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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

CYPRUS EMPIRE CORPORATION, CONTESTANT	CONTEST PROCEEDINGS
	Docket No. WEST 88-250-R
v.	Order No. 3225480; 5/24/88
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. WEST 88-251-R Citation No. 3225501; 5/24/88 Eagle No. 5 Mine Mine ID 05-01370
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEST 88-331 A.C. No. 05-01370-03578
v.	Eagle No. 5 Mine
CYPRUS EMPIRE CORPORATION, RESPONDENT	

DECISION

Appearances: R. Henry Moore, Esq., Buchanan Ingersoll, P.C., Pittsburgh, Pennsylvania, for Contestant/Respondent; Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent/Petitioner.

Before: Judge Morris

These consolidated cases are before me under Section 105(d) 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 an order and a citation charging Cyprus Empire Corporation ("Empire"), with a violation of the regulatory standard published at 30 C.F.R. 75.202(a).(FOOTNOTE 1)

After notice to the parties a hearing on the merits was held on November 21, 1988, in Denver, Colorado. The parties filed post-trial briefs.

Summary of the Cases

Order No. 3225480, contested in WEST 88-250-R, states as follows:

> Loose, broken roof was present in the tailgate entry of the 16 East longwall working section. The loose, broken roof (coal roof) was 6 feet in length and 6 feet 10 inches in width. The affected area was between two wooden cribs installed within 3 feet of the tailgate face shield (No. 126). A violation of 75.202(b).(FOOTNOTE 2) The operator had already dangered off the tailgate entry at the longwall face.

Citation No. 3225501, contested in WEST 88-251, states as follows:

> Loose, broken roof was present in the tailgate entry of the 16 East longwall section. The coal roof between two previously erected wooden cribs was broken and some roof had fallen to the mine floor. Two previously installed resin grouted rods with bearing plates were protruding downward about 16 inches. The roof coal had fallen from around the rods and the bearing plates. The affected area was 6 feet in length and 6 feet 10 inches in width.

This condition was one of the factors that contributed to the issuance of Imminent Danger Order No. 3225480 dated 05-24-88; therefore, no abatement time was set.(FOOTNOTE 3)

Stipulation

The parties have stipulated as follows:

One: the Eagle No. 5 Mine is owned and operated by Cyprus Empire Corporation.

Two: the Administrative Law Judge has jurisdiction over these proceedings; further, Cyprus Empire Corporation and the Eagle No. 5 Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

Three: the annual production of the Eagle No. 5 Mine is approximately 1.7 million tons. The operator is properly described as a large operator.

Four: the authenticity of the exhibits offered in hearing is stipulated, but no stipulation is made as to the facts asserted in such exhibits.

Five: the subject order and citations, modifications thereto and terminations were properly served by a duly authorized representative of the Secretary of Labor upon agents of Cyprus Empire Corporation on the date or dates stated therein, and may be admitted into evidence for the purposes of establishing their issuance and not the truthfulness or relevancy of any statement asserted therein.

Six: the history of violations in the 24 months preceding the subject order and citation was 74 violations in 320 inspector days. The parties have agreed that this constitutes a good history.

Seven: the imposition of a penalty by the Administrative Law Judge will not affect Cyprus Empire Corporation's ability to continue in business. Cyprus Empire does not stipulate to the appropriateness of the imposition of any penalty.

Eight: the longwall retreated 16 and one half feet between the time the area was dangered off on May 20th and May 24th, the date the inspector issued his order.

Nine: Various dates are involved in these cases. The pertinent week days are as follows:

May 20, a Friday
May 21, a Saturday
May 22, a Sunday
May 23, a Monday
May 24, a Tuesday

Summary of the Evidence

This litigation arose when Phillip R. Gibson, an MSHA inspector experienced in mining, inspected Empire's Eagle No. 5 coal mine. At the tailgate end of the 16 East longwall section he observed a yellow ribbon in place as a danger sign. As he closely observed the nearby roof he saw the condition he later described in the order and citation.

He saw the roof was broken and unstable. Coal had fallen from it around two previously installed resin-grouted roof bolts. The bearing plates were about 16" below the roof line.

There were two wooden cribs along the longwall face. The space between the two wooden cribs measured 6' x 6' 10" . The cribs had been placed about 3' from the last face shield (Shield No. 126) (Tr. 30, 31).

The travelway along the face of the 16 East longwall would exit into this exposed area (Tr. 30-32; Joint Ex. 1).

Even though the operator had placed a danger tape across the walkway, the inspector nevertheless felt the condition involved imminent danger and a violation of the regulation.

The roof appeared to be so unstable that it could fall at any time. If it fell it could cause serious physical harm, or even death (Tr. 30-32; Ex. G-9).

The area cited by the inspector is an area where miners would normally work or travel. But no miner was observed entering the dangered off area (Tr. 33).

The inspector went to the surface, called his superior and discussed what action should be taken. They concurred that the best approach would be to allow mining to continue. He then modified the citation so as to permit the mining cycle to resume. The mining progressed beyond the loose broken roof to where wooden cribs contained the roof (Ex. G-2, G-3).

Empire's witnesses Pobirk, Moss and Cario testified for the operator.

ROBERT POBIRK, in charge of the shift, is experienced in mining and longwall equipment (Tr. 80-87).

On May 20th the foreman learned the mine roof had deteriorated. Upon observing the condition he was not worried about a roof fall; rather, he was concerned about heaving in the area. He considered his options and added two cribs, a roof jack and two timbers. However, he did not support the 6' x 6' 10" area in the roof because it was heaving and rolling. He felt it was too dangerous to support the 6' x 6' 10" area. He would only support that area "as a last resort" (Tr. 88, 99).

Pobirk also instructed that the area be dangered off between the walkway and the bad top. In addition, the fire boss put danger tape considerably outby the hazard.

The bad top extended on the tailgate side and it was within eight to ten feet of the shield.

On the 24th (Tuesday) the roof and 6' x 6' 10" area was not in immediate danger of collapsing. On the 25th (Wednesday) the supplemental supports were adequate.

CHARLES J. MOSS, section foreman and a person experienced in mining, was responsible for installing the cribbing.

On May 20th Moss observed the cracks and squeezing and also saw that extra supports were necessary. He did not support the 6' x 6' 10" area because it would expose a miner to the hazardous condition of the roof. Moss put up the yellow ribbon from rail to rail on the walkway.

In the longwall section over Monday (May 23) and Tuesday (May 24) the roof got worse but Moss didn't recall any roof falling down. On Tuesday night Moss scaled down the area.

In Moss' view the best way to handle the 6' x 6' 10" area was to mine past it. This was done.

SAMUEL L. CARIO, Empire's longwall coordinator, inspected the longwall on the 20th and concurred in the views of Pobirk and Moss. Further, the operator's roof supports in this area exceeded the requirements of its roof control plan (Tr. 119-123).

Discussion

These cases involve longwall mining issues with a focus on the 107(a) withdrawal order and the roof control regulations. Specifically, the issues concern whether the withdrawal order was appropriate; further, was the order based on a condition of imminent danger and, finally, did the Secretary establish a violation of 30 C.F.R. 75.202(a).

The withdrawal order in contest here was issued by virtue of Section 107(a), 30 U.S.C. 817(a), which 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.

The term "imminent danger" is found in the Federal Coal Mine Health and Safety Act of 1969 and amendments to the 1977 Act. The term means:

> (T)he 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. 30 U.S.C. 802(j).

Historically, the first tests for determining whether an imminent danger exists were set forth in Freeman Coal Mining Corp., 2 IBMA 197, 212 (1973), and Eastern Associated Coal Corp., 2 IBMA 128, 80 I.D. 400 (1973), aff'd, Eastern Associated Coal Corp. v. Interior Board of Mine Operations Appeals et al, 491 F.2d 277 (4th Cir. 1974). In Eastern the Board of Mine Operations Appeals, formerly a division of the Interior Department's Office of Hearings and Appeals, herein "BMOA", 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 if normal mining operations were permitted to proceed in the affected area before the dangerous condition is eliminated; thus, the dangerous condition cannot be divorced from the normal work activity. 2 IBMA at 129.

In Freeman the BMOA elaborated on its decision in Eastern and held that the word "reasonably" as used in the definition of imminent danger necessarily means that the test of imminence is objective and that the inspector's subjective opinion is not necessarily to be taken at face value. The Board also gave this test of "imminent danger":

> . . . would 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. (Emphasis added) 2 IBMA at 212.

The United States Court of Appeals for the 7th Circuit in Freeman Coal Mining Company v. Interior Board of Mine Operations Appeals, et al., 504 F.2d 741 (1974), while quoting BMOA's definition of "imminent danger," went on to add its own:

> An imminent threat is one which does not necessarily come to fruition but the reasonable likelihood that it may, particularly when the result could well be disastrous, is sufficient to make the impending threat virtually an immediate one. (Emphasis added) 504 F.2d at 745.

The Commission, in Pittsburg & Midway Coal Mining Company v. Secretary of Labor, 2 FMSHRC 787 (1980), also set a course for approaching imminent danger questions:

> . . . we note that whether the question of imminent danger is decided with the "as probable as not" gloss upon the language of section 3(j), or with the language of section 3(j) alone, the outcome here would be the same. We therefore need not, and do not, adopt or in any way approve the "as probable as not" standard that the judge applied. With respect to cases that arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., we will examine anew the question of what conditions or practices constitute an imminent danger. (Emphasis added) 2 FMSHRC at 788.

In the enactment of the 1977 Act, the Senate Committee on Human Resources stated as follows:

> The Committee disavows any notion that imminent danger can be defined in terms of a percentage of probability that an accident will happen; rather the concept of imminent danger requires an examination of the potential of the risk to cause serious physical harm at any time.

> It is the Committee's view that the authority under this section is essential to the protection of miners and should be construed expansively by inspectors and the Commission. S. Rep. No. 95-181, 95th Cong., 1st Sess. _____ (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 626 (1978).

The facts in this case establish MSHA Inspector Gibson observed that a 6' x 6' 10" area of the roof was broken and unstable; coal had fallen from two roof bolts (Tr. 30). The roof in this area was slanted downward and fractured. Any size piece of coal could fall out of the area.(FOOTNOTE 4) The bad roof was between two ribs and two roof bolts (Tr. 45).

The inspector expressed the credible opinion that the roof condition was imminently dangerous if a miner was exposed to it (Tr. 31).

Empire's witnesses did not fully embrace the inspector's opinion concerning imminent danger but their actions do. When Pobirk, the foreman, observed the roof on the 20th (four days before the inspector)(FOOTNOTE 5) he was concerned about the heaving. He then installed two cribs together with roof jacks and two timbers (Tr. 88-90). He also had the area between the walkway and the bad top dangered off with tape (Tr. 92). Pobirk also concluded no additional support should be put in the 6' x 6' 10" area because that area was heaving. It was too hazardous to support the area (Tr. 94, 99).

As provided by the Mine Act and the case law, the expectancy of death or serious injury to a miner is necessary to support a condition of imminent danger. Such an expectancy existed here: Inspector Gibson testified the longwall was operating normally (Tr. 33). In addition, under normal circumstances, the tailgate end of the longwall would allow a miner to come directly off of the longwall into the return entry. In addition, as Inspector Gibson testified, the danger ribbon neither supports the roof nor takes it down (Tr. 35).

The Solicitor admits that no miner walked under the area of the bad roof and no one went through the area while it was dangered off (Tr. 11, 12). However, actual exposure to a miner to the hazardous condition is not required to find that a condition of imminent danger exists.

Empire contends that 75.202(a) limits its scope to "areas where persons work or travel." Therefore, the order must be vacated because entry into the area was prohibited by the installation of the danger tape. I disagree. The purpose of a 107(a) order is not only to cause the withdrawal of miners, but to insure that they remain out of the affected area until the condition is corrected. Further, it is clear that there were miners in the vicinity of the defective roof. The Valley Camp Coal Company, 1 IBMA 243, 248 (1972); Rio Algom Corporation, 2 FMSHRC 187 (1980).

Empire further argues its interpretation of the regulation is correct, otherwise a violation of the standard would exist every time roof is exposed and not immediately supported. Specifically, Empire cites 30 C.F.R. 75.208 and 30 C.F.R. 75.222(e) to support its position that the regulations contemplate the existence of unsupported roof.

I concur the regulations contemplate the existence of unsupported roof. However, such unsupported roof cannot be located where a miner could come directly off the longwall into the return entry which is the situation here.

In support of its view Empire cites Beth Energy, Inc., 10 FMSHRC 804, 808 (1988) (Melick, J); Cambridge Mining Corporation, 1 FMSHRC 987 (1979) (Commission), and Helen Mining Co., 6 FMSHRC 529 (1984) (Koutras, J).

The cases relied on by Empire are not inapposite the views expressed herein. In Beth Energy Judge Melick found that a mine examiner traveled a weaving course between three entries to avoid the bad roof.

In Cambridge the Commission affirmed a violation of 30 C.F.R. 75.200. Cambridge does not control the factual situation here. As the Commission noted the operator "had made the decision to have the men work in another entry until this [roof support] was done", 1 FMSHRC at 987.

Helen Mining is not controlling. Judge Koutras observed the pertinent prohibition of the regulation was that "no person shall proceed beyond the last permanent support unless adequate temporary support is provided," 6 FMSHRC at 567. In short, Judge Koutras' decision involved a regulation that was similar to the present 75.202(b). The Secretary's evidence in the instant case does not support a violation of 75.202(b). In short, subpart (a) is broader in scope than (b) as it encompasses hazardous areas which might endanger miners in the immediate vicinity.

The final principal issue concerns whether Empire violated the roof control regulation, 30 C.F.R. 75.202(a).

The present regulation was adopted January 27, 1988. The regulation, in its relevant part, provides that where hazards exist the "roof . . . shall be supported or otherwise controlled . . . . "

Historically, it appears that taking down loose roof by barring it down constitutes a form of control as contemplated by the current regulation. In this case section foreman Charles Moss scaled down the area on Tuesday night. His scaling down efforts were done from the end of the walkway (Tr. 112). However, I am unable to conclude that Moss' efforts at scaling down the roof constituted compliance with the regulations. Specifically, Moss' attempt was on Tuesday night and it is not established if his activities were before or after the MSHA order was issued. Further, there is no evidence in the record as to what, if anything, the scaling down effort accomplished. Scaling down could not constitute compliance unless it was effective. The key ingredient of effectiveness is not shown in this case.

Finally, in construing 75.202(a), what interpretation should be placed on the words that the roof must be "supported or otherwise controlled."

The Secretary argues that "otherwise controlled" is alternative language to "supported" and must constitute some form of physical restraint of the roof (Brief 11, 12). On the other hand Empire argues that barring down, the installation of yellow danger tape and continued mining beyond the defective roof constituted "control" within the meaning of 75.202(a).

In considering these issues I conclude that compliance with 75.202(a) can be accomplished in several ways. Initially, as the regulation provides, the area can be supported. In the alternative, the area may be barred down. The alternative of barring down a defective area is contained in the statute and it has been a control historically used. If support and barring down are not effective (the situation here) then the regulation requires effective control. I agree with the Secretary's view that some form of physical restraint of the defective area is required.

There is no evidence in the instant case whether the longwall equipment itself constituted an effective form of physical restraint of the defective roof and thus was a "control" within the meaning of 75.202(a).

Empire further objects to the Secretary's amendment of her order and citation so as to allege a violation of 75.202(a) in lieu of 75.202(b). Empire observes that the citation was issued on May 24, 1988. A month before the hearing the Solicitor verbally advised Empire's counsel he was considering asking leave to allege a violation of Section 75.202(a) (Tr. 12, 13). The modification was accomplished the morning of the hearing (Tr. 10, 11).

Empire's objections are without merit. Only the legal theory was changed, not the facts as alleged by the Secretary. Further, I agree with Empire that it cannot readily argue that the modification resulted in surprise (Tr. 13). In the absence of surprise, I reaffirm the ruling made at the hearing.

The cases cited by Empire in opposing the Secretary's amendment are not inapposite the views expressed herein. A ruling concerning amendments to the pleadings is largely discretionary. See Rule 15(a), Fed. R. Civ. P.

For the foregoing reasons the imminent danger order and the citation should be affirmed.

Civil Penalty

The statutory criteria to assess civil penalties is contained in Section 110(i) of the Act, 30 U.S.C. 820(i).

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The stipulation indicates the operator has a favorable history of prior violations; further, the proposed penalty is appropriate since it will not affect the ability of this large operator to continue in business. The gravity of the violation is high since death or serious injury could occur if a miner was struck by the defective roof. The Secretary overestimated the operator's negligence but I conclude it was low since the area was dangered off and no miners entered the area. The operator is to be credited with statutory good faith in abating the order even though it was by continuing the mining cycle. On balance, a civil penalty of $200 is appropriate.

For the foregoing reasons, I enter the following:

ORDER

1. In WEST 88-250-R: the contest of Order No. 3225480 is dismissed.

2. In WEST 88-251-R: the contest of Citation No. 3225501 is dismissed.

3. In WEST 88-331 Citation No. 3225501 is affirmed and a civil penalty of $200 is assessed.

John J. Morris
Administrative Law Judge

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FOOTNOTES START HERE
~FOOTNOTE_ONE

1. WEST 88-250-R is the contest of Order No. 3225480; WEST 88-151-R is the contest of the subsequent Citation No. 3225501; WEST 88-331 is the civil penalty proceeding.

~FOOTNOTE_TWO

2. At the commencement of the hearing, on the Secretary's motion, the order and citation were amended to allege a violation of 30 C.F.R. 75.202(a).

> Subparts (a) and (b) of 75.202 provide as follows:
> 75.202 Protection from falls of roof, face and ribs.
> (a) The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.
>
> (b) No person shall work or travel under unsupported roof unless in accordance with this subpart.

~FOOTNOTE_THREE

3. Order No. 3225480 and Citation No. 3225501 recite slightly different facts but it is agreed that both refer to the identical area.

~FOOTNOTE_FOUR

4. On Friday, May 20th, a different portion of the roof collapsed and the tailgate of the longwall was impassible (Tr. 37, 46, 47; Ex. G-6, G-7). However, the Solicitor disavows that these cases involve a blocked tailgate as prohibited in 75.215 (Tr. 24, 25).

~FOOTNOTE_FIVE

5. The inspector at one time indicated the 6' x 6' 10" area of the roof could have been supported on the 20th but not when he issued his order four days later. However, no evidence supports that contention and I reject it. On the 20th I conclude the roof was as described by witness Pobirk.