

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

August 11, 1997

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
v. : Docket No. SE 94-244-R
JIM WALTER RESOURCES, INC. :

BEFORE: Jordan, Chairman; Marks, Riley, and Verheggen, Commissioners

DECISION

BY THE COMMISSION:

This contest proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (Mine Act or Act), involves a citation and withdrawal order issued by the Department of Labor's Mine Safety and Health Administration (MSHA) alleging a violation of 30 C.F.R. ' 75.400 for accumulation of trash detected in an entry of Jim Walter Resources, Inc.'s (JWR) No. 7 Mine located in Birmingham, Alabama.1 After an evidentiary hearing, Administrative Law Judge Gary Melick affirmed the violation but concluded that the Secretary had not proved either that the violation was significant and substantial (S&S)2 or that it had resulted from JWR's unwarrantable failure to comply with the standard.3 16 FMSHRC

1 Section 75.400 states:

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.

(Emphasis added.) Active workings is defined in 30 C.F.R. ' 75.2 as Any place in a coal mine where miners are normally required to work or travel.

2 The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. ' 814(d)(1), which distinguishes as more serious in nature any violation that could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard . . .

3 The unwarrantable failure terminology is taken from section 104(d)(1) of the Act,

1511 (July 1994) (ALJ). Accordingly, the judge modified the order issued under section 104(d)(2) of the Act to a citation under section 104(a). *Id.* at 1514. In reaching his negative S&S and unwarrantable determinations, the judge declined to consider nearby trash materials located in the inactive workings of the mine because they did not violate the terms of section 75.400. *Id.* at 1512-14. 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 77.400 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 found the Secretary's interpretation, allowing consideration of conditions that do not violate health and safety standards in the determination of unwarrantable failure, to be a reasonable construction of the Mine Act. *Id.* at 919-20. Accordingly, the court remanded the case to the Commission to consider the non-violative trash accumulations when addressing whether "the record contains sufficient evidence of causation and culpability to support an 'unwarrantable failure' finding." *Id.* at 920. On July 22, 1997, the court issued its mandate.

---

30 U.S.C. ' 814(d)(1), which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards . . . ."

Pursuant to the court's order, we vacate the judge's unwarrantable determination and remand to the judge to consider the non-violative accumulations in the inactive area of the mine. The judge is to consider these accumulations, which his decision refers to as *Amassive* (16 FMSHRC at 1513), in light of the other factors that the Commission may examine in determining whether a violation is unwarrantable, including the extent of a 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. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (August 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984); *Midwest Material Co.*, 19 FMSHRC 30, 34 (January 1997); *Enlow Fork Mining Co.*, 19 FMSHRC 5, 11-12, 17 (January 1997). If the judge determines that the violation is unwarrantable, he shall modify the citation accordingly and reassess the civil penalty.

---

Mary Lu Jordan, Chairman

---

Marc Lincoln Marks, Commissioner

---

James C. Riley, Commissioner

---

Theodore F. Verheggen, Commissioner