

CCASE:  
WYOMING FUEL V. SOL (MSHA)  
DDATE:  
19901022  
TTEXT:

~2003

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

WYOMING FUEL COMPANY,  
CONTESTANT

v.

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

CONTEST PROCEEDINGS

Docket No. WEST 90-112-R  
Order No. 2930784; 2/13/90

Docket No. WEST 90-113-R  
Citation No. 2930785; 2/13/90

Docket No. WEST 90-114-R  
Order No. 3241331; 2/16/90

Docket No. WEST 90-115-R  
Citation No. 3241332; 2/16/90

Docket No. WEST 90-116-R  
Citation No. 3241333; 2/16/90

Golden Eagle Mine  
MSHA Mine ID No. 05-02820

Consolidated

DECISION

Appearances: Timothy E. Biddle, Esq., Susan E. Chetlin, Esq.  
Crowell & Moring, Washington, D.C.,  
for the Contestant;  
Margaret A. Miller, Esq., Office of the Solicitor,  
U.S. Department of Labor, Denver, Colorado,  
for the Respondent.

Before: Judge Morris

These consolidated cases are before me pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (the "Act") to challenge orders and citations issued to Wyoming Fuel Company ("WFC").

After notice to the parties an expedited hearing on the merits was held in Denver, Colorado.

The parties filed post-trial briefs.

Summary of the Cases

These consolidated cases involve two imminent danger orders and three citations.

~2004

WEST 90-112-R: In this case, WFC contests Order No. 2930784 issued under 107(a) of the Act by MSHA Inspector D.L. Jordan on February 13, 1990.

The order alleged an imminent danger existed. The order further closed the Golden Eagle Mine and ordered all personnel withdrawn from underground. The order reads as follows:

Methane in excess of 9.9% as approved by a hand-held detector at a point at least 12" from the roof face and ribs was present behind a line of 6 Kennedy stoppings that have been constructed across the second south entry at the intersection of the number 14 west main return. This encompass area behind the stoppings six (6) entries wide and 25 crosscuts deep. Bottle samples were collected to substantiate the the order. Citation No. 2930785 for a violation of 30 C.F.R. 75.329(a)(1) accompanies this order at section 8, "Condition or Practice".

A subsequent modification of the order was issued February 13, 1990, to allow construction of seals in 2d South. The modification reads:

. . . allow construction of seals in second south as per attached sealing plan as submitted and approved 2/13/90. No other work will be done until the order is terminated . . . (MSHA Order No. 2930784-01, "Subsequent Action" at section II, "Justification for Action").

Subsequently, on February 17, 1990, the order was again modified as follows:

The affected area in 2 South, West Main has now been sealed, Order No. 2930784 is further modified to allow the operator to resume mining operations. The Order will remain in effect to monitor the seals [sic. for methane] in 2 South every two (2) hrs. for a 72 hrs. period . . . 107(a) (MSHA Order No. 2930784-03, "Subsequent Action" at section II, "Justification for Action").

Only those persons necessary to monitor the gases and to safeguard the mine are to be allowed underground. . . . 107(a) (MSHA Order No. 2930784-02, "Subsequent Action" at section II, "Justification for Action").

~2005

WEST 90-113-R: In this case, WFC contests Citation No. 2930785 issued by Inspector Jordan.

The citation, issued under 104(a) of the Act, alleges a violation of 30 C.F.R. 75.329-1.

The citation reads as follows:

Methane ranging from .6 to 9.9% was present in front of and behind a line of Kennedy stoppings that were constructed across the second South Entries at the intersection with No. 14 West Main return entry, encompassing an area of 6 entries, 25 cross-cuts deep. This creates a situation of neither being sealed or ventilated, a violation of 30 C.F.R. 75.329-1(a). This was the main contributing factor to the issuance of imminent danger Order No. 2930784. Therefore no abatement time was set.

The regulation allegedly violated in its full text provides as follows:

75.329 Bleeder systems.

[Statutory Provision]

On or before December 30, 1970, all areas from which pillars have been wholly or partially extracted and abandoned areas, as determined by the Secretary or his authorized representative, shall be ventilated by bleeder entries or by bleeder systems or equivalent means, or be sealed, as determined by the Secretary or his authorized representative. When ventilation of such areas is required, such ventilation shall be maintained so as to continuously dilute, render harmless, and carry away methane and other explosive gases within such areas and to protect the active workings of the mine from the hazards of such methane and other explosive gases. Air coursed through underground areas from which pillars have been wholly or partially extracted which enters another split of air shall not contain more than 2.0 volume per centum of methane, when tested at the point it enters such other split. When sealing is required, such seals shall be made in an approved manner so as to isolate with explosion-proof bulkheads such areas from the active workings of the mine.

75.329-1. Sealing or ventilation of pillared of abandoned area.

(a) All areas of a coal mine from which the pillars have been wholly or partially extracted and abandoned areas shall be ventilated or sealed by December 30, 1970. For those coal mines in which ventilation can be maintained so as to continuously dilute, render harmless and carry away methane and other explosive gases within such areas and to protect the active workings of the mine from hazards of such methane and other explosive gases, the operator shall request permission from the Coal Mine Safety District Manager in whose district the mine is located to ventilate such areas.

(b) The request for permission to ventilate such areas must be submitted in time to allow consideration of the request, to obtain approval, and to permit the operator to install the ventilation system, or to install seals in the event the request to ventilate is denied, on or before December 30, 1970.

(c) The determination of whether ventilation will be permitted will be made after taking into consideration the history of methane and other explosive gases in the mine, the size of the gob or abandoned areas, and if the areas can be ventilated adequately.

(d) To be considered for approval the request shall contain the following information provided by the mine operator:

- (1) Name of mine and company.
- (2) Location of mine (town, county, state).
- (3) Operator's name and address.
- (4) Date of application.
- (5) A detailed history of the methane content determined throughout the mine and when available, the volume of air in which such methane determinations were made, to support the operator's application to ventilate.

~2007

(e) A description of the method by which the areas from which the pillars have been wholly or partially extracted and abandoned areas shall be ventilated and such maps and drawings as may be required to illustrate such method and to indicate existing, or proposed air volumes used to ventilate such areas.

(f) The signature and title of the person who submits the application for the operator.

WEST 90-114-R: In this case WFC contests Order No. 3241331 issued by MSHA Inspector A. Duran on February 16, 1990.

The order alleged a condition of imminent danger existed. The order was accomplished by Citation No. 3241332 and subsequently by Citation No. 3241333. The order required that all personnel be withdrawn from the underground area.

Order No. 3241331 reads as follows:

An unknown mixture of methane/air could not be determined at the Kennedy stopping constructed at #1, #2, and #3 entries of 1 - Right due to [sic. the condition] that there was no means of testing or detecting what mixture was behind the stoppings. #1, #2, and #3 were being ventilated with the use of a line curtain from #7 right return entry of 3d North. When No. 2 entry stopping was not ventilated methane of 10% plus volume percentum was detected 12 inches from the roof and face of the stopping with the use of a permissible hand held methane detector. Bottle samples were collected at leakage areas of the stopping to substantiate the order.

WEST 90-115-R: In this case WFC contests Citation No. 3241332. This citation, issued under 104(a) of the Act, accompanied Order No. 3241331.

The citation alleges a violation of 30 C.F.R. 75.329(1)(a), cited supra.

~2008

The citation reads as follows:

Methane/air mixture ranging from 0 to 10% plus volume percentum was detected with the use of a hand held methane detector when check 12 inches from the roof and face of #2 Kennedy stopping erected in the No. 2 entry of 1 Right. This was detected when the line curtain was removed that was ventilating the stopping. Other means of testing or detecting what mixture was behind the stopping was not provided at #1, #2, and #3 Kennedy stopping. This creates a situation of neither being sealed or ventilated, a violation of CFR 30 75.329-1(a). This was a contributing factor to issuance of an imminent danger 107(a) #3241331, therefore no abatement time was set.

WEST 90-116-R: In this case WFC contests Citation No. 3041333 which was issued after Order No. 3241331.

The citation alleges as follows:

This citation is issued for working in the face of a 107(a) Imminent Danger withdrawal Order No. 2930784 dated 02/13/90. The Company was observed in the process of constructing permanent seals in an entirely different area of the mine. 1 Right panel off 32d North without prior authorization or notification to MSHA. In addition the employees were exposed to an Imminent Danger due to an explosive gas mixture behind and in front of Kennedy stopping erected in #1, #2 and #3 entries of 1 Right Panel. Six employees and a Foreman was observed working in the immediate area. Employees stated the work had started on 02/14/90 to present 02/16/90 on the day shift.

#### Procedural Issues

WFC moved for an expedited hearing in these cases. The Secretary opposed and an expedited hearing was held.

The issue is again raised in this decision and the Commission is invited to consider the issue anew.

In support of its motion for expedition, WFC relies on the statutory requirements set forth at section 107(a) of the Act. The cited section provides as follows:

~2009

(e) Relief from orders; hearing; order; expedited proceeding.

(1) Any operator notified of an order under this section or any representative of miners notified of issuance, modification, or termination of such an order may apply to the Commission within 30 days of such notification for reinstatement, modification or vacation of such order. The Commission shall forthwith afford an opportunity for a hearing . . . and thereafter shall issue an order, based on findings of fact, vacating, affirming, modifying, or terminating the Secretary's order. The Commission and the courts may not grant temporary relief from the issuance of any order under subsection (a).

(2) The Commission shall take whatever action is necessary to expedite proceedings under this subsection. ( 107(e), (1) and (2), Emphasis added).

In opposition to the motion the Secretary states the 107(a) orders have been modified to permit mining activity. Further, the modified order simply requires that methane samples be taken each day to determine the stability of the methane since the construction of the permanent seals. The Secretary also contends that if all orders issued under 107 were expedited on request, there would no longer be any capability for expeditious hearings.

The Secretary further asserts the Congressional intent of Section 107(a) is to assist operators where an emergency situation exists. In short, the Secretary argues Congress intended to allow an expedited hearing only in the case of an active closure order, where the mine is not being allowed to produce and is suffering a great hardship as a result of an MSHA order.

It is also urged that the matter of whether a hearing should be expedited rests with the sound discretion of the presiding judge.

The Secretary also contends the Commission Rules are so structured that expedited hearings are allowed only in emergency situations.



Discussion

It is a basic rule of construction that where the language is clear the statute must be enforced as it is written unless it can be established that Congress clearly intended the words to have a different meaning. *Chevron, USA v. NRDC*, 467 U.S. 837, 842-43, 104 S.Ct. 2778 (1984); *United States Lines v. Baldrige*, 677 F.2d 940, 944 (D.C. Cir. 1982); *Phelps Dodge Corp. v. Federal Mine Safety and Health Review Commission*, 681 F.2d 1189, 9th Cir. (1982); *Freeman United Coal Mining Co.*, 6 FMSHRC 1577, 1578 (1984).

The statutory requirement, stripped of surplus language, is that "any operator . . . notified of an order, etc., may apply within 30 days . . . for a vacation of such order, etc." In such a situation, "the Commission shall expedite proceedings."

It is uncontroverted here that these cases involve orders issued under the authority of Section 107(a) of the Act. The contests were filed within 30 days.

The foregoing uncontroverted facts require that these cases be expedited. I agree with the Secretary that Congress may have intended an expedited hearing only in the event of an active closure order. However, the wording of 107 does not show such an intent.

Further, the structure of the Commission's Rules do not support the Secretary. Commission Rule 52, 29 C.F.R. 2700.52, provides as follows:

2700.52 Expedition of proceedings

(a) Motions. A motion of a party to expedite proceedings may be made orally, with concurrent notice to all parties, or served and filed by telegram. Oral motions shall be confirmed in writing within 24 hours.

(b) Timing of hearing. If the motion is granted, a hearing on the merits of the case shall not be scheduled with less than four days notice, unless all parties consent to an earlier hearing.

A fair reading of the statute and the Commission rules indicate that expeditious hearings involving 107(a) orders are generally not left to the discretion of the presiding judge; further, expedited hearings are not necessarily restricted to "emergency" situations.

~2011

I agree the failure to read "emergency situation" into the Act and Rule 52 could render the expedited hearing process meaningless. However, the writer has never found the expedited hearing process to be burdensome, nor have any litigants attempted to "overload" the Commission with requests for expeditious proceedings. If this were to become a problem interfering with the Commission's duties of adjudicating disputes under the Mine Act, the Commission would no doubt amend Rule 52. In such circumstances the appellate courts would accord great deference to the Commission's interpretation of its own rules. *Lucas Coal Company v. Interior Board of Mine Operations Appeal*, 522 F.2d 581 (1975).

In sum, under the Mine Act, contestant is entitled to an expedited hearing when a 107(a) order is involved.

If the orders here had been issued under 104(d) of the Act, a totally different result would have occurred.1 Under section 105(B)(2), [30 USC 815(b)(B)(2)], the Commission may grant temporary relief from a 104(d) order only under very restrictive conditions. These are:

(A) a hearing [before MSHA] has been held in which all parties were given an opportunity to be heard;

(B) the applicant shows that there is substantial likelihood that the findings of the Commission will be favorable to the applicant; and

(C) such relief will not adversely affect the health and safety of miners.

No temporary relief shall be granted in the case of a citation issued under subsection (a) of (f) of section 104. The Commission shall provide a procedure for expedited consideration of applications for temporary relief under this paragraph.

In sum, I reaffirm the previous ruling granting WFC an expedited hearing.

~2012

#### Amendment

The original citations and orders herein were issued in February 1990. On March 6, 1990, the Secretary sought to change the allegations from a violation of 30 C.F.R. 75.329 to a violation of 30 C.F.R. 75.316.

The operator's objection to the amendment was sustained for the reason that MSHA may not amend a citation that has already been terminated. See *Clinchfield Coal Company v. Federal Mine Safety and Health Review Commission*, 895 F.2d 773, 776 (D.C. Cir. 1990); *Emery Mining Corporation/Utah Power & Light Co.*, 10 FMSHRC 1337, 1346-47 (Morris, J) (Order), review granted (March 9, 1989).

#### Stipulation

At the commencement of the hearing the parties stipulated as follows:

1. The Golden Eagle Mine is owned by WFC and the mine is subject to the Act.
2. The annual production is 900,000 tons.
3. The Commission and Administrative Law Judge have jurisdiction over this matter.
4. The papers involved in these cases were properly served on the company and can be admitted in evidence.
5. Prior to the orders and citations herein the company received 10 citations for rock dust violations.

#### Summary of the Evidence

DONALD L. JORDAN has been a coal mine inspector for 19 years; he is a person experienced in mining. He has inspected the Golden Eagle underground mine on numerous occasions and does so for about eight weeks each year.

On February 13, 1990, he inspected the mine accompanied by Mark Bayes, an assistant mine foreman.

On that day he issued a 107(a) imminent danger order in the 2d South area of the mine (Order No. 2930784). Exhibit C-4, a mine map, shows 2d South, 1st Right and other areas discussed in the case.

~2013

The 2d South entry, an abandoned area, is 6 entries wide. Its width exceeds 2000 feet.

Inspector Jordan initially saw the Kennedy stoppings (hereafter called Kennedys or stoppings) when he examined the six entries. (The stoppings are shown in Exhibit S-5.) Foam had been applied around the roof and ribs of the stoppings. Stoppings are intended to deflect the air current and seal the area behind them. This was not an adequate procedure because there were numerous ignition sources behind the stoppings and there was an excessive liberation of methane. Therefore, the stoppings would be inadequate as a safety device.

The inspector was alarmed because the area was not sealed. In a couple of the entries the methane concentration went to 1.5 percent. The methane readings were as follows:

|             |             |
|-------------|-------------|
| No. 1 Entry | .8 percent  |
| No. 2 Entry | .6 percent  |
| No. 3 Entry | 1.5 percent |
| No. 4 Entry | .7 percent  |
| No. 5 Entry | .6 percent  |
| No. 6 Entry | .8 percent  |

The methane was measured with a methane detector.

In view of the amount of methane present on the ventilated side of the stoppings, the inspector was concerned about the methane concentrations behind the stoppings.

Inspector Jordan then withdrew 1000 to 1200 feet to a telephone and contacted his District Manager, Joe Pavlovich. He indicated to his supervisor that he needed sampling equipment to determine the concentrations behind the Kennedy stoppings. In his opinion there was an explosive mixture of methane behind the seals. Inspector Jordan also directed that the power inby be shut off in order to eliminate some ignition sources. He then examined the stoppings. He detected 2.2 percent methane in one of the entries. This indicated to him that the methane was changing back and forth between the stoppings. He then went to the No. 1 entry and withdrew a sample from behind the Kennedy stopping by using as aspirator pump. The air was trapped in a 50 mm bottle and the sample was sent to Mt. Hope, West Virginia for analysis.

In at least three-fourths of the readings with the methane detectors Inspector Jordan found that the methane exceeded 9 percent. He concluded this was a serious matter and withdrew the men from the mine issuing an imminent danger order for the 2d South area.

~2014

He based his order on the fact that the company has had a history of roof falls. Also, he was aware of ignition sources in the area. He considered this to be an imminent danger situation in view of the methane levels immediately behind the stoppings. These factors combined with the size of the area, namely 6 crosscuts wide by 25 crosscuts deep, an area in excess of 2000 square feet.

Inspector Jordan was aware of several sources of ignition such as roof bolts, track and trolley equipment, man doors and such. Also an ignition source could be from a roof fall striking against steel. If given these conditions, he had a reasonable belief that an explosion would occur. In fact, the conditions he found "scared the pants off of" him.

Explosions almost always cause a loss of life and they would propagate beyond the stoppings.

Mr. Jordan and his District Manager agreed that they should take immediate action by withdrawing the miners and retreating to the surface. He was afraid for himself. However, he couldn't be certain there would be an explosion.

They went to the surface and the mine superintendent was notified. A conference was held in the main company office.

The area behind the stoppings was not ventilated. In such a situation he would expect there would either be seals or the area ventilated. One would also expect that explosion-proof bulkheads would have been installed. In addition to the imminent danger order he issued a 104(a) citation. Inspector Jordan did not see any ventilation in the area and he considered the violation to be significant and substantial. The purpose of the seals was to create an atmosphere behind them. Seals have value outby an area as protection if an explosion occurs. A discussion took place with management about possible removal of the stoppings but no one wanted to volunteer to remove the Kennedys.

MSHA officials also discussed with company representatives that travel in 2d South would be restricted. The 107(a) order covered the entire mine but it was modified by Inspector Jordan to allow the company to construct seals but no other work. The operator's activities were limited to the 2d South area.

The inspector agreed that Kennedy stoppings are a recent innovation. In his opinion the condition is imminently dangerous if there is an explosive mixture of methane behind the stoppings and the area is inaccessible.

~2015

He indicated a methane detector is accurate to within .1 percent; when the methane concentration is in excess of 9 percent the detector loses its accuracy. Methane is in an explosive range when its concentration to oxygen is between 5 to 15 percent.

If the methane concentration is in excess of 20 percent, the inspector will remove the detector because it is no longer calibrated. Methane concentrations from 16 to 80 percent of oxygen are not explosive mixtures.

Prior to the day of this inspection Mr. Jordan had not seen the Kennedy stoppings in the 2d South area nor in 1st Right. The locations of the stoppings were not shown on the company mine map.

Kennedy stoppings are not explosion-proof bulkheads. This 2500-foot long area could not be ventilated; therefore, it should have been sealed. The purpose of the inspection was not to locate or find Kennedy stoppings. Any abandoned area must be sealed or ventilated. In the ventilation plan Kennedy stoppings could be used but not in lieu of a seal.

In fact, there was no room to build seals outby some of the stoppings. If seals had been constructed the inspector would not have issued his imminent danger order. With Kennedy stoppings in place he would expect to find some methane in the outby side.

Forty feet of tube was used on the aspirator to sample behind the stopping. A span of six entries is 600 feet.

The series of bottle samples that were taken (as shown on Exhibit S-6) justify the imminent danger order. Further, the hand held detectors had shown methane as high as 9 percent.

In 2d South there have been as many as six roof falls. When Inspector Jordan issued his imminent danger order, miners were working only two entries away. Only in one location did Inspector Jordan see any permanent sealing material.

Several hours elapsed from a verbal order of imminent danger at 11 a.m. until the company received the written order. Verbal orders are frequently issued. On the day it issued the imminent danger order, MSHA also wanted to know the company's plans to remedy the conditions. A Kennedy stopping is not the same as a seal. Methane will migrate from area to area. The air outby at the stopping was 37,632 CFM.

~2016

ANTHONY DURAN, an MSHA coal mine inspector, carries certificates as an assistant mine foreman in New Mexico. He works at the Golden Eagle Mine two quarters a year.

He inspected the mine on February 13, 1990, and went to the longwall section with Supervisor Joe Pavlovich and the mine foreman. On that date he was called to 2d South but did not take any methane readings. He agreed with Mr. Jordan as to the imminent danger in the area.

Inspector Duran issued an imminent danger order on February 16, 1990, when they were continuing with their inspection. He had learned the company was putting seals in 1st Right. The previous Jordan order had affected the entire mine. Inspector Duran was accompanied by Frank Burko of the company safety department. Six miners and a foreman were putting up seals in 1st Right. Inspector Duran went to the No. 1 and No. 2 stoppings and checked for methane. By using his hand-held methane monitor he found a concentration of methane. It was 1.9 percent to 2 percent at the wall. A methane detector may burn out if the concentration is above 10 percent.

The Kennedy stoppings were in place at 1st Right. He measured the methane at 2 to 5 percent. One of the stoppings had a hole in it and the concentration at that point was 8 percent.

In Inspector Duran's opinion, the concentration of methane is unpredictable in this gassy mine. If an explosion occurred behind the Kennedy stopping, it could propagate into the working area. The inspector also tried to take an air bottle measurement in the No. 3 crosscut but he could not determine if the tubing had gone through the Kennedy stopping. He took a methane reading of 1.9 to 2 percent when the tubing had been put through. Inspector Duran also sampled 3.3 to 2.4 percent on the right hand side and 8 percent at the Kennedy stopping.

He went back to No. 3 entry with two large air bottles and two smaller ones. He then issued a 107(a) order because of the possibility of an imminent danger. He could not see behind the Kennedy stopping. Methane requires an ignition source such as a roof fall. In a roof fall, if the roof bolts popped, they could cause a spark, or steel striking steel could cause a spark. The hazard is a resulting explosion. The inspector felt it was an imminent danger situation because he did not know what was behind the Kennedy stopping. He was also fearful of his own safety.

~2017

Inspector Duran issued a citation because WFC was working "on an order." The previous order did not allow working in 1st Right.

The area behind the Kennedy was not being ventilated. There were no seals completed in the 1st Right area. If an explosion occurred it could cause death, but the inspector did not know for certain that an explosion would occur. Inspector Duran did not know the concentration of the methane mixture behind the stopping. He issued the order because, in his opinion, the return entry could be shut off. He then went to the surface and called his supervisor.

Inspector Duran terminated the 107(a) order when the seals were completed. In addition, the methane tests indicated that the concentration was above 80 percent, which was clearly beyond the explosion range.

The inspector had seen Kennedy stoppings when the Golden Eagle mine was developing the headgate and tailgate. The methane detector used by the inspector was Model MX 240, as shown by Exhibit C-1.

In connection with Order No. 3241331 the inspector detected one reading at 5 percent and one at 8 percent. He recalibrated his instrument every morning and when he returned to the surface.

There were no surveillance tubes in the No. 2 or No. 3 entries. He couldn't tell whether or not the areas behind the Kennedy stoppings were ventilated. Inspector Duran took a sample in 1st Right. The samples taken from 1st Right are noted on Exhibit S-7, an analysis by the Denver Tech support lab.

RONALD L. PHELPS of Trinidad, Colorado, has been an MSHA supervisory inspector since October 22, 1989. He is a person experienced in mining; he has been in the Golden Eagle Mine six times.

Mr. Phelps was contacted by the inspector as to whether or not it was appropriate to issue the imminent danger order. In his supervisory position he has reviewed the records of the Golden Eagle Mine concerning rock dust surveys. In the past, the company has received 26 citations for inadequate rock dust.

Inspector Duran called Mr. Phelps concerning 1st Right. Inspector Duran said work was being done on the 1st Right on two seals but the miners were working in methane concentrations. The materials and tools being used could cause sparks; there was also an unknown methane mixture behind the stoppings.



~2018

Based on this information, Mr. Phelps concluded that it was reasonably likely than an explosion could occur. He felt he had no choice but to issue an imminent danger order. He also concluded that MSHA should issue a 104(a) order. He directed that the workers be withdrawn from the mine.

Mr. Phelps traveled to the mine and met with company representatives to establish a plan to complete the seals in 1st Right. He inspected the area and concluded the Kennedy stoppings did not meet the criteria of explosion-proof seals. He returned to the mine the following day and was informed that the seals only lacked a couple of blocks to be completed. Inspector Duran confirmed the completion of the 1st Right seals and MSHA terminated the order on 1st Right. The seals were completed at 12:55 p.m.; upon completion, the order was terminated as to 1st Right. MSHA authorized the resumption of mining but methane samples were required to be taken to verify the integrity of the 2d South seals.

After 72 hours, a favorable positive trend was established but MSHA left the modification in effect. The order was terminated on February 28 when it was indicated the seals were effective.

On the day the order was issued, the inspector met with several company officials, as well as with MSHA representatives Pavlovich and Jordan. At this meeting they discussed the conditions and requested that the company propose how it intended to correct the situation. After the company plan was approved the 2d South order was modified so that miners could safeguard the mine, but no other work was authorized. Also maintenance would be allowed in certain areas to address the problem of water accumulations, etc. The modification, in effect, states that no other work was to be done.

The inspector agreed he was only aware of one safety complaint in connection with 1st Right, a 103(g) complaint. Inspector Melvin Shively concluded after an investigation that the 103(g) complaint was invalid since he found initials in the necessary area. Shively did not tell the inspector about the Kennedy stoppings which were recessed 20 to 30 feet from the return.

On March 13, Mr. Phelps was involved in the dispatch of the inspectors. He assigned each inspector to a section of the mine. The previous evening, Inspector Duran told him that Kennedy stoppings existed across the 2d South entry. In Mr. Duran's opinion this blocked the ventilation; such a condition was a problem.

~2019

Mr. Phelps assigned Jordan to the west side and asked him to check the conditions. He did not want an area to be unventilated, nor did he want Kennedy stoppings serving as seals.

From Mr. Duran's statements, the witness believed miners were working in an explosive gas area. Mr. Duran told him the company had dropped the ventilation curtains.

After the order was issued on 2d South, MSHA allowed the company to build permanent seals. In 1st Right the seals were built; after the seals were completed in 1st Right, the methane was no longer in the explosive range.

Stoppings in 2d South were constructed in a poor position since they were close to the entries. The ribs themselves were crushed and rolled and there was concern about the integrity of the seals. Logically, there wasn't a perfect solution. The order of withdrawal issued on February 13 is the same order terminated February 28.

The imminent danger order was modified and left in effect as a control measure. When the order was issued on 2d South, the mine was closed. No one was allowed to return until the order was modified.

On acceptance of the company plan, the order was modified and the company was allowed to enter 2d South and build the seals. The company was also permitted to check the water accumulations and methane concentrations in the area.

The plan to construct the seals indicated an ongoing effort to provide a safe working environment. The ten-point plan that was approved by MSHA provided that certified people would monitor the area; also, non-sparking tools would be used.

The chain of command, from MSHA's viewpoint, was the office of District Manager John DeMichiei to Sub-District Manager Joe Pavlovich to the MSHA field office and then to the three regular MSHA inspectors.

WILLIAM REITZE, an MSHA mining engineer, has been with MSHA for three years. He is familiar with the Golden Eagle Mine and has been in the mine on three occasions. Mr. Reitze identified the ventilation plan for the mine; he has reviewed the plan in its present form (Exhibit S-8).

~2020

He indicated that Kennedy stoppings were a form of ventilation control but do not constitute a seal. All areas of a mine must be ventilated or sealed.

In this mine, Kennedy stoppings were across the entries in both areas. This would indicate the areas were not being ventilated. There was no way for air to make a loop through the area.

Permanent seals are constructed of 8-inch by 8-inch by 16-inch concrete blocks. The blocks for the seal must be 16 inches thick with a surveillance tube and water tap. If the seals are in place, methane can build up beyond the explosive range. The CO<sub>2</sub> will also increase in the atmosphere. It is impossible to build a perfect seal. Seals normally leak.

One method is to put in a temporary seal and then construct a permanent seal. The permanent seals are cut into the rib floor. The concrete blocks are then sealed with mortar.

The mine requires explosion-proof seals. A Kennedy stopping is not explosion-proof. A Kennedy stopping is eight inches thick but stoppings are not built to hold an explosion. In one of the entries here, it took four hours to install an explosion-proof seal. It is a good mining practice to monitor an atmosphere behind the seals as it is necessary to know the extent of methane build-up, depletion of oxygen, etc.

There can be variations of methane concentrations behind the Kennedy seal, as well as behind a permanent seal.

The mine maintained two areas which were not ventilated and permanent seals were not installed.

A map is part of the ventilation plan. It is shown in Exhibit S-8.

Exhibit S-9 shows the 2d South area where the seals are constructed (left of center of map shown in Exhibit S-9). On Exhibit S-9 the triple lines indicate a seal. The initials "SM" mean "Steve Madson." He indicated where the seals were to be constructed. Madson drew the seals on the company map and initialed the map. The map is part of the approved plan.

The ventilation plan requires methods to be used for the concrete explosion-proof seals. Exhibit S-10 is part of the ventilation plan. It contains estimated construction dates.

~2021

Seals are to be constructed and seals should go up to the ventilation stop.

#### WFC's Evidence

DAVID HUEY, Wyoming Fuel's Manager of Operations, is a person experienced in mining. The company employs 132 hourly miners and has 26 underground management personnel. The mine is 450 feet deep and a strata of shale overhangs the workings.

Exhibit C-2 is the roof control plan; a page of the plan is a lithologic survey prepared by the company's chief engineer.

The mine liberates in excess of five million cubic feet of methane in a 24-hour period; as a result, the company has a weekly inspection as mandated by 103(i) of the Act.

A 14-foot diameter intake shaft in the return shaft pulls 500,000 CFM. Exhibits C-3 and C-4 show the abandoned area.

The Kennedy stoppings are marked with three vertical slash marks on the exhibits.

The company increases ventilation to handle the methane liberated by the mine. Certain areas are sealed because of the amount of methane liberated. The Kennedy stopping is used to shut off air; it is not a seal.

There has been no mining in the 2d South area since 1985 because of floor heave and maintenance problems. The concrete block stoppings were broken.

If a stopping is crushed out, the air will short-circuit and not go back to the end of the panel.

Heaving problems in 2d South were present since Mr. Huey began his employment with the company. The company has also encountered black damp (CO<sub>2</sub>). The section is 2500 feet long. Black damp was encountered at 2,000 feet. Brattice was installed where the Kennedy stoppings had crushed out. This did not solve the problem, which has been ongoing since August 18, 1989. The company also blocked off entries with Kennedys. The Kennedys prevent access to an area. The company decided to seal 2d South when they installed Kennedy stoppings in January 1990. The company did not continue to work in 2d South after the Kennedy stoppings were installed. However, foremen walked the area in pairs in the event brattice needed to be moved.

~2022

Kennedys were installed in the latter part of January 1990 to keep the miners out. There was positive pressure maintained on the Kennedy stoppings. The purpose was to keep miners out of the areas where there was positive pressure on the stoppings. The 37,000 plus CFM airflow against the Kennedy stoppings would dilute any methane. The loop of air was drawn on Exhibit C-4; the arrows show the airflow before the Kennedy stoppings were installed.

The heave of the floor will break a Kennedy stopping. Kennedy stoppings were installed before an area was sealed. The ventilation plans permit Kennedy stoppings.

After putting in the stoppings the company would next, in sequence, install seals at the mouth of 2d South.

The material for installing the seals had been loaded and moved into position by the track. This was an ongoing process. The material would be transported by locomotive. The route is by a rope slope and then by cable car. On one trip the company could put in material for a seal but the material itself goes on a locomotive to the track end. The supplies are then hand-carried to the six sites. One man could carry one block from the track. It is about 600 feet. If the seals are on the outside then there is a possible travel distance of 900 feet from the track end to the seals. The mortar was contained in 90-pound bags.

Mr. Huey had a conversation with MSHA about the sealing of 2d South. The company planned to seal 2d South. MSHA's Archie Vigil was supportive of the idea.

Witness Huey was informed at home of the imminent danger order in 2d South. At that time he was advised that Inspector Jordan had ordered the miners withdrawn. The subsequent discussion with MSHA representatives took place at the mine office.

The outcome was to erect permanent seals which the company had already been set out to do. Mr. Huey did not agree with the imminent danger order because there was no imminent danger. There was a lot of black damp but there were no ignition sources in the area. The inspector said there was a possibility of a roof fall. However, the company uses resin-grounded roof bolts. There wouldn't be a roof fall behind the Kennedy stoppings.

Belt structures could not be ignition sources. MSHA also claimed that a roof fall could strike a rail and cause an ignition. They also claimed that the methane behind the Kennedy stoppings was in the explosive range. Mr. Huey would expect to find methane behind the Kennedy stoppings.

~2023

He was aware of two roof falls in 2d South in an area behind the Kennedy stoppings. This had occurred at some previous time.

The 1st Right area involved the imminent danger order. 1st Right and 2d Right were developed by longwall panel. The company encountered a fault in 2d Right. The fault resulted in excessive water (600 gallons per minute and excessive methane).

The company pumped out the water reducing the methane and also put up a seal. Mr. Huey was assisted by MSHA on arranging the temporary seals. Positive air pressure was used on the seals. They had a difficult time keeping the methane concentration below 2 percent. The company installed Kennedy stoppings across three entries but applied positive pressure to them. (The air-flow is shown in blue on Exhibits C-5). When the company reached 1st Right at the junction of 3d North, it could not get the methane concentration below 3 percent, so they took in fresh air and decided to seal 1st Right.

They also erected three Kennedy stoppings and started putting in explosion-proof seals. This started the last part of 1988. An MSHA inspector assisted them in this effort. The readings were taken at the face of the shields and no imminent danger orders were issued during the monitoring of the seals.

Methane to be explosive must be in the 5- to 15-percent range. The inspector knew Kennedy stoppings were located in 2d Right.

Permanent seals in 1st Right were put up in the latter part of 1988 and there were tubes to monitor behind the seals at the mouth of 2d Right.

In 1st Right the excessive water was permitted to flood. Then there was a low place from crosscut 7 through crosscut 9 (marked dip on Exhibit C-5.) Methane was also bubbling through the water. As a result of the water and methane, the company had to retreat to crosscut 11. Water was flowing at 20 gallons per minute.

In December 1988, the company decided to seal 1st Right and erect Kennedy stoppings. MSHA was supportive of this plan. The Kennedy stoppings were to seal off the methane. Without the stoppings it would not be necessary to keep miners in the area. They did not use oxygen apparatus to assist the miners in erecting the stoppings. It would have been unsafe to expose anyone to this type of atmosphere.

~2024

It was decided to put Kennedy stoppings and room curtains at 1st Right and start erecting the seals.

Also a bore hole from the surface was drilled. The purpose of the bore hole was to vent off any pressures in the area. The bore hole was installed in the summer of 1988. The bore hole took care of the methane but it would not enter 1st Right because of the fault line.

In February 1989, the company did not intend to install Kennedy stoppings as permanent seals. There was positive pressure on the seals as a result of 89,000 CFM. In 1st Right air was directed into the Kennedy stopping with line brattice. If there was no positive pressure, methane would go in the main return. Kennedy stoppings remained until February 16, 1990.

MSHA makes quarterly AAA inspections. The 1st Right area is one of the areas in the inspection book. In addition, a 103(g) complaint was made by a miners' representative. He claimed the company was not firebossing the 1st Right area. The company examiner would have to check the methane. It was not above 2 percent. An examiner would also examine Kennedy stoppings for methane. On February 16, MSHA said the company could not use the Kennedy stoppings as a seal. Mr. Huey said that they were not being used as a seal. MSHA did not advise them of any methane readings by the Kennedy stoppings.

Mr. Huey met Inspector Jordan on February 17. Inspector Jordan said that there was 10 percent methane concentration behind the No. 3 permanent seal in 1st Right.

In order to terminate the order, the company was required to build seals (as shown on Exhibit C-6). The seals had to be built by the 17th.

Mr. Huey was told this would be dangerous because of a possible roof fall at 1st Right; he did not agree there was any imminent danger.

The inspector said Kennedy stoppings could cause an ignition due to a spark, but this wasn't possible since most of this area was flooded. Any roof fall would drop into the flooded area.

Concerning the termination order in 1st Right, Mr. Huey took readings and knew that the methane concentration there was substantial. Inspector Jordan said it was a 10 percent concentration. Mr. Huey got a detector and obtained a reading of 80 percent methane. He had shut down the bore hole to increase the methane concentration.

~2025

"Imminent danger" means immediate danger to miners in a coal mine. Imminent danger can be bad roof, bad air, methane concentrations, black damp, and other conditions.

Concerning 1st Right, Mr. Huey did not believe there was imminent danger. The area was flooded and in 1st Right he had seen flooding for over a year. However, part of it was not flooded. Roof falls are not a source of spark because the company uses resin bolts. Also, at 1st Right more than ten feet of sandstone would have to fall before it could be a source of ignition.

There was no condition of imminent danger because there were no ignition sources or trolley wires.

It is not a safe mining practice to use Kennedy stoppings as permanent seals. Kennedy stoppings are in 1st Right to direct ventilation. It takes three hours to install Kennedy stoppings, while a permanent seal can be built in about 24 hours. There were no permanent seals in the 1st Right area.

The company decided to put up seals in the latter part of February 1989. This was a year before the inspection.

The seals were installed after the MSHA order was issued. The MSHA manager discussed seals in 1st Right on February 13 and 14. The company decided to put in seals because operations were shut down in 2d South. The company maintains three shifts at Golden Eagle. All of these are production shifts.

On February 14, six miners and the foreman built the seals. They started on Tuesday and finished three seals by Saturday afternoon.

The Kennedy stoppings directed the course of the air. An excessive amount of time did not elapse between the time the Kennedys were installed and the time the permanent seals were constructed. The Kennedy stoppings cut off access and ventilation to a given area.

The stoppings are printed on the mine map as two lines; the seals are printed on the map as three lines.

If an area is not ventilated it could be sealed with explosion proof seals because of possible explosions inby the seals.



~2026

Kennedy stoppings are not explosion proof. There was heaving in the 2d South area and Kennedy stoppings can be damaged by heave as can any kind of other stopping or seal.

The company planned to put in permanent seals when they got to it. There was some material in the area on February 13 but Mr. Huey did not know how much. There was not enough material in the area to build one seal. He didn't tell MSHA when the area would be sealed. The Kennedy stoppings were initially in 2d Right.

They worked on the permanent seals in 2d Right when they could get to it. At crosscut 13 the seals were done a lot quicker. Mr. Huey considered crosscut 13 to be an emergency situation.

In 2d South, on February 13, there was a carload of concrete blocks and mortar on the tract to be used to build permanent seals.

The witness did not believe an imminent danger condition existed at 2d South since there was no ignition source. There were roof mats in the area.

The witness knew of two roof falls by crosscut 20 and six roof falls in 2d South.

There is still disconnected track and trolley wire in the area. It took three shifts working five days to construct the seals. The material for the permanent seals was in the section before the Kennedy stoppings were installed. It was a management decision to install the Kennedy stoppings. If the company reconnected the track from the area marked "track end," it would be necessary to knock out two stoppings. (Ex. C-4). The track had been disconnected for a year.

As Manager of Operations, the witness reports to the company Vice President Charles McGlothlin; the mine foreman reports to the witness.

The witness did not discuss Kennedy stoppings in 2d South with Mr. McGlothlin. Kennedy stoppings cannot be used as a seal. The Kennedy stoppings were two to three feet from the seals.

The Company did not have a definite date to install seals. The first step was to install the Kennedy stoppings. The start date was when the Kennedy stoppings were erected; but the company had not begun to install the seals.

~2027

After the 107(a) order was issued on 2d South, the company discussed removing the Kennedy stoppings and installing seals in their place. However, the witness did not want to do that because you could only take down one stopping. It was unsafe to remove the Kennedy stoppings because of the methane mixture behind the Kennedy seals. The gas migrating from where the stoppings would be removed could be harmful.

Before the order was issued, the witness understood that MSHA accepted Kennedy stoppings as seals. This understanding was based on what MSHA had observed in the past.

Kennedy stoppings are designated on the map in the mine office; the area was also shown as "not ventilated."

The company has received a citation for curtains used as ventilation controls and it has also been cited for lack of rock dust. In the witness's previous job in West Virginia, the company did not use seals. Abandoned areas were not sealed.

The order was issued on 2d South because of a miner's complaint. The miner was John Garcia. He identified himself to the witness as the person who filed the complaint. He filed the complaint because the company was not letting him serve as a fireboss.

Once the Kennedy stoppings were erected, the company made weekly examinations at the stoppings; some of these were recorded in the book.

Certified firebosses could danger off any area. Firebosses are a mix of hourly and salaried people.

When the 107(a) order was issued at 2d South, the witness understood the company could work on 1st Right notwithstanding the order. MSHA's representative Mel Shively supported this idea and concurred with the company's view.

There was a cave-in to the sandstone at the east end of the mine in 1987.

It was ventilated at 1st Right after the Kennedy stoppings were installed because the company had a bore hole drilled into the area.

The diagram (Exhibit C-2) showing the lithology was made as a result of the bore hole samples. Some portions contained sandstone but others did not. The circled area line shows the return aircourse.

~2028

An explosion in 2d South would probably propagate into the mine. The witness was not aware when any sandstone had fallen onto the mine floor.

JACK FELTAGER is a construction foreman for Golden Eagle. He indicated the track and the trolley wire had been cut at the point marked "track end." The track was also cut out by the Kennedy stoppings for a distance of about 15 feet. The trolley wires were also cut at approximately the same location. By "cut" Feltager means separated and de-energized. Sections of the track were also removed. The cut was made in order to install stoppings.

The witness has built permanent seals with material that was present at the site. One seal could have been constructed with the material present but additional mortar mix would have been needed. The witness was partly involved in the building of the seals and it was necessary to hand-carry mortar blocks to the point of construction. One or two overcasts along the way were difficult to enter; it was also necessary to pass the 30-pound blocks through some manddoors which are 2 1/2 x 2 1/2 feet wide. They also used a wheelbarrow because the area was too restricted to use larger equipment. Forty miners were involved on Mr. Feltager's shift to install the seals. It took five days to construct them.

On February 13, in 1st Right, there were materials at the No. 2 entry to install seals. There were about 80 blocks and 30 to 40 bags of mortar. With this amount of material you could install two rows of a permanent seal.

When installing seals in 2d South the men were two to three feet from the Kennedy stoppings. The company had three foremen monitoring the Kennedy stoppings. MSHA representatives were also monitoring the work in the area.

No work was started with the permanent seals in 1st Right on February 13, 1980.

The witness receives his orders from the general plant foreman. No definite time had been set to begin the installation of the permanent seals. They were going to put Kennedy stoppings in, then do the seals "when we can." The witness has two crews who construct seals. Mr. Giacomo, of the company safety department, told the witness that the seals were to be built in 1st Right. On the 14th, Mel Shively asked the witness if they were working on the 1st Right seals. He replied affirmatively. They were starting the seal in the No. 3 entry and they had been at the work for seven hours.

~2029

The witness was familiar with the installation of seals. The Kennedy stoppings were used for ventilation control. When construction began at 1st Right the witness was aware of the 107(a) order and he understood the company could only work in the 2d South seam.

When he entered 2d South on February 13 with Mr. Duran and Mr. Pavlovich, the witness learned the inspector would issue the 107(a) order. When he realized MSHA was going to issue such an order he contacted other people in the mine. The witness was not aware of any imminent danger situation.

He remained in the mine ten minutes after he was told of the imminent danger.

DONALD L. GIACOMO, a member of the company's safety department, renders assistance to all departments. He has been in the mining business 18 years. He was familiar with the MX 240 (see Exhibit C-1), which is the instruction manual.

On February 13, 1990, MSHA issued the imminent danger order. The inspectors arrived at the mine about 6:30 a.m. and the withdrawal began between 10:30 and 11 a.m. The company did not receive a written copy of the order until after 5 p.m.

On February 14, it was decided seals should be built on 1st Right and he knew that they should take corrective action.

He was aware MSHA knew about the Kennedy seals in the area. At the close-out conference MSHA inspector Al Shively asked when the work would be done on the seals. About 2 to to 2:30 p.m. on February 14, Mr. Giacomo was approached by Mr. Shively who asked what they were doing in 1st Right. When they replied they were building seals, he said, "Good." That was what he wanted to hear. The imminent danger order was issued on 1st Right on February 16.

Under the 107(a) order the mine could be checked for hazardous conditions, but he did not discuss the possibility of going to 1st Right to construct the seals. The witness thought that if there was imminent danger he would construct the seals. When he arrived on 2d South on February 14, he did not consider that there was an imminent danger situation.

In the main return outby the Kennedy stoppings the air was moving in excess of 39,000 CFM and the witness could not detect methane in excess of 2 percent. A Kennedy stopping is not explosion proof.

~2030

The witness was not involved in the decision to put Kennedy stoppings in 1st Right. If there was no explosive mixture outby the stoppings, there was no urgency in erecting the permanent seals.

Nothing in the standards tells the company that the seals should be put in place whenever "practical."

There were no dangerous levels of methane outby the Kennedy stoppings. Hence, it was not necessary to construct permanent seals. The Kennedy stoppings blocked the access of miners in the area.

The witness was not involved in the decision as to when 2d South and 1st Right could be permanently sealed. Such a decision is made by Mr. Salazar, the general mine foreman.

The witness decided to install seals on February 14. Mr. Feltager was aware of the decision and by that time they had been advised of MSHA's order. At the Golden Eagle mine, MSHA inspectors write their orders after they come out of the mine. The time on the imminent danger order was 11 a.m. The witness physically received the order at about 5 to 5:30 p.m.

Before February 14, MSHA's Mr. Shively was aware of the Kennedy stoppings in 1st Right and before that date he asked when they would start building the seals. On February 14, Mr. Shively asked the witness what they were doing in 1st Right. The witness took that to mean "Are you building the seals in 1st Right today?" His response was that we were building the seals; Mr. Shively replied he was glad to hear that.

FRANK W. BURKO, a safety supervisor at the Golden Eagle Mine, accompanied Inspector Duran on February 16, 1990.

The purpose of the line brattice is to ventilate the stoppings. The inspector took readings right by the seal. Mr. Burko went to the No. 3 and No. 2 entries where the brattice had been drawn back to the ribline. Mr. Duran made several checks in the area of the No. 2 entry.

Mr. Burko said brattice should be brought in to help with the ventilation. Mr. Duran said he wanted to check. The inspector was checking two to four inches away from the stopping. He should have been a further distance back from the stopping.

In the No. 1 entry the parties were accompanied by a mine representative. The ventilation was disrupted by pulling the curtain back. Mr. Duran said he would have to issue a 107(a) order.

~2031

On the night of the February 16, the witness traveled with Mr. Phelps to 1st Right. The construction of the seals was continuing. He and Mr. Phelps looked at the seals in 2d right. Mr. Shively said that there was a continuing accumulation of water.

Mr. Burko did not remember his methane readings but they were not taken a foot from the roof or ribs. When in the No. 2 entry, he didn't hear Mr. Duran tell anyone to move the curtain. It took five minutes to take his readings. Mr. Duran did not explain his reasons and he wanted to keep the ventilation functioning.

The Kennedy stopping in the No. 2 entry was 10 to 12 feet back into the rib line. Mr. Burko did not travel to 2d South on the day the imminent danger order was issued.

Concerning the seals under construction: only two rows of 30 inches were needed to complete one of the seals. One or two rows had been started on the No. 2 seal.

In the No. 1 entry the curtain was pulled back but that would slow ventilation.

Apparently Mr. Burko got the same reading as Mr. Duran. The men took readings in the main return and there may have been a difference between the Burko and Duran measurements of methane.

CHARLES W. MCGLOTHLIN, JR., Vice President and General Manager of the Golden Eagle Mine, reports to Chuck Batty, CEO. Mr. McGlothlin has had 28 years in the mining industry and is experienced in that field.

Mr. McGlothlin was aware of the order of withdrawal issued February 13, 1990. He discussed the situation with subordinates in the mine and investigated the facts. The company further tried to develop a plan to satisfy MSHA. He met with MSHA representatives on February 13 to discuss ventilation in general and to develop a plan to abate the condition. Messrs. Huey, Phelps, Paplovich, Duran, and Jordan were present at the meeting.

Mr. McGlothlin challenged MSHA's conclusion that this was a condition of imminent danger. MSHA believed that it was an imminent danger situation due to the methane behind the Kennedy stoppings. Mr. McGlothlin disagreed because there was no ignition source behind the Kennedy stoppings.

~2032

The company's plan was to build permanent seals at 2d South but he was not sure when the construction would be completed.

On Thursday, February 15, about 5 p.m., he had a telephone conversation with MSHA's Mr. Phelps, of which he made notes. In the conversation, Mr. Phelps indicated that the new District 9 (MSHA) policy was that a 107(a) order would not be terminated. Mr. Phelps had been made aware of that policy. He believed that the company would know about it sooner or later. MSHA intended to modify the order to allow sampling. Mr. Phelps learned that the saturation inspection occurred because of an explosion at Pyro, Kentucky. There was no discussion about the Kennedy seals over the telephone.

On February 16 about 8:30 a.m., Mr. McGlothlin contacted Jerry Taylor at MSHA's office. He understood that Mr. Taylor was the No. 2 ranking official. On the telephone Mr. Taylor confirmed Mr. DeMichiei's policy; namely, no one could be underground while an atmosphere behind the seals was in an explosive range.

At his request Mr. DeMichiei returned Mr. McGlothlin's call about 9:30 a.m. He was aware the atmosphere behind the Kennedy stoppings was in the explosive range. Therefore, this constituted a situation of "imminent danger". Mr. McGlothlin told Mr. DeMichiei that the roof at the mine did not contain an ignition source. Mr. DeMichiei replied that they had attended a meeting and the subject had been discussed at a District Managers' conference. The managers were unanimous in their view. Imminent danger existed because of the possibility of a roof fall. Mr. McGlothlin was distressed because he felt MSHA regulations should not be made in this fashion; i.e., by a meeting of MSHA's managers.

Mr. DeMichiei said that he would forward a report from the Bureau of Mines to confirm his position. This report had not been received as of the date of the hearing.

After the talk with Mr. DeMichiei there was further conversation with him about the history of the roof falls at the mine. Mr. DeMichiei suggested a meeting on Tuesday (Monday was a Federal holiday). Mr. McGlothlin passed the information along to the Safety Department. Mr. McGlothlin made notes of the statements by Mr. DeMichiei.

Mr. McGlothlin has been a mine foreman, shift foreman, and an hourly worker. He was familiar with methane and with the sealing of abandoned areas. In his opinion, there was no ignition source in 2d South but he would agree that would be a situation of imminent danger if an ignition source existed.

~2033

At the time of the violation, Mr. McGlothlin had not read the order but he understood they could build seals in 2d Right. Inspector Shively recommended the time be used to build such seals. This information came from one of the company representatives, but Mr. McGlothlin did not remember who had told him about this facet of the case. The person who told him had first-hand information.

Mr. McGlothlin had seen the language in the order about the maintenance, inspecting, and pumping. He did not know who authorized the work. He was aware that Kennedy stoppings were being used to cut off circulation in the mine. They discussed the plan for sealing the areas in the mine.

Kennedy stoppings are an effective method to block off areas while permanent seals are being constructed. When seals are to be installed, it is a matter that is site specific. The seals had not been installed in over a year but the company had good positive pressure. The area was stable and under control. Seals are worked in with the regular construction schedule.

If the company experiences heaving, unstable roof, or methane over 2 percent in the return air, permanent seals should be installed.

On 2d South, no date had been established to put in seals. The Golden Eagle Mine can cut off ventilation and install permanent seals when they get around to it. This has been an accepted work practice. Mr. McGlothlin could not say for sure there was no ignition source behind the Kennedy stoppings. The company's concern was black damp migrating out into the return. A roof fall is not a possible source of ignition in an abandoned area.

There could have been an explosive methane mixture behind the seal. The company was concerned about the type of readings being done here by MSHA and there are many indications of improper measurements. Also, wrong instruments were used, while some instruments were used beyond their limits. Mr. McGlothlin could not imagine any ignition source in 2d South or 1st Right.

DONALD W. MITCHELL, an expert witness and a person experienced in mining, testified at length. The witness's expertise is developed in his testimony and also set forth in Exhibit C-8. The Mitchell-Barrett seal was developed as a result of a memorandum he wrote.

Methane can be ignited either by a thermal factor of approximately 1800 degrees Fahrenheit or by incendivity. The latter are



~2034

sources other than heat such as sparks, arcing, and electrical current. Some sparks are not incendive, that is, they are not capable of igniting a methane/air mixture.

The witness had been asked to review the facts known in the instant case and render his opinion. He was contacted after February 13, 1990. In connection with the rendering of his opinion, he reviewed maps, the roof control plan, ventilation plan, pressure differentials across the seals, and a ventilation study by Boyd and Company for the Golden Eagle Mine. He also visited the mine the week before he testified.

Methane is controlled by ventilation and a survey in September 1989 by Boyd and Company was very useful. (John T. Boyd is a consulting firm for the coal mine industry.)

Mr. Mitchell used a computer program which is the same program used by MSHA concerning the effect of gas, black damp, and methane.

Using the Boyd data and the flow of air, he added 1st and 2d Right to the network of computer data. The Boyd data did not include 1st and 2d Right as points in the network. He also added the bore holes from the mine to the surface which were shown in 1st Right and 2d Right. In addition, the Kennedy stoppings were calculated into the network but no other modifications were made to the Boyd data.

Seals are notorious leakers. They do not prevent an interchange of gas between areas and even the best seal leaks 100 to 150 cubic feet per minute per one inch of water gauge differential. However, a typical leakage is 100 to 1000 on the same scale.

The witness had been present during the proceedings in the case.

When Kennedy stoppings are in place, the area is being ventilated in certain respects. Ventilation requires a loop and there were three such air loops. They were as follows: (1) the No. 1 entry of 1st Right to the bore hole; (2) the No. 1 Right entry through the Kennedy stopping to the No. 3 entry before and after the seal construction began; and (3) the No. 1 entry to No. 2 entry. The bore hole constituted part of the loop.

The witness's study, without the Kennedy stoppings in place, indicate a concentration of methane at 1st Right of 5 percent. In the No. 7 entry the methane was 4.5 percent. Methane was originating at the face of 1st Right.

~2035

There is a problem of 4.5 percent methane concentration in the No. 7 return. Methane should not exceed a concentration of 1.5 percent.

With Kennedy stoppings in place and with a fly curtain, the methane concentration at the face of 1st Right would be 4 percent.

In the return air in the No. 7 entry there would be 1.5 percent concentration of methane. With a Kennedy stopping and fly curtain in place, the bore hole would become a major part of the ventilation loop. A fly curtain will increase the leaking rate from No. 7 entry into 1st Right.

Any methane behind the Kennedy stopping would move primarily to the bore hole, but some would leak through the right side of the Kennedy stopping into 3 North.

Methane was being liberated by 1st Right and there was methane behind the Kennedy stoppings. There was also an explosive mixture of such methane behind the Kennedy stoppings and a mixture could be as high as 100 percent. However, if there was a 25 percent concentration, then this was an explosive mixture. The witness would expect an explosive mixture of methane behind the Kennedy stoppings at some point in time. When the inspector measured, there would have been different levels of methane behind the stopping itself.

The test methods used by the MSHA inspectors were inadequate. The resulting samples tend to be on the low side as to combustibility. The inspector took samples at one of the Kennedy stoppings. There was a major leakage, which would be a point of greatest leakage.

If Mitchell used the inspector's procedure, he wouldn't have been able to determine the air and gas mixture on the inby side of the stoppings.

The inspector was monitoring the atmosphere, but it may not have all been behind the Kennedy stoppings.

You could end up with 1000 different analyses. If a person wanted to learn an air-gas mixture by the Kennedy stoppings he should take samples at the bore hole. A sample taken at any other place would not be accurate.

If a reading at the bore hole was between 5- to 15-percent, the first reaction of the witness would be to prevent anyone from entering the area.

~2036

If methane concentration is above 15 percent (above 20 percent asphyxiation can be expected), then no one should enter the area.

Mr. Mitchell made an in-depth study and concluded there were no ignition sources in 1st Right. In connection with this, he examined four conductors and questioned people at the mine. (A conductor is something that could spark an ignition.) A conductor could be a pipe (including plastic), telephone lines, track, and trolley wires, or any wires in the explosive atmosphere.

The company followed standard procedures and made certain that all conductors had been disrupted. Usually one joint of track is removed for a distance of 30 feet. In addition, electrical wiring is cut, folded back, and taped.

Mr. Mitchell was concerned about friction ignition, that is, sandstone or quartz crystal in sandstone which have a potential for sparking. There is no such rock in the mine and, if there was, it wasn't at the place of the breakage. The area of concern in the roof fall would not exceed 30 feet divided by 4 or 7.5 feet. In that area you could develop strain, which would cause a spark.

There were no steel bolts in the area. Steel bolts are a sparking hazard. If, due to a roof fall a bolt is torn apart, it will generate sufficient sparking energy.

If a bolt bearing plate is made of silicone steel, or coated with aluminum paint, a spark could result if it struck sandstone on the floor.

A piece of aluminum rusty steel also creates energy sufficient to spark, if it is falling at 30 feet per second. Sandstone rock falling 30 feet is capable of creating a spark.

In this mine, the plates have no aluminum paint. However, an area of concern was aluminum pop cans. If a roof falls and strikes an aluminum can across a dry rusty area a spark can result. However, in this mine no such spark could occur because there is no probability that there was a dry aluminum can in the area.

Track is also a potential for sparking but there was no track or trolley wires behind the Kennedy stoppings. In addition, there was no belt structure in 1st Right. Mr. Mitchell did not inquire about the presence of trolley hangers.

~2037

There were mandoors in 1st Right but the area was flooded up to crosscut No. 7. Mandoors would not constitute an ignition source. Even though such doors are made of steel there is insufficient energy for sparking.

Based on his analysis of the area, Mr. Mitchell was satisfied that there was no ignition source in 1st Right behind the Kennedy stoppings. Based on his experience, it was not reasonable for an inspector to conclude that it was reasonably likely that death or serious injury could occur. Further, there was no basis to conclude that there was an imminent danger to the miners. If imminent danger existed, MSHA could have required inert gas to be pumped into the bore hole.

Given the manner in which the Kennedy stoppings were installed, it is not unusual for the company to have used such stoppings as it did.

Seals could not have been built by miners wearing self-contained apparatus. Working with such apparatus destroys a miner's peripheral vision. Miners should never be permitted to wear such equipment for longer than an hour. If the miners were building seals and the Kennedy stoppings had not been erected, the men would be exposed to an explosive concentration of methane, or they were in an area where they could be asphyxiated. (Exhibit C-9 illustrates testimony of the witness; the figures of Exhibit C-9 came from a computer model.)

Mr. Mitchell was familiar with 30 C.F.R. 75.729. The regulation is statutory and it was written by Congress. Based on his knowledge of the Congressional intent and the related matters, the witness concluded that Section 75.329 does not apply to the Golden Eagle Mine. Basically, the regulation is related to 75.305(g)(2) which applied to mines in existence at the time it was enacted. The regulation applicable to the Golden Eagle Mine is contained in 75.30 which Congress discussed.

When Mr. Mitchell was at the Golden Eagle Mine, he visited 2d South; he also heard the testimony of the witnesses regarding the section. He did not do a computer analysis in 2d South because he believed the area was non-ventilatable.

Black damp is an oxygen-deficient atmosphere. Pure black damp was officially called "choke damp."

In 2d South, Mr. Mitchell marked "Dip" on the map. It is shown with a green arrow. The dip is from the face to the open

~2038

area of the mine. One would anticipate that black damp would flow into West Main. The coal absorbs oxygen and also exhales carbon dioxide. Black damp can develop in ventilated areas of the mine.

Based on the information Mr. Mitchell received, 2d South could not be ventilated because the stopping had been crushed and the flow of air could not be regulated. Airflow would, to some degree, depend upon the elevation and temperature differentials. One would expect black damp in an area where the ventilation was disrupted. If an area cannot be examined due to black damp, then the company's action in placing Kennedy stoppings was a reasonable procedure. Further, a proper procedure was to examine the Kennedy stoppings weekly to see if they were not leaking excessively. Some leaking is all right. If the Kennedy stoppings were put in too deep, then the examiner would be entering a place where there is no ventilation. He could be asphyxiated. The best test against black damp is a plain safety lamp RMX 240 which would give a warning of black damp.

On February 13, 1990, MSHA inspectors took a reading and concluded there was an explosive mixture behind the Kennedy stoppings. This was not a valid conclusion because use of an aspirator is not likely to give a valid representation of an area which extends some 2000 feet behind the tube. In addition, the surveillance tube in this case was too short. It should have been 60- to 70-feet in by the seal or Kennedy stoppings. Kennedy stoppings are leaky and would have a constant flow of air back and forth (in by and out by the seals).

Mr. Mitchell recommended the operator extend the surveillance tubes at least to the third crosscut. Such a tube must be away from the area affected by the leakage in order to obtain a correct reading.

If Mr. Mitchell had taken samples as the inspector had done, he would be unable to render any judgment. The inspector did not wait for bottle sample results. (Exhibit S-6 was analyzed by the Mt. Hope Laboratory.) Mr. Mitchell gave no significance to the sample number A 2109 on Exhibit S-6 since it was inconsistent with the other samples. All samples must be tested for reliability created in this situation. The beeswax used to seal the bottles could have been contaminated.

There was probably an explosive as well as a non-explosive mixture behind the Kennedy stoppings on February 13. One would expect that there would be different air mixtures of methane behind the stoppings. The mere existence of a mixture is not

~2039

dangerous as the primary potential is asphyxiation. In Mr. Mitchell's opinion on February 13, 1990, there were no ignition sources in 2d South. In connection with this, he considered the thermal paint and conductional ignition.

In Mr. Mitchell's view, there were no means to conduct any energy into the 2d South section. In arriving at this conclusion, he examined the track, trolley wire, and belt structures. He arrived at the same analysis as previously in connection with soda pop cans.

He also considered thermal leakage and studied the lithology. The lithology (rock formation) was free of strata. It is normally associated with frictional ignition potential. In this situation there were wet surfaces. Portions of the bottom had heaved but other portions had not.

The kitchen was located at about Nos. 18 and 22 crosscut. It contained lots of black damp but no ignition source.

For methane to be ignited with oxygen, there must be at least a 12 percent concentration. Mr. Mitchell also concluded there were no ignition sources from the manddoors, roof mats, roof bolts, or metal bolt plates. Accordingly, there was no basis for the inspector to consider an imminent danger. Mr. Mitchell would also have advised against constructing the seals.

MSHA would not terminate the order until the methane behind the seals reached a non-explosive range. MSHA representatives said that there were arguments against this view. Even if the area was below the explosive range, there still could have been explosive concentrations in the area.

The Kennedy stoppings were made of metal, but these stoppings were free of silicone and light alloys which could cause a spark. The seals that would be eventually constructed should be hitched into the roof. If this is done, the worst thing that can happen is that the roof will break away and become ineffective. MSHA requires that seals be constructed with an angle iron on both sides of the seal.

After he visited the mine, Mr. Mitchell concluded that no imminent danger existed on the date the orders were issued. In arriving at his conclusion, he assumed the information he had was credible.

Bore hole flows can be ascertained with a reasonable degree of certainty. A Kennedy stopping and a seal are two different

~2040

things. The witness was familiar with the instrument used by the Boyd company and he understood that the Boyd company borrowed instruments from MSHA to do its survey. He expected the results he found.

Mr. Mitchell did not know if the Boyd survey measured methane concentrations.

The bore holes were closed by the operator on the 17th to assure MSHA that there would be methane concentrations above the explosive range.

If an atmosphere is unsafe, seals can be constructed after the atmosphere is stabilized.

Witness Mitchell conceded there was an explosive mixture behind the Kennedy stoppings.

2d South is an area of the mine that should have been sealed or ventilated. It was not ventilated on February 13.  
Additional Evidence Presented by the Secretary

WILLIAM A. BRUCE (called by the Secretary), is the Chief of the Ventilation Division for MSHA. He has been so employed since June 1981. He is a graduate of the Colorado School of Mines and specialized in mine safety and health. He has also co-authored over 100 papers. At least half of them have dealt with ventilation and fragmentation of rock.

He has reviewed papers concerning fractional ignition and explosion-proof stoppings. Mr. Bruce identified Exhibit S-11 which outlines the explosive mixtures at which oxygen can explode. From Exhibit S-6 the sample taken by the inspector, A-2109, falls within the flammable area of methane. The methane concentration there was 6.19 percent.

Ignition sources can be caused by roof falls. An incendive spark is the same as an ignition source. Mr. Bruce has not visited the Golden Eagle Mine but he was present when the inspectors testified concerning the mine. He also reviewed the lithology as indicated in Exhibit C-2. He had not reviewed related lithology exhibits shown by Exhibit C-10 and C-11.

He also studied Golden Eagle rock samples. The samples had been obtained by Inspector Mel Shively and he secured them outby the seals in 2d South in entries 1 through 6. Samples were taken from the roof of the six entries. An analysis indicated that the rock samples were 19 percent quartz.

~2041

It was Mr. Bruce's opinion that the Kolanski and Neggi report was correct. It states ignition by sandstone on sandstone with a pressure of 50 pounds could easily produce an incendive spark. Kolanski and Neggi made their tests in an explosive chamber of methane.

A drop of 2.3 feet would produce a velocity of 3 feet per second.

In the Mr. Bruce's opinion on February 13 there could have been an ignition source from sandstone rubbing on sandstone. Also, a roof bolt seal falling at 32 feet a second would produce sparking.

Other ignition sources could be a roof fall of shale at a greater velocity or with a direct impact on aluminum or rusty steel.

At this particular mine the sandstone was above the shale but there are numerous sandstone channels in the area.

Mr. Bruce pointed out that each of the three lithological surveys appear quite different. They are now noted on Exhibits C-2, C-10, and C-11.

The map of 2d South does not show any sandstone but it could occur in 2d South and 1st Right.

Roof bolts in the 2d South were also a secondary source of ignition.

Mr. Bruce believed there was a potential source for explosion in 2d South on February 16. Accordingly, imminent danger existed in 2d South as well as in 1st Right on February 15, 1990.

Mr. Bruce had not heard that piezoelectric quartz had to be at least 30 percent of a rock fall in order to create an incendive spark. The ignition frequency in the Kolanski and Neggi report was 19 ignitions out of 119 efforts. The witness did not know what type of sandstone was used.

On Exhibit C-10, the sandstone was 42 feet above the Maxwell coal seam and on Exhibit C-11 the distance was 26 1/2 feet to 33 feet.

Mr. Bruce agreed that the issue was a possibility rather than a probability. When MSHA Representative Mel Shively was in Denver, Mr. Bruce directly verified with him as to where he had obtained his samples at the Golden Eagle Mine.



~2042

JOSEPH W. PAVLOVICH, MSHA's Sub-district Manager in McAlister, Oklahoma, is responsible for enforcing the Mine Act over the mines in his jurisdiction. He has been so employed since August of 1989 and has worked for MSHA for 15 years. He is a person experienced in mining.

As part of his duty he has inspected the Golden Eagle Mine. An MSHA inspection began February 13, 1990. He arrived at the 2d South area the same date. Exhibit C-4 shows where the witness left the mantrap and walked into the 2d South area.

Inspector Jordan told Mr. Pavlovich that he had examined all six entries in the area and found Kennedy stoppings erected across each entry. He also stated that he found methane with a hand-held detector of about 1.5 to 1.7 percent outby the stoppings.

Mr. Pavlovich's first reaction was that an unventilated area of the mine had not been sealed. The mine liberates five to six million cubic feet of methane in a 24-hour period.

Mr. Pavlovich was involved in a decision to issue the imminent danger order in 2d South. The men walk the belt entry and there was a lot of the belt structure leading to the first stopping which had been cut. That is why Inspector Jordan took a methane reading near the face; he detected a 2.2 percent concentration. This indicated the methane had increased in the last hour or two. He had found 1.5 or 1.7 percent on his initial examination. If there was 2.2 percent, there would be more methane behind the stopping.

A further factor leading to the issuance of the imminent danger order occurred when they walked over to the far righthand entry which the company calls No. 1. A vent pipe for the sample tube had been put through. The inspectors began to aspirate the line. The methane climbed 0 to 9 percent and he immediately removed the equipment to keep it from burning the sensing cell. This was tried on numerous occasions and continued to do the same thing. This indicated to Mr. Pavlovich that a concentration of at least 9 percent of methane existed behind the stopping. This would be a very dangerous concentration. Mr. Feltager stated the tube projected about 40 feet into the area. Mr. Pavlovich felt that they were getting a good representative sample. Bottle samples were also taken. Mr. Feltager stated that he thought that there was about 1600 feet of track left in the area. He wasn't sure about whether there was trolley wire. There was a load of belt structure and belt ropes and there may have been a rock dust pipe in the area. Also, roof

~2043

bolts, pans, and assorted metal objects could have been left behind during mining. This indicated to Mr. Pavlovich that there was a very good possibility of an ignition source. The occurrence of metal or the sparking of metal on metal or rock on metal could have ignited the methane.

Mr. Pavlovich also considered the possibility of a roof fall in 2d South. The area of the mine that they were dealing with was twenty-five crosscuts deep and six entries wide. If an ignition occurred, it would definitely propagate into the active areas of the mine, or disrupt enough of ventilation to harm the miners, or create conditions that would endanger the miners.

Mr. Pavlovich agrees that he was not exactly certain what he was dealing with behind 2d South. He determined there was a condition of imminent danger because of the large quantity of methane and the possibility of an ignition source.

Inspector Jordan had a CSE-102 methanometer. Inspector Duran normally carries a MX-240. The witness had given his MX-240 to another inspector because his equipment had failed. It is unusual that explosive mixtures of methane are found. Mr. Pavlovich did not consider that it was a choice to send an inspector back for a Riken methanometer. Mr. Pavlovich knew there was a quantity of methane behind the stoppings. He also knew there would be an explosive mixture. Methane that came out of the sampling tube indicated there was large quantities of methane. Accordingly, he was not going to send for the 100 percent (accurate) instrument with people working in the mine.

After finding these conditions, Messrs. Duran, Jordan, and Feltager discussed the issue of the amount of methane. Mr. Feltager told him of the metal objects he thought were back there. In Mr. Pavlovich's opinion, an explosion would endanger the lives of every man in the mine. Accordingly, a decision was made to remove everyone from the mine.

Mr. Pavlovich identified Exhibits C-2, C-10, and C-11 as being drawings as submitted by WFC and its approved roof control plan. After reviewing the lithology, no one could determine the rock composition precisely from the four pinpoint bore hole locations.

After the conversation with the superintendent, Mr. Pavlovich informed Mr. Feltager that it was necessary to systemically withdraw everyone from the mine. Mr. Feltager called every panel where miners were working and told them to proceed to the surface and to withdraw power. They were to travel as quickly as possible. The men also left the area quickly and evacuated the mine.

~2044

At the bathhouse there was a meeting with management representatives. At the company's request, the group traveled to the main office. At the meeting were Roland Phelps, Donalee Boatright, Don Jordan and the witness. On the company's side were Dave Huey, Rick Callor, and Donald Giacomo. Mr. McGlothlin did not participate in the full meeting.

Mr. Huey asked what his options were to get the mine back in operation. Mr. Pavlovich informed him that the area would either have to be ventilated adequately or sealed. Adequately means that all gases must be reduced to acceptable levels.

The Kennedy stoppings were not sealing anything. Such stoppings allow air to pass freely and they are not structurally as sound as a seal, nor are seals explosion proof. A large roof fall could blow them out. Mr. McGlothlin suggested that they ventilate the area. Mr. Huey said he could not ventilate the area because there were too many roof falls there. He also stated he was afraid to send anyone in there, nor would anyone volunteer to clip the Kennedy panels or the wires holding them together because of the fear of an explosion. The company's other option was to seal the area with explosion-proof bulkheads; that is, permanent seals.

Mr. Huey and Mr. Callor decided they would seal the area. MSHA requested the company prepare written safety precautions.

Mr. Pavlovich was informed by telephone on the morning of the 17th that the seals had been completed. Production was allowed to resume. From the day the order was issued the inspectors worked around the clock at the mine and continued to monitor the area. Mr. Pavlovich wanted to be sure the seals were functioning properly. After production was resumed MSHA continued to monitor the seals based on the operator's samples. The sampling was done on a two-hour basis at each of the sampling tubes. In the 1st Right section, ventilation had been cut off for the use of temporary stoppings for a period of more than a year.

Mr. Pavlovich indicated that there was a lot of methane being liberated. If there was any ventilation, it was not sufficient to dilute or render harmless the dangerous gases. In the view of Mr. Pavlovich it is not good practice to put stoppings in an area and not be working on the seals. To block off an area for a year ignores explosive mixtures of methane. This is not a good mining practice.

If Mr. Pavlovich was the operator he would have delivered materials to the site before the track was removed.

~2045

In each of the kitchen locations you would expect to find pop cans and aluminum foil. There are a succession of kitchens as the mining progresses.

Inspector Shively told Mr. Pavlovich that he was concerned over the fact that he did not recognize a condition of imminent danger. Most of Mr. Shively's inspections deal with electrical equipment in the face area. Mr. Shively did indicate to Jack Felthegeger some inquiry about when they were going to start building the seals. No particular date was given.

Prior to beginning construction of the permanent seals, the company submitted a copy of the plan to the MSHA's district manager. The plan set forth the precautions the operator would take and it also contained a series of drawings.

Mr. Pavlovich was informed when the 107(a) order was issued at the 1st Right section on February 16. Mr. Phelps told Mr. Pavlovich the circumstances under which the imminent danger order was issued.

Mr. Pavlovich felt a similar situation was present as they had found in 2d South. He had heard from Mr. Phelps the percentages of methane that Mr. Duran found outby the temporary stoppings and this was sufficient to justify an imminent danger particularly in view of the huge body of methane behind the stoppings. The fact that there was water in one of the areas did not change anything. In Mr. Pavlovich's experience the most common source of mine disasters in underground coal mines is the accumulation of methane in explosive quantities.

#### Additional Evidence Presented by Operator

DONALD W. MITCHELL (recalled): Mr. Mitchell does not agree with Mr. Bruce's testimony that the Mitchell Barrett seal could withstand a force of 20 PSI. It will withstand more than that. Extensive tests show that it will withstand forces up to 50 PSI.

Mr. Mitchell also disagrees with Mr. Bruce's testimony concerning the effect of water in an abandoned area preventing an ignition. In sum, water is the most effective quenching agent for incendive sparks.

Witness Mitchell identified Exhibit C-12 as a report of the U.S. Bureau of Mines entitled "Frictional Ignition Of Gas During A Roof Fall". The document was written by John Nagy and Edward Kawenski. The work in the report was done at the direction of the witness. The rock or sandstone tested was a light

~2046

gray quartzitic subjected to secondary recementation. This rock contained in excess of 90 percent quartz. Mr. Bruce testified that the Golden Eagle rock samples contained 19 percent piezo electric quartz. The samples on S-12 range from 16 to 19 percent quartz.

The potential for ignition in Golden Eagle Mine in 2d South and 1st Right sections is possible. The possibility is negligible.

A report prepared in the case shows that rock containing less than 30 percent quartz has a negligible incendive temperature potential (ITP). (See Exhibit C-13.) These studies indicate that the persons experimenting have never been able to obtain an incendive ignition of methane when the rock contained less than 30 percent quartz. The authors, instead of saying "no potential," merely state that the potential is "negligible."

Mr. Mitchell discussed at length the Belle Isle explosion involving a salt mine in Louisiana and the part he played in that investigation. He concluded that it was not valid to compare the Belle Isle explosion conditions at the Golden Eagle Mine. In the Golden Eagle Mine there was no shot firing nor any open electrical circuits in 2d South or 1st Right.

Mr. Mitchell does not agree with Mr. Bruce's testimony that any form of sandstone could create an incendive spark. This is because the potential for incendivity is a direct function of the quartz content. There is a high potential that the sandstone contains sufficient piezoelectric quartz and is subject to a sufficiently high strain as might be encountered in a longwall or in a pillaring operation.

The inspector thought from Mr. Duran's statements that miners were working in an explosive gas area. He didn't say check curtains had been taken down. Mr. Duran told him he didn't have ventilation curtains taken down.

Mr. Mitchell also disagreed with Mr. Bruce's statement that, any time a coal mine contains an explosive mixture of methane, there is a situation of imminent danger. His view was that, if this position was upheld, they would have to shut down almost every coal mine in the United States. There are explosive concentrations in almost every longwall operation.

The witness indicated that Exhibit C-14 is used throughout MSHA for evaluating the explosibility of an area. Exhibit C-14, a nose curve, can be used to determine the explosibility of any and all atmospheres in coal mines.

~2047

Witness Mitchell further explained why the two mine explosions (NEBO and Jim Walters No. 3) were not comparable to the Golden Eagle Mine. The MSHA representatives and the witness agreed that the probable ignition source for the methane behind the seals in the NEBO and Quilan Mines was a lightning strike. In the Jim Walter No. 3 Mine there was a fire behind the seals.

Mr. Mitchell indicated with a blue magic marker the proper place, in his opinion, to take methane checks out by the Kennedy stoppings. Mr. Mitchell used the letters "GP" and marked the gas points. Mr. Mitchell indicated that there was a difference between gob fires and the situation at the Golden Eagle Mine in 2d South and 1st Right sections.

He treated the area behind the Kennedys as gob because it was not travelable. He would treat the area behind the seals as gob because it is not an area where a miner could travel safely.

The immediate roof in the 2d South area is basically shale. The industry's goal is to attempt to control the immediate roof when a seam is being mined.

Mr. Mitchell initiated the work involved in what became the Nagy and Kawenski report (Exhibit C-12.) He does not agree with the conclusions contained in the report.

Shale contains quartz but it is not necessarily piezoelectric quartz. One does not expect to find piezoelectric quartz in shale. One would anticipate it would be well below the 30 percent level in shale. In the 2 South and 1st Right sections any roof fall would consist of a soft wet and unconsolidated shale material. It generally crumbles, breaks, and falls out around the roof bolts. You would seldom have pieces larger than a head.

#### Discussion and Further Findings

The initial issue presented here is whether a condition of imminent danger existed. The evidence presents a credibility determination on such issue.

The withdrawal orders herein were issued under the authority of Section 107(a) of the Act, 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 of 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.*, 3 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 Seventh 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 probably 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:



~2050

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., Federal Mine Safety and Health Act of 1977 at 626 (1978).

The situation at the Golden Eagle Mine: MSHA inspectors asserted that an explosive mixture of methane concentrations existed in a large abandoned area behind the Kennedy stoppings. They further asserted that ignition sources also existed in the unventilated area. No permanent seals had been erected and any explosion would most likely migrate into the entire mine.

Given the foregoing scenario, it was claimed that a condition of imminent danger existed and an order was issued under Section 107(a). The inspectors further ordered the work force withdrawn.

The inspector's belief of the existence of "an impending accident or disaster must be measured in light of their actions. Freeman Coal Mining, supra, 2 IMBA at 212.

Before MSHA would take any action in terminating the order, it approved the operator's abatement plan. Specifically, on the same day the order was written, it was modified to permit 113 miners to construct permanent seals in close proximity (two to three feet) from the Kennedy stoppings. The construction took five days with the crew working 24 hours a day. MSHA inspectors were also present during the construction. (Tr. 221, 404, 462).

In addition, MSHA had not required that the atmosphere be stabilized with inert gas before miners were permitted to enter the First Right section. (Tr. 628).

MSHA's undisputed actions, as above, necessarily cause me to conclude that MSHA did not believe "an impending accident . . . [was] likely to occur at any moment." Freeman, supra, 2 IBMA at 212. To like effect, see H.D. Entreprises, Ltd., 9 FMSHRC 1923 (1987) (Melick, J); Climax Molybdenum Co., 2 FMSHRC 2873 (1980) (Koutras, J).

~2051

I appreciate that MSHA directed the operator to monitor the area and to use non-sparking tools in the construction. But even such precautions would not protect the miners from the hazard perceived by MSHA, that is, an imminent explosion caused by an ignition source in an abandoned area.

WEST 90-112-R

In this case, I conclude that no condition of imminent danger, as defined in statutory and case law, existed in the mine. Accordingly, the contest of Order No. 2930784 should be sustained and the order should be vacated.

WEST 90-113-R

In this case, WFC contests Citation No. 2930785 issued by Inspector Jordan under Section 104(a) of the Act. The citation and the full text of the regulation, 30 C.F.R. 329, are set forth on pages 3-5, supra.

The Secretary contends that the regulation, 75,329-1 should be applied to mines that were opened after 1970.2

WFC argues that Section 75,329-1 does not apply to the Golden Eagle Mine.

In Ziegler Coal Company, LAKE 90-102-R (Sept. 21, 1990), Commission Judge George Koutras considered the identical arguments advanced in this case.

Section 75.329, which mirrors the statutory provision promulgated in 303(z)(2) of the Coal Mine Health and Safety Act of 1969 ("1969 Act"), requires that

[o]n or before December 30, 1970, all areas from which pillars have been wholly or partially extracted and abandoned areas, as determined by the Secretary or his authorized representative, shall be ventilated . . . or be sealed, as determined by the Secretary or his authorized representative.

~2052

Section 75.329-1 is a supplementary regulation promulgated to effect 75.329's general directive.<sup>3</sup> Section 75.329-1 provides, in part, as follows:

[a]ll areas of a coal mine which pillars have been wholly or partially extracted and abandoned areas shall be ventilated or sealed by December 30, 1970.

In determining whether 75.329-1 applies to the Golden Eagle Mine, the regulation must be analyzed in light of its plain meaning and congressional intent. "[I]n statutory construction, the primary dispositive source of information is the wording of the statute itself." *International Union, United Mine Workers of America v. Federal Mine Safety and Health Review Commission*, 840 F.2d 77, 81 (D.C. Cir. 1988) [quoting *Association of Bituminous Contractors v. Andrus*, 581 F.2d 85, 861 (D.C. Cir. 1978)].<sup>4</sup> The plain meaning of the statutory language is conclusive unless a clear legislative intent to the contrary can be demonstrated. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); *United States Lines, Inc. v. Baldrige*, 677 F.2d 940, 944 (D.C. Cir. 1982); *Freeman United Coal Mining Co.*, 6 FMSHRC 1577, 1578 (1984).

~2053

According to its plain language, 75.329-1's application is limited to areas which were pillared or abandoned prior to December 30, 1970, as evidenced by (1) the use of past tense ("have been . . . extracted" and "abandoned") in conjunction with the time limitation of "by December 30, 1970" and (2) the directive of 75.329-1(b). Congress's use of the past tense in 303(z)(2) of the 1969 Act and the Secretary's use of the past tense of it in the supplementary 75.329-1 demonstrate an intent to extend those requirements only to areas pillared or abandoned prior to December 30, 1970, and to require that only those areas be ventilated or sealed "by" that time.<sup>5</sup> "Congress could have phrased its requirement in language that looks to the [future] . . . , but it did not choose this readily available option." Gwaltney of Smithfield, 484 U.S. at 57. "Moreover, Congress has demonstrated in yet other statutory provisions that it knows how to avoid this [retro]spective implication by using language that targets wholly [prospective events]." *Id.*; see, e.g., 30 C.F.R. 75.326 ("[i]n any coal mine opened after March 30, 1970"); 30 C.F.R. 75.330 ("[i]n the case of mines opened on or after March 30, 1970"); 30 C.F.R. 75.500 ("[o]n or after March 30, 1971"); 30 C.F.R. 75.501 ("[o]n or after March 30, 1974").<sup>6</sup>

Further, the directive of 75.329-1(b) indicates that the intent of 75.329-1(a) was to require that areas of mines in existence when the 1969 Act was passed by ventilated or sealed prior to December 30, 1970. Section 75.329-1(a) provided that if

~2054

an area of a mine existing in 1969 could be ventilated, MSHA had to be notified and approve. Section 75.329-1(b) then required:

The request for permission to ventilate such areas must be submitted in time to allow consideration of the request, to obtain approval, and to permit the operator to install the ventilation system, or to install seals in the event the request to ventilate is denied, or before December 30, 1970.

30 C.F.R. 75.329-1(b) (emphasis added).

Indeed, the only interpretation of 75.329 and 75.329-1 consistent with the statutory scheme is that those regulations require only areas already pillared or abandoned prior to December 30, 1970, to be ventilated or sealed. See Gwaltney of Smithfield, 484 U.S. at 59. Any other reading would make 75.329-1 incomprehensible, violating the rule of construction that regulations must be interpreted "as a whole, in light of the overall statutory and regulatory scheme," *Campeanos Unidos v. United States Department of Labor*, 803 F.2d 1063, 1069 (9th Cir. 1986), "to give them a harmonious, comprehensive meaning, giving effect . . . to all provisions." *McCuin v. Secretary of Health and Human Services*, 817 F.2d 161, 168 (1st Cir. 1987) (citing *Weinberger v. Hynson*, 412 U.S. 609, 632-32 (1973)).

In 1969 Congress was concerned with methane accumulations in areas of mines that (1) were being pillared, (2) had been pillared or abandoned, or (3) would be pillared and abandoned. H.R. Rep. No. 91-563, 91st Cong., 1st Sess. 20-21, reprinted in House Committee on Education and Labor, 91st Cong., 2d Sess., Legislative History of the Coal Mine Health and Safety Act, 578-79 (Comm. Print 1970) ("Legislative History"). Congress enacted 303(z) of the Act to deal with methane accumulations in the three situations described above:

1. Section 303(z)(1) requires operators to ventilate an area "[w]hile pillars are being extracted" from it. That section of the Act was recodified without amendment in 30 C.F.R. 75.328.
2. Section 303(z)(2) required operators "within nine months after the operative date of this subchapter" (by December 30, 1970) to ventilate or seal all areas in existing mines which had been pillared or abandoned. That section was recodified without amendment in 75.329, which was supplemented by 75.329-1.

3. Section 303(z)(3) requires mines and sections of mines opened after the Act's effective date (March 30, 1970) to be designed so that abandoned sections can be sealed in accordance with an approved plan. That section became 75.330 of the regulations.

Even assuming that the plain language in light of the statutory scheme, "Admit[ted] a smidgen of ambiguity sufficient to allow a look at the legislative history, here such history provides no basis for overturning . . . the clear meaning of [the regulation]. International Union, United Mine Workers of America v. Mine Safety and Health Administration, No. 89-1563, slip op. at 4-6 (D.C. Cir. Apr. 13, 1990). The House Report and the Conference Report bolster the interpretation that 75.329 (and the supplementary 75.329-1) were intended to apply to mines and sections of mines already in existence when the 1969 Act became effective (giving those mines nine months to ventilate or seal), leaving 75.330 to deal with methane in mines and sections of mines opened after the 1969 Act's effective date.<sup>7</sup>

The House Report distinguishes the requirements for existing mines from those for new mines as follows:

Seals and bulkheads shall be used to isolate in an explosion-proof manner all abandoned areas in existing mines. [ 303(z)(2) of the Act, 75.329, 75.329-1]. In addition, wherever possible, new areas of existing mines will be "sectionalized" with explosive-proof sealing when abandoned, that is isolated from active sections. [ 303(z)(3) of the Act, 75.330]. In new mines, opened after the operative date of the Act, it is intended that the mining system be such as to permit isolation by explosion-proof bulkheads of each section of a mine as it is abandoned. [ 303(z)(3) of the Act, 75.330].

~2056

H.R., Rep. No. 91-563, 91st Cong., 1st Sess. 21, reprinted in Legislative History at 579 (emphasis added).

The same tripartite statutory scheme for regulating active pillar sections, areas already pillared or abandoned and, finally, areas to be pillared or abandoned is evident in the Conference Committee's explanation of how the three subparts of 303(z) of the Act work in tandem to regulate present, past, and future conditions:

The House amendment provided for the ventilation of areas of the mine while actively being pillared in a manner approved by the Secretary or his inspector. It also provided that, within 9 months after enactment, all mines which are or which have been abandoned must be sealed or ventilated, as determined by the Secretary or his inspector. The Secretary could permit a further time extension of 6 months. It described how adequate the ventilation should be and the method of sealing. In new mines and new working sections, a plan requiring sealing would be required.

\* \* \* \* \*

The conference substitute was adopted after the House amendment.

Under this substitute, paragraph (1) of section 303(z) [ 75.328] requires that areas which are actively being pillared must be ventilated in the manner otherwise prescribed under section 303.

Under the conference substitute, paragraph (2) of section 303(z) [ 75.329] provides that, within 12 months after enactment, all areas from which pillars have been wholly or partially extracted, and abandoned areas shall be ventilated by bleeder entries or by bleeder systems or by equivalent means or be sealed.

\* \* \* \* \*

Under the conference substitute, paragraph (3) of section 303(z) provides that, in the case of mines opened on or after the operative date of this title, or in the case of areas developed on or after

such date in mines opened prior to such date, the mining system shall be designed, in accordance with a plan and revisions thereof approved by the Secretary and adopted by the operator, so that, as each set of cross entries, room entries, or panel entries of the mine are abandoned, they can be isolated from the active workings of the mine with explosive-proof bulkheads approved by the Secretary or his inspector.  
H.R. Rep. No. 91-761, 91st Cong., 1st Sess. 81-82, reprinted in Legislative History at 1043-1044 (emphasis added).

The statutory and regulatory language, the statutory scheme, and the legislative history lead to the conclusion that 75.329 and 75.329-1 apply only to sections which were pillared or abandoned before December 30, 1970. The regulations do not apply to the Golden Eagle Mine, since the Secretary cannot show the mine was in existence before 1970.

The Secretary believes 75.329-1(a) applies to the Golden Eagle Mine. In this respect, she relies on cases where the standard was successfully applied since 1970. See Christopher Coal Company, March 1979 (FMSHRC); Itmann Coal Company, 2 FMSHRC 1986 (1980); Mettini Coal Corp., 6 FMSHRC 1507 (1984).

The difficulty in the Secretary's position is that the above cases do not involve the issues presented here. As a result, such cases are of no precedential value.

The Secretary further contends that the legislative history supports her view. Such history has been previously discussed and it supports WFC, and not the Secretary.

As noted herein, I generally agree with the well-reasoned decision of Judge Koutras in Ziegler, supra.

Accordingly, in WEST 90-113-R, the contest of Citation No. 2930785 should be sustained and the citation should be vacated.

WEST 90-114-R

In this case, MSHA Inspector Anthony Duran issued imminent danger Order No. 3241331.

The text of the order is set forth on page 5, supra.



~2058

The evidence in support of this order contains the same defect as existed in Order No. 2930784 in WEST 90-112-R.

For the same reasons, the contest of this order should be sustained and the order vacated.

WEST 90-115-R

In this case, WFC contests Citation No. 3241332 issued by Inspector Duran under Section 104(a) of the Act. This text of the citation, which alleges a violation of 30 C.F.R. 75.329-1(a) is set forth on page 3, supra.

As previously discussed, the cited standard, 75.329-1(a) does not apply to the Golden Eagle Mine. Accordingly, the contest of Citation No. 3241332 is sustained and the citation vacated.

WEST 90-116-R

In this case, WFC contests Citation No. 3241333 issued by Inspector Duran.

The text of the citation is set forth on page 6, supra.

WFC contends this citation should be vacated because WFC was not apprised of the specific violation; further, the operator claims it was denied administrative due process as required by 5 U.S.C. 534(b).

The credible evidence establishes the operator was "working on an order," but since the underlying order was invalid, this citation must necessarily be vacated.

For the foregoing reasons, I enter the following:

ORDER

All contests pending herein are SUSTAINED and all related orders and citations are VACATED.

John J. Morris  
Administrative Law Judge

AAAAAAAAAAAAAAAAAAAAAAAAAAAAAAAAAAAA  
FOOTNOTES START HERE

1. See Order in Medicine Bow Coal Co., WEST 90-117-R, March 13, 1990.
2. Brief at 20
3. When the Secretary of the Interior promulgated the first set of regulations to implement the interim mandatory standards in Title III of the 1969 Act, he added "interpretations and supplementary regulations," 35 Fed. Reg. 5237 (Mar. 28, 1970), to particularize those statutory provisions. See, e.g., Jim Walter Resources, 7 FMSHRC 493, 495 (1985); Florence Mining Co., 5

FMSHRC 189, 190, 195 (1983) ("in order to clarify Congressional intent and to narrow the overly inclusive language of the statutory standard [ 75.1405] the Secretary promulgated 75.1405-1 . . . . ") Among those interpretive and supplementary regulations was 75.329-1.

4. See also *Asarco, Inc. - Northwestern Mining Department v. Federal Mine Safety and Health Review Commission*, 868 F.2d 1195 (10th Cir. 1989); *Emery Mining Corp./Utah Power and Light Co.*, 10 FMSHRC at 1349. See *Rubin v. United States*, 449 U.S. 424, 430 (1981) (plain meaning governs statutory construction); *Phelps Dodge Corp. v. Federal Mine Safety and Health Review Commission*, 681 F.2d 1189, 1192-93 (9th Cir. 1982) (plain meaning governs construction of mine safety regulations).

5. "By" means "[b]efore a certain time; . . . not later than a certain time; or or before a certain time . . . ." Black's Law Dictionary 182 (5th ed. 1979). The dictionary is evidence of common usage, *Puerto Rican Cement Co.*, 4 FMSHRC 997, 998 n.1 (1982) [citing 2A Sutherland, Statutes & Statutory Construction 46.02 at 52 (4th ed. 1973)], to which adjudicatory bodies often refer to deciding matter of statutory construction. See *Phelps Dodge Corp.*, 681 F.2d at 1192; *Jim Walter Resources, Inc.*, 7 FMSHRC at 496.

6. There are apparently no cases construing "on or before December 30, 1970, in 75.329 or "by December 30, 1970" in 75.329-1. Cf. *C.F. & I. Steel Corp.*, 3 FMSHRC 99, 104 (1981) (Boltz, J) (the first sentence of 75.326, which begins "[i]n any coal mine opened after March 30, 1970," does not apply to mines opened before March 30, 1970); *Rushton Mining Co.*, Docket No. PITT 73-371-P, slip. op. at 22 (Jan. 31, 1975) (Cook, J) (same).

7. This construction of 75.329 and 75.329-1 is also supported by witness Mitchell's testimony. (Tr. 643-645). Mr. Mitchell was Assistant Chairman of the Bureau of Mines Task Force responsible for drafting the regulations to implement the 1969 Act. (Tr. 641; Ex. C-8). He was given specific responsibility for drafting the regulations to be promulgated under 303(z) of the Act. (Tr. 641). He confirmed that 75.329 and 75.329-1 apply only to areas opened prior to December 30, 1970. (Tr. 643-645).