

CCASE:
CONTESTS OF FRSPIRABLE
DUST SAMPLE AALTERATION
CITATIONS
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 SKYLINE, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

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| IN RE: CONTESTS OF RESPIRABLE DUST SAMPLE ALTERATION CITATIONS | Master Docket No. 91-1 |
| METTIKI COAL CORP., CONTESTANT | CONTEST PROCEEDINGS |
| v. | Docket No. YORK 91-28-R through YORK 91-29-R |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT | Citation No. 9859677 through 9859678 |
| | Mettiki Mine |
| PERMAC, INC., CONTESTANT | Docket No. VA 91-288-R |
| v. | Citation No. 9860990 |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT | Prep Plant No. 1 |
| RACE FORK COAL CORP., CONTESTANT | Docket No. VA 91-239-R through VA 91-240-R |
| v. | Citation No. 9860988 through 9860989 |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT | Woodman Luke Prep Plant |
| PONTIKI COAL CORP., CONTESTANT | Docket No. KENT 91-440-R through KENT 91-441-R |
| v. | Citation No. 9858800 through 9858801 |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT | Pontiki No. 1 Mine |

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WEBSTER COUNTY COAL CORP.,
CONTESTANT

v.

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

Docket No. KENT 91-364-R
through KENT 91-378-R

Citation No. 9858517
through 9858531

Retiki Mine

Docket No. KENT 91-379-R
through KENT 91-439-R

Citation No. 9858575
through 9858635

Dotiki Mine

WHITE COUNTY COAL CORP.,
CONTESTANT

v.

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

Docket No. LAKE 91-435-R
through LAKE 91-438 R

Citation No. 9858487
through 9858490

Pattiki Mine

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

v.

METTIKI COAL CORP.,
RESPONDENT

CIVIL PENALTY PROCEEDINGS

Docket No. YORK 91-44
A.C. No. 18-00621-03753D

Mettiki Mine

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

v.

PERMAC, INC.,
RESPONDENT

Docket No. VA 91-558
A.C. No. 44-03236-03514D

Prep Plant No. 1

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

v.

Docket No. VA 91-559
A.C. No. 44-03010-03528D

Woodman Luke Prep Plant

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RACE FORK COAL CORPORATION,
RESPONDENT

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

v.

PONTIKI COAL CORP.,
RESPONDENT

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

v.

WEBSTER COUNTY COAL CORP.,
RESPONDENT

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

v.

WHITE COUNTY COAL CORP.,
RESPONDENT

Docket No. KENT 91-1056
A.C. No. 15-08413-03614D

Pontiki No. 1 Mine

Docket No. KENT 92-102
A.C. No. 15-00672-03625D

Retiki Mine

Docket No. KENT 91-1039
through KENT 91-1042

A.C. No. 15-02132-03641D
through 15-02132-03644D

Dotiki Mine

Docket No. LAKE 91-713
A.C. No. 11-02662-03613D

Pattiki Mine

ORDER DENYING MOTION
TO VACATE CITATIONS

On May 26, 1992, the above named Contestants filed a motion to vacate the 87 citations issued to them by the Secretary of Labor on April 4, 1991. The citations alleged a violation of 30 C.F.R. 70.209(b) or 71.209(b) because the respirable dust samples submitted by Contestants had been altered by removing a portion of dust from the sample. As grounds for the motion Contestants state that the Secretary failed to issue the citations with the "reasonable promptness" required by section 104(a) of the Mine Act. The motion was accompanied by a memorandum in its support and a 57 page appendix which included affidavits, MSHA documents, and the

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Secretary's response to discovery requests. The Secretary filed a response to the motion on June 8, 1992.

Motion for Summary Decision

The facts and legal principles applicable to this motion are similar to those involved in the motion to vacate citations filed by Southern Ohio Coal Company (SOCCO) and Windsor Coal Company (Windsor) which was denied by an order issued May 22, 1992. As in the SOCCO/Windsor order, the motion to vacate citations here is treated as a motion for summary decision under Commission Rule 64(b). It may be granted only if the entire record shows that there is no genuine issue as to any material fact and movants are entitled to summary decision as a matter of law.

Facts

The respirable dust samples which resulted in the 87 contested citations were taken between August 15, 1989, and February 25, 1991. Robert Thaxton made the determination in the case of each sample that it showed an abnormal white center which established tampering. Thaxton received the samples between August 31, 1989, and March 11, 1991.

In November 1989, Howard Stone, Webster County Coal Safety Director, mailed the dust samples for the Dotiki Mine to MSHA. MSHA notified him of the results for all but one unit. When he asked MSHA about the omission, he was told that he had not submitted the correct number of samples. He therefore submitted a replacement sample. However, when the citations were issued on April 4, 1991, he noted that the sample for the allegedly missing unit was cited as exhibiting an abnormal white center.

In early 1991, Alan Smith, Safety Director at Mettiki Coal Corporation, asked MSHA whether Mettiki had submitted any samples containing AWCs and he received a negative reply. However, Mettiki was issued two citations on April 4, 1991, for samples taken in February 1990, which had been reviewed by Thaxton in March 1990.

Two potential witnesses for Contestants have died: the sole employee in the Safety Departments of Permac and Race Fork, who died in September 1991, and an employee of Webster County who was sampled in a designated occupation and who died in March 1991. Another potential witness of Webster County retired in December 1991. I find that there is no genuine issue as to these material facts.

Reasonable Promptness

In my SOCCO/Windsor order, I concluded that the Secretary established adequate justification for her 4-month delay in issuing the citations, namely, her wish to avoid premature disclosure of a pending criminal investigation. The same consideration applies to the motions before me now. I conclude that the Secretary has established adequate justification for the delay in their issuance: the government's interest in avoiding disclosure of a pending criminal investigation. The same interest justifies the Secretary's concealment and disclaimer regarding the existence of AWCs in response to Contestants' inquiries.

Contestants have advanced the same arguments concerning prejudice as were advanced by SOCCO and Windsor, with the additional argument that two potential witnesses (one for Permac and Race Fork, and one for Webster County) have died and clearly are not available to testify. Although Elbert Asbury of Permac and Race Fork died almost 6 months after the citations were issued, during which time his testimony could have been preserved, and the testimony of Marvin Forbes (who died prior to the issuance of the citations) would be of dubious relevance (Forbes apparently was a sampled miner), it is hard to argue that their unavailability has not limited Contestants' capacity to defend themselves in these proceedings. The question is whether the limitation is so prejudicial that fairness requires that the citations be vacated. As I previously noted, since Asbury's death occurred after the citations were issued, his testimony could have been preserved. With respect to Forbes' death, Contestants' have not shown what Forbes' potential testimony might have been, or that he was indeed the subject of a cited sample. Therefore, I conclude that the Secretary's delay did not result in prejudice to Contestants, and that the proceedings can be fairly determined on their merits.

Based on the above considerations and the considerations in the SOCCO/Windsor order, I conclude that Contestants have not shown that the delay in issuing the contested citations was prejudicial to their ability to defend themselves in these proceedings, and consequently, they are not entitled to summary decision as a matter of law.

ORDER

Accordingly, the motion to vacate citations filed on behalf of Contestants Mettiki, Permac, Race Fork, Pontiki, Webster County, and White County are DENIED.

James A. Broderick
Administrative Law Judge