

CCASE:
JIM WALTER RESOURCES V. SOL (MSHA)
DDATE:
19930310
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JIM WALTER RESOURCES, INC.,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. SE 92-249-R
v.	:	Citation No. 2804441; 3/13/92
	:	
SECRETARY OF LABOR,	:	Mine No. 7
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Mine ID 01-01401
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 92-328
Petitioner	:	A.C. No. 01-01401-03887
	:	
v.	:	Mine No. 7
	:	
JIM WALTER RESOURCES, INC.,	:	
Respondent	:	

DECISION

Appearances: R. Stanley Morrow, Esq., Birmingham, Alabama, for Contestant/Respondent;
William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Respondent/Petitioner.

Before: Judge Fauver

The company's notice of contest and the Secretary's petition for civil penalties were consolidated for hearing and decision, under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. Nine of the ten citations involved were settled. A hearing was held on the remaining charge, Citation No. 2804441.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, probative, and reliable evidence establishes the Findings of Fact and further findings in the Discussion below:

FINDINGS OF FACT

1. Jim Walter Resources, Inc., operates an underground coal mine, known as Mine No. 7, which produces coal for sale or use in or substantially affecting interstate commerce.

2. On March 13, 1992, Federal Mine Inspector Bill Deason inspected the No. 1 longwall section of Mine No. 7. He observed that the operator had endangered off approximately 75 feet of the travelway in the No. 4 entry because of bad roof (beginning at the forward crosscut), that some roof had fallen in and near the crosscut (as shown in Exhibit G-2), and that in Entry No. 3, near the crosscut, there were a crack across the entry and a brow. He found that the roof conditions constituted a hazard to miners who were required to travel through the crosscut, and therefore issued Citation No. 2804441, charging a violation of 30 C.F.R.

75.202. The regulation provides that "The roof, face and rib of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts."

75.202(a)

3. The company promptly submitted a supplement to its roof control plan, providing for additional roof and rib support in the area where the miners were traveling. Specifically, it proposed to support the area by installing additional timbers on five foot centers in the No. 3 entry to a point outby the brow, and to install additional cribbing on five foot centers from the rib line to the shields in the No. 3 entry (as shown in Exhibit G-3). The plan was promptly approved by MSHA and the citation was terminated. The supplemental plan, although acknowledging that it was "submitted as a result of the conditions being experienced", was submitted under protest by the company, which stated in the plan: "No. 7 Mine does not agree with the necessity of the plan and is only doing so to abate the citation issued " Exhibit G-3.

4. The company had previously endangered off a travelway in No. 3 entry because of bad roof, so that in the course of two shifts travelways in Nos. 3 and 4 entries were endangered off because of bad roof. The No. 3 entry had been re-opened before the No. 4 entry was closed.

5. Advancement of the longwall put stress on the roof across the crosscut intersecting Nos. 3 and 4 entries, as evidenced by the conditions observed by Inspector Deason. Additional roof support was needed to protect the miners who traveled through the crosscut (in the area shown in Exhibit G-3).

DISCUSSION WITH FURTHER FINDINGS

I find that the evidence sustains the inspector's finding that the roof where the miners were traveling was hazardous and required further support to comply with 30 C.F.R. 75.202(a).

The company contends that the citation is unenforceable because it was based upon an unwritten, arbitrary policy of the Subdistrict Manager of MSHA's Birmingham Office. About ten years ago, the Subdistrict Manager (Mr. Weekly) adopted an enforcement policy to cite a violation if the forward longwall crosscut was used as a travelway without additional roof support or

safeguards. Mr. Kenneth Ely, an MSHA supervisor, testified that Mr. Weekly's concern was that roof pressures created by advancing the longwall exerted substantial pressure on the forward intersection of the longwall entries (such as the forward crosscut connecting Nos. 3 and 4 entries) and that, as a regular occurrence, the roof in that area would deteriorate and present a hazard of falling without warning.

The Secretary contends that this enforcement policy is not arbitrary but was arrived at on the basis of the Subdistrict Manager's review of roof control plans, accident reports, etc., and his discussions with MSHA supervisors, inspectors, and roof specialists, as well as his own background and experience in mining and mine safety and health. Mr. Ely testified that the MSHA inspectors attempted to "marry" the manager's policy to existing mine conditions, and that MSHA recognizes that enforcement citations and orders must be supported by the facts independent of a manager's policy.

The company contends that the manager's policy is not enforceable because it was not promulgated in accordance with 101(a) of the Act, which requires formal rulemaking procedure (in compliance with 553 of the Administrative Procedure Act) for any rule "promulgating, modifying, or revoking a mandatory health or safety standard."

The Commission has held that MSHA's Program Policy Manual's "instructions are not officially promulgated and do not prescribe rules of law binding upon [the Commission]." Old Ben Coal Company 2 FMSHRC 2806, 2809 (1980). A fortiori, a Subdistrict Manager's unwritten policy is not a safety standard or modification binding on the Commission and cannot independently support a 104(a) citation. Rather, it is a local MSHA office directive to inspectors. Citations or orders issued under such a policy must stand or fall on their factual merits, based on actual mining conditions.

The evidence as to the mining conditions sustains the inspector's finding of a violation of 30 C.F.R. 75.202.

Considering the criteria for civil penalties in 110(i) of the Act, I find that a civil penalty of \$800.00 is appropriate for this violation.

CONCLUSIONS OF LAW

1. The judge has jurisdiction in these proceedings.
2. Jim Walters Resources, Inc., violated 30 C.F.R. 75.202 as alleged in Citation No. 2804441

~435

ORDER

WHEREFORE IT IS ORDERED within 30 days from the date of this Decision, Jim Walters Resources, Inc., shall pay the approved settlement civil penalties of \$2,814 and a civil penalty of \$800 for the violation charged in Citation No. 2804441, for a total of \$3,614 in civil penalties.

William Fauver
Administrative Law Judge

Distribution:

William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, 2015 Second Avenue North, Suite 201, Birmingham, Alabama 35203 (Certified Mail)

R. Stanley Morrow, Esq., Jim Walter Resources, Inc., P. O. Box 830079, Birmingham, Alabama 35283-0079 (Certified Mail)

/fcca