

January 6, 2009

In the matter of:  
R S and W Coal Company, Inc.  
R S and W Drift Mine  
ID No. 36-01818

Petition for Modification  
  
Docket No. M-2006-022-C

AMENDED PROPOSED DECISION AND ORDER

On May 12, 2006, R S and W Coal Company, Inc. filed a petition for modification, pursuant to Section 101(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. § 811(c), for a modification of the application of 30 C.F.R. § 75.1714-2(c) at the R S and W Drift Mine. Section 75.1714-2(c) states that, "Where the wearing or carrying of the self-rescue device is hazardous to the person, it shall be placed in a readily accessible location no greater than 25 feet from such person." The petitioner requested a modification to allow the storage of self-contained self-rescuers (SCSRs) within 200 feet of the working face.

MSHA conducted an investigation of the petition and issued a report on February 13, 2007. The report was supplemented on August 13, 2007, noting that R S and W had not complied with 30 C.F.R. § 75.1714-2(e) which states, "A mine operator may apply to the District Manager under Sec. 75.1502 for permission to place the SCSR more than 25 feet away," this being the first course of action rather than filing a petition. On November 26, 2007, MSHA dismissed the petition since R S and W had not submitted an SCSR storage plan to the District Manager pursuant to Section 75.1714-2(e).

The petitioner was granted a hearing on MSHA's dismissal of the petition. The hearing was held on March 10 and 11, 2008, in Hazleton, Pennsylvania. On May 13, 2008, the Administrative Law Judge remanded the matter stating, "I REMAND the Petitioner's petition to MSHA, and I DIRECT that MSHA forward the matter to the District Manager for a decision on the Petitioner's request for modification of the standard relating to placement of SCSRs within 25 feet of miners."

In order to comply with the Administrative Law Judge's order, the Administrator for Coal Mine Safety and Health forwarded the petition to the District Manager for consideration as an SCSR storage plan. On June 4, 2008, MSHA investigated the SCSR storage plan in accordance with Section 75.1714-2(e). The investigation included extensive discussions with Randy Rothermel, the petitioner and mine operator. During the investigation, the petitioner orally amended the terms of the SCSR storage plan to also request that the miners not be required to wear filter-type self-rescuer (FSR) devices and the mine not be required to have such FSR equipment available for the

personnel affected by the SCSR storage plan and that miners not be required to place SCSRs within 25 feet of miners on trips into and out of the mine. In effect, the amended SCSR storage plan requested relief from the application of 30 C.F.R. § 75.1714-2(a) through (f), which provides:

§ 75.1714-2 Self-rescue devices; use and location requirements.

- (a) Self-rescue devices shall be used and located as prescribed in paragraphs (b) through (f) of this section.
- (b) Except as provided in paragraph (c), (d), (e), or (f) of this section, self-rescue devices shall be worn or carried at all times by each person when underground.
- (c) Where the wearing or carrying of the self-rescue device is hazardous to the person, it shall be placed in a readily accessible location no greater than 25 feet from such person.
- (d) Where a person works on or around equipment, the self-rescue device may be placed in a readily accessible location on such equipment.
- (e) A mine operator may apply to the District Manager under § 75.1502 for permission to place the SCSR more than 25 feet away.
  - (1) The District Manager shall consider the following factors in deciding whether to permit an operator to place a SCSR more than 25 feet from a miner:
    - (i) Distance from affected sections to surface,
    - (ii) Pitch of seam in affected sections,
    - (iii) Height of coal seam in affected sections,
    - (iv) Location of escapeways,
    - (v) Proposed location of SCSRs,
    - (vi) Type of work performed by affected miners,
    - (vii) Degree of risk to which affected miners are exposed,

- (viii) Potential for breaking into oxygen deficient atmospheres,
  - (ix) Type of risk to which affected miners are exposed,
  - (x) Accident history of mine, and
  - (xi) Other matters bearing upon the safety of miners.
- (2) Such application shall not be approved by the District Manager unless it provides that, while underground, all miners whose SCSR is more than 25 feet away shall have a FSR approved by MSHA and NIOSH under 42 CFR part 84 sufficient to enable each miner to get to a SCSR.
- (3) An operator may not obtain permission under paragraph (e) of this section to place SCSRs more than 25 feet away from miners on trips into and out of the mine.
- (f) If an SCSR is not carried out of the mine at the end of a miner's shift, the place of storage shall be approved by the District Manager. A sign made of reflective material with the word "SCSRs" or "SELF-RESCUERS" shall be conspicuously posted at each SCSR storage location. Direction signs made of a reflective material shall be posted leading to each storage location.

MSHA's investigation report, issued on July 15, 2008, consists of information related to Section 75.1714-2(a) through (e)(1) and (f) for the District Manager's consideration of whether to approve the SCSR storage plan. In the report, MSHA determined that there is no hazard to miners in wearing and/or carrying an SCSR at the petitioner's mine. According to the report, MSHA inspectors "have traveled throughout areas of underground anthracite coal mines (including this mine) while wearing an SCSR and found that, although adding weight and bulk slows travel through these areas, no sense of creating a hazard is found." In the inspectors' view, "this mine's configuration allows miners to safely wear and/or carry SCSRs." Additionally, the report notes that, under Section 75.1714-2(e)(2) and (e)(3), the District Manager does not have the authority to approve the SCSR storage plan. On July 18, 2008, the District Manager denied approval of the plan, concluding "Any SCSR which is stored remotely from the work locations is of little or no value and is completely inconsistent with the congressional intent requiring SCSRs in all coal mines found in the original Emergency Temporary Standards as well as the MINER Act."

After a careful review of the entire record, including the petition and MSHA's investigative reports, this Amended Proposed Decision and Order is issued.

#### Findings of Fact and Conclusions of Law

Petitions for modification are filed with the Administrator under 30 C.F.R. part 44 and hearings, if requested, are held before the United States Department of Labor's Administrative Law Judges. Unlike petitions for modification, however, mine plans are adopted by operators and approved by District Managers, and any disputes over plan provisions are resolved in proceedings before the Federal Mine Safety and Health Review Commission. *See, e.g., Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987) ("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."). In view of the separate administrative procedures for petitions for modification and mine plans, this Amended Proposed Decision and Order will not review the District Manager's denial of the SCSR storage plan under Section 75.1714-2(a) through (e)(1) and (f) because any dispute over the plan is under the jurisdiction of the Commission. Nevertheless, this Amended Proposed Decision and Order addresses Section 75.1714-2(e)(2) and (e)(3), over which the District Manager has no discretion, but which are properly addressed through the petition for modification process.

The petitioner requested relief from the application of Section 75.1714-2(e)(2) and (e)(3) to allow the mine to place SCSRs up to 200 feet from the working face with exemptions from the requirements for FSRs and SCSRs within 25 feet of miners on trips into and out of the mine. The petitioner alleged that wearing and/or carrying SCSRs diminishes the safety of the miners by catching on timbers or roof while moving from working locations to other locations and that storing the SCSRs at a site within 200 feet of the working face, not providing or wearing FSRs, not carrying SCSRs in and out of the mine, and not providing SCSRs on the mantrip provides the same protection as the standard.

MSHA's investigation found that, although the petitioner's mine has not had a reported accident in 10 years, other underground anthracite mines have had explosions of methane, encountered oxygen-deficient air, and have had inundations of gas and water. As explained in MSHA's mine evacuation emergency temporary standard, 71 Fed. Reg. 12,252, 12,254-55 (Mar. 9, 2006), underground coal mines are dynamic work environments where the working conditions change rapidly and sometimes without

warning. In the high-hazard environment where coal miners work, the danger of a fire, explosion, or gas or water inundation is always present. Caved or mined out areas which contain coal and accumulated gas can be the locations for explosions caused by rock falls, and in some instances, fires are started by spontaneous combustion. Moreover, when active mines are connected into previously mined out areas, there is also the risk of exposure to an oxygen deficient atmosphere that can cause asphyxiation. Finally, when mining near other mined out areas, there can be a risk of water inundation. In the event of such emergencies, miners may have to escape through long and difficult underground travelways containing irrespirable air. These emergencies could occur at the petitioner's mine in the future.

Since 1980, each miner working in an underground coal mine has been required to have immediate access to an SCSR that provides at least 1 hour of oxygen for escape from the mine during an emergency. With three exceptions, the SCSR must be worn or carried: (1) if doing so is hazardous, a miner may put his/her SCSR in a readily accessible place no more than 25 feet away; (2) if a miner works in or around equipment, he/she may place the SCSR in a readily accessible place on the equipment, and (3) a mine operator may apply to the District Manager for approval of a placement distance greater than 25 feet from a miner, provided that the operator equips the miner with an FSR to enable him/her to get to the SCSR. 30 C.F.R. § 75.1714-2(c), (d), (e). An SCSR is a type of closed-circuit, self-contained breathing apparatus approved by MSHA and NIOSH under 42 CFR part 84 for escape from underground mines. 30 C.F.R. § 75.2. An SCSR contains or produces an independent supply of oxygen and, because it functions in a closed circuit, it enables miners to breathe clean air in the presence of hazardous or life-threatening contaminants in the mine atmosphere. In contrast, an FSR is a type of gas mask approved by MSHA and NIOSH under 42 CFR part 84 for escape from underground mines and which provides at least 1 hour of protection against carbon monoxide. 30 C.F.R. § 75.2. An FSR converts carbon monoxide resulting from a mine fire or explosion into carbon dioxide. The user of an FSR, however, must rely upon oxygen in the air.

With regard to Section 75.1714-2(e)(2), the petitioner requested storage of SCSRs up to 200 feet from the working face and asserted that miners would have sufficient time to get from the working face to the SCSRs and that FSRs would not be required to be worn by the miners or kept in the mine. Miners working underground when a mine emergency occurs must be able to rapidly find lifesaving devices and use those devices to help them prevent injury, evacuate the mine quickly, and save their lives. Immediate access to an SCSR, or an FSR to enable a miner to reach the storage location to retrieve an SCSR, is essential when a miner is underground and a fire or explosion happens. Here, the petitioner has not satisfied MSHA that, during a fire or explosion, miners without FSRs could reach the requested storage location to retrieve SCSRs in a prompt,

timely manner for safe evacuation from the mine. The petitioner's request for relief from the application of Section 75.1714-2(e)(2) would result in miners having no protection against potentially hazardous conditions or environments from the working face to a point where SCSRs would be stored, a distance of no greater than but approximately 200 feet. The petitioner's proposal of not providing miners with FSRs to aid them in getting to the storage location of SCSRs does not provide any of the intended protection afforded by the standard.

Regarding Section 75.1714-2(e)(3), the petitioner requested storage of SCSRs up to 200 feet from the working face and asserted that miners would not have SCSRs available as they traveled into or out of the mine (by foot or riding in a mantrip) and, thus, SCSRs would be in more reliable, pristine condition. At the petitioner's mine, miners ride a small locomotive or walk into and out of the mine and to and from their working locations. Since a mine accident or emergency that requires evacuation could occur while miners are traveling to or from their working locations, miners are required to have SCSRs available to them while entering and exiting the mine. The petitioner's request for relief from the application of Section 75.1714-2(e)(3) would result in miners traveling approximately 3,300 feet in and out of the mine daily with no protection from potentially hazardous conditions or environments. The petitioner's proposal of not providing miners with SCSRs as they enter and exit the mine does not provide any of the intended protection afforded by the standard.

MSHA concludes that application of Section 75.1714-2(e)(2) and (e)(3) provides the intended protection to miners and that the petitioner's alternative method will not at all times guarantee no less than the same measure of protection. MSHA also concludes that the wearing or carrying of SCSRs and FSRs does not result in a diminution of safety. This Amended Proposed Decision and Order, when final, will supersede the Proposed Order of Dismissal issued November 26, 2007.

### ORDER

Wherefore, pursuant to the authority delegated by the Secretary of Labor to the Administrator for Coal Mine Safety and Health, and pursuant to Section 101(c) of the Mine Act, it is ordered that R S and W Coal Company, Inc.'s petition for modification is hereby:

DENIED.

Any party to this action desiring a hearing on this matter must file in accordance with 30 C.F.R. part 44 within 30 days. The request for hearing must be filed with the

Administrator for Coal Mine Safety and Health, 1100 Wilson Boulevard, Arlington, Virginia 22209-3939.

If a hearing is requested, the request shall contain a concise summary of position on the issues of fact or law raised by the party requesting the hearing, including specific objections to the proposed decision. A party other than the petitioner who has requested a hearing may also comment upon all issues of fact or law presented in the petition, and any party to this action requesting a hearing may indicate a desired hearing site. If no request for a hearing is filed within 30 days after service thereof, the Amended Proposed Decision and Order will become final.

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Kevin G. Stricklin  
Administrator for  
Coal Mine Safety and Health