FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

24 JUN 1980

HARRISON-PELTRON, A Joint Venture, Applicant, v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	APPLICATION FOR REVIEW DOCKET NO. WEST 80-121-R ORDER NO. 387143 MINE: NEWLIN CREEK

DECISION

Appearances:

Phyllis K. Caldwell, Esq., Office of the Solicitor, United States Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294, for the Respondent.

Darrel J. Skelton, Esq., 4380 Harlan, Wheatridge, Colorado, 80033, for the Applicant.

Richard L. Fanyo, Esq., 1100 United Bank Center, Denver, Colorado 80290, for the Applicant.

Before: Judge Jon D. Boltz

STATEMENT OF THE CASE

This proceeding was filed by the Applicant pursuant to section 107(e) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1978) [hereinafter cited as "the Act" or "the 1977 Act"], seeking review of an order of withdrawal issued by the Respondent pursuant to section 107(a). *

* Section 107(a) of the 1977 Act, 30 U.S.C. § 817(a), reads:

> "If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized respresentative 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),

In accordance with a stipulated motion to expedite and pursuant to notice, a formal hearing was held in Littleton, Colorado, on February 26, 27 and 28, 1980. The filing of the transcript, post hearing briefs and reply briefs was completed on April 23, 1980.

By his withdrawal order, the Respondent alleges that on November 15, 1980, an imminent danger existed in four areas of Applicant's mine due to the condition of the roof. The Applicant alleges that no imminent danger existed on November 15, 1979, and that the withdrawal order should be vacated.

ISSUE

The sole issue presented for determination is whether on November 15, 1979, an imminent danger existed as a result of roof conditions in the four cited areas of Applicant's Newlin Creek Mine.

GOVERNING PRICIPLES

Imminent danger is defined 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." Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 3(j) (1976), as amended, 30 U.S.C. § 802(b)(4)(1978). The test of imminence is objective and the inspector's subjective opinion need not be taken at face value. Freeman Coal Mining Company v. Interior Board of Mine Operations Appeals, 504 F. 2d 741 (7th Cir. 1974).

The Applicant has the burden of proof in a proceeding involving an imminent danger order. Thus, the Applicant must show by a pronderance of the evidence that

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> 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."

an imminent danger did not exist. Lucas Coal Company, 1 IBMA 138 (1972). 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. Lucas Coal Company, supra, Carbon Fuel Company, 2 IBMA 42 (1973), Freeman Coal Mining Company, supra.

EVALUATION OF THE EVIDENCE AND FINDINGS OF FACT

Respondent's witness, a MSHA inspector, issued the contested withdrawal order on November 15, 1979, citing the following four areas of Applicant's mine:

(1) The No. 1 entry, from the 1st crosscut inby the portal to and including the 2nd crosscut for a distance of 165 feet.

(2) The No. 1 entry from the 8th crosscut to the face and including the connecting crosscuts, a distance of 200 feet.

(3) The No. 2 belt entry from the No. 8 crosscut to the face and including crosscuts, for a distance of 200 feet.

(4) The No. 3 intake entry from the portal to the face of the No. 3 entry and crosscuts for a distance of 1,360 feet.

To summarize the testimony of the MSHA inspector, generally, he observed loose, unsupported, cracked, drummy and separated roof in the cited areas, and, in the No. 1 entry from the 8th to the 9th crosscut, for a distance of 65 feet, he observed excessive widths measuring from 20 to 28 feet. The inspector had been in the mine the day before, on November 14, 1979, but did not notice any condition in the mine that would constitute an imminent danger.

Although subsequent modifications of the withdrawal order were made on November 27 and 29, 1979, the order was not terminated until December 10, 1979. Applicant did not conduct normal coal mining operations from November 15, 1979, to December 10, 1979. (TR. 425).

The immediate roof of the mine consisted of laminated shale of variable thicknesses. The ultimate roof of the mine was sandstone. (TR. 220-221). The mining sequence carried out by Respondent attempted to remove any of the immediate shale roof which might eventually fall.

Applicant's witnesses, including an independent expert witness who was a mining engineer and who first visited the mine on November 19, 1979, generally testified that some areas of the roof were loose, drummy or cracked, but that no imminent danger existed as to the condition of the roof due to the mining sequence which Applicant followed. The engineeer stated that after the continuous mining machine makes a cut (first approximately 8 feet along the left rib and then 8 feet along the right rib, each time backing out) the shale roof is allowed to fall or is cut down with the continuous miner. If it is necessary, safety posts are set and the roof is barred down. (TR. 217).

The mine inspector observed that workmen were scaling the top down when he made his inspection on November 15, 1979. (TR. 35). The mining engineer noticed that there was evidence of barring down throughout the mine. '(TR. 218). Thus, as part of the mining sequence, miners were following practices to remedy the condition of the roof before other mine personnel began working under the roof. (TR. 177).

Although the mining engineer who testified for the Applicant did not inspect the mine until November 19, 1979, I conclude that the condition of the roof had not improved since the date of the closure order on November 15, 1979. The mine was stiil closed due to the outstanding withdrawal order. Some roof work was going on in an effort to have the order terminated. However, the mining engineer and several employees of Applicant testified that because they did not know why the imminent danger order issued, or what constituted the imminent danger, they found it difficult to abate the withdrawal order. (TR. 241, 366, 367, 389, 419).

The engineer inspected the two areas that were observed by the MSHA inspector as being overwide. Both areas had been timbered to proper widths with an extra row of timbers between the outer row and the rib. These timbers had been installed for some time as concluded from the observation of rock dust which had accumulated on them and from the observation that they were providing adequate support. (TR. 208, 211, 212).

There was evidence that the crack located in the roof of entry No. 2, beyond the 8th crosscut, was of long duration due to the accumulation of mud and iron stains in the chink. (TR. 213-214). There was no evidence that the roof would fall before the condition could be abated in this area.

The entire No. 3 entry was included in the order, a distance of 1,360 feet. It is difficult to comprehend how there could' be no imminent danger in this area on November 14, 1979, and yet the next day, on November 15, 1979, the roof for the entire length of the entry was ready to fall. It is equally difficult to comprehend why a MSHA inspector and mining personnel of Applicant would walk through all three mine entries numerous times inspecting, and while the imminent danger order was still in effect, (TR. 142, 436), if the roof was "ready to cave in". (TR. 40). ". . . [E]very roof condition is not an imminent danger." Consolidation Coal Company v. Secretary of Labor, Mine Safety and Health Administration (MSHA), (Docket No. PENN 79-72, October 25, 1979) at 1692.

The mining engineer concluded that the roof consisted of competent sandstone. (TR. 264, 265). He testified that he found some pockets of shale which were drummy, loose or sagging slightly due to air slacking, but none which he considered to be an imminent danger because of the utilization of constant surveillance and the practice of barring down, (TR. 275, 313, 217, 218).

After an inspection on December 10, 1979, another MSHA inspector allowed the mine to reopen, but stated there would have to be a new roof control plan before the abatement was complete. (TR. 434).

All personnel intimately involved with the day to day operation of the mine agreed with the mining engineer that, although some isolated patches of shale may have been loose or drummy, no imminent danger existed in the mine on November 15, 1979. Likewise, attempts to support the shale were both futile and less safe than taking it down. These mine personnel included the manager, (TR. 411, 438), the mine superintendent, (TR. 364, 365), the swing shift foreman, (TR. 180, 182, 194), and the mine foreman. (TR. 334). The mine foreman also testified that after the closure order was issued more roof bolting took place than before, but he did not believe it added anything to the safety of the mine. (TR. 333). Apparently, the roof bolting was being done to assist in abatement of the order.

What is crucial in determining whether an imminent danger existed on November 15, 1979, is the time element. That is, whether the cited condition could be abated before the reasonable expectation of death or serious physical harm could occur. It may be that a different roof control plan would be more effective in controlling the potential risk of a roof fall in the mine, but that is not determinative in this imminent danger proceeding; time is.

The MSHA inspector who issued the order had been in the mine only once before November 14, 1979. His'testimony is not as persuasive as the operator's witnesses, who possessed a far greater familiarity and knowledge of the area and the day to day condition of the roof. The continuous vigilence and mining sequence practiced by the operator allowed Applicant to abate any dangerous roof condition before death or serious physical harm might reasonably be expected to occur.

CONCLUSIONS OF LAW

1. The Applicant and its Newlin Creek Mine are subject to the provisions of the Federal Mine Safety and Health Act of 1977.

2. The undersigned Administrative Law Judge has jurisdiction over the subject matter and parties to this proceeding.

3. The Applicant has sustained its burden of proof to a preponderance of the evidence that an imminent danger did not exist in its Newlin Creek Mine on November 15, 1979.

4. The withdrawal order should be vacated.

ORDER

Accordingly, Withdrawal Order No. 387143 is hereby VACATED.

Jon D. Boltz
Administrative Law Judge

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