

CCASE:

JIM WALTERS RESOURCES V. SOL (MSHA)

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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

JIM WALTERS RESOURCES, INC.,  
CONTESTANT

v.

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

Contest of Citation

Docket No. SE 80-43-R

No. 3 Mine

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

v.

JIM WALTERS RESOURCES,  
RESPONDENT

Civil Penalty Proceeding

Docket No. SE 80-141

A.C. No. 01-00758-03058F

No. 3 Mine

DECISION

Appearances: Robert W. Pollard, Esq., Birmingham, Alabama, for Jim Walters  
Resources, Inc.;  
Murray A. Battles, Esq., Birmingham, Alabama, for Secretary  
of Labor

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This action was commenced on December 26, 1979, when Jim Walters Resources, Inc., (hereinafter Jim Walters) filed a notice of contest of a citation issued on November 23, 1979, under section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 814(a) (hereinafter the Act). Upon completion of prehearing requirements, the contest of citation was heard in Birmingham, Alabama, on July 22, 1980. H.E. Melhorn and William Pitts testified on behalf of the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA). Frederick Carr, Jesse E. Cooley, and Thomas H. Coleman testified on behalf of Jim Walters. Both parties submitted posthearing briefs. On October 10, 1980, MSHA filed a proposal for assessment of a civil penalty based on the citation which is here contested by Jim Walters. Because the two cases involve similar issues of law and fact, pursuant to 29 C.F.R. 2700.12, I order the cases consolidated.

ISSUE

The issue in this case is whether the citation for violation of 30 C.F.R. 75.200 was properly issued.

APPLICABLE LAW

Section 104(a) of the Act, 30 U.S.C. 814(a), provides in pertinent part as follows:

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

30 C.F.R. 75.200 provides:

Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives.

#### STIPULATIONS

The parties stipulated the following:

1. Jim Walters is the owner and operator of the No. 3 mine in question.
2. The No. 3 mine is subject to the Federal Mine Safety and Health Act of 1977.
3. The Administrative Law Judge has jurisdiction of this proceeding, pursuant to Section 105 of the Act.
4. The Citation in question and the Termination were properly served on Jim Walters by a duly authorized representative of the Secretary and will be admitted into evidence as authentic.

#### FINDINGS OF FACT

I find that the evidence of record establishes the following facts:

1. The No. 3 Mine is owned and operated by Jim Walters.
2. Inspector H. E. Melhorn, who issued the subject citation, was a duly authorized representative of the Secretary of Labor.
3. On November 21, 1979, a fatal roof fall accident occurred at the No. 3 Mine in the face area of No. 3 entry, No. 6 section.
4. At the time of the accident, the crew had cut approximately 19 feet inby the last permanent support. In order to extend the line curtain, one temporary support had been set approximately 5 feet inby the last permanent support and approximately 5 feet from the nearest rib.
5. The victim was attempting to set a second temporary support. He walked on the wide side of the first temporary support (that is, not between the temporary support and the nearest rib) about 5 feet inby the first temporary support. At all times he was within 5 feet of the first temporary support.
6. As he was attempting to set the second temporary support, the victim was struck and killed by a rock which fell from the roof.
7. Paragraphs 4 and 5 of the Jim Walters roof control plan provide:
  4. When testing roof or installing supports in the face area, the workmen shall be within 5 feet of a temporary or permanent support.

5. Where it is necessary to perform work such as extend line curtains or ventilating devices inby the roof bolts or to make methane tests inby the roof bolts, a minimum of two temporary supports shall be installed. This minimum is applicable if they are within 5 feet of the face or rib and the work is done between such supports and the nearest face or rib.

8. MSHA investigated the accident and on November 23, 1980, Inspector H. E. Melhorn issued Citation No. 237745 which stated:

A fatal roof fall accident occurred in No. 6 Section at the face of No. 3 Entry and based on evidence and testimony the victim traveled from permanent roof support to a point of approximately 10 feet inby under unsupported roof. The approved roof control plan requires that no person advance beyond permanent roof support unless they travel between the rib and temporary supports.

#### DISCUSSION

The issue in this case is whether these facts establish a violation of Jim Walters roof control plan. A violation of the approved roof control plan is a violation of the mandatory standard contained in 30 C.F.R. 75.200. See Zeigler Coal Company v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976). At hearing, MSHA conceded that because the victim was always within 5 feet of the first temporary support, paragraph 4 of the roof control plan was not violated. MSHA contends that paragraph 5 of the plan required that the miner travel between the first temporary support and the nearest rib when walking inby permanent support to set a second temporary support in order to extend the line curtain. MSHA further contends that this part of the plan was violated by the actions of the victim preceding the accident. Jim Walters contends that miners are not required to travel between the rib and temporary support when setting other temporary support; they are only required to stay within 5 feet of permanent or temporary support. Jim Walters therefore asserts that because the victim stayed within 5 feet of the first temporary support, the roof control plan was not violated.

The specific issue in this case then is whether paragraph 5 of the roof control plan requires miners to travel between temporary support and the nearest rib when setting other temporary support in order to extend the line curtain. I find that it does not.

Paragraph 5 of the roof control plan is not clearly drafted. It requires that when such work as extending line curtains or taking methane tests inby permanent support is being done, certain precautions have to be taken. These precautions are that at least two temporary supports must be set; the temporary supports must be within 5 feet of the face or rib; and the work must be done between the nearest face or rib and the temporary supports. Paragraph 5 of the plan does not prescribe how temporary supports

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should be installed. Paragraph 4 of the plan explicitly states what precautions should be taken when roof supports are to be installed. That paragraph requires that when roof supports are being installed, the miner must stay within 5 feet of other temporary or permanent support. That is what was done here. I find that paragraph 4, not paragraph 5 describes what precautions must be taken when roof supports are being installed and in this case, those precautions were taken.

I am mindful that this case involves very unfortunate circumstances and that the primary purpose of the Act is to insure the health and safety of miners. Nevertheless, an operator is entitled to know what is required of it and what conduct constitutes a violation. Here, I have found that the plain wording of the roof control plan did not proscribe the conduct cited. The operator's employees testified that they never interpreted the plan to require what MSHA asserted it required. The MSHA inspector testified that he had previously seen miners travel on the wide side of temporary supports to set other temporary supports and had not cited the operator nor warned the operator that the conduct was in violation of the plan. MSHA in approving Jim Walters plan had the opportunity to require in plain language what it is attempting to require here and it may require it in the future, but it has not done so. I find that the facts of this case do not establish a violation of Jim Walters roof control plan. Therefore, no violation of the Act or mandatory standard has been proven.

#### CONCLUSIONS OF LAW

1. This Administrative Law Judge has jurisdiction over this proceeding pursuant to section 105 of the Act.

2. The evidence of record fails to establish a violation of the approved roof control plan pursuant to 30 C.F.R. 75.200.

3. On November 23, 1980, Citation No. 237745 was improperly issued under section 104(a) of the Act; Citation No. 237745 is vacated; and Jim Walters' contest of citation is granted.

4. Because Citation No. 237745 was improperly issued, the proposal for a civil penalty based on the citation is dismissed.

#### ORDER

WHEREFORE IT IS ORDERED that the contest of Citation No. 237745 is GRANTED and said citation is VACATED.

IT IS FURTHER ORDERED that the proposal for a civil penalty based on Citation No. 237745 is DISMISSED.

James A. Laurenson, Judge