FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 25, 2008

JIM WALTER RESOURCES, INC.,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. SE 2006-141-R
v.	:	Citation No. 7686228; 02/15/2006
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	No. 7 Mine
Respondent	:	Mine ID 01-01401
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2007-08
Petitioner	:	A.C. No. 01-01401-87100
v.	:	
	:	
JIM WALTER RESOURCES, INC.	:	
Respondent	:	No. 7 Mine

DECISION

Appearances: Thomas Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Guy W. Hensley, Esq., Jim Walter Resources, Brookland, Alabama, for the Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Notice of Contest filed by Jim Walter Resources ("Jim Walter"), challenging the issuance of a citation which alleges a violation of 30 C.F.R. § 75.400. Also at issue is a Petition for Assessment of Penalty filed by the Secretary of Labor seeking the imposition of a penalty for the alleged violation.

Subsequent to notice, the case was heard in Birmingham, Alabama on January 15 and 16, 2007. Jim Walter filed proposed findings of fact and conclusions of law on April 28, 2008. The Secretary filed a "letter brief" on April 29, 2008. On May 12, 2008, Jim Walter filed a brief in

response to the Secretary's "letter brief."[1]

I. Introduction

Jim Walter operates the No. 7 Mine, an underground coal mine. On February 15, 2006, MSHA inspector John Smoot inspected the North A belt (also known as the North Main belt) located in an intake air entry. The belt transported coal from the working face outby to the belt header.

Smoot observed float coal dust on the roof, ribs, belt frame, and floor from crosscut three inby to crosscut ten, a distance of approximately 867 linear feet. He described the float coal dust as being black in color, and lying on top of rock dust. Smoot indicated that the accumulated coal dust presented a hazard of a fire or explosion due to the presence of various ignition sources in the entry. Smoot stated that in order to abate the violative conditions, he required that the area be adequately rock dusted to dilute the float coal dust to a non-combustible state.

In addition, according to Smoot, coal fines were located in horizontal layers, between strata of rock dust. The fines extended throughout the belt area from the north header to crosscut eleven, a linear distance of approximately 1,451 feet. He indicated that in one area he poked his four foot aluminum walking stick through the material, and the pole went down approximately forty-eight inches. Smoot testified that at three or four locations, he used the claws at the bottom of the walking stick to open a vertical hole, four by twelve to fifteen inches, that extended from the top of the material to a maximum depth of one foot. According to Smoot, he looked down the vertical holes and observed layers of coal fines between strata of rock dust.

Smith opined that the fines were still hazardous even though they had accumulated over a significant period of time. According to Smoot, should the coal dust in the area propagate a larger fire or explosion, the strata of rock dust on top and below the coal fines could be blown off exposing the coal fines. He opined that accordingly they could enlarge a fire started by the ignition of coal dust in the area. In order to abate the accumulation of coal fines, Smoot required Jim Walter to physically remove them by shoveling, a task that took 5,730 man-hours.

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[1] Subsequent to the hearing, on June 9, 2008, Jim Walter filed Defendant's Exhibits 9, 10 and 11 that had been marked but not admitted as they were considered voluminous. Jim Walter was told to select only the relevant pages and offer them post-hearing. The latter filed these exhibits in their entirety. A showing has not been made that the exhibits are entirely relevant. Accordingly, only the day shift entry for February 14, 2006, and the owl shift report for February 15, are admitted as Defendant's Exhibits 9. The balance of the offered Defendant Exhibit 9 and Defendant's Exhibits 10 and 11 are not admitted, as they are not relevant to these proceedings.

II. Discussion

A. Violation of 30 C.F.R. § 75.400

Section 75.400, provides, as pertinent, that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces . . . and other combustible materials shall be cleaned up and not be permitted to accumulate in active workings. . . ."

According to Smoot, he observed float coal dust "[o]n the roof, the ribs, the belt frame, and the mine floor in an area from crosscut number three ... to the belt drive at crosscut number ten" (Tr. 31-32), a distance of 876 feet. He noted the presence in the area of ignition sources such as cables, electrical motors, switches and rollers.

Larry Taft, who, at the time of the trial was a state mine inspector, was the only person to travel with Smoot on the day of the latter's inspection. Taft testified that the cited dust was grey in color "the best that I can remember." (Tr. 285) In later testimony, he indicated that based on his experience, float coal dust is "dark grey-- dark medium grey to black." (Tr. 289) He was asked whether he formed an opinion as to whether the cited coal dust created a violative condition, and he responded as follows: "I don't remember, you know best I can remember . . . - it didn't look that bad. But then again, like I said, that's the best I can remember. We're talking two years ago." (Tr. 286)

I find that Taft did not contradict Smoot's testimony regarding the location of the coal dust on the roof, ribs, belt frame, and main floor, and that these accumulations extended 876 feet. Also, he did not contradict Smoot's testimony regarding the presence of ignition sources in the area.

I find, based on the uncontradicted testimony of Smoot, that the quantity of float coal dust that had accumulated was such that it could have ignited. *See Old Ben Coal Co*., 2 FMSHRC 2806, 2808 (Oct. 1980).[2] Thus, I conclude that the Secretary has established that Jim Walter was not in compliance with Section 75.400.[3]

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[2] I note that Smoot did not measure the depth of the accumulations, nor did he test for their combustibility. However, in establishing a violation, the absence of evidence of depth is not, in and of itself, a cause for vacating a Section 75.400 violation. *See Old Ben Coal Co.*, 2 FMSHRC at 2807. Further, Section 75.400 does not by its terms require testing to determine the percentage of combustible materials present. *See Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1290 (Dec. 1998).

[3] Jim Walter challenges the finding in the citation at issue as well as the testimony of Smoot regarding the existence of layered coal fines in an approximately four foot high vertical wall throughout the length of the entry from the header inby to crosscut eleven. However, inasmuch as a violation of Section 75.400 has been established predicated upon the existence of

B. Significant and Substantial

1. Case law

A "significant and substantial" violation is described in Section 104(d)(1) of the 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 that 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 822, 825 (Apr. 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 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.

Id. at 3–4.

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extensive float coal dust accumulations, it is not necessary, for purposes of establishing a violation under Section 75.400, to also establish the existence of accumulations of layered coal fines.

At the trial, Jim Walter also attempted to challenge the method of abatement required by MSHA, i.e. shoveling of the accumulation of coal fines. Since it is not necessary to decide the issue of the existence of accumulated coal fines, *a fortiori*, it is not necessary to discuss their abatement. In addition, Jim Walter has not addressed this issue in its Post Hearing Brief. Accordingly, it appears that Jim Walter has abandoned this argument. Further, there is not any provision in Section 105 of the Federal Mine Safety and Health Act of 1977 ("The Act") that grants an operator an opportunity to challenge before the Commission the reasonableness of the method of abatement required by the inspector, i.e. the removal of the fines by shoveling.

2. Smoot's testimony

Smoot testified that the hazard associated with float coal dust along a belt line is "[t]he hazard of fire or explosion." (Tr. 34–35) When asked to elaborate, he stated that "[b]elt rollers [located every ten feet] can go bad at any given time on the belt. If you have electrical equipment in the area. If there happened to spark or arc from the equipment, you could ignite the float coal dust. [sic]" *Id.* (Emphasis added). In this connection, he noted the presence in the cited area of "electrical belt motors," "cables going to the drive," and "an electrical control line running down the length of the belt. Which at various areas are switches to start and stop the belt. [sic]" (Tr. 35)

Smoot explained that a hazardous condition would result "[i]f a rock was to fall and cut one of the cables, you could get an arc out of a cable. Something's happening to one of the motor casings, have an opening in one of the casings, you could get an arc igniting the float coal dust. [sic]" (Tr. 36)

He testified further as follows:

> At various times the bearings either seize, or go bad in the bearing, or in the rollers, which could cause friction, heat. I have seen at times before sparks flying off the end of the rollers where the bearings were bad.[4] Shaft can break on one end of the roller, or the roller fall down against the frame causing sparks from turning metal on metal. Creating heat again. . . . It could possibly cause a fire. [sic]

(Tr. 37) (Emphasis added).

3. Discussion

The record clearly establishes the first element set forth above, i.e., that Jim Walter did violate a mandatory standard, i.e., Section 75.400. Also, based on the testimony of Smoot, I find that the violation contributed to the risk of a hazardous condition, i.e., a potential ignition. The issue presented herein relates to the third element in the *Mathies* criteria, the existence of a reasonable likelihood that the hazard contributed to will result in an injury-producing event. In order to establish this element, the Secretary must prove that there was a reasonable likelihood of an ignition.

In this connection, Smoot's direct testimony referred to the "happen[ing]" of sparking or

[4] Smoot indicated that this is "[n]ot really" an "uncommon" occurrence. (Tr. 39)

arcing from electrical motors, switches, or cables, which "could" ignite the float coal dust. (Tr. 35) However, Smoot in his testimony, did not express any opinion as to the likelihood of the occurrence of sparking or arcing or a resulting ignition. Although his inspection notes contain a statement that an ignition was "reasonably likely due to energized electrical equipment in the affected area" (Government Exhibit 3, p. 3), there was not any evidence adduced at the hearing that would tend to establish that it was reasonably likely that the equipment would produce an electrical arc or spark resulting in ignition. Specifically, there was not any evidence adduced with regard to the existence of any physical condition that would make it reasonably likely that any equipment in the area would produce a spark or an arc. In this connection, Smoot admitted on cross-examination that he did not find any non-compliance problems with the electrical equipment. In the same fashion, whereas Smoot testified that a cable could produce an arc if a rock were to fall and cut it, he admitted on cross-examination that there had not been any roof falls in the cited area, nor were there any problem with the roof.

Similarly, whereas he testified that "at various times" bearing seize, or a roller shaft "can" break (Tr. 35), or fall against the belt frame causing friction, heat, or sparks, there was not any evidence adduced regarding the existence of any physical conditions that would tend to establish that these ignition-causing events were reasonably likely to occur. Indeed, Smoot indicated on cross-examination that there were not any "bad roller[s]," rollers turning in coal, cutting into "anything," or "smoking." (Tr. 99) Nor was the belt misaligned.

Based on all of the above, I find that the Secretary's evidence is insufficient to establish that there was a reasonable likelihood of an ignition. Therefore, I find that the third element set forth in *Mathies,* 6 FMSHRC 1, was not established, and thus the violation was not significant and substantial.

C. Penalty

I find, for the reasons set forth above, II(B), *infra*, that the accumulated float coal dust could have resulted in a fire or explosion. Further, according to the uncontradicted testimony of Smoot, this hazard could cause burns or smoke inhalation. The citation at issue alleges that lost workdays or restricted duty could be expected. Jim Walter did not rebut this allegation. I thus find that the level of gravity of the violation was moderate.

Evidence was not adduced regarding the length of time the specific violative conditions had been in existence. However, I note that on February 2, 2006, Jim Walter was cited for the existence of float coal dust accumulations on the roof, rib and floor of the belt entry in question between crosscuts nine and seven for approximately 200 feet, the violative conditions were removed, and the cited areas were rock dusted the following day. It thus might be inferred that at least on February 2, 2006 an MSHA inspector did not observe float coal dust in any other areas in the entry in question aside from between crosscuts seven to nine. Thus, an inference might be

raised that the accumulations observed and cited by Smoot on February 15, had occurred sometime subsequent to February 3, 2006, and thus, at the maximum, had been in existence for a maximum of twelve days prior to being cited on February 15.

Jim Walter did not adduce any evidence that the accumulations had occurred just prior to Smoot's inspection.[5] Indeed, the extent of the accumulations, running approximately 867 linear feet, would indicate that they had been in existence for some significant time prior to February 15, 2006. Due to the extent of the accumulations, and the lack of evidence adduced by Jim Walter that it did not have either notice or knowledge of the extensive accumulations,[6] and for all the reasons set forth above, I find that the level of negligence was moderate.

The parties stipulated that the assessed penalty will not impair Jim Walter's ability to remain in business. The parties further stipulated that Jim Walter demonstrated good faith abatement. There was not any evidence adduced that the penalty sought would not be appropriate to the size of Jim Walter.

Considering all of the above factors as set forth in Section 110(i) of the Act including the operator's history of previous violations[7] in the two year period prior to February 15, 2006, I find that a penalty of $250.00 is appropriate for the violation found herein.

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[5] In its brief, Jim Walter refers to the Belt Crew Report for the day shift July 14, 2006 which contains the following notation: "1 cleaned N.M. T/V-3." Not much weight was accorded this entry as it is not clear whether the cleaning was performed in the cited area. Indeed, Jim Walter failed to produce any witness who either made this entry or who performed the cleaning.

[6] Jim Walter cites the lack of any entry for the owl shift February 15, 2006, relating to the need for further work in the North Main belt area as support for an inference that it surveyed the entry, and determined it did not need additional cleaning and rock dusting. Inasmuch as Jim Walter did not adduce any direct evidence relating to conditions observed on the owl shift on February 15, any finding that the entry did not need additional cleaning would be mere conjecture.

[7] Jim Walter argues, in essence, that the history of violations should not be accorded any weight because the Secretary did not establish the number of citations that related only to the mine at issue. Also Jim Walter argues that the data therein was inflated, as it lists citations issued to all its mines, and includes citations other than those that were paid or were finally adjudicated. Jim Walter bases the latter argument on limitations imposed at 30 C.F.R. § 100.3, which sets forth criteria to be considered by MSHA in proposing a penalty. In contrast, in the instant *de novo* proceeding the Commission and its Judge must consider Section 110(i) of the Act, which sets forth that one of the criteria to be considered is the operator's "history of violations." *Id*. It is significant that the phrase is not qualified, nor does it provide for any limitations, in contrast with Section 100.3.

ORDER

It is **Ordered** that the Notice of Contest, Docket Number SE 2006-141-R, shall be **Dismissed**. It is further **Ordered**, that, within thirty days of this decision, Jim Walter shall pay a civil penalty of $250.00 for the violation of Section 75.400 found herein.

Avram Weisberger
Administrative Law Judge

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