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

SOUTHERN OHIO COAL CO.,  
CONTESTANT

CONTEST PROCEEDING

v.

Docket No. WEVA 91-337-R  
Order No. 3116688; 3/18/91

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

Martinka No. 1 Mine

DECISION

Appearances: David M. Cohen, Esq., American Electric Power  
Service Corporation, Lancaster, Ohio, for the  
Contestant;  
Glenn M. Loos, Esq., Office of the Solicitor, U.S.  
Department of Labor, Arlington, Virginia, for the  
Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a Notice of Contest filed by the  
contestant pursuant to section 105 of the Federal Mine Safety and  
Health Act of 1977, challenging the legality and propriety of a  
section 103(k) order issued at the mine. A hearing was held in  
Morgantown, West Virginia, and the parties appeared and  
participated fully therein. They waived the filing of posthearing  
briefs, but they presented oral argument at the close of the  
hearing, and I have considered their arguments in the course of  
my adjudication of this matter.

Issues

The principal issue in this case is whether or not the  
contested order was justified and properly issued, or whether the  
inspectors acted unreasonably and arbitrarily in issuing the  
order. Additional issues raised by the parties are identified and  
disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30  
U.S.C. 301, et seq.

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2. Section 103(k) of the Act, 30 U.S. 813(k).
3. Commission Rules, 29 C.F.R. 2700.1, et seq.

#### Stipulations

The parties stipulated to the following (Tr. 7).

1. The contestant is the owner of the Martinka No. 1 Mine, and it is subject to the Act.
2. MSHA Inspectors Tom May and David Workman are authorized representatives of the Secretary of Labor.
3. The contested section 103(k) order was issued on March 18, 1991, and a copy was served on the contestant.

#### Discussion

The contested section 103(k) Order No. 3116688, issued at 11:50 p.m., on March 18, 1991, states as follows:

A roof fall has occurred in front of the Nos. 1-2-3-4 and 5 shields located at the head gate of the B-12 longwall section. The roof fell above the bolts and impedes passage from the stageloader area to the face. This order is issued for the safety of the miners. The following persons are allowed to enter the area; state mine inspectors, U.M.W.A. reps, and company reps.

The "area or equipment" affected by the order is shown on the face of the order as the "B-12 longwall section", and the order reflects that it was terminated at 3:00 a.m., March 19, 1991, after the completion of an investigation.

#### MSHA's Testimony and Evidence

MSHA Inspector David E. Workman testified that he conducted a regular AAA inspection of the mine on Monday, March 18, 1991, and that he arrived at 7:30 a.m., and left at 5:30 p.m. He confirmed that he received no reports of any roof falls on that day except that at approximately 4:00 p.m., while in the safety department office with Inspector May, and a company and union representative, company safety representative Dan Conoway informed him that a roof fall had been reported to him but that he did not know whether it was a "reportable fall". Mr. Conoway told him that he was not aware that anyone was injured and that he was going underground to investigate the matter. Mr. Workman informed Mr. Conoway that if he determined that the fall occurred above the anchorage zone and was impeding passage to call out and

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let him know and that he would go in and investigate the matter if it was a reportable fall. (Tr. 22).

Mr. Workman stated that state inspector Albert Lacara was also present when Mr. Conoway informed him of the fall, and Mr. Lacara informed him that he would go in and look the area over. Mr. Workman stayed at the mine until 5:30 p.m., and no one provided him with further information about the fall. He left the mine to return to his office and no one from management called him there or at home to report any fall. However, at approximately nine or ten p.m. that evening he received an anonymous call at home informing him of "a massive roof fall" on the B-12 longwall headgate area. He called his supervisor and informed him of the call, and then proceeded to the mine. He also contacted Mr. May and invited him to the mine to help him investigate the fall (Tr. 23-25).

Mr. Workman arrived at the mine at approximately 11:30 p.m. on Monday, March 18, 1991, and spoke with shift foreman Jim Keener. Mr. Keener confirmed that a fall had occurred on the longwall headgate but that he had not seen it, and that it was reportably 20 to 30 feet high. Mr. Keener also confirmed that the longwall was not in operation and that debris was being removed so that the face could be advanced to pull the shields in under the fall area. Mr. Workman then proceeded to interview three miners who had worked on the previous 12:00 a.m. to 8:00 a.m. shift on Monday morning.

Mr. Workman stated that stage loader operator Duke Willard told him that the roof was working throughout most of his shift in front of the No. 1 through 3 shields and that it fell toward the stage loader sometime between 7:30 and 8:00 a.m. on Monday morning, and that 2 roof bolts and fallen roof materials were laying in the stage loader. General laborer Roger Hutchinson informed him that the fall occurred in front of the shields on the headgate side, and that he saw roof bolts still hanging. He placed the fall at approximately 7:45 a.m. Mechanic Robbie Robinson informed him that the fall occurred in front of the No. 1 through 5 shields outby the stage loader at approximately 8:00 a.m, and that roof bolts and roof material fell into the stage loader conveyor chains. Foreman Ed Lane instructed him to call out and report the fall, and he did. He also reported it to the longwall superintendent (Tr. 26-28).

Mr. Workman was of the view that the roof fall as described to him by the three miners should have been reported to him or to Mr. May during the day of their inspection on Monday, March 18, and that someone on the shift should have known whether or not the roof fell above the anchorage and impeded passage and reported it as a reportable unplanned fall. Under the circumstances, he notified Mr. Keener at 11:50 p.m. that he was under a section 103(k) order and that he would be making an

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investigation. Mr. Workman explained that he issued the order in order to withdraw people from the area until an investigation was completed to evaluate the conditions and determine the corrective action needed (Tr. 29). In this instance, he also found an order necessary to insure the safety of miners because the information he received from the three miners that the roof bolts came down would indicate that the fall was above the roof bolts and that the adverse roof conditions could cause injury if anyone were hit by the falling roof. The roof bolts laying in the stage loader would indicate a fall above the roof bolt anchorage zone and a potential hazard to miners. He confirmed that he was upset because the roof fall had not been reported (Tr. 30-31).

Mr. Workman confirmed that after issuing the order he did not immediately go underground to the area where the fall had occurred. He spent time reviewing records and speaking to others, and management personnel were on their way to the mine. After Mr. May, the company safety manager, and the mine superintendent arrived, they all went underground and arrived at the section at 2:30 a.m., Tuesday morning, March 19. All work had ceased and people had been withdrawn because of the order. He looked over the area and observed that a fall had occurred rib-to-rib and approximately 20 feet to the top of the roof cavity. He described what he saw, confirmed a sketch of the scene, and indicated that the fall should have been reported as a reportable roof fall (Tr. 36). He discussed with management the corrective action required, including installing bars across the brow at the edge of the fall to prevent it from falling out, and the fall was still present (Tr. 38). The fall had existed for approximately 14 hours without being corrected, and the order was terminated at 3:00 a.m., after the area was supported and cleared out (Tr. 39).

Mr. Workman confirmed that management was doing a good job of recovering the fall, and it was directing the work force properly. Everyone was aware of the conditions and proper planning procedures were in place. He terminated the order after concluding his investigation and determining that the health and safety of the miners was no longer in danger (Tr. 41).

On cross-examination, Mr. Workman confirmed that at the time Mr. Conoway informed him about the fall he stated that he was unsure as to whether it was reportable or not, but that he was letting him know that a fall had occurred. Mr. Workman further confirmed that inspector May and the state inspector were also present at that time, but that he and Mr. May did not go to the section to look into the matter because "I didn't know that it was a reportable fall under Part 50, as to whether it would require an investigation under 103(k) of the Act" (Tr. 42). The state inspector informed him that he would go to the area, but he did not call the inspector to determine what he may have found, and he did not know whether any state violations were issued

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(Tr. 41-45). Mr. Workman confirmed that when there is a fall above the anchorage area it must be reported to MSHA as a reportable roof fall and MSHA will then inform the operator that it will investigate the matter (Tr. 46). He indicated that not all reportable falls require the closing of a portion of the mine to insure the safety of miners, nor do they require the immediate attention of MSHA (Tr. 48).

Mr. Workman stated that he based his order on the information he received from foreman Keener that a roof fall had occurred, and the interviews with the three miners on the 12:00 a.m. to 8:00 a.m. Monday morning shift. He acknowledged that Mr. Keener told him "he didn't know that much about what was going on up there", and that he would not know what happened between 8:00 a.m. and the time he issued the order at 11:50 p.m. Mr. Workman confirmed that management was working during the day to remove the fallen roof material and was following proper cleanup procedures (Tr. 51). He also confirmed that the information from the anonymous caller that there had been "a massive roof fall" was exaggerated.

Mr. Workman stated that it was necessary to issue the order in order to determine whether the fallen roof area was properly supported to prevent the fall from continuing to fall down the entry, whether the edge of the fall was properly supported, the type of supports which were present in the area, and the maintenance of the equipment (Tr. 57). He also considered the fact that the fall was still present after 14 hours after it happened and that it was reported to be 20 to 30 feet high, and "that gives me a lot of reason to go in and look at it for the health and safety of the people" (Tr. 59).

Mr. Workman confirmed that other than speaking to shift foreman Keener, he did not inform the safety department that he was going to conduct interviews with the three miners in question. However, Mr. Keener and another foreman were present during the interviews. Mr. Workman also confirmed that he told the company safety representative that it was basically his investigation and that he was not to ask any questions while he was interviewing the miners (Tr. 63-64). Mr. Workman conceded that he could have gone underground immediately after issuing the order at 11:50 p.m., and that a union and company safety representative were present at that time. He explained that he did not do so because "I didn't feel there was an imminent danger situation", but that based on the information he received during the three interviews "I felt that a policy order, such as a 103(k), is issued to make an investigation, which is what I done" (Tr. 67). He further explained as follows at (Tr. 68):

Q. But you didn't look at the conditions and then issue the order. You issued the order, then waited a few

hours and then looked at the conditions. Is that correct?

A. Yes, it is.

Q. It appears to me that the reason why a order was issued was largely due to you being upset about not being told about the roof fall. Is that a fair statement?

A. That is a very fair statement. Yes, sir, it is.

Q. So then if the roof fall would have been reported, you may not have issued the (k) order?

A. I would have investigated and may not have issued a (k) order. That is exactly right.

Mr. Workman stated that after he and Mr. May went to the fall area, he found that the crosscuts had been supported properly and that cribs were installed in the entry. However, the brow at the edge of the fall needed to be supported, and after discussing it with management, it was supported and he was then able to terminate the order within a half an hour (Tr. 74). He agreed that the best course of action to take when there is a roof fall at the headgate longwall area is to mine through the area as quickly as possible. He conceded that his order stopped all mining, but since 14 hours had already been wasted, "I didn't think a couple more hours was going to hurt that much" (Tr. 76).

Mr. Workman confirmed that roof falls above the anchorage zone have occurred in the past at the mine, and they have been reported by management. He did not believe that the mine has a history of trying to hide them from MSHA (Tr. 77). He further justified his order with the following explanation at (Tr. 90-91):

After I gained the knowledge and the aspects of the particular occurrence of that fall on the B-12 longwall, I made the determination at that time as a Federal Coal Mine Inspector that I needed to issue a 103(k) order because of the length of time that the condition existed; because of the lack of communication, of properly reporting; not knowing whether any injuries had occurred or were reported to me to have occurred; or a potential of other conditions existing that could have caused injuries to individuals.

Mr. Workman confirmed that the fact that 14 hours had passed did not indicate that management was not trying to do anything about the roof conditions, and he explained what was being done (Tr. 98).

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MSHA Inspector Thomas W. May confirmed that he inspected the mine on March 18, 1991, with Mr. Workman and that they were there from 7:30 a.m. until 5:30 p.m. He stated that at approximately 4:15 p.m., he received a report from Mr. Conoway who informed him and Mr. Workman that there was a roof fall at the longwall headgate but that he did not know whether it was reportable or not and that he was going to investigate. Mr. Workman informed Mr. Conoway to notify him if the roof fall was reportable, and if it was, he and Mr. May would go back underground. Mr. May stated that he and Mr. Workman left the mine at 5:30 p.m., and no one called them further about the fall (Tr. 107-111).

Mr. May stated that Mr. Workman called him late on the evening of March 18, and informed him of the fall. Mr. Workman advised him that someone had called him and reported that the fall was above the anchorage level. Mr. May then went to the mine and arrived there shortly after 1:00 a.m., Tuesday, March 19. Mr. Workman had already issued the section 103(k) by the time he arrived at the mine (Tr. 112). Workman told him he issued the order "for the health and safety of the miners" and that he had been informed that the headgate had fallen in above the anchorage level and that there was a problem with the passageway to the longwall face. Mr. May confirmed that he signed the order and agreed with it (Tr. 113).

Mr. May stated that upon investigation of the fall area, he found that the roof had fallen above the roof bolt anchorage in the headgate entry, and that cribs and posts were set in response to the fall. He stated that the operator was trying to mine out from under the fall, and discussions and recommendations took place with management in order to find a way to get the shields under the supports in order to mine out of the area (Tr. 113-114). Mr. May confirmed that he spoke with the headgate operator (Duke Willard) who informed him that the fall occurred at approximately 7:00 a.m. on his previous midnight shift and that bolts had fallen out and were in the pan (Tr. 115).

Mr. May believed that the order was justified to protect the health and safety of miners because of the roof conditions and impeded headgate passageway, and the fact that he and Mr. Workman were not notified of the fall in a timely manner so they could investigate it. He believed that miners faced a danger of additional fall of roof while going to and from the face. He believed that Mr. Workman had acted properly in issuing the order to insure that the recovery procedures were adequate to insure that no one was injured (Tr. 117). Mr. May stated that the purpose of the investigation was to find out what was going on underground in the section (Tr. 118). He confirmed that the order was in effect from approximately midnight, March 18, to 3:00 a.m., March 19, and he did not believe that this was a long time for an accident investigation (Tr. 119).

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On cross-examination, Mr. May confirmed that he did not believe it was necessary to go back into the mine after Mr. Conoway initially reported the fall because a state inspector was there and he indicated that he would look at the fall. However, Mr. May did not follow up and speak with the inspector because he "felt no need" to do so. Mr. May also considered the fact that two other MSHA inspectors were in the mine and that "If they had a reportable fall and there was a hazard, they would surely have reported it to someone during the day" (Tr. 122). Mr. May further confirmed that if the fall were reportable under Part 50 of MSHA's regulations, he would have gone back into the mine. However, absent other circumstances, if the fall is not reportable, there would be no need to go back in (Tr. 122).

Mr. May stated that he first learned that Mr. Workman had issued the order when he arrived at the mine, and that they did not previously discuss the order. Mr. May confirmed that the order was initially verbally issued and it was issued in writing "after everything was taken care of". Mr. May explained why the order was issued, and he indicated that the fall area had not been moved through and was not supported to facilitate passage. The area must be properly supported before it is mined through (Tr. 130-132).

Mr. May confirmed that he was involved in the examination and investigation of the fall area, including some discussions with miners who were working on the shift when the fall occurred (Tr. 137-138). MSHA's counsel pointed out that Mr. Workman issued the section 103(k) order verbally at 11:50 p.m., as noted on the face of the written order. Counsel confirmed that Mr. May did not participate in the miner interviews conducted by Mr. Workman, and that Mr. Workman made his own decision to issue the order based on his interviews with the miners (Tr. 137-139).

Mr. May conceded that he did nothing about the fall from the time it was initially reported at 4:00 p.m, March 18, by Mr. Conoway, and the time he went to the fall scene on the morning of March 19, because "it had not been reported as a reportable roof fall" (Tr. 139). However, he indicated that one of the purposes of a section 103(k) order is to "preserve the site". He denied that doing nothing was contrary to the safety interests of miners. He explained that work continued for 16 hours before the order was issued and the area still had not been mined through. Under the circumstances, he believed "there is something wrong with the procedure that they're using" (Tr. 141).

Mr. May explained his reasons for not going to the fall area when it was initially reported at 4:00 p.m., March 18, by Mr. Conoway, and he relied on the fact that there was no report of any safety problem and management had not reported that the roof fall was in fact a reportable fall pursuant to MSHA's Part 50

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regulations (Tr. 143). He confirmed that he does not always go to an area first to check it out before issuing a section 103(k) order. He did not do so in this case because "we wanted to investigate the area before further work was done" (Tr. 144).

Mr. May confirmed that within a half hour or more after he and Mr. Workman reached the site of the fall, "a good bit of work" was done so that the area could be immediately mined through. He also confirmed that upon reaching the scene, the roof had not as yet been adequately supported enough to mine through (Tr. 146).

Roger D. Vandergrift, general laborer, testified that he worked the midnight shift which ended at 8:00 a.m., on March 18, 1991, but he did not hear any reports of any roof falls until he returned to work on the midnight shift on March 19. He arrived at work at 10:30 p.m. that evening and served as the miners' walkaround representative accompanying Inspectors Workman and May. He confirmed that Mr. Workman interviewed three miners who were working at the time of the roof fall trying to find out what had occurred. Referring to his notes which he made during the interviews (exhibit R-5), Mr. Vandergrift indicated that one of the miners told Mr. Workman that the top was "dripping and working a little bit most of the shift," and that after the roof fell roof bolts were observed in the pan line (Tr. 149-152).

Mr. Vandergrift stated that a second miner told Mr. Workman that he wasn't sure how high the fall was and did not go under it to look, and that the third miner, mechanic Robbie Robinson, called out and reported the fall to Joe Verges, the communication man. Foreman Ed Lane had instructed Mr. Robinson to report the fall (Tr. 153). Mr. Workman also spoke with management personnel about the fall, but superintendent Wes Hoag was the only individual to say anything about the fall. Mr. Workman then informed shift foreman Jim Keener that he was issuing a section 103(k) order and that there was not to be any work done until he arrived. Mr. Workman stated that he was issuing the order "for the safety of the miners" (Tr. 154-155).

Mr. Vandergrift believed that an investigation was justified after Mr. Workman interviewed the miners because the fall occurred above the anchorage point and "it had to be checked to find out what happen" (Tr. 155). A fall above the anchorage is a reportable fall pursuant to the roof control plan, and "You have no support to hold the top" (Tr. 155).

Mr. Vandergrift confirmed that he travelled to the fall site with the inspectors after Mr. Workman issued his verbal order and he described what he observed. He stated that the area had not been mined through and that the only work which had been done was to run the pan line and clean out the rock. Mr. Workman and company personnel then discussed what was needed to correct the

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fall and to help work their way out of the fall area, including work to support the brow with crossbars and boards (Tr. 157).

On cross-examination, Mr. Vandergrift confirmed that Mr. Workman did not tell him that the roof fall was an urgent matter, but that he did issue the order for the safety of the miners who were going to be in the fall area. Mr. Vandergrift agreed that based on the miner interviews conducted by Mr. Workman, the order was justified (Tr. 160). He confirmed that Mr. Hoag had stated that "not much work had been done since the midnight shift on March 18" (Tr. 164). Mr. Vandergrift stated that the additional brow supports were significant in allowing mining to continue and to prevent the fall from continuing outby (Tr. 165).

#### Respondent's Testimony and Evidence

Daniel Conoway, safety and health manager, and former afternoon shift foreman, stated that he first learned of the roof fall at 4:15 p.m., on March 18, 1991, but that superintendent Wesley Hoag informed him at 10:00 a.m. that morning that "we had some bad conditions on the B-12 headgate". Mr. Hoag also informed him that the fall was not reportable but that he would send some people in to evaluate the situation and report back to him. During the shift change, general superintendent John Metz informed Mr. Conoway that "conditions had deteriorated on the B-12 face and that I should report to MSHA that we have had a fall" (Tr. 169). Prior to this time, Mr. Conoway knew that "we had some bad top conditions", but he did not know the extent of the fall. As soon as he received this information, Mr. Conoway informed MSHA Inspectors Workman, May, and state inspector Albert Lacara that he had received conflicting information about the fall, and that he was first informed in the morning about "some had top", but was then notified "that we do have a reportable fall". Mr. Conoway stated that he had no knowledge of any of the details of the fall, but informed the inspectors that "for the sake of argument, I'm reporting to you that we have a fall" (Tr. 172).

Mr. Conoway stated that after informing the inspectors of the fall, Mr. Workman asked him to let him know when he found out more of the details, and state inspector Lacara stated that he would inspect the area and asked Mr. Workman if he wished to be called. Mr. Workman stated that he did not. Mr. Conoway then informed Mr. Workman that "we're going in and look at it", and Mr. Conoway stated that his intent was to learn the details of the fall and to make measurements so that he could submit the information on an MSHA Form 70001. Mr. Conoway confirmed that there was a question in his mind as to whether or not the fall was reportable "because I had not seen it or no one in the safety department had seen it", but that "for the sake of argument, I

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wanted to report it" (Tr. 173). Mr. Conoway explained the work that is generally done to take care of a roof fall (Tr. 174-175).

Mr. Conoway stated that he returned to the mine at approximately 12:30 a.m., March 19, and Mr. Workman informed him that he had conducted an investigation of the fall with some of the people who were there and determined that it had occurred at 7:30 or 8:00 a.m., the previous morning and that he had issued a section 103(k) order (Tr. 176). Mr. Conoway stated that he was concerned that the order was issued because "you're just setting there basically letting the conditions worsen and not taking any corrective measures" (Tr. 178). When he and the inspectors reached the longwall face, Mr. Conoway and the group observed the top from under supported roof, and Mr. Conoway believed that sufficient cribs had been set at the headgate entry where the fall had occurred. He also indicated that the fall was somewhere in the neighborhood of twenty feet above the mine floor, which made it "seven, maybe eight feet from the roof". He further confirmed that the fall was "from rib to rib", and that some shields and the pontoons were covered with "quite a bit of loose rock and material". No one was voicing any safety concerns about the cleanup work, and Mr. Workman made some recommendations to support the brow and reposition some cribs, and this was done. Mr. Conoway believed that the place was adequately supported without the additional work which was done, but he could not state that the additional work did not enhance safety (Tr. 181).

Mr. Conoway stated that the operator had never been cited for not reporting a longwall roof fall, and that if the roof is broken above the bolts, it is reported. He confirmed that Mr. Workman's order was the first time the mine had received a section 103(k) order for a roof fall, and that on prior occasions inspectors have asked to review the operator's report of a fall, and that depending on the location of the fall, they would not go to the fall area (Tr. 182).

On cross-examination, Mr. Conoway confirmed that he first learned of "bad top" at 9:30 or 10:00 a.m., March 18, 1991, and that he spoke with Mr. Metz at 4:00 p.m. He stated that he did not know why it took six hours to determine the extent of the fall, and he explained that "part of the problem was to make sure the conditions were such that people could work, that we had a plan of attack developed" (Tr. 184). He confirmed that telephones are located in the underground section, and when asked how difficult it would be for someone underground to determine the extent of the fall, he stated "if they were there, it would not be that difficult" (Tr. 185). He confirmed that he did not go underground at 4:00 p.m., on March 18, but that he did go to the fall area with the inspectors after 11:00 p.m. (Tr. 186).

Mr. Conoway stated that he informed the inspectors at 4:00 p.m., March 18, that "I do not have any facts, but for the

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sake of argument, I'm telling you it's a reportable roof fall" (Tr. 187). He confirmed that he did not ask the inspectors to go to the section, that he did not definitely tell them "there is a reportable fall", and that he did not formally report it under section 50.10 of MSHA's regulations (Tr. 187). However, by reporting it and stating "for the sake of argument", he believed that he was in technical compliance with the law (Tr. 188).

Mr. Conoway stated that he did not exactly know what measures were being taken during the period after the fall, and that he could "just speculate". He explained that the cleaning up of the fallen rocks and debris was a slow process, and he confirmed that he never informed Inspectors Workman or May at 4:00 p.m., about any corrective work that was being done (Tr. 190). Mr Conoway stated that "sometimes the roof begins to drip or work or rip down one side; conditions deteriorate rather slowly. However, there are other times when it drops to the roots" (Tr. 191).

Ernest L. Weaver, longwall supervisor, confirmed that he was the supervisor on the B-12 longwall section on March 18, 1991, on the 8:00 a.m. to 4:00 p.m. day shift. He stated that when he arrived on the section that morning the midnight shift foreman advised him that "the top on the headgate was getting worse", and that when they went to look, they observed that the top was deteriorating and that "parts of the roof bolts were showing where rock had fell out" (Tr. 200). Mr. Weaver then informed his crew to set additional timbers and cribs if needed to insure their safety to and from the face. Mr. Weaver identified certain "call-out sheets" (exhibits C-1 through C-3), reflecting some of the work done with respect to the roof fall. One of the reports was his call-out which reflected that "we tried to advance the headgate as many times as we could possible, but due to the rock and the bad top conditions, we weren't able to advance like we wanted to" (Tr. 204).

Mr. Weaver confirmed that after the call-outs, production stopped, and the section was idled. He explained the ensuing work to address the fall conditions (Tr. 204-205). He confirmed that during the attempts to advance and drop the roof support shields, "the top deteriorated to the point where it fell in" and as attempts were made to move the shields forward, more roof materials were falling between the shields. When asked if he saw any hazards associated with not doing anything, he responded "the rule of thumb is you do not let a longwall set in bad top" (Tr. 206).

On cross-examination, Mr. Weaver confirmed that during the time measures were taken to clean out the fall area, the brow of the fall was not supported with bars or boards. He also confirmed that he did not inform any MSHA personnel of the measures being taken to address the fall. He stated that he

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called outside at noon during his shift on March 18, and told Pat Zuchowski that "it was a reportable fall" (Tr. 207). Mr. Weaver confirmed that he was not present with the inspectors when the brow was supported, and that the shields in the fall area were never up under supported roof during his shift (Tr. 208). Mr. Weaver further explained as follows at (Tr. 209):

Now, Ed Lane encountered a bad top during this shift, and by us going in there and trying to advance it, we more or less, in a sense, made it worse. But you had to make it worse in order to make it better, if you can understand what I mean.

Simply by loading the shields up and down, that makes it worse, but you have to do that to try to advance them forward. And if you have a lot of loose material up above you, naturally, when you keep doing this, it's going to fall. And that is what happened. It finally did all fall in.

Randolph K. Ice, accident prevention officer, stated that he worked the midnight shift of March 18, 1991, which ended at 8:00 a.m. that morning, and that he had learned nothing about any roof fall on that shift by the time he left the mine at 9:00 or 9:30 a.m. He next returned to the mine at 10:45 p.m. that same evening in preparation for going to work on the midnight shift of March 19. Upon arrival at his office he learned that Inspector Workman had issued a section 103(k) order. He then proceeded to the longwall office and found Mr. Workman interviewing a miner who worked on the midnight shift, and Mr. Workman confirmed to him that he had issued the order and was conducting an investigation. Mr. Workman informed him that he could stay in the room during the interviews, but that it was his investigation, and that miners would have to stay outside as long as he needed them (Tr. 214-215). Mr. Ice did not believe the order was justified, and it was his opinion that Mr. Workman issued it because "he was mad, very upset". Mr. Ice further stated that he assumed that someone had called Mr. Workman and filed a complaint.

#### Contestant's Arguments

The contestant argues that it is undisputed that the roof fall in question was reported to the MSHA inspectors at the end of the day shift at approximately 4:00 p.m., on March 18, 1991. However, the inspectors chose not to view the location of the fall, and issued the section 103(k) order at 11:50 p.m., that same evening without the benefit of first viewing or inspecting the fall location. Contestant maintains that the order forced it to discontinue work to alleviate the dangers associated with the roof fall and that it was not necessary to insure the safety of the miners, and in fact did not promote the safety of the miners.

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Under these circumstances, contestant concludes that the issuance of the order was unreasonable and an abuse of the inspectors' discretion, and that it should be vacated.

The contestant concedes that it would be appropriate to close down a section of the mine by issuing a section 103(k) order for an accident investigation when it is necessary to insure the safety of the miners. However, the contestant takes the position that the inspectors should have understood that it was not necessary to close the section down to insure the safety of miners, and that based upon what inspector Workman should have reasonably known at the time he issued the order, the order should not have been issued. The contestant points out that at the time the state inspector indicated that he would go to the fall location to determine the existing conditions, the MSHA inspectors declined to go with him. The state inspector issued no violations, and management was attempting to support the roof as necessary and to mine through the area, which everyone concedes is the proper procedure in the circumstances. This was a time consuming process, and the contestant's efforts continued throughout the day on March 18.

The contestant asserts that upon his return to the mine on the evening of March 18, Inspector Workman did not speak with the state inspector, and spoke to one who was really knowledgeable about the fall conditions, and there is no evidence that the three miners who he interviewed considered the conditions in the fall area particularly dangerous. Contestant further points out that Inspector Workman testified that he saw no urgency with regard to the roof and indicated that it had been that way for 14 hours and that "a few more hours wouldn't hurt". Yet, he still issued the order without first going to the fall location to observe the conditions, and that by doing so, the order resulted in an increase, rather than a decrease, of any danger resulting from the fall.

The contestant further points out that even after he issued the order, Mr. Workman waited several hours before going to the fall location. Contestant suggests that the obvious inference from this is that the inspectors knew there were no dangerous conditions at the fall location, and that any irritation by the inspectors because they were not notified earlier about the fall does not justify the issuance of the order.

#### MSHA's Arguments

MSHA asserts that the inspectors were first informed of bad top or a possible reportable roof fall at the end of the day shift on March 18, at approximately 4:15 p.m. The inspectors informed management officials that they would be at the mine for another hour, and invited them to inform them if further details were known or if the fall was a reportable fall pursuant to

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MSHA's reporting requirements. Since no further reports were forthcoming, the inspectors left the mine, but returned later that evening after Mr. Workman received an anonymous phone call informing him of a reportable fall. After interviewing three miners who had knowledge of the fall, Inspector Workman verbally issued the section 103(k) order and subsequently put it in writing, and it was co-signed by Inspector May who concurred in its issuance. The inspectors subsequently went to the location of the fall to conduct an investigation.

MSHA agrees that the issue presented in this case is whether or not the inspectors abused their discretion and acted unreasonably in issuing the order. Rochester and Pittsburgh Coal Company, 11 FMSHRC 2159 (November 1989). MSHA's position is that in determining whether or not the inspector acted reasonably, the only relevant fact is the knowledge available to him when he decided to issue the order, and not what he subsequently learned when he went underground to actually view and inspect the location of the fall. In support of this argument, MSHA cites a decision by former Commission Judge Virgil Vail in a compensation proceeding resulting from the issuance of a section 103(k) order. Homestake Mining Company, 4 FMSHRC 1829 (October 1982). In that case, in upholding the order, Judge Vail stated in part as follows at 11 FMSHRC 1839-1840:

A reasonable assessment of the facts known by Homestake at 6:30 a.m. prompted management to withdraw the miners from the Ross shaft that morning. Further, as late as 10:00 a.m. when the inspectors arrived, Homestake management had not made a positive determination as to the cause of the CO and smell of wood smoke in the shaft. Based on these facts, it is reasonable for the inspectors to believe there were grounds to issue the 103(k) order for the health and safety of the miners. If subsequent investigation revealed that the condition causing the CO and smoke in the shaft had abated, this would not make the original decision wrong.

\* \* \* \* \*

It is clear to me that section 103(k) of the Act clearly authorized the inspectors to issue the order of withdrawal on June 21, 1979. The plain language of this provision of the Act and related regulations authorizes representatives of the Secretary to issue such orders as they deem necessary to protect the health and safety of the miners. As the conditions existed at the time of the inspectors arrival at the mine, a prudent reading of the potential perils warranted the action taken in issuing the order and conducting the subsequent inspection of the affected area. Until the inspectors could be assured there was

no further danger to the miners from a fire or CO, the issuance of the 103(k) order was valid and proper.

MSHA asserts that the situation presented on March 18, indicated that a roof fall occurred in the morning, or as late as the afternoon on that day, and that there was confusion among mine management as to what was going on. Given the variety of the reports communicated to the inspectors, including the lack of any definitive information from management regarding the fall, and the miscommunication as to whether or not management was going to investigate the fall after 4:00 p.m. when it was reported to the inspectors, MSHA concludes that it is difficult to say what the inspectors should have done at that time. However, after receiving the anonymous call and returning to the mine, the inspector spoke to miners who were working on the section when the fall occurred and a supervisor, and he learned that roof bolts were down. The inspector also knew that the fall had occurred 16 hours earlier, and except for the anonymous call, no one told him anything about the fall. In these circumstances, MSHA concludes that it was natural for the inspector to be suspicious, and at that point in time, he issued the order and went underground to the fall location. Simply because mine management believes that the inspector should have done something else and disagrees with his decision to issue the order does not support any conclusion that the inspector abused his discretion.

#### Findings and Conclusions

Section 103(k) of the Mine Act authorizes a mine inspector, in the event of an accident which occurs in a coal or other mine, to "issue such orders as he deems appropriate to insure the safety of any persons" in the mine. MSHA's regulations at 30 C.F.R. Part 50 provides several definitions of an "accident". The relevant definition for purposes of this case is the definition found in section 50.2(h)(8), which defines an accident as "An unplanned roof fall at or above the anchorage zone in active workings where roof bolts are in use; or, an unplanned roof or rib fall in active workings that impairs ventilation or impedes passage".

Section 103(k) orders are typically issued by MSHA inspectors to secure the scenes of accidents, to insure the continued safety of mine personnel, to preserve evidence, and to facilitate the investigation of accidents. See: Miller Mining Company Co., Inc., 4 FMSHRC 1509 (August 1982), aff'd at 3 MSHC 1017 (9th Cir. 1983); Itmann Coal Company, 1 FMSHRC 1573 (October 1979); Harman Mining Corporation, 3 FMSHRC 45 (January 1981); Lancashire Coal Company, 12 FMSHRC 272 (February 1990; Homestake Mining Company, Supra.

Section 103(k) authorizes an inspector to issue such orders as he deems appropriate to insure the safety of miners. Thus,

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the issuance of such an order by an inspector is discretionary. If an inspector believes that an operator has the situation well in hand, and that the safety of miners is insured, he need not issue any orders at all. On the other hand, if the inspector is in doubt, or has insufficient information to enable him to make a judgment as to the severity of the situation, or the hazard exposure to miners, I believe he must be afforded the latitude to act according to the wisdom of his discretion and experience, particularly in accident situations involving an unplanned roof fall. In my view, in order to successfully respond to such situations, an inspector must be able to do what he believes is appropriate according to the facts as they are known to him, or as they appear to exist, at the time he makes the decision to act. Viewed in this context, I believe that the issue in this case is whether the facts and circumstances known to Inspector Workman at the time he decided to act warranted the issuance of the section 103(k) order. If the order was routinely issued, without regard to the safety or health of miners, then I believe it should be vacated. If, on the other hand, it was issued in order to insure the safety or health of the miners, it should be affirmed.

In this case, Inspector Workman testified that he issued the order out of consideration for the health and safety of the miners working in the location of the fall. He also testified that he decided to issue the order after he learned more about the fall through interviews with three miners who gave him information about the roof fall and roof conditions. Mr. Workman also took into consideration the length of time the roof conditions had existed, the lack of communication and more detailed information from mine management in properly and promptly reporting the fall, and his lack of any specific knowledge as to the existence of potentially hazardous conditions which could have resulted injuries to miners (Tr. 90-91).

Inspector May, who arrived at the mine after Mr. Workman had issued the oral order, countersigned the order when it was reduced to writing and he expressed agreement with the order and Mr. Workman's reason for issuing it. Mr. May confirmed that Mr. Workman told him that he issued the order out of concern for the health and safety of the miners, and that he had been informed that the roof had fallen above the roof bolt anchorage and that there was a problem with the passageway to the longwall face. Mr. May believed the order was properly issued in order to facilitate the investigation, and to insure that proper recovery procedures were being followed to preclude any injuries.

The miner's walkaround representative, Rodger Vandergrift, testified that one of the miners who Mr. Workman interviewed shortly before he issued the order told Mr. Workman that the roof had been "dripping and working" most of the shift, and that after the roof fell, roof bolts were observed in the longwall pan line.

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Mr. Vandergrift indicated that when there is a roof fall above the roof bolt anchorage there is no support to hold the top, and he believed that the order and investigation which followed Mr. Workman's interviews with the miners was justified in order to check out the situation. Mr. Vandergrift also indicated that Mr. Workman informed shift foreman Keener that he was issuing the order for the safety of the miners. Mr. Keener was not called to testify, and Mr. Vandergrift's testimony, which I find credible, stands un rebutted.

Foreman Conoway, who admitted that he knew about the bad top conditions early on Monday morning, March 18, but who disclaimed any knowledge of any of the details, nonetheless indicated that the roof conditions were continually deteriorating as the day went on before the inspectors return to the mine. He also indicated that a "working or dripping" roof may sometimes deteriorate slowly, but at other times it may "drop to the roots". Under the circumstances, it would appear that all of these potential hazards were present prior to the issuance of the verbal order by Inspector Workman, and the fact that the order may have resulted in the cessation of further work to mine through the area is irrelevant. Indeed, the existence of those hazards lends support to the action taken by the inspector.

I am not persuaded by the contestant's arguments that the work stoppage which resulted from Mr. Workman's verbal order at 11:50 p.m. increased the level of potential hazards to miners. The work to clear the fall was apparently taking place throughout the day shift of March 18, after the fall was initially reported out, and it apparently continued during part of the evening before the inspectors returned to the mine. Longwall supervisor Weaver testified that difficulties were encountered in advancing through the fall area because of the bad top conditions, and that during the attempts to advance and drop the shields, roof materials were falling between the shields, and that the top deteriorated further to the point where it fell in.

I take note of the fact that Mr. Conoway, who initially reported the fall to the inspectors at the end of the March 18, day shift, could only speculate as to the measures being taken to address the fall. He, like the inspectors, did not go to the fall location after he reported it to them. I quite frankly have difficulty comprehending why the inspectors, a shift foreman, union walkaround representative, and company safety representatives, all of whom apparently had some knowledge at the end of the shift that a roof fall occurred, chose not to go to the fall area to investigate. Although I understand the lack of knowledge as to whether or not the fall was "reportable" under MSHA's regulatory definition of a "reportable accident", as I stated during the course of the hearing, a roof fall, technically "reportable" or not, can injure and kill people. Under the circumstances, I believe that the inspectors, and mine management

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as well, had an obligation to timely follow up on the fall and to communicate with each other to ascertain the extent of the fall and the necessary corrective action. Since they failed to do so, I am not persuaded by their respective "finger pointing" and attempts to lay blame.

The contestant's assertions that the inspectors should have reasonably known that closing down the section by a section 103(k) order was not necessary to protect the health and safety of miners, and in fact exacerbated the situation because it delayed the mining through of the area are rejected. While it is true that Inspector Workman did not immediately go to the fall area upon his return to the mine on Monday evening before he issued his verbal order, I find nothing in section 103(k), or in MSHA's policy, that requires him to do so. While I agree that a view of the scene before the issuance of the order may have enabled the inspector to make a more precise and informed judgement with respect to the prevailing conditions, the fact that he relied on the information supplied by the three miners does not warrant a conclusion that the order was improperly issued. Further, I believe that mine management had more than ample time and opportunity to communicate with the inspectors and to inform them of the measures being taken to address the fall. If they had promptly done so, the order may not have issued. Since management failed to communicate further with the inspectors after the 4:00 p.m. informal and rather equivocal notice by shift foreman Conoway, it is in no position to complain.

After careful consideration of all of the testimony and evidence in this case, I conclude and find that the facts and circumstances concerning the roof fall, as known to the inspector at the time he verbally issued the order, warranted the action which he took and reasonably support his judgment that the order was necessary to insure the health and safety of the miners until he was able to go to the fall location and complete his investigation of the roof fall incident. I further conclude and find that the inspector acted properly and that the issuance of the order was not an unreasonable or arbitrary abuse of his authority and discretion. Accordingly, the contested order IS AFFIRMED.

#### ORDER

In view of the foregoing findings and conclusions, the contested section 103(k) Order No. 3116688, issued on March 18, 1991, IS AFFIRMED, and the Notice of Contest filed by the contestant IS DENIED and DISMISSED.

George A. Koutras  
Administrative Law Judge