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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

JIM WALTER RESOURCES, INC., : CONTEST PROCEEDING
Contestant :
v. : Docket No. SE 94-244-R
: Citation No. 3182848; 1/31/94
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : No. 7 Mine
ADMINISTRATION (MSHA), : I.D. No. 01-01401
Respondent :

DECISION

Appearances: J. Alan Truitt, Esq., Maynard, Cooper And Gale,
P.C., Birmingham, Alabama, and R. Stanley Morrow,
Esq., Jim Walter Resources, Inc., Brookwood,
Alabama, for the Contestant;
William Lawson, Esq., Office of the Solicitor,
U.S. Department of Labor, Birmingham, Alabama,
Respondent.

Before: Judge Melick

This case is before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act, upon the contest of Jim Walter Resources, Inc. (JWR) to challenge a withdrawal order issued by the Secretary of Labor for an alleged accumulation of combustible materials.

The order at issue, No. 3182848, issued on January 31, 1994, pursuant to Section 104(d)(2) of the Act(Footnote 1), charges a

1 Section 104(d) of the Act 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. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation,

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violation of the standard at 30 C.F.R. 75.400 and alleges that "[c]ombustible material, paper bags, rags, 5 wood pallets, 5 foot diameter cable spools and paper boxes were allowed to accumulate in the No. 3 entry on the No. 1 longwall section beginning 125 feet inby spad 9883 and extending inby for a distance of approximately 250 feet."

The cited standard requires that "coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein." The term "active workings" is defined as "any place in a coal mine where miners are normally required to work or travel." 30 C.F.R. 70.2(b).

It is undisputed that accumulations existed as cited on January 31, 1994, both inby and outby a check curtain identified on Government Exhibit No. 1, with the date "1-31-94." According to issuing Ventilation Specialist Thomas Meredith of the Mine Safety and Health Administration (MSHA) this check curtain separated the active outby area from the inactive inby area. At that time, the inactive inby area was admittedly not an area where miners typically worked or normally traveled. Under the circumstances, the inactive inby area cited in the order was not within the "active workings" and the accumulations located therein were therefore not in violation of the cited standard.

According to Ventilation Specialist Meredith, the accumulations in the active outby area consisted of an uncertain number of paper bags (rock dust bags), some sandwich bags, some cardboard boxes and a plastic garbage bag containing some oily rags and sandwich wrappers. While it may reasonably be inferred from that evidence that these were indeed combustible materials in violation of the cited standard, there is insufficient evidence that these materials constituted a "significant and substantial" violation or that their existence was the result of "unwarrantable failure."

fn. 1 (continued)

an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

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A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981). In Mathies Coal Co., 6 FMSHRC 1,3-4 (1984), the Commission explained:

In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary must prove: (1) the underlying violation of a mandatory safety standard, (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation, (3) a reasonable likelihood that the hazard contributed to will result in an injury, and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

See also *Austin Power Co. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (1987) (approving Mathies criteria).

The third element of the Mathies formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury, U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (1984), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. U.S. Steel Mining Co., Inc., 6 FMSHRC 1473, 1574 (1984); see also *Halfway, Inc.*, 8 FMSHRC 8, 12 (1986) and *Southern Oil Coal Co.*, 13 FMSHRC 912, 916-17 (1991).

The Government's evidence on this issue referenced the massive accumulations in the inactive area and evidence was not elicited as to whether the few combustible items found in the active area at issue constituted a "significant and substantial" violation. Accordingly, I cannot find that the Secretary has met his burden of proof on this issue. Indeed, Mr. Meredith acknowledged that the garbage bag, one box and one rock dust bag would not even constitute a violation of the cited standard. Under the circumstances, I find that the violative condition in the active area was of only moderate gravity.

In addition, in the absence of specific evidence as to when these few cited items in the active area were placed there (other than some time after January 24 and before they were cited on January 31) and/or the circumstances under which they were placed there, it is impossible to find the aggravated negligence necessary to support an unwarrantable failure finding. "Unwarrantable failure" has been defined as conduct that is "not justifiable" or is "inexcusable." It is aggravated conduct by a mine operator

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constituting more than ordinary negligence. Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007 (1987); Emery Mining Corp., 9 FMSHRC 1997 (1987). The few items found in the active area at issue herein could very well have been inadvertently placed where they were found without the knowledge of any responsible official and only shortly before discovery by the inspector.

In finding that the Secretary has not met his burden of proof on this issue, I have not disregarded the implication by the Secretary that a previous order issued on January 24, 1994, in another entry, shows that the operator was on notice of particular problems with accumulations in this mine. However, on the facts of this case, wherein only a few combustible items were found in the active area of a different entry and which could have been placed there inadvertently without the knowledge of a responsible official only a short time before discovery, no inference can be drawn from this prior violation alone sufficient to support a finding of gross negligence or unwarrantable failure.

The Secretary also argues that a statement to Meredith by longwall coordinator James Brooks (that he did not know why material had not been cleaned up and that he had not had outby people for over a week) is evidence of "unwarrantable failure." However, even assuming the accuracy of the statements, they are too ambiguous to allow the inference necessary to warrant the "aggravated conduct" findings upon which "unwarrantable failure" must depend.

Under the circumstances, the order at bar must be modified to a non-significant and substantial citation under Section 104(a) of the Act. Considering the criteria under Section 110(i) of the Act, I find a civil penalty of \$250 to be appropriate.

ORDER

Order No. 3182848 is modified to a citation under Section 104(a) of the Act and Jim Walter Resources, Inc. is directed to pay a civil penalty of \$250 for the violation charged therein within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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