FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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CLOVERLICK COAL COMPANY, LLC, Contestant v. SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	CONTEST PROCEEDINGS Docket No. KENT 2012-699R Order No. 8374442; 2/17/2012 Docket No. KENT 2012-700R Citation No. 8374443; 2/17/2012
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. CLOVERLICK COAL COMPANY, LLC, Respondent	CIVIL PENALTY PROCEEDING Docket No. KENT 2012-943 A.C. No. 15-18241-286281 Mine: No. 1

DECISION AND ORDER

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, Department of Labor, Nashville, Tennessee for Secretary of Labor

R. Henry Moore, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania for Cloverlick Coal Company, LLC

Before: Judge McCarthy

I. Statement of the Case

These cases are before me upon two notices of contest and a related petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). On February 17, 2012, in response to an anonymous 103(g) complaint alleging dangerous conditions at the highwall, MSHA launched an investigation of Cloverlick Coal Company's No. 1 mine. As a result of the investigation, MSHA issued imminent danger Order No. 8374442 to Cloverlick Coal Company, LLC ("Cloverlick"), which required the withdrawal of miners from the site of a recent excavation at the surface of the mine. MSHA also

issued Citation No. 8374443, which alleged that the operator failed to maintain safe access to all working places. On February 21, 2012, a duplicate safe access citation, Citation No. 8374444, was issued to Cumberland Mine Service, Inc. ("Cumberland"), the contractor in charge of the excavation and related construction project.[1]

On June 27, 2013, a hearing was held in Tazewell, Tennessee, after unsuccessful settlement negotiations.[2] Thereafter, post-hearing briefs were filed. The primary issues presented are whether the section 107(a) imminent danger Order No. 8374442 was properly issued to Clovelick, and whether Cloverlick violated 30 C.F.R. § 77.205(a), as alleged in Citation No. 8374443.

After careful review of the record, I find that the MSHA inspector was reasonable in his determination that the conditions at Cloverlick No. 1 mine presented an imminent danger to miners. As extant Commission and United States Court of Appeals precedent precludes review of the Secretary's discretion to issue a citation or order to a production operator or independent contractor, or both, I affirm Order No. 8374442. Although a hazardous condition existed, I find that Citation No. 8374443 alleges an impermissibly broad interpretation of the safe access standard. Because the Secretary has failed to establish that safe access was not provided, Citation No. 8374443 is vacated.

On the entire record, including my observation of the demeanor of the witnesses,[3] and after considering the post-hearing briefs, I make the following:

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[1] Cumberland contested the proposed civil penalty for Citation 8374444 and the case was docketed as KENT 2012-999. On January 8, 2013, Administrative Law Judge Janet Harner approved a settlement of this docket reducing the proposed penalty from $3,224 to $2,400.

[2] After hearing, the parties agreed to settle Citation No. 8399036, which alleged a violation 30 C.F.R. § 75.220(a)(1). According to the terms of the proposed settlement, Citation No. 8399036 remains unchanged, but the Solicitor justifies a reduction in penalty from $3,143 to $2,500 by stating that there is a legitimate factual and legal dispute regarding gravity. I have considered the representations and documentation submitted with the partial settlement, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

[3] In resolving conflicts in testimony, I have taken into consideration the demeanor of the witnesses, their interests in this matter, the inherent probability of their testimony in light of other events, corroboration or lack of corroboration for testimony given, experience and credentials, and consistency, or lack thereof, within the testimony of witnesses and between the testimony of witnesses.

II. Stipulations

The parties agreed to the following stipulations.

1) Cloverlick is an "operator" as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 803(d), at the coal mine at which the Order and Citation at issue in this proceeding were issued.

2) The Cloverlick No. 1 Mine, an underground bituminous coal mine at which the Order and Citation were issued in this proceeding is subject to the jurisdiction of the Mine Act.

3) Cumberland Mine Service is an independent contractor and is an "operator" as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 803(d), at the coal mine at which the Order and Citation at issue in this proceeding were issued.

4) 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.

5) The individual whose signature appears in Block 22 of the Citation and Order at issue in this proceeding was acting in his official capacity and as an authorized representative of the Secretary of Labor when the Citation was issued.

6) A true copy of the Citation and Order at issue in this proceeding was served on Cloverlick, as required by the Mine Act.

7) The total proposed penalty for the Citation in this proceeding will not affect Cloverlick's ability to continue in business.

8) Cloverlick had contracted with Cumberland Mine Service to perform work on its stacker belt, which included installing additional supports so that the stacker tube could be removed. Such work included excavation for the foundation of a new support for the belt. Such excavation included use of a track-mounted excavator, which is shown in the photograph marked as R. Ex. 11.

9) As a result of the inspection, Cumberland received Citation No. 8374444 alleging a violation of 30 C.F.R. § 77.205(a) on February 21, 2011. MSHA proposed a penalty of $3,224. Cumberland paid a penalty of $2,400.[4]

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[4] The stipulation has been changed to reflect a proposed assessment, rather than an assessment, and to correct the amount of the proposed assessment.

10) Cloverlick Mine No. 1 is in non-producing status at the time of this stipulation.

Jt. Ex. 1.[5]

III. Findings of Fact

Cloverlick Mine No. 1 is an underground bituminous coal mine located near Cumberland, Kentucky. Jt. Ex 1; R. Br. 2.[6] In February 2012, Cloverlick contracted with Cumberland to construct an elevated coal stacker belt to transport coal from inside the mine to the pit area. In the pit area, coal is stockpiled until it can be loaded onto trucks and transported off the property. Tr. 67; *see also* R. Ex. 1. The elevated belt was to be supported by cables anchored to two support structures located at the top and bottom of a steep hill. R. Ex. 1.

On February 17, 2012 at 12:10 p.m., MSHA received an anonymous safety complaint through its 1-800 hotline. P. Ex. 2.; Tr. 40. The complaint alleged dangerous conditions at the Cloverlick Mine No. 1. P. Ex. 2. Because the record of the complaint produced at hearing was heavily redacted to protect the identity of the anonymous complainant, the only description of the alleged hazard in the redacted complaint is that "[t]he wall has water coming out of it and hazardous rocks coming down." P. Ex. 2.

At 12:30 p.m., the complaint was forwarded to the MSHA district office and subsequently emailed to Robert Rhea, MSHA field office supervisor in Harlan, Kentucky. P. Ex. 2, at 2. Based on the information in the initial complaint, Rhea drafted a "sanitized" complaint that stripped out any facts that might identify the anonymous complainant. Tr. 42-43; *see also* P. Ex. 2, at 1. The sanitized complaint lists Cloverlick as the operator, but Rhea wrote "N/A" to indicate not applicable, in the space allotted for the contractor's name. P. Ex. 2, at 1; Tr. 52, 53.[7] The sanitized complaint describes the alleged hazardous condition as "Highwall dangerous - Rock & loose materials falling." P. Ex. 2, at 1. While Rhea was working on the paperwork, MSHA supervisor Lester Cox called inspector Silas Brock at home and asked him to come to the Harlan field office to help respond to the safety complaint. Tr. 44-45, 61.

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[5] In the interest of brevity, stipulations regarding the authenticity of exhibits have been omitted.

[6] In this decision, "Tr." refers to the hearing transcript; "J. Ex. #" refers to the parties' joint exhibits; "P. Ex. #" refers to the Secretary's exhibits; "R. Ex. #" refers to the Respondent's exhibits. P. Exs. 1-9 and R. Exs. 1-12 were received into evidence. Tr. 13, 15, 103, 130, 167, 179, 222, 244.

[7] Although the sanitized report lists assistant district manager Ed Sparks as the recipient of complainant's call, it is clear from the testimony that the call was made to MSHA's 1-800 hotline, not directly to MSHA. Tr. 40; *see also* P. Ex. 2, at 2. The 1-800 hotline is managed by an independent contractor. Tr. 40-41.

At 12:50 p.m., Rhea called Cloverlick's maintenance foreman, Ralph Martin, to warn the company about a credible allegation of a possible imminent danger. Tr. 46-49, 55; P. Ex. 6, at 1.[8] Rhea did not issue an imminent danger order during the call, but he requested that Cloverlick remove all miners in the affected area until an investigation could be completed. Tr. 46-49. After the call, Rhea briefed inspector Brock on the complaint. Brock reviewed the un-redacted complaint and was given a copy of the sanitized complaint to present to the operator. Tr. 62.

Brock's contemporaneous notes indicate that he arrived at the Cloverlick mine at 2:05 p.m. Within minutes of arriving, Brock began drafting an imminent danger order and citation to issue to Cloverlick. P. Ex. 6, at 1.[9] Brock drove down to the pit area, where he met Cloverlick superintendent, Lake Standridge, and vice president of Cumberland, Craig Garland. Tr. 65-66.

Standridge and Garland explained to Brock that Cumberland had excavated a hole at the base of the hill to build a foundation for one of the legs that would support the new coal stacker belt and a retaining wall for the hillside. Tr. 67, 82. Standridge told Brock that once Cloverlick was contacted by Rhea, the miners were removed from the area around the hole and no further work was done to the site. Tr. 70. Garland told Brock that "the next step would be to get into the hole that they excavated, build forms, and put rebar in there so they can pour concrete." Tr. 70-71.

Brock testified that the hillside directly above the work site was very steep and contained a significant amount of loose dirt and rocks, as well as concrete blocks and scrap metal. Tr. 65, 83, 86; *see also* P. Ex. 7-B. In addition, water was draining out of the side of the hill and had accumulated at the bottom of the hole "a little over ankle deep." Tr. 78. Brock testified that when he saw "all that loose material, I believe[d] in my heart that there was an imminent danger there and that if anyone was in that hole they would be in [the] line of a mud slide." *Id.*

During the investigation, Garland informed Brock that the hole had been excavated that

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[8] It is not common for MSHA to notify a mining operator in advance of sending an inspector to investigate a safety complaint. Tr. 55. In this situation, however, Rhea considered the threat to miner safety to be serious and credible enough to warrant a departure from normal practice. *Id.*

[9] Although Brock testified that he issued the imminent danger order and citation after a 45-60 minute investigation, the citation, order, and his contemporaneous notes indicate that the order and citation were issued at about 2:09 p.m., several minutes after Brock arrived on site. P. Ex. 3; P. Ex. 4; P. Ex. 6, at 2-3; *but see* Tr. 71, 93-94, 119; P. Ex. 6, at 5 (indicating that Brock had been at the mine for an hour before issuing the citation and order). In resolving this apparent conflict, I find it most likely that Brock began drafting the citation and order as soon he reached the mine based on the information in the complaint and his discussion with Rhea. After the investigation was complete, Brock may have added additional findings before formally issuing the order and citation to Cloverlick.

morning and that no miner had accessed the hole prior to the inspector's arrival. Tr. 96, 107. Garland testified that on the morning of the inspection, miners were working near the hole tying rebar in preparation for building the structure's foundation. Tr. 181. After receiving the call from Rhea, Garland testified that his foreman moved the miners and rebar to another location, away from the dig site. Tr. 180-81.

Inspector Brock, unable to rely upon facts gleaned from the anonymous complaint, was only able to testify that no miners worked in or near the hole during his time at the mine. Tr. 95-96. Brock, however, did notice orange paint along the side of the hole, but was unsure if miners had entered the hole to make the marks. *Id.*, *see also* R. Ex. 3-C. Contemporaneous photographs taken during the inspection reveal three horizontal lines of distinctive orange marking paint along the sides of the hole. R. Ex. 3-C.[10] Garland testified that he did not know who made the markings, nor what the paint was intended to signify. Tr. 207.

According to Garland, Cumberland had identified the loose material on the bank as a potential hazard prior to MSHA's intervention, and the contractor was considering various means of addressing the hazardous conditions. Tr. 179, 189, 202; *see also* Jt. Ex. 3.[11] Garland indicated that Cumberland had tried to clean up the hillside with an excavator, but was concerned that it was unsafe for miners to work in close proximity to the hillside. Tr. 202, 239. Brock confirmed that the bank showed markings, which indicated that an excavator had scraped off loose material on at least two occasions. Tr. 128. According to Garland, Cumberland did not intend to allow miners into the hole. Instead, Cumberland was considering two alternatives: (1) using an excavator outside the hole to lift the form and rebar into place, or (2) redesigning the coal stacker belt to move the support out further from the side of the hill. Tr. 202-03.

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[10] I take administrative notice of the fact that brightly-colored spray paint is commonly used in construction and mining sites as a way to mark surveying points, potential hazards, or locations of future construction.

[11] Garland testified that the dangerous conditions on the hill were noted during the pre-shift examination of the work site. Tr. 209. At the request of the undersigned, the parties were asked to produce a copy of the pre-shift examination report to be marked as Joint Exhibit 3. Tr. 211. The report indicates that during an examination on February 17, 2012 at 7:00 a.m., unsafe conditions were noted at the highwall near the stacker belt. Jt. Ex. 3. The report was signed by the foreman, but the co-signature for the mine manager/mine foreman/superintendent was left blank. Under action taken, foreman Johnny Gray wrote, "check for cracks." *Id.* Under remarks, Gray wrote, "unsafe highwall, built berm's, (sic) cautioned off area, advised men of the condition's (sic)." *Id.* At hearing, however, it was undisputed that the area was not cautioned off and berms were not built until after inspector Brock was on site. Tr. 90, 125, 137-38, *see also* R. Letter Accompanying Submission of Jt. Ex. 3. As the report included facts that were not available during the pre-shift examination, I find the reliability of the report suspect and that at least certain portions of the report were created after the fact.

At hearing, Garland and Brock gave conflicting testimony as to whether it was possible for Cumberland to place a wooden frame and pre-assembled rebar into the hole using the excavator, without requiring miners to be in the hole. Based on his limited experience building forms for concrete, Brock did not think it was possible for the excavator to place the forms, constructed outside the hole, into place in the hole, without requiring miners to access the alleged unsafe area at the base of the embankment. Tr. 77-79. Garland, however, maintained that he had done so in the past, but admitted that a miner would have to be near the hole to adjust the form when it is lifted into place by the excavator. Tr. 190-91.

Brock testified that Garland was resistant to the idea of moving the foundation away from the hillside. In fact, Garland told Brock that because "times are tough in the coal industry," Cumberland would have to lay off the miners if Cumberland could not proceed with construction that day. Tr. 94-95. Based on Cumberland's eagerness to proceed with the construction project, Brock determined that it was likely that miners would have to access the area at the base of the bank and be exposed to a significant risk of injury from falling earthen material. Tr. 93-94. Accordingly, Brock issued a section 107(a) imminent danger order to Clovelick, but not Cumberland. Order No. 8374442 specifically alleges:

> The operator has excavated a hole approximately 4 to 5 feet deep by 10 feet wide by 20 feet long at the construction project at the coal stockpile area. This hole is the site where workers are about to construct concrete forms for a restraining wall. The adjacent hillside at the hole is very steep and covered with wet loose earth, water is observed coming out of the hillside and is accumulating in the hole. This 107(a) Order is issued to stop the project and prohibit any activity at this site due to the threat of falling rock and/or sliding earth material.

P. Ex. 3.

In conjunction with the imminent danger order, Brock also issued a section 104(a) safe access citation to Cloverlick.[12] Citation No. 8374443 specifically alleges a violation of 30 C.F.R. § 77.205(a), as follows:

> Safe access is not provided at the retaining wall construction work site near the coal stockpile area. The operator has excavated a large hole, to build concrete forms, beside a steep hill side, that is covered with wet loose earth, water is observed coming out of the hillside and is accumulating in the hole. This condition puts miners at risk of being struck by falling rocks or loose earth materials. A 107(a)

[12] As noted above, a duplicate safe access citation that issued to Cumberland was settled.

> imminent danger order #8374442, has also been issued concerning this matter. No miners have yet been observed in the area cited.

P. Ex. 4. The Citation originally alleged that the conditions on the hillside were highly likely to result in a lost workdays or restricted duty injury to four miners. The Citation designated the violation as S&S, and attributed moderate negligence to Respondent Cloverlick. *Id.*

At 4:35 p.m., Citation No. 8374443 was terminated when a berm was erected around the hole and the area was cautioned off with tape. Tr. 147-48, 194-95; *see also* P. Ex. 7-G. Brock, however, did not terminate the imminent danger order because it was his understanding that Cumberland was planning to resume construction of the foundation. Tr. 148. Further, Brock admitted to Garland that he did not know how the operator could abate the imminent danger and promised to return to the mine with a ground control specialist or engineer to provide further instruction. Tr. 94.

On February 21, 2012, Brock returned to the mine site with MSHA mining engineer, Kevin Doan. Tr. 99. Upon re-examination of the site, Brock observed that a significant amount of material had fallen from the hillside into the hole. Tr. 100. Based on the size and amount of material in the hole, Brock amended Citation No. 8374443 to allege that the hazard would be reasonably likely to result in permanently disabling injuries. Tr. 109.

The imminent danger order was terminated after Doan discussed the problem with Garland and Curtis Scott, general manager for Cloverlick. Tr. 117-18. As a result of those discussions, Cloverlick agreed to fill the hole and re-engineer the project so that the foundation could be constructed further away from the hillside. *Id.*

IV. Disposition and Analysis

A. Order No. 8374442

1. Validity of Imminent Danger Order

An imminent danger exists whenever "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." 30 U.S.C. § 802(j); *see also Wyoming Fuel Co.*, 14 FMSHRC 1282, 1290 (Aug. 1992); *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *E. Associated Coal Corp. v. Interior Bd. of Mine Operations Appeals*, 491 F.2d 277, 278 (4th Cir. 1974) (emphasis omitted)). For an imminent danger order to issue under section 107(a), there must be some degree of imminence such that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time. *Id.* The Secretary bears the burden of proving the reasonableness of the imminent danger order by a "preponderance of the evidence." *Island Creek Coal Co.*, 15 FMSHRC 339, 346 (Mar. 1993).

The concept of imminent danger is not limited to hazards that pose an immediate danger. *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC at 2163 (citing *Freeman Coal Mining Co. v. Interior Bd. of Mine Operations Appeals*, 504 F.2d 741 (7th Cir. 1974)); *see also Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 858 (June 1996); *VP-5 Mining Co.*, 15 FMSHRC 1531, 1535 (Aug. 1993); *Island Creek Coal Co.*, 15 FMSHRC 339, 345 (Mar. 1993). Although the Commission has cautioned against narrowly construing imminent danger to include only immediate threats, there must be some degree of imminence to support an imminent danger order. That is, a hazard must be impending so as to require the withdrawal of miners. *Island Creek Coal Co.*, 15 FMSHRC at 345.

The undersigned "must support the findings and the decisions of the inspector unless there is evidence that he has abused his discretion or authority." *Wyoming Fuel*, 14 FMSHRC at 1291 (*quoting Old Ben Coal Corp. v. Interior Bd. of Mine Operations Appeals*, 523 F.2d 25, 31 (7th Cir. 1975)). An inspector abuses his discretion "if he issues a section 107(a) order without determining that the condition or practice presents an impending hazard requiring the immediate withdrawal of miners." *Island Creek*, 15 FMSHRC at 345. An abuse of discretion also "includes errors of law." *See, e.g., Utah Power*, 13 FMSHRC 1617, 1623, n. 6 (Oct. 1991).

Both parties agree that the earthen material on the steep bank of the hill posed a danger to anyone working in the excavated area at the time the Order was issued. Cloverlick, however, claims that an imminent danger did not exist because miners were never exposed to the danger. R. Br. at 11. Cloverlick relies on the fact that Brock did not see anyone working in the hole during his inspection, and he was unable to testify definitively that miners had accessed the hole prior to the inspection. Cloverlick further argues that any future action by Cumberland that might place a miner in the excavation is mere speculation on the part of the inspector because Cumberland was aware of the problem, but had not yet decided how to proceed. *Id.; see also* Tr. 160, 164, 168, 170. Thus, Cloverlick contends that the Secretary has failed to meet his burden to show that the danger was imminent.

Upon examination of the record, I find Cloverlick's arguments unconvincing. I do not credit Garland's self-serving testimony that Cumberland had not made a decision about how to proceed with the construction project. After the danger posed by the embankment was brought to the attention of management, Cumberland did not halt construction while it weighed its options. Rather, Cumberland proceeded to prepare the site for construction. By the time the imminent danger order was issued, Cumberland had all of the materials needed for building the foundation at the site and had begun to prepare the area for construction. That morning, Cumberland, armed with the knowledge of the danger the embankment posed, excavated the hole and instructed miners to begin building forms and tying rebar. Tr. 160. Once these tasks were completed, construction of the foundation could begin immediately. *See* Tr. 170.

While it is possible that Cumberland could have aborted the project at the last minute, such a scenario is unlikely given steps that Cumberland had taken up to this point. Furthermore,

Brock convincingly testified that Garland was intent on completing the project expeditiously and was resistant to the idea of re-engineering the project to move the foundation away from the embankment. Tr. 94-95. According to Brock, Garland said that there would be adverse financial implications for the company if Cumberland was unable to continue construction, and Cumberland would have to lay off the miners involved in the construction project. *Id.*

Having found that construction was imminent, I turn to Cloverlick's argument that the foundation could be constructed in such a way that miners would not have to work in the hazardous area. It is clear that at least one miner had already accessed the recently excavated hole on the morning of the inspection. Despite Garland's testimony to the contrary, the Secretary has produced the proverbial "smoking gun" in the form of testimony and photographic evidence clearly showing that the walls of the excavated area had been marked with spray paint. Tr. 96; P. Ex. 7a. Cloverlick has not offered any evidence that would refute the reasonable inference that any miner that applied these markings would have to be in very close proximity to the base of the dangerous embankment on the morning of the inspection, when the hole was excavated.

Accordingly, I find that Cumberland had already allowed miners to work in the hole despite its knowledge of the danger. Given this finding, it is reasonable to infer that Cumberland would have continued to do so, absent the anonymous complaint and quick intervention by MSHA.[13] Even assuming arguendo, that placing the forms and rebar with the excavator was possible, I find that miners would, at some point, have to access the hole during the course of continued mining operations. At hearing, Garland conceded that a miner would typically need to be positioned nearby to adjust the form as it is lifted into place. Tr. 190-91. Further, it strains credulity to assume that miners would not need to enter the hole to secure the form to the ground before pouring the concrete for the foundation.

Accordingly, I find that the Secretary has shown by a preponderance of the evidence, that inspector Brock's determination that the embankment posed an imminent danger to miners working in the excavated hole was reasonable. The credible evidence proffered at hearing strongly refutes Garland's assertions that miners had not accessed the hole earlier in the morning and would not be required to do so under continued normal mining operations. Despite knowing the danger that the embankment posed, Cumberland continued to prepare the site for construction. Given the adverse financial implications for Cumberland were it to halt construction, and given the effort that Cumberland had already expended to commence construction, it is reasonable to expect that construction would have continued, absent MSHA's intervention, and miners inevitably would have been placed in harm's way.

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[13] Cumberland's voluntary withdraw of miners from the excavation site does not preclude the issuance of an imminent danger order. The immediacy of the danger is determined by assuming continued normal mining operations, not operations that have been altered after MSHA alerts a mine of the danger. *E. Assoc. Coal Corp. v. Interior Bd. of Mine Operations Appeals*, 491 F.2d 277 (4th Cir. 1974).

2. Abuse of Discretion

Cloverlick argues that the Secretary abused his discretion by issuing the imminent danger order to Cloverlick, and not Cumberland. R. Br. 21. Cloverlick maintains that since it retained Cumberland to construct the stacker belt and since the contract required that Cumberland and its employees comply with all relevant MSHA standards, Cloverlick should not be liable for the hazardous conditions solely within the control of Cumberland. *Id.* Cloverlick argues that, although the hazardous condition was located at its mine, it did not contribute to the alleged violative conditions in any way. *Id.* at 23.

Cloverlick further argues that by citing the production operator, MSHA has departed from its own norms without explanation. R. Br. 22, 23. Respondent adduced evidence that MSHA has not typically issued dual enforcement actions to Cloverlick and its contractor. R. Ex. 8, 9; Tr. 159. Moreover, Cloverlick points to the fact that the Secretary has promulgated official agency guidelines that set forth when an order can be issued to a production operator in addition to the contractor. *See* Independent Contractors: Final Rule, 45 Fed. Reg. 44495 (1980). Cloverlick argues that the order should be vacated because the inspector did not comport with these guidelines when issuing the imminent danger order to the production operator.

Section 107(a) of the Mine Act states in pertinent part that "[i]f . . . an authorized representative of the Secretary finds that an imminent danger exists, such representative shall . . . 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." (emphasis added).

All of the courts that have had occasion to address the question have held that the Secretary may define an "operator" to include the production operator, the contractor, or both. *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 155 (D.C. Cir. 2006); *Int'l Union, United Mine Workers of Am. v. FMSHRC*, 840 F.2d 77, 83 (D.C. Cir. 1988); *Cyprus Indus. Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1119 (9th Cir. 1981); *Harman Mining Corp. v. FMSHRC*, 671 F.2d 794, 797 n. 2 (4th Cir.1981); *Bituminous Coal Operators' Ass'n v. Sec'y of Interior,* 547 F.2d 240, 246 (4th Cir. 1977) (addressing the issue under the Mine Act's precursor, the Federal Coal Mine Health and Safety Act of 1969). That Cloverlick could contract away its duties under the Mine Act is anathema to the Act's enforcement scheme. As the Commission has ruled, "it bears emphasis that the miners of an independent contractor are invited upon the property of the mine owner to perform work promoting the interests of the owner. A mine owner cannot be allowed to exonerate itself from its statutory responsibility for the safety and health of miners merely by establishing a private contractual relationship in which miners are not its employees and the ability to control the safety of its workplace is restricted." *Republic Steel Corp.*, 1 FMSHRC 5, 11 (Apr. 1979).

Accordingly, it is clear that the Secretary retains some discretion in determining which

operator to cite for any given citation or order and that the contractual relationship with an independent contractor does not limit the production operator's liability for violations of health and safety standards occurring at its mine. The only issue remaining is whether there are any bounds to the Secretary's discretion in deciding to issue an imminent danger order to a particular operator, which warrant Commission review.

Historically, the Commission has held that the Mine Act grants it an independent adjudicatory role in reviewing the Secretary's enforcement actions for abuse of discretion.[14] *See Bulk Transp. Servs., Inc.*, 13 FMSHRC at 1360-61 (reviewing the Secretary's choice to issue a citation to both the operator and contractor under an abuse of discretion standard); *Consolidation Coal Co.*, 11 FMSHRC 1439, 1443 (Aug. 1989) (same); *see also Cyprus Indus. Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1120 (9th Cir. 1981) (applying abuse of discretion test to Secretary's decision to issue an imminent danger order to a production operator). The position of the Commission was informed by the language of the Mine Act, which gives it jurisdiction over "substantial question[s] of law, policy or discretion," 30 U.S.C. § 823(d)(2)(A)(ii)(IV), and the Mine Act's legislative history, which makes clear that "[t]he Commission was established as the 'ultimate administrate review body' under the Act due to the recognition that 'an independent Commission is essential to provide administrative adjudication which preserves due process and instills much more confidence in the program.'" *Old Ben Coal Co.*, 1 FMSHRC 1480, 1484 (Oct. 29, 1979) (finding that the Secretary's decision to proceed against a production operator for a contractor's violation is reviewable by the Commission), *citing* S. Rep. No. 95-181, at 13 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 601, 635 (1978) ("Legis. Hist.").[15]

More recently, the D.C. Circuit Court of Appeals and the Fourth Circuit Court of Appeals have departed from this traditional view of the scope of the Commission's authority. These courts have ruled that the discretion of the Secretary to issue a *civil penalty* to the production operator and/or the independent contractor is unreviewable. *Sec'y of Labor v. Twentymile Coal*

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[14] In the past, the Secretary has proposed that imminent danger orders be reviewed under an arbitrary or capricious standard to determine if the order was issued to the proper operator. *Cyprus Indus. Minerals, Corp.*, 1 FMSHRC 2069, 2087 (Jan. 1980) (ALJ).

[15] The Supreme Court has also recognized the *unique* role of the Commission as the arbiter of questions of interpretation of the Mine Act. *Compare Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 214 (1994) (affirming the Commission's role in formulating a uniform and comprehensive interpretation of the Mine Act) with *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157-58 (1991) (emphasizing the narrowness of the holding that OSHRC is authorized to review the Secretary's interpretations only for consistency with the regulatory language and for reasonableness); *see also Speed Mining, Inc.*, 28 FMSHRC 773 (Sept. 2006) (Chairman Duffy, concurring and providing a detailed examination of the differences in the OSH Act and the Mine Act).

Co., 456 F.3d 151 (D.C. Cir. 2006); *Speed Mining, Inc. v. FMSHRC*, 528 F.3d 310 (4th Cir. 2008). The *Twentymile* and *Speed Mining* cases both find that the Commission lacks any policy-making role and thus may not create standards to review the Secretary's enforcement actions in furtherance of the Mine Act's purpose and safety objectives. Without a Commission-made standard or a standard expressly set forth in the Mine Act, no judicially manageable standards exist for determining which operator to cite. Therefore, the courts reason that, despite the general presumption of reviewability of agency actions, the Secretary's decision to cite a production operator is unreviewable. *Speed Mining*, 528 F.3d at 317-17; *Twentymile*, 456 F.3d at 157.

Although *Twentymile* and *Speed Mining* address the Secretary's authority to issue civil penalty citations to multiple operators, their underlying rationale appears to proscribe Commission review of other enforcement actions, such as in the context of imminent danger orders.[16] Aside from the Secretary's enforcement guidelines, the record does not provide any evidence of a standard by which the Commission may review the properness of the Secretary's decision to issue the imminent danger order to Cloverlick. The Commission and courts, however, have universally held that the enforcement guidelines are merely a general statement of policy that do not curtail the Secretary's discretion. *See, e.g., Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538 (D.C. Cir. 1986) (Scalia, J.).

Similarly, I find that the enforcement guidelines lack the certainty to bind the Secretary's discretion in choosing which party to issue a citation or order. Although the guidelines were published in the Federal Register and later incorporated into the Secretary's Program Policy Manual ("PPM"), the language of both iterations does not seem to constrain the discretion of the Secretary in any way. The four enumerated instances when the Secretary may issue a citation or order to a production operator are merely illustrative examples to put the industry on notice of when it is "normally appropriate" to deviate from the standard procedure of issuing a citation to the party responsible for the hazardous condition or practice. Furthermore, the PPM makes clear

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[16] There are some important differences that arise in the context of imminent danger orders that are not present in the circuit courts' decisions dealing with civil penalty citations. Unlike civil penalty citations, the purpose of an imminent danger order is to promptly counteract dangerous conditions that present a threat to the safety of miners, not to punish or assign liability to an operator. *See* S. Rep. No. 95-181, at 38, Legis. Hist. at 626. This specific purpose makes the discretion exercised by the Secretary less like the type exercised in a prosecutor's charging decision, and more akin to an exercise of police power to protect the general welfare, over which the courts traditionally have review. *See Plymouth Coal Co. v. Com. of Pennsylvania*, 232 U.S. 531, 545 (1914) (seizing mine property to further a safety interest is an exercise of police powers and the arbitrary exercise of such powers is subject to judicial review). An imminent danger order grants the inspector the awesome power to essentially seize an operator's property and issue a withdrawal order to protect the health and safety of miners. Such decisions are made quickly, often without review of the inspector's superiors or agency counsel. *See Island Creek Coal Co.*, 15 FMSHRC at 346.

that "MSHA's enforcement policy regarding independent contractors does not change production-operators' basic compliance responsibilities" to "assur[e] compliance by independent contractors with the Act and with applicable standards and regulations." U.S. Dep't of Labor, MSHA, Program Policy Manual, Vol. III, Part 45, at 10, (2003), *available at* www.msha.gov/REGS/COMPLIAN/PPM/PMMAINTC.HTM (last accessed July 17, 2014).

Although the guidelines do not have binding effect, the Secretary is still obligated to provide a reasoned explanation for a departure from established agency policy. *Telecomms. Research & Action Ctr. v. FCC*, 800 F.2d 1181, 1184 (D.C. Cir.1986) ("When an agency undertakes to change or depart from existing policies, it must set forth and articulate a reasoned explanation for its departure from prior norms."). Not all agency pronouncements and advice, however, rise to the level of agency policy or norms. For the enforcement guidelines to be considered official policy, the record must demonstrate a pattern of reliance on the guidelines to support agency decisions to cite a particular operator. *See Vietnam Veterans of Am. v. Sec'y of the Navy*, 843 F.2d 528, 539 (D.C. Cir. 1988).

There is insufficient evidence in the record to determine the extent of the Secretary's reliance on the enforcement guidelines. Although Respondent offered evidence that MSHA had not cited it for contractor violations in the past, inspector Brock testified that he had not reviewed the guidelines on the day of the initial inspection and did not appear to strictly follow the guidelines as a matter of general practice. Tr. 143, 146 (Brock testified that he normally issued dual enforcement actions when there are a significant number of contractor violations at a mine, which is not a consideration in the enforcement guidelines). Further, there is nothing in the record that indicates that MSHA expected that its inspectors would strictly adhere to the guidelines or that inspectors normally refer to the guidelines in determining which operator to cite.

Accordingly, under extant Commission and U.S. Circuit Court precedent I am constrained to find that the authority of the Secretary to issue an imminent danger order to a particular party is unreviewable. The undersigned sympathizes with Respondent's concern that the reversal of the Commission's authority to fully review the Secretary's enforcement discretion may lead to arbitrary enforcement.[17] The clear intent of Congress, as thoughtfully set forth by

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[17] In the present case, there exists some evidence that the initial decision to issue the citation and order to Cloverlick could be construed as arbitrary and capricious, and not the product of reasoned decision making on the part of the Secretary. The sanitized complaint indicates that Brock went into the inspection with the belief that a subcontractor was not involved. P. Ex. 2, at 1. Inconsistencies in Brock's time line of events make it appear that he decided to cite Cloverlick for the violative condition before the inspection was complete. *See supra* note 9. At hearing, Brock was evasive when asked why he decided to issue the citation and order to Cloverlick, and not to Cumberland. Tr. 141-43. Furthermore, I am unconvinced by the Secretary's argument that the citation and order were issued to Cloverlick because Gilliam's notes showed that Cloverlick had actual knowledge of the condition prior to MSHA's

former Chairman Duffy in the wake of the *Twentymile* decision, was for the Commission to ensure the consistent application of mine safety and health law and policy. *See Speed Mining, Inc.*, 28 FMSHRC 773, 775-86 (Sept. 2006) (Duffy, concurring). This interpretation of the Commission's role, however, has thus far failed to gain traction against the indiscriminate application of *Martin v. OSHRC* to Commission cases. Thus, I defer to the Commission's rather reluctant adoption of the principles set forth in the *Twentymile* and *Speed Mining* decisions. *See Imerys Pigments, LLC*, 28 FMSHRC 788 (Sept. 2006).[18] Having found neither a judicially manageable standard by which to measure the appropriateness of the Secretary's actions nor an obligation for the Secretary to explain a departure from apparent agency policy, this administrative tribunal lacks a basis for curtailing the Secretary's enforcement discretion. Accordingly, Order No. 8374442 is affirmed.

B. Citation No. 8374443

Citation No. 8374443 alleges a violation of 30 C.F.R. § 77.205(a), which states in pertinent part that a "[s]afe means of access shall be provided and maintained to all working places." While MSHA has not established an official policy for this standard, it has published guidance on its website about issues that operators should consider when determining compliance. U.S. Dep't of Labor, MSHA, Top 20 Violations: Tips, *available at* www.msha.gov/STATS/Top20Viols/tips/11001.htm#.Uz7_KFdhoTk (last accessed July 17, 2014). These issues include:

> Is permanent or temporary access provided to all working places? Are miners climbing the equipment or machinery to access work places? Are fall-of-person hazards created by a lack of a stairway, ladder, ramp, etc.? Are handholds provided, if necessary? Are crossovers or crossunders provided where needed?

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intervention. *See* P. Br. 22. I credit Gilliam's testimony that he made his notes about the incident after the imminent danger order was issued, and that the notes represent a third-hand account of discussions between Cumberland employees. *See* Tr. 240-44.

[18] In *Imerys Pigments, LLC*, the Commission applied the D.C.'s Circuit Court of Appeals's finding in *Twentymile* even though the operator could have appealed the case to the 11th Circuit Court of Appeals pursuant to section 106(a)(1) of the Act. *See Imerys Pigments, LLC*, 28 FMSHRC 788 (Sept. 2006). As I noted in *Pattison Sand Company, LLC*, 34 FMSHRC 2938, 2943, n. 3 (Nov. 2012) (ALJ), the Commission has not addressed the issue of non-acquiescence to circuit court decisions despite the fact that there is considerable authority that an administrative agency charged with the duty of formulating uniform and orderly national policy in adjudications is not bound to acquiesce in the views of the U.S. Courts of Appeals that conflict with those of the agency. *See, e.g., S & H Riggers & Erectors, Inc. v. OSHRC*, 659 F.2d 1273, 1278-1279 (5th Cir. 1981); *see generally* Samuel Estreicher, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679, 681 (1989).

Id.

By all accounts, inspector Brock was unsure how to classify the hazard when drafting the citation. Garland recalled that when he asked Brock how the hazard could be remedied, Brock replied, "I don't know enough about this to even make a citation." Tr. 193. Similarly, Brock testified that before issuing the citation under § 77.205(a), he spoke with the MSHA assistant district manager by telephone and said, "I really don't know what we could put on that [citation]. This is really not a high wall as far as rock or a high wall on a surface. If anything, it's a matter of safe access." Tr. 141-42. When asked at hearing how he reached this conclusion, Brock replied:

> Safe access is a broad reaching standard, but it just means that if a miner has to work in an area, then that area has to be made safe for him to work there. And safe access was not provided at this retaining wall construction project due to the threat of land slides and mud slides from that steep embankment . . . . Because there's nothing there to protect them from that wall of mud that's ready to slide off. And if that's the work site, then that's definitely not safe access to the work site.

Tr. 106.

Section 77.205(a), however, is not nearly as broad as the inspector suggests.[19] It is an oft-repeated legal maxim that "[w]hen the meaning of the language of a statute or regulation is plain, the statute or regulation must be interpreted according to its terms, the ordinary meaning of its words prevails." *W. Fuels-Utah, Inc.*, 11 FMSHRC 278, 283 (Mar. 1989). If the regulation is plain on its face, effect should be given to its clear meaning. *Exportal Ltda. v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990).

The clear meaning of § 77.205(a) only requires that the *means of access to a workplace* – be it a ladder, walkway, elevated platform, or other designated route – be free from safety hazards. The standard does not impose, as the inspector suggests, a "general duty" on operators to maintain safe workplaces. Such a duty would run afoul of the intent of Congress, who purposely did not include in the Mine Act the type of general duty clause present in the

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[19] The Secretary has not offered anything in the way of legal precedent or agency interpretation that supports reading the safe access standard so broadly. On post-hearing brief, the Secretary simply states, without further elaboration or support, that "[t]he Secretary submits that [§ 77.205(a)] has unquestionably been violated." P. Br. 20.

Occupational Safety and Health Act.[20]

Further, inspector Brock is mistaken in his assertion that ground control standards would not adequately address the hazardous condition at issue. While the hazard did not involve a "highwall" as was originally described in the 103(g) complaint, MSHA ground control standards for surface areas of underground coal mines specifically apply to embankments.[21] For example, § 77.1004 requires inspection of banks and terrain that slopes into a working area, and requires miners to be withdrawn pursuant to § 77.1713 if hazardous conditions are present. Similarly, § 77.1006 proscribes miners from "work[ing] near or under dangerous highwalls or banks."

As the Secretary has not opted to plead these other standards in the alternative, this case must rest on whether the Secretary can support the assertion that a danger to safety existed to miners accessing the work site. The Secretary acknowledges in his brief, "[t]he conditions described by Mr. Brock in his direct testimony, the photographs, and the written notes and testimony of Mr. Gilliam clearly establish that it was unsafe and extremely hazardous *for miners to work installing rebar in this hole* that had been dug at the base of the high wall created by this excavation." P. Br. 20-21 (emphasis added). Similarly, Brock testified that "[t]he imminent danger only existed if you were in the hole." Tr. 148; *see also* Tr. 151. While a hazard existed once a miner was in the hole, there was no evidence adduced at hearing to suggest that access to

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[20] When the Conference Committee was reconciling the differences between the House and Senate versions of the Mine Act, the committee explicitly removed a general duty clause that was contained in the original Senate version of the Act. The Senate Conference Report explained:

> The Senate bill contained a "general duty" clause which required operators to furnish safe and healthful working conditions free from recognized hazards likely to cause death or harm to miners and to comply with rules, regulations and orders promulgated under the Act. This provision would have permitted the issuance of citations or the assessment of civil penalties based on violations of the general duty. The House amendment had no general duty clause.

S. Conf. Rep. No. 461, 95th Cong., 1st Sess. 38–39, Legis. Hist. at 1316-17.

[21] The mound of earth directly adjacent to the excavation site was referred to as a "bank" or "embankment" throughout the hearing. *See, e.g.*, Tr. 30, 106, 163, 179, 180, 183, 185, 186, 204, 205. In the citation, order, and inspector's notes, it is referred to as a "hillside." P. Exs. 4-6. For purposes of this decision, banks and hillsides are synonymous. *See* Dictionary of Mining, Mineral, and Related Terms 77 (1968) (defining bank as "a hill or brow"); Merriam-Webster's Online Dictionary, http://www.merriam-webster.com/dictionary/bank (last accessed July 18, 2014) (defining bank as "a steep slope (as of a hill)" or "a mound, pile, or ridge raised above the surrounding level").

the workplace was itself dangerous. Accordingly, the citation is vacated.

V. Order

I find that inspector Brock reasonably determined that the conditions at Cloverlick No. 1 mine presented an imminent danger to miners. The Secretary, however, failed to prove by a preponderance of the evidence that Respondent Cloverlick violated 30 C.F.R. § 77.205(a) by failing to provide and maintain a safe means of access to all working places. Accordingly it is **ORDERED** that Order No. 8374442 be affirmed and that Citation No. 8374443 be **VACATED**.

It is further **ORDERED** that the operator pay a penalty of $2,500.00 for settled Citation No. 8399036 within thirty days of this order, if it has not already done so.[22]

Thomas P. McCarthy
Administrative Law Judge

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/tjr

[22] Payment should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.