FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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October 8, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2007-264
Petitioner	:	A.C. No. 01-014901-114900-01
v.	:	
	:	Docket No. SE 2007-271
	:	A.C. No. 01-01401-114900-02
JIM WALTER RESOURCES, INC.,	:	
Respondent	:	Mine: No. 7 Mine

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Guy W. Hensley, Esq., Jackson Kelly, PLLC, Brookwood, Alabama, for the Respondent.

Before: Judge Weisberger

Statement of the Case

These cases are before me based upon Petitions for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary"), alleging violations by Jim Walter Resources, Inc. ("Jim Walter") of various mandatory safety standards set forth in Title 30, Code of Federal Regulations.

Pursuant to notice, the cases were duly scheduled and heard in Birmingham, Alabama on June 10, 2009. Subsequent to the hearing, each party filed a brief. Neither party filed a reply brief.

I. Docket No. SE 2007-271

A. Citation No. 7691427

1. Findings of Fact

On July 16, 2007, MSHA Inspector Harry Wilcox inspected Jim Walter's No. 7 Mine, an underground coal mine. In the course of his inspection, he examined the alternate escapeway located in the intake air entry. According to Wilcox, two parallel stoppings, constructed from solid concrete blocks, extended from the floor to the ceiling and laterally across the entry from

the right rib, looking inby, to the middle of the entry. A regulator was located within the concrete blocks, and extended from the middle of the entry to the left rib. According to Wilcox, the small size of the regulator opening as well as pressure created by the high volume of intake air flowing through the regulator towards the face prevented passage through the regulator. An airlock that extended from the right rib to the middle of the entry allowed passage in either direction through the approximately six foot gap between the two stoppings.

A lifeline was provided in the entry for miners to use to escape in the event of diminished visibility caused by smoke resulting from a fire or explosion. The lifeline, which extended from the roof, was secured to the inby and outby sides of the airlock, but did not continue inside the airlock between the stoppings. Thus, when escaping outby in an emergency with diminished visibility, miners could escape in an outby direction by following the lifeline up to the inby airlock door. However, at that point it would be necessary to open the airlock door, and traverse the six foot distance inside the airlock to the outby door without the benefit of a lifeline. After opening the outby airlock door and re-entering the entry, it would be necessary to locate the lifeline in order to continue outby to escape.

Wilcox issued a citation alleging a violation of 30 C.F.R. § 75.380(d)(7), which was modified two days later to allege a violation of 30 C.F.R. § 75.380(d)(7)(i), which requires, as pertinent, that each escapeway should be provided with a "continuous, ... lifeline ... that shall be- (i) Installed and maintained throughout the entire length of each escapeway ... ;" (emphasis added).

2. Discussion

Jim Walter did not adduce any evidence contrary to the facts set forth above, nor did it impeach the inspector's testimony in these regards.

It appears to be Jim Walter's position that the lifeline was in compliance with Section 75.380(d)(7)(i). Jim Walter relies on the testimony of Ricky Parker, a safety supervisor, that miners travel the escapeway every ninety days, and that no one has had any problem negotiating the lifelines through the airlock.

In addition, Jim Walter relies on an MSHA computer-generated document, RX-1, which the inspector identified as "Q and As" (Tr. 43.), which provides that "If doors cannot be avoided, the lifeline should be secured to the stopping on either side of the door." Jim Walter argues that it was in compliance with the cited standard, as the lifeline was secured to the stopping on either side of the door. However, there is not any indication that RX-1 was promulgated pursuant to notice and comment.

Further, RX-1 is not consistent with the plain meaning of the regulation at issue, which requires that lifelines be, *inter alia*, "continuous." *Webster's Third New International Dictionary* (2002 ed.) ("*Webster's*") defines continuous as "characterized by uninterrupted extension in

space: stretching on without break or interruption." Inasmuch as the lifeline at issue did not continue through the airlock and there was a six foot break or interruption in the lifeline, I find that it was not "continuous" within the common meaning of that term. Accordingly, I find that the lifeline was not in compliance with Section 75.380(d)(7)(i).[1]

3. Penalty

Parker testified, in essence, that Jim Walter secured the lifeline to stoppings on either side of the airlock, in reliance on the "Q and As" (RX-1), "that was given out to us for compliance guidelines." (Tr. 52) I observed his demeanor, and find his testimony credible in this regard. I find that the level of Jim Walter's negligence was low. Taking into account all of the factors set forth in Section 110(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C § 820(i) ("Mine Act"), and placing most weight upon the low level of Jim Walter's negligence, I find that a penalty of $20.00 is appropriate for this violation.

B. Citation No. 7691428

1. Finding of Fact and Discussion

On January 23, 2007, Wilcox inspected the main fan area on the surface of the Jim Walter No. 7 Mine. A temporary vibration sensor cable was in use to monitor the vibration of the fan

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[1]Jim Walter argues, based on the following testimony of Parker, that the installation of a continuous lifeline through the airlock "presents several problems that threaten safety by interfering with the integrity of the lifeline." Jim Walter Resource's Proposed Findings of Fact and Conclusions of Law, at 4 ("Jim Walter's Brief"):

> Q. Are there any problems with running a lifeline through an airlock door, as Mr. Wilcox described previously?
> A. Yes, sir. We're having problems now with the doors constantly cutting the lifeline in two, damaging the lifeline. We're having to replace the lifeline continuously, due to the abrasion of the door shutting against it and the vibration due to the enormous amount of air currents coursing through that ventilation control.

(Tr. 56.)

Thus, Jim Walter's argument in defense is essentially based upon a diminution of safety which, according to well-established Commission caselaw, has been held to not constitute a defense in an enforcement proceeding unless the Secretary has first entered a finding of such diminution at a modification proceeding. *See Clinchfield Coal Co.*, 11 FMSHRC 2120, 2130 (Nov. 1989), citing *Sewell Coal Co.*, 5 FMSHRC 2026 (Dec. 1983), and *Penn Allegh Coal Co.*, 3 FMSHRC 1392 (June 1981).

shaft to ensure that it would not cause the shaft to fail. The cable entered the metal compartment for the sensor control through a door. It did not enter through any fitting; the door was closed against the cable.

Wilcox issued Citation No. 7691428, alleging a violation of 30 C.F.R. § 77.505, which requires as follows: "Cables shall enter metal frames of motors, splice boxes, and electric compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings."

Jim Walter urges that the citation be dismissed, and cites Wilcox's testimony that the cable had been placed inside the metal compartment only on a temporary basis, that the current on the cable "would be milliamps," and that he did not find any cable damage. (Tr. 75.) Jim Walter argues, in essence, that under these circumstances, Section 77.505 does not apply.

However, the mandate of Section 77.505 is clear and unequivocal in requiring that cables enter metal frames of electrical components "only through proper fittings." The language of Section 77.505 does not provide for any exceptions. Thus, to rule in favor of Jim Walter would result in the amendment of Section 77.505, which is manifestly beyond the powers of a Commission Judge.

2. Conclusion

I find that the record establishes that the cable entered an electric compartment through its door and not "through proper fittings." Thus, I find that it has been established that Jim Walter violated Section 77.505.

Considering all the factors set forth in Section 110(i) of the Mine Act, I find that a penalty of $60.00 is appropriate for this violation.

C. Citation No. 7691429

The parties stipulated that a violation of 30 C.F.R. § 77.504 occured as alleged in Citation No. 7691429, and that $60.00 is an appropriate penalty for this citation. Secretary's Brief and Argument, at 1, and Jim Walter's Brief, at 2.

II. Docket No. SE 2007-264

A. Citation No. 7690414

1. Findings of Fact

On September 29, 2006, MSHA inspector Russell Weekly inspected Jim Walter's truck shop. He indicated that four overhead lights in the left corner of the ceiling on the east side of

the shop were burnt out. According to Weekly, "[t]he area that these lights would have illuminated was not very adequately lit, even at the time of day the citation was issued, which was 0800." (Tr. 154.)

Weekly opined that a person walking to and from supply cabinets located on the east side of the shop could trip over an approximately 3/4 of an inch thick steel plate that was located under the cabinets. He asserted that persons working the evening or night shifts "could very possibly" trip over the steel plate since the area would be dark without the benefit of sunlight. (Tr. 162.)

Weekly issued a citation alleging a violation of 30 C.F.R. § 77.207, which provides that "[i]llumination sufficient to provide safe working conditions shall be provided in and on all surface structures, ... and working areas."

According to Parker, the floor of the structure at issue was sixty to seventy feet long, and thirty to forty feet wide. He indicated that a garage door ten to twelve feet wide and approximately fifteen feet high was located on the east side of the shop and was normally kept open.

Parker testified that opaque fiberglass skylights extended around the perimeter of the walls of the building. The skylights, which were approximately six feet high, were located "from halfway to three quarters of the [50 foot high] wall." (Tr. 235.)

According to Parker, there were four lights in the ceiling, in addition to the four cited by Weekly. Also, there were a total of seven wall lights located halfway up the walls, and distributed among the four walls. Parker testified that there were two cap lights in the shop, and "we have" tripod and hanging lights although he did not see them in the shop. (Tr. 244.)

Parker, who was the inspector during the latter's inspection, testified that "We didn't have a problem seeing anything that we needed to see at the time." (Tr. 245.) He opined that the illumination was sufficient.

2. Discussion

I take cognizance of the inspector's opinion that the illumination in the shop was not sufficient to provide safe working conditions due to the absence of four overhead lights. However, the weight to be accorded this opinion is diluted by considering the presence of opaque sky lights covering a significant portion of the walls surrounding the building. Further, I note the presence of additional ceiling and wall lights, and the availability of cap lights. I, thus, find the record does not establish that, during the daylight shift, illumination was insufficient.

Further, since the inspection was only during daylight, it is mere conjecture that the illumination would not have been sufficient during the evening and night shifts. There was not

any evidence adduced regarding the amount of illumination shed by all the operative lights located on the walls and ceiling. Moreover, I note the presence of additional portable lights, as well as the availability of cap lights. Also, I note that Weekly did not indicate the spatial relationship between the inoperative overhead lights, the working areas, and the location of the supply cabinets where the potential tripping hazard of a steel plate was located.

For all these reasons, I find that the Secretary has failed to adduce sufficient evidence to establish, by a preponderance of evidence, that due to the lack of four ceiling lights, the illumination remaining was not sufficient to provide safe working conditions. For these reasons, I find that it has not been established that Jim Walter violated Section 77.207. Accordingly, Citation No. 7690414 is **Dismissed**.

B. Citation 7690415

1. The Secretary's Case

Weekly testified that there were not any weatherproof covers over two 110-volt wall outlets that were located inside the shop. He indicated that a Jim Walter employee told him that the area is sprayed down and washed out daily. He opined that if water was inadvertently sprayed into the outlets in question, which were located four feet off the floor, the person doing the spraying could suffer an electrical shock due to a short circuit. Weekly issued a citation alleging a violation of 30 C.F.R. § 77.516.

Section 77.516 provides, as pertinent, that "all wiring and electrical equipment installed after June 30, 1971, shall meet the requirements of the national electric code in effect at the time of the installation." In support of the violation, the Secretary proffered a 1968 edition of the National Electric Code ("GX-10"). Jim Walter objected to the admissibility of GX-10, and after listening to arguments, the objection was sustained.[2]

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[2]The ruling sustaining the objection is set forth as follows, except for corrections of matters not of a substantive nature:

> Section 77.516 imposes a duty on an operator to meet the requirements of the National Electric Code in effect at the time of installation.
>
> There isn't any evidence in the record of the time of the installation of the shop, or any of the cited items. Therefore, the record is inadequate to establish that the 1968 edition, GX10, was the edition that was applicable on the date in question, i.e., the code that was "in effect" at the time of installation. Since it has not been established that GX-10 is relevant, I find it is inadmissible.

(Tr. 207-208.)

After the Secretary rested, Jim Walter made a motion for summary decision which was granted. The decision granting Jim Walter's motion is set forth below, with the exception of non–substantive changes, and the addition of matters that were inadvertently omitted.

2. Bench Decision

The Secretary has the burden of establishing a violation, which entails establishing all elements of a violation. Section 75.516 requires an operator to comply with the requirements of the National Electric Code "in effect at the time of the installation."

The Secretary has not presented any evidence with regard to the time of the installation, either of the structure that is at issue or specifically with regard to the wiring and installation of the outlets at issue. Thus, the Secretary has failed to establish which edition of the code was in effect at the time of the installation.

The Secretary proferred a copy of five pages from a 1968 edition of the National Electric Code (GX-10).[3] Jim Walter objected to its admissibility. After each party argued the merits of the objection, the objection was sustained. As such, GX-10 is not part of the record.

Thus, since the Secretary did not proffer the Code that was "in effect at the time of installation" (Section 75.516), it is clear that the Secretary has not established a violation of Section 75.516.

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[3]The Secretary cites GX-10, page four, paragraph 410-54, which requires that "[a] receptacle installed in damp or wet locations to be of the waterproof type." GX-10, p. 3, defines "wet location" as follows: "A location subject to saturation with water or other liquids; such as, locations exposed to weather, washrooms in garages and like locations."

There was not any evidence presented that the outlets at the location cited were subject to saturation. The inspector indicated that Mark Talbert, the truck shop foreman, stated that the floor area was washed out. The inspector opined that an uncovered outlet located on the inside wall of the structure four feet off the ground might, in the process of washing down the floor, be inadvertently hit by the water, causing possible damages. Such a situation is far short of the requirement of being subject to saturation.

There is not any evidence that the location of the outlets were subject to saturation of water or other liquids. Further, the location cited is not similar to those that are given as examples under the definition of wet location on page three of GX-10, such as the locations exposed to weather, washrooms in garages, and like locations.

For these reasons, the Jim Walter's motion is granted, and Citation No. 7690415 shall be **Dismissed**.

C. Citation No. 7690728

1. Findings of Fact

On November 2, 2006, MSHA inspector Billy Johnson inspected Jim Walter's underground mining operation. He indicated that a JOY 12-27 continuous miner ("left side miner") was not being operated. He noticed that it did not have a rock bar (pry bar). He indicated that when he cited it, it was located in the No. 2 entry, and "I think [it was] in the last open crosscut." (Tr. 284.) Johnson opined that although the miner was not being operated when it was cited, if it was intended for the miner to be used, then a rock bar is needed.

Johnson indicated that in the operation of the continuous miner, draw rock could be encountered in the roof which would require the rock to be pulled so it would not fall and injure miners.

According to Johnson, he told Joe Martin, a union safety man who was with him, and Red Morgan, a manager, to show him "a bar" if there was one in the face area, and they both said that bars were not kept in the face area; they were kept on the equipment. (Tr. 287.)

Johnson issued Citation No. 7600728 alleging a violation of Section 75.211(d), which, as pertinent, provides that a "a bar for taking down loose material shall be available in the working place or on all face equipment except haulage equipment."

Parker indicated that he spoke to some persons who had first-hand knowledge of the operation in the area in question. These persons told Parker that MSHA allowed the practice of removing the bar from a miner that had backed out of the face and parked, and placing it on the miner being operated on the other side of the section.

2. Discussion

By its clear terms, Section 75.211(d) provides that, in essence, an operator is in compliance if a bar is "available in the working place or on all face equipment." Thus, since the clear wording of Section 75.211(d) sets forth its obligations in the alternative, an operator is in compliance if either a bar is available in the working place, or is on all face equipment. Thus, to establish a violation, the Secretary must establish that a bar was neither available in the working place, nor on all face equipment. For the reasons that follow, I find that the Secretary has not met this burden.

a. "[A]vailable in the working place"

"Available" is defined in *Webster's,* as pertinent, as follows: "**(4):** that is accessible or may be obtained**.**" Accessible, as pertinent, is defined in *Webster's* as pertinent, as follows "**(4):** capable of being used."

Section 75.211(d) does not define the phrase "working place." However, 30 C.F.R. § 75.2 defines "working place" as "the area of a coal mine inby the last open cross-cut."

When Johnson issued the citation at issue, a bar was not physically located in the working place. However, as testified to by Johnson on cross-examination, a bar was "retrieved ... within five minutes" of the time the citation was written. (Tr. 293.) (emphasis added) It is significant to note that the citation was issued pursuant to the examination of the left side miner, which was located in the last open crosscut, i.e., "that open passageway connecting entries closest to the working face." *Jim Walter Resources, Inc.*, 11 FMSHRC 21, 26 (Jan. 1989). (emphasis added) I also note that the working place" was inby the last open crosscut. Jan. 30 C.F.R. § 75.211. Accordingly, since (1) it took only five minutes to "retrieve" a bar allowing Johnson to terminate the citation, and (2) Johnson was apparently at the location of the cited miner in the last open crosscut, it may be concluded that, when cited, it would have taken approximately five minutes to bring a bar to the working place, i.e., inby the last open crosscut.

Accordingly, I find that the bar was "available" in the "working place" within the common meaning of the former term. To rule otherwise would result in the amendment of Section 75.211(d) by substituting the word "located" for the word "available"and deleting the latter word. Clearly this is a function beyond the scope of the powers of a Commission Judge.

3. Conclusion

For all the above reasons, I find that Jim Walter was in compliance with the first phrase of Section 75.211(d), i.e., that a bar be "available in the working place." Thus, since the clear wording of Section 75.211(d), requires that a bar be available at the working place "or" an all face equipment, I find that Jim Walter satisfied one of the alternate mandates of Section 75.211(d). Therefore Citation No. 7690728 shall be **Dismissed.**

D. Citation No. 7689496

1. Findings of Fact

On January 2, 2006, MSHA inspector Edward Nicholson inspected the track entry while traveling the entry in a personnel carrier that rode on tracks. He observed airborne dust while traveling in and out of the entry. He indicated that there was sufficient dust to hinder visibility on the track.

Nicholson issued a citation alleging that Jim Walter was not in compliance with its ventilation and dust control plan ("Plan"), and as such violated 30 C.F.R. § 75.370(a)(1).

Specifically, he indicated that the basis for the citation was the non-compliance with "page 3" of paragraph E of the Plan. According to Nicholson, as a consequence of the cited conditions, a miner could develop respiratory diseases.

Parker indicated that he travels the area frequently and that "it's virtually impossible" to keep all dust out of intake air:

> due to ... the large amount of velocity of air we have coursed down through that entry especially, if you have – numerous personnel carriers that can be traveling in this one entry of the track, where we have deposited rock dust on the roof and the ribs, it also goes on the floor.
>
> The vibration of the machine traveling the metal tracks, the turbulence caused by all these pieces of equipment, can cause the rock dust to fall from the ribs or roof and even be picked up from the sides of the track because of this, in conjunction with the dust that can be on the equipment itself.

(Tr. 335-36.)

Parker traveled the cited entry with the inspector. He indicated that the cited conditions "[did not] constitute dust under the law." He explained his opinion as follows:

> [D]ue to the minute amount that was present. ... [and] due to the amount of velocity mass in the air, the dust is there for a few minutes; and then it's gone. It's moved rather quickly away.
>
> Q. Are you saying that any dust that's airborne is evacuated from the area by the mine?
>
> A. Yes, sir. It doesn't linger in the area.

(Tr. 337-38.)

2. Discussion

30 C.F.R. § 75.370(a)(1), as pertinent, provides as follows: "The operator shall develop and follow a ventilation plan ... The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine." (emphasis added)

The ventilation plan, as pertinent, provides as follows:

* * *

E. BELT AND TRACK HAULAGE SYSTEM

The belt and track haulage system will follow a dust control program. The dust control program is one or any combination of the following items:

1. Removing accumulations of loose, dry coal
2. Rockdusting
3. Wetting with water or other wetting agent.

(GX 12.)

The clear language of Section 75.370(a)(1), as pertinent, requires that an operator follow a ventilation plan which shall be designed to control dust. In other words, the plan shall be followed to control dust. These requirements are unequivocal, and do not provide for any exemption from compliance, as urged by Jim Walter, based upon an impossibility to keep all of the dust out of the intake air due to its velocity. It is significant that Parker did not specifically impeach or contradict Nicholson's testimony that, when cited, dust was observed in the air which impaired visibility. Further, I observed the witnesses' demeanors, and I find Nicholson's testimony regarding the presence of airborne dust to be credible. I find that at the time cited, due to the presence of dust in the air that impaired visibility, Jim Walter was not "following a dust control program." Accordingly, I find that Jim Walter violated Section 75.370(a)(1).

According to Nicholson, Jim Walter did have a program for keeping the track wet in the cited area. I also note Parker's testimony that if an area is deemed necessary for wetting or rock dusting, he "would get in touch with the proper management person to get that action taken." (Tr. 334.) Also, based on Parker's testimony that was not impeached or contradicted, I take cognizance of the difficulty to keep all dust out of the air due to the velocity of air in the entry, and the operation of carriers on the track causing the production of dust. I thus find the level of Jim Walter's negligence to be significantly mitigated. Considering this finding, as well as the other factors set forth in Section 110(i) of the Mine Act, I find that a penalty of $20.00 is appropriate.

ORDER

It is **Ordered** that the following citations be **Dismissed**: 7690414, 6790415, and 7690728. It is further **Ordered** that, within 30 days of this decision, Jim Walter shall pay a total civil penalty of $120 for the violations found herein.

Avram Weisberger
Administrative Law Judge

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