

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, D.C. 20001

July 2, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2003-160
Petitioner	:	A.C. No. 01-01322-00004
v.	:	
	:	Docket No. SE 2003-161
JIM WALTER RESOURCES, INC.,	:	A.C. No. 01-01322-00005
Respondent	:	
	:	No. 5 Mine

ORDER DENYING JIM WALTER RESOURCES’ MOTION FOR SUMMARY DECISION

In these cases, the Secretary of Labor (“Secretary”) on behalf of her Mine Safety and Health Administration (“MSHA”), alleges that Jim Walter Resources, Inc. (“JWR”) violated twenty-six mandatory safety standards promulgated pursuant to the Federal Mine Safety and Health Act of 1977. 30 U.S.C. § 801, et seq (“The Act”). The alleged violations are contained in citations and orders of withdrawal issued pursuant to sections 104(a) and 104(d) of The Act. 30 U.S.C. §§ 814(a), 814(d). Jim Walter Resources objects to the issuance of one of the orders – Order No. 7328082 – and moves for summary decision, pursuant to Commission Procedural Rule 67, 29 C.F.R. § 2700.67. JWR argues the undisputed material facts establish that the underlying standard cited in the order does not apply. For the reasons set forth below, Jim Walter’s motion is denied.

FACTS<sup>1</sup>

JWR’s No. 5 Mine is located in Tuscaloosa County, Alabama. Approximately 250 miners are employed at the mine. At the time of the events at issue, the mine operated 3 shifts a day. On Friday September 21, 2001, while the No. 4 Section of the mine was idle for maintenance, a crack in the roof was observed. In addition, a noise was heard and water was seen dripping from some of the roof bolt holes in the No. 2 Entry of the section, near the scoop battery charging station. (Resp’t’s Bf. Ex. 2 at 1). The section coordinator directed Tony Key, section foreman, to have supplemental roof support installed throughout the area. About 16, 10

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<sup>1</sup> The facts are derived from factual statements in the parties’ briefs.

foot long cable bolts were installed during the day shift on September 21. Methane, water, broken coal and broken shale were encountered above the anchorage zone of the primary roof supports. Because of the poor roof conditions, the cable bolts proved ineffective to support the roof, and on Sunday, September 23, a roof fall occurred near the scoop battery charging station. (Resp't's Br. Ex. 2 at 1).

When the roof fell, methane was liberated from the roof strata into the section's entries. This occurred at approximately 5:17 p.m., minutes before an initial explosion. The arching of a scoop battery that was damaged by the roof fall is believed to have ignited the methane. The explosion damaged critical ventilation controls and disrupted the airflow in the section. It also injured four miners.

Three of the injured miners left the No. 4 Section. The fourth was too badly hurt to be moved. Twelve other miners came into the area in an attempt to rescue the fourth miner and respond to the emergency situation. Other miners not responding to the explosion were not evacuated from the mine, even though the explosion damaged critical ventilation controls. At approximately 6:15 p.m. a second explosion occurred, leaving thirteen miners dead.

After the incidents, the Secretary conducted an extensive investigation. The investigation resulted in MSHA charging JWR with numerous violations, including that set forth in Order No. 7328082. The order states:

On September 21, 2001, two separate explosions occurred in 4 Section, resulting in fatal injuries to thirteen miners. The accident investigation revealed a proper evacuation procedure was not followed after the first explosion on 4 Section. Miners were not evacuated from the mine after an explosion damaged critical ventilation controls. These conditions were known by, and communicated to, management personnel including the CO Room Supervisor. The section foreman believed there was a possibility of explosion and did not effectively communicate this information to other miners. Miners from other areas of the mine responded to the emergency on 4 Section believing either an ignition or a fire had occurred. These miners were unaware an explosion had occurred and a second explosion was possible. Miners underground were not alerted to the problem through the mine wide telephone paging system. Also, management directed 7 additional miners to join the 13 miners already in 4 Section.

The order cites a violation of Section 75.1101-23(a)<sup>2</sup>, which at the time the order was issued read as follows:

Each operator of an underground coal mine shall adopt a program for the instruction of all miners in the location and use of fire fighting equipment, location of escapeways, exits,

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<sup>2</sup> As discussed more fully below, this regulation was later amended and republished as 30 C.F.R. §75.1502 (2003).

and routes of travel to the surface, and proper evacuation procedures to be followed in the event of an emergency. Such program shall be submitted for approval to the District Manager of the Coal Mine Health and Safety District in which the mine is located no later than June 30, 1974.<sup>3</sup>

### STANDARD FOR SUMMARY JUDGMENT

Commission Rule 67 provides: “A motion for summary decision shall be granted only if the entire record including the pleadings, depositions, answers to interrogatories, admissions, and affidavits shows: (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law.”

### JWR’S ARGUMENTS

JWR argues that Section 75.1101-23(a) did not govern its actions on September 23, 2001, after the first explosion. It is JWR’s belief that the standard expressly applied “only to emergencies involving underground fires.” (Resp’t’s Br. at 9). JWR notes that the standard was located in Subpart L of the mandatory safety standards for underground coal mines. This subpart was titled “Fire Protection.” JWR contends that the “purpose of the program of instruction for ‘evacuation procedures’ referenced in § 75.1101-23(a) must be to address fire emergencies, not other emergencies that could occur in an underground mine.” (Resp’t’s Br. at 10).

Second, JWR argues that its MSHA approved Fire Fighting and Evacuation Plan (the “Plan”) only applies to fire emergencies. JWR cites the language of the Plan to illustrate “its exclusive focus on preparing for and responding to *fire* emergencies.” (Resp’t’s Br. at 15) (emphasis in original).

Third, JWR argues that “MSHA’s post-accident issuance of an emergency temporary standard (‘ETS’) and final rule broadening the scope of the program of instruction under § 75.1101-23(a) further confirms that, when the JWR explosion occurred, the requirements of [the standard] were limited to fire emergencies.”<sup>4</sup> (Resp’t’s Br. at 16). JWR believes that this

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<sup>3</sup> On September 21, 2001 a plan approved by MSHA was in effect at the No. 5 Mine.

<sup>4</sup> The ETS addressed a deficiency in the relevant MSHA policy. MSHA stated it recognized that Section 75.1101-23(a) “did not adequately address responsibilities of the responsible person on the surface and the responsible person under ground” in the event an emergency evacuation was necessary. (Resp’t’s Br. Ex. 4 at 57). Therefore, the ETS required mine operators to designate a responsible person at the mine to take charge during mine fire, explosion, and gas or water inundation emergencies. This person was responsible for not only making the decision to evacuate, but also coordinating evacuations. MSHA further stated that “[t]he ETS . . . provide[d] that only properly trained and equipped persons essential to respond to the mine emergency may remain underground.” (Resp’t’s Br. Ex. 4 at 57). The ETS “also

“broadening” of Section 75.1101-23(a) indicates the standard was not inclusive enough to cover the events that occurred on September 21, 2001.

Moreover, JWR argues that even if Section 75.1101-23(a) “could somehow be construed to apply to events that were not fire emergencies,” the company was in compliance with the standard. JWR states that by having a Fire Fighting and Evacuation Plan (“Plan”) that was approved by MSHA, it satisfied the requirements of Section 75.1101-23(a). JWR also states that it “did follow the Plan and the miners’ actions in response to the explosion were consistent with [the] training and instruction” they received under the Plan’s “program of instruction.” (Resp’t’s Br. at 20).<sup>5</sup>

### SECRETARY’S ARGUMENTS

The Secretary submits that Section 75.1101-23(a) “is plainly worded and was intended to protect miners against hazards by requiring, without limitation, evacuations in mine emergencies.” (Pet’r’s Br. at 9). Accordingly, the Secretary states that “[i]f the meaning of a regulation’s language is plain, the plain meaning of the language is controlling and the regulation cannot be interpreted to mean something else.” (Pet’r’s Br. at 10). Thus, the word “emergency” in the standard is not limited to “fire emergency.”

Alternatively, the Secretary argues that even if the meaning of the standard is ambiguous, there are “two additional rules of regulatory construction [that] compel the court to find the standard applies to explosion related emergencies.” (Pet’r’s Br. at 11). First, on May 8, 1995, MSHA published an abstract stating that Section 75.1101-23(a) “requires each operator of an underground coal mine to adopt a program for mine evacuation in the event of an emergency, such as a fire or explosion” (Pet’r’s Br. at 13) (quoting 60 Fed. Reg. 23567 (1995)). This interpretation of Section 75.1101-23(a) was reasonable and entitled to deference. Second, “safety legislation and regulations must be constructed broadly to effectuate their purposes,” and “[s]ince the purpose of the evacuation provisions [was] to prevent loss of life during emergencies,” the Secretary’s broader interpretation should be accepted.” (Pet’r’s Br. at 14).

### ANALYSIS

#### *Applicability of Section 75.1101-23(a)*

Based on the facts as presently revealed in the record, I conclude it was not improper for

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broaden[ed] the existing requirements for a program of instruction for firefighting and evacuation to address fire, explosion, and gas or water inundation emergencies.” (Resp’t’s Br. Ex. 4 at 57).

<sup>5</sup> JWR also argues that the “Secretary’s interpretation of the regulation and Plan, even if permissible, is unenforceably vague” and fails to provide the notice required to support imposition of a civil penalty. (Resp’t’s Br. at 27). Given my conclusions on the proper interpretation of the standard, I need not address this issue. (*See infra* pp. 6-8).

MSHA to cite JWR for a violation of Section 75.1101-23(a). I am not swayed by JWR's argument that the standard only applies to fire emergencies, and I am persuaded by the Secretary's argument that the meaning of the standard is plain, and so must be enforced as written.

As has been observed by the Commission, the language of many standards is "simple and brief in order to be broadly adaptable to myriad circumstances." *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (November 1981); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2130 (December 1992). "Such broadly written standards must afford reasonable notice of what is required or proscribed." *Palmer Coking Coal Co.*, 22 FMSHRC 887 (citing *U.S. Steel Corp.*, 5 FMSHRC 3, 4 (January 1983)). In order "to pass constitutional muster, a statute or standard adopted thereunder cannot be 'so incomplete, vague, indefinite or uncertain that men of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (quoting *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (December 1982) (citations omitted)). A standard must "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Lanham Coal Co.*, 13 FMSHRC 1341, 1343 (September 1991).

When faced with a challenge that a safety standard failed to provide adequate notice of prohibited or required conduct, the Commission has applied an objective standard, i.e., the reasonably prudent person test. *BHP Minerals Int. Inc.*, 18 FMSHRC 1342, 1345 (August 1996). The Commission summarized this test as "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC at 2416.

"In evaluating whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard at issue would have recognized the applicability of the standard to the cited facts at issue, the Commission has analyzed a number of factors including the ordinary definition of the terms of the text of the regulation at issue, the consistency of the Secretary's enforcement, and whether MSHA has published notices regarding its interpretation [sic] the standard in question." *Western Industrial, Inc.*, 24 FMSHRC 269 (March 2002). (citations omitted).

Here, application of the test requires determining whether a reasonable operator would have concluded that an explosion was the kind of emergency event referenced in Section 75.1101-23(a), and I conclude that it would.

I find JWR's attempt to differentiate between a fire and an explosion to be a distinction without difference. I concur with the Secretary's statement that "explosions and fires are similar in nature and present similar hazards to miners underground." (Pet'r's Br. at 15). I agree with the Secretary that "it is reasonable to anticipate that a fire could create an explosion risk and an explosion could create a fire risk." (Pet'r's Br. at 15). This is because fires and explosions are fundamentally interrelated. According to the *Dictionary of Mining, Mineral and Related Terms*,

an explosion is “a rapid oxidation, accompanied by heat and flame, of firedamp, coal dust, or other strongly flammable material, resulting in a great and sudden development of gases and pressure.”; while a fire is “ the manifestation of rapid combustion or combination of materials with oxygen.” U.S. Dept. Of Interior, Bureau of Mines 402, 429 (1968).<sup>6</sup> These two events are so intertwined, I conclude it is eminently reasonable to view the “emergency” referred to in the standard as inclusive of an explosion. In other words, it is reasonable to apply the standard to both occurrences.

Given this interpretation of the standard, I find its placement in Subpart L logical, and I reject JWR’s suggestion that the placement of the standard and its regulatory context restricts it to fires only and excludes explosions. (Resp’t’s Br. at 13) (citing *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1192 (9<sup>th</sup> Cir. 1982)).

### Lack of Undisputed Material Facts

Since Section 75.1101-23(a) applies to explosion-related emergencies, the question is whether JWR followed its MSHA approved Fire Fighting and Evacuation Plan on September 23, 2001. However, the question can not be answered at this time because there are material facts in dispute that are essential in making this determination.

It is established law that once a plan is approved and adopted, its provisions are enforceable at the mine as mandatory safety standards. *See Cf. VP-5 Mining Co.*, 14 FMSHRC 1033, 1036-37 (June 1992) (citations omitted). As noted earlier, Order No. 7328082 charges JWR with allegedly failing to comply with its Plan. Specifically, the Secretary cites the following as alleged violations of the Plan: failure to evacuate No. 4 Section when the CO monitors started sending signals, failure to properly investigate the emergency as provided in the Plan, and sending poorly informed miners into No. 4 Section before the second explosion. (Pet’r’s Br. 33-34). JWR contests these allegations and argues that it did follow the Plan. Given the disputes over the applicable provisions of the Plan and whether they were violated, the Secretary will have to prove the alleged violations of the Plan at trial, either through documentary evidence or testimony, or both. JWR can rebut the Secretary’s case by showing the particular events of September 21 that the Secretary contends contravened the Plan either did not occur or were not contrary to the provisions of the Plan. Therefore, a trial is necessary to determine the outcome of this issue.

### ORDER

For the reasons stated above, I find that Section 75.1101-23(a) was correctly cited. I

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<sup>6</sup> The similarity between a fire and an explosion is noted in the Report created by JWR’s expert Malcolm J. McPherson. He states that “[i]t is probable that [the] second ignition of methane resulted in the propagation of flaming” and “[t]he flame would then accelerate into a gas explosion.”(Pet’r’s Br. Ex. J at 46).

further find that there are material facts in dispute, and a determination of the facts must be made to determine if the standard was violated. Accordingly, the Motion for Summary Decision by JWR is DENIED.<sup>7</sup>

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<sup>7</sup> JWR has directed my attention to a recent decision by the Court of Appeals for the District of Columbia Circuit regarding regulatory interpretation. *Association of Civilian Technicians, Wichita Air Capital Chapter v. FLAR*, 360 F.3d 195 (D.C. Cir 2004). Given my conclusions on the plain meaning of Section 75.1101-23(a), I find the case, which concerns among other things a discussion of broad versus strict construction of a standard, inapposite.