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JIM WALTER RESOURCES V. SOL (MSHA)
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JIM WALTER RESOURCES, INC., : CONTEST PROCEEDINGS
Contestant :
v. : Docket No. SE 93-335-R
: Citation 3007642; 6/2/93
:
SECRETARY OF LABOR, : Docket No. SE 93-336-R
MINE SAFETY AND HEALTH : Citation 3007641; 6/2/93
ADMINISTRATION (MSHA) :
Respondent : Mine No. 3

PARTIAL DECISION GRANTING THE
CONTESTANT'S CONTEST IN PART
AND
ORDER REINSTATING DUST CONTROL PLANS

Appearances: R. Stanley Morrow, Esq., Jim Walter Resources
Inc., and David M. Smith, Esq., Maynard,
Cooper, Frierson & Gale, Birmingham, Alabama for
Contestant;
William Lawson, Esq., Office of the Solicitor,
U.S. Department of Labor, Birmingham, Alabama, for
Respondent.

Before: Judge Feldman

These proceedings concern Notices of Contest filed by the
contestant pursuant to Section 105 of the Federal Mine Safety and
Health Act of 1977, (the Act) challenging the validity of two
citations issued on June 2, 1993, at the contestant's No. 3 Mine.
The citations were issued for alleged violations of Sections
75.370(a)(1), 30 C.F.R. 75.370 (a)(1), for longwall and
continuous mining operations without an approved dust control
plan. An expedited hearing was conducted in Birmingham, Alabama,
on June 18, 1993. At the hearing, the parties agreed that my
decision in Citation No. 3007641 concerning the contestant's
longwall operations would also apply to Citation No. 3007642
concerning the contestant's continuous mining operations.

At the hearing, the parties identified the two central
issues which must be resolved in order to determine the propriety
of the Mine Safety and Health Administration's (MSHA's) attempt
to rescind the subject dust control plans in effect at the
contestant's No. 3 Mine. These issues are: (1) whether a
citation issued for a violative dust concentration condition,
which is promptly corrected, in the absence of any reoccurrence,
provides a basis for rescission and modification of the dust

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control plan under Section 303(o) of the Act, 30 U.S.C. 863(o), or Section 75.370(a)(1) of the regulations;(Footnote 1) and (2) in the absence of any evidence of repeated or continuing dust concentration violations, whether an operator's unilateral decision to increase the air velocity at the working face and the water pressure of the sprays in excess of the minimum requirements in the existing dust control plan, in recognition of increased production output, provides a basis for modifying the existing dust control plan to reflect higher minimum air velocity and water pressure standards.

At the hearing, the parties stipulated to the fact that there is a positive correlation between the amount of coal extracted and the amount of coal dust that is generated as a result of the extraction process. As a general proposition, the contestant agreed that an increase in the volume of air ventilation and an increase in the volume of water sprayed at the working face tends to dilute the dust and reduce the concentration.(Tr. 146-150).

The approved dust control plan in effect as of January 20, 1993, required 48,134 C.F.M. (cubic feet per minute) of air velocity at the tailgate, water pressure of 50 P.S.I. (pounds per square inch) at the stage loader and on the external sprays, and 35 P.S.I. on the drum sprays. A single shift sample obtained on March 10, 1993, as a result of MSHA's "CBE" spot inspection program for the shearer operator designated occupation 044-0 revealed a dust concentration level of 2.8 mg/m³ (milligrams per cubic meter) which exceeds the allowable limit of 2.0 mg/m³ contained in Section 70.100(a). At the time of the March 10, 1993, inspection the contestant was mining 3,600 tons of coal per day, ventilating the tailgate with 63,600 C.F.M., and using 150, 100 and 48 P.S.I. of water pressure on the stage loader, external sprays and drums sprays, respectively. As a result of this

1 The focal point of this proceeding with respect to the contestant's longwall dust control plan is a violative respirable dust concentration exposure by a single occupation (the longwall shearer operator on March 10, 1993) out of approximately 8 to 10 occupations at the longwall, which was promptly corrected. As a result of this violation of the respirable dust concentration standard in Section 70.100(a), 30 C.F.R. 70.100(a), MSHA rescinded the dust control plan for the contestant's longwall operations (Tr. 177). There is no evidence of subsequent violations of Section 70.100(a).

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single shift sample, on March 26, 1993, MSHA notified the contestant that its existing dust control plan for the longwall was no longer adequate. (Footnote 2) (Gov. Ex.2).

Subsequent respirable dust samples submitted by the contestant during the period March 25 through March 27, 1993, reflected average dust concentration levels between 1.0 and 1.3 mg/m³. These dust concentration results were achieved with air velocity of approximately 52,000 C.F.M. at the tailgate and air spray pressure of between 50 and 60 P.S.I. at the stage loader and on the external sprays, and, water pressure of approximately 45 P.S.I. on the drums sprays. These compliant dust concentration levels were achieved when production was approximately 2,100 tons of coal per day. There is no evidence of any violative dust concentration levels since the March 10, 1993 inspection.

The statutory language of Section 303(o) of the Mine Act, as well as Commission and Court of Appeals case authority interpreting this statutory provision, require that mine ventilation or dust control plan provisions must address the specific conditions of a particular mine. See Carbon County Coal Company, 7 FMSHRC 1367 (September 1985); Zeigler Coal Co. v. Kleppe, 536 F.2d, 398, 406-07 (D.C. Cir. 1976). See also S. Rep. No. 181, 95th Cong., 1st Sess. 25 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 613 (1978).

While MSHA may consider conditions which are common to a number of mines, MSHA is prohibited from imposing general rules applicable to all mines in the plan approval process. See Peabody Coal Company, 15 FMSHRC 381, 386, (March 1993) citing UMWA v. Dole, 870 F.2d 662, 669-72 (D.C. Cir. 1989). Such universal application of mandatory standards to all mines must be accomplished through the mandatory safety and health standards

2 The Secretary's single shift sampling procedure was invalidated by Judge Weisberger on December 7, 1992. Keystone Coal Mining Corp., 14 FMSHRC 2017, appeal pending. Although the Secretary has appealed, the Secretary's continued use of the single sample procedure after this procedure has been determined to be invalid is inappropriate. Continued use of this procedure should be held in abeyance until resolution of the Secretary's appeal. At trial, the contestant requested that I address the important issues raised in this matter despite the impropriety of the single shift sample. Moreover, the continuous mining dust control plan in this proceeding was rescinded by MSHA as a result of a violation of the respirable dust concentration standard measured by the traditional five shift sample average.

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promulgated through the rulemaking process. Carbon County, 7 FMSHRC at 1370. In this regard, the Secretary's attempt to routinely rescind dust control plans whenever a violation of the respirable dust standard in Section 70.100(a) is detected is not mine specific and contravenes the statutory language and congressional intent of Section 303(o) of the Act. (Footnote 3)

In view of the above considerations, I issued the following bench decision partially granting the contestant's contest with regard to this first issue. The parties will continue to negotiate the resolution of the remaining issue concerning whether the dust control plan should be modified to reflect increased minimum air velocity and water pressure standards. The following is the transcript of the bench decision which is edited with non-substantive changes:

The issue in these contest proceedings is whether a violative dust concentration condition, or several violative dust concentrations, which are promptly corrected, in the absence of any reoccurrence, provide a basis for rescission and modification of a dust control plan under Section 303(o) of the Mine Act or Section 75.370(a)(1) of the regulations.

I believe that the Commission's decision in Carbon County Coal Company, supra, and the D.C. Circuit Court of Appeals decision in Zeigler Coal Company v. Kleppe, supra, is controlling on this issue.

In Carbon County, relying on the Zeigler case, the Commission concluded that mandatory safety standards should be established through the rulemaking procedure as they are applicable to the industry at large. However, Section 303(o) and its counterpart in 30 C.F.R. 75.370(a)(1), which are the applicable statutory and regulatory provisions in these proceedings, are intended to address unique conditions that are peculiar to a particular mine. Therefore, absent unique circumstances that have a causal relationship to continuing violative dust concentration levels, an excessive dust concentration, alone, does not provide a basis for rescission or modification of a dust control plan under Section 303(o) of the Act or Section 75.370(a)(1).

3 MSHA Inspector Randy Kline testified that MSHA routinely rescinds dust control plans when a violative respirable dust concentration is detected. (Tr. 174-177).

I feel that sanctions imposable under Section 70.100(a) of the regulations and Sections 104(b) and 104(d) of the Act provide an adequate incentive to achieve operator compliance with the dust concentration standards.

If the Secretary desires automatic rescission of the dust control plan for violation of the dust concentration standard, he should pursue such an approach through a rulemaking proceeding. Whether or not the Secretary is precluded from such an approach by the statutory language of Section 303(o) is beyond the scope of this proceeding.

As a further matter, there are minimum air velocity standards and water pressure standards provided in dust control plans as are provided in the instant plans. If the operator takes it upon itself to operate with air velocity and water pressure in excess of those minimum standards provided in the dust concentration plan, then it is still in compliance with the plan, since it is using air velocity and water pressure in excess of the minimum levels. Operators should not be discouraged from using more than the minimum levels. After all, the ultimate goal is preventing over exposure to dust concentrations. If, for whatever reason, the minimum standards, or, the additional standards the operator chooses to apply, do not adequately protect the miner, then there may be a basis for rescission of the dust control plan under Section 303(o) if there are peculiar circumstances in the mine which call for such a revision.

Consequently, I am issuing a bench decision granting in a limited fashion the contestant's contest in that I have concluded that a violative dust concentration level that has been corrected, in the absence of subsequent dust concentration violations, does not provide a basis for rescission of a dust control plan.

There are remaining issues with regard to the operation at Jim Walter's No. 3 Mine which may very well provide a basis for rescission. However, the Secretary has not yet completed his direct case.

The Secretary has provided a significant amount of testimony that indicates that there has been an increase in the amount of tonnage that is being produced at the contestant's mine. The contestant has apparently taken it upon itself to increase the air velocity and water pressure of the sprays. Whether or

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not these circumstances, when viewed in the context of the statutory language, provide a basis under the Commission's decision in Carbon County to rescind the dust plan remains to be seen since we haven't completed testimony on this issue.

I have discussed this matter with the parties and they have expressed an inclination to continue to discuss this matter in an effort to reach a satisfactory agreement on a modification of the existing dust control plan. As the parties have indicated that they are going to attempt to reach settlement on the remaining issue, I am issuing an order reinstating the dust control plan that was in effect prior to the rescission. Thus, the dust control plan in effect for the contestant's continuous mining and longwall operations in its No. 3 Mine immediately prior to the issuance of the citations in issue shall be reinstated.

I also have a stipulation that I have confirmed on the record that the dust control plan that is currently in effect in the contestant's No. 7 Mine shall also remain in effect as the issues in these proceedings also apply to the continuing validity of that dust control plan.

The dust control plan in the No. 3 and No. 7 Mines shall remain in effect for 14 days after the date of the release of my decision formalizing this matter. The parties are requested to inform me within 14 days of the release of a written decision in this matter as to whether or not they have been able to reach settlement on the remaining issue. If settlement is reached, I will request that the contestant withdraw its contest in these matters and I will issue a decision dismissing these proceedings. If settlement cannot be reached, we will reconvene as expeditiously as possible.

ORDER

Consistent with the above decision Jim Walter Resources, Incorporated's contest of Citation Nos. 3007641 and 3007642 IS GRANTED IN PART. The parties ARE ORDERED to inform me in writing within 14 days of the date of this decision whether the remaining issues in this contest proceeding have been settled. The parties are reminded that they must negotiate in good faith if it is apparent that the minimum dust control remedies in the subject

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plans are inadequate due to specific conditions at the contestant's mines. If settlement is not reached, the parties should inform me of suitable hearing dates for reconvening this matter.

Jerold Feldman
Administrative Law Judge

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