

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 29, 2008

JIM WALTER RESOURCES, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. SE 2008-389-R
v.	:	Citation No. 7691158; 03/04/2008
	:	
SECRETARY OF LABOR	:	Mine ID 01-01401
MINE SAFETY AND HEALTH	:	Mine: No. 7
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. SE 2008-521-R
	:	Citation No. 7691159; 03/04/2008
	:	
	:	Mine ID 01-01247
	:	Mine: No. 4

## SUMMARY DECISION

Before: Judge Bulluck

These cases are before me on Notices of Contest filed by Jim Walter Resources, Incorporated (“JWR”), against the Secretary of Labor, acting through her Mine Safety and Health Administration (“MSHA”), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“the Act”), 30 U.S.C. § 815(d). JWR challenges citations issued by MSHA under section 104(a) of the Act, alleging violations of the Secretary’s mandatory safety standard found at 30 C.F.R. § 75.507.

The parties have filed cross Motions for Summary Decision.<sup>1</sup> The Commission rule governing summary decisions, Rule 67(b), provides as follows:

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<sup>1</sup> The parties’ Motions for Summary Decision reference Docket No. SE 2008-389-R and Citation No. 7691158 in JWR’s No. 7 Mine only. However, JWR filed, unopposed, a Motion for Consolidation of Docket Nos. SE 2008-521-R and SE 2008-389-R, asserting that the citations in the dockets are “identical, other than the fact that the pump at issue in [SE 2008-521-R] is located at JWR Mine No. 4 and the pump at issue in Docket No. SE 2008-389-R is located at JWR Mine No. 7. The issues of fact and law will be the same in both contests.” JWR’s Motion is hereby **GRANTED**, and the cases are **CONSOLIDATED**. Notwithstanding the limited focus of the Motions, the arguments made therein also pertain to Citation No. 7691159 in Docket No. SE 2008-521-R, and this Decision disposes of both dockets.

A motion for summary decision shall be granted only if the entire record . . . shows: (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b). Based upon the stipulations and uncontested facts represented by the parties, I find that there is no genuine issue as to any material fact. Having reviewed the parties Motions, I conclude that, for the reasons stated below, JWR is entitled to summary decision as a matter of law.

## **I. Stipulations**

The parties stipulated as follows:

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

2. JWR is a mine operator subject to the jurisdiction of the Federal Mine Safety and Health Administration;

3. JWR is the owner and operator of the No. 7 Mine located in Tuscaloosa County, Alabama;

4. Operations at the No. 7 Mine are subject to the requirements of the [Federal] Mine Safety and Health Act;

5. MSHA Inspector John M. Church was acting in his official capacity as an authorized representative of the Secretary of Labor when he issued Citation No. 7691158; and

6. Citation No. 7691158 was served on JWR or its agent as required by the Act.

JWR Mot. at 1.

## **II. Factual Background**

These matters concern JWR's use of non-permissible deep well submersible pumps in sealed areas of its No. 4 and No. 7 Mines. JWR's operation of these pumps in No. 7 was challenged by MSHA in October of 2004, under section 75.507-1.<sup>2</sup> JWR duly contested the

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<sup>2</sup> 30 C.F.R. § 75.507-1 provides, in pertinent part, that "[a]ll electric equipment, other than power-connection points, used in return air outby the last open crosscut in any coal mine shall be permissible . . . ."

citation, and the case was heard and adjudicated by me. See *Jim Walter Resources, Inc.*, 27 FMSHRC 968, 978 (Dec. 2005) (ALJ) (“*JWR-I*”). In its Motion for Summary Decision, JWR asserts that the instant proceeding and *JWR-I* involve the same parties and controlling facts. JWR Mot. at 5. The Secretary does not challenge this assertion. As in *JWR-I*, here MSHA cited the submersible “deep well” pump systems in No. 4 and No. 7 Mines, with both surface and underground components, which JWR uses to remove vast accumulations of water from permanently sealed, worked-out underground areas where coal was formerly mined.

The conditions in the areas being dewatered remain consistent with the description set forth in *JWR-I*:

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

27 FMSHRC at 969-70 (footnote and citations omitted).

The pumps at issue are active electric submersible pumps, utilized in the sealed area of No. 7 since 1987, and are described in *JWR-I* as follows:

All electric controls for the pump are housed above ground in a pump starter unit. From the starter unit, a high voltage power conductor cable, encased in a steel pipe, runs some 2,000 feet underground to the original mine floor, and an additional 200 feet beneath that surface, where the electric motor and pump assembly are situated in a sump. The steel casing, at ground level on the surface, is capped by a metal well head. The motor sits at the bottom of the sump and is 30 feet high, there is a 5-foot seal between the motor and the pump, and the pump, itself, also 30 feet high, sits on top of the seal. According to the manufacturer’s specifications, in order for the pump to operate, there must be at least 30 feet of water (“head”) above the inlet of the pump, so that the motor and pump assembly require 65 feet of water in which to operate. Inside the steel casing is also a metal discharge pipe. The casing is slotted just below the water level, allowing water into the casing where it is forced down a second set of slots at the bottom, where it cools the electric motor. The pump, with a 500-gallon-per-minute capacity, then transports the water up the discharge pipe to a surface settlement pond. A vacuum sensor, located on the surface, automatically shuts off the power from the pump starter to the entire system, if it detects that the water level had dropped below 30 feet of head above the pump.

Additionally, JWR has installed a redundant safety system, undercurrent protection, that will also disable the system.

*Id.* at 970 (citations omitted).

### **III. Procedural Background**

The enforcement history associated with JWR's deep well submersible pumps is set forth in *JWR-I*, as well:

JWR's submersible pumps . . . had always been inspected by MSHA under Part 77 regulations applicable to surface areas of underground mines, and the National Electric Code ("NEC"). Under Part 77, the pumps were not required to be permissible. Sometime in 2003, in response to inconsistent enforcement in the districts, i.e., some were inspecting submersible pumps under Part 75 while others were applying Part 77, MSHA's Safety Division decided to impose uniform, nationwide compliance under Part 75. As a consequence, in order to continue use of nonpermissible pumps behind the seals underground, operators who had been inspected under Part 77 were required to file Petitions for Modification under section 101(c) of the Act.

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

MSHA issued its Proposed Decision and Order ("PDO") on June 17, 2004, authorizing JWR to continue use of its submersible pumps under specific detailed conditions. JWR found the conditions unacceptable and appealed the PDO, arguing, *inter alia*, that section 75.507 does not apply to the pumps at issue.

*Id.* at 970-71 (footnote and citations omitted).

On October 14, 2004, MSHA cited JWR for operating a nonpermissible deep well

submersible pump in “return air” in violation of 30 C.F.R. § 75.507-1. *Id.* at 971-72. JWR contested this citation which, after an evidentiary hearing, was vacated. Pending the outcome of that proceeding, JWR’s appeal of the PDO was stayed by the Department of Labor’s presiding ALJ. After the case was decided, on joint motion of the parties, the judge dismissed the appeal as moot. JWR Mot. at 2, 4.

The instant consolidated proceeding arises from section 104(a) Citation Nos. 7691158 (No. 7 Mine) and 7691159 (No. 4 Mine), issued to JWR by MSHA Inspector John Church on March 4, 2008. Both citations allege a violation of 30 C.F.R. § 75. 507 and describe the “Condition or Practice” as follows:

The mine operator utilizes deep well pumps with power connection points that are outby the last open crosscut and are not in intake air and permissible power connection units are not being used.

JWR timely contested the citations and, in its Motion for Summary Decision, challenges MSHA’s application of section 75.507 to the company’s non-permissible deep well submersible pumps, arguing that the standard does not apply to the sealed areas of its mine. JWR Mot. at 10. In her Motion for Summary Decision, the Secretary argues that she is “entitled to judgment as a matter of law [because the] pumps are indisputably outby the last open crosscut, are indisputably not located in intake air and [are] indisputably not permissible.” Sec’y Mot. at 3.

#### **IV. Findings of Material Fact and Conclusions of Law**

JWR and the Secretary essentially agree that the material facts upon which each is entitled to judgment as a matter of law are as follows:

1. The deep well pumps installed behind the seals at the JWR Number 7 Mine have power connection points that are not permissible;
2. The power connection points on the deep well pumps are located outby the last open crosscut; and
3. The deep well pumps installed behind the seals at the JWR Number 7 Mine are not located in intake air.

Sec’y Mot. at 2; JWR Mot at 2-7.<sup>3</sup>

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<sup>3</sup> Although JWR argues in its Reply to the Secretary’s Motion for Summary Decision that “[n]one of these facts . . . are material to this contest,” JWR Reply at 1, these three facts, alone, would establish the Secretary’s allegation of a violation of section 75.507, were I to conclude that the Secretary’s interpretation of section 75.507 is correct. Thus, these facts are critical to disposing of the issue before me.

The cited regulation provides as follows:

Except where permissible power connection units are used, all power-connection points outby the last open crosscut shall be in intake air.

30 C.F.R. § 75.507. This regulation codifies, with only a slight change in syntax, section 305(d) of the Act, which provides:

All power-connection points, except where permissible power connection units are used, outby the last open crosscut shall be in intake air.

30 U.S.C. § 865(d).

The issue upon which these cases turn is whether section 305(d) of the Act, codified in the Secretary's regulations at 30 C.F.R. § 75.507, was intended to reach beyond areas of underground coal mines that are ventilated to those areas permanently cut off from normal ventilation. As there is a statutory provision at issue, the first inquiry is "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). If section 305(d) is clear and unambiguous, effect must be given to its language. See *Chevron*, 467 U.S. at 842-43; accord *Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990). In determining whether Congress had an intention on the specific question at issue, courts utilize traditional tools of construction, including an examination of the "particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *Local Union 1261*, 917 F.2d at 44.

As mentioned previously, the material facts of these cases would seem to establish, at first blush, the elements of a violation of section 75.507. The power connection points on JWR's deep well submersible pumps are, contrary to the requirements of the regulation, not permissible, outby the last open crosscut, and not in intake air. This result, however, can be achieved only by formulaically applying section 75.507 out of context and in such a way that ignores the Secretary's regulations "as a whole." *K Mart Corp.*, 486 U.S. at 291. When viewed in their entirety, the vast majority of the Secretary's regulations can only be applied reasonably to accessible areas of a mine that, of necessity, require ventilation. As pointed out in *JWR-I*, "[b]y definition and operation, intake and return air circulate and work, consistent with the demands of active mining in the *accessible* parts of the mine." 27 FMSHRC at 977 (emphasis added). Here, however, the pumps are situated in inaccessible parts of the mines where, after the areas were sealed, dramatic atmospheric changes occurred within a relatively short period of time due to permanent separation from ventilation controls and circulated air systems. When seals were erected, the resultant stagnant environment behind the seals was entirely dissimilar to that in the active areas of the mine. In answer to the question posed in *Chevron*, I conclude that Congress did not speak to "the precise question at issue." 467 U.S. at 842. Section 305(d) was intended to regulate use of equipment in an underground mine's ventilated areas, where intake and return air

systems circulate to provide miners with fresh breathable air, and prevent contaminated air, laden with combustible byproducts of mining activities, from exposure to ignition sources. This statutory provision was not intended to regulate permanently sealed areas of mines comprised of atmospheres wholly dissimilar to that of the active working areas.

To further illustrate the misapplication of the cited standard, I point to another standard in Subpart F of 30 C.F.R. Part 75. JWR's pumps are electric equipment which, following the formulaic logic of the Secretary, would be subject to the requirements of section 75.512. This regulation is also the codification of a statutory provision, and provides that "[a]ll electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions." 30 C.F.R. § 75.512. Given that the submersible pumps are in a "no man's land" that cannot be examined at all, much less frequently, compliance with section 75.512 is an impossibility.

I recognize that, as to sealed areas of underground coal mines, the Secretary has legitimate safety concerns. These concerns, however, are subject to the proposition that "a regulation cannot be construed to mean what an agency intended but did not adequately express." *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982) (citations omitted). When, in 2003, the Secretary issued PIB No. P03-26, notifying mine operators that MSHA would henceforth apply section 75.507 to submersible pumps, she attempted to graft onto section 75.507 a new substantive requirement, i.e., she widened the ambit of section 75.507 to include sealed areas, which imposed new obligations that significantly affected private interests. *See Drummond Co.*, 14 FMSHRC 661, 684-85 (May 1992) (distinguishing between substantive rules, which require notice and comment rulemaking, and procedural rules, which do not). The Secretary's continued attempt to do so is contrary to well established principles of administrative law, as set forth in *Drummond*.

Even the Secretary's own regulations, however, both undercut her interpretation of section 75.507 and illustrate the unreasonableness of attempting to fit the square peg of regulating stagnant atmosphere in sealed areas into the round hole of provisions clearly intended to regulate accessible, ventilated areas. The Secretary's ventilation regulations contained in Subpart D of 30 C.F.R. Part 75 include a provision entitled "Construction and repair of seals," which states, in relevant part:

- (a) The mine operator shall maintain and repair seals to protect miners from hazards of sealed areas.
- (b) Prior to sealing, the mine operator shall – (1) Remove insulated cables, batteries, and other potential *electric ignition sources* from the area to be sealed when constructing seals, *unless it is not safe to do so*. If ignition sources cannot safely be removed, seals must be constructed to at least 120 psi[.]

30 C.F.R. § 75.337 (emphasis added). Here, when JWR sealed areas that required constant

dewatering in its No. 4 and No. 7 Mines, it placed in those sealed areas pumps that were potential electric ignition sources. Whether it was unsafe to do so is a question that is not before me, nor is JWR cited in the instant matters for violating the requirements of section 75.337. The Secretary would be well advised, it would seem, to reconsider the issue in light of section 75.337, which, at least, recognizes the unique “hazards of sealed areas,” and also contemplates utilizing “electric ignition sources” within sealed areas, so long as they are isolated from the active mine workings by seals constructed in accordance with the specification in the standard.

Because I find that the Secretary’s interpretation of section 75.507, as applied to deep well submersible pumps operating in sealed areas, impermissibly expands the scope of section 75.507, no violation has been committed by JWR, and Citation Nos. 7691158 and 7691159 are hereby vacated.

### **ORDER**

Accordingly, for the reasons set forth herein, JWR’s Motion for Summary Decision is **GRANTED**, the Secretary’s Motion for Summary Decision is **DENIED**, and Citation Nos. 7691158 and 7691159 are **VACATED**.

Jacqueline R. Bulluck  
Administrative Law Judge

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