

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 New Jersey Avenue, NW, Suite 9500
Washington, D.C. 20001-2021
Telephone No.: (202) 434-9958
Fax No.: (202) 434-9949

January 11, 2007

R S & W COAL COMPANY, INC.,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. PENN 2007-106-R
v.	:	Order No. 7009050; 12/22/2006
	:	
SECRETARY OF LABOR,	:	
Mine Safety and Health	:	
Administration, MSHA	:	R S & W Drift
Respondent.	:	Mine ID: 36-01818

ORDER OF DISMISSAL

This matter involves a withdrawal order issued on December 22, 2006, to the Contestant, R S & W Coal Company, Inc., (“R S & W”) pursuant to section 104(b) of the Federal Mine Safety and Health Act, as amended, for failure to abate a 104(a) citation alleging a violation of 30 C.F.R. 75.381(c)(5). The subject order was issued for R S & W’s failure to install a directional lifeline now required under the Mine Improvement and New Emergency Response Act of 2006 (“Miner Act”) after having been given a reasonable time for abatement.

Although this case does not involve an Emergency Response Plan, this proceeding is the first under new requirements pursuant to the Miner Act.

R S & W filed a Notice of Contest and requested an expedited hearing. Because of the emergency circumstance, a hearing was held on the record via telephone conference on December 27, 2006. R S & W appeared *pro se* and was represented by company president, Randy Rothermel. The Secretary of Labor (“Secretary”) was represented by Adam Welsh. The parties filed post-hearing statements outlining their arguments. I held a subsequent telephone conference with the parties, on December 29, 2006.

For the following reasons, I affirm the 104(b) order as written and R S & W must comply with the standard within two weeks of December 29, 2006.

Summary of Parties’ Arguments

In its Notice of Contest, R S & W requests temporary relief from the order pending a resolution of its Petition for Modification now before the Mine Safety and Health Administration (“MSHA”) because “this is a new law elected by congress [sic].” Cont. Mot. The company

argues that “to comply with this law [would] be a diminution of safety for this mine.” *Id.* In the petition, R S & W requests that the continuous directional lifeline not be required at this mine for safety reasons. Cont. Ex.1. In particular, the company asserts:

[I]f we hang a lifeline – 75- to 80-degree pitch, we have to use two hands and two feet on the ladder to crawl outside. A lifeline would be in the way, and as far as going in and out of the drift, we’re mining on rocks. To leave the drill holes just to fasten his lifeline and the lifeline is supposed to be hung 6- to 8-foot high, it is something that would happen, that we will have to travel the drift using the lifeline to rock. We will be standing up where the air is bad, where the lifeline we have, more or less, is our trap going in and out.

Tr. 15.

R S & W does not dispute the fact of the violation. *Id.*, Tr. 49.

The Secretary contends she has established a prima facie case that the 104(b) order is valid and that R S & W does not dispute the validity of the order. Sec’y Position Statement 2-3. Moreover, the Secretary asserts that R S & W’s request that the regulation not be applied to this mine is an invalid argument in this Commission proceeding because the issue relates to the Petition for Modification, not to the validity of the order or underlying citation. *Id.* at 4. Such an argument is properly brought in Department of Labor proceedings associated with the modification petition. *Id.* In short, the Secretary avers, a Commission proceeding is not the proper forum for determining whether a mine should be exempt from a particular standard. *Id.*

Discussion

Section 75.381(c)(5) provides:

Each escapeway shall be

(5) Provided with a continuous, durable directional lifeline or equivalent device that shall be--

(i) Installed and maintained throughout the entire length of each escapeway as defined in paragraph (b) of this section;

(ii) Flame-resistant in accordance with the requirements of part 18 of this chapter upon replacement of existing lifelines; but in no case later than June 15, 2009;

(iii) Marked with a reflective material every 25 feet;

iv) Located in such a manner for miners to use effectively to escape;

(v) Equipped with directional indicators, signifying the route of escape, placed at intervals not exceeding 100 feet. When cones are used as directional indicators, they shall be installed so that the tapered section points inby; and

30 C.F.R. 75.381(c)(5).

As stated by the Secretary, there is no dispute that a violation exists. Tr. 28. R S & W was issued the underlying citation on June 8, 2006. Tr. 12. R S & W purchased a lifeline, but it did not install the line by the time the 104(b) order was issued in December. Tr. 14. The company was given a reasonable amount of time to obtain the lifeline from the vendor and extensions of time to abate. Tr. 18, 26-27. Accordingly, I conclude that the 104(b) order was validly issued, and I affirm the order as written.

I also agree with the Secretary's argument that the Petition for Modification and the issue of whether R S & W should be exempt from the regulation are irrelevant to this Commission proceeding. Such matters are properly brought before the Department of Labor. In general, the diminution of safety defense is not applied in Mine Act proceedings. An operator may use the defense only when the following circumstances apply: "(1) the hazards of compliance are greater than non-compliance; (2) alternative means of protecting miners are unavailable; and (3) a modification proceeding under section 101(c) of the Mine Act would not have been appropriate." *Westmoreland Coal Co.*, 7 FMSHRC 1338, 1341 (Sept.1985). *See also Penn Allegh Coal Co. Inc.*, 3 FMSHRC 1392 (June 1981); *Sewell Coal Co.*, 5 FMSHRC 2026 (Dec. 1983).

In response to the question of whether it would be safe to install the lifeline, MSHA Field Office Supervisor Lawrence Gazdick testified that MSHA is not requiring the mine to put the ladder on the pitch. It could be fastened to the face of the rock along the side. Tr. 29-30. Gazdick testified that this is not a modification of the standard; the requirements for installation are only slightly different than the requirements as understood by R S & W. Tr. 32-33. Thus, R S & W has not met all requirements of the test.

The Commission later stated that while *Penn Allegh* and *Sewell* preclude resolution of a modification petition based upon diminution of safety *per se* in enforcement proceedings, they do not "bar[] the Commission from weighing the hazards to miners of compliance vs. non-compliance within the context of an extension of abatement time to contest" *Clinchfield Coal Co.*, 11 FMSHRC 2120, 2130 (Nov. 1989). However, this exception does not apply, as Mr. Gazdick testified that R S & W was given approximately four chances to abate over a period exceeding six months. Tr. 26.

During the conference call on December 29, 2006, I issued a bench decision, ordering R S & W to install the lifeline after receiving assurance from MSHA that it could install the lifeline in the manner indicated by Mr. Gazdick. MSHA agreed to allow the mine to remain in operation during those two weeks.

Accordingly, R S & W is **ORDERED** to install the lifeline within two weeks of December 29, 2006. If it fails to do so, MSHA, once again, will close the mine.

This case is **DISMISSED**.

Robert J. Lesnick
Chief Administrative Law Judge

Distribution:

Adam F. Welsh, Esq., Office of the Solicitor, U.S. Department of Labor, The Curtis Center,
Suite 630E, 170 S. Independence Mall West, Philadelphia, PA 19106-3306

Randy Rothermel, Mine Operator, R S & W Coal Company, Inc., 207 Creek Road,
Klingerstown, PA 17941

/rao