return air course was not being examined in its entirety. The citation charged that there were three areas of standing water and that

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the evidence indicates they were being by-passed. In addition there was no evidence of dates, times, and initials present to indicate that the return aircourse was being examined at intervals not exceeding seven days.

22. The citation was continued while water was being removed from water hole 1 and 2 and a bridge was constructed over a portion of water hole 2. Rushton filed a petition for modification with respect to the area covered by water hole 3.

REGULATION

30 C.F.R. 75.305 provides in part as follows:

In addition to the preshift and daily examinations . . . , examinations for hazardous conditions, including tests for methane, and for compliance with the mandatory health or safety standards, shall be made at least once each week by a certified person . . . in the return of each split of air where it enters the main return . . . , at least one entry of each intake and return aircourse in its entirety The person making such examinations and tests shall place his initials and the date and time at the places examined, and if any hazardous condition is found, such condition shall be reported to the operator promptly.

* * *

ISSUES

1. Whether, within seven days of June 2, 1988, examinations by certified persons were made in the return air course of the West Mains of the Rushton Mine?

2. Whether, if such examinations made, the person(s) making the examinations placed their initials, and the date and time at the places examined?

3. Whether, if a violation is established, it was significant and substantial?

CONCLUSIONS OF LAW

1. Respondent is subject to the provisions of the act in the operation of the Rushton Mine. I have jurisdiction over the parties and subject matter of this proceeding.

2. The required weekly examinations of return air courses do not mandate that the examiner walk the entire area, but he

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must be able to adequately examine the entire area for hazardous conditions and for compliance with mandatory health and safety standards.

3. With respect to the water holes involved in this proceeding, I conclude that the examiner adequately examined the area of water hole No. 1 (he walked through the water hole) and water hole No. 2. In the latter instance, he made methane tests at the water's edge and was able to adequately examine the roof and ribs by sighting over the water--a distance of about 20 feet. I further conclude that the examiner was unable to adequately examine the area of water hole No. 3. The water hole was impassible, and it was not possible to adequately examine the roof and ribs by sighting over a distance of 180 feet.

4. I conclude, based on my finding of fact No. 9, that the examiner placed his initials and the date and time at the places examined in the areas covering water holes 1 and 2.

5. I conclude, based on my finding of fact No. 13, that the examiner did not place his initials and the date and time at the places examined in the area covering water hole 3.

6. Therefore, I conclude that a violation of 30 C.F.R. 75.305 has been established to the extent that an adequate examination was not made of the area covered by water hole 3 and the examiner failed to place his initials and the date and time of the examination in that area.

7. There is no evidence in the record that the violation was reasonably likely to result in an injury of a reasonably serious nature. Therefore, the citation was improperly designated as significant and substantial.

ORDER

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

1. Citation 2885756 issued June 2, 1988, is AFFIRMED to the extent that it charges a violation of 30 C.F.R. 75.503 for failure to examine that portion of the return air course which includes water hole No. 3, and failure to record the examiner's initials and the date and time of examination at that area.

2. The citation is MODIFIED to eliminate the designation of the violation as significant and substantial.

