

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY VENUE, N.W., SUITE 9500
WASHINGTON, D.C. 20001

December 20, 2005

JIM WALTER RESOURCES, INC.,	:	CONTEST PROCEEDING
Contestant,	:	
	:	Docket No. SE 2005-28-R
v.	:	Citation No. 7682362; 10/14/04
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	No. 7 Mine
ADMINISTRATION (MSHA),	:	Mine ID 01-01401
Respondent	:	

DECISION

Appearances: Guy W. Hensley, Esq., Jim Walter Resources, Inc., Brookwood, Alabama; Warren B. Lightfoot, Jr., Esq., Maynard, Cooper & Gale, P.C., Birmingham, Alabama, for Contestant; Anne G. Paschal, Esq., U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia, for Respondent.

Before: Judge Bulluck

This case is before me on a Notice of Contest filed by Jim Walter Resources, Incorporated (“JWR”) against the Secretary of Labor, acting through her Mine Safety and Health Administration, (“MSHA”), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“the Act”), 30 U.S.C. § 815(d). JWR challenges a citation that MSHA issued under section 104(a) of the Act, alleging a violation of the Secretary’s safety regulation found at 30 C.F.R. § 75.507-1.

A hearing was held in Birmingham, Alabama. The parties’ Post-hearing Briefs and Reply Briefs are of record. For the reasons that follow, the citation shall be vacated.

I. Stipulations

The parties stipulated as follows:

1. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction to hear and decide this contest proceeding pursuant to section 105 of the Federal Mine Safety and Health Act of 1977;

2. Jim Walter Resources, Incorporated, is a mine operator subject to the jurisdiction of the Federal Mine Safety and Health Administration;

3. Jim Walter Resources is the owner and operator of the No. 7 Mine located at 18069 Hannah Creek Road, Brookwood, Alabama, 35444;

4. Operations at the No. 7 Mine are subject to the jurisdiction of the Mine Safety and Health Act;

5. MSHA Inspector Charles Carpenter was acting in his official capacity as an authorized representative of the Secretary of Labor when he issued Citation No. 7682362;

6. Citation No. 7682362 was served on Jim Walter Resources or its agent, as required by the Act;

7. Citation No. 7682362 is authentic and may be admitted into evidence for the purpose of establishing its issuance, but not for the purpose of establishing the accuracy of any statements asserted therein;

8. The submersible pump which resulted in the issuance of the citation herein is non-permissible;

9. If the Administrative Law Judge upholds Citation No. 7682362, a single penalty assessment of \$60.00 should be imposed;

10. The penalty proposed in paragraph 9 will not affect Jim Walter Resources' ability to remain in business; and

11. Jim Walter Resources is a large operator within the meaning of the Mine Act.

II. Factual Background

JWR owns and operates three underground coal mines, Nos. 4, 5, and 7, in Brookwood, Alabama. Thirteen submersible ("deep well") pump systems, located on the surface with components underground, have been used at JWR's facilities since 1987 to remove vast accumulations of water from underground permanently sealed, worked-out areas where coal has formally been mined.¹ Tr. 154. Once the permanent seals are erected, the sealed areas are totally

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A "worked-out" area of a mine is a large section from which all mineral coal or ore has been taken. American Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 630 (1997). The regulations define "worked-out area" as an area where mining has been completed, whether pillared or nonpillared, excluding developing entries, return air courses, and

isolated and inaccessible; they cannot be traveled, examined, inspected or ventilated. The water that collects in the sealed area at issue forms a large underground lake that requires constant management, so as to prevent the water from compromising the seals and inundating the active workings of the No. 7 Mine. Tr. 163. The pumps, therefore, are situated at the lowest elevations of the sealed areas in natural water collection basins. Tr. 163, 198. In addition to the pumps, as part of its methane drainage system, JWR has numerous degas wells situated at intervals throughout the sealed area, which are the sole means of determining atmospheric conditions in the otherwise inaccessible area.² Tr. 206-07, 211-12, 240-42.

Typical of JWR's 13 active electric submersible pumps, the pump at issue is one of five operating to dewater the sealed area in the No. 7 Mine, and was installed in 1997. Tr. 31, 155; ex. R-5. It is situated 6,022 feet south and 2,994 feet west of the nearest seal. Tr. 28, 118, 194; ex. J-1. The area was sealed in October of 2002. Tr. 208. All electric controls for the pump are housed above ground in a pump starter unit. Ex. R-2, R-3. From the starter unit, a high voltage power conductor cable, encased in a steel pipe, runs some 2,000 feet underground to the original mine floor, and an additional 200 feet beneath that surface, where the electric motor and pump assembly are situated in a sump.³ The steel casing, at ground level on the surface, is capped by a metal well head. The motor sits at the bottom of the sump and is 30 feet high, there is a 5-foot seal between the motor and the pump, and the pump, itself, also 30 feet high, sits on top of the seal. According to the manufacturer's specifications, in order for the pump to operate, there must be at least 30 feet of water ("head") above the inlet of the pump, so that the motor and pump assembly require 65 feet of water in which to operate. Inside the steel casing is also a metal discharge pipe. The casing is slotted just below the water level, allowing water into the casing where it is forced down to a second set of slots at the bottom, where it cools the electric motor. The pump, with a 500-gallon-per-minute capacity, then transports the water up the discharge pipe to a surface settlement pond. A vacuum sensor, located on the surface, automatically shuts off the power from the pump starter to the entire system, if it detects that the water level has dropped below 30 feet of head above the pump. Additionally, JWR has installed a redundant safety system, undercurrent protection, that will also disable the system. Tr. 33-35, 156-64, 245-46.

JWR's submersible pumps, utilized in sealed areas since 1987, had always been inspected by MSHA under Part 77 regulations applicable to surface areas of underground mines, and the

intake air courses. 30 C.F.R. § 75.301. "Sealing" refers to a routine method of shutting-off areas utilized by some mines to secure the active areas against flowing or escaping gas, air or liquid, by erecting permanent barriers. *Dictionary of Mining, Mineral, and Related Terms* at 487.

²A degas well is a vertical borehole through which methane and other contaminants are removed from the atmosphere of a mine.

³A "sump" is an excavation made underground to collect water, from which it is pumped to the surface or to another sump nearer the surface. *Dictionary of Mining, Mineral, and Related Terms* at 551.

National Electric Code (“NEC”). Tr. 54-57, 99-100, 125, 167. Under Part 77, the pumps were not required to be permissible.⁴ Sometime in 2003, in response to inconsistent enforcement in the districts, i.e., some were inspecting submersible pumps under Part 75 while others were applying Part 77, MSHA’s Safety Division decided to impose uniform, nationwide compliance under Part 75. Tr. 101-104. As a consequence, in order to continue use of nonpermissible pumps behind the seals underground, operators who had been inspected under Part 77 were required to file Petitions for Modification under section 101(c) of the Act.

JWR opposed MSHA’s application of Part 75 underground standards and when extensive informal discussions about the safety of JWR’s pumps proved unfruitful, JWR filed a Petition for Modification with MSHA on July 22, 2003, seeking approval to continue operation of its nonpermissible submersible pumps in sealed areas of its Alabama mines, including No. 7 herein at issue. Ex. C-1. In the meantime, before issuing its decision on the Petition, MSHA issued Program Information Bulletin No. P03-26 (“PIB”), clarifying compliance requirements for nonpermissible electric submersible dewatering pumps installed in sealed areas, return air courses or bleeder entries in underground coal mines. The PIB notified the mine industry of MSHA’s application of section 75.507 to submersible pumps, that the pumps are located in return air for purposes of the regulation, and that they are required to be permissible, unless a modification is approved by MSHA. Ex. R-6.

MSHA issued its Proposed Decision and Order (“PDO”) on June 17, 2004, authorizing JWR to continue use of its submersible pumps under specific detailed conditions. Ex. C-1. JWR found the conditions unacceptable and appealed the PDO, arguing, *inter alia*, that section 75.507 does not apply to the pumps at issue.⁵ The appeal has been stayed, pending the outcome of the instant matter.

On October 14, 2004, MSHA Inspector Charles Carpenter conducted a AAA inspection of JWR’s No. 7 Mine. Tr. 26. Of the five submersible pumps installed in the sealed area, only the one at issue in this case was running. Tr. 31. Upon inspecting the pump, Carpenter determined that it was nonpermissible and operating in return air, in contravention of the

⁴The regulations define permissibility: “(1) As applied to electric face equipment, all electrically operated equipment taken into or used in by the last open crosscut of an entry or a room of any coal mine the electrical parts of which, including, but not limited to, associated electrical equipment, components, and accessories, are designed, constructed, and installed, in accordance with the specifications of the Secretary, to assure that such equipment will not cause a mine explosion or mine fire, and the other features of which are designed and constructed, in accordance with the specifications of the Secretary, to prevent, to the greatest extent possible, other accidents in the use of such equipment.” 30 C.F.R. § 75.2.

⁵There is credible testimony that the modifications mandated by the PDO for all the pumps would cost JWR an estimated \$1.3 to \$1.4 million. Tr. 171. Moreover, there is no dispute that it is impossible for JWR to make the existing pumps permissible. Tr. 110, 115, 167.

provisions of the PIB. Consequently, he issued section 104(a) Citation No. 7682362, alleging a non-significant and substantial violation of 30 C.F.R. § 75.507-1, and describing the hazardous condition as follows:

The operator is operating a nonpermissible 3,200-volt alternating current (VAC) submersible pump with nonpermissible electric power connections in the southwest sealed area of the Jim Walter Resources, Inc., No. 7 mine. The pump with its connections is not being ventilated with intake air by the No. 7 mine ventilation system.

Ex. R-1; tr. 26-27. JWR timely contested the citation, challenging the PIB and MSHA's application of the underground regulation to what JWR considers surface equipment.

III. Findings of Fact and Conclusions of Law

A. Fact of Violation

In pertinent part, the cited regulation provides as follows:

(a) All electric equipment, other than power-connection points, used in return air outby the last open crosscut in any coal mine shall be permissible

30 C.F.R. § 75.507-1.

It is well settled that the "language of a regulation . . . is the starting point for its interpretation." *Dyer v. United States*, 832 F. 2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 44 U.S. 102, 108 (1980)). Where the language of a regulatory provision is clear, its terms must be enforced as written, unless the regulator clearly intended the words to have a different meaning or unless such meaning would lead to absurd results. *See id.*; *Utah Power and Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). If, however, the meaning is ambiguous, deference has been accorded by the courts to the Secretary's reasonable interpretation of the regulation. *See Udall v. Tallman*, 30 U.S. 1, 16-17 (1965) (finding that the reviewing body must "look to the administrative construction of the regulation if the meaning of the words used is in doubt") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1955)); *Exportal Ltda. v. United States*, 902 F. 2d 45, 50 (D.C. Cir. 1990) ("Deference . . . is not in order if the rule's meaning is clear on its face.") (quoting *Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984)). The parties both take the position that section 75.507-1, including "return air" as defined by section 75.301, is unambiguous. Cont. Br. at 14; Sec. Br. at 7. I agree, and find that the plain meaning of the regulation requires that the electric submersible pump at issue be

permissible, if it is operating in return air.⁶ *Assuming arguendo*, that the regulation were ambiguous, the Secretary's interpretation would not be entitled to deference because, for the reasons that shall be discussed below, it is unreasonable.

As a threshold matter, JWR argues that, by definition, the sealed area is not a part of the mine, because the permanent barriers break the connection between the active mine workings, including worked-out areas, and the former mine workings.⁷ The company reasons that, as a practical matter, the solid barriers formed by the seals and ribs prevent working, traveling ventilating, examining and inspecting behind the seals. Cont. Br. at 1, 11-13. The Secretary, conversely, maintains that the sealed area results from the work of extracting bituminous coal and is, therefore, a mine, required to be depicted on the mine maps in accordance with 30 C.F.R. § 75.1200(b). Sec. Br. at 9-10. Recognizing that the Act requires broad interpretation to effectuate its protective purposes, JWR's reliance on the permanent separation between the sealed area and active mine workings to advance this argument is misplaced, especially in view of the water's potential to break through the seals and flood the active mine. JWR, itself, minimizes the significance of the physical barriers when it comes to the questions of liability and responsibility, by the very emphasis and diligence it places on water removal within the contained areas. No construction of the cases JWR cites as authority for its position exempts the sealed area from mine status, absolves JWR of its responsibility to maintain the sealed area, or short-circuits the analysis required to determine whether section 75.507 is applicable to the sealed area. *See Bushy Creek Coal Co.*, 17 FMSHRC 966 (June 1995) (ALJ); *Apex Minerals, Inc.*, 19 FMSHRC 796 (April 1997) (ALJ). Accordingly, I find that the sealed area is a "mine" subject to regulation under the Act.

⁶"Return air" is air that has circulated the workings and is flowing towards the main mine fan. *Dictionary of Mining, Mineral, and Related Terms* at 457. The regulations define "return air" as "[a]ir that has ventilated the last working place on any split of any working section or any worked-out area whether pillared or nonpillared. If air mixes with air that has ventilated the last working place on any split of any working section or any worked-out area, whether pillared or nonpillared, it is considered return air. For purposes of § 75.501, air that has been used to ventilate any working place in a coal producing section or pillared area, or air that has been used to ventilate any working face if such air is directed away from the immediate return is return air." 30 C.F.R. § 75.301.

⁷Section 3(h)(2) of the Act defines "coal mine" as: "an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities." 30 U.S.C. § 802(h)(2). By regulation, a coal mine "[i]ncludes areas of adjoining mines connected underground." 30 C.F.R. § 75.2.

The parties do not dispute that the submersible pump at issue is located outby the last open crosscut. Ex. J-1; Resp. Br. at 6. They also agree that the pump is nonpermissible. Stip. 8. The point of controversy, then, is whether this pump, with its underground components, is operating in return air. At the heart of this question is MSHA's concern that the pump poses a potential ignition source for an underground fire or explosion.

JWR contends that the pump's controls are located above ground, the underground motor/pump assembly is operating underwater and, because the steel casing connecting the motor to the surface components is situated in stagnant, "otherworldly" atmosphere rather than return air, Part 77 surface standards should apply. Cont. Br. at 2, 9. The Secretary, on the other hand, maintains that the worked-out area contained return air at the time it was sealed, the resultant atmosphere constitutes return air, and that the exchange of air at the seals pulls return air from the active mine into the sealed area. Sec. Br. at 7. Furthermore, the Secretary argues, as a single unit, linked from the surface controls to the submersed underground motor by the steel encased electric cable, the electric components are situated in return air. *Id.* at 10. While I agree with the Secretary that the submersible pump system constitutes a single unit of electric equipment operating underground, the evidence in its entirety does not support her contention that the pump is being operated in return air.

a. Testimony of the Secretary's Witnesses

MSHA Inspector Charles Carpenter testified that once prior to October 2003, he had inspected the pump at issue under Part 77 and the NEC. Tr. 54-56. According to Carpenter, there was "no real direction" or "no clear-cut way" provided to the districts to inspect the submersible pumps until MSHA issued the PIB. Tr. 56-57. The operation of the pump did not change between the two inspections, he acknowledged, but he issued the instant citation based on the change in enforcement policy set forth in the PIB. Tr. 57-60. When asked whether the five pumps in No. 7 are located in return air, in replying "yes and no," he explained that "[t]he area that's sealed is separated from the mine atmosphere, the normal mine atmosphere, by a set of seals which basically stagnates that area. However, based upon pressure differential as well as the mechanics of the pump, it would draw that return air into the sealed area, or vice-versa, depending on pressures." Tr. 31-32, 63. Moreover, while he opined that water pumped from the reservoir would be displaced by air seeping through the seals from the active workings, he conceded that he did not consider the air within the seals to be return air, and that the air exchanged at the seals probably would not travel very far. Tr. 32-33, 47, 50. In fact, Carpenter acknowledged, Part 75 only requires testing of the air/gas mixture 15 feet on the other side of the seal. Tr. 50-51. Carpenter also attested to lacking knowledge of the air/gas mixture in the vicinity of the pump. Tr. 51-52. Moreover, he conceded that he knew of no event that would cause an explosion to a pump submersed in a large body of water. Tr. 54.

Specialist Robert Phillips oversees the petition program for MSHA's Division of Safety. The PIB at issue was drafted primarily by Phillips. Tr. 76. He also drafted the PDO that has

been appealed to the Secretary. Tr. 114. Phillips testified that there are only two types of air underground, intake or return, and that the air passing by the seals is return air. Tr. 77.⁸ He stated that, although the pump is submerged in 30 feet of water, the metal pipe is conductive, and the electric wiring and associated circuitry present hazards. Tr. 78-79. According to lightning experts, he asserted, the mine is located in a lightning-prone area. Tr. 89. In support of MSHA's mandate that the submersible pump be permissible, Phillips referenced several mine explosions that occurred in sealed areas, occasioned by lightning striking surface metal equipment and igniting methane underground. Tr. 79-81. These incidents were investigated, he stated, and resulted in a report by the National Institute for Occupational Safety and Health ("NIOSH"), aimed at reducing the danger of gas explosions in sealed areas of mines.⁹ Tr. 81. Phillips described the transition zone at the seals and well heads, where intake and exhaust of air occurs due to differences in atmospheric pressures, and methane accumulates in the explosive range from 5 to 15%. Tr. 82-83. While he framed the hazard as operating a nonpermissible piece of equipment in a sealed area somewhere near a transition zone, where the oxygen/methane mixture goes through the explosive range, he conceded that the regulations require only a 15-foot transition zone behind the seals for monitoring air/gas mixtures. Tr. 102, 116-18. According to Phillips, he was unaware of MSHA applying Part 75 to JWR's pump systems prior to the issuance of the PIB, and conceded that in so doing, MSHA had been aware that it was making illegal what had previously been legal operation of these pumps. Tr. 99, 103-105. He gave conflicting testimony, however, as to whether MSHA had applied Part 75 regulations to submersible pumps in general, before it issued the PIB. Tr. 125; but see 127-28. Phillips admitted that MSHA had not studied whether there had been fires or explosions in conjunction with operation of submersible pumps prior to issuance of the PIB, and that none of his references to explosions behind seals caused by lightning strikes, involved deep wells operating in flooded areas. Tr. 106-07. Phillips also acknowledged that the pump is a great distance from the nearest seal, and that he does not know the content of the air/gas mixture above the water where the pump is located. Tr. 118-19, 133. Furthermore, he conceded that if the oxygen content were less than 1%, an explosion would be impossible. Tr. 134. Finally, when asked to refer to the NIOSH report, Phillips conceded that if the methane concentration is above 15%, "lightning has no effect." Tr. 136.

Dean Skorski, supervisory electrical engineer in the Mine Electrical Systems Division at MSHA's Pittsburgh Safety and Health Technology Center, testified that he had conducted an evaluation of the pump's surface grounding system. Tr. 147. When asked about underground

⁸"Intake air" is "[a]ir that has not yet ventilated the last working place on any split of any working section, or any worked-out area, whether pillared or nonpillared." 30 C.F.R. § 75.301.

⁹In recommending methods of reducing the probability of occurrence of explosions from lightning penetrations into underground sealed (gob) areas, NIOSH Technology News No. 489, issued May 2001, concludes that methane concentrations greatly above the upper flammable limit of 15% will be unaffected by lightning or other potential sources that might exist in the gob, such as old batteries, roof falls and spontaneous combustion. Ex. C-2.

hazards associated with operating the pump, he stated that “there’s one system in place, and it extends from the utility through the transformer station to the underground area. And not knowing what the environment is underground, the hazards are hard to define.” Tr. 142. Skorski conceded that, in case of an electrical problem caused by a lightning strike or fault going into the pump system, if the underground environment contains less than 1% oxygen, or a significant body of water, an explosion will not occur. Tr. 147-48.

b. Testimony of JWR’s Witnesses

Randy Watts, senior electrical maintenance engineer since 1990, is involved with the design and installation, maintenance and testing of all electrical equipment at JWR. Tr. 153-54. Watts described in great detail the operation of the electric submersible pumps, and stated that JWR has not experienced significant problems since the company began using them in 1987. Tr. 169. He could not imagine an ignition or explosion occurring, he asserted, because of the motor’s submersion in at least 60 feet of water. Tr. 165-66. When asked specifically how the pump at issue would fare in the event of a lightning strike, he opined that it would dissipate the energy very quickly because of its contact with wet earth and the water at the very bottom of the mine. Tr. 173-74. Watts also expressed his belief that Part 77 addresses any hazards associated with operation of the pump. Tr. 175-76.

Thomas McNider has been directly involved in ventilation or in its oversight since beginning work at JWR in 1976 and, in that capacity, has been directly responsible for most of the ventilation design for all the mines and insuring compliance with Part 75.300 ventilation standards. Tr. 184-87. He testified about his extensive experience in seal construction, and that he works with the mines in designing the layout of the seals for worked-out areas. Tr. 187-89. Using a map of No 7, McNider located the pump at issue in the sealed area, 2,994 feet west and 6,022 feet south of the nearest seals. Tr. 194. He located the nearest degas wells 1,634, 3,008, and 3,574 feet away from the pump. Tr. 195-96; ex. C-3, J-1. McNider explained the utility of the degas wells, in determining the composition of the atmosphere above the water, by stating that “[w]e produce these wells on an ongoing basis, seven days a week, 24 hours a day. . . . We sample these periodically. After this area is sealed for a certain period of time, these wells will reflect the atmosphere that the deep well would see, in time. And what I mean by ‘in time’ is after it’s gone through a period to where you reach a stable atmosphere back here, which can be very short.” Tr. 197; ex. C-3. McNider stated that a major distinguishing factor between sealed and unsealed areas is that Part 75.334 requires that worked-out areas be either ventilated or sealed, but not both. Tr. 200. McNider opined that the sealed area does not contain intake air, by testifying that “[i]n my definition of ‘return air’ is as it’s used to describe under Part 75, and in a working sense air that is intake air or air that is used to ventilate either a working section or some other piece of equipment or whatever defined under Part 75, as it’s coursed away into the fan, then it becomes return air. When you are in a sealed portion, that air does not work. It is not moved, it’s stagnant. So to me, that is a distinction between sealed and unsealed.” Tr. 205-06; see 234-37. According to McNider, samples were collected from the degas wells and analyzed

the day before the hearing. Tr. 206. He reported the atmosphere in the vicinity of the pump to contain 90% methane and less than 1% oxygen - - an atmosphere well beyond the 5 to 15 % explosive range. Tr. 206-08. He dated the contained atmosphere at approximately two and a half years old, since the seals were completed around October 2000.

Tr. 208. McNider also elaborated on the composition of the non-circulating atmosphere by stating that “[basically, after you seal an area, the oxygen is depleting because it is oxidizing with the carbon in the area, and either typically it forms carbon dioxide, and the residual left is nitrogen and the methane is building up. It takes a little bit of - - that was what I referred to earlier about a certain amount of time, which would be in my estimate a few months, for it to reach this steady state. And then basically what you have there is methane, nitrogen and carbon dioxide.” Tr. 208-09; see 232-33, 299-40. In responding to questions about whether the atmosphere had remained essentially the same after settling into its steady state, he asserted that, typically, the samples yield the lowest methane concentration at 60%, with residual nitrogen and less than 1% oxygen. Tr. 209-11. On cross-examination, McNider acknowledged that there is no way to ascertain the exact methane concentration in the atmosphere around the pump, but opined that it would be similar to the concentrations measured at the degas wells. Tr. 231, 240-41.

David Hicks, planning manager of No. 4 Mine since 1998 and familiar with the submersible pump at issue, testified that he is unaware of the head of water above the pump ever dropping below 30 feet. Tr. 244-45. Hicks also explained that the pump only functions with a continuous supply of water and that, coupled with the force of gravity, it could never remove all the surrounding water. Tr. 245-46.

B. Disposition

The Secretary’s enforcement action is based on her interpretation of return air, as defined by section 75.301. Therefore, what is at issue here is the interpretive policy applying the regulation, rather than the regulation, itself. Under the plain language of section 75.507-1, the electric pump, located outby the last open crosscut, must be permissible if it is being operated in return air. The Secretary’s contention that the air within the sealed area has to be return air, since it cannot be intake air, would apply to the active mine and not the worked-out sealed area. By definition and operation, intake and return air circulate and work, consistent with the demands of active mining in the accessible parts of the mine. Sealing causes dramatic atmospheric changes within an enclosure, within a relatively short period of time, such that the resultant stagnant environment is entirely dissimilar to that in the active mine. By standing steadfast on the position that underground atmosphere, without exception, must be the one simply because it cannot be the other, the Secretary is ignoring the distinctly different environmental properties of sealed and active areas in the mines. All air changes underground; return air, after all, was intake air, before it performed the cleansing function for which it was brought into the mine. Likewise, it undergoes further change when it is shut off from ventilation in the active mine. The Secretary’s inspector, in fact, wavered from her position that the sealed area contains return air.

Tr. 31-32, 47. Testimony that the methane/oxygen mixture behind the seals is at a level far beyond the explosive range, was wholly un rebutted by the Secretary. McNider gave credible testimony that the degas wells yield methane concentrations ranging from 60% to 90%. Furthermore, the Secretary did not challenge the NIOSH report that lightning and any other potential ignition sources pose no hazard to methane in concentrations greatly beyond the upper flammable limit of 15%. In focusing on the air exchange at the seals, she did not establish that any contamination by return air migrates appreciably beyond the 15-foot transition zone to create an explosive atmosphere where the pump is located. Moreover, the Secretary launched no challenge to JWR's argument that, notwithstanding the methane concentration, the lake-sized body of water in the sealed area is not conducive to lightning. Based on the evidence in its entirety, it is my finding that JWR's submersible pump in the No. 7 Mine is not operating in return air. Therefore, section 75.507-1 is inapplicable and the pump is not required to be permissible.

Because I find that the Secretary's interpretation of section 75.507-1, as applied to worked-out sealed areas, is at odds with the regulation she seeks to enforce by impermissibly expanding the unambiguous definition of return air, and that her policy erroneously applies a permissibility standard to electric equipment that is not being operated in return air, no violation has been committed by JWR and Citation No. 7682362 is hereby vacated.

ORDER

Accordingly, it is **ORDERED** that Citation No. 7682362 is **VACATED**.

Jacqueline R. Bulluck
Administrative Law Judge
(202) 434-9987

Distribution: (Certified Mail)

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