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

JIM WALTER RESOURCES, INC., CONTESTANT	Application for Review
	Docket No. SE 82-34-R
v.	Order No. 0757586 2/19/82
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	No. 7 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. SE 82-53 A/0 No. 01-01401-03041 F
v.	No. 7 Mine
JIM WALTER RESOURCES, INC., RESPONDENT	

Appearances: Robert W. Pollard, Esq., Birmingham, Alabama, and H. Gerald Reynolds, Esq., Tampa, Florida, for Jim Walter Resources, Inc. Frederick W. Moncrief, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Secretary of Labor

DECISION

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

On February 15, 1982, a fatal roof fall occurred at the No. 7 Mine of Jim Walter Resources (the operator). Following an investigation which commenced on February 16, 1982, MSHA on February 19, 1982, issued an imminent danger Order of Withdrawal under section 107(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 817(a) (the Act). The order also alleged that the practice described in the order was proscribed by the approved roof control plan and therefore violated 30 C.F.R. 75.200.

Pursuant to notice, a hearing was held in the Review proceeding in Birmingham, Alabama, on September 21, 1982. William H. Pitts, an MSHA roof control specialist, testified for the Secretary. Ed Melhorn, an MSHA mine inspector, was called as a witness by the operator and Charles J. Hager, III and Frederick Carr also testified on the operator's behalf. A civil penalty case was subsequently filed. Because the civil penalty proceeding and the review proceeding involve the same order, and similar issues of fact and law, they are hereby CONSOLIDATED.

Both parties have filed posthearing briefs. On the basis of the evidence introduced at the hearing and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. At all times pertinent to these proceedings, Jim Walter was the owner and operator of the No. 7 Mine in Tuscaloosa County, Alabama.

2. On February 15, 1982, a fatal roof fall occurred in the subject mine in the face area of No. 4 entry, No. 1 section.

3. An order of withdrawal was issued on February 19, 1982, which alleged that the following condition or practice occurring on February 15, 1982, constituted an imminent danger and a violation of the approved roof control plan:

> A fatal roof fall accident occurred on the No. 1 section at the face of the No. 4 entry and based on evidence and testimony, the victim was installing a support to install line curtain and while installing the support the victim was standing more than 5 feet inby the permanent roof supports and more than 5 feet from the rib or face. The approved roof control plan requires that workmen shall be within 5 feet of the face or rib or permanent supports while extending line curtain.

4. On February 19, 1982, a modification of the order of withdrawal was issued which permitted mining operations to continue "while the following sequence of roof supports are installed to advance the line curtain and to permit MSHA personnel to evaluate this system:" A minimum of two temporary supports are required when any work is performed inby the last row of permanent supports. One must be a jack or timber set no more than 5 feet from the rib and the other the miner head placed against the top. These supports shall be not more than 4 feet apart and not more than 5 feet inby the last row of permanent supports or last temporary support. Any work done inby the last row of roof supports shall be done between such supports and the nearest face or rib.

5. On February 15, 1982, the continuous miner dislodged the last inby safety jack to which the end of the line curtain was attached as the miner was tramming back from the face.

6. The miner operator and miner helper then proceeded inby the permanent supports to reset the jack and reattach the line curtain to it. They travelled on the left side (the "wide side") of the curtain after examining the roof visually and sounding it with a hammer. The miner operator was holding the jack to the right side of it and the helper began tightening the screw while standing on the left side. A roof rock fell brushing the miner operator and knocking him back against the right rib. It fell on top of the helper and killed him. The victim was approximately 7-1/2 feet from the right rib and 5 feet inby the last standing roof jack. He was 10 feet inby the last row of permanent roof supports.

7. The approved roof control plan in effect for the subject mine at the time of the fatality contained the following safety precautions among others:

> "4. When testing roof or installing supports in the face area, the workmen shall be within 5 feet (less if indicated on sketch) of a temporary or permanent support."
>
> "5. When it is necessary to perform any work such as extend line curtains or other 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 only 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. The approved ventilation plan in effect for the subject mine at the time of the fatality required that a line curtain be maintained to within 10 feet of the face. The mine liberated considerable methane which required an exceptionally high velocity and quantity of air to ventilate the face area. Because of this it was necessary to fasten the curtain to the top, the middle, and the bottom of the temporary support.

9. A fatal roof fall occurred at the No. 3 Mine of Jim Walters' on November 21, 1979, under circumstances similar to those involved in this case. A citation was issued in the prior case charging a violation of 30 C.F.R. 75.200 because of failure to comply with the approved roof control plan. The citation was contested before the Commission. After a hearing, Judge James Laurenson found that paragraph 4 of the roof control plan (which is identical to the same paragraph in the roof control plan applicable in this case) did not require that miners travel between the temporary support and the nearest rib when setting supports to extend the line curtain. The Judge granted the notice of contest and vacated the citation. Jim Walters v. Secretary, 2 FMSHRC 3276 (1980).

10. The Secretary states that Judge Laurenson's decision involved circumstances "virtually identical" to those in the case before me.

11. The Secretary did not petition for review of Judge Laurenson's decision.

12. Subsequent to Judge Laurenson's decision, there were discussions between MSHA officials and the operator attempting to clarify the requirements of paragraphs 4 and 5 of the safety precautions in the roof control plan, but no changes were agreed upon.

13. Subsequent to the fatal roof fall involved herein, there have been discussions between MSHA and the operator relating to paragraphs 4 and 5 of the precautions in the approved roof control plan. Specifically, a rewriting of the above paragraphs permitting the use of the miner head as roof support has been discussed, but the plan has not yet been modified.

STATUTORY PROVISION

Section 3(j) of the Act defines an imminent danger as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

REGULATORY PROVISION

30 C.F.R. 75.200 provides as follows:

> 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 inadequately 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.

ISSUES

1. Whether the condition or practice described in the order of withdrawal existed in the subject mine and, if so, whether it constituted an imminent danger.

2. Whether a violation of the approved roof control plan and therefore of 30 C.F.R. 75.200 was established.

(a) Whether the Secretary is estopped or barred from asserting that the condition is a violation of the standard by reason of the decision in Jim Walters Resources Inc., 2 FMSHRC 3276 (1980).

3. If a violation of the mandatory standard was established, what is the appropriate penalty therefor?

CONCLUSIONS OF LAW

Jim Walter Resources, Inc. was subject to the provisions of the Federal Mine Safety and Health Act in the operation of the No. 7 Mine at all times pertinent hereto, and the undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

IMMINENT DANGER

The existence of an imminent danger and the propriety of an imminent danger order of withdrawal do not depend upon the existence of a violation of a mandatory standard. Freeman Coal Mining Corporation, 2 IBMA 197. An imminent danger under the Act is not limited to situations involving "immediate danger" but includes conditions that "would induce a reasonable man to estimate that, if normal operations %y(3)4B proceeded, it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger." Old Ben Coal Corp. v. Interior Bd. of Mine Op. App., 523 F.2d 25, 32 (7th Cir. 1975), quoting Freeman Coal Mining Co. v. Interior Bd. of Mine Op. App., 504 F.2d 741, 743 (7th Cir. 1974).

The order under review here alleges that a miner was standing more than 5 feet inby the permanent roof supports and more than 5 feet from the rib or face, and the evidence introduced at the hearing establishes that such were the facts (Finding of Fact No. 6). MSHA roof control specialist Pitts considers this practice equivalent to travelling or working under unsupported roof and therefore an imminent danger. His opinion was based in part on the fatality which occurred here and the one which occurred in Jim Walters No. 3 Mine referred to in Finding of Fact No. 9.

I conclude that Mr. Pitt's opinion that the condition or practice which was shown to exist here would probably result in an injury was certainly a reasonable one. The evidence is clear that the condition or practice described not only could reasonably be expected to cause death or serious physical harm, but that in fact it did cause or at least contribute to the death of two of the operator's employees. The contention of the operator that the rib conditions may also present a hazard in no way negates the danger posed by unsupported roof. The fact that the condition or practice was permitted by the roof control plan (if it was) does not negate the existence of an imminent danger. Therefore, I conclude that working or travelling more than 5 feet inby permanent supports and more than 5 feet from a rib or face is an imminent danger and the withdrawal order was properly issued.

The operator argues that the practice cannot constitute an imminent danger since it has been followed for many years in the subject mine and in other mines in the district. Non sequitur. The fact that an imminently dangerous condition has existed and been tolerated is no argument for its continuance. The operator also argues that the 3 day delay between the investigation and the issuance of the order indicates that the condition was not imminently dangerous. MSHA's explanation for the time period is that there were discussions with State officials, Mine Management and Union representatives concerning the practice, and that when Mine Management stated that the practice would continue, it was decided to issue the withdrawal order. Clearly, the withdrawal order should have been issued immediately after the investigation, but the delay hardly establishes that the condition or practice was not imminently dangerous.

RES JUDICATA/COLLATERAL ESTOPPEL

Judge Laurenson's decision, which involved, as the Solicitor states, "virtually identical circumstances" to those in the case before me, held that paragraph 4 of the precautions in the roof control plan governs when roof supports are being installed to extend the line curtains. Since paragraph 4 does not require that miners stay within 5 feet of a rib or face, he vacated the citation and dismissed the civil penalty proposal. Judge Laurenson's decision followed a formal adversary hearing; both parties filed posthearing briefs. The government did not file a petition for discretionary review with the Commission. Counsel states "that some consideration was given to whether or not to file a [petition for review]" but in any event, it was not filed. Therefore, Judge Laurenson's decision was the final decision of the Commission.

Following that decision MSHA could have petitioned for review (and appealed to the Court of Appeals if the petition was denied) or it could have proceeded to modify the roof control plan. It did neither, but rather chose to ignore the decision and yet continue to enforce its interpretation of the roof control plan which had been rejected. The parties to the two proceedings are the same, the roof control plan has not been changed, the

circumstances in the two cases are "virtually identical." It would appear that if res judicata is ever applicable to administrative proceedings, it is applicable here.

The Supreme Court stated in United States v. Utah Construction and Mining Co., 384 U.S. 394 (1966) at 421:

> When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.
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> * * * * * * *
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> In the present case, the Board was acting in a judicial capacity when it considered the %y(3)4B claims, the factual disputes resolved were clearly relevant to issues properly before it and both parties had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any adverse findings. There is, therefore, neither need nor justification for a second evidentiary hearing on these matters already resolved as between the two parties.

See also Mitchell v. National Broadcasting Co., 553 F.2d 265 (2nd Cir. 1977); Atlantic Richfield Company v. Federal Energy Administration, 556 F.2d 542 (T.E.C.A. 1977); Bowen v. United States, 570 F.2d 1311 (7th Cir. 1973); Continental Can v. Marshall, 603 F.2d 590 (7th Cir. 1979). In the Continental Can case, the court held (594-5) that the tests are whether the issue raised in the subsequent case is the same as that decided in the prior case; whether the issue was actually litigated; whether the decision in the prior case depended on the resolution of the issue; and whether the decision was final. The Secretary asserts in his brief that Judge Laurenson's decision was not "final" and refers to Commission Rule 73 which states that an unreviewed decision of a judge is not a precedent. This rule has nothing to do with finality or res judicata, but with stare decisis, a wholly different doctrine. I conclude, following the tests in Continental Can that Judge Laurenson's decision is res judicata and the Secretary is precluded from challenging it in the proceeding before me.

It is grossly unfair to assert, as the Solicitor does in his brief, that

> "What is at stake, as these two cases dramatically illustrate, is human life. However well intentional management may have been in relying on the prior decision, the cost of that reliance was a life. Such a result is not to be tolerated by a law the stated purpose of which is the preservation of life."

Judge Laurenson's decision was issued November 14, 1980. The fatal injury involved herein occurred February 15, 1982. Since the Secretary chose not to appeal, he had ample opportunity to effect changes in the roof control plan. He failed to do so.

Since I have concluded that Judge Laurenson's decision is res judicata as between the parties, I conclude that a violation of 30 C.F.R. 75.200 has not been shown. Further discussion of the merits of the case or of Judge Laurenson' decision is unnecessary and inappropriate.

PENALTY

Since I have concluded that a violation of a mandatory safety standard was not established, the penalty proceeding must be dismissed. An imminent danger order of withdrawal will not per se support a penalty assessment.

ORDER

Based upon the above findings of fact and conclusions of law, IT IS ORDERED:

1. The withdrawal order issued under section 107 of the Act, as a withdrawal order is AFFIRMED.

2. The withdrawal order, insofar as it charges a violation of 30 C.F.R. 75.200, is VACATED.

3. The penalty proceeding is DISMISSED.

James A. Broderick
Administrative Law Judge