

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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January 16, 1996

JIM WALTER RESOURCES, INC., : CONTEST PROCEEDING
Respondent :
v. : Docket No. SE 94-667-R
: Order No. 3184043
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : No. 5 Mine
ADMINISTRATION (MSHA), :
Petitioner :
:
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 95-131
Petitioner : A. C. No. 01-01322-03989
v. :
: Mine No. 5
JIM WALTER RESOURCES, INC., :
Respondent : Docket No. SE 95-140
: A. C. No. 01-01401-04058
:
: Docket No. SE 95-141
: A. C. No. 01-01401-04059
:
: Mine No. 7

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor,
U.S. Department of Labor. Birmingham, Alabama, for
Petitioner;
R. Stanley Morrow, Esq., Jim Walter Resources,
Inc., Brookwood, Alabama, for Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on a notice of contest and petitions for assessment of civil penalty filed by Jim Walter Resources, Inc., against the Secretary of Labor, and by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Jim Walters, respectively, pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977, 30. U.S.C. § 815. The company contests the issuance to

it of Order No. 3184043 on September 1, 1994. The Secretary's petitions seek \$26,462.00 in penalties for eight violations of his mandatory health and safety standards. For the reasons set forth below, I approve the agreement of the parties settling all but two orders in Docket No. SE 95-140, affirm the two contested orders and assess civil penalties of \$19,224.00.

A hearing was held on July 20, 1995, in Hoover, Alabama. MSHA Coal Mine Inspector Kirby G. Smith, MSHA Supervisory Safety and Health Specialist Kenneth Ely and miner Keith Plylar testified for the Secretary. Longwall Face Foreman Henry M. Thomas was a witness on behalf of Jim Walters. The parties also submitted briefs which I have considered in my disposition of these cases.

SETTLED ORDERS AND CITATIONS

At the beginning of the hearing, counsel for the Secretary stated that Docket Nos. SE 94-667-R, SE 95-131, SE 95-141 and two citations in Docket No. SE 95-140 had been settled. With respect to Docket No. SE 95-131, the parties agreed to reduce the proposed penalty for Order No. 3184043 from \$5,000.00 to \$2,500.00 and Jim Walters agreed to withdraw its contest of the order (Docket No. SE 95-667-R). For Docket No. SE 95-141, the parties agreed to modify Order Nos. 3182603 and 3182618 by deleting the "significant and substantial" designations and to reduce the proposed penalty for each from \$903.00 to \$309.00, and to reduce the proposed penalty for Order No. 3183771 from \$7,500.00 to \$4,000.00. In Docket No. SE 95-140, the parties have moved to vacate Citation No. 3189887 and the Respondent has agreed to pay the proposed penalty of \$506.00 for Citation No. 3183885 in full.

After considering the parties' representations, I concluded that the settlements were appropriate under the criteria set forth in Section 110(i) of the Act, 30 U.S.C. § 820(i), and informed the parties that I would approve the agreement. (Tr.

364-72.) The provisions of the agreement will be carried out in the order at the end of this decision.

ORDERS NO. 3189434 AND 3189435

The parties contested Orders No. 3189434 and 3189435 in Docket No. SE 95-140. The orders were issued by Inspector Kirby Smith on August 25, 1994, during his inspection of Jim Walter's No. 7 Mine. While inspecting the No. 2 longwall, the inspector

observed that plastic line curtains had been placed on the mine floor, from the longwall chain line, across the longwall pontoons, to the place where the longwall shield jacklegs joined the pontoons. He also saw line curtains hanging from where the jacklegs joined the shield down to the pontoons. The curtains extended for 20 or 25 shields, past shield 184, and, consequently, past the methane monitor located at the tailgate.

Smith was accompanied on his inspection by Paul Phillips, assistant mine foreman, Barry Hurst, longwall coordinator, and Stan Odom, union representative. Near the midway point of the longwall, the inspector took some methane readings. He detected .4 percent methane 12 inches from the mine roof and 1.1 percent methane 12 inches from the mine floor. Inspector Smith took another reading behind the curtains hanging from shield No. 184 and detected 2.2 percent methane.

As a result of these readings, the inspector issued the orders in question. Order No. 3189434 alleges a violation of Section 75.323 of the Regulations, 30 C.F.R. § 75.323, because

[m]ethane was allowed to accumulate along the Number Two Longwall face in excess of 1.4% due to mine ventilation plastic curtain being placed on the mine floor and supported as a line curtain by the shields jack legs. This method was utilized to trap and divert the methane bleeders that were encountered in the mine floor to the Longwall gob and tailgate entry.

(Govt. Ex. 2.) The order was issued under Section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2).¹

Order No. 3189435 sets out a violation of Section 75.342 of the Regulations, 30 C.F.R. § 75.342, in that "[l]ine curtain was installed on the shield jack legs on the Number Two Longwall so

¹ Section 104(d)(2) provides:

If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations.

as to divert accumulations outby the tailgate methane sensor. This action rendered the methane monitor's response to methane along the longwall face to be inaccurate." (Govt. Ex. 5.) This order was also issued under Section 104(d)(2).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The No. 7 mine is located in the Mary Lee Coalbed which, as of a 1985 report by the Bureau of Mines, had the highest average liberation of methane per mine of any coalbed in the United States. (Govt. Ex. 7.) In that same report, the No. 7 mine was shown to have the highest methane liberation of any mine in the U.S. Methane liberation continues to be a problem at the mine. As Mr. Thomas, the longwall face foreman stated, "I deal with it every day." (Tr. 262.) In 1993, 15 methane ignitions occurred in the mine. Fifteen more occurred in 1994, eight of those on longwall sections.

Order No. 3189435

To avoid repeating the same evidence, the second order will be discussed first. Section 75.342 requires that "MSHA approved methane monitors shall be installed on all . . . longwall face equipment," among other places, "at the return air end of the longwall face." It further requires that the monitors "shall be maintained in permissible and proper operating condition," so that "[w]hen the methane concentration . . . reaches 1.0 percent the monitor shall give a warning signal" that is "visible to a person who can deenergize the equipment." Finally, it requires that the monitor "shall automatically deenergize the machine" when the methane concentration "reaches 2.0 percent" or the "monitor is not operating properly."

The Respondent argues that there was no violation of this regulation. At first blush, this argument appears to have some merit. It is true that Jim Walter had a methane monitor located in the proper place and there is no evidence that it was not calibrated or in permissible condition or that it did not give a visual warning signal at 1.0 percent methane or deenergize the equipment at 2.0 percent methane. Indeed, there is no evidence that the monitor was not in proper operating condition, *if it had been permitted to operate properly.*

That it was not, however, is the difficulty. By placing a line curtain on the floor and hanging it from the jacklegs of the longwall shields so that the methane seeping from the "bleeder" in the mine floor would be directed away from methane monitor,

Jim Walter did not "maintain" the monitor in "proper operating condition."

Jim Walter clearly had a problem with methane seeping from a bleeder in the floor. Even though there was 131,000 cfm of air coursing from the headgate to the tailgate of the longwall, it was not sufficient to reduce the concentration of methane below 1.0 percent. Since the velocity of the air could not be increased further and could not be redirected, Jim Walter's only alternative, according to ventilation specialist Kenneth Ely, was to stop production until the methane bled off. Instead, the Respondent elected to direct the methane along the floor and behind the curtains hung from the shields. That way, it would not be sensed by the monitor and production could be continued.

By directing the methane away from the monitor, the company precluded the monitor from performing its function. The net effect of this, as suggested by the Secretary's witnesses, was the same as placing a plastic bag over the monitor so that it could not sense the air passing around it. The deliberate directing of the methane out of the flow of air which was supposed to "dilute, render harmless, and carry [it] away," 30 C.F.R. § 75.321, and past the tailgate methane monitor was the equivalent of rendering the monitor inoperable. Accordingly, I conclude that Jim Walter did not maintain the monitor in proper operating condition and, therefore, violated Section 75.342.

Order No. 3189434

Section 75.323 requires that when "1.0 percent or more methane is present in a working place . . . electrically powered equipment in the affected area shall be deenergized, and other mechanized equipment shall be shut off," that "[c]hanges or adjustments shall be made to the ventilation system to reduce the concentration of methane to less than 1.0 percent" and that "[n]o other work shall be permitted in the affected area until the methane concentration is less than 1.0 percent." The section further requires that when "1.5 percent or more methane is present in a working place . . . [e]veryone except those persons referred to in section 104(c) of the Act shall be withdrawn from the affected area; and . . . electrically powered equipment in the affected area shall be disconnected at the power source."

The Secretary argues that Jim Walter violated this section by not deenergizing the longwall equipment until after Inspector Smith advised the longwall coordinator that he was going to issue the orders in this case. On the other hand, Jim Walter alleges that they did not become aware that methane in excess of 1.0

percent was present until the inspector informed them that he was issuing the orders and that then they deenergized the machinery.² I find that Jim Walter should have known that methane of 1.0 percent or more was present in the working area and, therefore, did not comply with the regulation.

There were two ways that the miners at the longwall could have determined that 1.0 percent or more of methane was present: (1) someone with a methane detector could have taken a reading, or (2) one of the monitors on the longwall could have sensed it. However, Jim Walter had rendered its tailgate monitor inoperable by directing the methane away from it. But for this action, the tailgate monitor would have detected the methane, just as Inspector Smith's detector did, would have given a warning signal to alert the crew, if between 1.0 and 1.9 percent methane was detected, or would have deenergized the machinery, if 2.0 percent methane was detected.

Having taken steps to make the methane monitor not operate properly, Jim Walter cannot now claim that it did not comply with Section 75.323 because it did not know that methane was present. The fact is that it would have but for its actions to avoid knowing. Consequently, I conclude that the company violated the regulation.

Significant and Substantial

The inspector found both violations to be "significant and substantial violations" of the regulations. A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a

² Jim Walter also questions whether the equipment was energized at the time the orders were issued. Inspector Smith said that it was. Mr. Thomas said he thought that it was not, but that he could not be sure. Based on the Longwall Section Report, (Govt. Ex. 12), which indicates that the power was on between 8:50 a.m. and 9:19 a.m., and Mr. Thomas's testimony that the shutdown occurred at 9:19 a.m., (Tr. 327), I find that the equipment was energized when the inspector took his methane readings and issued the orders.

reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. See also *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987)(approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

Applying the *Mathies* criteria, I have already found, (1) that the company violated two mandatory safety standards. I further find: (2) That these violations contributed to a measure of danger to safety, *i.e.* a methane ignition, or in the worst case, a methane explosion; (3) That there is a reasonable likelihood that an ignition or an explosion would result in an injury; and (4) That there is a reasonable likelihood that the injury would be reasonably serious in nature, *i.e.* burns or death. Accordingly, I conclude that the violations were "significant and substantial."

Unwarrantable Failure

The inspector also found that these violations resulted from Jim Walter's "unwarrantable failure" to comply with the regulations. The Commission has held that "unwarrantable failure" is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010 (December 1987). "Unwarrantable failure is characterized by such conduct as 'reckless disregard,' 'intentional misconduct,' 'indifference' or a 'serious lack of reasonable care.' [*Emery*] at 2003-04; *Rochester & Pittsburgh Coal Corp.* 13 FMSHRC 189, 193-94 (February 1991)." *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994).

Mr. Thomas testified that curtains were put on the floor and hung from the shields because "we'd had it [methane] every day, it wasn't just that day. You know, you can look back on the reports and see where we'd wrote [*sic*] it up. But on this date we had some and we'd pulled the power, knocked the power off and

hung curtain and did *whatever we could do to get the power back on.*" (Tr. 271, emphasis added.) Plainly, this was an intentional act. The velocity of the air could not be increased to render the methane harmless, so the methane was routed past the monitor so the longwall could be kept running.

While Mr. Thomas stated that he had frequently placed curtains on the floor and hung them from the longwall shields to deal with methane problems, I find it significant that neither of the MSHA officials had ever heard of such a practice. Nor had Mr. Plylar, a miner who had worked on the No. 2 longwall and was a member of the safety committee, the last four years as chairman. Perhaps Mr. Thomas was exaggerating to try to justify what appears to be a very dangerous practice evidencing, at best, an indifference to the safety of miners.

Whether this was the first time or not, I find that the Respondent acted intentionally and with a serious lack of reasonable care. Accordingly, I conclude that the violations were the result of Jim Walter's unwarrantable failure to follow the regulations.

CIVIL PENALTY ASSESSMENT

The Secretary has proposed a civil penalty of \$11,600.00 for these two violations. However, it is the judge's independent responsibility to determine the appropriate amount of a penalty, in accordance with the six criteria set out in Section 110(i) of the Act. *Sellersburg Stone Co. v. Federal Mine Safety and Health Review Commission*, 736 F.2d 1147, 1151 (7th Cir. 1984).

In connection with the six criteria, the parties have stipulated that Jim Walter is a large mine operator and that any penalty imposed in this case will not affect its ability to continue in business. (Tr. 8.) I further note that the No. 7 mine is a large mine with a fairly large number of violations for the two years preceding the violations. (Govt. Ex. 10.) The evidence in the case demonstrates that the Respondent was highly negligent and that the gravity of the violations is very serious. The citations indicate that the company demonstrated good faith in abating the violations. Considering all of this, I conclude that the proposed penalty of \$11,600.00 is appropriate.

ORDER

Order No. 3184043 in Docket No. SE 95-131 is **AFFIRMED** and the Respondent's notice of contest in Docket No. SE 94-667-R concerning that order is **DISMISSED**; Order Nos. 3189434 and 3189435 and Citation No. 3183885 are **AFFIRMED** and Citation No. 3189887 is **VACATED** and **DISMISSED** in Docket No. SE 95-140; Order No. 3183771 is **AFFIRMED** and Order Nos. 3182603 and 3182618 are **MODIFIED** by deleting the "significant and substantial" designations and **AFFIRMED** as modified in Docket No. SE 95-141. Jim Walter Resources, Inc., is **ORDERED TO PAY** civil penalties of **\$19,224.00** within 30 days of the date of this decision. On receipt of payment, these proceedings are **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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