

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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August 23, 1995

JIM WALTER RESOURCES, INC., : CONTEST PROCEEDING
Contestant :
v. : Docket No. SE 94-586-R
: Order No. 3184217; 7/22/94
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : No. 4 Mine
ADMINISTRATION (MSHA) :
Respondent :
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. SE 94-429
Petitioner : A.C. No. 01-01247-04120
v. :
: Docket No. SE 94-448
: A.C. No. 01-01247-04122
JIM WALTER RESOURCES, INC., :
Respondent : No. 4 Mine
: Docket No. SE 94-394
: A.C. No. 01-01322-03957
: No. 5 Mine
: Docket No. SE 95-430
: A.C. No. 01-01401-04011
: No. 7 Mine

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Respondent and Petitioner;
David M. Smith, Esq., Maynard, Cooper & Gail, Birmingham, Alabama, for Contestant and Respondent;
R. Stanley Morrow, Esq., Jim Walter Resources, Inc., Brookwood, Alabama, for Contestant and Respondent.

Before: Judge David Barbour

These consolidated cases involve one contest proceeding and four civil penalty proceedings brought under the Federal Mine Safety and Health Act of 1977 (Act) (30 U.S.C. ' 801 et seq. (1988)). In the contest proceeding, Jim Walter Resources, Inc. (Jim Walter) challenges the validity of an order of withdrawal issued pursuant to section 104(d)(2) of the Act (30 U.S.C. ' 814(d)(2)). In the civil penalty proceedings, the Secretary of Labor (Secretary), on behalf of his Mine Safety and Health Administration (MSHA), petitions for the assessment of civil penalties for numerous violations of mandatory safety and health standards.

The cases were heard in Hoover, Alabama. Prior to the hearing, counsels for the parties announced that they had settled many of the alleged violations in the civil penalty proceedings, but they had been unable to settle the issues relating to the contest of the order of withdrawal (Docket No. SE 94-586-R), and to two of the alleged violations of health standards (Docket No. SE 94-448). I advised counsel that I would hear their explanations of the settlements after all of the evidence had been submitted regarding the contested issues. I stated that if I believed the settlements were warranted, I would approve them on the record and affirm my approvals in this decision.

The Issues

The order of withdrawal contested in Docket No. SE 94-586-R alleges a violation of 30 C.F.R. ' 72.630(a), a health standard requiring the control of dust resulting from the drilling of rock. The order also contains special findings alleging that the violation was a significant and substantial (S&S) contribution to a mine health hazard and was the result of Jim Walter's unwarrantable failure to comply with section 72.630(a).

The alleged violations in Docket No. SE 94-448 are each of 30 C.F.R. ' 70.440-3, a health standard that required dust

from a rock drill to be readily distributed and carried away from the drill operator or other workers in the area. The citations in which the violations are alleged also contain S&S findings. The Secretary proposed civil penalties of \$1610 for each of the alleged violations.

The issues in the contest proceeding are whether Jim Walter violated section 76.630(a) and, if so, whether the special findings are valid. The issues in the civil penalty case are whether Jim Walter violated section 70.400-3, whether the S&S findings are valid, and the amount of any civil penalties to be assessed. Finally, the parties agreed that if I concluded the violation cited in the contested order existed, I should make findings regarding the gravity of the violation and the negligence of Jim Walter in order to guide the parties in resolving the civil penalty aspects of the case (Tr. 7).

The Standards

Section 70.400, of which section 70.400-3 is a subsection, was in effect until April 18, 1994. Section 70.400 stated:

The dust resulting from drilling in rock shall be controlled by use of permissible dust collectors, or by water, or water with a wetting agent, or by ventilation, or by any other method or device approved by the Secretary which is as effective in controlling such dust.

Section 70.400-3 stated:

To adequately control dust from drilling rock, the air current shall be so directed that the dust is readily dispersed and carried away from the drill operator or any other workers in the area.

On April 19, 1994, Section 70.400 was replaced by section 72.630(a), and section 70.400-3 was replaced by section 72.630(d) (See 59 Fed. Reg. 8327 (1994)). The new standards are virtually identical to the old.

Section 72.630(a) states:

Dust resulting from drilling in rock shall be controlled by use of permissible dust collectors, or by water, or water with a wetting agent, or by ventilation, or by any other method or device approved by the Secretary that is as effective in controlling the dust.

Section 72.630(d) states:

To adequately control dust from drilling rock, the air current shall be so directed that the dust is readily dispersed and carried away from the drill operator or any other miners in the area.

The Citations and The Order

Citation No. 3186828 (Docket No. SE 94-448), which alleges a violation of section 70.400-3, was issued on March 21, 1994, at the No. 4 Mine. It states, in part:

According to statements made by management and labor employees, rock drilling is being conducted on the No. 2 longwall ... with ventilation as the only method of dust control. The drilling is being done on-shift and affected employees are not being removed downwind on the longwall face. Training shall be conducted on all three shifts in the requirement that with ventilation as the only means of dust control during rock drilling, the air shall either be directed away from the face or the affected employees removed from the area. The drilling is being done with gopher ... drills (Gov. Exh. 4).

Citation No. 3186829 (Docket No. SE 94-448) was issued on the same date, at the No. 4 Mine, and alleges a violation of the same health standard. It states, in part:

According to statements made by management and labor employees, rock drilling has been conducted on the face and belt entry of the [No. 1] longwall ... with ventilation as the only method of dust control. The drilling is being done on shift and affected employees are not being removed from downwind on the longwall face. Training shall be conducted on all three shifts in the requirement that with ventilation as the only means of dust control during rock drilling, the air shall either be directed away from the face or the affected employees removed from the area. The drilling is done with gopher ... drills (Gov. Exh. 5).

Order No. 3184217 (Docket No. SE 94-586-R), which alleges a violation of section 72.630(a), was issued on July 22, 1994, at the No. 4 Mine. It states, in part:

Statements given by labor and management employees ... show that dust resulting from drilling in rock was not being controlled by use of permissible dust collectors, or by water, or

by water with [a] wetting agent, or by ventilation controls. Employees who were drilling the No. 1 longwall section roof with pneumatic rotation drills on [the] 7-2-194 owl shift were exposed to this dust while installing permanent roof supports. As many as four (4) drills were in operation at any one time and none of the drills were equipped with dust suppression devices (Gov. Exh. 8).

The Arguments

In opening his case, counsel for the Secretary stated that the regulations regarding the control of rock dust from drilling provide essentially for three means of control -- approved dust collectors, water, or ventilation. Because workable dust collectors are not available for pneumatic rock drills, dust control can be a serious problem unless water or effective ventilation is used (Tr. 11). The citations and order were issued because Jim Walter used pneumatic rock drills, but did not use water or properly use ventilation. The ventilation in the cited areas was ineffective in that the rock dust traveled over miners who were downwind of the drills (Tr. 12).

Counsel for Jim Walter agreed that no effective dust collectors were available for the rock drills and that the company had to use either water or ventilation. Water posed a hazard to the miners operating the drills, and the configuration of ventilation on the longwall sections made it impossible to use ventilation for dust control (Tr. 16). Counsel asserted that Jim Walter did an "excellent job in maintaining a safe and healthy environment" nonetheless (Tr. 16), and that the situation the company faced was "more [like] an impossibility of compliance position" than anything else (Tr. 17).

The Secretary's Witnesses

Judy McCormick

Judy McCormick is in charge of the health inspection activities at MSHA's Birmingham, Alabama, subdistrict office. As part of her work, she supervised three inspectors who conduct dust and noise surveys (Tr. 19-20). McCormick stated that when section 70.400 was in effect, it was usually applied to percussion-type rock drills that drilled mine roofs (Tr. 21).

McCormick testified that section 70.400 required dust from drilling in rock to be controlled by permissible dust collectors, water, water with a wetting agent, ventilation or "any other method that [was] approved by the Secretary" (Tr. 22). She understood that if ventilation was used as a means of dust control, the air had to be directed so the dust was carried away from a drill operator and other miners. If a miner was downwind from the drill operator and

dust from the drill passed over him or her, a violation of the standard occurred. The volume of the air made no difference as to whether the violation existed (Tr. 39). In McCormick's view, section 72.630 contained the same requirements as section 70.400.

McCormick identified a citation that was issued by MSHA Inspector Newell Butler at Jim Walter's No. 3 Mine on March 15, 1994 (Gov. Exh. 3). The citation alleged a violation of section 75.400-3. It was issued for drilling rock on the No. 2 longwall section with ventilation as the only means of dust control and with miners downwind of the drilling. According to McCormick, these were essentially the same conditions that six days later resulted in the alleged violations of section 70.400-3 at the No. 4 Mine, and that six months later caused the contested order to be issued at the mine (Tr. 26).

The alleged violations of section 70.400-3 were not based upon the personal observation of the inspector, but rather upon his interviews with labor and management personnel. McCormick explained:

[T]he longwalls of Jim Walter's [were] having compliance problems. And it was brought to our attention by the United Mine Workers that drilling was being done with the Gopher [percussion-type] drills ... and people on the longwall faces were being exposed to this dust (Tr. 28).

McCormick testified that in April 1994, she taught an MSHA sponsored class for coal operators regarding compliance with Part 72. Jim Walter sent two employees, one of whom was Wyatt Andrews, the safety supervisor at the No. 4 Mine (Tr. 30-31). During the course, section 72.630 was discussed. Neither Andrews nor the other Jim Walter employee who attended told McCormick that the company was unable to comply with the standard (Tr. 31).

McCormick was asked about health hazards associated with drilling rock. Her answer was succinct -- "[e]xposure to crystalline silica or quartz resulting in silicosis" (Tr. 32). She explained that the mandatory dust standards of Part 70 limit respirable dust in the atmosphere of active workings of an underground coal mine to 2.0 milligrams of dust per cubic meter of air when no quartz or less than five percent quartz is present (30 U.S.C. ' 70.100). When more than five percent quartz is present, the limit decreases (30 C.F.R. ' 70.101). The reduced allowable concentration is mandated because of the heightened possibility of contracting silicosis due to increased quartz in the mine atmosphere (Tr. 33).

In the two years prior to the hearing, a reduced respirable dust limit was in effect at the No. 4 Mine (Tr. 33). In other words, during that time Jim Walter had to maintain the average concentration of respirable dust in the mine atmosphere of both longwalls at a standard lower than 2.0 milligrams per cubic meter of air. McCormick stated that MSHA had cited the company for violating the reduced standard (Tr. 34-35).

McCormick was asked about "bulk samples." She explained that such samples were taken when a mine was experiencing a "quartz problem." The purpose of the samples was to identify the source of the quartz. The samples consisted of bulk material from the coal face, the roof or the floor (Tr. 35).

Bulk samples were collected at the No. 4 Mine during the winter of 1993 (Tr. 37-38). According to McCormick, analysis of the samples "showed that the presence of quartz was extremely high in the Middle Man rock in the face, which is a rock part in between the coal [...] ... negligible in the Blue Creek coal seam ... high in the roof, high in the floor and extremely high in the Mary Lee coal seam" (Tr. 37). The samples were taken at Jim Walter's request to help the company isolate the source of quartz on the longwall. The results of the analysis of the samples were given to the company's manager of ventilation.

No bulk samples were taken for the exact areas covered by the subject citations, or, for that matter, within 100 feet of the areas, nor were respirable dust samples taken (Tr. 44). McCormick did not know what the respirable dust concentrations were on the longwall sections when the alleged violations occurred (Tr. 45). When asked how MSHA could determine the quartz content of the dust being breathed by miners if samples were not taken and analyzed, McCormick replied that the hazard from rock dust was so great, "it was not necessary to prove an overexposure to any standard, only to prove an exposure" (Tr. 63). She added that the quartz content of the dust did not matter, there was an assumption that exposure would result in silicosis at some point (Tr. 64).

McCormick also stated that if miners wore respirators, an operator would still have to comply with the standards. However, use of personal protection equipment might affect the S&S nature of the violation (Tr. 38, 39, 55).

McCormick believed the minimum air quantity required for the No. 1 longwall was 65,000 cubic feet per minute when mining was in progress. The quantity required was less when mining ceased and the longwall was being recovered. She did not know how much less, and she did not know the volume of air present on the No. 1 longwall when the contested order was issued. Nonetheless, she insisted that whatever the volume was, it had no bearing on the alleged violation, nor on its S&S nature (Tr. 52, 55-57).

When promulgating Part 72, the Secretary, through MSHA, stated:

Under some circumstances, continuous mining machines and roof bolters work on a single split of air, and this can result in only the drillers being protected while persons working downwind could be exposed. If proper precautions are taken, however, ventilation can be an effective method of dust control. MSHA, therefore, has not deleted paragraph (d) [of section 72.630].

MSHA will continue to determine compliance with this requirement under the final rule as it has enforced ' 70.400-3; i.e., through the measurement of air quantity or other measures set forth in a mine's ventilation and methane and dust control plan (59 Fed. Reg. 8325 (1994)).

McCormick was asked whether this statement indicated that compliance with section 72.630(d) should be based upon air quantity measurements. McCormick responded, "No" (Tr. 56-57).

In McCormick's view, to establish a violation of section 72.630(d), all an inspector needed to know was the method of dust control being employed by the operator. If ventilation was being used, and if miners were downwind of the drill, there was a violation (Tr. 60-61).

Gary Don Greer

Inspector Gary Don Greer works in the MSHA safety division. He worked previously in the health division and administered the taking of respirable dust samples (Tr. 67-68). Greer testified about the events that lead him to issue the contested order.

On July 21, 1994, Greer conducted an inspection at the No. 4 Mine. He arrived underground as the crew from the third shift or "owl shift" was leaving (Tr. 150). (The owl shift began at 1100 p.m. on July 20, and ended at 700 a.m. on July 21 (Tr. 110).) Greer was accompanied by miners' representative, G Lynn Loggins. (Loggins is also a member of the United Mine Workers of America (UMWA) mine safety committee (Tr. 69-70).)

Greer and Loggins traveled to the No. 1 longwall section, and arrived about 30 minutes after the end of the owl shift (Tr. 122-123). Loggins told Greer about "the problems that labor had ... with negotiations with management concerning drilling rock, and having people work downwind in ... drilling operations" (Tr. 70). Loggins also told him that a section 103(g) complaint would likely be filed for having miners working downwind while rock was drilled (Tr. 147, 161-162). (Section 103(g) of the Act (30 U.S.C. ' 813(g)) provides that a representative of miners has the right

to obtain an immediate inspection on request if the representative has reasonable grounds to believe a violation exists.)

Recovery operations were underway at the longwall face. On the headgate side of the section, the operations required installation of a monorail, a rail type system used to hang cables (Tr. 21). The work necessitated drilling holes into the roof with percussion-type drills (Gopher drills) (Tr. 71, 142).

Greer explained that a Gopher drill weighs approximately 150 pounds (Tr. 90, 142). It can be carried by two people without much difficulty. The drill steel is hollow. Pressurized air courses up the steel and turns the bit. As the bit rotates, it pulverizes the roof rock. Unless the pulverized rock is collected or wetted, the dust is forced out of the drill hole by the air and enters the mine atmosphere in a visible cloud (Tr. 90-91). When water is used, no dust enters the atmosphere (Tr. 97).

Greer did not know of any dust collection devices that would work on Gopher drills. He believed the only way to control the dust was with water or ventilation (Tr. 101-102). Although Jim Walter had been mining longwalls since 1980, until the inspection of July 21, Greer never saw water used to control rock dust (Tr. 103). Prior to July, he never issued a citation for miners working downwind when ventilation was the only means of rock dust control (Tr. 104).

The longwall section foreman was Ed Scalla. According to Greer, Scalla asked how Jim Walter could operate drills on the section and comply with section 72.630 (Tr. 148, see also Tr. 71). (Greer speculated that Scalla inquired about the problem because the UMW A and Jim Walter had been discussing it (Tr. 75).) Greer told Scalla that Jim Walter could provide water or water with a wetting agent to the drills or could use ventilation (Tr. 72-73).

Greer asked how many drills were available on the section, and Scalla stated that there were two (Tr. 72-73). Greer responded that with two drills operating and with ventilation used as the means of dust control, miners could not work below the upwind drill (Tr. 73-74).

According to Greer, following the discussion with Scalla, Eugene Averette, the longwall maintenance supervisor, fitted one of the two drills with water by connecting a water line to the drill. It took approximately 15 minutes (Tr. 76, 109).

Greer then watched while the drill was used and water was coursed through the drill steel into the drill hole (Tr. 76-77). It was the first time Greer had seen water used with a percussion-type rock drill (Tr. 103, 126). Six or seven bolts were installed in the roof. It took approximately three or four minutes to drill a hole (Tr. 90-91). Some water came out of the hole as it was drilled, but the water did not interfere with the operation of the drill (Tr. 126). When the hole was finished, the drill was picked up and moved over five feet and the next hole was drilled (Tr. 92).

Greer and Loggins also observed both drills in operation at the same time. The drills were from 100 feet to 250 feet apart (Tr. 92). The miners located downwind did not have dust passing over them from the upwind drill because the water on the upwind drill was effective in controlling the dust (Tr. 77). Greer asked the miners operating the upwind drill if the water caused them any problems, and they replied that it did not (Tr. 78). Greer also asked Loggins if he believed there was any danger in using water and Loggins replied that he did not (Tr. 154). No one from mine management asked any questions about the operation of the drill, or indicated any problem with the water (Tr. 79).

Greer testified that water was readily available on a longwall section. When mining was in progress, it was used to wet the coal, and during recovery operations, a water line for fire fighting ran to the end of the track (Tr. 78-79).

When Greer returned to the surface, he was told that McCormick wanted him. Greer called McCormick, who advised him that she had received a section 103(g) inspection request from the UMW A. The request stated that miners were required to work downwind during roof drilling operations and that the drills were not equipped with water (Tr. 80). Greer told McCormick that because of his recently completed inspection, he was aware of the problem and that he would "handle the request" (Tr. 81).

Greer returned to the mine the next day. Pursuant to the section 103(g) request, he interviewed several miners, including Keith Burgess, owl shift union safety committee man, and Loggins (Tr. 81). Greer also interviewed Wyatt Andrews and the foreman of the owl shift (Tr. 82).

In Greer's view, the section 103(g) request was referring to conditions that had existed on the July 21 owl shift. Greer asked management personnel if roof bolts had been installed during that shift. He was told that they had been and that as many as four Gopher drills had been used at one particular time (Tr. 83).

Greer asked the shift supervisor if he was aware that a citation had been issued in March because drills were not equipped with water and effective ventilation controls were not used. The supervisor told him he was not aware of the citation (Tr. 84). However, Greer maintained that Wyatt Andrews and Jerry Maddox, the longwall manager, were aware of the previous citations (Tr. 84-85). Maddox told Greer that he believed the use of water to control dust could create a hazard (Tr. 96). Greer acknowledged that injecting water into the roof could add weight to the roof (Tr. 117).

Greer's discussions with Jim Walter supervisory personnel and UMW A employees yielded identical information regarding the July 21 owl shift -- that none of the drills in operation at any one time were equipped with dust suppression devices or water (Tr. 122). Greer believed there was a violation of section 75.630(a) because the investigation revealed that Jim Walter failed to provide water, or water with an agent, to allay dust generated by drilling rock and failed to implement any type of ventilation control that carried drill dust away from people working downwind (Tr. 86-87).

Greer found the violation of section 75.630(a) was caused by the company's unwarrantable failure to comply, in that Jim Walter management knew that the practice of drilling without protective devices and with miners downwind was a violation of the standard (Tr. 87). In other words, the violation was deliberate. He stated, "I asked ... Andrews and I asked ... Maddox if they were aware that violations of a similar nature had been issued, and both stated that ... they were aware" (Tr. 87-88).

Greer found the violation was S&S because the drilling

of rock that contained quartz could lead to quartz-bearing respirable dust, and exposure to the dust could cause breathing problems and silicosis (Tr. 89). However, Greer admitted that when he wrote the order he had no information about the volume of ventilation in the affected area, the content of respirable dust in the atmosphere, nor any information about the specific composition of the dust (Tr. 131, 138). He stated his finding that the violation was "highly likely" to lead to illness was an "educated guess" (Tr. 132).

William Keith Burgess

William Keith Burgess is a longwall helper at the No. 4 Mine. He has been employed by Jim Walter since January 1980, and he is a member of the UMW A safety committee (Tr. 167). (The committee meets with management on a monthly basis and discusses specific problems with management on a daily basis (Id.).

Burgess stated that some days before July 22, he was present when the committee and management discussed the issue of controlling dust from rock drilling (Tr. 168-169). (He believed the subject had been discussed by the union and management previously. However, this was the first time he was involved (Tr. 172).) At the meeting, Wyatt Andrews and Fred Kozell, the deputy mine manager, represented management. Burgess, Loggins and another miner were the union representatives (Tr. 168-169, 172). The reason for the meeting was that rank-and-file miners knew Gopher drills would be used during forthcoming longwall recovery work. According to Burgess, when the union personnel asked Kozell if water was going to be used to control the rock dust, Kozell responded affirmatively and said that he would have the drills fitted for water (Tr. 170).

Burgess described a Gopher drill as approximately three feet high with a swing-type handle. Two levers are located in the middle of the handle, one controls the air that is blown into the drill steel, and the other extends the drill into the roof (Tr. 174-175). Burgess stated that visually observed dust is created when water is not used (Tr. 176).

On July 21, Burgess was working on the owl shift as a long-wall helper and drill operator. He recalled four Gopher drills in use during the shift. Two were on the section when the crew arrived and two were brought to the section by the crew (Tr. 179). (Several other inoperable drills were on the section when the crew arrived (Id.).) Drilling went on during the entire owl shift and Burgess was not aware of water used on any of the drills during the shift (Tr. 183-184, 222).

Burgess testified that the four drills were operated at the same time (Tr. 179). Although he could not see other drills operating when he was drilling, when he stood back, he

could see more than one drill operating, and none of the drills were fitted for water (Tr. 216-217, 221, 226, 227).

The drills were along the longwall face between the headgate and tailgate (Tr. 181-182). One drill was located at the head-gate. Because the air on the longwall moved from the headgate to the tailgate, the other drills were located downwind from the

first drill (the headgate drill) (Tr. 182-183). Burgess believed he was operating the third drill (Tr. 183). While he was drilling, Burgess observed dust coming toward him from the other drills (Tr. 228).

Burgess described some of the roof being drilled as "bad top" (Tr. 199). At times, the drill steel passed through breaks in the roof strata, which indicated to him that the strata was cracked (Tr. 199-200, 201).

Shortly before entering the mine on July 21, the owl shift crew was told by Ed Hertzog, the foreman, to get respirators (Tr. 186). Burgess testified that he had never previously been issued a respirator (Tr. 188). According to Burgess, Hertzog stated the respirators were to replace water on the drills (Tr. 191, 225-226).

Once on the section, Burgess attempted to wear his respirator, but removed it because it pulled his head downward he could not watch the roof (Tr. 190). Only one miner wore a respirator during the entire shift. All other miners on the crew wore their respirators at least for an hour (Tr. 190, 218).

When it became clear that water was not going to be used on the drills, Burgess discussed with the other safety committee members the possibility of requesting a section 103(g) inspection (Tr. 192-193). Burgess believed an inspection was warranted due to "the issue of [the] health of the miners" (Tr. 193). He also stated that one drill operator was concerned about what would happen if water got into the roof strata (Tr. 204, 205).

Bobby Horton

MSHA Inspector Bobby Horton is supervised by McCormick. He stated that he issued the March 21 citations to Jim Walter. The citations alleged violations of section 70.400-3 at the No. 4 Mine (Tr. 229-230; Gov. Exhs. 4 and 5). He did not go underground to observe the conditions described on the citations, rather he obtained the information from interviewing miners (Tr. 231).

The citations were issued subsequent to McCormick's instructions to check rock drills (Tr. 231). After interviewing miners and management employees, Horton determined that the drills were not equipped with water or with permissible dust collectors (Tr. 232). Jim Walter personnel who were present during the interviews included Wyatt Andrews and Fred Kozell. Union members were also present (Tr. 232-233).

Horton was told during the interviews that miners at the No. 1 and No. 2 longwalls were working downward while drilling and that no water or dust suppression devices were used to control the dust (Tr. 233, 237). Kozell confirmed this (Tr. 238). Therefore, Horton found that violations of 70.400-3 had occurred.

Horton also found that because the violations presented the hazard of contracting silicosis, they were S&S (Tr. 236-237). Horton did not take any dust samples in connection with the citations and he had no knowledge of the dust content of air on the longwall sections. Horton did not know the degree of any miner's actual exposure (Tr. 242, 243). Nevertheless, he found the alleged violations posed a likelihood of illness because of the "history of quartz and samples that [came] back from Jim Walter's No. 4 Mine" (Tr. 243). He testified, "[y]ou can get disabled. Breathing quartz, people can get silicosis" (Tr. 244).

Horton believed that up to ten miners were exposed to the hazard because the dust from the drills had passed over them (Tr. 237).

Glynn Loggins

Loggins accompanied Greer to the No. 1 longwall at the start of the July 21 day shift. He and Greer observed roof bolting operations when water was used on the drills. Loggins heard Greer ask a drill operator if the drill operator had any problems using the drill with water. The drill operator replied that he did not (Tr. 396-397).

Jim Walter's Witnesses

Jeffrey Wade Maddox

Jeffrey Wade Maddox, the longwall manager at the No. 4 Mine has worked on longwalls for 13 years. As the longwall manager, Maddox is responsible for the operation of the mine's two long-walls and for the miners working on the longwall sections (Tr. 250). The work day on each longwall section is divided into three shifts. Each shift has a production foreman and a maintenance foreman. In addition, each day shift has a longwall coordinator, who reports directly to Maddox (Tr. 250).

Maddox normally works the day shift, but he is responsible for longwall operations 24 hours a day. When a longwall is being recovered, Maddox is at the mine from ten to twelve hours a day. When he is not at the mine, he is "on call" (Tr. 272, 309, 312). According to Maddox:

I will meet the evening shift supervisors coming in on their oncoming shift, and talk to them several times during their shift. The owl shift supervisor will be contacted prior to his shift. And 30 percent of the time, they call me at home during the a.m. hours (Tr. 272-273).

The No. 1 longwall panel was approximately 950 feet wide and 6,350 feet long (Tr. 252). According to Maddox, in July 1994, the roof along the face became increasingly hard to control. As a result, longwall mining ceased 125 feet short of projections, and recovery started (Tr. 251).

The Blue Creek coal seam is mined at the No. 1 Mine longwall. Above the Blue Creek coal is a seam of rock (the Middle Man seam) which varies in thickness from ten inches to five feet. Above the rock is another coal seam, the Mary Lee seam, and above the Mary Lee seam is sandstone (Tr. 253-254, 255). Jim Walter prefers to use the Middle Man seam as the roof (Tr. 256).

When mining stopped on the No. 1 longwall, the Middle Man seam constituted about one fourth of the roof (i.e. the first 25 shields). The Middle Man seam had become increasingly narrow. As a result, the Mary Lee coal seam was mined and the remaining three fourths of the roof (approximately 160 shields) consisted of sandstone (Tr. 256-257). This roof was unstable and some of it was falling before it could be pinned (Tr. 258-259, 283). One fall measured 35 feet long, five feet wide and four to five feet thick (Tr. 260).

Maddox was aware that water or other dust control measures were needed for the drills (Tr. 277). After Jim Walter received the March citations, it experimented with water, but each experiment had an associated problem (Tr. 227-228).

Following a consultation with the distributor of the drills, the company tried a system whereby water came through a drill's handle. When this did not work, the system was modified to allow a hose to be plugged in at a different point. On July 19, six drills that were fitted in this way were used on the No. 1 longwall (Tr. 279-280, 281). They only worked for a short while. One problem encountered was that if the drill steel hit a crack or void in the roof strata and water dispersed into the strata, the steel would "hang up" and could not be removed (Tr. 278).

During the evening shift on July 20, Piper, the No. 1 longwall foreman, called Maddox at home and told Maddox he could not keep the drills operational. Maddox understood the problem to be that the water was "tearing the heads up" (Tr. 283). In addition, when the drill steel hung up, the drill operators were afraid to pull out the drill steel for fear of pulling down the roof (Tr. 285). Because the drills were inoperable the mine production report for the evening shift stated that the company needed "to get [the] powered respirator[s] charged" for the oncoming owl shift (Tr. 343-344; JWR Exh. 2 at 11).

Around 4:00 a.m., during the owl shift, Maddox, who was still at home, spoke with longwall foreman Hertzog (Tr. 346). Hertzog said he was using two drills, and asked if Maddox wanted water hooked up to the drills. Maddox told Hertzog to try water on one of the drills (Tr. 287). However, Maddox did not know if this was done (Tr. 347).

Maddox testified that on July 22, he attended a meeting with Greer and others and discussed the problem (Tr. 291). According to Maddox, Greer asked if he was aware that drills were in operation without water and Maddox stated he was aware of it. Greer also asked if Maddox was aware of the citations written in March, and Maddox stated that he was (Tr. 291).

Greer asked why the drills were being operated without water and Maddox responded that Jim Walter was in a hurry to bolt the roof because it was bad (Tr. 291-292). Maddox later testified that time was of the essence and that the longer the roof remained unbolted, the more it deteriorated (Tr. 376).

Maddox stated that Greer did not inquire about the efforts Jim Walter had made to operate the drills with water (Tr. 292). Nor did Maddox volunteer any information about the

company's attempts to use water. When asked why he did not tell Greer about this, he responded, "[t]he question wasn't asked" (Tr. 292, 356). When Maddox saw that Greer was writing an order of withdrawal, Maddox became angry and he abruptly ended his conversation with Greer (Tr. 374).

Maddox did not advise UMW A safety committee members of the efforts Jim Walter had been making to provide water for the rock drills. Nor did he contact MSHA's technical support division or the MSHA subdistrict health division about the problems Jim Walter was experiencing with the rock drills (Tr. 354-355, 357-358).

Maddox testified that a day or two before the withdrawal order was issued, he received complaints from day shift drill operators about infusing water into the roof (Tr. 294, 334-335). Maddox stated that the miners were concerned because, "[t]he roof was extremely bad" (Tr. 294). However, he agreed that roof conditions are dynamic and can change from shift to shift (Tr. 372). Maddox did not speak with the miners again about the problem (Id.).

Wyett Andrews

Wyett Andrews, who is the safety supervisor at the No. 4 Mine, stated that during the evening shift of July 20, he was in deputy mine manager Kozell's office when it was reported that there was a problem using water while drilling (Tr. 381-382). As a result, Kozell directed Andrews to get the power respirators prepared for the owl shift (Tr. 382). Andrews had the respirators' batteries charged so that the respirators would be ready (Tr. 384).

The July 21 owl shift crew took the respirators into the mine (Tr. 384). Andrews believed that if the respirators were worn they would protect the miners from respirable dust (Tr. 391). He acknowledged that most miners did not like to wear the respirators because they are bulky and uncomfortable. As a result, Jim Walter did not require that they be worn, only that they be available for wear (Tr. 392).

Andrews believed that after the March citations were issued, Jim Walter abated them, in part, by training its miners in compliance. The training took two or three minutes and consisted of instructing longwall miners, supervisors and longwall coordinators that if the drills did not have water, personnel were not to be located downwind of the drills (Tr. 394, 395). Andrews was certain that Maddox took part in the training (Tr. 396). (Interestingly, Maddox did not recall much regarding the training (Tr. 323-325). He stated:

We came in and sat down ... They went over the instruction with me over what had to be done. The drills had to be converted to water. And we were going to try that to see how it worked (Tr. 324.)

Finally, Andrews testified that on July 20, 21 and 22, the air volume on the No. 1 longwall ranged from between 78,260 cfm to 85,550 cfm (JWR Exh. 3 pp 2-7; Tr. 385). Under the mine's ventilation plan, the minimum air volume required during longwall recovery was 18,000 cfm (Tr. 386).

The Violations

The alleged violations are based on substantially similar facts and, as noted, the standards alleged to have been violated are substantively identical. Section 70.400 required, and section 70.630(a) requires, that dust resulting from drilling in rock be controlled by use of permissible dust collectors, water, water with a wetting agent, or by ventilation. Section 70.400-3 explained, and section 72.630(d) explains, that ventilation control is adequate when the ventilation is so directed that dust is carried away from the drill operator and/ or any other miners.

Bobby Horton, who issued the March 21 citations, stated that he learned through interviews that rock drills in use at the No. 4 Mine were not equipped with permissible dust collectors or with water, and that miners were downwind while the drills were operated (Tr. 231, 233, 237). In addition, Horton stated that Mine Manager Kozell confirmed that Jim Walter was not using any means to suppress the dust (Tr. 238).

Horton's testimony went unchallenged and I accept it. It establishes that Jim Walter was not controlling the dust resulting from drilling by any of the methods specified in section 70.400. Jim Walter was not using permissible dust collectors, water, or water with a wetting agent. Because the longwalls were ventilated on what was essentially a single split of air that traveled from the tailgate to the headgate, and because I accept Horton's testimony that miners were working downwind from the drills while the drills were operated,, it is clear that the dust was not controlled adequately by ventilation. Therefore, I conclude the March violations existed as charged.

I further find that there was a violation of 72.630(a) on the owl shift on July 21, 1994. Burgess' firsthand testimony establishes the violation. Burgess worked on the owl shift, and I accept his assertion that drilling took place during the entire shift (Tr. 183). I also accept his testimony that as many as four drills were used at one time, that the first was located at the headgate and the others were located downwind, along the longwall (Tr. 181-183). In this regard, I note his assertion that when he "stood back," he saw more than two drills in operation, and that none was fitted with water (Tr. 221, 227). The fact that water was not used is also attested by Burgess' statement that he saw dust coming toward him from an

upwind drill, and by his testimony that Hertzog told him the respirators were a replacement for using water when drilling (Tr. 191, 225-226, 228).

None of Jim Walter's witnesses undermined Burgess' testimony. Maddox stated that he told Hertzog to hook up water on one drill, but he was not present on the section and he admitted that he did not know if it was done (Tr. 287, 347). Thus, the testimony of Burgess compels the conclusion that during the owl shift of July 21, dust resulting from drilling rock was not controlled by dust collectors or water and, because miners were working downwind in dust from the drilling, was not controlled by ventilation.

In concluding that the violations existed as charged, I have considered Jim Walter's argument that the Secretary's failure to take air measurements and dust samples on the longwall sections warrants vacation of the citations and order (JWR Br. 17-19). Jim Walter asserts that without such measurements and samples, "MSHA cannot measure the health risk to the miners from the dust and cannot reasonably contend that Jim Walter was not suppressing the dust ... by dilution with ventilation" (JWR Br. 18).

It is true that when the Secretary promulgated section 72.630, he seems to have stated that he would determine whether ventilation was an adequate means of dust control through the measurement of air quantity and other measures set forth in the mine's ventilation, methane and dust control plan. ("MSHA will continue to determine compliance with th[e] requirement [of section 72.630 (d)] ... as it has enforced ' 70.400-3, i.e., through the measurement of air quantity or through other measures set forth in a mine's ventilation ... plan (59 Fed. Reg. at 3825).")

However, the intent and actual meaning of the statement is an enigma to me. Counsel for the Secretary has not offered an explanation. No testimony was offered by either party that compliance with section 70.400-3 was determined through the measurement of air volume. The Secretary's Program Policy Manual -- the official repository of the Secretary's interpretation of the regulations and of his enforcement practices -- is silent regarding the matter.

In any event, because the standards themselves are very clear, I conclude that the statement is beside the point. The standards require dust resulting from drilling to be controlled by the methods indicated. If ventilation is a chosen method, they require the air current to be directed so that dust is carried away from the drill operator or other miners in the area. The regulations contain not one word about air measurements and/or dust samples. I cannot conclude that the Secretary intended to condition compliance upon requirements he did not promulgate.

S&S

A 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" (30 C.F.R. ' 814(d)(1)).

A violation is properly designated S&S, "if, based upon the particular facts surrounding the 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 Consolidation Coal Co., 8 FMSHRC 890 (June 1986), aff'd sub nom Consolidation Coal Co. v. FM SHRC, 824 F2d 1076 (D.C. Cir. 1987), the Commission concluded that the S&S analysis it adopted in Mathies Coal Co., 6 FM SHRC 1, 3-4 (January 1984), with certain adaptations, is appropriate in determining whether certain health-related standards are S&S. The Commission stated that to prove a mandatory health standard is S&S, the Secretary must establish:

(1) the underlying violation of a mandatory health standard; (2) a discrete health hazard--that is, a measure of danger to health--contributed to be the violation, (3) a reasonable likelihood that the health hazard contributed to will result in an illness; and (4) a reasonable likelihood that the illness in question will be of a reasonably serious nature.

Consol, 8 FMSHRC at 897.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), the Commission stated:

We have explained further that the third element of the ... formula [enunciated in Consol] 'requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury [or illness]' (U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984)). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574-75 (July 1984)(Emphasis in original).

The question of whether any particular violation is S&S must be based on the particular facts surrounding the violation (Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April

1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987)). Further, any determination of the significant nature of a violation must be made in the context of continued normal mining operations (National Gypsum, 3 FMSHRC at 329; Halfway, Inc., 8 FMSHRC 8, 12 (January 1986); U.S. Steel Mining Co., 7 FMSHRC at 1130).

I have found that the violations existed as charged. Thus, the first element of the Consol test has been established. I further find that the violations presented a discrete health hazard. I accept the testimony of McCormick that previous bulk samples showed a high presence of quartz in the roof and elsewhere on the longwall section (Tr. 33, 37). The Commission observed in Consol that, "[s]ilicosis has been recognized for a long time as a disease associated with coal miners, and the inhalation of silica-bearing dust has been causally linked to the disease" (8 FMSHRC at 1279). When rock dust is not controlled by methods other than ventilation, when the ventilation control is inadequate in that miners work in and breathe the dust, and when the dust is reasonably likely to contain quartz, a discrete health hazard is established.

However, the Secretary's proof fails to meet the third element of the Consol test. In the context of a violation of sections 70.400-3 and 72.630(a), this element requires the Secretary to establish a reasonable likelihood that the hazard contributed to will result in an illness. In other words, the Secretary must prove it was reasonably likely that inhalation of the rock dust traveling downwind would result in the miners becoming ill as mining continued on the longwall.

Because bulk samples of the area of the roof being drilled were not collected, and because the respirable dust content of the mine atmosphere in which the miners were working was not sampled, none of the Secretary's witnesses could testify to the exact silica content of the subject roof area, to the silica content of the drill dust, or to the actual concentration of respirable dust to which the miners were exposed. Nor did the witnesses offer testimony regarding the respirable dust exposure limits on the longwall sections on March 21, 1994 and on July 21, 1994, or what the average concentration of respirable dust in the longwall atmospheres reasonably might have been.

Rather than testimony regarding the specific facts needed to find a reasonable likelihood of illness or the specific facts needed to make a reasonable inference of such a likelihood, the Secretary's witnesses testified to a lack of specific knowledge and to generalities. Such testimony is insufficient to establish the reasonable likelihood of illness.

In reaching this conclusion, I have considered the Secretary's assertion that, "once a violation of the drill dust control regulation is established, a presumption arises that

it is reasonably likely that the health hazard contributed to will result in an illness" (Sec. Br. 12). The Secretary cites Commission decisions finding such presumptions when exposure-related health standards are violated; i.e., Consol, 8 FM SHRC at 890 (finding a violation of section 70.100(a) S & S), and U.S. Steel Mining Co., Inc., 8 FM SHRC 1274 (September 1986) (finding a violation of section 70.101 S & S). These presumptions are based upon the fact that the exposure levels set in the standards are "the maximum level allowed to achieve [Congress's] stated goal of preventing disabling respiratory disease" (U.S. Steel, 8 FM SHRC 1279-1280). Because cumulative exposures to respirable dust above the limits are an important risk factor, and because the state of scientific and medical knowledge does not make it possible to determine the precise point at which respirable diseases induced by the dust will present, the Commission presumed that a documented overexposure established a reasonable likelihood that illness would develop.

The standards for drill dust control are not based upon findings linking their violation to the reasonable likely development of disease. Rather, the standards themselves are the primary means of controlling drill dust exposure (59 Fed. Reg. 8325 (1994)). This means that the Secretary must establish, for each violation, that the particular circumstances cited are reasonably likely to result in disease as mining continues.

As I have noted, the Secretary did not do so here. He offered no evidence regarding the average concentration of respirable dust that Jim Walter had to maintain on the longwall section on March 21 and July 21. Nor did he present testimony regarding the actual level of exposure of the miners, or the reasonably likely level of exposure on those dates.

This is not to say that the Secretary necessarily had to offer the results of bulk samples and/or of respirable dust samples, to establish the inspectors' S & S findings. It is conceivable he could have offered testimony from which a reasonable likelihood of exposure in excess of the applicable permissible limit or limits could have been inferred. However, he did not.

Rather, the Secretary proved that in the past the longwall sections were under a reduced, but unspecified exposure level. This does not lead inevitably to a conclusion that on March 21 and July 21 miners in the same sections who were working under similar conditions were exposed to respirable dust concentrations whose average exceeded the level allowed. They might have been or they might not have been, and S & S findings can not rest upon the past tense of "may."

Gravity

Although the violations were not S & S, they were serious. Jim Walter was operating rock drills without dust control devices and miners were downwind from the drills. Further,

the roof being drilled was composed of rock may have had a high silica content. The ventilation on the longwalls was carrying the rock dust over the downwind miners. The miners were subjected to the possibility of inhaling silica bearing dust at a level in excess of that allowed. This is enough to establish the seriousness of the violations.

I have considered Andrews testimony that respirators were available for use by miners on the owl shift (Tr. 382-384). Had Jim Walter established that the respirators were worn throughout the owl shift by all miners who were downwind from the drills, the gravity of the July 21 violation might have been mitigated.

The company made no such showing. Andrews acknowledged the respirators were bulky and uncomfortable and that most miners did not like to wear them (Tr. 392). Moreover, he admitted that Jim Walter did not require they be worn, only that they be available for wear (Id.). The fact that availability did not foster continuing use was confirmed by Burgess. He stated that only one miner wore a respirator for the entire shift (Tr. 190, 218). Although the rest of the crew wore respirators for one hour at least, that did nothing to mitigate their exposure during the remainder of the shift.

Unwarrantable Failure and Negligence

In Emery Mining Corp.(9 FM SHRC 1997, 2004 (December 1987)) the Commission held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence and that it is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or "a serious lack of reasonable care" (Rochester and Pittsburgh Coal Co.,13 FM SHRC 189 (December 1991)).

By July 21, 1994, Jim Walter was on notice regarding the requirements of section 72.630 and of the Secretary's intent to enforce the standard. Six months before, three citations had been issued for essentially the same conditions. Andrews and Maddox told Greer they were aware of the March citations issued at the No. 4 Mine (Tr. 84-85). Moreover, Andrews was one of two Jim Walter employees who attended MSHA sponsored classes on Part 72, classes in which compliance with section 72.630 was discussed (Tr. 84-85).

Despite this knowledge, Jim Walter argues, in part, that any failure to comply was due to the need to speedily bolt the roof before it deteriorated (JWR Br. 32). Jim Walter presented testimony to this effect, in that Maddox stated that the roof was bad and needed to be bolted in a hurry (Tr. 291-292). In addition, Jim Walter argues that it was not indifferent to the requirements of the regulation, that it was making diligent efforts to comply but was having trouble developing a system whereby water could be used and the drills could be kept operational (JWR Br. 31-32).

While I do not doubt the company had problems with the roof, I do not believe the company was trying diligently to comply. If, in fact, Jim Walter was having compliance problems, it is logical that this would have been explained to Greer. It was not (Tr. 374), and Maddox's excuse -- that Greer did not ask about the problems -- strains credulity given the consequences of Jim Walter's indifference (Tr. 292, 356, 357).

If Jim Walter could not successfully fit and operate its drills with water, it is reasonable to think that the company would have contacted MSHA about the problem and perhaps even have advised the UMW A safety committee, since it knew of the miners' concerns about working in drill dust (Tr. 354-355, 357-358).

Therefore, I find that Jim Walter fully understood what was required, but was indifferent to compliance. Its failure to control dust from rock drilling on the owl shift on July 21, was the result of a serious lack of reasonable care and hence was the result of the company's unwarrantable failure to comply with section 72.630(a).

In exhibiting a serious lack of reasonable care, Jim Walter failed to meet the standard of care required by the circumstances. Consequently, I also conclude the company was highly negligent in allowing the violation of section 72.630(a).

Finally, I conclude that Jim Walter exhibited ordinary negligence in allowing the violations of section 70.400-3 to exist. The first time Jim Walter was cited for a violation of the standards relating to drill dust control was March 15, 1994. The citation was issued six days before the citations at the No. 4 Mine. Jim Walter personnel should have known that the conditions which elicited the citation at the No. 3 Mine were likely to result in similar citations at the No. 4 Mine, and reasonable care required that the conditions not be repeated at the No. 4 Mine.

Other Civil Penalty Criteria

A MSHA computer print out indicates that in the 24 months prior to March 21, 1994, the total number of paid violations at the No. 4 Mine was 1,050 (Gov. Exh. 11). While this is a large number of previous violations, there were no previous paid violations of section 70.400 (Id.).

Jim Walter is a large operator and the No. 4 Mine is a large mine.

There has been no showing that the size of the penalties will effect Jim Walter's ability to continue in business, and I conclude that it will not.

Jim Walter demonstrated good faith in attempting to achieve rapid compliance with section 70.400-3 and section 72.630(a).

Civil Penalties

Docket No. SE 94-448

| <u>Order/ Citation No.</u> | <u>Date</u> | <u>30 C.F.R. '</u> | <u>Proposed Penalty</u> | <u>Assessed Penalty</u> |
|--------------------------------|-------------|--------------------|-----------------------------|-----------------------------|
| 3186828 | 3/21/94 | 70.400-3 | \$1610 | \$600 |
| 3186829 | 3/21/94 | 70.400-3 | \$1610 | \$600 |

The violations were serious. They were caused by Jim Walter's ordinary negligence. Given the ordinary negligence and the fact that the violations represent the first time the drill dust standard was enforced at the mine, I conclude that penalties significantly less than those proposed are appropriate. Accordingly, I will assess penalties of \$600 for each violation.

Settlements and Orders

At the close of the hearing, Jim Walter's counsel explained, on the record, the nature of the settlements to which the parties had agreed (Tr. 406-412). Having considered the proposed settlements and the reasons supporting them, I find they are appropriate and consistent with the purposes of the Act. Accordingly, as set forth below, the settlements are approved.

Docket No. SE 94-429

| <u>Order/ Citation No.</u> | <u>Date</u> | <u>30 C.F.R. '</u> | <u>Proposed Penalty</u> | <u>Settlement</u> | |
|--------------------------------|-------------|--------------------|-----------------------------|-------------------|---------|
| 31824519 | 2/ 3/ 94 | | 75.523 | \$4,000 | \$1,000 |

(The Secretary agrees the unwarrantable failure finding cannot be sustained and he will modify the order to a citation issued pursuant to section 104(a) (30 U.S.C. '814(a)) (Tr. 406).)

| <u>Order/ Citation No.</u> | <u>Date</u> | <u>30 C.F.R. '</u> | <u>Proposed Penalty</u> | <u>Settlement</u> | |
|--------------------------------|-------------|--------------------|-----------------------------|-------------------|-------|
| 3185367 | 3/ 14/ 94 | | 75.380(g) | \$1,610 | \$850 |

(The parties agree that the number of persons affected by the violation was four or five not ten as found by the inspector. (Tr. 406-407))

| <u>Order/ Citation No.</u> | <u>Date</u> | <u>30 C.F.R. '</u> | <u>Proposed Penalty</u> | <u>Settlement</u> | |
|--------------------------------|-------------|--------------------|-----------------------------|-------------------|------|
| 3183302 | 3/ 17/ 94 | | 77.1605(b) | \$50 | \$50 |

| <u>Order/ Citation No.</u> | <u>Date</u> | <u>30 C.F.R. '</u> | <u>Proposed Penalty</u> | <u>Settlement</u> | |
|--------------------------------|-------------|--------------------|-----------------------------|-------------------|------|
| 3183203 | 3/ 17/ 94 | | 77.1605(b) | \$50 | \$50 |

| <u>Order/ Citation No.</u> | <u>Date</u> | <u>30 C.F.R. '</u> | <u>Proposed Penalty</u> | <u>Settlement</u> |
|--------------------------------|-------------|--------------------|-----------------------------|-------------------|
| 3183204 | 3/21/94 | 75.220 | \$ 50 | \$ 50 |
| 3185374 | 3/21/94 | 75.206(a)(2) | \$506 | \$506 |

(Jim Walter agrees to pay in full the penalties proposed (Tr. 407).)

| <u>Order/ Citation No.</u> | <u>Date</u> | <u>30 C.F.R. '</u> | <u>Proposed Penalty</u> | <u>Settlement</u> |
|--------------------------------|-------------|--------------------|-----------------------------|-------------------|
| 3185375 | 3/21/94 | 75.700 | \$595 | \$150 |

(The Secretary agrees that the S&S finding cannot be sustained and he will modify the citation (Tr. 407).)

| <u>Order/ Citation No.</u> | <u>Date</u> | <u>30 C.F.R. '</u> | <u>Proposed Penalty</u> | <u>Settlement</u> |
|--------------------------------|-------------|--------------------|-----------------------------|-------------------|
| 3185376 | 3/21/94 | 75.380(g) | \$1610 | \$850 |

(The parties agree that the number of persons affected by the violation was four or five not ten as found by the inspector. (Tr. 407).)

| <u>Order/ Citation No.</u> | <u>Date</u> | <u>30 C.F.R. '</u> | <u>Proposed Penalty</u> | <u>Settlement</u> |
|--------------------------------|-------------|--------------------|-----------------------------|-------------------|
| 3183306 | 3/22/94 | 75.403 | \$793 | \$250 |

(The Secretary agrees that the S&S finding cannot be sustained. He will modify the citation (Tr. 408).)

| <u>Order/ Citation No.</u> | <u>Date</u> | <u>30 C.F.R. '</u> | <u>Proposed Penalty</u> | <u>Settlement</u> |
|--------------------------------|-------------|--------------------|-----------------------------|-------------------|
| 3185377 | 3/22/94 | 75.1100-2(b) | \$ 50 | \$ 50 |

(Jim Walter agrees to pay in full the penalty proposed (Tr. 408).)

| <u>Order/ Citation No.</u> | <u>Date</u> | <u>30 C.F.R. '</u> | <u>Proposed Penalty</u> | <u>Settlement</u> |
|--------------------------------|-------------|--------------------|-----------------------------|-------------------|
|--------------------------------|-------------|--------------------|-----------------------------|-------------------|

3185378 3/22/94 75.400 \$1298 \$600

(The parties agree that the number of persons affected by the violation was two not six as found by the inspector. (Tr. 408).)

| <u>Order/ Citation No.</u> | <u>Date</u> | <u>30 C.F.R. '</u> | <u>Proposed Penalty</u> | <u>Settlement</u> |
|--------------------------------|-------------|--------------------|-----------------------------|-------------------|
| 3185379 | 3/22/94 | 75.400 | \$793 | \$600 |

(The parties agree that the number of persons affected by the violation was two not three as found by the inspector (Tr. 408-409).)

| <u>Order/ Citation No.</u> | <u>Date</u> | <u>30 C.F.R. '</u> | <u>Proposed Penalty</u> | <u>Settlement</u> |
|--------------------------------|-------------|--------------------|-----------------------------|-------------------|
| 3185380 | 3/23/94 | 75.381(c)(4) | \$50 | \$50 |

(Jim Walter agrees to pay in full the penalty proposed (Tr. 409).)

Jim Walter is ORDERED to pay the penalties shown.

The Secretary is ORDERED to modify the order and citations as indicated.

Docket No. SE 94-448

| <u>Order/ Citation No.</u> | <u>Date</u> | <u>30 C.F.R. '</u> | <u>Proposed Penalty</u> | <u>Settlement</u> |
|--------------------------------|-------------|--------------------|-----------------------------|-------------------|
| 3185543 | 2/7/94 | 75.503 | \$617 | \$500 |

(The Secretary agrees the unwarrantable failure finding cannot be sustained. He will modify the order to a citation issued pursuant to section 104(a) (30 U.S.C. ' 814(a)) (Tr. 409).)

| <u>Order/ Citation No.</u> | <u>Date</u> | <u>30 C.F.R. '</u> | <u>Penalty</u> | <u>Proposed Settlement</u> |
|--------------------------------|-------------|--------------------|----------------|--------------------------------|
| 3185551 | 2/23/94 | 75.335 | \$506 | \$0 |

(The Secretary agrees the area cited was not covered by the standard. He will vacate the citation (Tr. 409).)

| <u>Order/ Citation No.</u> | <u>Date</u> | <u>30 C.F.R. '</u> | <u>Penalty</u> | <u>Proposed Settlement</u> |
|--------------------------------|-------------|--------------------|----------------|--------------------------------|
| 2807401 | 3/16/94 | 75.207(a) | \$50 | \$50 |
| 2807381 | 3/21/94 | 75.370(a)(1) | \$50 | \$50 |
| 2807382 | 3/21/94 | 75.370(a)(1) | \$50 | \$50 |

(Jim Walter agrees to pay in full the penalties proposed (Tr. 409).)

| <u>Order/ Citation No.</u> | <u>Date</u> | <u>30 C.F.R. '</u> | <u>Penalty</u> | <u>Proposed Settlement</u> |
|--------------------------------|-------------|--------------------|----------------|--------------------------------|
| 2807384 | 3/30/94 | 75.370(a)(1) | \$1610 | \$500 |

(The parties agree that the number of persons affected by the violation was two not ten as found by the inspector. (Tr. 410).)

| <u>Order/ Citation No.</u> | <u>Date</u> | <u>30 C.F.R. '</u> | <u>Penalty</u> | <u>Proposed Settlement</u> |
|--------------------------------|-------------|--------------------|----------------|--------------------------------|
| 3584781 | 4/11/94 | 75.403 | \$506 | \$150 |

(The Secretary agrees that the S&S finding cannot be sustained and he will delete it (Tr. 410).)

| <u>Order/ Citation No.</u> | <u>Date</u> | <u>30 C.F.R. '</u> | <u>Penalty</u> | <u>Proposed Settlement</u> |
|--------------------------------|-------------|--------------------|----------------|--------------------------------|
| 3185922 | 4/11/94 | 75.342 | \$595 | \$0 |

(The Secretary agrees the citation does not state a violation. He will vacate the citation (Tr. 409).)

| <u>Order/ Citation No.</u> | <u>Date</u> | <u>30 C.F.R. '</u> | <u>Penalty</u> | <u>Proposed Settlement</u> | |
|--------------------------------|-------------|--------------------|----------------|--------------------------------|--|
| 3183479 | 4/ 12/ 94 | 75.1725 | \$595 | \$150 | |

(The Secretary agrees that the S&S finding cannot be sustained. He will modify the citation (Tr. 410).)

Jim Walter is ORDERED to pay the penalties shown.

The Secretary is ORDERED to modify the order and citations as indicated and to vacate the citations indicated.

Docket No. SE 94-394

| <u>Order/ Citation No.</u> | <u>Date</u> | <u>30 C.F.R. '</u> | <u>Penalty</u> | <u>Proposed Settlement</u> | |
|--------------------------------|-------------|--------------------|----------------|--------------------------------|--|
| 3186004 | 1/ 3/ 94 | 75.1725(a) | \$5,800 | \$1,500 | |

(The Secretary agrees the unwarrantable failure finding cannot be sustained. He will modify the order to a citation issued pursuant to section 104(a) (30 U.S.C. '814(a)) (Tr. 411).)

Jim Walter is ORDERED to pay the penalty shown.

The Secretary is ORDERED to modify the order as indicated.

Docket No. SE 94-430

| <u>Order/ Citation No.</u> | <u>Date</u> | <u>30 C.F.R. '</u> | <u>Penalty</u> | <u>Proposed Settlement</u> | |
|--------------------------------|-------------|--------------------|----------------|--------------------------------|--|
| 3185568 | 2/ 16/ 94 | 50.20 | \$ 50 | \$ 50 | |
| 3182854 | 2/ 22/ 94 | 75.1722(a) | \$267 | \$267 | |

(Jim Walter agrees to pay in full the penalties proposed (Tr. 411).)

| <u>Order/ Citation No.</u> | <u>Date</u> | <u>30 C.F.R. '</u> | <u>Penalty</u> | <u>Proposed Settlement</u> | |
|--------------------------------|-------------|--------------------|----------------|--------------------------------|--|
| 3182858 | 3/ 7/ 94 | 75.370(a) | \$851 | \$400 | |

(The Secretary agrees the unwarrantable failure finding cannot be sustained and that he will modify the order to a citation issued pursuant to section 104(a) (30 U.S.C. '814(a)) (Tr. 411412).)

Jim Walter is ORDERED to pay the penalties shown.

The Secretary is ORDERED to modify the order as indicated.

Docket No. SE 94-586-R

| <u>Order No.</u> | <u>Date</u> | <u>30 C.F.R. '</u> |
|------------------|-------------|--------------------|
| 3184217 | 7/22/94 | 72.630(a) |

The inspector's finding of a violation of section 72.630(a) is AFFIRMED, as is his finding that the violation was due to Jim Walter's unwarrantable failure to comply. The inspector's S&S finding is VACATED. The Secretary is ORDERED to modify the order accordingly.

Dismissal of Proceedings

Jim Walter shall pay the assessed penalties within 30 days of the date of this decision. The Secretary shall modify and vacate the referenced citations and orders within the same 30 days. These proceedings are DISMISSED.

David F. Barbour
Administrative Law Judge

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