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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., Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. SE 93-56-R
	:	Citation No. 3188499; 11/10/92
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	No. 5 Mine I.D. No. 01-01322
UNITED MINE WORKERS OF AMERICA, Intervenor	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 93-132 A.C. No. 01-01322-03896
UNITED MINE WORKERS OF AMERICA, Intervenor	:	No. 5 Mine
v.	:	
JIM WALTER RESOURCES, INC., Respondent	:	

DECISION

Appearances: David M. Smith, Esq., J. Alan Truitt, Esq. Maynard, Cooper, Frierson and Gale, P.C., Birmingham, Alabama, and R. Stanley Morrow, Esq., Jim Walter Resources, Inc., Brookwood, Alabama, for Jim Walter Resources, Inc; William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for the Secretary of Labor; Patrick K. Nakamura, Esq., and Robert Weaver, Esq., Longshore, Nakamura and Quinn, Birmingham, Alabama, on behalf of the United Mine Workers of America.

Before: Judge Melick

These consolidated cases are before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," to challenge Citation No. 3188499 issued by the Secretary of Labor for

the failure of Jim Walter Resources, Inc. (JWR) to have operated with an approved ventilation, methane and dust control plan (ventilation plan). The underlying issue is how JWR will comply with the respirable dust sampling requirements in longwall mining sections set forth in 30 C.F.R. 70.207.

30 C.F.R. 70.207 provides, in relevant part, as follows:

> (e) Unless otherwise directed by the District Manager, the designated occupation samples shall be taken by placing the sampling device as follows:
>
> * * *
>
> (7) Longwall section. On the miner who works nearest the return air side of the longwall working face or along the working face on the return side within 48 inches of the corner.

Rather than sample in accordance with the above subsection (7) JWR requested that the Mine Safety and Health Administration (MSHA) district manager consider an alternative sampling procedure within his discretionary authority under the above subsection (e). This proposal was submitted on October 10, 1992, as a modification to its ventilation plan (Exh. G-13). The MSHA district manager thereafter rejected the proposed modification and has not "otherwise directed" how sampling should take place. Under the circumstances, JWR must comply with Section 70.207(e)(7).

In an interlocutory decision issued August 23, 1993, notifying the parties of the burden of proof and standard of proof to be applied in this case, it was held that the revised ventilation plan submitted by JWR on October 10, 1992, under the circumstances of this case,was only a vehicle to enable the district manager to exercise his discretion to "otherwise direct" a method of dust sampling under 30 C.F.R. 70.207(e). It was accordingly held that the attempted us of the ventilation plan modification procedure in the instant case did not alter the burden of proof and standard of proof applicable to a mine operator's challenge to the Secretary's exercise of discretion under the cited standard.

It was further held that the burden was upon JWR to prove that the decision of the district manager, in not otherwise directing that JWR could conduct its respirable dust sampling in the manner it had requested, was arbitrary and capricious. However, since the posture of these cases ultimately is that of enforcement proceedings, i.e., the

issuance of Citation No. 3188499 and the challenge of that citation under Section 105(d) of the Act, it is apparent that, in fact, the Secretary has the burden of proof in these cases. The Commission has long held that in an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation. Asarco Mining Co., 15 FMSHRC 1383 (1993), Jim Walter Resources, Inc., 9 FMSHRC 903, 907 (1987). Consistent with this, the Secretary in these cases in fact assumed the burden of going forward with the evidence and the decision herein is based upon the placement of the burden upon the Secretary. Moreover, since it is the decision by the district manager to deny JWR's requested modification that is the underlying issue herein and since the Secretary is the proponent of that decision, the burden of proof is, in any event, properly upon the Secretary in these proceedings to show that the decision of the district manager was not arbitrary and capricious. See 5 U.S.C. 556(d); Commission Rule 63(b), 29 C.F.R. 2700.63(b).

The analysis of the "arbitrary and capricious" standard by the Circuit Court in American Mining Congress v. Marshall, 671 F.2d 1251 (10th Cir. 1982), although applied to judicial review under the Administrative Procedure Act, is nevertheless instructional.(Footnote 1) In this regard the Court stated as follows:

> The United States Supreme Court explained the meaning of the arbitrary and capricious standard in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed. 2d 136 (1971):
>
> > Section 706(2)(A) requires a finding that the actual choice made was not 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.
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> Id. at 416, 91 S.Ct. at 823 (citations omitted). Under this standard, the agency must demonstrate that it considered the relevant factors and alternatives after a full ventilation of the issues and

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1 See 5 U.S.C. 706(2)(A).

> that the choice it made based on that consideration was a reasonable one. [footnote omitted] (Emphasis added)

The determination of whether the district manager acted in an arbitrary and capricious manner must also be limited to the facts and information presented to him at the time he made such decision. See Golden Coal Mining Co., L.P. v. Secretary, 12 FMSHRC 1360 (1990).

The record shows that on October 10, 1992, JWR presented to MSHA District Manager Joseph Garcia an alternative for dust sampling of the occupation designated as "the miner who works nearest the return air side of the longwall working face," i.e., the occupation identified at 30 C.F.R. 70.207(e)(7). The particular provisions at issue appear in paragraph K(2)(f) of the October 10, 1992, ventilation plan (Exh. G-13) and provide an alternative method for computing allowable downwind exposure to respirable dust. It read as follows:

> The work practices of the miners down wind time will be adjusted to correspond with the respective sample result of the 7 samples taken that was not greater than the respirable dust level which shall not exceed 2 mg when the respective hourly sample is multiplied by an equivalent MRE conversion factor of 1.38.

Garcia testified that in early November 1992 he rejected this proposal because it provided for the calculation of respirable dust exposure in terms of weight gain expressed in milligrams.(Footnote 2) While conceding that he did not understand the proposed modification and did not try to understand it, he stated that it was not necessary for him to understand it because the proposed testing procedures were in violation of the Secretary's regulations. Garcia testified that the regulations require, for purposes of determining respirable dust exposure, a conversion of weight gain to dust concentration expressed in milligrams per cubic meter of air (mg/m3). In his brief, the Secretary cites in this regard the following standards: 30 C.F.R. 70.2(d), 70.200, 70.202, 70.201 and 70.206.

It is undisputed,moreover, that before rejecting the JWR proposal in paragraph k(2)(f) Garcia nevertheless conferred with his ventilation specialist Judy McCormick who agreed that the

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2 It is not disputed that Mr. Garcia was the District Manager who made this decision even though the subsequent formal rejection letter dated November 6, 1992 was signed by his successor (Exh. G-14).

proposal would violate the regulations for respirable dust sampling. It is further undisputed that before rejecting the JWR proposal Garcia also conferred with Bob Peluso of the MSHA technical support staff in Pittsburgh, Ron Schell, the Chief of MSHA's Health Division, MSHA Deputy Administrator and mining engineer Robert Elam, and Ed Hugler, a Deputy Assistant Secretary. According to Garcia, "every recommendation I had back on this is that weight gain was not an acceptable way of calculating for respirable dust."

JWR argues that the district manager's statements (that he did not understand the JWR proposal and had no intention of understanding it) show that his decision was arbitrary and capricious. These statements taken out of context would appear to support JWR's position. If the district manager does not understand the technical aspects of a proposal to be evaluated under 30 C.F.R. 207(e) it is incumbent upon him to confer with persons having the necessary expertise to provide a rational and reasoned basis for his decision.(Footnote 3) However, the record in this case shows that the district manager did in fact confer with a number of legal and technical experts before making his decision.

In any event, the district manager's discretion under 70.207(e) is limited to making modifications in the locatio or placement of the sampling devices and nothing more. The district manager does not have the authority under that section to change the computational methodology as JWR seeks in its proposal. Accordingly, it was not incumbent upon the district manager to make any change in the computational methodology.

Under the circumstances I find that the decision of the district manager was not arbitrary and capricious. Accordingly, his denial of the JWR proposed modification in paragraph k(2)(f) of its October 10, 1992 plan must stand and the citation must be affirmed. Since this case was initiated for the sole purpose of litigating the unique issues presented and that the alternative provisions submitted by JWR were never actually implemented, I find that a civil penalty of $1 is appropriate.

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3 It appears that Robert Haney, an MSHA Supervisory Mining Engineer and apparently MSHA's principal expert on this highly technical issue, was not consulted until well after the district manager made his decision in this case and only then in preparation for this litigation.

ORDER

Citation No. 3188499 is AFFIRMED and Contest Proceeding Docket No. SE 93-56-R is DISMISSED. Jim Walter Resources, Inc. is directed to pay a civil penalty of $1 for the violation charged in Citation No. 3188499 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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