

CCASE:

IN RE CONTESTS OF RESPIRABLE
DUST SAMPLE ALTERATION
CITATIONS

DDATE:

19920813

TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

IN RE: CONTESTS OF RESPIRABLE
DUST SAMPLE ALTERATION
CITATIONS

Master Docket No. 91-1

ORDER

INTRODUCTION

On June 26, 1992, counsel for the Secretary filed with the Commission a copy of a letter sent the same day to counsel and representatives for all Contestants in this proceeding. The letter states that the Secretary will propose that a case be selected to be tried first, which should meet certain criteria with respect to the number of citations and other matters outlined in the Secretary's letter. The letter proposes that case-specific depositions for this trial be taken between August 17 and November 13, 1992; that stipulations, witness lists, and exhibit lists be filed by December 11, 1992; and that the trial commence January 12, 1993.

On July 1, 1992, Contestants (with a few exceptions) represented by the law firms of Jackson & Kelly, Crowell & Moring, Buchanan Ingersoll, and Smith, Heenan & Althen filed a motion for consolidation of their actions for the purposes of a separate trial on the issue of the causation of "abnormal white centers" (AWCs). Contestants filed a memorandum in support of their motion. On June 15, 1992, the Secretary filed a statement in opposition to the motion.

Pursuant to notice, a prehearing conference was called on July 17, 1992, in the Commission hearing room in Falls Church, Virginia. At the conference, counsel discussed their different conceptions of what the basic issue in the proceedings is, and offered different views on the question of consolidation for an issues trial or the trial of a bellwether case. At the conclusion of the conference, I invited counsel to file memoranda stating what they consider an appropriate statement of the issues in the case, and to submit their further views on the most appropriate way to handle the trial. Such memoranda were filed by the Secretary, the Contestants represented by the four law firms named earlier herein, a separate memorandum filed by KTK Mining & Construction, Inc., which received a single citation and is represented by Smith, Heenan & Althen, a memorandum filed by U.S. Steel Mining Co., Inc., and a statement filed by Energy

designated expert witnesses. Many designated the same witnesses. In all, six different experts were listed: Dr. Richard Lee, Dr. Larry Grayson, Dr. Thomas Malloy, Dr. Chaoling Yao, Dr. Morton Corn, and Dr. Andrew McFarland. The Secretary has elsewhere listed her generic expert witnesses as Dr. Virgil Marple, Dr. Kenneth Rubow, Dr. James Vincent, Thomas Tomb, and Lewis Raymond. In her memorandum, the Secretary states that she now agrees to a common issues trial, to be immediately followed by a trial of an operator with a substantial number of citations.

CONSOLIDATION

This master docket presently contains contests and penalty proposals concerning approximately 4000 citations, most issued on April 4, 1991, charging violations of 30 C.F.R. 70.209(b), 71.209(b), or 90.209(b). Part 70 involves underground coal mines, Part 71 surface facilities, and Part 90 special provisions for miners who have evidence of the development of pneumoconiosis. The three sections contain identical language. The 4000 citations are virtually identical except for mine identification. The issue in each case is the same. Most of the witnesses for the Secretary will be required to testify in each case that is tried. Many of the Contestants' witnesses are common. The complexity and volume of these cases make it imperative that common issues be tried together: the time and expense required to try each case separately would be prohibitive, both to the Government and the mine operators. Therefore, pursuant to Rule 42, Fed. Rules of Civ. P., I hereby ORDER that all cases in this docket presently assigned to me be CONSOLIDATED for the purpose of trying the issues common to all the cases. The issues will be discussed and defined hereafter in this order. So far as practical, I will be guided by the Manual for Complex Litigation, 1-Pt. 2 Moore's Federal Practice 10 et seq. (2d ed. 1986), in the trial. A decision following the trial will be binding on all parties.

ISSUES

Although these cases have been before the Commission for more than a year and the parties have engaged in extensive pretrial discovery, in much of which the presiding judge has been involved, only now does it appear that there is a sharp disagreement as to the basic issue presented for resolution. The Secretary asserts that the issue is whether she can show by a preponderance of the evidence that the weight of a cited filter was altered (which she apparently equates with reduced or changed) while the filter was in the control of the operator. She denies that proving the operator's intent, or indeed that the operator took an affirmative act in causing the alteration, is part of her burden in establishing the violation. The Contestants argue that the issue is whether the operators intentionally altered the weight of the cited filter cassettes

while in the operators' custody.

Each of the citations contested herein charges the mine operator with violating the provisions of Section 209(b) of Part 70, Part 71, or Part 90. The standard in Section 209(b) provides:

The operator shall not open or tamper with the seal of any filter cassette or alter the weight of any filter cassette before or after it is used to fulfill the requirements of this part.

All the citations allege a violation of the cited standard in virtually identical language:

The weight of the respirable dust cassette no. _____ collected on [date] from a sampling entity at this mine has been altered while the cassette was being submitted to fulfill sampling requirements of Title 30 C.F.R. Parts 70, 71 or 90.

All the citations allege that the violations resulted from Contestants' "reckless disregard" which as explained in 30 C.F.R. 100.3(d) represents the highest category of negligence and shows that "[t]he operator displayed conduct which exhibits the absence of the slightest degree of care."

When penalties were proposed for the contested violations, a narrative statement was issued to all respondents containing the following language:

On April 4, 1991, MSHA issued section 104(a) citations at the _____ mine. _____ was cited for _____ violations of 30 C.F.R. 70.209(b), 71.209(b) or 90.209(b) because the respirable dust samples that were submitted to MSHA were invalid; respirable dust had been intentionally removed from the samples before they were submitted to MSHA.

The Secretary proposed penalties ranging from \$1000 to \$1800 for each violation of 70.209(b) and 71.209(b), and penalties of \$10,000 for each violation of 90.209(b). There can be no doubt that the Secretary was alleging that each of the 4000 violations was the result of an intentional altering of the weight of a dust cassette, including a substantial number of violations at mines receiving only one or two citations.

As I stated above, the parties disagree on what is prohibited by Section 209(b): does it proscribe conduct on the

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part of the mine operator, forbidding him to tamper with or alter the weight of a filter cassette, as Contestants argue, or is the standard violated simply if the weight of the cited filter is altered (changed or reduced) while the filter is in the custody of the operator, as the Secretary asserts?

The standard is written in the active voice. Reading the words of the standard according to their ordinary meaning, they proscribe conduct, rather than outlawing a condition. The Secretary's discussion of the Mine Act's strict liability for violations of mandatory standards begs the question, which is, what constitutes a violation?

The word "alter" is defined in Websters 3rd New International Dictionary (1986), p. 63, as "1. to cause to become different in some particular characteristic (as measure, dimension, course, arrangement or inclination) without changing into something else . . . "

The terms "alter" and "tamper" or "tamper with" are, if not exact synonyms, closely related words. See William C. Burton, Legal Thesaurus (1980), pp. 21, 488, 539.

If the weight of a filter cassette is "altered," the alteration can only be caused in one of two ways: either some person or persons actively caused it, or it resulted accidentally. The words of the standard in Section 209(b) according to their plain meaning refer to an action, proscribe conduct, include the concept of intention, and exclude an accidental occurrence. The Secretary has not directly argued that an accidental alteration of the filter weight while it is in the operator's custody violates the standard, but that is the clear implication of her present stated position.

Whatever her position on what is necessary to prove a violation of the standard in the abstract, she has clearly taken the position with respect to the contested citations in this litigation that the violations resulted from intentional acts.

In response to interrogatory no. 17(h) served by Contestant Utah Power & Light the Secretary responded:

Whether it is the Secretary's contention that the alleged AWC on the cited sample could not occur in any manner other than by the intentional act of an individual.

Answer: Yes (January 10, 1992).

The deposition of Robert Thaxton taken on July 25, 1991, contains the following:

Q [By Ms. Beverage] But it was in your own mind sufficient upon which you could make a determination in the 4945 filters cited that they were indeed violations of the law and resulted from deliberate tampering; is that a fair statement?

A. It was enough to write the violations as issued that visual observation of the filter face indicated dust removal.

Q. Dust removal resulting from deliberate tampering?

A. There is nothing in the citation about that.

Q. The citations are issued resulting from the reckless disregard of a coal operator, are they not?

A. Yes, they are.

Q. And what does that mean to you in the context of this batch of citations?

A. The reckless disregard indicates that a deliberate act has taken place.

* * *

Q. Okay. So that you believe that the phenomenon described in those citations resulted from deliberate dust removal; correct?

A. It resulted from a deliberate act, yes.

Q. That resulted in dust removal; correct?

A. Correct.

pp. 310-12.

Later in the same deposition, Mr. Thaxton stated that if a single sample was received having characteristics similar to those of an AWC, it "would not be classed as a sample that would be AWC" and therefore would not be violative. Id. at 426. This apparently was based on the conclusion that a single such sample could result from accidental means. However, three, four, or five such samples from the same mine in a three week period would render an accidental cause "illogical" and "very unlikely."

Id. at 429. Mr. Thaxton's testimony makes it clear that he cited only AWC filters that he concluded resulted from deliberate dust removal.

The report of Mr. Thaxton on February 7, 1992, entitled "AWC" Citation Determination Report concludes as follows:

Based on my observations of the face of normal respirable dust filters and my experience in reproducing the dust deposition patterns on the cited "AWC" filters, it is my opinion that the occurrence of the "AWC" filters could not result from the normal sampling process. Based on my observation of the filter face of each cited "AWC" cassette, I have concluded that respirable dust was removed by deliberate action after or near the end of the sampling period.

Contestants have pointed to the Secretary's Statement in Opposition to Contestants Motion to Vacate Citations (April 27, 1992) wherein she stated that her "multifaceted and protracted" investigation was used "to exclude all reasonably likely accidental causes of the AWC phenomenon."

Contestants have also cited public statements and Congressional testimony by Labor Department officials, including the Secretary, tending to show that she is charging that Contestants intentionally tampered with or altered the weight of dust sample filters. In fashioning this order, I am not considering such statements, which are not part of the record in this case.

The Secretary argues that the cases raise two issues: first, whether the weight of a cited dust sample was altered while in the custody of the mine operator; second, if so, whether the alteration was deliberate or intentional. She asserts that if she prevails on the first issue a violation is established, and that the second issue "is a matter related solely to the statutory factor of negligence for assessment of a penalty." I have considered this argument and reject it. There obviously may be degrees of culpability and degrees of negligence associated with a violation of Section 209(b), but the violation itself necessarily includes an intentional action on the part of the mine operator. The plain words of the standard will bear no other interpretation.

I believe it important, indeed essential to a proper framing of the issue, that I clearly state my conception of the scope of the standard in Section 209(b) prior to the trial. Therefore, I hold that as a matter of law the accidental, unintentional altering (changing, reducing) the weight of a filter cassette

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while the cassette is in the custody of the mine operator is not a violation of 30 C.F.R. 70.209(b), 71.209(b), or 90.209(b).

FURTHER PREHEARING MATTERS

1. All expert witness discovery shall be completed on or before October 2, 1992. Case-specific discovery will be stayed pending the trial on the common issues.
2. On or before October 30, 1992, the parties shall exchange lists of witnesses expected to be called to testify and exhibits expected to be offered, and shall file copies with me by the same date.
3. The parties shall attempt to stipulate as to facts not in dispute and to agree on trial procedures and shall file stipulations and trial briefs with me on or before November 13, 1992.
4. A prehearing conference will be held commencing at 10:00 a.m. Tuesday, November 17, 1992, in the Hearing Room, 5203 Leesburg Pike, Falls Church, Virginia, for the purposes of further discussing trial procedures.

LEAD COUNSEL COMMITTEE

Pursuant to the Manual for Complex Litigation, I appoint the following as a lead Contestants counsel committee who shall be chiefly responsible for conducting the common issues trial on behalf of all Contestants:

Laura E. Beverage and Jackson & Kelly Timothy M. Biddle and Crowell & Moring Michael T. Heenan and Smith, Heenan & Althen R. Henry Moore and Buchanan Ingersoll John C. Palmer IV and Robinson & McElwee H. Thomas Wells and Maynard, Cooper, Frierson & Gale.

The lead counsel committee shall consult with one another and with counsel for other Contestants and formulate procedures for conducting the issues trial in the most expeditious manner possible consonant with the complexity of the case and fairness to all parties. Specifically, they shall agree upon a combined opening statement and the conduct of the examination and cross examination of each witness by a single attorney. In exceptional circumstances examination and cross examination of a witness may be conducted by more than one attorney by leave. In no event will duplicative cross examination by multiple attorneys be permitted.

The lead counsel committee will be responsible for preparing

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and filing the prehearing documents called for in this order, and for formulating in concert with the Secretary's counsel stipulations of fact and trial procedures. The lead counsel committee shall file a trial brief on behalf of all Contestants.

NOTICE OF HEARING

The parties will take notice that the consolidated cases will be called for hearing on the common issues described below commencing at 9:00 a.m. Tuesday, December 1, 1992, at a hearing location in the Washington, D.C. area. I will notify the parties of the hearing site by a subsequent notice. The hearing will continue each weekday from December 1 through December 22, 1992. If not completed, it will resume on Tuesday, January 5, 1993.

ISSUES AND EVIDENCE

The basic common issue for the trial of which these cases are consolidated and which will be resolved in the trial is: Whether an abnormal white center (AWC) on a cited filter cassette establishes that the operator intentionally altered the weight of the filter?

Evidence bearing on this issue will include the scientific evidence - the opinions of expert witnesses as to the possible causes of AWCs. It may also include statistical evidence concerning the occurrence of AWCs before and after the contested citations were issued, and the number of AWCs found in particular mines. It may include evidence as to any changes in MSHA's procedures in examining filters for AWCs. It may include evidence concerning the finding of AWC patterns on MSHA inspector samples. It may include other evidence reasonably related to the basic issue stated above. Concerning this issue, the Secretary has the burden of establishing her case by the preponderance of the evidence.

James A. Broderick
Administrative Law Judge