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WYOMING FUEL V. MSHA
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
August 29, 1991

WYOMING FUEL COMPANY

v. Docket No. WEST 90-238-R

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

BEFORE: Backley, Acting Chairman; Doyle, Holen and Nelson, Commissioners

DECISION

BY THE COMMISSION:

In this contest proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988) ("Mine Act" or "Act"), Wyoming Fuel Company ("WFC") seeks review of a decision by Commission Administrative Law Judge John J. Morris, affirming an imminent danger order of withdrawal issued pursuant to section 107(a) of the Mine Act. 1/ The judge held that the section 107(a) order was validly issued when methane concentrations in excess of 1.5% were detected in a return entry of WFC's

1/ Section 107(a) of the Mine 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 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an order requiring the operator of such mine to cause all persons, except those referred to in section [104(c)], to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary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. The issuance of an order under this subsection shall not preclude the issuance of a citation under section [104] or the proposing of a penalty under section [110].

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

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Golden Eagle Mine. 12 FMSHRC 1664 (August 1990) (AIJ). The Commission granted WFC's petition for discretionary review. For the reasons that follow, we reverse the judge's decision.

I.

The essential facts are undisputed. On June 12, 1990, several inspectors of the Department of Labor's Mine Safety and Health Administration ("MSHA") including Inspector Don Jordan, were conducting an inspection of WFC's Golden Eagle Mine, located in Weston, Colorado. This underground mine uses a combination of continuous miner and retreating longwall mining methods.

At about 7:50 a.m., Inspector Jordan, General Mine Foreman Steve Salazar, and miner representative Ralph Sandoval approached the northwest No. 1 tailgate section of a longwall unit. As they entered the section, they were informed by the section mechanic, Ben Chavez, who was on his way to deenergize the longwall unit, that methane gas in excess of 1.5% had been detected by foreman Rich Kretaski while Kretaski was examining the return entry. Kretaski had then ordered the immediate withdrawal of all personnel from the area and had posted the entry point of the unit to prevent the return of any of the withdrawn employees.

Jordan and Salazar went to the No. 1 return entry and, using hand held methane detectors, measured the methane gas level at 1.7%. In the No. 4 return, gas concentrations measured from 0.9 to 1%, and at the face, from 0.3 to 0.8%. After leaving the face area, the two men travelled approximately 1,400 feet down the return entry, where further methane measurements ranged from 1.4 to 1.7%. Tr. 89.

At 8:10 a.m., Inspector Jordan issued the contested section 107(a) order, which stated:

Methane (CH₄) in excess of 1.5% was detected with a permissible hand held methane detector. Was present in return entry of the NW #1 tail gate section.... Management had taken steps to correct the condition prior to the issuance of this order. The order was issued to safeguard the health and safety of personnel and to insure proper corrective action.

At 2:30 p.m. the same day, Jordan modified the order to permit mining when the methane concentrations dropped below 1%. The order was terminated on June 21, 1990.

At the hearing, Inspector Jordan indicated three factors supporting his decision to issue the imminent danger order. He stated that the mine was a very gassy mine and that methane concentrations can escalate rapidly. He also stated his belief that 30 C.F.R. 75.309(b) requires an inspector

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to issue such order when methane reaches 1.5% in a return entry. 2/ Tr. 25-27. He further testified that a 1.5% concentration of methane in a return entry is not in itself an imminent danger. Tr. 37. He stated that he issued the withdraw order because 30 C.F.R. 75.309(b) requires him to withdraw miners whenever the methane level exceeds 1.5%.

In his decision, the judge first considered whether existing conditions constituted an imminent danger when the order was issued. He concluded: "On the facts presented here, it would appear that no condition of imminent danger existed within the ordinary meaning of section 107(a). 12 FMSHRC at 1670. His determination was based on the considerations that the methene concentrations had not reached an explosive range and that the inspector and mine superintendent would not have walked some 1,400 feet up the entry if they had believed an imminent danger existed.

Nevertheless, the judge pointed to the requirement of section 303(i)(2) of the Mine Act that all persons "shall be withdrawn" from a return entry of a mine endangered by a concentration of methane of 1.5% or more. He opined that whether "the described methane concentrations are held to be a per se imminent danger' ... or a Congressionally mandated imminent danger is not critical to a resolution of the issues." 12 FMSHRC at 1670. He rejected WFC's argument that "the presence of 1.7% methane does not trigger a section 107(a) order because there can be no per se imminent danger under the Act, stating:

WFC's argument should be addressed to the Congress, not to the Commission. The statute, as stated above, clearly defines a 1.5 percent concentration methane to be an area of the mine that is endangered. It requires withdrawal of all miners from such an area.

12 FMSHRC at 1671.

2/ 30 C.F.R. 75.309(b), a mandatory safety standard, repeats verbatim section 303(i)(2) of the Mine Act, which provides:

If, when tested, a split of air returning from any working section contains 1.5 volume per centum or more of methane, all persons, except those persons referred to in section [104(d)] of this [Act], shall be withdrawn from the area of the mine endangered thereby to a safe area and all electric power shall be cut off from the endangered area of the mine, until the air in such split shall contain less than 1.0 volume per centum of

methane.

30 U.S.C. 863(i)(2).

The judge also stated that the proper forum in which to seek an alternative method of enforcing section 75.309(b) without resort to a section 107(a) order is in a rulemaking proceeding. 12 FMSHRC at 1672. Finally, the judge rejected WFC's argument that proposed changes in the Secretary's ventilation regulations, which would not require the withdrawal of miners until the methane concentration reaches 2.0%, invalidated the Secretary's position. The judge stated that the case had to be decided on existing regulations and not on proposed changes, which might never be adopted. *Id.*

II.

On review, WFC contends that the 1.5% concentration of methane in the return entry did not constitute an imminent danger and that, lacking a finding of imminent danger by the judge, the imminent danger order was invalidly issued. The Secretary argues that the presence of methane in concentrations exceeding 1.5% in a return entry constitutes an imminent danger, justifying the use of a section 107(a) order to require the withdrawal of all miners.

We conclude that substantial evidence amply supports the judge's finding that "no condition of imminent danger existed within the ordinary meaning of section 107(a)." 12 FMSHRC at 1670. The Secretary did not contest this finding on review. The record clearly demonstrates that at the time the section 107(a) order was issued, the concentration of methane had not reached an explosive level, a mining activity had been suspended, the miners had been withdrawn, and electric power to the unit was being deenergized. Accordingly, we affirm the finding of the judge that no imminent danger existed at the time the order of withdrawal was issued.

The Mine Act does not empower the Secretary to issue a section 107(a) order except upon the finding of an imminent danger. We reject the Secretary's implicit argument that section 303(i)(2) of the Mine Act authorizes the use of a section 107(a) order regardless of whether an imminent danger is found. The testimony of Inspector Jordan suggests that he was trained to issue a section 107(a) order to implement the withdrawal of miners required under 30 C.F.R. 75.309. He testified that "when I encounter 1.5% methane regardless of the situation, if I am in fact present. ... I am obligated to issue an imminent danger" order. Tr. 36.37. Thus, he issued the order, not because he found that the specific conditions in the mine created an imminent danger, but because he felt obligated to issue such an order whenever the level of methane exceeds 1.5% in return air.

3/ The highest concentrations of methane measured by Inspector Jordan were 1.8% in the No. 1 return entry, 1.2% in the No. 4 return entry and 0.8% at the face. Tr. 22.25; 88-89. The inspector further testified that methane is explosive only when the concentration is between 5 and 15% and is most explosive at 9%. Tr. 45.46. The inspector did not detect an explosive mixture of methane at any location in the mine.

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The language of section 303(i)(2) of the Mine Act directs mine operators to withdraw miners and to cut off electric power when a concentration of methane in excess of 1.5% is detected in a return entry of an underground coal mine. The relevant legislative history explains the reason for the required withdrawal of miners from the endangered areas:

This section requires that men be withdrawn by the operator or inspector, if he is present, and power shut off from a portion of a mine endangered by a split of air returning from active underground workings containing 1.5 percent of methane.

The presence of 1.5 percent of methane in the air current returning from active underground working places indicates that considerably larger amounts of methane may be accumulating in the air as places in the mine through which the current of air in such split has passed. Safety requires that employees be withdrawn from the portion of the mine which is endangered by the possibility of an explosion of any such accumulation of methane, and that all electric power be cut off from such portion of the mine, until the cause of the high percentage of methane in such returning air is ascertained and the quantity of methane in such returning air is reduced to no more than 1.0 percent.

S. Rep. No. 411, 91st Cong., 1st Sess. 59 (1969), reprinted in Senate Subcommittee on Labor of the Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 185 (1975) (Legis. Hist.)

As the legislative history explains, Congress was concerned that a 1.5% concentration of methane in a return entry indicates that "considerably larger amounts of methane in a return entry may be accumulating" in other areas, creating "the possibility of an explosion." *Id.* (emphasis added). Nowhere in the language of the statute or in its legislative history do we find support for a conclusion that a concentration of 1.5% of methane constitutes, by its very nature, an imminent danger as that term is used in the statute. 4/

4/ The Interior Board of Mine Operations Appeals, in *Pittsburgh Coal Company*, 2 IBMA 277 (1973) concluded that, under section 303(h)(2) of the Coal Act of 1969, the presence of 1.5% of methane in a working place per se warrants a finding of 'imminent danger'. *Id.* at 278. The Board's "finding

was based on the reasoning of the administrative law judge that since Congress required the "drastic action of withdrawal, then it must be because the situation was viewed as one of imminent danger." *Id.* at 282. We do not agree. Neither in Pittsburgh, nor in the case now before us, was evidence presented by the Secretary to support a finding that a concentration of 1.5% of methane in and of itself constitutes an imminent danger.

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We reject the Secretary's argument that the withdrawal of miners under section 303(i)(2) of the Mine Act (section 75.309(b)) warrants a finding of imminent danger and the issuance of a section 107(a) order of withdrawal. This argument superimposes, improperly we believe, the Secretary's authority to issue a section 107(a) order of withdrawal onto the provisions of section 303(i)(2). Section 303(1)(2) is a mandatory safety standard; it is violated only when an operator fails to withdraw miners and shut off power when methane concentrations reach 1.5% in return air. The presence of such concentration is not by itself a violation of the standard.

Further, nowhere in the language of section 303(i)(2) or its legislative history are the terms "imminent danger", or "imminent danger order of withdrawal" to be found. The statute simply states that "all persons ... shall be withdrawn," and the legislative history makes clear that the miners must be withdrawn "by the operator or inspector, if he is present." The Secretary's mandatory standard at 30 C.F.R. 75.309(b) reiterates the statutory provision, requiring that all persons "shall be withdrawn." The responsibility for complying with the mandatory standard rests with the operator. Unlike section 107(a), section 303(i)(2) and 75.309(b) are directed to the operator rather than to the Secretary. A violation of the mandatory standard occurs if and when an operator fails to withdraw the miners and cut off electric power as required by the standard. The operator should be cited under section 104, 30 U.S.C. 814, for such a failure. Then failure to abate the violation in a timely manner would result in the issuance of an order of withdrawal under section 104 and the withdrawal of miners would thus be effected. 5/

Congress has provided the Secretary with considerable authority to order the withdrawal of miners to ensure their safety for other than imminent danger conditions. Such withdrawal may be required by an inspector pursuant to section 104(b) of the Act, 30 U.S.C. 814(b), when the operator has failed to abate a violation of a mandatory standard in a timely manner or pursuant to section 104(d), 30 U.S.C. 814(d), based on a finding of "unwarrantable failure" on the part of an operator. Section 103(k), 30 U.S.C. 813(k), authorizes an inspector to issue orders requiring the withdrawal of miners as he deems appropriate in the event of "any accident" and section 107(b)(2), 30 U.S.C. 817(b)(2), permits an inspector to order the withdrawal of miners under certain conditions short of imminent danger, after specified procedures are followed.

Substantial evidence supports the judge's finding that the conditions present at the mine did not constitute an imminent danger. The language of the Mine Act and the legislative history establish that section 303(i)(2) is addressed to mine operators and requires that they remove miners and cut off

electric power when the level of methane in the return split of air reaches

5/ Of course, if an inspector does find that conditions at the mine create an imminent danger, as defined in section 3(j), 30 U.S.C. 802(j), he is required to issue a section 107(a) order.

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1.5%, because an explosive level of methane "may be accumulating at places in the mine through which the current of air in such split has passed." Legis. Hist. at 185. In this case, Inspector Jordan inspected the area through which the current of air passed and found that, in fact, explosive levels of methane were not accumulating at the mine. Neither section 303(i)(2) nor section 107(a) provides that such a condition constitutes an imminent danger. The Secretary is not authorized to issue an imminent danger withdrawal order unless her authorized representative, in this case the inspector, finds that an imminent danger is present.

For the foregoing reasons, we reverse the judge's decision and vacate the contested section 107(a) order.

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