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

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JIM WALTER RESOURCES, INC.,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. SE 94-326-R
v.	:	Order No. 2807385; 3/30/94
	:	
SECRETARY OF LABOR,	:	No. 4 Mine
MINE SAFETY AND HEALTH	:	MINE ID 01-01247
ADMINISTRATION (MSHA),	:	
Respondent	:	

DECISION

Appearances: David M. Smith, Esq., and J. Alan Truitt, Esq., Maynard, Cooper & Gale, P.C., Birmingham, Alabama, and R. Stanley Morrow, Esq., Jim Walter Resources, Inc., Brookwood, Alabama, for Contestant; Patrick K. Nakamura, Esq., Longshore, Nakamura & Quinn, Birmingham, Alabama, for Intervenors; William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama for Respondent.

Before: Judge Hodgdon

This case is before me on a notice of contest filed by Jim Walter Resources, Inc. (JWR) against the Secretary of Labor pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815. JWR contests the issuance of Order No. 2807385 to it on March 30, 1994. For the reasons set forth below, the order is affirmed.

This case was heard on July 26, 1994, in Birmingham, Alabama. Judy Ann McCormick testified on behalf of the Secretary. Thomas E. McNider and Edward W. Grygiel testified for JWR. The parties have also filed briefs which I have considered in my disposition of this case.

BACKGROUND

This case is a classic example of what happens when all terms of an agreement are not reduced to writing. The essential facts are undisputed, but the conclusions that JWR and the Mine Safety and Health Administration (MSHA) have drawn from those facts are widely divergent.

Early in 1992, JWR submitted to MSHA a ventilation control plan to be implemented for all of its longwall mines, including the No. 4 Mine. Among other things, the plan proposed an alternative method for sampling the respirable dust exposure of the designated occupation on the longwall section to that set out in Section 70.207(e)(7) of the Regulations, 30 C.F.R. 70.207(e)(7).(Footnote 1) MSHA had, at least, two objection to this particular proposal.

First, MSHA did not agree to determining the time that miners would be permitted to work downwind of the shear to be based on the weight of the dust collected in the sampling device. Section K(2) of the plan provided that seven dust pumps would be operated for one, two, three, four, five, six and seven hour intervals during standard operating cycles of the longwall and that the permissible downwind time would correspond to the interval sample which did not exceed 2 mg. of dust. MSHA wanted the plan to provide for equivalent concentrations as set out in Section 70.206 of the Regulations, 30 C.F.R. 70.206.(Footnote 2) MSHA

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Section 70.207(e)(7) states:

> (e) Unless otherwise directed by the District Manager, the designated occupation samples shall be taken by placing the sampling devices as follows:
>
> . . . .
>
> (7) Longwall section. On the miner who works nearest the return air side of the longwall working face or along the working face on the return side within 48 inches of the corner.

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Section 70.206 explains:

> The concentration of respirable dust shall be determined by dividing the weight of dust in milligrams collected on the filter of an approved sampling device by the volume of air in cubic meters passing through the filter and then converting that concentration to an equivalent concentration as measured with an MRE instrument. To convert a concentration of respirable dust as measured with an approved sampling device to an equivalent concentration of respirable dust as measured with an MRE instrument, the concentration of respirable dust measured with the approve sampling device shall be multiplied by the constant factor prescribed by the
> (continued on next page)

apparently prevailed on this issue because the approved plan states that the downwind time will be adjusted to correspond to the interval sample that does "not exceed 2mgm3 [sic]." (Gvt. Ex. 2.)

Secondly, and what has caused the problem in this case, MSHA did not agree with JWR's interpretation of what Section K(3)(e) meant when it said that when dust sampling revealed that dust exposure levels upwind of the shear were not in compliance with the permissible level of exposure, that the time that all workers on the longwall face would be permitted to work would "be adjusted utilizing the downwind exposure time in place." To JWR, "downwind exposure time in place" referred to the permissible downwind time determined under Section K(2) of the plan. (Tr. 108-09.) To MSHA, "downwind exposure time in place" would be determined by using a computer formula taking other ingredients, including upwind exposure levels, into consideration. (Tr. 49, 98-99.)

The plan for the No. 4 Mine was approved sometime after June 1992.(Footnote 3) (Gvt. Ex. 2.) Although there were many discussions between JWR and MSHA concerning the interpretation of K(3)(e), some of which evidently took place after the plan was approved, MSHA consistently has held to its interpretation of the plan. The approved plan, however, contains the original language for Section K(3)(e) proposed by JWR. There is no evidence that MSHA communicated its interpretation to JWR in writing, nor is there any evidence that JWR affirmatively agreed, in writing or otherwise, to MSHA's interpretation.

Nevertheless, JWR had been furnished copies of the computer program used by MSHA to calculate the downwind time no later than August 1992, and was aware of what the program involved. (Cont. Ex. F.) By December 1992, JWR was also aware that in calculating the downwind time, MSHA would not necessarily use all seven

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Secretary for the approved sampling device used, and the product shall be the equivalent concentration as measured with an MRE instrument.

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There is no evidence, direct or otherwise, as to when the plan was actually approved. Gvt. Ex. 2 does not contain the standard cover letter from the District Manager approving the plan. No one testified concerning the date the plan was approved. However, no one disputed that the plan was in fact approved.

samples provided for in K(2), but would eliminate up to two samples that were out of "progression." (Cont. Ex. E., Tr. 74-79.)

At least once, prior to the order in question, JWR was issued a citation at the No. 4 Mine for violating its ventilation control plan with respect the downwind exposure on the longwall. (Tr. 33-4, 37, 127.) JWR apparently did not challenge MSHA's interpretation of the plan with respect to any alleged violations received prior to the instant one.(Footnote 4)

On March 28, 1994, MSHA notified JWR that the March 23 dust sample results for the shear operator showed noncompliance with the applicable dust standard and that, therefore, the corresponding face time for the longwall was "0" hours. In other words, the longwall could not be operated. That same day, JWR submitted a supplemental plan to allow the longwall to resume operations. The plan was approved on March 29.

On March 30, Judy McCormick, an MSHA coal mine inspection supervisor, while at the No. 4 Mine, was informed by JWR employees that the longwall had been operated between the time JWR was notified of the "0" face time and the time the supplemental plan was approved. Consequently, Section 104(d)(2)(Footnote 5) Order No. 2807385 was issued to JWR on March 30. The order cited a violation of Section 75.370(a)(1) of the Regulations, 30 C.F.R. 75.370(a)(1), and stated:

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JWR's challenge to MSHA's disapproval of this ventilation plan, particularly Section K(2), with respect to its No. 5 Mine was denied by another Commission judge, Jim Walter Resources, Inc., 16 FMSHRC 851 (Judge Melick, April 1994). That decision is currently pending before the Commission.

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Section 104(d)(2) of the Act, 30 U.S.C. 814(d)(2), provides, in pertinent part:

> 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.

> On 3/28/94, the operator was notified via telephone and fax that the "K" sample results indicated that the shear operator was in non-compliance on the No.#2 Longwall (MMU 0200) and the downwind time was 0 hours. As a result, the face time for the longwall was also 0 hours. A plan was approved on 3/29/94 approximately mid day-shift which allowed the longwall to resume operations in order for samples to be collected. On the morning of 3/30/94, it was revealed, through interviews with longwall employees, that at approximately 10:30 PM on 3/28/94, the #2 longwall did resume operation in violation of item K.3.E. of the approved dust control portion of the current ventilation plan. The longwall continued to operate through the owl shift and was then closed on the day shift on 3/29/94.

(Gvt. Ex. 3.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 75.370(a)(1) provides, in pertinent part, that "[t]he operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine."

In another case involving JWR, the Commission described how the ventilation plan is supposed to be developed and approved. It said:

> The approval and adoption process is bilateral and results in the Secretary and the operator, through consultation, discussion, and negotiation, mutually agreeing to ventilation plans suitable to the specific conditions at particular mines. Zeigler v. Kleppe, 536 F.2d 398, 406-407 (D.C. Cir. 1976); Carbon County Coal Co., 6 FMSHRC 1123 (May 1984). The process is flexible, contemplates negotiation toward complete agreements, and is aimed at compliance with mine safety and health requirements. Under the approval and adoption process, the operator submits a plan to the Secretary who may approve it or suggest changes. The operator is not bound to acquiesce in the Secretary's suggested changes. The operator and the Secretary are bound, however, to negotiate in good faith over disputes as to the plan's provisions and if they remain at odds they may seek resolution of their disputes in enforcement proceedings before the Commission. Carbon

> County Coal Company, 7 FMSHRC 1367, 1371 (September 1985); Penn Allegh Coal Co., 3 FMSHRC 2767, 2771 (December 1981). The ultimate goal of the approval and adoption process is a mine-specific plan with provisions understood by both the Secretary and the operator and with which they are in full accord. Once the plan is approved and adopted, these provisions are enforceable at the mine as mandatory safety standards. Zeigler, supra at 409; Carbon County, 7 FMSHRC at 1370; Penn Allegh.

Jim Walter Resources, Inc., 9 FMSHRC 903, 907 (May 1987). Unfortunately, the process did not work as it was supposed to in this case.

Clearly, if the provisions of JWR's ventilation plan were understood by both JWR and MSHA and if they were in full accord in that understanding, this case would not have arisen. Both parties share the blame for this. If MSHA intended to interpret Section K(3)(e) of the plan as it has, it should have required that the section be written in accordance with its interpretation. If JWR would not agree to that, then MSHA should not have approved the plan. On the other hand, once JWR learned how MSHA was interpreting the section, it was incumbent on them to notify MSHA immediately if they did not agree to that interpretation, rather than wait a year and a half and at least one citation later to claim that the interpretation was not part of their plan.

Based on the facts in this case, I conclude that JWR violated the provisions of its ventilation plan and, thus, violated Section 75.370(a)(1) as alleged. This conclusion is grounded on a finding that JWR acquiesced in MSHA's interpretation of the plan. There are two factors which indicate that JWR acquiesced in MSHA's interpretation.

First, the method for sampling the dust exposure of the designated occupation on the longwall section was not required to be in the ventilation plan and was, therefore, gratuitous to the plan. In fact, Section 70.207(e)(7) specifically provides the method for sampling the longwall section and the only alternative to that method is as otherwise directed by the District Manager.(Footnote 6) Consequently, since the method of dust sampling is not an option with the operator, the district manager could have rejected that part of the plan out of hand.

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The text of Section 70.207(e)(7) is set out in fn. 1, supra.

Instead, the district manager, apparently as an accommodation to JWR, considered that section of the plan to determine if he wanted to "otherwise direct" JWR's proposed method of sampling. In effect, he directed the method with MSHA's modifications. While this direction should have been in writing, at this point, JWR could either have accepted the modifications, or sampled in accordance with Section 70.207(e)(7). Since they continued to operate under the plan, JWR apparently accepted the modifications.

The second element that indicates that JWR assented to MSHA's interpretation is the time factor. JWR knew by August 1992 how MSHA was interpreting Section K(3)(e) and they knew by at least December 1992 that MSHA was not always using all seven samples submitted to apply the section, yet they apparently did nothing about it. For over a year they continued to submit monthly samples. JWR received at least one citation for violating the section and apparently had other occasions when the longwall was shut down for a period of time because of the section, but they did not contest MSHA's interpretation.

It was only when JWR received a serious 104(d)(2) order that they suddenly claimed that the plan was being applied improperly. By then, it was too late. JWR had acquiesced in MSHA's interpretation and is bound by that acquiescence.

This violation was determined by the inspector to be "significant and substantial."(Footnote 7) In Consolidation Coal Company,
8 FMSHRC 890, 899 (June 1986), aff'd sub nom. Consolidation Coal v. FMSHRC, 824 F.2d 1071 (D.C. Cir. 1987), the Commission held that "when the Secretary proves that a violation of 30 C.F.R. 70.100(a), based upon excessive designated occupation samples

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A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon 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 (April 1981).

has occurred, a presumption that the violation is a significant and substantial violation is appropriate."

Although this case involves a violation of Section 75.370(a)(1), not Section 70.100(a), the same principle is involved. By violating its ventilation plan, JWR's miners were exposed to excessive dust concentrations. Thus, the reasoning behind the presumption applies as well to this case.

JWR has not presented any evidence to rebut the presumption that the violation in this case was "significant and substantial." Accordingly, I conclude that it was "significant and substantial."

MSHA also characterized this violation as having occurred as the result of an "unwarrantable failure" on JWR's part.(Footnote 8) Ms. McCormick testified that it was characterized this way because:

> first this was not the first time that this has happened at the No. 4 mine. Second, the operator was notified by telephone and by fax of the fact that the shearer [sic] operator sample . . . was not in compliance. When I talked to Mr. Andrews on the telephone, the safety inspector for the company, we discussed the fact that the longwall was closed. It was a convenient opportunity for it to come at that time because the longwall was down for maintenance problems anyway. So when the maintenance problems were over and they put the longwall back to work, we did feel that it was reckless disregard on their part because they were well aware of what the plan required and had been notified that they were in violation.

(Tr. 37-8.)

In addition to this, the evidence indicates that JWR submitted a supplemental plan to MSHA to permit them to resume operating the longwall, but started operations before the plan had been approved. Taken all together, I conclude that JWR's

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The Commission has held that "unwarrantable failure" is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987).

conduct in committing this violation was inexcusable, unjustifiable and, therefore, aggravated. Consequently, the violation resulted from JWR's "unwarrantable failure."

ORDER

JWR violated Section 75.370(a)(1) of the Secretary's Regulations by not complying with its ventilation control plan. The violation was both "significant and substantial" and the result of an "unwarrantable failure." Accordingly, it is ORDERED that Order No. 2804385 is AFFIRMED.

T. Todd Hodgdon
Administrative Law Judge

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