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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

v.

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

CONTEST PROCEEDING

Docket No. SE 89-17-R
Citation No. 3012076; 10/25/88

No. 5 Mine

Mine I.D. # 01-01322

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

v.

JIM WALTER RESOURCES, INC.,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. SE 89-47
A.C. No. 01-01322-03727

No. 5 Mine

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. 3012076 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 of the violation alleged therein. More particularly Jim Walter seeks review in this case of a citation issued for its refusal to acquiesce in the Secretary's demand that its Ventilation and Methane and Dust Control Plan (Plan) contain a provision stating as follows:

When methane content in any bleeder entry or any return except a section return exceeds 1.0 volume percentum, mine management shall submit a plan and obtain approval by the district manager. This plan

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shall detail additional procedures and safeguards which will be utilized to insure safety.

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

A citation is hereby issued in that the mine operator adopted proposed changes in their approved Ventilation System and Methane and Dust Control plan dated Sept. 27, 1988, which has not been approved by the District Manager. Refer to cover Letter 9-1V-52 dated September 28, 1988, and response cover letter dated October 25, 1988.

The September 28, 1988, letter from Jim Walter Mine Manager James Beasley and referenced in the above citation reads as follows:

I request that the cover letter for the No. 5 Mine Ventilation System and Methane and dust Control Plan signed by me on September 27, 1988, be revoked and that the last paragraph of that letter that reads as follows be deleted.

"When methane content in any bleeder entry or any return except a section return exceeds 1.0 volume percentum, mine management shall submit a plan and obtain approval by the District Manager. This plan shall detail additional procedures and safeguards which will be utilized to insure safety."

We shall comply with part 75.305.

The response from Acting MSHA District Manager Boone to Mine Manager Beasley dated October 25, 1988, referenced in the citation, reads as follows:

The request dated September 28, 1988, which deletes a statement on the approved Ventilation System and Methane and dust Control Plan dated September 27, 1988, has been received, and cannot be approved. Additional procedures and safeguards are required to insure safety in the return areas of the above mine because of the potential of the methane content in the return to change very rapidly. A daily inspection of the return entries will assure that a continuing evaluation will be conducted and immediate corrective measures can be undertaken.

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The 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 to 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 and it was Jim Walter's refusal to acquiesce in the Secretary's demand that the plan contain the cited provision that led to this contest and civil penalty proceeding. While the Commission did not designate in the Carbon County decision the party having the burden of proof nor did it set forth the standard of proof to be applied, the parties hereto have agreed that the Secretary, as the moving party attempting to include the disputed provision in the Ventilation Plan has the burden of proof. See 5 U.S.C. 556 (d). I have determined that the Secretary must prove by a preponderance of the evidence that, without the Secretary's proposed change, the mine operator's Ventilation Plan does not provide an adequate measure of protection to the miners in the subject mine.1

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On the merits, Williams Meadows, a supervisory mining engineer for MSHA and a graduate mining engineer with extensive engineering and supervisory experience in the mining industry, testified that all mine ventilation plans in his sub-district i.e. the Birmingham Sub-District of MSHA District 7, are examined by him for approval or disapproval. It was Meadows' recommendation that Jim Walter's proposed Ventilation Plan not be approved without the disputed provisions and, in addition, that the following provisions be included:

A plan shall be submitted by the operator, in detail, showing the proposed procedures and safeguards which will be utilized to insure the safety of all persons underground. This plan shall include, but is not necessarily limited to, the following information:

1. The entire area shall be examined by a certified person, at intervals not to exceed 24 hours. During this examination this main return and bleeder splits shall be examined, including the area immediately before the air enters the return shaft. Just prior to entering a return shaft, the methane content of this air shall be less than 1.0 volume per centum. Records must be made of all these examinations.

Electrical equipment shall not be operated in an area where the methane content in the air is 1.0 volume per centum or more.

It was Meadow's expert opinion that since the Mary Lee Coal Bed in which the subject mine was operating is the highest methane liberating coal bed in the United States and because of the fluctuation of methane levels in this mine, additional precautions were necessary for safe mining operations. According to Meadows, fluctuations in methane levels are caused by, among other things, the rate of mining advancement, the mine design and differences in degassification efforts.

Robert Keykendall, an experienced MSHA Coal Mine inspector, testified that he issued a section 107(a) imminent danger withdrawal Order on March 8, 1990, for methane in the return air course in excess of 2 percent. Bottles samples taken at that time showed methane levels of 2.64 and 2.26 percent. It is not disputed that the cited area was subject to "fire boss" examinations and that according to the examination books the area had been "fire bossed" and no methane found only three days before the withdrawal order was issued. It may reasonably be inferred from this evidence that indeed in this coal seam of high methane, examinations more frequently than once weekly, are warranted.

In support of its position Jim Walter called as its witness Charles Stewart, General Manager for safety and training. According to Jim Walter records, during calendar years 1987, 1988, and 1989, there were only two citations issued for violations of the standards at 30 C.F.R. 75.308, 309, 310, 316 and 329. While this evidence of course tends to rebut the testimony of Meadows that MSHA had relied upon the issuance of prior citations in determining that the levels of methane fluctuated within the subject mine, it nevertheless does not negate the Secretary's case.

The credible expert evidence in this case clearly supports the position of the Secretary that in this admittedly highly gassy mine more specific precautions are warranted in the Ventilation Plan than are required by the general provisions of law. The Secretary has met her burden of proving that operation of the subject mine without the disputed provisions would indeed be unsafe.

Accordingly I find that Jim Walter violated 30 C.F.R. 75.316 in at least technically operating its No. 5 Mine without the disputed provisions in its Ventilation Plan. Inasmuch as the citation was issued pursuant to a Secretarial policy providing for the challenge for disputed ventilation plan provisions and the violation was of limited duration and not hazardous I find the proposed civil penalty of \$20 to be 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. 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).