

CCASE:  
SOL (MSHA) V. JIM WALTER RESOURCES  
DDATE:  
19890912  
TTEXT:

~1747

Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)  
Office of Administrative Law Judges

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

CIVIL PENALTY PROCEEDINGS

Docket No. SE 89-12  
A.C. No. 01-01247-03817

v.

Docket No. SE 89-32  
A.C. No. 01-01247-03828

JIM WALTER RESOURCES,  
INCORPORATED,  
RESPONDENT

No. 4 Mine

DECISION

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

Before: Judge Maurer

These cases are before me upon petitions for assessment of civil penalty under Section 104(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., (the Act).

Pursuant to notice, a hearing was held in Birmingham, Alabama, on May 9, 1989. Prior to the commencement of testimony at the hearing, the parties advised me that they had a proposed settlement of one of the three citations at issue. Citation No. 9984577 was originally assessed at \$241 for a violation of 30 C.F.R. 70.100(a). A reduction in penalty to \$50 is proposed for that respirable dust violation because further investigation revealed that the exposed employees were wearing personal protective equipment (respirators). In light of that additional information, MSHA agreed to delete the significant and substantial (S&S) characterization of the violation. I have considered the representations submitted by motion on the record in this case, and have concluded that the proffered settlement is appropriate under the statutory criteria set forth in Section 110(i) of the Act. I so approved the petitioner's motion from the bench at the hearing. Pursuant to the Rules of Practice before this Commission, this written decision confirms the bench decision I rendered at the hearing, approving the partial settlement of this case.

~1748

The aforementioned partial settlement did not include Citation Nos. 3010179 or 3187766 which both allege identical violations of 30 C.F.R. 75.1718 and propose a civil penalty of \$20 each. Two different inspectors issued the above two citations, and in order to avoid having to call the second inspector to testify to essentially an identical fact situation, the parties agreed to actually try only Citation No. 3010179. They agreed that whatever that outcome should be, would also control the result concerning Citation No. 3187766.

#### STIPULATIONS

The parties stipulated to the following, which I accepted (Tr. 19-20):

1. Jim Walter 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 Administrative Law Judge has jurisdiction to hear this case.
4. The Inspector who issued the citation was a duly authorized representative of the Secretary.
5. A true and correct copy of the subject citation was properly served upon the operator.
6. The copy of the subject citation is authentic and may be admitted into evidence for the purpose of establishing its issuance, but not for the purpose of establishing truthfulness or relevance of any statements found therein.
7. Imposition of a penalty will not affect this operator's ability to continue in business.
8. The operator's history of prior violations is average.
9. The operator is large in size.
10. The operator abated the violation in good faith.

#### DISCUSSION AND FINDINGS

Citation No. 3010179 sets forth the subject condition as follows:

Potable drinking water was not provided for the active No. 2 Longwall Section.

~1749

The Citation charges a violation of 30 C.F.R. 75.1718 which provides:

An adequate supply of potable water shall be provided for drinking purposes in the active workings of the mine, and such water shall be carried, stored, and otherwise protected in sanitary containers.

Mr. David McAteer testified that he is a UMWA safety committeeman at the No. 4 mine. On the day of the inspection that culminated in the issuance of the instant citation, he told Inspector Meredith that they were having problems getting the company to provide potable water on the sections and asked for his help.

Inspector Meredith testified that he issued the citation at bar on August 4, 1988, when he did not find a container of any kind with potable drinking water on the No. 2 longwall section. At the time he was outby the section in the area where they keep the emergency sled, emergency supplies, first aid equipment, and normally, their potable drinking water. The inspector further testified (Tr. 32, 38-9):

I asked Mr. Fillibaum, who is the evening shift assistant mine foreman at that time, if he knew where any potable water was, because there wasn't any on the sled. And Mr. Fillibaum, if I recall, he said, "Well, you know everybody brings their water." And I says, "No, I don't know that, but you're going to have to provide water here," because this is normally where they have it, is on the emergency sled.

I asked him where the potable drinking water was they were supposed to provide and he said, "We don't have any up here. We'll have to get some sent in from the outside."

Mr. John Fillibaum testified on behalf of the operator. He stated that in his opinion there was an adequate supply of potable drinking water on the section, because each miner carries his own drink of choice.

I find that the preponderance of the evidence demonstrates that there was not an adequate supply of potable drinking water on the No. 2 longwall section as charged by the Secretary.

The regulation speaks of an "adequate" supply of drinking water. This incorporates a requirement that the water be readily available to the miners and I believe that the regulation also contemplates that the water be provided by the operator. It is not sufficient compliance to shift this regulatory burden to the individual miner to furnish his own water, even if, as a practical matter, most miners do furnish their own personal drinks.

~1750

On this basis, I conclude that a violation existed, and I have considered the statutory criteria set forth in Section 110(i) of the Act for determining the appropriate penalty for this violation. Under the facts and circumstances present in this record, I find that the \$20 penalty proposed by the Secretary is the appropriate penalty for the violation. By agreement of the parties, I make the same findings with regard to Citation No. 3187766.

ORDER

Accordingly, it is ORDERED that Citation Nos. 9984577, 3010179 and 3187766 are AFFIRMED. The allegation in Citation No. 9984577 that the violation was significant and substantial is stricken.

It is further ORDERED that the following civil penalties are assessed:

Citation No.	Penalty
9984577	\$50
3010179	\$20
3187766	\$20

It is further ORDERED that the operator pay \$90 within 30 days from the date of this decision as civil penalties for the violations found herein.

Roy J. Maurer  
Administrative Law Judge  
Administrative Law Judge