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SOL (MSHA) V. JIM WALTER RESOURCES  
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR  
WASHINGTON, D.C. 20006

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. SE 93-367-A
Petitioner	:	A. C. No. 01-01247-04072
	:	
v.	:	
	:	No. 4 Mine
JIM WALTER RESOURCES	:	
INCORPORATED,	:	
Respondent	:	

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor, U. S. Department of Labor, Birmingham, Alabama, for the Petitioner; Stanley Morrow, Esq., Jim Walter Resources Incorporated, Brookwood, Alabama, for the Respondent.

Before: Judge Merlin

This case is a petition for the assessment of a civil penalty filed by the Secretary of Labor against Jim Walter Resources Incorporated under section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820.

Statement of the Case

The violation in this case, Citation No. 3187628, was originally contained along with seven other violations in Docket No. SE 93-367 which was set for a calendar call on February 2, 1994. All eight violations were discussed on the record at the calendar call, and the parties agreed to settle seven of the violations. On Feb 8, 1994, an order was issued creating this docket and removing Citation No. 3187628 from SE 93-367 and placing it into SE 93-367-A. A decision approving settlement was issued on the same day for the remaining seven violations in Docket No. SE 93-367. On February 17, 1994, a notice of hearing was issued for SE 93-367-A and this case was set for hearing.

Citation No. 3187628 was issued as a 104(a) citation, for an alleged violation of 30 C.F.R. 75.380(d). A hearing was held on April 19, 1994, the transcript has been received and the parties have filed post hearing briefs.

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30 C.F.R. 75.380(d) sets forth the following:

(d) Each escapeway shall be (1) Maintained in a safe condition to always ensure passage of anyone, including disabled persons;

(2) Clearly marked to show the route and direction of travel to the surface;

(3) Maintained to at least a height of 5 feet from the mine floor to the mine roof, excluding the thickness of any roof support, except that the escapeways shall be maintained to at least the height of the coalbed excluding the thickness of any roof support where the coalbed is less than 5 feet;

(4) Maintained at least 6 feet wide except- (i) Where necessary supplemental roof support is installed, the escapeway shall be not less than 4 feet wide; or (ii) Where the route of travel passes through doors or other permanent ventilation controls, the escapeway shall be at least 4 feet wide to enable miners to escape quickly in an emergency;

(5) Located to follow the most direct, safe and practical route to the surface; and

(6) Provided with ladders, stairways, ramps, or similar facilities where the escapeways cross over obstructions.

Citation No. 3187628 dated April 8, 1993, and challenged herein, charges a violation for the following alleged condition or practice:

The secondary escapeway off No. 9 section, No. 6 section, and No. 1 longwall was not being maintained in safe condition to always ensure safe passage of anyone, including disabled person in that at least 10 overcast along this route were not provided stairways that are at least 4 foot wide, and these stairways were not provided with handrails.

The inspector found that the foregoing violation was significant and substantial and that it resulted from a moderate degree of negligence on the part of the operator.

Prior to going on the record, the parties agreed to the following stipulations (Tr. 6-9):

(1) The operator is the owner and operator of the subject mine.

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

(3) I have jurisdiction of this case.

(4) The inspector who issued the subject 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) A copy of the subject citation and a copy of the termination of the violation in issue in this proceeding are authentic and may be admitted into evidence for purposes of establishing their issuance but not for the purpose of establishing the truthfulness or relevancy of any statements asserted therein.

(7) Payment of any penalty will not affect the operator's ability to continue in business.

(8) The operator demonstrated good faith abatement.

(9) The operator has an average history of prior violations for a mine operator of its size.

(10) The operator is large in size.

(11) The facts set forth in the subject citation are admitted as written.

#### Evidence of Record

On April 8, 1993, the MSHA inspector examined the secondary escapeway at the operator's Number 4 Mine. He stated that escapeways are avenues which allow miners to leave their work areas in the event of an emergency (Tr. 19). In the subject mine the primary escapeway is the track entry on intake air which is fresh air going toward working and longwall faces (Tr. 24-25, 62-63, 82, 86). In the event of an individual injury the primary escapeway would be used to evacuate the person (Tr. 43). The secondary escapeway located on return air would be used to leave the mine if an emergency such as an ignition or fire rendered the primary escapeway unusable (Tr. 35-36, 86-87). The inspector testified that the secondary escapeway in this mine is several thousand feet in length and that it took him an hour or two hours to walk the cited secondary escapeway (Tr. 23).

An overcast is similar to an air bridge. It is designed not to leak air (Tr. 26). Air can pass through a door in the overcast going in one direction and on top of the overcast in the other direction (Tr. 62). In this situation intake air was going through doors in the overcasts (Tr. 62). Return air was going

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over the overcasts and this path constituted the secondary escapeway (Tr. 62-63). Overcasts are made of mortared concrete blocks with a steel structure on top with rock dust bags over them (Tr. 26). They extend 20 feet from one side of the escapeway entry to the other, are 3 to 5 feet high and present the appearance of a concrete wall (Tr. 25-28). The distance between the top of the overcast and the top of the mine roof varies depending on the size of the opening and how much has been cut out for the overcast (Tr. 28-29).

Overcasts are generally grouped in twos and threes to separate intake air from return air and direct the air flow (Tr. 30-32). The ten cited overcasts were grouped in this manner and the stairs going over them consisted of blocks left over from construction (Tr. 32). The blocks were stairstepped up and loosely stacked two abreast from the bottom (Tr. 33). Because the overcasts were fairly high, the stairs extended about 4 or 5 feet off the mine floor (Tr. 33). The inspector estimated that the stairs were about 2 feet wide, but he did not measure the blocks and had never measured any such concrete blocks (Tr. 33-34, 83-84). He admitted that some of the stairs could have been as much as three feet wide (Tr. 84). He did not recall how each set of stairs was constructed and acknowledged that they were not all the same (Tr. 84-85). The inspector further testified that the stairs were loose, rickety, cumbersome and not mortared, but he did not include any of those conditions in the citation (Tr. 51, 63).

Based upon the assumption that the stairs were two feet wide, the inspector was of the opinion that they were not adequate to insure safe passage of anyone including disabled persons (Tr. 69). In the inspector's view four people would be ideal to carry a stretcher over the overcasts (Tr. 46). He believed 2 foot wide blocks would be inadequate, because even if only two persons were carrying the stretcher they would have to stop and lift the person on top of the overcast and slide him across the top (Tr. 49). A crew of four persons would not have sufficient room (Tr. 49). The inspector believed that 4 foot wide stairs would provide ample room to carry a stretcher over the overcasts without stopping (Tr. 49-50).

#### Findings and Conclusions

The requirements of the several subparagraphs of paragraph (d) of 30 C.F.R. 75.380 are cumulative rather than alternate in nature. Subparagraph (1) imposes a general duty to maintain escapeways in a safe condition to insure safe passage including disabled persons. Subparagraph (2) additionally requires that the route of travel be clearly marked. Succeeding subparagraphs impose further conditions.

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Some of the conditions in paragraph (d) apply only to specific situations. The 4 foot width requirement for escapeways set forth in subparagraph (4)(ii) applies only where the escapeway route of travel passes through a door or other ventilation controls. It is not, therefore pertinent here where the route of passage was not through a door in the overcast but rather over the overcast (Tr. 29, 62-63). The inspector did not issue the citation under this provision (Tr. 66).

It must also be noted that subparagraph (6) of paragraph (d) requires that escapeways be provided with ladders, stairways, ramps or other similar facilities where, as here, an escapeway crosses over an obstruction. Unlike the provision applicable to escapeways going through obstructions, the mandate for staircases and other facilities that go over obstructions sets forth no minimum width. The inspector did not mention subparagraph (6) either in the citation or in his testimony.

In light of the foregoing, it is clear that there is no express requirement that stairs going over an overcast be at least four feet wide. The inspector stated that he based the citation upon subparagraph (1) which as already noted, directs that each escapeway be maintained in a safe condition to always ensure passage of anyone, including disabled persons (Tr. 66-67). In determining whether the general obligation for safe escapeways imposed by subparagraph (1) has been satisfied, each case must be examined and judged on its facts.

When asked why he believed the escapeway would not insure safe passage of disabled persons, the inspector gave contradictory responses. He repeatedly stated that he issued the citation because the stairs were rickety, loose and not mortared (Tr. 51, 69, 72, 74). However, he also admitted that he had not included those circumstances in the citation (Tr. 63). When asked why he did not put in the citation that the stairway was rickety and loose, the inspector answered, "If I sit and write every detail that I think is important in every citation I issue, I may never get my job done" (Tr. 71).

The citation does refer to the absence of handrails and the inspector stated that if handrails had been present, he would not have looked at rickety and loose as being important (Tr. 72-73). At another point, he stated that all factors played a part. But he immediately followed up by saying that if the stairs had been wide enough, he would not have found a violation even had there been no handrails (Tr. 72-73). The inspector acknowledged that if the stairs had been the way he saw them but had been 4 feet wide, he would not have issued the citation (Tr. 74-75). As he finally stated, four feet was the "bottom line" (Tr. 75). In light of the foregoing, I conclude that the inspector's finding

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of violation was premised upon the fact that the stairs were not 4 feet wide.

Under the general duty provision of subparagraph (1) the staircases cited by the inspector must be evaluated to determine whether 4 foot wide stairs were necessary to insure safe passage. The record demonstrates that the citation is not based upon an evaluation of the staircases which allegedly violated the mandatory standard. Although he remembered that the staircases were not all the same, the inspector did not recall how they were constructed (Tr. 84-85). The inspector conceded that he did not measure the concrete blocks he cited and, indeed, had never measured any such blocks (Tr. 33, 83-84). He granted that some of the steps he cited could have been three feet wide depending on how they were stacked (Tr. 84). When confronted with his actions, the inspector said, "I wish I had to do this all over again. I would measure them and tell you exactly. I didn't take the time to do it." (Tr. 84).

There is therefore, no factual support for the inspector's finding that the staircases were unsafe because they were only two feet wide (Tr. 34). Moreover, the inspector's judgement that stairs four feet in width were necessary for safe passage cannot be accepted as a basis for finding a violation, because his conclusion was not predicated upon the characteristics of the staircases he cited. Since the inspector did not remember the features of these staircases, approval of his actions would constitute imposition of a blanket requirement that staircases going over overcasts be 4 feet wide. This is precisely what the mandatory standard fails to demand of staircases and other facilities that cross over obstructions. As set forth above, the Secretary knows how to require minimum widths for escapeways when he wants them, such as when the escapeway route of travel goes through an overcast. If it is the Secretary's wish that such an obligation obtain in a case like this one, independent of the particular facts, he should do what he has done before in like situations, i.e., engage in rulemaking. The adjudicatory route will not afford him the relief he seeks on a record such as the one made in this case.

In light of the foregoing, I conclude that the Secretary has failed to make out a prima facie case and that his penalty petition must be dismissed.

The foregoing is dispositive of the case. However, one further matter must be noted. At the outset of the hearing the Solicitor argued that if a violation occurred, it must be held significant and substantial because the underlying emergency should be presumed. The Solicitor advanced this position for the first time at the hearing. This case was discussed at a calendar call and the Solicitor did not raise this issue. Subsequently, preliminary statements were

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filed and again the Solicitor did not raise the issue. At my request, the parties briefed the issue in their post hearing briefs. However, upon review of the record I find that the failure of the Solicitor to bring up this matter before the commencement of the hearing was materially prejudicial both to the operator and the undersigned. Operator's counsel decision not to bring any witnesses to the hearing, might well have been different had the Solicitor made his intentions known in a timely manner. Even more importantly, if this issue had been reached, I would have been deprived of the record necessary for a determination of whether adoption of the presumption would be justified. What the Solicitor overlooks is that the adoption of a presumption cannot be divorced from consideration and analysis of the facts upon which it is sought to be justified.

The post-hearing briefs filed by the parties have been reviewed. To the extent the briefs a

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CONSOLIDATION COAL COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEVA 94-157-R
v.	:	Citation 3305270; 12/28/93
	:	
SECRETARY OF LABOR, Mine	:	Humphrey No. 7 46-01453
Safety and Health	:	
Administration, (MSHA),	:	Docket No. WEVA 94-15