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

BEAVER CREEK COAL COMPANY
CONTESTANT

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

CONTEST PROCEEDINGS

Docket No. WEST 89-23-R
Citation No. 3224857; 10/18/88

Docket No. WEST 89-24-R
Order No. 3224859; 10/18/88

Trail Mountain No. 9 Mine
Mine ID 42-01211

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

v.

BEAVER CREEK COAL COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDINGS

Docket No. WEST 89-182
A.C. No. 42-01211-03557

Docket No. WEST 89-185
A.C. No. 42-01211-03556

Trail Mountain No. 9 Mine

DECISION

Appearances: Robert J. Murphy, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Respondent;
David M. Arnolds, Esq., ARCO, Denver, Colorado
for Contestant.

Before: Judge Cetti

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 two citations and one imminent danger withdrawal order issued by the Secretary of Labor's Mine Safety and Health Administration ("MSHA") against the Beaver Creek Coal Company (Beaver Creek) and for review of civil penalties proposed by the Secretary for the related violations.

Pursuant to notice, these cases were heard in Salt Lake City, Utah. Both parties have filed post-hearing briefs which I have considered along with the entire record in making this decision.

STIPULATIONS

The parties have agreed to the following stipulations, which I accept:

1. That Beaver Creek is engaged in mining and selling of coal in the United States and its mining operations affect interstate commerce.
2. That Beaver Creek is the owner and operator of Trail Mountain Number 9 Mine.
3. That Beaver Creek is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S. Code 801.
4. That the presiding Judge has jurisdiction in this matter.
5. That the proposed penalties will not affect Beaver Creek's ability to continue in business.
6. That Beaver Creek demonstrated good faith in abating the alleged violations.
7. That Beaver Creek is a medium-size operator with approximately 244,097 tons of production in 1988.
8. The certified copy of the Mine Safety and Health Administration's Assessed Violation History (Ex. J) accurately reflects the history of Beaver Creek's Trail Mountain No. 9 Mine for the past two years, prior to the date of the citations.

ISSUES

1. Whether there was a violation of 30 C.F.R. 75.1704 as charged in Citation No. 3224857.
2. Whether there was a violation of 30 C.F.R. 75.202(a) as charged in Citation No. 3224858.
3. Whether the violations were "significant and substantial."
4. Whether the violation of 30 C.F.R. 75.1704 (Citation No. 3224857) resulted from "unwarrantable failure" on the part of Beaver Creek.

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5. Whether the issuing inspector abused his discretion or authority in issuing the 107(a) closure Order No. 3224859.

6. The appropriate civil penalties, if any, to be assessed taking into consideration the statutory civil penalty criteria in Section 110(i) of the Act.

I

Beaver Creek owns and operates Trail Mountain No. 9 Mine (the "Mine"), an underground coal mine located near Price, Utah.

These contest and civil penalty proceedings arise out of MSHA's issuance to Beaver Creek of Section 107(a) imminent danger closure Order No. 3224859 and its underlying Citation No. 3224858, and a 104(d)(1) unwarrantable failure Citation No. 3224857. Beaver Creek timely contested the imminent danger closure order and the two citations. The proposal for penalties, WEST 89-185 (Citation No. 3224857) and WEST 89-182 (Citation No. 3224858) were served on Beaver Creek a few days before the hearing and were timely answered.

The two citations and the 107(a) closure order are so closely related factually, that all proceedings were consolidated and testimony from each witness on both citations and the order were taken at one time. There are, however, separate issues between Order No. 3224859, with its related Citation No. 3224858, and Citation No. 3224857.

Inspector Robert Huggins, accompanied by his supervisor, William Ponceroff, conducted the inspection of the mine. Supervisor Ponceroff was present, partly for the purpose of observing Mr. Huggins and evaluating his ability and training. It was, nevertheless, Mr. Huggins' inspection. Mr. Jeffrey Cooper, who at that time was the Safety and Health Supervisor for Beaver Creek, and Mr. Duane Gilbert, Shift Supervisor for Beaver Creek, joined the inspection team.

Mr. Cooper is a highly trained and experienced health and safety professional. (See transcript C. 203-206 for specifics on his training and experience). Mr. Gilbert is an experienced supervisor, holding fire boss and mine foreman certificates since 1978. Inspector Huggins and his Supervisor Ponceroff are also highly trained, experienced mine safety professionals.

The inspection party went underground to make the inspection at approximately 7 a.m. during a non-production shift. While

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walking in by the No. 2 belt line, they heard the noise of rushing air. The usual belt line noise was absent since the belt was not running at the time the air noise was heard and investigated. The noise as described by Supervisor Ponceroff was "like driving in the car and you open a wing window . . . it was really noticeable." The noise was characterized by Inspector Huggins, as a wind speed of 45-60 miles per hour pouring through a car window. The noise was heard before its source was discovered. The wind noise source was located. It was identified as a hole in the coal rib on the off walkway side of the belt entry between crosscuts Nos. 5 and 6. The hole was approximately eight inches high, six inches wide, and seven inches thick.

Coal dust which was emitted from this rib opening resulted in the formation of a conical accumulation at the base of the rib, indicating to all concerned that the rib hole must have been there for quite some time.

The inspector and Mr. Cooper looked through the hole in the rib using their cap lamps but they could see very little in either direction. They did, however, see some deterioration of the roof with fallen debris about five feet high and at the far side saw some roof at an angle.

Although they did not realize it at the time, the inspection team, in looking through the hole in the rib, were looking into an old abandoned work out area that was located between the belt entry and the return entry.

Mr. Huggins and Mr. Cooper went through the man door at the No. 5 crosscut stopping between the belt entry and the return entry to try to see the hole from the return side. They could not find it even when Supervisor Ponceroff and Mr. Gilbert shone a light through the hole and put smoke through the hole in their attempts to locate the hole. The reason they could not find the hole from the return side was that the hole through the rib entered into the abandoned worked-out area that was located between the belt entry and the return, and this old worked-out abandoned area was closed off from the return by two stoppings on the return side.

The men left the mine and went to the mine office where Inspector Huggins and Mr. Cooper looked at the mine map and found the narrow area in the rib and determined that the hole was probably in that spot. At that point in time they still did not realize why they were unable to see the light or smoke which they put through the hole in the rib.

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After some discussions with Supervisor Ponceroff, Mr. Huggins stated that he thought the hole constituted an unwarrantable failure and the roof conditions constituted an imminent danger. Mr. Cooper disagreed.

After several phone calls between the inspectors and the Denver MSHA office, the inspectors proposed that Beaver Creek build a 50-foot longwall of solid concrete block. Beaver Creek objected because it believed the cost would have been prohibitive and Mr. Cooper did not believe there was any hazard. Finally, Mr. Gilbert suggested building a crib wall, which he believed was unnecessary but which he suggested in order to get the closure order lifted. The inspector approved.

Mr. Cooper then asked what areas of the mine were affected and the inspector told him the belt line and the return. Therefore, Mr. Cooper withdrew all of the men from the mine inby crosscuts 5 and 6. The crib wall was promptly constructed at a cost of about \$3,600 in material and \$35,000 in lost production. The closure order was lifted within one and one-half days of the inspection.

Because he believed there was no major roof problem, Mr. Cooper took a camera when he returned underground and took photographs of the area. Within the next two days, he took additional photographs, took measurements and observations, and documented his findings on a certified mine map, which was received into evidence as Beaver Creek's Exhibit 2.

The conditions that existed under which Mr. Huggins issued the closure order and the unwarrantable failure citation were as follows:

1. A six-inch by eight-inch hole was in the rib that separated the belt entry from old workings. Inspector Huggins could only guess at the length and thickness of that rib. Mr. Ponceroff did not check the thickness and therefore he did not know what it was.

2. Air slack or potting had occurred in the roof along the rib, the extent of which Supervisor Ponceroff did not measure. Inspector Huggins did not measure it either but estimated that it varied from 9 inches to 14 inches deep for the length of the rib. Mr. Cooper later measured it to be in two areas, 16 feet long and 4 feet long respectively, for a depth of generally 4 inches to a maximum of 7 inches.

3. Timbers in the belt entry next to the rib, which had been present at least ten years, showed no sign of taking weight.

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4. Bolts in the belt entry were on four- to five-foot centers showed no weight stress.

5. There was no evidence of cutting or shearing of the rib into the roof.

6. There was fallen roof material in the worked-out area behind the rib; i.e., in this abandoned area between the rib and the return entry. The roof in that worked out area had been unsupported and the area had been mined out a long time ago, variously estimated at 10-15 or more years.

7. The six-inch by eight-inch hole that separated the belt entry from the old worked out area had existed a long time.

8. The air going through the hole in the rib entered the old workings, which were stoppings off from the return entry.

9. All air in the mine was deliberately vented to the return entry. Belt air is vented to the return by the use of regulators which an operator can locate anywhere he desires. Beaver Creek had a regulator close to the portal, about six crosscuts outby the hole.

10. The return entry was the mine's alternate or secondary escapeway.

II

Docket Nos. WEST 89-23-R and WEST 89-185

Citation 3224857

Inspector Huggins issued Citation No. 3224857 under Section 104(d)(1) of the Act for a violation of 30 C.F.R. 75.1704. Section 8, "Condition or Practice" of the citation reads as follows:

The designated return escapeway was not being maintained to ensure safe passage of persons including disabled persons. A hole has eroded from the belt entry into the return entry through the coal rib between #5 and #6 crosscuts on #2 beltline. The hole was measured to be 8 inches by 6 inches and the air was making a rushing noise and going into the return. The #6 and #7 stoppings used to separate the belt air from the return air designated escapeway are leaking and the air rushing into the return could be readily heard. These conditions have been there for awhile and it should have been observed by the preshift examiner.

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The citation states that the risk of injury was highly likely, that the gravity was S&S and that Beaver Creek's negligence was high.

The cited regulation 30 C.F.R. 75.1704 provides in relevant part as follows:

Except as provided in Section 75.1705 and 75.1706, at least two separate and distinct travelable passageways which are maintained to ensure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening, . . . and shall be maintained in safe condition and properly marked.

Discussion and Conclusion

The main facts surrounding Citation No. 3224857, set out above, are well established and virtually undisputed. A hole six inches by eight inches was present in the coal rib between crosscuts 5 and 6 on the offside of the belt entry. The hole went into a worked out area between the belt entry and the return entry. The return entry was the alternate escapeway. The old workings were stoppings off on the return side of the workings. Thus, the return escapeway was separate and distinct and was maintained in a safe condition. The return entry was separate from the belt entry by stoppings on the return side of the worked out area. There was no persuasive evidence of any significant air leakage at any of the mines stoppings. Cf. Rochester & Pittsburgh Coal Company, 10 FMSHRC 1576, 1577-1578. The rib, except for the six-inch by eight-inch hole, constituted a redundant separation. The preponderance of the evidence presented did not establish a violation of 30 C.F.R. 75.1704. Citation No. 3224857 is vacated. Contest proceeding No. WEST 89-23-R is granted. Civil Penalty proceeding WEST 89-184 is dismissed.

III

Docket Nos. WEST 89-24-R and WEST 89-182

Citation No. 3224858

Citation No. 3224858 alleges a section 104(a), S&S violation of 30 C.F.R. 75.202(a). The citation reads as follows:

The mine roof was not being supported adequately by a distance of 60 feet between the #5 and #6 crosscuts and the #2 belt entry. The roof has potted out

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next to the rib and the rib is about 2 feet thick for a distance of about 50 feet next to old entry.

30 C.F.R. Section 75.202(a) reads as follows:

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.

IV

Imminent Danger Closure Order No. 3224859

The 107(a) imminent danger closure order issued to Beaver Creek reads as follows:

The following condition constitutes an imminent danger which was observed between the #5 and #6 crosscuts in the #2 belt entry of the left rib going in the mine. The coal rib between the belt entry and the return entry is about 2-foot thick with a hole in the coal rib into the return. There is a lot of pressure on the rib because the main fan is about 1,000 feet from this area. The old entry behind this rib (return side). The roof has fallen and the two-foot rib is about 50 feet in length. The mine roof in the belt entry has potted out next to this two-foot coal rib. See Citation 3224858.

The Secretary, based upon the testimony of Inspector Huggins and Supervisor Ponceroff, contends that the area behind the six-inch by eight-inch hole in the rib, the old worked-out area adjacent to the belt entry, was in the process of rapid deterioration. The fallen roof debris in this worked-out area was approximately five (5) feet in height. Supervisor Ponceroff testified that the thickness of the rib between the belt entry and the old workings had "whittled down to two foot." He further testified that he "imagined" that Inspector Huggins assumed the 2 foot thickness of rib extended for a distance of 50 feet (Tr. 93). He also testified he observed sloughage on both sides of the rib line, "potting out" of the roof and fracture lines running from the "old workings to the belt line roof." Mr. Ponceroff stated that the "entire area from the return entry to the belt line entry was showing "signs of change."

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When asked what signs of change the area was showing, he replied:

A. The signs of change at the location of the post where the hole was -- occurred, had eroded through the rib. Sloughage was occurring. Lamination was occurring. The area was potting out. If you -- the area in the cracks had been -- were recent cracks; there was no rock dust in those cracks.

Huggins testified he did not measure the length of the thinned-out rib or its thickness but he "guessed" it was about 50 feet in length and averaged 2 feet in thickness.

Beaver Creek's Position

Beaver Creek submits that closure Order No. 3224859 and its underlying Citation No. 3224858 were without any basis in law or in fact and that Inspector Huggins' issuance of them was improper and abusive.

Beaver Creek outlines its position as follows:

1. Inspector Huggins did not believe that an imminent danger existed.
2. No danger with respect to the rib or roof existed.
3. If a danger existed, it was not imminent.
4. The order is defective on its face because it fails to state the area of the mine throughout which the alleged danger existed.

Section 107(a) requires that the authorized representative of the Secretary issue the order if he finds that an imminent danger exists. Beaver Creek contends that if the issuing inspector did not believe that an imminent danger existed, the order must fall.

Beaver Creek presented some evidence in support of its assertion that the issuing inspector, Huggins, did not believe an imminent danger of a roof fall existed. Mr. Cooper testified that on November 10, 1988, in Salt Lake City, Inspector Huggins, after his deposition, said to Mr. Cooper, "For your information, and completely off the record, I want you to know that the imminent danger was not mine; the unwarrantable was." Mr. Cooper testified that he documented this statement in his journal on that day.

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Inspector Huggins adopted practically all of Supervisor Ponceroff's testimony at the hearing.

Beaver Creek also points out that Inspector Huggins by his own admission did not remember looking at the condition of the timbers or bolts to see if they were taking weight. He testified he did not look over his head.

While the evidence presented by Beaver Creek on this issue has some plausibility, I credit the testimony of Inspector Huggins and Supervisor Ponceroff that Mr. Huggins did in fact determine that an imminent danger existed.

Roof Fall Danger

With respect to the issuance of the imminent danger order, Mr. Huggins testified on direct examination as follows:

Q. Okay. And, could you tell us the circumstances that led to the issuance of that particular citation (sic)?

A. All the things that was involved in this area right here, like I said, not knowing what is overhead, and in the interest of safety, and so forth, that's why it was issued.

On cross-examination Inspector Huggins' reasons for issuing the imminent danger closure order were summarized as follows:

Q. I understand your testimony, then, that you issued the eminent danger (sic) danger order out of fear of a roof fall, because the roof had fallen and (sic) the old workings that was unsupported, and because there was potting along the rib that you estimated or guessed at being 2 feet thick, like couldn't really determine.

A. And, also, that I could not see straight up. I did not know what was above.

Q. Sure, you didn't know what was above --

A. Right. That's true.

Q. -- because you can't see through the roof?

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A. And in the interest of safety, you know --

Q. Uh-huh.

A. -- and it was to save somebody's life, the way I look at it.

(Tr. 179 - 180)

Beaver Creek in support of its position points to the uncontroverted fact that the roof bolts and timbers in the belt entry, which had been in place for at least 10 years, showed no stress or signs of taking weight; that Inspector Huggins seemingly ignored the mine map and only guessed at the length and thickness of the rib in question.

Inspector Huggins testified that he did not consider whether the timbers or the bolts showed signs of stress because he was concerned about the "potting," which he asserted was a real indication of a roof fall. Inspector Huggins estimated the potting to be 9 inches to 14 inches deep and ran most of the length of the rib, but he took no measurements. There was conflicting opinion as to whether this condition was due to air slack or potting. Supervisor Ponceroff described air slack to be an eroding of the mine due to moisture, and he described potting to be the falling away of large pieces in the shape of a kitchen pot. Supervisor Ponceroff testified that there can be air slack without a risk of a roof fall and also there can be potting without the risk of a roof fall. Mr. Cooper testified that what existed was air slack, not potting, and that air slack is a normal occurrence in mines. Mr. Cooper measured the air slack to be generally 4 inches in depth to 7 inches maximum and in two stretches, 16 feet and 4 feet long, respectively. The photographs of the area (B.C. Ex. 4.6, 4.8 and 4.9) show the condition that existed. It was undisputed that the rib was not cutting or shearing up into the roof. Mr. Cooper testified that the rib was not crushing out.

Inspector Huggins' primary concern, in addition to the potting, apparently was based on the 6 inch by 8 inch hole in the rib that existed for a long time and his guess that the rib was only 2 feet thick for 50 feet, therefore insufficient to support the roof.

Inspector Huggins also expressed concern about the fallen roof in the old workings. However, the old workings were very old and were unsupported, while the roof in the belt entry was supported by timbers and closely spaced bolts which appeared to

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be in good shape. Mr. Cooper testified the roof in the belt entry along the rib was in good condition (Tr. 250, BC Ex. 4.12, 4.13, and 4.14).

Supervisor Ponceroff asserted that Beaver Creek was using the rib as a primary support and therefore it should have been 50 to 60 feet thick, and that the rib provided little or no support, creating a 40-foot span which would result in sag that would finally break. Inspector Ponceroff, like Mr. Huggins, puts little weight on the facts that the rib had been there many years and that the timbers and bolts show no weight, even though those bolts and timbers were at least 10 years old. Beaver Creek contends that, if there was going to be any sag, it would have shown on the timbers in those 10 years.

Supervisor Ponceroff argued that he could see vertical cracks in Beaver Creek's pictures received in evidence that could result in a roof fall. Beaver Creek contends that Supervisor Ponceroff never explained in any intelligible manner how those cracks, if they existed, could create a danger when the adjacent timbers and bolts showed no stress. Beaver Creek also points out that Supervisor Ponceroff's testimony about the risk resulting from the cracks and from the fallen roof in the worked-out area and the air slack was that the roof could fall, not that a fall was likely or imminent. This is evident in the following excerpt from his testimony:

So, the what can happen in a case like this, the reason why you can have a massive roof fall there, is the fact that it may be -- the fracture may be going at an angle, and it'll stay there until something else breaks, and that hole (sic) thing can come at once.
(Emphasis added).

Mr. Cooper, on the contrary, testified that the cracks were not vertical or on an angle, but were mere horizontal laminations. It is undisputed Mr. Cooper did one thing the inspectors failed to do. After the inspectors left, he tested the area in question with a scaling bar and found it to be solid. Mr. Cooper testified that "I banged on that thing, and banged on it, and it was just as solid as ever. You couldn't hear anything there." Supervisor Ponceroff testified that it is common to do this "sound and vibration" test but that he did not do it and it is clear from the record that Inspector Huggins did not do it.

Supervisor Ponceroff also made much of the report of unintentional roof falls in the mine. Beaver Creek, however, presented evidence that all five prior unintentional falls were in areas where there was either no roof support or only some partial

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bolting and all five prior falls were in different areas of the mine that were quite a ways away from the area in question.

Mr. Robert J. Marshall, a certified mining engineer, was the last witness to testify. He is the engineering supervisor for Beaver Creek. He is a licensed engineer in Utah and Colorado. After the inspection, Mr. Marshall conducted an extraction ratio study of the percentage of the coal that had been removed versus the percentage of coal that remained in place. Mr. Marshall's analysis showed that the coal in place provided approximately two times as much support as was required by the roof. The thinned out stretch of the rib, as perceived by Supervisor Ponceroff and Inspector Huggins, provided negligible support. However, that support was unnecessary. The thinned-out stretch could have been completely removed without creating a risk of a roof fall.

His testimony was offered as an expert witness with respect to coal mine roof control issues.

Discussion

Section 107(a) of the Act provides in part 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 the imminent danger no longer exist.

Section 3(j) of the Mine Act, 30 U.S.C. 802(j), defines an 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." This definition is unchanged from the definition contained in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1976) (amended 1977) (the "1969 Coal Act"). The Senate report on the Mine Act explains

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that the Secretary's authority to issue imminent danger orders "should be construed expansively by inspectors and the Commission." S. Rep. No. 181, 95th Cong., 1st Sess. 38 (1977), reprinted in Legis. Hist. Mine Act 626.

In discussing the concept of imminent danger, the Commission has recently stated:

In analyzing [the] definition [of imminent danger], the U.S. Courts of Appeals have eschewed a narrow construction and have refused to limit the concept of imminent danger to hazards that pose an immediate danger. See, e.g. Freeman Coal Mining Co. v. Interior Bd. of Mine Op. App., 504 F. 2d 741 (7th Cir. 1974). Also, the Fourth Circuit has rejected the notion that a danger is imminent only if there is a reasonable likelihood that it will result in an injury before it can be abated. Eastern Associated Coal Corp. v. Interior Bd. of Mine Op. App., 491 F.2d 277, 278 (4th Cir. 1974). The court stated 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 area before the dangerous condition is eliminated." 491 F.2d at 278 (emphasis in original). The Seventh Circuit adopted this reasoning in Old Ben Coal Corp. v. Interior Bd. of Mine Op. App., 523 F.2d 25, 33 (7th Cir. 1975).

Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989).

The Seventh Circuit has further recognized the importance of the inspector's judgment in issuing an imminent danger order:

Clearly, the inspector is in a precarious position. He is entrusted with the safety of miners' lives, and he must ensure that the statute is enforced for the protection of these lives. His total concern is the safety of life and limb We must support the findings and the decisions of the inspector unless there is evidence that he has abused his discretion or authority. (emphasis added)

Old Ben, supra, 523 F.2d at 31; Rochester & Pittsburgh, 11 FMSHRC at 2164.

The Commission has taken note of the fact that mine roofs are inherently dangerous and that even good roof can fall without warning. Consolidation Coal Company, 6 FMSHRC 34, 37 (January 1984). It has also stressed the fact that roof falls remain the leading cause of death in underground mines, Eastover Mining Co., 4 FMSHRC 1207, 1211 and n. 8 (July 1982); Halfway Incorporated, 8 FMSHRC 8, 13 (January 1986); Consolidation Coal Company, supra.

The Commission recently stated in upholding the issuance of an imminent danger withdrawal order in Rochester & Pittsburgh Coal Co. v. Secretary of Labor, supra at 2164; [The operator's] focus on the relative likelihood of [miners] being injured . . . ignores the admonition in the Senate Committee Report for the Mine Act that an imminent danger is not to be defined "in terms of a percentage of probability that an accident will happen." S. Rep. No. 181, 95th Cong., 1st Sess. 38 (1977), reprinted in Senate Subcommittee on Labor of the Committee on Human Resources, 95th Cong., 2nd Session, Legislative History of the Federal Mine Safety and Health Act of 1977 at 626 (1978). Instead, the focus is on the "potential of the risk to cause serious physical harm at any time." Id. The Committee stated its intention to give inspectors "the necessary authority for the taking of action to remove miners from risk." Id.

"[Such] argument also fails to recognize the role played by MSHA inspectors in eliminating imminently dangerous conditions. Since he must act immediately, an inspector must have considerable discretion in determining whether an imminent danger exists." Applying this rationale to the case at bar, the question, in my opinion, is whether Inspector Huggins abused his discretion or authority when he determined, on the basis of his observations and the information he had at the time he issued the order, that an imminent danger existed. Upon review of the evidence I am unable to find that he abused his discretion or authority. I therefore uphold the validity of the imminent danger order.

The Commission has recently noted that an imminent danger order need not be based upon a violation of a mandatory standard in order to be valid. See S. Rep. No. 461, 95th Cong., 1st Sess. 39 (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 1317 (1978) ("Legis. Hist."); Freeman Coal Mining Co., 1 IBMA 197, 207-08 (1973), aff'd, Freeman Coal Mining Co. v. IBMA, 504 F.2d 741 (7th Cir. 1974). Accordingly, despite upholding the validity of the imminent danger order, the question of whether a preponderance of the evidence establishes a violation of 30 C.F.R. 75.202(a) as alleged in Citation No. 3224858 remains.

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After the inspector completed his inspection and left, Mr. Cooper made further observations, photographs, measurements, and tests. He used a scaling bar and found the belt entry roof in question to be solid. Mr. Marshall, a certified mining engineer, conducted an extraction ratio study. He testified that the coal in place in the area in question provided approximately two times as much support as was required to support the roof. This expert testimony was credible and was not rebutted. I credit the testimony of Messrs. Marshall and Cooper. On the basis of their testimony and my evaluation of all the evidence in the record, I find that the preponderance of evidence presented is insufficient to establish a violation of 30 C.F.R. 75.202(a). Citation No. 3224858 is therefore vacated.

ORDER

1. Citations Nos. 3224857 and 3224858 are vacated and the related proposed penalties are set aside.
2. The Section 107(a) imminent danger Order No. 3224859 is affirmed.

August F. Cetti
Administrative Law Judge