

CCASE:  
RUSHTON MINING V. SOL (MSHA)  
DDATE:  
19890724  
TTEXT:

~1419

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 89-146-R  
Citation No. 2889705; 3/20/89

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

Rushton Mine  
Mine ID #36-00856

DECISION AND ORDER DENYING MOTION FOR SUMMARY DECISION

Rushton Mining Company (Rushton) has filed a Motion for Summary Decision in the captioned case pursuant to Commission Rule 64, 29 C.F.R. 2700.64, seeking to vacate the challenged citation. The citation at issue, No. 2889705, alleges a violation of the standard at 30 C.F.R. 70.510(b)(2) and charges as follows:

A plan for the administration of a continuing effective hearing conservation program was not submitted for approval within 60 days following the issuance of the notice of violation that was issued on 1/17/89. The plan had not been submitted as of this date, 62 days after the issuance.

There appears to be no factual dispute that indeed a notice of violation was issued on January 17, 1989, under section 104(a) of the Act for a violation of 30 C.F.R. 70.501 under "subpart F-Noise Standard. It is also undisputed that the citation on its face stated that a hearing conservation plan must be submitted to the Federal Mine Safety and Health Administration (MSHA) within 60 days of the issuance of that citation. It also appears to be undisputed that such a plan for a hearing conservation program was not submitted for approval within 62 days of the issuance of that citation.

Rushton argues however that the Secretary's regulations do not in fact require the submission of a hearing conservation plan upon a single showing of excessive noise levels during a periodic noise survey but rather only upon a subsequent showing of excessive noise levels during a supplemental noise survey conducted as required by 30 C.F.R. 70.509.

The Secretary's regulations provide in relevant part as follows:

~1420

70.507 - Initial Noise Exposure Survey

On or before June 30, 1971, each operator shall:

(a) Conduct, in accordance with this subpart, a survey of the noise levels to which each miner in the active workings of the mine is exposed during his normal work shift.

\* \* \*

70.508 - Periodic Noise Exposure Survey

(a) At intervals of the least every 6 months after June 30, 1971, but in no case shall the interval be less than 3 months, each operator shall conduct, in accordance with this subpart, periodic surveys of the noise levels to which each miner in the active workings of the mine is exposed and shall report and certify the results of such surveys to the Mine Safety and Health Administration, and the Department of Health and Human Services.

\* \* \*

70.509 - Supplemental Noise Exposure Survey; Reports and Certification

(a) Where the certified results of an initial noise exposure survey conducted in accordance with 70.507, or a periodic noise exposure survey conducted in accordance with 70.508, show that any miner in the active workings of the mine is exposed to a noise level in excess of the permissible noise level prescribed in Table I, the operator shall conduct a supplemental noise exposure survey with respect to each miner whose noise exposure exceeds this standard. This survey shall be conducted within 15 days following notification to the operator by the Mine Safety and Health Administration to conduct such survey.

\* \* \*

70.510 - Violation of Noise Standard; Notice of Violation; Action Required By Operator

(a) Where the results of a supplemental noise exposure survey conducted in accordance with 70.509 show that any miner in the active workings of the mine is exposed to noise levels which exceed

the permissible noise levels prescribed in Table I, the Secretary shall issue a notice to the operator that he is in violation of this subpart.

(b) Upon receipt of a Notice of Violation issued pursuant to paragraph (a) of this section, the operator shall:

(1) Institute promptly administrative and/or engineering controls necessary to assure compliance with the standard. Such controls may include protective devices other than those devices or systems which the Secretary or his authorized representative finds to be hazardous in such mine.

(2) Within 60 days following the issuance of any Notice of Violation of this subpart, submit for approval to a joint Mine Safety and Health Administration-Health and Human Services committee, a plan for the administration of a continuing, effective hearing conservation program to assure compliance with this subpart.

The problem in this case arises from inartful draftmanship of the regulations. If subsection 70.510(b)(2) is read separate from and independent of the other provisions in the section it is clear that there was a violation as charged since it is undisputed that no hearing conservation plan was submitted within the 60 day period established by that regulation.

Indeed unless subsection (b)(2) is read in such a separate and independent manner it is in irreconcilable conflict and becomes nonsensical. It is of course a basic rule of construction that the interpretation that produces the greatest harmony and the least inconsistency ought to prevail. Sutherland Stat Const 46.05 (4th Ed.)

Subsection 70.510(b)(2) must therefore be read separate and independent of the remainder of the section. It is in itself unambiguous in requiring the submission of a hearing conservation plan "within 60 days following the issuance of any Notice of Violation of this subpart" (Emphasis added). This interpretation is of course also consistent with that taken by the Secretary in this case and in her Policy Manual.

Under the circumstances the Motion for Summary Decision must be denied. The operator has not shown as a matter of law that it is entitled to such a decision. Commission Rule 64. Accordingly this case along with its related civil penalty proceeding (Docket No. PENN 89-197) will be set for hearing on the merits. While the Secretary has not filed a Motion for Summary Decision in this case it would appear,

~1422

based upon the undisputed evidence, that a violation of the cited standard did in fact exist and that such a Motion would be granted concerning the existence of the violation. A hearing would nevertheless be necessary on the remaining issue of whether the violation was "significant and substantial". In addition, issues under section 110(i) of the Act must be addressed in determining the appropriate penalty to be assessed in the related civil penalty proceeding.

Gary Melick  
Administrative Law Judge  
(703) 756-6261