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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

CONSOLIDATION COAL COMPANY, APPLICANT	Application for Review Docket No. MORG 79-109
v.	Order No. 814153
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Dated: February 26, 1979 Four States No. 20 Mine
UNITED MINE WORKERS OF AMERCIA (UMWA), RESPONDENT	

DECISION

Appearances: Karl T. Skrypak, Esq., Pittsburgh, Pennsylvania, for the applicant Leo J. McGinn, Trial Attorney, U.S. Department of Labor, Arlington, Virginia, for respondent MSHA Joyce A. Hanula, Legal Assistant, Washington, D.C., for respondent UMWA

Before: Judge Koutras

Statement of the Proceeding

This is an action filed by the applicant on March 8, 1979, pursuant to section 107(a)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 817(e)(1), seeking review of an imminent danger closure order issued by MSHA inspectors Raymond L. Ash and Frank D. Bowers on February 26, 1979, pursuant to section 107(a) of the Act. Withdrawal Order No. 814153, described the following condition or practice which the inspectors believed constituted an imminent danger warranting closure of the entire mine and the withdrawal of miners:

> An order of withdrawal is issued to withdraw all miners from the inside of the Consol No. 20 mine and miners on the surface at the Four States Preparation Plant to insure their safety due to the danger of the fresh water dam giving way. The fresh water dam is used for the Four States Community

water. Water is being discharged from the dam with 2 Ford tractors, discharging into (2) 10" inch lines, approximately 1000 gallons per minute, approximately half-way over the embankment and the water pressure from these 10" lines are eating away at the embankment and toe of the dam to a depth of approximately 6 to 7 feet. This order is issued through no fault of the company. Also, other signs of instability exists along the face and toe of this, such as piping and etc.

In its review petition, applicant asserted that the order was improperly and unlawfully issued because:

1. The description of the conditions and practices in the order is inaccurate, no violation of section 3(j) of the 1977 Act occurred as alleged, and that there did not exist in the Four States No. 20 Mine at the time in question any conditions or practices constituting an "imminent danger" within the meaning of section 107(a) of the Act.

2. The order is invalid since the Mine Safety and Health Administration (MSHA) did not have the authority, capacity, power or right to act in the subject situation. MSHA lacked jurisdiction in the matter since the dam was not owned, operated or controlled by the applicant, and it was not used in, to be used in or resulting from the coal mining operations at the Four States No. 20 Mine. An engineering study relating the volume of water in the dam to the elevation of the mine shaft indicates that it would have been physically impossible (in the event of a dam failure) for the resulting water flow to reach the site of the mine shaft.

3. The order falsely implies that the breastwork of the dam was purely earthen when same was in fact concrete and steel at the face banked with earth and covered with trees and vegetation. Therefore, "no danger" existed and the likelihood of the dam breaking was certainly not "imminent."

Respondents filed timely answers to the review petition and asserted that the imminent danger order was properly issued and should be affirmed. A hearing was held in Morgantown, West Virginia, on July 31 and August 1, 1979, and the parties appeared and participated fully therein. Posthearing proposed findings, conclusions, and supporting briefs have been filed by all parties and the arguments presented have been carefully and fully considered by me in this course of this decision.

Applicable Statutory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

2. Section 107(a) of the Act 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 caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

3. Section 3(j) of the Act (30 U.S.C. 802(j)) provides that the term "imminent danger" means: "[T]he 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; * * *."

Issues

1. Whether the conditions cited and described by the inspectors presented an imminent danger warranting the issuance of a closure order pursuant to section 107 of the Act.

2. Whether MSHA exceeded its jurisdiction by issuing an imminent danger closure order and requiring the withdrawal of miners based on an asserted imminent danger which purportedly did not exist in the mine or on mine property.

3. Additional issues raised by the parties are identified and discussed in the course of this decision.

Background of the Controversy

Aside from the question of jurisdiction and whether an imminent danger did in fact exist, the essential facts surrounding the issuance of the imminent danger order in question do not appear to be in dispute. The events leading up to the issuance of the order began on the evening of February 26, 1979, when MSHA's subdistrict office received a telephone call through MSHA's chain of command concerning a "hotline" telephone call received by MSHA's Arlington, Virginia, headquarters reporting that someone was discharging water from a dam in the municipality of Four States, West Virginia. The dam in question is known as the Four States Dam, and it is owned and operated by the Four States Public Service District and is used as a water supply for the residents of the community of Four States. The dam is not owned or controlled by the applicant and it is not located on mine property. It was originally constructed in the early 1900's and is located in a remote rural area, approximately 1,600 feet from the mine property beginning at a parking lot, and approximately one-half mile northeast of the town of

Four States on an unnamed tributary of Tevebaugh Creek of the West Fork River of the Monongahela River. The physical characteristics and type of construction for the dam are detailed in a study compiled in February 1979, by the West Virginia Department of Natural Resources under guidelines provided by the United States Corps of Engineers pursuant to the National Dam Inspection Act, P.L. 92-367, August 2, 1972. A copy of the study is a part of the record and was supplied to all of the parties and to me for the purpose of familiarizing the parties with the physical characteristics and problems concerning the dam as perceived by those entities who compiled the report and for the purpose of posthearing arguments (Tr. 259-260). Since the report was mentioned and referred to on several occasions during the course of the hearing, it was received by me over objections by applicant's counsel as to its probative value.

In general, the dam in question is approximately 29 feet high and 255 feet wide, and it consists of an arched concrete, brick, and concrete block cantilever retaining wall with an earthen embankment consisting of trees, soil, and extensive and dense vegetation and brush. The embankment was described as a slope varying from 25 to 35 degrees to the downstream side, and the surface water area was described as encompassing some 3.7 acres and extending some 800 feet. At normal height, the volume of water impounded by the structure was described as approximately 45-acre feet, although the actual volume of water retained by the dam has apparently never been precisely computed. In addition to the Corps of Engineers study, the record compiled in this proceeding includes maps, surveys, descriptions, sketches and pictorial slides which detail the physical exterior and engineering construction specifications for the dam. In addition, for the purpose of familiarizing me and the parties with the general topography and geography of the dam and surrounding terrain, including its proximity to the mine which is located downstream, a visit was made to the dam site and the mine at the conclusion of the hearing and those in attendance included counsel for all parties as well as MSHA's inspectors and others who testified at the hearing.

Upon arriving at the dam site at approximately 7:30 p.m., on February 26, 1979, a dark, cold, and snowy evening, MSHA inspectors Ash and Bowers observed two tractors parked at the side of the dam pumphouse. The tractors were supplying power to two pumps which were pumping water from the dam through two 10-inch lines. One line was extended part way down the earthen side of the dam structure, and the second line was located below the first one, and both lines were discharging water from the dam down the earthern embankment. No one was tending the pumps and no one was in the area. The inspectors observed and believed that the water being pumped from the dam resulted in the washing away of a large gulley or culvert, and the depth of the this wash-out was approximately in excess of some 5 feet. After this initial observation, the inspectors traversed across the dam and observed what was described as fresh water coming out of the ground in several locations on the earthern side of the structure, and moving water which was swirling about in different directions at

the bottom or toe of the earthern side of the dam. They believed that these conditions had resulted

from water seepage from the inside or water impoundment side of the dam through the concrete structure. They estimated the water level in the dam at that time as approximately 2 or 3 feet below the top of the dam. They then proceeded back to the gulley area created by the pumping water and at that time estimated it to be some 7 to 8 feet in depth and much longer than initially observed. At that point in time, they decided that the continuing erosion of the portion of the earthern structure where the water was being pumped created a potential for collapse of the dam, thereby creating an imminent danger to the miners working at the mine located downstream at the mouth of a hollow extending from the dam to the mine property. The inspectors then drove to the mine and advised the mine superintendent by telephone that a section 107(a) closure order would be issued until such time as the pumping of the water from the dam was stopped or the lines extended at the face of the dam, and the written order was issued at 8:30 p.m. A prior incident involving the dam occurred in December 1978, when state and local authorities, concerned about the possible collapse of the dam after a heavy rainfall, ordered the evacuation of the inhabitants downstream, including miners from the Four States No. 20 Mine.

After the closure order was issued and the miners withdrawn, the inspectors returned to the dam to await the arrival of an MSHA engineer. The only person in the area at this time was a civil defense representative who was apparently in charge of the pumping of the water from the dam, and it was later determined that the pumping was done at the recommendation of the Corps of Engineers in order to prevent the water from reaching the spillway level of the dam. Upon arrival of the engineer, he and the inspectors again inspected the dam, and the engineer concurred in the inspectors' assessment that the pumping of the water from the dam onto the earthern face of the structure had caused the erosion creating the gulley, and coupled with leakage from the structure, could lead to a collapse of the dam if the pumping were to continue unabated.

After the cessation of the pumping of the water, the order of withdrawal was terminated at 11:45 a.m., on February 27, 1979, and the termination order states as follows: "Pumping of water on the earthern breastwork of the Four States water dam has been discontinued, therefore, there is no longer erosion of the breastwork and it is now in a more stable condition."

Following the termination of the order, MSHA engineers engaged in a study to determine in future incidents, what the precise effects would be downstream should the dam fail. Based on this study, it was determined that in the event of a partial or full collapse of the dam structure, a wall of water ranging from 5 to 8 feet in depth would reach parts of the mine property, including the railroad yards and some of the surface area of the preparation plant, but not the mine shafts or the preparation plant building itself.

Testimony and Evidence Adduced by MSHA

MSHA inspector Raymond Ash, testified that on February 26, 1979, he received a telephone call from the MSHA office in Arlington about a water

problem at the Four States Fresh Water Reservoir and in response to the call, he and fellow inspector Frank Bowers went to the dam and arrived at 7:30 p.m. Mr. Ash observed two tractor pumps discharging water through two 10-inch rubber lines in an uncontrolled manner on the earthern part of the dam. The first rubber line, located near the toe of the dam, was washing away the earthen breastwork of the dam. The second rubber line, located over the embankment, was not causing any damage to the dam (Tr. 19-23). When he walked along the dam embankment, he found the ground icy, slushy, and spongy, and when he inserted a 3-foot long tree limb and a five-eighths-inch steel bolt rod into the embankment, they disappeared. He found muddy cavities in the breastwork of the dam, including gully erosion. The gully was about 8 feet deep and 60 feet long, and the water was about 3 feet below the top of the dam and the spillway was not being used. When he walked to the other side of the dam, he saw more cavities in the earth breastwork, and water was bubbling in the center of the earth breastwork as well as out of the ground against the stone face of the dam. The water was traveling down the hill, and the presence of running water, including the gully erosion, frightened him. The presence of running water coming through the earth breastwork, led him to believe that the pumping had caused the stone wall of the dam to fail, and a trench created by the pumping provided a place for the whole side of the earth dam to slide. Water, clay and stones were swirling at the toe of the dam. After making all of these observations, it was his judgment that the stability of the dam was so bad that there was a real danger of the dam "coming out." He discussed the situation with Mr. Bowers, and while they concluded that MSHA did not have jurisdiction over the dam, they believed that something had to be done and they wanted someone at the mine to help take care of the problem (Tr. 23-31).

Mr. Ash testified that the mine property was 500 to 600 feet below the dam and while traveling to the mine he saw 6 inches of muddy water running over the road, and he believed that the muddy water came from the dam. Upon arriving at the mine he talked to superintendent Eugene Jordan by telephone about the situation, and Mr. Jordan advised him that the company had nothing to do with the dam. After attempting to issue a verbal withdrawal order at 8:15 p.m., which Mr. Jordan would not accept, it was issued in writing and served on the company at 8:30 p.m. At that time he also telephoned the assistant district manager, the state police, and the U.S. Army Corp of Engineers about the dam conditions (Tr. 34). After the withdrawal order was served, he and Mr. Bowers went back to the dam to wait for Frank R. Watkins, MSHA's water impoundment engineer.

Mr. Ash defined an imminent danger as "it is a condition or practice that if it is allowed to continue and the operation goes on as normal, and this condition or practice is allowed to continue, someone will get seriously hurt or killed" (Tr. 36). The dam is 300 feet wide, 1,000 feet long, with a face of some 30 feet, and it had a prior water overflow problem. The uncontrolled pumping and wash-out led Mr. Ash to believe that if he had not issued the withdrawal order the continued pumping

would have caused the right side of the portion of the dam upstream to erode that it would have

lost its earth face and stone wall at the same time. Fifty to 60 miners, as well as the recreational hall downstream could be in danger from flooding (Tr. 36-42).

On cross-examination, Mr. Ash testified that his training in water impoundments consists of a 5-day MSHA training program dealing with the recognition of dangerous conditions rather than water volume calculations and structure analysis and he has no such training (Tr. 42-43). On the evening in question it was dark and the only lighting available was his cap lamp (Tr. 44). If the dam had broken, the water may have reached mine property, and at the time the order issued he thought it would reach the portal (Tr. 54). When he arrived at the mine, he did talk to certain mine supervisors about the condition of the dam, but he did not inspect the mine completely to determine the extent of the imminent danger, nor did he remain to insure that all miners were in fact withdrawn and this was because he is not required to. He denied that he had given his consent to anyone to remain in the mine (Tr. 54).

On redirect, Mr. Ash reiterated that he observed a steady stream of water at the top of the earthen portion of the dam and it was starting to flow down the face of the bank with enough force to carry sediment away very quickly. It was his opinion that the water resulted from a break somewhere in the stone-faced dam because the water flow was more than mere seepage. When asked why he believed the water from the dam would reach the mine in the event of a collapse, he answered as follows (Tr. 59-60):

> Q. When you related about the collapse of the dam to the danger on mine property, did you have any basis for a judgment as to whether or not there was enough capacity here to affect or involve the mine property?
>
> A. I actually thought there was enough water that it would go down both shafts there. It would probably knock the power off at the Four States and go down at least two shafts, the coal shaft and the shaft that the men who worked near that bottom came down.
>
> Q. What was the basis for this judgment?
>
> A. I have seen water. I have seen water running in shafts before.
>
> Q. But from this dam related to the mine, what made you think that this dam was large enough in capacity to possibly have this happen?
>
> A. I had no firm basis for my opinion, nothing; engineering, no firm basis, or anything. To me, the dam was large enough. There was a large volume of water, and I couldn't see how it could go down that hollow without getting into that shaft.

> Later on, it is easy to look at it and think but then, it is a snowy night; it is cold, and the wind is blowing. There was rain; there was water; there was mud all over the face of that dam. To me, we did the proper thing.

Mr. Ash further stated that he could not determine how the tractors got to the dam site, nor could he find out who was operating them. His attempts to ascertain these facts by telephone were fruitless since no one wanted anything to do with the dam. He believed that when he issued his order there was a definite potential danger of risk to the miners in the mine (Tr. 61).

In response to questions from the bench, Mr. Ash explained the basis on which he issued his imminent danger order as follows (Tr. 68-70):

> JUDGE KOUTRAS: Assuming that that dam had been two and one-half to three feet below the level of the crest, and assuming that they had no pumps there, would you have done anything that night? There wouldn't have been any cause for anybody to go there, would there?
>
> THE WITNESS: No, there wouldn't have.
>
> JUDGE KOUTRAS: Your concern was the manner in which this water was being pumped out of this dam that was causing some erosion?
>
> THE WITNESS: Yes, sir.
>
> JUDGE KOUTRAS: So am I to assume then that the principal cause of the apparent imminent danger, or what you thought was imminent danger, was caused by the manner in which this water was being pumped out of the dam?
>
> JUDGE KOUTRAS: So the rushing water that you were concerned about was the water that was being pumped out of the dam with these ten-inch lines?
>
> THE WITNESS: Yes, sir.
>
> JUDGE KOUTRAS: Which was causing a little erosion here?
>
> THE WITNESS: In my opinion, it was more than a little.
>
> JUDGE KOUTRAS: It was causing a gully of water to rush down?
>
> THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Theoretically if they pumped all of the water out of the dam, it would inundate the mine at some point in time, wouldn't it?

THE WITNESS: No, because it would come out gradual.

JUDGE KOUTRAS: The reason that you decided to withdraw the miners was because that you thought this pumping of the water was done in such a manner that eventually --

THE WITNESS: This pumping was done in such a manner that this gully, the erosion gully, would come down here and give this bank, which is nothing but mud, spongey mud, a place to slide and let the whole dam go.

JUDGE KOUTRAS: If that spongey mud slid, what would happen to the stone wall and the cement behind it and all of that? Would that come down, too, in your mind?

THE WITNESS: Yes, it would have.

And, in response to questions by Applicant's attorney (Tr. 77):

Q. Mr. Ash, isn't it true that if the people who were pumping this dam had extended those hoses below the dam, they could have pumped out the entire volume of water in that dam, and it would not have bothered that mine whatsoever; isn't that true?

A. Yes, sir.

Q. The real imminent danger that you were fearful of is the actual bursting of that dam and the wall of water coming down that valley; is that correct?

A. Yes, sir.

MSHA Inspector Frank D. Bowers testified that he has been a coal mine inspector for approximately 9 years but that his experience and training on dams and impoundments was the same as that of Mr. Ash. He accompanied Mr. Ash on the evening of February 26, during the inspection of the dam, and after listening to his testimony he indicated substantial agreement with it. The discharging of the water over the dam and onto the earthern embankment by pumping was eating away at the embankment, and this in turn would weaken the stone or brick dam wall behind the embankment. He has seen training films which depicted water seeping through an embankment from a crack, and he indicated that once started it will eventually eat away the dirt and then give way. Aside from the gulley of water, the other water they observed was from seepage through the dam. Since he had no authority to order the pumps shut down and could do nothing about the dam, his only recourse was to "pull

the men out of the mine for their safety." He believed an imminent danger existed and he defined "imminent danger" as "an event which could be reasonably expected to cause serious harm or death before such condition or practice can be abated" (Tr. 82-85).

On cross-examination, Mr. Bowers reiterated that his dam and impoundment training consisted of a 1-week training class which consisted primarily of viewing slides, films, and classwork. In the event he observes an impoundment condition which does not appear normal or is not an imminent danger, his practice is to call on Mr. Watkins for assistance. Mr. Bowers agreed that he had no jurisdiction over the dam itself. He believed the mine property was approximately 500 to 600 feet down the hollow from the dam, but also agreed that the distance could be 1,600 feet (Tr. 87). There was vegetation on the earthern breastwork structure of the dam and some of it was as high as 20 feet. He had not previously inspected the dam and has not inspected it since the order was issued (Tr. 88). With regard to the existence of an imminent danger outside of mine property, Mr. Bowers testified as follows (Tr. 89-90):

Q. Is it your opinion that an imminent danger condition can exist outside of mine property?

A. At this particular time, yes.

Q. And you would agree that this condition was outside of the mine property?

A. Yes.

MR. SKRYPAK: I have nothing further.

BY MR. McGINN:

Q. Mr. Bowers, what area was closed as being in imminent danger under the order?

A. The entire mine, the inside and outside surface facility.

Q. So the imminent danger consisted of the area of the mine?

A. Yes.

Q. When you say that the imminent danger was outside, did you mean --

A. As far as the dam giving way, which was not, as far as we knew, on mine property.

Q. So the cause of the imminent danger, is that correct?

A. Yes.

Q. Was upstream?

A. Right.

Q. But the closure order was issued --

A. It was on the mine property itself.

Q. That is where the danger existed; is that correct?

A. That is right.

JUDGE KOUTRAS: That is a play on words, too. It is clear to me that both inspectors believed that the cause of the imminent danger was something that was off mine property, but they were concerned that if they did not withdraw those miners, the imminent danger would get on mine property; the water would get down. Isn't that what their testimony is?

MR. McGINN: Yes. I have nothing further.

In response to questions from the bench, Inspector Bowers testified that the water from the dam was coming down the hollow, and while it did not reach mine property at that time, it did reach the roadway paralleling the hollow. His concern was that the pumping of the water over the earthen breast of the dam would eventually weaken the dam wall, and while he did not know how long this process would take, he stated, "By all indications, it looked to me like it wouldn't take long" (Tr. 93). Mr. Bowers also stated that Consolidation Coal was not in violation of any regulations, and that while he had no jurisdiction to check out the dam, the only thing he had to work with was section 107(a). As far as he knows, no MSHA inspector has been back to the dam to inspect it again. Assuming there were another rainfall, he would not go back to inspect the dam unless he were asked to because he has no authority over the structure.

MSHA supervisory engineer Frank R. Watkins, testified that he is in charge of waste banks and impoundments and that he previously worked for the Federal Power Commission, Bureau of Power. His prior experience includes the writing of engineering reports along with Commission license orders for hydraulic and power generation dams on navigable waterways operated by private parties. He also conducts engineering studies on the construction and maintenance of water impoundments, refuse piles, shaft construction, and ground control for strip mines (Tr. 98). He visited the dam site in question after receiving a telephone call from Merle Manus, MSHA Assistant District Manager, and after arriving at the Four States Water Reservoir at 9:30 p.m., he spoke with the MSHA inspectors, a safety committeeman, the

dam pump operator, and a Civil Defense representative. He walked across the dam to the spillway, and observed that water was not going through the spillway. There was 2-1/2 to 3 feet of freeboard between the top of the dam and the water level. There were two areas that were leaking through the dam structure. The first leak was located in the middle which was free-moving, and the second leak was located to the right which was a slow leak. In addition to water, he observed an 8-foot gully near the water pumps. After observing the 8-foot gully, he observed an "old hole" which appeared to be the place where the water was coming from and it was located at the center of the dam 3 feet from the top. The water was coming straight through the dam itself and exiting downstream.

Mr. Watkins stated that the area from where the water was exiting indicated to him that the dam had a high "phreatic line" which is a line indicating the water level within the dam, and it is a critical sign of instability. The higher the level of the phreatic line, the lower the level of stability of the dam (Tr. 100-105). When he arrived at the water pump location, he observed two 10-inch pump lines, one above the other, discharging water, and the lines were washing away the earth part of the dam's structure. A gully and channel were being created by these water lines. The gully was 8 feet deep, 6 feet wide and 18 feet long, with a 32-degree slope. It was his opinion that the sloped gully hole was a significant factor in causing the dam to be unstable (Tr. 107). He also observed a soft sink hole where he could push anything into it and the object would completely disappear. The sink hole was a sign that the dam was heavily saturated with serious voids in its structure. In addition to the pumping of the water, the existence of vegetation was a factor in causing the dam to be unsafe in that when the trees die, their roots leave holes where water can enter the earth embankment, thus carrying particles that create larger holes and erosion which can create a pumping type of failure. In his opinion, the water was flowing through the earthen part of the dam, the dam was capable of collapsing, and, the water in the dam was capable of flooding the mine (Tr. 109-110).

On cross-examination, Mr. Watkins, testified that his conclusions were based on visual observations rather than engineering tests. He testified that he did not compute the water volume and depth, and he believed that the water that flowed at the bottom of the dam was due to seepage rather than runoff (Tr. 112-115). Although MSHA did not conduct a stability analysis on the dam, he believed that the concrete-stone abutment could have retained the water even if the earth breastwork had washed away (Tr. 116-119).

On redirect examination, Mr. Watkins testified it is likely that the remaining concrete-stone impoundment would fail if the earth embankment had washed away (Tr. 120). The washing away of the downstream face of the dam by two 10-inch lines was the primary reason for the issuance of the imminent danger order. When the pumping stopped it was his opinion that the imminent danger had ceased. The water content of the dam is 29 feet, and

the volume of water is 51 acre-feet. Based on the 51 acre-feet, the water level would

reach the mine property if the dam collapsed, but there is no data or estimates available that would change his opinion about water flooding the mine property (Tr. 129-130).

On recross-examination, Mr. Watkins testified that the concrete stone structure behind the earth structure may have withstood the water pressure, and if there was an instantaneous collapse, the water would reach the mine preparation plant but not the mine shafts (Tr. 131-133).

Mr. Watkins testified that if the water impoundment was located on mine property, it would fall under the Federal jurisdiction of the Secretary of Labor, and would be within the purview of Part 77 dealing with water impoundment regulations (Tr. 133). The reason the dam does not fall under the Part 77 water impoundment regulations is that it is not owned by Consolidation. If the dam is not covered by Part 77 regulations, the Secretary has no jurisdiction to act, and MSHA does not have any jurisdiction over the dam structure (Tr. 134). However, when the dam endangers miners, withdrawal orders are issued notwithstanding the fact that other agencies may have direct jurisdiction and control over the dam (Tr. 137).

Inspector Ash was recalled and testified that with regard to the previous December incident concerning the possibility of the dam collapsing, MSHA assigned an inspector to make a routine inspection for the purpose of determining whether Consolidation had withdrawn the miners from the mine. It was reported that miners were withdrawn and several unidentified agencies were at the dam site. Since MSHA had no jurisdiction, he advised the inspector not to get involved. Mr. Ash confirmed that miners were voluntarily withdrawn without any orders being issued by MSHA, and had they not been withdrawn, a withdrawal order would probably have been issued by MSHA (Tr. 138-140).

MSHA mining engineer Edwin Brady, testified that he is a graduate of the University of West Virginia and since 1976 has specialized in waste impoundments and water hydraulics. Specifically, he has served MSHA in an engineering capacity reviewing impoundment designs and dam projects to determine whether they comply with the regulations (Tr. 141). On February 27, 1979, he and Mr. Watkins inspected the Four States Water Reservoir. He arrived there at 8:30 a.m., and walked up and down the dam, including the area downstream. In measuring the dimensions of the dam, he found that it was 255 feet wide, 800 feet long, 29 feet high, with a slope angle of 27 degrees. He took 14 photographs of the dam and described them by means of a slide projector (Exhs. 1-14, Tr. 146). He conducted two studies of the dam to determine the effects of a dam collapse, and based on a UD-16 soil conservation service field mechanical method, it was determined that if there was a 50-foot breach in the dam, the water elevation level on the average would approximately come to 1,040 feet and would reach the mine railroad yard and a small area beyond that, but, below the buildings and shafts (Tr. 147). Using the UD-16 method, the depth of the water reaching the railroad yard could not be determined because of a lack of data

concerning the elevation of the mine property (Tr. 148). However, in his

opinion, if there was a complete collapse of the dam, the water level would be at an 8-foot level at the railroad yard area, and this opinion is based on the fact that the distance between the dam and Mine property is 1,600 feet and the elevation in the railroad yard is 1,032 feet (Tr. 148-149).

On cross-examination, Mr. Brady testified that no one, including MSHA, has yet determined the actual depth of the reservoir, and his calculations are based on information submitted by another governmental agency. He did not use any other engineering methods to determine the depth of the dam, but hand instruments were used to compute calculations on the dam and these were compared with the other data supplied to him (Tr. 152). Based on his observations at the dam, he did not believe that an instantaneous break would occur, but that a partial failure would occur. The "worst thing" that could have occurred was an instantaneous, rather than partial break, and in this event his calculations indicated that there would have been 8 feet of water at the mine property on the railroad track, and with a partial breach, there would have been 6 feet at that location. With an instantaneous breach, the water itself would never have reached the mine shafts or preparation plant, but would have reached the upper portions of the railroad track as shown on the topographical map (Exh. G-4). Based on the elevations and topography as depicted on the map, the primary flow of water from the dam in the event of a break would be out to the left rather than directly at the mine shaft and preparation plant, and his visual observations upon visiting the dam site confirmed this fact.

Mr. Brady stated that based on his after-the-fact calculations, he would have withdrawn men from the lower part of the railroad yard which is associated with the car-dropping process, but he would not have withdrawn them from the preparation building itself or from the underground mining facilities. In his view, the only persons in possible danger were those who may have been located in the railroad track area below the actual preparation plant in an area depicted within contour line 1,040 as shown on the map (Tr. 152-158).

In response to UMWA questions, Mr. Brady stated that based on his study of the situation, if the dam totally collapsed and the water came down the hollow, it would not reach the mine portal. Under certain conditions, the recreation center building located down the middle of the hollow could possibly determine the flow of water, but this would be hard to define (Tr. 160).

Testimony and Evidence Adduced by the UMWA

Betty Garrett, Chairperson of the Four States Public Service District, testified that her agency did not exercise any legal authority over the dam, including the water pump system, when Withdrawal Order No. 0814153 was issued on February 26, 1979 (Tr. 163). When her agency obtained ownership of the dam in May 1979, she became involved in attempting to resolve the matter when no one wanted to do anything about the imminent threat. The

State Department of Natural Resources and the U.S. Corps of Engineers would take no action other than to conduct dam studies. Her attempts at locating the dam owners came about as a result of the fact that Federal funds to aid in a dam stability analysis, or to effect repairs, which has still not been done, are only available if the dam is not privately owned. Prior to her agency's involvement, the previous owners were the Rochester & Pittsburgh Coal Company and a Mr. Daniel Hall, who was the operator of the water system, and those are the entities from whom her agency obtained the deed to the dam.

She was at the dam at approximately 5 p.m., on the day MSHA's order issued and she wondered why no one was there watching the pumps since she was concerned that school children ride in and out of the area on a school bus. She has never determined who started the pumps which were pumping the water. She telephoned a Mr. Gene Straight at the Fairmont Civil Defense Office and he did not know who started the pumps, but Mr. Daniel Hall came to the dam the same evening and turned them off. Mr. Hall denied starting the pumps and told her there was nothing he could do since he did not start them.

Mrs. Garrett testified further that she hopes the dam will be repaired and she is still attempting to get someone to conduct a stability study. In the meantime, pumping will again be done when the water level rises, and this will be monitored by her agency and the State Department of Natural Resources. She was told that the water level must be maintained 2 feet below the spillway level. In the event the water level rises again, her agency will notify the Department of Energy as well as the people downstream, including the mine itself. The dam is the only source of local water supply (Tr. 163-166).

On cross-examination, Mrs. Garrett stated that the tractors which were pumping water are controlled by the Civil Defense Office but owned by the State Department of Highways. The orders to keep the water level 2 feet below the spillway came from a report made by the Department of Natural Resources and the U.S. Corps of Engineers. Those reports reflect that the dam is "a high hazardous potential structure, introducing imminent threat to the people below the dam" (Tr. 168). Her agency now owns the land that the water is on and the water and waterworks, but the Four States Community has been using the water as their water source since 1911 (Tr. 168, 172). However, she also later indicated that Four States has been using the water at the dam as a source of their water supply since 1946 or 1948 (Tr. 173).

Mrs. Garrett related her attempts to ascertain the owner or owners of the dam through the search of tax and deed records at the local courthouse. She believed that the last owner was the R & P Coal Company, but since Consolidation Coal paid taxes for land in Four States she also assumed that Consol owned it, but she confirmed that the deed came from R & P, and that at the time of the prior dam problems last December, R & P owned it, but Four States was buying the water from Mr. Hall, who in turn had leased the water rights from R & P. She entered into negotiations on

behalf of her

agency to purchase the dam from R & P, and this occurred on May 22, 1979 (Tr. 171). Her interpretation of the deed is that "It gives us the ground so that we could do something with the dam. That's all. The dam; it gives us the dam." (Tr. 180).

Earnest W. Michael, chairman of the Consol No. 20 Mine Safety Committee, testified that he was notified of the withdrawal order 45 minutes after it was issued, and he and fellow safety committeeman Gary Riggs went to the dam and walked around looking at the conditions. He expressed agreement with the contents of the imminent danger order as issued, including the finding of imminent danger. The next day, he met with company officials and safety inspectors, and Inspector Ash advised Consol employee Mauck that if he could guarantee that no more water would be pumped down over the crest of the dam the order would be lifted. Mr. Mauck assured him that he would make sure the pumping was stopped (Tr. 186-189).

On cross-examination, Mr. Michaels testified that neither MSHA nor anyone else ever led him to believe that Consol had anything to do with the pumping at the dam, but he always believed that Consol owned the dam. He has worked at the No. 20 Mine for 8 years and it was his understanding that Consol owned the dam and the property around it (Tr. 192).

Michael P. Zemonick, president of the UMWA local, and an employee of Consol, testified that he was scheduled to work at the mine on December 9 and 10, 1978, but was advised by mine superintendent Darrel Auch that in view of a reported danger at the dam all work for those 2 days had been cancelled, and he did not work that weekend. He participated in the meeting the day after the order in question was issued, and he believed that mine management was trying to contact Mr. Hall to take care of the dam so that the mine could return to production. He indicated that "some people" say that Mr. Hall owns the dam, but that "it is really not known" (Tr. 195).

Applicant's Testimony

Kent Simmons, preparation plant foreman, testified that the order in question was served on him on the evening of February 26, 1979, after Inspectors Ash and Bowers advised him that they were going to shut the mine down because the dam was in danger of bursting and that the water would go down the mine shafts. Mr. Simmons then telephoned mine superintendent Jordan, and the inspectors left to return to the dam, and after some 15 minutes, they again came to the mine and told him they were writing an order and that miners should be withdrawn, and by 9:15 a.m., everyone was out of the mine. Mr. Simmons did not go to the dam and had no personal knowledge as to what was there. Responding to a question about the physical mine layout near the preparation plant, Mr. Simmons testified that railroad cars are filled one at a time with coal, uncoupled, and then dropped off for shipment by a car dropper who spends 5 to 10 percent of his time in the coal yard, and he is usually the only person there (Tr. 217).

On cross-examination, Mr. Simmons testified that coal miners walk down by the tipple rather than the lower end of the railroad tracks to get to

the privately-owned recreation center, and that occasional maintenance work is performed at the tipple (Tr. 219). With regard to the recreation center, Mr. Simmons stated that it is not located on mine property and is privately owned and operated by someone in the community (Tr. 220).

Eugene L. Jordan, general mine superintendent, Consol No. 20 Mine, testified that he received a phone call from Mr. Simmons at approximately 8:15 the evening of February 26, and he advised that MSHA inspectors Ash and Bowers were concerned about the dam. He spoke with Mr. Ash who informed him that the dam was in a "dangerous condition" because someone was pumping water there. Mr. Ash inquired as to the identity of the person doing the pumping and Mr. Jordan suggested a contact with Mr. Dan Hall because he (Jordan) believed that Mr. Hall was in charge of the water system or, in the alterative, a contact with Mrs. Garrett. Mr. Ash called him again and advised him that a withdrawal order would issue against Consol but that it will note that "it is no fault of Consolidation Coal Company." Mr. Jordan did not visit the mine after the order issued, but he did go there on the morning of February 27, and he also went to the dam site at approximately 8:30 a.m. that morning, and the pumps were not operating. He subsequently learned that they ran out of gas. He observed the dam conditions, including the gulley which had been washed out, and he stated that the dam did not appear any different from the way he observed it on any other day (Tr. 220-226).

Mr. Jordan testified that he had previously observed the dam weekly during his travels along the dam road, and he considered buying a home nearby but did not do so because of the dam and his fear that his young son might fall into it. The morning after the order issued, and while at the dam, he observed the water seepage through the dam breastwork, but was not concerned about it. Since the order issued, he has traveled back and forth from the dam site no less than three times a week and has observed no one performing any reclamation work at the site, although he has observed the water level at the same height or higher than it was on February 27. He testified that Mr. Mauck, who is now retired as a company vice president, advised Inspector Ash that although Consol has nothing to do with the dam, he would look into the water pumping situation (Tr. 226-231).

Mr. Jordan testified that Mr. Daniel Hall is employed by Consol as a bratticeman, but that Consol is not involved with the dam at all. Mr. Hall advised him that he started the pumps on the advice of the state agency who controls the dam, and the state agency purportedly told Mr. Hall that the water should be pumped when it reaches close to the spillway. Mr. Hall advised him that he would in the future extend the pumping lines beyond the area of the wash-out and that was the last time he saw Mr. Hall (Tr. 233). The pumps were not owned by Consol and Consol had nothing whatsoever to do with the dam (Tr. 234). Mr. Jordan stated that it was his opinion that on February 27 the dam was not in such a condition that it posed a threat of serious injury or death to the miners at the mine (Tr. 236). Mr. Jordan stated

that Mr. Ash agreed that he could keep supervisory personnel in the mine after the order issued in order to keep it from flooding (Tr. 238).

On cross-examination, Mr. Jordan testified that he has never been concerned about the dam because he has gone by it "hundreds of times" since 1969. He indicated that on December 7, 1978, representatives of the U.S. Corps of Engineers and the State Department of Natural Resources visited his office at the mine and expressed concern over the fact that water was going over the dam spillway. The state police were also present and people were being evacuated from the area, and water was being pumped from the dam by the local fire department. Although he was not particularly concerned, men were withdrawn from the mine shaft but not from the preparation plant. He was not concerned because he had observed the dam "come up and down for ten years" and based on his visual observations and judgment, even if the dam had totally collapsed the water would not have reached the shafts because the shafts are at a higher level than everything else (Tr. 243-244). The Corps of Engineers has never advised him that it did not think the dam was safe, but did tell him it was in a deteriorating condition (Tr. 245).

Mr. Jordan stated that Mr. Hall charges his customers directly for the water used from the dam, and while he owns the water system, he did not know whether Mr. Hall also owns the dam (Tr. 253). Regarding the water that was being pumped from the dam on the evening the order issued, Mr. Jordan testified that his "concern" over that condition would depend on the appearance of the gulley and whether it was eroding "a whole lot of the face of the dam away or just the small amount it did" (Tr. 256). Assuming that the pumping had continued continuously for a couple days, that would possibly have concerned him (Tr. 256). Since Consol did not own or control the dam, he was not going to send anyone there to shut the pumps down in order to abate the order (Tr. 257).

DISCUSSION

The Concept of Imminent Danger

"Imminent danger" is defined in section 3(j) of the Act, 30 U.S.C. 802(j) 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."

Section 107(a) of the Act provides as follows:

> 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 condition

or practice which caused such imminent danger no longer exists.

> The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

The legislative history with respect to the concept of "imminent danger," Committee on Education and Labor, House of Representatives, Legislative History of Federal Coal Mine Health and Safety Act of 1969 at page 4 (March 1970), states in pertinent part as follows:

> The definition of an "imminent danger" is broadened from that in the 1952 Act in recognition of the need to be concerned with any condition or practice, naturally or otherwise caused, which may lead to sudden death or injury before the danger can be abated. It is not limited to just disastrous type accidents, as in the past, but all accidents which could be fatal or nonfatal to one or more persons before abatement of the condition or practice can be achieved. [Emphasis added.]

And, at page 89 of the report:

> The concept of an imminent danger as it has evolved in this industry is that the situation is so serious that the miners must be removed from the danger forthwith when the danger is discovered * * *. The seriousness of the situation demands such immediate action. The first concern is the danger to the miner. Delays, even of a few minutes may be critical or disastrous.

The former Interior Board of Mine Operations Appeals has held that an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner or normal mining operations are permitted to proceed in the area before the dangerous condition is eliminated. The dangerous condition cannot be divorced from normal work activity. Eastern Associated Coal Corp. v. Interior Board of Mine Operations Appeals, et al., 491 F.2d 277, 278 (4th Cir. 1974). The test of imminence is objective and the inspector's subjective opinion need not be taken at face value. The question is whether a reasonable man, with the inspector's education and experience, would conclude that the facts indicate an impending accident or disaster, likely to occur at any moment, but not necessarily immediately. Freeman Coal Mining Corporation, 2 IBMA 197, 212 (1973), aff'd, Freeman Coal Mining Company v. Interior Board of Mine Operations Appeals, et al., 504 F.2d 741 (7th Cir. 1974). The foregoing principles were reaffirmed in Old Ben Coal Corporation v. Interior Board of Mine Operations Appeals, et al., 523 F.2d 25 (7th Cir. 1975), where the court, following Freeman, phrased the test for determining an imminent danger as follows:

> [E]ach case must be decided on its own peculiar facts. The question in every case is essentially the proximity of the

> peril to life and limb. Put another way: Would a reasonable man, given a qualified inspector's education and experience, conclude that the facts indicate an impending accident or disaster, threatening to kill or to cause serious physical harm, likely to occur at any moment, but not necessarily immediately? The uncertainty must be of a nature that would induce a reasonable man to estimate that, if normal operations designed to extract coal in the disputed area proceeded, it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger.

In a proceeding concerning an imminent danger order, the burden of proof lies with the applicant, and the applicant must show by a preponderance of the evidence that imminent danger did not exist. Lucas Coal Company, 1 IBMA 138 (1972); Carbon Fuel Company, 2 IBMA 43 (1973); Freeman Coal Mining Corporation, 2 IBMA 197 (1973). However, since withdrawal orders are "sanctions" within the meaning of section 7(d) of the Administrative Procedure Act (5 U.S.C. 556(d) (1970)), and may be imposed only if the government produces reliable, probative and substantial evidence which establishes a prima facie case, MSHA must bear the burden of establishing a prima facie case. It should be noted that the obligation of establishing a prima facie case is not the same as bearing the burden of proof. That is, although the applicant bears the ultimate burden of proof in a proceeding involving an imminent danger withdrawal order, MSHA must still make out a prima facie case. Thus, the order is properly vacated where the applicant proves by a preponderance of the evidence that an imminent danger was not present when the order was issued. See: Lucal Coal Company, supra; Carbon Fuel Company, 2 IBMA 43 (1973); Freeman Coal Mining Corporation, supra; Zeigler Coal Company, 4 IBMA 88, 82 I.D. 111 (1975); Quarto Mining Company and Nacco Mining Company, 3 IBMA 199, 81 I.D. 328, (1973-1974); Kings Station Coal Corporation, 3 IBMA 322 81 I.D. 562 (1974).

The Seventh Circuit also noted in its Old Ben opinion that an inspector has a very difficult job because he is primarily concerned about the safety of men, and the court indicated that an inspector should be supported unless he has clearly abused his discretion (523 F.2d at 31). On the fact presented in Old Ben, the court observed that an inspector cannot wait until the danger is so immediate that no one can remain in the mine to correct the condition, nor can the inspector wait until an explosion or fire has occurred before issuing a withdrawal order (523 F.2d, at 34). Thus, on the facts presented in this proceeding, MSHA must show that reasonable men with the inspectors education and experience would conclude that the water being pumped out of the dam over and down the earthern breastwork at such a rate which was causing a gulley and other erosion and washing away of materials to occur constituted a situation indicating an impending accident or disaster, likely to occur at any moment, but not necessarily immediately.

Arguments Presented by the Parties

Applicant Consolidation Coal Company (Consol)

In its posthearing brief, applicant traces the chain of title to the dam and maintains that this is conclusive proof that the subject fresh water dam is not owned, operated, or controlled by Consol. In addition, applicant states that MSHA has admitted that this is in fact the case, and that the inspectors themselves testified and conceded that they have no jurisdiction over the dam structure.

With regard to the existence of any imminent danger on the day the order issued, applicant argues that a literal reading of the definition of the term "imminent danger" as it appears in section 3(j) of the Act, coupled with the definitions of "coal or other mine" as set forth in sections 3(h)(1) and (2), clearly establishes that the condition or practice purported to be an imminent danger must exist in a coal or other mine as defined by the Act, and that the water dam area in question obviously does not come under any definition of coal mine or coal property. Applicant maintains further that section 302 of the 1977 Amendments Act, which established MSHA in the Labor Department, did not grant to MSHA broad general police powers as the protector of all mankind and the enforcer of all laws, but limited its jurisdiction to the provisions of the Act, namely enforcement powers for mining activities.

With respect to the independent contractor cases such as MSHA v. Republic Steel, decided April 11, 1979, holding an owner responsible for violations where it lacked control or was not at fault, applicant points out that in all of these cases the conditions or practices cited existed in a coal mine over which MSHA had jurisdiction. Regarding the recent decision in Westmoreland Coal Co. v. Mine Safety and Health Review Commission, 606 F.2d 417 (4th Cir. 1979), where the Commission upheld the closing of a mine because of the danger of flooding from an adjacent mine, applicant argues that it is obvious that the condition or practice in that case was caused by and located in an adjacent coal mine, and that MSHA had jurisdiction over the condition or practice because of the definition of coal mine as found in section 3(h)(1), section 3(h)(2), and section 318(1) of the Act. In the instant case, applicant points to the fact that the fresh water dam, which was the condition giving rise to the issuance of the order, is not to be found within any of the jurisdictional guidelines given to MSHA. Applicant maintains that if MSHA is allowed to construe their jurisdiction as covering extrinsic factors as conditions or practices which can cause an imminent danger the boundaries are limitless. An inspector could believe that Skylab or a similar satellite might fall on a mine; an inspector might believe that a nuclear reactor accident would affect a mine five or more miles away; an inspector might believe that Boulder Dam would burst and flood a mine 20 miles away. The possibilities are endless. As in this case, if there was a danger of a dam breakage, Applicant maintains that the police powers of the State of West Virginia

would authorize civil defense or police-related authorities to evacuate people including miners at the mine who

might be in danger. The civil authorities, who are more experienced in these matters, did not envision any danger since they did not request that anyone, including residents of the homes directly below the dam be evacuated.

With regard to the existence of "imminent danger, applicant cites the court decisions in Eastern Associated Coal Corporation v. Interior Board of Mine Operations Appeals, 491 F.2d 277, 278 (4th Cir. 1974), aff'g Eastern Associated Coal Corporation, 2 IBMA 128, 136 (1973), and Old Ben Coal Corporation v. Interior Board of Mine Operations Appeals, 523 F.2d 25 (7th Cir. 1975), where the court affirmed the Secretary's determination that an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated. However, applicant argues that in order to determine "reasonable actions," one must consider the inspectors' training and experience. In this case, applicant asserts that while Inspectors Ash and Bowers may have been qualified inspectors for underground coal mining, they were novices in the area of dam evaluation. In support of this premise, applicant cites the testimony of Inspector Ash indicating that his total training in evaluating water impoundments consisted of a course lasting 5 working days at an average of 6-1/2 hours per day (Tr. 43). The training consisted of lectures and visual aids in the form of slides of various impoundments (Tr. 42-44). Training was not given in methods of calculating structural stability or water volume but merely in recognizing dangerous conditions (Tr. 42-44). Further, the training dealt with earthen dams, not with dams having solid wall construction (Tr. 43). The training was conducted in a classroom (Tr. 42-44). Likewise, applicant cites the testimony of Inspector Bowers indicating that his total training was exactly the same as that of Mr. Ash (Tr. 86). He had the same 5 days at the rate of 6-1/2 hours per day (Tr. 86). Applicant maintains that the two inspectors, with only 32-1/2 hours of training each in water impoundments were certainly not qualified to make a judgment as to whether or not the fresh water supply dam was in danger of bursting.

With regard to the conditions which prevailed on the evening of February 26, 1976, when the order issued, applicant argues that it was already dark when the inspectors arrived at the dam site, and that the only means of lighting was the inspectors mine cap lamps (Tr. 44). Inspector Ash testified that the lamps normally shine 90 to 100 feet, but that night in the rain, snow, wind and fog, it was somewhat less (Tr. 45). The inspectors did not know the depth of the water in the dam (Tr. 46). Nor did they know its actual length or width (Tr. 48). Therefore, there is no possible way a reasonable calculation of the water volume behind the dam could have been made. Therefore, prior to the issuance of the order at about 8:30 p.m., on February 26, 1979, the inspectors only had less than 1 hour to visually observe the dam in adverse weather conditions. They saw some wet areas on the face of the dam and alleged three areas where they believed water was flowing (Tr. 47-49). However, they only assumed the

water was coming through the dam when it could have been run off from outside water

sources. The primary area of concern was a ditch that was being created by water discharging from hoses connected to the two pumps. However, it turns out that when issuing the order, the inspector did not know how much water was in the dam; he did not know where water seepage on the breast of the dam was coming from; he did not know what material the dam was constructed from; he did not know its stability; he could not determine if a partial bursting or if a total instantaneous burst would take place. With all of these unknowns, one would contend that if an inspector is alleging that water is going to flood a mining area he cannot just guess at it. He must have a reasonable idea of the amount of water that he speculates might be rushing toward the mine. In this case, applicant suggests the inspector could do nothing more than guess as to all factors involved which is certainly not reasonable.

Finally, applicant argues that after the order was issued, MSHA's own engineering studies and the testimony of its dam engineering expert, Mr. Watkins, established that even if there was a complete instantaneous burst of the dam, that the water would never have risen to a level that it would go down the shaft into the mine (Tr. 133). Mr. Watkins testified:

> (Skrypak) Q. Based on what you know now, would that water have reached the Preparation Plant or the shafts where the men go into the mine?
>
> (Watkins) A. Based upon what I know now, I would say that it would not go down the openings into the shaft.
>
> (Skrypak) Q. It would not go down the shaft?
>
> (Watkins) A. It would not go down the shaft.
>
> (Skrypak) Q. So although the inspectors did not know it on that night, the water, even assuming an instantaneous burst of that dam, would not have made it go down the shaft; is that correct?
>
> (Watkins) A. Right. That is our engineering judgment. [TR 133]. [Emphasis added.]

In summary, applicant's case rests on its assertions that while many state and Federal agencies had been involved with the fresh water dam in question and seemed to do nothing, MSHA is attempting to make Consolidation Coal Company a scapegoat. Since MSHA does not have jurisdiction over the dam which is not owned, operated or controlled by a coal company, and since it does not fall within any definition of a coal mine, applicant claims MSHA lacks jurisdiction to issue any withdrawal orders. And, since an imminent danger must exist in a coal mine and not be an extrinsic causal factor, applicant asserts the testimony clearly establishes that the inspectors did not have the training or experience to make a reasonable judgment, and that even the crudest training or general common sense would dictate that the

inspectors should have had some knowledge of the volume of water involved, which these inspectors did not.

Respondent MSHA

Citing the precedent cases dealing with imminent danger, Freeman Coal Mining Company, supra; Eastern Associated Coal Corporation, supra, and Old Ben Coal Corporation, supra, MSHA argues that given the facts described in the record of testimony and on the face of the withdrawal order, the inspectors had no possible course of action other than to issue an 107(a) order withdrawing miners from coal mine property until the hazardous condition could be abated. Given the circumstances presented on the night of February 26, 1979, MSHA believs that no reasonable man charged with the responsibility for protecting the lives and safety of miners on coal mine property, could possibly have acted otherwise. MSHA asserts that the action of the inspectors completely satisfied the reasonable standard test set out in Freeman. The inspectors were authorized representatives with extensive mining experience; they had received specialized training for just such a situation as presented in this case which required a decision concerning the stability of a dam. Inspector Ash was personally familiar with the size and structure of the dam as well as its location with respect to the mine below it. Both inspectors were aware, as a result of a prior incident that occurred in December 1978, when state officials had evacuated families from the area below the dam and Consol officials had voluntarily evacuated miners from the mine before an inspector arrived in the area because of a feared dam collapse resulting from heavy rainfall, that the dam had been classified as highly unstable and had been recognized as a genuine threat. Further, MSHA argues that after inspecting the dam for signs of general instability, the inspectors determined that the continuing eroding of the earthen structure resulting from the high pressure water discharge would likely lead to collapse of the structure unless the pumping were terminated. Proceeding to mine property, and upon further investigation, they determined that the six (6) inches of water already covering the ground in the tipple area was leakage from the dam. They then explained to mine management the conditions observed by them and the reasons why an imminent danger existed at the mine, requiring the immediate withdrawal of those working there.

Based on the foregoing arguments, MSHA concludes that an imminent danger as defined under the Act and under controlling Board and court decisions existed as alleged and that the inspectors acted reasonably, and in accordance with legal precedents in ordering the immediate withdrawal of the miners. Further, MSHA asserts that the applicant has failed to sustain its burden of proof with respect to both the threshold issue of no danger and the issue of imminence. In support of this argument, MSHA argues that while Consol put forward two witnesses, neither of them could offer any eyewitness testimony concerning the issues of danger or of imminence and no direct evidence was offered by the applicant in this regard. MSHA concludes that the applicant has failed to rebut by a

preponderance of the evidence the presumption of imminent danger which arose when the order was issued.

With regard to applicant's argument that the imminent danger order of withdrawal is invalid because it cannot be held responsible for the condition which caused the imminent danger on coal mine property and that the water dam in question is not owned, operated or controlled by applicant and therefore, not subject to MSHA's jurisdiction, MSHA contends that both arguments must be rejected. In support of its position, MSHA points out that the section 107(a) order in question itself states that "this order is issued through no fault of the company," and that unlike orders of withdrawal issued pursuant to sections 104(d)(1) and (2), in which an inspector must find that there there has been a violation of a mandatory health or safety standard and that such a violation was caused by the unwarrantable failure of the operator to comply, the valid issuance of an order issued pursuant to section 107(a) does not require the finding of a violation of a mandatory standard or any negligence attributable to the operator. Section 107(a) simply states that upon the finding that an imminent danger exists, an order requiring the operator to withdraw all persons from the affected areas shall be issued. The question in this proceeding, asserts MSHA, is not whether the imminent danger as alleged was caused by applicant, but rather, whether an imminent danger existed as alleged for miners working at the Consolidation Four States No. 20 Mine. Citing the case of District 6 United Mine Workers v. United States Department of the Interior Board of Mine Operations Appeals, 562 F.2d 1260 (1977), where the court held that imminent danger could exist even without any failing by the mine operator, for example, as a result of natural causes; whereas the other closures all involve some negligence by the operator. MSHA points to the court's citation from the legislative history of the Act which states that:

> The concept of an imminent danger as it has evolved in this industry is that the situation is so serious that the miners must be removed from the danger forthwith when the danger is discovered without waiting for any normal proceedings or notice. The seriousness of the situation demands such immediate action. The first concern is the danger to the miners. Delays even of a few minutes may be critical or disastrous. After the miners are free of danger, then the operator can expeditiously appeal the action of the inspector. The imminent danger may be due to a violation of a mandatory safety standard or some other cause not covered by a standard, including natural causes. Senate Report No. 91-411 91st Congress, 1st Session 90 (1969).

Finally, MSHA argues that the language of section 107(a) and the definition of imminent danger in the Act specifically and deliberately exclude any considerations of liability, cause, or negligence upon the part of a mine operator, and that nowhere in the language of the Act or in its legislative history can there be found any basis for restricting an imminent danger to a situation whose cause, natural or otherwise, exists on mining property. Citing District 6 United Mine Workers, supra at 1267,

MSHA states that Congressional hearings, statutory language, and judicial review all support the fact that "the clear intent of Congress is that coal

mines, or areas of coal mines, in which imminent danger was found to exist must be evacuated at once, with the benefit of any doubt cut in favor of withdrawal." The unmistakable intent of Congress is that it matters not one whit what caused the imminent danger; the sole concern is that miners on mine property be evacuated immediately. MSHA concludes that to adopt the narrow, restrictive meaning of imminent danger proposed by applicant in this proceeding would be in direct conflict with case law dealing with the interpretation of federal coal mine safety legislation, and it cites St. Mary's Sewer Pipe Company v. Director of U.S. Bureau of Mines, 262 F.2d 378, 381 (3rd Cir. 1959), where the court said: "It is so obvious as to be beyond dispute that in construing safety or remedial legislation, narrow or limited construction is to be eschewed."

MSHA suggests that the interpretative principles set out in St. Mary's Sewer Pipe, have been reaffirmed in the judicial decisions it has cited in support of its case, and that the Conference Committee Report in the legislative history of the 1969 Act further evidences the intention of Congress, in stating as follows: "In adopting these provisions, the managers intend that the Act be construed liberally when improved health or safety to miners will result." Conference Report No. 91-761, 91st Cong. 1st Sess. at 62.

Respondent UMWA

Respondent argues that the imminent danger in this case is the potential of flooding the surface and underground of Consol's Four States No. 20 Mine by the bursting of the Four States dam, which is classified as a "high hazard potential structure * * *." The dam is a high hazard potential structure, "because there is a chance of loss of more than a few lives should failure occur" (UMWA Exh. I, at 2). Citing the Fourth Circuit Court decision in Westmoreland Coal Company v. Mine Safety and Health Review Commission and Marshall, 606 F.2d 417 (1979), respondent argues that the condition or practice does have to exist in the mine that is shut down by a closure order, and the miners do not have to be working at the time a closure order is issued. Respondent asserts that in the Westmoreland case, the court upheld MSHA's closing of Westmoreland's Hampton #4 Mine because of the possibility that the mine could be flooded with water from an abandoned, adjacent mine, and that the court affirmed the Secretary's enforcement action, even though the source of the imminent danger did not exist in the mine that was owned, controlled, or operated by Westmoreland.

Respondent argues that the question of fault and control on the part of a mine operator are not prerequisites to the issuance of a closure order, and in support of this argument cites the Commission's decision of April 11, 1979, in MSHA v. Republic Steel Corp., Dockets MORG 76-21 and MORG 76-95-P, holding Republic responsible for violations created by its independent contractor even though Republic could not have prevented the violations. Respondent asserts that in both Westmoreland and Republic, the operator who was subjected to the Secretary's

enforcement action did not control the area in which the dangerous condition existed, and although in each instance, the operator who received the withdrawal order could not have prevented the

dangerous condition from occurring, neither of these facts was considered an adequate reason for vacating the withdrawal order at issue and, in each case, therefore, the Secretary's enforcement action was upheld.

Citing a number of cases at page 9 of its brief, respondent argues further that the reasonableness of the Secretary's construction of section 107(a) is apparent, since the Secretary has followed the mandate of Congress and the Courts that the Act be construed liberally in order to promite its primary purpose, that of promoting safety in the mines. Citing the legislative history of the 1977 Act, Senate Report No. 95-181, 95th Cong., 1st Sess. (1977), respondent states that the Senate Committee Report rejected a construction of "imminent danger" which would require a finding by an inspector that it would be as likely as not that a serious injury or death would result before a condition might be abated. The report stated:

> The Committee disavows any notion that imminent danger can be defined in terms of a percentage of probability that an accident will happen; rather the concept of imminent danger requires an examination of the potential of the risk to cause serious physical harm at any time. It is the Committee's view that the authority under this section is essential to the protection of miners and should be construed expansively by inspectors and the Commission. Since we are dealing with situations where there is an immediate danger of death or serious physical harm. The Committee intends that the Act give the necessary authority for the taking of action to remove miners from risk. [Emphasis added.]

Turning to the evidence and testimony adduced at the hearing, respondent points to the fact that Consol admitted some involvement with the dam and was aware of its condition in that it had given some piping to someone who ran the waterworks, but has since discontinued the practice. In addition, respondent argues that the testimony reflects that Consol employee Daniel Hall ran the water works, that mine superintendent Jordan contacted him about the pumping of the water, and that then Consol vice president Mauck prevailed on Mr. Hall to take certain steps to prevent any future incident involving the pumping of water over the face of the dam. Respondent believes it is apparent on the facts here presented that an employee of Consol, Mr. Mauck, felt he would be able to take steps to protect the miners from an imminent danger in the future. Respondent concludes that the inspectors, after observing the water and the condition of the dam, could not disregard the miners' safety and acted reasonably in issuing the section 107(a) order, and that they need not wait until the water is on mine property before issuing a section 107(a) order.

In its reply brief, respondent UMWA comments on applicant's discussion of the jurisdictional and reasonable belief issues, and it points to applicant's counsel's comments at the hearing

where he stated:

> Mr. Skrypak: "Your Honor, we have no problem with the idea of the reasonable belief of the inspectors. If it

> matters * * * we would accept that, that the imminent danger order is based on a reasonable belief by the inspectors. Our position is purely jurisdictional, that he did not have the jurisdiction over that outside force * * *." [Emphasis added.]

(Tr. 9, 11-17).

With regard to the applicant's arguments concerning the inspector's training and expertise in evaluating water impoundments, respondent states that applicant fails to mention that Mr. Ash has had 21 years of experience before joining MSHA, much of the time at the Four States No. 20 Mine, and that he was raised near the dam, saw it rebuilt, and knew the approximate size and dimensions of the dam (Tr. 17, 39). Further, respondent argues that while a stability analysis on the dam is not available, the Army Corps of Engineers' report classified it as a "hazardous structure," and in fact, asserts that the report had caused the pumping (which was the subject of the instant action) to be initiated in the first place because, when the water level raises, it must be kept 2 feet below the spillway (Tr. 145). Further, respondent argues that the term "reasonableness," as used in the Act, means reasonableness in the minds of the inspectors and not reasonableness as interpreted by applicant. Just as applicant cannot realistically expect the inspectors to wait until the water has reached mine property before issuing their closure order, so, too, applicant cannot expect to have only a dam expert issue the closure order. The inspector has adequate training to meet MSHA requirements and he was backed by the Army Corps of Engineers' study which stated that, whenever the water level rises, it must be kept 2 feet below the spillway for safety precautions. Thus, respondent again concludes that the 107(a) order was issued on a reasonable belief that the dam was in danger of bursting before abatement of the condition might occur which would endanger the lives of the miners working on the surface and underground at the Four States No. 20 Mine.

Findings and Conclusions

Were the conditions described by the inspectors an imminent danger, and if so, was the withdrawal order properly issued?

It is clear from the testimony of Inspectors Ash and Bowers that they believed the dam would weaken and collapse if the pumping of the water over the face of the dam and down the earthern embankment continued unabated. Their conclusion that this event was likely to occur was based on their observations of water being pumped and discharged in such a manner as to cause erosion of materials from the earthern breastwork of the dam, the formation of a gulley which grew in depth and breadth as they made their way across the dam structure during their inspection, water seepage which they attributed to a breach in the dam structure itself, other signs of instability which they described during their testimony in support of the withdrawal order, and their belief that had the dam collapsed, the surging water would go down the hollow and inundate the mine, including the surface

preparation plant as well as the shafts. The inspectors' conclusions, both as to the existence of an imminent danger, and the conditions which they observed which led them to conclude that the dam would collapse if the pumping and discharging of the water continued unabated was supported by the testimony of MSHA engineer Watkins who arrived at the dam site an hour or so after the written withdrawal order was issued. Mr. Watkins examined the existing conditions, including the water level in the dam, several leaks which he believed were caused by seepage through the dam structure itself, the gully being formed by the pumping and discharging of water through the two lines described by the inspectors, sink holes, erosion being caused by the pumping, and the existence of a high dam phreatic or seepage line which he believed was a critical sign of the instability of the dam structure. Mr. Watkins also believed that with the existence of all of these conditions, the dam was capable of collapsing, and if it did, the water would flood the mine.

The thrust of applicant's defense to the imminent danger order is its belief that such an order may not be issued on the basis of an imminently dangerous condition which exists outside of or off mine property, and MSHA's lack of jurisdiction over the dam structure itself. Also, applicant maintains that the inspectors' lacked the necessary engineering expertise to make an informed judgment as to the stability of the dam and that an after-the-fact engineering study conducted by MSHA indicated that even if the dam had collapsed, the water would only have reached the perimeter of the mine property at the railroad yard and would not have innudated the preparation plant or the underground mine shafts.

Regarding the actual conditions observed by the MSHA inspectors and Mr. Watkins, none of the witnesses presented by applicant actually observed those conditions on the evening of February 26 when the order issued. Preparation Plant Foreman Simmons never visited the dam site and knew nothing about the conditions observed there. Mine Superintendent Jordan visited the dam site the day after the order issued and after the pumping and discharging of water had ceased. Although he expressed little concern over the condition of the dam, he agreed that had the pumping and discharge of water continued for a couple of days, that would have been of some concern to him. He also indicated that the erosion and formation of the gulley, which was the primary concern of the inspectors, would have concerned him only if more rather than less of the face of the earthern portion of the dam were affected by the erosion. It seems obvious to me that the continuous pumping and discharging of the water from the dam over and down the earthern breastwork of the dam would have increased, rather than decreased, the erosion, thus expanding the gulley being formed. Under the circumstances, taken in perspective, Mr. Jordan's "concerns" with respect to the erosion and the existence of the gulley coincides with the concerns of the inspectors.

After careful review and analysis of the testimony presented by MSHA in support of the closure order in question, I find and

conclude that the

inspectors acted properly in issuing the order and that their testimony supports their finding of an imminent danger. I am not persuaded by applicant's arguments concerning the lack of engineering expertise by the inspectors at the time they observed the conditions on which they based their action. It seems clear to me that the inspectors were qualified to make a judgement as to the existence of an imminent danger, that they were qualified mine inspectors of many years experience in mining, including the inspection of mines and the detection of any perceived hazards which may result from those inspections. Further, I do not believe that one necessarily has to be a professional engineer to determine whether an imminent danger actually exists. Those judgments may, and in fact are, made by inspectors in the normal course of their everyday mine inspections. The question presented is whether on the facts presented they acted reasonably in the circumstances presented on the evening of February 26, 1979. In this case, both inspectors were experienced inspectors and they had adequate training in the detection of conditions which could lead to the collapse of a dam structure. The fact that they were proved subsequently wrong with respect to the question of whether the water would actually reach the dam in the event of a collapse is immaterial to their judgement call made on the evening of February 26. The legislative history of the concept of "imminent danger," as well as the case law previously discussed herein makes it clear to me that the inspector's made the proper decision and that the facts and circumstances which they observed supports their judgement that an imminent danger did in fact exist at the time the order was issued.

Applicant's suggestion that an inspector must wait upon the arrival of a professional engineer or water impoundment expert, or must await the result of engineering studies before taking any action to insure the safety of miners is rejected. Faced with the situation of a possible dam collapse and the inundation of the mine from that collapse, the inspectors need not wait the results of further testing or studies before taking immediate appropriate action to protect the lives of miners. They are compelled to take prompt action, and to do anything less would endanger lives and lessen the impact of what Congress intended when it enacted the imminent danger withdrawal sanction of section 107(a). A literal application of applicant's argument on this point would require an inspector to sit back and wait until the water from the dam is running down the mine shafts before taking any action. On the facts presented here, if the inspectors had not acted and the pumping of water had continued unabated and uninterrupted, I conclude that it was just as probable as not that the earthern portion of the dam would have weakened and washed away to the point where it was likely that it would have collapsed and released a torrent of water downstream in the direction of the mine. Under the circumstances, it seems clear to me that the inspectors' intent in issuing the order was to remove the miners from the imminently dangerous position they were in and to insulate them from the possibility of being exposed to the water had it reached the mine shafts. Further, as pointed out by the UMWA in its brief, applicant's counsel more or less conceded during oral arguments at the hearing that the

inspectors' finding of imminent danger was based on their reasonable belief that the conditions they observed presented an imminently dangerous situation.

May an imminent danger order be sustained in the basis of an imminently dangerous condition which exists off mine property?

After careful review and consideration of the arguments presented by the parties with respect to the question of whether extrinsic factors off mine property may serve as the basis for a finding of imminent danger affecting miners on mine property, I conclude and find that the arguments advanced by the respondents in this case are correct and that those advanced by the applicant must be rejected. While it may true that on its face, the definition of "imminent danger" as stated in section 3(j) speaks in terms of conditions or practices in a mine, it is also true and without question that the courts have construed the Act broadly and liberally so as to effectuate Congressional intent to insure the safety of miners while in their work environment. It seems clear to me from the legislative history and the court decisions cited by the respondents that the Act has been liberally construed on the side of safety and that once it is established that an imminent danger posing a threat to the lives and safety of miners has been established it matters not that the source of the imminent danger is some exstinsic set of circumstances. On the facts of this case, it seems clear that the imminent danger was the liklihood of a dam failure which the inspectors reasonably believed would have resulted in a torrent of water inundating the mine. In such circumstances, I cannot conclude that the inspectors acted unreasonably. Further, it seems clear that applicant too does not seriously contest the fact that such an imminent danger should be ignored. Aside from the legalistic and strict interpretation arguments advanced by the applicant in defense of the closure order, applicant still maintains that it would have voluntarily withdrawn miners without prodding from MSHA if in fact an imminent danger existed and that it did so in the past when it ceased mining operations and withdrew miners in December 1978 when the dam crested and resulted in an evacuation of persons downstream by several local agencies.

With respect to the question of whether MSHA had initial jurisdiction over the dam, the fact is that notwithstanding MSHA's own admission that it lacks inspection jurisdiction over the dam, the inspectors did venture on the dam property, albeit as trespassers, and determined that an imminent danger in fact existed. That is a fact that I cannot ignore, and coupled with the additional fact that the dam owner lodged no protest to the presence of the inspectors at the time the closure order was issued, I am constrained to apply the facts as I find them. Here, as previously found and concluded by me, the dam conditions as observed by the inspectors on the evening of February 26, constituted an imminent danger and they acted reasonably so as to protect the miners from harm. Under the circumstances, while the inspectors may not have had enforcement jurisdiction over the dam per se, they did have jurisdiction under the Act to determine the existence of any imminent danger to the miners and to take appropriate action to insure the safety of the miners and to insulate them from any hazards posed by that danger.

I believe it is clear from the evidence and testimony presented in this proceeding that applicant did not own, operate, or other control the dam

structure which in fact created the imminently dangerous condition found by the inspectors on the evening of February 26, 1979. Further, while it is true that applicant did not initially create the imminent danger nor exercised any legal control over the abatement of the conditions which resulted in the imminent danger, it is clear from the facts presented in this case that the abatement was a direct result of applicant's exercise of its influence over the person who was manning the pumps. While Mr. Hall's status as an employee of Consol may not be considered in a technical sense as creating an employee-employer relationship concering the dam and the pumping of water that was taking place on February 26, the fact is that applicant's then vice president prevailed on Mr. Hall to take the necessary steps to stop the pumping, thereby insuring the abatement and eventual termination of the closure order. In addition, one may infer that from a practical and realistic point of view, this act on the part of a Consol official precluded the future pumping of water in such a manner which undoubtedly would again expose the mine to another possible closure order. Thus, on the facts here presented, while applicant may be correct when it argues that it has no legal responsibility to insure against future pumping of the water in the manner in which it was being pumped on February 26, it seems clear to me that Mr. Hall would not want to again place himself in a similar position of defying or ignoring the pleas of his own employer to cease and desist from any future course of actions which would inevitably lead to another mine closure order and loss of production, irrespective of the fact that Consol may not have any legal obligations to intercede.

Although one may sympathize with Consol's predicament with respect to the abatement process, the fact is that on the facts of this case abatement was achieved through the direct intervention of Consol and that fact should be appreciated and recognized by all concerned. This is particularly true in this case where it seems clear that while the dam in question has for many years been a source of potential threats, not only to the miners and a community hall downstream, but to all of the inhabitants of the Four States Community, no one has taken any direct action to conduct stability studies and to take the necessary construction corrective action to insure against the loss of property and lives in the event of a dam failure. It also seems clear, and MSHA concedes, that the imminent danger resulted from no fault on the part of applicant, and MSHA should seriously consider this fact if it is contemplating filing a separate civil penalty proceeding seeking an assessment against Consol for the imminently dangerous conditions created by the dam on February 26. I take note of the fact that the language of section 107(a) with regard to the assessment of any civil penalty on the facts here presented suggests that the filing of any such act is discretionary or permissive rather than mandatory, and that considering the circumstances here presented, a civil penalty proceeding may be inequitable.

Conclusion

In view of the aforementioned findings and conclusions, and

on the basis of the preponderance of the reliable and probative evidence adduced

in this proceeding, I find and conclude that the conditions described in the order of withdrawal constituted an imminent danger and that the order was issued. The evidence of record supports the judgment of the inspectors that the conditions they found on the day in question presented a situation that could reasonably be expected to result in death or serious injury to the miners in the Four States No. 20 Mine before the conditions could be abated and that normal mining operations could not continue or proceed until those conditions were abated.

Order

Order of Withdrawal No. 814153 issued February 26, 1979, is AFFIRMED and this proceeding is DISMISSED.

George A. Koutras
Administrative Law Judge