FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SPARTAN MINING COMPANY, Petitioner	CONTEST PROCEEDING
v.	Docket No. WEVA 2015-407-R Order No.: 9020932; 12/30/14
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	Mine: Road Fork #51 Mine Mine ID No.: 46-01544

SUMMARY DECISION

Before: Judge Barbour

This case is before me upon a Notice of Contest filed by Spartan Mining Company ("Spartan"), challenging the issuance by the Secretary of Labor ("Secretary") of an imminent danger order, under section 107(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 817(a). The Order was issued on December 30, 2014, at Spartan's Road Fork No. 51 Mine, an underground bituminous coal mine located in Wyoming County, West Virginia, when an inspector for the Secretary's Mine Safety and Health Administration ("MSHA") saw a miner standing alongside a moving continuous mining machine and instructed the miner to immediately remove himself from the area. In conjunction with the Order and pursuant to section 104(a) of the Act, the inspector also issued Citation No. 9020933 to Spartan.[1]

The court initially scheduled a June 9, 2015, hearing on this matter. Shortly after the notice of hearing was issued, the parties settled all issues related to Citation No. 9020933 and requested that the court resolve the remaining issues regarding the imminent danger order on summary decision.[2] The parties agreed to submit stipulations of fact and cross-motions for summary decision, and the court issued an Order cancelling the June 9 hearing. The parties subsequently filed Cross-Motions for Summary Decision with accompanying Briefs ("Secy' Br." and "Resp't Br.") and Joint Stipulations of Fact ("Stip. 1 through 13"), followed by Reply Briefs from each side ("Sec'y Reply Br." and "Resp't Reply Br."). The court issued an Order

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[1] Citation No. 9020933 charged the company with a violation of 30 C.F.R. § 75.220(a)(1), which requires an operator to adopt and comply with an approved roof control plan. A provision in Spartan's approved plan prohibited miners from standing alongside a continuous miner when the continuous miner was being trammed, unless it was cutting coal. *See* Stip. 10.

[2] The court approved the settlement on June 24, 2015. *Spartan Mining Co.*, Docket No. WEVA 2015-592, Unpublished Order at 2 (June 24, 2015).

Requesting Additional Joint Stipulations on August 5, 2015, and the parties complied by submitting three additional Joint Stipulations on September 1, 2015 ("Stip. 14 through 16").

Commission Rule 67(b) states: "A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b). Based on the stipulations, I find that there is no genuine issue as to any material fact, and that the Secretary is entitled to summary decision as a matter of law. Accordingly, I **AFFIRM** the Order as issued.

STIPULATIONS

The court accepts the following stipulated facts to be undisputed.

1. At all times relevant to this proceeding, Spartan was the "operator" of the Road Fork #51 mine, Mine ID Number 46-01544, as defined by section 3(d) of the Mine Act.

2. At all times relevant to this proceeding, the Road Fork #51 mine was a "coal or other mine" as defined by section 3(h)(1) of the Mine Act.

3. At all times relevant to the proceeding, the Road Fork #51 mine had an effect on commerce within the meaning of section 4 of the Mine Act.

4. Operations of the Road Fork #51 mine are subject to the provisions of the Mine Act.

5. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated administrative law judges pursuant to sections 105 and 113 of the Mine Act. Civil penalties are not imposed for imminent danger orders issued pursuant to section 107(a) of the Mine Act.

6. By entering into these Joint Stipulations, neither party waives its right to appeal the Administrative Law Judge's decision on the Cross Motions for Summary Decision.

7. Order No. 9020932 was issued by an authorized representative of the Secretary and was properly served to Spartan on December 30, 2014.

8. On December 30, 2014, during his inspection of the Road Fork #51 Mine, MSHA Inspector Nicholas Christian observed a continuous mining machine being trammed forward and in reverse in the #1 entry while the continuous

miner operator was positioned alongside the continuous mining machine, which is commonly referred to as the "red zone."[3]

9. Immediately after the continuous miner operator was observed in the "red zone," Inspector Christian removed him from the danger and orally issued imminent danger Order No. 9020932 under section 107(a) of the Mine Act.

10. Paragraph 22 of the MSHA approved roof control plan in place at the Road Fork #51 mine on December 30, 2014, states as follows: "When the continuous miner is being trammed in the working place or anywhere in the mine other than when cutting coal, no person shall be allowed along either side of the continuous mining machine."

11. The continuous miner operator's actions that were cited in Order 9020932 were in violation of the above referenced provision of the approved roof control plan. Inspector Christian also issued Citation No. 9020933 pursuant to section 104(a) of the Mine Act for a violation of 30 C.F.R. 75.220(a)(1).

12. Inspector Christian's decision to issue Order No. 9020932 was based on the single incident described in section 8 of the body of the Order and not on previous occurrences of a factually similar event.[4]

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[3] The Secretary implies that the machine was being operated remotely by the miner who was standing alongside it. *See* Sec. Br. 18.

[4] Section 8 of the Order states the following:

> The operator failed to follow the approved roof control plan on the 005-0 MMU. When observed the miner operator was standing in the red zone along the side of the continuous miner in the #1 entry. . . . The miner was being trammed back and forward in the heading while the miner operator was positioned along side of the miner in the red zone. Upon, the miner operator being removed from the danger[, a]n oral imminent danger was issued to the Mine Foreman, at 0900 hours on this date. After, the miner was de[-e]nergized and measurements were taken the miner was 30" from the rib at the outby end of the pan of the miner and 31" at the gauges on the outby end of the miner where the operator was standing. The mining height in this location is approximately 50" therefore restricting the miner[']s ability to stand up right and pos[ing] more of a danger to himself while having to bend over that could result in the controls being engaged and also while the miner is being trammed while the operator is along side of the machine the miner could swing over inadvertently resulting in fatal injuries from crushing hazards against the rib.
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> Citation #9020933 will be issued in conjunction with this order.

Resp't Ex. 1.

13. Spartan disputes that the actions of the continuous miner operator described in Stipulation No. 8 constitute a "condition" or "practice" as those terms are used in sections 3(j) and 107(a) of the Mine Act but, for the purposes of this proceeding, does not dispute that the remaining requirements of sections 3(j) and 107(a) of the Mine Act have been satisfied.

14. The continuous mining operator was the only miner working in and prohibited from being in the area around the continuous mining machine while the machine was energized.

15. After observing the miner tramming the continuous mining machine while standing alongside it in the "red zone," the inspector immediately, within a matter of seconds, removed the miner from danger at that time by flashing his cap lamp at him (the inspector was approximately 60 feet from the miner when this occurred). After the inspector did so, the miner immediately shut off the continuous mining machine and walked over to the inspector. The inspector then called out for the mine foreman and section foreman, who were nearby. The foremen responded within a minute and were verbally informed by the inspector of the issuance of the imminent danger order.

16. The facts in Joint Stipulation No. 8 could have reasonably been expected to cause death or serious physical harm had the inspector not removed the miner from the danger.

ANALYSIS

As the stipulations make clear, on December 30, 2014, Inspector Nicholas Christian issued section 107(a) withdrawal Order No. 9020932 directing a continuous mining operator to exit the "red zone" alongside a continuous mining machine. Stip. 7-9. Christian had reason to believe that the miner could have been killed or seriously harmed had he not acted. Stip. 16. Section 107(a) of the Mine Act provides, in pertinent part:

> 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 . . . 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). Consistent with this statutory directive, Christian identified the existence of a danger in the area around the continuous mining machine while it was energized, immediately

withdrew the miner from the danger by flashing his cap lamp at him, and within a minute orally informed the foremen in the area of the issuance of an imminent danger order. Stip. 15.

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). In this instance, the danger was abated by withdrawing the miner from the "red zone." Spartan concedes that the facts giving rise to the Order could have reasonably been expected to cause death or serious physical harm had the inspector not withdrawn the miner. Stip.16. The only disputed issue presented to the court is whether or not what the inspector observed when he issued the Order falls under the meaning of "condition or practice" as found in section 3(j) of the Act. Resp't Br. 1-2.

As a preliminary matter, Spartan and the Secretary disagree on the appropriate level of deference that should be afforded to the Secretary's interpretation of the terms "condition" and "practice." The Secretary argues that his interpretation is entitled to *Chevron* deference, whereby the court resolves any ambiguity in the statute by deferring to the Secretary's interpretation so long as it is reasonable. Sec. Br. 9-11 (citing *Chevron U.S.A. Inc. v Natural Res. Def. Counsel, Inc.*, 467 U.S. 837, 842-44 (1984)). Spartan argues that the Secretary's litigating position in this individual case is entitled only to *Skidmore* deference, which depends solely on the persuasiveness of the Secretary's interpretation. Resp't Reply Br. 1-7 (citing *Skidmore* v *Swift & Co.*, 323 U.S. 134, 139 (1994); *United States v Mead Corp.*, 533 U.S. 218, 234-37 (2001)). The court finds it unnecessary to resolve this dispute. Assuming, *arguendo*, that the Secretary's interpretation is entitled to *Skidmore* deference only, the court is nonetheless persuaded by the Secretary's argument that the facts in this matter constituted a "condition or practice" under section 3(j).

Under section 107(a), MSHA inspectors are charged with a duty of withdrawing and prohibiting miners from entering an area in which an imminent danger exists until that danger and the "conditions or practices" that gave rise to it no longer exist. Section 3(j) clarifies the definition of "imminent danger" by further reference to a "condition or practice," but neither 107(a) nor 3(j) defines the phrase "condition or practice." In the absence of any statutory or regulatory guidance, the Secretary has chosen to define a "practice" as an "act or process of doing something" and a "condition" as a "mode or state of being," with both definitions encompassing the facts in this case. Sec. Br. 11-12, 15. The company argues that what Christian observed does not constitute a practice because the Secretary has not alleged any "customary or routine act that formed the basis for the Order." Resp't Br. 7. It further argues that what Christian observed does not constitute a condition, since "the conduct described in the Order had already occurred when the Order was orally issued." Resp't Br. 10.

The court first looks to apply the ordinary meaning of the disputed terms, given that they are not specifically defined by the Act or regulations promulgated under it. *See Peabody Coal Co.*, 18 FMSHRC 686 , 690 (May 1996). The dictionary defines "practice" as both "[a] habitual or customary action or way of doing something" and "[t]he act or process of doing something; performance or action," while "condition" is defined as a "mode or state of being." *The American Heritage Dictionary* 383, 1378 (4th ed. 2009). Although it might be reasonable to think that allegations of a "practice" would require some evidence of repeat or customary conduct, the

facts that Christian observed fall squarely under any relevant definition of a "condition" that this court can identify.[5] The danger caused by the continued operation of the energized continuous miner in conjunction with the machine operator's presence in the "red zone" was an existing "state of being" that ceased only after the withdrawal of the miner.

Spartan's contention that "the conduct described in the Order had already occurred when the Order was orally issued" suggests that the company does not believe that an imminent danger order had been issued until the inspector formally notified the foremen in the area, at which point the condition had already been abated. Resp't Br. 10. Accordingly, the company cites to *Rag Cumberland Res. LP*, 22 FMSHRC 994 (Aug. 2000) (ALJ), a case involving a mantrip accident, where a Commission Administrative Law Judge ("ALJ") vacated an imminent danger order that was issued well after a miner had already exited the mantrip and reached the surface, and where there was no continued threat to miners. Notably, the decision is silent as to whether the MSHA inspector who issued the imminent danger order took any steps to remove affected miners from the area of danger before the condition had abated or while the collision was impending. *Id.* at 997-98. It is not even clear that the inspector would have had any opportunity to do so at that point. *Id.* The instant matter would be analogous to *Rag Cumberland* if Christian had not acted to remove the miner from the impending danger and had not issued a withdrawal order until well after the continuous miner operator had already exited the "red zone."

It seems to the court that the parties are not so much arguing over the definition of the phrase "condition or practice" as they are over the timing and actions required to establish the Order itself. The court refuses to take the formalistic approach implicitly endorsed by Spartan, which would require inspectors to utter the words "imminent danger order" before withdrawing miners. The Mine Act's legislative history reflects Congress's view that "the authority under [section 107(a)] is essential to the protection of miners and should be construed expansively by inspectors and the Commission." S. Rep. No. 461, 95th Cong., 1st Sess. 39 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 1317 (1978) ("Legis. Hist."). Given this history, the court is unwilling to elevate form over substance.

While it is conceivable that a significant enough delay in the formal notification to an operator of an imminent danger order could pose notice or evidentiary problems that would justify vacating an order, this case does not involve such facts. The immediacy of the danger in the instant matter required an immediate response on the part of the inspector without pausing to explain the statutory authority for ordering withdrawal, and the inspector followed up his withdrawal order with sufficiently prompt formal notification. Therefore, the court views the inspector's ordering of the continuous miner operator out of the red zone and the oral notification

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[5] At one point, Spartan defines "condition" as "involv[ing] some type of inanimate object in a 'state of being'". Resp't Br. 9. While the company provides no authority for this definition, and the court is unable to find any definition that focuses specifically on an inanimate object, the facts in this matter would still fall under Spartan's proposed definition. The continuous mining machine in the entry was an inanimate object that was central to the danger posed to the withdrawn miner. The fact that the withdrawn miner's hazardous conduct also contributed to the danger is immaterial, as the Commission has upheld imminent danger orders caused by a miner's hazardous conduct. *See Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159 (Nov. 1989).

to management officials immediately thereafter as one continuous action constituting the imminent danger order itself and finds that the Order was a valid and appropriate response to a condition which, as stipulated to by the parties, could reasonably have been expected to cause death or serious physical harm before it could be abated. The court concludes therefore that the issuance of the 107(a) withdrawal order was proper.

ORDER

In accordance with the foregoing, the Secretary's motion for summary decision is **GRANTED**, Spartan's motion for summary decision is **DENIED**, and the withdrawal order issued by the Secretary under section 107(a) of the Act is **AFFIRMED**.

David F. Barbour
Administrative Law Judge

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