FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 New Jersey Avenue, NW, Suite 9500
Washington, DC 20001-2021

February 3, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2008-881
Petitioner	:	A.C. No. 01-01247-153621
	:	
v.	:	
	:	
JIM WALTER RESOURCES, INC,	:	No. 4 Mine
Respondent	:	
	:	
JIM WALTER RESOURCES, INC,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. SE 2008-173-R
	:	Citation No. 7691861; 12/15/2007
v.	:	
	:	Docket No. SE 2008-268-R
	:	Citation No. 7693051; 1/22/2008
	:	
SECRETARY OF LABOR,	:	No. 4 Mine
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	

DECISION

Appearances: Thomas Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor;
David Smith, Esq. and John Holmes Esq., Maynard Cooper & Gale, PC, Birmingham, Alabama, on behalf of Jim Walter Resources, Inc.

Before: Judge Melick

This case is before me upon the petition for a civil penalty (consolidated with a related Contest Proceeding) filed by the Secretary of Labor ("Secretary") pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301 et seq. (the "Act") charging Jim Walter Resources Inc. ("JWR") with three violations of mandatory standards and seeking civil penalties for those violations. The general issue before me is whether JWR violated the cited standards as charged, and if so, what is the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act. Additional specific issues are addressed as noted below.

At hearings, the Secretary filed a motion to settle Citation Nos. 7691858 and 7691861 for

$687.00 and $308.00 respectively. I have considered the representations and documentation proffered in connection with the motion and find that the proposed penalties are acceptable within the framework of section 110(i) of the Act. Accordingly, an order directing payment of those penalties will be incorporated herein.

Citation Number 7693051

This citation, issued January 22, 2008, alleges a "significant and substantial" violation of the standard at 30 C.F.R. §77.1710(g) and charges as follows:

> An accident occurred at the surface Clean Coal Loadout Building on December 4, 2007. An employee of O & O Services, a contractor working at the site, fell through an opening 21 inches by 48 inches, and landed on a concrete platform 25 feet below, resulting in life threatening injuries. The worker was not wearing a safety belt or other means of fall protection

The cited standard provides as follows:

> Each employee working in a surface coal mine or in a surface work area of an underground mine and coal mine, will be required to wear protective clothing and devices as indicated below:
> ...(g) safety belts and lines where there is a danger of falling;....

The citation was subsequently terminated by the Department of Labor's Mine Safety and Health Administration ("MSHA") on February 5, 2008 after JWR abated the alleged violation. MSHA agreed to abate the alleged violation after "management submitted to MSHA a statement indicating that a greater emphasis on the use of PPE will be related to contractors doing work on JWR No.4 property and during the process of hazard training will review recent accidents of contractor employees."

JWR's independent contractor O & O Services ("O & O") was also charged, in Citation Number 7693049 on January 17th, 2008, with the same violation of the standard at 30 C.F.R. §77.1710(g) as JWR. That citation charges as follows:

> An accident occurred when O & O Services employee, Tony Pierce fell through an opening in the Clean Coal Loadout Building at the Jim Walter Resources, Inc. No. 4 mine. The employee was working over an opening 21 inches by 48 inches and not wearing a safety belt or other means of fall protection. He fell through the opening onto a concrete platform 25 feet below, resulting in life threatening injuries. The worker positioned over the open hole for an extensive period of time. A supervisor had knowledge that the worker was in a hazardous location where fall protection was needed and

took no action. The supervisor was present at the time the accident occurred. The foreman engaged in aggravated conduct constituting more than ordinary negligence.(Exh. G-2).[1]

For the reasons that follow, I find that O & O violated the cited standard as charged and that JWR, as the mine operator who contracted with O & O, is liable without fault for that violation and is therefore subject to civil penalties under the Act. This decision by the Secretary to charge JWR for the violation of its contractor is unreviewable. *Speed Mining Inc. v. FMSHRC et al.,* 528 F. 3d 310 (4th Cir. 2008).[2]

It is undisputed that JWR contracted with O & O on September 17th, 2007 to provide the labor and supervision for a project to replace a structure described as a cone used to funnel and load coal into trucks at the preparation plan loadout facility (Exh. JWR-32). In that contract, O & O agreed not only to provide supervision but also to comply with all safety regulations and to hold JWR harmless for any violations. (Exh. JWR-32). O &O's work on the project began on Sunday, December 2nd, 2007. On December 4th, 2007, work was delayed when the third segment (of eight) of the cone would not set into place. It was obstructed by finlike protrusions (stiffeners) on the metal plate upon which it rested (Exh. G-6).

According to O & O leadman Bobby O'Dell, he and O & O foreman Kris Gamble discussed how to cover the hole at the bottom of the cone after the obstructing metal plate would be removed. They discussed using a metal grate which would then provide a safe platform over the 21 inch by 48 inch hole so that work could continue on the cone. O'Dell testified that following the above discussion with foreman Gamble, they proceeded up to the room where the cone was being replaced. Gamble was standing at the doorway to the room and he (O'Dell) was standing behind him outside the doorway. According to O'Dell they were standing there five minutes, at most, during which time Gamble turned around and spoke to him twice as described in the following colloquy at hearings:

The Court: Were you talking with Mr. Gamble?

A. (Mr. O'Dell) Only the two conversations or the two statements that was made, Tony is trying to put it in place and then Tony had fell. My back was to him and I was not looking inside the door.

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[1] A motion for approval of a settlement of this O & O citation has also been approved on this date. See Docket No. SE 2008-1033

[2] The Circuit Court in *Sec'y v. Twentymile Coal Co., et al.*, 456 F. 3d 151 (D.C. Cir. 2006) held that the Secretary's discretionary decisions in this regard are nevertheless "subject to constitutional constraint" including those "imposed by the equal protection components of the Due Process Clause of the Fifth Amendment." JWR has not however established in this case that a constitutional infirmity exists herein. Accordingly, the Secretary's decision to cite JWR is not reviewable by this Commission.

The Court: Did Mr. Gamble turn around to talk to you?

A. Yes.

Q. (By Mr. Grooms) That's when he told you that Kris was prying with a pry bar on the piece of wood; is that correct?

A Yes. He told me he was trying to put this piece in place. Right. Then he turned back around and then that's when he said Mr. Pierce had fallen? That's right."

(Tr. 368 -370)

Kris Gamble testified that he was foreman for O & O during relevant times and started working on the cone replacement project on the day shift at 7:00 a.m. Monday, December 3rd, 2007. At that time he saw his employees working with fall protection. He testified that he was familiar with the MSHA regulations regarding fall protection and that JWR had always expected O & O's employees to tie off when working on heights. Gamble returned on Tuesday, December 4th, 2007 at around 6:30 a.m. At that time he met with JWR engineers to "line things up." The subject hole was then covered with a metal plate and was covered at all times when JWR employees were present. He observed that O & O's employees were still using fall protection that morning and in particular, he observed that the fall victim, Tony Pierce, was working on a ladder with fall protection. Gamble further testified that he had talked to Pierce that day and reminded him that he needed to wear fall protection unless he was working on the plate. Gamble further testified in a colloquy at hearings as follows:

Q. (Mr. Grooms) What happened after you and Bobby [O'Dell] discussed alternative means of covering the hole?

A. That's when me and him went up there to go look at it.

Q. What did you see when you got to the top of the stairs?

A. Well, I just saw people in there working. They were trying to lower a piece into place and everybody was just sitting there working, kind of sitting around the hole.

Q. How long were you there before Tony fell?

A. Well, Bobby was coming behind me. I think he stopped to say something to somebody for a minute. I mean, it couldn't have been long. It couldn't have been long, just a few minutes.

Q. In the brief time you were there, did you notice where Tony Pierce

was?

A. He was standing up on top there where we had the plate.

Q. Did you notice that he was not tied off?

A. No, I didn't. I wasn't even paying attention to that. I was looking at the piece and stuff they were bringing in and I just didn't notice.

Q. Did you notice that he wasn't wearing fall protection?

A. No, I didn't notice.

Q. Did you look at what he was actually standing on?

A. The only time I ever noticed the board was when he stuck a pry bar in to pry the piece around and that's when the board shot out and he went down.

Q. Do you know how long Tony had been standing on the board before he fell?

A. I would have so [sic] say it would be some time after break, I guess.

Q. Did you know that he was standing on a board?

A. No.

Q. Before he fell?

A. No. I didn't see the board until he went to pry.

Q. Why didn't you stop him, Mr. Gamble?

A. I didn't notice.

Q. Yes. Now just for orientation, again Exhibit 28, that's the load-out facility; correct?

A. Correct.

Q. From the outside. Now let me show you now Exhibit 20C. Have you got that, Mr. Gamble?

A. I do.

Q. Is that based on your recollection of that room where the cone was being installed? Are we looking from the door at that point?

A. Yes.

Q. How far would you say the door was from the cone facility, from the platform I should say?

A. From the center of the platform, maybe ten feet.[3]

Q. At the time that you entered the door and observed Mr. Pierce standing on the board, that's where you saw him right there. He would have been inside the cone essentially; right?

A. Yes, he was inside the cone.

Q. He is what, about six feet six tall?

A. Yes.

Q. And you saw him prying with the pry bar on the board; right?

A. Yes.

Q. You were there long enough to see him prying; correct?

A. Yes.

Q. And you had said you had never seen him on the board before?

A. No.

Q. And that didn't alarm you to see him standing there with the pry bar prying on the board over the hole?

A. When I seen him hit the board with the bar, there was no time to say anything.

Q. But you knew the hole was there; correct?

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[3] Contrary to this testimony, MSHA Inspector Womack estimated this distance as three to four feet (Tr. 72).

A. I knew there was a hole below this plate, but I did not know it was exposed as far as it was.

Q. So how long did you observe Mr. Pierce standing on the board without the fall protection?

A. I wasn't there long. I remember talking to some other people. I would say I might have been up there three to four minutes at the most maybe.

(Tr. 313-318)

Within this framework of evidence, I find that O & O employee Tony Pierce was working over the subject 21 inch by 48 inch hole standing only on a board lying across the hole (Exh. G-20 K and G-20 L) and not wearing a safety belt or other means of fall protection. When the board on which he was standing gave way, he fell through the opening onto a concrete platform 25 feet below. I further find that O & O foreman Kris Gamble was present and in a position estimated to have been between only three to ten feet away to observe Pierce for as long as five minutes working over the hole supported only by a 2 X 12 board and without fall protection. Under the circumstances, it is clear that O & O, through its agents, did not engage in specific and diligent enforcement of the safety belt requirement. *Sec'y v. Southwestern Illinois Coal,* 5 FMSHRC 1672 (Oct. 1983); *Sec'y v. Southwestern Illinois Coal,* 7 FMSHRC 610 (May 1985). The violation by O & O has therefore clearly been proven as charged. As previously noted, since the Secretary may charge the mine operator for violations committed by its independent contractors, JWR is also liable for the violation as charged in Citation Number 7693051.

The violation was also clearly "significant and substantial" and of high gravity. 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 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 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 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 (December 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 (Aug. 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 1573, 1574 (July 1984); *see also Halfway, Inc.,* 8 FMSHRC 8, 12 (Jan. 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-917 (June 1991).

Clearly, working without fall protection on 2 X 12 wooden board over a 21 X 48 inch hole with a 25-foot drop onto a concrete platform below, is a discreet safety hazard. Moreover, there can be no dispute that falling 25 feet onto a concrete platform would be reasonably likely to cause serious or fatal injuries. The record shows that Pierce survived his fall but suffered serious injuries including multiple broken bones.

Civil Penalties:

Under section 110(i) of the Act, in assessing civil monetary penalties, the Commission and its judges must consider 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 person charged in attempting to achieve rapid compliance after notification of the violation. JWR is a large business with a significant history of violations (considering only Exhibit A to the Secretary's Petition filed herein). There is no evidence that even the proposed penalties would affect its ability to remain in business. There is no dispute that the violation was abated promptly and in good faith. The gravity criterion has been previously discussed.

Negligence has been defined as conduct involving an unreasonably great risk of causing damage or conduct that falls below the standard established by law for the protection of others against unreasonable risk of harm. *Prosser & Keeton, Law on Torts*, § 31 (5th Ed). The Secretary alleges in her "Narrative Findings for a Special Assessment", but without factual support, that JWR was moderately negligent. Issuing MSHA inspector, Steven Womack, found that JWR was moderately negligent for the reason that it did not do "everything they could" to see that its contractor was following Federal regulations. JWR argues in its brief however, that the Secretary has provided no notice as to what "everything they could" entails.[4] JWR is arguing, in effect, that the Secretary has not provided notice as to the standard established by law that is required of JWR. The closest the Secretary has come to providing notice to JWR of the standard of care established by law was in the abatement she required for a prior violation of the same standard by JWR about one month before the incident herein and involving a fatal fall accident of an employee of a JWR contractor. The Secretary required JWR to abate that violation by providing only "additional training" and by installing an "adequate anchorage system" to secure personnel from falling (Exh. G-9).[5]

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[4] The Secretary does not maintain that the standard of care required of JWR is the same as the standard required for proving violations committed by O & O under the *Southwestern* cases.

[5] It is also noteworthy that the only action the Secretary required to abate the instant citation was for JWR to submit to MSHA a "statement indicating that a greater emphasis on the use of PPE will be related to contractors doing work for JWR No. 4 property and during the process of

In this case, an anchorage system had indeed been provided by way of loops welded onto the cones (Exh.G-20 F). The record also shows that before work began JWR confirmed that the O & O employees had received all of the requisite training for the job. Indeed, the Secretary has not alleged that the O & O employees were not provided adequate training. In addition, the record shows that when JWR personnel were present they observed fall protection in use. Furthermore, there is no evidence that any JWR personnel were aware that Pierce was working over the open hole or that Pierce failed to wear fall protection. Finally, the record shows that O & O was an approved vendor with whom JWR had years of prior safe work experience, that it had never been cited for a violation of MSHA regulations, that it had a safety training program and that it had provided the necessary safety harness and anchorages for Mr. Pierce.

The Secretary suggests in her brief that JWR had a legal duty to take over from O & O the direct supervision of the cone replacement project because it " knew or could not help but know of the creation of a hole in the platform." The Secretary is, in essence, suggesting that JWR must maintain direct and continuous supervision over its contractor's employees because of the possibility that an employee may at some point in time be working without necessary fall protection. The Secretary fails to cite any legal authority and I find that there is no legal support for this suggestion. It is also noteworthy that no such requirement was a condition of abatement for either the prior citation or the current one.

Under the circumstances, I conclude that JWR in this case exercised the standard of care required by law and that it complied with the Secretary's required standard of care as stated in her prior abatement order to JWR. I further find that JWR exercised due diligence and could not reasonably have known of the violative condition created by an employee of O & O. Accordingly, I do not find that the Secretary has met her burden of proving negligence on the part of JWR. Considering the factors set forth in section 110(i) of the Act, I find that a civil penalty of $500.00 for the violation charged in Citation No. 7693051 is appropriate.

ORDER

Citations No. 7691858 and 7691861 are hereby affirmed. Citation Number 7693051 is also affirmed as a "significant and substantial" violation and Jim Walter Resources Inc., is directed to pay civil penalties of $687.00, $308.00 and $500.00, respectively, for the three violations charged therein within 40 days of the date of this decision. Contest Proceedings Docket Nos. SE 2008-173-R and SE 2008-268-R are hereby dismissed.

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hazard training will review recent accidents of contractor employees." Surely, if the Secretary is going to demand a more specific standard of care and one that is "established by law," she has a duty to provide specific notice of that to the operator.

Gary Melick
Administrative Law Judge
202-434-9977

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