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

JIM WALTER RESOURCES, INC., CONTESTANT	CONTEST PROCEEDINGS
v.	Docket No. SE 86-141-R Order No. 2811695; 9/22/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. SE 86-142-R Order No. 2811621; 6/23/86 No. 5 Mine

DECISION

Appearances: R. Stanley Morrow, Esq., Birmingham, Alabama, for Contestant;
William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Respondent.

Before: Judge Melick

These consolidated cases are before me upon the applications for review filed by Jim Walter Resources Inc., (Jim Walter) pursuant to section 107(e)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et. seq., the "Act," to challenge the issuance by the Secretary of Labor of two "imminent danger" withdrawal orders under section 107(a) of the Act.(FOOTNOTE 1) At hearing the parties elected to proceed on stipulations of fact. The issue before me is whether an "imminent danger" existed as alleged and within the framework of the stipulated evidence.

The order in this case, No. 2811695, issued September 22, 1986, reads as follows:

> Methane in excess of 1.5 per centum was detected not less than 12 inches from the roof face and ribs in the face of the No. 4 entry in the 005 section. AG 70 methane detector with a probe was used; however a bottle sample could not be taken due to the face being cut beyond the last row of roof bolts and the area was not supported with roof bolts.

The agreed stipulations of fact are as follows:

> In the face area in the No. 4 entry, inby the last open crosscut, 3 measurements of methane were taken. Those 3 measurements in the face area were 1.7% methane, 1.8% methane and 2.0% methane, and that the miners had not been withdrawn from this area . . . . the readings were taken with a hand-held methanometer; they were not bottle samples." (Tr. 71).

It was subsequently also stipulated that "the air was tested in a working place."

Section 3(j) of the Act defines "imminent danger" 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 Secretary argues in his post-hearing brief that the presence of 1.5 volume per centum or more of methane in the air at any working place constitutes such an "imminent danger" per se. According to the Secretary an "imminent danger" is thereby established and warrants the issuance of a section 107(a) withdrawal order under the authority of section 303(h)(2) of the Act. (FOOTNOTE 2)

The Secretary argues that the former Department of Interior Board of Mine Operations Appeals (the Board) found in Pittsburgh Coal Co., 2 IBMA 277 (1973), that the issuance of an "imminent danger" withdrawal order under section 104(a) of the Federal Coal Mine Health and Safety Act of 1969 (the virtually identical predecessor to section 107(a) of the Act) was mandated by the presence of the factors set forth in section 303(h)(2). In the Pittsburgh Coal Co. decision the Board adopted the analysis in the decision of the judge below concerning the relationship between an "imminent danger" withdrawal order and section 303(h)(2) (of the 1969 Act). The judge's analysis was as follows:

> Under section 104(a) an inspector "shall issue" a withdrawal order to clear designated mine areas if upon inspection a condition of imminent danger is found to exist. In similar language the latter part of section 303(h)(2) provides for a withdrawal of miners, though it does not express itself in terms of imminent danger. By requiring a withdrawal of miners upon the detection of a 1.5 volume per centum the Act seems to be recognizing a condition of imminent danger.
> As defined in section 3(j) of the Act, "imminent danger includes a condition which could reasonably be expected to cause death or serious physical harm before such condition * * * can be abated." If Congress has determined by statute that a 1.5 volume per centum reading is sufficient to require the drastic action of withdrawal, then it must be because the situation was viewed as one of imminent danger. Congress in 303(h)(2) has intentionally left no room for doubt or discretion in what it viewed as an imminent danger. Considering the nature of the gas, the perilous conditions created by it, and insignificant quantum of energy necessary to cause an ignition - there is a sufficient basis to characterize a 1.5 percent concentration as one of imminent danger.
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> The seriousness with which congress viewed the methane problem can be seen by the 303(h)(1) requirement of an initial preshift examination for the gas to be repeated at twenty minute intervals thereafter. The deadly history of the gas in the last thirty years bears ample witness to the intent of Congress to reduce this major cause of death. [footnote omitted] It can reasonably be inferred that the withdrawal requirement of 303(h)(2) presumes the existence of a condition of imminent danger. This being the case, the issuance of an 104(a) order would appear to be the appropriate

> method of notifying an operator of what is required of him under the Act, where he has not upon his own initiative withdrawn the miners from the area affected by the methane.

In addition the Board observed in its decision that:

> "[I]n the section-by-section analysis of section 204(h)(2), subsequently enacted as section 303(h)(2) of the Federal Coal Mine Health and Safety Act of 1969, the report of the Senate Committee [footnote omitted] states as follows:
>
> * * * If the air contains 1.5 percent of methane, withdrawal of the miners by the operator or inspector, if he is present, is required * * * Long experience has shown that the methane, when present is dangerous. The explosion range is between 5 and 15 percent. Once it reaches 1.5 percent it can accumulate rapidly. Thus, action must be taken promptly before it reaches 1.5. percent. (Emphasis added)
>
> In our view this expression of Congressional intent is sufficient to override the arguments advanced by the appellant and to sustain the Judge's decision on this point."

While this Commission has stated in Secretary v. Pittsburgh and Midway Coal Mining Company, 2 FMSHRC 787 (1980) that it would examine anew the question of what conditions and practices constitute an "imminent danger" the legal analysis of the Board concerning the issuance of "imminent danger" withdrawal orders under the conditions set forth in section 303(h)(2) is persuasive and I accordingly apply that analysis to this case.

It is not disputed in this case that there was at least 1.5 volume per centum of methane in the air in the face area in the No. 4 entry inby the last open crosscut and that the miners therein had not been withdrawn. Within the above framework of law an "imminent danger" therefore existed and the withdrawal order was properly issued in this case pursuant to sections 303(h)(2) and 107(a) of the Act. See also Consolidation Coal Company v. Secretary of Labor, 4 FMSHRC 1960 (Judge Kennedy, 1982).

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The order in this case, No. 2811621, also issued under section 107(a) of the Act reads as follows:

> The methane content when tested not less than 12 inches from the roof face or ribs was in excess of 1.5 volume per centum in the No. 1 entry 1.5%, No. 2 entry 1.3%, No. 3 entry 1.5% and No. 4 entry 1.8% on the No. 3 section. Air sample was collected.

The order was modified on June 24, 1986, the date following its issuance, to identify the area affected as the "No. 3 entry inby spad No. 4386 crosscut right and face of No. 4 entry inby No. 4386 spad."

The parties again stipulated the facts at issue and those stipulations are as follows:

> Methane concentrations in the No. 1 entry was 1.5%; in the No. 2 entry 1.3%; in the No. 3 entry 1.5%; in the No. 4 entry 1.8% . . . . the section was not producing coal at the time of the inspection; that power was energized on the battery charger, . . . that the crew of miners was inby the last open crosscut working on a rock fall which occurred in the face of No. 4 entry. No. 5 mine is subject to the 5Äday spot inspections pursuant to section 103(i) of the Act and Mr. Gaither was inspecting the mine subject to spot inspection." (Tr. 60, 61, 67).

It was later further stipulated that the "air was tested in . . . working place[s]."

Within the framework of these stipulations and the applicable law previously noted it is clear that an "imminent danger" existed in those entries cited in Order No. 2811621 on June 23, 1986. Accordingly this order was also properly issued under section 107(a) of the Act.

Order No. 2811621 was again modified on September 22, 1986, and that modification (No. 2811621Ä2) reads as follows:

> Methane in excess of 1.5 per centum was detected in the left and right split of air current returning off the No. 3 section beginning at spad No. 2856 on left side in No. 1 entry and spad No. 3855 on right side in No. 4 entry and extending inby to the Nos. 1, 2, 3, and 4 faces in No. 3 section. Bottle samples were taken to substantiate the findings. Order No. 2811621 dated 6Ä26Ä86 is hereby modified to show area or equipment to be closed. Nos. 1, 2, 3, and 4 entries beginning at spad No. 2856 in No. 1 entry across to spad No. 3855 in No. 4 entry and extending inby to the Nos. 1, 2, 3, and 4, faces in No. 3 section.

The parties stipulated the essential facts as follows:

> [A]t Spad Number 3713, bottle sample revealed 1.65 percent methane. At Spad Number 3897, bottle sample revealed 1.67 percent methane. At the left regulator, Number 3 section, bottle sample revealed 1.7 percent methane. At Spad Number 4238, bottle sample revealed 1.76 percent methane. Power was on power center located at intake air. Power center was energized running a drill for degasification under an MSHA approved supplement to the ventilation plan, which was approved on 8Ä18Ä86. At the time methane content was less than 1.0 percent in the area where the drill was placed, and the aforementioned areas where all within the areas closed by the modification dated 9Ä22Ä86 (Tr. 69).

It was subsequently further stipulated that the air was tested "in a split of air returning from a working section."

The Secretary here argues that section 303(i)(2) of the Act requires the issuance of an "imminent danger" withdrawal order when the factors cited therein are found to exist, just as section 303(h)(2) has been found to require the issuance of such an order.

Section 303(i)(2) provides as follows:

> If, when tested, a split of air returning from any working section contains 1.5 volume per centum or more of methane, all persons, except those persons referred to in section 104(d) of this Act, shall be withdrawn from the area of the mine endangered thereby to a safe area and all electric power shall be cut off from the endangered area of the mine, until the air in such split shall contain less than 1.0 volume per centum of methane.

I agree with the Secretary. Section 303(i)(2) sets forth criteria under which miners are to be withdrawn under conditions of "imminent danger" equivalent to those set forth in section 303(h)(2). The rationale of the Pittsburgh Coal Co. case in issuing "imminent danger" withdrawal orders under the authority of section 303(h)(2) is accordingly applicable here as well. Thus when the conditions set forth in section 303(i)(2) are found to exist an "imminent danger" also exists and a withdrawal order pursuant to section 107(a) may properly be issued.

Accordingly order of withdrawal No. 2811621 and its modification dated September 22, 1986, were both properly issued under section 107(a) of the Act and are hereby affirmed.

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ORDER

Orders of withdrawal No. 2811698 and No. 2811621 (and the modification thereto dated September 22, 1986) are hereby affirmed. The contests of those orders are accordingly denied.

Gary Melick
Administrative Law Judge

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~FOOTNOTE_ONE

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

If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the 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.

~FOOTNOTE_TWO

2 Under section 303(h)(2) of the Act when the air at any working place contains 1.5 volume per centum or more of methane "all persons, except those referred to in section 104(d) of [the] Act, shall be withdrawn from the area of the mine endangered thereby to a safe area, and all electric power shall be cut off from the endangered area of the mine, until the air in such working place shall contain less than 1.0 volume per centum of methane."