

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 NEW JERSEY AVENUE, N.W., SUITE 9500  
WASHINGTON, D.C. 20001

September 20, 2011

JIM WALTER RESOURCES, INC.,	:	CONTEST PROCEEDING:
Contestant,	:	
	:	Docket No. SE 2008-962-R
v.	:	Order No. 7693789; 07/24/2008
	:	
SECRETARY OF LABOR,	:	Mine ID 01-01401
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent.	:	
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING:
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2009-267
Petitioner,	:	A.C. No. 01-01401-173519-02
	:	
v.	:	Mine: No. 7 Mine
	:	
	:	
JIM WALTER RESOURCES, INC.,	:	
Respondent.	:	

**SUMMARY DECISION**

Before: Judge Bulluck

These cases are before me on Notice of Contest and Petition for Assessment of Civil Penalty filed by Jim Walter Resources, Incorporated (“JWR”), against the Secretary of Labor (“Secretary”), acting through her Mine Safety and Health Administration (“MSHA”), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“The Act”), 30 U.S.C. § 815(d). JWR challenges an Order issued by MSHA under section 104(d)(2) of the Act, alleging a violation of the Secretary’s mandatory safety standard at 30 C.F.R. § 75.362(b).

The parties have filed cross Motions for Summary Decision. Pursuant to Commission Rule 67(b), “[a] motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) that there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law.” 29 C.F.R. § 2700.67.

It is well settled that summary decision is an extraordinary measure and the Commission has analogized it to Rule 56 of the Federal Rules of Civil Procedure, which the Supreme Court

has construed to authorize summary judgment only “upon proper showings of the lack of a genuine triable issue of material fact.” *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007) (citations omitted). When considering a motion for summary decision, the Commission has noted that, “the Supreme Court has stated that ‘we look at the record on summary judgment in the light most favorable to . . . the party opposing the motion,’ and that ‘the inferences to be drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion.’” *Hanson Aggregates New York, Inc.*, 29 FMSHRC at 9 (quoting *Poller v. Columbia Broadcasting Sys. Inc.*, 368 U.S. 464, 473 (1962) and *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

Based upon the uncontested facts represented by the parties, I find that there is no genuine issue as to any material fact. Having reviewed the parties’ Motions, I conclude that, for the reasons stated below, the Secretary is entitled to summary decision as a matter of law.

## **I. Stipulations**

The parties stipulated as follows:

1. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction to hear and decide this civil penalty proceeding pursuant to section 105 of the Federal Mine Safety and Health Act of 1977;
2. JWR is a mine operator subject to the jurisdiction of the Federal Mine Safety and Health Administration;
3. JWR is the owner and operator of the No. 7 Mine located in Brookwood, Alabama;
4. MSHA Inspector John Terpo was acting in his official capacity as an authorized representative of the Secretary of Labor when he issued Order No. 7693789; and
5. Order No. 7693789 was served on JWR or its agent as required by the Act.

JWR Mot. at 1-2.

## **II. Factual and Procedural Background**

This matter concerns JWR’s alleged failure to conduct an on-shift examination of the belt conveyor haulageways in sections 9 and 10 of Mine No. 7. On July 24, 2008, MSHA Inspector John Terpo arrived at the No. 7 Mine to conduct a regular inspection. Sec’y Mot. at 3. While reviewing the pre-shift and on-shift examination books, Terpo noticed that belts 9, 10A, and 10B were described as “idle” during the July 24 owl shift. Sec’y Mot. at 3. Clint Webster, the Control and Operations monitor, gave Terpo a computer printout which indicated that the belts at issue had run from 11:00 p.m. until 12:18 a.m., and again from 5:54 a.m. to 7:00 a.m. Sec’y

Mot. at 3. Belts 9, 10A, and 10B are located in the southwest end of the mine. Sec’y Mot. at 3. The “owl shift” precedes the day shift and runs from 11:00 p.m. to 7:00 a.m. Sec’y Mot. at 3. During the owl shift, coal was being produced in the north end of the mine, six to ten miles from sections 9 and 10. Sec’y Mot. at 3. Miners were present in sections 9 and 10 on the July 24 owl shift performing maintenance, bolting, rockdusting, and other mining-related work. JWR Mot. at 2, 5.

Inspector Terpo issued 104(d)(2) Order No. 7693789, charging JWR with a violation of 30 C.F.R. § 75.362(b). The violation was deemed significant and substantial (“S&S”) and an unwarrantable failure to comply with the standard. The Secretary proposed a specially assessed penalty of \$70,000.00. JWR contested the Order and the case was scheduled for hearing. Subsequently, however, the parties elected to file cross motions for summary decision.

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

JWR admits that an on-shift examination of the 9, 10A, and 10B belt haulageways was not performed during the owl shift of July 24, 2008. JWR Mot. at 2, 4.

The cited standard provides as follows:

During each shift that coal is produced, a certified person shall examine for hazardous conditions along each belt conveyor haulageway where a belt conveyor is operated.

30 C.F.R. § 75.362(b).

The issue for resolution in this case is whether section 75.362(b) requires an operator to conduct an on-shift examination of each belt conveyor haulageway where a belt is being run for any reason, so long as coal is being mined on some section of the mine during that shift.

Regarding section 75.362(b), the Commission has stated that “[t]he standard’s regulatory history supports a plain meaning approach.” *Rawl Sales & Processing Co.*, 23 FMSHRC 463 at 473 (May 2001), *accord Consolidation Coal Co.*, 18 FMSHRC 1541, 1547-48 (Sept. 1996). In *Rawl*, the Commission affirmed the ALJ’s summary decision in favor of the operator.<sup>1</sup> In that case, the ALJ found that no on-shift examination of the belt haulageway was required because no miners were underground during the particular shift in question. *See generally Rawl Sales & Processing Co.*, 21 FMSHRC 219 (ALJ) (Feb. 1999). That case is distinguishable from the case at hand because, here, the parties acknowledge that miners were working underground during the owl shift on July 24 while coal was being produced elsewhere in the active workings of the same mine.

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<sup>1</sup> The Commission’s vote in that case was evenly split and, therefore, “the effect of the split decision is to allow the judge’s decision to stand as if affirmed.” 23 FMSHRC at 463.

The phraseology of section 75.362(b), “*during* each shift that coal is produced,” refers to a time and not a place. (emphasis added). There is no dispute that during the owl shift of July 24, 2008, coal was being produced in the north end of No. 7. The term “*each* belt conveyor haulageway” contemplates multiple belts and the duty to inspect all of them. (emphasis added). This is the case here.

In the course of mining, belts are “operated” for various reasons. The 9, 10A, and 10B belts were turned off for 6 hours of the 8-hour owl shift. Miners arrived on sections 9 and 10 around 11:50 p.m. and the belts were still running until 12:18 a.m. JWR Mot. at 5, 6-7. During this time, the belts were carrying the remainder coal from the evening shift out of the mine. JWR Mot. at 6. The belts were reactivated at the end of the owl shift “[i]n order to assure that a proper on-shift examination could be made on the day shift.” JWR Mot. at 6-7. It is unclear whether the miners were still on the sections when the belts were turned on at 5:54 a.m. at the end of the owl shift.

As mentioned previously, miners were present on sections 9 and 10 performing duties associated with producing, although not actually cutting, coal such as bolting, rockdusting, and servicing equipment. JWR Mot. at 5. Whenever belts are running, miners are exposed to potential hazards that can arise during their operation.

The legislative history of the Act points to Congress’ concern with hazards associated with belt lines, noting that “[m]any fires occur along belt conveyors as a result of defective electric wiring, overheated bearings, and friction; and therefore, an examination of belt conveyors is necessary.” S. Rep. No. 91-411, at 57 (1969), *reprinted in* Senate Subcomm. on Labor, Comm. on Labor and Public Welfare, Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 183 (1975).

Based on the foregoing, I find that JWR violated section 75.362(b) when it failed to conduct an on-shift examination of the belt haulageways in sections 9 and 10 of Mine No. 7, during the owl shift of July 24, 2008.

#### Significant & Substantial

This violation was designated as significant and substantial by the inspector. A violation is significant and substantial (“S&S”) when the violation is “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” 30 U.S.C. § 814(d)(1). A violation is properly designated as S&S “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonable serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In order to establish that a violation is significant and substantial, the Secretary must prove:

(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

*Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *see also*, *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-4 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). The evaluation is made in terms of “continued normal mining operations.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). Moreover, resolution of whether a violation is S&S must be based “on the particular facts surrounding the violation.” *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1998); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

The fact of the violation has been established. The focus of the S&S analysis here is whether the violation was reasonably likely to result in an injury producing event. In *U.S. Steel Mining Co.*, the Commission provided further guidance:

We have explained that the third element of the *Mathies* formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial.

*U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1129 (Aug. 1985) (citations omitted). Lack of an on-shift examination of the belt haulageways is likely to lead to a failure to identify serious conditions that could result in injuries ranging from cuts, bruises, sprains, broken bones and contusions to fatalities. Conditions such as faulty wiring, malfunctioning equipment, and falling objects present discrete safety hazards, such as slip and fall or the possibility of fire or explosion. If any of these events were to occur, it is reasonably likely that injuries resulting to miners would be of a reasonably serious nature.

With respect to belt haulageways in sections 9 and 10, the belts were running while miners were working on the sections, and for a period of time the belts were transporting coal. Should a defective wire or belt friction have generated a spark, it is reasonably likely that it would have lead to a fire or explosion. Belt fires are a significant hazard associated with mining, as evidenced by Congress’ concern with belt line hazards, noted above. Oxygen and a fuel source – elements necessary for a fire to occur – were present. Friction from rollers could have produced an ignition source that could have lead to a fire. As is possible with belt fires, a fire could have spread throughout the mine. Furthermore, smoke from a fire could have created a serious safety hazard. It could have obstructed the miners’ sight, preventing or delaying escape

from the mine, and could have exposed them to inhalation of toxic gases. Additionally, should a belt defect, such as a stuck roller or a ripped or loose belt, have gone undetected, it is reasonably likely that a miner situated in close proximity to the belt could have tripped and fallen or otherwise become entangled in the belt's moving parts, causing a reasonably serious injury.

I find that the failure to conduct an on-shift examination of the belt haulageways in question for any possible defects or conditions requiring attention was reasonably likely to result in injury causing events of a serious nature and, therefore, that the violation was S&S. Accordingly, I affirm the Secretary's S&S finding.

### Unwarrantable Failure

The Order was also designated as an unwarrantable failure to adhere to the requirement of the standard, as set forth in section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1). Unwarrantable failure is considered "aggravated conduct constituting more than ordinary negligence." *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec, 1987). Unwarrantable failure is "characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-4; *Rochester & Pittsburgh Coal Corp.*, 13 FMSHRC 189, 193-4 (Feb. 1991).

The Commission has set forth the following factors to be considered in making an unwarrantable failure analysis: "the extensiveness of the violation, the length of time that the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1548 (Sept. 1996) (citing *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994)).

The violation was based on the activities of one shift. No evidence has been proffered by the Secretary that JWR has been cited for violating this standard at any time in the past. As stated previously, miners were present on sections 9 and 10 while the belts were running for approximately 1.5 hours. During that time, coal was transported on the belts for approximately 30 minutes. This short length of time is a mitigating factor.

Moreover, as JWR points out, it had a good faith belief that there was no duty to conduct an examination of the subject belt haulageways on the July 24 owl shift. In fact, JWR did conduct an on-shift examination pursuant to another subsection of the standard, section 75.362(a)(1).<sup>2</sup> Therefore, this violation does not rise to the level of aggravated conduct

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<sup>2</sup> Section 75.362(a)(1) requires that "[a]t least once during each shift . . . a certified person designated by the operator . . . conduct an on-shift examination of each section where anyone is assigned to work during the shift. . . ." According to JWR, this examination was conducted because miners were assigned to work in sections 9 and 10. JWR Mot. at 9. I find that JWR's examination under 75.362(a)(1) of the sections where crews were scheduled to work weighs against saddling the operator with indifference or reckless disregard in failing to inspect the

contemplated by the Act.

Consequently, I find that the Secretary has not met her burden of establishing aggravated conduct contemplated by the Act, and that the violation was a result of JWR's moderate negligence, not its unwarrantable failure to comply with the standard. Accordingly, the Order shall be modified to a citation issued pursuant to section 104(a) of the Act.

### Penalty

While the Secretary has proposed a specially assessed civil penalty of \$70,000.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(I) of the Act, 30 U.S.C. § 820(j). *See Sellersburg Co.* 5 FMSHRC 287, 291-92 (March 1993), *aff'd*, 763 F.2d 1147 (7th Cir. 1984).

In assessing the appropriate penalty for this violation, I have considered that JWR is a large operator. JWR has not been cited for a similar violation and, therefore, I do not find its history to be an aggravating factor in assessing the penalty. I have found the violation to be relatively serious, given that the lack of inspection of the belt haulageways in question could potentially expose miners to serious injuries. Moreover, I have ascribed moderate negligence to the operator. Therefore, having considered JWR's large size, ability to remain in business, history of violations, seriousness of violation, moderate degree of negligence, good faith abatement and other mitigating factors, I find that a \$20,000.00 penalty is appropriate.

### ORDER

**WHEREFORE**, JWR's Motion for Summary Decision is **DENIED**, and the Secretary's Motion for Summary Decision is **GRANTED**. Order No. 7693789 is hereby **MODIFIED** to a citation issued under section 104(a) of the Act, with the degree of negligence reduced to "moderate." It is further **ORDERED** that JWR pay a civil penalty of \$20,000.00 within 30 days of the date of this decision.<sup>3</sup> Accordingly, these cases are **DISMISSED**.

Jacqueline R. Bulluck  
Administrative Law Judge

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subject belt haulageways under section 75.362(b).

<sup>3</sup> Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390

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