THE FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue NW, Suite 520N
Washington, D.C. 20004

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JIM WALTER RESOURCES, INC., Contestant, v. SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent,	CONTEST PROCEEDING Docket No. SE 2007-203-R Citation No. 7689677; 02/15/2007 Mine: No. 7 Mine ID: 01-01401
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. JIM WALTER RESOURCES, INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. SE 2007-294 A.C. No. 01-01401-118868 Mine: No. 7

DECISION ON REMAND

Appearances: Neil Morholt, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;

John B. Holmes, III, Esq.; Allen B. Bennett, Esq., Maynard, Cooper & Gale, P.C., Birmingham, Alabama, for Respondent.

Before: Judge Bulluck

These cases, brought pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 815(d), were heard by former Commission Administrative Law Judge ("ALJ") Avram Weisberger, who concluded that Jim Walter Resources, Incorporated ("JWR") did not violate 30 C.F.R. § 75.202(a) and vacated Citation No. 7689677.[1] *Jim Walter*

[1] By order of the Bankruptcy Court for the Northern District of Alabama, JWR is now known as "New WEI 13, Inc." Resp't Suppl. Br. at 1.

Res., Inc., 34 FMSHRC 1386 (June 2012) (ALJ).[2]

The Secretary filed a Petition for Discretionary Review on July 24, 2012. The Commission reversed the judge, finding that in a workplace and travelway, "[t]he roof fall that pinned McKinney under a piece of rock, resulting in his death, amply demonstrates that the roof was not supported in a manner to protect him from hazards related to falls," and remanded the case for further proceedings to decide whether the violation was significant and substantial ("S&S") and to assess an appropriate civil penalty. *JWR*, 37 FMSHRC 493, 496-97 (Mar. 2015).[3]

I. Proceedings on Remand

On August 12, 2016, I held a telephone conference with counsel representing the parties, who agreed that the record was sufficiently developed to resolve the issues on remand. On September 2, 2016, JWR filed a Supplemental Brief; on September 9, 2016, the Secretary filed a Response to Respondent's Supplemental Brief, moving to dismiss the cases as moot. On September 20, 2016, JWR then filed a Reply, also construed as a motion to dismiss.

For the reasons set forth below, I **DENY** the Secretary's and Respondent's motions.

In his Response, the Secretary asserts that these cases should be dismissed as moot because, as a result of bankruptcy proceedings, JWR "does not presently operate any mines." Sec'y Resp. to Resp't Suppl. Br. at 2. It is well settled that bankruptcy proceedings do not preclude proceedings before the Commission. *See* 11 U.S.C. § 362(b)(4) (exempting from the Bankruptcy Code's automatic stay provision any action or proceeding by a governmental unit to enforce its police or regulatory power); *Big Laurel Mining Corp.*, 37 FMSHRC 1997, 1998 (Sept. 2015) (finding that civil penalty proceedings initiated by the Secretary fall within the section 362(b)(4) exemption); *accord Hidden Splendor Res., Inc.*, 35 FMSHRC 1548, 1550 (June 2013). As such, the Commission may set penalties under the Act without regard to separate bankruptcy proceedings, with the caveat that the Commission's judgment is enforced in other forums. *Sec'y of Labor on behalf of Price v. JWR*, 12 FMSHRC 1521, 1530 (Aug. 1990). On the other hand, section 110(i) of the Act may permit consideration of bankruptcy when fixing a penalty amount where the operator is still in business, has not dissolved, and has not sold its assets, because "[e]vidence of an operator's financial condition is relevant to the ability to continue in business criterion," which is one of the six statutory penalty factors. *See Georges Colliers, Inc.*, 23 FMSHRC 822, 825 (Aug. 2001). However, the mere fact of a bankruptcy does

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[2] Two civil penalty dockets were at issue in the ALJ's decision, SE 2007-263 and SE 2007-294. Only the latter docket was taken by the Commission on appeal.

[3] Judge Weisberger has retired and the remanded case was assigned to me by the Chief ALJ.

not, under this body of binding precedent, render a case moot.[4]

Even assuming, *arguendo*, that this matter is moot, dismissal below the Commission level is not warranted. The adjudication of the citation at issue is governed by the "law of the case," consistent with the Commission's specific remand instructions. The Commission explained this doctrine in a case where it found that the ALJ had failed to follow remand instructions:

> As we held long ago, "[a]n administrative law judge must follow the rules and precedents of the Commission." *Sec'y of Labor on behalf of Jones v. Oliver*, 1 FMSHRC 23, 24 (Mar. 1979). This is the Commission's formulation of the well-settled rule that requires a lower tribunal to strictly adhere to the terms, express or implied, of an appellate court's mandate, "taking into account the appellate court's opinion." *Piambino v. Bailey*, 757 F.2d 1112, 1119 (11th Cir. 1985). The "law of the case" doctrine is a specific application of the mandate rule that requires a trial court to follow appellate determinations of fact and law in subsequent proceedings in the same case, unless new evidence or an intervening change in precedent dictates a different result. *Id.* at 1120.

Dolan v. F&E Erection Co., 23 FMSHRC 235, 240 (Mar. 2001); *see E. Ridge Lime Co., L.P.*, 21 FMSHRC 416, 421-22 (Apr. 1999) (factual conclusions made by Courts of Appeal constitute the law of the case and must be accepted by the Commission when the case is remanded). Here, the Commission reversed the ALJ and found that a violation had occurred, and ordered that further proceedings be held to determine whether the violation was S&S and assess the appropriate penalty. *JWR*, 37 FMSHRC at 497. Therefore, I must strictly adhere to the law of the case and follow the Commission's specific instructions. Accordingly, the Secretary's motion is denied.

Turning to JWR's motion to dismiss, the operator asserts that "the Secretary has voluntarily declined to prosecute this case further and [has] thereby withdrawn the citation and proposed penalty." Resp't Reply at 2. JWR states further that the Secretary's discretion to withdraw civil penalties and citations is unreviewable. *Id.* at 2 (citing *RBK Constr., Inc.*, 15 FMSHRC 2099, 2101 (Oct. 1993)). In *RBK Construction*, the Commission granted the parties' motions to dismiss upon recognizing the Secretary's unreviewable authority to withdraw citations under circumstances in which no findings of violation had been made. 15 FMSHRC at 2101. As has been fully discussed, the instant matter is not analogous. Therefore, at this stage in the proceeding, where the Commission has found a violation and remands with specific

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[4] I note that in a matter involving an operator seeking relief from a final order, the Commission dismissed the case as moot after the Department of Labor's Civil Penalty Compliance Office had informed it that the penalty case was being closed as uncollectible, because the operator had been subject to dissolution in bankruptcy and was no longer in the mining business. *River Point Processing, Inc.*, 21 FMSHRC 413 (Apr. 1999). In the instant matter, where there is a finding of a violation without a penalty assessment and, therefore, no final order of the Commission, I decline to follow *River Point Processing.*

instructions to assess the penalty, the Secretary does not have the discretion, prosecutorial or otherwise, to circumvent the Commission's finding. Accordingly, JWR's motion to dismiss is denied.

II. Factual Background[5]

Jerry McKinney was a miner and special projects manager at JWR. As such, he was known "for being all over the mine" and as the "man to go to" for ventilation and roof control problems. Tr. 281, 516. On October 12, 2006, McKinney examined the permanent stopping north of survey station 3575, also known as spad 3575, and was in the process of repairing it; subsequently, he was found pinned under a 83" x 43" x 7" rock that had fallen from the mine roof near a prior roof fall. Tr. 242-43, 335-36, 339; Gov. Ex. 10 at 4, 12; Gov. Ex. 5 at 3. The rock had been supported by two roof bolts and a metal strap that were still attached to it after the fall. Tr. 401-03, 431. There was no witness to the accident. Tr. 254.

A few hours after the accident had occurred, MSHA personnel, Inspector Harry Wilcox, Electrical Specialist John Church, and Supervisor Jerry Langley conducted an investigation. Tr. 262, 265-66; Gov. Ex. 5 at 2. Wilcox traveled to the accident site by the "green path," the same path that Wilcox determined that McKinney had traveled, which had been re-supported with timbers in 2003. Tr. 292-93, 383, 491-92; Gov. Ex. 10 at 12. In order to make the accident area safe for the investigation team, Wilcox had JWR install timber posts to support the roof. Tr. 293-94. Wilcox observed an earlier rock fall in the immediate vicinity of the accident area which, he determined, may have compromised the integrity of straps and bolts securing the roof at the accident site. Tr. 336-37, 406-08. He concluded that McKinney had been fatally injured by a rock that had fallen from the brow of that nearby, earlier fall. Tr. 339. Wilcox also observed two other previous rock falls to the east of the accident site, which he opined had not occurred recently. Tr. 374, 378. He testified that JWR Miner's Representative Joe Martin told him that he had seen a rock fall near the accident site between July and September of 2006. Tr. 357-58; Gov. Ex. 5 at 14. He further testified, based on his interview with JWR employee Paul Arthur Philips, that miners traveled the "red path," instead of the shorter green path, because of adverse roof conditions. Tr. 373; Gov. Ex. 6 at 22. McKinney's notes from the day of the accident recorded three rock falls in the vicinity of the accident area (two of these falls were the two identified by Wilcox as having occurred some time in the past). Tr. 270, 374; Gov. Ex. 9 at 3; Gov. Ex. 10 at 9.

On February 15, 2007, MSHA issued its Report of Investigation and Citation No. 7689677 to JWR, alleging a violation of section 75.202(a).[6] Gov. Ex. 10. Wilcox determined

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[5] The factual findings of the Commission are, hereby, incorporated by reference in their entirety. 37 FMSHRC at 494.

[6] 30 C.F.R. § 75.202(a) provides that "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts."

that the violation was S&S, and that JWR was moderately negligent in violating the standard. Gov. Ex. 15.

III. Significant and Substantial

In *Mathies Coal Co.*, the Commission set forth four criteria that the Secretary must establish in order to prove that a violation is S&S under *National Gypsum*: 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. 6 FMSHRC 1, 3-4 (Jan. 1984); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988) (approving *Mathies* criteria), *aff'g* 9 FMSHRC 2015, 2021 (Dec. 1987). Resolution of whether a violation is S&S must be based "on the particular facts surrounding that violation." *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988); *Youghiogheny & Ohio Coal Co., 9* FMSHRC 2007, 2011-12 (Dec. 1987). The Secretary need not prove a reasonable likelihood that the violation, itself, will cause injury. *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010).

The Commission has recently explained that the second *Mathies* criterion requires the judge to define the hazard against which the violation contributes, and then determine "whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2038 (Aug. 2016); *ICG Illinois, LLC*, 38 FMSHRC 2473, 2475-76 (Oct. 2016). When evaluating the third *Mathies* criterion, the judge is to assume that the hazard identified in step two has been realized, and then consider whether the hazard would be reasonably likely to result in injury in the context of "continued normal mining operations." *Newtown Energy*, 38 FMSHRC at 2045 (citing *Knox Creek Coal Corp.*, 811 F.3d 148, 161-62 (4th Cir. 2016); *Peabody Midwest Mining, LLC*, 762 F.3d 611, 616 (7th Cir. 2014); *Buck Creek Coal*, 52 F.3d at 135); *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984).

The Secretary argues that the inadequately supported roof contributed to a rock-fall hazard, and that McKinney's fatal injury establishes that a 7′ x 3′ x 7″ (approximation of the actual dimensions) falling rock is reasonably likely to lead to reasonably serious injuries. Sec'y Br. at 20-21. JWR argues that the occurrence of the fatal rock fall, alone, does not automatically trigger a finding of S&S. Rather, it contends, the appropriate focus of the inquiry is whether the rock fall was reasonably likely to occur, and reasonably likely to result in serious injury. JWR Suppl. Br. at 1-2. JWR argues that the rock fall was highly unlikely to occur because the roof was supported in accordance with its roof control plan, and that injury was highly unlikely because the accident occurred in a section of the mine that was rarely traveled. *Id.* at 2-3.

The fact of violation has been established, in that the Commission found that the roof in the area where McKinney was working was inadequately supported. Respecting the second *Mathies* criterion, the hazard against which section 75.202(a) is directed is a rock fall and,

notwithstanding JWR's contention that the existing roof support complied with its roof control plan, the rock fall resulting in McKinney's death was reasonably likely to occur because of the likelihood that the anchorage points around the fallen rock had been compromised by the previous, adjacent rock fall; also, numerous other documented rock falls in the vicinity of the accident area evidenced the heightened probability of another occurring nearby. The third *Mathies* criterion has been met, in that a rock falling from the roof and striking a miner was reasonably likely to result in injury. It is also highly likely that a rock at least 7′ x 3′ x 7″ in dimension would result in serious musculoskeletal to fatal injuries, as the occurrence of McKinney's death demonstrated, satisfying the fourth *Mathies* criterion.

IV. Negligence[7]

The Secretary argues that JWR was moderately negligent, and makes several contentions to demonstrate that management knew that the roof support in the accident area was inadequate. He contends that the 2003 re-support project in the green path put JWR on notice of the hazard, that a reported rock fall had occurred within 100 feet of the accident area, and that miners avoided traveling the green path because of unsupported roof. Sec'y Br. at 21-22; *see JWR*, 34 FMSHRC at 1392. The Secretary also argues that JWR was negligent through the actions of McKinney, its agent, because McKinney continued to work in the accident area despite having personally recorded three rock falls. *Id.* at 22-23.

On the contrary, JWR contends that previous rock falls did not put it or McKinney on notice of an impending rock fall because roof conditions are localized. It also contends that McKinney traveled only under supported roof six to ten feet away from the previous fall, and that retreating from the accident area would have prevented McKinney from making essential repairs to the ventilation system. JWR Br. at 29-31.

It is undisputed that JWR was aware of deteriorating roof conditions and rock falls within hundreds of feet of the accident site and, crucially, that JWR was aware of a rock fall adjacent to the accident site only a few months prior to McKinney's death. Indeed, miners chose to bypass the entire green pathway in favor of a longer route, so as to avoid exposure to inadequately supported roof. Thus, the record establishes that rock falls in the vicinity of the accident area were fairly commonplace, and that McKinney's work there, even if six to ten feet from the brow of the recent rock fall, was simply too close to known unsupported roof for the operator to claim ignorance of the heightened danger. JWR's contention, that maintaining the mine's ventilation system required McKinney to work in the area of the accident is unpersuasive, because it fails to recognize the operator's duty to make the area safe by setting additional timbers or other supplemental roof support. This is precisely the action that JWR took to alleviate the hazard after the fatal accident had occurred. For these reasons, and absent any indication that JWR took any measures to protect McKinney from performing his duties under the inadequately supported

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[7] The Commission's remand directing assessment of an appropriate penalty, of necessity, requires a negligence finding.

roof, work it deemed essential to the maintenance of the mine's ventilation system, I find that JWR was highly negligent in committing the violation.

V. Civil Penalty Assessment

While the Secretary has proposed a specially assessed civil penalty of $35,500.00, I must independently determine the appropriate penalty by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i). *See Sellersburg Co.*, 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). These criteria are: the operator's history of previous violations, the appropriateness of the penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator in achieving rapid compliance after notification of the violation. 30 U.S.C. § 820(i).

JWR argues that MSHA's Assessed Violation History Report, offered by the Secretary, should be excluded from evidence because it lists citations from JWR's mines that are not at issue in this proceeding, as well as citations that have been vacated, paid, or are duplicative.[8] JWR Br. at 31-34; see Gov. Ex. 16. I find that JWR's contentions apply to the appropriate weight afforded the Report, rather than its admissibility. Therefore, Government Exhibit 16 is, hereby, **ADMITTED**.

Accounting for the objections raised by JWR, and considering only violations at the No.7 mine in the 15-month period preceding issuance of Citation No. 7689677, JWR was cited for a total of 386 violations, 10 of which were violations of section 75.202(a). Gov. Ex. 16. Based upon this record and JWR's stipulation at hearing that it was a large operator, I find that JWR's violation history is neither an aggravating nor mitigating penalty factor. See Jt. Stips. 20. I also find that JWR demonstrated good faith in achieving rapid compliance after notice of the violation. See Sec'y Br. at 25. In addition to the seriousness of the violation and JWR's high negligence, I note the longstanding judgment of the Commission that subjecting workers for any amount of time to hazardous roof conditions is an especially egregious violation, as was demonstrated here by McKinney's tragic death. *See Consolidation Coal Co.*, 6 FMSHRC 34, 37 n.4 (Jan. 1984) ("Roof falls have been recognized by Congress, the Secretary of Labor, the industry, and this Commission, as one of the most serious hazards in mining."). The final penalty criterion, JWR's ability to continue in business, involves the financial status of the operator and is inapplicable due to JWR's dissolution in bankruptcy and asset sale.

Therefore, having considered the seriousness of the violation, JWR's large size, non-aggravating history of violations, high negligence, and good-faith abatement, I find that a penalty of $35,500.00, as proposed by the Secretary, is appropriate.

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[8] Neither Judge Weisberger nor the Commission ruled on the admissibility of Government Exhibit 16.

ORDER

WHEREFORE, Citation No. 7689677 is **AFFIRMED**, as modified to reflect "high" negligence, and it is **ORDERED** that Jim Walter Resources, Incorporated **PAY** a civil penalty of $35,500.00 within thirty (30) days of this Decision.[9]

Jacqueline R. Bulluck
Administrative Law Judge

Distribution:

Neil A. Morholt, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville TN 37219-2440

John B. Holmes, III, Esq.; Allen B. Bennett, Esq., Maynard, Cooper & Gale, P.C., 1901 Sixth Avenue North, 2400 Regions/Harbert Plaza, Birmingham AL 35203

[9] Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket Number and A.C. number.