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SOL (MSHA) V. JIM RESOURCES
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS Docket No. SE 84-11 A.C. No. 01-00758-03561
v.	
JIM WALTER RESOURCES, INC., RESPONDENT	Docket No. SE 84-15 A.C. No. 01-00758-03559 Docket No. SE 84-16 A.C. No. 01-00758-03560 Docket No. SE 84-23 A.C. No. 01-00758-03569 No. 3 Mine

DECISION

Appearances: Terry Price, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Petitioner; R. Stanley Morrow, Esq., and H. Thomas Wells, Esq., Birmingham, Alabama, for Jim Walters Resources, Inc., Respondent.

Before: Judge Merlin

These cases are petitions for the assessment of civil penalties filed under section 110(a) of the Act by the Secretary of Labor against Jim Walters Resources, Inc. for alleged violations of the mandatory safety standards.

Stipulations

At the hearing, the parties agreed to the following stipulations which were accepted (Tr. 5-6):

1. Jim Walters Resources, Inc., is the owner and operator of the subject mine.

2. The operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The presiding administrative law judge has jurisdiction over these proceedings.

4. The inspectors who issued the subject citations were duly authorized representatives of the Secretary.

5. The subject citations were properly served on the operator.

6. Copies of the citations may be admitted into evidence for the purpose of establishing their issuance but not for the truthfulness or relevancy of the statements asserted therein.

7. Imposition of penalties will not affect the operator's ability to continue in business.

8. The alleged violations were abated in a timely fashion.

9. The operator's prior history is average.

10. The operator's size is large.

11. The inspector and the operator's witnesses are accepted as experts in mine health and safety.

By agreement of both parties, all the docket numbers were consolidated for hearing and decision (Tr. 5).

SE 84-11

Citation No. 2192159

During the course of the inspector's testimony, it became apparent that the inspector was not familiar with the portion of the safeguard notice upon which his citation was based (Tr. 21-25). The Solicitor moved to vacate the citation and withdraw the penalty petition with respect to it. The motion was granted from the bench (Tr. 25).

The citation is Vacated and no penalty is assessed.

Citation No. 2310279

The subject citation dated September 27, 1983, describes the condition or practice as follows:

> From the North and West V are the way [sic] to the end of the tail track on Section 007-0 there were [sic] material in the form of rails--metal bands--timbers--crib blocks in the required clearance along the track. Safeguard No. 1 T.J.I. was issued on 7-27-76.

The citation was originally issued under 30 C.F.R. 75.1403-8(b). By modification dated May 18, 1984, the citation was changed to cite 30 C.F.R. 75.1403-8(d), which provides as follows:

> (d) The clearance space on all track haulage roads should be kept free of loose rock, supplies, and other loose materials.

The citation was based upon Safeguard Notice 1 TJI dated July 27, 1976, which stated in pertinent part as follows:

> The clearance space on all track haulage roads should be kept free of loose rock, supplies and other loose materials.

The inspector testified that debris was present on the track haulage road for 1 1/2 miles in the described area (Tr. 27-28). He said the concentration of debris was sporadic along the length of the track but became more cluttered inby toward the section (Tr. 28). The mantrip was running on the debris (Tr. 39). The operator's witness who accompanied the inspector disagreed that the mantrip ran over the materials or that the condition worsened (Tr. 41-42) but he admitted that 5,000 feet of the track were bad (Tr. 43-45). I find the inspector's testimony more persuasive and accept it. The citation properly cited the condition as a violation under 30 C.F.R. 1403-8(d). Moreover, the citation fits squarely within the terms of the safeguard notice quoted above.

I accept the inspector's testimony that a mantrip could hit some of the debris (Tr. 38-39). I find the testimony of the inspector that the mantrip was riding over the rails

more persuasive than the operator's contrary evidence (Tr. 39, 41). The violation was serious. Moreover, I conclude the operator was negligent. The violation was significant and substantial because it exposed miners to the reasonable likelihood of a serious injury whenever they rode the mantrip.

I have carefully reviewed the operator's arguments regarding the underlying notice to provide safeguards and find them to be without merit. I recognize that safeguards must be narrowly construed. However, the language of 75.1403-8(d) is plainly mandatory and the language used is easily susceptible of objective interpretation and uniform application. The subject citation as amended was properly based upon the safeguard notice. The operator had notice and knew exactly what it was charged with. Finally, the operator's arguments regarding the safeguard notice are raised for the first time in the post-hearing brief which is too late. If I had found any merit in the operator's assertions, the Solicitor would have been entitled to an opportunity to respond.

The Solicitor's recommendation of a $20 penalty is unacceptable. As already set forth, the inspector's testimony makes clear this was a serious violation and that the operator was remiss in allowing it to exist. Thus, the representations in the Solicitor's brief that negligence was low and that only one person would be affected is contrary to the evidence the Solicitor himself introduced at the hearing. Penalty proceedings before the Commission are de novo and penalties must be assessed in accordance with the six statutory criteria set forth in section 110(i) of the Act. The original assessment made by MSHA is not binding upon this Commission. This is particularly true when the original assessment is one of the so-called "single penalty assessments" of $20 made before the hearing in a case where a hearing is actually held.

A penalty of $100 is assessed.

Citation No. 2192262

The subject citation dated September 8, 1983, describes the condition or practice as follows:

> A clear travelway of at least 24 inches on each side of the North Mains No. A and B belt was not maintained in that large rocks, rolls of belt, and belt structures were obstructing the walkways. Safeguard No. 0658641 was issued by T.J. Ingram on 09-08-81.

Safeguard No. 0758641 dated September 8, 1981, states as follows:

> 24 inches of travel space was not provided between the No. 3 longwall belt and the right rib along the pillar inby No. 7 leader.
>
> 24 inches of travel shall be provided on both sides of the belt.

30 C.F.R. 75.1403-5(g) provides:

> (g) A clear travelway at least 24 inches wide should be provided on both sides of all belt conveyors installed after March 30, 1970. Where roof supports are installed within 24 inches of a belt conveyor, a clear travelway at least 24 inches wide should be provided on the side of such support farthest from the conveyor.

The inspector testified that the belt in question was used only to transport coal and I so find (Tr. 48, 51). The Solicitor takes the position that 30 C.F.R. 75.1403-5(g) covers coal-carrying conveyor belts and the operator argues that it does not (Solicitor's Brief p. 4, Operator's Brief pp. 11-13). After extensive consideration Judge Koutras decided this standard does not apply to coal-carrying belt conveyors. Monterey Coal Company, 6 FMSHRC 424, 451-458 (February 1984). I believe Judge Koutras was correct. Section 75.1403 establishes the authority to issue safeguards "with respect to the transportation of men and materials". Section 75.1403 is contained in Subpart O, which is entitled "Hoisting and Mantrips", terms relating to the movement of men and material. Accordingly, I do not believe coal-carrying belts are covered by the cited section. If the Secretary believed coal-carrying conveyor belts properly could be covered under Subpart O, it would have been a simple matter for him to specifically include them. This was not done. I note that coal-carrying belts are specifically mentioned in 30 C.F.R. 75.303 ordering pre-shifts. Congress was explicit in making certain requirements applicable to these belts in other instances. Here, all indications are that Congress did not intend to have the safeguard provisions apply to coal-carrying belts.

In light of the foregoing, Citation No. 2192262 is Vacated and no penalty is assessed.

SE 84-15

Citation No. 2310262

The subject citation dated September 20, 1983, describes the condition or practice as follows:

> The approved plan for storage of the S.C.S.R. rescuers was not being complied with in that 3 rescuers were found at the North tool room and no personnel was at the location. 1 self rescuer was found hanging alongside of the track haulage in the North West Mains and no personnel was present in the vicinity.

30 C.F.R. 75.1714-2 provides as follows:

> (a) Self-rescue devices shall be used and located as prescribed in paragraphs (b) through (f) of this section.
>
> (b) Except as provided in paragraph (c), (d), (e), or (f) of this section, self-rescue devices shall be worn or carried at all times by each person when underground.
>
> (c) Where the wearing or carrying of the self-rescue device is hazardous to the person, it shall be placed in a readily accessible location no greater than 25 feet from such person.
>
> (d) Where a person works on or around equipment, the self-rescue device may be placed in a readily accessible location on such equipment.
>
> (e) A mine operator may apply to the District Manager under 30 CFR 75.1101-23 for permission to place the self-contained self-rescue device more than 25 feet away.
>
> (1) The District Manager shall consider the following factors in deciding whether to permit an operator to place a self-contained self-rescue device more than 25 feet from a miner:

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(i) Distance from affected sections to surface,

(ii) Pitch of seam in affected sections,

(iii) Height of coal seam in affected sections,

(iv) Location of escapeways,

(v) Proposed location of self-contained self-rescuers,

(vi) Type of work performed by affected miners,

(vii) Degree of risk to which affected miners are exposed,

(viii) Potential for breaking into oxygen deficient atmospheres,

(ix) Type of risk to which affected miners are exposed,

(x) Accident history of mine, and

(xi) Other matters bearing upon the safety of miners.

(2) Such application shall not be approved by the District Manager unless it provides that all miners whose self-contained self-rescuer is more than 25 feet away shall have, in accordance with paragraphs (b), (c), and (d) of this section, at all times while underground, a self-rescue device approved under Subpart I of Part 11 of this chapter or Bureau of Mines Schedule 14F, Gas Masks, April 23, 1955, as amended (Part 13, 30 CFR, 1972 ed.) sufficient to enable each miner to get to a self-contained self-rescuer.

(3) An operator may not obtain permission under paragraph (e) of this section to place self-contained self-rescuers more than 25 feet away from miners on mantrips into and out of the mine.

> (f) If a self-contained self-rescue device is not carried out of the mine at the end of a miner's shift, the place of storage must be approved by the District Manager, a sign with the word "SELF-RESCUER" or "SELF-RESCUERS" shall be conspicuously posted at each storage place, and direction signs shall be posted leading to each storage place.
>
> (g) Where devices of not less than 10 minutes and 1 hour are made available in accordance with 75.1714-1(a)(3)(ii) or 75.1714-1(b)(2), such devices shall be used and located as follows:
>
> (1) Except as provided in paragraphs (c) and (d) of this section, the device of not less than 10 minutes shall be worn or carried at all times by each person when underground, and
>
> (2) The 1-hour canister shall be available at all times to all persons when underground in accordance with a plan submitted by the operator of the mine and approved by the District Manager. When the 1-hour canister is placed in a cache or caches, a sign with the word "SELF-RESCUERS" shall be conspicuously posted at each cache, and direction signs shall be posted leading to each cache.
> Sec. 101, Pub.L. 91-173 as amended by Pub.L. 95-164, 83 Stat. 745 as amended by 91 Stat. 1291 (30 U.S.C. 811))
> [43 FR 54246, Nov. 21, 1978]

The permission which the operator received from MSHA regarding the placement of self-contained self-rescuers provides at paragraph 10 (MSHA Exhibit 3E, p. 2):

> All miners outby working sections shall be within ten (10) minutes travel time of a self-contained self-rescuer when travelled at a normal pace for that general area of the mine. The self-contained self-rescuer may

> be placed with their lunch containers, or in a designated area during the shift. At the end of the shift, the SCSR's for these miners will be left near the bottom of the elevator and will be stored in a designated area which will be identified with a conspicuous "Self-Rescuer" sign.

The inspector's testimony demonstrates that MSHA has failed to make its case with respect to the three self-contained self-rescuers in the tool room. As set forth in the plan, the operator is required to have the self-rescuers within 10 minutes' walking distance of miners who are outby the working sections. The inspector testified that he looked up and down the track haulage which is the primary entrance and exit and did not see anyone (Tr. 69-70). He assumed that because he saw no one in the track entry, the individuals who left the three self-rescuers were electricians who went somewhere else more than 10 minutes away (Tr. 81-82). This is not necessarily so. The inspector did not look anywhere but the track entry (Tr. 82). In particular, he did not look in the belt entry where he admitted there could have been belt cleaners working within 10 minutes' walking distance (Tr. 82-85). Accordingly, no violation can be found with respect to the three self-rescuers.

The situation with respect to the fourth self-rescuer is different. The night before the inspector issued the citation, he saw it hanging up alongside the track haulage in the same place it was when he issued the citation (Tr. 71-73). The inspector so informed the operator's safety inspector who accompanied him (Tr. 94). Based upon the evidence, the inference is warranted that the self-rescuer had not been moved and was in the same place the entire time. This violated that section of paragraph 10 quoted above, which requires that self-rescuers for miners working outby working sections must be left near the bottom of the elevator at the end of the shift.

The inspector testified that in his experience, extra self-rescuers were not taken on the section (Tr. 114-116). There is one self-rescuer per miner on the section (Tr. 117). He has been at this mine frequently and has seen this practice (Tr. 117). Therefore, because one self-rescuer was left behind, someone must have travelled from the section to the bottom near the elevator without one. I accept the inspector's uncontradicted testimony that this is a gassy mine (Tr. 105, 107). Based upon the foregoing, I conclude the violation was serious and that the operator was negligent.

I further conclude that this violation was significant and substantial because traveling to the bottom near the elevator without a self-rescuer in this gassy mine would expose a miner to the reasonable likelihood of reasonably serious harm.

A penalty of $125 is assessed.

SE 84-16

Citation No. 2310209

The citation dated October 4, 1983, describes the condition or practice as follows:

> The approved plan for storage of the S.C.S.R. Rescuers was not being complied with in that 4 rescuers were found in a crosscut approximately 120 feet inby the central storage area and 2 rescuers were found on the No. 2 section that were left after the shift change and no personnel was present in vicinity.

The mandatory standard cited is 30 C.F.R. 75.1714-2(a), quoted above. That part of paragraph 10 of the plan quoted above, which provides that at the end of the shift self-rescuers will be left near the bottom of the elevator, was relied upon by the inspector (Tr. 109).

The inspector testified that he found four self-rescuers lying in a cross-cut and two more hanging up on the section (Tr. 102). On the shift he issued the citation, the section was idle and no one was working or even present on the section (Tr. 105). The prior shift had been a maintenance rather than a coal producing shift (Tr. 113). The inspector believed the self rescuers had been left from some previous shift but he had no idea how long the six had been where he found them (Tr. 103, 107-108). Given that there was no one on the section, the hazard was not that self-rescuers were located more than 10 minutes away from the miners (Tr. 103). Indeed, the inspector stated that because the self-rescuers were centrally located, they could have been reached within 10 minutes (Tr. 108). According to the inspector, the violation was that the self-rescuers were not left near the bottom of the elevator as required by paragraph 10 of the plan.

I accept the inspector's uncontradicted testimony that the number of miners on the section and the number of self-rescuers were the same. The inference is that men must have

traveled from the section to the elevator bottom without self-rescuers. Accordingly, a violation existed. It was serious because it exposed the men in this gassy mine to danger for the 30 to 35 minutes it would take them to reach the elevator. The operator was especially negligent because six self-rescuers and six miners were involved. Clearly, the operator should be more vigilant to make sure the men do not leave the section without their self-rescuers. The violation was significant and substantial because in this gassy mine and on this section where there has been ignition after ignition, travelling to the elevator bottom without self-rescuers exposed miners to the reasonable likelihood of reasonably serious harm.

A penalty of $250 is assessed.

ORDER

In accordance with the foregoing, the operator is hereby Ordered to pay the following penalties within 30 days from the date of this decision:

Docket No.	Citation	Violation		Penalty
SE 84-11	2192159	30 C.F.R.	75.1403-8(d)	None
SE 84-23	2310279	30 C.F.R.	75.1403-8(d)	$100
	2192262	30 C.F.R.	75.1403-5(g)	None
SE 84-15	2310262	30 C.F.R.	75.1714-2(a)	$125
SE 84-16	2310209	30 C.F.R.	75.1714-2(a)	$250
			TOTAL	$475

Paul Merlin
Chief Administrative Law Judge