FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001
June 30, 2004

JIM WALTER RESOURCES, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. SE 2003-97-R
	:	Order No. 7670621; 03/03/03
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. SE 2003-98-R
ADMINISTRATION (MSHA),	:	Order No. 7670622; 03/03/03
Respondent	:	
	:	No. 7 Mine
	:	Mine ID No. 01-01401

DECISION

Appearances: Warren B. Lightfoot, Jr., Esq., Maynard, Cooper & Gale, P.C., Birmingham, Alabama, and Guy W. Hensley, Esq., Jim Walter Resources Inc., Brookwood, Alabama, on behalf of the Contestant;
Ann G. Paschall, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, and Terry Gaither, Conference and Litigation Representative, U.S. Department of Labor, Mine Safety and Health Administration, on behalf of the Respondent.

Before: Judge Melick

These cases are before me upon notices of contests filed by Jim Walter Resources, Inc. (JWR) pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, (1994), the "Act," to challenge two withdrawal orders issued by the Secretary of Labor pursuant to Section 104(d)(1) of the Act.[1]

---

[1] Section 104(d)(1) provides as follows:

"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such 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, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also

Order No. 7670621

Order No. 7670621 alleges a "significant and substantial" violation of the mandatory standard at 30 C.F.R. § 75.400 and charges as follows:

> Float coal dust, (dry and black in color and easily suspended in the air by placing the float coal dust between the hands and patting the hands together (A) was allowed to accumulate along the Main North belt line from #1 to #40 cross cut, a distance of approximately 4875 feet, and (B) from #54 cross cut to #77 ½ cross cut, a distance of approximately 2000 feet. In the area from #54 to #77 ½, there were bottom brackets where the bottom belt was rubbing the brackets. 1 at 110 feet inby #74 cross cut was so hot one could not leave the hand in contact with the bracket. This is an ignition source that could cause a fire with the float coal dust present. The belt was rubbing 2 bottom brackets at 20 feet and 30 feet inby #69 cross cut. The belt was rubbing a bottom bracket at #60 cross cut. 2 bottom rollers were running in coal fines, float coal dust, and rock dust 50 feet and 60 feet inby #66 cross cut. A bottom roller at #56 cross cut was broken and hanging down on one side with the belt rubbing on the other side. In the area from #1 cross cut to #40 cross cut, one bottom roller was running in accumulations of rock dust and coal fines, 3 bottom rollers running in accumulations of rock dust and coal fines at #38 cross cut, 1 bottom roller at #22 cross cut running in accumulations of rock dust and coal fines, 1 bottom roller running in accumulations of rock dust and coal fines 20 feet outby #20 cross cut, 2 bottom rollers running in accumulations of rock dust and coal fines 10 feet and 20 feet inby #19 cross cut, 2 bottom rollers at #10 cross cut running in coal fines, 2 bottom rollers 10 feet and 20 feet oubtby #7 cross cut turning in coal and coal fines, 1 bottom roller 50 feet outby #7 cross cut running in coal. Coal and coal fines were under the belt drive to the extent the drive rollers were turning in coal. 2 rollers on top of the East track overcast were turning in coal fines. The bottom belt had been rubbing the following belt stands to the point the stands were cut half way through and were shinny [*sic*] from being rubbed, 2 stands at #36 cross cut, 7 stands at #31 cross cut, 2 stands at #29 cross cut, 2 stands at #26 cross cut, 7 stands at #24 cross cut, 1 stand at #22 cross cut, 2 belt stands at #16 cross cut, 1 at #14 cross cut, 3 stands at #9 1cross cut , 2 stands at #8 cross cut, 1 stand at #7

---

caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

cross cut. 1 broken top roller 30 feet inby #28 cross cut. The energized hydraulic belt winch unit was covered with black float coal dust.

The company has been cited 26 times since 01/02/2003 for 75.400 violations. MSHA has discussed this with management several times to no avail.

The cited standard, 30 C.F.R. § 75.400, provides that "coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered on electrical equipment therein."

John Smoot, a coal mine inspector for the Department of Labor's Mine Safety and Health Administration (MSHA), has been employed by MSHA since the year 2000. He has extensive underground coal mining experience of more than 20 years. He arrived at the JWR No. 7 Mine on March 3, 2003, around 2:30 p.m. At this time he reviewed the preshift examination books for the mine belts for the period March 1, 2003 through the day shift on March 3, 2003. (Government Exhibit No. 1). After examining the books, Smoot, along with union walkaround representative, Dwight Cagle and company representative, Jerry Mullins, began an underground inspection. Traveling along the main north belt line beginning at crosscut 77 ½, Smoot observed what he believed to be coal dust accumulations. He found the coal dust to be dry and black in color and easily suspended in the air. According to Smoot, the coal dust existed along the main north belt line from the No. 1 to the No. 40 crosscut, a distance of approximately 4,875 feet and from the No. 54 crosscut to the No. 77 ½ crosscut, a distance of approximately 2,000 feet. At hearing, Inspector Smoot identified on a mine map (Joint Exhibit No. 1) where he also found what he considered to be potential ignition sources within the same area, including an area where the bottom belt was rubbing the brackets. More particularly, he found a bracket so hot that he could not leave his hand in contact with it. In addition, there were several areas where bottom rollers were running in accumulations of coal fines and coal. Smoot also found several belt stands cut half way through by the belt.

Smoot opined that, due to the amount of float coal dust and the presence of ignition sources, it was reasonably likely for reasonably serious injuries to occur. Fire and smoke would likely result from an ignition and, since the ventilating air proceeded inby the belt and there were 30 miners working inby, Smoot opined that those miners would be exposed to the hazard. Smoot's testimony in this regard is credible in essential respects. The testimony clearly supports a violation of the cited standard and a finding that the violation was of high gravity and "significant and substantial."

A violation is properly designated as "significant and substantial" if, based on 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 reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1,3-4 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum* 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.

See also Austin Power Inc. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

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 (*U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984)). The likelihood of such injury must be evaluated in terms of continued normal mining operations without any assumptions as to abatement. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991).

Smoot also concluded that the violation was the result of high negligence and "unwarrantable failure." In *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987), the Commission held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. This determination was derived, in part, from the plain meaning of "unwarrantable" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" (the failure to use such care as a reasonably prudent and careful person would use, and is characterized by "inadvertence," "thoughtlessness," and "inattention"). 9 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." 9 FMSHRC at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 189, 193-94 (February 1991). The Commission has also stated that use of a "knew or should have known" test by itself would make unwarrantable failure indistinguishable from ordinary negligence, and accordingly, the Commission rejected such an interpretation. A breach of a duty to know is not necessarily an unwarrantable failure. The thrust of *Emery* was that unwarrantable failure results from aggravated conduct, constituting more than ordinary negligence. *Secretary v. Virginia Crews Coal Co.*, 15 FMSHRC 2103, 2107 (October 1993).

Smoot based his findings of unwarrantability and high negligence on a number of factors. First, Smoot observed that notations in the preshift reports showed that accumulations had existed in the areas he cited and had not been reported in the preshift books as having been corrected. He noted, in particular, on the preshift examiner's report (Government Exhibit No. 1): (1) at page 1 at the fourth listed location: "40-header North B" "needs spot cleaning back of take up to #17"; on page 2 at the third listed location: "North A" "need swept 60-40, 88-90, 91, 92 ½"; (3) at the bottom of page 2: "North Main need additional dust 77-72, 77-65 need swept

northeast side"; (4) page 4, at the fourth listed location: "North B" "Acc of float coal dust 56-68, b-need swep [*sic*] need spot cleaning take up [illegible]"; (5) at page 5 the third listed location: "North A" "need swept 89, 92, 62½, 40 3 - 1."[2] (6) it was reported at the bottom of page 5, under "Remarks-North A" "need additional 13-5." (7) on page 6 the third listed location: at "Main North A" "additional dust 72-83½"; (8) at page 7 "Remarks-North A," "needs rock dust added from #24 - #33 brattice." Smoot observed that the above conditions were reported as "hazardous" in the preshift examiner's book but there was no indication as of the date of his inspection on March 3, 2003, that any corrective action had been taken. With the exceptions previously noted in footnote 2, this observation appears to be correct.

As Inspector Smoot described in his testimony, the areas he observed in the preshift examiner's books as needing corrective action were within the same areas in which he found violative "coal dust accumulations." Even considering the exceptions noted in footnote 2, this evidence clearly supports a finding of high negligence, reckless disregard and a serious lack of reasonable care. While Contestant argues that the No. 7 Mine Belt Crew Report (Operator's Exhibit No. 2) shows that some corrective action was reported to have been taken, such report is not required to be maintained by Federal law and is not therefore subject to the same certifications of accuracy and criminal sanctions for falsification under Federal law as the preshift and onshift examination reports. I therefore can give entries in the Belt Crew Report but little weight. The credibility of such a report is particularly suspect where entries do not have equivalent notations in the Federally mandated preshift examiner's report.

Inspector Smoot also relied, for his findings of high negligence and unwarrantability, on his observation that insufficient efforts were being made to clean up the massive accumulations he found. While Smoot apparently found no one working on the belt, I am satisfied from the testimony of others, including union walkaround Dwight Cagle, that two miners were indeed sweeping the belt. Cagle observed two "belt cleaners" during the course of the inspection. One had a broom and was sweeping the ribs in a crosscut and the other, who had just come through a man door, was sweeping the timbers. However, Cagle opined that those two belt cleaners could, at most, clean a maximum of ten crosscuts in an 8-hour shift. He also noted that they would need to shovel under the belt line. According to Cagle, only two persons were available for belt cleaning at that time. The extra belt cleaners were working the longwall and all other miners available that day had been assigned to other work.

One of the belt cleaners, Pearl Longhorn, also testified that they were able to sweep 15 crosscuts over during the entire shift but performed no shoveling. The other belt cleaner, Margaret Martin, testified that she thought they had swept 20 crosscuts during the shift. In her opinion, however, the area also needed rock dusting.

---

[2] It is noted, however, with respect to this latter notation that it was reported under the column "action taken" that 62-40 was "corrected." In addition, it was reported on the March 3 "owl shift" report that "2 people swept 40-62 Br." (Government Exhibit No. 1 p. 7).

I conclude, based on the credible evidence, that the assignment of only two belt cleaners to clean the massive accumulations was grossly inadequate. The belt cleaners themselves testified that, at best, they were able to sweep only 15 to 20 crosscuts during their shift and that the area still needed rock dusting. The failure of JWR to assign adequate manpower to the cleanup effort is also evidence of gross negligence, indifference, and a serious lack of reasonable care. This evidence therefore independently establishes that the violation was the result of the operator's high negligence and "unwarrantable failure" to comply.

As further corroboration of the grossly inadequate cleanup efforts, I also note that the abatement of the violative condition required significant rock dusting. 34 man-shifts were utilized with 28 pods of rock dust - - the equivalent of 56 tons of rock dust (Tr. 64). In addition, in order to abate the violative condition, 13 man-shifts were needed to clean the accumulations from the belt drive and 54 man-shifts to clean around the bottom rollers where they had been running in accumulations. Moreover, 43 bottom rollers and 66 bottom roller brackets were replaced. Such massive abatement efforts clearly demonstrate the inadequate efforts to have prevously corrected the violative conditions. (See Government Exhibit No. 3, p.3).

The Secretary also cites, as evidence of high negligence and unwarrantability, the existence of 23 prior charging documents for violations at the No. 7 Mine of the same standard at issue herein, *i.e.*, 30 C.F.R. § 75.400, over the preceding three months. Those documents were admitted into evidence by order dated February 12, 2004. *See* 26 FMSHRC 133 (February 2004). This Commission has held that prior notification by inspectors to mine operators about potentially unsafe conditions can be used to demonstrate negligence and unwarrantability. *See Enlow Fork Mining Co.,* 19 FMSHRC 5, 11-12 (January 1997). In this case the recent issuance of 23 charging documents for violations of the same standard at issue herein, singly and in combination, indeed, provided notice to JWR that it needed to increase its efforts to comply with the requirements of that standard.[3] This evidence, I therefore find, provides an independent basis for the findings of high negligence and unwarrantability.

Order No. 7670622

Order No. 7670622 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.1725(a) and charges as follows:

> The Main North belt was not being maintained in safe operating condition or immediately removed from service. 36 belt stands were cut over half way through from being rubbed by the bottom belt. The stands were shinny [*sic*] where they had been rubbed showing this rubbing was recent. This causes heat

[3] While JWR correctly suggests in its posthearing brief that some of these charging documents are less probative to this case than others, *e.g.,* violations for trash accumulations rather than coal dust accumulations, all are sufficiently probative to be relevant to this issue.

> from friction. 21 bottom rollers were running in accumulations of coal fines, and rock dust causing heat from friction. 5 broken bottom rollers were hanging down on one side with the bottom belt rubbing the other side causing heat from friction. There was 1 broken top roller. The bottom belt was rubbing 4 bottom roller brackets. One of these brackets located 110 feet inby cross cut #74 was very hot to the touch. This is an ignition source to cause a fire. 2 areas of float coal dust, (black in color, dry, and easily suspended in the air by placing the float coal dust between the hands and patting the hands together), were located in this area of the belt. An area from #1 cross cut to #40 cross cut, approximately 4875 feet, and an area from #54 cross cut to #77 ½ cross cut, approximately 2000 feet. In the area from #1 to #40 cross cut is the energized belt power center, electrical belt starter box, and the energized hydraulic take-up unit for the belt. Float coal dust (black in color) was present on all of these energized electrical units. Coal and coal fines were under the belt drive to the point the drive rollers were running in coal. In the area from #54 cross cut to #77 ½ cross cut, there was 1 broken bottom roller, 2 rollers turning in accumulations of rock dust and coal fines, 4 bottom roller brackets being rubbed by the bottom belt including the bracket at #74 cross cut.

The cited standard provides that "mobile and stationery machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately." Many of the conditions cited by Inspector Smoot on the main North belt, for example most of the 36 belt stands cut more than half-way through by the bottom belt, broken rollers on the belt, etc., were cited in the prior order. These conditions were clearly violative of the cited standard and I conclude, based on the same evidence, that they constituted a "significant and substantial" violation of high gravity.

I also find that the violative conditions were the result of high negligence and unwarrantable failure based on the sheer number of violative conditions alone. It may also reasonably be inferred that conditions, such as 36 damaged belt stands cut half way through, were obvious. It may also reasonably be inferred that such conditions were observed by the preshift examiner but not corrected. This evidence establishes that the violation was the result of reckless disregard and a serious lack of reasonable care.

In reaching this conclusion I have not disregarded JWR's argument that the defective top roller, the seven defective bottom rollers and the 36 damaged stands constituted only "1% or less of the equipment" in the 6800-foot distance traveled by Inspector Smoot and that this should be considered in mitigation of unwarrantability findings. I find, however, that the failure to identify and correct that large number of defects rather suggests that JWR has not been implementing an adequate inspection regimen. A larger area to inspect and maintain may require more inspectors and maintenance workers, but it cannot be an excuse for failure to observe and correct such a large number of defects.

Under the circumstances I find that the orders must be affirmed as written.

ORDER

Orders No. 7670621 and 7670622 are hereby affirmed and these Contests dismissed.

Gary Melick
Administration Law Judge

Distribution: (Certified Mail)

Ann G. Paschall, Esq., Office of the Solicitor, U.S. Dept. of Labor, 61 Forsyth Street, S.W., Room 7T10, Atlanta, GA 30303

Warren B. Lightfoot, Jr., Esq., Maynard, Cooper & Gale, P.C., 1901 Sixth Avenue North, 2400 AmSouth/Harbert Plaza, Birmingham, AL 35203

Guy Hensley, Esq., Jim Walter Resources, Inc., P.O. Box 133, Brookwood, AL 35444

/mca