

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
Washington, DC 20001-2021

March 1, 2004

JIM WALTER RESOURCES, INC. : CONTEST PROCEEDINGS
Contestant, :
 :
v. : Docket No. SE 2003-103-R
 : Citation No. 7670930; 03/13/2003
 :
SECRETARY OF LABOR, : Docket No. SE 2003-104-R
MINE SAFETY AND HEALTH : Order No. 7670931; 03/13/2003
ADMINISTRATION (MSHA), :
Respondent. : Docket No. SE 2003-114-R
 : Order No. 7671112
 :
 : Docket No. SE 2004-115-R
 : Order No. 7671113
 :
 : Mine: No. 4
 :
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Petitioner, : Docket No. SE 2004-54-A
 : A.C. 01-01247-09962
v. :
 : Mine: No. 7
JIM WALTER RESOURCES, INC. :
Respondent. :

DECISION

Appearances: Warren B. Lightfoot, Jr., Maynard Cooper & Gale, P.C., Birmingham, AL, for Jim Walter Resources, Inc.;

Guy W. Hensley, Walter Resources, Inc., Brookwood, AL, for Jim Walter Resources, Inc.;

Sharon D. Calhoun, Dana L. Ferguson, Esq., U.S. Department of Labor, Office of the Solicitor, Atlanta, GA., for the Secretary of Labor.

Before: Judge Weisberger

Statement of the Case

These cases are before me based upon notices of contest filed by Jim Walter Resources,

Inc. (Jim Walter) challenging three orders issued to it by the Secretary of Labor, and the special findings set forth therein. Additionally, at the hearing on this matter held in Birmingham, Alabama, on October 22, and 23, 2003, the parties agreed to present for decision the various penalty factors required to be found by the Commission, in the event it is found that Jim Walter violated a mandatory standard, as set forth in Section 110(I) of the Federal Mine Safety and Health Act of 1977 (the Act). Subsequent to the hearing the Secretary filed a petition for assessment of civil penalty seeking penalties for the violations alleged in Docket Numbers SE 2003-114-R, and 115-R.

I. Docket No. SE 2003-103-R

At the hearing, the parties reported that the issues raised by the notice of contest have been settled. The Secretary presented a joint motion to dismiss the notice of contest. Based on the Secretary's representations, the motion was granted and this case was ordered dismissed.

II. Docket No. SE 2003-104-R

At the hearing, the Secretary moved to dismiss the notice of contest asserting that the parties settle the issues raised by the notice of contest. The Company did not object to this motion, and based on the Secretary's assertions, the motion was granted and the notice of contest was ordered dismissed.

III. Docket Nos. SE 2003-114-R (Order No. 7671112), and 115-R (Order No. 7671113)

A. Introduction

On April 16, 2003, at approximately 9:00 a.m., MSHA Inspector John Thomas Terpo, along with Keith Plylar, an employee of Jim Walter who accompanied the inspector as a representative of the miners, and Jack Gravely, an outby foreman employed by Jim Walter, inspected the Entry No. 4 longwall section of Jim Walter's underground No. 7 Mine. The roof of the entry was supported by bolts and straps. In addition, the roof was supported by two parallel rows of cribs placed on five foot centers that extended the entire 3,000 foot length of the entry¹. The cribs were designed to extend from the floor to the roof. Cap boards ("T" boards) and wedges were placed on top of the cribs, where necessary, to ensure that the cribs were flush with the roof. According to Terpo, he observed that from spad 15348 through spad 15429, a distance of approximately two thousand feet, all the cribs in this area were loose, as they were not secured against the roof. Terpo testified that this condition was very obvious, as he observed gaps between the roof and the top of the cribs of at least one-half inch. According to Terpo, he measured 50% of the cribs in this area with a tape, and there was a three inch gap between the top of most of the cribs and the roof. Also, "T" boards were hanging down from some of the

¹The Roof Control Plan provides for a single row of cribs.

loose cribs. In traveling inby, the group walked between the rows of cribs. However, at various points the area was “dangered off” with signs directing them not to proceed between the rows, but to detour and continue walking in-by between the outside of the crib rows and the rib. In addition, Terpo observed “unstable roof” in two places and had to detour between the outside of the cribs and the rib. One of these areas contained fractured and loose roof along with rocks, some hanging down in the center of the entry. These conditions continued for seventy-five linear feet. Continuing inby, Terpo encountered another area of bad roof which extended ninety feet, requiring the group to detour, and he did not enter these areas. However, according to Terpo, in each instance when he walked between the ribs and cribs, and looked up at the top of the ribs and the roof, he noticed three inch gaps between the top of the cribs and the roof in these two areas. According to Terpo, every time he tapped the roof in the seventy-five foot and ninety foot areas where there was bad roof, small particles came down. Terpo indicated that he saw numerous rocks in these areas that were approximately four feet long and two to three feet wide.

Terpo opined that the gaps between the top of the cribs and the roof had existed for more than twenty-four hours. He stated that cribs, being made out of wood, shrink due to exposure to air, but that in his experience, it would take approximately four weeks for the wood to shrink to a point where a gap of three inches would be created, and most of the cribs were three inches from the roof.

On April 16, Terpo issued Order No. 7671112 alleging a violation of 30 C.F.R. 75.220(a)(1) (Jim Walter’s roof control plan²), that was significant and substantial, and resulting from its high negligence and unwarrantable failure. He also issued Order No. 7671113 alleging a violation of 30 C.F.R. § 75.364(h)³ that was significant and substantial, and due to Jim Walter’s high negligence and unwarrantable failure. This order alleges that in a weekly examination on April 15, the examiner failed to record fractured loose roof in five separate locations in Entry No. 4, and that cribs, required by the roof control plan, were not installed properly against the roof in two locations where fractured loose roof existed.

B. Docket No. SE 2003-114-R (Order No. 7671112)

_____ 1. Violation of Jim Walter’s Roof Control Plan (30C.F.R. § 75.220(a)(1))

At the hearing, Jim Walter admitted that, “technically”, it violated the roof control plan (Tr 23). Based upon this admission which is supported by the evidence of record, I find that Jim

²The roof control plan requires, inter alia, that the tailgate entry of the longwall panel”... will be systematically supported using a single row of cribs” (Exhibit C-1)

³Section 75.364(h) provides that, regarding weekly examinations, “... a record of the results of each weekly examination, including a record of hazardous conditions found during each examination and their locations ... shall be made.”

Walter did violate its roof control plan, and Section 75.220(a)(1), supra.

2. Significant and Substantial

A "significant and substantial" violation is described in section 104(d)(1) of the Mine 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 U.S.C. § 814(d)(1). A violation is properly designated significant and substantial "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 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum* the Secretary of Labor 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 an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In *United States Steel Mining Co. Inc.*, 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

We have explained further that 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 (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 Company, Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

As found above, Jim Walter did violate a mandatory standard, inasmuch as the cribs in question did not properly support the roof in violation of its roof control plan. However, the roof in the entry in question was supported by bolts and straps. There is not any evidence in the record that these items of support were either improperly installed, maintained, or not all in good condition. Further, although the roof control plan requires the installation of a single row of cribs, Jim Walter had installed an additional row which provided a double row of support cribs in this entry.

In essence, Jim Walter argues that the violation was not significant and substantial in that the roof was well supported and not hazardous; that there is insufficient evidence that although some of the cribs were not touching the roof this condition contributed to the hazard of a roof fall; that there was not a reasonable likelihood of a roof fall occurring; and that in the event of such an accident only one person would be injured. I note that Gravely, who accompanied Terpo during the inspection, was asked in direct examination whether there was any loose rock in the ninety and seventy-five foot areas referred to by Terpo, he answered, no. I find that this testimony is insufficient to rebut Terpo's testimony that in these areas the roof was bad. Gravely subsequently conceded that in these areas "the top was fractured". (Tr. 228). Further, Gravely was asked whether he saw any other areas of loose roof, aside from the seventy-five and ninety foot areas, he testified as follows: "I scaled down some other loose roof areas, yes, sir." (Tr. 235). This testimony does not contradict Terpo's testimony that, aside from the hundred and sixty-five feet that he dangled off, there were two areas of fractured and loose roof along with rocks hanging down the center of the entry. Also, Terpo's testimony that whenever he tapped the roof in the 75 foot and 90 foot areas where there was bad roof small particles came down, is further evidence of loose roof. I do not find support in the record for Jim Walter's assertions that this testimony of Terpo's has been contradicted by Plylar and Gravely. Plylar's testimony does not establish that he observed Terpo continuously throughout the entire inspection. He was asked, on cross-examination, whether he was "pretty much able to see" Terpo's actions the entire time - down the entry and back - and he stated, "yes sir". (Tr. 202). He was then asked as follows: "You never saw him bump the roof, did you?" And his answer was "I don't remember seeing it". (Tr. 202). I find this testimony not definite enough to contradict the specific testimony of Terpo regarding his actions, especially in light of my observations of the latter's demeanor while testifying, which I found indicated that his testimony in this area was credible. Further, since Gravely did not positively testify that he observed Terpo continuously throughout the inspection, I find that his answer in the negative, to a question by Respondent's counsel on direct-examination as to whether he had ever seen Terpo hit or bump the roof "at anytime", (Tr. 225) insufficient to contradict the testimony of Terpo relating to his actions in this regard.

I also take cognizance of Gravely's opinion that a crib which does not quite touch the roof is not a hazard "if there is good roof above it" (Tr. 229). However, he was asked if it would be a hazard if there was loose roof above a crib that was not tight with the roof and he answered as follows: "It would just depend on how far the crib was from the top. If it was pretty close, I would say no because the top could still settle on the crib." (Tr. 229). In this connection, Gravely testified, in contrast to Terpo, that from the seventy-five foot area down towards the headgate, the majority of the cribs were only a half inch from the roof; and that from the beginning of the crib line down to the seventy-five foot area the cribs were "tight against the roof" (Tr. 226). I place more weight on the testimony of Terpo that in the cited approximately 2000 foot linear distance, from spad 15348 through spad 15429, there was a three-inch gap between the top of most of the cribs and the roof, inasmuch as this conclusion was based upon his tape measurements of 50 % of the cribs in this area. In contrast, Gravely did not take any measurements. I find Gravely's testimony that he observed Terpo taking a measurement with a ruler only on one occasion, and Plylar's testimony that he did not observe anyone taking

measurements of the loose cribs, insufficient to rebut Terpo's testimony in the absence of any foundation in the record that either of these witnesses continuously watched Terpo's actions throughout the inspection. I observed Terpo's demeanor while testifying on this point, and find his testimony credible.⁴ Further, the record does not contain any contradiction of Terpo's testimony that in the seventy-five and ninety foot areas there were gaps between the cribs and the roof, some of the roof was fractured.

Considering all of the above, I find that the weight of the evidence establishes that, when inspected, the roof conditions were somewhat hazardous. Further, since the cribs, designed to provide roof support, were not flush with the roof for an extensive distance in the entry in violation of the roof control plan, I find that the violative conditions contributed to the hazard of a roof fall. Additionally, I note the following existed in the cited areas: loose rocks as testified to by Terpo, and not specifically contradicted by other witnesses; loose material that had to be scaled; fractured roof, especially in a 75 foot and 90 foot area where cribs were not flush against the roof; and extensive areas in the entry where the cribs were not in contact with the roof. Based on these conditions there was a reasonable likelihood of the occurrence of an injury producing event, i.e., a roof or a rock fall. Further, taking into account the extensive area affected, I find that it has been established that, given the continuance of normal mining operations, i.e., a weekly examination of the area, that there was a reasonable likelihood of a roof fall causing death or serious injury. Thus, for all the above reasons, I conclude that this violation was significant and substantial.

3. Unwarrantable Failure

On April 15, 2003, the day prior to the inspection at issue, Richard Sandlin, Jim Walter's outby foreman, conducted a weekly examination of the entry in question. Sandlin indicated that, in his inspection, he did not see any hazardous conditions. He also indicated that he did not see any condition that would have been reasonably likely to have resulted in an event where there would be an injury of a reasonably serious manner.

Sandlin testified that as he walked down the entry he looked at the cribs, and most cribs seemed close to the top, although in a couple of places two or three cribs were loose. He described the gap between these cribs and the roof as approximately one-half to one inch. According to Sandlin, the roof was well supported with roof bolts and straps which were in good shape. He indicated that he did not see any seventy-five foot or ninety foot areas of loose rock. However, Sandlin indicated that he observed fractured roof in ten to twelve different places; and the longer crack in the roof extended twenty linear feet. Sandlin scaled loose pieces in these fractured areas. He was asked whether he left any loose rock unscaled when he left the entry and he answered "to my knowledge, no, sir." (Tr. 243).

⁴I also find some corroboration in Plylar's testimony that most of the gaps that he observed in the two thousand foot area cited were between three and six inches, although he did not measure them.

On the other hand, I take cognizance of Terpo's testimony that the gaps between the cribs and the roof were "obvious". In this connection, Plylar corroborated Terpo's testimony regarding the existence of three inch gaps between some cribs and the roof. Based on Terpo's experience, I find his testimony credible that the cribs, made out of wood, shrink upon exposure to air, and it would take approximately four weeks for the wood to shrink to where a gap of three inches would be created. In this connection, as discussed above (III(B)(2), infra), I find the credible evidence establishes that a significant number of cribs were three inches from the roof. A further indication of the obviousness of the gaps between the roof and the top of the cribs is found in Gravely's testimony wherein he indicated that 50 % of the wedge boards that had been inserted between the top of the crib and the roof to eliminate the gap were loose, and 20 to 25% had fallen out.

I find that the record establishes the existence of the following conditions in the areas cited by Terpo on April 16, 2003: loose cribs that extended for a significant distance in the entry; that these conditions were obvious; and that in two areas consisting of a total one hundred and sixty-five feet, in addition to loose cribs the roof was fractured. In the context of the combination of these conditions, I find it more likely than not that at least some of these hazardous conditions had existed for some time prior to April 16.⁵ I thus find that the existence, on April 16, of violative conditions of extensive areas where the cribs did not touch the roof, to have been the result of a degree of negligence on the part of Jim Walter that was more than ordinary and reached the level of aggravated conduct. For these reasons I find that it has been established that the violation herein was as the result of Jim Walter unwarrantable failure. (See *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987))

C. Docket No. SE 2003-115-R (Order No. 7671113)

1. Violation of 30 C.F.R. § 75.364(h)

Essentially, for the reasons set forth above, (III (B)(3) infra), I find that the weight of the evidence establishes the existence of hazardous conditions in the area in question on April 16, 2003, at the time of Terpo's inspection. Specifically, that for more than two thousand linear feet cribs were not in contact with the roof. In addition, within this section, the roof was fractured in two areas totaling one hundred and sixty-five feet, and the roof was loose and contained loose rocks in some places. Due to the significant number of cribs involved, and the extensive area of fractured roof, combined with the presence of loose rock and loose roof, I find that, in combination, it was more likely than not that at least some of these hazardous conditions were in existence when the area was inspected by Sandlin the previous day. The weekly examination report does not contain any notation of hazardous conditions. Accordingly, I find that Jim Walter did violate Section 75.364(h), supra, which requires, as pertinent, a record of the results of the weekly examination "... including a record of hazardous conditions found during each examination"

⁵I thus reject Sandlin's testimony regarding the conditions of the cribs on April 15.

2. Significant and Substantial

I reiterate my finding that the violative condition of cribs not being in contact with the roof constitutes a significant and substantial violation for the reasons set above, (III (B)(2) infra). Accordingly, I conclude that if the condition itself was a significant and substantial violation, then for the same reasons, the failure to report such a condition constitutes a significant and substantial violation.

3. Unwarrantable Failure

As set forth above, hazardous conditions were present at the time of Sandlin's examination. Due to the extensive nature of these conditions the failure to report constitutes more than ordinary negligence and reaches the level of aggravated conduct and hence is found to be an unwarrantable failure (See *Emery, supra*).

D. Penalties

1. Order No. 7671112

I find, based on the parties' stipulations, that Jim Walter demonstrated good faith abatement, and that a reasonable penalty will not impair its ability to continue in business. Neither party offered any argument that Respondent's size should be accorded any significant weight in evaluating the penalty to be imposed. I take cognizance of the history of violations as set forth in Respondent's Exhibit No. 1.⁶ Essentially, for the reasons set forth above, III (B)(3) infra, I find that the level of Respondent's negligence was high. Further, for essentially the same reasons set forth above, III (B)(2) infra, I find that the level of gravity of this violations was high.

Taking into account the above factors referred to in Section 110(i) of the Act, giving most weight to Respondent's high negligence, and the high level of gravity of the violation herein which could have led to a fatality, I find that a penalty of \$6,000.00 is appropriate for this violation.

2. Order No. 7671113

I find, based on the parties' stipulations, that Jim Walter demonstrated good faith abatement, that a reasonable penalty will not impair its ability to continue in business. Neither

⁶I have considered Jim Walter's arguments that the history of violations should not be a negative penalty factor inasmuch as none of the violations in the report indicated that it was on notice of crib deficiencies, or problems with compliance with 30 C.F.R. §§75.220(a)(1) or 364 (b). However, in evaluating all the elements set forth in Section 110(i) of the Act I place most weight on the factors of negligence and gravity due to their high level (III(B)(2), and III (C)(2), infra).

party offered any argument that Respondent's size should be accorded any significant weight in evaluating the penalty to be imposed. I take cognizance of the history of violations as set forth in Respondent's Exhibit No. 1.⁷ Essentially, for the reasons set forth above, III (C)(3) infra, I find that the level of Respondent's negligence was high. Further, for essentially the same reasons set forth above, III (C)(2) infra, I find that the level of gravity of this violations was high.

Taking into account the above factors referred to in Section 110(i) of the Act, giving most weight to the Respondent's high negligence, and the high level of gravity of the violation herein which could have led to a fatality, I find that a penalty of \$1,400.00 is appropriate for this violation.

III. Order

It is **Ordered** that the Orders at issue be affirmed as written, and that the Notices of Contest, Docket Nos. SE 2003-114-R and 2003-115-R, be **Dismissed**.

It is further **Ordered** that, pursuant to the Secretary's Joint Motion to Dismiss which was granted, Docket Nos. SE 2003-3-R and 2003- 4 be **Dismissed**.

It is further **Ordered** that Respondent pay a total civil penalty of **\$7,400.00** for the violation of Order Nos. 7671112, and 7671113.

Avram Weisberger
Administrative Law Judge

Distribution: (Certified Mail)

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⁷Supra, n.6.