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BETH ENERGY MINES 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

BET HENERGY MINES, INC.,  
CONTESTANT

CONTEST PROCEEDING

v.

Docket No. PENN 90-2-R  
Order No. 2892059; 9/27/89

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

Cambria Slope Mine No. 33  
Mine ID 36-00840

DECISION

Appearances: Paul D. Inglesby, Esq., U.S. Department of Labor,  
Office of the Solicitor, Philadelphia,  
Pennsylvania, for Petitioner;  
R. Henry Moore, Esq., Buchanan Ingersoll,  
Pittsburgh, Pennsylvania for Respondent.

Before: Judge Melick

This contest proceeding is before me upon expedited hearings pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," and Commission Rule 52, 29 C.F.R. 2700.52, to challenge a withdrawal order issued by the Secretary of Labor against Beth Energy Mines, Inc., (Beth Energy).

The Order at issue, No. 2892059, charges as follows:

The approved ventilation and methane and dust control plan was not being complied with in the 4 West Main 8 Right area of the mine in that an intake regulator had been constructed in No. 3 intake entry of 8 Right without prior approval of the District Manager. It was explained to this operator on several previous occasions that prior approval must be granted by the District Manager before installing an intake overcast.

Following the presentation of the Secretary's case, counsel for Beth Energy filed a Motion to Vacate the order for lack of evidence. The motion was granted at hearing in a bench decision. That bench decision is set forth below with only nonsubstantive corrections:

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All right. Well I'm compelled to grant the motion to vacate. I don't have any choice. The Government's expert, Mr. O'Rourke, has indeed testified that there is not sufficient information in the record presented to him (and indeed, the Government was even given an opportunity after it concluded its case-in-chief to present such information, but declined to do so) from which he could determine whether the device at issue here was indeed a regulator. Since the Government could not, in fact, prove that the device was a regulator, then, of course, it cannot be shown that the device was in any event such a device that required any kind of approval in the Ventilation, Methane and Dust Control Plan or in any of the attendant submissions required under 30 C.F.R. section 75.316. Therefore the Government's case must fail. The order must be vacated and the contest is granted.

ORDER

Order No. 2892059 is vacated and this Contest is granted.

Gary Melick  
Administrative Law Judge  
(703) 756-6261