CCASE:
MSHA V. V AND R COAL
DDATE:
19811014
TTEXT:
FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
October 14, 1981
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. HOPE 76-275-P
IBMA 77-21

V and R COAL COMPANY

DECISION

This penalty proceeding arose under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. $801 et seq. (1976)(amended 1977) ["the 1969 Coal Act"]. The Mining Enforcement and Safety Administration's appeal was pending before the Interior Department Board of Mine Operations Appeals on March 8, 1978. Accordingly, it is before us for decision. 30 U.S.C. $961 (Supp. III 1979). The issue is whether the judge properly vacated a notice of violation alleging a failure to comply with 30 C.F.R. $70.246. 1/ We affirm the judge.

The Secretary's petition for penalty assessment, alleging several violations including a violation of $70.246, was served upon V and R Coal Company. V and R failed to answer and a default was entered. The judge then ordered MESA to show cause why the alleged violation of $70.246 should not be dismissed on the ground that MESA had failed to prove the availability of an approved sampling device of the required capability. The judge cited the holding of the Board in Eastern Associated Coal Corp., 7 IBMA 14 (Sept. 30, 1976), aff'd on reconsideration, 7 IBMA 133 (Dec. 20, 1976), as requiring such proof. 2/ After MESA responded that the violation was for failure to sample and that the Eastern decision did not relieve an operator of that duty, the judge rejected this argument and vacated the notice of violation.

1/ 30 C.F.R. $70.246 provides:

During one production shift in every sampling cycle with respect to a working section, an approved sampling device shall be placed in the intake air course of that working section and a sample will be taken within 200 feet out by the working faces of such section.

2/ In the Eastern decision the Board held that the MRE instrument and the respirable dust sampling devices approved by the Secretary yielded results based upon dust particulates whose size exceeded that which the 1969 Coal Act, in section 318(k), defined as respirable.

~2275

We have thoroughly examined the record and find no error in the judge's decision. 3/ Accordingly, the decision of the judge is affirmed.

3/ We note that the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $801 et seq. (Supp. III 1979), removed the statutory basis for the Board's Eastern decision by amending the statutory definition of "respirable dust." See Alabama By-Products Corp., 2 FMSHRC 2760 (1980). We note also that V. R Coal Company apparently is no longer in existence and has no assets. See V & R Coal Co., 3 FMSHRC 2019 (WEVA 81 188, etc., August 28, 1981)(ALJ decision). Therefore, no purpose would be served by further proceedings in this case.

~2276

Distribution

Michael McCord, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

V & R Coal Company
c/o James Johnson, President
Route 1, Box G
Slab Fork, West Virginia 25920