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

EASTERN ASSOCIATED COAL CORP., APPLICANT	Application for Review
v.	Docket No. HOPE 76-289 IBMA 77-20
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Order of Withdrawal No. 1 RDL February 18, 1976 Keystone No. 1 Mine

DECISION

Appearances: Nancy Sproul Bifulco, Legal Assistant, Eastern Associated Coal Corp., Pittsburgh, Pennsylvania, for Applicant Edward H. Fitch IV, Esq., Office of the Solicitor, U.S. Department of Labor, for Respondent

Before: Judge Charles C. Moore, Jr.

On September 2, 1980, the Federal Mine Safety and Health Review Commission vacated the decision I had issued in the above case on January 27, 1977, (hereinafter "Eastern II") and remanded it to me for "reconsideration in light of, and entry of a new decision consistent with, Eastern Associated Coal Company, Docket No. HOPE 75-699, IBMA 76-98" (hereinafter "Eastern I") also issued September 2, 1980. That case, concerned two questions: (1) the reviewability of a section 103(f) order issued under the Federal Coal Mine Health and Safety Act of 1969, (FOOTNOTE 1) and; (2) the validity of that order and its modification. The Commission found that by virtue of the transfer provisions of the 1977 Act it had the authority to review section 103(f) orders and, in so doing, upheld the administrative law judge's decision affirming the order and its modification.

An accident occurred in Eastern I in which a shuttle car operator was injured as a result of being trapped between his shuttle car and the rib. During a faulty unloading procedure the cable hook, which holds the shuttle car in

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place, came loose allowing the car to move down the tracks and come in contact with the shuttle boom which pushed it off the tracks into the rib.

The Commission held that a section 103(f) order could not be issued for the sole purpose of preserving evidence. Section 103(e)(FOOTNOTE 2) specifically provided for the preservation of evidence whereas section 103(f) was designed to ensure miners' safety in the aftermath of an accident.

The Commission found sufficient safety reasons to justify issuance of a section 103(f) order in Eastern I. The inspector was unable to determine why the cable hook came loose and caused the accident, so that until such a determination was made the miners' safety remained in jeopardy. An undisturbed accident scene was thus requisite. The Commission agreed with the judge's conclusions that where there is a strong possibility that the accident might be repeated if operations were allowed to resume and if an accident investigation is necessary to determine the cause of the accident and the means by which to prevent a recurrence, a section 103(f) order is appropriate.

Based on these findings, the Commission remanded Eastern II to me for reconsideration. After thoroughly reviewing both cases, I find no reason to disturb my prior decision.

In Eastern II, an inspector issued a section 103(f) order after a minor methane explosion occurred while he was making a regularly scheduled inspection of the mine. It was established at the hearing that the events which caused a cutting machine operator and his helper to report an explosion were a profusion of sparks accompanied by a "poofing" noise. The cutting machine operator immediately returned to the face and performed a spot-check for methane which proved negative. The section foreman shut off power to the section and withdrew all personnel. The inspector was informed of the incident and issued a verbal 103(f) order to the operator which was later reduced to writing. The inspector tested for methane at the face and for ventilation. The methane reading 2 inches inside the cut was 3.1 percent. The ignition level for methane is 5 percent to 15 percent.

After interviewing the cutting machine operator and his helper, the inspector returned to the surface about 1 p.m. and contacted his sub-district office which informed him to return to the mine to collect a dust sample. Instead of returning directly to the mine, he waited for a state inspector to arrive and, as a result, did not collect that dust sample until sometime between 6 and 8:15 p.m. The federal inspector's decision to await the state

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inspector stemmed from professional courtesy in conducting accident investigations rather than a concern for safety. Additional support for this conclusion was provided by the fact that the inspector terminated the order immediately upon taking the dust samples so that he must have been convinced that the area in question was safe. I accordingly modified the termination time on the withdrawal order to read 1 p.m.

The inspector's air bottle test for methane later showed full compliance with the Act, however, the dust samples showed traces of coke.

If an ignition did occur and I found that it most probably had, it was caused by a pocket of methane, the presence of which can only be established by the tests which were conducted. Thus, preserving the scene of the accident was not crucial to a determination of the accident's cause, as it was in Eastern I. Similarly, and as the inspector's conduct bears out, the miners' safety was no more in jeopardy at 1 p.m. than it was at 8:15 p.m., contrary to Eastern I. There the inspector did not know the cause of the accident and feared a recurrence. In Eastern II, there were no injuries, the cause was rather apparent and the tests performed showed, so far as they are able, little chance of a recurrence.

In light of these factors and after reconsidering my decision I find that the modification of the withdrawal order was appropriate and I incorporate that decision in toto herein.

Charles C. Moore, Jr.  
Administrative Law Judge

~FOOTNOTE\_ONE

1 Section 103(f) of the 1969 Act [30 U.S.C. 801 et seq. (1976) (amended 1977)] provides:

"In the event of any accident occurring in a coal mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in the mine or to recover the mine or to return affected areas of the mine to normal." 30 U.S.C. 813(f).

~FOOTNOTE\_TWO

2 "In the event of any accident occurring in a coal mine, the operator shall notify the Secretary thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof. In the event of any accident occurring in a coal mine where rescue and recovery work is necessary, the Secretary or an authorized representative of the Secretary shall take whatever action he deems appropriate to protect the life of any person,

and he may, if he deems it appropriate, supervise and direct the rescue and recovery activity in such mine." 30 U.S.C. 813(e).

January 27, 1977

MINING ENFORCEMENT AND SAFETY  
ADMINISTRATION (MESA),  
Respondent

Review Proceeding  
Docket No. HOPE 76-289

v.

Order of Withdrawal

EASTERN ASSOCIATED COAL CO.,  
Petitioner

IRDL 2-18-76

DECISION

Appearances: Edward H. Fitch, IV, Esq., Office of the Solicitor, Department of the Interior, for Respondent; Charles Q. Gage, Esq., Eastern Associated Coal Company, and Thomas E. Boettger, Esq., Eastern Associated Coal Company, for Petitioner.

Before: Administrative Law Judge Moore

The above-captioned review proceeding came on for hearing in Charleston, West Virginia, in September of 1976. The United Mine Workers of America had previously filed an answer to the petition for review, but did not appear at the hearing and has not filed any post hearing brief. There has been no motion, request, or even suggestion, however, that the union be dismissed from the proceedings and I accordingly decline to do so. Nor has there been any challenge to the right of this office to review an Order issued under section 103(f) of the Act, and inasmuch as the Board of Mine Operations Appeals has ruled that under certain circumstances Orders issued under that section of the Act are reviewable, I deem any challenge as to whether or not those circumstances have been satisfied, as waived.

The order of withdrawal that is the subject of this proceeding was issued on February 18, 1976, at Eastern's Keystone No. 1 Mine located in McDowell County, West Virginia. Ronald D. Lilly, an inspector for the Mining Enforcement and Safety Administration (MESA), a duly authorized representative of the Secretary, issued the withdrawal order under section 103(f) of the Coal Mine Health and Safety Act of 1969 (the Act). The inspector had arrived at the mine between 7:30 and 8:30 a.m. to conduct a regular scheduled

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inspection. His scheduled activities were centered on the main line track haulageway.

At approximately 9:15 a.m., on February 18, 1976, the incident that instigated the subject order occurred. A cutting machine operator and his helper working in the 7 left one panel heard a "woof" or a "poof" as they made a lateral cut along the bottom of the face as part of the conventional mining process. The operator, Mr. Belcher, and his helper, Mr. Graham, reported that they saw a ball of fire or at least a profusion of sparks. The helper immediately fled returning only when Mr. Belcher's spot check for methane proved negative.

The section foreman, Mr. Rotenberry, was informed of the incident. He shut off the power in the section, withdrew the personnel and contacted the assistant and General Mine Foreman, Mr. Pickett. The assistant mine foreman, Mr. Norris, notified Inspector Lilly, of the possible ignition at approximately 10:45 a.m. and arranged for his transportation to the scene. After retrieving his bag from outside the mine, the MESA inspector proceeded to the 7 left one panel and verbally issued the 103(f) order to Mr. Norris and the ventilation foreman accompanying him, Mr. Phelps. The inspector reached the scene at about 11:05 a.m.

Shortly after the incident occurred, and prior to Inspector Lilly's arrival, Mr. Pickett, the general mine foreman, arrived at the panel. He made three safety checks which showed an absence of methane, and a velocity of 5,000 cubic feet of air across the face. The machine operator and his helper were interviewed by Pickett. He examined the cutting bar and found no evidence of charring. General compliance with the Act was noted by Mr. Pickett. Work was resumed and the power returned after his inspection.

Upon arrival at 11:05 a.m., Inspector Lilly began to investigate the incident. The MESA inspector proceeded to test for methane at the face and for ventilation. An air bottle was "broken" to provide for laboratory tests, the results of which showed full compliance with the Act.

The cutting machine operator and his helper were interviewed. The methane detector on the machine was found operable. A methane reading was taken 2 inches inside the cut made by the machine. The reading was 3.1 percent methane. The ignition level for methane is 5 percent to 15 percent.

This initial investigation was completed shortly after 12 noon, the order was reduced to writting, the panel was deenergized and the men withdrawn.

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Inspector Lilly contacted the subdistrict office after he reached the surface about 1 p.m. His instructions were to return to the mine to collect a dust sample. He was notified that an accident investigator, Inspector Farley, was on his way. In conjunction with a state inspector's decision to await Inspector Farley's arrival and to attend the interrogation of the witnesses, Inspector Lilly chose to delay his reentry into the mine until Farley arrived. As a crowd gathered around the mine office at the shift change, approximately 4 p.m., the federal inspector proceeded to the mouth of the panel accompanied by several company, union, and MESA personnel to await Farley's arrival.

This group arrived at the mouth of the panel at approximately 4:15 p.m. Farley had arrived in the meantime, and he instructed Lilly to conduct the underground investigation while he, Farley, conducted the interrogations. The state inspector again refused to enter the mine until the interrogations by Farley were concluded. Lilly honored this position and declined to enter the panel until the state inspector arrived.

This delay ended at 6 p.m. The group reentered the panel, Lilly collected two dust samples, one from the cutting bar and one along the cut. Later analysis determined that these samples contained a "trace" of coke. The air and ventilation were again checked, the investigation ended and the order was terminated at 8:15 p.m.

Section 103(f) of the Act states:

In the event of any accident occurring in a coal mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate state representatives, when feasible, of any plan to recover any person in the mine or to recover the mine or to return the affected areas of the mine to normal.

Under section 3(k) of the Act, an ignition is an accident and there is no question that the Inspector was in the mine at the time of the incident which gave rise to the issuance of the order. If, therefore, an ignition occurred, the Inspector clearly had the right to issue "such orders as he deems appropriate to insure the safety of any person in the coal mine \* \* \*".

The evidence as to whether an ignition actually occurred is not conclusive. Eastern speculates that the cutter bar hit a sulfur ball, actually iron pyrites, and that what the two coal miners saw was a shower of sparks created by the cutter which is similar to a chain

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saw, cutting through the sulfur ball. There was no testimony however that at a later time after further mining, a sulfur ball containing a cut had been discovered. On the other hand, the "poof" or "woof" described by the two coal miners is consistent with a low energy methane explosion. I take judicial notice /\*/ of the fact that when methane concentrations are near the extreme ends of the explosion range i.e., near 5 percent or near 15 percent a low energy explosion results from an ignition. Also, traces of coke found in the dust samples are consistent with a methane ignition. The fact that the "poof" was followed by smoke (Tr. 32) also indicates an ignition. I therefore find that it is more probable than not that a methane ignition did occur, but even if it did not, the report of a possible methane ignition and the fact that whatever did happen caused the two coal miners to be afraid, and think an ignition had occurred justified the issuance of the order.

Having found that the Inspector was justified in issuing the order in question however, it does not follow that it was proper to continue the effect of the order until 8:15 p.m. In so continuing the effect of the order the Inspector was following and relying on instructions issued by MESA which state that one of the purposes of an order issued under section 103(f) of the Act is to preserve the evidence of the "accident" (Tr. 99). The purpose of the order which the Inspector is to issue under the section in question, however, by its clear language, is to insure the safety of any person in the mine, not to preserve the evidence of the event that gave rise to the order. The section speaks in terms of safety and recovery of the person from a mine and returning the affected area of the mine to normal, but it does not, in my opinion, contemplate an order or the continuation of an order in such a manner as to make the investigation by MESA convenient. The instructions which the inspector relied on are set forth in joint exhibit 1 which consists of a memorandum dated August 7, 1974, from the assistant administrator, Coal Mine Health and Safety to the various district managers and the attached guidelines for issuance of orders under section 103 of the Act. I would like to call attention to the following provision of those guidelines:

The issuance of a Section 103(f) order is to be distinguished from an order issued under Section 104 of the Act. These two orders have different statutory

bases and criteria for issuance, and should be considered independently. It should be noted that much greater control can be exercised through a Section 103(e) or (f) order than can be obtained through a Section 104(a) "imminent danger" order. Section 104(a) contains an exception of the withdrawal of persons described in Section 104(d). There are no exceptions contained in Section 103(e) or (f) and the authorized representative may take whatever action he deems appropriate to "protect the life of any person", to "insure the safety of any persons" in the coal mine, and to "prevent the destruction of any evidence which would assist in determining the cause or causes of the accident."

In my opinion the quoted portion of the guidelines is designed to delude the inspector into believing that the statute provides for the issuance of an order for three purposes:

1. To protect the life of any person.
2. To insure the safety of any persons; and
3. To prevent the destruction of any evidence which would assist in determining the cause or causes of the accident.

The last quoted words, however, do not come from section 103 of the Act but are similar to words contained in section 103(e). When quoted in context they state:

The operator shall notify the Secretary thereof [of an accident] and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof.

In my opinion the guidelines clearly represent that statutory language exists when in fact it does not. I think that the instructions that the inspector relied on were erroneous.

He should have been instructed to lift the order when he was satisfied that the order was no longer necessary "to insure the safety of any person in the coal mine". It is of course difficult to determine long after an event what the Inspector's state of mind was at any particular time during the occurrence, but it is obvious that after he re-entered the mine and took the two dust samples and terminated the order at 8:15 p.m., he was satisfied that there was no continued danger to the miners. The fact that the dust samples later were tested and showed traces of coke could not have entered into his decision to terminate the order. Therefore his second entry into the panel for the purpose of taking dust samples could not reasonably be associated with his fear for the safety of the miners.

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If the Inspector feared for the safety of the miners at 11 a.m. when he verbally closed the section, and did not fear for their lives at 8:15 p.m. when he terminated the order, some event must have occurred during that span of time to alter his opinion. If his thinking was changed by listening to interviews on the surface, the record contains no evidence of it. I think it is reasonable to conclude that after the Inspector, on his first visit to the section, had examined the equipment including methane monitors, made methane tests and taken air samples and discussed these matters with his superiors, that he knew at that time as much, insofar as the safety of the miners is concerned, as he knew at 8:15 p.m. when he terminated the order. Waiting for federal Inspector Farley and the state Inspector was insufficient reason to continue the order in the absence of some fear for the safety of the miners. The fact that he had no such fear is demonstrated by the fact that after a delay of some 6-8 hours, and without obtaining any additional knowledge, he terminated the order after taking two dust samples which were not analyzed until the following day. He thus learned nothing new on his second trip to the section where the incident occurred.

I therefore conclude that the order in question was properly issued, but that it should have been terminated when the Inspector reached the surface and informed his superiors of the results of his investigation. I think it reasonable for him to consult with his superiors prior to terminating the order because after hearing his report they might know of some possible danger that he was unaware of that should be checked. That did not occur however and he should have been instructed to terminate the order. If he had proceeded immediately to the section to take dust samples before terminating the order, I would have considered that reasonable. It was not reasonable, however, to delay the matter as was done here. I want to emphasize that I am criticizing the instructions (guidelines), not the inspector.

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ORDER

IT IS THEREFORE ORDERED, that the Order of Withdrawal be modified to show termination at 1 p.m.

Charles C. Moore, Jr.  
Administrative Law Judge

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As in the case of official notice, the parties may be heard as to the propriety of taking judicial notice. See Rule 261(e) of Federal Rules of Evidence. Any party may therefore submit, within 10 days of the date of this decision, any material in opposition to the noticed fact.