CCASE:
ENERGY WEST MINING CO. V. SOL (MSHA)
SOL (MSHA) V. ENERGY WEST MINING CO.
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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August 10, 1993

ENERGY WEST MINING COMPANY Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEST 92-819-R
v.	:	Citation No. 3851235; 9/2/92
	:	
	:	Cottonwood Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 93-168
	:	A.C. No. 42-01944-03613
v.	:	Cottonwood Mine
ENERGY WEST MINING COMPANY, Respondent	:	

SUMMARY DECISION

Before: Judge Lasher

This matter is before me on Contestant's Motion for Summary Decision and Respondent MSHA's Opposition thereto and Cross-Mo-Motion for Summary Decision. The general issue arises out of the applicability of a requirement contained in a "Decision and Order Granting Petitions for Modification," dated July 14, 1989 (Modification Order) resolving Contestant Energy West's petition to modify the application of 30 C.F.R. 75.326 to its Cottonwood Mine. United Mine Workers of America, as intervenor, filed a motion in support of Respondent MSHA's position. The parties agree to consolidation of these two proceedings for decision.

The contest proceeding challenges Citation No. 3851235 issued to Contestant on September 2, 1992, because Contestant was using unapproved diesel-powered trucks in its two-entry mining operation. The Citation charges:

> The Petition for Modification, Docket No. 86-MSA-3 was not being complied with in the 9th left Two Entry Panel. The belt was in the No. 2 Entry. The longwall is being set up for pillar retreat. 9th Left is the headgate entries. There were three diesel Isuzu trucks that were not approved under 30 C.F.R. Part 36. This is required on page 41(C)(3).

The Citation was modified on October 1, 1992, to change the requirement of the Modification Order allegedly violated from 41 (C)(3) to 41(C)(4).(Footnote 1) Section 41(C)(4) reads: "... all diesel-powered equipment operated on any two-entry longwall development or two-entry longwall panel shall be equipment approved under 30 C.F.R. Part 36."

Contestant concedes that at the time the Citation was issued, three Isuzu trucks were being used in the 9th Left two-entry panel to transport miners and equipment to and from the section. It also appears that at that time the Citation was issued coal was not being extracted in 9th Left.(Footnote 2) I accept as an undisputed fact that the three Isuzu trucks were not "approved." Even though Contestant does not expressly concede such, such is implied from its contest, since otherwise there would be no issue here. (See fn. 5, at page 5 of Respondent's Cross-motion).

Contestant maintains that there is a third phase of operation, besides the two mentioned in the approved Modification Order. Spelled out clearly, this argument goes:

1. At the time the Citation was issued, Contestant was engaged in "construction work," i.e., preparing to "set up" longwall equipment on the 9th Left longwall panel.

2. This "set-up" work is neither "development" or "longwall retreat mining,"

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1 This provision appears in the Modification Order (Ex. B to Contestant's Motion) at page 41. In its Motion, Contestant refers to this requirement, and others, as "Conditions."

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2 A major dispute of fact, however, occurs as to Contestant's assertion in its motion that "Development of the longwall panel was complete and longwall retreat mining had not commenced." (See "Undisputed Facts," No. 7, at page 6 of Contestant's Motion.)

neither of which was going on when the Citation was issued.(Footnote 3)

3. Part III of the Modification Order (See p. 39 of Ex. B to Contestant's Motion) under which paragraph (C)(4) is found relates only to these two activities: "Development" and "Retreat Mining" since it comes under the Heading "Requirements Applicable to Both Development and Retreat Mining Systems."

The Respondent contends that Contestant is not entitled to summary decision because there are disputed issues of material fact (explained below) which are both in dispute and critical to Contestant's Motion, and further that Respondent's interpretation of the Modification Order is proper and should be affirmed on summary decision.

Respondent also argues that Contestant is incorrectly using this contest proceeding before the Commission to amend the Modification Order to enable it to use unapproved diesel-powered equipment during the installation of longwall mining equipment, rather than proceeding as it should to seek amendment of the Order pursuant to 30 C.F.R. 44.53, under which the Secretary could consider whether such an amendment would result in a dimunition of safety. (See fn.4 at p. 3 of Respondent's Cross-Motion).

Upon consideration of the briefs, evidence and arguments submitted, I find the position of Respondent meritorious and it is here adopted.

ORDER DENYING CONTESTANT'S MOTION FOR SUMMARY JUDGMENT

At pages 1 and 4-6 of its motion, Contestant maintains that there are no material issues of fact.

Respondent, however, points out that there are significant issues relating to facts upon which Contestant's motion is based. Thus, Contestant is not entitled to summary decision because such a ruling would require that this tribunal resolve issues in dispute between the parties. While Respondent acknowledges many of the facts that Contestant claims to be undisputed, the fact most crucial to the resolution is hotly contested. Moreover, Respond-

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3 It is Respondent MSHA's position that installation of longwall equip- ment is an integral facet of two-entry longwall mining, inseparable from the development and the retreat mining phases.

ent challenges assumptions that Contestant Energy West draws from material facts that are not in dispute, as well as Contestant's interpretation of statements used in support of its position.

Summary judgment is appropriate only where a tribunal "is satisfied that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Celotex Corporation v. Catrett, 477 U.S. 317, 330 (1986), quot- ing, F.R.C.P. 56(c). It is the burden of the party moving for summary judgment to prove that there exists no genuine issue of material fact.

Contestant attempts to meet its burden by offering seven paragraphs of "material facts" about which there is allegedly "no genuine dispute." While Respondent accepts the majority of such as undisputed, it contends Contestant inaccurately alleges agree-ment regarding the central fact at issue in this matter-that "[d]evelopment of the longwall panel was complete, and longwall retreat mining had not commenced." (Motion at 1, 5-6.) Indeed, Respondent's position is directly contrary to Contestant's. Re- spondent's position is that installation of longwall equipment is an integral facet of two-entry longwall mining, inseparable from the development and the retreat mining phases. Respondent's Answers to Contestant's Request for Admissions, pages 2 and 3 (attached as Respondent's Exhibit G), and the attached affidavits of Fred Marietti and Robert Ferriter (attached as Respondent's Exhibits H and I, respectively), which support Respondent's posi- tion, clearly establish a factual dispute between the parties as to whether the installation of long-wall machinery constitutes a phase of "longwall development" and/or "retreat mining." (Footnote 4)

Contestant attempts to establish that it "was not engaged in either development or retreat mining, " as those terms are used in the Order by (1) attaching to its Motion an affidavit from Randy Tatton, their Chief Safety Engineer and (2) referring to an MSHA publication on new ventilation standards. However, neither of these sources demonstrate the existence of undisputed fact.

Mr. Tatton states that "[d]evelopment ... was completed on August 18, 1992." Tatton Affidavit at 3 (attached as Secret- ary's Exhibit J). However, Mr. Tatton's statement does not pro-

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4 Even if Respondent were to concede, for the purposes of Contestant's motion, that there are no undisputed facts at issue, the Motion must be denied since the parties disagree on the inferences which may be reasonably drawn from those facts. See Central National Life Insurance Company v. Fidelity and Deposit Company of Maryland, 626 F.2d 537 (7th Cir. 1980). While Respondent concedes that no coal was being produced on the 9th Left Longwall panel at the time the Citation was issued, the parties disagree on whether this fact enables Contestant from complying with the terms and conditions of the Order.

vide sufficient detail to conclude that even he believed that they had completed the process of "develop(ing) the two-entry system," as that term is used in the Order. (Respondent's Ex. B at 37 and 39). Mr. Tatton's statement may mean nothing more than that Contestant had finished cutting the entryways needed to per-form longwall mining. However, since Contestant was actively en-gaged in setting up the longwall mining equipment, Motion at 5-6, there is no basis for concluding that Mr. Tatton believed that they were finished with the development of the "two-entry system."

Even if Mr. Tatton's statement achieved the necessary degree of precision, his opinion cannot suffice as a basis for summary judgment. Opinions do not generally provide sufficient basis for summary judgment. Elliott v. Massachusetts Mutual Life Insurance Co., 388 F.2d 362, 365 (5th Cir. 1968). Moreover, MSHA experts disagree with his assessment; they believe that the development of the two-entry development had not been completed when the Ci-tation was issued. See, Respondent's Exhibits H and I. Further, Mr. Tatton's application of the conditions at the mine to the terms and conditions of the Order is not a fact that he can defi-nitely establish for the purposes of summary decision. Indeed, that is the province of the tribunal after reviewing evidence and applying such evidence to the provision of the Order.

The MSHA report cited by Contestant also fails to prove that the central material fact is undisputed.(Footnote 5) Motion at 7-8, refer-ring to MSHA Ventilation Questions and Answers, November 9, 1992. The report was developed to provide information on new MSHA ven-tilation standards. Applying the statements to this case is not valid since the questions and answers are directed toward venti- lation practices, not the use of diesel-powered equipment in mines. Also, the answers are premised upon standard mining prac-tices and do not assume a modification of mining practices that limit egress from the mine, thus demanding compliance with rules more stringent than those contained in the Code of Federal Regulations.

Accordingly, Contestant's Motion for Summary Decision is denied.

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5 Even were it definitive support for Contestant's position, the report cannot serve as a basis for establishing undisputed facts regarding MSHA's posi- tion because the report is not an official policy document and not intended to be enforced as such. See, Ventilation Questions and Answers, November 9, 1992, Introduction (attached as Secretary's Exhibit K).

It is concluded that Respondent's contention that Complain-ant must use diesel equipment approved pursuant to 30 C.F.R. Part 36 during all facets of its two-entry underground mining is con-sistent with the language and intent of the Modification Order, as well as the legislative mandate pursuant to which the Order was entered. In contrast to Contestant's Motion for Summary Decision, Respondent's motion for such can be affirmed based upon interpretation of the Order. Respondent's position is not de- pendent on inferences from evidence submitted with its motion.

Respondent's Brief in support of its Motion is well-reasoned and persuasive. It is based not only on the literal language of the Order itself, but also on the nature of two-entry mining, prior understanding of the parties and analysis of the sources upon which Respondent relied in incorporating the various re-quirements (Conditions) into the Modification Order. In view of the thoroughness and length of Respondent's position together with its supporting points and authorities which appear at pages 9 through 32 of its Cross-motion and Brief, such is here incorpo-rated by reference.

CONCLUSION

Contestant Energy West contends that it is bound by the sub-ject requirement (Condition) only when coal is actually being ex- tracted. The essence of Contestant's premise is that the term "development" as used in the Modification Order and the applic- able requirement refers only to actual mining of the development entries and cannot include installation of equipment necessary to extract the coal outlined by such development entries.

As pointed out by UMWA in its Response in support of Re- spondent's position ... "... in order to adopt the construction urged by Energy West, this Court would have to conclude that the Secretary deliberately chose to protect miners from a potential fire source only while coal was being extracted."

It is concluded that the term "development" does include the activity of setting up longwall equipment, i.e., the activity which was ongoing when the subject citation was issued, and that this term is broad enough to encompass the entire process of pre- paring to retreat mine the longwall panel.

ORDER

1. Contestant's Motion for Summary Decision in Docket No. WEST 92-819-R is DENIED. Respondent's Cross-motion for Summary

Decision therein is GRANTED, Citation No. 3851235 is AFFIRMED, and this contest proceeding is DISMISSED.

2. In Docket No. WEST 93-168, the single penalty assess- ment of $50 sought by MSHA is ASSESSED for Citation No. 3851235.

Michael A. Lasher, Jr.
Administrative Law Judge

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