

CCASE:
MSHA V. SOUTHERN OHIO COAL
DDATE:
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, DC
December 13, 1988

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),

v.

Docket Nos. LAKE 87-95-R
LAKE 88-26

SOUTHERN OHIO COAL COMPANY

BEFORE: Ford B. Ford, Chairman; Backley, Doyle, Lastowka, and
Nelson, Commissioners

ORDER

BY THE COMMISSION:

In this matter pending on review, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act" or "Act"), counsel for the Secretary of Labor has filed a motion requesting vacation of the citation and associated civil penalty assessment in issue and dismissal of the proceeding. Southern Ohio Coal Company ("SOCCO") has filed a response indicating that it has no objection to the granting of the Secretary's motion. For the following reasons, we grant the motion.

On July 22, 1987, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued SOCCO a citation alleging a violation of 30 C.F.R. § 70.100(a), the mandatory health standard that, in general, requires operators of underground coal mines to maintain continuously an average concentration of respirable dust in mine atmospheres at or below 2.0 milligrams of dust per cubic meter of air ("mg/m"). The citation was based on analysis of twelve respirable dust samples obtained by MSHA inspectors conducting a respirable dust survey in a particular longwall section of SOCCO's

Meigs No. 2 underground coal mine. The samples indicated an average respirable dust concentration of 2.1 mg/m³, a level in excess of that permitted under section 70.100(a). SOCCO contested the citation and this matter proceeded to hearing before Commission Administrative Law Judge Avram Weisberger. In his decision, Judge Weisberger concluded that SOCCO had violated the standard, affirmed the citation, and assessed a \$259 civil

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penalty for the violation. 10 FMSHRC 923 (July 1988(ALJ)). We subsequently granted SOCCO's petition for discretionary review, which, inter alia, challenged the dust sampling procedures used by the MSHA inspectors in this case.

After the submission of SOCCO's brief on review, the Secretary filed with us a Motion to Vacate Citation and to Dismiss Proceeding. In this motion, the Secretary states that one of the twelve samples upon which the citation was based was not obtained in conformance with MSHA's sampling procedures. The Secretary further states that if the invalid sample were deleted from the dust analysis, the average dust concentration for the mine section in question would be 1.67 mg/m³, a permissible level. The Secretary requests that we enter an order vacating the citation and assessed civil penalty and dismissing this proceeding. On November 18, 1988, the Commission issued an order directing SOCCO to file a written response to the Secretary's motion. On November 29, 1988, SOCCO filed a Memorandum in Response, in which it asserts that it has no objection to the granting of the Secretary's motion and the dismissal of this proceeding.

As we have held, our "responsibility under the Mine Act is to ensure that a contested case is terminated, or continued, in accordance with the Act." *Youghioghney & Ohio Coal Co.*, 7 FMSHRC 200, 203 (February 1985) ("Y&O"). A motion by the Secretary to vacate a citation or order and to dismiss a review proceeding will be granted if "adequate reasons" to do so are present. See, e.g., *Y&O*, supra; *Kocher Coal Co.*, 4 FMSHRC 2123, 2124 (December 1982); *Climax Molybdenum Co.*, 2 FMSHRC 2748, 2750-51 (October 1980), aff'd, 703 F.2d 447 (10th Cir. 1983). Here, the Secretary asserts that it now appears to her that a necessary factual predicate for the violation in issue is lacking. As the prosecutor charged with enforcement of the Mine Act, the Secretary has reached a determination that she should seek withdrawal of this proceeding. Cf. *Roland v. Secretary of Labor*, 7 FMSHRC 630, 635 36 (May 1985), aff'd, No. 85 18-8 (10th Cir. July 14, 1986). The operator has not objected to the Secretary's motion or claimed that it will be prejudiced by the requested action. No reason otherwise appears on this record as to why the motion should not be granted.

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Accordingly, upon consideration of the Secretary's motion and the operator's response, the Secretary's motion is granted. The citation and assessed civil penalty are vacated. Our direction for review is also vacated and this proceeding is dismissed.

Ford. B Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

Distribution

David A. Laing, Esq.
Porter, Wright, Morris & Arthur
41 South High Street
Columbus, Ohio 43215

Dennis D. Clark, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Administrative Law Judge Avram Weisberger
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041