

CCASE:
ROCHESTER & PITTSBURGH COAL 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

ROCHESTER & PITTSBURGH COAL COMPANY,
CONTESTANT

v.

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

CONTEST PROCEEDING

Docket No. PENN 89-85-R
Order No. 2889351, 2/2/89

Greenwich Collieries No. 2

Mine ID 36-02404

DECISION

Appearances: Joseph A. Yuhas, Esq., Rochester & Pittsburgh Coal Company, Ebensburg, Pennsylvania, for the Contestant; Joseph Crawford, Esq., Office of the Solicitor, Department of Labor, Philadelphia, Pennsylvania, for the Respondent.

Before: Judge Weisberger

Statement of the Case

In this Contest Proceeding, the Operator (Contestant) seeks a review of a withdrawal Order issued by the Mine Safety and Health Administration (MSHA) pursuant to section 104(b) of the Mine Act, 30 U.S.C. 814(b). Pursuant to notice, the case was heard in Johnstown, Pennsylvania, on November 21, 1989. Leroy Niehenke testified for Contestant, and Robert Joseph testified for the Secretary (Respondent). Respondent filed a Post Hearing Brief on January 12, 1990. Proposed Findings and Memorandum of Law were filed by Petitioner on January 16, 1990.

Stipulations

At the Hearing the Parties entered into the following stipulations:

1. The Administrative Law Judge has jurisdiction over this proceeding.

2. Rochester & Pittsburgh Coal Company is subject to the jurisdiction of the Mine Act.

Findings of Fact and Discussion

Leroy Niehenke, an MSHA Inspector and Electrical Specialist, testified that on February 2, 1989, his supervisor informed him that there was an outstanding citation that had been issued for Contestant's Greenwich Collieries Mine. Niehenke indicated that his supervisor told him to go to the mine, and check on the status of the cited condition.

The original citation had been issued on December 21, 1988, alleging a violation of 30 C.F.R. 1719 in that "The illumination provided for both the front and rear of the Kersey scoop tractor serial number 7175, . . . located in M11X-1, 010 working section, was less than .006 foot lamberts. . . ." The original citation had set January 16, 1989, as the date for the abatement of the cited violation.

Niehenke indicated that he observed the scoop, on February 2, and the illumination system was not completely installed, inasmuch as the power cable for the illumination system was not installed, the unused openings for the light enclosures were plugged but not tack welded, and hose clamps on a flame resistant conduit were not provided. According to Niehenke, he had installed this type of system in the past, and indicated that it should take two individuals two shifts to install this system. He also indicated that dealers, who provide the necessary parts to properly illuminate the scoops, are located within 20 to 30 miles of the subject mine.

In essence, Niehenke testified that he decided to issue a 104(b) Order for failure to abate, rather than extend the citation, because the Operator did not show any "diligence" in abating the violative condition (Tr. 30). He also indicated that the hazard of operating the scoop without adequate illumination, was not eliminated by moving the scoop outby the last open crosscut. He thus indicated that the equipment, i.e., the scoop, still could be used anywhere including the inby by the last open crosscut, and hence he issued the 104(b) Order rather than extend the time to abate the Citation. He also indicated that there were no signs preventing the scoop from being used inby the last open crosscut.

The original citation issued December 21, 1988, alleges that the scoop in question did not have sufficient illumination as provided for in 30 C.F.R. 75.1719(e)(6). It was subsequently amended to show a violation of 30 C.F.R. 75.1719-1(d).

~148

30 C.F.R. 75.1719(a), states that sections 75.1719 through 75.1719-4 prescribe the requirements ". . . for illumination of working places in underground coal mines while persons are working in such places and while self-propelled mining equipment is operated in the working place." (emphasis added). Section 75.1719-1(d), supra, provides as follows: "The luminous intensity (surface brightness) of surfaces that are in a miner's normal field of vision of areas in working places that are required to be lighted should be not less than 0.06 footlamberts when measured in accordance with section 75.1719-3." (Emphasis added). Thus a plain reading of these regulatory sections reveals that the requirements for illumination are limited to "working places," and that specifically the requirement for luminaries of not less than .06 footlamberts, is required for machinery which is "operated in the working place." 30 C.F.R. 75.2(g)(2) defines working place as ". . . the area of the coal mine inby the last open crosscut." The scoop in question, when observed by Niehenke on February 2, was outby the last open crosscut (Government Exhibit 2). Niehenke indicated on cross-examination that as far as he could determine, the scoop in question was not used inby the last open crosscut, after the citation in question was issued. He further indicated on cross-examination, that the scoop in question was in complete compliance with all regulatory standards if used outby the last open crosscut. He agreed that on the date he issued the Citation the scoop was in a condition that permitted its use outby the last open crosscut.

Accordingly, I find that inasmuch as section 75.1719, supra, mandates illumination standards at the working place, once the scoop in question had been removed from the working place, i.e., outby the last open crosscut, it was no longer in violation of section 75.1719, supra. When Niehenke observed the scoop on February 2, it was not at the working place. Hence, the original citation had been abated, as the scoop's condition no longer violated the terms of section 75.1719, supra, since it was not at the working place. Accordingly, since the citation had been abated, the section 104(b) Order should not have been issued, and it should be vacated.

ORDER

It is ORDERED that the Notice of Contest herein is SUSTAINED, and it is further ORDERED that Order No. 2889351 be VACATED.

Avram Weisberger
Administrative Law Judge