FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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August 17, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2003-160
Petitioner	:	A.C. No. 01-01322-00004
	:	
v.	:	Docket No. SE 2003-161
	:	A.C. No. 01-01322-00005
JIM WALTER RESOURCES, INC.,	:	
Respondent	:	
	:	No. 5 Mine

ORDER DENYING MOTION FOR RECONSIDERATION
OR
CERTIFICATION

Jim Walter Resources, Inc. (JWR) moves for reconsideration of an order denying its Motion for Summary Decision (Order, July 2, 2004) . In the alternative, it moves that the matter be certified to the Commission as a controlling question of law whose immediate review will materially advance the final disposition of the proceedings. The Secretary opposes the motions. For the following reasons, I conclude the motions should not be granted.

FACTUAL BACKGROUND

The facts are set forth in the Order (pages 1-3) and need not be repeated in toto. The controversy arises out of a double explosion that occurred at JWR's No. 5 Mine on September 23, 2001. Among the enforcement actions resulting from MSHA's subsequent investigation of the accident were orders issued pursuant to Section 104(d) of the Act (30 U.S.C. § 814(d)). One of the orders, No. 7328082, alleges a violation of 30 C.F.R. § 75.1101-23(a). The Secretary seeks a civil penalty assessment of $55,000 for the alleged violation (Docket No. SE 2003-160). The alleged violation is one of eight that are at issue in docket. Seven are proposed to be assessed at $55,000, and one is proposed to be assessed at $50,000.[1]

[1] In the consolidated case, Docket No. SE 2003-161, the Secretary petitions for the assessment of ten additional alleged violations. The assessments proposed for these alleged violations are significantly less than those proposed for the violations in Docket No. SE 2003-160.

At the time the order was issued section 75.1101-23(a) stated:

> Each operator of an underground coal mine shall adopt a program for the instruction of all miners in the location and use of fire fighting equipment, location of escapeways, exits, routes of travel to the surface, and proper evacuation procedure to be followed in the event of an emergency. Such program shall be submitted for approval to the District Manager of the Coal Mine Health and Safety District in which the mine is located no later than June 30, 1974.[2]

In pertinent part the order states:

> [A] proper evacuation procedure was not followed after the first explosion on 4 Section. Miners were not evacuated from the mine after an explosion damaged critical ventilation controls. These conditions were known by and communicated to management personnel including the CO Room Supervisor. The section foreman believed there was a possibility of an explosion and did not effectively communicate this information to the other miners. Miners from other areas of the mine responded to the emergency on 4 Section believing either an ignition or a fire had occurred. These miners were unaware an explosion had occurred and a second explosion was possible. Miners underground were not alerted to the problem through the mine wide telephone paging system. Also management directed 7 addition miners to join the 13 miners already in 4 Section.

In its motion JWR argued section 75.1101-23(a) was inapplicable to the conditions that existed at the mine on September 23 and the order should be vacated. JWR raised a number of grounds for finding the standard was improperly cited. Foremost, it contended the standard expressly applied "only to emergencies involving underground fires" (Mot. at 10). Therefore, it was wrong to cite the standard for "other emergencies that could occur in an underground mine," specifically for an emergency involving an explosion. JWR also argued if section 75.1103-23(a) "could somehow be construed to apply to events that were not fire emergencies," the company was in compliance with the standard because its miners' actions were consistent with the Plan (Id. 20).

In ruling on the motion, I held that given the facts revealed by the record, it was not improper for MSHA to cite the company for a violation of section 75.1101-23(a) (Order 4-5). I stated I was not swayed by the company's argument the standard applied only to fire emergencies. Applying a "reasonably prudent person test," I concluded the September 23 emergency was of the type referenced in section 75.1101-23(a). In essence, I found a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have concluded the standard applied to both fire and explosion emergencies and that the

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[2] On the date the violation allegedly occurred, a plan (the "Plan") approved by MSHA was in effect at the mine.

company's attempt to differentiate between a fire and an explosion for purposes of the standard was "a distinction without difference" (Order 5). Given that interpretation, I found the standard's placement in Subpart L of the regulations, a subpart headed "Fire Protection," logical, and I rejected the company's suggestion that the location "of the standard and its regulatory context restrict[ed] it to fires only and exclude[d] explosions" (Id. 6).

Having found it was not incorrect to cite section 75.1101-23(a), I held there were insufficient facts in the record to determine whether JWR complied with the standard on September 23. I noted the company and the Secretary did not agree whether the allegations set forth in Order No. 7328082 violated the company's Plan and that at trial the burden would be on the Secretary to establish that the allegations in the order actually contravened the Plan as it then existed (Order 6).

Because I found that Section 75.1101-23(a) was correctly cited and that material facts remained to be determined, I denied the motion (Order 6-7).

RECONSIDERATION

In moving for reconsideration, the company asserts, as it did in its motion, that MSHA's revision of the regulation after the accident and the agency's decision to put the standard under a different subpart indicates that MSHA itself did not consider the standard to apply to explosion-related emergencies (Mot. 1-2).[3] It also argues that the conclusion that a reasonably prudent mine operator would have found the standard applicable to explosion emergencies is inconsistent with the fact that the Secretary later revised the standard (Id. 2-3).

With all due respect, I am not persuaded. If, as I believe, a reasonable, prudent mine operator would have concluded the September 23 emergency was of the type referenced in section 75.1101-23(a), the fact that the Secretary chose to revise and reposition the regulation at a later date does not make the previously worded and positioned regulation inapplicable. The Secretary has a duty to refine, revise and clarify her regulations based on her administrative experience. Revising a regulation to more clearly state what previously was reasonable to infer does not signal the inapplicability of the prior regulation. Nor is it inconsistent with concluding the prior standard applied to then existing facts. Rather, such a revision is the type of honing and

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[3] In December 2002, the Secretary redesignated section 75.1101-23(23(a) as section 75.1502 and moved the regulation from Subpart L to Subpart P of Part 75. Subpart P is titled "Mine Emergencies" (67 FR 76665 (December 12, 2002); 67 FR 78044 (Dec. 20, 2002)). As part of the revised regulation, the Secretary specified an evacuation program was required for "[m]ine emergencies that endanger miners due to fire, explosion, or gas or water inundation" (30 C.F.R. §75.1502(a)(1)). JWR argued in its motion, "if the Secretary intended § 75.11-01-23(a) to apply to all potential mine emergencies, she would have said so and included it in Subpart P, as she did when she revised the standard" (Mot. 11).

refining of a regulation the Secretary is obligated to undertake.

I remained convinced that when all is said and done, the matter is a simple one – would a reasonably prudent operator have concluded the standard applied only to fire emergencies and excluded other emergencies, specifically those involving an explosion? For the reasons I have stated, I continue to believe the answer is no.

Because I found the standard applicable to the events of September 23 , I stated that at trial the Secretary would "have to prove the alleged violations of the [evacuation] Plan . . . either through documentary evidence or testimony, or both" and that JWR can "rebut the Secretary's case by showing the particular events . . . the Secretary contends contravened the Plan either did not occur or were not contrary to the provisions of the Plan" (Order 6). In urging reconsideration, the company cites deposition testimony it obtained following issuance of the order. JWR maintains the testimony establishes that the order was not issued for violating the Plan but, rather, for violating the standard or the intent of the standard (Mot. For Reconsid. 4-5). However, this assertion is disputed by the Secretary. She states that at trial she will prove that JWR violated specific portions of its then existing Plan (Sec's Opp. To Resp. Mot. For Reconsid. 3). Thus, issues remain to be tried.

For these reasons, I decline to reconsider my conclusion that the motion should be denied.

CERTIFICATION

Commission Rule 76(a)(1)(I) states that a judge may certify an interlocutory ruling when it involves and "controlling question of law and . . . immediate review will materially advance the final disposition of the proceeding." While the issue of whether or not section 75.1101-23(a) applied to the events of September 21 is controlling regarding Order No. 7328082, its resolution will not materially advance the final disposition of the proceeding. The order sets forth but one of 18 alleged violations at issue in the consolidated proceedings. Of the 18, eight, including the alleged violation of section 75.1101-23(a), are expected to be vigorously contested by the parties. The hearing is scheduled to begin on November 4, 2004, and will extend well into December. Removal of one of the alleged violations from those that will be tried will not significantly shorten the length of the trial nor the time within which a decision will be rendered by the undersigned.

Equally important, denial of certification will not deprive JWR of review of the issue. If I ultimately conclude the standard was violated, the company may appeal to the Commission, which will have the opportunity to review the matter in the context of a complete and, I hope, enlightening record.

ORDER

JWR's Motion for Reconsideration or Certification is **DENIED.**

David F. Barbour
Administrative Law Judge
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