FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 19 2006

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2003-160
Petitioner	:	A.C. No. 01-01322-00004
	:	
UNITED MINE WORKERS	:	
OF AMERICA,	:	
Intervenor	:	
	:	
v.	:	
	:	
JIM WALTER RESOURCES, INC.,	:	No. 5 Mine

DECISION ON REMAND

Before: Judge Barbour

In this civil penalty proceeding, the Secretary of Labor (Secretary), on behalf of her Mine Safety and Health Administration (MSHA), petitioned for the assessment of civil penalties for eight alleged violations of mandatory safety standards for underground coal mines. The Secretary charged the violations occurred at the No. 5 Mine of Jim Walter Resources, Inc. (JWR) and that they directly contributed to the causes of two explosions and/or the resultant deaths of 13 miners. Because of their contributory natures, the Secretary proposed a civil penalty of $55,000 each for seven of the alleged violations and a penalty of $50,000 for the remaining alleged violation. The Secretary's proposals were the result of special assessments. *See* Petition for Assessment of Civil Penalty, Exhibit A.

Following an extensive hearing, I issued a decision in which I found the Secretary failed to prove six of the alleged violations. The findings were not appealed.[1] I further found she in part proved two of the violations, but did not establish the violations contributed to the cause of the accident and/or resulted in the fatalities. I assess JWR $2,500 for one of the violations and $500 for the other. The parties appealed.

After considering the parties' arguments, the Commission ruled that I properly found the two violations existed. The Commission also upheld my findings regarding the civil penalty

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[1]The lack of an appeal effectively removed from consideration $325,000 of the Secretary's total proposed penalties of $435,000.

criteria applicable when assessing penalties for the violations. Nonetheless, it vacated the penalties, instructed me to revisit them, and ordered me to provide a "further explanation" of the bases for new assessments. 27 FMSRHC at 607; see also *Id.* at 580.

Subsequently, I orally requested counsels determine whether they could settle the matter by agreeing to appropriate penalties. After several exchanges of views, counsels advised they could not. Therefore, in compliance with the Commission's directive, new assessments and a more complete explanation of the penalties follows.[2]

THE ORIGINAL FINDINGS OF VIOLATION AND PENALTIES

Order No.	Date	30 C.F.R	Proposed Penalty	Original Assessed Penalty
7328105	12/11/02	75.360(b)(3)	$55,000	$2,500

Order No. 7328105 stated as follows:

> On September 23, 2001, two separate explosions occurred in 4 Section resulting in fatal injuries to thirteen miners. The accident investigation revealed that an adequate preshift examination was not conducted in 4 Section where persons were scheduled to perform maintenance work and install roof bolts during the oncoming day shift on September 23, 2001. The examination was incomplete in that an examination of the working places was not conducted where miners were scheduled to roof bolt the unsupported face areas. The main mine fan had been off during the previous shift, creating the potential for methane accumulations in the long crosscuts between No. 2 and No. 3 Entries as well as in face areas. The examiner was not made aware of these circumstances and was instructed by mine management to limit the examination to the electrical installations only.
>
> In addition, a hazardous condition consisting of inadequate rock dust existed, but was not identified by

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[2] I am, of course, aware the decision in this matter has been the subject of comment, much of it by those with agendas driven by things other than the facts of the case. This decision will be more detailed and lengthier than is usual on remand so the few who may be interested in the facts can have them at hand.

> the examiner. The condition was obvious, widespread and in the areas traveled by the examiner. During the investigation, mine dust samples were collected throughout 4 Section. These band samples were subjected to an Incombustible Analysis. The results revealed that approximately 97% of the sample results did not meet the regulatory requirements for incombustible content of the combined coal dust, rock dust and other dust. . . . The condition contributed to the severity and extent of the second explosion that resulted in fatal injuries. This Order will not be terminated until hazard recognition training is provided for certified mine examiners at the No. 5 Mine.

Gov't Ex. 7.

As a reading of the order reveals, the Secretary alleged JWR violated section 75.360(b)(3) in two ways: (1) by limiting the preshift examination for the oncoming day shift on September 23 to electrical installations, thus ensured an incomplete examination of the No. 4 Section; and (2) by its preshift examiner failing to identify inadequate rock dust applications that existed on the section. I upheld the order with regard to the first allegation, but because I concluded the Secretary did not establish the presence of inadequate rock dust, I vacated the order with regard to the second. 27 FMSHRC at 805-806.

Noting section 75.360(b)(3) requires an examination for hazardous conditions in "[w]orking sections . . . if anyone is scheduled to work on the section . . . during the oncoming shift" (i.e., a preshift examination) and that "working section" is defined as "[a]ll areas of the coal mine from the loading point of the section to and including the working faces" (30 C.F.R. § 75.2), I concluded since the preshift examiner admitted he did not examine the faces, if anyone was "scheduled to work on the section" prior to the preshift examination, the standard was violated. 27 FMSHRC at 808.

I further noted that the maintenance crew supervisor, John Puckett, credibly testified that prior to going underground on September 23, he understood he and his crew were scheduled to work on the No. 4 section and that the work was scheduled prior to September 23. Based on Puckett's testimony, I found that JWR scheduled miners to work on the No. 4 Section prior to the preshift examination, and I concluded that the preshift examiner's failure to examine "all areas of [the No. 4 Section] . . . from the loading point of the section to and including the working faces" violated section 75.360(b)(3). 27 FMSHRC at 808.

The order was cited pursuant to section 104(d) of the Act (30 U.S.C. 814(d)), and the Secretary consequently charged the violation was a significant and substantial contribution to a mine safety hazard (S&S) and the result of JWR's unwarrantable failure to comply. I upheld these findings. 27 FMSHRC at 808-812.

Turning to the gravity of the violation and to JWR's negligence in allowing the violation to exist, I found that the hazards to miners from failing to completely preshift examine the entire section were serious indeed. I noted the gassy nature of the mine, the fact the fan had been "down" and the fact electrical and diesel equipment were present. Under these circumstances, exposing Puckett's crew to the hazards of a less than fully-examined section meant exposing it to the hazards of a methane-related accident with resulting serious, even fatal, consequences. 27 FMSHRC at 810. I further noted that although the gravity of the violation was mitigated to some extent by the fact Puckett conducted a "supplemental" examination once he was on the section, the mitigation did not remove the violation from the serious category. 27 FMSHRC at 810-811. The explosions occurred on the shift following Puckett's shift, and I also noted "the inadequate preshift examination did not contribute to the fatalities that resulted from the explosions." 27 FMSHRC at 812 n. 58.

I next found that JWR's failure to ensure the No. 4 Section was completely examined before miners were sent to work on the section was indicative of a serious lack of reasonable care. I observed that Puckett, as a representative of mine management, was held to a heightened standard of care, a standard he did not meet when he lead miners onto the No. 4 Section knowing that the preshift examination was incomplete. I further found that the preshift examiner's supervisor was negligent in restricting the preshift examination, even though he should have known that the No. 4 Section was designated as a place miners were assigned to work. 27 FMSHRC at 811.

In assessing a civil penalty of $2,500 for the violation, I took account of the statutory civil penalty criteria as follows:

> [T]he parties stipulated that the proposed penalties will not adversely affect JWR's ability to continue in business, JWR is a large operator, and the company should be credited with good faith, timely abatement.

27 FMSHRC at 812. In addition, I found the company had a large history of prior violations. *Id.*

I concluded my consideration of the penalty by stating:

> I have found the violation was serious in view of the types of injuries . . . it could have engendered. I also have found the violation was due to the high

> negligence of JWR management personnel. Given these findings, the company's large size, its large history of previous violations, its good faith, timely abatement, and the fact the assessment will not adversely affect its ability to continue in business, I conclude that a penalty of $2,500 is appropriate for the violation.

27 FMSHRC at 812. Finally, I stated, "other violations of section 75.360 cited pursuant to section 104(d) of the Act [had] been assessed by the Secretary at similar amounts." *Id.*

Order No.	Date	30 C.F.R	Proposed Penalty	Original Assessed Penalty
7328085	**12/11/02**	**75.1101-23(c)**	**$55,000**	**$500**

The order charged a violation of 30 C.F.R. § 75.1101-23(c) in that JWR failed to conduct fire and emergency drills at intervals of not more than 90 days. The order, as modified, stated:

> On September 23, 2001, two separate explosions occurred in 4 Section, resulting in fatal injuries to thirteen miners. The accident investigation revealed the operator failed to conduct fire and emergency drills at intervals of not more than 90 days. Interviews of underground miners and a review of mine records indicate that few such drills had been conducted since March 2001. The lack of training and simulation relative to proper evacuation procedures to be followed in the event of an emergency affected the miners' response to the emergency situation of September 23.

Gov't Ex. 4A; *see also* Gov't Ex. 4.

In finding a violation, I looked first to the wording of the standard. I noted that at the time WJR was charged with the violation, section 75.1101-23(c) stated in part:

> Each operator of an underground coal mine shall require all miners to participate in fire drills, which shall be held at periods of time so as to ensure that all miners participate in such a drill . . . at intervals of not more than 90 days . . . .
>
> (1) The operator shall certify by signature and date that the fire drills were held in accordance with the requirements of this section. Certifications shall

> be kept at the mine and made available on request to an authorized representative of the Secretary.
>
> (2) For purposes of this paragraph (c), a fire drill shall consist of a simulation of the actions required by the approved fire fighting and evacuation plan described in paragraph (a)(1) of this section.

30 C.F.R. § 75.1101-23(c). I found this wording clear, and I concluded it required the operator to ensure all of its miners participated in fire drills at least every 90 days and to certify in writing that each miner participated. 27 FMSHRC at 819. I further found that the participation and certification requirements were separate and that non-compliance with the certification requirement did not automatically establish non-compliance with the participation requirement. *Id.*

In addition, I found that when the standard stated a drill "shall consist of a simulation of actions required by the approved fire fighting and evacuation plan," it mandated an "on-site imitation of action specified by the approved plan to be part of the drill." 27 FMSHRC at 819.

Extrapolating from the requirements of the mine's fire fighting and evacuation plan, a plan adopted by JWR and approved by the Secretary, I further concluded "during a fire drill, there must be an on-site simulation of a response to a mine fire" and "the miners must go through the motions of actually carrying out the [fire drill] duties specified in the plan." 27 FMSHRC at 822. In other words, I held the plan required the on-site simulation of fire fighting activities.

I then noted the various duties specified in the plan (27 FMSHRC at 822), and the credible testimony of eight miners who stated they had not participated in a fire drill simulating fighting a fire. I found the testimony "establishe[d] that JWR violated the standard by failing to ensure [these miners'] participation in the type of simulated fire drills required by the standard at least every 90 days." *Id.* I also concluded there was a general lack of on-site simulations at the mine. 27 FMSHRC at 823.

The order was cited pursuant to section 104(d) of the Act (30 U.S.C. 814(d)) and the Secretary consequently charged that the violation was S&S and unwarrantable. I did not affirm these findings. 27 FMSHRC at 824-826. Rather, I determined the violation was not S&S because JWR "regularly instructed its miners through other exercises in fire fighting practices and techniques" and the violation did not relate to the company's failure to conduct all training in how to confront a fire or in how to respond to a fire emergency, but rather related to the company's failure to conduct the type of on-site, hands-on drills required by the standard and the plan. Because of the other types of fire fighting and evacuation instruction and training received by miners, I concluded it was not reasonably likely failure to conduct the on-site, hands-on drills would result in injuries to the miners. 27 FMSHRC at 825.

Nevertheless, I viewed the violation as a moderately serious one. While I agreed with the company that the record confirmed no miner lost his life on September 23 due to a lack of fire fighting training, I noted that the focus of the gravity criterion was on the effect of a hazard if it occurred and that it was conceivable the effect of not conducting on-site, hands-on fire drills for all miners would be serious in the event of a fire. 27 FMSHRC at 825.

Turning to the unwarrantable finding, I found the record fully supported concluding the company did not exhibit a "reckless disregard" for its compliance responsibilities, in that company personnel honestly believed their fire fighting training and instruction met the requirements of the standard.[3] 27 FMSHRC at 826. Weighing the totality of the evidence, I concluded that the company was moderately negligent in failing to comply with the standard.

In assessing a civil penalty of $500 for the violation, I took account of the statutory civil penalty criteria as follows:

> [T]he parties stipulated that the proposed penalties will not adversely affect JWR's ability to continue in business, JWR is a large operator, and the company should be credited with good faith abatement . . . In addition . . . the company has a large history of prior violations.
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> * * *
>
> I have found the violation was moderately serious and JWR was moderately negligent. Given these findings, the company's large size, its large history of previous violations, its good faith, timely abatement, and the fact the assessment will not adversely affect its ability to continue in business, I conclude that a penalty of $500 is appropriate for the violation.

27 FMSHRC at 826. Finally, I noted that the assessment was "in a range of other assessments proposed [by the Secretary] for moderately serious violations that resulted from the company's moderate negligence." *Id.* at n. 74.

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[3] The belief, I noted, was "abetted in no small part" by the Secretary's less-than-clear *Program Policy Manual* guidelines regarding compliant fire drill practices and by her longstanding failure prior to the explosions to cite JWR for not conducting proper fire drills. *See* 27 FMSHRC at 826; *see also* 823-824; n. 71.

THE COMMISSION'S REMAND

As previously stated, the Commission upheld my finding of a violation of section 75.360(b)(3). 28 FMSHRC at 598-601. It also upheld my finding that the violation of section 75.360(b)(3) was S&S. It observed, because of the failure of Puckett to conduct a complete preshift examination, "miners . . . who accompanied Puckett and those who did not, were working and traveling through a section that should have been entirely preshifted before they entered it but was not" (28 FMSHRC at 602) and that "miners were on the section for a significant amount of time before it had been entirely preshifted." *Id.* at 603. The Commission recognized, because of the lack of a complete preshift examination, the miners were exposed to the hazards of a possible methane buildup. In addition, because the record indicated the roof on the No. 4 Section was subject to prior roof faults and falls, the Commission concluded the failure to conduct a complete preshift examination also exposed the miners to possible faulty roof conditions. The Commission agreed with me that the violation was serious in nature. *Id.* at 603-604.

On the issue of unwarrantable failure, the Commission divided evenly. The division left standing my finding the violation was due to the company's unwarrantable failure to comply with the standard. The Commission also left undisturbed my finding JWR was highly negligent. 28 FMSHRC at 604-605.

Turning to the violation of section 75.1101-23(c), the Commission concluded substantial evidence supported my finding not all miners participated in the simulated fire drill and fire fighting activities required by the approved and adopted plan. 28 FMSHRC at 592-594. The Commission also affirmed my conclusion that the violation was not S&S, but was moderately serious. 28 FMSRHC at 597. It noted that none of the fatalities that resulted from the explosions were the result of the violation and that although JWR did not provide all miners with on-site simulated fire drills, as required by the standard and its plan, it regularly instructed its miners in firefighting practices and techniques and conducted required quarterly fire drills. 28 FMSHRC at 595-596. The Commission also left standing my finding that the violation was the result of JWR's negligence.

In remanding the matter for reconsideration of the penalties and a more complete explanation of their bases, the Commission reminded me of its longstanding admonition:

> When . . . it is determined that penalties are appropriate which substantially diverge from those originally proposed, it behooves . . . [the Commission's] judges to provide a sufficient explanation of the bases underlying the penalties assessed by the Commission.

Sellersburg Stone Co., 5 FMSHRC 287, 290-94. (March 1983). The Commission also noted:

> If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness.

Id. at 293; 28 FMSHRC at 606-607.

ASSESSMENTS AND EXPLANATION

Order No.	Date	30 C.F.R	Proposed Penalty	Assessed Penalty on Remand
7328105	**12/11/02**	**75.360(b)(3)**	**$55,000**	**$5,000**

It is important to again emphasize that the initial proposed penalty of $55,000 was based in large measure upon the fact that part of the condition cited as an alleged violation, failure by the preshift examiner to recognize a hazardous, obvious and widespread inadequate rock dust application in the areas he traveled, contributed to the severity and extent of the second explosion and resulted in fatal injuries. This allegation was not proven at trial, and my dismissal of this part of the order was not appealed. Thus, the only part of Order 7328105 which constituted a violation was the charge that the preshift examiner failed to conduct a preshift examination of the entire No. 4 Section on September 23. The incomplete examination did not contribute to the explosions and to the resultant fatalities. Had a penalty been proposed by the Secretary as a non-contributory violation, it would have been far, far less than $55,000, and the fact that the violation was non-contributory is a major reason for the "substantial divergence" between the amount proposed by the Secretary and the amount I originally assessed.

The part of the violation that was proven – the fact that the preshift examination did not "cover" the entire section, even though miners were scheduled to roof bolt the unsupported face areas and to do other work on the section – resulted in miners working in and traveling through a section that should have been entirely preshifted before they entered. 28 FMSHRC at 602. In gauging the nature of the hazard presented by the incomplete preshift examination, I observed the mine was gassy, the fan had been off, and potential ignition sources existed in the section. Taken together, I concluded these factors subjected the miners to the danger of being involved in a methane-related ignition or explosion as normal mining operations continued. 27 FMSHRC at 809-811. The Commission pointed to an additional hazard. It noted evidence of faulty roof in the No. 4 section and concluded, "[r]oof falls posed another hazard." 28 FMSHRC at 603. The roof-fall hazard, added significantly to the gravity of the violation, and I should have considered it when I assessed the penalty.

Further, and as the Commission reminded me in affirming the violation, the preshift examination requirements are "of fundamental importance in assuring a safe working environment underground." *See* 28 FMSHRC at 598 (*quoting Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (January 1995) and 61 Fed. Reg. 9764, 9740 (March 11, 1996)). They are a primary means of detecting developing hazards, such as methane accumulations and bad roof. While all federal health and safety regulations governing conditions and practices in the nation's mines are designed to protect the miner, some have more important protective functions than others. When, as here, a regulation of "fundamental importance" is violated, the gravity of the violation is increased and, all other things being equal, the penalty assessed should be more than for the violation of a less important standard. I did not adequately consider this factor in evaluating the seriousness of the violation.

With regard to JWR's negligence, I found that two of JWR's employees failed to meet the standard of care required of them and that the failure of JWR "to ensure the No. 4 Section was completely examined before miners were sent to work on the section was indicative of a serious lack of reasonable care." 27 FMSHRC at 811. I, therefore, upheld the inspector's special finding of unwarrantable failure on the company's part. 27 FMSHRC at 811. I also found the company's negligence to be "high." *Id.* These findings were not changed by the Commission. Nor have there been changes to the other stipulated civil penalty criteria or to my conclusion the company has a large history of previous violations. 27 FMSHRC at 812.

In view of the roof fall hazard, the fundamental importance of compliance with the preshift requirements to miner safety, JWR's high negligence, and the other penalty criteria, I conclude that a penalty greater than that which I originally assessed is warranted, and I assess a penalty of $5000.[4]

Order No.	**Date**	**30 C.F.R**	**Proposed Penalty**	**Assessed Penalty on Remand**
7328085	**12/11/02**	**75.1101-23(c)**	**$55,000**	**$500**

Here, too, the Secretary's proposed penalty of $55,000 was based upon the fact that the order alleged the violation "affected the miners' response to the emergency situation on

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[4] While this penalty also "substantially diverges" from the penalty originally proposed, the divergence is primarily explained by the fact that the original proposal was based primarily upon the part of the violation that allegedly contributed to the explosions and the resultant fatalities, an allegation that I again emphasize was not established at trial. It may be of interest to some that the revised assessment conforms with and perhaps exceeds what the Secretary would have proposed for a violation cited under section 104(d), had she believed the violation did not contribute to the explosions or the resultant fatalities. *See e.g.*, *Jim Walter Resources, Inc.*, Docket No. SE 2003-161, Exh. A, Narrative Findings of Special Assessment. (The company's history of previous violations also is instructive in this regard. *See* Attachment to Stipulations (printout of previous history)).

September 23" (Gov't Ex. 4) and thus contributed to the fatalities resulting from the explosions. *See* Narrative Findings of Special Assessment, Docket No. SE 2003-160. I found, however, that although JWR violated the cited standard to the extent of not providing its miners with the on-site, hands-on fire drills required by the standard, the violation did not contribute to the fatalities that resulted from the explosions, and I found that JWR "regularly instructed its miners through other exercises in fire fighting practices and techniques." 27 FMSHRC at 825; *see also* n. 73. As previously stated, I concluded and the Commission affirmed, the violation was not S&S and was but moderately serious. 27 FMSHRC at 825; 28 FMSHRC at 597.

I also found the company did not exhibit "reckless disregard" for the company's compliance responsibilities under section 75.1101-23(c) and the violation was not the result of the company's unwarrantable failure to comply with the standard. 27 FMSHRC at 826. These findings were not appealed; nor was my finding that JWR was moderately negligent in failing to comply with the standard. *Id.*

The assessment of a penalty for the violation must be based on what the Secretary proved, not on what she alleged. Here, her proof was light years from her allegations. The fact that the assessment "substantially diverge[d]" from the proposal, was caused primarily by the Secretary's equally substantial gap in proof.

The resultant penalty of $500 took into consideration all of the statutory civil penalty. Given the criteria, which remain unchanged, I continue to find the penalty appropriate.[5]

ORDER

JWR is **ORDERED** to pay a total civil penalty of $5,500 in satisfaction of the violations in question. Payment is to be made to MSHA within 30 days of the date of this proceeding. Upon receipt of full payment, this proceeding is **DISMISSED**.

David F. Barbour
Administrative Law Judge
(202) 434-9980

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[5] Again, it may be of interest to some to know the penalty is akin to what the Secretary would have proposed for a moderately serious, non-contributory violation of section 75.1101-23(c) caused by moderate negligence. *See* 27 FMSHRC at 826 n. 74.