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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 86-48
A.C. No. 01-01247-03692

v.

Docket No. SE 86-55
A.C. No. 01-01247-03698

JIM WALTER RESOURCES, INC.,
RESPONDENT

JIM WALTER RESOURCES, INC.,
CONTESTANT

CONTEST PROCEEDINGS

Docket No. SE 86-13-R
Order No. 2605577; 10/29/85

v.

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

Docket No. SE 86-14-R
Order No. 2605598; 10/29/85

Docket No. SE 86-16-R
Order No. 2605676; 11/7/85

Docket No. SE 86-17-R
Order No. 2605679; 11/14/85

No. 4 Mine

DECISION

Appearances: Harold D. Rice, Esq., and R. Stanley Morrow,
Esq., Jim Walter Resources, Inc., Birmingham,
Alabama for Contestant;
George D. Palmer, Esq., and William Lawson, Esq.,
Office of the Solicitor, U.S. Department of Labor,
Birmingham, Alabama, for Respondent.

Before: Judge Melick

These consolidated cases are before me under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," to challenge the issuance by the Secretary of Labor of six citations and withdrawal orders to Jim Walter Resources, Inc., (Jim Walter) and for review of civil penalties proposed by the Secretary, for the violations alleged therein. At hearing the parties proposed to settle all but two of the withdrawal orders. The contested orders, Order Nos. 2605598 and 2605676 issued under section 104(d)(2)

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of the Act, were thereafter the subject of evidentiary hearings.(FOOTNOTE 1)

Jim Walter acknowledges the violations cited in these orders and that the requisite underlying section 104(d)(1) orders were pending before any clean inspection had been completed. The validity of the orders and the issues before me are thus limited to whether the violations were caused by an "unwarrantable failure" of the operator to comply with the cited standard and the amount of civil penalty to be assessed in accordance with section 110(i) of the Act. See footnote 1 supra.

Order No. 2605598 charges a violation of the standard at 30 C.F.R. 75.316 and states as follows:

"The current approved Ventilation System and Methane and Dust Control Plan was not being complied with in the cross-cut to the right of survey station 6498 located in the No. 2 entry on the No. 13 section in that only 10,920 cubic feet of air per minute was measured at the inby end of the line curtain. The approved plan required 18,000 cubic feet of air per minute while coal is being cut mined or loaded. Coal was being cut in the face of the entry."

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It is not disputed that MSHA Inspector Ona Jones was in the cited area during the course of his inspection on October 23, and 24, 1985 and on both occasions had informed representatives of management that there was insufficient air to mine coal at the faces of the No. 1 and 2 entries. These mine officials told Jones that they would "get it fixed."

Jones returned to the section on October 29, when he learned that coal was being mined. Upon his arrival he saw the continuous miner backing out of the face. It had "gassed out" after encountering an excess of 1% methane. A methane check with a methanometer on an extended probe showed 5.1% methane on the off curtain side and 1.7% on the other side. The miner operator told Jones that they had also "gassed out" earlier that shift but they had hung a wing curtain and cleared the methane. The shift had begun at 11:00 p.m. on the 28th and it was then 1:41 a.m.

Section foreman Steve Goldman told Jones that he measured 18,000 cfm (cubic feet per minute) when he brought the miner into the face. It is stipulated that 18,000 cfm was the minimum air volume required by the ventilation plan at the inby end of the line curtain while coal is being cut, mined or loaded.

Inspector Jones' determination of "unwarrantable failure" was based upon the amount of work he thought would have to be done to bring the ventilation up to the 18,000 cfm requirement. It is not disputed that the gap in the line curtain along the roof line (4 to 5 feet long and up to 1 foot high) found when the order was issued had existed since October 23rd. This is the same condition Jones reported to management on October 23rd and October 24th. Air was leaking through that gap and across the top of the line curtain in 3 or 4 areas where the curtain had slackened up to 4 inches from the roof. In one area the line curtain was hanging 8 to 12 inches from the roof along a horizontal distance of approximately 3 feet.

In addition, the "run-through-drop" (a 20 foot-wide passageway through the line curtain) was just hanging "side-by-side." This also had to be sealed with line curtain to prevent excessive air leakage in the abatement process. Finally, Jones found an area of air leakage located 12 feet inby the jack in which the curtain had bowed into the rib. Additional jacks had to be inserted to prevent this bowing effect and this correction alone increased the ventilation to 14,805 cfm. Once the line curtain was pulled to the roof and the run-through-drop was sealed the ventilation improved to 19,902 cfm. It was Jones' opinion that the section foreman should at least have seen the bow in the line curtain which in itself seriously restricted the air flow.

In Ziegler Coal Company, 7 IBMA 280 (1977) the Interior Board of Mine Operations Appeals interpreted the term "unwarrantable failure" as follows:

"An inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator new or should have known existed or which it failed to abate because of lack of due diligence, or because of indifference or lack of reasonable care."

The Commission has concurred with the Board's definition to the extent that an unwarrantable failure to comply may be proven by a showing that the violative condition or practice was not corrected or remedied, prior to the issuance of a citation or order, because of indifference, willful intent, or serious lack of reasonable care. United States Steel Corporation v. Secretary of Labor, 6 FMSHRC 1423 at 1437 (1984).

Within this framework I must agree with the "unwarrantable failure" determination by Inspector Jones. Jones had clearly warned Jim Walter's management some 5 days before the instant violation of serious defects in its ventilation of the cited section. Indeed one of the defects causing leakage of ventilation on the date of the violation had on two prior occasions, been pointed out to Jim Walter management by Jones.

In addition, on the same shift in which the violation herein was cited, and only a short time before, the section had "gassed out". In other words the methane level had then exceeded 1% and the continuous miner was removed from the face and shut down. This problem should have triggered a complete corrective response by the section foreman including an air reading. This was particularly important because the section foreman acknowledged that he had obtained only the bare minimum 18,000 cfm of ventilation at the commencement of his shift and should therefore have been on notice that the slightest impediment to the ventilation system would have caused the section to fall below that minimum. Thus when the line curtain developed a bow into the rib the section foreman should have taken immediate action to assure proper ventilation. Under the circumstances the violative condition was not corrected or remedied prior to the issuance of the order at bar because of indifference, willful intent, or serious lack of reasonable care. The violation was therefore caused by the "unwarrantable failure" of the operator to comply with the law. For the same reasons I find that the mine operator was negligent.

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The violation also presented a serious hazard. It is undisputed that if the ventilation remained insufficient, methane could rapidly build-up to explosive levels in the face area and ignition sources such as the bits on the continuous miner could generate sparks thereby causing an ignition or an explosion. The hazard was particular grave under the circumstances because of the large amounts of methane liberated at this mine i.e, 30 million cubic feet in each 24 hour period. Indeed, according to MSHA supervisory mining engineer, William Meadows, the No. 4 Mine was in the top 5% in total face liberation of methane of all mines in the country. Under the circumstances serious injuries were reasonably likely to occur. The violation was accordingly "significant and substantial". Secretary v. Mathies Coal Co., 6 FMSHRC 1 (1984).

Order No. 2605676 also alleges a violation of the mine ventilation plan under the standard at 30 C.F.R. 75.316. The order charges as follows:

"The current approved Ventilation Methane and Dust Control Plan was not being complied with on the No. 8 section (008A0) in that only 25,600 cubic feet of air per minute was measured in the last open cross-cut on the right side. The plan requires air in the last open cross-cut be maintained at a minimum of 30,000 cfm on each coal producing split."

MSHA inspector Judy McCormick was inspecting the No. 8 section of the No. 4 Mine in the early morning hours of November 7, 1985, when she noticed a temporary stopping in bad repair. It appeared that they were "losing air" through the stopping. She found only 25,600 cfm of air in the last open cross-cut on the right side where 30,000 cfm was required. McCormick also found 2 slits in the line curtain 18 inches high and 1 foot apart which were allowing air to escape. She also noted that the curtain was neither flush against the rib nor attached properly at the roof.

At the time McCormick issued her order, coal was not being produced and little methane was present. She observed however that if mining had resumed in the faces or if coal was loaded there could have been a problem. She also noted that equipment and miners were available to resume operations in those entries at any time. With insufficient ventilation McCormick opined that methane could build up and, should equipment subsequently enter the section, ignitions could occur leading to fire or explosions.

McCormick alleged that the violation was caused by "unwarrantable failure" because she believed the foreman should have seen that the temporary stopping was not adequate

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to prevent air leakage. The stopping was in the track entry where the foreman passes. McCormick conceded however that the preshift report for the cited section showed a volume of 37,520 cfm and that she could not determine how much air was leaking through the temporary stopping. She also acknowledged that significant variations in air readings taken at the same time and location are not unusual.

Within this framework of evidence I do not find "unwarrantable failure." The undisputed evidence shows that before the commencement of the shift at issue, some 2 1/2 hours before this violation, the air volume was 7,520 cfm greater than required. It appears moreover that that reading was taken at a time when the temporary stopping was in the same condition as found by Inspector McCormick. In the absence of any obvious and significant changes in the ventilation system the section foreman could reasonably have expected that the air volume would continue to be above the minimum even 2 1/2 hours later. It cannot therefore be concluded that the foreman should have known of the violative condition before the issuance of the order at bar. For the same reasons I find the operator chargeable with but little negligence.

I do find however that this violative condition did present a serious and "significant and substantial" hazard. Mathies, supra. It is undisputed that low air volumes may lead to less ventilation at face areas which, in turn, would permit the accumulation of methane to explosive levels. Under the circumstances it would be reasonable to expect that mining would have continued in the cited areas thereby bringing ignition sources within close proximity to the methane. Ignition sources such as the ripper heads of the continuous miner striking rock could lead to methane ignitions and/or explosions and accordingly serious burn injuries and/or fatalities from fire or explosions. Accordingly, Order No. 2605676 is modified to a citation under section 104(a) of the Act and the "significant and substantial" findings relating thereto are affirmed. In assessing civil penalties in these proceedings I have also considered that the operator is medium in size and has a moderate history of violations. I also note that all of the violative conditions were abated in a timely manner.

ORDER

Order No. 2605598 is affirmed as a section 104(d)(2) order with "significant and substantial" findings. Order No. 2605676 is modified to a citation under section 104(a) of the Act and the "significant and substantial" findings associated therewith are affirmed. Civil penalties of \$350 (Civil Penalty Docket No. SE 86Ä55) and \$175 (Civil Penalty Docket No. SE 86Ä48) are hereby assessed for these orders, respectively and must be paid within 30 days of the date of this

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decision. The associated Contest Proceedings, Docket Nos. SE 86Ä14ÄR and SE 86Ä16ÄR, are dismissed.

SETTLEMENT PROPOSAL

The Secretary has also moved for approval of a settlement agreement as to the citations and orders remaining under Civil Penalty, Docket No. SE 86Ä48. A reduction in penalties from \$2,100 to \$1,400 was proposed. I have considered the representations and documentation submitted and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

ORDER

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that in addition to the amounts previously noted Respondent pay the proposed penalties of \$1,400 within 30 days of this order. The associated Contest Proceedings Docket Nos. SE 86Ä13ÄR and SE 86Ä17ÄR are dismissed.

Gary Melick
Administrative Law Judge

1 Section 104(d)(2) provides as follows:

"If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine."

Section 104(d)(1) provides as follows:

"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act."