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JIM RESOURCES V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

JIM WALTER RESOURCES, INC.,
CONTESTANT

CONTEST PROCEEDING

v.

Docket No. SE 86-139-R
Citation No. 2810267; 9/22/86

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

No. 5 Mine

DECISION

Appearances: R. Stanley Morrow, Esq., Birmingham, Alabama,
for Contestant;
William Lawson, Esq., Office of the Solicitor,
U.S. Department of Labor, Birmingham, Alabama,
for Respondent.

Before: Judge Melick

This case is before me under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et. seq., the "Act" to challenge Citation No. 2810267 issued to Jim Walter Resources Inc. (Jim Walter) by the Secretary of Labor on September 22, 1986.

The citation as amended at hearing charges a "significant and substantial" violation of the standard at 30 C.F.R. 75.309(a) and reads as follows: (FOOTNOTE 1)

Methane from 1.1% to 1.2% was detected with a GÄ70 methane detector, in the main return aircourse of the No. 3, 5, 6 and 7 sections from spad No. 2821 outby to spad No. 2174, the overcast of No. 5 and No. 7 section track. Also the main return aircourses from spad No. 2242 extending inby to spad No. 2827 where the No. 5 section left return joins the left return of the No. 7 section. Also extending up the No. 5 section left return from spad No. 2827 to the working face. Bottle samples were taken to substantiate this citation.

The regulatory standard at 30 C.F.R. 75.309(a) reads, as relevant hereto, as follows: "if, when tested, a split of air returning from any working section contains 1.0 volume per centum or more of methane, changes or adjustments shall be made at once in the ventilation in the mine so that such returning air shall contain less than 1.0 volume per centum of methane."

The mere discovery of 1.0 volume per centum or more of methane in a split of air returning from a working section is clearly not sufficient to constitute a violation of this part of the standard. See *Secretary v. Mid Continent Coal and Coke Company*, 1 IBMA 250 (1972). The essence of the violation is the failure to make "changes or adjustments %y(3)27 at once in the ventilation in the mine so that such returning air shall contain less than 1.0 volume per centum of methane."

In this case it is not disputed that methane gas in excess of 1.0 volume per centum was found by Carl Early, an inspector for the Federal Mine Safety and Health Administration (MSHA) on September 22, 1986. While the citation shows on its face that it was issued by Inspector Early at 7:00 a.m. on September 22, 1986, there is no statement or evidence as to the time lapse between the discovery of the cited methane readings and the issuance of the citation or regarding what, if any, efforts were made to correct the problem. Indeed Inspector Early testified that he did not know when the operator began action to correct the cited condition but conceded that he was told by Ray Hutchins, the Mine Foreman upon notification that the methane readings were in excess of 1% and the citation at bar was being issued, that he "would start immediate action to improve ventilation." Early also acknowledged that "mine management" told him that they had idled another section and erected an equalizing overcast. (FOOTNOTE 2)

MSHA Supervisory Inspector Donald Mize accompanied Early on his September 22, inspection. Mize could not recall whether he had asked the foreman whether or not he was planning on taking any other action to improve the ventilation. Mize told Early to issue the subject citation because he "thought" mine management was not making progress toward correcting the problem.

According to both Thomas McNider, Deputy Manager for ventilation, and Ronny Ganey, a ventilation engineer, work to improve ventilation had been ongoing before and after the instant citation was issued. More specifically Ganey testified that when he arrived at the mine at 7:00 a.m. on September 22, 1986, he found that Foreman Jerald Thomas had been working to correct the ventilation for that entire night. The problem was eventually corrected by placing overcasts in service, correcting leaky line curtains, erecting a check curtain and patching brattices.

Within this framework of evidence I cannot find that the Secretary has sustained his burden of proving that the operator failed to make "changes or adjustments %y(3)27 at once in the ventilation in the mine so that such returning air shall contain less than 1.0% volume per centum of methane," upon the discovery of methane at 7:00 a.m. on September 22, 1986 in excess of that concentration. The credible evidence shows that the citation was issued immediately upon the discovery of the violative methane and Respondent was given no opportunity to make the requisite changes or adjustments. Accordingly the citation was issued prematurely and cannot be sustained for the alleged violation of the standard at 30 C.F.R. 309(a).

The Secretary also maintains in its amended citation however that the facts alleged in the original citation also constitute a separate violation of the operator's Ventilation System and Dust Control Plan (Ventilation Plan) under the standard at 30 C.F.R. 75.316. It is not disputed that the alleged violation is based upon the last paragraph of page 2 of the Secretary's cover letter approving the operator's Ventilation Plan. Those provision require that "when methane content in a main return exceeds 1.0 volume per centum of methane, mine management shall submit a plan detailing additional evaluation procedures and safeguards which will be utilized to insure safety."

Based on the factual allegations in the citation that the methane content in the main return air course exceeded 1.0 volume per centum of methane and the notation that the citation was issued at 7:00 p.m. on September 22, 1986, it is apparent that under the noted provisions mine management was then required to "submit a plan detailing additional evaluation procedures and safeguards which will be utilized to insure safety."

The evidence in this case shows that a plan was indeed submitted to MSHA on the following day i.e., September 23, 1986. That plan was returned to the mine operator for

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"necessary correction(s)" by letter dated September 24, 1986 (Exhibit GÄ8). In an attachment to that letter MSHA specified the "corrections" that the operator should address in any further submissions. By letter dated September 26, 1986, and received by MSHA on September 30, 1986, the operator again submitted a "plan" but, it appears did not specifically address the corrections deemed "necessary" by MSHA.

There is no evidence however that at the time the mine operator wrote its letter of September 30, that it then had received the MSHA letter dated September 24. The amended citation charging the instant violation was issued October 7, 1986. The record shows that on October 15, 1986, after the issuance of that amended citation, MSHA responded to the mine operator specifying, for the first time, certain detailed requirements that the operator "shall include, [in its plan] but [was] not necessarily limited to."

Since no time is specified within which "mine management shall submit a plan" that time must be deemed to be a "reasonable time." Under the circumstances of this case I do not find that a reasonable time was provided by the Secretary between the notification to mine management by the issuance of the citation on September 22, 1986, of methane in excess of 1%, and the failure to submit a plan meeting the Secretary's approval.

The evidence shows that mine management submitted what may be construed to be a "plan" on September 23, 1986, the day after the citation was issued. It followed with another submission on September 26, 1986. Although these submissions were not "approved" by MSHA it is apparent that the specific reasons for disapproval (or the specific changes needed in these submissions to obtain MSHA approval) were not communicated to the mine operator until MSHA sent its letter dated October 15, 1986, some 8 days after it had issued its amended citation. Under these circumstances I do not believe the mine operator was given a reasonable time to have its plan approved. The operator must be given reasonable time to develop and submit a plan acceptable to the Secretary before a citation can properly be issued under the cited provisions. Accordingly the violation is not proven and the allegations in this regard must be dismissed.

Since I have found no violation in regard to matters alleged by the Secretary in the citation at bar there is no need to decide whether or not the Secretary had the legal authority in the first instance to require the mine operator to comply with the provisions set forth in the last paragraph of page 2 of his cover letter approving the operator's Ventilation Plan. It is clear however that the Secretary has the authority to require the inclusion of reasonable requirements in such a Ventilation Plan pursuant to section 303(o) of the

