FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 23, 2014

JIM WALTER RESOURCES, INC., Contestant, v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	CONTEST PROCEEDING Docket No. SE 2012-681-R Order No. 8522884; 08/13/2012 Mine ID: 01-01401 Mine: No. 7 Mine

DECISION

Appearances: Carmen L. Alexander, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for the Petitioner

David M. Smith, Esq. and Allen B. Bennett, Esq., of Birmingham, Alabama, for the Respondent

Before: Judge James G. Gilbert

This case is before me upon a notice of contest filed by Jim Walter Resources, Inc. ("JWR") following the issuance of an imminent danger order, Order No. 8522884, pursuant to section 107(a), 30 U.S.C. § 817(a), of the Federal Mine Safety and Health Act of 1977 (the "Act"). The parties presented testimony and evidence at a hearing held in Birmingham, Alabama.

I. Stipulations of Fact

1. JWR operates the No. 7 mine, an underground coal mine located in Brookwood, Alabama, and the mine's operations affect commerce within the meaning and scope of the Federal Mine Safety and Health Act of 1977, as amended.

2. The mine is subject to the jurisdiction of the Act.

3. The administrative law judge and Federal Mine Safety and Health Review Commission have jurisdiction to hear this matter.

4. The mine is subject to regular inspections by the Mine Safety and Health Administration pursuant to section 103(a) of the Act, 30 U.S.C. § 813(a).

5. On August 13, 2012, MSHA inspector Larry McDonald was at the No. 7 mine to conduct the rock dust survey on the No. 8 section of the mine.
6. JWR demonstrated good faith abatement.

7. JWR timely contested the imminent danger order in this proceeding and timely served its notice of contest to the Secretary of Labor.

II. Background

JWR operates the No. 7 mine, an underground coal mine located in Brookwood, Alabama. *Stipulation* No. 1. The mine is subject to the jurisdiction of the Mine Safety and Health Act of 1977, as amended. *Id.*; *Stipulation* No. 2. The mine is also subject to regular inspections by the Secretary's Mine Safety and Health Administration ("MSHA") pursuant to section 103(a) of the Act, 30 U.S.C. § 813(a), as well as five day spot inspections due to the quantity of methane liberated at the mine. *Stipulation* No. 4; Tr. 60, 65. The mine is considered a very gassy mine, liberating 20 million cubic feet of methane in a 24 hour period. Tr. 65. MSHA Inspector Larry McDonald was familiar with the mine, its history as a gassy mine, and previous ignitions that occurred in the mine. Tr. 65-72; Government's Exhibit (Gov. Exh.) 1.

On August 13, 2012, McDonald issued an imminent danger order under section 107(a) of the Act as the result of a buildup of methane in a roof cavity in Section 8 of the No. 7 mine. Gov. Exh. 9.

Section 107(a) of the Act provides:

> 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 or 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.

30 U.S.C. § 817(a).

Section 3(j) of the Act defines "imminent danger" as the "existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j). Section 107(a) of the Act provides for the issuance of an order requiring the withdrawal of persons in areas of a mine who are exposed to such an imminent danger. "Imminent danger orders permit an inspector to remove miners immediately from a dangerous situation, without affording the operator the right of prior review, even where the mine operator did not create the danger and

where the danger does not violate the Act or the Secretary's regulations." *Jim Walter Resources, Inc.*, 33 FMSHRC 3211 (December 2011) (ALJ). "This is an extraordinary power that is available only when the 'seriousness of the situation demands such immediate action.'" *Id.* (citing *Utah Power & Light Co*., 13 FMSHRC 1617, 1622 (Oct. 1991) (quoting Sen. Rep. No. 91-411, *reprinted in* Senate Subcomm. on Labor, Comm. on Labor and Public Welfare, Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 215 (1975))).

The 107(a) order in this case stated as follows:

> Methane was allowed to accumulate in a high cavity on #8 section (MMU-008) between the #2 intake entry and the #3 intake belt entry, which is the long crosscut. This crosscut was located at spad #24394 in the #2 intake entry. The high cavity was approximately 165 foot [*sic*] in the crosscut from the #2 intake, [*sic*] There was a line brattice curtain hung within 25 foot [*sic*] from the high cavity. Upon inspection of the high cavity, that measured approximately 5 foot [*sic*] in width by 7 foot [*sic*] in length by 2 foot [*sic*] in depth into the mine roof, detected a concentration of methane gas that went over range on the X-AM Drager multi-gas detector. Bottle sample was taken bottle #R9897. An oral 107 (a) imminent danger order was issued to John Connellan (Safety Supervisor), at 11:00 hours on this date. Power was immediately re-moved [*sic*] from the section and only miners needed to improve ventilation was [*sic*] allowed in the area. Citation #8522885 is being issued in conjunction with this order.

Gov. Exh. 9.

JWR contests the imminent danger order in this proceeding. For the reasons that follow, I find that the MSHA inspector did not abuse his discretion in the issuance of the 107(a) order on August 13, 2012.

III. Hearing Testimony

A. Testimony of Inspector Larry McDonald

On August 13, 2012, MSHA Inspector Larry McDonald conducted an inspection at the No.7 mine, accompanied by JWR safety supervisor John Connellan and United Mine Workers of America ("UMWA") miners' representative Steve Pendley (referred to collectively as "the inspection party"). Tr. 79, 264. On that day, McDonald entered the mine by elevator, rode a diesel manbus down the section 8 track, and traveled inby on the section 8 track to the end of the track, where the inspection party exited the manbus. Tr. 80. He then turned left into the number 2 entry, where he saw the Lo Trac and inspected it. Tr. 92-93. The Lo Trac passed inspection. Tr. 93. McDonald then continued to the spad number for his first rock dust survey. Tr. 93. After completing a rock dust survey in the number 1 entry, McDonald observed the Lo Trac enter the long crosscut by the number 2 entry where the cavity at issue in this case was located. Tr. 95. McDonald was approximately 520 feet from the long crosscut at the time he made his observation. Tr. 159.

McDonald continued to conduct his rock dust survey as the inspection party made their way toward the long crosscut. McDonald observed his methane detector fluctuate as he walked toward the number 2 entry.

> And at that time, I came through the man door leading to the number 3 entry, traveling toward the number 2 entry in this long crosscut. As I come through the door, I had my detector already in my hand and I observed the change in methane, that it went up.

Tr. 96.

At this point McDonald observed a line curtain hung up in the long crosscut, which he surmised was present to ventilate the area of methane. Tr. 96. When he reached the right corner of the brattice to make a reading, he observed a cavity in the roof of the long crosscut. Tr. 96. McDonald then stepped up on a pallet of blocks and raised his detector into the cavity. Tr. 97. About two inches into the cavity above the roof line the reading was 1 percent. Tr. 97.

As he continued to raise the detector further into the cavity, the readings continued to rise past 5 percent. Tr. 97. At this point, the detector was approximately 14 inches from the peak of the cavity roof. Tr. 97. McDonald then had Pendley bring his detector over to compare and see if he obtained the same results. Tr. 97. Pendley's detector confirmed the reading. Tr. 97. Connellan also brought his detector and all three detectors confirmed McDonald's reading. Tr. 97. At this point, McDonald issued the imminent danger order. Tr. 97. McDonald then took a bottle sample of the air in the cavity which eventually identified a reading of 51.77 percent methane. Tr. 104, 110; Gov. Exh. 6, Gov. Exh. 7.

McDonald testified on cross-examination that there were eight miners in the vicinity, though he was not clear on where those miners were located, or how close to the long crosscut those miners may have been. Tr. 183. The closest miners not part of the inspection party were identified as Eric Church and James Woods. Tr. 123.

B. Testimony of Miner Eric Church

Mine worker Eric Church was present in section 8 when McDonald, Connellan, and Pendly arrived for their inspection. Tr. 223. According to Church, McDonald did not inspect the Lo Trac after exiting the manbus prior to his rock dust surveys; instead, Church requested that McDonald inspect the Lo Trac after he had the chance to clean and degrease the Lo Trac. Tr. 224. Church waited for the inspection party to pass before driving the Lo Trac to the washdown station just outside the long crosscut where the cavity containing the methane was located. Tr. 224, 226-28. Church stated that the Lo Trac never entered into the long crosscut at any point during the time the inspection was ongoing, nor did it move from its parked location at the washdown station in the number 2 entry for the next 24 hours. Tr. 228-31. McDonald inspected the Lo Trac at this location, and the Lo Trac was "tagged out" as a result of that inspection, and, as a result, the Lo Trac was out of operation until the identified problem could be repaired. Tr. 230.

Testimony of Safety Supervisor John Connellan

Mr. Connellan and Mr. Pendley joined Inspector McDonald for the rock dust survey. Tr. 258, 264. After traveling on the manbus to section 8, the inspection party exited the manbus. Tr. 264-65. Church had been present detrashing the track, and after exiting the manbus, Connellan spoke with Church. Tr. 264. McDonald then inspected the Lo Trac that was present in section 8 at the time. Tr. 265. The Lo Trac had an unidentified issue, and Connellan or Pendley placed a danger tag on the Lo Trac. Tr. 265. Connellan then instructed Church to bring the Lo Trac to the washdown station in the number 2 entry, clean it, and locate an electrician to correct the Lo Trac. Tr. 265. The inspection party then took various rock dust surveys until it approached the number 2 entry. Tr. 267. Connellan entered the long crosscut first and walked past the cavity in the long crosscut, almost to the end, but realized that McDonald and Pendley were not with him. Tr. 270. At this point, he stopped and turned and observed Pendley and McDonald taking gas measurements by the brattice line. Tr. 270-71. He checked his spotter and noted that his readings of methane were two tenths to three tenths. Tr. 271. He walked back to where Pendley and McDonald were taking readings and observed McDonald step onto some blocks, raise his methane detector into the cavity, and the detector alarmed. Tr. 271. McDonald then told him to cut the power and that he was issuing an imminent danger order. Tr. 271.

Connellan then walked down the long crosscut to the number 2 entry at approximately Spad No. 24395 where he observed Church by the washdown station and instructed Church to get a blower curtain. Tr. 277, 279; Gov. Exh. 3. He then proceeded in the number 2 entry to the power center, where he met Randall Emory, the day shift supervisor, and he informed Emory that they had an imminent danger order in the long crosscut and instructed Emory to cut power. Tr. 276. Emory turned off the power at the power center near Spad No. 24959. Tr. 276; Gov. Exh. 3. Emory accompanied Connellan back to the long crosscut to where McDonald and Pendley remained near the cavity. Tr. 276-77. McDonald informed Connellan that he took a bottle sample. Tr. 277. Connellan also measured the cavity and placed his methane detector in the cavity where it alarmed. Tr. 277. McDonald then told Connellan that it was in his best interest to shut down the belt line. Tr. 277. Connellan travelled back through the mandoor to the number 3 entry and hit the emergency stop on the belt line. Tr. 278. The parties then hung the blower curtain sufficient to ventilate the cavity. Tr. 278. McDonald stepped back on the blocks and placed his methane detector into the cavity and it did not alarm. Tr. 282. At that point, McDonald terminated the imminent danger order. Tr. 282.

C. Testimony of Engineer Tom McNider

Mr. McNider is general manager of engineering for JWR. Tr. 324. Included in his job functions is overseeing the ventilation plan for the No. 7 mine. Tr. 325; Gov. Exh. 17. McNider stated that in his best judgment, based upon his knowledge of the ventilation plan for this mine, the air in the number 2 entry was moving approximately 65,000 cubic feet per minute ("CFM"), and that the air diverted into the long crosscut by the existing blower curtain was something less than 65,000 CFM on the date of the citation. Tr. 354, 365.

D. Testimony of Expert Witness Dr. Jerry Tien

Dr. Tien was accepted as an expert witness to testify on the issue of methane dilution. Tr. 385. Dr. Tien stated that with 6,500 CFM of air moving into the cavity, the cavity would achieve full methane dilution (15 methane reading or less) in .02106 of a second. Tr. 394. Dr. Tien further opined that the diluted methane from the cavity would not have escaped in a volatile amount (5-15% methane) after its dilution, once it entered the long crosscut. Tr. 400. Dr. Tien said the methane would travel along the roof line, as it is lighter than air, and the dilution with the airstream would carry it from the mine. Tr. 400. He opined that because the identified ignition sources were downwind of the cavity containing the methane, there was little likelihood that any of the identified ignition sources could act as an ignition source given their existing location at the time of issuance of the 107(a) order. Tr. 402-03.

E. Rebuttal Testimony of Inspector Larry McDonald

In rebuttal to the lack of air quantity readings near the cavity location at the time of issuance of the order, McDonald stated that he did not take air quantity measurements at the location of the cavity in the long crosscut because there was insufficient air movement to operate the anemometer blades. Tr. 426-27.

IV. Discussion

To support a finding of imminent danger, an inspector must conclude that "the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time." *Utah Power & Light Co.*, 13 FMSHRC 1617, 1622 (Oct. 1991). In reviewing an inspector's finding of imminent danger, the Commission must support the inspector's determination "unless there is evidence that he has abused his discretion or authority." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2164 (Nov. 1989) (quoting *Old Ben Coal Corp. v. IBMA*, 523 F.2d 25, 31 (7th Cir. 1975) (emphasis omitted)). The Commission has held that an "abuse of discretion" is found when "there is no evidence to support the decision or if the decision is based on an improper understanding of the law." *Energy West Mining Co.*, 18 FMSHRC 565, 569 (Apr. 1996).

While the crucial issue is whether the inspector abused his discretion or authority, the judge is not required to accept an inspector's subjective "perception" that an imminent danger existed. Rather, the judge must evaluate whether, given the particular circumstances, it was reasonable for the inspector to conclude that an imminent danger existed. The Secretary still bears the burden of proving his case by a preponderance of the evidence. Although an inspector is granted wide discretion because he must act quickly to remove miners from a situation that he believes to be hazardous, the reasonableness of an inspector's imminent danger finding is subject to subsequent examination at the evidentiary hearing. *Jim Walter Res., Inc.*, 29 FMSHRC 1043 (Nov. 16, 2007).

The critical question in determining whether an accumulation of methane presents an imminent danger is whether there is an ignition source that might reasonably be expected to cause an explosion, resulting in death or serious injury within a short period of time. *Consol of*

Kentucky, Inc., 30 FMSHRC 1 (Jan. 2008); *see also Island Creek Coal Co.*, 15 FMSHRC 3339, 346-247 (Mar. 1993); *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988).[1]

A. Potential Ignition Sources

There is no debate that at the time of the issuance of the 107(a) order, there was a buildup of methane in the cavity in the long crosscut that was in the explosive range. While JWR went to great lengths to discuss the effects of remediation of the methane buildup, and the rapid method available for dissolution of methane, the issue in this case is not the speed of remediation but whether there existed a potential ignition source for the buildup of methane in the cavity sufficient to justify the issuance of the 107(a) order. McDonald identified four separate potential ignition sources that led to his issuance of the imminent danger order: (1) the high voltage cable; (2) the battery charger; (3) the power center; and, (4) the Lo Trac. Tr. 113-14, 117.

The high voltage cable was located "coming down the number 2 entry." Tr. 117. There was no evidence that the high voltage cable was actually in the long crosscut. The number 2 entry is downwind of the long crosscut. Tr. 96; Gov. Exh. 3. As Dr. Tien testified, ignition sources located downwind of the cavity were unlikely to produce a spark to ignite methane in the long crosscut given that the spark would travel downwind as well. Tr. 408. Methane that might be expected to "leak" from the cavity would be quickly diluted upon entering the long crosscut, and further dilute as the gas enters the number 2 entry. Tr. 403. Also, the diluted methane, none of which would be in the combustible range due to the dilution, would travel along the roof line as it exited the mine through normal ventilation procedures. Tr. 400. Indeed, the ventilation in the mine was not at issue in this case. Accordingly, I find that methane that might have escaped the cavity would be properly diluted and rendered harmless once it entered the long crosscut and eventually down the number 2 entry along the roofline, passing the high voltage cable. For these reasons, I find that the high voltage cable located in the number 2 entry was not a likely ignition source for the buildup of methane in the cavity at the time of issuance of the 107(a) order.

Likewise, the battery charger as an ignition source suffers the same fate. McDonald credibly testified that the battery charger is an ignition source "given these battery chargers have little regulators behind them, and it's going to pull air across that battery charger to keep the -- when you're charging batteries, they produce hydrogen during the charging process, and they have to be ventilated straight into the return." Tr. 117-118. However, there was no evidence that the battery charger was a mobile piece of equipment or that it would likely be used in or near the cavity in the long crosscut. As this piece of equipment was located downwind of the cavity, and beyond the long crosscut in the number 2 entry, it was unlikely that the battery charger could act

[1] The Secretary presents an alternate theory in support of his case. The Secretary argues that if there does not exist an ignition source based on the facts of this case, the imminent danger order must be upheld, as the presence of methane in the explosive range alone is sufficient evidence to issue an imminent danger order under section 107(a) without identification of an ignition source. This argument was referred to in a recent case as a "*per se* rule of 5 percent methane." *Jim Walter Resources, Inc. v. Sec'y of Labor*, 33 FMSHRC 3211, 3220 (Dec. 2011)(ALJ). As I find that an ignition source exists, I need not reach the Secretary's alternate theory in support of the 107(a) order.

as an ignition source for the cavity. Also, as any methane that might escape the cavity would be sufficiently diluted before reaching the battery charger, there was no concern for ignition beyond the long crosscut or in the number 2 entry. The power center located at Spad No. 24959 is also not located near enough to the cavity, nor upwind of the cavity, to be reasonably considered to be a potential ignition source at the time of issuance of the imminent danger order. Gov. Exh. 3. This leaves a review of the potential of the Lo Trac as an ignition source.

McDonald testified that the Lo Trac was a potential ignition source because it is a piece of "non-permissible" equipment. Tr. 88. "Non-permissible" equipment means it does not have explosive proof enclosures on it. Tr. 89, 209-10. The Lo Trac has electrical connections that are open, an exposed alternator, and frictional brakes that may cause sparks. Tr. 209-210. While mine witnesses refuted McDonald's testimony that he observed the Lo Trac in the long crosscut on August 13, 2012, I find that McDonald reasonably believed that he observed the operation of the Lo Trac in the long crosscut, and that such operation could be a potential ignition source. In its location in the number 2 entry, Respondent is correct that the Lo Trac, like the aforementioned sources, was not a potential ignition source. However, unlike the above cited potential ignition sources, the Lo Trac is a mobile piece of equipment. Witnesses for the mine testified that the Lo Trac is certainly capable of traveling in the long crosscut. Tr. 315. I need not find that the Lo Trac did, in fact, operate in the long crosscut on August 13, 2012, to find that the Lo Trac was a potential ignition source.

The Lo Trac was only a short distance from the long crosscut after it was brought to the washdown station by Mr. Church. Tr. 224, 226, 274-75; Gov. Exh. 3.[2] McDonald could reasonably anticipate that the Lo Trac would be used for delivery of supplies or other intended uses in the long crosscut at some point in the near future, and certainly before the condition could be abated. Thus, even if McDonald was mistaken that the Lo Trac entered the long crosscut as he observed prior to issuance of the 107(a) order, given the Lo Trac's exposed components, its lack of explosive proof enclosures, its proximity to the long crosscut, and its mobility, it was not unreasonable for McDonald to consider the Lo Trac as a potential ignition source.

JWR contends that the Lo Trac could not be an ignition source because the distance between the engine's exposed machinery and the roof cavity, some four or five feet, made the possibility of ignition highly unlikely. Tr. 400. It also points out that because methane is lighter than air, it will travel along the roof line if it escapes from the cavity and that because it will dissipate rapidly once it leaves the cavity, the cavity remains the sole location of methane in the explosive range, and thus any ignition must occur in the cavity. Tr. 400. As the Lo Trac is not likely to spark upwards some four to five feet sufficient to ignite the methane, considering the Lo Trac to be an ignition source, even if it were to enter the long crosscut, is a bridge too far. Tr. 408, 415.

I have considered these arguments, and I agree that the likelihood of ignition from the Lo Trac might appear somewhat remote. However, it is not impossible, nor is it even improbable. A potential ignition source is precisely that. In *Jim Walter Resources, Inc.*, 33 FMSHRC 3211,

[2] The Lo Trac was parked by the number "3" of Spad No. 24935 as identified by the witness on Government's Exhibit 3. Tr. 274-75.

3217 (Dec. 2011) (ALJ), potential ignition sources included such remote occurrences as clothing static. In other words, when methane gathers in the explosive range, any spark is an ignition source, even if the likelihood of that spark seems somewhat remote. The issue is whether the inspector's decision to consider the possibility that the Lo Trac could enter the crosscut and a spark therefrom could ignite the methane is a reasonable one. Potential ignition sources are by their nature speculative. That speculation must be within the realm of reasonable probability to support its existence as a potential ignition source. While I am sympathetic to JWR's position, I cannot discount McDonald's conclusion that the Lo Trac may spark if driven in the crosscut. While that spark may have to travel upwards as much as four or five feet "at exactly the right angle at the right moment to make it happen" it would be sufficient to ignite the methane in the cavity. Tr. 414-15; *Utah Power & Light Co.*, 13 FMSHRC at 1622 ("[w]ithout considering the 'percentage of probability that an accident will happen,' the inspector must determine whether the condition presents an impending threat to life and limb.").

While other identified potential ignition sources were downwind of the crosscut, and not likely to enter the crosscut or be in or near the cavity itself, the Lo Trac is a mobile piece of machinery that can be reasonably expected to travel to various portions of the mine, including the long crosscut. The fact that the Lo Trac had been "tagged out" for repair (not by order of the inspector but by mine authorities) is not dispositive on this issue. Tr. 230. The Lo Trac was in an operable condition at the time of the issuance of the imminent danger order as evidenced by Church's movement of the Lo Trac to the washdown station just outside the long crosscut in the number 2 entry. Tr. 224. Nothing prevented its use by mine personnel for its intended purpose. The proximity of the Lo Trac to the cavity, combined with McDonald's observation that the Lo Trac had been operating in the long crosscut that day, was sufficient for McDonald to reasonably conclude that the Lo Trac was a potential ignition source. I cannot find that Inspector McDonald abused his discretion in the issuance of the imminent danger order when he reasonably believed that the Lo Trac could, and did, enter the long crosscut while the buildup of methane remained in an unremediated condition.

B. Immediate Danger

Respondent argued that the facts of this case lack the immediacy aspect of an imminent danger. "An imminent danger is present when 'the situation is so serious that the miners must be removed from the danger forthwith when the danger is discovered without waiting for any formal proceeding or notice.'" *Utah Power & Light Co.*, 13 FMSHRC 1617, 1621 (Oct. 1991) (quoting Sen. Rep. No. 91-411, *reprinted in* Senate Subcomm. on Labor, Comm. on Labor and Public Welfare, Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 215 (1975)). Respondent elicited testimony from McDonald that the immediacy considered under an imminent danger order means the danger may occur and is "close and fixing to happen." Tr. 131-32. Respondent correctly states in its post hearing brief that the immediacy present in an imminent danger situation is among considerations that distinguish an imminent danger order from a "significant and substantial" (S&S) violation. *Jim Walter Resources Inc.'s Post-Hearing Brief* at 15. Thus, when reviewing an imminent danger order, it is important to consider whether the immediacy of the situation justifies the issuance of the order.

In an attempt to negate immediacy, Respondent presented expert testimony that addressed the rapid dissolution of methane after it escapes the cavity, thereby arguing that a danger that can be remediated rapidly cannot act as an imminent danger. This argument has been rejected previously because the issue is not the rapidity of the abatement but the potential for injury or death if the methane is left in an unremediated condition and normal mining operations are permitted to continue. *Eastern Assoc. Coal Corp. v. IBMA*, 491 F.2d 277, 278 (4th Cir. 1974).

Respondent also argued that the absence of an identifiable ignition source in the long crosscut within the immediate vicinity of the cavity made the finding of immediacy unreasonable. I accept the expert's analysis on the issue of ventilation, as reflected by my decision to discount the potential ignition sources downwind of the cavity. However, Respondent's focus on immediacy places a high burden on the inspector that section 107(a) does not require. An ignition source need not be in the immediate vicinity of the methane buildup in a "ready to spark" condition for it to be a potential ignition source. It need only exist within a reasonable proximity that an experienced inspector can conclude presents an imminent danger if the ignition source were brought in contact with methane in the explosive range. Such determinations are fact specific and are based upon the inspector's knowledge of normal mining operations. This is not a situation in which the inspector opined about such potential ignition sources as roof falls or lightning. *Consol of Kentucky, Inc.*, 30 FMSHRC at 6. Rather, the potential ignition source identified by the inspector was just beyond the long crosscut in an operable condition.

While the other identified potential ignition sources were not likely to spark near the methane build-up given their location at the time of issuance of the order, the Lo Trac was close by, operable, and capable of entering the long crosscut at any time. While not in a position directly beneath the methane filled cavity at the time of issuance of the 107(a) order, the inspector knew it was just beyond the crosscut in the number 2 entry and that it could reasonably be expected to enter the long crosscut under normal mining operations. There is evidence in the record that the long crosscut was the source of some activity, and given the presence of materials stored in the long crosscut, it was not unreasonable for the inspector to assume that the Lo Trac might enter the long crosscut to retrieve or move such materials in the foreseeable future. That knowledge was sufficient to establish imminence and render the Lo Trac a potential ignition source for the methane accumulation in the cavity.[3]

[3] In addition to the inspection party, two miners were identified as being within the vicinity of the long crosscut and would likely be seriously injured in the event of an explosion in that area. Tr. 123. The record is unclear as to exactly who else may have been present, or whether the mine was "in production" at the time of the issuance of the 107(a) order. Nevertheless, I find that there was sufficient activity in or near the long crosscut to place miners located in that area in danger of "death or serious physical harm" in the event of an explosion of methane in the cavity in the long crosscut.

C. Post-Hoc Justification

Finally, Respondent suggested that the inspector's identification of potential ignition sources constituted a *post-hoc* justification for issuance of the imminent danger order. Tr. 36. I credit the inspector's testimony that while he focused on the build-up of methane in the cavity as the basis for issuance of his imminent danger order, he knew of the existence of the potential ignition sources at the time he issued the order. The inspector did testify that he believed that the build-up of methane alone justified his 107(a) order, but in addition he testified that the identified ignition sources discussed above also informed his decision to issue the imminent danger order. I have no reason to doubt the credibility of the inspector on that issue.

V. Conclusion

For the above stated reasons, I find the Secretary has demonstrated by a preponderance of the evidence that Inspector McDonald did not abuse his discretion.

ORDER

The Imminent Danger Order issued on August 13, 2012, as reflected by Citation 8522884, is **AFFIRMED** as issued.

/s/ James G. Gilbert
James G. Gilbert
Administrative Law Judge

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