FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 7, 2000

JIM WALTER RESOURCES, INC.,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. SE 94-244-R
	:	Citation No. 3182848; 1/31/94
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	No. 7 Mine
ADMINISTRATION (MSHA),	:	Mine ID No. 01-01401

DECISION

Before: Judge Melick

This remanded contest proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* involves a citation issued by the Department of Labor's Mine Safety and Health Administration (MSHA), alleging a violation of 30 C.F.R. § 75.400[1] because of a trash accumulation in an entry of the No. 7 Mine of Jim Walter Resources, Inc. (JWR).

The factual and procedural background of the case was set forth by the Commission in its decision on April 19, 1996, (18 FMSHRC 508) as follows:

> On January 24, 1994, MSHA Inspector Thomas Meredith cited JWR for a violation of section 75.400 because of trash accumulations in the No. 2 entry of JWR's No. 7 Mine. Tr. 29-30; Govt. Ex. 3. *See* 16 FMSHRC at 1514.
>
> On January 31, 1994, the date of the citation at issue, Meredith conducted a follow-up inspection and confirmed that JWR had abated the conditions that led to the issuance of the January 24 citations. Tr. 31. During the inspection, he observed in the No. 3 entry an accumulation of trash at the check curtain, which directed ventilation across the longwall face and also separated the active outby area from the inactive inby area. Tr. 16; 64. The judge found that the trash in the

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[1] 30 C.F.R. § 75.400 provides as follows:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on . . . electric equipment therein.

" Active workings" is defined in 30 C.F.R. § 75.2 as "[a]ny place in a coal mine where miners are normally required to work or travel."

outby area consisted of "[a] garbage bag, one box and one rock dust bag . . . ." 16 FMSHRC at 1513. Inby the curtain, there was a larger accumulation of trash that extended for 250 feet and included paper bags, rags, rock dust bags, wooden pallets and large cable spools. Tr. 21-24; Gov't Ex. 2. The materials on both sides of the curtain were combustible. Tr. 24. *See* 16 FMSHRC at 1512.

Inspector Meredith issued a citation, which charged a violation of section 75.400, and a withdrawal order, pursuant to section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2). [fn 1, supra]. The inspector designated the violation as S&S and alleged that it was due to the operator's unwarrantable failure to comply with the standard. 16 FMSHRC at 1511-13; Govt. Ex. 2.

JWR challenged the citation and, following hearing, Judge Melick affirmed the violation. [fn. 1, supra]. Although he noted that the existence of accumulations inby and outby the check curtain was undisputed, the judge concluded that "the inactive inby area cited in the order was not within the 'active workings' and the accumulations located therein were therefore not in violation of the cited standard." *Id.* at 1512. He further concluded that the evidence concerning combustible material outby the line curtain was insufficient to establish that the violation was S&S. 16 FMSHRC at 1512-13. The judge also determined that the evidence was insufficient to establish that the violation was due to the operator's unwarrantable failure. *Id.* At 1513-14.

Subsequent events were reported by the Commission in its August 16, 1997, decision as follows:

The Secretary petitioned the Commission to review the S&S and unwarrantable determinations. A divided Commission affirmed the judge's decision. 18 FMSHRC 508 (April 1996).

Subsequently, the Secretary filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit. On May 2, 1997, the court issued its decision, affirming in part and reversing and remanding in part the decision of the Commission. *Secretary of Labor v. FMSHRC*, 111 F.3d 913 (D.C. Cir. 1997). The court affirmed the Commission's determination that the section 7[5].400 violation was not S&S and rejected the Secretary's argument that, in considering whether the violation was S&S, the Commission should take account of the seriousness of the nearby non-violative accumulation. *Id.* at 917-18. Relying on the language of section 104(d)(1), the court determined that "Congress has plainly excluded consideration of surrounding conditions that do not violate health and safety standards" from the S&S determination. *Id* at 917.

However, the court determined that section 104(d)(1) was ambiguous on

the question whether the non-violative accumulation could be considered for the unwarrantable determination. *Id.* at 919-20. The court noted that, when the Mine Act is ambiguous on a point in question, a court is required to apply the analysis set forth in *Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984), and defer to a reasonable interpretation of the Secretary. 111 F.3d at 914-15, 919-20.

The court agreed with the Secretary's interpretation of Section 104(d) of the Act, which had not been advanced at the trial below, that, in determining unwarrantable failure, consideration must also be given to the surrounding non-violative conditions. The Secretary argued before the circuit court, for the first time before any tribunal, that the existence of inby trash, although not violating any health or safety statute or regulation, demonstrated negligence rising to unwarrantability. The court accordingly remanded this case to the Commission to determine whether, "applying the Secretary's interpretation of the statute, the record contains sufficient evidence of causation and culpability to support an 'unwarrantable failure' finding." In its subsequent remand order the Commission directed that "non-violative accumulations in the inactive area of the mine" therefore be considered "in light of the other factors that the Commission may examine in determining whether a violation is unwarrantable, including the extent of the violative condition, the length of time that the violative condition has existed, whether the violation is obvious or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance and the operator's efforts in abating the violative condition made prior to the issuance of the citation or order."

In the instant remand the divided Commission held that the primary issue in this case is the "extent to which the non-violative accumulations [can] be considered in conjunction with the violative accumulations to ascertain unwarrantability" and directed that consideration be given to the factors set forth in *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994), including "the extent of [the] violative condition, the length of time that it has existed, whether the violation is obvious or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance and the operator's efforts in abating the violative condition made prior to the issuance of the citation or order." [emphasis added] 19 FMSHRC at 1379.

Since it is the Secretary who has the burden of proving unwarrantable failure and since it is the Secretary who has the responsibility of advancing and providing the necessary legal analysis to support her theories of unwarrantability, the Secretary (as well as JWR) was provided the opportunity to submit a brief in this regard following the instant remand. Unfortunately, the Secretary has largely squandered this opportunity by premising her brief largely upon the false assumption that the inby trash accumulations constituted violations of the cited standard and that the trial judge erred in finding that they were not violative. This issue was, of course, never raised by the Secretary in her initial petition for review. Moreover, the Secretary acknowledged before the circuit court, and it is clearly now the established law of the case, that the inby trash was not in violation of the cited standard.

The "Mullins" Case Factors:

1(a) *The extent of the violative condition.* The Secretary has failed to sustain her burden of proving that this condition was extensive. Indeed, according to MSHA ventilation specialist Thomas Meredith, the trash in the active outby area consisted of only a few items:

> "some paper bags from the rock dusting operations. There was [*sic*] sandwich bags. There was some cardboard boxes. There was a garbage bag that was half under the curtain, half out burst open at that point. (Tr. 18).

The garbage bag was plastic and contained paper sandwich bags and some oily rags (Tr. 20). As depicted on the Secretary's own exhibit, the area in which they were located was also quite small (See Gov't Exh. No. 1). It may reasonably be inferred from this evidence that the violative condition was therefore not extensive and not, in itself, an aggravating factor justifying an unwarrantable failure finding.

(b) *The extent of the non-violative condition.* Non-violative, i.e. lawful, accumulations existed in the inby area of the No. 3 entry over a distance of approximately 250 feet and included approximately 100 to 250 empty rock dust bags that had been piled 2 or 3 feet high along the rib, five wooden pallets and a five-foot diameter wooden cable spool (Tr. 22-23 and 44). These lawful accumulations may reasonably be characterized as extensive. Under the circumstances it may also reasonably be inferred that the operator on the date of the instant violation "knew or should have known" that trash, not in violation of the Secretary's regulations, existed in the inby area. However, since the Secretary by her own regulations imposed no duty to clean up this lawful inby trash the operator here can be charged with but little negligence. No inference of unwarrantability can be made from the extent of the lawful trash condition alone. In any event this Commission has rejected the use of a "knew or should have known" standard alone for determining unwarrantability. *Virginia Crews Coal Co.*, 15 FMSHRC 2103 (October 1993).

(c) *The relationship between the extent of the non-violative condition and the extent of the violative condition.* In this regard it has been suggested that the operator must have been aware of the violative trash accumulation because of the extensive, albeit lawful, inby conditions. 19 FMSHRC at 745 n.7. Such a conclusion depends however upon proof that the outby trash existed at the same time that an agent of the operator could have seen the inby trash. Indeed, the outby trash could very well have came into existence only shortly before it was cited. Thus, even assuming, *arguendo*, that an agent of JWR had known of the extensive inby trash at some point in time, if the outby trash did not yet exist, then the inby trash could hardly have placed JWR on notice of any outby trash. The Secretary has simply not sustained her burden of proof that the lawful inby trash thereby provided notice to an agent of the operator of the existence of any violative outby trash.

The Commission majority in the aforementioned footnote specifically stated as follows:

> The evidence suggests that, because of the inby conditions, the violation was obvious and JWR must have been aware of it. For instance, the inspector testified without contradiction that the operator had placed a ventilation curtain on top of the trash accumulation, splitting open a garbage bag and spilling its contents on the outby side of the curtain. Tr. 19-20, 65. The inspector testified that the accumulation that was outby the curtain was "just the continuation of everything that was inby the curtain." Tr. 19.

The cited transcript pages are set forth below:

> Q. (By Mr. Lawson) Was the material you observed out by the check curtain, was this simply the remains of a lunch or was it more extensive than that?
>
> JUDGE MELICK: Is there any objection to him leading the witness?
>
> MR. TRUITT: Yes, Your Honor.
>
> JUDGE MELICK: I think that would have to be sustained.
>
> Q. (By Mr. Lawson), Describe the accumulations out by the curtain as far as the extent of them.
>
> A. [Inspector Meredith] Out by the curtain?
>
> Q. Right
>
> A. It was just the continuation of everything that was in by the curtain.
>
> JUDGE MELICK: Well, we don't know what was in by yet. So, you'll have to say exactly what was out by.
>
> THE WITNESS: I've stated all I can remember that was out by. If I say anything else, it would not be factual. I cannot testify to things that factual.
>
> JUDGE MELICK: You say that there was a plastic garbage bag beneath the curtain itself?
>
> THE WITNESS: Yes, there was a plastic garbage bag on this corner over here that had trash in it. It was burst open and just laying all through here like something had ran over it and burst it open.
>
> JUDGE MELICK: You were pointing to the in by side of the curtain.

THE WITNESS: The corner of the bag when I first noticed it was on this side where the paper bags were.

JUDGE MELICK: The out by side?

THE WITNESS: Yes, sir.

JUDGE MELICK: Where were the contents of that plastice bag spilled out?

THE WITNESS: Some of it was underneath the curtain. Some of it was out from underneath the curtain, and some of it was in by the curtain because it had been burst.

JUDGE MELICK: You were able to identify what was out by the curtain?

THE WITNESS: Yes, sir.

JUDGE MELICK: What exactly was out by the curtain that had spillled from that garbage bag?

THE WITNESS: That was sandwich bags and paper bags and some oily rags that was out by this area.

JUDGE MELICK: Are these plastic sandwich bags?

THE WITNESS: No, sir.

JUDGE MELICK: What were they?

THE WITNESS: They were some paper bags. The only plastic I observed was the plastic bag itself.

(Tr. 19-21).

* * * *

Q. Can you tell me specifically what items were out by the check curtain marked 1-31-94?

A. There were rock dust bags. There was the busted garbage bag with other bags that came out of it, and I know there was a cardboard box, but I can't remember if there was two at that point or the other one was behind the curtain.

Q. How many rock dust bags, do you remember?

A. I do not know the exact quantity. I did not count bags.

Q. Would it have been less than five?

A. I didn't count them. I couldn't testify one way or the other to be honest with you.

Q. It would be a small number?

A. I don't recall exactly how many bags it was because they were piled up on the rib. They were two or three foot high and they came all the way through the curtain there. They could have been stacked up two or three foot high. They could be 20 or 25 bags, and if they're not mashed down, there could be four or five. I didn't count bags.

Q. You just can't say how many bags were there?

A. Specifically I can't in that one location.

(Tr. 65).

From this testimony it is clear that it was Inspector Meredith's opinion that the plastic garbage bag had been burst open, not by the placement of the ventilation curtain onto the garbage bag, but from something running over it (Tr. 19 L.23 - Tr. 20 L.2). Indeed, Meredith subsequently opined that the scoop had run over this bag of garbage (Tr. 25 L. 22-23). According to the inspector's testimony some of the trash from that garbage bag was found beneath the check curtain and outby the curtain and, indeed, a portion of the bag itself was lying beneath the curtain. The inspector did not however testify that the operator had placed the ventilation curtain on top of the garbage bag. From the record it may reasonably be inferred that the trash had been forced or pushed under the curtain by the same equipment that the inspector thought had initially burst the garbage bag open. There is, moreover, no clear evidence to suggest that any agent of the operator had any knowledge of the violative ouby trash either at the time the check curtain was hung or at any later time.

The inspector also contradicts himself in his testimony that the outby accumulations "were just a continuation of everything that was inby the curtain" (Tr. 19). When the inspector was asked to itemize the specific materials outby the check curtain he did not include some of the materials he claims to have found inby the check curtain. There is no mention, for example, of any wooden pallets or spools outby. No inference that the outby accumulations were in fact a continuation of "everything" inby the curtain can therefore properly be drawn from such contradictory testimony. Moreover, even assuming, *arguendo*, that the same type of trash was found in both locations it cannot, in any event, thereby be inferred that it was placed there at the same time, or that the outby material was present at the time the check curtain was hung.

Under all the circumstances I cannot conclude that, because of the existence of the obvious but lawful inby trash, an agent of the operator must have been aware of the small amount of outby trash. Indeed, it is just as likely as not that the small amount of outby trash accumulated only after the accumulation of inby trash and only shortly before its discovery by the inspector. Moreover, the inspector himself seemed to express reservations as to whether that small amount of trash even constituted a violation.

2(a) *The length of time the violative condition existed.* It is undisputed that the violative condition came into existence sometime after January 24, 1994 and before the date the violation was discovered, January 31, 1994. Inspector Meredith observed no accumulations in the cited area on January 24, 1994. He acknowledged that he had no idea how long some of the materials had been present. Indeed, no direct evidence has been presented to show more precisely when each item of outby trash was placed in the entry. Accordingly, because of the inadequacy of the Secretary's proof, it may be inferred that the few items found in the outby area by Meredith on January 31, 1994, may have been in existence only briefly. No inference of unwarrantability can therefore be made.

(b) *The length of time the non-violative condition existed.* As noted above, the Secretary established only that these materials came into existence sometime between January 24, 1994 and January 31, 1994. Inspector Meredith opined that "[i]t was over a period of time that all this stuff had to accumulate in there on each shift" (Tr. 55). From the quantity of inby trash it may indeed reasonably be inferred that it had taken more than one shift to accumulate. Indeed, from Inspector Meredith's observations on January 24, it may be inferred that some of the same rock dust bags and wooden pallets may have remained since that date. However, as long as those materials were in an the inactive area, they were lawful and the operator had no statutory or regulatory duty to remove them. In addition, a portion of the trash could have come into existence only shortly before it was discovered by Inspector Meredith. Under the circumstances unwarrantability cannot be inferred.

(c) *The relationship between the length of time the violative condition existed and the length of time the non-violative condition existed.* Inasmuch as the Secretary failed to establish the length of time that either the violative or non-violative conditions existed (other than within the broad parameters between January 24 and January 31, 1994) no clear inferences or conclusions can be reached in this regard. More specifically, no relationship has been established because there is no clear evidence as to how long the outby trash had existed.

3(a) *Whether the violative condition was obvious*. The Secretary has failed to sustain her burden of proving that the violative condition was obvious. It consisted of a relatively small number of items in a small area (See Gov't Exh. No. 1) and included an uncertain number of paper bags (rock dust bags), some sandwich bags, a cardboard box or boxes and a plastic garbage bag containing some oily rags and sandwich wrappers. The size of the cardboard boxes, sandwich bags and plastic garbage bag was not established by the Secretary nor their color, nor other information such as whether they were covered by coal dust, the lighting conditions, or whether they were in open view in a well traveled area or hidden in a crevice or corner.

(b) *Whether the non-violative condition was obvious.* The non-violative accumulations extended throughout the No. 3 entry over a distance of 250 feet and included approximately 100-250 empty rockdust bags that had been piled 2 or 3 feet high along the rib, five wooded palettes and a number of wooden cable spools. While it is not known how long these accumulations had existed, it is clear that they would have been obvious to anyone inby the check curtain on January 31, 1994.

(c) *The relationship between the violative and non-violative conditions.* The suggestion that the obvious nature of the non-violative accumulations must have made management aware of the violative accumulations has previously been discussed and rejected.

4(a) *The degree of danger posed by the violative condition.* The Secretary failed in this case to sustain her burden of proving that the few combustible items found in the active area at issue were, in themselves, hazardous. The testimony of Inspector Meredith regarding the nature of the hazard included both the non-violative and violative trash (Tr. 51). Indeed, Inspector Meredith opined that one garbage bag, one box and one rockdust bag would not even constitute a violation of the cited standard (Tr. 66). The initial findings in this case that the violation was not "significant and substantial," are, moreover, now the established law of the case.

(b) *The degree of danger posed by the non-violative conditions.* Inspector Meredith testified that the accumulations were hazardous in that they "increased the possibility of fires - - more fuel for a fire if we had one on a longwall face" (Tr. 51). It was "very combustible." One should be skeptical of such testimony however in light of the fact that neither by statute nor by the Secretary's regulations are such accumulations prohibited in inactive areas. It is also noteworthy that while the Secretary has acknowledged the fact that such accumulations were lawful, the Secretary has not seen fit even after 5 ½ years to yet proscribe such conditions by regulation, as one would expect if they were indeed as hazardous as she claims.

However, as I have previously noted, even though the inby accumulations were lawful I agree that this trash presented some degree of hazard and that the operator had some duty to clean it up. The failure to have cleaned up those lawful accumulations therefore does demonstrate some degree of negligence. However, because they were not violative and the operator's duty to clean them up was not clearly stated by statute or regulation, such negligence was not so aggravated or of such a gross nature as to constitute the high degree of negligence necessary for an unwarrantable failure finding.

(c) *The relationship between the degree of danger posed by the violative condition and the degree of danger posed by the non-violative condition.* I do not find that the danger posed by the non-violative trash and the negligence of the operator in failing to have cleaned up that trash warrants a finding of negligence justifying unwarrantable failure findings transferrable to the violative condition. While the relatively small hazard of the violative trash could have been enhanced by the larger hazard of the lawful trash, because of the lack of proof as to length of time they co-existed no firm conclusions can be made in this regard.

5. *Whether the operator had been placed on notice that greater efforts were necessary for compliance*. In this regard, the Secretary argues that seven days before the order in this case was issued another withdrawal order had been issued for accumulations in an adjacent entry, presumably in an active area of the mine. The Secretary was unable to represent however that it was then a final order and was not therefore subject to being vacated. It was therefore admitted into evidence for a very limited purpose, not to show that a violative condition had in fact existed as alleged, but only to show that the Secretary believed a violative condition had existed. (Tr. 58-59). Thus, that order cannot ethically be used to show that the operator was thereby placed on notice by a similar previous violative condition.

In any event, since this previous order was apparently issued to an active area of the mine where the accumulations could very well have been violative, that order would not in itself have provided notice that the non-violative trash in the inactive area of the mine at issue herein was unlawful or had to be promptly removed. Finally, as I have previously found, "on the facts of this case, wherein only a few combustible items were found in the active area of a different entry and which could have been placed there inadvertently without the knowledge of a responsible official only a short time before discovery, no inference can be drawn from this prior condition alone sufficient to support a finding of gross negligence or unwarrantable failure."

6(a) *The operator's efforts in abating the violative condition made prior to the issuance of the citation or order.* No evidence has been presented to show that the operator made any effort to clean up the outby trash before the order was issued. However, it is not known how long this small amount of trash existed or whether any agent of the operator was aware of this trash.

(b) *The operator's efforts in abating the non-violative condition prior to the issuance of the citation or order.* There is no evidence that the operator attempted to abate or clean up the non-violative condition prior to the issuance of the order herein. As I have previously noted, the operator had some duty to clean up even this lawful accumulation and I have recognized that its failure to do so constituted a lesser degree of negligence not amounting to unwarrantable failure.

(c) *The relationship between 6(a) and 6(b).* There is insufficient evidence to establish any relationship between 6(a) and 6(b) because of the absence of a statutory or regulatory duty to clean up the lawful inby trash and because of the lack of evidence as to how long the outby trash had existed.

Under all the circumstances I do not find that the Secretary has sustained her burden of proving that the violation herein was the result of the operator's "unwarrantable failure."

ORDER

Order No. 3182848 is hereby modified to a citation under Section 104(a) of the Act without "significant and substantial" findings.

Gary Melick
Administrative Law Judge

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