

CCASE:
JIM WALTER RESOURCES V. SOL (MSHA)
DDATE:
19901024
TTEXT:

~2061

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 PROCEEDINGS

Docket No. SE 90-19-R
Citation No. 3010382; 11/1/89

No. 5 Mine
Mine ID # 01-01322

Docket No. SE 90-20-R
Citation No. 3009494; 11/1/89

No. 7 Mine
Mine ID #01-01401

Docket No. SE 90-21-R
Citation No. 3009294; 11/1/89

No. 4 Mine
Mine ID # 01-01247

Docket No. SE 90-23-R
Citation No. 3008996; 11/1/89

No. 3 Mine
Mine ID 01-00758

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

v.

JIM WALTER RESOURCES, INC.,
RESPONDENT

CIVIL PENALTY PROCEEDINGS

Docket No. SE 90-33
A.C. No. 01-01322-03752

No. 5 Mine

Docket No. SE-90-36
A. C. No. 01-00758-03756-

No. 3 Mine

Docket No. SE 90-37
A. C. No. 01-01247-03860

No. 4 Mine

Docket No. SE 90-38
A. C. No. 01-01401-03771

No. 7 Mine

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor,
U.S. Department of Labor, Birmingham, Alabama
for the Secretary of Labor;
Alfred F. Smith, Jr., Esq., and David M. Smith, 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 four citations 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 violations alleged therein. More particularly Jim Walter seeks review in this case of citations issued for its refusal to acquiesce in the Secretary's demand that its Fan Stoppage Plans (Plans) contain a provision stating in relevant part as follows:

. . . in the event of a fan stoppage and the miners have been withdrawn from the mine to the surface, the following procedures shall be implemented:

1. Every area of the mine where miners are required to travel or work shall be examined by a certified mine examiner prior to miners entering any portion of the mine.
2. The miners will be prohibited from following the mine examiner while the examinations are being made.

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.¹

It is not disputed in this case that Jim Walter negotiated in good faith and for a reasonable period concerning the disputed provisions of the Plans at issue and it was Jim Walter's refusal to acquiesce in the Secretary's demand that the Plans contain the cited provisions that led to these contest and civil penalty proceedings. In a similar case I have held that the Secretary, as the moving party attempting to include the disputed provision in ventilation plans has the burden of proof. See 5 U.S.C. 556 (d). Secretary v. Jim Walter Resources, Inc., 12 FMSHRC 1384 (1990). I also determined in that case that the Secretary must prove by a preponderance of the evidence that, without her proposed change, the mine operator's Plan does not provide an adequate measure of protection to the miners in the subject mine.² I find these legal standards applicable as well to the cases at bar.

Citation No. 3009294 alleges a violation of the standard at 30 C.F.R. 75.321 and charges as follows: "a citation is hereby issued in that the operator is presently operating

~2064

the No. 4 Mine without having adapted [sic] an approved Fan Stoppage plan as required by 30 C.F.R. 75.321."3

It is undisputed that the Fan Stoppage Plan adopted by Jim Walter in 1976 had been consistently interpreted by both the former MSHA District Manager and the mine operator for 12 years to permit miners to reenter the mine after a fan stoppage and evacuation sequentially after resumption of fan operations and as each section of the mine was inspected.⁴ It is undisputed that when a new district manager for the MSHA district governing the subject mine assumed his position in 1989, he determined that the foregoing interpretation was erroneous and notified Jim Walter that as of October 11, 1989 MSHA would enforce the "national policy" allowing miners to return underground after a fan stoppage only after the entire mine has passed inspection. (Exhibit No. G-1)

A formal revision of the existing fan stoppage plan was thereafter attempted by letter dated October 17, 1989, (Exhibit G-2). Jim Walter refused to acquiesce in the attempted modification of the Plan and was cited for the instant violation on November 1, 1989, apparently under an MSHA policy providing for litigation of disputed fan stoppage plans consistent with the Commission decision in Carbon County.

~2065

MSHA Ventilation Specialist Kenneth Ely, is in charge of reviewing ventilation and fan stoppage plans for the corresponding MSHA district and makes recommendations for the approval or disapproval of such plans within the framework of district and national policy and regulations. According to Ely, the procedures formerly followed in his MSHA district were not as safe as the uniform national MSHA procedures i.e. requiring the entire mine to be reexamined before any miners are permitted underground following a fan stoppage. According to Ely, the former procedures could expose miners reentering the mine to hazards such as methane. It may reasonably be inferred from Ely's testimony that the concern is that explosive levels of methane may have built-up in yet uninspected sections of the mine adjacent to areas that had been inspected and to which miners had been returned to work after a fan stoppage. An explosion or fire triggered by such methane in an adjacent section could propagate fires and/or explosions in adjacent sections where miners were working. Within this framework I am convinced that the Secretary has met her burden of proving in this case that operation of the subject mine without the disputed provisions in its Fan Stoppage Plan would indeed not provide an adequate measure of protection to the miners. Accordingly the violation in the citation is proven as charged.

In reaching this conclusion I have not disregarded the testimony of Mine Manager Jesse Cooley, an experienced graduate mining engineer, that the safety of miners is "insured" under the old plan in the same fashion as their safety would be secured under the provisions of 30 C.F.R. 308 and 309. According to Cooley the cited regulatory provisions permit miners to continue working in adjacent sections while another section may be closed because of violative conditions. Cooley's argument fails however to take into consideration that imminently dangerous conditions such as highly explosive levels of methane may exist in adjacent sections -- conditions much more severe than are contemplated by sections 308 and 309. Cooley's argument is therefore inapposite to the case at bar.

The citation at bar was apparently issued pursuant to a secretarial policy providing for the challenge of disputed fan

~2066

stoppage plan provisions and did not involve any hazard or negligence under the precise circumstances herein. The parties hereto have agreed that disposition of Citation No. 3009294 (Dockets SE 90-37, SE 90-21-R) will control all of the cases herein. Accordingly, considering the criteria under section 110(i) of the Act I find the proposed penalties of \$20 in each of the civil penalty proceedings to be appropriate.

ORDER

Citations No. 3010382, 3009494, 3009294, and 3008996 are affirmed and Jim Walter Resources, Inc., is directed to pay civil penalties of \$20 for each of the violations charged therein within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

AA

FOOTNOTES START HERE

1. While the dispute in these cases involves provisions of fan stoppage plans and not ventilation plans, the resolution of disputes over such plans should analogously be resolved through the procedures discussed by the Commission in Carbon County.

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 an administrative hearing. See 5 U.S.C. 706(2)(A).

3. 30 C.F.R. 75.321 reads as follows:

Each operator shall adopt a plan on or before May 29, 1970, which shall provide that when any mine fan stops, immediate action shall be taken by the operator or his agent (a) to withdraw all persons from the working sections, (b) to cut off the power in the mine in a timely manner, (c) to provide for restoration of power and resumption of work if ventilation is restored within a reasonable period as set forth in the plan after the working places and other active workings where methane is likely to accumulate are reexamined by a certified person to determine if methane in amounts of 1.0 volume per centum or more exists therein, and (d) to provide for withdrawal of all persons from the mine if ventilation cannot be restored within such reasonable time. The plan and revisions thereof approved by the Secretary shall be set out in printed form and a copy shall be furnished to the Secretary or his authorized representative.

4. This interpretation appears to be contrary to the plain language of the 1976 Plan and to MSHA's national policy according to the new MSHA District Manager. The relevant Plan provisions

read as follows:

Upon restoration of the ventilation and after the fan has been in operation with a normal water guage, a reexamination shall be made of the entire mine, as required by the regular preshift examination, before the men are permitted to reenter the mine and before any power lines leading underground are energized. (Exhibit No. G-4)