

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

September 29, 1989

SECRETARY OF LABOR, : CTVTL PFNALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 89-70
Petitioner : A. C. No. 01-01401-03743
v. :
 : No. 7 Mine
JIM WALTER RESOURCES, INC., :
Respondent :

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor,
U. S. Department of Labor, Birmingham,
Alabama, for Petitioner;
Robert Stanley Morrow, Esq., Jim Walter
Resources, Inc., Birmingham, Alabama, for
Respondent.

Before: Judge Merlin

This case is a petition for the assessment of civil penalties filed by the Secretary of Labor against Jim Walter Resources, Inc., under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820. A hearing was held on August 24, 1989, and post-hearing briefs now have been filed.

At issue in this case is Citation No. 3187963, dated November 28, 1988, issued pursuant to section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), and charging a violation of 30 C.F.R. § 75.220 for the following condition or practice:

"The current Roof Control Plan was not being followed on the No. 5 section in that the face of the crosscut being cut from No. 2 entry to No. 1 entry had been mined from 23 feet 3 inches to 29 feet 6 inches from the last row of permanent roof supports, or until the crosscut holed through into the No. 1 entry. The controls of the continuous mining machine in use on this section measured 20 feet 3 inches from the cutting head. This shows that the continuous miner operator was from three (3) feet to nine (9) feet three (3) inches in by the last row of roof bolts during this cut. The current Roof Control Plan states that controls of the continuous

mining machine or loading machine shall not advance **inby** the last row of roof bolts except with approved extended cut plan (pages 13 note 1, page 14, note, 1, page 15, page 16 note 1 page 17 note 1). An approved extended cut plan is not in force at this mine at this time. This is the second violation of this type since November 10, 1988, indicating that this problem may be a practice and indicating that the mining machine operator, helper and section foreman are not fully aware of the serious consequences that may result **from** working under unsupported roof."

Also in issue is Order No. 3187964 dated November 28, 1988, issued pursuant to section **104(d)(1)** of the Act, supra, and charging a violation of 30 C.F.R. § 75.220 for the **following** condition or practice:

"The current Roof Control' Plan was not being followed on the **No. 5** section in that the face of the crosscut being cut from **No. 2** entry to **No. 3** entry had been mined up to 23 feet 6 inches **inby** the last row of permanent roof supports. **The** controls of the continuous miner measured 20 feet 3 **inches** from the cutting head. This shows that the continuous miner operator was up to 3 feet 3 inches **inby** the last row of roof bolts during this cut. The current Roof Control Plan states that controls of the continuous miner or loading machine shall not advance **inby** the last row of roof bolts except with an approved extended cut plan (pages 13-18 note 1). **An** approved extended cut plan is not in force at this mine at this time. This is the third violation of this type since November 10, 1988 and the second such violation observed on this shift on **No. 5** section. This strongly indicates that this may be a practice on this section. This also shows a lack of awareness to the hazards **involved** in working under unsupportaa **roof** by the miner operator, helper and section foreman."

At a pre-hearing conference the parties agreed to the following stipulations.

(1) The operator is the owner and operator of the subject mine;

- (2) The operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977;
- (3) The administrative law judge has jurisdiction of this case;
- (4) The inspector who issued the subject citation and order was a duly authorized representative of the **Secretary**;
- (5) True and correct copies of the subject citation and order were properly served upon the operator;
- (6) Copies of the subject citation **and order** and terminations thereof are authentic and may be admitted into **evidence** for purposes of establishing their issuance, but not for the purpose of establishing the truthfulness or relevancy of any statements asserted therein, except as agreed to by stipulation;
- (7) The operator is large in size;
- (8) Payment of any penalty herein will not affect the operator's ability to continue in business;
- (9) The roof control plan in effect on November 28, 1988, requires that the controls of a continuous miners machine shall **not** be advanced **inby** the last row of roof bolts;-
- (10) The conditions described on the face of Citation No. 3187963 are accepted as written therein and constitute a **violation** or the operator's roof control plan pursuant to 30 C.F.R. § 75.220;
- (11) The **conditions** described on the face of Order No. 3187964 are accepted as written therein and constitute a **violation** of the operator's roof control plan pursuant to 30 C.F.R. § 75.220;
- (12) **Citation** No. 3187963 and Order No. 3187964 are properly characterized as significant and substantial violations;
- (13) During the 24-month period prior to the issuance of the citation and order in this case, i. e., **November** 28, 1988, the operator was issued 21 **104(a)** citations, and two **104(d)(2)** orders for violations of its approved roof control plan.

The foregoing stipulations were accepted (**Tr. 8**).

The operator having stipulated to the existence of the violations and to their being significant and substantial, the parties agreed at the pre-hearing that the issues to be determined **in this matter** are the existence of unwarrantable **failure** in the subject citation and order, and the appropriate amount of civil penalties (**Tr. 8**).

The Commission has defined unwarrantable failure as "aggravated conduct constituting more than ordinary negligence." Emery Mining Corporation, 9 FMSHRC 1997, 2001 (December 1987), Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007, (December 1987). Southern Ohio Coal Company, 10 FMSHRC 138 (February 1988); Quinland Coals, Inc., 10 FMSHRC 705 (June 1988). The existence of unwarrantable failure may be adjudicated in these proceedings. Quinland Coals, Inc., 9 FMSHRC 1614 (September 1987).

The inspector testified that the excess cut which was from 3 feet to 9 feet 3 inches, cited in the citation, was visibly obvious and that it would have taken about 1½ hours to make that cut (Tr. 28). According to the inspector, it is the practice of the operator's section foreman to be in the area where coal is being mined (Tr. 36, 38). It was the inspector's opinion that the section foreman was in the cited area for at least a portion of the time when the excess cut was made and that he had to have known of it (Tr. 36, 38). Four to six cars of coal were taken from the excessive portion of the cut (Tr. 45). The cut was so excessively deep that it penetrated through the crosscut to the next entry where the bolts in that entry made it clear that the cut had gone much too far (Tr. 42-44). Finally, a citation had been issued for the same type of violation a few weeks previously (MSHA Exh. 7, Tr. 71). The inspector's testimony is uncontradicted and I accept it.

That roof falls are the leading cause of fatalities and injuries in underground mining, has long been recognized. See most recently, U.M.W. v. Dole, 870 F.2d 662 (D.C. Cir. 1989). Compliance with the roof control plan is therefore, a critical priority. In Youghiogheny and Ohio Coal Company, supra, the Commission in upholding a finding of unwarrantable failure, held that the section foreman is responsible for compliance with the roof control plan and that in discharging this responsibility he is held to a demanding standard of care in safety matters. In the instant case the section foreman fell far short of what reasonably could have been required of him. The extent of the cut, the length or time taken to make it, and its visible nature demonstrate conduct of a most aggravated nature. After consideration of the foregoing circumstances, I conclude that under applicable Commission criteria unwarrantable failure was present here. The finding of unwarrantable failure in Citation No. 3187963 is Affirmed.

The second excessive cut which was cited in Order No. 3187364 was not as deep as the first one, but according to the inspector the foreman would have seen it any time after the continuous miner operator went beyond the last roof supports (Tr. 40). Up to four cars of coal were involved in the excessive portion of this cut (Tr. 46-47). Moreover the second cut was made immediately after the one cited in the citation (Tr. 49).

When the inspector saw both cuts he concluded that the roof control plan did not mean as much to the operator as it should have (**Tr. 49**). The Commission's decision in Youghiogheny and Ohio Coal Company, cited supra, also is in point here. **In** that **case** the Commission noted the judge's finding that the inspector had cited the operator for the same violation three days previously, 9 FMSHRC **at** 2010. Insofar as the element of time is concerned, the back-to-back cuts here are even more compelling. I believe the second cut constituted the kind and degree of conduct the Commission has identified as aggravated. Accordingly, it must be found that unwarrantable failure was present here also. **The** finding **of** unwarrantable failure in Order No. 3187964 is **AFFIRMED**.

Based upon the circumstances set forth herein, I find the operator guilty of a high degree **of** negligence in both instances and that both violations were very serious. The remaining criteria in section **110(i)** are covered by the stipulations.

The post-hearing briefs filed by the parties have been received. **To** the extent they are inconsistent with this decision, they are rejected.

ORDER

In light of the foregoing it is **ORDERED** that the findings of unwarrantable failure in Citation No. 3187963 and Order No. 3187964 be **AFFIRMED**.

It is further **ORDERED** that a penalty **of** \$1,200 be **ASSESSED** for Citation No. 3187963.

It is further **ORDERED** that a penalty of \$1,600 be **ASSESSED** for Order No. 3187964.

It is further **ORDERED** that the operator **PAY** the foregoing amounts within 30 **days** from the date of this decision.



Paul Merlin
Chief Administrative Law Judge

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