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SOL V. JIM WALTER RESOURCES
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
February 6, 1989

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

CIVIL PENALTY PROCEEDING

Docket No. SE 88-42
A. C. No. 01-01322-03697

v.

No. 5 Mine

JIM WALTER RESOURCES, INC.,
Respondent

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor, U. S. Department of Labor, Birmingham, Alabama, for Petitioner; Harold D. Rice, Esq., R. Stanley Morrow, Esq., Jim Walter Resources, Inc., Birmingham, Alabama, for Respondent.

Before: Judge Merlin

This case is a petition for the assessment of a civil penalty filed by the Secretary of Labor against Jim Walter Resources, Inc., under section 110 of the Federal Mine Safety and Health Act of 1977. 30 U.S.C. 820. An evidentiary hearing was held on November 30, 1988, and post-hearing briefs have now been filed.

Citation No. 3011407, dated January 13, 1988, recites as follows:

> "Based on the results of an evaluation of SCSR training conducted 12/16-22/87 where 25 persons were interviewed to determine the effectiveness of the training 5 of the 25 persons failed to know the proper procedures for donning the self contained self rescuer. This is 20 per cent of the persons interviewed. The training shall be reevaluated by management and an assurance obtained that all mine personnel underground are aware of the proper donning procedures."

On January 28, 1988, the citation was modified to allege a violation of 30 C.F.R. 75.1714. The parties agree that (c)(2) is the applicable portion of 75.1714 (Tr. 5). The mandatory

standard in effect at the time the citation was written, provided as follows:

> (2) Training in the use of self-contained self-rescue devices shall include each person properly opening the device, activating the device, inserting the mouthpiece or simulating this task while explaining proper insertion of the mouthpiece, and putting on the nose clip. 1/

At the hearing the parties agreed to the following stipulations: (1) The operator is the owner and operator of the subject mine; (2) the operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977; (3) the administrative law judge has jurisdiction of this case; (4) the inspector who issued the subject citation was a duly authorized representative of the Secretary; (5) true and correct copies of the subject citation and modification were properly served upon the operator; (6) copies of the subject citation and modification are authentic and may be admitted into evidence for the purpose of establishing their issuance but not for the purpose of establishing the truthfulness or relevancy of any statements asserted therein; (7) imposition of a penalty will not affect the operator's ability to continue in business; (8) the operator's history of prior violations is average; (9) the operator is large; (10) the applicable regulation is 30 C.F.R. 75.1714(c)(2). The foregoing stipulations were accepted at the hearing (Tr. 5).

The citation recites that twenty-five people were interviewed to determine the effectiveness of the operator's training program and that 5 of the interviewees failed to know proper donning procedures. The inspector testified that she conducted the interviews to determine the effectiveness of the operator's training and issued the citation because she believed the training was ineffective and a failure (Tr. 26-27, 54, 56). She stated that the interviews were not conducted to determine individual failures and therefore, she did not cite specific instances regarding particular individuals (Tr. 56). She also testified that in order for the operator's training to be effective and for the operator to avoid being found guilty of a violation, 100% @f the individuals interviewed must correctly answer the required number of questions and perform the donning procedures set forth in an MSHA test which the inspector used to determine compliance with the mandatory standard (Tr. 62). If

1/ 30 C.F.R. 75.1714 was subsequently amended, but its substantive requirements are essentially unchanged. 53 F.R. 10336, March 30, 1988.

one in 500 employees failed the test, the inspector would find the training ineffective (Tr. 63-64). It would not matter to the inspector if a miner feel asleep during training, did not absorb the training, knew it but forgot it, or purposely failed the test because he was mad at the company (Tr. 64-65). However, the MSHA supervisory inspector testified that if less than 100% of miners passed the test or if 1% failed, he might not issue a citation, whereas another inspector might, and that issuance of a citation under such circumstances was a judgment call (Tr. 96).

30 C.F.R. 75.1714(c)(2) directs that miners be given training in the use self-rescuers and that this training include performance of certain activities by individual miners which may be summarized as "hands-on" training. The inspector's requirement that the operator's training program be "effective" does not appear in the mandatory standard. Rather it is nothing more than the inspector's own creation cut from whole cloth. In addition, the inspector testified that regardless of the circumstances all miners must pass the test or the training would be found ineffective and the operator guilty of a violation. The inspector's equation of effectiveness with perfection also is unfounded. It is clear that in issuing this citation the inspector has strayed far from what the law actually prescribes. Elemental fairness requires that the operator be held accountable only for what the law and regulations require.

Furthermore, the MSHA supervisory inspector could not offer any basis for sustaining the lack of effectiveness charge in the citation. Although he did not agree with the issuing inspector's 100% compliance requirement, he offered no acceptable explanation of his own. He merely stated that issuance of a citation where there was less than 100% compliance was a "judgment call". Such an approach is unsatisfactory because it would leave every inspector free to decide for himself when to issue a citation and every operator unable to tell what is expected of it.

The citation's further allegation that five miners failed to know proper donning procedures also does not properly charge a violation of the mandatory standard. Once again, it must be noted that the mandatory standard requires that training be given and that the training be hands-on. As the testimony at the hearing makes clear, individuals may receive the required training, but still not be able to put on the self-rescuers for a variety of reasons, such as forgetting, inability to understand, or willful intent to fail (Tr. 64-65). Upon prompting by the Solicitor, (Tr. 74-75), the inspector equated donning failure with training failure, without considering any of the foregoing circumstances which could render that equation false. Moreover, the Solicitor did not challenge the possible existence of these factors.

The MSHA supervisory inspector testified that the allegation of being unaware of the donning procedures meant personnel at the

mine had not been properly trained (Tr. 90). As already set forth, I reject this reasoning because although donning failure may certainly be evidence of a lack of training, it does not always follow that an individual's inability to put on a self-rescuer means he did not receive the requisite training. Therefore, one cannot automatically be equated with the other. The supervisory inspector further stated that rather than issue five citations in this case, only one was issued to give the operator time to comply (Tr. 93). However, in view of the language of the mandatory standard, a lack of the prescribed training for named individuals should be charged and thereafter supported with specific proof, whether the individuals are identified in one citation or in separate citations. The operator has a right to expect that the charges against it conform to the statute and regulations.

For the foregoing reasons, I conclude that the citation does not properly charge a violation in accordance with the applicable mandatory standard.

Even if the citation had properly alleged a violation, MSHA's case would fail, because the evidence falls far short of establishing a violation. At the hearing the inspector could not remember the names of the five individuals whom she alleged failed the MSHA test until she looked at her notes (Tr. 41-42). And even after she named the five miners, she could not remember how many of the five did not know how to put on the self-rescuer (Tr. 75). All she could say was that "some" of the miners who could not don the self-rescuer were included in the five referred to in the citation, but she did not know which ones or if all five failed the donning procedures (Tr. 75-76).

Only one of the five named individuals, Ms. Willie Jean McCrary, testified at the hearing. Ms. McCrary stated that she had not been given hands-on training (Tr. 13-15). However, she admitted signing a Certificate of Training which states on its face in bold letters that she had received hands-on training (Op. Exh. 1, Tr. 10-11, 18). One of the operator's associate safety inspectors, Mr. Haygood, testified that hands-on training had been given in classes of about 10 people (Tr. 105-106). Mr. Haygood had not himself trained Ms. McCrary, but he had on occasion assisted Mr. Lee another associate safety inspector, who had trained Ms. McCrary and signed her certificate (Op. Exh. No. 1, Tr. 112-113). According to Mr. Haygood, each shift was set up the same way, calling ten people for training (Tr. 111). The instructors went by the manufacturer's guidelines and their training included everything in the MSHA test used by the inspector (Tr. 127-128, 131). After consideration of the matter, I find persuasive the signed Certificate of Training and the testimony of Mr. Haygood. I do not find convincing Ms. McCrary's testimony that she did not remember signing the certificate and that she did not know what hands-on training meant (Tr. 10, 23-24). Ms. McCrary admitted she did not remember everything her instructor,

Mr. Lee, said and did (Tr. 19). Finally, Ms. McCrary said she knew some of the donning procedures, but not all of them and the record does not indicate what she knew and what she did not know (Tr. 15). Therefore, I conclude Ms. McCrary received hands-on training.

The remaining four individuals referred to in the citation did not testify and the inspector did not state what they knew or did not know or what they did or did not do in their interviews. As already noted, the inspector admitted she did not know how many or which ones of the five could not put on the self-rescuer (Tr. 75). The record contains signed Certificates of Training for three of these four miners, Lockhart, Sides and Dukes (Op. Exhs. Nos. 2, 3, 4). Mr. Haygood, the associate safety inspector whose testimony I have already accepted, trained and signed the certificates of Lockhart and Dukes. I find persuasive these certificates and Haygood's testimony that these two individuals received hands-on training. Mr. Lee who signed Ms. McCrary's certificate, also signed Sides' certificate. Here again, the certificate and Mr. Haygood's testimony regarding the training he and Mr. Lee gave are persuasive. The record does not contain a certificate of training for the fifth individual, Harris. However, MSHA has failed to make out a prima facie case of no hands-on training for Harris because the inspector did not specify what he could not do and, aside from reading his name from her notes, she did not specifically refer to him. In light of the foregoing, even if the citation properly charged a violation, I would have no alternative but to conclude that MSHA failed to prove a violation with respect to any of these five miners.

The rest of the inspector's testimony was similarly vague and nonspecific. She said "several people" forgot to put goggles on or forgot to take the nose clip out of the mouthpiece and that "some people" missed every part of the MSHA test, one question or another (Tr. 38). But she did not identify these people. There is no way for the operator to defend itself against charges that a group of unidentified individuals could not perform one step or another in the donning of self-rescuers or did not have the knowledge deemed necessary by the inspector.

Although "effectiveness" is not a proper measure by which to determine whether a violation occurred and although the evidence does not, in any event, show the existence of a violation, note must be taken of the means whereby the inspector undertook to demonstrate the existence of a violation. The inspector questioned the 25 miners she interviewed based upon a test devised by someone at MSHA headquarters (Govt. Exh. No. 1, Tr. 92). The inspector received the test from her supervisor, but she did not know who devised it and she was not told what to do with the test other than go to the mine and give it (Tr. 63). The test assigns a point value to each question; there are two parts to the test (one of which requires donning ability); both

test parts must be passed; and the passing grade for each part is specified (Govt. Exh. No. 1, Tr. 36, 42, 59-61). The first time the operator learned of the test was when the inspector furnished a copy as she began the interviews (Tr. 27, 109). The inspector admitted the test is not part of the mandatory standard (Tr. 58-59). It is difficult to imagine anything more unfair than finding the operator guilty of a violation based upon a questionnaire and scoring system, of which it had no advance notice. Therefore, apart from all the other reasons why this citation is invalid, use of the MSHA test under the circumstances presented here is improper.

For a similar result see the recent decision of Administrative Law Judge John J. Morris Secretary of Labor v. Utah Power and Light Company, decided January 9, 1989 (Dk. No. West 88-92).

The briefs of the parties have been reviewed. To the extent that they are inconsistent with this decision they are rejected.

ORDER

Accordingly, it is ORDERED that Citation No. 3011407 be VACATED and that the instant petition for the assessment of a civil penalty be DISMISSED.

Paul Merlin
Chief Administrative Law Judge

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