FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, D.C. 20001

October 7, 2004

JIM WALTER RESOURCES, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. SE 2003-150-R
v.	:	Order No. 7670455; 06/26/2003
	:	
SECRETARY OF LABOR,	:	Docket No. SE 2003-151-R
MINE SAFETY AND HEALTH	:	Order No. 7670457; 06/27/2003
ADMINISTRATION (MSHA),	:	
Respondent	:	No. 7 Mine
	:	Mine ID 01-01322
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2003-138A
Petitioner	:	A. C. No. 01-01322-04260
v.	:	
	:	Docket No. SE 2004-45A
JIM WALTER RESOURCES, INC.	:	A. C. No. 01-01322-07603
Respondent	:	
	:	No. 5 Mine

ORDER DENYING MOTION IN LIMINE
AND
ORDER DENYING MOTION TO ENFORCE SETTLEMENT

I.
The Consolidated Cases

In Docket No. SE 2003-150-R, Jim Walter Resources, Inc., (JWR), is contesting the validity of Citation No. 7670455, a citation issued pursuant to Section 104(a) of the Mine Act (30 U.S.C. §814(a)) on June 26, 2003. The citation alleged that JWR violated mandatory safety standard 30 C.F. R. §75.334(b)(1), in that the bleeder system for the I-panel longwall was not maintained so as to continuously dilute and move methane-air mixtures and other gases, dusts, and fumes from the worked-out area away from active workings and into a return air course or to the surface of the mine. The citation referenced methane readings that were taken between June 10 and June 25, 2003, at points in the mine's longwall bleeder system. The readings are alleged to have established an upward trend of methane concentrations and "collectively [to have] indicate[d] that the bleeder system [could] no longer handle the current methane liberation" (Citation No. 7670455 at 2). The citation set 6:00 p.m., June 27, 2003, as the time and date for abatement.

In Docket No. SE 2003-151-R, JWR is contesting the validity of Order No. 7670457, which was issued at 7:45 p.m. on June 27, 2003, pursuant to Section 104(b) of the Act (30 U.S.C. §814(b)). The order alleged that JWR failed to timely abate Citation No. 7670455, in that it did not make improvements to enhance the effectiveness of the longwall bleeder system so that the system "continue[d] to liberate high quantities of methane and . . . [could not] continuously dilute the methane to safe operating levels" (Order 7670457).

In Docket No. SE 2004-045-A, the Secretary is petitioning for the assessment of a civil penalty of $1,550 for the alleged violation of section 75.334(b)(1) contained in Citation No. 7670455. Also, she seeks the assessment of a civil penalty of $164 for an alleged violation of mandatory safety standard 30 C.F.R. §75.323(e). The alleged violation is contained in Citation No. 7669872, issued on June 19, 2003.

In Docket No. SE 2003-138-A, the Secretary is petitioning for the assessment of a civil penalty of $317 for an alleged violation of section 75.334(b)(1) contained in Citation No. 7670075. The violation allegedly occurred on August 14, 2002.

II.
The Motion in Limine

In the part of the consolidated case that involves Citation No. 7670455 and Order No. 7670457, JWR moves to exclude from evidence the following items and testimony: certain specified exhibits that relate to a June 28, 2003 through July 1, 2003 ventilation survey conducted at JWR's No. 5 Mine by MSHA technical support expert, John Urosek; an MSHA memorandum dated August 4, 2003, titled "Results of an Underground Mine Air Pressure Quantity Investigation at . . . [JWR's] No. 5 Mine;" notes of MSHA Inspector William R. Spens from his investigation of the mine's ventilation system from June 27, 2003 through July 2, 2003; all testimony of John Urosek; all testimony of William Spens; and all testimony relating to any investigations or inspection of the ventilation system at the mine conducted after the issuance of the June 27, 2003 order (Order No. 7670457).

The company argues that the written material and the testimony is excludable because an inspector must believe that the operator has violated a mandatory health or safety standard before he or she issues a citation or order. Therefore, the pertinent question is "whether the inspector reasonably believed that a violation of section 75.334(b)(1) existed, not whether the inspect[or] (or MSHA) can later justify an unjustifiable citation and order. . . ." (Mot. 2). According to JWR, an investigation or inspection occurring after the issuance of the citation and order is not relevant and has "no bearing on whether the [i]nspector believed the operator had violations of any mandatory health or safety standards" (Id.). Moreover, the testimony of Messrs. Urosek and Spens would bring forth no firsthand knowledge of the facts underlying the citation and the order since they were not part of the decisional process to issue the two enforcement actions (Id. 3-4).

III.
Ruling on Motion in Limine

I decline to exclude the written materials and testimony because I cannot conclude they are in fact irrelevant to the issues at hand. The primary issue concerning Citation No. 7670455 and the subsequent order is whether or not a violation of section 75.334(b)(1) occurred on June 26, 2003, at 7:00 p.m., and secondary issues involve the alleged significant and substantial (S&S) nature of the alleged violation, the degree of negligence of JWR (assuming a violation is found), and whether on June 27 it was reasonable for the inspector to decline to extend the time for abatement of the citation. It is conceivable that each item of evidence JWR seeks to exclude could have a bearing on these issues.

In declining to exclude the evidence, I note my disagreement with JWR's contention that investigations occurring after issuance of a citation or order cannot be used to establish a violation cited prior to the investigation. Evidence discovered post-citation may be used – and not infrequently is used – to prove that prior alleged conditions existed. As counsel for the Secretary points out, the question is what the facts were at the time the violation was cited, and proof used to find the answer is not restricted to those facts that were in the inspector's mind when he or she issued the citation (Sec's Statement in Opp. to Mot. in Limine 3).

IV.

The Motion to Enforce Settlement and Ruling

JWR also moves to enforce a settlement agreement it contends it reached with counsel for the Secretary. In its motion, JWR states that the parties began earnestly to discuss a settlement of these cases around September 10, 2004, and that counsel for the Secretary forwarded to counsel for JWR a draft settlement agreement on or around September 14. The proposed agreement concerned all issues in these cases except the alleged violations of section 75. 232(e) contained in Citation No. 7669872 (Docket No. SE 2003-45-A), which the parties believed could be appropriately submitted for decision on the basis of motions for summary judgment. Discussions continued between counsel and, on September 21 or 22, counsel for JWR proposed adding seven additional words to the draft agreement. According for JWR, the proposed additional words were discussed on the morning of September 22, and the parties agreed to the September 15 settlement proposal, leaving out the proposed seven words. At this point, counsel for JWR understood the case was settled. However, on the afternoon of September 22, counsel for the Secretary began to state that there was no settlement and that terms of the September 15 proposed settlement were not agreeable to the Secretary. In other words, in JWR's view, counsel for the Secretary refuses to settle the matter on terms he proposed on September 15, terms JWR accepted on September 22.

Counsel for the Secretary has yet to reply to this motion, but there is no need for him to do so because it is clear to me that the motion cannot be granted. The settlement of contested

issues is an integral part of dispute resolution under the Mine Act (Pontiki Coal Corp., 8 FMSHRC 668, 674 (May 1986)), and the Act requires settlements to be subject to the approval of the Commission and its judges (see 30 U.S.C. §820(k)). For there to be an enforceable settlement, there must be a genuine agreement between the parties; that is to say, there must be a true meeting of the minds as to the settlement agreement's provisions (Peabody Coal Co., 8 FMSHRC 1265, 1266 (September 1986)).

Settlements of contested civil penalty and associated review cases are submitted for approval in the form of motions made orally on the record or motions made in writing. It is worth noting that no motion to approve a settlement has been submitted to the undersigned in these cases. Nor has there been any oral on-the-record representation as to a settlement and its terms. JWR's own motion establishes that there has been no meeting of the minds as to the terms of a settlement. Had there been an agreement, it would have been formalized and submitted in writing or it would have been entered orally on the record and documented in transcript form. The "back and forth" which counsel for the company describes is part of the settlement process, a process that has yet to reach fruition. Controversies as to who agreed to what and when are why the Commission's judges require fully-documented agreements before they recognize a case as settled. The lesson is clear; the parties must formally document their agreements if they want them to be enforced.

ORDER

For the above stated reasons, the motions are **DENIED**.

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