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MSHA V. WYOMING FUEL
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August 28, 1992

SECRETARY OF LABOR,	
MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket Nos. WEST 90-112-R WEST 90-113-R WEST 90-114-R
v.	WEST 90-115-R WEST 90-116-R
WYOMING FUEL COMPANY	

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

DECISION

BY THE COMMISSION:

These five contest proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. • 801 et seq. (1988)(the "Mine Act" or "Act"), and involve three citations, issued to Wyoming Fuel Company ("WFC") by the Department of Labor's Mine Safety and Health Administration ("MSHA") pursuant to section 104(a) of the Mine Act, 30 U.S.C. • 814(a), and two imminent danger orders, issued pursuant to section 107(a) of the Mine Act, 30 U.S.C. • 817(a). Following an expedited evidentiary hearing, Commission Administrative Law Judge John J. Morris reaffirmed his pretrial grant of WFC's motion for an expedited hearing. 12 FMSHRC 2003, 2008-11 (October 1990)(ALJ). The judge vacated the two citations that alleged violations of 30 C.F.R. • 75.329-1(a), on the basis that the cited standard, by its terms, did not apply to the mine in question.(Footnote 1) In reaching this conclusion, he disallowed modification by MSHA of the citations, subsequent to their termination, to allege violations of 30 C.F.R. • 75.316, on the grounds that terminated citations may not be modified.(Footnote 2) 12 FMSHRC at 2012. The judge also vacated the two imminent danger orders, based on his finding that the inspectors' actions belied their stated opinions that imminent dangers existed in the mine. 12 FMSHRC at 2050-51, 2058. He vacated the third citation (No. 3241333) as well, which alleged that WFC was working contrary to the terms of an imminent danger withdrawal order, based on the fact that he had found that imminent danger order invalid. 12 FMSHRC at 2058.

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1 Section 75.329-1(a) provides in pertinent part that, "[a]ll areas of a coal mine from which the pillars have been wholly or partially extracted and abandoned areas shall be ventilated or sealed by December 30, 1970...."

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2 Section 75.316 provides in part that a "ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the

mining system of the coal mine and approved by the Secretary shall be adopted by the operator...."

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For the reasons that follow, we affirm in result the judge's vacation of Citation No. 3241333. We reverse the judge's determinations that he was without discretion to determine whether WFC's motion for an expedited hearing should be granted, and that terminated citations may not be modified by the Secretary. We vacate the judge's decision as to the imminent danger orders, and remand for further proceedings.

I.

Factual Background and Procedural History

WFC operates the Golden Eagle Mine, an underground coal mine located in Colorado. In a 24-hour period, the mine liberates over five million cubic feet of methane.

A. The Second South Section

WFC had not mined the Second South area since 1985 because of floor heave and ventilation problems. In late 1989, WFC decided to seal the area because it determined that it could no longer be examined safely. In January 1990, WFC blocked all six of the entries with Kennedy stoppings.(Footnote 3) On February 12, 1990, MSHA Inspector Donald Jordan, accompanied by Mark Bayes, an assistant mine foreman for WFC, examined the Second South area, and noticed the Kennedy stoppings erected across all six entries. Inspector Jordan took methane readings outside each of the six stoppings, using a handheld methane detector, and obtained readings ranging from .6 to 1.5% methane. Tr. 45-46, 48. Shortly thereafter, he used an aspirator pump to withdraw samples from behind the stopping in the No. 1 entry, and obtained a methane reading in excess of 9%. Tr. 53-54, 62.

After consulting with his subdistrict manager, Joe Paplovich, Inspector Jordan orally issued an imminent danger withdrawal order. Inspector Jordan had determined that an imminent danger existed because he believed that there were ignition sources behind the stoppings. Tr. 65, 110-11. He knew of six roof falls that had occurred in the Second South area. Tr. 65, 109-10. He was of the opinion that a roof fall behind the stoppings could create an incentive spark if steel struck steel, and, due to the presence of methane, could result in an explosion. Tr. 66, 97, 111.

After Inspector Jordan left Second South, he and other MSHA personnel held a conference with WFC management to discuss abatement methods. It was agreed that WFC would erect permanent seals in the area, and a detailed abatement plan was developed for construction of the seals. The plan required, in part, that certified personnel be present to monitor gas levels, that methane levels be maintained below l%, and that non-sparking tools be used. Tr. 223.

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3 A Kennedy stopping is comprised of a series of telescopic metal panels and is used to direct air courses. Tr. 42.

After the meeting, Inspector Jordan went back to the mine and issued a written imminent danger order covering the entire mine, and a section 104(a) citation alleging a significant and substantial ("S&S") violation of section 75.329-1(a).(Footnote 4) Inspector Jordan believed that the abandoned area in the Second South section had been neither ventilated nor sealed as required by section 75.329-1(a). Tr. 72. He subsequently modified the Second South imminent danger order to allow construction of the permanent seals under the controlled conditions of the abatement plan. The modification provided that "[n]o other work will be done until the order is terminated." Order No. 2930784-01.

In carrying out the approved abatement plan, WFC employees worked within two to three feet of the Kennedy stoppings while constructing the permanent seals. Tr. 462. On February 17, the seals were completed after approximately 113 miners had worked five days. Tr. 404-05, 462, 893. The citation was then terminated. Tr. 70.

On that same day, the Second South imminent danger order was again modified to "prohibit any other work until the atmosphere behind the seals has passed either above or below the explosive range for methane and oxygen gas combinations." Order No. 2930784-02. The modification provided that "[o]nly those persons necessary to monitor the gases and safeguard the mine are to be allowed underground." Id. The order was again modified later that day to allow resumption of production and to require WFC to monitor methane levels behind the seals for 72 hours. Order No. 2930784-03; Tr. 201. On February 28, after it was determined that methane levels were beyond the explosive range, MSHA terminated the Second South imminent danger order. Tr. 114, 202-03, 564, 896.

B. The First Right Section

In December 1988, WFC had decided to seal the First Right section because it was unable to maintain a methane level below 2%, and water was flooding into the area. Tr. 347-48, 354, 357-58. In February 1989, WFC erected Kennedy stoppings in all three entries of the section. Construction of the permanent seals began on February 14, 1990, the day after issuance of the Second South imminent danger order. Tr. 349, 363, 478-79.

On February 16, while the Second South abatement work was going on, MSHA Inspector Anthony Duran, accompanied by Frank Perko, the safety supervisor for the mine, travelled to the First Right Section and observed six miners and a foreman erecting permanent seals. Tr. 141-43, 500. Inspector Duran obtained methane readings ranging from 2% to 5% in front of the stoppings, and up to 8% near a small hole in one of the stoppings. Tr. 144-46, 149.

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4 The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. • 814(d)(1), which, in pertinent part, distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard...."

Inspector Duran issued a section 107(a) imminent danger order. He believed "there was a possibility of an imminent danger behind [the] Kennedys," because there was an unknown mixture of methane behind the stoppings and a spark from a roof fall or from the tools being used to construct the seals could cause an ignition. Tr. 151-53, 159, 198. Inspector Duran also issued Citation No. 3241333 alleging WFC was working contrary to the terms of the earlier imminent danger order. Tr. 155. That citation, as issued, described MSHA's enforcement action to be under both sections 104(a) and 107(a), but no section of the Mine Act or regulations was set forth as having been violated. Inspector Duran also issued a second citation, No. 3241332, alleging a violation of section 75.329-1(a) in the First Right area. The mine was evacuated, and MSHA and WFC officials met to establish a plan for
completion of the permanent seals in that area. Tr. 199. On February 17, after the conditions had been abated, the imminent danger order and citation were terminated.

On March 6, subsequent to the termination of the two citations alleging violations of section 75.329-1(a) and one week prior to the evidentiary hearing, the Secretary served WFC with modifications of the citations. The modifications changed the standard allegedly violated from 30 C.F.R. • 75.329-1(a) to 30 C.F.R. • 75.316, and stated that the areas were not "properly sealed and the stopping[s] in use as seals were not constructed as explosion proof seals as required by the approved ventilation ... plan."
Exhs. S-1, S-2.

C. Hearing and Judge's Decision

At the evidentiary hearing, WFC objected to the modifications of the citations on the grounds that citations cannot be modified after termination. Tr. 9-10. The Secretary contended that she may modify a citation at any time and that, in any event, the proof at trial would be the same for either the modified or the unmodified versions of the citations. Tr. 12-13, 16-17. The judge sustained WFC's objection, and the Secretary proceeded at the hearing on the original citations. Tr. 14, 23.

In his decision, the judge confirmed his earlier ruling that WFC was entitled to an expedited hearing on the imminent danger orders because section 107 of the Act and Commission Procedural Rule 52, 29 C.F.R. • 2700.52, demonstrated to him that expedited hearings on such orders are not restricted to emergency situations and are not left to the discretion of the presiding judge. 12 FMSHRC at 2008-11. Citing Clinchfield Coal Company v. FMSHRC, 895
F.2d 773, 776 (D.C. Cir. 1990), and Emery Mining Corp./Utah Power & Light Co.,
10 FMSHRC 1337 (March 1989)(ALJ), the judge reaffirmed his bench ruling and held that the two citations could not be modified to allege violations of section 75.316 because the citations had been terminated at the time of

attempted modification. 12 FMSHRC at 2012.

The judge vacated both imminent danger orders after determining that the inspectors' belief in the existence of "an impending accident or disaster must be measured in light of their actions." 12 FMSHRC at 2050. The judge concluded that "MSHA's undisputed actions ... necessarily cause me to conclude that MSHA did not believe `an impending accident ... [was] likely to occur at ~1286
any moment.'" Id. (citations omitted). The judge based this conclusion upon the fact that MSHA had permitted 113 miners to construct seals in close proximity to the stoppings and MSHA had not required the atmosphere behind the stoppings to be stabilized through the addition of inert gas before miners were permitted to enter the area. 12 FMSHRC at 2051, 2057-58.

The judge also vacated the two citations alleging violations of section 75.329-1(a) because he found that the standard's application is limited to areas in mines that were pillared or abandoned prior to December 30, 1970, and that "the Secretary [could] not show [that] the [Golden Eagle] mine was in existence before 1970." 12 FMSHRC at 2057.

Finally, the judge dismissed Citation No. 3241333, reasoning that, although "credible evidence establishes the operator was `working on an order,'" the citation must be vacated because the underlying order was invalid. 12 FMSHRC at 2058. Accordingly, the judge sustained WFC's five contests. 12 FMSHRC at 2058.

The Commission subsequently granted the Secretary's petition for discretionary review, in which she challenges the judge's decision to grant WFC's motion for an expedited hearing, the judge's determination that citations cannot be modified following their termination, and the judge's vacation of the imminent danger orders and Citation No. 3241333.

II.

Disposition of Issues

A. Expedited hearing

The Secretary argues that the judge erred in granting WFC's motion for an expedited hearing because section 107(e) does not mandate an expedited hearing but, instead, allows the Commission to decide what action may be appropriate. She maintains that, here, there was no reason to expedite WFC's contests in view of the fact that the imminent dangers orders had been terminated. The Secretary contends that requiring motions for expedited hearings to be granted "automatically" would result in burdening Commission judges and straining the Secretary's limited resources.

We begin by examining the plain meaning of section 107(e), 30 U.S.C. 817(e). As the Commission has often recognized, the "primary dispositiv source of information [about the meaning of statutory terms] is the wording of the statute itself." Consolidation Coal Co., 11 FMSHRC 1609, 1613 (September 1989)(citations omitted). Additionally, effect must be given, if possible, to every word in a statute. United States v. Menasche, 348 U.S. 528, 538-39 (1955). Section 107(e)(1) of the Mine Act provides in pertinent part that:

Any operator notified of an order under this section or any representative of miners notified of the issuance, modification, or termination of such an order may apply to the Commission within 30 days of such notification for reinstatement, modification or
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vacation of such order. The Commission shall forthwith afford an opportunity for a hearing....

30 U.S.C. • 817(e)(1)(emphasis added). Section 107(e)(2), 30 U.S.C. 817(e)(2), provides that the "Commission shall take whatever action i necessary to expedite proceedings under this subsection." This language does not mandate that such hearings must be scheduled "immediately" in all circumstances, or that the Commission must automatically grant a party's motion for expedition on the terms sought.

The key words in this statutory language are "forthwith" and "expedite." Webster's Third New International Dictionary, Unabridged 895 (1971) ("Webster's"), defines "forthwith" as "with dispatch; without delay; within a reasonable time; immediately; immediately after some preceding event." Black's Law Dictionary 588 (5th ed., 1979) ("Black's"), defines "forthwith," in part, as "[i]mmediately; without delay; directly; within a reasonable time under the circumstances of the case; promptly and with reasonable dispatch...." Webster's defines "expedite," as "to carry through with dispatch; execute promptly; to accelerate the process...." Webster's at 799. Black's definition of "expedite" is substantially the same. Black's at 518.

We conclude that sections 107(e)(1) & (2) require the Commission to provide an opportunity for a hearing on an imminent danger order with dispatch and without undue delay but, nevertheless, within a period of time reasonable under the circumstances of each case. The terminology requires promptness, but does not require immediacy under all circumstances. Accordingly, we hold that informed discretion remains with Commission judges in scheduling hearings on imminent danger orders to consider factors that may affect the period of time reasonable under the circumstances of each case. For instance, the judge may consider such factors as whether an imminent danger order is still in effect and the time necessary for a party to prepare adequately for a hearing in light of the complexity of the case.

In the present case, the Secretary opposed WFC's motion to expedite on the grounds that the closure order was no longer in effect and that the Secretary's management of the case was adversely affected because she was forced to go to trial with outstanding discovery requests. S. Br. at 19, 23. The judge did not expressly consider these factors when ruling on WFC's motion. The judge focused only upon whether section 107(e) deprived him of all discretion in granting motions to expedite hearings on imminent dangers and determined that it did. For the reasons discussed above, we reverse that determination. However, because the hearing has already been held, and because the question of whether the hearing should have been expedited under

the circumstances is now moot, further consideration of the issue by the judge is unnecessary.

B. Modification of terminated citations

The Secretary submits that the judge erred in denying her modifications to allege violations of section 75.316 rather than section 75.329-1(a). We hold that, absent legal prejudice to WFC, the Secretary's modifications of the citations were permissible.

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WFC's essential argument on review is that the citations had been terminated prior to the attempted modifications and, thus, because they were no longer in effect within the meaning of section 104(h) of the Mine Act, 30 U.S.C. • 814(h), they could not be modified. Section 104(h) provides that "[a]ny citation or order issued under this section shall remain in effect until modified, terminated or vacated by the Secretary or his authorized representative, or modified, terminated or vacated by the Commission or the courts pursuant to section 105 or 106." The judge agreed with WFC's position, citing his earlier decision in Emery Mining, supra, 10 FMSHRC at 1347, in which he held that "once a citation or order is no longer in effect because it was terminated it cannot be modified." 12 FMSHRC at 2012. We disagree.

The Act does not define "termination," nor does the legislative history explain the meaning or consequences of terminating a citation or withdrawal order. However, termination of citations and orders is a common administrative function of the Secretary. She states that termination of a citation is merely an administrative action used to indicate to an operator that it has successfully abated a violative condition and that the operator is no longer subject to a potential withdrawal order under section 104(b), 30 U.S.C. • 814(b), for "failure to abate" the alleged violation. According to the Secretary, termination of a citation means that the cited condition no longer exists, since abatement has been accomplished, not that the citation itself no longer exists for other legal purposes. The Secretary's policy manual for the guidance of MSHA inspectors reflects the Secretary's longstanding position in this regard. I Coal Mine Inspection Manual: Procedure, Orders, Citations and Inspection Reports • B, MSHA form 7000-3 (1982). See Mettiki Coal Co., 13 FMSHRC 760, 766-67 & n.6 (May 1991) (MSHA's manuals may serve as accurate guides to MSHA policies and practices).

WFC does not dispute the Secretary's contention that, at the least, termination of a citation informs the operator that abatement of the violative condition has been completed, and that the operator is not subject to a section 104(b) withdrawal order involving that citation. Moreover, in Loc. U. 1810 UMWA v. Nacco Mining Company, 11 FMSHRC 1231 (July 1989), the Commission concluded that termination occurs when the Secretary determines that a violative condition has been abated and, therefore, signals that the violative condition no longer exists. 11 FMSHRC at 1236.

Although it is not readily apparent from the language of section 104(h) what legal actions may or may not be taken with respect to a citation or order following its termination, it is obvious that a citation or order, even though terminated, remains in effect for purposes of subsequent contest and civil penalty proceedings. The citations in question, for example, have been contested by WFC, even though they have been terminated. Also, a terminated citation remains subject to vacation by the Secretary, the Commission, or a court. See section 104(h). Indeed, WFC's contests of the citations seek their vacation by the Commission, and the Secretary's authority to vacate these citations, even though they have been terminated, is not disputed.
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Addressing a similar problem in Nacco, supra, the Commission explained:
Thus, the language of section 104(h) that states that a citation or order issued under section 104 "shall remain in effect until modified" does not necessarily mean that the original citation or order ceases to have any effect following modification.... Rather, the original citation or order remains in effect, as modified.
11 FMSHRC at 1236.
Accordingly, we conclude that termination does not divest the Secretary of jurisdiction over the citation or order or set in stone the initial citation or order as written. We reiterate the Commission's view set forth in Nacco that termination of a citation is meant only to convey that a violative condition has been abated and to inform the operator that it will not be subject to a section 104(b) "failure to abate" withdrawal order involving that citation. Consequently, in appropriate circumstances, the Secretary may modify a terminated citation or order. Consistent with the Secretary's basic position herein, however, we emphasize that the Secretary may not modify a terminated citation to direct further abatement -- for the foundation of our holding is that termination does no more and no less than signal that abatement has been successfully completed.(Footnote 5)
The remaining issues are the scope of the Secretary's modification authority and whether the modifications in the present case are permissible. Section 104(a) citations are essentially "complaints" by the Secretary alleging violations of mandatory standards. The Secretary's attempted modifications, alleging, based on the same facts, that a different standard has been violated, are essentially proposed "amendments" to the initial complaints, i.e., citations. The Commission has previously analogized the modification of a citation to an amendment of pleadings under Fed. R. Civ. P. 15(a).(Footnote 6) Cyprus Empire Corp., 12 FMSHRC 911, 916 (May 1990). In Cyprus Empire, where the operator conceded that it was not prejudiced thereby, the Commission affirmed the trial judge's modification of a terminated citation to allege violation of a different standard. Id.

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5 The reliance by WFC and the judge upon an observation in the D.C. Circuit's decision in Clinchfield, 895 F.2d at 776, is misplaced. In that case, involving the Mine Act's compensation provisions, 30 U.S.C. • 821, the Court noted in passing that "the power to modify evidently ceases after an order has been terminated." This statement was dictum, conditionally phrased, and not further explained.

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6 The Commission's Procedural Rules, 29 C.F.R. Part 2700, provide that on questions of procedure not regulated by the Act, the Commission's rules, or the Admin. Procedure Act, 5 U.S.C. • 551 et seq. (1988), the Commission may apply the Fed. R. Civ. P., insofar as "practicable" and "appropriate." 29 C.F.R. • 2700.1(b).

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In Federal civil proceedings, leave for amendment "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The weight of authority under Rule 15(a) is that amendments are to be liberally granted unless the moving party has been guilty of bad faith, has acted for the purpose of delay, or where the trial of the issue will be unduly delayed. See 3 J. Moore, R. Freer, Moore's Federal Practice, Par. 15.08[2], 15-47 to 15-49 (2d ed. 1991)("Moore's"). And, as explained in Cyprus Empire, legally recognizable prejudice to the operator would bar otherwise permissible modification. Here, there has been no assertion that the Secretary has been guilty of bad faith or undue delay. Rather, in response to the Secretary's petition for review of the judge's ruling on modification, WFC argued that it would be prejudiced by modification of the citations.

Accordingly, we reverse the judge's finding that a citation cannot be modified after it has been terminated, and remand this matter for consideration of whether WFC would suffer legally recognizable prejudice if Citation Nos. 2930785 and 3241332 were modified as proposed by the Secretary. The judge may seek guidance, insofar as "practicable" and "appropriate," in Fed. R. Civ. P. 15 and case law thereunder. If the judge finds prejudice, the citations shall remain unmodified and his holding vacating them, on the basis of the inapplicability of section 75.329-1, shall stand. If the judge does not find legally recognizable prejudice, the citations shall be modified to allege violations of section 75.316, and the judge shall conduct such further proceedings as he deems necessary.

C. Validity of imminent danger orders

Section 3(j) of 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). In Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159 (November 1989)("R&P"), the Commission

reviewed the precedent analyzing this definition and noted that "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." 11 FMSHRC at 2163 (citations omitted). It noted further that the courts have held 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." Id., quoting Eastern Associated Coal Corp. v. Interior Bd. of Mine Op. App., 491 F.2d 277, 278 (4th Cir. 1974).

In Utah Power & Light Co., 13 FMSHRC 1617, 1621 (October 1991), the Commission held that there must be some degree of imminence to support a section 107(a) order and noted that the word "imminent" is defined as "ready to take place: near at hand: impending ...: hanging threateningly over one's head: menacingly near." 13 FMSHRC at 1621 (citation omitted). The Commission

determined that the legislative history of the imminent danger provision supported a conclusion that "the hazard to be protected against by the withdrawal order must be impending so as to require the immediate withdrawal

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of miners." Id. Finally, the Commission stated that the inspector must determine whether an imminent danger exists without considering the "percentage of probability that an accident will happen." Id., quoting S. Rep. No. 181, 95th Cong., 1st Sess. 38 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 626 (1978)("Mine Act Legis. Hist.").

In both R&P and UP&L, the Commission concluded that an inspector must be accorded considerable discretion in determining whether an imminent danger exists because an inspector must act with dispatch to eliminate conditions that create an imminent danger. R&P, 11 FMSHRC at 2164; UP&L, 13 FMSHRC at

1627. As the U.S. Court of Appeals for the Seventh Circuit recognized:

> 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.

Old Ben Coal Corp. v. Interior Bd. of Mine Op. App., 523 F.2d 25, 31 (7th Cir. 1975)(emphasis added).

The judge did not apply the appropriate analysis in his imminent danger determination. He recited the extensive evidence, but did not weigh it in order to determine whether a preponderance of the evidence showed that the conditions or practices, as observed by the inspectors, could reasonably be

expected to cause death or serious physical harm, before the conditions or practices could be eliminated. The judge apparently did not consider R&P or Old Ben (UP&L had not yet been decided), nor did he determine whether the inspectors abused their discretion in issuing the orders.

Instead, the judge found that the imminent danger orders were invalid solely because the inspectors' actions in permitting 113 miners to construct permanent seals in close proximity to the Kennedy stoppings, and not requiring that the atmosphere in the First Right section be stabilized through the insertion of inert gas, demonstrated that MSHA did not believe that "an impending accident ... [was] likely to occur at any moment." 12 FMSHRC at 2050 (citations omitted). The judge relied upon the decision of the Board of Mine Operations Appeals in Freeman Coal Mining Corp., 2 IMBA 197, 212 (1973).

The judge cited Freeman to stand for the propositions that "the test of imminence is objective and ... the inspector's subjective opinion is not necessarily to be taken at face value," and that the "inspector[s'] belief of the existence of an impending accident or disaster must be measured in light of their actions." 12 FMSHRC at 2048, 2050.

Although the inspectors' actions are relevant to a consideration of whether imminent dangers existed in the two areas, their actions must be viewed within the context of the specific conditions extant. Section 107(a)

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requires elimination of the conditions giving rise to the imminent danger withdrawal order. Actions to achieve such elimination must be suitable to the specific conditions presented, and the method of abatement is left to the informed discretion of the designated representatives of the Secretary. Some imminently dangerous conditions may require abatement that poses a degree of unavoidable risk to miners. The fact that such actions are necessary to abate a condition, however, does not mean that the condition does not pose an imminent danger.

Because the judge failed to apply the appropriate analysis as to imminent danger and to weigh the evidence accordingly, we vacate his decision as to the imminent danger orders, and remand for further consideration consistent with this decision. In applying the Commission's imminent danger test, the appropriate focus is on whether the inspector abused his discretion when he issued the imminent danger order. The judge should set forth necessary factual findings, credibility determinations and conclusions of law. The judge should make factual findings as to whether the inspector made a reasonable investigation of the facts, under the circumstances, and whether the facts known to him, or reasonably available to him, supported issuance of the imminent danger order. In so doing, the judge should take into consideration the conditions observed by the inspectors in each of the two areas. We note that much of the evidence is contradictory and requires resolution by the judge.

D. Validity of Citation No. 3241333

Although the judge found that the "credible evidence establishes the operator was working on an order," he vacated Citation No. 3241333 because he found that the underlying imminent danger order was invalid. 12 FMSHRC at 2058. The Secretary argues that the judge erred in vacating the citation because the fact that an imminent danger order may later be found invalid does not excuse noncompliance with that order. She maintains that an operator cannot "pick and choose" which imminent danger order merits its compliance, on the chance that it might prevail when contesting the validity of the order.

We share the Secretary's concern that miner safety may be compromised if the validity of an underlying imminent danger order were a prerequisite to upholding a citation alleging noncompliance with that order. The legislative history of section 107 makes clear that the removal of miners from the perceived imminent danger is the paramount concern; disputes over whether the miners should, in fact, have been removed are resolved only afterward. For instance, the Senate Report for the Federal Coal Mine Health and Safety Act of 1969 (the "Coal Act") states that "the miners must be removed from the danger forthwith when the danger is discovered without waiting for any formal proceedings or notice.... After the miners are free of danger, then the operator can expeditiously appeal the action of the inspector." 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.).

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In a similar vein, under section 107(e)(1) of the Mine Act, 30 U.S.C. • 817(e)(1), the Act's provisions for temporary relief (30 U.S.C.•815(b)(2)) do not apply to imminent danger orders. The Senate Report for the Mine Act explains this limitation as follow:

> It is the Committee's view that the authority under this section is essential to the protection of miners and should be construed expansively by inspectors and the Commission.... The Committee intends that the Act give the necessary authority for the taking of action to remove miners from risk. The Committee points out that, although imminent danger closure orders are subject to review by the Commission (as are all closure orders), Section 108(e) [107(e)] provides that no temporary relief may be granted from the issuance of such an order. This limitation on the review authority of the Commission in this respect does not suggest a limitation on the inspector's authority to issue such orders, but rather is consistent with the importance of the imminent danger order as a means of protecting miners.

Mine Act Legis. Hist. at 626 (emphasis added).

WFC contends that the Mine Act recognizes that an operator need not comply with an imminent danger order with which it disagrees and that sections 108, 110 and 111, 30 U.S.C. • 818, 820, 821, provide a remedy for such noncompliance. While we agree with WFC that the Mine Act contains sanctions for operator noncompliance with an imminent danger order, we find no indication in the Mine Act that such noncompliance is legally permissible or that the validity of an imminent danger order is a prerequisite to finding failure to comply with that order. Accordingly, we hold that the judge erred in finding that the validity of Citation No. 3241333 was dependent upon the validity of the Second South imminent danger order. Nevertheless, for the following reasons, we affirm in result the judge's vacation of the citation.

The Secretary asserts that WFC violated section 109(c) of the Mine Act, 30 U.S.C. • 819(c), by working contrary to the terms of an imminent danger order. S. Br. at 5, 14-15; Tr. 25. However, citation No. 3241333 does not, in fact, charge WFC with a violation of section 109(c). The citation was modified by Modification No. 3241333-01 to allege a violation of section 109(c). The citation was subsequently modified by Modification No. 3241333-02 to strike section 109(c) as the section of the Mine Act violated, and to substitute in its place section 107(a). Neither modification is part of the official record. While WFC attached Modification Nos. 3241333-01 and 3241333-
02 to its post-hearing brief, the Secretary moved to strike the modifications from the official record because they had not been introduced into evidence and she had not had the opportunity to cross-examine as to them. Neither party has sought review of the judge's decision granting the Secretary's motion.

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We find the Secretary's actions here to be confusing and inconsistent. The Secretary first modified the original citation to allege a violation of section 109(c), and later to allege a violation of section 107(a). The Secretary then successfully moved to strike those modifications from the record. On review, the Secretary is attempting to proceed on the first modification, alleging a violation of section 109(c). In an enforcement action, the Secretary "bears the burden of proving any alleged violation." Jim Walter Resources, Inc., 9 FMSHRC 903, 907 (May 1987). If the Commission were to affirm the citation as first modified, it would be in the untenable position of affirming a citation that is not part of the official record and one subsequently modified to allege a different violation. Under section 113(d)(2)(C) of the Mine Act, 30 U.S.C. • 823(d)(2)(C), the Commission may consider only those matters that are part of the record. Accordingly, we affirm the judge's vacation of the citation.

III.

Conclusion

For the reasons set out above, we affirm in result the judge's vacation of Citation No. 3241333. We reverse the judge's conclusions that he was

without discretion to determine whether WFC's motion for an expedited hearing should be granted and that the terminated citations cannot be modified. We remand for consideration of whether WFC suffered prejudice as a result of the modifications. Finally, we vacate the judge's decision vacating the imminent danger orders, and remand for reconsideration consistent with the principles set forth in this decision.

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Accordingly, the judge's decision is affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

Ford, B. Ford, Chairman
Richard V. Backley, Commissioner
Joyce A. Doyle, Commissioner
Arlene Holen, Commissioner
L. Clair Nelson, Commissioner