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JIM WALTER RESOURCES V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

JIM WALTER RESOURCES, INC.,
CONTESTANT

CONTEST PROCEEDINGS

v.

Docket No. SE 89-16-R
Citation No. 3012039; 10/25/88

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

No. 3 Mine
Mine I.D. # 01-00758

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

CIVIL PENALTY PROCEEDINGS

v.

Docket No. SE 89-42
A.C. No. 01-00758-03732

No. 3 Mine

JIM WALTER RESOURCES, INC.,
RESPONDENT

DECISION AND ORDER DENYING MOTION TO DISMISS

Before: Judge Melick

By oral motion at hearings in these consolidated cases and by subsequent written motion the Secretary of Labor moved to dismiss the "Notice of Contest". The Secretary argues in her motion that mine operator Jim Walter Resources, Inc., (Jim Walter) cannot obtain review of the Secretary's decision denying a modification to a ventilation plan for the reason that the proposed modification is also the subject of another mandatory standard.

The pleadings show that on September 29, 1988, Jim Walter submitted for the Secretary's review a supplement to its ventilation plan in which it stated as follows: "a ventilation change of 25,000 cfm or greater of any section split will be considered a major air change and the change will be made according to 75.322." The Secretary through the Mine Safety and Health Administration (MSHA) did not approve the request and Jim Walter thereafter informed MSHA that it

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no longer adopted its existing ventilation plan under 30 C.F.R. 75.316. MSHA thereafter issued a citation alleging a violation of that standard. The violation was abated when Jim Walter readopted its prior approved plan without incorporating the requested change.

Section 303(o) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," requires, in relevant part, that a mine operator must adopt a ventilation plan which has been approved by the Secretary. These provisions are restated in the regulatory standard at 30 C.F.R. 75.316 under which the subject citation was issued. In this case it appears that Jim Walter is seeking through modification of its ventilation plan to obtain clarification and objectivity in the application of the regulatory standard at 30 C.F.R. 75.322. The latter standard provides that "changes in ventilation which materially affect the main air current or any split thereof and which may affect the safety of persons in the coal mine shall be made only when the mine is idle."

As Jim Walter noted in its Brief it is apparent that this regulatory standard was written with the understanding that ventilation changes which may materially affect the main air current in one mine may not have the same effect in another mine. As Jim Walter further observes, whether a change in air quantity of, for example, 9,000 cfm, has a material effect will depend upon the particular mine's layout and conditions, as well as upon the ventilation plan it adopts for meeting the requirement of the Act.

Jim Walter alleges in this case that it performed studies of changes in ventilation in the subject No. 3 Mine and that the resulting data demonstrated that ventilation changes of up to 25,000 cfm had no material affect upon the main air current or any split thereof, because of the particular ventilation system and manner of ventilating that mine. Jim Walter maintains that the data obtained was submitted to MSHA by letter dated January 19, 1988, and that it requested a determination by MSHA that such a change (of up to 25,000 cfm) was not a major change at the subject mine.

MSHA responded to the request by letter dated February 11, 1988, which stated in part as follows:

The National Coal Mine Health and Safety Inspection Manual for underground coal mine states, in part, that any ventilation change in which any split of air is increased or decreased by an amount equal to or in excess of 9,000 cfm is considered a major

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change. Historically, this 9,000 cfm limit has been established for about 17 years; therefore this request is denied.

Subsequently Jim Walter submitted a revision to its approved ventilation plan pursuant to 30 C.F.R. 75.316 stating that because of the particular ventilation system utilized at this particular mine, ventilation changes of up to 25,000 cfm would be made while the No. 3 Mine was still operating. MSHA refused to approve the change. Jim Walter, nevertheless briefly adopted this change thus leading to the issuance of the citation by MSHA and the readoption of the prior approved plan.

In her Motion to Dismiss the Secretary argues that Jim Walter is impermissibly attempting to expand the scope of its ventilation plan in this case in that ventilation plans may not infringe upon subject matter which could have been readily dealt with in mandatory standards of universal application" citing Zeigler Coal Company v. Kleppe, 536 F.2d 398 at 407 (D.C. Cir. 1976).

In the instant case Jim Walter maintains that it has generated data which indicate that changes in ventilation of up to 25,000 cfm can be made at its No. 3 mine while the mine is operating since such changes do not materially affect the main air current. Whether or not the allegation may subsequently be proven in this case the issue is clearly mine specific in that it concerns the particular conditions at the Jim Walter No. 3 mine and is not a matter which can be dealt with by a single mandatory standard applicable to all mines. The Secretary's argument herein is accordingly without merit.

The Secretary also appears to claim in this case that because of the existence of another regulatory standard, 30 C.F.R. 75.322, the subject matter of that standard cannot be the subject of any portion of Jim Walter's ventilation plan. This argument is without legal support and is likewise rejected. Under the circumstances the Secretary's Motion to Dismiss is denied.

Gary Melick
Administrative Law Judge
(703) 756-6261