

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

601 New Jersey Avenue, N.W., Suite 9500

Washington, D.C. 20001

February 2, 2004

JIM WALTER RESOURCES, INC., : CONTEST PROCEEDINGS
Contestant :
v. : Docket No. SE 2003-97-R
: Order No. 7670621; 03/03/03
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Docket No. SE 2003-98-R
ADMINISTRATION (MSHA), : Order No. 7670622; 03/03/03
Respondent :
: No. 7 Mine
: Mine ID No. 01-01401

ORDER ADMITTING EVIDENCE

At initial hearings in these cases on September 9, 2003, the Secretary of Labor offered into evidence 26 charging documents alleging violations over the three-month period preceding the violations at issue, of the same mandatory standard that is at issue in these cases, *i.e.*, 30 C.F.R. § 75.400. The Secretary asserted at the time that these charging documents were evidence of similar repeated violations supporting her theories of high negligence and “unwarrantable failure” in the cases at bar. See *Peabody Coal Co.*, 14 FMSHRC 1258, at 1263-64 (August 1992) and *Deshetty, employed by Island Creek Coal Co.*, 16 FMSHRC 1046, 1051 (May 1994). At the time of hearing however, only one of those 26 charging documents had become final. Accordingly 25 of the 26 charging documents were found inadmissible and the Contestant’s objections to the evidence were sustained.

At continued hearings on December 15, 2003, the Secretary offered 23 of the original 26 charging documents into evidence but under a new theory. The Secretary argued that the documents were admissible not as evidence of violations *per se* (acknowledging that the charging documents had not yet become final) but that the charging documents were evidence of notice to the operator that it was MSHA’s position that the cited conditions were violative and that the issuance alone of those charging documents provided notice of MSHA’s concerns about accumulation problems and that the operator needed to increase its efforts to comply with the standard. A ruling on the admissibility of the proffered charging documents was deferred subject to Contestants filing a posthearing legal memorandum.

In its memorandum filed January 9, 2004, Contestant objects to the admission into evidence of the 23 charging documents proffered by the Secretary at the December 15, 2003, trial. The Contestant objects on the grounds, (1) that they are not relevant, (2) that all of the charging documents are under contest and therefore not final and would become relevant only if and when they become final, (3) that five of the proffered charging documents were not designated as “significant and substantial” and, for this additional reason, were not relevant, (4)

six of the charging documents proffered by the Secretary relate primarily to trash, other materials and equipment and therefore are not relevant to whether Contestant knew or should have known of dust accumulation problems at the No. 7 Mine, (5) of the 23 prior charging documents only three of them relate to dust accumulations on the beltlines and that the rest of them relate to areas of the mine other than beltlines, (6) none of the prior charging documents relate to dust accumulations in the north main belt area - - the area to which the present citations relate, (7) five of the charging documents are “without merit” because the areas in question are supplied by intake air - - Contestant argues that such areas were essentially free of float coal dust therefore maintains that those citations should not be at all relevant to Contestant’s notice of accumulation problems prior to Order No. 7670621, (8) the allegations in Order No. 7678683 are “meritless” because Contestant had several employees working in the area at the time of the alleged violation and therefore, that order should not be considered as evidence of notice.

I find the 23 proffered charging documents to be relevant to the issues of negligence and “unwarrantable failure” and that such evidence should not be barred by lack of finality under the Secretary’s theory that such documents are evidence of prior notice by the Secretary to Contestant of her concerns with various accumulations of combustible materials in the subject mine in close time proximity to the issuance of the orders at bar. Such evidence is even more persuasive than that of oral notification by inspectors to mine operators about potentially unsafe conditions in a mine. The Commission has acknowledged that such evidence may be used to show that the operator has been placed on notice that it must increase its efforts to comply with the standard. See *Enlow Fork Mining Co.*, 19 FMSHRC 5, 11-12 (January 1997). Such notice has therefore been considered by the Commission in determining negligence and unwarrantability. The utilization of prior charging documents in this manner does not therefore require that those charging documents be final. It is not the violation within the charging documents that is critical but only the notice provided by the issuance of those charging documents.

Contestant’s remaining arguments (numbered 3 through 7 herein) go primarily to the weight to be given the evidence and not to its admissibility. Under the circumstances the proffered 23 charging documents are admitted collectively as Government Exhibit No. 6.

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