

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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August 31, 2000

EASTERN ASSOCIATED COAL CORP.,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEVA 2000-98-R
v.	:	Order No. 7185736; 8/7/2000
	:	
SECRETARY OF LABOR, MINE SAFETY	:	Rock Lick Prep Plant
AND HEALTH ADMINISTRATION,	:	Mine ID 46-06448
Respondent	:	

DECISION GRANTING CONTESTANT'S MOTION TO DISMISS

Appearances: R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania, for the Contestant;
Daniel M. Barish, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, and Dana Hosch, MSHA, U.S. Department of Labor, Mt. Hope, West Virginia, for the Respondent.

Before: Judge Weisberger

I. Introduction

This case is before me based upon a notice of contest and motion to expedite, filed by Eastern Associate Coal Corporation ("Eastern"), challenging the issuance by the Secretary of Labor ("Secretary") of an order, under Section 107(a) of the Federal Mine Safety and Health Act of 1977 ("the Act"), that had been issued to Eastern on August 7, 2000, regarding an aspect of its operation at the Rock Lick Preparation Plant.¹ The Rock Lick Preparation Plant at issue processes coal and maintains stockpiles (surge piles). Coal is delivered to the surge piles by stacker tubes (loaders)

¹The order was issued orally by MSHA inspector Sherman Lee Slaughter to Eastern's agents over the telephone on August 7, 2000, and was reduced to writing and served on August 8, 2000.

Pursuant to a telephone conference call between the undersigned and attorneys for both sides on August 10, 2000, the case was scheduled to be heard in Charleston, West Virginia, on August 16 and 17, 2000.

located above the piles. The coal then comes out of windows on the side of stacker tubes to accumulate on the piles. Coal is removed from the piles by the action of vibrating feeders located at the bottom of the piles which cause the coal in the pile to drop, in a cone shaped area, known as a withdrawal area, through the feeders onto a conveyor belt. The width of the cone, at its widest point, at the top of the pile, is dependent upon the height of the pile.

II. The Secretary's Case

MSHA inspector Sherman Lee Slaughter, inspected the subject site on June 27, 2000. He entered reclaim tubes located under the piles in order to observe the feeders which are located in the tubes and could not otherwise be observed. He indicated that most of the feeders did not have gates. According to Slaughter, in discussions with Eastern's agents at the time, he ascertained that Eastern did not have any procedures to determine if a cavity or void existed in the pile above the feeder, before a bulldozer would be allowed to operate on the pile. He also noted that the bulldozers had only one radio, an F.M. mobile radio, and did not have any back-up communication. Slaughter also found that the bulldozer operators did not have any way to shut-off either the feeders or the stacker tubes from the bulldozer. Also, although there were cameras on the site, the operators of the feeders could not see the bulldozer operators all the time they were on the piles. He stated that it was understood that a bulldozer would not operate over an inactive feeder or over a withdrawal area. He did not see any evidence of any cavities or voids in the piles, and concluded that the conditions and practices at the site did not create an imminent danger. Nor did he issue any citation or order as a consequence of his inspection on June 27, 2000.

Slaughter indicated that on Monday, August 7, 2000, he received a telephone call from the Madison MSHA office, advising him that an incident had occurred on August 5, at the Rock Lick Plant. Slaughter telephoned Jerry Swanson, Eastern's operations manager at the plant, who advised him that on August 5, after the feeder was started on the Eagle raw coal pile, it was noted that it was plugged, that coal was not going through the feeder, and it was determined that there was a cavity. According to Slaughter, Swanson told him that a bulldozer operator was directed to use a bulldozer to dig into the pile in order to open the void to allow coal to be released through the feeder. After the bulldozer made several passes it slid down into an opening in the pile, and the foreman told the bulldozer operator to get out of the bulldozer and walk away from the area. A second bulldozer was then sent to push coal into the opening in order to stabilize the pile. After approximately 9 to 10 passes, the second bulldozer backed off 75 feet and the first bulldozer fell into the opening.

Slaughter concluded that because this pile was plugged, he expected others to be plugged. However, he did not explain this conclusion nor did he provide the basis for it. On August 7, at 2:45 p.m., Slaughter issued an imminent danger order to Swanson, over the telephone, prohibiting bulldozers from being operated in the withdrawal area. He indicated that he had issued the order because the conditions that he described could reasonably cause a person to become injured before the conditions were abated.

Slaughter explained that he issued the order orally because he did not want to wait until he got to the mine due to “imminency”. He said he indicated to Swanson that he needed to come to the mine immediately. Swanson asked him to come to the mine the next morning between 8:30 a.m. and 9:00 a.m. because the persons that Slaughter needed to talk to would be present at that time, and Slaughter agreed. Slaughter indicated that although on August 7, he had concluded that the danger was imminent, he still wanted to go to the site in order to evaluate all the conditions and to ensure that they were as described to him on August 7. He also delayed the issuance of the withdrawal order because he sought information from the company regarding angles of the withdrawal area, and heights of the piles so that he could describe on the withdrawal order the specific area from which miners and equipment were to be withdrawn.

When Slaughter arrived at the mine on August 8, and Eastern’s agents asked for a written order, he told them that he needed to talk to the bulldozer operators prior to his giving them a written order, in order to find out exactly what the facts were.

Slaughter indicated that in conversations with the bulldozer operators on August 8, he was informed that there was a verification system for active feeders as operators would be advised when the feeders would be activated and when coal would start to move in the withdrawal area. The bulldozer operators would then know that there were not any cavities in that pile. However, they indicated that there was no verification system to advise them of cavities in piles served by inactive feeders. The operators confirmed that they only had one radio in each bulldozer, that they did not have any remote controls in the bulldozers to shut-off the feeders and stacker tubes, and that cameras were unable to transmit views of miners at all times when working on the piles. Also, the bulldozer operators advised him that they were unable to determine the distance of their bulldozers from the feeder. Nor were they able to determine the height of the piles.

Slaughter indicated that the instant written order was finally served by him at 6:30 p.m., August 8, and that some of the delay was caused by the need to have a typewritten computer generated form, and there were problems with the office computer.

Slaughter explained that if the coal in the pile becomes compacted due to the operation of the bulldozer on the top surface, a layer of compacted coal can occur, called a bridge. In such an event, if the feeder is activated, loose coal below the bridge will flow toward the feeder creating a void or cavity below the bridge. Once a feeder is activated, and if no coal flows through the feeder, it can indicate blockage in the feeder by large pieces of coal, or can indicate existence of a void in the pile. In addition, Slaughter explained that vibration could still occur within the feeder as a consequence of equipment riding on the top of the pile, or as a result of vibration in an adjacent feeder, even though the vibrator had not been turned on. In such an event, even if a feeder had not been turned on, a void or cavity could result if a bridge had been created due to compaction. Should a bulldozer be operated over the withdrawal area of a feeder that is not active, and should a void exist below the surface in the pile, the bulldozer could then fall into the cavity fatality injuring the operator. He referred to various accidents that had been documented by MSHA involving vehicles falling into cavities at other mines, resulting in a fatality or a serious

injury.

According to Slaughter, the following conditions and practices created an imminent danger: (1) not all the vibrating feeders had gates or other means to prevent gravity flow, (2) the piles at issue were known to plug and have cavities, (3) there was no back-up system of communication as the equipment that operated at the top of the piles had only one radio whose antenna could be knocked off if the dozer slid when falling down a cavity, (4) there were no cameras sufficient to see the bulldozer operators at all times on the pile, (5) there was no remote system in the bulldozers to allow the operators to shut-off feeders and stacker tubes, and (6) that generally cavities occur over feeders. He described the practices that created the imminent danger along with the conditions as follows: (1) there was not any system to determine if there was a cavity above an inactive feeder, before allowing the operator to travel within a withdrawal area of any feeder in the pile, which would create a danger if a cavity existed, as the bulldozer could fall, resulting in the operator getting covered with coal and possibly suffocating, and, (2) the practice of operators working within the angle of withdrawal when pushing coal to an active feeder and ringing (benching) coal above inactive feeders.

Specifically, with regard to his conclusion that the various dangers that existed were imminent, he stated, in various points in his testimony, as follows: (1) that bulldozers were used to push coal away from the stacker tubes and to move fines from the top of the pile over the edges to get at the coal in the lower parts of the pile, (2) that on August 7, because he was informed that the bulldozer had fallen into a cavity, he therefore concluded that the bulldozer was being operated within the withdrawal area of the feeder in a pile that it was working on, and that therefore bulldozers operate in withdrawal areas of other piles, (3) that he knew cavities existed in the piles at Rock Lick, (4) that he knew the work procedures used exposed the bulldozer operators to working within the withdrawal areas that had cavities, and therefore it was reasonable to expect that a bulldozer operator could receive a serious injury before the work procedures were changed, (5) that he was concerned about a potential for a cavity but not the existence of an actual cavity, and (6) that an imminent danger did not depend upon the existence of cavities the day the order was issued but upon knowing that cavities do occur and that it was reasonable to expect that they will occur again before work procedures or conditions change. He was asked his opinion regarding the probability of cavities occurring within a short period of time, and he answered that it could be expected at any time i.e., at any moment. However, he did not elaborate upon or explain the basis for this opinion.

Raymond Butler who operates a bulldozer on the site, stated that it is his procedure to fill an emptying withdrawal area before he moves to work on the next feeder, in order to avoid a void over an inactive feeder. He said that there was a void in the piles about 3 to 4 months ago.

David Stover, a bulldozer operator clarified that on August 5, he exited his bulldozer after it had been pulled 10 feet sideways into a cavity when he was attempting to cut into the pile sideways to get the coal to fall through a cavity. He testified that after the second bulldozer arrived and made about a dozen pushes attempting to fill up this hole, a second hole developed.

The second bulldozer operator got out of the bulldozer, and the bulldozer slid into the hole backwards.

Dr. Kelvin Ke-Kang Wu, a professional engineer with a doctorate in mining engineering majoring in rock mechanics, and minoring in rock/soil mechanics, has extensive experience in the area of safety issues regarding surge piles. He described various hazards caused by cavities. He indicated that cavities result if the pile becomes compacted by weight. Other factors causing cavities are moisture, the presence of fines in raw coals, and the effect of freezing temperatures. Assuming the existence of the following facts he opined, in essence, that there was reasonable potential that these conditions and practices could lead to a serious injury or death before they are abated: (1) the presence of three clean coal stockpiles, and three raw coal stockpiles, all with vibration feeders under them, (2) the presence of a total of thirty-three feeders, most of which do not have gates, (3) the absence of a system to verify that there are no cavities above inactive feeders before bulldozer operators travel over these inactive feeders, (4) the creation of voids two weeks prior to the date in question over all feeders in the raw coal piles that had six feeders, (5) the occurrence of an incident wherein the bulldozer operator attempted to eliminate a void by digging into a pile, and the bulldozer slid sideways 10 feet into a cavity and the bulldozer operator was able to get out to safe ground, and a second bulldozer started to fill in the void that the first bulldozer had started to slide into but a second void opened up and the second bulldozer continued to fill in the void and sank backwards into the void, and that the voids were over two adjacent feeders, (6) that there were instances in the past where voids were created over feeders at this plant, and (7) that in one incident a bulldozer went nose down, partially in the void, but no one was hurt, and (8) that there is evidence of generally good communication between the bulldozer operators and the load-out operator, but that the bulldozers have only one radio.

Wu was asked whether these conditions and practices have a reasonable potential to cause a fatality or serious injury within a short period of time. He answered that if proper communication equipment is not provided, the operator will have only a slim chance to escape should the bulldozer fall into a cavity, that there is a possibility of the glass windows and windshield on the bulldozer breaking and the operator suffocating if the bulldozer is buried and it takes a long time to dig it out, and that not all cabs have extra strong reinforced glass. He was asked his opinion on the likelihood that a void will occur. He answered that every surge pile has that potential, and that the likelihood is affected by the type of materials in the pile, the properties of the material, how long the pile has been in existence, (that the longer it is in existence the more it can become compacted based on its own weight), weather conditions, and the type of equipment operating on the pile. He then was asked whether the fact that two voids occurred two weeks prior to the date at issue is a factor in evaluating likelihood, and he stated that if the first void is known and the bulldozer sinks into it, it means he was too close. Regarding the second void he opined that its existence was not known and therefore there was not enough information. He also indicated that the amount of voids in a pile depends on the amount of coal drawn out of the pile and how fast it is drawn out. Also, there are piles that do not have any voids.

Hence, the gravamen of his testimony, speaks to the gravity of the dangerous conditions, and the degree of danger. However, it does not address the main issue as to whether, on the date the order was issued, August 7, the danger, i.e., the existence of cavities, was imminent.

At the conclusion of the Secretary's case, Eastern made a motion for a summary decision. After listening to arguments from both counsel a decision was made granting the motion.

III. Evaluation

The following sets forth the oral decision made on the motion at the hearing, with the exception of minor changes not related to matters of substance.

1. The Case Law

In dealing with the motion raised by the Operator and the reply by the Secretary, the first step is to ascertain the proper standard to be applied in reaching a decision as to whether or not the Secretary has sustained its burden of establishing that there existed an imminent danger as defined in Section 3(j) of the Act. The Secretary cited Freeman Coal Mining Co. v. Interior Bd. of Mine Op. App., 504 F. 2nd 741 and (7th Cir. 1974), and Eastern Associated Coal Corp. v. Interior Bd. of Mine Op. App. 493 F. 2nd, 277 (4th Cir. 1974). It is significant to note that both those cases were decided under the predecessor of the existing Act, namely they were decided under the Coal Act of 1969. The controlling Act in the case at bar is the Federal Mine Safety and Health Act of 1977. There's been considerable commission law subsequent to the enactment of the Act and I rely upon Commission law in this regard in determining the standard to be set when evaluating an imminent danger.

In reviewing the Commission cases, I note one of the leading cases, Utah Power & Light Co., 13 FMSHRC 1617 (1991) cited by both counsel. The Commission, first of all, in Utah Power & Light Co., supra, at 1621 reviewed the legislative history of the term "imminent danger" as found in the Act, and concluded based upon its review of the legislative history, as follows: "Thus the hazard to be protected against by the withdrawal order, must be impending, so as to require the immediate withdrawal of miners." (Emphasis added.) Continuing further, at 1622, the Commission held that to support a finding of imminent danger, the inspector must determine "whether the condition presents an impending threat to life and limb". (Emphasis added) The Commission went on to state that only by limiting Section 107(a) withdrawal orders to such impending threats does the imminent danger provision assume its

proper function under the Mine Act. Critically, the Commission in Utah Power and Light, *supra*, at 1622, distinguished an imminent danger withdrawal order from a significant and substantial determination as follows:

If the imminent danger provisions of the Act are interpreted to include any hazard that has the potential to cause a serious accident at some future time, the distinction is lost between a hazard that creates an imminent danger, and a violative condition that ‘is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard.’

The Commission in Utah Power & Light Co., *supra*, clarified its earlier ruling in Rochester & Pittsburgh, 11 FMSHRC 2159 (November 1989). In Rochester & Pittsburgh, *supra*, the Commission, in discussing imminent danger used the phrase, “at any time”. In explaining that phrase, the Commission, in Utah Power & Light Co., *supra*, stated as follows: “the Commission used the phrase, ‘at any time,’ in the sense of, ‘at any moment.’ ” (Emphasis added)

In summarizing, the Commission, in Utah Power & Light Co., *supra*, at 1622, held as follows: “To support a finding of imminent danger, the inspector must find that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time,” (Emphasis added)

Following Utah Power and Light, *supra*, the Commission issued Wyoming Fuel Co., 14 FMSHRC 1282 (1992). In Wyoming Fuel, *supra*, the Commission noted its previous decision in Rochester & Pittsburgh, *supra*, a 1989 decision which had quoted from Eastern Associated Coal Corporation, *supra*, 277, 278, as follows: “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.” Leaving it just like that, one might have the impression that the Commission was retreating somewhat from its earlier pronouncement in Utah Power & Light Co., *supra*, linking the term “imminent danger” to a degree of imminence, in other words, a time-related situation. That is not the case. In Wyoming Fuel, *supra*, in the paragraph following the Commission’s quote from Eastern Associated Coal, *Supra*, the Commission, at 14

FMSHRC supra, at 1290, discussed its previous ruling in Utah Power & Light Co., supra and stated that it had held in Utah Power & Light Co., supra, that, “there must be some degree of imminence to support a Section 107(a) order.” (Emphasis added.) The Commission in Wyoming Fuel, supra, at 1290, reiterated that in Utah Power & Light Co., supra, at 1621 the Commission had “noted that the word ‘imminent’, is defined as ready to take place: near at hand: impending ...: hanging threateningly over one’s head: menacingly near.”

In Wyoming Fuel, supra, at 1290 - 1291, the Commission, in further discussing its prior decision in Utah Power & Light Co., supra, stated that it had previously determined, referring, to Utah Power & Light Co., supra, “that the legislative history of the imminent danger provision supported the conclusion that, ‘the hazard to be protected against by the withdrawal order must be impending so as to require the immediate withdrawal of miners”’ (Emphasis added). It appears at least through Wyoming Fuel, supra, that the Commission was maintaining its holding that imminent danger means an imminence of something occurring within a short period of time.

In Island Creek, 15 FMSHRC 339, (1993), the Commission noted its prior holding in Wyoming Fuel, supra, at 1291, that in imminent danger cases the judge must determine, “whether a preponderance of the evidence showed that the conditions or practices, as observed by the inspector could reasonably be expected to cause death or serious physical harm before the conditions or practices could be eliminated.” (Island Creek, supra, at 346). It might be construed that the Commission was retreating from its position that, as stressed by Utah Power and Light, supra, some degree of imminence was required to establish an imminent danger, since Utah Power and Light, supra, was discussed in its decision prior to its discussion of Wyoming Fuel, supra. However, in the most recent discussion by the Commission of imminent danger Blue Bayou Sand and Gravel, 18 FMSHRC 853 (1996) the Commission, after reviewing the definition in the Act of imminent danger and noting language from its prior decision in Rochester & Pittsburgh, 11 FMSHRC supra at 2163, quoted the following language it had set forth in Rochester & Pittsburgh, supra, at 2163: “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.” Blue Bayou, supra, at 858. However, it is very important to note that in the same paragraph, the Commission in Blue Bayou, supra,

at 858, the most recent commission decision on imminent danger explained as follows quoting from Utah Power and Light, *supra*: “[t]he Commission has explained that ‘[t]o support a finding of imminent danger, the inspector must find that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time.’ (Emphasis added.) Utah Power & Light Co., 13 FMSHRC 1617, 1622 (October 1991) (“U P & L”).”

I conclude that Commission doctrine, at this point in time, requires, regarding the existence of an imminent danger, that it be established by a preponderance of the evidence, that a hazardous condition or practice has a reasonable potential to cause death or serious injury within a short period of time. And this is to be distinguished from a significant and substantial determination that looks at a broad continuum of a reasonable likelihood of an injury producing event occurring, assuming continuing normal mining operations. In contrast, a withdrawal is much more limited. The incident, the hazardous condition or practice, that can cause death or serious injury must have a reasonable potential of occurring, not throughout this entire continuum, but within a short period of time.

2. Discussion

The question now is, what is the evidence in the record of an injury producing event occurring within a short period of time, considering the conditions and practices cited by the inspector. Of all the different factors, conditions and practices discussed by the inspector and referred to by Counsel, one stands out. It is the sine qua non of all these different practices and conditions. Namely, the existence of a cavity. Without a cavity there is no danger. A practice of perhaps having a system or communication that might be deficient, a condition of perhaps not having sufficient cameras, or not having a backup radio, all become insignificant if there is not a reasonable potential of an injury production event occurring within a short period of time. In this case, the only practice or condition that has any potential of causing serious injury or death is a cavity. Everything else flows from the existence of a cavity. The other factors, if present, and go to the degree of injury, and the seriousness of injury. But first there must be an injury, i.e., there must be a cavity. Therefore, it must be established that there was a reasonable potential of the existence of a cavity on August 7.

In evaluating the Secretary’s case, I first note the

inspector's testimony. On direct examination he discussed imminence. He concluded that an injury producing event, i.e., a cavity was imminent, because on his visit to the site on June 27, he was told by an agent of the company, that the company knew cavities existed in the Rock Lick piles. However, on cross examination, he indicated that on August 8, there was no plugging, that he did not know if there were cavities when he issued his order, but that his concern was the potential for cavities, not the actual cavity indicated in any pile with a feeder. Potential for cavities is not the issue. Potential for cavity creation over any time is not the issue. The issue is potential for a cavity within a short period of time.

The inspector was asked his opinion regarding the probability of a dangerous condition occurring within a short period of time, i.e., a cavity occurring within a short period of time. He indicated that a cavity can be "expected at any time", and he indicated "any time" is equated with "any moment", i.e., that cavities could occur at any moment. But he did not explain the basis for his opinion.

Dr. Wu, the expert in the particular areas that we are concerned with, was asked, in essence, to assume the existence of the various practices and conditions that the inspector testified to, and to state his opinion whether there was a reasonable potential that an incident involving a void will occur, causing death or serious injury within a short period of time. He answered, yes. However, in explaining his answer, he discussed the problems with rescue after an incident, and that there would be a danger of suffocation, or being buried by coal should the bulldozer's glass windows break. He was asked the question again, and basically rephrased his answer, but again referred to the short period of time to allow for successful rescue of a bulldozer operator after falling into a cavity. He explained, in his answer, that bulldozer cabs do not all have stronger glass and that it is more likely that the glass will break and suffocation will result if a bulldozer operator does not exit the cab in time. His answer related to the degree of injury and gravity, but did not address the key issue which is the occurrence in of a cavity within a short period of time. Both the inspector and the expert testified to various factors that could create a bridge which could lead to a cavity e.g., moisture, freezing the type of material in the pile, the time of the feeder's operation cycle, and the presence of

vehicles on top of the pile. However, Dr. Wu did not explain what the specifics in the case were, and why these specifics would lead to a conclusion that a cavity would result in a short period time.²

Thus,

I find that the Secretary has not established its case by a preponderance of the evidence and the motion is granted.

ORDER

It is **ORDERED** that the Notice of Contest be sustained, and that Withdrawal Order No. 7185736 be dismissed.

Avram Weisberger
Administrative Law Judge

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²In the oral decision at the hearing it was inadvertently omitted that I take cognizance of testimony relating to the existence of two cavities on August 5. However, in evaluating whether it thus, can reasonably be inferred that cavities existed or were imminent on August 7, it is important to note that Dr. Wu, the Secretary's expert, was asked to explain how the occurrence of the voids, less than two weeks before the date at issue, "factor[ed]" into his opinion regarding the likelihood of a void occurring, and he replied as follows: "It factor in my opinion is if you know there's one void, you send one bulldozer to excavate it and it sinks in. That means it's just too close to that hole, the voids. Then the second void was not know. If he had known, he won't drive on the second void. So there's some misinformation or the information is not adequate as possible void, the area which might --- should be concerned." (Sic.) I thus find that Dr. Wu did not explain whether the occurrence of two voids on August 5, increased the likelihood of occurrence of cavities on August 7, the date at issue. Thus, giving most weight to Dr. Wu's testimony, based on his expertise and experience, the preponderance of the evidence does not establish that from the occurrence of voids on August 5, it might reasonably be inferred that voids existed or were imminent on August 7, the date the order was issued.

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/sct