

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 14, 2010

JIM WALTER RESOURCES, INC.,	:	CONTEST PROCEEDINGS
Contestant,	:	
	:	
v.	:	Docket No. SE 2008-124-R
	:	Citation No. 7693357, 11/02/2007
	:	
SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH	:	Mine ID: 01-00758
ADMINISTRATION (MSHA),	:	
Respondent.	:	
	:	
SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2008-792
Petitioner,	:	A.C. No. 01-00758-148659
	:	
v.	:	
	:	
JIM WALTER RESOURCES, INC.,	:	Mine: No. 3
Respondent.	:	

**ORDER GRANTING THE SECRETARY’S
MOTION FOR A PROTECTIVE ORDER**

Before: Judge Barbour

On March 30, 2010, Jim Walter Resources (“JWR”) served upon the Secretary of Labor (“Secretary”) a supplemental 30(b)(6) Deposition Notice and Request for Production of Documents. The notice requested the Secretary to make available for deposition “the person or persons designated by [MSHA] as being able to testify as the MSHA representatives in regard to the following topic:

- 9. MSHA District 11's citation history and enforcement actions related to all citations and/or orders issued to Jim Walter Resources, Inc., and/or any independent contractor or subcontractor from January 1, 2000 through November 2, 2007 alleging violations of 30 C.F.R. §77.1710(g) on any Jim Walter Resources, Inc. Mine site or property, including but not limited to each citation

listed and/or included in Exhibit A attached hereto.¹

JWR also requested that the Secretary produce

1. The complete investigation file of each of the citations listed ... in Exhibit A, and
2. Any and all documents relating to the citations listed in Exhibit A.

Although the subject citation contested in Docket No. SE 2008-124-R and Docket No. SE 2008-792 was issued on November 2, 2007, the citations listed on Exhibit A were issued between October 12, 2000 and December 12, 2007.

The Secretary objects to the broad nature of the topic upon which the company seeks to depose MSHA's representatives. She asserts that "[the] citation history and enforcement actions relating to all citations and/or orders issued to [JWR] and/or any independent contractor or subcontractor from January 1, 2000 through November 2, 2007 alleging violations of [section] 77.1710(g)," is information not likely to produce relevant evidence. She further argues that producing the nine inspectors required to give the requested deposition testimony would be "oppressive and unduly burdensome," as would be the production of the requested documents. Further, in the Secretary's view, the documents can lead to no admissible evidence because she has "unlimited discretion" to cite a contractor or a production operator. Therefore, and contrary to JWR's assertions, she cannot have abused her discretion when she cited JWR for the alleged violation at issue. (The Secretary cites *Speed Mining, Inc. v. FMSHRC*, 528 F.3d 310, 318 (4th Cir. 2008).)

RULING

The Secretary's motion **IS GRANTED**. She need not comply with the requests made in JWR's March 30, 2010 supplemental 30(b)(6) Deposition Notice.² In a letter directed to Counsels on April 7 and before I was aware of the Secretary's motion, I stated my belief that JWR's request was a distraction from "the matter at hand." I further stated that I viewed the issues in the captioned matters as being "relatively simple." I stated that they were whether "the alleged violation [of section] 77.1710(g) occur[ed]; if so, [whether] JWR is liable; if so what is the amount of the civil penalty I must assess." I noted that "the company's relevant history of previous violations can easily be obtained from the agency's print-out of past violations." Since I

¹Exhibit A is an MSHA computer print-out that lists 22 citations issued for alleged violations of section 77.1710(g). Seven of the citations were issued to JWR, three were issued to JWR's agents and 12 were issued to JWR's contractors.

²Because I believe other principals resolve this matter, I, like the Secretary, take no position on whether a request under Rule 30(b)(6) is appropriate at this juncture of the case. Fed. R. Civ. P. 30 (b)(6).

will not consider as relevant past violations cited prior to November 2, 2005, JWR's deposition and production request clearly includes irrelevant material. Moreover, I agree with the Secretary that the voluminous nature of the material sought and the number of personnel required to testify about it, make the request oppressive and unduly burdensome.

Finally, as I read the law, the Secretary enjoys broad discretionary authority to cite the operator, the independent contractor, or both for contractor violations. *See Jim Walter Resources, Inc.*, 31 FMSHRC 724, 726-727 (May/June 2009). As the court in *Speed Mining* expressly noted, the strong presumption in favor of judicial review of agency actions is overcome when the authorizing act provides "no judicially manageable standards ... for judging how and when an agency should exercise its discretion." *Speed Mining*, 528 F.3d at 317 (citing *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).) The court went on to find the Mine Act to provide no manageable standard by which to judge MSHA's exercise of discretion and concluded, as the Secretary rightfully states, that the Secretary's "citation decisions are 'committed to agency discretion by law' and, therefore, are unreviewable." *Id.* I am compelled to follow the court's holding. Therefore, in the cases at bar, if the Secretary can show the violations occurred, that JWR was the operator of the mine, that Hooper and Chandler Steel Erectors ("Hooper") was an independent contractor of JWR, and that Hooper committed the contested violation, the issue of whether JWR was properly cited will not arise because the Secretary has unreviewable discretion to cite Hooper, JWR or both. For this reason too, JWR's request is unlikely to lead to the discovery of admissible evidence and must be rejected.

David F. Barbour
Administrative Law Judge

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