

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, D.C. 20001

August 27, 2008

JIM WALTER RESOURCES, INC.,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. SE 2006-295-R
v.	:	Citation No. 7684534; 07/21/2006
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	No. 4 Mine
Respondent	:	Mine ID 01-01247
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2007-197
Petitioner	:	A.C. No. 01-01247-110958
	:	
v.	:	
	:	
JIM WALTER RESOURCES, INC.,	:	
Respondent	:	No. 4 Mine

**DECISION**

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor;  
David Smith, Esq., Maynard, Cooper & Gale, Birmingham, Alabama, on behalf of Jim Walter Resources, Incorporated.

Before: Judge Zielinski

These cases are before me on a Notice of Contest filed by Jim Walter Resources, Incorporated (“JWR”) and a Petition for Assessment of Civil Penalties filed by the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges that JWR is liable for one significant and substantial violation of the Secretary’s Mandatory Safety Standards for Underground Coal Mines, and proposes the imposition of a civil penalty in the amount of \$35,500.00. The citation alleging the violation was issued following MSHA’s investigation of a fatal accident that occurred on March 29, 2006, at JWR’s No. 4 mine. A hearing was held in Birmingham, Alabama, and the parties filed briefs after receipt of the transcript. For the reasons set forth below, I find that JWR did not commit

either of the alternatively alleged violations, and vacate the citation.<sup>1</sup>

### Findings of Fact - Conclusions of Law

JWR's No. 4 mine is located in Tuscaloosa County, Alabama, near the community of Brookwood. It provides employment for 454 persons, and operates six days per week, three shifts per day, with production on all shifts. One longwall panel and several mechanized mining units and continuous mining machine units are operated in the mine. As of March 29, 2006, the date of the accident, longwall panel N-13 had been completed, i.e., mined to its "stop point." Polypropylene mesh, reinforced with wire rope, had been installed along the roof line for the last 30 feet of the longwall advance. The mesh was fed over the tips of the longwall shields and, as the shields were advanced, roof falls in the gob anchored the mesh to the mine floor. At the stop point, the shields were advanced to within five feet of the face. JWR was in the process of installing roof bolts in that five-foot space, pinning the forward edge of the mesh to the mine roof. The roof bolts and mesh, along with wooden supports installed after the last pass of the longwall shear, were intended to provide roof support to allow removal of the shields.

Roof bolting had started on the midnight shift, and was continued on the day shift on March 29. Three crews of miners, four persons each, including a supervisor, worked to install the bolts. The Secretary's regulations require that operators of underground coal mines develop and follow a roof control plan, approved by MSHA's District Manager, that is suitable for the prevailing geological conditions and the mining system used at the mine. 30 C.F.R. § 75.220(a)(1). The regulation also provides that additional measures shall be taken to protect persons if unusual hazards are encountered. JWR's approved roof control plan required that roof bolts be a minimum of 36 inches long, have five-inch square plates, and be installed on five-foot centers. Ex. G-6. The section of the plan dealing with longwall roof control also provided:

This plan contains the minimum roof control measures to be used and is formulated for normal roof conditions in association with the mining system described. In active areas where subnormal roof conditions are encountered, the minimum roof control methods will be supplemented with longer or additional roof bolts, posts, crossbars, cribs, Propsetters, Packsetter Bags, steel mats, or wire mesh, Link-N-Lock cribs, "Cans," or cable bolts, whichever is most applicable.

Ex. G-6 at 27.

Subnormal roof conditions existed at two locations along the face of the longwall panel, near shields numbered 110 and 130. The roof at shield 130 was particularly jagged and difficult to bolt. In the area of shields 100 to 110, smooth slick joints in the rock created instability that had resulted in a roof fall during the midnight shift. The fall created a cavity ranging from one to

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<sup>1</sup> As noted above, the Secretary was permitted to amend the citation to allege that JWR had violated either of two mandatory standards.

three feet high that ran for 30 feet along the five-foot space between the tips of the shields and the face. Tr. 230, 341. The fall had been cleaned up, and a day shift roof-bolting crew, William Hardy, Garry Jones and William Ducker, began to install bolts where the previous shift had stopped. Hardy, who had over 28 years of mining experience at JWR, took the drill, Ducker was putting resin into the bolt holes and Jones, who had over 23 years of mining experience, was preparing bolts to be installed. The crew worked from the “pan line,” the steel pan along which coal cut by the shear was transported to conveyor belts that removed it from the mine. The crew’s work area under the longwall shields is depicted in a drawing in MSHA’s accident report. Ex. G-4 at 8. A copy of the drawing is included as an Appendix to this Decision.

Because of the subnormal roof conditions, 48-inch bolts were being used instead of the 36-inch bolts specified in the plan, six-inch square plates were being used instead of five-inch plates, and wooden “T-bars” were being installed to provide additional support. The experienced roof bolting crew also decided to install two rows of bolts in the five-foot space, and place them on centers of three and one-half to four feet. This resulted in installation of substantially more bolts than were required under the plan, the provisions of which would have been satisfied with one row of bolts on five-foot centers. At about 10:00 a.m., after Hardy had installed about 12 bolts, Jones asked to take the drill and Ducker went to eat lunch. Jones began to drill holes for the installation of bolts. Hardy retrieved some supplies, and then began to prepare bolts for installation.

The miners were using a hand-held pneumatic powered drill, operated by controls mounted on a handle attached to an arm about three feet long that rotated out from the drill body. The drill is depicted in photographs taken at the scene. Ex. G-5(a), (b), (g). The handle had a lever that applied air pressure to a cylinder rod that protruded from the bottom of the cylindrical drill. When the drill was in a vertical position, the rod rested on the mine floor, and application of air pressure forced the drill steel up against the roof. Separate controls governed drill motor rotation and the flow of water and air for flushing cuttings from the hole. Drill steels of five and six feet in length were supplied. In order to start drilling a hole for a bolt, the operator reached out to position the drill, usually at a slight angle, and activated the air pressure lever to push the drill steel up against the roof. He then swung the control arm out, stepped back further under the shield, and began to operate the drill.

Because it was difficult to see up into the cavity, the operator stood at the edge of the shield and turned at an angle of approximately 45 degrees to the face. From that position, he was able to see the point where the drill steel contacted the roof, and could position the drill to install a bolt in the correct location. The face ventilation air current flowed from the headgate to the tailgate of the longwall, i.e., from right to left as one’s back was to the gob. Hardy had been working from left to right, and had closed the unbolted gap to about 19 feet. He had rotated his body in a clockwise direction, and positioned himself at about a 45 degree angle to the face. The roof directly inby his left shoulder, and closest to the face, had been bolted and was considered to be permanently supported. However, the face ventilation air current caused water and drill cuttings to blow toward him. When Jones took the drill, he rotated his body in a counter-

clockwise direction, so that the ventilation air current took the water and cuttings away from him. However, he continued to work from left to right. Consequently, the roof adjacent to his right shoulder, and closest to the face, had not yet been bolted. Any portion of the roof more than five feet away from the last-installed roof bolt was considered unsupported roof.

About 11:20 a.m., Jones was beginning to install his fifth bolt. Scratch marks on the mine roof, where he apparently attempted to start the next hole, were located three feet from the tip of the shield and four feet from the last-installed bolt. Tr. 75, 144, 152, 296-98; ex. G-5(h), G-8 at 5. Hardy was two shields away (about ten feet), assembling bolts, plates and T-bars. His back was to Jones. He heard a “crashing” noise, turned, and saw rocks and debris falling around the drill, and “coming down” the handle of the drill. Tr. 350-53. He then saw Jones bow his head forward slightly and bend his knees. Jones then straightened up, pushed away from the drill, and moved back, away from the face. His arms were flailing, as if he were trying to regain his balance, and he fell backward onto the pan line, striking his head on it. He stopped breathing, and was largely unresponsive. Several miners immediately administered first aid, and called for emergency assistance. Denver R. Cantor, the bolting crew’s supervisor, who was approximately 40 feet away inspecting the bolted roof, was among the first to reach Jones. Jones was transported out of the mine and his care was turned over to emergency medical technicians, who transported him to a hospital. He died from his injuries on April 10, 2006.

MSHA was promptly notified of the accident. Raymond C. Dorton, Jr., an MSHA roof control specialist and accident investigator, arrived on the scene before most of the miners had left the mine. He issued an order pursuant to section 103(k) of the Act, preserving the accident scene. He inspected the area, took photographs and interviewed those present. When the interviews had been concluded, JWR inquired about whether the order could be lifted. Dorton was interested in identifying some steps that could be taken to prevent future similar occurrences. He and Darrell L. Loggains, JWR’s longwall manager, discussed instructing miners to position themselves perpendicular to the face when starting to install bolts, and to remain under supported roof as subsequent bolts were installed. Dorton indicated that those measures would be sufficient to lift the order. Loggains typed up the measures while Dorton showered, and called them down to the miners working underground. Dorton then lifted the order. The measures were subsequently added to JWR’s roof control plan at MSHA’s insistence. Ex. G-6 at p. stamped “JWR-D197-000079.”

After completing his investigation and leaving the mine, Dorton did not feel that JWR had violated its roof control plan or any other regulation. However, when the investigative report was issued, on July 21, 2006, it had been concluded that JWR had violated a mandatory safety standard, and Citation No. 7684534 was issued.<sup>2</sup> Ex. G-2, G-4. The citation was terminated at

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<sup>2</sup> JWR argues that the investigative report is unreliable. It points to several statements that are contradicted by the record, specifically, that the mine roof in the area of the accident had not been scaled, that Hardy had taken the same drilling position that Jones had, and that a specific rock had fallen from the right and struck Jones. The first two points are of no

the same time that it was issued, because the actions taken to lift the section 103(k) order were deemed sufficient to remedy the violation, and because the area had been mined out. JWR contested the citation and the subsequently assessed civil penalty.

Citation No. 7684534, as originally issued, alleged a violation of 30 C.F.R. § 75.202(a), which provides, in pertinent part:

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.

The “Condition or Practice” section of the citation stated:

The operator failed to support or otherwise control the roof to protect persons from hazards related to falls of the roof on the N-13 Longwall Panel. On March 29, 2006, an area of unsupported roof fell and led to a fatal injury of a miner on April 10, 2006.

Ex. G-2.

The citation was issued pursuant to section 104(a) of the Act and also alleged that the fatality occurred as a result of the violation, that it was significant and substantial (“S&S”), that one miner was affected and that the operator’s negligence was moderate.

The decision to charge JWR with a violation represented the “collective” judgment of several Department of Labor personnel, including employees at MSHA and the Office of the Solicitor. It was not unanimous. Although Dorton was designated to issue the citation, he did not believe that JWR violated the regulation, and has held that opinion from the date of the accident to present. Tr. 82, 255-56. As he explained at the hearing, he disagreed with the decision to charge a violation of section 75.202(a), “[b]ecause referencing 202(a), my belief is that 202(a) says that the roof will be supported where persons work or travel. My belief is that is what they were doing. They were in the process of supporting the top in the area where persons work or travel.” Tr. 82.

On October 25, 2006, Dorton executed a modification of the citation to specify a violation of section 75.220(a)(1), instead of section 75.202(a). Section 75.220(a)(1) provides:

Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions,

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consequence. As noted above, Dorton made clear that the conclusions about how the accident occurred were assumptions, and that there is no evidence that a particular rock struck Jones, or, if he was struck by a rock, where it came from.

and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.

The condition and practice section of the citation was changed to read:

The operator failed to take additional measures to protect persons from unusual hazards encountered on the N-13 longwall panel. The mine operator's existing procedures for installing roof bolts on the longwall face did not include provisions for safe positioning of the drill operator. An area of roof fell causing the fatal injury of a miner.

Ex. G-2.

On February 25, 2008, the citation was again modified to allege that JWR had violated either section 75.202(a) or 75.220(a)(1), and the condition or practice section was changed to read:

The operator failed to support or otherwise control the roof to protect persons from hazards related to falls of the roof on the N-13 Longwall Panel. On March 29, 2006, an area of unsupported roof fell and led to a fatal injury of a miner on April 10, 2006. The operator failed to take additional measures to protect persons from unusual hazards encountered on the N-13 Longwall Panel. The mine operator's existing procedures for installing roof bolts on the Longwall face did not include provisions for safe positioning of the drill operator. An area of roof fell causing the fatal injury of a miner.

Ex. G-2.

The Secretary subsequently filed a motion in these proceedings to amend the citation to include the alternative allegations. By Order dated March 10, 2008, the Secretary's motion was granted.<sup>3</sup>

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<sup>3</sup> Amendment of a citation or order after a notice of contest has been filed should be accomplished by motion, not on the Secretary's own initiative. *Consolidation Coal Co.*, 4 FMSHRC 1791, 1795 n. 11 (Oct. 1982). The Secretary's motion was granted, over JWR's opposition, because the alternative allegations were based upon the same facts and presented no additional abatement issues, and JWR had been put on notice of the section 75.220(a)(1) allegation shortly after the initial modification of October 25, 2006, when Dorton's first deposition was taken. See *Empire Iron Mining Partnership*, 29 FMSHRC 999, 1003-05 (Dec. 2007).

## The Section 75-202(a) Violation

The Secretary's position on this alleged violation presents the unusual, perhaps unheard of, situation where the MSHA inspector who issued the violation and testified on behalf of the Secretary does not believe that the alleged violation occurred. JWR argues that where "the Secretary's authorized, designated representative cannot – or will not, based on a lack of conviction – testify that an alternatively plead standard has been violated, it is a violation of the Mine Act (and general principles of due process) to require [it] to rebut such an allegation." Resp. Br. at 7-8. JWR's argument is based upon section 104(a) of the Act, which reads, in pertinent part:

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. . . .

30 U.S.C. § 814(a).

However, the Act specifically recognizes that the Secretary may cause a citation to be issued, if she believes, after investigation, that a violation occurred. JWR does not suggest that the Secretary's Office of the Solicitor was without authority to file the Petition for Assessment of Civil Penalty, or to pursue either of the alternative allegations. The Secretary's burden is to prove the violations and related allegations, e.g., gravity and negligence, by a preponderance of the evidence. To be sure, that burden is amplified by the absence of a witness who actually believes that the evidence establishes a violation. But, it is not impossible. If the Secretary can meet her burden, relying on all of the evidence introduced at the hearing, a violation can be established. The fact that her chief witness does not support the alleged violation is not fatal.

In *Canon Coal, Co.*, 9 FMSHRC 667, 668 (April 1987), the Commission held that:

Questions of liability for alleged violations of this broad aspect of this standard [the precursor to the present section 75.202(a)] are to be resolved by reference to whether a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized that hazardous condition that the standard seeks to prevent. Specifically, the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard. We emphasize that the reasonably prudent person test contemplates an objective – not subjective – analysis of all the surrounding circumstances, factors, and considerations bearing on the inquiry in issue. (citations omitted)

The Secretary argues that JWR was aware of adverse roof conditions where Jones was working, but took no action to provide additional roof support to protect Jones from the roof fall. She points out that JWR's roof control plan provided a list of materials that, she contends, "could and should" have been used to protect Jones, including, posts, crossbars and cribs, and that JWR's failure to employ such measures constituted a violation of section 75.202(a) under *Canon's* reasonably prudent person test. Sec'y. Br. at 28.

The Secretary's argument is not supported by the evidence. It amounts to little more than the strict liability interpretation that was rejected in *Canon*, i.e., rock fell and caused an injury – therefore the standard was violated. There was no evidence that the roof control measures employed by JWR were inadequate or insufficient to support the roof. In fact, it appears that they were, because none of the bolts, with their plates and T-bars, failed to perform their intended function. As Dorton explained, JWR was doing what was required under the standard, i.e., installing appropriate support for the roof.

The additional measures noted by the Secretary, posts, crossbars and cribs, do not automatically pop into place with the push of a button. Like roof bolts, they must be installed by miners. There was no evidence as to whether such measures would have been appropriate, or even feasible, under the conditions presented, or whether installing them would have presented greater or lesser exposure to a hazard and risk of injury than the installation of the roof control measures actually being employed. Failure to use roof control measures other than those being installed was not mentioned, or even alluded to, in MSHA's accident investigation report, the twice-modified citation, or any of the other reports or documents associated with the incident.

The Secretary also contends that JWR's failure to have previously implemented the "additional safety practice," that was developed in order to lift the section 103(k) order, i.e., positioning of the drill operator, amounted to a violation of section 75.202(a). Whether the absence of the "practice" could be considered a failure to support or otherwise control the roof, as the regulation requires, is debatable. Assuming that it could, under *Canon*, the test to be applied is "whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard." 9 FMSHRC at 668.

The safety practice at issue was not developed as a roof support or control measure to meet the protection intended by section 75.202(a). When Dorton participated in developing the practice, and approved its implementation as sufficient to lift the order, he did not believe that JWR had committed any violation, but was simply trying to identify possible preventive measures. Tr. 322. Dorton had worked at JWR's No. 4 mine for 13 years, including several years as an outby longwall foreman. As an MSHA roof control specialist from 2001-2005, he reviewed, or assisted in reviewing JWR's roof control plan at six-month intervals, and visited the



mine to check on compliance with the plan and consult on roof control issues.<sup>4</sup> Although he had not personally observed installation of roof bolts at the termination of a longwall panel, he had extensive first-hand knowledge of the roof conditions in the mine, and had seen similar conditions on prior occasions. Tr. 244, 246-48, 320. JWR had been following its procedure for bolting the roof in preparation for removal of the shields for many years, and had never experienced an accident from a roof fall. Tr. 215, 262-63, 427. Over the years, there were a considerable number of persons, at both JWR and MSHA, who were very familiar with the mining industry and the protective purpose of the standard, the roof conditions at JWR's mine and JWR's procedures for bolting the area between the shields and face, none of whom suggested the practice, or sought to include it in the roof control plan for the No. 4 mine, or any other mine prior to the accident. Tr. 246-48, 263, 326-27.

Considering all of the evidence, I find that the Secretary has not proven by a preponderance of the evidence that the safety practice was a support or control that a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard.

It is also far from clear that the accident could have been avoided, had the safety practice been followed. The objective of the practice is to assure that the drill operator remains under roof that is either supported by roof bolts or shields. Dorton concluded, from his investigation, that Jones was under the shields. Tr. 252, 297-99. No one knows exactly what happened to cause Jones to stumble backward and fall. Hardy saw some debris come down from the roof around the drill motor. That material most likely came from an area of supported roof, because Jones had started the hole within four feet of the last installed bolt. If Jones was struck on the hands by a rock, neither Dorton, nor anyone else knows where such a rock would have come from, i.e, whether it would have come from supported or unsupported roof. Tr. 272, 290. It is possible that Jones was startled by the debris and fell backward as he attempted to back away from it. His fatal injury was not directly caused by rock falling from the roof, and, with the possible exception of the scrape on his right hand, it is not clear that any of the injuries he suffered were so caused. As JWR argues, the accident could very well have happened even if Jones had been operating under the newly established safety practice.

The Secretary also argues that JWR failed to assign enough miners to the crew so that personnel would have been available to "watch or to assist" Jones in carrying out the drilling. Sec'y Br. at 28. Again, the evidence does not support her position, which, like her main argument on this alleged violation, does not appear in the accident investigation report or any other documentation associated with the incident. The Secretary relies upon the testimony of JWR officials. However, those officials testified that the work crews were adequate in size, and allowed for individuals to take breaks and attend to other tasks. Tr. 124-29, 182-83, 222. As JWR argues in its brief, the statements were to the effect that "safety is enhanced by having co-

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<sup>4</sup> Dorton's experience, education and other qualifications are detailed in his resume. Ex. G-15.

workers paying attention to the work of co-workers while they all work together. [They cannot] be fairly interpreted as recommending that roof bolting crew sizes be increased under the circumstances of this case.” Resp. Br. at 27-28. As JWR goes on to point out, no such changes were suggested or implemented in order to lift the section 103(k) order or in subsequent amendments of JWR’s roof control plan. To the extent that the Secretary’s argument could be construed as an attempt to amend the citation, which would require additional abatement efforts, it would be denied.

I find that the Secretary failed to prove, by a preponderance of the evidence, that JWR violated section 75.202(a).

#### The Section 75.220(a)(1) Violation

As noted previously, section 75.220(a)(1) provides:

Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.

The Secretary’s regulations governing roof control plans also provide that: “No proposed roof control plan or revision to a roof control plan shall be implemented before it is approved.” 30 C.F.R. § 75.220(c).

JWR’s MSHA-approved roof control plan contains provisions specifically addressing roof support for the termination of a longwall panel and removal of mining equipment. It specifies that roof bolts be installed in the space between the face and the tips of the shields; that roof bolts have a minimum length of 36 inches; that bolts be installed on five-foot centers; and that additional rows of bolts be installed if the distance between the face and the tips of the shields exceeds five feet. The plan also specified additional measures to be used where “subnormal roof conditions” are encountered.

#### 1. General Information

This plan contains the minimum roof control measures to be used and is formulated for the normal conditions in association with the mining system described. In active areas where subnormal roof conditions are encountered, the minimum roof control methods will be supplemented with either longer or additional roof bolts, posts, crossbars, cribs, Propsetters, Packsetter Bags, steel mats, or wire mesh, Link-N-Lock cribs, “Cans,” or cable bolts whichever is most applicable.

Ex. G-6 at 27.

The “additional measures” that the Secretary asserts that JWR failed to implement were: 1) a procedure requiring miners to “drill in the direction wherein roof support in the form of roof bolts or the longwall shield would have been overhead or in the direction from which the miners were bolting,” and 2) “having four miners assisting and watching the adverse roof for . . . ‘abnormal’ situations.” Sec’y Br. at 25. Neither of these additional measures were specified in JWR’s roof control plan at the time of the accident. The former is the safety practice that was implemented following the accident in order to secure lifting of the section 103(k) order, and was later added to the roof control plan. The latter appeared only in the post-hearing briefing of this case.

Initially, it strikes me that the Secretary is, in effect, seeking to charge JWR with a violation of provisions that were not included in its roof control plan at the time of the accident, and which, by regulation, it could not have unilaterally adopted or implemented. Dorton essentially agreed and testified that, in his opinion, JWR had not violated its roof control plan, as it existed on the day of the accident. Tr. 255-57. JWR appears to concede that where an operator is in full compliance with its approved roof control plan, the Secretary can proceed under the general “additional measures” clause of section 75.220(a)(1), citing *Wabash Mine Holding Co.*, 27 FMSHRC 672 (Oct. 2005) (ALJ). Resp. Br. at 13. However, it is not clear that *Wabash*, in fact, so holds and, in any event, it is not binding precedent. Were it necessary to decide the issue, I would hold that, where the additional measure urged by the Secretary was not specified in the operator’s roof control plan, the Secretary cannot properly allege a violation of the roof control plan regulation, section 75.220(a)(1), but may proceed under section 75.202(a), the operator’s general obligation to support or otherwise control the roof, face, and ribs of areas where persons work or travel. *So. Ohio Coal Co.*, 10 FMSHRC 138, 140-41 (Feb. 1988) (compliance with an approved roof control plan does not preclude liability for failure to comply with a generally applicable regulation requiring adequate roof support). Without reference to a specific plan provision, the last sentence of section 75.220(a)(1), requiring that additional measures be taken to protect persons if unusual hazards are presented, appears to add nothing to the operator’s general obligation to control roof conditions, as specified in section 75.202(a). The Secretary does not argue that a violation of the “additional measures” requirement of section 75.220(a)(1) should be judged by any different legal standard than that applicable to a violation of section 75.202(a).

It is not necessary to decide the legal issue identified above, because I find that the Secretary has not proven a violation of section 75.220(a)(1). I agree with the Secretary that the roof conditions where the accident occurred were “unusual hazards,” within the meaning of the regulation. However, I find that JWR employed appropriate additional measures, as specified in its roof control plan, to address them.

While JWR argues that the roof conditions in the area of the accident did not constitute unusual hazards, it is clear that they were substantially more hazardous than those typically found, especially considering the mining activity occurring at that time and location. Dorton identified adverse roof conditions in the area of the accident as slicken-sided joints, very unconsolidated material that lacked cohesion. Tr. 66-68. A roof fall had occurred in the area on

the previous shift. Cantor regarded the area as a “bad spot” presenting subnormal roof conditions. Tr. 186-88. While similar roof conditions might have been encountered in the past and were simply mined through, the area of the accident could not be mined through because panel N-13 had reached its stop point. The adverse roof conditions had to be dealt with, and made safe for miners who would be working in the area to remove the shields. I have no difficulty finding that the adverse conditions in the area of the accident were “unusual hazards” that required JWR to implement additional measures to control the roof under its roof control plan.

JWR employed several “additional measures” to control the adverse roof conditions. It used roof bolts that were 12 inches longer than required, larger bearing plates, and added T-bars. It also installed substantially more bolts, on closer spacings than specified in the plan.<sup>5</sup> The Secretary has not identified any additional measure specified in the plan at the time of the accident that JWR should have implemented, but did not. The Secretary’s arguments on implementation of the safety practice and crew size were rejected previously. They are no more valid under section 75.220(a)(1).

I find that the Secretary failed to prove, by a preponderance of the evidence, that JWR violated section 75.220(a)(1).

### **ORDER**

Jim Walters Resources’ contest to Citation No. 7684534 is sustained. Citation No. 7684534 is **VACATED**, and the Petition for Assessment of Civil Penalty in Docket No. SE 2007-197 is hereby **DISMISSED**.

Michael E. Zielinski  
Administrative Law Judge

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<sup>5</sup> JWR argues that, because its plan’s additional measures provision is worded in the singular, that it was only obligated to use one of the specified “additional measures.” Whether or not JWR’s literal reading of the plan is correct, under section 75.202(a), it would have been obligated to use any measures reasonably necessary to control adverse roof conditions, regardless of whether they were specified in its roof control plan.

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