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UTAH POWER AND LIGHT V. SOL (MSHA)

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

UTAH POWER AND LIGHT COMPANY,
MINING DIVISION,

CONTESTANT

v.

CONTEST PROCEEDING

Docket No. WEST 90-285-R
Order No. 3583332; 7/12/90

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

Cottonwood Mine
Mine ID 42-01944

DECISION

Appearances: Susan E. Chetlin, Esq., Crowell & Moring,
Washington, D.C.,
for Contestant;

James B. Crawford, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for Respondent;

Robert Jennings, International Representative,
UMWA, District 22, Price, Utah,
for Intervenor.

Before: Judge Lasher

This matter came on for expedited hearing on July 19 and 20, 1990, to review a so-called "Imminent Danger" Withdrawal Order issued pursuant to Section 107(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (herein Mine Act). The Applicant (Contestant) Utah Power & Light Company, Mining Division (herein UPL) and the Secretary of Labor, MSHA (herein MSHA) were represented by Counsel. United Mine Workers of America (herein UMWA), the representative of miners, was represented by its International Representative, Mr. Robert Jennings. The parties submitted closing arguments (and precedent references) in lieu of post-hearing briefs.

The subject Withdrawal Order, No. 3583332, was issued on July 12, 1990, at Contestant's Cottonwood Mine by MSHA Inspector Jerry O.D. Lemon. It had the effect of removing from service UPL's only two EIMCO (Diesel) #915 scoops (herein 915). The Order, consisting of four pages with diagrams, and two subsequent one-page modifications, alleges that the dangerous condition results from "blind spots" and the restricted field of vision available to the 915 operator. The basis for the issuance of the

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order was more fully developed in the exhibits and testimony of six witnesses presented by MSHA. UPL also called six witnesses and introduced exhibits in support of its positions.

Issues

The withdrawal order does not contain any charge of violation of safety or health standards. MSHA's allegation that an imminent danger existed is based on its investigation of the circumstances, including measurements of visibility problems and "blind spots," interviews, and findings as to prior accidents involving the subject equipment (See T.19-21).

UPL contends that the enforcement action taken by MSHA was inconsistent with the existence of an imminent danger, including arguments that (1) the mine was subject to some 20 prior inspections while the 915s were in use (since about 1985) without their being cited, (2) that a prior 103(g) inspection conducted by Inspector Fred R. Marietti on May 21 and 22, 1990, did not result in any enforcement action or in a finding of imminent danger, (3) that Inspector Lemon delayed for approximately two hours his issuance of the withdrawal order (citing the decision of ALJ James Laurenson in Sharp Mountain Coal Company, et al., 3 FMSHRC 115 (January 1981), and (4) that the 915s are still permitted use in other mines.

UPL also contends that the 915s have been in use over five years in its Cottonwood Coal Mine without the occurrence of any "lost-time" injuries (T. 23), that there was no emergency, and that use of the 915s was not "likely to lead to death or serious injury." (T. 23-26).

The Order

Withdrawal Order No. 3583332 was issued on July 12, 1990, at approximately 2 p.m. by Inspector Lemon. It provides, inter alia:

Safe operation of the EIMCO 915 diesel scoop, Serial No. 01147 could not be done in that an inspection was done by the writer on 7/12/90 and it was determined that serious visibility [sic] problems existed on the model 915-1147 in that; the view opening from the top of the operators cab over the steering wheel was 2" to 2 3/4" wide and with a miner--that was 5 $\frac{1}{2}$ 9" tall was placed 4 $\frac{1}{2}$ outby or from the side of the machine and moved inby and outby, it was determined that an approximate blind spot of 23 $\frac{1}{2}$ 10" existed on opposite the operators side of the

machine. This blind spot imposes a serious blind spot to any coal miner walking on this side of the machine. See the below diagram which is not to scale:

[Refer to diagram on Ex. G-1]

There is no termination time set as this is an order. It is important to note that the EIMCO 915, SIN-04117 was also taken underground to the 1st South Main Intake haulage road and the following results were found; with a Isuzu pickup parked in the center of the entry, lined up with this EIMCO-915--with the bucket on the EIMCO in the half-roll position (up)--, the operator can see only the top of the cab of the truck. Front of the truck right at the bucket--of the EIMCO. To see the headlights of this truck other truck had to be moved 164 feet outby the EIMCO on a fairly flat roadway. These headlights are at about 31" height.

Results of in mine Rear View:

[Refer to diagram on Ex. G-1]

Results of turning EIMCO (away from operators sight): The operator in this case could not see the Isuzu pick-up at a 269-foot distance. He could only see the glare of the lights on the mine roof. There was a 5% grade approximately drop from the corner turn point to the Isuzu pick-up.

[Refer to diagram on Ex. G-1]

At 6" from the bucket of scoop, operator of the scoop can barely [sic] see the top of the Isuzu for a considerable distance. The entry at this location was about 19 feet wide by 8 feet height. This diesel scoop is approximately 76" height from the ground to the top of the canopy. From the entry floor to the top of the highest point on a surge tank cover plate it was 65" . This machine is 8 $\frac{1}{2}$ " . The operators compartment on the machine is flush with the right-hand side of this machine. In the writers view--the visibility [sic] on this machine is terrible from the operators compartment. There has been one reported serious accident--with this scoop and an Isuzu pick-up truck driving into each other. Neither operator seen each other until it was too late.

[Refer to diagram on Ex. G-1]

To summarize these two diagrams, diagram A which is to the radiator and end of the machine. [A] 5' 9" man was placed 4' from the side of the machine and he could not be seen from the belt up, until a point 72 1/2' distance. The boot level of the miner could not be seen for a distance of 92 1/4 feet (This would be 90% to 100% of the miner view).

In Diagram B, looking over the bucket of this machine--the same man was placed 4' from the right-hand side of this machine and this man--from the belt up could not be seen for a distance of 130 feet (50% observation of this man) and from his boots up to his head could be seen at about 199' from the operators eye area. These tests were run on the surface.

There is no part and section of 30 C.F.R. that relates to this visibility [sic] problem observed here, so this is a 107-a order with no violation of Part 30 CFR. A regular operator was placed in the operators cab prior to making these tests and all distances were based on his sight (Terral Hardy).

The first modification of the Order was issued by Inspector Lemon on July 16, 1990, stating: "107(a) Order dated July 12, 1990, is hereby modified to also show that following the interviews of five Diesel EIMCO 915's operators, it was found that far more than one accident had occurred over a five-year period. At least 15 accidents were substantiated through the interviews. Ed Taylor, operator, five accidents; Scott Oliver, operator, two accidents; Robert Phelps, operator, one accident; Steve Miner, operator, three accidents; James Ledger, operator, three accidents. All these operators talked to, stated that a real visibility problem exists opposite the operator's side of these two EIMCO 915s on this property. Also, that serious blind spots exist when making a turn away from the operator's sight, into crosscuts or around entries. These interviews were conducted on July 13, 1990."

The second modification was issued by Inspector Lemon on July 18, 1990, indicating: "107-a Order No. 3583332 dated July 12, 1990, is hereby modified to show continuations sheet No. 2 modified on the lower diagram, under Results of Turning EIMCO (away from operator sight). This diagram of the EIMCO scoop is modified to show the bucket on the other end of the

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EIMCO 915. Also in the body of the condition under this diagram, the first sentence is modified to read; at 6" from the Radiator end of this scoop, the operator of the EIMCO can barely see the top of the Isuzu pick-up truck."

Inspector Lemon was sent to the mine by his superiors on July 12, 1990, to take a "second look" or make a "follow-up" following an earlier MSHA investigation into a complaint filed under section 103(g) of the Mine Act with special emphasis on the visibility problems of the 915s (T. 29, 62, 74).

The Section 103(g) Complaint1

In a letter to Randy Tatton, UPL's Safety Director, Steven L. Thornton, President, UMWA, Local 2176, District 22, complaints by 915 (927) diesel haulage operators in a May 10, 1990, union meeting relating to "Isuzu trucks" and visibility problems were reported (Ex. A-6).

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By letter of May 16, Mr. Tatton and Earl Snow, General Mine Foreman, responded to the Thornton letter and listed some 12 measures being taken to resolve the problems. (Ex. A-5).

Based on an unsigned complaint dated May 21, 1990 (Ex. A-7, p. 1), MSHA Inspector Fred R. Marietti, (on the same date) conducted an investigation of the complaint and on May 22, 1990, issued a two-page report based thereon (also Ex. A-7, pp. 2 and 3). This report states.

"This is the result of a 103(g) inspection conducted on 05/21-22/90. The EIMCO 915 scoop was looked at and the operators of the scoops interviewed. Changes in lighting, moving of lights, removal of metal or lowering has been conducted on the machine to increase the operators visibility. The operators feel they are in control of their machine. Because the machine is so large and the mine environment restricts the machine's mobility, it is apparent that they have to be operated with some precautions. This also includes precautions of other equipment being operated by its operator. Traffic rules have to be established and followed to avoid accidents. In regard to the 300

feet mentioned in the 103(g) complaint,² there are many areas where that would be impossible due to dips, bends, and other conditions common to the mine environment. Depending on the size of the equipment, lower as an Isuzu pick-up, it may not be able to be seen immediately alongside or within 25 to 50 feet in front or behind on the side opposite the operator's compartment. A person standing is more easily seen with his light and reflective tape and this mine requires reflective vests also. Operators of Isuzus and other equipment were interviewed also. It appears that the general consensus of the persons interviewed was that traffic rules and consideration with safe driving methods need to be followed. On May 16, a meeting was held between management and representatives of the miners. A copy of the outcome with problems needing to be addressed is enclosed as a part of this investigation. At the time of this investigation, the problems addressed have been implemented or are being worked on. There were no violations, safeguards, or orders issued."

According to Inspector Lemon, he had no knowledge why Inspector Marietti did not issue a withdrawal order, but he assumed that "he didn't go through the tests and examinations we went through." (T. 60). This impression was borne out in the record (T. 168-172, 176-179, 201).

General Findings

At the times material herein, UPL utilized two 915s at its Cottonwood underground coal mine and has done so since approximately 1985 (T.152).

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The 915 is 30 feet long by 8 feet wide by 5 feet high (T.55, 149).3 It weighs approximately 20 tons (T. 85, 149) and runs between five and seven mph (T. 67, 242). The 915 is more suitable for metal/non metal mines since they generally have a higher seam than coal mines (T. 144-146).

Eighty to 90 percent of the time, the two 915s are engaged in taking supplies from outside the mine to the sections and the rest of the time they are engaged in "gobbing" - a process of cleaning up loose coal on an active section, or "even outby in crosscuts or roadways." The 915s travel "the most traveled roadways into the mine" and "travel all the main intakes in." Inspector Lemon testified the 915s would meet all traffic "coming in the opposite direction" and would meet "occasional miners walking along intakes, miners coming from other entries, belt entries, what have you, through the doors through these intakes." (T. 54-55, 120, 149, 150). The two 915s are operated on all three eight-hour shifts at the mine (T. 96).

One miner, Jeffery A. Ricchetti, a mechanic, described the operational effect of the 915s as follows:

"Well, one, I've seen these operators visually, because they can't see out of the machine, they've hooked onto pieces of equipment in my sections, drug 'em down the entries, they've run into our material cars, tore the supplies off the material cars, they've ran into 7200 cables with these machines, live 7200 cables with these machines, basically because they can't see out of these machines. And they are big and large, and they take up the entry, and they kind of scare you when you go around them." (T. 84).

Ricchetti also described the mine as being full of intersections, turns, dips and rolls (T. 91, 94) and indicated that it was difficult from an Isuzu pick-up to see another pickup at 100 or 200 yards (T. 91).

The adverse effect on visibility of the vagaries, "ups and downs" and bends in the mine was conceded or confirmed by numerous other witnesses (T. 100-104, 113-114, 116, 187-188, 190, 197-198, 203-206, 265, 288, 290, 293, 301-305). The existence of "blind spots" due to dips was also confirmed (T. 265, 297). Relying on the reflections from the lights of other vehicles does not always prevent the 915 operator from striking the other vehicle (T. 295-296, 312-313). It would be "possible" not to see a miner on foot due to "blind spots" (T. 297-299).

Upon his arrival at the mine on July 12, Inspector Lemon had one of the two 915s brought to the surface (this was the "better" of the two machines, T. 61) where he conducted visibility tests. A "four-foot blind spot" was found by placing a 5' 9" man four feet from the machine (T. 30, 31, 32, Ex. G-3). For a distance of 14 feet 8 inches parallel to the machine, the 915 operator could see no portion of the man's head (T. 33, T. 140-144). Then for a space of six inches, the man could be seen; then, however, another blind spot occurred from the end of the six-inch point, described by the Inspector as follows:

A. Then at roughly an approximate point six inches in by this 14 foot 8 inch point this man again went into another blind spot and we advanced him out to nine foot two inches.

Q. Is that indicated here in Exhibit 3?

A. Yes, it is.

Q. And in that area this man who was walking parallel four feet from the piece of equipment could not be seen?

A. Yes, sir. So from this examination we surmised that we had a serious blind spot off the operator's side of this machine, and being very concerned with this, because this type of machine in a coal mine, there are people walking alongside of these machines." (T. 34).

The record reveals numerous situations where the 915 has very limited or partial visibility (Ex. G-3, G-5, G-6; T. 34, 47, 49, 77, 97, 142, 193, 197-198, 277, 278, 281, 295, 300).

On July 12 after the surface tests, the 915 was taken underground into the First South intake roadway where the approximate mine height was 8 feet and the width was 20 feet (T. 35).

From first talking to two operators (Terral Hardy and Edmond Taylor), Inspector Lemon determined there was a visibility problem on the side opposite the operator, and in making turns into crosscuts and entries (T. 36, 45, 47). With respect to the 915's visibility problem relating to the modified Isuzu pick-ups used in the mine, Inspector Lemon testified:

"That means that I was standing right next to the operator myself, although he was in--his visibility was probably just a little less than mine. I could see roughly that much of the cab, and that's what he could see, about an inch of the cab, about an inch and a half of the cab. And after the six-inch outby, the six inches the truck faded out of view, and up to a distance of 269 feet you couldn't see any part of the truck, nor could you see any part of the headlights. All you could see is the light off the truck, the glare off the mine roof." (T. 39). (Emphasis added).

XXX

XXX

XXX

THE WITNESS: No, you cannot see the headlights. You can see the light glare against the mine roof.

THE COURT: Okay, you can see the top of the truck?

THE WITNESS: No, you can't.

THE COURT: Okay. Are you saying at 269 feet away, you can't see any part of the truck?

THE WITNESS: Yes, that's what I'm saying.

THE COURT: Oh, okay. So on EXHIBIT 5 you indicated 269 feet the Eimco operator cannot see the headlights of the truck?

THE WITNESS: That's right, sir.

THE COURT: Okay, you're saying now he couldn't see the top of the truck either?

THE WITNESS: No, all he could see was the light reflections off of the liner or from a blue strobe light." (T. 41). (Emphasis added).

Inspector Lemon gave this description of the view an operator has through the cab of the 915:

- A. This gives a true indication of the view, it gives a true indication of the real problem we have, a basic problem of tunnel vision. When you're setting in this cab, your head is against this cab, and you're looking at a space of two to two and three-quarter inches over to five and three-quarter on the far left side of that and this machine, if you keep in mind, is approximately eight feet one inches wide. It's just like looking down a tube." (T. 52). See also Exhibit G-4.

The Inspector explained his decision to issue an imminent danger Order in this manner:

"I concluded it was very dangerous with the blind spots that we have. I feel it's a very serious blind spot opposite the operator's side of the machine, and I feel also that it's a very dangerous situation exists with visibility on turns, and that's why I issued the order. That's my feeling, that we have a serious situation here." (T. 77).

Respondent MSHA established that there has been a significant number of accidents involving the 915 over the 5-5 1/2 year period it had been in use at the Cottonwood Mine. Thus, Inspector Lemon's investigation revealed there had been approximately 15 accidents over the period (T. 50, 58, 73).

Several of these accidents had the potential of causing serious injuries (T. 50, 73, 100-102, 158, 195, 281, 301).

In one of the accidents, involving an Isuzu pickup driven by Larry Hunsaker, an electrician mechanic, and Robert Phelps, who was operating a 915, the Isuzu pickup was "totaled" (T. 102, 111). Hunsaker narrowly escaped serious injury (T. 100, 101-102, 111, 112). Although the two vehicles were approaching each other "head on," neither driver saw the other (T. 107-108, 113-114, 116). While Hunsaker received "corrective action" from UPL for "going too fast," the record nevertheless indicates the essential cause of this and other accidents as the visibility problem of the 915 driver (T. 47-49, 65, 89-90, 91, 113, 114, 116, 118, 134, 159-160, 193, 194, 197, 203-206, 277, 278, 291).

Another 915 accident resulted in the filing of a safety grievance in April 1990 (T. 158), following which special meetings were held between UPL, UMWA, and the 915 operators.

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After these meetings UPL installed work changes and equipment changes prior to the July 12, 1990 Withdrawal Order (Exs. A-1, A-5, A-6; T. 160). Some of these changes announced by UPL in a May 16, 1990 memo (Ex. A-5) were to encourage Isuzu travel in certain areas, counseling an apparently aberrant Isuzu operator, training in traffic policies, upgrading lighting (high intensity blue strobe light) for parked Isuzus, training Isuzu operators to get into a safe location at least 300 feet away from oncoming large equipment, eliminating a severe dip, upgrading lighting systems on the 915s, and lowering the 915s fenders to improve visibility (T. 160-168, 172, 191, 216, 229). Nevertheless, these changes, presumably in effect on July 12, 1990, did not change the testing and measuring results (Exs. G-2, 3, 4 and 5) obtained by Inspector Lemon, nor the opinions of various credible witnesses adduced at the hearing as to the visibility problem. Further the upgraded lighting was not placed on other equipment (T. 163, 216-217), nor were the strobe lights installed on all Isuzu pickups (T. 288, 378-379).

MSHA also established that there was considerable exposure to miners traveling on foot in the mine by the blind spots and visibility limitations of the 915 (T. 94-95, 110, 142-143, 256, 266-273, 290, 292, 297-299, 389).

Contestant's Positions

Contestant established through its Chief Safety Engineer, Randy B. Tatton, that the most serious disabling injuries at the mine were back injuries and that use of the 915, which has the capability of delivering material in close proximity to the work site, would decrease such injuries by decreasing the amount of material actually handled by miners (T. 150).

915 operators are task-trained on the machines and on several occasions special training sessions have been held to discuss new work rules, and such things as use of lights and rights-of-way rules (T. 152-154, 155).

No "occupational injuries," i.e. lost-time injuries, have occurred at the Cottonwood mine as a result of the operation of the 915s (T. 156). While the accident involving Phelps-Hunsaker involved an injury to Hunsaker, such required only first-aid and was not classified as an occupational injury calling for reporting to MSHA (T. 157).

Mr. Tatton testified that following the installation of new work rules on or about May 23, 1990, there have been no collisions involving the 915 (T. 171, 174-175).

Mr. Tatton described in some detail what he considered Inspector Lemon's indecision after conducting his measurements and before the withdrawal order was issued (T. 180-184). Among other things, Mr. Tatton indicated that on July 12 the inspection party returned to the surface and arrived at his office about 12:15 p.m.; that he asked Inspector Lemon what he was "going to do with the machine," and that the Inspector said he had to look at his information before making a decision. Mr. Tatton said it was not until 1:30 p.m. to 1:45 p.m. before the company was asked to take the machines out of service (T. 180-182).

Mr. Tatton gave the opinion that the use of the 915 at the Cottonwood mine did not constitute an imminent danger and explained:

"To me an imminent danger means that if that machine turned around and went back in that mine, it would probably kill somebody; and I knew for a fact we'd operated two machines for five years and never even had an occupational injury." (T. 184).

The 915 operator Edmond Taylor indicated that at 2 p.m. on July 12, 1990, he was asked by one Dixon Peacock to tag his 915 out of service (T. 228). Mr. Taylor's opinion was that the 915's visibility problem did not create an imminent danger (T. 228, 248).

Dale Fillmore, area manager for Eimco/Jarvis/Clark, the maker of the 915, testified that he is in charge of sales and service of his company's products for his area; that the 915 has been produced for 15 years; that some 20-25 other "mines" use the 915; that "several" of such mines have similar seam heights to the Cottonwood mine; that it was his opinion that use of the 915 at the Cottonwood was not reasonably likely to lead to death or serious injury; that the safety of the 915 has to be related to the professionalism of the operator and such things as work rules.

Dave D. Lauriski, director of health, safety and training for UPL testified that at 12:30 p.m. on July 12, 1990, he called the mine and spoke with Mr. Tatton (T. 345-346) who told him that "there was a concern that there was going to be some enforcement

action taken against the equipment."⁴ Mr. Lauriski then went to the mine and discussed the matter with Inspector Lemon, who was undecided whether to cite a violation or issue an imminent danger order (T. 346, 349). Lauriski suggested that a meeting with Inspector Lemon's supervisors in Price, Utah might be in order in lieu of enforcement action being taken (T. 349).

According to Mr. Lauriski, it was at this point that Inspector Lemon suggested that UPL voluntarily take the 915s out of service. Inspector Lemon's supervisor was called and reportedly he, in effect, said that the enforcement decision was Inspector Lemon's to make and that such a meeting as that suggested by Lauriski would be "meaningless." (T. 349-350). Inspector Lemon then issued the withdrawal order.

Mr. Lauriski did not believe that the "visibility restrictions" on the 915 created "a reasonable likelihood of serious injury or death." (T. 351). He also said that taking the 915s out of service increases the "manhandling" of materials by individual miners, would slow down supplying the mine with needed materials for retreat mining, etc., and would increase the risk of injury to miners because of the types of manual labor that might have to be performed. He also was concerned that mine housekeeping and trash removal would deteriorate (T. 352-353, 356). He also indicated that on July 12, 1990, only approximately three-fourths of the 26-27 Isuzu pickups were equipped with strobe lights for use when parked (T. 359, 378-379).

As noted above, contestant UPL introduced evidence that, to make the 915's operation safer, it installed work changes and equipment changes prior to the July 12, 1990 Withdrawal Order (Exs. A-1, A-5, A-6; T. 160-167, 172).

Nevertheless, these changes presumably in effect on July 12, 1990, did not change the testing and measuring results obtained by Inspector Lemon, nor the opinions of various credible witnesses adduced at the hearing as to the visibility problem. Further, the upgraded lighting was not placed on other equipment (T. 163, 216-217), nor were the strobe lights installed on all Isuzu pickups (T. 288, 378-379).

UPL also established that it had certain "Rules of the Road" in effect on July 12, 1990, one of which, pertaining to right-of-way, provided that smaller vehicles must give way to larger vehicles (T. 70-71). The record indicates that the 915 is the largest such equipment in the mine (T. 89). Here again, though, there is the evidence that, while the Isuzu pickups were required by this rule to get out of the way of the oncoming 915s, there are occasions, such as when going around a turn, when this is impossible (T. 90-91, 190, 193, 197-198, 276-279).

Other significant (and preponderant) evidence shows (1) because of dips and turns, the 915 operator's visibility is further limited (T. 127, 131, 159, 191, 197-198, 235, 238, 265); (2) the rules are not always followed (T. 127, 131, 159, 191, 197-198, 203, 206, 238-240, 244-246, 276, 277, 278, 281-284); and (3) conditions are not always "normal" (T. 97, 193, 197, 238-240, 244-246, 276, 277, 278, 281-284). Individual miners do not wear their reflective tape in the same place (T. 284).

UPL makes the argument that there were 5 to 5 1/2 years of inspections at the Cottonwood mine while the 915 loader was in service without a withdrawal order being issued on the 915. To the extent that such contention goes beyond the raising of a possible basis for inferring that the 915 has no dangerous visibility problem and raises the defense of estoppel, such is rejected. See Secretary of Labor v. King Knob Coal Company, Inc., 3 FMSHRC 1417 (1981). Further, there is no showing that the specific limits of visibility were ever previously determined as they were in the tests and measurements of Inspector Lemon, and as I have noted elsewhere herein the determination of Inspector Marietti apparently was not anywhere as thorough as that of Inspector Lemon.

Contestant UPL was also concerned with and presented evidence with respect to its economic hardship and cost factors which would attend the loss of use of the 915s. Such evidence, however, is not found to be directly or indirectly relevant to the decisive issue in this case: whether an imminent danger existed.

Discussion and Conclusions

The question in this matter is whether or not the blind spots and visibility limitations on the operators of the 915s constitute an imminent danger.

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The meaning of "imminent danger" has undergone transformation since the general concept of it first appeared in mine safety law in 1952.⁵ See *Freeman Coal Mine Company v IBMA*, (7th Cir. 1974). In that case the Court, speaking in reference to the 1969 Federal Coal Mine and Safety Act, quoted from the legislative history, to wit:

The definition of an "imminent danger" is broadened from that in the 1952 act in recognition of the need to be concerned with any condition or practice, naturally or otherwise caused, which may lead to sudden death or injury before the danger can be abated. It is not limited to just disastrous type accidents, as in the past, but all accidents which could be fatal or nonfatal to one or more persons before abatement of the condition or practice can be achieved. 115 Cong. Rec. 39985 (1969). (Emphasis added.)

The Federal Mine Safety and Health Review Commission in the last year retained the view of the U.S. Appellate Courts in its decision in *Rochester & Pittsburgh Coal Company v. Secretary of Labor*, 11 FMSHRC 2159 (November 1989), wherein it set forth the following useful formula for analysis of "imminent danger" questions:

In analyzing this definition, 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 adopted the position of the Secretary 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.)"

These principles seem to put to rest any argument--if such is indeed actually made--by UPL that an "emergency" extant in the mine is a prerequisite to the existence of an imminent danger determination. In Rochester & Pittsburgh, *supra*, the Commission also seemed to emphasize that the analytical focus is on the "Potential of the risk to cause serious physical harm at any time" (emphasis added). Inspector Lemon testified in this connection that:

"In my mind, I feel that reasonably, at any time, someone could be seriously hurt or killed, if I let this condition go before it could have been abated." (T. 56).

The Inspector 6 elaborated on this judgment as follows:

A. Okay, I'm very concerned with off the operator's side, if they're hitting these pickups and they don't actually know where the pickup is, I'm very concerned with where the person that got out of the pickup is, whether he's walking around. If they couldn't see the pickup, they're not going to see the operator that's between the line of pickup.

Q. What kind of hazard would there be?

A. This would be an imminent danger, if he was pinned between that and the machine, you'd kill him outright or crush him to where he'd be seriously hurt.

Q. What if he was inside the truck, how would you compare?

A. If he was inside the truck, he could also be killed, if the machine hit that pickup in the door side of the operator, it could be fatal. That's all in relation to the speed that the machine is traveling, but that's a very, very possible likelihood. (T. 56-57)

UPL's claim that the 915 was really no different in visibility limitation to other pieces of equipment (T. 133-136, 184-185, 188-189, 203-206) was in the form of generally stated opinion evidence, unsupported by measurements taken on such other equipment or accident statistics (T. 198). Nor was such other equipment shown to be similar to the 915 (T. 136-137). Such is not considered to overcome the more detailed and convincing proof submitted by MSHA in support of its conclusion that the 915's blind spots visibility problem created an imminent danger (T. 190, 193, 197, 203-206, 297, 299).

Although UPL in one of its major arguments takes the position that the Inspector's "delay" in issuing the Withdrawal Order demonstrates an inconsistency with the "emergency" or urgency it alleges is necessary to justify an imminent danger order, Inspector Lemon satisfactorily explained his actions as follows:

A. Well, at this time I asked the safety man, Randy Tatton, and a few other management people around there, I needed some time to go outside to look at all the data we had got together, and compiled all this stuff, and I told him I felt we had a serious problem here with visibility. And I asked him at this time if he would pull his machines out of service until I could get all this stuff together. And so Randy said yes, this would be possible.

He took his machines out of service. They took them outside and they put company tags on them and they put them in the--it's a little house where they store rock dust, right adjacent to their surface shop area.

Q. So you did that immediately after you made your observations of the situation?

A. Yes.

Q. You didn't wait two hours?

A. No, and we did that immediately. Randy took them out of service immediately, and then we got outside and we talked about the problems. I was having a real problem finding a section in 30 CFR to attach to the imminent danger order, and I couldn't find one because there is not one. So I, in fact, issued the order, and then we went down and put the tags on the machine. And some of the safety department, maybe one of the mine managers, went on down to the Price office to meet with one of the supervisors, and they asked me to go down with them, and I said I'd be down shortly, as soon as I finished looking at the Eimco and took some measurements. And I took some measurements and looked at it.
(T. 45, 46).

Inspector Lemon, when called as a rebuttal witness, reiterated his testimony that while the inspection party was still underground he asked Mr. Tatton (in the presence of the union representative and an MSHA "technical support man") to voluntarily remove the 915s from service (T. 381).

Based on the Inspector's explanation for the short delay in issuing the withdrawal order, and the fact that for at least part of this period UPL actually, albeit voluntarily, removed the 915s from active service, I attribute no misunderstanding or doubt on the Inspector's part as to the necessity of or justification for issuing the Order.⁷

UPL's "delay in issuance" argument can be equated to an "Instant Recognition" test, that is, if the situation is not so patent or obviously an "emergency," that it immediately dawns on the "reasonable man" inspector observing such and causes him to act instantaneously, then the condition or practice cannot be an

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imminent danger. Such a test undoubtedly would cover some imminent danger situations, but not necessarily all. Applying such a test might frequently shift the litigation from a trial of the true issue to a trial of such things as the Inspector's I.Q., his fatigue, or his high-level expertise on a specific safety subject. Again, the effect would be that if the inspector cannot literally "hip-shoot" a particular decision, the withdrawal order should not stand. Such a squeezing of the decision time-frame would infringe on the principle that mine inspectors must have "the necessary authority for the taking of action to remove miners from risk." Rochester & Pittsburgh Coal Co., *supra*. In the instant matter, the inspector had measurements, tests, information, a number of laws, enforcement options and fairness to the mine operator as factors to weigh. Any one of such factors in a given set of circumstances might justify a longer period of deliberation than that involved here. Forcing a hasty decision may not always be consistent with either sound mine safety enforcement or justice.

I find no basis for concluding that Inspector Lemon abused his discretion or authority in the issuance of an imminent danger withdrawal order in this matter.

It is concluded that the conditions observed by the Inspector and described in the record could reasonably have been expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed, and that the use of the 915s with the severe visibility limitations described herein above created a significant potential of causing serious physical harm at any time.

ORDER

Based on the foregoing findings and conclusions, UPL's application for review seeking vacation of Withdrawal Order No. 3583332 is DENIED and the Order is AFFIRMED.

Michael A. Lasher, Jr.
Administrative Law Judge

FOOTNOTES START HERE

1. Section 103(g) of the Mine Act provides:

"(g)(1) Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners or by the miner, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that the operator or his agent shall be notified forthwith if the complaint indicates that an

imminent danger exists. The name of the person giving such notice and the names of individual miners referred to therein shall not appear in such copy or notification. Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provision of this title. If the Secretary determines that a violation of danger does not exist, he shall notify the miner or representative of the miners in writing of such determination.

(2) Prior to or during any inspection of a coal or other mine, any representative of miners or a miner in the case of a coal or other mine where there is no such representative, may notify the Secretary or any representative of the Secretary responsible for conducting the inspection, in writing, of any violation of this Act or of any imminent danger which he has reason to believe exists in such mine. The Secretary shall, by regulation, establish procedures for informal review of any refusal by a representative of the Secretary to issue a citation with respect to any such alleged violation or order with respect to such danger and shall furnish the representative of miners or miner requesting such review a written statement of the reasons for the Secretary's final disposition of the case."

2. The complaint alleges: "The EIMCO 915 loaders at our mine have a visibility problem of which the operators cannot see the travelway or incoming traffic 300^b out. (This was brought up by an operator at a meeting with management.) We feel this to be an imminent danger to personnel traveling the roadways. Also, we have experienced several accidents involving this equipment." (Ex. A-7).

3. By comparison, an Isuzu pick-up weighs 3000 pounds (T. 85). There were approximately 25-27 Isuzus operating at the mine (T. 286-287, 359, 378). At the time of the Order's issuance, not all of the Isuzu pick-ups had been equipped with strobe lights. (See Ex. A-5; T. 288, 359).

4. 12:30 p.m. would have been shortly after the inspection party returned to the surface. This particular testimony also supports Inspector Lemon's position that he was going to do something about the 915s. (See also T. 363).

5. The Mine Act 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." Section 3(j) of the Mine Act; 30 U.S.C. 802(j). This definition was not changed from the definition contained in the Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1976) (amended 1977) (the "Coal Act").

6. Inspector Lemon was a particularly persuasive witness, his testimony reflecting the thoroughness of his testing and investigation, his candid responses on cross-examination, and sincerity of conviction.

7. One member of UPL's management, Garth Neilsen, Longwall Superintendent, verified that the Inspector was concerned about getting the 915s out of service and that his "indecision" was about how to do it:

To me he seemed undecided. I do feel he felt there was a definite safety problem there, as far as visibility, but he felt--I felt that he felt he was undecided on how to handle that, as far as which way to get the machine out of service. (T. 211) (Emphasis added).