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LION MINING V. SOL (MSHA)
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

LION MINING COMPANY, : CONTEST PROCEEDING
Contestant :
v. : Docket No. PENN 93-420-R
: Order No. 3706548; 7/2/93
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Grove No. 1
ADMINISTRATION (MSHA), :
Respondent : Mine ID 36-02398

DECISION

Appearances: Joseph A. Yuhas, Esq., Barnesboro, Pennsylvania,
for Contestant;
Richard T. Buchanan, Esq., Office of the
Solicitor, U.S. Department of Labor, Philadelphia,
Pennsylvania, for Respondent.

Before: Judge Fauver

Lion Mining Company seeks to vacate a 107(a) withdrawal order under the contest provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, probative, and reliable evidence establishes the Findings of Fact and further findings in the Discussion below:

FINDINGS OF FACT

1. Lion Mining Company owns and operates Grove No. 1 mine, an underground mine that produces coal for sale or use in or substantially affecting interstate commerce.

2. On the afternoon of July 1, 1993, Lion Mining Company's mine foreman detected 2.8 percent methane (above normal levels) in the 16 Left bleeder. He removed several stoppings to increase ventilation and monitored the area.

3. When no changes occurred, he went to the surface for an MX 240 monitor to get a better methane reading. The 3:00 p.m. crew assigned to the 16 Left section was not sent into the section.

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12. High concentrations of methane can move very rapidly from a bleeder entry into an active working section in the event of a roof fall or a line brattice falling down.

13. In April 1993, high concentrations of methane backed up from the 17 Right bleeder into the active workings of that section as reflected in Order No. 3706477. Inspector Huntley was aware of that order when he issued Order No. 3706548.

14. On April 24, 1992, methane accumulated in the 17 Right section because of a failure to maintain adequate face ventilation. The methane was ignited by heat or sparks generated by cutting bits on a continuous miner. Inspector Huntley participated in the investigation of the methane ignition.

15. On August 19, 1991, methane accumulated in the 16 Right section because of a failure to maintain adequate face ventilation. The methane was ignited by heat or sparks generated by cutting bits of a continuous miner. Inspector Huntley participated in the investigation of that methane ignition.

DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS

An "imminent danger" is defined in 3(j) of the Act as "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." If an MSHA inspector finds an imminent danger, 107(a) provides that he or she must:

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 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determined that such imminent danger and the conditions or practices which caused such imminent danger no longer exist.

The legislative history of 107(a), which was unchanged when the 1969 Mine Act was amended in 1977, underscores the hazards of methane accumulations:

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The most hazardous condition that can exist in a coal mine, and lead to disaster-type accidents, is the accumulation of methane gas in explosive amounts. Methane can be ignited with relative little energy and there are, even under the best mining conditions numerous potential ignition sources always present. . . . [H.R. No. 563, 91st Cong., 1st Sess. 21 (1969).]

The Commission has noted that "the U.S. Courts of Appeals have eschewed a narrow construction and have refused to limit the concept of imminent danger to hazards that pose an immediate danger." Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (1989). The Commission has also noted that the courts have 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 area before the dangerous condition is eliminated." Id., quoting Eastern Associated Coal Corp. v. Interior Bd. of Mine Op. Appl., 491 F.2d 277, 278 (4th Cir. 1974). The Commission has adopted the Seventh Circuit's holding that an inspector's finding of an imminent danger must be upheld "unless there is evidence that he has abused his discretion or authority." 11 FMSHRC at 2164, quoting Old Ben Coal Corp. v. Interior Bd. of Mine Op. App. 523 F.2d 25, 31 (7th Cir. 1975); see also: Wyoming Fuel Co., 14 FMSHRC 1282, 1291 (1992).

While the inspector has considerable discretion in determining whether an imminent danger exists, there must be some degree of imminence to support an imminent danger finding. Utah Power & Light Co., 13 FMSHRC 1617, 1621 (1991).

The evidence shows that a dangerous condition existed in the Grove No. 1 mine on July 2 and 3, 1993. Inspectors Huntley, Fetsko, and Jardina recorded explosive levels of methane in the 16 Left bleeder during that approximately one and one-half day period. High levels of methane were also found at the 10 Left bleeder. A roof fall could have ignited the methane or, had normal mining been permitted to resume, a number of electrical ignition sources would have been present in the active 16 Left section. The Secretary's experts testified, convincingly, about the potential for an immediate explosion that could have quickly traveled to widespread areas of the mine. I find that a preponderance of the reliable evidence supports the inspector's finding that an imminent danger existed. I also find that the reliable evidence supports the modification of the 107(a) order to include the entire mine.

Lion Mining contends that Inspector Huntley was precluded from issuing a 107(a) order because it had voluntarily evacuated the mine and deenergized equipment in the 16 Left section. However, 107(a) orders are intended not only to withdraw miners from a mine or area affected by an imminent danger, but also to prevent resumed mining until "an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent no longer exist." The Act does not contemplate leaving this decision to the operator itself.

In *Eastern Associated Coal Corp. v. Interior Board of Mine Operations Appeals*, 491 F.2d 277, 278 (4th Cir. 1974), the Court upheld the IBMA's decision affirming an imminent danger order in a similar situation. The Court stated that, although the company:

had voluntarily withdrawn miners from the affected area until the conditions were corrected prior to issuance of the [imminent danger withdrawal] order[,] the Secretary determined, and we think correctly, that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." [Emphasis added.]

The decision of the IBMA, found at 2 IBMA 128 (No. IBMA 73-28, 1973), more fully states the facts of that case. The inspector had issued an imminent danger withdrawal order for a mine entry because of a lack of clearance between the top of a shuttle car and the roof, and because two loose roof bolts were hanging from the roof. When the inspector arrived, the company had removed the shuttle car from the area and was beginning to correct the situation. Nonetheless, the IBMA held:

The dangerous condition cannot be divorced from the normal work activity. The question must be asked -- could normal operations proceed prior to or during abatement without risk of death or serious injury? Although prior evacuation of miners or voluntary work stoppage by an operator may be laudatory and indicate concern for the safety of the miners, such actions, although taken in all good faith, cannot operate to eliminate an otherwise imminently dangerous condition or practice. Likewise, the fact that the process of abatement may have commenced prior to the issuance of the order . . . does not in our view serve to invalidate the order. [2 IBMA at 136; emphasis added.]

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