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SOL (MSHA) v. JIM WALTER RESOURCES

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

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

CIVIL PENALTY PROCEEDING

Docket No. SE 85-43
A.C. No. 01-01247-03633

v.

No. 4 Mine

JIM WALTER RESOURCES, INC.,
RESPONDENT

Appearances: George D. Palmer, Esq., Office of the Solicitor,
U.S. Department of Labor, Birmingham, Alabama,
for Petitioner; Harold D. Rice, Esq., and
R. Stanley Morrow, Esq., Birmingham, Alabama,
for Respondent.

DECISION

Before: Judge Broderick

STATEMENT OF THE CASE

Petitioner seeks a civil penalty for an alleged violation of 30 C.F.R. 77.1710(e), because two employees of a contractor working on mine property were not wearing protective footwear. Respondent denies liability for the violation committed by an independent contractor. Pursuant to notice, the case was heard in Birmingham, Alabama, on June 18, 1985. Ona L. Jones testified on behalf of Petitioner. Gary Nicosia testified on behalf of Respondent. Both parties waived their rights to file post hearing briefs. I have considered the entire record and the contentions of the parties and make the following decision.

FINDINGS OF FACT

There is no significant dispute as to the facts in this case. On July 18, 1984, on the basis of a 103(g) complaint, the MSHA inspector observed two employees of the Dependable Drilling Company working on the mine surface drilling a hole for a waterpipe

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from the surface into the mine. Neither of the employees had protective footwear. They were handling a drill stem weighing in excess of 100 pounds, and in the judgment of the inspector, protective footwear was required. This occurred at about 6:30 a.m. The Inspector did not have an MSHA I.D. number for Dependable Drilling, and the MSHA office was not open at the time. He discussed the matter with Respondent's Safety Director, who said that Dependable Drilling did not have an MSHA I.D. number, and suggested that the citation be issued to Respondent. The citation was issued to Respondent. It was later modified to show the contractor's I.D. number, but a penalty was assessed against Jim Walter.

On December 2, 1981, Respondent entered into a "Blanket Contract" with Dependable Drilling Company whereby the latter agreed to perform work detailed on Purchase Orders issued by Jim Walter. On May 31, 1984, such a Purchase Order was issued to the contractor to drill a hole according to certain specifications for a fixed price. The terms of the December 2, 1981 contract were incorporated by reference in the Purchase Order. The contract provides that the contractor shall have "absolute and entire charge, control and supervision of the work . . . shall hire and discharge all workmen . . . the contractor agrees to comply . . . with the requirements of all statutes . . . and rules of all governing bodies. . . ." Jim Walter did not exercise any control over Dependable or its employees except to make sure it was drilling the hole according to the specifications in the Purchase Order. The work on the contract began June 26, 1984, and was completed August 10, 1984. This was the only work performed by Reliable at the subject mine. The drilling was performed at a point about 150 feet from Jim Walter's safety office. Jim Walters had a rule that hard hats and hard toed shoes be worn on mine property, and it enforced the rule against its employees.

The evidence does not establish that Jim Walter contributed to the existence of the violation, nor that it had control over the existence of the hazard. No Jim Walter employees were exposed to the hazard. The violation was abated on the same day the citation was issued when Dependable's employees obtained and were wearing hard-toed footwear.

ISSUE

Whether the citation was properly issued to Respondent, the "production-operator"?

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CONCLUSIONS OF LAW

In the case of Secretary v. Cathedral Bluffs Shale Oil Company, 6 FMSHRC 1871 (1984), appeal docketed, No. 84-1492 (D.C.Cir.1984), the Commission held that citing the production operator for a violation arising from the work activities of an independent contractor was improper in the absence of exposure to the hazard by the employees of the production operator, or control over the condition that needs abatement by the production operator. That decision is controlling here: Respondent's employees were not even minimally exposed to the hazard, and there is no evidence that it had any control over the condition which needed abatement: obtaining and requiring the contractor's employees to wear hard-toed shoes.

The Secretary argues that administrative convenience justified citing the production-operator: The inspector did not know whether the contractor had an MSHA I.D. number. He also argues that in these circumstances, the Secretary had discretion to cite the operator, the contractor, or both. These arguments have been rejected by the Commission. I conclude that the citation was improperly issued to Respondent.

ORDER

Based upon the above findings of fact and conclusions of law, citation no. 2482404 issued July 18, 1984 is VACATED, and the penalty proceeding based on the citation is DISMISSED.

James A. Broderick
Administrative Law Judge