

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

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

JIM WALTER RESOURCES, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. SE 93-335-R
	:	Citation No. 3007642;
	:	6/2/93
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. SE 93-336-R
ADMINISTRATION (MSHA),	:	Citation No. 3007641;
Respondent	:	6/2/93
	:	Mine No. 3
	:	
	:	Mine ID 01-00758

DECISION

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 contest proceedings were initially heard on June 18, 1993, in Hoover, Alabama. On July 6, 1993, I issued a Partial Decision formalizing my bench decision in this proceeding. Partial Decision in Jim Walter Resources, Inc., 15 FMSHRC 1447. The Partial Decision identified the following two central issues: (1) whether a citation issued for a violative dust concentration condition, which is promptly corrected, in the absence of any recurrence, provides a basis for rescission and modification of the dust control plan under section 303(o) of the Mine Safety and Health Act of 1977, 30 U.S.C. 863(o), or section 75.370(a)(1) of the regulations, 30 C.F.R. 75.370(a)(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 view of increased production output, provides a basis for modifying the existing dust control plan to reflect higher minimum air velocity and water pressure standards.

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The Partial Decision granted the contestant's contest with respect to the first issue and temporarily reinstated the existing dust control plans. In the Partial Decision, citing Peabody Coal Company, 15 FMSHRC 381, 386 (March 1993); Carbon County Coal Company, 7 FMSHRC 1367 (September 1985); and Zeigler Coal Co. v. Kleppe, 536 F.2d 398, 404-407 (D.C. Cir. 1976), I noted that it is well established that the statutory language in section 303(o) of the Mine Act requires mine ventilation or dust control plan provisions to address specific conditions at a particular mine. Partial Decision, 15 FMSHRC at 1449. Thus, the Secretary is precluded from imposing general rules applicable to all mines in the plan approval process. Id. I concluded, therefore, that the Secretary lacks the statutory authority to routinely rescind dust control plans whenever a violation of the respirable dust concentration standard in section 70.100(a), 30 C.F.R. 70.100(a) is detected. Id. at 1450.

At the hearing, the parties expressed a willingness to pursue settlement of the remaining issue. Resolution of this issue depends upon whether the minimum air velocity and water pressure standards contained in the existing dust control plans are adequate dust suppression measures for the continuous mining or longwall operations at the individual mine in question. The Secretary bears the burden of proof concerning the suitability of minimum dust control plan provisions. Peabody, 15 FMSHRC at 388. However, it is incumbent on the operator to explain why these minimum provisions are sufficient if, as in the instant case, the operator operates with air velocity and/or water pressure levels that are considerably greater than the minimum standards. In attempting to resolve these issues, it is fundamental that the parties must engage in good faith negotiations. Id.

In a letter dated August 25, 1993, the Secretary now moves to vacate the two contested citations, thus, reinstating the rescinded dust control plans. Counsel for the contestant has informed me, albeit reluctantly, that he interposes no objection to the Secretary's motion to vacate.

I also note, parenthetically, that declaratory relief in this instance is inappropriate. The conditions noted at the respondent's No. 3 Mine during the March 10, 1993, inspection which provided the basis for this proceeding are not static and are subject to change. Therefore, there is no substantial likelihood of recurrence of this alleged enforcement harm as dust control plans are mine specific and relate to current mine operations and conditions. See Mid-Continent Resources, Inc., and UMWA, 12 FMSHRC 949, 956 (May 1990). Consequently, the Secretary's motion shall be granted.

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ORDER

Accordingly, the Secretary's motion to vacate the subject Citation Nos. 3007641 and 3007642 IS GRANTED and IT IS ORDERED that these contest proceedings as they relate to these citations ARE DISMISSED WITH PREJUDICE against the Secretary.

Jerold Feldman  
Administrative Law Judge

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