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CYPRUS MINERALS V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

CYPRUS INDUSTRIAL MINERALS CORP.,
APPLICANT

v.

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

Application for Review

Docket No. DENV 78-558-M

Order No. 34205

DECISION

Appearances: Scott H. Dunham, Esq., O'Melveny & Myers, Los Angeles, California, for the applicant Thomas E. Korson, Attorney, U.S. Department of Labor, Office of the Solicitor, Denver, Colorado, for the respondent

Before: Judge Koutras

Statement of the Proceedings

This is an action filed by Cyprus Industrial Minerals Corporation (Contestant) pursuant to section 107(e)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 817(e)(1), seeking review of an imminemt danger closure order issued by MSHA inspector Donald K. Everhard on August 3, 1978, pursuant to section 107(a) of the Act. The withdrawal order, No. 342065, cited a violation of 30 CFR 57.3-2, and the condition or practice which the inspector believed constituted an imminent danger warranting closure of the "whole mining area of the Bosal #1 claim," is described as follows on the face of the order: "Dangerous loose rock and overburden was present on the north side of drift immediately above the working level of the drift. The face and south rib also had not been completely scaled and dangerous loose rocks were observed also."

In its review petition, contestant asserted that the order was improprly and unlawfully issued because (1) the area which is the subject of the order is not a mine within the meaning of the Act and was beyond the jurisdiction of MSHA, and (2) even if the area cited can be construed to be a "mine," the operator was one Leonard "Pee Wee" Holmes, an independent contractor who was in fact the "operator" at the time the order issued.

Respondent filed an answer to the review petition on September 7, 1978, and moved to dismiss on the ground that contestant failed to include a copy of the order with its petition. Applicant filed a response to the motion, and by order issued by me on September 21, 1978, respondent's motion to dismiss was denied, and by notice of hearing issued on October 12, 1978, the matter was scheduled for a hearing on the merits in Helena, Montana, November 17, 1978.

On November 6, 1978, respondent filed a motion for a continuance of the hearing on the ground that MSHA was in the process of reviewing its enforcement policy with regard to independent contractors and that there was a good possibility that in light of this review, the parties would probably resolve the matter without the necessity of a hearing on the merits. By order issued by me on November 8, 1978, the case was continued, and on January 24, 1978, I issued another order directing the parties to advise me of the status of MSHA's policy review concerning independent contractors and whether the case should be scheduled for hearing. On February 6, 1979, respondent's Arlington, Virginia Solicitor's Office advised me by letter that MSHA had not changed its enforcement policy with regard to citing mine owners for violations committed by independent contractors and that it did not appear that any future policy changes in this regard would be applied retroactively. The Solicitor also advised that the order in question was still in effect and that a hearing would be required. Accordingly, by notice issued April 13, 1979, a hearing was scheduled for Helena, Montana on July 17, 1979, and the parties appeared and participated therein. The parties waived the filing of written proposed findings and conclusions but were afforded an opportunity to present their respective arguments on the record at the hearing, and the arguments presented have been considered by me in the course of this decision.

## Issues

1. Whether the area where the alleged imminent danger was found was a mine within the meaning of the Act.

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

3. Whether the mine owner, rather than the independent contractor, was the proper party to be served with the closure order in question.

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

## Stipulations

The following admissions and stipulations were made by the parties (Exhibit JE-1):

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1. This review proceeding is properly before me pursuant to section 107 of the Act.

2. Applicant Cyprus Industrial Minerals (CIM) is an operator of certain mines generally subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the "Act"), and MSHA is the governmental agency responsible for administration and enforcement of the Act.

3. Leonard "Pee Wee" Holmes is an independent exploration contractor who contracted with CIM to perform work for CIM on property owned by CIM according to his own methods and without being subject to the control of CIM except as to the final result of his work. Holmes contracted with CIM to establish a portal and drive two exploration drifts for CIM, one at its Snow White Mining Claim and the other at its Bosal #1 Mining Claim. CIM specified the work it wished performed and the geographical area wherein the work was to be performed but Holmes was solely responsible for achieving the results desired by CIM. The only work being performed was for assessment. There was no production at these sites.

4. In performing the work for CIM, Holmes furnished all the equipment, manpower and supplies. CIM did not supervise or otherwise direct Holmes in his work. He exercised complete control over the area in which he was working. He was not an agent or an employee of CIM. The completed work, however, inured to the benefit of CIM.

5. Holmes has worked as an independent exploration contractor for more than 10 years and has worked in underground and aboveground mining of minerals for approximately 35 years.

6. Raymond Pederson was an employee of Holmes. He was not an agent or employee of CIM. Holmes hired Pederson to work with him to perform the work Holmes contracted to do for CIM. Pederson had worked in aboveground and underground mining of minerals for approximately 18 years.

7. The alleged violation of the Act cited in Order No. 342065 occurred during the course of work performed by the independent contractor, Holmes, and his employee Pederson. None of the employees of CIM were endangered by or involved in the occurrence which resulted in Order No. 342065.

8. Holmes is not in any way affiliated with CIM other than pursuant to the Agreement for Services executed by Holmes and CIM which called for Holmes to do certain construction work. The Agreement for Services provided that the relationship between CIM and Holmes was to be that of owner and independent contractor.

9. By Thursday, July 27, 1978, Holmes and Pederson completed without incident the portal and exploration drift at CIM's Snow White Mining Claim. The following day, Friday, July 28, 1978, Holmes and Pederson began working to establish a portal and exploration drift at CIM's Bosal #1 Mining Claim.

10. On Wednesday, August 2, 1978, Holmes and Pederson began preparations for setting posts for the portal at the Bosal #1 Mining Claim. They proceeded to clear away the muck that had collected at the base of the portal as a result of barring and scaling the face of the hill. Also on Wednesday, Holmes and Pederson used a frontloader CAT 988 to clear the overburden above the portal. They also scaled from the top of the hill as well as from the ground and barred and scaled the brow.

11. On Thursday, August 3, 1978, Holmes and Pederson began working around 8 a.m. They did more barring and scaling of the face of the hill in preparation for setting posts. They completed the barring and scaling to their satisfaction and were in the process of setting the posts when rocks suddenly broke loose from the face of the drift and struck Pederson, crushing him. Pederson was pronounced dead at the scene.

12. On August 3, 1978, MSHA inspector Donald K. Everhard served Order No. 342065 to Donald F. Kennedy of CIM. Order No. 342065 was issued pursuant to Secretarial Order No. 2977. Mr. Everhard believed that the barring and scaling had not been completed satisfactorily because of the presence of loose rock.

Testimony and Evidence Adduced by the Respondent MSHA

MSHA inspector Donald K. Everhard testified that he has been associated with the mining industry since 1948, and with MESA and MSHA as a mine inspector for the past 5-1/2 years. He has also worked as a contract miner and is familiar with the hazards of loose rock, since he has observed loose rock fall and has attended classes dealing with the subject. He went to the job site in question after receiving a phone call from his office advising him that there had been a fatality there. He arrived there at about 4:45 p.m., and CIM engineer Don Kennedy, State mine inspector Bill Gilbert, and contractor Leonard Holmes were there when he arrived. Mr. Holmes explained what had taken place, and they examined the site from a safe distance. From the top right-hand edge of the site which had been cleared of loose rock, he observed loose rock in the face of the drift, some smaller loose rock on the right-hand side, and a high overburden on the left side (Tr. 24-28).

Inspector Everhard identified a copy of the order he issued and confirmed that it refers to section 57.3-22 and he indicated that is what he intended to cite (Tr. 29). He issued the imminent danger order after observing hanging loose rock in the center of the drift which was approximately 18 feet high, and hanging loose rock on the right-side of the drift. Although loose overburden had been cleared from the top edge of the face on the right-hand side back about 10 to 12 feet, the left-hand side had loose overburden above the solid rock which had not been cleared away for some 25 feet. The rock was overhanging loose rock which could have slipped at anytime. Had work proceeded as previously done on the same schedule an accident could have occurred. He believed the loose rock on the right hand side should have been rebarred and rescaled and the high overburden on

the left should have been completely removed (Tr. 29-32).

On cross-examination, Mr. Everhard indicated that he prepared his "inspector's statements" no later than August 5, and that he did make reference to a violation of section 57.3-2 in the report. The loose rock he observed hanging on the face of the drift was in the same approximate area as the rock which fell from close to the center of the drift. He recalled the accident investigation report of August 3, 1978, and indicated that he prepared a rough drawing of the accident scene. The victim, Mr. Pederson, was standing on the right side of the drift and Mr. Holmes on the left side. The rock which struck Mr. Pederson fell from somewhere near the center of the drift. He took no pictures of the job site once he arrived there because he had no camera, and he was not at the site prior to the accident. He was told by Mr. Holmes that barring and scaling of the walls had taken place prior to the accident and he did observe barring and scaling tools in the area, and he had no reason to believe that it was not done (Tr. 33-40).

Inspector Everhard testified that he issued the order to the operator, Cyprus Industrial Mineral Company, rather than Mr. Holmes because he was verbally instructed to do so by his supervisor who advised him that this was the policy (Tr. 40). He did not question Mr. Holmes regarding who was controlling or supervising the operation on the day in question and he was aware of the fact that the accident victim was employed by Mr. Holmes and had no affiliation with CIM (Tr. 41).

On redirect, Mr. Everhard indicated that while scaling and barring of rock had been done when he arrived at the job site, it was not complete because he still observed loose rock in the face area and the sides and it was not adequately supported. He cited 57.3-22 because loose ground should have been removed and adequately supported to eliminate the hazard of loose rock. The operator's nearest mine is a mile and a half from the job site in question. He considered the job site to be an underground mining operation because there was a drift into the side of the mountain and underneath the ground (Tr. 47).

In response to questions from the bench, Mr. Everhard testified that he was told that only two men, namely Mr. Pederson and Mr. Holmes, were working at the operation prior to the accident, and that this was the usual number of people working there. Neither Mr. Everhard nor MSHA had previously inspected the site at anytime. The work began there sometime in mid-July 1978. Prior to the accident of August 3, the drift had been driven some 18 to 21 feet. The men were establishing a drift under the brow into the side of the mountain. After establishing the brow, they were to drive in another 20 to 23 feet underground. The overburden and loose material was removed from the drift opening by a front end loader, and a jack-leg mining machine which was used to drill holes was also used and the material was blasted out. A compressor was also present to produce air to run the jackleg machine, and picks, shovels, and bars were also there. The drift was unsupported and it was an active working (Tr. 47-52).

On recross Mr. Everhard stated that he was told a half a ton of loose rock covered the accident victim and that he was struck by a large rock.

Mr. Everhard never received a copy of the contract between Mr. Holmes and the operator, and he indicated that his description of the drilling and blasting which was taking place was standard procedure for cutting a drift, and while he observed a post or two lying alongside the walls, no support timber was installed, and the two men were starting to install it at the time of the accident (Tr. 56-57).

Applicant's Testimony and Evidence

Donald F. Kennedy, production manager, CIM, Beaverhead Mine, testified that 21 employees work at the mine and that it is an open-pit operation mining talc, and is located about a mile and a half from the site of the accident. No mining was taking place at that site and no employees of the operator were there performing any work. He hired Mr. Holmes to do the work there because someone was needed with experience driving underground workings for assessment work on the mining claims, and the operator had no one with that experience. Mr. Holmes was recommended as someone who had done this type of work and the reports on him were good. He was at the site on one occasion prior to the accident for the purpose of showing Mr. Holmes the second site where another adit was to be driven. The contract with Mr. Holmes called for the driving of two adits, and Mr. Kennedy exercised no control or supervision over the work performed by Mr. Holmes. The purpose of the exploration drift was to determine the width of any talc in the area. At the time the drift was opened he did not intend to use it for mining, and it was possible that the portal would have been so used but this could not be determined until they knew what was found (Tr. 69-73).

On cross-examination, Mr. Kennedy testified that had the drift being developed by Mr. Holmes produced substantial indications of the existence of valuable minerals further steps would be taken to mine the minerals, drilling would commence, and an open-pit mine would have been developed. Mr. Holmes' project was to last for some 2 or 3 weeks, and his work was not expected to exceed 3 weeks. In fact, it took him 2 weeks to drive the drift. Mr. Holmes was instructed to complete another drift first, and then start on the Bosal work (Tr. 73-77). Mr. Kennedy conceded that his company generally could have trained its own personnel to perform the work done by Mr. Holmes, but simply drilling a bore hole would not result in mineral samples as large as those disclosed by developing a drift (Tr. 79). At the time of the accident, he was the company official responsible for safety matters (Tr. 85). In open-pit mining, problems are encountered with loose rock (Tr. 89).

On redirect Mr. Kennedy stated that one of the considerations in hiring Mr. Holmes to develop the drift in question was that he had prior experience in this type of work, and the company opted not to do the work because of its lack of expertise (Tr. 90). In response to bench questions, he testified that no mining is presently taking place on the Snow White Claim because no minerals of value were discovered and no mining is

taking place at the site of the withdrawal order and no equipment is located there (Tr. 90-91). Although Mr. Holmes had not as yet developed an actual drift at the time of

the accident, a trench was developed into the side of the hill. Mr. Kennedy viewed the conditions cited in the withdrawal order and conceded that some surface loose alluvium material was present on the left side up on the surface (Tr. 93). He surmised that the small amount of material which fell on the victim resulted in the fatality, and from all appearances of the fatality area he did not feel that a danger was present (Tr. 95). He believed that the remaining material which was located some 25 feet up the high face after the accident was small loose alluvium material consisting of rock and dirt (Tr. 95). If he were the inspector he would have issued a citation in order to clear some of the loose materials, but he would not have considered the conditions an imminent danger (Tr. 97). Mr. Holmes was developing a portal, and a portal is the initial entry into the underground drift (Tr. 98). The drift established by Mr. Holmes at the Bosal claim was identical to the one established at the Snow White Claim (Tr. 98, Exh. A-1).

On recross, Mr. Kennedy testified that he visited the Bosal claim earlier prior to the accident and he did so to show Mr. Holmes the approximate direction in which to drive the drift and Mr. Holmes intended to establish a brow at the job site in question (Tr. 100).

Leonard Holmes testified that he owns a bar and has also engaged in contract mining for some 25 years, including experience in driving exploration drifts such as the one he was driving at the Bosal claim, and that he has never had an accident. He contracted with CIM to drive two exploration drifts and he identified a copy of the contract (Joint Exh. 3). The accident victim, Ray Pederson, worked for him previously in 1975 performing drift work, cleaning out old raises, and performing ventilation work. He paid Mr. Pederson and Mr. Pederson had some 18 years of experience in mining, including the driving of many exploration drifts. He and Mr. Pederson worked on drifts at Cyprus' Snow White claim, including timbering work. They also intended to use timbers at the Bosal drift work. He described the work being performed at the time of the accident, including drilling and cutting preparations to establish a portal, and the cleaning of the sides of the brow in order to establish room for the installation of timbers. During this process, he borrowed a piece of equipment from CIM to help clean off the brow. He also described the work performed by him in attempting to clear an area to facilitate the installation of support timbers (Tr. 103-109).

Mr. Holmes described how the accident occurred and indicated that a "slip" was encountered and he described it as "a greasy piece of ground that's under your rock." One of the walls "looked bad," but he indicated that it was a granite formation which interlocked with other rock and once this occurred "you didn't have to worry" because "the rock was interlocked." Prior to any attempts to set posts, material was barred and scaled from the foot of the rib wall, and the "cat" borrowed from CIM was also used for barring and scaling. No loose rock was observed at the foot of the wall and rib prior to the setting of the posts

and he believed "we were safe." He identified the area on Exhibit A-2, labeled "Foot wall rib" where the accident victim was standing holding the posts when the rock fell and struck

him. Mr. Holmes was standing to the left and was not struck by any rock. The base of the drift at the time was 10 feet wide and the face was some 22 feet from where they could establish a portal and the timbering was from the face back. The ground conditions were examined on a daily basis while the work was being performed (Tr. 109-115).

Mr. Holmes testified that based on the existing conditions immediately before the accident, he did not believe that an imminent danger existed, and that after the rock fell and struck Mr. Pederson he did not intend to continue setting posts before doing any other work. After Mr. Pederson was killed he intended to do nothing but leave the area. Assuming he went back the next day, he would have cleaned up the area and started again, and this work would have included additional barring and scaling since once the rock fell it would have "loosened up something else again." Once timbering begins, barring, scaling, and cleaning out the muck would have been the safest way to proceed. In his opinion, there was no way to bar and scale to eliminate the hazard which existed at the time the rock fell and struck Mr. Pederson. He had encountered loose rocks slips in the past and indicated that "you will run into that anytime you are mining." The only way to prevent rock slippage is to timber and he was in the process of doing that at the time of the accident. The purpose of setting the timbers was to establish a brow underneath the face of the drift in order to support it. Mr. Holmes defined an imminent danger" as "something that you could work under or around if you wanted to take a chance." In his opinion, after the accident occurred the conditions which existed did not present an imminent danger where someone would be injured or killed if they continued work in that area. The rock which fell came from the hanging wall on the foot wall side of the area where work was being performed. Mr. Holmes stated he was responsible for the work being performed at the accident site because it was his contract (Tr. 115-120).

On cross-examination, Mr. Holmes indicated that he was paid by CIM for the work performed on the Snow White claim, but has not been paid for the work performed at the Bosal site (Tr. 121). Mr. Holmes denied that there was loose ground at and above the face at the time of the accident, but that 4 tons of rock struck Mr. Pederson at one time and he was not struck by a single rock although the material came out in one chunk. The rocks fell from approximately 4 to 6 feet above where he was holding the posts (Tr. 128). The slip of ground which caused the fall occurred 4 feet back and 2 feet into the face and they could not see it. They would not have been working underground had they observed the slip (Tr. 129-130). The "cat 988" which was used was owned by CIM since he did not own one (Tr. 131). Regarding the existence of any loose rock on the hanging wall side before the accident, Mr. Holmes stated that there was "none that was of any bother to us," but that overburden was present above the hanging wall and it could have fallen in at any time because "when you are mining it could happen" (Tr. 138).

On redirect and in answer to a question as to whether the presence of the overburden on the left side hanging wall presented an imminent danger, Mr. Holmes stated "Not if they are miners, no, that hanging wall wouldn't have bothered them one bit" (Tr. 139).

William H. Gilbert, testified that he is employed as a Montana state mining inspector with 30 years prior mining experience in underground mining and some surface mining experience. He was present at the mine site immediately after the accident and examined the job site immediately after the accident. He took some measurements and some photographs. In his view, the prevailing conditions after the accident did not present an imminent danger, but the area would have had to been barred down again. He is authorized under state mining laws to issue imminent danger withdrawal orders but did not issue one in this instance because Mr. Kennedy told him that he decided to stop the project and Mr. Holmes was going to move all of his equipment out. In view of this, he saw no point in issuing any order and he did not feel that the conditions at that time justified an imminent danger order and he would not have issued one (Tr. 143-144).

On cross-examination, Mr. Gilbert stated that he would not have issued an imminent danger order because he "didn't think the conditions were that bad" (Tr. 145). He knew that inspector Everhard had issued a citation, but did not know it was an order, and he first learned that an imminent danger order had issued the day of the hearing (Tr. 146). Mr. Holmes would have had to bar down the muck in order to work safely in the future (Tr. 148).

In response to bench questions, Mr. Gilbert stated that under state law "imminent danger" is not defined. It simply states that if an imminent danger exists a withdrawal may be issued and it remains in effect until the condition is abated (Tr. 151-152). Regarding the conditions which prevailed after the accident, he testified that the ground, like all surface ground, was shattered and loose (Tr. 153-154).

Inspector Everhard was recalled in rebuttal and testified further as to the conditions which prevailed after the accident. Loose, unstable overburden ground was present and it could have slipped off the top of the hanging wall and slipped into the work site onto the floor of the drift (Tr. 158). On cross-examination, Mr. Everhard testified as to how supporting timbers should have been installed and that a 22 foot area had been taken out (Tr. 164). He did not cite the operator for failure to examine the face and rib and has no way of knowing whether this was done or not (Tr. 166). Mr. Holmes was recalled and testified that no CIM employee operated the borrowed Cat 988 but that Mr. Pederson did (Tr. 169).

Arguments Presented by the Parties

Respondent MSHA

Respondent argues that Inspector Everhard's concern about the loose material which remained on the hanging wall side of the overburden justified

his imminent danger order and that the opinion of the state mine inspector regarding the presence of an imminent danger should be given no weight. Further, respondent argues that the testimony establishes that additional work had to be performed before any mining could continue after the fatal accident and that this factor also supports the inspector's order. As for the independent contractor question, respondent asserts that the record establishes that the work performed by Mr. Holmes at CIM's Snow White and Bosal claims indicates that it was of very short duration, that Mr. Holmes performs work at several locations and in effect has a very limited presence on the mine site, whereas CIM has an ongoing operation and could have performed the work itself by training its personnel. Under the circumstances, respondent submits that MSHA's discretionary policy of citing mine operators rather than contractors is a good policy which should be affirmed.

With regard to the question as to whether the work being performed by Mr. Holmes constituted "mining" within the meaning of the Act, respondent argues that section 3(h)(1)(c) of the Act which defines a mine to include "shaft, excavation, or tunnel" indicates that the work being performed by Mr. Holmes justifies a finding that the work site was in fact a "working to be used in the work of extracting minerals" and that it is covered by the Act (Tr. 171-179).

Applicant

Applicant argues that the primary issue in this case is the independent contractor question and CIM is not the proper party in the proceedings. Counsel argues that the parties have stipulated that Mr. Holmes is an independent contractor and that CIM exercised no control or authority over the work being performed by Mr. Holmes other than to instruct him as to the results which should come from his work. Although counsel conceded that CIM lent Mr. Holmes a bulldozer, it was operated by Mr. Holmes' employee Pederson and not by any CIM employees. Based on the Monterey Coal Company decision, counsel asserts that it is clear that CIM is not the proper party in this proceeding and that Mr. Holmes, as an indispensable party, should have been made a party and should be responsible for the imminent danger order. As for the suggestion by MSHA that CIM train its own personnel to perform the work done by Mr. Holmes, counsel argues that there is no requirement under the law that it do so and that the stipulation is dispositive of this question. Finally, counsel argues that MSHA's policy of citing mine operators rather that contractors, without any effort to ascertain such circumstances as control, operator expertise, safety considerations, etc., is arbitrary and without legal foundation.

With regard to whether the work site in question may be considered a "mine site" covered by the Act, counsel argued that the work being performed by Mr. Holmes was clearly work being performed in order to determine the presence of an ore body worthy of being mined. Counsel conceded that there was an ore body present, but argues that the work by Mr. Holmes was

exploration and assessment work and that the portal being established was

not intended to be used for mining purposes. Rather, the ore would be mined by strip mining. Since the work was preliminary to any actual mining, counsel suggests that MSHA had no jurisdiction to cite violations.

With regard to the existence of any imminent danger, counsel relies on the testimony of state mining inspector Gilbert who was of the opinion that the conditions presented did not justify the issuance of such an order, and that at the time of Mr. Everhard's arrival on the scene, all work had ceased, Mr. Holmes had left the scene, and the deceased accident victim had been removed. Further, counsel argues that Mr. Holmes testified that in the event further work would have proceeded after the rock fall, the first thing he would do would be to clear the area out and scale and bar down the materials which resulted from the apparent slip in the rock. In addition, counsel points to the fact that Mr. Holmes observed no rock in the area which presented any danger and that he believed the area was safe to work in (Tr. 179-187).

Findings and Conclusions

Were the activities and work being performed by Mr. Holmes at the mine site in question mining operations covered by the Act, and did MSHA have jurisdiction to issue citations and orders?

The Federal Metal and Nonmetallic Mine Safety Act of 1966, 30 U.S.C. 721 et seq., defined the term "mine" as:

> (1) an area of land from which minerals other than coal or lignite are extracted in nonliquid form or, if in liquid form, are extracted with workers underground,
>
> (2) private ways and roads appurtenant to such area, and (3) land, excavations, underground passageways, and workings, structures, facilities, equipment, machines, tools, or other property, on the surface or underground, used in the work of extracting such minerals other than coal or lignite from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in the milling of such minerals, except that with respect to protection against radiation hazards such term shall not include property used in the milling of source material as defined in the Atomic Energy Act of 1954, as amended. [Emphasis added.]

The Metal and Nonmetallic Mine Safety Act was repealed upon enactment of the Federal Mine Safety and Health Act of 1977, P.L. 95-164, November 9, 1977. Section 3(h)(1) of this law defines a "coal or other mine" as:

> (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations,

underground passageways, shafts slopes, tunnels and workings, structures,

facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment; * * *. [Emphasis added.]

Section 104(a) of the Act provides as follows:

> (a) If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a violation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

Section 107(a), 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 conditions or practices 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.

Applicant has stipulated that it is a mine operator covered generally by the Act. With regard to the surface and underground activities and work conducted by Mr. Holmes at the No. 1 Bosal Claim on contestant's mine property, the testimony and evidence adduced here reflects that Mr. Holmes' work was in fact work normally associated with a talc mining operation. Mr. Holmes was driving a drift at the time of the accident and this work included blasting, drilling, cutting, removal and cleaning of materials, timbering, bulldozing overburden, barring and scaling of loose rock, and attempts at establishing a brow and a portal for the express purpose of extracting minerals. Similar work had previously been completed by Mr. Holmes at applicant's Snow White Claim, and it seems clear that Mr. Holmes is in fact an experienced mining man of many years experience in driving drifts. Further, applicant conceded the existence of a mineable ore body and that Mr. Holmes' work was directly related to the eventual mining of that ore; and, by the very terms of the contract (JE-3) Mr. Holmes agreed to establish a portal and to drive an exploration drift. Under these circumstances, I conclude and find that Mr. Holmes' work at the time of the accident were in fact mining activities within the meaning of the Act, that the work being performed at the Bosal Claim was work at a "mine" as defined by the Act, and that MSHA had enforcement jurisdiction to regulate those activities through the applicable mandatory safety standards promulgated under the Act. Applicant's arguments to the contrary are rejected.

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

"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."

The legislative history of the Act brings out relevant testimony with regard to this question. The conference committee report, section-by-section analysis of the 1969 Act has the following to say about imminent danger:

> [T]he 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.

And, at pg. 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 serioiusness 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), and in this case the court phrased the test for determining an imminent danger as follows:

> [W]ould 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 contestant proves by a preponderance of the evidence that an imminent danger was not present when the order was issued. See: Lucas 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).

At the hearing, MSHA's counsel took exception to my ruling that he should proceed first and establish a prima facie case (Tr. 17-20). MSHA's exception is rejected and my prior ruling made at the hearing is hereby reaffirmed.

I am not persuaded by applicant's argument that state mining inspector Gilbert did not believe that the conditions which existed did not constitute an imminent danger and that he would not have issued a withdrawal order under state law. It is clear from the record here that the state definition of an "imminent danger" is not the same as that set forth under the Federal law in question, and the fact that mining activities had ceased is irrelevant. Mr. Gilbert was obviously satisfied with the fact that all mining had ceased after the accident and order was issued and I believe that this fact served as the basis for his opinion that he would not have issued an imminent danger order. However, he candidly admitted that additional work of scaling and barring would still have to be done before any mining could continue after the accident, and I find his testimony that the prevailing conditions after the accident were "not that bad" to be somewhat equivocal. The critical question presented is not what Mr. Gilbert would have done, nor whether Mr. Everhard should have taken some other course of action instead of issuing an imminent danger withdrawal order, but rather, whether his action was justified by the circumstances presented. See Eastern Associated Coal Corporation, 2 IBMA 128, 173 (1973), where the former Interior Board of Mine Operations Appeals stated that "[W]e are not called upon here to decide whether the Inspector chose the most appropriate of several alternatives, but rather, we are called upon to decide whether the action he did take was a proper and lawful exercise of authority under the Act." Further, the fact that all mining activities had ceased and Mr. Holmes had withdrawn both himself and his equipment from the accident scene is likewise irrelevant. As pointed out by the Board of Mine Operations Appeals in the cases of UMWA, District #31, 1 IBMA 31 (1971), and The Valley Camp Coal Company, 1 IBMA 243 (1972), the effect of an order of withdrawal not only takes the miner or miners out of the area of the dangerous condition, but also keeps them out until the danger has been eliminated. In the UMWA case, the Board stated:

> * * * an Order of Withdrawal is more extensive that the mere withdrawal of miners--it also confers jurisdiction on the Bureau to prohibit reentry until an authorized representative of the Secretary determines than an imminent danger no longer exists * * *. Thus the purpose of a withdrawal order is not only to remove

the miners but also to insure that they remain withdrawn until the conditions or dangers have been eliminated. Regardless of the sequence of events of the method by

> which the miners were originally withdrawn, a mine, or section thereof, is officially closed upon the issuance of an order pursuant to section 104.

Although Mr. Kennedy did not believe that an imminent danger existed after the accident occurred, he admitted that loose alluvium materials consisting of rock and dirt were still present some 25 feet up the high face of the area in question, and that if he were the inspector he would issue a citation requiring the materials to be cleaned up. Further, while Mr. Kennedy testified that a small amount of loose materials and rock fell on the accident victim, Mr. Holmes, who was present and an eyewitness to the fall, testified that approximately 4 tons of materials fell on the victim and that it came from the hanging wall side of the area where the work was being performed. He attributed the fall of materials, including "chunks" of rock, from a slip of the ground which he believed occurred some 4 feet back and above where the victim was standing attempting to install some posts. Mr. Holmes also testified that the slip was undetected and he candidly admitted that he and the victim would not have been working in the area had they known about the slip of ground. Further, Mr. Holmes admitted to the existence of overburden, including loose rocks, on the hanging side of the wall prior to the accident and while he dismissed it as something that did not "bother" him or would be of no concern to miners, he candidly admitted that the overburden could have fallen at any time because anything can happen when one is engaged in mining activities. It seems to me that after the slip of ground, which was not detected, and which apparently caused the fall of rocks and other materials which killed and covered up the victim on the day in question, that it was altogether likely that given the same circumstances after the accident, another slip could occur and again cause another fatality once the work was continued. The fact that additional barring and scaling would have again been accomplished before beginning work again a second time would not, in the circumstances here presented, insure that another slip would not occur. Barring and scaling had been previously done by Mr. Holmes, but that did not prevent the undetected slip of ground which caused the fatality.

Inspector Everhard expressed concern over the existence of loose, unstable overburden and rocks, and overhanging loose rock located up an 17 foot high drift and above the area where work had ceased after the fatal accident. He also expressed concern over the fact that he did not believe that the drift area where the work was being performed at the time of the accident had been adequately supported to prevent loose rocks and materials from falling. He was concerned over the fact that had Mr. Holmes continued work after the accident, following the same mining procedures which were described to him at the time of the accident, another fall could occur as a result of further ground slippage due to the loose materials present, and that if this occurred the slip would have fallen into the area where work would have been performed. In these circumstances, I conclude and find that Inspector Everhard acted properly in issuing the order and that the conditions which were present as described in

his order presented an imminently

dangerous situation that could reasonably be expected to result in serious injury or death before the conditions could be abated and that normal mining activities could not continue or proceed until those conditions were abated.

Was the imminent danger order properly served on the mine owner-operator?

Applicant argues that the imminent danger order here was inappropriately served on CIM, the mine owner, and that it should have been served on Independent Contractor Leonard "Peewee" Holmes. In support of this argument, contestant argues that the parties have stipulated that Mr. Holmes, as an independent contractor, was performing contract work for CIM, and that Mr. Holmes is an indispensable party since he was the person who was operating and in control of the "mine" at the time the order issued and that CIM exercised no control or direction over the work being performed by Mr. Holmes at the job site (Tr. 5-8).

Respondent MSHA's position is that the Secretary has discretion as to which mine "operator" to cite, and that in this case, in the exercise of his discretion, the Secretary decided to cite CIM as the owner-operator of the mine (Tr. 13-16). Further, it is clear from Inspector's Everhard testimony that although he was aware of the fact that the accident victim was employed by Mr. Holmes rather than CIM, and did not inquire of Mr. Holmes as to who was supervising and directing the work at the scene of the accident, he issued the order to Cyprus because his supervisor instructed him that this was MSHA's enforcement policy (Tr. 40-41). It is further clear to me that although MSHA's counsel attempted to make a record concerning the factual basis for the issuance of the order, i.e., supervision, direction, continuing presence on the mine, borrowed equipment, etc., that at the time the order issued on August 3, 1978, the inspector was merely following MSHA's enforcement policy of citing only the owner-operator and not the independent contractor. As a matter of fact, MSHA stipulated that the order was issued in compliance with Interior Secretarial Order 2977, and I note that the reason for the delays in this proceeding is the fact that MSHA initially sought a continuance on November 17, 1978, on the ground that it was at that time reviewing its enforcement policy regarding independent contractors and the argument was then made that the review may resolve this controversy without the necessity of a hearing. Subsequently, on February 6, 1979, MSHA advised that no changes were made in its enforcement policy and the case proceeded to hearing.

During the course of the argument, MSHA's counsel stated that the Secretary's decision to issue the order against the mine owner was based on a "matter of law and policy," and the fact that a contractor did not have a Mine Identification Number was part of the "mix" or considerations that goes to that policy determination (Tr. 83-84). When asked about the status of any proposed independent contractor guidelines or regulations, counsel stated that as of the hearing (August 3, 1979), none were promulgated but "it is hoped that in the near future there will

be issued a proposed regulation on that subject for public comment" (Tr. 84). Counsel's position was succintly stated as follows at page 14 of the transcript:

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On the independent contractor issue, it is our position that the statute with its definition of operator as including independent contractors gives the Department of Labor the discretion to issue citations to operators for violations committed by their independent contractors. We think that is a position which the Congress intended. We think that we have the discretion to either issue the citation to the operator or to the independent contractor. We have exercised our discretion here to issue the citation to the operator, and we think essentially that that forecloses the issue.

And, at pp. 174-178:

> On the independent-contractor issue, I submit that we have shown that the facts of this case show why the Secretary's policy of citing owners, operators, for the acts or omissions of independent contractors--we have shown why that's a good policy.
>
> This was a very small job. The Snow White claim, which was similar, took only three days. This particular work was not expected to last I believe it was either two or three weeks that the--according to the testimony of Mr. Kennedy.
>
> Mr. Holmes is clearly the type of businessman who works at different sites. He is hard to follow down. Cyprus, on the other hand, is a mile away. Cyprus has an ongoing operation. It is administratively practical for Cyprus in these circumstances to be held to Mr. Holmes' actions.
>
> Cyprus should be charged, and I submit that the legislative history shows that Congress intended to give the Secretary the discretion to cite the operator.
>
> In this circumstance there is nothing in the legislative history which indicates that Congress wanted the Secretary to proceed against the independent contractor. It was for the Secretary to decide, and I submit that that exercise of discretion by the Secretary is sound.
>
> JUDGE KOUTRAS: Now, let me stop you on that point. You feel that the legislative history supports the conclusion that the reason that Congress included an independent contractor was to give the Secretary the discretion to--which party to cite?
>
> MR. KORSON: I think it was the intention to give the Secretary the discretion to decide that issue.
>
> JUDGE KOUTRAS: Standard of discretion?

MR. KORSON: Well, Your Honor, under the Administrative Procedure Act, there are circumstances under which the discretion of an agency may be examined, yes.

JUDGE KOUTRAS: Which is to see whether it's arbitrary or capricious?

MR. KORSON: That's correct.

JUDGE KOUTRAS: If the agency hadn't decided for the independent contractor without any standards at all, would that be arbitrary or capricious?

MR. KORSON: That would be arbitrary or capricious, but that is not what happened here. What I am suggesting is there are at least two alternative positions here that could have been taken with the Secretary here with the statutory language. The Secretary could have concluded that he would direct his inspectors to cite the independent contractor in this situation, but he decided not to do that, at least for the time being, and I submit that the two choices presented are both entirely defensible policies based on the statute.

The Secretary's policy decision to proceed against a mine operator-owner rather than an independent contractor was recently reviewed by the Commission in MSHA v. Old Ben Coal Company, Docket No. VINC 79-119, October 29, 1979. While expressing some doubt concerning the Secretary's "owners only" enforcement policy, and while expressing some concern that any unduly prolonged continuation of a policy that prohibits direct enforcement of the Act against contractors, the Commission nevertheless in Old Ben affirmed the Secretary's present discretionary enforcement policy of proceeding only against the mine opeator-owner. Further, upon review of the decision of Judge Michels in MSHA v. Monterey Coal Company, Dockets HOPE 78-469- 78-476, rejecting MSHA's absolute or strict operator-owner liability theory, the Commission, on November 13, 1979, reversed Judge Michels and in so doing relied on its ruling in Old Ben.

On October 23, 1978, MSHA published a draft of its proposed regulations dealing with certain guidelines which are intended to enable mine inspectors to proceed directly against contractors for their violations, and on August 14, 1979, proposed regulations were published in the Federal Register, 44 Fed. Reg. 47746-47753 (1979). Although the Commission views this as an intent by the Secretary to enforce the Act directly against contractors for violations they commit, and alluded to the fact that continued enforcement against owner-operators rather than contractors on the ground of administrative convenience would be an abuse of discretion and contrary to Congressional intent, the Commission nevertheless opted to allow the Secretary additional time to implement changes in his contractor enforcement policy and chose not to disturb the Secretary's interim policy decision to

proceed solely against owner-operators out of consideration for the Secretary's "consistent enforcement for reasons consistent with the purposes and policies of the 1977 Act." Under the circumstances, while I may be in agreement with Judge Michels' well-reasoned ruling in his Monterey decision and with Commissioner Backley in his dissents in Old Ben and Monterey, I am constrained to apply the Commission's decisions in those cases to the facts presented here, and, following those decisions, I conclude and find that the order in question here was properly issued to CIM and contestant's arguments to the contrary are rejected.

Although there was a question raised during the opening arguments at the hearing with respect to the question as to whether MSHA has established the fact of violation concerning the specific mandatory standard cited by the inspector on the face of his order (Tr. 10-15), it is unnecessary for me to make a specific finding on this question at this time. It is clear, and the parties are in agreement, that an imminent danger order may be validly issued and affirmed for conditions or practices constituting an imminent danger but not constituting violations of any specific mandatory safety standard, Eastern Associated Coal Company, 1 IBMA 233, 235 (1972). In this regard, I take note of the fact that on November 19, 1979, MSHA filed its proposal for assessment of civil penalty against Cyprus Industrial Minerals pursuant to section 110(a) of the Act, seeking a $1,000 civil penalty assessment for an alleged violation of 30 CFR 57.3-22, the mandatory safety standard cited by the inspector on the face of the imminent danger order here in question. That matter is still pending before me and the parties will have an opportunity to address the pertinent issues presented in that proceeding.

## 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 that the conditions described in the order of withdrawal constituted an imminent danger and that the order was properly issued. The evidence of record supports the inspector's judgment that the conditions he found on the day in question presented a situation that could reasonably be expected to result in death or serious injury before the conditions could be abated and that normal mining operations could not continue or proceed until the conditions were abated. I have also concluded that the work being conducted by Independent contractor Holmes for CIM at the time the order issued were activities directly related to mining at a mine within the meaning and intent of the Act and that the order was properly issued to CIM as the mine owner.

## ORDER

Order of Withdrawal No. 342065 issued August 3, 1978, is AFFIRMED and this proceeding is DISMISSED.

George A. Koutras
Administrative Law Judge