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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

v.

JIM WALTER RESOURCES, INC.,  
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. SE 86-83  
A.C. No. 01-01401-03628

No. 7 Mine

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor,  
U.S. Department of Labor, Birmingham, Alabama,  
for Petitioner; Harold Rice, Esq., and R. Stanley  
Morrow, Esq., Birmingham, Alabama, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

In this proceeding, the Secretary seeks civil penalties for two alleged violations of the mandatory standard contained in 30 C.F.R. 75.316. In one, Respondent is charged with violating its approved ventilation, methane and dust control plan by failing to maintain line curtain to within ten feet of all faces in all working places inby the last open crosscut at all times except while roof bolting. With respect to this violation, the parties submitted the case for decision on stipulated facts and an agreed-upon issue. The other citation involves an alleged failure to comply with the approved ventilation plan in that methane in excess of 2.0 percent (modified by agreement at the hearing to 1.0 percent) was detected in the Southeast and South bleeder entries of the subject mine. Evidence was taken on this violation at the hearing in Birmingham, Alabama, on October 22, 1986. Ronald James Soneff, II, William Jerry Vann, and Kenneth Ealey testified on behalf of the Secretary. Ted Sartain testified on behalf of Respondent. Both parties have submitted post hearing briefs. Based on the entire record and considering the contentions of the parties, I make the following decision.

PRELIMINARY FINDINGS OF FACT

Respondent at all times pertinent hereto was the owner and operator of an underground coal mine in Tuscaloosa County, Alabama, known as the No. 7 Mine. Respondent is medium sized and its history of prior violations is average. The imposition of penalties herein will not affect Respondent's ability to continue in business. The violations charged were abated in good faith.

ORDER NO. 2605979

On March 13, 1986, Federal Mine Inspector Gerald N. Tuggle issued a withdrawal order under section 104(d)(2) of the Act alleging a violation of 30 C.F.R. 75.200. It was modified on March 24, 1986, to charge a violation of 30 C.F.R. 75.316 rather than 75.200. The parties have stipulated that the following condition was present in the No. 8 section of the subject mine: the continuous mining machine had mined the crosscut to the left on the curtain (brattice line) side and the end of the curtain terminated in excess of 10 feet from the deepest point of penetration of the face to the straight of the entry. The parties have agreed that the approved ventilation, methane and dust control plan in effect at the subject mine when the order was issued required that the line brattice be maintained to within 10 feet of the area of deepest penetration of all faces in all working places in by the last open crosscut at all times except while roof bolting.

The parties have agreed that the issue before me is whether Respondent was required to maintain line curtain to within 10 feet of all faces, or only the working faces from which coal is being extracted or was most recently extracted. The same issue was decided by me in a case between the same parties in September 1985. *Secretary v. Jim Walter Resources, Inc.*, 7 FMSHRC 1471 (1985). I decided that Respondent was required to maintain the line curtain to within 10 feet of all faces. Respondent did not seek Commission review, and the decision became a final decision of the Commission. 30 U.S.C. 823(d)(1). Ordinarily, the doctrine of res judicata or collateral estoppel would preclude the relitigation of an issue between the same parties which was previously litigated. 46 Am.Jur. Judgments 397 (1969); 1B Moore's Federal Practice 0.405 (1982); RESTATEMENT (SECOND) OF JUDGMENTS, 27, 83 (1982); KENNETH DAVIS, ADMINISTRATIVE LAW TREATISE, 21:1-21:9 (2d Ed.1983); *Commissioner v. Sunnen*, 333 U.S. 591 (1948); *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966); *Montana v. United States*, 440 U.S. 147 (1979). However, the same issue between the same parties was relitigated in the case of *Jim Walter v. Secretary*, 8 FMSHRC 568 (1986), review pending. In that case Judge Koutras held that the plan requirement that line brattice be maintained to within 10 feet of all faces means all working faces. The question of issue preclusion was apparently

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not raised by the Secretary in that case. Because the issue has been decided in conflicting ALJ decisions, and is presently before the Review Commission, I will address the merits of the case.

30 C.F.R. 75.316 provides in part as follows:

A ventilation system and methane and dust control plan \* \* \* suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator \* \* \* The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require \* \* \* [Emphasis added].

The ventilation plan in this case, as in the other cases, was changed in 1972 to include the following language:

Line brattice shall be maintained to within 10 feet of the area of deepest penetration of all faces in all working places inby the last open crosscut at all times except while roof bolting and servicing as stated in the plan.

This provision was imposed upon Respondent in 1972 because of the high methane liberation in its mines. For this reason, the Secretary required "additional or improved equipment," beyond that required by 30 C.F.R. 75.302-1(a), which mandated that line brattice be maintained to within 10 feet of active working faces. I conclude that the requirement imposed by the Secretary is within his authority, and that the term "all faces" includes idle faces. The citation was properly issued. The parties have stipulated that the proposed penalty of \$750 is appropriate for the violation.

CITATION NO. 2605452

#### FINDINGS OF FACT

On February 20, 1986, MSHA ventilation specialist William Vann inspected the subject mine, after being informed by MSHA safety inspector Jerry Tuggle that the mine was having problems with high methane concentrations in the area of the No. 1 longwall section. Inspector Vann was accompanied by Ted Sartain, ventilation engineer for Jim Walter, and by a union representative. He took methane readings with three separate mechanical instruments, three in the Southeast bleeder entries,

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and four in the South bleeder entries. The former varied from 2.1 percent methane to 2.5 percent. Two bottle samples were taken and were later analyzed at the MSHA laboratory. The samples showed 2.13 percent and 2.21 percent methane. The readings in the South bleeder entries varied from 1.4 percent to 3.06 percent and included readings of 2.4 percent, 2.6 percent, 2.7 percent and 3.0 percent methane. Three bottle samples were taken and analyzed at 2.32 percent, 2.33 percent and 3.05 percent methane. Mr. Sartain also took methane readings which essentially agreed with those of Inspector Vann. The area covered by the Inspector totalled approximately 6600 feet. Because of these findings, the Inspector issued an imminent danger withdrawal order under section 107(a) of the Act requiring Respondent to withdraw from the No. 1 longwall section and the Southeast main and South entries behind the longwall. He also issued a 104(a) citation charging a violation of the ventilation, methane and dust control plan. At the time the order and citation were issued, the longwall was energized and in operation.

Ronald Soneff, a fireboss at Jim Walter, made an inspection of the No. 1 longwall section in the latter part of 1984. He found and recorded the finding of 4 percent methane in the South bleeder entries. The following day he was told not to inspect the area thereafter. After a management change, he returned to firebossing the area in mid-1986.

The subject mine is a gassy mine. It liberates in excess of 19 million cubic feet of methane in a 24 hour period. For this reason it is subject to spot inspections under section 103(i) of the Act every 5 working days. The subject mine has experienced 52 methane ignitions from 1977 to 1985, six of them between October 22, 1985 and September 24, 1986. The last one (September 24, 1986) occurred on the headgate side of the No. 1 longwall section.

The roof in the South bleeder entries is very poor and has been deteriorating since at least 1984. Rock falls have affected the ventilation in the South and Southeast bleeder entries. In December 1985, Inspector Vann told Ted Sartain that the roof was beginning to deteriorate in the bleeder entries. Sartain replied that Respondent was beginning to install cribs in the area.

The ventilation System and Methane and Dust Control plan in effect for the subject mine on February 20, 1986 contained the following provision:

All provisions of published regulations and criteria pertaining to ventilation and methane and dust control must be followed except as noted below:

75.316-2(d)--When methane content in a main return exceeds 1.0 volume percentum, mine management shall submit a plan detailing additional evaluation procedures and safeguards which will be utilized to insure safety.

On August 1, 1985, Respondent requested a change in the ventilation plan as follows:

Jim Walter Resources, No. 7 Mine requests that the methane content in the main return air courses be in excess of 1.0 volume percentum, but shall not exceed 2.0 volume percentum. The following provisions will be complied with in this area:

1. Fireboss examinations \* \* \* at intervals not to exceed twenty four hours.
2. Electrical equipment will not be operated in an area where the methane content \* \* \* is 1.0 percentum or more.
3. The main return air splits shall be examined immediately prior to entering a return shaft or fan. The methane content of the air passing through the fan shall be less than 1.0 volume percentum.

The request was approved February 21, 1986 by the MSHA District Manager in a letter reading:

The request that the methane content in the bleeder entry and the Number One South East Main return air courses after the bleeder splits from the longwall panels enter these air courses be in excess of 1 percent but not to exceed 2 percent methane has been reviewed and is approved for the area serving the Number One Longwall.

After the order and citation were issued on February 20, 1986, and the No. 1 Longwall was shut down, Respondent closed No. 11 section (a continuous miner section) and took the air from that section and put it on the longwall to increase the ventilation and reduce the methane. On February 23, 1986, Inspector Vann found that the volume of air was increased in the South and Southeast bleeder entries, and the methane content had been reduced to less than 1.5 percent. The order was terminated. The citation was terminated on February 26, 1986, when it was learned that the District Manager had approved the supplement to the ventilation plan.

Whether Respondent's failure to maintain the methane content in the South and Southeast bleeder entries of the No. 1 longwall section at or below 1.0 percent was a violation of the approved ventilation plan.

#### CONCLUSIONS OF LAW

Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977 in its operation of the No. 7 Mine, and I have jurisdiction over the parties and subject matter of this proceeding. 30 C.F.R. 75.316 requires Respondent to adopt a ventilation system and methane and dust control plan. When such a plan is adopted and approved by the Secretary, Respondent is required to comply with its provisions. *Zeigler Coal Company v. Kleppe*, 536 F.2d 398 (D.C.Cir.1976). The provisions in the plan in effect at the subject mine relating to maximum permissible methane content are not, as counsel for the Secretary admits, a model of clarity. However, I believe that a fair reading of the letter of July 17, 1985 approving the plan shows that it requires adherence to the criteria in 30 C.F.R. 75.316-2 ( 75.316-2(d) provides that methane in a return air course should not exceed 2.0 percent, and that air in any active workings shall contain less than 1.0 percent methane) except that where methane in a main return exceeds 1.0 percent, a plan shall be submitted with detailed evaluation procedures and safeguards to insure safety. The "exception" thus imposes a more stringent requirement than the criteria in 75.316-2(d). I read the plan to require Respondent when circumstances indicate that methane may exceed 1.0 percent to take the steps necessary to reduce it below 1.0 percent. The evidence here shows a history of excessive methane in the area in question. It also shows that Respondent was aware of this fact. It further shows a seriously deteriorating roof condition which could be expected to disrupt ventilation. It shows on the date of the inspection methane readings far in excess of the maximum percentages, and approaching dangerous levels. These facts in combination show a violation of the ventilation plan. The request of August 1, 1985 to increase the maximum permissible level to 2.0 percent does not constitute "a plan detailing additional evaluation procedures and safeguards which shall be utilized to insure safety."

The steps taken after the order and citation were issued should have been taken earlier and would have prevented the excessive methane buildup. Cf. *Secretary v. Youghioghney & Ohio Coal Company*, 5 FMSHRC 1581 (1983), vacated on motion, 7 FMSHRC 200 (1985).

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The excessive methane content in the area of the mine in question posed a serious hazard to miners--from an ignition or mine fire, or even an explosion if the methane concentration increased. The conditions causing the excessive methane were known to Respondent, which should have taken steps to reduce it. The violation was very serious, and resulted from Respondent's negligence. Based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is \$1000.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED that Respondent shall, within 30 days from the date of this decision, pay the following civil penalties for violations found herein:

Order 2605979	\$	750
Citation 2605452		1000
Total		\$1750

James A. Broderick  
Administrative Law Judge