CCASE:
IN RE CONTESTS OF RESPIRABLE
DUST SAMPLE ALTERATION
CITATIONS
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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

On August 24, 1992, the Secretary of Labor filed a motion for reconsideration and clarification of my order issued August 13, 1992. She also seeks an extension of time for completion of expert discovery. On August 27, 1992, Contestant KTK Mining and Construction, Inc., filed a response to the Secretary's motion. On September 3, 1992, Contestants represented by Jackson & Kelly, Crowell & Moring, Buchanan Ingersoll, and Smith, Heenan & Althen, filed a response to the motion.

I. MOTION FOR RECONSIDERATION

The motion for reconsideration asks that I reconsider and reverse the conclusion in my order that an accidental, unintentional altering the weight of a filter cassette 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). The Secretary asserts that the plain wording of the standard supports her position that she need not prove intent in order to establish a violation, and that in any event her interpretation of the standard is entitled to deference. She further argues that requiring the Secretary to prove intent is contrary to the strict liability provisions of the Mine Act. She suggests that "while the terms "open' and "tamper' [in the standard] arguably may seem to suggest an intentional act, the term alter, within its context, does not."

A. Plain Wording

The mandatory standard in Section 209(b) prohibits ("shall not") the mine operator from doing something, namely opening or tampering with the seal of a cassette, or altering its weight: an action rather than a condition is proscribed. The contested citations allege that the mine operator did something to the filter cassette, rather than that something happened to it. Unlike other uses of the negative terminology "shall not" in other mine safety and health standards which typically proscribe conditions, Section 209(b) proscribes action by the operator. The fact that the standard prohibits opening or tampering with the seal of a filter cassette as well as altering its weight does

not in any way show that by the use of the word "alter", "the Secretary meant something other than an intentional act." The Secretary's position stated in her motion "that a violation of Sections 70.209(b), 71.209(b) and 90.209(b) occurs whenever there is a change, or alteration, of the weight of the dust filter" is plainly not supported or supportable by the words of the standard. On reconsideration, I repeat my holding that as a matter of law the accidental, unintentional altering (changing, reducing) the weight of a filter cassette 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).

B. Deference

A reviewing court is obliged to defer to the reasonable interpretations of the Secretary of Labor when they conflict with the reasonable interpretations of the Occupational Safety and Health Review Commission (and therefore the Commission must defer to the Secretary). Martin v. OSHRC, _____ U.S. _____, 113 L.Ed. 2d 117 (1991). Whether the same rule applies to the Mine Safety Review Commission is not clear. Compare Secretary of Labor v. Cannelton Industries, Inc., 867 F.2d 1432, 1433 (D.C. Cir. 1989) (the Secretary's interpretation of ambiguous provision of the Mine Act is entitled to deference) with Drummond Company, Inc., 14 FMSHRC 661, 675 (1992) (the Commission may review questions of law and policy in cases brought by the Secretary).

In any event, the language of Section 209(b) is not ambiguous, but explicit and precise. It tells the mine operator: thou shalt not alter the weight of a filter cassette. In my judgement it is not reasonable to interpret this prohibition to include an accidental change of the filter cassette weight. Therefore, insofar as this is the Secretary's interpretation of the standard, it is not reasonable and therefore not entitled to deference.

C. Strict Liability

There is no dispute that the Mine Act provides strict liability for violations of mandatory standards. If an operator is shown to have violated a standard, the operator is liable. Most of the Mine Act mandatory standards prescribe certain conduct. Part 70, for example, enjoins the operator to maintain respirable dust levels, to take certain dust samples with approved sampling devices maintained and calibrated by a certified person, to transmit the samples to MSHA, to make approved respiratory equipment available, to control dust from drilling rock, etc. If the operator fails to do any of these things, he is in violation of the standard, and his intent is irrelevant. Section 209(b) is different: it prohibits what only can be interpreted as deliberate acts, and no violation can be established if a deliberate act is not shown. Unless a violation

is established, any discussion of strict liability for a violation begs the question. One cannot prove that a violation occurred by arguing that violations result in strict liability.

II. MOTION FOR CLARIFICATION

It has been the Secretary's position that a cited AWC can only have resulted from a deliberate act by which the weight of the filter cassette was altered. The purpose of the common issues trial is to receive evidence concerning this allegation that I may determine whether or not the AWCs on the cited filters can only have resulted from such deliberate acts. There is nothing in my order of August 13, 1992, which would require or even permit the Secretary to prove the state of mind of a particular mine operator. The intent of a particular mine operator or group of operators is not an issue in the common issues trial and the Secretary "need not identify the specific individuals who altered the weight, when such alteration occurred . . . or the manner in which the weight alteration was accomplished." (Secretary's motion, p. 13). These are matters for case-specific trials.

The issue is whether an AWC on a cited filter cassette establishes that the operator intentionally altered the weight of the filter. The ultimate paragraph of my August 13 order indicated some of the kinds of evidence that might be relevant to the resolution of that issue. Other evidence may include the criteria the Secretary followed to determine which AWC filters should be cited.

III. MOTION FOR EXTENSION OF TIME

The Secretary seeks an extension of time for the completion of expert witness discovery from October 2 to October 30, 1992. The Secretary states that she will be unable to provide supplemental or additional expert reports before September 25, 1992, and that the extension should not delay the trial date.

Contestants oppose the request for extension of time on the ground that the Secretary's need for additional time resulted from her failure to direct her expert witness in a timely fashion to conduct additional testing. They state that to extend expert witness depositions to October 30 will interfere with other prehearing requirements, e.g., exchanges of witness and exhibit lists by October 30 and offering stipulations and trial procedure agreements by November 13. Contestants further state that the Secretary designated a new expert witness on September 2, which "raises additional issues which the Contestants . . . intend to address in a separate motion to be filed on or about September 9." Contestants request that I withhold ruling on the Secretary's request for an extension until that time.

I have considered the motion and the response. I accept the Secretary's representation that an October 2 date will create problems for her to complete her expert witness preparation. I agree with Contestants that an extension to October 30 will compress the prehearing requirements and may result in attempts to postpone the trial date. I intend to hold to the December 1 date for the commencement of the trial.

Delaying a ruling on the Secretary's motion until Contestants file a motion concerning the addition of a new expert witness will further complicate and delay the completion of discovery. Therefore, without indicating how I may rule on that matter when and if a motion is filed, I hereby extend the time for completion of expert witness discovery to October 16, 1992.

James A. Broderick
Administrative Law Judge