FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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Washington, D.C. 20001

November 16, 2007

JIM WALTER RESOURCES, INC.,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. SE 2007-307-R
	:	Order No. 7692770; 06/25/2007
v.	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	No. 4 Mine
ADMINISTRATION, (MSHA),	:	Mine ID 01-01247
Respondent	:	

ORDER GRANTING CONTESTANT'S MOTION FOR SUMMARY DECISION

Before: Judge Zielinski

This case is before me on a Notice of Contest filed by Jim Walter Resources, Incorporated ("JWR") pursuant to section 107(e) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 817(e). JWR seeks vacation of Order No. 7692770, an imminent danger order issued pursuant to section 107(a) of the Act. JWR has moved for summary decision. The Secretary has opposed the motion, contending that JWR has failed to establish that there are no material facts in dispute or that it is entitled to summary decision as a matter of law. For the reasons set forth below, the motion is granted.

Facts

Following the Sago and Darby mine disasters, where miners were killed as a result of a methane explosions originating in sealed areas of mines, the Secretary's Mine Safety and Health Administration ("MSHA") took action to require mine operators to monitor the atmosphere in such areas and to address potentially hazardous conditions. MSHA issued Program Policy Bulletin No. P06-16, on July 19, 2006, which required operators to assess the atmosphere behind alternative seals, and to take remedial action if concentrations of methane from 3 percent to 20 percent were present. On May 22, 2007, MSHA issued an Emergency Temporary Standard ("ETS"), pursuant to section 101(b) of the Act. 72 FR 28796-28817 (May 22, 2007). The ETS, which became effective upon publication, amended 30 C.F.R. § 75.335, by increasing strength requirements for newly constructed seals. It also required mine operators to develop and submit for approval protocols for monitoring and maintaining inert the atmosphere in sealed areas,

where the seals were not constructed to withstand 120 psi of overpressure. The ETS further provided:

> (4) When oxygen concentrations are 10.0 percent or greater and methane concentrations are from 3.0 percent to 20.0 percent in a sealed area, the mine operator shall take two additional gas samples at one-hour intervals. If the two additional gas samples are from 3.0 percent to 20.0 percent and oxygen is 10.0 percent or greater —
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> (I) The mine operator shall implement the action plan in the protocol; or
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> (ii) Persons shall be withdrawn from the affected area, except those persons referred to in section 104(c) of the Act.

30 C.F.R. § 75.335(b)(4).

On June 25, 2007, Danny Crumpton, an MSHA inspector, began a quarterly inspection of JWR's No. 4 Mine. He reviewed seal examination records required to be kept under the ETS, and noted several entries reporting levels of methane within the action range specified in the ETS. He called the MSHA District 11 office, and spoke with Johnny Calhoun, the head of the ventilation division, and with Gary Wirth, the assistant district manager. He reported the seal examination record entries and told them he would take gas readings at the seals, which he proceeded to do. Readings at several seals were unremarkable. However, at 11:23 a.m., he conducted a test at seal 31, and measured methane at 10.0 percent and oxygen at 12.6 percent. He took a bottle sample, and waited to take the additional hourly measurements referenced in the ETS. Danny Aldrich, JWR's outby coordinator, who accompanied Crumpton, called for foam packs as a means to abate the condition.[1] Crumpton took another measurement at 12:27 p.m., and obtained the same result as the first test. At 1:27 p.m., Crumpton took the third measurement required by the ETS, and found that the methane concentration was 8.0 percent, and the oxygen concentration was 12.7 percent.

The three successive measurements within the specified ranges satisfied the ETS's requirement for remedial action. Because JWR's protocol/action plan had not yet been approved, the action required by the ETS was withdrawal of persons from the affected area. Crumpton took no immediate action. He continued his inspection, and proceeded to the next seal, seal 24. At 1:50 p.m., Crumpton took a measurement at seal 24, and detected 14.0 percent methane and 10.5 percent oxygen. He then proceeded to the nearest phone, called Wirth, and reported the results of his measurements. Wirth instructed Crumpton to issue an imminent danger withdrawal order at 2:20 p.m.

[1] This was consistent with the proposed action plan in JWR's protocol, which had been submitted to, but not yet approved by, MSHA.

Crumpton issued Order No. 7692770, as directed by Wirth, relying upon Wirth's judgment.[2] Throughout the course of these events, Crumpton did not conclude that there was, or was not, an imminent danger. Contestant's Statement of Undisputed Facts, #11. The possibility that a roof fall might ignite the gas detected by Crumpton was the only potential ignition source considered by Wirth in making the decision to have Crumpton issue the 107(a) order. *Id*. #13. At no time did Crumpton note any indications that a roof fall was imminent, behind or near seal 31, or in any other area. Nor did he note any other roof hazards. *Id*. #14.

Analysis

Commission Procedural Rule 67, 29 C.F.R. § 2700.67, states that a motion for summary decision shall be granted if there is "no genuine issue as to any material fact" and that "the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b). The Secretary argues that there are material facts in dispute, specifically denying item #9 in JWR's statement of undisputed facts, which reads: "The decision to issue 107(a) Order 7692770 was based solely upon the concentrations of methane and oxygen measured at seal 31." The Secretary maintains that Wirth's decision also rested upon a "consideration of roof falls as a possible ignition source." Sec'y Op. at 5. However, in item #13 of its statement JWR asserted: "The possibility that a roof fall might ignite the gas detected by Inspector Crumpton was the only potential ignition source considered by Assistant Director Wirth, in making the decision to have Inspector Crumpton issue 107(a) Order 7692770." While factual statement #9 omits the critical ignition source information, when read together with item #13, the Secretary's objection is obviated. I find that there is no dispute as to any fact material to the issues raised by JWR's motion.

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, 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, 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.

[2] The Order, exhibit 3 to Crumpton's deposition, notes the readings at both seals 24 and 31 as explosive mixtures justifying issuance of the order. However, the Secretary has stipulated that the readings at seal 24, which were not within the explosive range, are not relied upon in support of the order.

30 U.S.C. § 817(a).

"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 Mine Act or the Secretary's regulations. This is an extraordinary power that is available only when the 'seriousness of the situation demands such immediate action.'" *Utah Power & Light Co.*, 13 FMSHRC 1617, 1622 (Oct. 1991) ("*Utah*") (quoting from the legislative history of the Federal Coal Mine Health and Safety Act of 1969, the predecessor to the 1977 Act). An imminent danger exists "when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1290 (Aug. 1992) (quoting from *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) ("*R&P*")). While the concept of imminent danger is not limited to hazards that pose an immediate danger, "an inspector must 'find that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time.'" *Cumberland Coal Resources, LP*, 28 FMSHRC 545, 555 (Aug. 2006) (*quoting from Utah*, 13 FMSHRC at 1622). Inspectors must determine whether a hazard presents an imminent danger without delay, and a finding of an imminent danger must be supported "unless there is evidence that [the inspector] had abused his discretion or authority." *R&P*, 11 FMSHRC at 2164.

While an inspector has considerable discretion in determining whether an imminent danger exists, that discretion is not without limits. An inspector must make a reasonable investigation of the facts, under the circumstances, and must make his determination on the basis of the facts known, or reasonably available to him. As the Commission explained in *Island Creek Coal Co.*, 15 FMSHRC 339, 346-347 (Mar. 1993):

> While the crucial question in imminent danger cases 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 [her] 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.

An inspector "abuses his discretion . . . when he orders the immediate withdrawal of miners under section 107(a) in circumstances where there is not an imminent threat to miners." *Utah*, 13 FMSHRC at 1622-23.

The critical question in determining whether an accumulation of methane presented an imminent danger is whether there was an ignition source that might reasonably have been expected to cause an explosion resulting in death or serious injury within a short period of time. In *Island Creek*, the Secretary conceded that explosive accumulations of methane in a longwall gob would create an imminent danger only if an ignition source presented a significant danger.[3] 15 FMSHRC at 347. Similarly, on the related question of whether a methane accumulation hazard presented a reasonable likelihood of an injury causing event, the Commission has focused on the presence of an ignition source. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988) (critical question for significant and substantial determination is likelihood of explosive concentrations of methane coming into contact with an ignition source). The Commission has held that statements that certain events "could" occur, are not sufficient to support a finding that there was a reasonable likelihood of an ignition of methane for a significant and substantial determination. *Zeigler Coal Co.*, 15 FMSHRC 949, 953-54 (June 1993).

JWR's motion challenged Crumpton's decision to issue the order, and the fact that he, admittedly, had not made a determination that an imminent danger existed. The Secretary countered that it was Wirth, who is also an authorized agent of the Secretary, who made the determination to issue the order, and that his exercise of discretion should be sustained. In its reply to the opposition, JWR does not dispute the fact that Wirth made the decision, and that he did not have to be present at the scene to have done so. However, it contends that Wirth must be held to the same "abuse of discretion" standard that would apply had he been on the scene, and that he clearly abused his discretion in this case.

The alleged imminent danger condition, an explosive level of methane in the atmosphere behind seal 31, was confirmed by Crumpton no later than 11:23 a.m.[4] Crumpton was an experienced inspector who had made determinations on issuance of imminent danger orders in the past. He was aware of potential ignition sources in the sealed area, namely roof falls and electromagnetic field changes. Yet he made no determination that an imminent danger existed at that time. Nor did he make a determination that an imminent danger existed when he confirmed the readings at 12:27 p.m., re-confirmed them at 1:27 p.m., or found similar readings at seal 24 at 1:50 p.m. At 2:20 p.m., when he talked to Wirth, he still had not made a determination that an imminent danger existed.

It is extremely doubtful that Wirth could have been in a better position than Crumpton to assess whether conditions at the mine presented an imminent danger. Crumpton, who was on the

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[3] The Commission expressly did not reach the issue of whether the Secretary "may support an imminent danger order by showing that an explosive accumulation of methane is present without proving a specific ignition source." 15 FMSHRC at 348. The Secretary does not claim to take such a position here.

[4] As noted in the ETS, methane is explosive at concentrations between 5% and 15%, when in the presence of oxygen concentrations of at least 12%. 72 FR at 28799.

scene, had not identified any roof hazards, and never concluded that a roof fall was imminent in the sealed area, or in any other area of the mine. Wirth testified during his deposition that the only potential ignition source that he considered was a roof fall. However, he admitted that, because of "the unknown composition of the atmosphere and the unknown nature of the composition of the rock" in JWR's mine, it would have been pure conjecture to specify a probability for an ignition from a roof fall.[5] Cont. ex. 3 at 76. It is clear that he did not instruct Crumpton to issue the order based upon an assessment of the likelihood of a roof fall resulting in an ignition. He testified that he was applying an unwritten rule, or policy, subscribed to by unnamed MSHA officials, to the effect that "atmosphere readings that fell within the ETS numbers of 4.5 to 17 [percent methane], and above 10 percent oxygen, constituted an imminent danger." *Id*. at 72-73.

The Commission has criticized situations in which an inspector's exercise of discretion in determining whether an imminent danger exists had been "constrained" by instructions issued by MSHA officials, which "precluded the inspector from conducting a requisite reasonable investigation of the facts and exercising his discretion." *Cumberland Coal Resources, LP*, 28 FMSHRC 545, 555-56 (Aug. 2006). It also found "particularly appropriate" an MSHA policy prohibiting the use of section 107(a) orders for control purposes, where the instructions removed the inspector's independent judgment in issuing imminent danger orders. 28 FMSHRC 556, n. 14.

Wirth does not appear to have been acting in conformance with instructions from a supervisor. Rather, he decided to adopt a position held by some other MSHA officials. Nevertheless, he was, in essence, using the section 107(a) order for control purposes, i.e., to enforce the withdrawal provision of the ETS.[6]

Under the authorities cited above, it is clear that an actual ignition of the explosive atmosphere behind the seals was, at best, a theoretical possibility, and that issuance of the imminent danger order was not justified. It is apparent that Wirth was enforcing the ETS, rather than making a discretionary determination that an imminent danger existed. The ETS was issued

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[5] In a recent case, MSHA ventilation specialists, one of whom had developed training materials on the subject, essentially conceded that a roof fall was an unlikely ignition source. *Cumberland Coal Resources, LP*, 27 FMSHRC 295, 319-20 (Mar. 2005) (ALJ) (*aff'd in part, rev. in part*, 28 FMSHRC 545 (Aug. 2006).

[6] There may have been another avenue available to enforce the ETS. Once the three successive readings within the ETS's specified range were obtained, JWR was obligated to withdraw persons from the affected area. If it failed to do so within a reasonable period of time, Crumpton could have issued a citation charging a violation of the ETS, and imposed an appropriate time for abatement. If JWR failed to timely abate the violation, and no extension of the abatement deadline was warranted, Crumpton could have issued an order pursuant to section 104(b) of the Act, requiring withdrawal of miners from the affected area.

upon a determination by the Secretary that miners face a grave danger when underground seals separating abandoned areas from active workings fail. 72 FR at 28796. While that determination supports the issuance of the ETS, it does not override the requirements for issuance of an imminent danger order pursuant to section 107(a) of the Act. Moreover, the structure of the ETS, which requires action if concentrations of methane and oxygen that are not necessarily explosive exist for a period of two hours, is inconsistent with the concept of an imminent danger.

ORDER

Based upon the foregoing, Contestant's motion for summary decision is hereby **GRANTED**. JWR's contest of Order No. 7692770 is **SUSTAINED**, and Order No. 7692770 is hereby **VACATED**.

Michael E. Zielinski
Administrative Law Judge

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