

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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April 30, 1998

JIM WALTER RESOURCES, INC.,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. SE 98-14-R
	:	Citation No. 4482278; 9/23/97
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	No. 7 Mine
ADMINISTRATION (MSHA),	:	Mine ID No. 01-01401
Respondent	:	

## DECISION

Appearances: R. Stanley Morrow, Esq., Birmingham, Alabama, and Guy Hensley, Esq., Jim Walter Resources, Inc., Brookwood, Alabama, for Contestant;  
William Lawson, Esq., Office of the Solicitor, Department of Labor, Birmingham, Alabama, for Respondent.

Before: Judge Hodgdon

This case is before me on a Notice of Contest filed by Jim Walter Resources, Inc., against the Secretary of Labor, 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 Citation No. 4482278. A hearing on the contest was held on March 5, 1998, in Birmingham, Alabama. For the reasons set forth below, I affirm the citation.

## Factual Setting

A "Code-A-Phone" message was received in the Mine Safety and Health Administration (MSHA) district office on September 9, 1997, alleging that Jim Walter was putting coal and float coal dust accumulations in the No. 2 entry of the No. 1 longwall panel in Mine No. 7, where the

dinner hole was located.<sup>1</sup> Coal Mine Inspector Gregory McDade went to the mine to investigate the complaint on September 10, 1997. He went to the longwall section and found an accumulation of coal behind a check curtain in the No. 2 entry. It appeared to him that the coal had been pushed from the entry crosscut between the No. 2 and No. 3 entries into the No. 2 entry.

He was advised by miners working in the area that the accumulation had been in the No. 2 entry for about 24 hours before a ventilation curtain (curtain 2) had been placed in front of it. Prior to the coal accumulation being placed in the entry, it had served as a parking place for the “tool car” and as the dinner hole. Behind the curtain and the accumulation, McDade observed another curtain (curtain 1), which until curtain 2 was put up had served to direct air to the longwall face.

Based on what he had observed and been told, the inspector believed that the coal accumulation was a violation of the regulations. However, to be sure, he returned to the district office to discuss the situation with his supervisor. They concluded that it was a violation and on September 23, 1997, Inspector McDade issued Citation No. 4482278 to the company. It alleges a violation of section 75.400, 30 C.F.R. § 75.400, because:

Coal dust, including float coal dust and loose coal and other combustible materials such as wood and paper was allowed to accumulate in the No. 2 Entry of the active No. 1 longwall panel. These accumulations were pushed, hauled and deposited in the No. 2 Entry by scoop against a ventilation drop. The accumulation of coal dust, float coal dust, loose coal and other combustible materials was 43' feet in length, 19 feet in width and 6 feet in height, 58 feet in by survey station 111317.

(Govt. Ex. 1.)

### **Findings of Fact and Conclusions of Law**

Section 75.400 provides, in pertinent part, that: “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 . . . .” The parties agree that the facts are as set out above. It is the Contestant’s position that there was no violation of the regulation

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<sup>1</sup> “Code-A-Phone is a toll-free ‘hot line’ to the MSHA headquarters in Arlington, Virginia, that is used to request an inspection of a mine, to report safety or health problems, or to report possible violations of the mandatory safety and health standards. MSHA’s policy is not to reveal the source of a Code-A-Phone request or report.” *Stillion v. Quarto Mining Co.*, 12 FMSHRC 932, 933 n.2 (May 1990). A transcript of the call is faxed to the MSHA district office nearest the mine for investigation.

because the accumulations were behind curtain 2 and were, therefore, not in the “active workings” of the mine.<sup>2</sup>

When the “tool car” and the dinner hole were in the No. 2 entry, the area was clearly within the active workings of the mine. Miners regularly went to the “tool car” to retrieve and replace tools, miners regularly ate in the area and the area up to curtain 1 had to be examined at least weekly. When the accumulations were pushed into the entry, but before curtain 2 was installed, the accumulations were within the active workings of the mine. The dinner hole was still in the entry, right in front of the accumulations, and curtain 1 still had to be examined at least once a week to make sure it was functioning properly.

Inspector McDade concluded, based on what he was told, that the accumulations were in the entry for at least 24 hours before curtain 2 was put up. His conclusion was corroborated by the testimony of Danny Joe Nelson, a Jim Walter employee, who stated that he was working the 11:00 p.m. to 7:00 a.m. shift on Sunday night-Monday morning when he first noticed the accumulations in the No. 2 entry. At that time, curtain 2 had not been installed. The next night, when he came to work, the curtain had been placed in front of the accumulations. Therefore, I find that the accumulations were in the active workings of the mine for at least 24 hours.

Since the accumulations were in the active workings for at least 24 hours, I conclude that Jim Walter violated section 75.400. The Secretary wishes to go further, however. She argues that even after curtain 2 was installed, the accumulations violated section 75.400 because curtain 2 was only put up to hide the accumulations and circumvent the rule.

There is evidence to support the Secretary’s theory. Inspector McDade testified:

The first check curtain was in good shape. There would have been no reason for installing the second check curtain at that point. When I went through check curtain number two and examined the area behind it, the coal was there. It was a large pile of coal pushed back there and other debris and materials.

And traveling on back to check curtain number one, the check curtain number one was in very good shape too. So, I made an examination for methane but there was none, and there was ventilation somewhat moving across the area. But I suspect that it was not a good mining practice because it accesses an area where methane could accumulate.

Q. In your 20 some years of inspecting underground coal

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<sup>2</sup> “Active workings” are defined in section 75.2, 30 C.F.R. § 75.2, as “[a]ny place in a coal mine where miners are normally required to work or travel.”

mines and your previous years of supervisory and labor work for U.S. Steel and Drummond, have you ever seen two check curtains installed in such a manner as depicted in Government's Exhibit 2; that is, within 43 feet of each other?

A. No, I haven't.

(Tr. 90-91.) Kenneth W. Ely, a MSHA Ventilation Expert, also testified that he had never seen ventilation curtains installed this way and opined that it was a bad mining practice to have accumulations between two ventilation curtains in an essentially unventilated area.

The company did not present any evidence to rebut MSHA's inference. Michael A. Evans, Longwall Coordinator, the only witness presented by Jim Walter, stated that he was not present when the inspection was made. He further related that if a ventilation curtain is performing its ventilation function, a new curtain would not normally be installed 43 feet in front of it and that he did not know who had installed curtain 2. He did not testify as to the reason curtain 2 had been put up.

In another case concerning Jim Walter, involving a combustible material accumulation located behind a check curtain, Commissioner Riley stated in a concurring opinion: "We hope responsible operators would not resort to sweeping their problems behind a curtain separating 'active workings' from inactive areas. While such a move may comply with the letter of applicable regulations, it falls short of the spirit of the law, which is intended to prohibit the accumulation of combustible materials that present an avoidable risk to miners." *Jim Walter Resources, Inc.*, 18 FMSHRC 508, 514 (April 1996). It appears that that is exactly what Jim Walter did in this case.

It is one thing for accumulations to naturally occur in inactive workings, through roof falls and rib sloughing, it is quite another for accumulations to be deliberately placed in inactive workings or to be placed in active workings which are then made inactive by the hanging of a ventilation curtain. The former is clearly not a violation of section 75.400. I find that the latter is.

It is a violation because when the accumulations are placed in inactive workings, placing them there makes the area a place where miners are required to work or travel. Or, as in this case, when accumulations are placed in active workings and then the area is made inactive, the accumulations are in active workings while they are being deposited. Thus, the very act of trying to hide the accumulations is a deliberate violation of section 75.400.

It does not appear that there is any way that combustible accumulations can be intentionally placed either in inactive workings or in active workings that will be made inactive without violating the regulation during the placement. While placing accumulations behind curtains or similar barriers may make them harder to detect, once discovered, problems of proof should be no more difficult than they were in this case. Furthermore, since this is clearly a bad

mining practice, it should be expected that operators interested in the safety of their miners would not follow such a practice. Finally, because this can only occur as the result of an intentional act, those who are not concerned with the safety of their miners are opening themselves to charges of “reckless disregard” for the safety of miners and “unwarrantable failure” citations and orders.<sup>3</sup>

**ORDER**

Accordingly, I conclude that the accumulation of combustible materials in the No. 2 entry violated section 75.400. Citation No. 4482278 is **AFFIRMED**.

T. Todd Hodgdon  
Administrative Law Judge

Distribution:

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<sup>3</sup> Since Jim Walter may have been misled by the Commission’s decision in *Jim Walter Resources, Inc.*, 18 FMSHRC 508 (April 1996), into thinking that such activities were acceptable, even though the Commission did not specifically address this issue, I am concurring with the inspector’s finding that this violation involved “moderate” negligence.