

CCASE:
CONTESTS OF RESPIRABLE
DUST SAMPLE ALTERATION
CITATIONS
DDATE:
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TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, Virginia 22041

IN RE: CONTESTS OF RESPIRABLE
DUST SAMPLE ALTERATION
CITATIONS

Master Docket No. 91-1

SOUTHERN OHIO COAL COMPANY,
CONTESTANT

CONTEST PROCEEDINGS

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

Docket Nos. LAKE 91-454-R
through LAKE 91-472-R

Docket Nos. WEVA 91-1244-R
through WEVA 91-1258-R

WINDSOR COAL COMPANY,
CONTESTANT

Docket Nos. WEVA 91-1259-R
through WEVA 91-1260-R

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

GREAT WESTERN COAL (KENTUCKY),
INC.,
CONTESTANT

Docket Nos. KENT 91-867-R
through KENT 91-871-R

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

GREAT WESTERN COAL INC.,
CONTESTANT

Docket Nos. KENT 91-859-R
through KENT 91-863-R

v.
SECRETARY OF LABOR,

~650

MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

HARLAN FUEL CO.,
CONTESTANT

Docket Nos. KENT 91-864-R
through KENT 91-866-R

v.

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

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

PENALTY PROCEEDING

Docket Nos. WEST 91-475 and
WEST 91-476

v.

ENERGY FUELS COAL, INC.,
RESPONDENT

ORDER GRANTING LEAVE TO FILE OUT OF TIME

ORDER DENYING MOTION TO STRIKE AND DIRECTING
SECRETARY TO RESPOND TO MOTION TO VACATE

On March 3, 1992, Contestants Southern Ohio Coal Company and Windsor Coal Company (Contestants) filed a motion for an order vacating the 36 citations issued by the Secretary of Labor (Secretary) on April 4, 1991, to Contestants. Each citation alleged a violation of 30 C.F.R 70.209(b) because the respirable dust sample submitted by Contestants had been altered by removing a portion of the dust from the sample. The motion was accompanied by a memorandum in support of the motion and 30 attached exhibits. On March 18, 1992, the Secretary filed a motion to strike Contestants' motion to vacate together with its supporting memorandum and the associated exhibits, on the ground that the motion to vacate "relies in significant part" on inappropriate documents and materials.

On March 30, 1992, Contestants filed an opposition to the Secretary's motion to strike. On March 30, 1992, the Secretary filed a motion for leave to file out of time her previously filed motion to strike Contestants' motion to vacate citations.

On March 25, 1992, Energy Fuels Coal, Inc. (Energy Fuels) filed a motion to vacate the nine citations issued to it on April

~651

4, 1991. Energy Fuels incorporates by reference the memorandum in support of the motion to vacate citations filed by Contestants. On March 31, 1992, the Secretary filed a motion to strike energy Fuels' motion to vacate.

On April 1, 1992, Great Western Coal (Kentucky), Inc., Great Western Coal, Inc., and Harlan Fuel Co., filed a motion to join the Contestants' motion to vacate citations and memorandum in support of the motion.

I

The Secretary's motion to strike, considered as a response to the motion to vacate, was admittedly filed five days out of time. The reason advanced in her motion for leave to file out of time is that her counsel, because of the high volume of paper involved in this case, inadvertently failed to notice that the motion to vacate was served by hand delivery, and therefore she was not entitled to add five days to the time her response would be due under Commission Rules 8(b) and 10(b). The Secretary asserts that the issue raised in the motion to strike is of great importance, and that Contestants have not shown any prejudice because of the late filing. The reason advanced for the late filing is somewhat lame. I agree that the issue is very important, but so is the necessity for timeliness, as the Secretary has asserted more than once in these proceedings. Nevertheless, I will grant the Secretary's motion for leave to file out of time and I receive the motion to strike with its supporting memorandum for filing.

II

Contestants have moved to vacate the citations contested in these proceedings on the ground that they were not filed with reasonable promptness as required by 104(a) of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. 814(a). If the citations are vacated they, of course, cannot support a penalty petition, and the contest proceedings become moot. Thus, the motion is one for summary decision and, as the Secretary notes, is potentially dispositive of the entire master docket, No. 91-1.

Commission Rule 64(b) (modelled on Fed. R. Civ. P. 56) provides that a motion for summary decision may be granted only if the entire record "including the pleadings, depositions, answers to interrogatories, admissions, and affidavits" shows that there is no genuine issue as to any material fact, and the movant is entitled to summary decision as a matter of law.

The motion to vacate refers to and relies upon the dates the cited dust samples were taken (contained in the citations); the dates the cited samples were received by Robert Thaxton

(contained in the custody sheets supplied by the Secretary); the deposition testimony of Thaxton that he alone was authorized to determine that a filter with an abnormal white center was a violation; the deposition testimony of Thaxton that he began classifying filters as tampered-with in March, 1989 (Peabody filters), and in August, 1989 (other mine operator filters); and the deposition testimony of Thaxton, Edward Hugler and Robert Nesbit that MSHA delayed voiding the AWC samples and withheld the issuance of citations to avoid alerting the industry to the pending investigation, and at the request of the U.S. Attorney's office. Contestants assert that the delay prejudiced them in that failure to notify them after the August 19, 1989 samples that MSHA deemed them violations prevented them from taking potentially corrective action to avoid future AWCs; and that important and potentially exculpatory physical evidence, e.g., non-cited samples taken at the same time as the cited samples and cassette parts of the cited samples, was not preserved. The motion does not refer to exhibits to support these assertions, but Contestants' opposition to the Secretary's motion to strike refers to the Secretary's response to Contestants' interrogatories, Set II, where she admits that she no longer has and cannot produce the plastic cases in which the cited filters were enclosed, the plugs inserted in the orifices of the plastic cases, the tape sealing the plastic cases, and the foil backing of the filters. The motion also refers to the "Lee Report," an expert opinion study and report prepared by Contestants' experts, and argues that it shows that the Secretary's premise that AWCs can result from tampering and from no other cause "was flat wrong" and that had the foil backings and cassette assemblies been preserved, the Lee group could have demonstrated that AWCs resulted from a cassette manufacturing anomaly rather than tampering. The motion further states that potential witnesses have become unavailable and recollections have grown dim with the passage of time. It relies on an affidavit of the Safety and Health Director of Contestants' parent company to show that three supervisors who oversaw the dust sample collection and eight sampled miners in the mines are no longer employed by Contestants, and that with respect to about half of the cited samples, Contestants are unable to identify the individual miner who was sampled.

III

The Secretary's response to the motion to vacate, treated as a motion for summary decision, is a motion, under Commission Rule 10 and presumably under Fed. R. Civ. P. 12(f), to strike Contestants' motion to vacate on the ground that it relies in part on references to materials that are not appropriate to consider for disposition of a motion for summary decision. Specifically, the Secretary states that Contestants' motion relies on the opinion testimony of Donald Tuchman of the U.S. Bureau of Mines and of Sharon Ainsworth of MSHA to show that the

citations were unreasonably delayed. It further asserts that the motion relies on the Lee Report, an expert opinion report, to show that Contestants were prejudiced by the delay.

A motion for summary decision is improper, or at least may not be granted, if there is a genuine issue as to any material fact. Rule 64(b). Factual issues, factual disputes, or differences of opinion may not be resolved on such a motion. Contestants argue that the Tuchman and Ainsworth testimony is relied upon to show that the Secretary had adopted the position that AWCs constituted violations long before the citations were issued. They assert that the opinions of Tuchman and Ainsworth are irrelevant and are not relied upon. Contestants argue that the Lee Report was referenced, not to establish the validity of its conclusion that AWCs are not necessarily the result of tampering, but to show prejudice resulting from Contestants' inability to examine the plastic cases, plugs, tapes, and foil backings of the cited filters.

Although the motion to vacate to some extent argues the merits of the citations, I do not find that it relies on opinion evidence for its contention that the entire record shows no genuine issue of material fact related to the question whether the citations were issued with reasonable promptness. Both parties have argued their positions on the merits of the motion for summary decision, that is, whether there is a genuine issue as to any material fact. The question before me at this time, however, is raised by the motion to strike: whether the motion for summary decision was properly framed and relies upon "the entire record, including depositions, answers to interrogatories, admissions, and affidavits," in an attempt to show that there is no genuine issue as to any material fact. Without indicating any conclusion as to the validity of the motion to vacate, I am persuaded that it is not defective as a motion. Therefore, it must be responded to. Any references in the motion or its supporting memorandum to other than factual matters supported by the record will be disregarded.

IV

The Secretary requests 30 days from the date of the issuance of an order on the motion, in which to file her statement in opposition "because of the complex nature of this matter, as well as its great importance to the Secretary in her enforcement of the Mine Act in this and other cases." Contestants object to giving her additional time, pointing out that the motion to vacate was filed and served almost a month hence, and giving the Secretary an additional 30 days means that she will have had 60 days to oppose the motion.

If the Secretary exaggerates the complex nature of this matter, it is without question a matter of great importance. For

~654

that reason, in order that I may have full and fair argument, I will require the Secretary to respond to the motion to vacate within 20 days of the date of this order. Contestants shall have ten days thereafter to reply.

ORDER

Accordingly, IT IS ORDERED

1. The Secretary's motion for leave to file her motion to strike out of time is GRANTED;

2. The Secretary's motion to strike Contestants' motion to vacate is DENIED;

3. The Secretary shall within 20 days of the date of this order file with me and serve upon Contestants a response to the motion to vacate.

4. Contestants shall have 10 days from the date the Secretary's response is filed and served to reply to it.

James A. Broderick
Administrative Law Judge