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MSHA V. UTA POWER & LIGHT
DDATE:
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TTEXT:
October 31, 1991
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

Docket No. WEST 90-285-R

UTAH POWER & LIGHT COMPANY,
MINING DIVISION

BEFORE: Backley, Doyle, Holen and Nelson, Commissioners
DECISION

BY THE COMMISSION:

This review proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. • 801 et seq. (1988) (the "Mine Act" or "Act"). It involves the validity of a withdrawal order issued by the Secretary of Labor to Utah Power & Light Company, Mining Division ("UP&L"), alleging that the limited visibility of operators of EIMCO 915 diesel scoops ("scoops") created an imminent danger. The imminent danger withdrawal order was issued by an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") under section 107(a) of the Mine Act, 30 U.S.C. • 817(a), at UP&L's Cottonwood Mine. ¹ The withdrawal order did not charge UP&L with violation of any of the safety standards promulgated by the Secretary and no citations or orders were issued under section 104 of the Act, 30 U.S.C. • 814, in conjunction with the section 107(a) withdrawal order.

¹ Section 107(a) of the Mine 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an order requiring the operator of such mine to cause all persons, except those referred to in section [104(c)], to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions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.

examination of one of the scoops.

3 Section 103(g) of the Mine Act provides, in pertinent part:

Whenever a representative of the miners has reasonable grounds to believe that a violation of a

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section 103(g) complaint alleged that visibility limitations on the scoops created an imminent danger.

On May 22, 1990, MSHA Inspector Fred Marietti was sent to investigate the complaint. Inspector Marietti determined that safe operation of the scoops depended upon the adoption of safe working procedures in the haulageways. He noted that traffic rules needed to be followed and other precautions needed to be taken to operate the scoops safety. He concluded by stating that "[a]t the time of this investigation, the problems addressed have been implemented or are being worked on." Exh. A-7. He issued no citations, withdrawal orders or safeguards.

B. Order of withdrawal

Subsequently, MSHA Inspector Jerry Lemon was instructed by the MSHA District Manager to take a "second look" into the complaint. Tr. 29.

Inspector Lemon inspected the mine on July 12, 1990, and issued the section 107(a) order of withdrawal that is the subject of this proceeding, requiring UP&L to withdraw both scoops from the mine. The order states that "[s]afe operation of the EIMCO 915 diesel scoop ... could not be done in that ... serious vis[i]bility problems existed..." Exh. G-1.

Inspector Lemon performed his inspection in two parts. First, he asked UP&L for permission to examine a scoop on the surface, where he performed a number of visibility tests. In one test a miner was placed four feet from the side of the scoop opposite the operator's cab and was asked to walk parallel to the scoop towards the radiator end of the scoop. Exh. G-1; 12 FMSHRC at 1714. During this test, the scoop operator could not see this miner for a distance of approximately 24 feet as he walked parallel to the scoop. Id.

The inspector also performed a number of tests underground. In one test, the scoop was parked in an offside turning position (as if making a left turn into a crosscut) and a pickup located in the crosscut was backed away

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mandatory health or safety standard exists, or an imminent danger exists, such representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual miners referred to therein shall

not appear in such copy. Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provisions of this title.

30 U.S.C. • 813(g).

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from the scoop. Exh. G-1; 12 FMSHRC at 1715. The operator could not see the pickup during this test but could see the glare of the pickup's lights on the mine roof. Id. After performing these tests, Inspector Lemon issued the order of withdrawal later that day. The following day the inspector modified the order to describe accidents that the inspector believed were caused by the visibility limitations of the scoops and to correct a portion of the original order. Exh. G-1.

UP&L contested the order and an expedited hearing was held on July 19, 1990. On September 7, 1990, after the judge's decision was issued, the order was terminated when certain modifications were made to the scoops.

In concluding that the visibility limitations associated with the scoops presented an imminent danger, the judge relied on the Commission's decision in Rochester & Pittsburgh Coal Company, 11 FMSHRC 2159 (November 1989).

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judge first concluded that an "emergency" situation is not a prerequisite to the existence of an imminent danger. 12 FMSHRC at 1722. Based on his reading of Rochester & Pittsburgh, the judge then evaluated the potential risk of the scoops causing serious physical harm at any time. Id. The judge credited Inspector Lemon's testimony that a miner could be killed or seriously injured if the condition was allowed to continue. 12 FMSHRC 1722-23. After rejecting the arguments made by UP&L, the judge held that he could "find no basis for concluding that Inspector Lemon abused his discretion or authority in the issuance of an imminent danger withdrawal order in this matter." 12 FMSHRC at 1725. The judge then stated:

It is concluded that the conditions observed by the Inspector and described in the record could reasonably have been expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed, and that the use of the [scoops] with the severe visibility limitations described herein above created a significant potential of causing serious physical harm at any time.

Id.

II.

Disposition of Issues

The issue in this case is whether the visibility limitations of the scoops created an imminent danger requiring their immediate removal from service. UP&L disputes that the danger presented by the visibility limitations of the scoops was imminent at the time the order of withdrawal was

issued and argues that the alleged hazard was not so serious or imminent that immediate withdrawal of miners was required. (Footnote 4) We hold that the secretary

4 UP&L also argues that Inspector Lemon's alleged hesitation and delay in issuing the imminent danger order supports its view that the order is not valid. The judge rejected UP&L's argument. 12 FMSHRC at 1723-25. We agree with the judge that "[f]orcing a hasty decision may not always be consistent with either

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failed to prove that the visibility limitation presented a danger that was imminent.

A. Requirement of imminence

The word "imminent" is defined as "ready to take place: near at hand: impending...: hanging threateningly over one's head: menacingly near." Webster's Third New International Dictionary (Unabridged) at 1130 (1986). The language of the Act and its legislative history make clear that Congress intended that there must be some degree of imminence to support a section 107(a) order.

The term "imminent danger" is defined in section 3(j) of the Act to mean "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 was not changed from the definition contained in the Coal Mine Health and Safety Act of 1969 30 U.S.C. • 801 et seq. (1976)(amended 1977)(the sound mine safety enforcement or justice." 12 FMSHRC at 1725. In any event, Inspector Lemon reasonably believed that the scoops were out of service during the time he was deciding what action to take. "Coal Act"). The Senate Report for the Coal Act states that an imminent danger is present when "the situation is so serious that the miners must be removed from the danger forthwith when the danger is discovered without waiting for any formal proceeding or notice." S. Rep. No. 411, 91st Cong., 1st Sess 89 (1969) reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess. Part 1 Legislative History of the Federal Coal Mine Health and Safety Act of 1969 at 215 (1975)("Coal Act Legis. Hist.") It further states that the "seriousness of the situation demands such immediate action" because "[d]elays, even of a few minutes, may be critical or disastrous." The Conference Report for the Coal Act states that imminent danger orders are concerned with "any condition or practice...which may lead to sudden death or injury before the danger can be abated." Coal Act Legis. Hist. at 1599 (emphasis added). Finally, the Senate Report for the Mine Act states that imminent danger orders deal with "situations where there is an immediate danger of death or serious physical harm." (Footnote 5) S. Rep. No. 181, 95th Cong., 1st Sess. 38 (1977) reprinted in Senate Subcommittee on Labor, Committee on Human Resources,

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Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 626 (1978)("Mine Act Legis. Hist.")(emphasis added). Thus, the hazard to be protected against by the withdrawal order must be impending so as to require the immediate withdrawal of miners.

The role of section 107(a) orders in the statutory scheme of enforcement
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sound mine safety enforcement of justice. "12 FMSHRC at 1725. In any event, Inspector Lemon reasonably believed that the scoops were out of service during the time he was deciding what action to take.

5 Several courts have rejected the arguments of mine operators that imminent dangers orders can be issued only for conditions that create an immediate danger of death or serious injury. See, e.g. *Old Ben Coal Corp. v. IBMA*, 523 F. 2d 25 at 32-33 (7th Cir. 1975). Nevertheless, the Senate Report makes clear that imminence is required.

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is based on a requirement of imminence. 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." *Coal Act Legis. Hist.* at 215. As a consequence, an inspector does not have the authority to issue a section 107(a) order in situations where the danger does not necessitate the immediate removal of miners. Thus, the inspector must determine whether the hazardous condition presents a danger of death or serious injury that is imminent. Without considering the "percentage of probability that an accident will happen," the inspector must determine whether the condition presents an impending threat to life and limb. *Mine Act Legis. Hist.* at 626. Only by limiting section (a) withdrawal orders to such impending threats does the imminent danger provision assume its proper function under the Mine Act.

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. Section 104(d)(1); 30 U.S.C. • 814(d)(1). A violation is of a significant and substantial ("S&S") nature if "there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Company*, 3 FMSHRC 822, 825

(April 1981). In that case, the Commission held that to be of an S&S nature, a cited condition "need not be so grave as to constitute an imminent danger."

3 FMSHRC at 828.

In Rochester & Pittsburgh, the Commission referenced Congress's intention that the focus should be on an examination of the "potential of the risk to cause serious physical harm at any time." 11 FMSHRC at 2164. The judge appeared to base his decision on his interpretation of the phrase "at any time." The Commission used the phrase "potential of the risk to cause injury" to make clear that the percentage of probability of an injury is not the focus of the inquiry. It appears that Judge Lasher interpreted the phrase "at any time" to mean "at any time in the future," thereby eliminating any requirement that the danger be imminent or impending. The Commission used the phrase "at any time" in the sense of "at any moment." Where an injury is likely to occur at any moment, and an abatement period, even of a brief duration, would expose miners to risk of death or serious injury, the immediate withdrawal of miners is required.

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. An inspector, albeit acting in good faith, abuses his discretion in the sense of making a decision that is not in accordance with law when he orders the immediate withdrawal of miners under section 107(a) in circumstances where there is not an imminent threat to

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miners. 6

B. Analysis of the record

A review of the record as a whole demonstrates that the Secretary failed to prove that the visibility limitation of the scoops presented a danger that was imminent.

1. Visibility measurements

UP&L does not dispute the results of the visibility tests, but contends that the tests do not demonstrate the presence of an imminent danger. Substantial evidence supports the judge's finding that, during the surface test, the scoop operator could not see a miner who was walking parallel to and four feet from the side of the scoop opposite the operator's cab, for a distance of approximately 24 feet. 12 FMSHRC at 1714. Substantial evidence also supports the judge's finding that, during an underground test, while the scoop was parked in an off-side turning position, the operator of the scoop could not see a pickup as it backed away from the scoop. 12 FMSHRC at 1715. The judge relied on these tests, along with the history of prior accidents, in concluding that an imminent danger existed. While he noted that UP&L's operating practices and procedures were designed to address the hazard associated with the scoop's visibility limitations, he concluded that they "did not change the testing and measuring results." 12 FMSHRC at 1719. UP&L argues that because these tests did not take actual mining conditions or practices into account, the tests were incapable of proving that the scoops presented an imminent danger. UP&L contends that no imminent danger existed because scoop operators could identify the presence of miners and other

vehicles during actual mining operations and could mitigate the danger through the use of safe operating procedures.

The tests performed by the inspector do not, by themselves, establish the existence of an imminent danger because they did not take into account actual working conditions. For example, the underground test described above did not duplicate actual operating conditions. The scoop was stationary during the entire test and was parked so that the blind spot was in the

6 Abuse of discretion may be broadly defined to include errors of law. See generally, *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 185-86 (1973); *NL Industries, Inc. v. Department of Transportation*, 901 F.2d 141, 144 (D.C. Cir. 1990); *U.S. v. U.S. Currency, in the Amount of \$103,387.27*, 863 F.2d 555, 561 (7th Cir. 1988); *Bothyo v. Moyer*, 772 F.2d 353, 355 (7th Cir. 1985) ("abuse of discretion may be found only if there is no evidence to support the direction decision or if the decision is based on an improper understanding of the law"); *Bosma v. United States Dept. of Agriculture*, 754 F.2d 804, 810 (9th Cir. 1984) (the choice of sanction is largely within an agency's discretion; the reviewing court may overturn it only if it is unwarranted in law or unjustified in fact); *Taylor v. United States Parole Commission*, 734 F.2d 1152, 1155 (6th Cir. 1984) ("Abuse of discretion' is a phrase which sounds worse than it really is."); *Beck v. Wings Field*, 122 F.2d 114 (3rd Cir. 1941).

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direction of the crosscut. Exh. G-5. As a result, the pickup was not visible for a considerable distance. In an operating situation, however, the scoop would complete the turn and the crosscut would become visible because it would no longer be in the operator's blind spot. Tr. 189. An analysis of the operating procedures used by scoop operators is therefore required.

2. Haulage operating procedures

UP&L's argument is that at the time the order was issued, no imminent danger existed because physical conditions and operating procedures in the haulageways greatly reduced any visibility problems presented by the scoops. In particular, UP&L relies on the fact that it strengthened its haulage safety procedures in response to the UMWA's letter of May 13, 1990 and Inspector Marietti's investigation of May 22. See Exhs. A-5, A-6, A-7 & A-8. It is undisputed that UP&L made a number of improvements in the operating procedures

prior to Inspector Lemon's July 12, 1990 inspection. In May and June 1990, UP&L: (1) installed brighter lighting systems on scoops (quartz halogen lights), (2) modified the fenders, cab and engine cowling on scoops to improve visibility, (3) required pickups and other small vehicles to use other roadways where feasible, (4) installed strobe lights on pickups to be used when parked, (Footnote 7) (5) required all pickups and other small vehicles to yield right-of-way to scoops by pulling into crosscuts whenever a scoop approaches, (6) required all vehicles, especially pickups, to maintain a safe

rate of speed, (7) required the flashing of lights and the sounding of horns at all corners and intersections, (8) required that pickups be parked in crosscuts and prohibited the parking of vehicles in the haulage entries, and (9) eliminated the visibility limitations at one of the most severe dips in the mine by cutting back the roof. Exh. A-8. These procedures were communicated to all affected miners. Tr. 172-73.

Scoop operators, aware of the scoop's visibility limitations, testified about the operating procedures they use to reduce the risk of collisions and accidents. Tr. 235-36. They stated that the improved haulage procedures introduced in May and June 1990 reduced the risk of accidents and collisions. For example, pickups had frequently been parked in the haulage entries or at the intersections of crosscuts and entries where they could not be seen. As a result, several collisions had occurred. Under the procedures in effect at the time of the withdrawal order, parking in such locations was prohibited and, more importantly, strobe lights or flashers were used on the pickups. Tr. 125-26. The operators testified that, as a result of the strobe light policy, they are now aware of the presence of such vehicles and can stop the scoop, get out and move the pickup if it is in the way. Tr. 126; 131-33; 232-33; 243; 279. They may not always be able to see the parked pickup from the

7 At the time of Lemon's inspection, strobe lights had been installed on about 75% of pickups. Pickup drivers were required to use yellow flashers until strobe lights were installed. The strobe lights, similar to the blue lights on the top of police cars, are permanently mounted on top of the pickups' cabs. The yellow flashers, similar to yellow flashers used on road construction barricades, are placed on top of the cab by the driver using the attached suction cup.

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cab of the scoop, but the flashing light alerts them to its presence so that they can take preventive action. Id. They stated that they can detect a moving pickup from the glare of its lights. Tr. 231-32; 272.

Scoop operators testified further that the new halogen lights made it easier to see and be seen. Tr. 230-32, 285-87. Scoop operators flash their lights and blow their air horns when making turns and at dips in the entry. Tr. 236-37. They also testified that pedestrians are rarely in the haulageways where scoops travel and that such pedestrians are easily spotted because of the cap light and reflective tape on their hard hat, and the reflective tape on their clothing. Tr. 252-56; 273; 280; 285-86; 296; 309. The scoop operators acknowledged that visibility from a scoop is limited, but testified that that visibility is often restricted when operating mining equipment. They are of the opinion that the scoops can be operated without incident as long as safe operating procedures are followed. Tr. 135-36; 228-29; 231; 243-44; 274-75; 279-80.

Inspector Lemon was aware of UP&L's work rules but he did not believe that those work rules solved the visibility problems. Tr. 385. He went on to

state that "[t]hey were adding safety precautions to take, but they were not solving this [visibility] problem." Tr. 386. Judge Lasher also recognized that these changes had been made, but concluded that these changes "did not change the testing and measuring results ... nor the opinions of various credible witnesses ... as to the visibility problem." 12 FMSHRC at 1719. In essence, both the inspector and the judge determined that no matter what work rules were adopted or how strictly they were enforced, the visibility problems of the scoops created an imminent danger.

The inspector testified that he was concerned with three situations in which there might be an injury-producing accident: (1) when the scoop is making an offside turn, (2) when a dip in the haulageway limits the scoop operator's line of vision, and (3) when pedestrians are present. The issue in this case is not whether the visibility limitations of the scoops presented some degree of hazard in these situations but whether the scoops created an imminent danger.

As noted above, when a scoop operator makes an offside turn, his visibility is reduced during that turn. The scoop operators testified that they were aware of this limitation and regularly take steps to reduce the hazard. Tr. 230-31. Some of these steps were included in the new operating procedures. Operators regularly slow down, sound their air horns and flash their lights when turning. Tr. 188; 236-37. They look for light reflections on the roof and ribs to detect the presence of vehicles. Tr. 231-32. Finally, if they are uncertain as to what may be in the area, they stop, get out of the scoop and look around before turning. Tr. 121-22; 231.

When scoop operators and operators of pickups and other small vehicles approach a dip in the mine, their visibility is reduced because they cannot see as far down the entry. UP&L instituted a number of changes to reduce this hazard. First, it eliminated the line of sight problem at one of the biggest dips by cutting back the roof in the dip. Second, operators of vehicles sound their horns and flash their lights before entering a dip. Tr. 236. Third,

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pickups and other small vehicles use alternate roadways rather than the main haulageway when traveling in the mine. Tr. 161-62. Finally, scoops are given the right of way and pickups are to pull into a crosscut whenever they see an approaching scoop. Tr. 163; 230; 253. The brighter halogen lights, which are unique to scoops, alert pickup drivers that a scoop is approaching. While these practices do not eliminate the hazard, they reduce significantly the danger associated with dips.

There has never been a scoop accident in this mine involving pedestrians. There are very few pedestrians in the main haulageways in which the scoops travel. Tr. 253; 280. Pedestrians are most likely to be encountered when repairs are being made along the haulageway and at the places where the scoops are delivering supplies. Tr. 253; 280. Flashing lights are set up in areas where repair work is being done. Tr. 280. Miners also wear cap lights and reflective tape on their hard hats and on their clothing.

Tr. 252, 284; 286. At locations where supplies are to be delivered, a miner on the ground often directs the scoop operator or, if no one is available, the scoop operator gets out and looks around before proceeding into the area. Tr. 122; 245-46. The scoop operators testified that they have no difficulty detecting the presence of pedestrians because of the reflective tape and cap lights. Tr. 124; 252; 255; 273; 288-90. A scoop operator testified that miners on foot generally make their presence known to machine operators by flashing their cap lights at the operators. Tr. 308-09.

3. Accident history

It is not disputed that there have been approximately 15 accidents involving the scoops in the five years that they have been used. None of these accidents resulted in an occupational injury as that term is defined in 30 C.F.R. • 50.2(e); 8 one accident required the application of first aid, 30 C.F.R. • 50.2(g). All of these accidents occurred before UP&L changed its haulage operating procedures. Eight of the 14 accidents discussed in the record involved scoops hitting unoccupied pickups that were parked in a haulageway, a crosscut, or in an intersection. The scoop operators testified that they cannot always see a pickup when it is parked offside the scoop but that they can determine its location when it is equipped with a strobe light and can move it if necessary. Tr. 126; 131-33; 232-33; 243; 279.

Judge Lasher emphasized in his decision an accident involving Robert Phelps and Larry Hunsaker. 12 FMSHRC at 1716. Scoop operator Phelps was traveling along the main haulageway with a load of gravel in his bucket. Tr. 100. He had the bucket in a raised position in front of him. Hunsaker was driving a pickup in the opposite direction. Tr. 100-01; 111. They collided head on at a dip in the haulageway. Id. Phelps said he could not see very well over the raised, fully loaded bucket. Tr. 101. The bucket hit the cab of the pickup. Tr. 102; 111. Hunsaker did not see the scoop because

8 30 C.F.R. • 50.2(e) defines "occupational injury" as "any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury...."

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he was reaching down for his radio. Tr. 103. He testified that he could not see the lights of the scoop because they were behind the bucket. Tr. 113; 116. Phelps stated that he saw the pickup before he entered the dip. Tr. 104. Hunsaker testified that if Phelps had been driving the scoop so that the bucket was at the back and the radiator was at the front, Hunsaker would "have had a lot better chance of seeing the [scoop's] headlights." Tr. 118.

The record discloses that at least four factors contributed to this accident: the dip in the roadway; the fact that Phelps was driving the scoop with a loaded bucket in a raised position in front of him, blocking his vision and obscuring the scoop's lights; the fact that Hunsaker reached down for his radio; and the speed of the pickup. Phelps was unable to see the pickup

because the position of his bucket restricted his vision. Two scoop operators testified that they drive the scoop with the radiator in the front and the bucket in the back when the bucket is loaded with bulky materials. Tr. 235; 298. The measures UP&L has taken since this accident, as discussed above, are aimed at eliminating the risk of similar accidents. The evidence demonstrates that haulage operating procedures used at the time the imminent danger order was issued significantly reduced the risk of accidents. Scoop operators testified that most of these accidents would not have occurred if these procedures had been in place. See, e.g., Tr. 237-238. The history of accidents provides little support for the imminent danger finding.

III.

Conclusions

The evidence of record fails to establish that the scoops presented a danger to miners that posed an imminent or impending threat to their safety. The withdrawal of miners under section 107(a) is authorized only where the danger is imminent. Thus, we conclude that MSHA issued a withdrawal order under section 107(a) under circumstances where an imminent threat to the safety and health of miners was not present. ⁹

We reaffirm our holding in *Rochester & Pittsburgh* that an inspector must have considerable discretion in determining whether an imminent danger exists. This is because an inspector must act immediately to eliminate conditions that create an imminent danger. We also reiterate here that the hazardous condition or practice creating an imminent danger need not be restricted to a threat that is in the nature of an emergency, and that section 107(a) withdrawal orders are "not limited to just disastrous type accidents." Coal

⁹ We note that the inspector in this case was not limited to the provisions of section 107(a) in addressing hazards presented by the scoops. For example, he might have utilized the safeguard provision of section 314(b) of the Act, 30 U.S.C. • 874(b), which was designed to address mine-specific transportation hazards, to tailor a notice to provide safeguard. If the operator failed to comply with the safeguard, he could have issued a citation or order under section 104 with an appropriate abatement time.

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Act Legis. Hist. at 1599.

For the foregoing reasons, we reverse the judge's decision holding that the two EIMCO scoops presented an imminent danger to miners and we vacate the

section 107(a) order of withdrawal. ¹⁰

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

10 Chairman Ford did not participate in the consideration or disposition of this case.