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

CONSOLIDATION COAL COMPANY, CONTESTANT	Contest of Order
v.	Docket No. LAKE 82-69-R Order No. 824092 3/11/82
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Oak Park No. 7 Mine

DECISION AND ORDER

On October 28, 1982, this matter came on for oral argument on the operator's motion for summary decision and the Secretary's opposition thereto.

The motion was supported by a deposition of the charging inspector in which he testified he did not believe the conditions cited in his 107(a)-104(a) Order-Citation constituted either (1) an imminent danger or (2) a violation of 30 C.F.R. 75.308 of the mandatory safety standards. (FOOTNOTE- 1)

The Secretary opposed the challenge to the validity of the order on the ground that a 1.5% accumulation of methane constitutes per se an imminent danger. Pittsburgh Coal Company, 2 IBMA 277 (1973); Eastern Associated Coal Corp., 3 IBMA 60, 62 (1974). These holdings were, in

turn, predicated on the legislative history of the standard (Section 303(h)(2) of the Coal Act) which states:

> This provision makes it clear that the operator has an obligation to take positive steps when there is a methane buildup. Production must cease and all efforts must turn to reducing the danger where methane reaches the 1-percent level. If the air contains 1.5 percent of methane, withdrawal of the miners by the operator or inspector, if he is present, is required and electric power must be shut off. Legislative History, Coal Mine Health and Safety Act, Committee on Education and Labor, House of Representatives, 91st Cong., 2d Sess. 58-59 (1970).

I find that as a matter of fact and law a 1.5% concentration of methane is an imminent danger.

The operator also urged that because the inspector found that all miners, except those required to abate the condition, (FOOTNOTE- 2) had been voluntarily withdrawn, albeit only some 400 feet to the power center, issuance of a withdrawal order was unnecessary and improper. (FOOTNOTE- 3) As the Secretary points out, it is well settled that the withdrawal of miners by the operator (so-called voluntary withdrawal) does not abate an imminent danger nor does it preclude issuance of an imminent danger withdrawal order. The purpose of such an order is to insure the miners will not be required to return until the condition of imminent danger has been corrected. Itmann Coal Company v. Secretary, 1 FMSHRC 1472, 1577 (1979); Eastern Associated Coal Corp., 2 IBMA 128, 136 (1973), affd. sub. nom. Eastern Associated Coal Corp. v. Interior Board of Mine Operations Appeals, 491 F.2d 277 (4th Cir. 1974); Eastern Associated Coal Corp., 3 IBMA 60, 62 (1974). The same is true of the operator's

claim that it was making a good faith effort to abate the condition. UMWA v. Clinchfield Coal Company, 1 IBMA 33, 41 (1971); Valley Camp Coal Company, 1 IBMA 243, 248 (1972).

This brings us to the challenge to the 104(a) violation charged. The authorities are clear that a 1.5% accumulation of methane standing alone does not constitute a violation of 75.308. (FOOTNOTE-4) Eastern Associated Coal Corp., 1 IBMA 233, 237 (1972); Mid-Continent Coal and Coke Company, 1 IBMA 250, 253 (1972).

The inspector found mining operations had ceased, the area deenergized and an effort made to remedy the situation. Despite these efforts the concentration was still at 1.7% when discovered by the inspector. It took another hour and a half to bring the condition within the acceptable limit of 1%. This indicates it may have worsened before it was controlled. Counsel for the Secretary expressed some reservations about the level and effectiveness of the effort to abate and the diligence with which precautions were being pursued since the section had not been dangered off. (FOOTNOTE-5) Based on representations made by the inspector, however, counsel for the Secretary was compelled to concede he had insufficient evidence to prove the operator had failed to take the necessary action to abate as specified in 75.308. Compare, Mid-Continent Coal and Coke Company, supra. For these reasons, I find the motion for summary decision as to the fact of violation must be granted.

I conclude, therefore, there is no triable issue of fact; that as a matter of law the Secretary is entitled to a summary decision on the validity of the imminent danger withdrawal order; and that the operator is entitled to a summary decision on the violation charged.

Accordingly, it is ORDERED that the validity of the order challenged is AFFIRMED and the contest DISMISSED. It is FURTHER ORDER that the violation charged be, and hereby is, VACATED and the contest GRANTED.

Joseph B. Kennedy
Administrative Law Judge

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~FOOTNOTE_ONE

1 The inspector testified he issued the order and citation because he received the following written instructions from his superior on March 10, 1982, the day before the order-citation issued:

Dean:

In event of methane in excess of 1.5% or more you must issue 107(a) imminent danger, whether they find it or you.

You must also use the section number 75.308. State in body of notice the circumstances: In other words management was aware of condition and took appropriate action by withdrawing miners and pulling the power.

There will be no penalty assessed if operator does what he is supposed to do.

~FOOTNOTE_TWO

2 The methane buildup was the result of cutting into a methane feeder in the corner of the A Entry of the 2D Off 3 North Section. This was known as a "hot" section. While the area was apparently well rock dusted and the section deenergized, the condition would have to be classed as highly explosive inasmuch as the buildup continued for some time after the withdrawal order issued. The record shows the order issued at 1140 but was not abated until 1310, an hour and a half later. The record does not show when the feeder was first discovered nor why, after it was discovered, the section was not dangered off. A concentration of 5% is, of course, extremely explosive. It is unfortunate that the inspector was so unconcerned that he failed to remain on the section to monitor the situation.

~FOOTNOTE_THREE

3 For this proposition, the operator relied on a decision by Judge Boltz. Secretary v. C.F. & I. Steel Corporation, 3 FMSHRC 99 (1981). Judge Boltz later recognized his decision rested on an erroneous reading of the precedents. C.F. & I Steel Corporation v. Secretary, 3 FMSHRC 2819 (1981).

~FOOTNOTE_FOUR

4 I believe a more precise reading of the law would show that while a 1% concentration is not a violation an operator's failure to control and dissipate the concentration before it reaches 1.5% warrants a finding of violation. A close reading of all of the provisions relating to the control of methane discloses that whenever a concentration of .25% to .5% is observed safe mining practice dictates immediate action be taken to monitor the situation closely and to adjust the ventilation system so as to keep the concentration from ever reaching 1.5%.

~FOOTNOTE_FIVE

5 Counsel for the Secretary and the trial judge were shocked to learn that the inspector, who had eleven years of experience, did not believe any danger existed as he did not know that a methane accumulation of 1.5% is per se an imminent danger. Prior to this case, the inspector and apparently other inspectors in the Vincennes District, believed that as long as the miners were withdrawn from the face and the section deenergized there was no danger and no violation. It is understood that as a result of these disclosures the Assistant Secretary for Mine Health and Safety will take appropriate action to correct this deficiency in the inspectors' training.