

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, D.C. 20001

September 26, 2007

R S & W COAL COMPANY, : CONTEST PROCEEDINGS
Contestant :
 :
v. : Docket No. PENN 2007-361-R
 : Order No. 7010193; 09/13/2007
 :
SECRETARY OF LABOR, : Docket No. PENN 2007-362-R
MINE SAFETY AND HEALTH : Order No. 7010194; 09/13/2007
ADMINISTRATION (MSHA), :
Respondent : Docket No. PENN 2007-363-R
 : Citation No. 7010195; 09/13/2007
 :
 : R S & W Drift
 : Mine ID 36-01818

DECISION

Appearances: Adam F. Welsh, Esq., U.S. Department of Labor, Philadelphia, Pennsylvania, on behalf of the Respondent
Adele L. Abrams, Esq., Diana R. Schroecher, Esq., Beltsville, Maryland, on behalf of the Contestant

Before: Judge Barbour

In these contest proceedings brought pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 815(d)) (the “Mine Act” or “Act”), RS&W Coal Company (“RS&W” or “the company”) challenges the validity of two orders of withdrawal and one citation issued on September 13, 2007, at its RS&W Drift Mine.¹ Because its mine was

The company contests Section 104(b) Order No. 7010193, which charges the company with a failure to timely abate a violation of 30 C.F.R. § 75.370(a)(1) (Docket No. PENN 2007-361-R); Section 104(b) Order No. 7010194, which charges the company with a failure to timely abate a violation of Section 75.364(b)(4) as cited in section 104(a) Citation No. 7009620 (Docket No. PENN 2007-363-R); and section 104(a) Citation No. 7010195, which charges the company with a failure to comply with Section 103(a) of the Act, 30 U.S.C. § 813(a) (Docket No. PENN 2007-363-R). As noted in the decision, the company effectively withdrew its contest of Order No. 7010193 when MSHA vacated the order. The citation underlying the order (Citation No. 7008854) remains extant, and Docket No. PENN 2007-361-R is therefore stayed pending either the abatement of the citation or the issuance of an order of withdrawal for the company’s failure to timely abate the violation of Section 75.370(a)(1) alleged in the citation. Tr. ___; Screen 44-46 of 1,000 (e-mail

closed by the orders, the company sought and was granted an expedited hearing, which was convened on Tuesday, September 18, 2007, in Washington, D.C. At the close of the hearing, and with the concurrence of counsels, I entered a decision on the record. Except for editorial changes, the decision is reproduced verbatim herein.²

In these contest proceedings brought pursuant to Section 105(d) of the . . . Act . . . RS&W Coal Company is contesting two orders issued pursuant to Section 104(b) of the [A]ct and one citation issued pursuant to Section 104(a). Prior to going on the record, the conte[st] regarding the validity of one of the orders, Order No. 7010193, was resolved for the time being when the time for compliance with the standard allegedly violated in the citation underlying the order was extended, and the order was effectively terminated. . . . [T]he parties and I agree . . . [a] proper way to proceed . . . is to keep Docket No. PENN 2007-361-R open as a viable case pending resolution of the underlying citation. Should another order be issued, it will be filed under this document number and proceedings will then . . . follow according to the Commission's rules.

[T]he remaining cases, Docket[s] No. PENN 2007-362-R and PENN 2007-363-R, have been heard today in the Commission's offices in . . . [Washington, D.C.]. Because Order No. 7010194 had the effect of closing the underground portion of RS&W's mine, the hearing was conducted on an expedited basis. I am issuing this bench decision following the receipt of all of the evidence and after hearing counsels' closing arguments. The decision will not be final and appealable to the Commission until it has been reduced to writing, and that cannot take place until the transcript is received. Upon issuance of the written decision, it will be sent by fax to counsel.

* * *

version of the transcript).

Because I doubted the hearing process was the best way to reach a result that adequately accounted for the technological and fiscal considerations involved in resolving the parties' remaining outstanding issues, before entering the bench decision, I expressed my hope the parties would redouble their efforts to resolve the remaining issues short of another expedited hearing. Tr. __; Screen 967-970 of 1,000 (e-mail version of transcript). As the reader will note, the hope is reiterated in the bench decision.

Order No. 7010194 [Docket No. PENN 2007-362-R] charges RS&W with a violation of 30 C.F.R. [§] 75.364(b)(4), a mandatory safety standard requiring in pertinent part at least every seven days [that] a certified person examine for hazardous conditions at each seal along a return or bleeder air course.^[3] RS&W is cited for failing to make the required examination at the mine's east side worked out area seals. The underlying citation, Citation No. 7009620, gave RS&W a week to abate the alleged violation. The contested order was issued eight days later when . . . [the inspector] determined . . . the condition had not been corrected.

There are [three] primary issues. Was RS&W in violation of Section 75.364(b)(4)[?] [I]f so, was it given a reasonable time to abate? And was it reasonable not to further extend the time for abatement?

I find RS&W violated Section 75.364(b)(4). First, I conclude from the testimony of Inspector Dudash that there were at least two seals that, if inspection is required, should have been inspected. It is true when Inspector Dudash issued the citation and Inspector Mehalchick issued the order, that neither inspector personally observed the seals. Nonetheless, I accept the testimony of Inspector Dudash that he saw the seals in May [2007], and there is no indication the nature of the seals changed between May and September. In fact, the only change would have been their progressive deterioration, something that is inevitable over time and something that, if anything, would warrant their inspection.

In reaching . . . [a] conclusion . . . the two seals existed, I note further Inspector Dudash's unrefuted testimony . . . he carefully checked with his supervisor to make sure, in view of . . .

Section 75.364(b)(4) states:

At least every 7 days, an examination for hazardous conditions at the following locations shall be made . . .:

* * *

(4) At each seal along return and bleeder air courses and at each seal along intake air courses not examined under § 75.360(b)(5).

[an] [existing] petition for modification [(discussed below)], which seals, if any, . . . [were] “covered” by the standard, and that the two seals were among those indicated to him [to be covered].

Having found the seals existed, I also find . . . they were not inspected every seven days as required by the . . . [cited standard]. There really isn't any dispute about this point.

RS&W would have me find a [granted] petition for modification entered into the record as Contestant's Exhibit 1 removed . . . [the company's] obligation to inspect the seals. This I cannot do.

First, and most obviously, the petition modifies the application of Section 75.332(b)(1) and Section 75.332(b)(2) [not Section 77.364(b)(4)].

Moreover, in my opinion, the company never satisfactorily explained how the modification of standards that deal with the ventilation of working sections and working places relieve it from the duty to weekly examine seals in return and bleeder air courses. And I further find, as [the company's witness] Mr. Randy Rothermel testified, that the area in question was a bleeder.

In reaching these findings, I am mindful of the company's assertion . . . compliance will force it to send an examiner into a dangerous area [,but for me t]o focus . . . on the hazards posed . . . [to] the examiner, . . . [would require] me to ignore other [legal and readily available] options . . . namely, and as the inspectors repeatedly testified, to danger off the area or to rehabilitate it.

I understand there may be detrimental economic consequences to these alternative[s], but the economic feasibility of abatement has, in my view, only been argued, not proven, and I am not in a position to decide the issue on the record if I believed it relevant to abatement, which [in any event] I do not.

As for the greater hazard defense the company has raised, that is to say, [if the standard applies] . . . compliance poses a diminution of safety for the examiner, . . . that [i]s an issue for a petition for modification of a cited standard, not as argued here[,] a defense to the violation.

Having found the violation existed, I further find the time granted to abate it was reasonable. It [i]s clear [to me] from the testimony had RS&W begun abatement efforts, perhaps even begun . . . discussion of such efforts [with MSHA], the time for compliance would have been extended. It is the operator's responsibility to comply, which means the operator must take the initiative in compliance efforts. Here I find RS&W did not take that initiative. [Rather, the company did nothing.]

In upholding the citation and order, I further find the violation was not serious. The danger, as explained by the inspectors, was that explosive or noxious gases might build up behind the seals and leak into the mine atmosphere. Given the lack of significant methane [ever accumulating] at the mine and given the lack of evidence of other dangerous gases accumulating, I find such a hazard was unlikely to occur.

Moreover, even if there had been a more immediate hazard, one would assume MSHA would have cited it long before [it issued the underlying citation on] September 5th, which leads me to a discussion of RS&W's negligence.

I conclude that it was low. As counsel for the operator pointed out and as the testimony establishes, the mine was inspected at least several times prior to September 5th . . . [Y]et [,] a violation of Section 75.364(b)(4) was not cited at those times.

I further find, as the company's witnesses testified, that management officials genuinely, albeit mistakenly, believe compliance was not required.

Moving on to the alleged violation of Section 103(a) of the [A]ct [Docket No. PENN 2007-363-R], I find the violation existed as charged.^[4] I accept the testimony of Inspector Mehalchick, who . . . was there, that when Mr. [Randy] Rothermel was asked [by MSHA] to let MSHA officials look at the [mine's] books, he denied the request. This violated the cited section of the [A]ct because the MSHA officials were at the mine as part of

Section 103(a), 30 U.S.C. § 813(s), states in pertinent part:

Authorized representatives of the Secretary . . . shall make frequent inspections and investigations in coal . . . mines each year[.]

an ongoing inspection and, therefore, [they] had the right to see the books.

I have no doubt Mr Rothermel was [,as he testified,] angry. I have no doubt he felt [ill] [as he also testified] [and that] . . . he was on medication that made him sleepy, but his excuse that he did not authorize MSHA to look at the books because he thought the mine . . . was closed [by the previously issued Section 104(b) Order] . . . rings hollow to me. The order which he was given specifically restricted closure to the underground areas of the mine and [did] not affect the mine office where everyone involved had gathered.

The parties agree . . . the violation was unlikely to cause an injury or illness, and I concur. The parties disagree as to RS&W's negligence, and here on balance, I find the evidence favors a lower level of negligence than [that] found by the inspector.

The fact Mr. Rothermel was ill may well have temporarily clouded his judgment and triggered the response that he made [denying MSHA permission to see the books].

Therefore, [in these cases] and in view of . . . the extenuating circumstances, while I will uphold the contested enforcement actions, I will modify the inspectors' negligence findings.

Accordingly, Citation No. 7009620, Order No. 7010194 and Citation No. 7010195 are affirmed, except to the extent that Citation No. 7009620 and Citation No. 7010195 are modified to reflect RS&W's low negligence.

Finally, Docket No. [PENN 2007-] 361-R remains a viable case, subject to resolution of the pending citation.

This means MSHA is closing the underground portion of [RS&W's] mine for a non-S&S, non-serious violation caused by low negligence. Is it legal? Yes. Is it the best use of MSHA's authority? I leave that [question] for others to ponder, but what seems certain is that it would benefit all involved to try to work together in a cooperative rather than a confrontational spirit. The present situation obviously helps neither party[;] nor for that

matter does it assist [those of] the public [who rely on the mine's anthracite coal.].

* * *

Tr. __; Screen 970-998 of 1,000 (e-mail version of transcript).

David F. Barbour
Administrative Law Judge
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Distribution: (by Certified Mail and by Facsimile)

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