

CCASE:

JIM WALTER RESOURCES V. MSHA

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FMSHRC-WDC

May 29, 1987

JIM WALTER RESOURCES, INC.

v.

Docket No. SE 85-36-R

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

Docket No. SE 85-62

Docket No. SE 85-109

Docket No. SE 85-123

Docket No. SE 85-124

v.

JIM WALTER RESOURCES, INC.

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

Docket No. SE 86-83

v.

JIM WALTER RESOURCES, INC.

BEFORE: Ford, Chairman; Backley, Doyle. Lastowka and Nelson,  
Commissioners

DECISION

BY THE COMMISSION:

In these consolidated contest and civil penalty proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)(the "Mine Act"), the issue is whether Jim Walter Resources, Inc. ("Jim Walter") violated 30 C.F.R. § 75.316 by failing to comply with its approved methane and dust control plan by not maintaining line brattice to within 10 feet of "all faces." 1/ Commission

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1/ 30 C.F.R. § 75.316, a mandatory safety standard for underground coal mines, repeats § 303(o) of the Mine Act, 30 U.S.C. § 863(o).

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Administrative Law Judge George Koutras held in Docket No. SE-85-36-R, etc. that the Secretary of Labor ("Secretary") did not establish a violation. 8 FMSHRC 568 (April 1986)(ALJ). 2/ In Docket No. SE 86-83 Commission Administrative Law Judge James Broderick concluded that a violation was established and assessed a civil penalty of \$750. 3/ 9 FMSHRC 109 (January 1987)(ALJ). We

granted petitions for discretionary review of both decisions. We consolidated the cases on review and heard oral argument. For the reasons that follow, we affirm Judge Koutras' decision and reverse Judge Broderick's.

I.

The antecedents of these controversies arose in 1972 when a methane ignition occurred at Jim Walter's No. 3 mine. The mine is located in Tuscaloosa County, Alabama, and has a history of high methane liberation. At the time of the methane ignition, the No. 3 mine's approved ventilation plan required that line brattice be maintained to within 10 feet of all working faces while coal was being cut and loaded. After mining of the face ceased, the line brattice was taken down and cleanup operations in the face area were conducted. A continuous mining machine being used during the cleanup caused a methane ignition. Following the ignition, Jim Walter was cited by the Secretary of Interior's Mining Enforcement and Safety Administration ("MESA") for a

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Section 75.316 provides in part:

A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator....

The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

2/ Docket No. SE 85-36-R is a contest proceeding filed by Jim Walter challenging a withdrawal order. Docket Nos. SE 85-62, SE 85-109, SE 85-123, and SE 85-124 are penalty proceeding= initiated by the Secretary. Docket No. SE 85-124 was inadvertently omitted from Jim Walter's petition for discretionary review. The parties agree that it should have been included, and consequently, we deem it before us on review. In Docket No. SE 85-124, Judge Koutras also found a violation of the permissibility standard, 30 C.F.R. § 75.503. This violation is not before us on review.

3/ In addition, Judge Broderick found a second violation of section 75.316 in that Jim Walter allowed methane on a longwall section to exceed the maximum permissible limit. This violation is not before us on review.

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violation of section 75.316, but the proceeding was dismissed after it was determined that coal was not being mined at a "working face" when the ignition occurred, and that the cited provision in the ventilation plan therefore was inapplicable. MESA thereafter concluded that the ventilation plans at certain of Jim Walter's mines should be revised to require that line brattice be maintained to within 10 feet of "the area of deepest penetration of all faces in all working places in by the last open crosscut" (the "all faces provision"), rather than just working faces. 4/

Accordingly, in 1973 Jim Walter submitted to the appropriate MESA district manager for his review and approval a ventilation plan for the No. 7 mine, which also is located in Tuscaloosa County and also has a history of high methane liberation. As submitted by Jim Walter, the plan applicable to the No. 7 mine contained a provision that line brattice be maintained to within 10 feet of all working faces. The MESA district manager sent Jim Walter a letter that approved the plan with the proviso that line brattice be maintained to within 10 feet of "all faces," as stated above. Between 1973 and 1984, each time the ventilation plan for the No. 7 mine was reviewed at six-month intervals, as required by statute and the Secretary's regulation, Jim Walter submitted a plan that required line brattice to be maintained to within 10 feet of all working faces and the MESA (and MSHA) district manager responded with a letter stating that the plan was approved provided that line brattice "be maintained to within 10 feet ... of all faces."

Apparently, between 1973 and November 13, 1984, no citations were issued either by MESA or MSHA alleging a violation of the all faces provision at Jim Walter's mines. On November 13, 1984, however, an MSHA inspector issued the first citation alleging such a violation at Jim Walter's No. 4 mine, also in Tuscaloosa County. Jim Walter asserted that there was no violation because mining had ceased at the face and would not be resumed for several days, and it was not required by the plan to maintain line brattice within 10 feet of idle faces. Following an evidentiary hearing, Judge Broderick ruled against Jim Walter and found that the area at issue was a face within the meaning of the all faces provision. Jim Walter Resources, Inc., 7 FMSHRC 1471 (September 1985)(ALJ). 5/

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4/ MESA administered the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976)(amended 1977), the predecessor of the Mine Act. When the Mine Act became effective in 1977, enforcement jurisdiction transferred from the Secretary of the Interior to the Secretary of Labor and MESA was replaced by the Mine Safety and Health Administration ("MSHA").

5/ Jim Walter did not seek Commission review of this decision.

The parties stipulated that the issue in Docket Nos. SE 85-36-R, etc. is identical to the issue in the case involving the November 13, 1984 citation. The Secretary argues that Judge Koutras erred in not finding Jim Walter collaterally estopped from relitigating the issue. We reject this contention. The Secretary did not argue collateral estoppel below. nor has he shown any cause for failure to do so. The Mine Act and  
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II. Docket No. SE 85-36-R, etc. 6/

On April 8, 1985, MSHA Inspector Judy McCormick inspected the No. 7 mine. In the No. 13 section of the mine, Inspector McCormick found that a crosscut had been driven to the left for 24 feet off the No. 2 entry toward the No. 1 entry. Prior to driving the crosscut, the continuous mining machine had advanced the No. 2 entry a distance of 8 feet inby, creating an 8 foot extension of the No. 2 entry inby the crosscut (location Y on Exh. G-3). Line brattice was not maintained to within 10 feet of location Y. However, line brattice was maintained to within 10 feet of the end of the crosscut (location X on Exh. G.3). Inspector McCormick believed that under the all faces provision both location X and location Y were faces within 10 feet of which line brattice had to be maintained. Therefore, Inspector McCormick issued a withdrawal order alleging a violation of section 75.316. Jim Walter abated the alleged violation by installing line brattice to within 10 feet of location Y.

Jim Walter contested the validity of the withdrawal order asserting that under its approved ventilation plan line brattice was not required at location Y. For a variety of reasons, Judge Koutras agreed. In his decision, Judge Koutras noted that section 75.316 requires that the plan approved by the Secretary and adopted by the operator be suitable to the mine. The judge found the all faces provision not suitable to the No. 7 mine in that its implementation would result in added hazards. 8 FMSHRC at 593. The judge also found that the Secretary did not present credible evidence to establish reasons why the provision was required, that it was inconsistent with other mandatory safety standards, and that it was discriminatory. Id. at 588, 593-594. Finally, the judge criticized the manner in which MSHA attempted to impose the requirement through the use of a "proviso" inserted in successive letters approving Jim Walter's plans. Id. at 592-593. The judge vacated the withdrawal order and dismissed the civil penalty proceedings. Id. at 594.

Because we conclude that the Secretary did not prove a violation of section 75.316, we agree with the result reached by the judge. Our conclusion, however, is premised upon a different and more limited basis. We find that the disputed language of the plan provision is ambiguous. We further find that the Secretary's evidence

does not dispel the ambiguity and does not establish that the cited condition violated the provision at issue.

Ventilation plans are approved by the Secretary and adopted by

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Commission Procedural Rule 70(d) bar, except for good cause shown, an assignment of legal error upon which the judge had no opportunity to pass. 30 U.S.C. § 823(d)(2)(iii); 29 C.F.R. § 2700.70(d). *Wilmot Mining Co.*, Docket No. LAKE 85-47, 9 FMSHRC (April 30, 1987), slip op. at 3.

6/ The parties stipulated that this part of the consolidated proceeding would be determined on the basis of the facts in Docket No. SE 85-109.

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mine operators pursuant to section 75.316 and section 303(o) of the Mine Act. The approval and adoption process is bilateral and results in the Secretary and the operator, through consultation, discussion, and negotiation, mutually agreeing to ventilation plans suitable to the specific conditions at particular mines. *Zeigler v. Kleppe*, 536 F.2d 398, 406-407 (D.C. Cir. 1976); *Carbon County Coal Co.*, 6 FMSHRC 1123 (May 1984). The process is flexible, contemplates negotiation toward complete agreement, and is aimed at compliance with mine safety and health requirements. Under the approval and adoption process, the operator submits a plan to the Secretary who may approve it or suggest changes. The operator is not bound to acquiesce in the Secretary's suggested changes. The operator and the Secretary are bound, however, to negotiate in good faith over disputes as to the plan's provisions and if they remain at odds they may seek resolution of their disputes in enforcement proceedings before the Commission. *Carbon County Coal Company*, 7 FMSHRC 1367, 1370-71 (September 1985); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2771 (December 1981). The ultimate goal of the approval and adoption process is a mine-specific plan with provisions understood by both the Secretary and the operator and with which they are in full accord. Once the plan is approved and adopted, these provisions are enforceable at the mine as mandatory safety standards. *Zeigler*, supra at 409; *Carbon County*, 7 FMSHRC at 1370; *Penn Allegh*. In an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation. In plan violation cases the Secretary must establish that the provision allegedly violated is part of the approved and adopted plan and that the cited condition or practice violates the provision. Here, Jim Walter argues in part that the all faces provision was not a part of the approved and adopted plan at the No. 7 mine. We do not reach this question, however, because, even assuming the provision is considered a part of

the approved and adopted plan, in the instant case the Secretary did not prove that the failure to provide line brattice to within 10 feet of the cited location (location Y) violated the all faces provision.

In Penn Allegh, the Commission held:

The statute and the standard require the parties to agree on a dust control plan in the interest of miner safety. Therefore, after a plan has been implemented (having gone through the adoption/approval process) it should not be presumed lightly that terms in the plan do not have an agreed upon meaning.

3 FMSHRC at 2770. The Provision in that case was ambiguous on its face but the Secretary established the meaning intended by the parties by presenting credible evidence as to the history and purpose of the provision and evidence of consistent enforcement. The Secretary's evidence in the instant case falls far short in these respects.

First, the record contains no detailed and consistent testimony from the Secretary's witnesses illuminating the meaning of the all faces provision. Indeed, the testimony of two of the Secretary's witnesses is

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at odds regarding the meaning of the term "all faces." Inspector McCormick conceded that there is no definition of the term "face" in the Mine Act or in the Secretary's regulations and could only "guess" that the term "face" would be "the area from which coal is to be extracted or is being extracted." Tr. 102. MSHA's supervisory mining engineer, William H. Meadows, disagreed with the inspector's view and stated that the term "face" "has not been interpreted" to include areas where future mining is planned and that he "would not enforce it that way." Tr. 182. This conflicting testimony in general evidences the difficulty in ascertaining from the record an agreed definition of the term. Tr. 156-160. Since the Secretary's own witnesses were uncertain and in disagreement as to the meaning of the all faces provision, it cannot be presumed that Jim Walter was aware that the provision meant what the Secretary now urges it means. Compare U.S. Steel Mining Co., 8 FMSHRC 314, 320 (March 1986)(detailed and consistent testimony of MSHA inspector supports Secretary's interpretation of plan).

Second, the Secretary presented no evidence of any prior consistent enforcement of the "all faces" provision that might have established that Jim Walter was on notice regarding the Secretary's interpretation of the meaning of the provision. Compare Penn Allegh, supra, 3 FMSHRC at 2769-70 (consistent enforcement is strong evidence of interpretation of plan).

Third, the Secretary asserts that on April 8, 1985, there

were two faces, location X and location Y, in the No. 13 section. Yet the Secretary admitted that the 1972 ignition incident that led to the Secretary's inclusion of the disputed provision involved only one face. Tr. Oral Arg. 16.17. The 1972 ignition involved a failure to maintain line brattice to within 10 feet of the most recently mined face. On April 8, 1985, location X was the face most recently mined and all parties agree that Jim Walter maintained line brattice within 10 feet of location X.

For these reasons, we conclude that the Secretary did not prove a violation of section 75.316. We therefore affirm the judge's decision insofar as it is consistent with our discussion.

### III. Docket No. 86-83

On March 13, 1986, MSHA Inspector Gerald N. Tuggle issued a withdrawal order to Jim Walter alleging a violation of section 75.316 at Jim Walter's No. 7 mine: 7/

[T]he continuous mining machine had mined the crosscut in [the No. 2 entry of the No. 8 section] to the left on the curtain (brattice line) side and the end of the curtain terminated in excess of 10 feet from the deepest point of penetration of the face to the straight of the entry.

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7/ Originally the order charged a violation of 30 C.F.R. § 75.200 but was modified subsequently to allege a violation of section 75.316.  
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The parties agree that the conditions described in the order occurred. The Secretary alleged that in failing to maintain the line brattice to within 10 feet "of the face to the straight of the entry," Jim Walter violated the all faces provision.

In the subsequent civil penalty proceeding Jim Walter asserted that it did not violate section 75.316. The essence of Jim Walter's argument was that the end point to the straight of the No. 2 entry had not been recently mined and that under the approved ventilation plan, it was not required to maintain line brattice to within 10 feet of that point. The parties stipulated that the issue of whether Jim Walter violated the standard was identical to the issue pending before the Commission in Docket Nos. SE 85-36-R, etc., and that the Commission's decision in those cases would be controlling. Stipulation 1 and 4. See also Tr. 4-5. Accordingly, because the judge's decision in this docket was based on a rationale at odds with our disposition set forth above, we reverse his decision and vacate the withdrawal order.

### IV.

In deciding these cases, we decline to attempt on the present records to determine an all-encompassing definition of the term "face." We also do not address whether the ventilation plans

at the subject mines should include the additional measure urged by the Secretary. The Act and the mandatory standard require the Secretary and the operator to agree upon a ventilation plan. It is of paramount importance under the statute that both the Secretary and the operator proceed diligently and in good faith to develop a conclusive and suitable plan containing provisions clearly understood by both. Thus, if MSHA continues to believe that the all faces provision is necessary to miner safety and suitable to Jim Walter's mines, it should seek to reach agreement with Jim Walter on the provision through proper implementation of the ventilation plan approval and adoption process. In this regard, we note the parties strongly disagree as to whether the all faces provision was ever conclusively incorporated into the ventilation plan. The record indicates that for thirteen years Jim Walter submitted plans for approval without the all faces provision and that MESA, and then MSHA, approved the plans by letters that included the all faces provision. It serves neither the safety of the miners nor the policy of the Mine Act when the Secretary and an operator are unable to reach firm agreement on the meaning of a mine plan provision even after several years of dealing with that provision. Given the importance Congress attached to mine specific plans, we emphasize that it is incumbent upon the parties to adopt a more effective mechanism to ensure that mine plans are expeditiously, unambiguously and conclusively approved and adopted. Accordingly, the judge's decision in Docket Nos. SE 85-36-R, etc., vacating the Secretary's citations, dismissing MSHA's civil penalty

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proposals, and granting Jim Walter's contest is affirmed. The decision in Docket No. SE 86-83, finding a violation of the all faces provision, is reversed, and the subject order of withdrawal and civil penalty are vacated.

Ford B. Ford, Chairman  
Richard V. Backley, Commissioner  
Joyce A. Doyle, Commissioner  
James A. Lastowka, Commissioner  
L. Clair Nelson, Commissioner

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