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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 PROCEEDING
	Docket No. SE 89-16-R
v.	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), PETITONER	CIVIL PENALTY PROCEEDING Docket No. SE 89-42 A.C. No. 01-00758-03732
v.	No. 3 Mine
JIM WALTER RESOURCES, INC., RESPONDENT	

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama for the Secretary of Labor;
H. Thomas Wells, Jr., Esq., Maynard, Cooper, Frierson, and Gale, P.C., Birmingham, Alabama for Jim Walter Resources, Inc.

Before: Judge Melick

These consolidated cases are 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 contest Citation No. 3012039 issued by the Secretary of Labor pursuant to Section 104(a) of the Act against Jim Walter Resources, Inc., (Jim Walter) and for review of civil penalties proposed by the Secretary for the violation alleged therein. More particularly the underlying issue is whether Jim Walter's proposed change in its Ventilation System, Methane and Dust Control Plan (Ventilation Plan), which was rejected by the Secretary would at all times guarantee no less than the same measure of protection afforded the miners at the subject mine by the existing provisions of the Ventilation Plan.

The citation at bar alleges a violation of the standard at 30 C.F.R. 75.316 and, as amended, charges as follows:

The Jim Walter Resources No. 3 mine has implemented and adopted the proposed change in the supplement to the Ventilation System, Methane and Dust Control Plan identified as 9-1V-52, which requested a change in the air current of 25,000 cfm be permitted prior to be [sic] construed as a major air change. This request has been denied in writing by the District Manager. On 10/25/88 JWR Inc., was operating the No. 3 Mine without having adopted a Ventilation Plan which had been approved by the Secretary.

By letter dated September 29, 1988, Jim Walter had requested a change in its existing approved Ventilation Plan. That letter, directed to Carl Boone, the Acting District Manager of Mine Safety and Health Administration District No. 7, reads as follows:

> Please substitute the attached page for page 9 of the current approved ventilation plan signed September 15, 1988. The only difference between the two pages is that the attached page specifies 25,000 cfm or greater air change on a section split be considered a major change. The supplement will be implemented upon approval.

More particularly Jim Walter sought to add the following language to its Ventilation Plan: "[a] ventilation change of 25,000 C.F.M. or greater of any section split will be considered a major air change and the change will be made according to 75.322."

Acting District Manager Boone rejected this request in the following letter addressed to Mine Manager G.W. Coates:

> The proposed supplement to the Ventilation System and Methane and dust Control Plan dated September 29, 1988, which seeks to make a change of 25,000 CFM be considered a major change, has been reviewed and cannot be approved.
>
> Currently any change less than 9,000 CFM can be made. A change greater than 9,000 CFM would not provide the same measure of protection to the miners.

A subsequent request for the same change was again rejected by Mr. Boone in the following letter to Coates:

> Your request dated January 19, 1988, that the amount of air considered to be a major ventilation change at the above mine be increased to a maximum of 25,000 cfm has been reviewed by the District

ventilation staff. The National Coal Mine Health and Safety Inspection Manual for Underground Coal Mines 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 change. Historically, this 9,000 cfm limit has been established for about 17 years; therefore, this request is denied.

This Commission discussed the underlying legal authority for the litigation of disputed ventilation plans in Secretary v. Carbon County Coal Co., 7 FMSHRC 1367 (1985). It stated in this regard as follows:

> The requirement that the Secretary approve an operator's mine ventilation plan does not mean that an operator has no option but acquiesce to the Secretary's desires regarding the contents of the plan. Legitimate disagreements as to the proper course of action are bound to occur. In attempting to resolve such differences, the Secretary and an operator must negotiate in good faith and for a reasonable period concerning a disputed provision. Where such good faith negotiation has taken place, and the operator and the Secretary remain at odds over a plan, review of the dispute may be obtained by the operator's refusal to adopt the disputed provision, thus triggering litigation before the Commission. Penn Allegh Coal Co., 3 FMSHRC 2767, 2773 (December 1981). Carbon County proceeded accordingly in this case. The company negotiated in good faith and for a reasonable period concerning the volume of air to be supplied the auxiliary fans. Carbon County's refusal to acquiesce in the Secretary's demand that the plan contain a free discharge capacity provision led to this civil penalty proceeding.

It is not disputed in this case that Jim Walter negotiated in good faith and for a reasonable period concerning the disputed provision. While in this case it was the refusal to approve Jim Walter's proposed change in the plan that led to this contest and civil penalty proceeding the underlying issue is analagous and review under the Carbon County rationale is warranted. The Commission did not designate in the Carbon County decision which party must bear the burden of proof nor did it set forth the standard of proof to be applied. The parties hereto have agreed however that Jim Walter, as the moving party attempting to include the disputed provision into its Ventilation Plan, has the burden of proof. See 5 U.S.C. 556 (d). I have further determined by analogy that the standard of proof in this proceeding should be the same standard applicable in

modification proceedings under Section 101(c) of the Act.1 Thus I find that Jim Walter bears the burden in this proceeding of proving by a preponderance of the evidence that its alternative method of achieving the result (purpose) of the standard at 30 C.F.R. 316 and of its Ventilation Plan will at all times guarantee no less than the same measure of protection afforded the miners at its mine by such standard and its existing Plan.2 By applying this standard to the case at bar it is clear that Jim Walter has failed to sustain its burden of proof.

Under current application of the Jim Walter Ventilation Plan and within the framework of 30 C.F.R. 75.322 any ventilation change in which any split of air is to be increased or decreased by an amount equal to or in excess of 9,000 cfm must be made only when the mine is idle and that before mine power can be restored in all areas affected by the ventilation changes an examination must be performed in accordance with 30 C.F.R. 75.303. It is acknowledged that during the course of mining operations occasions do arise in which additional air is needed to ventilate methane and dust from a working section. Under MSHA's current application of the standard at 30 C.F.R. 75.322 Jim Walter is permitted to increase air by 9,000 cfm with miners underground and the mine operating with electrical power. In the event a greater quantity of air is needed, MSHA requires that such changes be made while the mine is idle with the miners outside. The

essence of Jim Walter's requested change in its Ventilation Plan is that it be permitted to increase ventilation by as much as 25,000 cfm with miners remaining underground and the mine operating. In other words Jim Walter is requesting to be allowed to make ventilation changes up to 25,000 cfm without having to remove the miners or perform an examination of the affected areas in accordance with 30 C.F.R. 75.303 before restoring mine power and resuming production. Jim Walter therefore has the burden of proving that making such ventilation changes is at least as safe with miners underground, without cutting power and without performing examinations in accordance with 30 C.F.R. 75.303.

In support of its position, Jim Walter cites computer simulations and in-mine tests it performed purportedly showing that altering the air flow by as much as 25,000 cfm did not result in what its experts deemed to be significant ventilation changes. It is not disputed however that these simulatious and tests cannot possibly address the multitude of potential variables that can and do occur in such a complex system as the Jim Walter No. 3 Mine. The results of a 25,000 cfm air change cannot therefore be reliably predicted. Based on the Secretary's credible evidence, the consequences could be serious including an inundation of excess methane in the working areas. Clearly the safer practice is to make the requested ventilation changes while the mine is idle and then to conduct an inspection before allowing the miners to return underground. Indeed one of Jim Walter's own experts, senior mine engineer Richard Pate, essentially agreed in the following colloquy at hearing:

> Q. Mr. Pate, when a change, a ventilation change is made in the mine, let's just assume that a 25,000 change was made during this study, how can you be assured of what the affects of that change are going to be in other areas of that mine without first going and checking and seeing on those conditions?
>
> A. There's no other way to know besides checking, doing a check of the parts of the mine.
>
> Q. So would it be safer from the miners' standpoint for workers down there that when a change such as 25,000 is made to go and examine those areas to see what the conditions are before permitting them in the return?
>
> A. It is a normal practice when any air change is made for us to examine the areas to see what effect it has had on the mines.

Q. That would be the safest route to go?

A. Yes.
(Tr. 36-37).

The opinion of the operator's expert is reinforced by the Secretary's evidence in this case. Under the circumstances Jim Walter has not sustained its burden of proving that the proposed alternative procedures set forth in its proposed modification to its Ventilation Plan would at all times guarantee no less than the same measure of protection afforded the miners at its mine by the application of the regulatory standards and the existing Ventilation Plan. The violation in the citation is according proven as charged. Considering the absence of any hazard under the limited circumstances of this case and that the purpose of the issuance of the citation in this case was to have the attempted modification to its Ventilation Plan reviewed by the Commission, the proposed civil penalty of $20 is clearly appropriate.

ORDER

Jim Walter Resources, Inc., is directed to pay a civil penalty of $20 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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FOOTNOTES START HERE

1. Section 101(c) of the Act reads in relevant part as follows:

Upon petition by the operator or the representative of miners the Secretary may modify the application of any mandatory safety standard to a coal or other mine if the Secretary determines that an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard, or that the application of such standard to such mine will result in a diminution of safety to the miners in such mine.***

2. The Secretary argues that whatever decision is made by the MSHA District Manager, whether to impose a new plan provision over the operator's objection or whether to refuse to include a provision the operator desires, is to be reviewed under an "arbitrary and capricious" standard. The "arbitrary and capricious" standard is however only applicable under the Administrative Procedure Act to judicial review of final administrative action following the administrative hearing. See 5 U.S.C. 706(2)(A).