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MSHA V. CYPRUS EMPIRE
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
May 2, 1990

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA) Docket Nos. WEST 88-250-R
WEST 88-251-R
v. WEST 88-331

CYPRUS EMPIRE CORPORATION

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY: Ford, Chairman; Doyle, Lastowka and Nelson, Commissioners

This proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1982)("Mine Act" or "Act"), involves a citation and imminent danger withdrawal order issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Cyprus Empire Corporation ("Cyprus"). The citation, as modified, alleges a violation of 30 C.F.R. 75.202(a), requiring that the roof of areas where persons work or travel be supported or otherwise controlled. 1/ The imminent danger order, issued pursuant to section 107(a) of the Mine Act, arose out of the same conditions as the citation. 2/ Also at issue is whether the Secretary of Labor's

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1/ 30 C.F.R. 75.202(a) provides as follows:

> The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

2/ Section 107(a) of the Act provides:

> 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

prehearing modification of the citation and imminent danger order was proper. Commission Administrative Law Judge John J. Morris permitted the modification, concluded that Cyprus violated section 75.202(a), affirmed the imminent danger order, and assessed a civil penalty of $200. 11 FMSHRC 368 (March 1989)(ALJ). For the reasons that follow, we affirm the judge:s allowance of the modification and his affirmance of the imminent danger order. We reverse the judge's finding of a violation of section 75.202(a), however, and we vacate the citation and civil penalty.

I.

Cyprus owns and operates the Eagle No. 5 Mine, an underground coal mine located in Craig, Utah. During the evening shift on Friday, May 20, 1988, Charles Moss, section foreman, observed poor roof conditions in the tailgate entry of the 16 East longwall section. The area of poor roof was immediately adjacent to Shield #126, the last shield on the longwall face. A walkway running parallel to the face and passing under the longwall's shields, including Shield #126, exited into the area of bad roof in the tailgate entry.

Moss contacted the shift foreman, Robert Pobirk, and they examined the roof. Pobirk directed Moss to string yellow "danger tape" across the end of Shield #126 to block access from the face to the area of bad roof. Pobirk also had yellow danger tape placed across the tailgate entry outby the area of poor roof conditions to block access from that direction.

On the next shift, on May 21, 1988, miners installed additional support in the "dangered off" area between the cribs that were already present. They placed two cribs to prevent the poor roof conditions from spreading further into the tailgate entry and a third crib to prevent rib sloughage. They also installed two roof jacks and two timbers. According to Pobirk, additional support was not placed in the area closest to Shield #126 because such support would have served no purpose and would have exposed the miners installing such support to the hazard of a roof fall. Tr. 91-92, 110-11.

> 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)] of this title, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section [104] of this title or the proposing of a penalty under section [110] of this title.

30 U.S.C. 817(a).

On the evening shift on Tuesday, May 24, 1988, MSHA Inspector Phillip Gibson observed the area of poor roof adjacent to Shield #126. The previously strung yellow danger tape was still in place prohibiting travel from the longwall walkway into the area of poor roof. The danger tape in the tailgate entry was also still in place, prohibiting travel from that direction. Inspector Gibson measured the area of poor roof adjacent to Shield #126 as being 6 feet 10 inches. The closest support cribs were about three feet from Shield #126. Joint Exhibit 1 shows the adversely affected area and is attached to this decision.

As a result of his observations, Gibson issued to Cyprus a section 104(a) citation, 30 U.S.C. 814(a), alleging a violation of 30 C.F.R. 75.202(b). 3/ The citation states

> Loose, broken roof was present in the tailgate entry of the 16 East longwall section. The coal roof between two previously erected wooden cribs was broken and some roof had fallen to the mine floor. Two previously installed resin grouted rods with bearing plates were protruding downward about 16 inches. The roof coal had fallen from around the rods and the bearing plates. The affected area was 6 feet in length and 6 feet 10 inches in width. This condition was one of the factors that contributed to the issuance of [the imminent danger order]; therefore, no abatement time was set.

Gibson also designated the violation to be of a significant and substantial nature.

At the same time, Gibson issued a section 107(a) imminent danger withdrawal order based on the same condition. The order states as follows:

> Condition or Practice
>
> Loose, broken roof was present in the tailgate entry of the 16 East longwall working section. The loose, broken roof (coal roof) was 6 feet in length and 6 feet 10 inches in width. The affected area was between two wooden cribs installed within 3 feet of the tailgate face shield (No. 126). A violation of 75.202(b). The operator had already dangered off the tailgate entry at the longwall face.

3/ 30 C.F.R. 75.202(b) provides:

> No person shall work or travel under unsupported roof unless in accordance with this subpart.

> Area or Equipment
>
> The tailgate entry of the 16 East longwall section beginning at No. 126 shield and extending outby about 10 feet.

When Inspector Gibson arrived on the surface, he called his supervisor, Clarence Daniels. They agreed that to abate the citation and order Cyprus would be permitted to continue mining in order to pass by the dangerous area. From the time the bad roof conditions were first encountered on May 20, the longwall face had advanced 16-1/2 feet, and about 8 to 10 feet of further work would carry mining operations entirely past the area of poor roof conditions. Gibson modified the imminent danger order about two hours after it had been issued to state as follows:

> [The] Imminent Danger Order ... is hereby modified to allow mining to resume in order to mine pas[t] the affected area of the tailgate entry of the 16 East longwall section. The roof had sat so precariously on the wooden cribs in the tailgate entry, that removing them to install additional roof supports, posed a greater hazard.

Gibson imposed no special conditions or restrictions on the continued mining.

When Inspector Gibson returned to the mine the next evening, May 25, 1988, mining had progressed beyond the poor roof to a point where wooden cribs adequately contained the roof over the travelway into the tailgate entry. Therefore, he terminated the citation and order.

Cyprus contested both the citation and withdrawal order, and after the Secretary proposed a civil penalty for the alleged violation the matters were consolidated for hearing before Judge Morris. On November 18, 1988, three days before the hearing, the inspector modified the citation to allege a violation of section 75.202(a), rather than section 75.202(b). He similarly modified the withdrawal order to reflect the modification of the citation. Counsel for Cyprus was notified of the amendment on the same date, and the modifications were served on Cyprus on the day of the hearing, November 21, 1988.

At the hearing, Cyprus' counsel did not object to the modifications. Instead, he acknowledged that the Secretary's counsel had notified him approximately one month before the hearing that the citation would likely be modified to allege a violation of section 75.202(a). He also acknowledged that Cyprus was not prejudiced by the amendment. Tr. 13. The judge and the parties proceeded with the hearing on the basis of the allegation of a section 75.202(a) violation. In its posthearing brief, Cyprus nevertheless raised an objection to the modification of the citation and order.

In his decision, the administrative law judge rejected Cyprus' belated objection to the modification of the citation and order. The judge emphasized that Cyprus had conceded that the modifications had not resulted in prejudice. The judge also noted that amendment of pleadings is largely committed to the discretion of the trial judge pursuant to the standards contained in Fed. R. Civ. P. 15(a). 11 FMSHRC at 379. Accordingly, the judge approved the modification of the citation and order to allege a violation of section 75.202(a) instead of 75.202(b). Id.

The judge also affirmed the imminent danger order. He rejected Cyprus' argument that the order was invalid because entry into the cited area had been prohibited by the danger tape. The judge explained that the "purpose of a 107(a) order is not only to cause the withdrawal of miners, but to insure that they remain out of the affected area until the condition is corrected." 11 FMSHRC at 377. The judge credited the MSHA inspector's opinion that the roof condition was imminently dangerous to any miner exposed to it. 11 FMSHRC at 376. The judge noted that, although in their testimony Cyprus' witnesses did not fully embrace the inspector's opinion concerning the imminent danger, their actions in supporting the roof and dangering off the area did. 11 FMSHRC at 376. He further stated that, although no miner had entered the dangerous area while it was dangered off, "actual exposure [of] a miner to a hazardous condition it not required to find that [an] ... imminent danger exists." 11 FMSHRC at 377.

Finally, in concluding that Cyprus had violated section 75.202(a), the judge agreed with the Secretary's view that, as an acceptable alternative to roof "support," the standard's reference to a roof's being "otherwise controlled" refers to some form of "physical restraint of the defective area." 11 FMSHRC at 378-39. The judge rejected Cyprus' view that its installation of yellow danger tape constituted a "control" within the meaning of section 75.202(a). 11 FMSHRC at 379. The judge stated:

> In compliance with these issues I conclude that compliance with 75.202(a) can be accomplished in several ways. Initially, as the regulation provides, the area can be supported. In the alternative, the area may be barred down. The alternative of barring down a defective area is contained in the statute and it has been a control historically used. If support and barring down are not effective (the situation here) then the regulation requires effective control. I agree with the Secretary's view that some form of physical restraint of the defective area is required.

Id.

The judge did not specifically address the question of whether the cited area was a place "where persons work or travel" within the meaning of section 75.202(a). However, in his discussions of the imminent danger order, the judge found that "under normal circumstances, the tailgate

end of the longwall would allow a miner to come directly off of the longwall into the return entry" and that "there were miners in the vicinity of the defective roof." 11 FMSHRC at 377. He also found that walked under the area of bad roof and no one went through the area while it was dangered off...." Id.

II.

Cyprus contends that the judge erred in permitting the modification of the citation and imminent danger order. Cyprus submits that the Secretary failed to explain adequately the delay in amending the documents and that the delay was unreasonable.

Although the Commission's procedural rules do not address amendment of pleadings, the Commission may properly look for guidance to Fed. R. Civ. P. 15(a) ("Rule 15(a)"). 4/ See Commission Procedural Rule 1(b), 29 C.F.R. 2700.1(b). Under Rule 15(a), the trial court possesses considerabl discretion in resolving motions seeking leave to amend pleadings. Such leave is to be freely granted in the interest of justice, and a court's determinations in this regard will not be overturned except for abuse of discretion. See, e.g., 3 J. Moore, Moore's Federal Practice Par. 15.08 (2d ed. 1989)("Moore's"). See El Paso Rock Quarries, Inc., 3 FMSHRC 35, 38 (January 1981). Among the permissible purposes of such amendments are changes in the nature of the plaintiff's claims or legal theories. E.g., Moore's, supra, Par. 15.08[3]. Delay alone, regardless of length, does not bar a proposed amendment if the other party is not prejudiced. Moore's, Par. 15.08[4]. Here, the Secretary, through her modifications, sought only to allege that a different, though substantively related, subsection of the same standard applied to the cited conditions.

Cyprus conceded at the hearing that it was not prejudiced by the modifications, and proceeded with the hearing without protest. If Cyprus was aggrieved by the amendments, it should have objected at the hearing before the judge; its objection in the post-hearing brief was not timely. Cf. A.H. Smith, 5 FMSHRC 13, 17 n. 5 (January 1983). Therefore, we hold that the judge did not abuse his discretion in allowing the modifications.

Cyprus argues that the judge erred in concluding that it violated

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4/ Rule 15(a) states in part:

> Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. ...

section 75.202(a) for two reasons: (1) under the cited standard the area at issue was not an area "where persons work or travel;" and (2) "dangering-off" the area is an acceptable form of "control" of the roof. Because we find the first issue dispositive, we need not reach the second.

To establish a violation of 30 C.F.R. 75.202(a), the Secretary was required by the terms of the standard to prove that the cited area was an area "where persons work or travel." As discussed above, the judge found that "under normal circumstances, the tailgate end of the longwall would allow a miner to come directly off the longwall into the return entry." 11 FMSHRC 377 (emphasis added). What the judge did not consider, however, is whether "normal circumstances" are presented here.

The record in this case establishes that as soon as Cyprus encountered the poor roof conditions, it dangered-of the area to prevent miners from entering the area of adverse roof conditions. In doing so, Cyprus acted in accordance with accepted safe-mining practice. 5/ There is no evidence that at any time during the existence of the dangerous roof conditions, other than during the attempt to install additional roof support, any miner worked or traveled in the cited area. Indeed, the Secretary has conceded as much. 11 FMSHRC at 377; Tr. 11, 44, 49, 68-69. See also Oral Arg. Tr. 33. The Secretary also did not prove that, while the area was dangered off, the job duties of any miners required them to enter the affected area. See, e.g., Oral Arg. Tr. 9-10, 32-34. Thus, the record establishes that the operator acted appropriately in dangering-off the area of bad roof and that no miners worked, traveled or were required to enter into the area at issue.

Importantly, we note that in the circumstances presented, the Secretary agreed with Cyprus that installation of additional roof support was neither necessary nor desirable. The Secretary also agreed with Cyprus that the safest and most appropriate course to follow in eliminating the danger was to allow continuation of the normal longwall

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5/ For example, section 303(d)(1) of the Mine Act provides:

> If [a mine operator] finds a condition which constitutes a violation of a mandatory health or safety standard or any condition which is hazardous to persons who may enter or be in such area, he shall indicate such hazardous place by posing a "DANGER" sign conspicuously at all points which persons entering such hazardous place would be required to pass .... No person, other than an authorized representative of the Secretary or a State mine inspector or persons authorized by the operator to enter such place for the purpose of eliminating the hazardous condition therein, shall enter such place which such sign if so posted.

30 U.S.C. 863(d)(1). (emphasis added).

mining process so as to mine past the problem area. Thus, the remedial action required by the Secretary here was nothing more than what Cyprus itself had determined was necessary in order to prevent miners from being exposed to the hazard presented: prohibiting access into the tailgate and continuing the normal mining process until mining progressed beyond the dangerous area.

In sum, we conclude that a violation of section 75.202(a) was not established because, under the circumstances of this case, the area of bad roof at issue was not an area where persons worked or traveled. Accordingly, the judge's finding of a violation is reversed, and the citation and civil penalty are vacated.

Finally, Cyprus argues that the judge erred in affirming the imminent danger withdrawal order. Cyprus argues that no persons were exposed to the hazardous roof conditions since it prohibited access to the area and that the nature of the cited roof conditions could not reasonably have been expected to cause death or serious harm before they were abated.

Preliminarily, we note that an imminent danger order need not be based upon a violation of a mandatory standard in order to be valid. See S. Rep. No. 461, 95th Cong., 1st Sess. 39 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 1317 (1978)("Legis. Hist."); Freeman Coal Mining Co., 1 IBMA 197, 207-08 (1973), aff'd, Freeman Coal Mining Co. v. IBMA, 504 F.2d 741 (7th Cir. 1974). Accordingly, despite our vacation of the citation alleging a violation of section 75.202(a), the question of the validity of the imminent danger order remains.

The Mine Act defines an 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). This definition is unchanged from the definition contained in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1976)(amended 1977)(the "1969 Coal Act"). The Senate report on the Mine Act explains that the Secretary's authority to issue imminent danger orders "should be construed expansively by inspectors and the Commission." S. Rep. No. 181, 95th Cong., 1st Sess. 38 (1977), reprinted in Legis. Hist. Mine Act.

In discussing the concept of imminent danger, we recently stated:

> In analyzing [the] definition [of imminent danger], the U.S. Courts of Appeals have eschewed a narrow construction and have refused to limit the concept of imminent danger to hazards that pose an immediate danger. See, e.g., Freeman Coal Mining Co. v. Interior Bd. of Mine Op. App., 504 F.2d 741 (7th Cir. 1974). Also, the Fourth Circuit has rejected the notion that a danger is imminent only if there is a reasonable likelihood that it will

> result in an injury before it can be abated. Eastern Associated Coal Corp. v. Interior Bd. of Mine Op. App., 491 F.2d 277, 278 (4th Cir. 1974). The court adopted the position of the Secretary that "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." 491 F.2d at 278 (emphasis in original). The Seventh Circuit adopted this reasoning in Old Ben Coal Corp. v. Interior Bd. of Mine Op. App., 523 F.2d 25, 33 (7th Cir. 1975).

Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989).

The Seventh Circuit has further recognized the importance of the inspector's judgment in issuing an imminent danger order:

> Clearly, the inspector is in a precarious position. He is entrusted with the safety of miners' lives, and he must ensure that the statute is enforced for the protection of these lives. His total concern is the safety of life and limb.... We must support the findings and the decisions of the inspector unless there is evidence that he has abused his discretion or authority. (emphasis added).

Old Ben, supra, 523 F.2d at 31; Rochester & Pittsburgh, 11 FMSHRC at 2164.

We disagree with Cyprus that because it had prohibited access to the hazardous area, the Secretary's imminent danger order was invalid. Under section 107(a) of the Act, the Secretary is responsible not only for determining the area of the mine affected by the danger and removing miners from such area but also determining when miners may safely re-enter the affected area because the conditions or practices that caused the danger no longer exist. We cannot conclude that the inspector abused his discretion in issuing an order prohibiting re-entry into the area until the hazard was eliminated. 6/

6/ Under the 1969 Coal Act, the Department of Interior s Board of Mine Operations Appeal ("Board") addressed the legal effects of an operator's voluntary withdrawal of miners upon the validity of imminent danger withdrawal orders. Clinchfield Coal Co., 1 IBMA 33 (1971); The Valley Camp Coal Co., 1 IBMA 243 (1972). In these decisions, the Board emphasized that an imminent danger withdrawal order is more extensive than the mere withdrawal of miners; it also confers jurisdiction to prohibit re-entry until it is determined that the imminent danger no longer exists. The Board accordingly held that the issuance of the withdrawal orders involved in those proceedings was proper even though the operator had voluntarily withdrawn the miners from the mine before the issuance of the orders. Clinchfield, supra, 1 IBMA at 41; Valley

The hazards of roof falls are well known. See, e.g., UMWA v. Dole, 870 F.2d 662, 664 (D.C. Cir. 1989) (citing the preamble to the promulgation of MSHA's current roof support standards, 53 Fed Reg. 2354 (January 27, 1988). Here, Inspector Gibson found that the roof was slanted downward, broken, and fractured. Tr. 30, 31-32. He also found pieces of roof about one foot wide and two or three feet in length on the floor. Tr. 30, 44. He found two roof bolts with bearing plates about 16 inches below the roof line. Tr. 36. He believed that the roof looked so unstable that it could fall at any time, and that if it did fall, it could cause serious physical harm or death. Tr. 31. Cyprus' witnesses also acknowledged that the roof conditions in the cited area. Tr. 96, 99, 111, 125. Cyprus' section foreman Moss testified that "[t]here were some huge cracks the cribs squeezed together" and that the roof "looked really heavy." Tr. 109.

Thus, we conclude that substantial evidence supports the judge's affirmance of the order. The inspector did not abuse his discretion in issuing the order to control re-entry into an area of bad roof..

Camp, supra, 1 IBMA at 248.

III.

Accordingly, we affirm the judge's action in permitting the Secretary to modify the citation and order, we reverse the judge's finding that Cyprus violated section 75.202(a), we vacate the citation and civil penalty assessed for the violation, and we affirm the imminent danger withdrawal order.

Commissioner Backley concurring in part and dissenting in part:

I respectfully dissent from that part of the majority decision holding that no violation of 30 C.F.R. 75.202(a) occurred.

There is no factual dispute regarding this issue. The cited roof was in a highly dangerous condition. Indeed today we all conclude that the roof condition constituted an imminent danger. The gravity of the situation was such that MSHA agreed with the operator's determination that the risk involved in any remedial effort to support the roof was unacceptable. The safer course of action was to danger-off the area and mine beyond the dangerous area. This the operator did. Indeed, the record indicates that no miners ventured past the yellow tape used by the operator to danger-off the subject area.

In evaluating the legal effect of the foregoing, the majority has concluded that no violation occurred "...because, under the circumstances of this case, the area of bad roof at issue was not an area where persons worked or traveled." Slip op. at 8.

I cannot agree with this cramped construction of the cited regulation. A reasonable reading of the majority's opinion would lead one to conclude that it is now possible to immunize an area of the mine from MSHA enforcement if the area is successfully dangered-off. Whether or not the majority intends to convey that message is beside the point. In my opinion such a conclusion is wrong and dangerously contrary to Congressional intent.

I have carefully reviewed the record in this matter and find the Secretary's arguments on this issue to be compelling. The operator's action in dangering-off the area was not only "...in accordance with accepted safe-mining practice", as determined by the majority, Slip op. at 7, but was in fact mandatory. Indeed the operator's obligation under the law goes beyond merely dangering-off the hazardous area. The roof must be supported or controlled. In this case the cited roof was neither supported nor controlled as required by the regulation. The imminently dangerous condition was ultimately abated by mining past the cited area.

The majority, however, does not directly reach the issue of whether the roof was controlled. The majority has determined that the Secretary failed to prove that this was an area where persons worked or traveled. In so concluding, the majority has apparently rejected the well-reasoned arguments to the contrary urged by the Secretary. Specifically, the Secretary argues that ventilation and on-shift examinations required the presence of miners in the cited area. The Secretary also lists other necessary maintenance functions pertaining to the roof, water pump and water lines which would ordinarily cause miners to be in the cited area. Most significantly, the Secretary argues that under the requirements of 30 C.F.R. 75.215(a) the operator is required to

maintain a safe travelway out of the section through the subject tailgate side the longwall. In response to these arguments, Cyprus concedes that although the preshift and onshift examinations did not require miner exposure to the cited area, the weekly ventilation examination required under 30 C.F.R. 75.305 was not a factor in this case because the subject condition existed for approximately five days. Oral arg. at 9-10. We are left with the implication that had the condition existed beyond a week's time, compliance with the examination requirement would have resulted in miner exposure to the cited roof.

In response to the Secretary's concerns regarding necessary maintenance functions which would ordinarily cause miners to work under the cited roof, Cyprus admitted that if the cited area had not been dangered-off the installation of supplemental roof support and the maintenance of pumps "would put them into this particular area." Oral arg. 11-12.

Finally and most significantly, in responding to the Secretary's assertion that because 30 C.F.R. 75.215(a) requires that the tailgate side of the longwall be maintained as a safe travelway out of the section Cyprus cannot simply eliminate the subject tailgate entry as a place where persons work or travel, Cyprus argues that the headgate could be used as an escape route, or as a last resort, the subject tailgate could have been used since it was not physically blocked. Oral arg. at 8.

In consideration of the foregoing, it is clear that the subject tailgate was "indisputably, normally an area where persons work or travel." Sec. brief at 18, Oral arg. at 33. Accordingly, I conclude that the regulatory threshold "where persons work or travel" has been met in this case. To do otherwise, as the majority has reasoned, risks the dangerous misapprehension that compliance can be achieved with tape and board.

In reaching its conclusion of no violation, the majority places significant importance upon the fact that " ...the remedial action required by the Secretary was nothing more than what Cyprus itself had determined was necessary in order to prevent miners from being exposed to the hazard presented..." Slip op. at 7-8. I share that concern. I also agree that Cyprus did not fail to take remedial action. This concern however is not relevant to the issue of whether the regulation was violated. The regulation contains no such exception. The roof where persons work or travel shall be supported or otherwise controlled. The fact that MSHA and Cyprus agreed that the dangerous roof was best left undisturbed, does not in any way diminish or alter the fact that the subject roof, located as it was within 36 inches of the tailgate shield 126, was in violation of 30 C.F.R. 75.202(a). The manner in which compliance is achieved is not an element relating to the determination of whether a violation occurred. It is, however, expressly relevant in considering the appropriate amount of civil penalty to be assessed. 30 U.S.C. Section 820(i).

Accordingly, I have concluded that the subject area was clearly a place where persons work or travel and that the cited roof was not supported or controlled and that therefore a violation of 30 C.F.R. 75.202(a) occurred.

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