

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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September 6, 1995

JIM WALTER RESOURCES, INC., : CONTEST PROCEEDING
Contestant :
v. : Docket No. SE 95-404-R
: Citation No. 3198331; 8/2/95
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : No. 4 Mine
ADMINISTRATION (MSHA), : Mine I.D. No. 01-01247
Respondent :
and :
: :
UNITED MINE WORKERS :
OF AMERICA, :
Intervenor :

DECISION

Appearances: R. Stanley Morrow, Esq., Jim Walter Resources, Inc., Brookwood, Alabama, for the Contestant; David M. Smith, Esq, J. Alan Truitt, Esq., Maynard, Cooper & Gale, P.C., Birmingham, Alabama, for the Contestant; William Lawson, Esq. Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for the Respondent; Patrick K. Nakamura, Esq., Nakamura & Quinn, Birmingham, Alabama, for the Intervenor.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a notice of contest filed by Jim Walter Resources, Inc. (Contestant) challenging the issuance by the Secretary of Labor (Respondent) of Order

No. 3198331, pursuant to Section 107(a) of the Federal Mine Safety and Health Act of 1977 (the Act). In addition, Contestant also filed a motion for expedited proceeding, which was received by the Commission on August 4, 1995. On August 7, 1995, in a telephone conference call between the undersigned and counsel

for Contestant and Respondent, the motion to expedite was granted and this case was scheduled for hearing on August 22 and 23. On August 15, 1995, Contestant filed a motion for partial summary decision, and Respondent filed his response on August 17, 1995.

On August 17, 1995, in a telephone conference call with counsel for Contestant and Respondent, the motion was denied.¹ Subsequently, the United Mine Workers of America (UMWA) moved to intervene.

At the hearing, Johnny Jordan, Hulett Keith Chaney, Terry Lindley, and Kenneth Wayne Ely testified for Respondent. George Vass, James Reginald Lamons, and Darvel Leon Loggains testified for Contestant. The parties each filed a brief, via fax, on August 25, 1995.

Findings of Fact and Discussion

¹The basis for the denial of the motion was set forth in the conference call, and reiterated on the record at the commencement of the hearing on August 21.

Jim Walter Resources, Inc. (Jim Walter) operates two longwall sections at its No. 4 mine. The longwall face on the section in issue is approximately 900 feet long. Roof support is provided by five foot wide shields that advance forward as the face is cut. Approximately 192 shields are placed side-by-side for the length of the face. The various parts of the shields are set forth in Respondent's Exhibit No. 1. In normal operations, each shield is moved forward, in sequence, by electronic controls that are located in an adjacent shield. The miner who operates these controls stands under the canopy of the adjacent shield. To advance the shield forward, pressure is released from the leg jacks which causes the canopy to be lowered and the pontoon to be raised. The entire shield is then advanced forward to the face. Lastly, the hydraulic leg jacks are pressurized to press the canopy up against the roof. If the height of the roof exceeds the stroke² of the leg jacks, additional gob is placed under and in front of the advancing shield so as to raise the bottom of the shield and ensure that the stroke of the jack legs will place the canopy against the roof. In this situation, or when the base jacks, which lift up the pontoon of the shield when the canopy is depressured allowing for forward movement, are not operating properly, then the shield can become mired in the gob preventing forward movement of the shield. Timbers are then placed vertically between the canopy and the base of the shield. When the canopy is lowered to touch the top of the timber and pressure is applied, the pontoon is raised allowing the shields to be moved forward.

On August 1, 1995, Kenneth Wayne Ely, an MSHA Supervisory Mine Safety and Health Specialist, was requested to visit the No. 2 longwall at Jim Walter's No. 4 Mine, to observe a demonstration whereby timbers were used to elevate the pontoon of a shield in order to advance the shield. In the demonstration, the timber, placed in a vertical position between the canopy of the shield and the bottom of the shield, was tied to the leg jack.

After Ely returned to his office, between 7:00 p.m. and 11:00 p.m., Glenn Tinney, the subdistrict manager, related to him that he (Tinney) had conversations with miners regarding the use of timbers on the longwall to help advance the shields. In a series of conversations between Tinney and Ely, between 7:00 p.m. and 11:00 p.m., on August 1, Tinney informed Ely that miners told him of the following practices and hazards:

²Essentially, the stroke is the maximum distance that the canopy can be set above the bottom of the shield. The stroke can be set at different heights.

timber butts are used to help advance the shields, timbers are placed on top of butts, rocks have been known to fall off the edge of the top of the shields, hydraulic hoses have been damaged when timbers were used, there have been unplanned movement of the shields when timbers were used, and that numerous base jacks may not be operating properly.

At approximately 11:00 p.m. on August 1, Ely received a telephone call from a miner complaining of the existence of practices constituting an imminent danger. Ely indicated that the complaining miner reported that the longwall jack legs may have serious problems, and may not be properly pressurized. It was reported that the leg jacks were in disrepair, and that numerous base jacks were deficient or missing. It was also reported that miners using timbers to advance the longwall were holding timbers with their hands while advancing the shields, thereby placing themselves in a hazardous area where rocks might fall on them. It was further reported that the practice of using timbers to advance the shields created unplanned movement of the shields. Lastly, it was reported that miners were using a variety of blocks on top of the handrail or the pan line.

Ely left the office at approximately 11:30 or 11:45 p.m., and met with another inspector at "an eating place" (Tr. 367) on the way to the mine to discuss the section 103(g) complaint. He arrived at the mine at about 1:30 a.m. on August 2. Ely indicated that it normally takes approximately an hour and ten minutes to drive from the MSHA office to the mine.

Between 3:00 a.m. and 4:00 a.m., Ely interviewed six miners on the owl shift of the No. 1 longwall section, and other inspectors interviewed miners on the owl shift of the No. 2 longwall section. According to Ely, after reports of ten or twelve interviews were received at 6:55 a.m., an imminent danger order was issued pursuant to section 107(a) of the Act.³ Sometime between 3:00 and 4:00 a.m., Ely asked the manager of the longwall to no longer use timbers to advance the longwall until the MSHA inspectors completed the investigation. He said that the basis for this request was the information he had received from a miner on the telephone at 11:00 p.m. on August 1, requesting a 103(g) inspection. The imminent danger withdrawal order at issue alleges the following practice:

³The order at issue, No. 3198331, was signed by Kirby Smith, an MSHA inspector who was not available at the date of the hearing. At the hearing, it was stipulated that the issuance of the order was a joint effort involving Smith and Ely, and that the issue to be decided was the discretion of Ely in issuing the order.

An unsafe work practice has been identified during an investigation for 103(g) investigation as a result of a miner complaint. Testimony of persons working on #1 and #2 longwalls revealed that workers were being permitted to perform work while in a hazardous location. Workers were placing timbers and crib blocks to support longwall shield canopies while advancing longwall shields. Persons were holding timbers and/or cribs blocks (sic) in their hands while moving longwall canopies to come in contact with these timbers and/or cribs. This exposed persons to falling rock from the top and sides of the shield and to unplanned movement of the shields. Different persons were permitted to install these timbers and/or cribs blocks (sic) in a variety of ways with little or no supervision.

The order contains the following language under the heading Area or Equipment: "[t]he practice of using timbers and/or crib block to assist in the advancement of the long wall shields."

The order at issue alleges the existence of an "imminent danger" as per section 107(a) of the Act. Section(3)(j) of the Act defines an imminent danger as "... the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

In Utah Power and Light Co., 13 FMSHRC 1617 (1991), the Commission reviewed the Legislative History of this decision, and concluded as follows: "[t]hus the hazard to be protected against by the withdrawal order must be impending so as to require the immediate withdrawal of miners." (13 FMSHRC, supra, at 1621.) (Emphasis added)

The Commission rejected an interpretation of the imminent danger provision of the Act which includes, "... any hazard that has the potential to cause a serious accident at some future time" (Utah Power and Light, supra at 1622). The Commission further explained its holding as follows:

To support a finding of imminent danger, the inspector must find that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time. An inspector, albeit acting in good faith, abuses his discretion in the sense of making a decision that

is not in accordance with law when he orders the immediate withdrawal of mines under section 107(a) in the circumstances where there is not an imminent threat to miners.

Utah Power and Light, supra at 1622. See also, Island Creek Coal Company, 15 FMSHRC 339 (March 1993); Wyoming Fuel Co., 14 FMSHRC 1282 (August 1992).

For the reasons that follow, I find that the evidence fails to establish that there was an imminent threat to miners.

Jim Walters does not have any work rules, safety rules, guidelines, or instructions to govern the use of timbers to advance a longwall shield. Respondent presented the testimony of three miner witnesses who work on the longwall and proffered the testimony of six additional witnesses whose testimony would be cumulative to the testimony of the miner witnesses regarding the use of timbers to advance the longwall shields. Respondent's witnesses, Johnny Jordan, who has been a longwall helper and shearer operator on the No. 2 longwall since 1983, Hulett Keith Chaney, who has been a scoop operator and inside laborer on the No. 2 longwall since 1993, and Terry Lindley, who, as an electrician and repairman, has worked on the No. 2 longwall since 1978, testified based on their observations and actions. Their essentially uncontradicted testimony establishes the existence of the following work practices regarding the use of timbers⁴ to advance the longwall shields: timbers were placed vertically between the bottom of the canopy and at various locations on the bottom such as the relay bar, pan line, and handrail of the cable trough; timbers were stacked atop cribs; timber butts were stacked atop timbers; timbers were used that had been cut unevenly, miners had to steady timbers with one hand while operating with the other hand the rotary valve located on the shield in order to advance the shield, miners jammed the rotary valve controls with pliers, rocks, or other items in order to keep the valve set firm in a certain setting, miners rode the shield that was being advanced in situations when the shield was being moved by the rotary valve, and that in placing the timbers, miners were located in close proximity to pinch points and to the pan line, which was in operation most of the time. Jordan, Chaney, and Lindley testified in essence testified that they considered the above practices to be unsafe. They testified that

⁴Timbers are oak or pine, six inches by six inches and are sawed to the appropriate length to be placed between the underside of the canopy and the bottom of the shield. Timbers are used for roof support at other locations in the mine.

the timbers were reused in advancing the longwall, and some of them had "mushroomed" on the top and were split or cracked. Chaney testified that on one occasion, when he was setting a timber under the canopy, it kicked out from the top and bumped him in the shoulder, but he did not miss any work. Lindley testified that on one occasion he was hit on the leg by a timber.

In addition to the hazards of timbers kicking out and injuring miners, the miners testified to various other hazards involved in the above practices, such as miners being subject to the hazard of rocks falling off the canopies from the tip of the canopies or between the shields, especially when the shields are lowered distances more than a few inches to accommodate the length of the timber. Also, hazards exist when a single miner must balance himself by having one hand hold on to the timber and another to operate the valve lowering the canopy. As such, the miner may not observe rocks being thrown from the adjacent pan line, or he might get injured by being exposed to various pinch points upon movement of the shield. Also, should the shield move forward in an "unplanned" fashion as a consequence of the practice of the jamming of the rotary valves, a miner also might be injured.

Ely indicated that he issued the imminent danger order because information provided to him from the miners he interviewed on the owl shift established the following practices, which had been told to him over the telephone by a miner at 11:00 p.m. the previous evening: (1) miners were using timbers to advance the longwall and were holding the timbers with their hands and thus were placing themselves in a situation where they were exposed to falling rock; (2) the unplanned movement of the shields which resulted from this practice; and (3) the use of blocks and timbers in various position, such as on top of the rail or on the pan line. He stated that it "was just a matter of luck" (Tr. 278) that no serious injury resulted from the various practices testified to. He stated that, in his opinion, if the practice had not been stopped immediately that there was a very good likelihood of someone going to get a serious injury, get killed (sic)(Tr. 278) . He was asked what was imminent about the work practices that were described to him. His testimony is as follows:

A. Again, because of the variety of methods and ways that timber was being used, workers were placing themselves in an area that I thought was a high potential for an accident to occur.

Q. When?

A. Immediately.

Q. Why is that?

A. Because when we interviewed the miners that night, they described all these variety of conditons to us, and if they had continued on with those type practices, I believe that there would have been a serious injury going to occur (Tr. 279).

I find that the evidence is insufficient to establish that there was any condition or practice which, if not abated, had a reasonable potential to cause death or serious injury " ... within a short period of time" (Emphasis added.) (Utah Power and Light, supra, at 1622). Neither Ely nor any other inspector observed any condition that constituted an imminent danger. As testified to by Respondent's witnesses, various hazards were attendant upon the various practices of using timbers to advance the shields. However, Ely did not articulate with specificity the factual basis for his conclusion that the hazardous practices created an imminent threat to the safety of miners. It might be inferred that due to the variety of practices involved herein, and the frequency of their use, that there may have been a reasonable likelihood that the various hazards created would result in an injury or illness of a reasonably serious nature. However, a distinction must be made between conditions or practices that establish a significant and substantial violation and those that create a imminent danger (Utah Power and Light, supra, at 1622). Only the latter may properly be the subject of a Section 107(a) withdrawal order.

Chaney testified to having been bumped in the shoulder by a timber that kicked out, and Lindley testified to having been hit on a leg on one occasion by a timber, However, it is significant to note that according to the uncontradicted testimony of James Reginald Lamons, the longwall manager at the No. 4 mine, and Darrel Leon Loggains the longwall manager at the No. 3 mine, timbers have been used in advancing the longwall since its inception in 1979. There is no evidence of any serious injuries resulting from these practices. Respondent offered in evidence documentation of 14 injuries that had occurred on longwall faces, 11 of which resulted from rocks falling off of top of canopies or between shields (Respondent's Exhibit No. 6). However, there is no indication that any of these injuries occurred as the consequence of the use of timbers in advancing the face.

Hence, for all of the above reasons, I conclude that it has not been established that Contestant's practices had a reasonable

potential to cause death or serious injury within a short period of time. I thus find that the inspectors abused their discretion in issuing the withdrawal order at bar.⁵ Hence, the withdrawal order is to be dismissed.

ORDER

IT IS ORDERED that Order No. 38198331 be DISMISSED.

Avram Weisberger
Administrative Law Judge

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⁵In his brief, Respondent relies on U.S. Steel Corp., 3 FMSHRC (13) (January 1981) (Judge Broderick) and U.S. Steel Group, Minesota Ore Operations, 15 FMSHRC 1720 (August 1993) (August 1993) (Judge Barbour). To the extent that these cases are not consistent with my decision in the instant case, I choose not to follow them.

