CCASE: LION MINING V. SOL (MSHA) DDATE: 19941228 TTEXT: FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

:	CONTEST PROCEEDING
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:	Docket No. PENN 93-420-R
:	Order No. 3706548; 7/2/93
:	
:	Grove No. 1
:	
:	Mine ID 36-02398
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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.

4. The mine foreman, general assistant and safety director went to the 16 Left bleeder where they found that methane levels had increased to over five percent, i.e. an explosive level. FOOTNOTE 1 Everyone was evacuated from the mine.

5. Lion developed a plan of action and notified MSHA of the methane levels. Three miners were sent underground to monitor the situation and give status reports every half hour. Ventilation to the affected area was increased from approximately 10,000 cubic feet per minute to 20,000.

6. MSHA Inspector Huntley arrived at the mine about 10:45 p.m. The production crews had been sent home, and there was no power on any equipment in the 16 Left section.

7. The inspector arrived at the 16 Left bleeder around midnight, took methane readings and found explosive levels. He determined that an imminent danger existed and issued 107(a) Order No. 3706548 for the 16 Left section.

8. Later, Inspector Huntley's supervisor, Ted Glusko, instructed him to modify the order to designate the entire mine as the area affected by the order.

9. Explosive levels of methane were found by Inspectors Huntley, Fetsko, and Jardina in the 16 Left bleeder system on July 2 and 3, 1993. By July 3 the operator abated the methane condition by making ventilation changes. The order was terminated by Inspector Kenneth Fetsko around 3:15 p.m. on that date.

10. Inspector Huntley issued the 107(a) order because of high concentrations of methane in the 16 Left bleeder entry, the possibility that a roof fall could occur igniting the methane, and the danger to miners if normal mining operations were resumed before the methane condition was abated.

11. Had normal mining operations been permitted to resume under the conditions observed by Inspector Huntley, there would have been several ignition sources present in and around the active working section, such as a continuous miner, roof bolters, ram cars, tractors, scoops, non-permissible golf carts, battery charging stations, and an electrical transformer. In addition, check curtains could have been moved or knocked down, causing the methane in the 16 Left bleeder to back up into the active working section.

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1/ Methane is explosive in concentrations of 5 to 15 percent.

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:

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.]

The above quoted language of the Fourth Circuit Court in affirming the IBMA's decision has become black letter law. See, e.g., V.P. Mining Co., 15 FMSHRC 1531, 1535 (1933); Wyoming Fuel Co., 14 FMSHRC 1282, 1290 (1992); and Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (1989). In another key case, the Seventh Circuit emphasized that imminent danger orders are intended not only to withdraw miners from a dangerous area, but also "to assure the miners [will] not carry on routine mining operations in the face of imminent dangers." Freeman Coal Mining Co. v. IBMA, 504 F.2d 741, 744 (7th Cir. 1974). Citing the legislative history, the Court noted that an inspector who issues an imminent danger order must "prevent entrance by anyone to that mine or area, except those miners necessary to abate the hazard. . . ." Id. at 744 n.4. FOOTNOTE 2

I find that a preponderance of the evidence shows that the inspector exercised reasonable discretion in issuing the subject 107(a) order

CONCLUSION OF LAW

1. The judge has jurisdiction.

2. The Secretary proved that the inspector acted on reasonable grounds and with substantial supporting facts in issuing Order No. 3706548.

ORDER

WHEREFORE IT IS ORDERED that:

- 1. Order No. 3706548 is AFFIRMED.
- 2. This proceeding is DISMISSED.

William Fauver Administrative Law Judge

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The legislative history cited by the Court further states: "the imminent danger may be due to a violation of a mandatory safety standard or some other cause not covered by a standard, including natural causes. . . ." See also VP-5 Mining Co., 15 FMSHRC 1531 (1993), where the Commission affirmed an imminent danger order but vacated an accompanying citation.

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