FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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October 14, 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
UNITED MINE WORKERS	:	
OF AMERICA,	:	
Intervenor	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2003-174
Petitioner	:	A.C. No. 01-01322-04271
v.	:	
	:	
JIM WALTER RESOURCES, INC.,	:	No. 5 Mine
Respondent	:	

RULINGS ON PENDING MOTIONS IN LIMINE AND MOTION FOR SUMMARY DECISION

Jim Walter Resources (JWR) has filed several pre-trial motions in limine and one motion for summary decision, which are addressed herein.

I. MOTION IN LIMINE TO EXCLUDE REPORT

First, the company has moved to exclude from evidence the report of the investigation (the "Report") MSHA conducted into two explosions that occurred at JWR's No. 5 Mine on September 23, 2001. The report, which is titled Report of Investigation Fatal Underground Coal Mine Explosions September 23, 2002, was issued on December 11, 2002. The Secretary opposes the motion. For the reasons that follow, I conclude that the report should not be excluded.

When ruling on any motion, a judge must keep in mind the basic principles governing the subject litigation, foremost of these are the nature of the particular proceeding and the nature

of the motion. This proceeding is administrative in nature and the motion requests exclusion of potential evidence prior to being offered. The Commission long ago made clear that, when rendering a decision, a judge must base his or her findings and conclusions on substantial evidence[1] (Mid-Continent Resources, Inc., 6 FMSHRC 1132, 1135-36 (May 1984)). The principal issues in these cases concern alleged violations of the Secretary's mine safety and health regulations for underground mines found during the investigation. The Report contains much information regarding the Secretary's view of the events leading to the accident, her description of the accident, and her narrative description of some, but not all, of the enforcement actions MSHA took and the violations it alleged as a result of the investigation. In addition, the Report contains narrative descriptions of the investigation, as well as narrative discussions of the mine's organization, the mine's physical layout, and mine procedures and systems that, in the Secretary's view, relate to the explosion. Several mine maps also are included.

To be relevant, evidence must be both material and probative. To be material, it must be offered to prove a proposition or event that is at issue or to provide background for understanding the proposition or event. To be probative, it must tend to establish the proposition or event. Joining these concepts, the Federal Rules of Evidence defines "relevant evidence" as "evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" (Fed. R. Evid. 401). The system of proof presupposes that all relevant evidence is admissible (Fed. R. Evid. 402). While there are exceptions to keep otherwise relevant evidence from the record [2], the judge is granted much discretion in ruling on admissibility. If evidence is relevant, fairness to the parties and the judge's duty to facilitate full development of the record, warrant great restraint in excluding the evidence from the record.[3]

RULING

Given these underlying principles, the first issue before me is whether the Report is relevant, and I conclude that it is. The Report not only concerns the investigation that lead MSHA to issue the subject citations, in some instances it directly involves the specific citations at issue. At one end of the spectrum, the Report may only provide background for understanding

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[1] Substantial evidence is "such evidence as a reasonable mind might find adequate to support [the judge's] conclusion" (Consolidated Edison Co. v. NLRB , 305 U.S. 197, 229 (1938)).

[2] See e.g., Fed. R. Evid. 403 (providing for exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues . . . or considerations of undue delay, waste of time, or needless presentation of cumulative evidence").

[3] The weight the judge gives to the evidence once admitted is another matter entirely.

the events at issue. At the other end, it may corroborate and supplement testimony establishing alleged violations. Either way it is relevant. However, like any relevant evidence admitted into evidence, it will be subject to rebuttal, and the weight that is ultimately attributed to the Report, or to the parts of the Report used by the Secretary and/or the UMWA, can be impacted fundamentally by that rebuttal.

As noted, while all admitted evidence must be relevant, not all relevant evidence must be admitted. Relevant evidence may be excluded if it is only minimally relevant that is if the judge finds it is too tangential to the questions at issue. At law, otherwise relevant hearsay evidence is routinely barred. In arguing for the Report's exclusion, JWR notes that it is hearsay and argues that its admission would be fundamentally unfair (Mot.3). It asserts that hearsay evidence, such as the Report, is only admissible if it meets a high standard of reliability and truthfulness, and it points to Rule 803(8)(c) of the Federal Rules (Fed. R. Evid. 803(8)(c)), which permits admission of results and reports of investigations "made pursuant to law, unless the sources of information or other circumstances indicate lack of trustworthiness" (Mot. 4-5). In JWR's view, the Report's lack of trustworthiness is established by its "impermissible legal conclusions and unreliable factual findings" (Id. 5). JWR argues that Rule 803(8)(c) bars legal conclusions within a report, and since the Report inextricably mixes legal conclusions with purported factual findings, the entire report must be excluded (Id. 6). JWR goes on to detail many circumstances which, it asserts, attest to the unreliability of the Report and to the inherent bias of MSHA in presiding over the formulation of the Report (Mot. 11-31).

In my view, JWR's objections and concerns do not on their face set forth adequate reasons to bar the Report from the record. If the Report is admitted, it will not speak for itself. For it to bear on the outcome of the case, it will have to be supplemented by testimony. Once the testimony has been offered, JWR will have an opportunity to impeach the testimony and on cross-examination to otherwise question the Report's reliability. In short, it will have the opportunity to use its concerns to diminish the weight attributed to the Report or to its pertinent parts. The essential point is that the Report will be of probative value only to the extent it supports my ultimate findings, and that value will be measured by weighing the Report against various factors, a crucial one being whether those whose statements and opinions are reported are available for in-court cross-examination and whether JWR persuasively attacks the reliability and accuracy of the witnesses. Moreover, even if the Report were inherently prejudicial to the company, which I do not find, the in-court right to impeach the Report as actually used at trial before the judge, fully protects JWR from invidious conclusions based on the Report's contents.

Because I conclude the Report is relevant to the issues before me and because I conclude the company's concerns of fairness and prejudice, inter alia, can be met at trial, the motion will not be granted.

II.
MOTION IN LIMINE TO EXCLUDE EVIDENCE OF PRIOR VIOLATIONS

Second, JWR has moved to exclude evidence of prior violations of 30 C.F.R. § 75.400 for any purpose and to limit consideration of evidence of prior violations of 30 C.F.R. § 75.403.[4] As grounds for its motion, JWR speculates that "MSHA may intend to introduce evidence of past violations of § 75.400 and § 75.403 in an attempt to show that: (1) because it violated these standards in the past, it must have been in violation of them on September 23, 2001; (2) . . . it knew or should have recognized inadequate rock dust levels and addressed them during pre- and on-shift examinations on September 22 and 23, 2001; and (3) . . . it was on notice of the need to be more attentive to ensuring compliance with them and, therefore, its actions on September 22 and 23, 2001 were negligent and the result of an unwarrantable failure to comply with the law" (Mot. 2). The company argues that the requirements of section 75.400 are independent of the requirements of section 75.403, and, as such, have no factual or legal bearing on whether violations of section 75.403 or violations of the pre- and on-shift examination standards occurred, or on whether JWR was negligent or unwarrantably failed to maintain adequate levels of rock dust on the date of the explosion, or failed to identify allegedly inadequate rock dust levels during pre- and on-shift examinations (Id. 2-3). JWR also argues that prior violations of section 75.403 are not at issue because JWR was not advised it was out of compliance with the

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[4] Section 75.400 prohibits the accumulation of combustible materials in underground coal mines. The regulation states:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.

Section 75.403 states:

> Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 65 per centum, but the incombustible content in the return aircourses shall be not less than 80 per centum. Where methane is present in any ventilating current, the per centum of incombustible content of such combined dusts shall be increased 1.0 and 0.4 centum for each 0.1 per centum of methane where 65 to 80 per centum, respectively, of incombustibles are required.

incombustible content levels of dust alleged in almost all of the prior violations until after September 23, 2001. In the company's view, for penalty assessment purposes, the only relevant prior violations to consider are repeat violations of the standards the company is found to have violated (Mot. 11 at n.7).

RULING

As stated above, when ruling on any motion, a judge must keep in mind the basic principles governing the subject litigation, the foremost of which are the nature of the particular proceeding and the nature of the motion. The motion relates only to Docket No. SE 2003-160, which, of course, is a civil penalty proceeding. The primary issues in the proceeding are whether the alleged violations in fact occurred, and, if so, whether the violations were the result of JWR's negligence and unwarrantable failure to comply with the standards. If JWR violated a standard, a civil penalty must be assessed for the violation, and the assessment must take account of the civil penalty criteria of section 110(i) of the Act (30 U.S.C. § 820(i)).

In Docket No. SE 2003-160, eight violations are alleged to have occurred. They are set forth in the following citations and orders:

> 1. Citation No. 7328081 alleges a violation of section 75.403 and charges that the vast majority of dust samples collected during the investigation of the explosion did not meet the regulation's requirements for incombustible content of combined coal dust, rock and other dust;
>
> 2. Order No. 7328082 alleges a violation of section 75.1101-23(a) and charges that JWR's adopted and approved program of instruction in the location and use of fire fighting equipment, etc., was not followed as required [5];
>
> 3. Citation No. 7328083 alleges a violation of section 75.202(a) and charges that the roof in the No. 2 Entry of the No. 4 Section at the intersection of survey station No. 13333 was not supported or otherwise controlled to protect persons from hazards

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[5] Section 75. 1101-23(a) states in part:

> Each operator . . . shall adopt a program for instruction of all miners in the location and use of fire fighting equipment, routes of travel to the surface, and proper evacuation procedures to be followed in the event of an emergency. . . ."

related to a roof fall [6];

4. Order No. 7328085 alleges a violation of section 75.1101-23(c) and charges that JWR failed to conduct fire and emergency drills at intervals of not more than 90 days, in that interviews and miner records indicated that no drills had been conducted since March, 2001[7];

5. Order No. 7328088 alleges a violation of section 75.360(b)(3) and charges that an adequate pre-shift examination was not conducted in the No. 4 Section of the mine for the oncoming afternoon shift on September 22, 2001, in that the rock dust which had been applied was inadequate, obvious and widespread, but was not identified as a hazard by the pre-shift examiner[8];

6. Order No. 7328104 alleges a violation of section 75.362(a)(1) and charges that JWR did not perform an adequate on-shift examination in the No. 4 Section of the mine where two mechanics were assigned to work on September 22, 2001, in that the rock dust which had been applied was inadequate, obvious and widespread, but was not identified as a hazard by the on-shift

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[6] Section 75.202(a) states:

> The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

[7] Section 75.1101-23(c) states:

> Each operator of an underground coal mine shall require miners to participate in fire drills, which shall be held at periods of time so as to ensure that all miners participate in a drill no later than January 31, 1974, and at intervals of not more than 90 days thereafter.

[8] Section 75.360(b)(3) requires the person conducting the pre-shift examination to examine for hazardous conditions at "[w]orking sections and areas where mechanized mining equipment is being installed or removed, if anyone is scheduled to work on the section or in the area during the oncoming shift."

examiner[9];

7. Order No. 7328105 alleges a violation of section 76.360(b)(3) and charges that JWR did not conduct an adequate pre-shift examination in the No. 4 Section where miners were scheduled to perform maintenance work and to install roof bolts during the oncoming shift on September 23, 2001, in that the examination did not include working places where miners were scheduled to install roof bolts, did not include the cross-cuts between the No. 2 and No. 3 entries, and the rock dust which had been applied was inadequate, obvious and widespread, but was not identified as a hazard by the pre-shift examiner;

8. Order No. 7328106 alleges a violation of section 75.360(b)(3) and charges that JWR did not conduct an adequate pre-shift examination in the No. 4 Section where miners were scheduled to install cribs during the oncoming shift on September 23, 2001, in that rock dust which had been applied was inadequate, obvious and widespread, but was not identified as a hazard by the pre-shift examiner.

The operator's history of previous violations is the first of the civil penalty assessment criteria listed in the Act (30 U.S.C. § 820(i)). In assessing civil penalties, the Act and the Commission require that a judge take account not only of the operator's prior history of violations of the specific standards that have been violated, but of its general history as well. As the Commission has repeatedly noted, the language of section 110(i) does not limit the scope of the applicable history to violations that are similar to the violations that are proven at trial (see e.g., Jim Walter Resources, Inc., 18 FMSHRC 552, 557 (April 1996)).[10] It long has been the

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[9] Section 75.362(a)(1) states in part:

At least once each shift, or more often if necessary for safety, a certified person designated by the operator [i.e., the on-shift examiner] shall conduct an on-shift examination of each section where anyone is assigned to work during the shift and any area where mechanized equipment is being installed or removed during the shift. The . . . [on-shift examiner] shall check for hazardous conditions . . . .

[10] For this reason, JWR's suggestion that "unrelated violations" (presumably violations of standards other than those found to have existed) should not be considered as part of JWR's relevant history of prior violations, is contrary to Commission precedent and is

practice in civil penalty cases for a judge to consider as relevant all paid violations that occurred within 24 months of a found violation. To the extent previous violations of sections 75.400 and 75.403 come within this parameter, they are relevant and will not be excluded.

Nor am I persuaded that evidence of any prior violations of section 75.400 or section 75.403 offered as proof that JWR violated section 75.403 (as alleged in Citation No. 7328083) or section 75.360(b)(3) (as alleged in Orders No. 7328088, 7328105 and 7328106) and section 75.362(a)(1) (as alleged in Order No. 7328104) should be excluded. It is obviously true, as the company points out, that section 75.400 and section 75.403 have different requirements and, at this point, it seems a "reach" to imagine how prior violations of section 75.400 and section 75.403 might in part establish the alleged violations of section 75.403 and the pre-shift and on-shift examination standards, but, without the testimony of those who assert a connection between the past violations and an alleged violation, I cannot entirely rule out such a connection and, hence, I cannot rule out the relevancy of the past violations for this purpose. As previously noted, any testimony offered by MSHA in this regard will be subject to cross-examination, and the efficacy of the Secretary's position will be best judged on the basis of the fully developed record. Although the company asserts that allowing evidence of prior violations of section 75.400 and section 75.403 to show that JWR violated section 75.403 and the cited pre-shift and on-shift examination standards would be prejudicial to its interests (Mot. 10), this is an administrative proceeding where the judge can weigh the totality of the evidence, not a case in which evidence needs to be excluded to shield a jury from the taint of bias.

Moreover, contrary to JWR's assertion, past violations of section 75.400 and section 75.403 may be relevant to determine whether the company was negligent and/or unwarrantably failed to comply with section 75.403, section 75.360(b)(3) and section 75.362(b)(1). Negligence is the failure to exercise the care reasonably required under the circumstances and unwarrantable failure is "aggravated conduct, constituting more than ordinary negligence by a mine operator in relation to a violation" (Emery Mining Corp., 9 FMSHRC 1995, 2004 (December 1987)). In determining if conduct is unwarrantable, the Commission has recognized a number of non-exclusive factors that are relevant (see e.g., Mullins and Sons Coal Co., 16 FMSHRC 192, 195 (February 1994); Peabody Coal Co., 14 FMSHRC 1258, 1261 (August 1992)) and has stated that it is the totality of the operator's conduct in relation to the violation that must be considered (The Helen Mining Co., 10 FMSHRC 1672, 1676 n. 4 (December 1988), citing Emery Mining Corp., 9 FMSHRC 1997 (December 1987); see also FMC Wyoming Corp., 11 FMSHRC 1622, 1627-28 (September 1989)). (Logically, the same analysis applies when making a negligence finding.) Thus, where an operator has been placed on notice about a condition that constitutes a violation, the level of priority placed on abatement of the problem is a factor properly considered in a negligence and unwarrantable failure analysis (see, e.g., Enlow Fork Mining Co., 19 FMSHRC 5 (January 1997)). If, as JWR maintains, in many instances it was not placed on notice of alleged violations until after the explosions occurred, it may offer testimony to this effect at trial. Certainly, such testimony would be relevant in assessing the priority the company gave to

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rejected.

maintaining the required incombustible content of dust in the area and to the totality of the company's conduct.

For these reasons, the motion in limine to exclude evidence of prior violations will not be granted.

III.
MOTION FOR SUMMARY DECISION
OR
MOTION IN LIMINE TO EXCLUDE DUST SAMPLE RESULTS

Third, JWR has moved for a summary decision finding Citation No. 7328081, and Orders No. 7328088, 7328104, 7328105, and 7328106 invalid; or, in the alternative, for an order in limine, excluding from evidence the results of mine dust samples taken by MSHA after the explosions on September 23, 2001.

As noted above, Citation No. 7328081 charges, inter alia, that JWR failed to maintain the incombustible content of the mine dust at a required level throughout specified parts of the mine and that the condition "contributed to the severity and extent of the second explosion." The orders charge that JWR failed to properly pre-shift and on-shift pertinent parts of the No. 4 Section on the last several shifts prior to the explosions because the company failed to recognize and address the inadequacy of the rock dust applications in the area.

To support the allegations relating to incombustible content, MSHA collected and analyzed dust samples. The samples were collected from mid-October until mid-December 2001. The samples were analyzed at the agency's Mt. Hope, West Virginia laboratory. The results of the samples purportedly showed that of 123 band samples taken, 121 (over 98%) had incombustible levels below the regulatory requirements – that is, the incombustible content of the combined coal dust, rock dust and other dust was less than 65% in the intake air courses and less than 80% in the return air courses.

JWR, however, points out that coal extracted from the mine comes for the Blue Creek Coal Seam, a soft and unusually friable seam that readily crumbles into dust (Mot. 7) and that the sample results should "come as no surprise" since they were taken: after two explosions, significant flooding, and the passage of 7 to11 weeks (Mot. 8-9). In the company's view, "common sense" indicates that, given these factors, the samples could not possibly accurately depict pre-explosion conditions at the mine (Mot. 9). Therefore, the samples are not evidence of what they purport to prove and, because the citation and orders are premised on the samples, the enforcement actions are invalid (Mot. 9-10).[11] In other words, the samples should be excluded

[11] The company cites to cases upholding the principle that a test result used as evidence of a past event must reflect conditions sufficiently comparable to the conditions that existed at the time of the past event (see, e.g., Hall v. General Motors Corp., 647 F.2d 178, 180

as irrelevant because they are not representative of pre-explosion conditions (Mot. 29).

JWR also attacks the samples as unreliable and, hence, inadmissable because they are not identified as to their source and because they are not representative of the whole substance they purport to represent (Mot. 38). The company asserts all of the purported band samples are not in fact band samples; some are "grab" samples and, therefore, are inherently unrepresentative (Id.). It also asserts, in several instances, MSHA relied on two different sampling results from the same location (Mot. 39), and that some of the samples where contaminated by dust blown from other areas during the explosion (Mot. 39).

For these reasons, summary decision should be granted, vacating the citation and three of the four orders, and the fourth order (Order No. 7328105) should be modified to eliminate any reference to inadequate rock dust and the failure of the examiners to detect (Mot. 40).

Finally, although the citation and orders on their face indicate the alleged violations are based on the collected dust samples, JWR notes that Inspector Murray, who issued the citations and orders, stated in deposition testimony that the even if the dust samples do not represent conditions as they existed prior to the explosion, the enforcement actions are nonetheless valid because of "the fact of the explosion" itself (Mot. 42, quoting Murray dep. 391-392). JWR points out that Clete Stephan, who it describes as MSHA's "principal expert on the issue" (Mot. 42), stated that an explosion could be propagated even with 92 or 93 percent incombustible content or with "a little sprinkling of float coal dust on top surfaces" (Mot. 42, quoting Stephan dep. 416). For these reasons, JWR maintains the fact of the explosion cannot in itself support the citation and orders (Mot. 42).

If summary decision is denied, JWR, nonetheless, wants the samples barred from admission to the record.

RULING

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 (29 C.F.R. §2700.67).

The material facts involved in establishing the violation of section 75.403 as set forth in Citation No. 7328081 turn on the question of whether rock dust in the cited areas was maintained

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(D.C. Cir. 1980); Mattis v. Carlon Electrical Products, 295 F.3d 856, 863 (8th Cir. 2002)).

in such quantities that the incombustible content of the combined coal dust, rock dust and other dust was not less than 65%. It is clear from the citation that the Secretary's allegation of a violation is premised on the results of the samples. If the samples do not support the alleged violation, it cannot be sustained, unless the Secretary can prove an alternative plausible theory. The material facts involved in establishing a violation of section 75. 360(b)(3) as set forth in Orders No. 7328088, 7328105 (in part), and 7328106 and section 75.362 (a)(1) as set forth in Order No. 7328104 are whether the pre-shift examiner conducted a detective examination on the oncoming afternoon shift on September 22, 2001, in failing to identify inadequate rock dust applications which then existed in the areas the examiner traveled (Order 7328088); whether the on-shift examiner conducted a detective examination in the No. 4 Section on the afternoon shift on September 22, 2001, in failing to identify inadequate rock dust applications which then existed (Order No. 7328104); whether the pre-shift examiner conducted a detective examination on the No. 4 Section, where persons were scheduled to perform maintenance work and install roof bolts, in failing to identify inadequate rock dust applications which then existed (Order No. 7328105); and whether the pre-shift examiner conducted a detective examination on the No. 4 Section, where persons were scheduled to work installing cribs, in failing to identify inadequate rock dust applications which then existed (Order No. 7328106). It is clear the allegations of violations largely are premised on the assertion that the inadequate rock dust applications were "obvious and widespread" and "should have been recognized by a prudent examiner" (e.g., Order 7328106).

While JWR has raised fundamental questions concerning the relevance of the sample test results as indicative of the conditions existing at the time the examinations were conducted, the Secretary has responded by asserting that the sample results are relevant and that they establish a prima facie case JWR was not in compliance with section 75.403. She asserts that, if anything, the test results were altered in JWR's favor by the explosion and its aftermath (Sec.'s Resp. 3), in that the explosion actually increased the percentage of incombustible content, "because coal dust is consumed and incombustible content settles out as the forces dissipate in the area the dust originally was located" (Id. 9). Indeed, according to the Secretary, the incombustible content ration may have reached a level 5% to 7% higher than that which existed before the explosion (Id. 10). Moreover, flooding that followed the explosion would have had a neutral effect, if any, on the samples, in that coal and rock particles "would have been drained out of the flooded area in equal proportion to their presence in the area" (Id.10). Finally, the Secretary argues that rib sloughage caused by the unusually friable coal did not materially affect the sample results and that the samples were properly collected and analyzed (Id.12-13). Thus, in the Secretary's view, the question of the reliability of the sample results is a factual dispute that forecloses summary decision (Id. 6-7).

With regard to the alleged violations of section 75.360(b)(3) and section 75.362(a)(1), the Secretary maintains that the pre-shift and on-shift examiners violated that standards by failing to detect the inadequate rock dust conditions that existed and by failing to detect the "float coal dust explosion hazard" (Sec.'s Resp. 14). The Secretary adds that, "The operator appears to have failed to inform its examiners when MSHA inspectors found hazardous conditions in areas that

had been examined . . . . [and] that over time a degree of laxness in the detection and correction of hazardous conditions occurred at the . . . [m]ine" (Id.). She asserts her case in this regard rests on more than sample results.

JWR's motion for summary decision must fail, in that material facts – namely, those concerning the relevance of the dust samples – very much are in dispute. Do the samples establish the incombustible content of the dust as it existed prior to the explosion? The issue appears to be critical to establishing the alleged violation of section 75 403 and has a bearing also on proving the alleged violations of section 75.360(b)(3) and section 75.362(a)(1). Although JWR has raised significant questions concerning the effects of the explosion and its aftermath upon the incombustible content of the samples, the Secretary has responded that she can answer the questions with facts that prove the sample results accurately reflect pre-explosion conditions. The answer will lie in the proof the parties offer at trial. Moreover, while the results of dust samples may be indicative of the evident nature of the allegedly inadequate applications of rock dust, they are not the only evidence that can conceivably support finding violations of the pre-shift and on-shift examination standards. Credible evidence of the visual appearance of the areas and credible evidence of the significance of the appearance also may be offered. Again, the answer will lie in the proof the parties offer at trial.

The motion in limine also must fail. I cannot conclude based on the record as it now stands that the sample results are irrelevant to establishing the alleged violations. Indeed, depending on the evidence offered at trial, they may be highly relevant. Nor is failing to exclude them prejudicial to JWR when, at trial, the company will have the opportunity to raise questions regarding the effects of the explosions on the sample results and to offer evidence as to those effects. It is not implausible that the company will be able to establish that no significant weight should be attributed to any of the sample results, in which case the Secretary's attempts to prove a violation of section 75.403 may be severely impaired, and her attempts to prove violations of section 75.360(b)(3) and section 75.362(a)(1) also will be compromised, but, the issues must be tried to find out.

ORDER

For the reasons stated above, JWR's motions are **DENIED**.

David F. Barbour
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