FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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June 14, 2012

JIM WALTER RESOURCES, INC., Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. SE 2007-109-R
v.	:	Citation No. 7690107; 11/29/2007
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent	:	Docket No. SE 2007-203-R
	:	Citation No. 7689677; 02/15/2007
	:	Docket No.; SE 2007-204-R
	:	Citation No. 7689678; 02/15/2007
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	Mine: No. 7
	:	Mine ID: 01-01401
	:	CIVIL PENALTY PROCEEDINGS
v.	:	Docket No. SE 2007-263
JIM WALTER RESOURCES, INC., Respondent	:	A.C. No. 01-01401-114900-01
	:	Docket No. SE 2007-294
	:	A.C. No. 01-01401-118868
	:	Mine: No. 7

DECISION

Appearance: Neil A. Morholt, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Secretary of Labor;
John Holmes, Esq., Allen Bennett, Esq., Maynard, Cooper & Gale, P.C. Birmingham, Alabama, for Jim Walters

Before: Judge Weisberger

These cases are before me based upon petitions for assessment of civil penalty filed by the Secretary of Labor ("Secretary") alleging that Jim Walter Resources, Inc. ("Jim Walter") violated various mandatory safety standards set forth in Title 30 of the Code of Federal

Regulations.[1] Pursuant to Notice, the cases were scheduled and heard in Birmingham, Alabama on March 6 and 7, 2012. On April 18, 2012, each party filed a Post-Hearing Brief. On April 30, 2012, the Secretary filed a response to Jim Water's Brief. On May 3, 2012, Respondent filed a response to Petitioner's Post-Hearing Brief.

I. Citation No. 7690417 (Violation of 30 C.F.R. § 77.400(d)) (Docket No. SE 2007-263)

At the conclusion of the Secretary's case, the Respondent made a motion for summary decision arguing that the Secretary failed to establish a *prima facie* case that it violated Section 77.400(d), *supra.* After listening to oral arguments, the motion was granted in an oral decision which is set forth below, with the exception of corrections of matters not of substance.

Section 77.400(d) *supra* requires that "[e]xcept when testing the machinery, guards shall be securely in place while machinery is being operated." On September 29, 2006, MSHA inspector Russell Alan Weeks inspected the No. 7 Mine and observed a structure used as a truck shop. Located outside the truck shop was a pressure washer ("washer") that was mounted on a flat concrete pad and was used to wash heavy equipment parked nearby. Weeks observed that there was not any guard in place on the washer. As a consequence, moving parts consisting of a flywheel and a rubber V-belt were exposed. According to Weeks, these parts were "within arm's reach." Tr. 34. He issued a citation alleging a violation of Section 77.400(d) *supra*, which provides that, "[e]xcept when testing the machinery, guards shall be securely in place while machinery is being operated."

There is not any evidence in the record that the exposed machinery was being tested. Accordingly the exception to Section 77.400(d), *supra* does not apply. Weeks testified that he observed that the cover that was used as a guard, "was on top of the [steam cleaning unit] basically between the control box and the top of the unit." (Tr. 33). Therefore the focus is on the clear operative language of Section 77.400(d) *supra* that "guards shall be securely in place while machinery is being operated." That phrase has two components. Thus, in order to prevail, the Secretary must establish two elements set out in Section 77.400(d) *supra*, *i.e.*, (1) that a guard was not securely in place and (2) that the machinery was being operated. The Secretary adduced evidence that a guard was raised; thus it established the first element. However the second element concerning whether the machinery was being operated, is a concern. It is the Secretary's position that the machinery was neither tagged, nor otherwise removed from power, and therefore was not locked out, and was thus available for use.

I am unaware of any cases that interpret Section 75.400(d), *supra* in the manner in which the Secretary has argued; more importantly, the language of the standard is clear that guards shall be securely in place while machinery *is being operated.* The Secretary's witness testified that when he observed the machinery, the flywheel and the belt were not in operation. Therefore, the

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[1] The history of the cases are set forth at the commencement of the hearing on March 6, 2012 (Tr. 6-12), and are incorporated herein by reference.

machinery was not being operated. Since the Secretary has not established a prima facie case, Jim Walter's motion for summary decision is granted and Citation 7690417 is dismissed.

II. Citations No. 7690107 (Violation of 30 C.F.R. § 75.400) (Docket No. SE 2007-263)

At the conclusion of the Secretary's case, the Respondent made a motion to dismiss. After listening to oral arguments for both parties, the motion was granted. After both parties rested, the parties presented closing arguments, and an oral decision was made which is set forth below with the exception of corrections of matters not of substance.

A. Introduction and Discussion

Citation No. 7690107 concerns an alleged violation of 30 C.F.R. § 75.400, involving float coal dust within a power center located in the underground section of Jim Walter's No. 7 Mine. On November 29, when MSHA Inspector Edward Nicholson inspected the power center, the section was not producing coal, but the power center was energized.

The inspector indicated that his view of the power center was through a window on one side of the power center, which was approximately four-to-six inches in height and ten-to-twelve inches long. Jim Walter's safety director testified to those measurements, which were not rebutted or impeached by the Secretary.

Within the power center were various pieces of electrical equipment – insulators, circuit breakers, cables and transformers. There was not any physical barrier or separation between the area referred to as the disconnect compartment, and the rest of the interior of the power center. According to the inspector, a switch was located outside the power center; that in operating the switch, it is possible to eliminate power to the equipment inside the power center. However, the operation of the switch does not cause arcing on the various electrical components. The inspector indicated that he observed black float coal dust that was paper thin on the various surfaces. He opined that the float coal dust could be ignited, or even could propagate an explosion. He stated that float coal dust is highly combustible, and indicated that as a consequence of a possible fire or explosion, significant injuries could result to persons in the area such as burns or smoke inhalation. He indicated that such injuries were reasonably likely to occur if the accumulations were not cleaned. Accordingly, he issued the subject citation.

On the other hand, Richard Parker, Jim Walter's safety director who accompanied the inspector, indicated that he looked through the same window and the dust that he saw was not black. Parker indicated that he told two individuals within two hours of the next shift, which commenced at 3:00 p.m., to vacuum the inside of the power center, to collect the dust, and then to put a sample of the collection of dust that was vacuumed in a sealed bag, and place it in an office where he would pick it up. Parker stated that he received an e-mail from these individuals indicating essentially what he testified to, and he confirmed the information in a subsequent conversation with them.

The following day Parker took the sample items to a laboratory for testing. Subsequently, the test results were sent to Jim Walter, and a proffer was made of that exhibit. The exhibit was not admitted because there were significant defects in the proof of the chain of custody of the dust.

Since there is no evidence to indicate that there was not any change in the composition of the material inside the power center, there is not any assurance that what was vacuumed was exactly the same as what was observed, and which formed the basis for the citation. Next, there also is no evidence as to the fashion of the vacuuming, leaving serious questions as to the reliability of what was scooped up and sent to the laboratory.

It is unknown whether each and every particle of dust that was collected or only a certain portion was turned in to the office; whether only certain areas were vacuumed; and whether there were any alterations to the sample when it was not under anyone's control. Due to all these uncertainties and others that are presented on the record, the laboratory results were not admitted.

B. Further Discussion

The subject citation involves a violation of 30 C.F.R. § 75.400 which provides, in essence, that the coal dust, loose coal, "and other combustible materials" shall be cleaned up. Based upon the clear language, it is manifest that the qualifying phrase "and other combustible material" modifies all nouns set out in Section 75.400 *supra*. The Secretary has the burden of establishing that what was observed within the power center was considered "combustible." The inspector did provide his opinion based upon a visual examination. But he did not touch or measure the subject materials. It is not clear what, aside from his observation, provides a basis for his conclusions.

Consequently, there are significant defects in both the Secretary's case and Jim Walter's case. At best, the evidence is in conflict. In finally resolving the matter, the focus is on the critical fundamental principle of burden of proof. The Secretary has the burden of establishing a violation by a preponderance of evidence that is clear and convincing. In regard to the quality of the evidence, it is a concern that the inspector's testimony does contain many uncertainties that tend to detract from his testimony. He did not recall the location of the vents in the power center. He was not sure of the amount of voltage that came into the power center, he did not recall if the window had dust on it, and he was not sure if the transformers were connected to one another.

I also reviewed his notes which are admitted in evidence as Government Exhibit 3. According to his testimony, these are contemporaneous notes. His notes pertaining to his observations of the conditions at issue are set forth on page four of five. There are three columns, and each column has a page number at the lower right-hand corner ("Nicholson's page"). On Nicholson's pages eleven and twelve, he set forth his contemporaneous notes of his observations; and, again, there are not any specific facts to substantiate his opinion found in the third line that he issued the citation for combustible material in the form of float coal dust. Given

all of the above concerns regarding the evidence before me, I find that the Secretary has failed to meet its burden of establishing a violation by a preponderance of clear and convincing evidence. Therefore Citation No. 7690107 is dismissed.

III. Citation No. 7689677 (Violation of 30 C.F.R. § 75.202(a) (Docket No. SE 2007-294)

A. Introduction

On October 12, 2006, a rockfall occurred in the No. 2 entry[2] adjacent to a previous rockfall in a crosscut at survey station ("spad") 3575, North Mains Section, in the underground portion of Respondent's No. 7 coal mine. At approximately 8:00 a.m. that day, Special Project's Manager, Jerry McKinney's body was found pinned under a piece of rock, in the immediate area of the fall. There were not any eyewitnesses to the accident. Within a few hours after the discovery of McKinney's body, MSHA Inspector Harry Wilcox, who was serving as an investigator, inspected the site along with John Church, an MSHA Electrical Specialist, and MSHA Supervisor, Jerry Langley. In addition, Dale Johnson and Sam Mulleni represented the state of Alabama. In the course of a subsequent investigation of the accident, these investigators interviewed 13 persons. On February 15, 2007, MSHA issued a Report of Investigation, ("Report"), and on the same date issued a citation to Jim Walter alleging a violation of 30 C.F.R. § 75.202(a).

B. The Secretary's witnesses

Wilcox testified that he was advised by a supervisor at the Bessemer field office at approximately 9:00 a.m. on October 12, 2006, to go to the mine and start an investigation of a fatal accident.

Wilcox indicated that he and the rest of the investigation team traveled the green route[3] from main track entry towards the site of the victim and observed three rockfalls[4], but their

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[2] In October 2006, entries in the area ran north-south, parallel to the main track entry. The entries were approximately 100 feet apart, and were separated by crosscuts that extended inby from main entry, and were perpendicular to the entries. The site of the rockfall at issue in the No. 2 entry, was just north of a crosscut approximately 700 feet inby the main track entry.

[3] The various possible paths to the areas at issue from the main track entry, via various crosscuts are indicated by different colored lines in the *Report of Investigation* (Government Exhibit 10, p. 12) ("Gx") and referred to in the text as green, red, or blue route, path or pathway, respectively.

[4] Labeled "1," "2,", and "3 " on page 12, Gov. Ex. 10. Also, Wilcox testified that in addition there was another previous roof fall in a crosscut just east of the evaluation point No. 5. He indicated that he could not travel in that crosscut because the roof was unsupported.

progress was not hindered. According to Wilcox, as he approached the survey spad 3575 where McKinney's body had been located, he observed a "large" previous[5] rockfall (Tr. 293). He indicated that in order to make the area safe for the investigators, he "had" the operator install posts. (Tr. 293).

According to Wilcox, the body of the victim was located under a rock 83 inches long by 43 inches wide by 7 inches thick that had fallen from a brow from a previous rockfall. A roof bolt and metal strap were attached to the rock that had fallen on McKinney. Wilcox indicated that he could not tell for sure how long the fall had existed before McKinney had arrived there on the date of the accident.[6]

In addition, Wilcox opined that the cited conditions resulted in a hazard of a roof fall because there had been a previous roof fall at the accident site, and there were two other roof falls to the east of the site. He said that the history of previous falls indicated that the roof had deteriorated, and was unsafe.

Wilcox further indicated that the roof in the area where McKinney was found was supported by bolts, straps and timber. He opined that since it was close to a previous roof fall, it could have been compromised due to the potential of weakened anchorage points, especially for conventional "bail type roof bolts" which had been used in the area at issue.[7] (Tr. 407-408)

In essence, Wilcox testified that he found a violation of Section 77.202(a) based on the following facts: Jim Walter had been aware of deteriorating roof conditions outby the site where McKinney was found,[8] and that the roof conditions at the site were a continuation of the hazards alleged in a previously filed petition for modification which covered the areas south of the

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[5] Thatched area on Gx 10, p. 4.

[6] According to Wilcox, based on McKinney's notes (Gov. Ex. 9), he concluded that McKinney's route the day of the rockfall was as follows: he started at "A", went to "B," went West to "C", then south to "D" and returned to the fall area at "3." (Tr. 326-332; Gov. Ex. 10, p. 12).

[7] He indicated this opinion is based on his observation of the accident site; that bolts had been pulled away in the area immediately around where the rock was' "and the roof bolts that have pulled out of the roof" (Tr. 408).

[8] McKinney's notes for the day of the accident indicate "fall[s]" in three successive locations inby "3825 " (Gov. Ex. 9, p. 3). In addition, Wilcox opined that the fact the additional posts had been installed in the green walkway path indicates that Jim Walter had been aware of unsafe roof conditions in the cited area.

evaluation points in north mains, and are indicated by the entries and crosscuts within pink circle in Appendix "B" to the Report (Gov. Ex. 10, p. 12). Wilcox described the violation as being significant and substantial because a fatality occurred.

Wilcox found the negligence to be moderate because the company knew or should have known of adverse roof conditions at the accident site. In this connection, Wilcox asserted that McKinney, a Senior Projects Manager, had seen "the conditions . . and then the company knowing the deteriorating conditions, bad conditions from the previous resupport times in 2003 and 2006." (sic) (Tr. 378). Additionally, Wilcox testified that he saw an area that had been resupported in 2003 that extended along the green path east from the five seals[9] until two entries west of the track entry. He opined that accordingly the company should have been aware that the conditions in the roof were deteriorating, and that it needed to be resupported.

C. Discussion

The ultimate issue in this case is whether the Secretary has established, by a preponderance of evidence, that Jim Walter violated Section 77.202(a) *supra* which provides as follows:

> The roof, face and ribs 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.

In *Harlan Cumberland Coal Company* 20 FMSHRC 1275, 1277, the Commission held as follows regarding the test to be utilized in determining whether a violation exist under Section 75.202(a) *supra*:

> The Secretary's roof control standard is broadly worded. *See* 30 C.F.R. § 75.202(a). Accordingly, we have held that "the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard."

Canon Coal Co., 9 FMSHRC 667, 668 (Apr. 1987) (citing *Helen Mining Co.*, 10 FMSHRC 1672, 1675 (Dec. 1988)) 20 FMSHRC 1277

In *Cannon Coal Company*, 9 FMSHRC 667 (April 1987), the Commission emphasized as

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[9] The Report, *supra* Gx 10, p. 12, contains a map of the area at issue. The seals are marked on the left side of the map as five dark colored rectangles.

follows regarding the application of its reasonable person test as follows:

> We emphasize that the reasonably prudent person test contemplates an objective – not subjective – analysis of all the surrounding
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> circumstances, factors, and considerations bearing on the inquiry in issue. *See, e.g., Great Western, supra*, 5 FMSHRC at 842-43; *U.S. Steel, supra*, 5 FMSHRC at 5-6.

9 FMSHRC at 668

The Commission, in *Canon, supra*, in affirming the judge's decision that the test had not been met by the Secretary set forth its rationale as follows:

> The judge [examined] objective circumstances surrounding the roof fall. 8 FMSHRC at 700-10. He concluded, in essence, that the Secretary had failed to produce evidence that objective signs existed prior to the roof fall that would have alerted a reasonably prudent person to install additional roof support beyond the support that actually had been provided by the operator. 8 FMSHRC at 710 (Emphasis added).

Canon, supra, at 668

Thus, under *Canon*, *supra*, in order to establish a violation of Section 75.202 (a), *supra*, the Secretary has the burden of establishing the existence of "objective signs [that] existed prior to the roof fall," (emphasis added), and that these objective signs would have alerted a reasonably prudent person to install additional roof support beyond that which had been actually provided at the time. (*Canon supra* at 668). For the reasons that follow, I find that the Secretary has failed to meet this burden.

It is most significant to note that the Secretary did not adduce the testimony of any witnesses who had observed conditions of the roof prior to the fall at issue. Nor does the record indicate that they were any persons who had observed the roof in the areas at issue prior to the accident. The Secretary relies on McKinney's notes taken on the date in question prior to the roof fall. These indicate "rockfall[s]" which appear to be noted by him inby spad 3825 (Gov. Ex. 9,p. 3). However, it is most significant to note that he did not set forth any observations of specific roof conditions which would have been indicative of need for further support.

Wilcox testified that when he traveled the green path on the morning at issue on the way to the location of McKinney's body, he noted evidence of roof falls, the existence of a brow, and

cracks. In addition, he said that he saw that the top was "ragged" (Tr. 409).[10] Wilcox did not explicitly opine that these latter conditions had existed prior to the roof fall. To the contrary, he admitted on cross-examination that he could tell what the roof looked like before it fell on McKinney. He also conceded that timbers had already been set when he was in the area in question, that bolts, T-boards, posts, and straps were contained in the roof just north of the site where McKinney's body was found, and that the bolts in the roof there looked secure.[11] Critically, there is not any evidence of any indicia of inadequately supported roof such as: loose draw rock present on and above straps (*See, Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1277 (Dec. 1998), unsupported roof (See, *Eastern Associated Coal Corp.*, 32 FMSHRC 1189, 1196 (Oct. 2010); a brow suspended four feet from the floor (See, *Jim Walter Resources*, 30 FMSHRC 69, 79 (Jan. 2008) (ALJ); ribs flaking and emitting a cracking sound, and roof bolts hanging down (See, *Consolidation Coal Company*, 19 FMSHRC 1897, 1905-6, 1908 (Dec. 1997); or areas of roof that had "potted out," between bolts which resulted in some bolts becoming loose, or bearing plates that were not up against the roof, (See, *Eastern Associated Coal Co.* 31 FMSHRC 174, 179-180 (Jan. 27, 2009) (ALJ). Nor is there any evidence that prior to the accident the roof control plan had not been fully complied with.

Thus, for all the above reasons, I conclude that the Secretary has failed to establish by a preponderance of clear and convincing evidence that prior to the roof fall at issue, the roof conditions were such that a reasonable and prudent person would have recognized the need for additional support. Accordingly, I conclude that it has not been established that Jim Walter violated Section 75.202(a) *supra*.

ORDER

It is ordered that Citation Nos. 7689677, 7690107, and 7690417 be dismissed, and that

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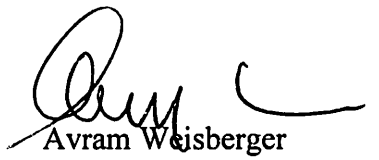
[10] It is significant that there is not any evidence based on personal observations or forensics to indicate that these conditions were in existence prior to the roof fall at issue. Also, it is significant to note that under Section 75.202(a) *supra*, the requirement of providing roof support is limited to "areas where person work or travel." There is not any indication in the record that persons work or travel along the green path. In this connection, I take cognizance of a statement by Jim Walter's foreman Paul Arthur Phillips (Gov. Ex. 6, p. 20), that the green path represents the travelway used by miners. Not much weight was given to this statement as it was not signed by Phillips nor was it notarized. It is also significant to note that Phillips was not called to testify and there is not any showing that he was no longer available to testify. More weight is accorded the in-court testimony of John Aldrich, Safety Manager at the mine at issue, who testified that the "green path" was not utilized due to the presence of multiple area of rocks on the floor resulting from previous falls; instead, miners heading west to the evaluation point from the main track entry traveled the "red path" as illustrated on Gov. Ex. 10, p. 12.

[11] He also conceded that it probably is correct to assume that the area through which McKinney passed contained been strapped and had at least two bolts.

the above captioned proceedings be DISMISSED.



Avram Weisberger
Administration Law Judge

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