

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
7 PARKWAY CENTER, SUITE 290
875 GREENTREE ROAD
PITTSBURGH, PA 15220
TELEPHONE: 412-920-7240 / FAX: 412-928-8689

JUL 23 2018

CUMBERLAND CONTURA, LLC,
Contestant,

v.

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Respondent.

CONTEST PROCEEDING

Docket No. PENN 2018-50-R
Order No. 9078215; 09/28/2017

Mine ID: 36-05018
Mine: Cumberland Mine

DECISION AND ORDER

Appearances: R. Henry Moore, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for Contestant.

Jordana L. Greenwald, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent.

Before: Judge Lewis

I. STATEMENT OF THE CASE

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq. (2006) (“Mine Act” or “Act”). At issue is an imminent danger order issued under section 104(a) of the Act. On January 11, 2018, a hearing was held in Pittsburgh, PA. The parties presented testimony and documentary evidence and filed post-hearing briefs.

II. JOINT STIPULATIONS¹

The parties have stipulated to the following facts:

1. Cumberland is an “operator” as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter “the Mine Act”), 30 U.S.C. §803(d), at the mine at which the subject Order in this proceeding was issued.

¹ The Joint Stipulations were submitted at hearing as Joint 1, which will hereinafter be referred to as JX-1. The Secretary’s exhibits will be referred to as GX followed by its alphabetical letter and Contestant’s exhibits will be referred to as CX followed by its number.

2. Operations of Cumberland mine are subject to the jurisdiction of the Mine Act.
3. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judge pursuant to Sections 105 and 113 of the Mine Act.
4. Andrew W. Gallagher, who is a Health Specialist for MSHA and whose signature appears in Block 22 of the Order at issue in this proceeding, was acting in an official capacity and as an authorized representative of the Secretary of Labor when the subject Order was issued.
5. A true copy of the Order at issue in this proceeding was served on Cumberland as required by the Act.
6. Cumberland Mine is owned and operated by Cumberland Contura, LLC.

III. SUMMARY OF TESTIMONY

Anthony Gallagher

Anthony Gallagher had been working for MSHA since 2013, first as an inspector trainee E0-1 inspector, and then for the last two years as a health specialist. Tr. 20-21². His job duties included “running dust or running noise” on coal mine sections. Tr. 21. Prior to coming to MSHA, he had worked as a coal miner for 6 years, possessing a miner’s certification.³ Tr. 22.

On September 28, 2017, Gallagher issued a dust citation and imminent danger order to Cumberland Mine. Tr. 22. He had traveled to Cumberland on E0-1 inspections in the past. Tr. 23. While coming up 81 East Mains Track, going into the 68 headgate area, he observed an off-track motor and some cap lamps. Tr. 24-26. After going with Contestant’s employees to find blocking and cribbing materials, Gallagher returned on a mantrip with Bob Dalnoky (the mine’s senior safety representative). Tr. 26-27, 137. Contestant’s employees started placing materials under the motor “to start jacking it up and slewing it over.” Tr. 28. Gallagher then saw the cap lamp of Will Christopher coming through the “least clearing side of the motor” as the motor was being lifted off the ground with a jack walker.⁴ Tr. 28-30. The jack walker was attached to the motor. Tr. 31.

² Reference to the hearing transcript will be referred to as Tr., followed by the page number(s).

³ Gallagher did not have any foreman’s or miner’s papers. Tr. 74. He had become an authorized representative in the spring of 2015. Tr. 74-75. When he had worked at Rosebud Mining, the transportation utilized was rubber-tired vehicles. Tr. 75. His past experience with jacking up dollies involved free-standing jacks that were positioned under the dollies so that they could be slewed over to be put back on the rail. Tr. 75.

⁴ A jack walker is essentially a hydraulic jack attached to an I-beam that will push down on the mine floor and move the motor. Tr.30.

There was “a lot” of wind, making it difficult to hear conversation without the raising of voices. Tr. 31. Gallagher flagged both Christopher and an individual in the kitchen operator’s compartment of the 20-ton motor to stop everything, and ordered that the diesel motor be shut down. Tr. 32. Gallagher did so because he “was scared” for Christopher’s life. Tr. 32. In his experience, when blunt pieces of steel⁵ were being put together, they sometimes “unexpectedly and very surprisingly” move in an unforeseen direction. Tr. 32.

Gallagher was approximately five or six feet from the diesel motor when Christopher walked over. Tr. 33. *See also* GX A. The derailed motor was in the crosscut area. Tr. 35. There was approximately 36” of space between the motor and rib when Christopher walked through. Tr. 36. On the other side of the motor there was approximately 6-7 feet of space to the closest rib. Tr. 37.

After stopping all progress, Gallagher pulled the two motor men, Christopher and Dalnoky, to the outby end of the motor. Tr.38. He informed them that it was extremely unsafe for somebody to walk through a pinch point while the motor was being lifted or re-railed. Tr. 38. Gallagher also opined that there were “too many bosses,” that the re-railing was unorganized, and that there should have been a plan prior to attempting to re-rail a piece of equipment. Tr. 38.

Respondent’s employees went back to work cribbing up the motor to slew it over, using the jack walker. Tr. 38-39. As company representatives, including (Jeff) Everett, were walking up to Gallagher’s right hand side, Gallagher heard a “big bang” when the jack walker had “unexpectedly slipped or grabbed hold of something and slammed.” Tr. 39.

Gallagher explained to Everett that it was unsafe to have so many people around, “barking orders,” while a piece of equipment was being moved. Tr. 39. At this point Gallagher informed Dalnoky that he was issuing a 107(a) imminent danger order for Will Christopher having walked through the pinch point between the motor and the rib. Tr. 40.

Dalnoky disagreed with Gallagher’s determination, asserting that re-railing equipment was within Contestant’s expertise, and that it was not an unsafe act.⁶ Tr. 40.

Gallagher estimated that the time between when he first observed Christopher walk by the motor and his issuance of a 107(a) imminent danger order was “under three minutes.” Tr. 41. Christopher had reported that he did not know that the motor was going to be raised when he had walked through. Tr. 42. Further, the individual in the operator’s compartment had not known that Christopher was going to walk past the motor. Tr. 42; *See also* Tr. 50.

⁵ The “blunt pieces of steel” which Gallagher was referring to were the track, the jack walker, the frame of the 20-ton diesel motor, the undercarriage, everything that was involved in the situation. Tr.33.

⁶ Gallagher noted that Dalnoky was “pretty verbal” in his disagreement. Tr. 40.

Gallagher had also spoken with the outby mechanic who reported that a pair of jack walkers had broken down the day before in the same intersection, approximately 20 feet from where the motor was sitting. Tr. 43.

Gallagher recorded his notes prior to going underground, while underground, and subsequently on the surface. Tr. 45; *See also* GX B. He had made a blunt drawing of the motor and track according to his observations on the day of the incident. Tr. 47; GX B, p.7. Gallagher had not specifically mentioned that there had been a bang in his notes. He did not think that the bang had anything to do with the imminent danger order. Tr. 53.

On the way to terminate the rock dust citation Gallagher had a “man to man conversation,” with Bob Dalnoky, involving some, “pretty aggressive yelling,” in the intersection of the occurrence, ending with apologies and a handshake. Tr. 53. Dalnoky further advised Gallagher that he would lose his job if an imminent danger order were to be issued. Tr. 53. However, this conversation was not mentioned in Gallagher’s notes. Tr. 57.

On the elevator ride to the surface Gallagher has spoken with Christopher. Christopher had stated that he did not know that they were going to raise a piece of equipment when he passed the motor. Tr. 56.

Gallagher also spoke with Frank Foster, a member of Contestant’s Safety Department, who questioned whether there was any other way to deal with the controversy rather than an imminent danger order. Tr. 58. Gallagher explained this was the tool he had in his toolbox for such situations. Tr. 58. Gallagher also advised that he would be issuing an S&S Citation if there was a safeguard existing for this situation. Otherwise, he would be writing a safeguard to stop such instances from happening in the future.⁷ Tr. 59.

Gallagher was aware of other occasions when miners were injured in the process of re-railing diesel-powered equipment on similar rail systems.⁸ Tr. 68. Shortly before the incident at issue, a miner had sustained a severe foot fracture while re-railing a piece of equipment. Tr. 68. The father of a coworker of Gallagher’s had been killed in a re-railing accident. Tr. 69. Gallagher reported that he had feared for Christopher’s life when Christopher had walked between the big piece of equipment and a coal rib. Tr. 69. He had declined to give a safety talk in lieu of issuing an imminent danger order because, in his experience, such an approach did not, “clear up the situation.” Tr. 70.

Gallagher denied knowing of other inspectors who issued safeguards on the same day that they had witnessed a particular condition. Tr. 71. He conceded that for two months, from

⁷ Gallagher explained that he could not simply issue a safeguard immediately upon witnessing an unsafe act without following prescribed procedures. (T. 59-60). A safeguard was eventually issued on 12/1/17. Tr. 62; *See also* GX D wherein it states: “This is a notice to provide a safeguard preventing anyone from positioning themselves in a pinch point while re-railing track mounted equipment.”

⁸ *See* cross-examination regarding such incidents at Tr.76.

9/28/17 to 12/1/17, the alleged unsafe condition could have occurred again because no safeguard had been issued. Tr. 73.

Gallagher did not know the specific facts regarding the accident involving an injury at Enlow Fork Mine referred to in his earlier testimony. He did not know whether jack walkers were being used. Tr. 76. He also did not know the specifics regarding the fatality at Loverridge Mine that he referred to. Tr. 76. Nor had he looked into the specifics of the other derailment injuries that he had testified about. Tr. 76. He testified that he had never re-railed a track-mounted vehicle. Tr. 77.

When Gallagher made his drawing from the inby end of the motor, (GX B, p.7) the motor was still off the track. Tr. 77.

Gallagher acknowledged that Contestant's employees whom he had heard, "barking orders," would have had to yell to be heard. Tr. 77.

Given the location where motorman Stevens was sitting in the kitchen of the motor, which was on the inby end, Christopher would have had to walk right by the operator. Tr. 79. Christopher would be wearing a cap light and reflective clothing. Tr. 79. The motorman would have "probably" observed Christopher walk by him. Tr. 80-81.

At the point Gallagher had issued his verbal imminent danger order, Christopher had already walked by the motor and was out of danger. Tr. 81-82.

Gallagher estimated the distance between the motor and the rib to be approximately 36". Tr. 83. He never actually measured the distance (despite the motor having been shut down)⁹. Tr. 83. Further, he had not noticed whether any of the motor's wheels were off track. Tr. 85-86. He did not know how many times Contestant's employees had to jack up the outby end, or back end of the motor to get it back on track. Tr. 86. Gallagher agreed that in order to re-rail the motor, it would be necessary to jack the motor up, place blocking underneath the jack, and then jack the motor up again so it could be raised high enough to get the wheels up to the rail. Tr. 87. He further agreed that Dalnoky had not perceived the events at issue to constitute a hazard. Tr. 88.

Gallagher himself had never driven any of the vehicles in the mine because he was an inspector. Tr. 89. Nor had he ever re-railed any vehicles in the mine(s) because he was an inspector. Tr. 89.

Gallagher observed the jack walker "abruptly" move but could not determine the direction of the "jerk", nor did he know the distance that the jack walker had moved. Tr. 90. The loud bang that Gallagher heard while watching the re-railing process had "scared" him. He relayed such to Dalnoky. Tr. 90-91.

⁹ As discussed *infra* the ALJ notes the discrepancy between inspector Gallagher's testimony and that of Dalnoky on this point, as well as Gallagher's decision not to perform an actual measurement of the interspace at issue.

Christopher did not advise him, as they were exiting the elevator, that Christopher had announced to the motorman that he was going to pass the motor. Tr. 92.

Anthony Gallagher Redirect Examination

Gallagher was uncertain of the distance between the rib and motor on the outby end. Tr. 92. He did not recall hearing Dalnoky state that everything was static. Tr. 93.

Jeffrey Spooner

Spooner was a motorman at Cumberland Mine, working in this position for approximately 4 years. Tr. 96-97. He had begun working for Contestant in June 2011 and had no previous mining experience. Tr. 99. As a motorman, he essentially transported materials throughout the mine and moved goods. Tr. 97.

He recalled the incident at issue and testified that he had been working with Shawn Stevens on that day.¹⁰ Tr. 97-98. A guide rail had loosened causing the motor to come off track. Tr. 98. All four of the locomotives wheels had come off track. Tr. 101. The left inby wheel was located inside the rail. Tr. 101; *See also* GX A. The wheel on the other side would have been in the apex between the three tracks, straight in the turn. Tr. 102. The outby wheels were basically in the same location(s) inside the track rail. Tr. 102. Two were contained between the two track rails over the actual rail system. The other two were “completely outside of it between the straight rail and the turn rail.” Tr. 102.

Typically, when a motor goes off track, jack walkers are used to elevate the motor to slew it over. Tr. 103. However, in the instant matter, because the wheels had ended up “much lower”¹¹ below the top of the rail, blocking was also required. Tr. 103.

The motor would need to be elevated by the jack walker as high as possible with blocking being put under the motor and the process repeated until the wheels could clear the rail. Tr. 103.

Initially, Spooner was at the site alone with Stevens. Tr. 104. When Dalnoky and Gallagher arrived, he took their jeep to obtain blocking at a location approximately 600-800 feet away. Tr. 104. Stevens remained in the motor with the lights on. Tr. 104. When Spooner returned, he saw Gallagher walking towards the motor and heard the inspector yell, “stop.” Tr. 105.

Spooner did not believe that the area through which Christopher walked was unsafe. Tr. 106. There was “no way” that the motor could have moved over toward the rib because the “wheels wouldn’t allow it to jump the rail.” Tr. 106. That was the reason blocking was needed. Tr. 106. Spooner already on the same day had to jack up the motor 4 to 5 times. Tr. 107.

¹⁰ Spooner stated that Stevens had health issues (and was therefore not at the hearing).

¹¹ Spooner estimated that the wheels were 12” to 14” below the rail. Tr.103.

The area was loud and noisy due to the airflow and revving up of the engine in the motor for hydraulics to work. Tr. 108.

It was a typical event for a jack walker to come down and sometimes slew, going under the I-beam of the rail, causing the “whole thing” to jump and make a loud noise. Tr. 109. It was just the jack walker that moves; the motor does not move. Tr. 109. When Christopher walked beside the motor, it was not moving. Tr. 109. Rather, it was just sitting there, idle. Tr. 109. Typically, when Spooner or his fellow workers are around a motor, a foot is taken off the dead man so that the motor cannot move and is inoperable. Tr. 109.

Spoooner had seen no potential for the motor to have moved over into the walkway where Christopher was walking. Tr. 110. Christopher would have had to be wearing a cap lamp, reflective clothing, and blinking lights. Tr. 110.

Spoooner agreed that you would not want “a bunch of people milling about,” during re-railing and would want only one-person giving orders. Tr. 111.

During the re-railing at issue, Stevens was communicating with Spooner and Dalnoky was helping Spooner move the blocking. Tr. 111.

Spoooner did not witness personally any movement of the jacks when Christopher walked up alongside the motor. Tr. 112. Looking outby, Christopher would have been on the right side of the motor, and both the front and back wheels were on the inside of the rail. Tr. 112. The motor was sitting at an angle and could not have moved in such a way so as to move (sideways) to where Christopher was walking. Tr. 112. Jack walkers drop approximately 12”-14” and slew approximately 6”-8”. Tr. 113.

Jeffrey Spooner Cross Examination

Spoooner was not facing the motor when he had heard Gallagher hollering. Tr. 115. He was not certain whether Christopher had passed the motor entirely when Gallagher had yelled, “stop”. Tr. 116. Further, he did not actually witness whether the motor was in motion in any direction when Christopher passed through. Tr. 116. Christopher was certain the motor was not in motion because if Christopher had walked up and alerted Stevens that he was walking by, Stevens would have taken his foot off the dead man and stopped all activity. Tr. 117.

Spoooner agreed that a miner should not walk by machinery that was being jacked, even if it were safe to do so because one should not take a chance to go by moving equipment. Tr. 117. Common sense also dictated such. Tr. 119.

William Christopher

Christopher had worked at Cumberland Mine since 2010. Tr. 122. He had previously worked as a contractor at Bailey Mine since 2005. Tr. 122. His past mining jobs, including shuttle car operator, outby utility, general inside laborer, and presently rock dust motorman. Tr. 122.

As to the incident at issue, Christopher observed Spooner's motor off track at the corner of the 81 East Mains with its lights on. Tr. 123. Coming from an inby direction, Christopher walked down to the motor. Tr. 124. The motor could not be raised high enough with the blocking material at the scene so Christopher told Stevens he wanted to get more blocking materials from Spooner who had just returned to the site. Tr. 124. At that point Christopher walked past Stevens, down along the right side of the motor to get blocking materials. Tr. 124. Christopher remembered informing Stevens, "hold that, I want to get cribs from Spooner" before walking past the motor. Tr. 125. Coming outby, the right hand wheel was between the two rails. Tr. 126. The left hand wheel would have been in the middle of the other row because "you had to switch the apex or whatever." Tr. 126. Christopher thought it was safe to walk by the motor because the motor was off-track and he had alerted Stevens "to hold that." Tr. 127.

Christopher did not notice Gallagher flagging him as he walked by. While not remembering Gallagher's exact words, Christopher did however recollect that Gallagher had said something concerning the fact that the motor could have slid over. Tr. 127. Christopher did not mention if the jack walker had slipped off or had made a sudden movement. Tr. 129. Subsequently, during a ride in the elevator, Christopher told Gallagher that he had not noticed whether the motor was being lifted when he walked by. Tr. 130.

William Christopher Cross Examination

Christopher had told Stevens to stop because it was common practice in the mine that before passing any piece of machinery to make sure the operator knows you are going through. Tr. 131. It could be unsafe to move the motor while someone was walking by. Tr. 132.

Christopher reported that he could not be sure whether the motor was being raised as he passed through. Tr. 133. Nor was he sure, whether there were any sudden movements as the jacking process proceeded. Tr. 135.

Robert Dalnoky

At the time of hearing, Robert Dalnoky had been the senior safety representative at Cumberland Mine for two years. Tr. 137. His duties included escorting inspectors, performing training, and ensuring employees worked in a safe fashion. Tr. 137. He had previously worked as a shift foreman at the Emerald Mine. Tr. 138. Identical rail haulage systems were utilized at both mines. Tr. 138. Some of Emerald Mine's motors had in fact been transferred to Cumberland Mine after Emerald's closing.¹²

Dalnoky had Pennsylvania certification papers for mine foreman and assistant mine foreman. Tr. 141. He also had a two-year mining technical degree from Penn State University. Tr. 141.

¹² Prior to working at Emerald Mine, Dalnoky had worked for Consol and Gateway Mine as a section foreman and part-time shift foreman. At Consol's Westland Mine a rail coal haulage system was used with cars being pulled by 50-ton motors. Tr.139-141.

As to the 9/28/2017 incident in question, Dalnoky remembered traveling with Gallagher to the 68 Head Gate Section. Tr. 142. As they rounded a curve, they came upon a derailed motor off track. Tr. 142. Spooner flagged them to come forward as he needed some wood. Returning from 69 Section, Dalnoky saw Christopher talking to the operator of the motor as he was approaching, Tr. 143. As Christopher passed the motor, Dalnoky saw nothing-unsafe happening. Tr. 143. The motor was off all four wheels. The outby jack walker was up but the motor was not moving. Tr. 143.

Dalnoky did not see the jack walker raise the motor any further as Christopher walked by. Tr. 144. Even if the motor were being raised, there would have been no danger because the wheels were in between the track(s) and the motor could not have slewed over. Tr. 145-146. Because of the blowing air, Dalnoky could not hear the words exchanged between Stevens and Christopher. Tr. 146.

After Christopher had walked past the motor, it began to be jacked up. The tip of the jack walker was sitting on the flange of the rail and slipped, creating a bang. Tr. 147. At that point, Gallagher raised his hands, yelling, "stop." Tr. 146. When Dalnoky asked him "what is the matter," Gallagher replied, "you scared me." Tr. 147.

There followed an exchange between Gallagher and Dalnoky in which Gallagher asserted that Christopher could have been injured in passing by the motor and Dalnoky asserted that it was not possible for such. Tr. 148.

After other of Contestant's supervisory personnel arrived at the scene, Gallagher announced that he was issuing an imminent danger 107(a) order because "that guy walked along the rib there," and "there is just too many people around here." Tr. 149.

Dalnoky disagreed and became, "a little excited," at which point Jeffrey Everett grabbed him by the shoulder. Dalnoky then walked away. Tr. 150.

Dalnoky then helped to get the motor on the track, repairing the guide rail whose bolt had broken with a new bolt. Tr. 150.

Gallagher advised Dalnoky that an imminent danger order was "the only tool in his tool box" and could not be convinced from issuing such. Tr. 151.

A map of the site was created to reflect where the motor was at the time the imminent danger order was issued and where Christopher had walked past the motor. Tr. 152-154; CX 1A. Dalnoky observed Gallagher taking measurements of the distance between the rib and motor where Christopher walked which he announced to be three feet. Tr. 154-155.

Subsequently, while in a jeep with Gallagher, Dalnoky apologized for "going off." Tr. 155. Dalnoky understood how Gallagher, due to his inexperience in rail haulage mines, may have been frightened by the re-railing scene that he witnessed. Tr. 156. However, he still disagreed that Christopher's actions posed an imminent danger. Tr. 156. Dalnoky denied ever telling Gallagher that he might be fired if an imminent danger order were issued. Tr. 156.

When the jack walker skipped off the flange, the motor did not move. Tr. 157. Dalnoky had written notes immediately after the incident to keep matters fresh in his mind. Tr. 158; CX 2. He corrected one of the observations contained in the notes to reflect that Christopher had actually walked down the “wide” side of the motor rather than the tight side. Tr. 158; *See also* CX 1A.

Normally, it takes about approximately four times to jack a motor back up onto the rail. In his career, Dalnoky had re-railed a countless number of motors, lowboys, and equipment. Tr. 159.

Jack walkers (attached to motors) are the “safest thing” to have: there was no chance of the bar hitting you or the jack flying out. Tr. 160.

Dalnoky characterized the re-railing at issue as a “textbook” operation, stating that Spooner was the only individual giving directions, and that it was a routine procedure. Tr. 161.

Robert Dalnoky Cross Examination

Dalnoky could not hear the actual exchange between Christopher and the motorman during Christopher’s walk-by. Tr. 163, 165. He would not have heard if Christopher were giving directions to Mr. Stevens. Tr. 166.

Dalnoky disagreed that Christopher was in a “pinch zone” at the time of the incident. Tr. 171. The motor was still off on all four wheels when the jack walker was up. Tr. 173. He further asserted that it was only *after* Christopher had walked through that the jack walker slipped off the rail and that Gallagher “went nuts.” Tr. 175. Dalnoky disagreed with the wording of the Respondent’s written order because the jack walker was not being used when Christopher walked through. Tr. 185.

Jeffrey Everett

The mine superintendent, Jeffrey Everett, testified at the hearing. He had worked 6 years as such, previously working for two years as superintendent of Emerald Prep Plant.¹³ Tr. 192.

On the date in question, Everett travelled to the scene with various corporate personnel and heard yelling. Tr. 194. He noticed Gallagher yelling and observed Spooner and Dalnoky with cribbing material in their hands. Tr. 155. He asked Gallagher what was going on and Gallagher replied that he feared somebody was going to get hurt because more than one person was giving directions. Tr. 195. At some point Everett learned that a 107(a) order was being issued. Tr. 196. Everett assumed the order was being issued due to him and other corporate personnel passing along the tight side of the motor. Tr. 196. He may have put his hand on Dalnoky’s shoulder. Tr. 198.

¹³ Everett’s former jobs included: maintenance superintendent since 1999 and union maintenance man for 22 years. Tr.192.

Everett explained the benefits of using jack walkers, which allowed controlled movement with no risk of falling over. Tr. 200-202. The maximum horizontal movement or side-by-side movement was 9 inches. Tr. 201-202.

Jeffrey Everett Cross Examination

Everett was not present at the time that Christopher actually walked past the motor and would not know whether there was any movement of the motor during such time. Tr. 203.

IV. ISSUE PRESENTED

Did the Secretary carry his burden of proving by the preponderance of the evidence that the Section 107(a) imminent danger order in question was properly issued?

V. LAW AND REGULATIONS

Section 107(a), 30 U.S.C. § 817(a) in pertinent part, provides:

If, upon any inspection or investigation of a coal or other mine which is subject to this [Act], an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an Order requiring the operator of such mine to cause all persons, except those referred to in section [104(c)], to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which cause such imminent danger no longer exist. (Emphasis supplied)

Section 3(j) of the Act, 30 U.S.C. §802(j) defines an “imminent danger” as “the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.”

VI. CONTENTIONS OF THE PARTIES

The Secretary contends that, in the within matter, MSHA’s representative properly exercised his discretion in issuing a 107(a) order. Inspector Gallagher came upon a scene in which a 20-ton locomotive was derailed. He heard “too many bosses” yelling orders. (TR. 38, 78, 107, 111). He observed a miner, Christopher, walking through a narrow interspace between the derailed locomotive and coal rib, and concurrently heard a loud bang and perceived machinery movement. (TR. 28-30, 38-40). Fearful for the miner’s safety, Gallagher, within minutes, concluded that an imminent danger order was warranted.

Inter alia, Contestant maintains that, during the time period when Christopher had passed the derailed motor, it was not possible for the motor to have moved any distance horizontally so as to have endangered the miner. Any reasonable investigation would have revealed such.

VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

It is the duty of the Secretary to establish by a preponderance of the evidence that an imminent danger order is properly issued. This question turns on whether the conditions or practice observed by the inspector could reasonably be expected to cause death or serious bodily injury before the practice could be eliminated. *Wyoming Fuel Co.*, 14 FMSHRC 128, 129 (Aug 1992).

An inspector's issuance of a Section 107(a) order is reviewed under an "abuse of discretion" standard. *Island Creek Coal Co.*, 15 FMSHRC 339, 345-346 (Mar. 1993). An imminent danger order will be upheld if the Secretary proves by a preponderance of the evidence that the inspector concluded, based upon information that was known or *reasonably available* to him at the time the order was issued, that an imminent danger existed. *Id.* at 346.

However, in both *Island Creek*, 15 FMSHRC at 346, and *Knife River Construction*, 38 FMSHRC, 289 at 1291 (June 2016), the Commission emphasized that the Judge is not required to accept an inspector's subjective perception that an imminent danger existed but rather must evaluate whether it was objectively reasonable for an inspector to conclude that an imminent danger existed.

This Court finds that Gallagher had an honest belief that possible movement of the derailed motor during the time Christopher passed such would have posed an imminent danger. Gallagher's descriptions of coming upon the derailment scene and hearing men shouting and hearing loud noise(s), of observing Christopher entering a narrow space between the motor and rib, of perceiving possible movement of equipment all support the bona fide and good nature of Gallagher's subjective belief.

However considering *the specific factual circumstances* of the within controversy, this Court is not persuaded that the inspector's belief was a reasonable one. As set forth *supra* in the *summary of testimony*, Contestant's witnesses consistently maintained that *it was not physically possible* for the locomotive to have slewed over so as to have struck Christopher at the moment that Christopher had passed through the rib/locomotive inter-space. (*See inter alia* Spooner testimony at Tr. 106, 112 that the locomotive wheels were located inside the tracks and that there was, "No way... No matter what happened," that the wheels could jump the rail; Christopher testimony at Tr. 127; Dalnoky testimony at Tr. 147-148; Everett testimony that jack walkers were spaced at all four corners of the machine and at that time there was no risk of the machine, "automatically just falling over" at Tr. 202).

In his investigation, which lasted less than three minutes (TR. 40-41), Gallagher had failed to take such steps as measuring the actual interspace distance¹⁴ and of noting where the derailed motor's wheels were actually located vis-à-vis the tracks. Tr. 85-86. As noted *intra*,

¹⁴ This Court specifically accepts Gallagher's testimony that he had not actually measured the distance but estimated such, and rejects Dalnoky's testimony on this point. This Court also rejects Gallagher's contention that taking measurements after the ordered work stoppage would have presented a hazard.

brief interviews with available witnesses would have revealed the physical impossibility of untoward motor movement.

In *Knife River Construction*, objective observable facts supported the inspector's conclusion that an imminent danger order should have been issued. In *Knife River*, the inspector stopped what he believed to be an unsafe scraper and asked for a demonstration that the vehicle was capable of stopping and holding on a grade while it was carrying a load before issuing an imminent danger order. 38 FMSHRC at 1290. The scraper failed to do so, the inspector observed it failing to come to a stop on a grade and at the bottom of such. *Id.* The inspector was aware that an embankment was under construction and feared that the scraper would continue to travel toward the waste dump, an area of the mine with multiple grades and depart the embankment. *Id.*

In *Knife River* there was clear *objective* evidence that the scraper could *not* hold its land on a grade and/or come to a safe stop. In the instant matter there was no such clear objective evidence presented by the Secretary that the motor in question, given its location off-track, could have moved horizontally during the jacking up process so as to have endangered Christopher.

Of course, as discussed within, an inspector's reasonable belief in the existence of an imminent danger may be validated -- despite the lack of actual objective evidence supporting his determination. Hazardous situations often arise when an inspector must necessarily rely solely upon his own experience, personal perceptions, and instincts in determining the need for an imminent danger order. However, to avoid a finding of arbitrariness, an inspector must timely and prudently investigate all available evidence regarding a perceived danger before issuing his order. This Court finds that Inspector Gallagher failed to fulfill this duty of sensible investigation and thus abused his discretion.

At hearing and in their briefs all parties essentially concurred that it was unwise and unsafe for a miner to pass through a squeeze point while machinery is in motion. Indeed, Contestant has not challenged the notice of Safeguard issued in this matter that prohibits anyone from positioning themselves in a pinch point while re-railing track-mounted equipment.

This Court suspects that the combination of Dalnoky's "know it all attitude" and verbal aggression toward the less experienced Gallagher had played a role in Gallagher's failure to have properly investigated whether the derailed motor in question could have in fact moved in such a manner so as to have injured Christopher.¹⁵

This Court finds that, given this case's particular circumstances, a prudent inspector, possessing a qualified inspector's education and experience, would not have concluded *after a reasonable investigation* that an imminent danger had actually existed. In reaching this determination, this Court has made various credibility determinations, including giving credit to

¹⁵ Dalnoky displayed the same off-putting hubris at hearing but did offer persuasive testimony that the derailed motor at the moment Christopher passed had not posed an actual danger to the miner.

Contestant's witnesses' consistent assertions that it had not been physically possible for the derailed motor to have moved horizontally or sideways during the time period in question.¹⁶

This Court found Gallagher to be an honest individual. However, this Court concludes that Gallagher's inexperience with the re-railing process and machinery at issue, coupled with his initial misapprehension at viewing what he believed a chaotic and dangerous re-railing scene, led him to an unreasonable determination based upon inadequate investigation.

Considering also that any imminent danger as to Christopher had already passed once Christopher had walked by the locomotive, this Court finds that Gallagher had abused his discretion in issuing the within 107(a) order.

In essence this case scenario raises the following issue. Considering the totality of the circumstances, including any facts peculiar to the mining industry and including any information known or readily available, would a prudent inspector reasonably conclude that an imminent danger in fact existed? This Court is not persuaded that, in investigating the site of the derailment and in interviewing parties at the scene, a reasonably prudent inspector would have concluded that an imminent danger was posed.

This Court emphasizes that an inspector is not required—in garnering all available information—to conduct an unduly prolonged investigation or engage in a lengthy complex analysis of risk. But he must reasonably inspect the imminent danger scene at issue, question available witnesses, and make straightforward assessments of whether the condition or practice at issue in fact can reasonably be expected to cause death or serious physical harm. Given the total circumstances, Gallagher's investigation was not sufficient. An example of his investigatory insufficiency was Gallagher's failure to note where the motor's wheels rested—inside or outside the tracks—after the derailment.

The Court also emphasizes that the within holding is based upon specific credibility assessments and case specific factual findings. This is a narrow case-specific holding and it in no way intended to abrogate the general rule that inspectors may reasonably believe an imminent danger exists even if no mandatory safety standard was actually being violated. *See Utah Power and Light Co.*, 13 FMSHRC 1617, at 1622 (Oct. 1991).

In finding that Gallagher's belief that an imminent danger existed was objectively unreasonable, this Court is not holding that inspectors may only issue 107(a) orders when there is

¹⁶ This Court is unable to find that all of the Contestant's witnesses perjured themselves on this point. This Court does, however, accept that Dalnoky was incorrect, possibly because of faulty recollection, in his assertions that Gallagher had actually measured the interspace at issue. This Court declines to apply a "*falsus in uno falsus in omnibus*" assessment as to Dalnoky's remaining testimony, which was found to be credible in light of such factors as Dalnoky's lengthy past experience in the re-railing process at issue.

“objective, ascertainable, evidence”¹⁷ of looming danger. Nor does this Court suggest that the Secretary may only prove the existence of an imminent danger by introducing physical evidence, disinterested corroborative testimony and supporting expert testimony. Such evidence may not be readily obtainable in imminent danger situations where the unsafe condition can arise suddenly and in a remote section of the mine, where the inspector is alone, and where physical evidence is elusive. Rather, this Court merely holds that, consistent with the Mine Act’s purpose and legislative history and consistent with Commission case law, an issuing inspector’s honest perceptions must be reasonable ones *under the circumstances*; and that Gallagher’s determination, albeit in good faith, was not a reasonable one due to his failure to garner and consider all available evidence.¹⁸

A preponderance of the evidence establishes that it would not have been possible for the derailed motor to have struck Christopher as he passed through the interspace at issue. This could have been readily ascertained upon a reasonable survey of the site and upon reasonable inquiry of available witnesses. Neither of which would have required a prolonged safari in time and space.

This Court finds that the inspector abused his discretion and acted arbitrarily and capriciously in issuing the subject order. The 107(a) Order is hereby Vacated.

ORDER

It is hereby **ORDERED** that 107(a) Order No. 9078215 is **VACATED**. Having found that the order is invalid, this case is **DISMISSED**.


John Kent Lewis
Administrative Law Judge

Distribution:

R. Henry Moore, Esq., Jackson Kelly, PLLC, Three Gateway Center, Suite 1500, 401 Liberty Avenue, Pittsburgh, PA 15222

Jordana L. Greenwald, Esq., Office of the Solicitor, U.S. Department of Labor, Suite 630E, The Curtis Center, 170 S. Independence Mall West, Philadelphia, PA 19106-3306

¹⁷ See Commission’s discussion of and rejection of stringent “objective, ascertainable evidence” test in validating reasonable belief in *Secretary of Labor on behalf of Robinette v. United Castle Coal Co*, 3 FMSHRC 809-812 (April 1981).

¹⁸ The proper test for assessing the subjective/objective components of a miner’s work refusal in discrimination cases is essentially similar to the test applied herein to an inspector’s 107(a) subjective/objective determination. See again *Robinette* at 808-812 (April 1981) for an excellent in depth analysis of such.