

CCASE:

W. R. GRACE & COMPANY v. SOL (MSHA)

DDATE:

19810121

TTEXT:

Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

W. R. GRACE AND COMPANY,  
CONTESTANT

v.

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)  
INTERNATIONAL CHEMICAL WORKERS  
UNION,

RESPONDENTS

Contest of Citation and Orders

Docket No. SE 80-98-RM

Docket No. SE 80-99-RM

Docket No. SE 80-100-RM

Bonny Lake Mine

ORDER DENYING MOTION TO DISMISS  
and  
ORDER OF CONTINUANCE

These consolidated proceedings concern two imminent danger withdrawal orders and one citation served to contestant W. R. Grace and Company by an MSHA inspector on May 7, 1980. The dockets have been scheduled for hearings on the merits in Tampa, Florida, during the term February 3-5, 1981, and the parties were so informed by notice of hearing issued by me on December 29, 1980.

On January 19, 1981, the Secretary, with the asserted concurrence of contestant's counsel, filed a document styled "Notice of Dismissal", whereby the Secretary purports to withdraw from this proceeding as a party respondent and to dismiss his answer to the contest. Although the document is not styled as a motion I will treat it as such for the purpose of my ruling in this matter. As grounds for its motion, the Secretary asserts that "the evidence now available does not appear to sustain the violations as alleged". The Secretary also asserts that the contested orders and citation have been reissued to the independent contractor (Pop's Painting of Lakeland) in accordance with MSHA's present policy concerning independent contractors, a copy of which is attached to the motion.

Exhibit "D" attached to the motion is a copy of an October 31, 1980, memorandum from MSHA's Administrator Robert B. Lagather, setting forth the "new" independent contractor policy, and paragraph three advises

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that in the case of citations pending before this Commission, counsel may either dismiss the case against the operator or move to join the contractor as a party. In view of the Commission's October 7, 1980, decision in Climax Molybdenum Company v. MSHA, et al., DENV 79-102-M through DENV 79-105-M, the Secretary may not dismiss any cases pending before this Commission or its Judges. In Climax, the Commission clearly stated that once an operator contests a citation the Secretary cannot deprive the Commission of jurisdiction by vacating the citation. Accordingly, any attempts by the Secretary to summarily dismiss these proceedings on his own initiative without my prior approval is rejected.

With regard to the "new" independent contractor policy, Mr. Lagather's memorandum makes reference to a policy which became effective June 23, 1980. However, a copy of that policy is not attached to the motion, and I have no independent recollection as to what it may be. The present independent contractor regulations found in Part 45, Title 30, Code of Federal Regulations, became effective July 31, 1980, 45 Fed. Reg. 44494, et seq., and I assume these are controlling.

In a recent contest proceeding concerning an order and three citations issued by MSHA inspectors on February 9 and 11, 1980, the operator defended on the ground that at least one of the citations and the order should have been served on the independent contractor rather than on the contestant mine operator-owner, Harman Mining Corporation v. MSHA, Dockets VA 80-94-R through VA 80-97-R, decided January 2, 1981. In those proceedings, MSHA took the position that since the citations were issued before the effective date of the new independent contractor regulations on July 31, 1980, the then prevailing policy of citing only the owner-operator was controlling, and no mention was made of any June 23 or October 31, 1980 policies. In the instant cases, even though the orders and citation were also issued prior to the effective date of the newly promulgated contractor regulations, MSHA opted to apply its new policy rather than the "owners only" argument advanced in the Harman Mining cases.

The Secretary states that the contested orders and citation have been reissued substituting Pop's Painting of Lakeland as the responsible independent contractor mine operator, but that Pop's Painting has not contested the modified orders and citations. I take note of the fact that copies of the "modified" orders and citations simply make reference to the fact that they are modified to reflect the change in the named respondent and there is no change in the issuance date of the orders or citations, and there is no information as to when these citations may have been actually served on the contractor.

The Secretary's motion to dismiss these proceedings is DENIED at this time and the scheduled hearings are CONTINUED. Further, in order to clarify several matters raised by the motion, and to resolve the somewhat inconsistent enforcement actions taken against operators and contractors, MSHA's counsel

is directed to furnish me with the following information within  
twenty (20) days of the date of this order:

1. A statement clarifying the asserted June 23, 1980, contractor policy referred to in the October 31, 1980 Lagather memorandum.

2. Whether the statement that "the evidence now available does not appear to sustain the violations as alleged" is based on the fact that the contractor, rather than W. R. Grace and Company, is solely liable and responsible for the orders and citation issued in these proceedings.

3. The date and method of service of the orders and the citation on the contractor Pop's Painting of Lakeland, and whether there is any indication that the contractor intends to contest the citations.

George A. Koutras  
Administrative Law Judge