FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 8, 1999

CYPRUS CUMBERLAND RESOURCES, CORPORATION	:	CONTEST PROCEEDING
Contestant	:	Docket No. PENN 98-15-R
v.	:	Order No. 3657679; 9/25/97
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Cumberland Mine Mine ID 36-05018
Respondent	:	

DECISION ON REMAND

Before: Judge Feldman

This case concerns the propriety of the September 25, 1997, issuance of 104(d)(2) withdrawal Order No. 3657679 at Cyprus Cumberland Resources Corporation"s (Cyprus') Cumberland Mine. The withdrawal order was predicated on 104(d)(1) Citation No. 3657625 that was issued at Cyprus' Cumberland facility on June 18, 1997. The only contested issue is whether the Mine Safety and Health Administration (MSHA) had performed a "clean inspection" of the Cumberland Mine between June 18, 1997, and September 25, 1997, thus relieving Cyprus of the consequences of the 104(d) "chain" withdrawal sanctions provided in section 104(d)(2) of the Mine Act, 30 U.S.C. § 814(d)(2) of the Act.[1] The Secretary has stipulated that, with the exception of the 60 West Mains haulage, the entire Cumberland Mine had been inspected during the relevant interim period between the issuance of the predicate 104(d)(1) citation and the subject withdrawal order.

The 60 West Mains haulage is approximately 4,200 feet long and has been the primary route of travel into and out of the Cumberland Mine since 1983. It is an area where there is no active mining. Therefore, the condition of this area changes little from inspection to inspection.

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[1] Section 104(d)(2) provides:

> If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations.

The evidence reflects, from June 18, 1997, through September 25, 1997, at least eleven mine inspectors traveled the 60 West Mains haulage a total of 135 round trips in slow moving battery operated vehicles (crickets or mantrips).[2] (Resp. Ex 1). During these trips these inspectors had an opportunity, if not an obligation, to repeatedly observe the roof, rib, and track conditions in the 60 West Mains haulage to ensure these conditions were not hazardous. These inspectors could have left their battery operated vehicles at any time if they had observed any hazardous or violative condition.

The Secretary does not dispute the fact that mine inspectors routinely traveled down the 60 West Mains Haulage. However, the Secretary asserts a clean inspection had not occurred until September 26, 1997, when the 60 West Mains haulage was inspected on foot.

The initial decision determined the 60 West Mains haulage had been inspected prior to the September 25, 1997, issuance of the subject withdrawal order by virtue of the daily observations of the rib, roof and track conditions by MSHA inspectors that routinely traveled this mine entry. As a result, the initial decision modified 104(d)(2) withdrawal Order No. 3657679 to a 104(d)(1) citation. 20 FMSHRC 285 (March 1998) (ALJ).

On July 29, 1999, the Commission vacated the modification of 104(d)(2) withdrawal Order No. 3657679 and remanded this matter for further consideration. 21 FMSHRC 722. In its remand, the Commission noted the Secretary has relied on the testimony of supervisory inspector Robert Newhouse to prove that a "regular" inspection of 60 West Mains haulage had not occurred between June 18, 1997, and September 25, 1997. *Id.* at 728. However, the Commission also noted "an intervening clean inspection is not limited solely to a complete regularly scheduled inspection, but may be composed of a combination of inspections, so long as taken together they constitute an inspection of the mine in its entirety." *Id.* at 726, *quoting U.S. Steel* 6 FMSHRC at 1912. In this regard, the Commission has determined a clean inspection can consist of a series of regular and spot inspections. *Kitt Energy Corp.*, 6 FMSHRC 1596 (July 1984), *aff'd sub nom. UMWA v. FMSHRC*, 768 F.2d 1477 (D.C. Cir. 1985). Consequently, the Commission directed me to consider entries made by Cyprus in a log it maintained summarizing mine inspector activities to determine if there were any entries evidencing spot inspections in the 60 West Mains haulage during the relevant time frame. 21 FMSHRC at 728. Cyprus' inspection activity log has been admitted as respondent's exhibit 1.

Specifically, in directing me to examine the Cyprus log and its various entries, the Commission noted:

> The <u>log</u> and its various entries <u>must be examined and weighed against other evidence admitted into the record</u>. Such examination and fact-finding more appropriately reside with the judge in the first instance, rather than with the Commission on review.

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[2] Mine inspectors McCort, Radolec, Terrett, Dean, Wilson, Pogue Kelly, Gulley, Patterson, Rantovich, and MSHA supervisory mine inspector Newhouse, traveled the 60 West Mains haulage during this period. (Resp. Ex. 1). It is unclear whether several of these individuals are state rather than MSHA inspectors.

Id. (Emphasis added).

Pursuant to the Commission's remand, the Secretary and Cyprus were provided with an opportunity to address whether the Cyprus log reflects any entries concerning MSHA spot or regular inspections in the 60 West Mains preceding the issuance of the September 25, 1997, withdrawal order. The Secretary filed her Position on Remand on September 22, 1999. The Secretary correctly states there are no entries in Cyprus' log reflecting a regular or spot inspection of the 60 West Mains.

Cyprus filed its Position Statement on this question on September 30, 1999. Cyprus states its log entries note the ultimate inspection destination of inspectors on particular days. Although Cyprus states the log places inspectors in the area of the 60 West Mains haulage, Cyprus does not contend that its log contains any entries reflecting regular or spot inspections in the 60 West Mains haulage.

I have considered the information the Commission directed me to consider in light of the Commission's prior holding in *Kitt Energy* that a clean inspection can consist of a combination of inspections, including regular and spot inspections.

In *Kitt Energy*, the Commission rejected the Secretary's "attempt to exclude from consideration under section 104(d)(2) all inspections other than the so-called regular inspections [as] unconvincing." 6 FMSHRC at 1599. The Commission further stated:

> [the Secretary's] designations of inspections as "spot" or "regular" inspections are administrative designations not established in the Act . . . . Any MSHA inspector conducting any enforcement inspection authorized by the Mine Act is required to cite every observed violation of the Act or its standards. The fact that during a particular inspection an inspector may give emphasis to particular types of hazards does not serve to place blinders on the inspector or prevent the issuance of citations for other violations.

Id.

The Court of Appeals, in affirming the Commission's *Kitt Energy* decision, noted the Commission had determined "a 'clean' inspection could be comprised of <u>any type of inspection</u> ('regular' or 'spot') <u>or any combination of various inspections</u>, so long as the mine was completely inspected." 768 F.2d at 1479 (emphasis added) (footnote omitted).

The initial decision in this matter recognized there is no evidence of any activity by MSHA officials that MSHA has characterized as a "spot" or "regular" inspection of the 60 West Mains. However, MSHA's characterization of its activities as not constituting a regular or spot inspection, while relevant, is not material or probative evidence on whether an inspection of the 60 West Mains haulage in fact occurred. Rather, resolution of whether an inspection of the

60 West Mains haulage had been performed must be based on an analysis of MSHA's actions, not how MSHA chooses to characterize its actions.[3]

Thus, the question is whether the Secretary has satisfied her burden of proof that the 60 West Mains haulage was not inspected for 104(d)(2) purposes despite the daily presence of numerous mine inspectors in that entry. The Secretary cannot prevail simply by establishing that inspectors had not exited their battery operated vehicles to inspect electrical boxes located in the 60 Mains. During quarterly inspections of a mine in its entirety, MSHA inspectors do not inspect each piece of mining equipment, all ventilation controls, or all entries in a mine. (Tr. 144, 331-2, 481, 708-9, 804-5). Rather, inspectors focus their attention on areas where mining is actively occurring. (Tr. 294). It follows that the required degree of thoroughness for an adequate inspection of a mine area under section 104(d)(2) is dependent on whether the area is the site of active mining.[4]

During the course of oral argument before the Commission in this proceeding, the difficulty of describing the requisite inspection activities necessary to establish that a "clean" inspection of an entire mine had been performed for 104(d)(2) purposes was addressed:

> **Commissioner Riley**: Well, what is the all-hazards language that the court inserted in *Kitt* ? What should we read into that? Does that mean that an area can be inspected but unless it is certified as having been inspected and free of all hazards [in] that particular section[,] in fact the entire mine hasn't been inspected for purposes of 104(d)(2)? (Oral Argument, Tr. 11)
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> **Ms. Geraghty**: I think you've got to look at it on a case-by-case basis, and I think that the Commission has clearly said that spot inspections if there are a sufficient number of them can constitute an inspection for purposes of getting a clean inspection . . . . [T]he Secretary is not required to inspect every single inch of a mine, even during quarterly inspections . . . . I mean I think its important to

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[3] Evidence is immaterial if it is relevant to prove a proposition, but the proposition is neither in issue nor probative of a fact in issue. Jerome Prince, Richardson on Evidence (10th ed. 1973). The contestant does not contend, nor could it prove, that MSHA performed what MSHA designated as "spot" or "regular" inspections in the 60 West Mains haulage. The fact that MSHA did not administratively designate its mine inspectors' activities in the 60 West Mains haulage as "spot" or "regular" inspections, is not probative on whether those activities constituted an inspection.

[4] For example a "regular" inspection of the 4,200 feet long 60 West Mains haulage on September 26, 1997, took 1½ hours to complete. A "regular" inspection of a comparable longwall area undoubtedly would take a much longer period of time. *See* fn. 7, *infra*.

> distinguish between, you know, having to inspect every inch of the mine and looking at the mine in its entirety, you know, have we covered this mine in terms of looking for hazards that you would expect to find in a mine. (Oral Argument, Tr. 12, 13-14).

Resolution of whether or not a clean inspection has occurred must be done on a case-by-case rather than a deferential basis.[5] 21 FMSHRC at 726 citing Kitt Energy; UMWA v. FMSHRC, 768 F.2d at 480. The evidence is equivocal as to whether any MSHA inspector disembarked from a cricket or mantrip in the 60 West Mains haulage during the time in question. Inspector Patterson testified although he could not remember doing so, "it's possible" he left the battery operated vehicle for closer observation. (Tr. 301). However, as previously noted, inspectors could have left their vehicles at any time if they had observed any conditions that caused concern.

Notwithstanding the above discussion of the probative value of MSHA's "regular" and "spot" characterizations, in the final analysis, resolution of this case is quite simple. The question is whether a reasonable person, familiar with the deterrent purposes of section 104(d)(2) with respect to unwarrantable failure, would conclude that the numerous mine inspectors' observations (during approximately 135 round trips) of the 60 West Mains haulage ribs, roof, and track, constitute an adequate inspection for hazardous conditions in that inactive mine area. *See Ideal Cement Company*, 12 FMSHRC 2409, 2415-16 (November 1990) (the reasonable person analytical approach the Commission has adopted in evaluating the fairness of application of broad safety standards to particular factual settings).

Applying the reasonable person test, it is unreasonable to conclude that MSHA mine inspectors, who are intimately familiar with the hazards of mining, would repeatedly travel an entry without ensuring there are no hazardous rib, roof, or track conditions. It is likewise unreasonable that mine inspectors, during a three month period beginning in June 1997, would repeatedly travel an entrance of a mine, to enter deeper inby, without ensuring that traveling through the entrance was safe. Waiting until September 26, 1997, to inspect the 60 West Mains haulage, when MSHA was about to finally exit the mine after it had completed its quarterly inspection, is as prudent as closing the barn door after the horse has departed.

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[5] The need for a case-by-case analysis will only arise when the Secretary asserts the absence of a clean inspection. Although deference may be accorded the Secretary's interpretations of regulatory and statutory provisions in appropriate circumstances, deferring to the Secretary on this central factual issue of whether an inspection of the entire mine in fact occurred, would trivialize due process and pay lip service to the Commission's case-by-case approach.

As previously noted, the Commission has held the Secretary has the burden of proving the absence of an intervening clean inspection. *Kitt Energy*, 6 FMSHRC at 1600. In proving the absence of a clean inspection, the Secretary must prove there were portions of the mine that remained to be inspected at the time that the disputed 104(d)(2) order was issued.[6] *Id.* If the Secretary wishes to rely on an uninspected area of a mine to continue enforcement of a 104(d)(2) probationary chain, she should not rely on an inactive mine area, that has been traveled by no fewer than eleven inspectors, a total of approximately 270 times.[7] Simply put, I reject the essential premise advanced by the Secretary in this case - - that numerous inspectors, to a person, turned the proverbial blind eye as to whether there were any hazardous rib, roof, or track conditions in the 60 West Mains haulage.

Finally, in reaching this conclusion, I recognize that the D.C. Court of Appeals, in affirming *Kitt Energy*, rejected the argument that "an inspector's physical presence in each area of the mine - - regardless of the object of the inspection or the hazards actually examined for in each particular area - - qualifies as an intervening 'clean' inspection." 21 FMSHRC at 726, *quoting Kitt Energy*; UMWA v. FMSHRC, 768 F.2d at 1479. Consistent with *Kitt Energy*, I am not suggesting the casual traversing of mine areas to arrive at other mine locations for the purpose of inspecting those areas constitutes an inspection of the area traveled. However, here the 60 West Mains haulage is the primary means of entry and exit from the Cumberland Mine. To conclude that numerous mine inspectors traveled this area without determining if ingress and egress was safe with respect to the rib, roof and track conditions, as well as with respect to ventilation, would deny the obvious. I decline to do so.

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[6] In *Kitt Energy*, the Commission recognized the inherent difficulty imposed on the Secretary in proving a negative - - that a clean inspection had not occurred. The Commission stated, in order to satisfy her burden of proof, the Secretary need only keep records of the areas in a mine that have been inspected. 6 FMSHRC at 1600. Inherent in the Commission's directive is that the Secretary's records will reflect areas of the mine that remained to be inspected because there had been little or no MSHA inspector presence. Here, the dilemma for the Secretary is that records demonstrate daily inspector presence in the 60 West Mains haulage.

[7] The quarterly inspection was completed on September 26, 1997, the day after the subject withdrawal order was issued, when inspector George Rantovich walked the 60 West Mains haulage. Rantovich's inspection took 1½ hours, and he found no violations of any mandatory safety standard. 20 FMSHRC at 289. Completing this inspection within 1½ hours appears to be at odds with the Secretary's assertion that a clean inspection of this 4,200 feet long mine entry required a thorough inspection of the roof conditions; rib conditions; track conditions, including whether the track is blocked properly and the joints are tight; ventilation stoppage; the direction of air flow; any manholes; clearances; fire fighting equipment; and any electrical installations in the entry, including cables, wiring and switches. *See* 21 FMSHRC at 727, fn.6.

ORDER

Consistent with the Commission's directive, I have considered the Cyprus inspection activity log entries in relation to the other evidence of record. I conclude the Secretary has failed to demonstrate, by a preponderance of the evidence, that a "clean" inspection of the Cumberland Mine had not occurred prior to the September 25, 1997, issuance of 104(d)(2) Order No. 3657679. Consequently, the modification of 104(d)(2) Order No. 3657679 to a 104(d)(1) citation **IS REINSTATED**.

Jerold Feldman
Administrative Law Judge

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