FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 28, 2008

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2006-40
Petitioner	:	A.C. No. 01-01322-71461
	:	
	:	Docket No. SE 2006-123
	:	A.C. No. 01-01322-76460
	:	
	:	Docket No. SE 2006-221
	:	A.C. No. 01-01322-87101
	:	
v.	:	No. 5 Mine
	:	
	:	Docket No. SE 2006-187
	:	A.C. No. 01-01247-81979
	:	
	:	No. 4 Mine
	:	
	:	Docket No. SE 2006-222
	:	A.C. No. 01-01401-87100
	:	
JIM WALTER RESOURCES, INC.,	:	Docket No. SE 2006-308
Respondent	:	A.C. No. 01-01401-92559
	:	
	:	Docket No. SE 2007-77
	:	A.C. No. 01-01401-100002
	:	
	:	Docket No. SE 2007-117
	:	A.C. No. 01-01401-94880
	:	
	:	No. 7 Mine

DECISION

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

Before: Judge Feldman

These civil penalty proceedings concern petitions for assessment of civil penalties filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 820(a), by the Secretary of Labor (the Secretary), against the respondent, Jim Walter Resources, Inc., (JWR). The petitions seek to impose a total civil penalty of $28,817.00 for 33 alleged violations of mandatory safety standards in 30 C.F.R. Parts 75 and 77 of the Secretary's mandatory safety regulations governing underground coal mines.

These matters were heard from October 23 to October 25, 2007, in Birmingham, Alabama. At trial, the parties advised that they had reached a settlement agreement with respect to 27 of the 33 cited violations in these proceedings. The parties settled Docket Nos. SE 2006-221, SE 2006-187, SE 2007-77 and SE 2007-117 in their entirety. There were partial settlements in Docket Nos. SE 2006-123 and SE 2006-308. The record was left open for the parties to submit the terms of their agreement in writing. The settlement terms were filed on December 13, 2007, at which time the record was closed. The parties' settlement terms are approved herein.

The evidentiary hearing concerning the remaining issues consisted of, in the order in which they were heard, three 104(a) citations in Docket No. SE 2006-222; two 104(a) citations in Docket No. SE 2006-308; one 104(a) citation in Docket No. SE 2006-40; and one 104(d)(2) order that alleges an unwarrantable failure in Docket No. SE 2006-123. All of the cited violative conditions were designated as significant and substantial (S&S) in nature.[1]

The parties were advised that I would defer my ruling pending post-hearing briefs, or, issue a bench decision if the parties waived their right to file post-hearing briefs. The parties elected to waive post-hearing briefs in favor of a bench decision. (Tr. 1110-13). This decision, adjudicating the six citations and one order in these proceedings, contains the edited bench decisions that are supplemented with pertinent case law. The citations and order will be addressed in this decision in the order in which they were presented at trial.

[1] Generally speaking, a violation is S&S if it is reasonably likely that the hazard contributed to by the violation will result in an accident causing serious injury. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981).

I. Pertinent Penalty Criteria

The bench decision applied the statutory civil penalty criteria in section 110(i) of the Act, 30 U.S.C. § 820(i), to determine the appropriate civil penalty to be assessed. In determining the appropriate civil penalty, section 110(i) provides, in pertinent part:

> the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

JWR is a large mine operator that is subject to the jurisdiction of the Mine Act. The proposed penalties will not affect JWR's ongoing business operations and JWR promptly abated the cited violations. It has neither been contended nor shown that JWR's history of violations is an aggravating factor in determining the appropriate civil penalty to be assessed in these proceedings. The remaining civil penalty criteria will be addressed in the disposition of these matters.

II. Relevant Case Law

a. Significant and Substantial

The bench decision applied the Commission's standards with respect to what constitutes a significant and substantial (S&S) violation. A violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, *supra*, at 825. In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission explained:

> 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 [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC at 3-4.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 104-05 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

In *United States Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (August 1985), the Commission explained its *Mathies* criteria as follows:

> We have explained further that the third element of the *Mathies* formula 'requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.' *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Company Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984). (Emphasis in original).

The Commission subsequently reasserted its prior determinations that as part of any "S&S" finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. *Peabody Coal Company*, 17 FMSHRC 508 (April 1995); *Jim Walter Resources, Inc.*, 18 FMSHRC 508 (April 1996).

b. Unwarrantable Failure

The Commission has determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence and encompasses conduct characterized as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC 1997, 2001, 2003-04 (Dec. 1987); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). The Commission has recognized that whether conduct is "aggravated" in the context of unwarrantable failure is determined by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstances exist. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000).

III. Findings and Conclusions

a. Docket No. SE 2006-222

i. Citation No. 7687031 - Coupling Device

During the day shift on January 17, 2006, Mine Safety and Health Administration (MSHA) Inspector John Thomas Terpo observed a track mounted diesel operated locomotive on the main haulage track. Although the locomotive had been used to transport haulage cars earlier in the shift, the locomotive was not connected to any haulage cars at the time of the inspection. Haulage cars can be connected to either end of the locomotive so that they can be pulled in either direction. Consequently the locomotive is equipped with automatic and manual coupling/decoupling devices on each end.

The automatic coupler enables the locomotive operator to decouple haulage cars by pulling a tab in the cab of the locomotive. The manual decoupling device consists of inserting a

bar into a decoupling release from the side of the locomotive. Both the automatic and manual coupling devices enable the locomotive operator to disengage haul cars without his exposure between cars.

Terpo determined that both the automatic and manual coupling device was inoperative on one end of the locomotive. Consequently, haulage cars could only be coupled or uncoupled on that end by hand, by stepping between the locomotive and the haulage car. Terpo was concerned that, given the unevenness of the mine floor, a car could roll causing serious injury to a miner who was positioned between cars.

As a result of his observations, Terpo issued Citation No. 7687031 citing a violation of the Secretary's mandatory safety standard in 30 C.F.R. § 75.1405. (Gov. Ex. 2). This standard requires all haulage equipment to be equipped with automatic couplers that do not require miners to go between cars. Terpo considered the violation to be significant and substantial (S&S) because he believed there was a reasonable likelihood that a miner positioned between cars will sustain serious finger or hand injuries. Terpo attributed the cited violation to a moderate degree of negligence. The Secretary has proposed an $838.00 civil penalty for Citation No. 7687031.

At trial, JWR stipulated to the fact of occurrence of the cited violation. (Tr. 22). However, JWR disputes the S&S characterization. Keith Plylar, JWR safety supervisor, testified that haul cars also have decoupling devices that can be utilized as an alternative to the locomotive's decoupler. Plylar also opined that the locomotive could be turned around so that the functional coupler on the other end of the locomotive could be used. Terpo stated that not all haulage cars have coupling devices, and, that those that do, are sometimes inoperative.

Citation No. 7687031 Bench Decision

The following is a summary of the bench decision, with editorial additions including supporting case law, that was issued upon completion of the relevant testimony :

> Section 75.1405 requires automatic decoupling devices to prevent individuals from exposure to injury between haulage cars. JWR has stipulated to the fact of the violation. Consequently, the remaining issues are S&S, gravity and the appropriate civil penalty.
>
> Violations are properly designated as S&S if there is a reasonable likelihood that the hazard contributed to by the violation will result in an event in which there is a serious injury. *Mathies* 6 FMSHRC at 3-4; *U.S. Steel Mining*, 6 FMSHRC at 1836; *U.S. Steel Mining,* 6 FMSHRC at 1868. Here the hazard caused by the violation is exposure of extremities between a locomotive and a haulage car. Given the varying grades of a mine floor, in the context of continuing mining operations, it is reasonably likely that a haulage car will roll while a miner is attempting to manually decouple, resulting in serious crushing or amputation

injury to the fingers or hands. *Halfway Incorporated*, 8 FMSHRC 8, 12 (January 1986) (S&S determinations viewed in the context of continued mining operations).

JWR attempts to mitigate the hazard by asserting that decouplers on haulage cars may be used as an alternative to the automatic decoupler on the locomotive. Putting aside the issue of whether there is a decoupler on a haulage car, or whether it is operational, reliance on the vagaries of human conduct for the proposition that a safe alternative method will be used, to mitigate the hazard posed by the cited violation, is not persuasive. In this regard, the Commission has held that "[w]hile miners should, of course, work cautiously, that admonition does not lessen the responsibility of operators, under the Mine Act, to prevent unsafe conditions." *Eagle Nest, Inc.*, 14 FMSHRC 1119, 1123 (July 1992). Thus, the Commission concluded the exercise of caution does not mitigate the S&S nature of a violation. *Id*. With respect to gravity, since the hazard posed by the cited violation exposed miners to serious injury, the violation is serious in gravity.

Turning to the issue of negligence, although Terpo vaguely testified about previous accidents during manual decoupling, Terpo was unable to establish that a relevant accident had occurred at a JWR mine to place it on a higher state of awareness. In addition, the evidence does not reflect that JWR was aware of this condition because there is no evidence that the malfunctioning coupling device had been noted during pre-shift examinations. The Secretary proposes a civil penalty of $838.00. Giving JWR the benefit of the doubt that its management personnel lacked actual knowledge, I will attribute the violation to no more than a moderate degree of negligence. **Accordingly, a civil penalty of $700.00 shall be assessed for Citation No. 7687031**.

(Tr. 101-110).

ii. Citation No. 7687034 - Bushing

On January 24, 2006, Terpo examined the No. 6 Section electrical starter box for the winch motor on the belt drive. The winch is used to tighten and adjust the conveyor belt. Power measuring 480 volts AC is supplied to the electrical box by an incoming cable. Power from the electrical box is supplied to the winch by an outgoing electrical cable that is protected by a thick rubber insulated jacket.

The outgoing supply cable contains three distinct wire leads that are also protected by rubber jackets. The rubber insulation on each wire lead is only approximately ⅛ to ¼ inch thick. (Tr. 115-16). The outgoing supply cable is connected to the electrical box by stripping small sections of the outer rubber insulation at the end of the supply cable and at the end of each wire lead. Each wire lead is attached to a connector inside the electrical box that transfers energy

through the supply cable that is connected from the electrical box to the winch. The electrical box does not remain stationary. Rather, it is moved when the location of the winch is changed.

Exposed wire leads create an electrical hazard if the internal wires come in direct contact with the metal electrical box. To avoid this hazard, the wire leads are inserted into the box through a rubber bushing that surrounds the metal opening in the box. The rubber bushing is held securely in place by a clamp that is installed at the opening where the cable enters the box. The opening in the bushing is designed to be small so that the supply cable fits snugly in the bushing, protecting the internal separated wire leads from exposure and contact.

Terpo noted that approximately 1 to 1½ inches of the of the insulated wire leads on the winch starter box were exposed through the bushing on the outside of the box. (Tr. 117-18, 123). Terpo stated that the exposed insulation on each wire lead was intact. (Tr. 145). Terpo surmised that someone had stepped on the cable pulling the lead wires through the bushing.

As a result of his observations, Terpo issued Citation No. 7687034 citing a violation of the Secretary's mandatory safety standard in 30 C.F.R. § 75.515. (Gov. Ex. 4). This standard requires, in pertinent part, "[w]hen insulated wires other than cables pass through metal frames, the holes shall be substantially bushed with insulated bushings."

Terpo believed that movement of the lead wires ultimately would result in deterioration of the their rubber insulation that would create an electrocution hazard because of exposure of the leads to contact with the metal box. Consequently, Terpo designated the violation as significant and substantial (S&S).

Plylar without contradiction, that the bushing remained in place secured to the metal opening by a clamp. (Tr. 181-82). However, Plylar admitted the opening in the bushing was too large to maintain the lead wires snugly in place within the electrical box. (Tr.186). Plylar believed that miners are protected by circuit breakers in the unlikely event bare metal wire contacted the metal electrical box. (Tr. 183).

Citation No. 7687034 Bench Decision

The following is the edited bench decision for Citation No. 7687034:

> The regulatory standard in section 75.515 requires holes in metal boxes shall be "substantially bushed." It is well settled that the Secretary has the burden of proving the fact of a violation. *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987). Keith Plylar candidly conceded that the opening in the bushing was too large to keep the lead wires within the electrical box. Since approximately one inch of the insulated wire leads protruded from the box and were exposed through the bushing, it cannot be said that the winch starter box was substantially bushed. Consequently, the evidence supports the fact of a section 75.515 violation.

> Turning to the issue of S&S, a significant and substantial determination must be based on the particular facts surrounding the violation. *Lion Mining*, 18 FMSHRC 695, 699 (May 1996). Here the focus is on the likelihood of a confluence of factors that are necessary to create an electrocution hazard. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988). The Secretary does not contend that the wire lead connections inside the electrical box were loose or otherwise exposed to metal. There was only approximately one inch of exposure, and the rubber insulation on the wire leads was intact. Significantly, the evidence does not reflect that the bushing did not remain securely in place in the hole in the electrical box. Thus, there is no evidence that the lead wires could contact the metal opening.
>
> The occurrence of the electrical hazard of exposure of leads to metal requires the unlikely confluence of deterioration of the rubber jackets exposing the lead wires, as well as the displacement of the rubber bushing that is held securely in place by a metal clamp. Although I am cognizant that S&S determinations should be made in the context of the continuing existence of violative conditions in the face of continued mining operations, I am unpersuaded that it is reasonably likely that this confluence of events will occur creating an electrical hazard. Thus, I am unable to conclude that the hazard posed by the condition of the bushing will contribute to an event in which there is an electrocution accident. *See eg.*, *Mathies* 6 FMSHRC at 3-4. Accordingly, the S&S designation in Citation No. 7687034 shall be deleted.
>
> The Secretary has proposed a $1,238.00 civil penalty. **In view of the modification of Citation No. 7687034 to non-S&S, a civil penalty of $600.00 shall be assessed for the subject citation.**

(Tr. 1118-25).

iii. Citation No. 7687036 - Brow

JWR's No. 7 mine is a twin seam (double seam) mine. The seam consists of a lower coal seam known as the Blue Creek seam, and an upper coal seam known as the Mary Lee seam. The lower Blue Creek seam is approximately four feet wide. The smaller Mary Lee seam is approximately one foot in width. The coal in these seams is considered to be soft. The Blue Creek and Mary Lee seams are separated by approximately five feet of rock referred to as "the middleman." (Tr. 291). The middleman rock is somewhat harder in consistency than the rock in the mine roof. In vicinity of the No. 6 section battery charger station where Citation No. 7687036 was issued, the combined height of the striated seam is approximately ten feet. Thus, a rib in the battery charging area is approximately ten feet high consisting of three striations from mine floor to roof - - the Blue Creek seam, the middleman rock, and the Mary Lee seam.

Terpo inspected the No. 6 section battery station on January 25, 2006. Terpo was accompanied by Keith Plylar. Terpo observed that sloughage at the corner of a ten feet high rib had created a corner rib brow. Terpo noted that a battery to be charged was partially located under the brow. Terpo's cap light was the source of illumination for his observations. (Tr. 319). Terpo described the condition in his contemporaneous hand written notes. (Gov. Ex. 7, pp. 14-20). Terpo's notes reflect, in pertinent part:

> "An area of rib - (brow) located on the corner of an entry x-cut . . . was not adequately supported . . . . The mine height in this area is approximately 10 ft. The exposed brow measured 42" at its widest point. . . . The battery was partially located (30") under the rib."

(Gov. Ex. 7 at p. 14, 16).

Terpo's notes do not reflect the distance from the mine floor to the brow. Contrary to JWR's contention that the brow was suspended 4 feet off of the mine floor, Terpo testified the brow was 8 ½ to 9 feet above the mine floor reflecting that a substantial portion of the rib had deteriorated leaving a residual one foot outcrop hanging from the roof. (Tr. 277). However, Terpo's testimony is inconsistent with sloughage of the entire three striations of the seam. In this regard, Terpo described the brow condition as "sloughage . . . underneath the brow where the coal seam is. There is an area that had sloughed off - partially sloughed off. So it allowed that cavity there." (Tr. 200). Thus, Terpo's notes reflect a battery was under the cavity.

The "cavity" caused by the 'partial sloughage' described by Terpo is consistent with JWR's assertion that the brow was suspended approximately 48 inches from the mine floor as a result of sloughage of the Blue Creek seam. In support of its contention, JWR proffered photographs that depict the brow's height and testimony by Parker and Plylar that they took measurements that indicated the subject brow was 44 to 48 inches from the ground. (Resp. E's. 2, 3; Tr. 308, 335).

JWR's roof control plan required ribs to be pinned at intervals of five feet. However, JWR installed additional pins by pinning the ribs three feet on center. (Tr. 323). Terpo testified that he did not see additional roof bolts in the brow. Parker and Plylar testified that two additional rib bolts were installed into the brow in opposite directions. (Tr. 290, 320, 325). These bolts penetrated the middleman rock and Mary Lee seam and were anchored into the mine roof. (Resp. Ex. 1). The bolts were installed with yield tubes that are designed to compress to reveal rib movement due to stress. (Tr. 328). However, Plylar testified that the yield tubes remained intact reflecting that the brow was securely supported. (Tr. 328).

Terpo spoke to Parker about his observations of the brow after he returned to the surface. Terpo learned that the brow had been supported by a wood post that had been dislodged the week before. (Tr. 208). Parker and Plylar opined that the supplemental wooden support was installed in an abundance of caution, although they believed the brow was adequately supported. Both

Parker and Plylar admitted that the wood support was not installed at the time of Terpo's inspection. (Tr. 294, 320-21).

As a result of his observations, Terpo issued Citation No. 7687036, citing an alleged violation of 30 C.F.R. § 75.202(a). This mandatory safety standard requires roof, face and rib areas where persons work or travel to be adequately supported to protect against hazards associated with falls of the roof, face or ribs and coal or rock bursts. Citation No. 7687036 states:

> The corner rib brow of the # 6 section of the battery charging station was not adequately supported where persons have to work or travel. A battery was partially located under the brow and due to the approximate rib height of 10 feet, miners connecting or disconnecting the battery in this area could be struck in the event it were to fall. The corner rib had separated from the roof 5 inches and had fractures on both sides.

(Gov Ex. 6).

Terpo designated the cited condition as S&S because he was concerned about the likelihood of serious injury to individuals working in the battery charging area in the event that the brow fell. Terpo attributed the violation to a moderate degree of negligence. The citation was terminated shortly after it was issued after timbers were reinstalled as supplemental support.

Citation No. 7687036 Bench Decision

The following is the edited bench decision for Citation No. 7687036:

> The threshold issue is the fact of the occurrence of the alleged violation. Section 75.202(a) requires rib areas to be adequately supported to protect against the hazards posed by a rib roll or fall. I credit the testimony of Parker and Plylar that the brow was suspended approximately four feet from the mine floor. This conclusion is supported by Terpo's testimony that the brow created a "cavity" caused by 'partial sloughage.' Terpo's description is consistent with sloughage of the Blue Creek seam that is four feet in width. The testimony and photographs presented by JWR reflecting that the brow was approximately four feet off of the ground outweighs Terpo's inconsistent testimony and equivocal notes on this issue.
>
> I note the uncontradicted testimony of Parker and Plylar that there were a greater number of pins in the rib than required by the roof control plan. They also testified about two additional roof bolts that were installed in the brow through the middleman and Mary Lee seam into the mine roof. Terpo, on the other hand, testified he did not see additional roof bolts in the brow. The area observed by Terpo was illuminated with cap light. Under these circumstances, the flash

photography evidence in Respondent's Exs.1 - 3, that supports the testimony of Parker and Plylar with respect to additional roof bolts, outweighs Terpo's testimony. However, resolving the issue of the height of the brow, and the support measures that were installed, does not resolve the issue of whether the subject rib was adequately supported to protect persons against the hazards of a rib fall as required by section 75.202(a).

In this case, JWR has admitted that additional support was prudent by virtue of the fact that it had installed timbers. Having recognized and installed additional support, JWR assumes the risk of liability for a section 75.202(a) violation if the timbers are dislodged and not reinstalled. Thus, JWR's failure to reinstall the additional support warrants the conclusion that it failed to take the steps required to ensure that miners were protected from the hazards associated with a rib brow fall. Accordingly, the Secretary has satisfied her burden of demonstrating a violation of the cited mandatory standard.

Turning to the issue of significant and substantial, while a brow fall will undoubtedly expose miners to serious or fatal injury, whether the violation was properly designated as S&S is based on whether it was reasonably likely, given the rib and brow support measures in place, that the brow would fall. Pinning the rib three feet on center, in addition to roof bolting the brow through the middleman into the mine roof, significantly mitigated the likelihood of a brow failure. Thus, on balance, the Secretary has not shown that it was reasonably likely that the hazard posed by the failure to reinstall the timbers will result in an event, *i.e.*, a brow fall, that will cause serious injury. *Mathies* 6 FMSHRC at 3-4. Thus, the S&S designation from Citation No. 7687036 shall be deleted.

With respect to negligence, Terpo attributed the degree of JWR's culpability as moderate. The Secretary has proposed a civil penalty of $1,238.00 for Citation No. 7687036. The degree of negligence is an important factor in considering the appropriate civil penalty. Once JWR undertook to further support the brow with timbers it was obliged to ensure that the timbers remained in place. JWR's failure to reinstall the timbers evidences a high degree of negligence that negates any significant reduction in the proposed penalty that would otherwise occur because the violation has been reduced to non-S&S in nature. Accordingly, Citation No. 7687036 shall be modified to reflect the cited condition was a non-S&S violation that was attributable to a high degree of negligence. Consequently, a civil penalty of $1,000.00 shall be assessed for Citation No. 7687036.

(Tr. 1126-37).

iv. Final Disposition of Docket No. SE 2006-222

The Secretary proposed a total civil penalty of $3,314.00 for the three citations in issue in Docket No. SE 2006-222. Based on this decision, a total civil penalty of $2,300.00 shall be assessed for the three subject citations.

Total Proposed Penalty: $3,314.00 Total Assessed Penalty: $2,300.00

b. Docket No. SE 2006-308

i. Citation No. 7687073 - Safeguard

Safeguards are issued pursuant to 30 C.F.R. § 75.1403 to notify mine operators that actions are required to "minimize hazards with respect to transportation of men and materials" at a particular mine site. After a safeguard is issued, 30 C.F.R. § 75.1403-1 requires the mine operator's continued compliance with the terms and conditions of the safeguard.

During an inspection of JWR's No. 7 Mine that occurred several years earlier on February 16, 1995, Inspector John Terpo observed 12 track rails that were stored between the main haulage track 300 feet outby the longwall section tail track. At that time, JWR was engaging in retreat mining. The track rails were stacked in between the track after they were removed as the track entry retreated. Terpo was concerned that the track rails could shift and cause a derailment of the man-trip causing injuries to its miner occupants. As a result of his observations, Terpo issued Safeguard No. 4476297 on February 16, 1995, requiring JWR to remove the 12 track rails from the track bed. (Gov. Ex. 13).

On March 20, 2006, eleven years after the issuance of Safeguard No. 4476297, Terpo noted two track rails located on the metal cross ties in between the track in the No. 3 Section. The rails were located one crosscut outby the end of the track. Unlike the earlier safeguard that was issued during retreat mining, in this case JWR was advancing the track entry. Plylar testified, without contradiction, that the track rails were placed between the track at the end of the shift in preparation for advancement of the track by personnel on the following shift. (Tr. 412, 423). Once again, Terpo was concerned that the rails in between the track could cause a derailment that would result in serious injury. Consequently, on March 20, 2006, Terpo issued 104(a) Citation No. 7687073 citing an S&S violation of Safeguard No. 4476297. (Gov. Ex. 12).

Citation No. 7687073 was abated after Terpo required JWR to remove the rails and place them along the track entry rib. I note, parenthetically, that the safeguard standard in 30 C.F.R. § 75.1403-8 requires clearance space on all track haulage roads to be kept free of loose rock, supplies, and other loose materials.

Citation No. 7687073 Bench Decision

The following is the edited bench decision for Citation No. 7687073
As Inspector Terpo testified, safeguards are issued to protect miners from transportation hazards, that are unique to a particular mine, that are not otherwise

addressed in the Secretary's mandatory safety standards. Citation No. 7687073 alleges an S&S violation of the safeguard issued on February 16, 1995. That safeguard was issued after JWR had stored 12 track rails in between the track during retreat mining. The Secretary proposes a civil penalty of $524.00 for Citation No. 7687073.

The earlier safeguard is distinguishable from the underlying facts in Citation No. 7687073. There were only two track rails between the track rather than the 12 rails cited in the underlying safeguard. This is significant because the two rails, located near the end of the track, were placed there in preparation for installation during the following shift as the track entry progressed. Thus, the cited rails were placed between the track for installation rather than for the purpose of storage.

It is significant that the Secretary's regulations recognize that the necessity of equipment in working sections is a relevant consideration in determining the applicability of her safety requirements. In this regard, section 75.380, 30 C.F.R. § 75.380, governing escapeways ordinarily requires escapeways to be maintained at least six feet wide. However, in instances where there is "mobile equipment near working sections, and other equipment essential to the ongoing operation of longwall sections," the Secretary permits a narrower escapeway width, as long as the width is sufficient to allow miners, including disabled persons, to escape quickly in an emergency. 30 C.F.R. § 75.380(d)(4)(iv).

Thus, obstructions that might otherwise constitute a safety violation may be permissible if they are limited in scope and occur during the normal mining cycle. Here, the two rails were placed near the end of the track in contemplation of installation, rather than for the purpose of storage. Consequently, the safeguard that, in effect, prohibited storage of rails between track, was not violated by the facts in this case.

In reaching this conclusion I am not trivializing the hazard posed by long-term storage of rails in track beds. The propriety of the short term placement of the rails is limited to the facts in this case. I urge JWR to note their intent to advance the track during the next shift in pre-shift reports if these circumstances should reoccur. **Accordingly, Citation No. 7687073 shall be vacated**.

(Tr. 1137-45).

ii. Citation No. 7687054 - Seal

Citation No. 7687054 concerns whether a cementatious ventilation control seal was being maintained so that it achieved its intended purpose. As a general matter, seals separate abandoned areas of a mine from active workings. Properly maintained seals serve two purposes.

First, they separate unventilated, methane contaminated air in abandoned areas from active areas of the mine. When barometric pressure is low the direction of air infiltration in a mine is from abandoned areas into active areas. Although it is not abnormal for seals that maintain their structural integrity to allow small concentrations of contaminated air to infiltrate into active workings based on barometric pressure, seals must be maintained to prevent leakage of methane into active mine areas through cracks or other structural deficiencies. The Secretary contends the cited seal constituted a violation of her regulatory standard because it was leaking.

The second purpose of a seal is to withstand the lateral force of an explosion to prevent the escape of gases from abandoned areas into active areas. The Secretary does not contend that the cited seal was structurally deficient with respect to its ability to withstand lateral forces.

Cementatious seals are constructed by pumping a cementatious foam material into wood forms. The dimensions of the wood forms are the length and height of the entry to be sealed. The depth of the wood form is usually about four feet. To provide additional infiltration protection, curtains are attached to the wood forms in front of the faces of the seals on both the active and abandoned sides of the form.

Prior to entering the No. 7 Mine on February 22, 2006, Terpo received a complaint from a miner that there were high levels of methane concentrations at the northeast intake seals. The miner was particularly concerned when there was a low pressure system. Since there was a low pressure weather system that day, Terpo decided to inspect the seals.

The No. 43 cementatious seal located in the main right intake air course was approximately 20 feet long, 7 feet high and 4 feet in depth. There was approximately 30 thousand cubic feet per minute coursing the right intake air entry. (Tr. 701). As is common in most mines, check curtains were installed diagonally from the main right intake ribs to the face of the seals, including the No. 43 seal, to ventilate the seals by diverting the 30,000 CFM intake air along the face of the seals. Thus, the check curtains serve to dilute any contaminated air that infiltrates through the seals. (Resp. Ex. 4; Tr. 673-78).

As Terpo approached the No. 43 seal he could hear the sound of blowing air. At a distance of approximately ten feet from the seal, Terpo obtained methane monitor reading concentrations ranging from two to four percent. The explosive range of methane begins at fifteen percent.

At the seal, Terpo noted an opening in the curtain in front of the face of the seal that was approximately 9 inches long by 2 inches high. The opening was located 7 inches from the roof and 24 inches from the right side rib. Terpo inserted his hand in the opening in the curtain and determined there was an indentation, or hole, in the cementatious material that was approximately 6 inches deep. Terpo agreed that the remaining depth behind this 6 inch cavity was 42 inches (3½ feet). (Tr. 502). He also admitted that it was possible that this 42 inch remaining depth was intact and solid. (Tr 609-10). Terpo testified that he was afraid that sticking his hand further into the hole may have resulted in additional unconsolidated material

falling and trapping his arm. (Tr. 503). Terpo did not use a probe to determine the nature and extent of the indentation behind the curtain.

Terpo obtained two bottle samples of air. The first sample (# K9220) was taken at an arms length distance downwind from the seal. Terpo estimated this bottle sample was taken approximately two feet from the opening. Laboratory analysis revealed a methane concentration of 9.68 percent and an oxygen concentration of 15.70 percent. Terpo obtained another bottle sample (# K9290) approximately 6 feet downwind from the seal. This bottle sample revealed concentration levels of 1.85 percent methane and 19.61 percent oxygen. (Gov. Ex 10).

Terpo testified that oxygen levels of less than 19.5 percent are unsafe. However, Terpo conceded that the atmospheric conditions at the No. 43 seal did not require any safety precautions such as an oxygen mask. In other words, with the exception of inhaling the contaminated air directly from the hole in the curtain, there was no respiratory hazard.

As a result of his observations, Terpo issued Citation No. 7687054 alleging a violation of the mandatory safety standard in 30 C.F.R. § 75.333(h). This mandatory standard requires seals to be maintained in order "to serve the purpose for which they were built." Terpo designated the cited condition as S&S because an examiner travels this area on a weekly basis. In addition, Terpo was concerned that the leakage, although substantially diluted with intake air, flows into the main right intake air course that ultimately is directed to track entries and working sections where there are ignition sources. Terpo attributed the cited violation to a moderate degree of negligence.

The citation initially was terminated by Terpo approximately five hours after it was issued after "a polyurethane foam (RHH - Vers Foam) was applied to the hole filling the hole keeping air from traveling through the seal." (Gov. Ex. 8, p.1). Terpo withdrew his termination of the citation two days later on February 24, 2006, because "polyurethane foam (RHH-VERSA FOAM) has been determined not to be an approved means to correct the problem that exists on the No. 43 seal." (Gov. Ex. 8, p.3). The citation was ultimately terminated on March 1, 2006, after a new cementatious seal was installed in front of the existing seal. (Gov. Ex., p. 5; Tr. 637).

JWR supervisor Richard Parker accompanied Terpo during his inspection of the No. 43 seal. Parker stated that some material fell out of the hole when Terpo lifted the flap on the curtain. Parker related that, upon lifting the flap, Terpo stated "the seal wasn't doing what its supposed to." (Tr. 721-22). Parker testified that Terpo began "digging at the material, scraping it." (Tr. 721-22). Parker believed Terpo created the indentation by scraping his fingers on the face of the seal. (Tr. 721).

Ty Olsen, JWR's Outby Area Manager at the No. 7 Mine, described the cementatious seal construction process. Olsen described how yellow curtains are attached to the active and abandoned sides of the forms. The curtains remain in place after the seal is poured and the cement cures. Olsen stated there are approximately 100 seals in the No. 7 Mine, the majority of which are cementatious seals. Olsen reported that there have been no curing problems with seals.

Olsen stated the method of determining if a seal is structurally defective is to probe the seal with a metal rod.

Olsen testified that, although he did not accompany Terpo during his inspection, he observed the No. 43 seal immediately after it was cited. Olsen agreed there was a 9 inch by 2 inch cut in the outer curtain through which air flow could be felt. Olsen described the outer curtain as a plastic perimeter or barrier that was essentially air tight. He also described the surface of the seal directly behind the curtain hole as dry and granular in nature. Olsen believed the indentation found by Terpo was the result of probing that had been done by Terpo, and/or others, who had attempted to discover the source of the leak. Olsen believed the air flow was coming from leakage along the right hand rib line that was concentrated between the curtain and the seal and escaping through the opening in the curtain.

Olsen attempted to abate the cited violation by applying polyurethane foam on the right rib line and on strata several feet from the seal. (Tr. 638). He also applied polyurethane foam to close the hole in the curtain. However, as noted above, the application of polyurethane was deemed to be inadequate and a new cementatious seal ultimately was installed in front of the existing seal.

On February 28, 2006, four days after the issuance of the citation, Danny Hagood, a member of JWR's Six Sigma Department's engineering staff, probed the indentation behind the opening in the curtain with a straightened cable hanger. Hagood found an area approximately ½ inch in diameter located about six inches from the left corner of the curtain flap that was "somewhat softer than the surrounding material." (Resp. 6).

Citation No. 7687054 Bench Decision

The following is the edited bench decision for Citation No. 7687054:

Citation No. 7687054 alleges a violation of section 75.333(h) that requires seals to be maintained to achieve their intended purpose - - to prevent leakage from abandoned areas. A civil penalty of $1,238.00 is proposed for this citation.

As a threshold matter, leakage must be distinguished from normal migration of air flow due to barometric pressure. The Secretary maintains the condition of the No. 43 seal did not prevent leakage of contaminated air from inactive into active workings. The evidence undeniably reflects that the air flow cited by Terpo was attributable leakage. I reach this conclusion based on the nature and extent of the air flow described by Terpo, as well as the testimony of Olsen and Parker.

Olsen credibly testified that the 2 inch by 9 inch hole in the curtain, through which contaminated air leaked, was abnormal. Thus, it obvious that the condition of the seal supports the conclusion that it was not being maintained to enable it to achieve its intended purpose, *i.e.*, to keep leakage from penetrating into active workings. **Consequently, the evidence supports the fact of the violation of section 75.333(h) and the moderate degree of negligence attributed to JWR by the Secretary**.

Resolving whether the condition of the seal constituted a significant and substantial violation must be based on the particular facts in this matter. Thus, the source of the leakage must be identified to determine if the seal was significantly compromised. The evidence does not support the Secretary's case that the leakage was due to a defect in the face of the seal that was located directly behind the flap in the curtain. The indentation was not probed by Terpo. Moreover, it is doubtful that Terpo would have initially terminated the citation based on the application of polyurethane foam if he believed there was a four feet deep hole through the seal, or, if he believed the seal was so compromised that his arm could become entrapped.

Rather, the evidence reflects that the only connection between the hole in the curtain and the indentation described by Terpo is that the irregularity in the face of the seal occurred after manual probing to determine the source of the leakage. The credible evidence reflects the source of the contaminated air flow was cracking in the vicinity of the right ribline, that was further concentrated between the face of the seal and the curtain, and ultimately released through the hole in the curtain. This contaminated air was immediately diluted by the check curtains that swept 30,000 CFM of intake air across the face of the seal. Viewing the facts in their entirety, the nature and extent of the leakage, the immediate dilution by the check curtains, and the absence of ignition sources in the immediate vicinity of

the seal, do not support the Secretary's view that a suffocation or ignition event is reasonably likely. **Accordingly, the S&S designation in Citation No. 7687054 shall be deleted**. **In view of the modification of the citation to reflect a non-S&S violation, a civil penalty of $850.00 shall be assessed for Citation No. 7687054**.

(Tr.1149 -61).

iii. Settlement Terms in Docket No. SE 2006-308

The Secretary initially proposed a civil penalty of $963.00 for Citation No. 7687085, the remaining citation in Docket No. SE 2006-308. The parties have agreed that JWR shall pay a reduced civil penalty of $500.00 for this citation. The terms of the parties' settlement are approved.

iv. Final Disposition of Docket No. SE 2006-308

The Secretary proposed a total civil penalty of $2,725.00 for the three citations in issue in Docket No. SE 2006-308. Based on the disposition of Citation Nos. 7687073 and 7687054 in this decision, and the settlement of Citation No. 7687085, a total civil penalty of $1,350.00 shall be assessed for the three subject citations.

Total Proposed Penalty: $2,725.00 Total Assessed Penalty: $1,350.00

c. Docket No. SE 2006-40

i. Citation No. 7686313 - August 31, 2005 Blast

Section 103(g) of the Mine Act, 30 U.S.C. § 813(g), confers on miners the right to obtain an immediate inspection by notifying the Secretary that they have reason to believe that an imminent danger exists, or that a violation of a mandatory safety standard has occurred. An anonymous complaint (# 05-176) was received on September 1, 2005, in MSHA's District 11 Field Office that JWR failed to warn four miners who were in a blast zone prior to the detonation of a blast that occurred at the No. 5 Mine at approximately 6:30 p.m. on the evening of August 31, 2005. Two additional complaints (# 05-178 and 05-181) were received on September 2, 2005, that blasting occurred on consecutive days (Wednesday, August 31 and Thursday, September 1, 2005) at the No. 5 Mine without warning miners who were working nearby. (Gov. Ex. 19).

MSHA Inspector Steven Womack was dispatched to the No. 5 Mine on the afternoon of Friday, September 2, 2005, to investigate Complaint ID 05-176 and 05-178. Womack was not aware that a third complaint (05-181) had been received. Upon arriving at the mine, Womack met with mine manger Greg Franklin and Ricky Parker, who was then an hourly safety committeeman. Womack informed them that 103(g) complaints had been received concerning

blasts that had occurred on the previous two days. Franklin and Parker identified the miners that were on site at the time of those blasts.

Womack went underground to examine the blast area. Womack noted that the roof conditions were "horrible" and that many of the entries had roof falls. (Tr. 864). Womack observed that additional support, consisting of wooden cribs and metal cross beams, was installed against the belt entry roof. (Tr. 864-66). After observing the vicinity of the blasts, Womack interviewed eight miners who were present during the blasts who were also working on the afternoon of September 2, 2005.

Womack determined that both blasts occurred in the No. 1 East Rehabilitation area at survey station 1143 in a crosscut between the track and belt entries where future seal E30 was to be installed. (Gov. Exs. 28A, 28B). The blasts contained approximately 50 to 70 sticks of dynamite. (Tr. 872). Although both blasts occurred in the vicinity of the future E30 seal, Parker testified that the Wednesday blast was in the direction of the track entry and the Thursday blast was in the direction of the crosscut. (Gov. Ex. 29; Tr. 926).

Terry Mabe was the shift foreman in charge of the Wednesday, August 31, 2005, shot. Stanley Downs was the shot blaster. At the time of the Wednesday blast, there were three hourly employees and one supervisor that were located in close proximity to the blast. The supervisor was foreman Jerry Dixon. The hourly employees were Jeremy Beavers, Derrick Burger and Ernie Breasscale. Terry Mabe told Womack that, at the time of the Wednesday blast, he sent Ralph Sadler to notify everyone that the blast was about to occur. Mabe stated Sadler informed him that the area was clear.

Jerry Dixon initially informed Womack on September 2, 2005, that, on Wednesday, he, Beavers, Burger and Breasscale were working in the crosscut near the belt entry clearing rock from the vicinity of the E24 seal. (Gov. Exs. 28A, 28B, 29). The E24 seal is located, one entry outby, in the same crosscut as the blast site at the future E30 seal. (Gov. Ex 29).

Beavers told Womack that neither he nor his fellow crewmen were warned prior to the August 31 blast. Beavers stated his supervisor, Jerry Dixon, also was unaware that the blast was about to occur. Beavers related that he was startled when the roof shook and flaked. Beavers confronted Terry Mabe after the blast. Mabe told Beavers he was not to blame because he was unaware anyone was working in the area.

Both Breasscale and Burger told Womack they were working at the No. 24 seal during the blast. Breasscale stated dust, flaky roof material and the smell of explosives came into their work area. Breasscale stated miners usually were warned to evacuate blast areas prior to blasting.

Burger stated he was shaken by the blast. He wanted to leave the area, but Jerry Dixon required him to stay and continue working. Burger later confronted Mabe about the blast. Mabe told Burger that Supervisor Randy Dixon (no relation to Jerry Dixon) had notified him that

everyone was accounted for and it was safe to proceed with the shot. Randy Dixon, who was present, told Burger, if anyone was to blame, he was responsible because he thought all of the beltmen had been accounted for. Specifically, Randy Dixon told Womack he mistakenly believed the miners were working at the belt head, approximately 840 feet further outby in the belt entry, a safe distance away from the blast. (Tr. 854-58, Gov. Exs. 28A, 28B).

Since the area where Jerry Dixon and his crew were working was in the same crosscut as the Wednesday blast, Womack believed the men, situated approximately 125 feet in a direct line from the blast site, were exposed to fly rock. (Tr. 873; Gov. Ex. 23, p.6, Gov. Ex. 29). Womack determined that, with the exception of those four men, all miners were located at a safe distance outby the blast area in an area known as "the dinner hole." (Tr. 874-76; Gov. Exs. 28A, 28B). The "dinner hole" is an area that provides protection to miners because of its distance from the blast site and because it is located behind a solid block of unmined coal. (Tr. 878-80).

Based on his findings, Womack issued 104(d)(2) Order No. 7686312 citing a violation of the mandatory standard in 30 C.F.R. § 75.1325(c)(1). (Gov. Ex. 20). This mandatory standard requires all persons to withdraw from a blast area, and each adjacent working place where a hazard would be created by the blast, to an area that is around at least one corner from the blast area. In other words, this standard clearly prohibits miners from being in the direct line of a blast.

After Womack's initial interviews, JWR advised Womack that the exact location of the miners at the time of the Wednesday blast was in doubt. Consequently, Womack re-interviewed Jerry Dixon, Beavers, Breasscale and Burger on September 8, 2005. The subsequent interviews continued to reflect that the miners were not notified prior to the blast. However, the miners recanted their prior statements with regard to their exposure to the blast. Dixon and his crew now indicated they were around the corner in the belt entry under roof beams, rather than being directly exposed in the crosscut. Consequently, Womack superceded 104(d)(2) Order No. 7686312 with 104(d) (2) Order No. 7686313 citing a violation of the safety standard in 30 C.F.R. § 75.1325(c)(2) instead of a violation of 30 C.F.R. § 75.1325(c)(1). Section 75.1325(c)(2) requires a qualified person to determine that all persons are a safe distance from the blasting area before blasting.

Order No. 7686313 states:

> Based upon information received during a 103(g) investigation (Complaint ID 05-176 and 05- 178) it has been determined that the qualified person did not ascertain that all persons were a safe distance from the blasting area.
>
> On the 1 East Rehabilitation Area on 8/31/05 at approximately 6:30 p.m. a shot was fired in the crosscut at survey station 1143 (Track Entry) where future seal E29 was to be erected. In the adjacent entry (Belt Entry) directly across from the blast area at survey station 1175 three hourly and one salary worker were performing clean-up on the beltline. The 4 workers were not aware that a shot

was to take place and were not notified. The only barrier between the workers and the blast was gob placed in the crosscut. The foreman in charge at the blast area did not make a diligent effort to see that all persons were in a safe area away from the blast. The workers encountered smoke and dust from the blast and small pieces of falling material from the mine roof.

The mine operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard.

(Gov. Ex. 21).[2] Although the negligence attributable to JWR initially was characterized as high supporting an unwarrantable failure, Womack lowered the degree of negligence to moderate and modified Order No. 7686313 to a 104(a) citation on September 15, 2005. The removal of the unwarrantable failure was based on the new information that the miners were situated in the belt entry rather than being directly exposed to flyrock in the crosscut.

Citation No. 7686313 Bench Decision

The following is the edited version of the bench decision for Citation No. 7686313:

Although the Secretary initially charged JWR with a violation of the safety standard in section 75.1325(c)(1) that requires all persons to leave a blast area and to seek shelter in an area that is around *at least* one corner from the blast area, she subsequently superceded the citation by modifying the cited standard to a section 75.1325(c)(2) violation. This safety standard requires a qualified person to determine that all persons are a safe distance from the blasting area before blasting. A civil penalty of $614.00 for Citation No. 7686313 is proposed.

As a threshold matter, I note that both section 75.1325(c)(1) and 75.1325(c)(2) require all persons to be evacuated from the blast area prior to detonation. Section 75.1325(c)(1) requires, *at a minimum*, that miners are at least around one corner from the blast area. If miners are situated around a corner, but the corner is in proximity to the blast site, section 75.1325(c)(1) may still be violated if miners have not retreated to a safe location. Thus, the dispositive issue is whether foreman Jerry Dixon and his crew were at a safe distance from the blast area when they were working around a corner in the belt entry, approximately 125 feet away from the August 31 blast.

[2] The mine map erroneously labels the site of the blast at the E29 rather than the E30 seal. (Gov. Exs. 28A, 28B). Consequently, Citation No. 7686313 identified the blast area as future seal E29 based on Womack's reliance on the mine map. The blast area was at the future location of the E30 seal. (Tr. 819).

JWR does not dispute that it failed to warn the miners prior to the August 31 shot. The falling roof material, the fright of the miners, and the admissions by JWR management personnel, support the conclusion that the miners were not evacuated from the blast area.

Hearsay is admissible in this proceeding. 29 C.F.R. 2700.63(a); *REB Enterprises, Inc.*, 20 FMSHRC 203, 206 (Mar. 1998); *Mid-Continent Resources, Inc.*, 6 FMSHRC 1132, 1135 (May 1984). Beavers, Breasscale and Burger all recounted to Womack how they were exposed to dust, flaking roof material and the odor of explosives. Both Beavers and Burger related that they were startled and shaken by the unanticipated blast. In fact, Burger was so distraught that he requested to be relieved of duty. One can only imagine the shock to the nervous system caused by an unexpected nearby explosive blast. The fact that supplemental roof support was installed in the belt entry does not negate the fact that the miners were not warned and evacuated prior to the blast.

JWR now claims the miners were not in the blast area when they were working in the belt entry because they were protected from the direct line of the blast. JWR's assertion is undermined by several of its admissions to the contrary. An admission is a statement that is offered against a party that discredits, and is inconsistent with, its present claim in an adjudicative proceeding. 2 *McCormick on Evidence* § 254 at 179 (6th ed. 2006). Admissions have probative value and are received as substantive evidence of the facts admitted. *Id*. at 179, 180.

Terry Mabe, the shift foreman in charge of the August 31 blast, admitted that he was unaware of anyone in the vicinity of the belt entry because he had been assured by Sadler that the area was clear. More importantly, foreman Randy Dixon, who apparently authorized Mabe to proceed with the blast, admitted he was responsible because he thought all of the beltmen had been accounted for. Section 75.1325(c)(2) requires all persons to be evacuated from the blast area prior to detonation. Thus, both Mabe and Randy Dixon admitted that they failed to ensure that the blast area was clear of personnel. JWR has offered no evidence to rebut the admissions made by its management personnel. **Accordingly, the evidence supports the fact of occurrence of a section 75.1325(c)(2) violation**.

With regard to S&S, a violation is properly designated as significant and substantial if there is a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *National Gypsum*, 3 FMSHRC at 825; *Mathies Coal Co.*, *supra*. It is difficult to imagine how the failure to clear a blast area could be deemed a non-significant and substantial violation, particularly in this case when the blast was unexpected. In other words, the fact that the miners were in the belt entry was fortuitous because, unaware of the imminent explosion, they could have wandered into a

direct line of the blast at any moment. Moreover, the shock, alone, could cause serious physical trauma including cardiac arrest. **Consequently, the violation was properly designated as S&S.**

Finally, although initially attributing the violation to a high degree of negligence, the citation ultimately was modified to reflect a moderate degree of negligence. While I am inclined to believe the negligence was high because foreman Jerry Dixon should have been aware of the impending blast that posed a significant safety hazard to him and his crew, I will not disturb the Secretary's assertion of moderate negligence. *Midwest Material Co.*, 19 FMSHRC 30, 35 (Jan. 1997) (supervisors are held to a higher standard of care). Consequently, the civil penalty proposed by the Secretary for Citation No. 7686313 shall be sustained. **Thus, a $614.00 civil penalty shall be assessed for Citation No. 7686313**.

(Tr. 1162-72).

ii. Final Disposition of Docket No. SE 2006-40

Docket No. SE 2006-40 is a single citation case. The Secretary proposed a civil penalty of $614.00 for Citation No. 7686313 which JWR shall be ordered to pay.

Total Proposed Penalty: $614.00 Total Assessed Penalty: $614.00

d. Docket No. SE 2006-123

i. Order No. 7686314 - September 1, 2005 Blast

A second blast occurred in the crosscut at the future E30 seal during the day shift at approximately 3:30 p.m. on Thursday, September 1, 2005, just as the evening shift was arriving for duty. The day shift foreman was Phillip Miles. The day shift shot fireman was Ronnie Hyche. The evening shift foreman was Terry Mabe. Although the evening crew had arrived on the section, the night shift miners were not advised that the shot was about to take place. Jerry Dixon had not yet informed Miles about the incident concerning his crew's exposure in the blast area the previous evening.

As the night shift arrived, Mabe and his crew gathered in the vicinity of the dinner hole that was approximately 1,000 feet outby the blast site. Mabe left the dinner hole area and walked to the blast site where Miles and Hyche were preparing the explosives.

Jerry Dixon was unaware that the blast was about to occur. At approximately 3:30 p.m., shortly before Mabe returned to the dinner hole area from the blast site, Jerry Dixon sent night shift miners Jeremy Beavers and Paul Aaron to the belt entry in the vicinity of the No. 22 seal to examine the roof conditions where the belt was about to be installed. (Gov. E's. 28B, 29, p.3).

As Beavers and Aaron passed the dinner hole at the intersection of spad 91, they encountered a group of miners. However, the miners did not mention that a blast was about to occur.

Mabe and Miles traveled back to the dinner hole area and warned everyone that the blast was about to occur. Before blasting, Mabe assigned guards in the crosscuts that intersected the track entry at Spad Nos. 191 and 194 to ensure that the blast area remained unoccupied. (Tr. 1068, 1082, 1086; Gov. E's. 28A, 28B). The guards prevented persons from traveling to the belt entry. (Tr. 1069-71, 1077-78).

Mabe also assigned Nathan Mason to guard the feeder area to prevent access to the belt entry. Mabe sent Ralph Sadler to the belt head to make certain that the belt entry had been evacuated. Sadler apparently could not see Beaver and Aaron's cap lights inby because of the downward slope of the belt entry. (Tr. 1052-53). Sadler reported that the area was clear.

The No. 22 seal is located at a crosscut of the belt entry that is approximately 219 feet outby from the crosscut with the future E30 seal. The center of the belt entry where it intersects with the crosscut containing the future E30 seal is approximately 120 feet from the blast site. (Gov. Ex. 29, p.3). At approximately 3:30 p.m., Beavers and Aaron felt the force of the blast when they were in the belt entry near the 22 seal.

Charles Dickey has been a blasting supervisor and manager since 1985. (Tr. 1067). On Thursday, September 1, 2005, Dickey was JWR's section manager. He was with Miles and Hyche when they prepared the Thursday shot. Dickey conceded that, by allowing Beavers and Aaron to travel the belt entry, they were not kept outby the guarded perimeter that had been established as the area of safety. (Tr. 1070-72, 1077-78, 1081-86). Similarly, Ricky Parker admitted more could have been done on September 1, 2005, to make sure the blast area was cleared before the shot. (Tr. 1053).

As a result of his investigation Womack issued 104(d)(2) Order No. 7686314 citing a significant and substantial violation of the mandatory safety standard in 30 C.F.R. § 75.1325(c)(2) that requires a qualified person to determine that all persons are a safe distance from the blasting area before blasting. The Order states:

> Based upon information receipt during a 103G investigation (Complaint ID 05-176 and 05-178) it has been determined that the qualified person did not ascertain that all persons were a safe distance from the blasting area.
>
> On the 1 East Rehabilitation Area on 9/1/2005 at approximately 3:30 P.M. a shot was fired in the crosscut at survey station 1143 where future seal E29 is to be erected and from the heading proceeding inby toward survey station 1144 (Two Shots). The Day Shift Foreman and the Evening Shift Foreman were both present and directing the work force at the blast location. Two evening shift workers entered into the adjacent belt entry and were proceeding toward the blast area near survey station 1372 when the shot was set off. The workers were not notified that

a blast was about to take place and no one was station[ed] outby the blast area as is normal practice to restrict persons from entering the area.

On the previous evening (8/31/05) a shot was set off with workers in close proximity to the same blast area without warning and the same Evening Shift foreman present at the blast location and in charge of the work force. The foreman was notified of the 8/31/05 incident by the workers involved and took no action to prevent a re-occurrence. The previous occurrence has been cited under this event number.

The mine operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard.

(Gov. Ex. 22).[3] Womack characterized the violation as S&S because of the serious hazard created by exposing persons to a blast zone. He attributed the violation to an unwarrantable failure because of JWR's repeated failure to keep all persons at a safe distance from the blasting area before blasting.

Order No. 7686314 Bench Decision

The edited version of the bench decision for Order No. 7686314 follows:

104(d)(2) Order No. 7686314 cites a violation of section 75.1325(c)(2). This safety standard requires a qualified person to determine that all persons are a safe distance from the blasting area before blasting. The Secretary proposes a civil penalty of $4,100.00 for Order No. 7686314.

The threshold question is whether Beavers and Aaron were kept a safe distance from the blasting area. Once again we are presented with the concept of admissions. Admissions are words or *acts* of a party that are offered as evidence by the opposing party. 2 *McCormick on Evidence, supra,* § 254 at 178. Admissions can be expressed as statements. *Id*. There are also admissions of conduct. *Id*. at 179. As previously noted, admissions are received as substantive evidence of the facts admitted. *Id*. at 180.

JWR has admitted that Beavers and Aaron were not kept a safe distance from the blast because they were permitted to travel in an area that was supposed to be guarded to prevent entry prior to the blast. Although JWR's conduct is an admission that the belt entry at the No. 22 seal was an unsafe area, JWR asserts

[3] As noted in fn. 2, *supra*, although Order No. 7686314 identified the blast area as having occurred at seal E29, the correct location was in the vicinity of future seal E30. (Tr. 819).

that the location of Beavers and Aaron was not unsafe because they were around a corner and approximately 220 feet from the crosscut that was the site of the explosion. Once again, this assertion is unavailing as their location was fortuitous in that their unawareness of the imminent explosion could have led them into a direct path of flyrock. Finally, both Parker and Dickey have conceded that these miners were in a prohibited location. Accordingly, the evidence conclusively establishes a violation of the cited standard as Mabe and Miles failed to determine that all persons were at a safe distance from the blast on September 1, 2005.

The issue of significant and substantial is self-evident. Exposure to post-blast roof falls and flyrock resulting in serious injury or death is a likely possibility when blast areas are not cleared.

With regard to whether aggravated or unjustifiable conduct occurred as a basis for an unwarrantable failure, the Commission has determined that relevant factors are: whether the mine operator is aware of the violation; whether it has been placed on notice that greater efforts for compliance are necessary; and whether the violation poses a high degree of danger. *Virginia Slate Company,* 24FMSHRC 507, 512-13 (June 2002) (citations omitted). All of these factors exist in the current case. Both Jerry Dixon and Terry Mabe were aware of the incident on the previous evening, yet they allowed it to reoccur. As a supervisor directing the location and activities of subordinates, Jerry Dixon's repeated failure to know that blasts were scheduled to occur is inexcusable. There is no evidence that any additional measures were taken after the August 31 incident to ensure that miners were kept a safe distance from future blasts. As noted, the high degree of danger posed by this repeated failure is obvious. Accordingly, the Secretary has shown that this violation is attributable to unwarrantable conduct.

The Secretary concluded that JWR's conduct constituted high negligence. Ensuring that blast zones remain free of personnel is not a trivial pursuit. Although the August 31 incident could be properly characterized as conduct evidencing a moderate or high degree of negligence, the same cannot be said when the behavior repeats itself the following day. Rather, JWR's September 1 failure to effectively ensure that its personnel were prevented from entering blast zones constitutes a reckless disregard of the serious hazards associated with the use of explosives.

The Commission has noted that the *de novo* assessment of civil penalties does not require "that equal weight must be assigned to each of the penalty assessment criteria." *Thunder Basin Coal Co.*, 19 FMSHRC 1503 (Sept. 1997). Rather, the judge must qualitatively analyze each of the penalty criteria to determine the appropriate civil penalty to be assessed. *Cantera Green*, 22 FMSHRC 616, 625-26 (May 2000). **JWR's reckless disregard warrants a civil penalty that is**

higher than the Secretary's initial proposal. Accordingly, the unwarrantable failure in 104(d)(2) Order No. 7686314 shall be affirmed and JWR shall pay a civil penalty of $5,500.00 for the cited violation.

(Tr. 1172-77).

ii. Settlement Terms in Docket No. SE 2006-123

The Secretary proposed a civil penalty of $11,225.00 for the remaining 12 citations in issue in Docket No. SE 2006-123. The parties have agreed that JWR will pay a reduced civil penalty of $7,764.00 in satisfaction of the 12 citations. The reduction in proposed penalty is based on a reduction in the gravity of the cited violative conditions.

I have considered the representations and documentation submitted in support of the parties' settlement agreement and I conclude that the proffered agreement is appropriate under the criteria set forth in Section 110(i) of the Mine Act. Accordingly, the parties' settlement terms shall be approved.

iii. Final Disposition of Docket No. SE 2006-123

Total Proposed Penalty: $15,325.00 **Total Assessed Penalty: $13,264.00**

e. Docket No. SE 2006-221

i. Settlement Terms in Docket No. SE 2006-221

The Secretary proposed a civil penalty of $1,125.00 for the three citations in issue in Docket No. SE 2006-221. The parties have agreed that JWR will pay a reduced civil penalty of $370.00 in satisfaction of the three citations. The settlement terms include deleting the significant and substantial designation from Citation Nos. 7687171 and 7687200.

I have considered the representations and documentation submitted in support of the parties' settlement agreement and I conclude that the proffered agreement is appropriate under the criteria set forth in Section 110(i) of the Mine Act. Accordingly, the parties' settlement terms shall be approved.

ii. Final Disposition of Docket No. SE 2006-221

Total Proposed Penalty: $1,125.00 **Total Assessed Penalty: $370.00**

f. Docket No. SE 2006-187

i. Settlement Terms in Docket No. SE 2006-187

The Secretary proposed a civil penalty of $1,423.00 for the three citations in issue in Docket No. SE 2006-187. The parties have agreed that JWR will pay a reduced civil penalty of $690.00 in satisfaction of the three citations. The settlement terms include deleting the significant and substantial designation from Citation No. 7687571.

I have considered the representations and documentation submitted in support of the parties' settlement agreement and I conclude that the proffered agreement is appropriate under the criteria set forth in Section 110(i) of the Mine Act. Accordingly, the parties' settlement terms shall be approved.

ii. Final Disposition of Docket No. SE 2006-187

Total Proposed Penalty: $1,423.00 **Total Assessed Penalty: $690.00**

g. Docket No. SE 2007-77

i. Settlement Terms in Docket No. SE 2007-77

The Secretary proposed a civil penalty of $2,581.00 for the five citations in issue in Docket No. SE 2007-77. The parties have agreed that JWR will pay a reduced civil penalty of $905.00 in satisfaction of the five citations. The settlement terms include deleting the significant and substantial designation from Citation Nos. 7687869 and 7687877.

I have considered the representations and documentation submitted in support of the parties' settlement agreement and I conclude that the proffered agreement is appropriate under the criteria set forth in Section 110(i) of the Mine Act. Accordingly, the parties' settlement terms shall be approved.

ii. Final Disposition of Docket No. SE 2007-77

Total Proposed Penalty: $2,581.00 **Total Assessed Penalty: $905.00**

h. Docket No. SE 2007-117

i. Settlement Terms in Docket No. SE 2007-117

The Secretary proposed a civil penalty of $1,710.00 for the two citations in issue in Docket No. SE 2007-117. The parties have agreed that JWR will pay a reduced civil penalty of $850.00 in satisfaction of the two citations. The reduction in proposed penalty is based on a reduction in the gravity associated with the cited violative conditions.

I have considered the representations and documentation submitted in support of the parties' settlement agreement and I conclude that the proffered agreement is appropriate under the criteria set forth in Section 110(i) of the Mine Act. Accordingly, the parties' settlement terms shall be approved.

ii. Final Disposition of Docket No. SE 2007-117

Total Proposed Penalty: $1,710.00 **Total Assessed Penalty: $850.00**

ORDER

Consistent with this Decision, **IT IS ORDERED** that 104 (a) Citation Nos. 7687031, 7687034 and 7687036 in Docket No. SE 2006-222 **ARE AFFIRMED**. **IT IS FURTHER ORDERED** that the significant and substantial designation in Citation Nos. 7687034 and 7687036 shall be deleted, and that Citation No. 7687036 shall be modified to increase the degree of negligence from moderate to high.

IT ORDERED that, 104(a) Citation No. 7687073 in Docket No. SE 2006-308 **IS VACATED**. **IT IS FURTHER ORDERED** that the significant and substantial designation in 104(a) Citation No. 7687054 in Docket No. SE 2006-308 shall be deleted and that the citation **IS AFFIRMED** as modified.

IT IS FURTHER ORDERED that 104(a) Citation No. 7686313 in Docket No. SE 2006-40 **IS AFFIRMED**.

IT IS FURTHER ORDERED that 104(d)(2) Order No. 7686314 in Docket No. SE 2006-123 is modified to reflect that the cited violation is attributable to a reckless disregard and that Order No. 7686314 **IS AFFIRMED** as modified.

IT IS FURTHER ORDERED that the parties' motion to approve settlement with respect to the remaining citations in issue in these proceedings **IS GRANTED**.

Consistent with this decision and the parties' settlement terms, **IT IS ORDERED** that Jim Walter Resources, Inc., **shall pay a total civil penalty of $20,343.00** in satisfaction of the 104(a) citations and 104(d) order that are the subject of these civil penalty proceedings. The sum total of $20,343.00 represents the following civil penalty payments for each of the docketed cases in these matters:

Docket No.	Proposed Penalty	Assessed Penalty
SE 2006-222	$3,314.00	$2,300.00
SE 2006-308	$2,725.00	$1,350.00
SE 2006-40	$614.00	$614.00
SE 2006-123	$15,325.00	$13,264.00
SE 2006-221	$1,125.00	$370.00
SE 2006-187	$1,423.00	$690.00
SE 2007-77	$2,581.00	$905.00
SE 2007-117	$1,710.00	$850.00
TOTAL	**$28,817.00**	**$20,343.00**

Payment is to be made to the Mine Safety and Health Administration within 40 days of the date of this Decision. **IT IS ORDERED** that upon timely receipt of payment, the captioned civil penalty matters **ARE DISMISSED**.

Jerold Feldman
Administrative Law Judge

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