FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. WEST 2013-827-RM
	:	WEST 2013-828-RM
v.	:	WEST 2013-829-RM
	:	WEST 2013-1009-M
KNIFE RIVER CONSTRUCTION	:	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

DECISION

BY: Jordan, Chairman; Cohen and Nakamura, Commissioners

These proceedings, which arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), involve an imminent danger order issued pursuant to section 107(a) of the Act[1] by the Secretary of Labor's Mine Safety and Health Administration ("MSHA") to Knife River Construction. The order required a scraper that was in operation to be immediately removed from service.

Knife River contested the order before a Commission Administrative Law Judge. The Judge affirmed the order. Knife River then filed a petition for discretionary review with the Commission, which we granted.

For the reasons that follow, we conclude that substantial evidence supports the Judge's decision to affirm the order because the inspector reasonably believed that the continued operation of the scraper represented an imminent danger to miner safety. Accordingly, we affirm the decision of the Judge.

[1] Section 107(a) of the Mine Act, 30 U.S.C. § 817(a), provides an MSHA inspector with the authority to order the withdrawal of miners if he observes a condition or practice that he reasonably believes represents an imminent danger to miner safety or health.

I.

Factual and Procedural Background

In May 2013, MSHA inspector Bryan Chaix arrived at Knife River Construction's Vernalis Plant to begin a regular inspection. The Vernalis Plant is a sand and gravel mine located in California.

Chaix was accompanied on his inspection by two representatives of Knife River: the foreman, George Muraoka, and the safety manager, Kevin Smudrick. Chaix observed a scraper that was in the process of moving clay material to the waste dump.[2] He stopped the vehicle for an inspection. Inspector Chaix asked the operator to demonstrate that the vehicle was capable of stopping and holding on a grade while it was carrying a load. The operator gathered a full load of material (approximately 70,000 pounds) and began to descend a steeply graded access road at a slow speed. Inspector Chaix and Smudrick followed on foot.

The scraper failed to come to a stop on the graded portion of the road. It stopped briefly after it reached the bottom, however, and then continued to travel toward the waste dump.

As the scraper drove away, Chaix issued an oral order pursuant to section 107(a) of the Mine Act that the vehicle be immediately stopped and removed from service. The written order was issued shortly thereafter and stated in relevant part:

> [A scraper] did not stop on a grade when tested. The equipment was in service at the time of inspection, handling both raw feed and waste. The grade on which it was tested measured approximately 12-14%.

Gov. Ex. 1.

The inspector also issued a citation pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), for a violation of the mandatory safety standard at 30 C.F.R. § 56.14101(a)(1), which provides that "[s]elf-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels." The citation stated that the violation was "significant and substantial" ("S&S").[3] After the issuance of the citation, a mechanic traveled out to the scraper and fixed the brakes on site.

Knife River contested the citation and the order before a Commission Administrative Law Judge. The Judge affirmed the section 107(a) order, concluding that the Secretary

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[2] A "scraper" is a "digging, hauling, and grading machine having a cutting edge, a carrying bowl, a movable front wall (apron), and dumping or ejecting mechanism." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 485 (2d ed. 1997).

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

demonstrated that the inspector reasonably believed that the continued operation of the scraper represented an imminent danger to miner safety. 36 FMSHRC 2176, 2178-79 (Aug. 2014) (ALJ). The Judge concluded that the inspector acted within his discretion to issue the order based on the facts known and available to him at the time. *Id.* The Judge also affirmed the associated citation that alleged a violation of the mandatory safety standard at 30 C.F.R. § 56.14101(a)(1), but deleted the citation's S&S designation. *Id.* at 2180.

Knife River petitioned for review of the Judge's decision to affirm the section 107(a) order, but did not seek review of the section 104(a) citation. The Commission granted the petition.

On review, Knife River argues that the Judge erred in finding that the Secretary demonstrated that the inspector reasonably believed that the defective brakes on the scraper constituted an imminent danger. Knife River also argues that the Judge's decision to affirm the section 107(a) order contradicts, and is otherwise incompatible with, his conclusion that the violation of the mandatory standard was not S&S.

II.

Disposition

Section 107(a) of the Mine Act provides that if an MSHA inspector "finds that an imminent danger exists, [the inspector] shall . . . issue an order requiring the operator of such mine to cause all persons . . . to be withdrawn from" the relevant area until the danger no longer exists. 30 U.S.C. § 817(a). Section 3(j) of the Act defines an "imminent danger" as a condition "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).

An inspector's issuance of a section 107(a) order is reviewed under an "abuse of discretion" standard. *Island Creek Coal Co.*, 15 FMSHRC 339, 345-46 (Mar. 1993). The order will be upheld if the Secretary proves by a preponderance of the evidence that the inspector reasonably concluded, based on information that was known or reasonably available to him at the time the order was issued, that an imminent danger existed. *Id.* at 346. The Commission has explained that a Judge is not required to accept an inspector's subjective perception that an imminent danger existed but, rather, must evaluate whether it was objectively reasonable for the inspector to conclude that an imminent danger existed. *Id.* We review the Judge's determination of whether the inspector abused his discretion under a substantial evidence standard. *See, e.g., Connolly-Pacific Co.*, 36 FMSHRC 1549, 1555 (June 2014).

While the danger justifying an imminent danger order need not be immediate, the danger must be such as to require the immediate withdrawal of miners because it could reasonably be expected to cause death or serious harm before the danger can be abated. *Freeman Coal Mining Co. v. Interior Bd. of Mine Operations Appeals*, 504 F.2d 741, 743-45 (7th Cir. 1974); *see also Connolly- Pacific*, 36 FMSHRC at 1555 (citing *Cumberland Coal Res., LP*, 28 FMSHRC 545, 555 (Aug. 2006), *aff'd*, 515 F.3d 247 (3d Cir. 2008)); *Blue Bayou Sand and Gravel, Inc.*, 18 FMSHRC 853, 858 (June 1996). In addition to the withdrawal of miners, an issuing inspector

may also require that dangerous equipment be immediately removed from service. *See Utah Power and Light Co.*, 13 FMSHRC 1617, 1619 (Oct. 1991).

The Mine Act's legislative history reflects Congress's view that "the authority under [section 107(a)] is essential to the protection of miners and should be construed expansively by inspectors and the Commission." S. Rep. No. 95-181, at 38 (1977), *reprinted in* Senate Subcomm. On Labor, On Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 626 (1978).

A. Substantial evidence supports the Judge's decision that the inspector acted within his discretion when he issued the order pursuant to section 107(a).

The Judge affirmed the section 107(a) order, specifically noting that it was issued immediately after the inspector observed the scraper fail to stop on a steep grade while carrying a heavy load. 36 FMSHRC at 2178. Accordingly, the Judge concluded that the inspector did not abuse his discretion. *Id.* The Judge correctly limited his analysis to whether the inspector's belief was reasonable at the precise time he issued the order. *See Jim Walter Res., Inc.*, 37 FMSHRC 1968, 1971-72 (Sept. 2015); *see also Wyoming Fuel Co.*, 14 FMSHRC 1282, 1292 (Aug. 1992) ("the appropriate focus is on whether the inspector abused his discretion when he issued the imminent danger order.").

We conclude that the Judge's decision – that the inspector reasonably believed that the scraper operator risked serious physical harm by continuing to drive to the waste dump – is supported by substantial evidence in the record.[4]

At the time he issued the oral order, the inspector was aware that the scraper was carrying a full 70,000 pound load. Tr. 146, 155. The inspector had just witnessed that the scraper was not able to stop on a grade. Tr. 41. Despite the defective brakes, the scraper continued to travel toward the waste dump[5], an area of the mine with multiple grades.[6] Tr. 43-45. In addition, the inspector was aware that an embankment was under construction at the waste dump. Tr. 34, 40. The inspector testified that his *primary concern* was that the scraper would depart that

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[4] "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

[5] Knife River's safety manager Kevin Smudrick, testified that the scraper exited the graded road, stopped on level ground, and then "took off again." Tr. 175-76. Smudrick also stated that the inspector asked him where the scraper was going and that Smudrick responded: "[w]ell, evidently, you know, he doesn't see us walking down. He's probably going to go dump his load and come back up to the top." *Id.*

[6] The dissent suggests that the inspector's testimony that the area contained "multiple grades" is insufficient. *See* slip op. at 16. Notably however, Knife River did not challenge the inspector's characterization of the area surrounding the dumpsite in its Post-Hearing Brief, nor did any of its three witnesses provide alternative evidence. Accordingly, the inspector's testimony was not contradicted.

embankment because it was traveling to the dump site without fully functioning brakes. Tr. 39, 41 ("Primarily my concern [was] about departing the embankment.").[7] The operator's representatives were not able to stop the driver nor communicate the order to him as they did not have their radios at that moment.[8] Tr. 42, 84-86, 177.

Inspector Chaix understood that although there were alternative methods available to abruptly stop the vehicle, such as the emergency brake or lowering the cutting tool, using either method would put the driver at risk for injury. Tr. 49-50. The inspector succinctly explained why he believed this was an imminent danger, stating "[t]hat's a big piece of equipment and . . . some pretty big distances and some steep grades involved. It's the kind of thing that gets people killed." Tr. 44. When asked who he expected to be injured by this condition, he responded, "[p]rimarily the equipment operator themselves, but anybody else nearby in the traffic pattern of the scraper." Tr. 44.

We conclude that the testimony above supports the Judge's conclusion that the inspector reasonably believed that an imminent danger existed.[9] Accordingly, we affirm the Judge's conclusion that the inspector did not abuse his discretion in issuing the section 107(a) order.[10]

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[7] Our dissenting colleagues ignore the issuing inspector's testimony. Instead, without citing any evidence, they independently conclude that there was no possibility that a scraper with inadequate brakes could depart the embankment.

[8] Our dissenting colleagues conclude that because the scraper's brakes were tested at a low speed and because the scraper eventually came to a stop on level ground, the inspector could not have reasonably believed that its driver was in any serious danger during the test. *See* slip op. at 9-10. Their analysis is flawed as it entirely ignores context; the order was issued as the scraper drove away from the inspector toward the dumpsite after demonstrating that its brakes were defective. Hence, the inspector's inquiry as to whether an imminent danger existed was not confined to the testing conditions (involving a slow-moving truck on a grade with barricades), but also properly took into account the fact that after leaving the grade, the truck would travel at a faster speed in locations where it would not be protected from overtravel by barriers. Tr. 39-41.

Our colleagues also ask (somewhat ironically): "why did the inspector not ensure that the scraper remained at the bottom of the grade once it stopped, instead of allowing [it] to continue traveling through the mine with defective brakes?" Slip op. at 11. Of course, the answer is that he did do something; the inspector ordered the representatives of the operator to stop the driver immediately, pursuant to the authority provided by section 107(a) of the Mine Act. The representatives of the operator simply failed to halt the driver as they did not have their radios available at the time the order was issued.

[9] We note that no one disputes the outcome of the imminent danger order (that the scraper be removed from service) and that the scraper operator, unaware of the imminent danger order, parked the scraper and removed it from service for repairs. KR Reply Br. at 9.

[10] We are troubled by the dissent's contention that "[h]ere, there is also a real question of whether an abuse of discretion may be found where an inspector issues an imminent danger

B. The Judge's conclusions with respect to the section 107(a) order and his conclusions with respect to the S&S designation on the section 104(a) citation are not irreconcilable.

Knife River also argues that the Judge's ruling on the imminent danger order should be overturned because it is allegedly inconsistent with his ruling that the related citation was not S&S. We disagree.

The Secretary did not petition for review of the deletion of the S&S designation from the citation issued pursuant to section 104(a), and accordingly the Judge's conclusions regarding the citation are not before the Commission. Therefore, we take no position on the legality of his findings regarding the S&S designation.[11] However, we observe that the Judge's ruling on the imminent danger order and his ruling on the S&S designation in the citation involve different evidentiary considerations.

It is well-established that an inspector has the discretion to issue a section 107(a) order if he reasonably believes there is an imminent danger, even if the imminent danger at issue does not violate a mandatory safety standard. *See Utah Power & Light*, 13 FMSHRC at 1622. In evaluating the issuance of the order, a Judge necessarily considers the evidence from an objectively reasonable inspector's perspective at the time of issuance. The key question is whether the inspector abused his discretion.

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order but does nothing to prevent the continued operation of the subject machinery." Slip op. at 8. This statement appears to suggest that no inspector should issue an imminent danger order without first trying to singlehandedly abate the potential danger, and that the Secretary must put on evidence of such efforts in order to sustain an imminent danger order, a contention we categorically reject. The issuance of an imminent danger order *is* the tool a mine inspector uses to withdraw miners from danger.

[11] A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, the Commission further explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard — that is, a measure of danger to safety — contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); accord *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

In contrast, violations of mandatory safety standards must be proven by the Secretary by a preponderance of the evidence at a hearing before a Commission Judge. *See Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989). The Judge considers the evidence of the violation *de novo*; he does not view the evidence from the inspector's perspective. The key question is whether the Secretary satisfied his burden of proof.

With respect to the citation issued to Knife River for inadequate brakes, the Judge credited the testimony of Kevin Farewell, the scraper operator, who stated that even if the brake did not bring the scraper to a stop on the grade, he was able to rely on the engine retarder to remain in control of the vehicle. *See* 36 FMSHRC at 2180; Tr. 148, 161. After considering Farewell's testimony, the Judge deleted the S&S designation. Even assuming *arguendo* that the Judge's action was appropriate, it would not preclude a finding that the inspector, upon observing the driver's inability to bring the scraper to a stop on grade, could reasonably believe such failure amounted to an imminent danger.

Because the Judge's conclusions were made after appropriately using different standards of review, we hold that his conclusions are not irreconcilable.

III.

Conclusion

For the foregoing reasons, we conclude that the Judge's decision is supported by substantial evidence in the record, and, therefore, we affirm it.

Mary Lu Jordan, Chairman

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

Commissioners Young and Althen, dissenting:

The majority summarily affirms the decision below sustaining an imminent danger order. However, a full and fair exposition of the record demonstrates that substantial evidence does not support an objectively reasonable basis for the inspector to have reasonably expected a death or serious injury before abatement. Inspectors must act quickly when they see an imminent danger, but the evidence in this case does not come close to providing an objectively reasonable basis for issuance of an imminent danger order. For that reason, we respectfully dissent.

DISCUSSION

An imminent danger is "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). Unquestionably, inspectors must have a substantial amount of authority to issue imminent danger orders and we must uphold orders unless we conclude that inspector abused his discretion. *Old Ben Coal Corp. v. Interior Bd. of Mine Operations Appeals,* 523 F.2d 25, 31 (7th Cir. 1975); *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2164 (Nov. 1989). Here, there is also a real question of whether an abuse of discretion may be found where an inspector issues an imminent danger order but does nothing to prevent the continued operation of the subject machinery. This inaction is untenable where an inspector holds a reasonable belief that death or serious injury would reasonably result if the activity at issue did not immediately cease.

Four factors comprise the existence of an imminent danger. These are, (1) a condition or practice in a mine (2) that could reasonably be expected to cause (3) death or serious physical harm (4) before such condition or practice can be abated. The Commission has rejected any notion that a judge or the Commission must accept the subjective perception of an inspector. Instead, we are to review the facts determining instead "whether it was objectively reasonable for the inspector to conclude that an imminent danger existed." *Mill Branch Coal Corp.*, 37 FMSHRC 1383, 1389 (July 2015) (citing *Island Creek Coal Co.*, 15 FMSHRC 339, 346 (Mar. 1993)). The inspector here did not even evince a *subjective* belief in an imminent danger. Therefore, it is impossible for the inspector's belief to be found *objectively* reasonable if we review the Judge's determination looking at the objective facts presented at the hearing. *See, e.g., Connolly-Pacific Co.*, 36 FMSHRC 1549, 1555 (June 2014).[1]

[1] The Commission requires that an inspector make a reasonable investigation that permits the Judge and Commission to determine whether the facts known to him, or reasonably available to him, support the issuance of the imminent danger. *Island Creek*, 15 FMSHRC at 346 (citing *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1292 (Aug. 1992)). That element does not particularly come into play in this case. This case boils down to whether the inspector acted in an objectively reasonable manner by issuing and maintaining an imminent danger order when he observed a scraper creep down a grade at two miles-per-hour and come to a complete stop at the bottom of the grade.

In *Utah Power & Light Co.*, 13 FMSHRC 1617, 1622 (Oct. 1991), the Commission observed that, if any hazard that has the potential to cause a serious injury qualifies as an imminent danger, the distinction between an imminent danger and a significant and substantial violation is lost. The outcome-determinative difference is that, for an imminent danger, the expectation must be for serious injury or death "before the condition or practice can be abated." The objective facts presented at the hearing must provide substantial evidence in support of the inspector's determination.[2]

The majority correctly but only partially defines substantial evidence in its opinion. *See* slip op. at 4 n.4. Importantly, in assessing whether a finding is supported by substantial evidence, the record as a whole must be considered including evidence in the record that "fairly detracts" from the finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). The record in this case, when fully reviewed, contains overwhelming evidence detracting from the imminent danger finding. In particular, the Judge failed to take into account his own findings that establish a slow (two mph) rate of speed, the ability of its operator to use other means besides the brakes to stop the scraper at any time, the absence of any other persons who might have been injured during the event, the impossibility of overtravel on the enclosed grade, the protective measures shielding the operator from hazards arising from a low-speed collision, and the inspector's own inconsistent testimony in the face of all of these facts.

Among the detracting evidence, the inspector eventually concedes that, with the scraper moving at two mph, he knew, or should have known, that the scraper operator could have stopped almost immediately at any time and at the operator's discretion, including during the descent down the grade. Tr. 49. Having made that telling admission, the inspector does not provide any evidence to support a finding that such stopping would be expected to cause serious injury or death. Indeed, the evidence confirms that the section 104(a) citation issued for the defective brakes would have resulted in abatement just as quickly and as efficiently as the section 107(a) order. Moreover, these errors are only a portion of the detracting evidence that we now review.

It is uncontested that the maximum speed of the scraper throughout its descent was approximately two miles per hour. Tr. 155, 167. As explained by the scraper operator, Mr. Farwell, the scraper was equipped with a "retarder" that slows the transmission and engine thereby slowing the rate of descent, to guard against a runaway. Tr. 148, 156. The retarder automatically engages at speeds greater than two to three miles per hour. In this case, the scraper was moving so slowly that the retarder did not even engage. Tr. 156. The scraper operator explained that he never was in any danger, (Tr. 155), and, had he felt any danger, he with certainty could have stopped the scraper virtually immediately (from its two mph speed) by lowering the cutting tool. Tr. 148. More importantly for our review of the inspector's order, the inspector's testimony, though inconsistent, shows that the inspector himself realized that the scraper was not out of control and had come to a complete stop at the bottom of the grade.

Prior to the inspection on the date of the imminent danger order, the scraper operator had been working in a relatively flat area of the mine, Tr. 153, and the scraper's brakes were fully

[2] Here, the Judge determined the violation was not significant and substantial.

operational. Tr. 154. The inspector asked the scraper operator how the operator wanted to demonstrate the brakes were working. The operator himself responded that he was heading to a new work area and the inspector could watch his performance in that new area. The inspector agreed. Tr. 34.[3]

The inspector testified that no equipment or people were down the grade from where the brake test occurred. Tr. 74. Thus, at the suggestion of the scraper operator, the inspection occurred on the first run by the scraper, fully loaded, down a new and steep grade. Tr. 154-55. From this point, the record demonstrates conclusively that an imminent danger did not exist as the scraper crawled down the slope at two mph with the operator able to stop it at any moment.[4]

First, the inspector's testimony was inconsistent in critical areas related to his actions. On direct examination, the inspector testified he could not recall whether he saw the scraper stop at the bottom of the grade. He testified that it continued its loop back to the work place from which it started downhill. Tr. 38. The inspector testified that the reason he could not recall if the scraper stopped was because he "was engaged in a discussion with agents of the operator at that time." Tr. 38. If this testimony were correct, then the inspector did not watch the scraper complete its descent down the grade.

This questionable and unreliable testimony contrasts sharply with Knife River's case, wherein all of its witnesses, including the scraper operator, testified that the scraper completely stopped at the bottom of the grade when it reached the flat area. After that testimony, the Secretary recalled the inspector. The inspector then testified that he had started walking toward the bottom of the grade but turned around because the scraper was "way out ahead of me, and [it] kept going after reaching the bottom of the grade." Tr. 205. This testimony varies from his earlier testimony that he was talking to Knife River's employees so he did not see what

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[3] During his testimony, the inspector seemed to emphasize that the scraper operator had not tested the brakes on that specific grade before the inspector observed him. However, the inspector acknowledged that the scraper operator had told him that the operator had tested the brakes at the start of his shift and they were working fine where he was then operating the scraper. Tr. 48, 154. The inspector also testified that: (1) the scraper operator told him that he was going to start working a new area; (2) the scraper operator himself suggested that grade as the appropriate place for a test; and (3) the appropriate method of testing is for a fully loaded scraper to travel the grade and attempt to stop. Tr. 33-34. Because this was the first run of the day on that area, the absence of a prior "test" of the brakes in that area with a full load before the inspector watched is a meaningless distraction.

[4] The inspector's testimony demonstrates that he had little understanding of how a scraper operates. The inspector did not know about, or at least did not identify, the important safety assistance provided by the equipment's "retarder." The retarder slows the transmission and engine. Tr. 148. The retarder works automatically if the scraper exceeds three mph. In this case, the retarder did not come into play because the scraper never reached a speed at which it would automatically operate. The inspector either did not know or, at least, did not testify that he was aware that the retarder works as an auxiliary braking system on the scraper.

happened, but it is generally consistent with his earlier testimony that he did not see the scraper stop.

After the Secretary completed his case, however, the Judge asked the inspector whether the scraper stopped at the bottom of the grade and the inspector had a change of heart, mind, or memory and equivocally testified, "[y]ou know, I think it might have stopped briefly." Then, the Judge honed in and directly asked, "[b]ut he did stop? He was able to stop on flat ground?" The inspector finally remembered clearly and responded with a simple "yes." Tr. 208. The inspector actually knew the scraper had stopped completely when it reached the bottom of the grade. This fact raises an obvious question not accounted for by the Judge or the majority: why did the inspector not ensure that the scraper remained at the bottom of the grade once it stopped, instead of allowing the purported menace to continue traveling through the mine with defective brakes?

From this testimony, inconsistent and changing as it was, we see that the inspector, though at first denying the knowledge, actually knew that the scraper stopped promptly and properly while still carrying the 70,000 pound load that it would soon drop as it took the 2 to 3 minute trip back to the starting point.[5] It is uncontested that the scraper returned to the top of the grade in a matter of 2 to 3 minutes, and the inspector knew it was completing a loop and returning to the top of the ramp. This means that the scraper could have continued carrying the 70,000 pounds for only a very brief period in the open drop area depicted in photographs entered into the record by MSHA before dropping the load and returning to the top of the ramp. The majority makes no effort to explain why, during the very brief period, the operator could not have used the same techniques that the majority does not contest could have been used to quickly stop the scraper on the 14% grade.

The majority does not deal with the inspector's inconsistent testimony and, therefore, does not account for the fact that the inspector grudgingly and only with a judicial push admitted he had seen the scraper come to a complete stop at the bottom of the steep grade. Further, the evidence is clear that the scraper's job was to move material from the top of the grade to the flat area at the bottom and then return to the top of the grade. The inspector himself testified that the scraper would continue its loop upward to the top of the grade, (Tr. 38, 54), — a process that took only a couple of minutes. Tr. 116.

Second, uncontested facts contradict the inspector's assertion of danger. The inspector stated his primary concern was the safety of the scraper operator and when the Secretary's counsel asked the inspector about any danger to the scraper operator, the inspector responded that he was concerned that he might "over-travel the roadway." Tr. 38-39. That testimony is obviously incorrect; indeed, it is incredible. Operator witnesses and photographs of the site demonstrate that there were significant barriers on each side of the roadway. Mr. Farwell, the scraper operator, testified that overtraveling the roadway was not possible:

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[5] The majority asserts the ground was level when the scraper stopped; no testimony supports that assertion. However, if the ground was level, or if the grade had diminished only minimally but the scraper was able to stop, as the record establishes it did, there is no reasonable explanation for the inspector's failure to have the scraper remain at its stopping point in the face of what he asserts was an imminent danger arising from its continued operation.

> I had a 30-foot wall on one side and about 100-foot wall on the other side. At the very bottom, I've still got the 100-foot wall, and I've got a berm that is mid-axel height on the -- on the scraper. So I -- I had no problems.

Tr. 157.

The inspector's testimony that the scraper could have dangerously left the roadway is objectively and tellingly wrong. Either the inspector did not recognize the physical conditions at the site or, despite his testimony, he could not actually have had concerns of overtraveling the roadway. Indeed, Mr. Farwell graphically explained the virtual walls on the sides of the roadway, the area to which he was heading, the speed of the scraper, and the braking mechanisms. All this led to Mr. Farwell's testimony that he never was in any danger and never considered stopping the scraper although he could have at any moment. Tr. 155-60.[6]

Further, the inspector did not testify from the photographs or otherwise how the scraper operator could have overtraveled the dumpsite.[7] He did not point to any dangerous "embankment" that the operator could overtravel. Further, as noted above, the inspector eventually acknowledged that the scraper came to a complete stop at the bottom of the grade.

Third, when the Secretary's counsel asked if there was a way of stopping the scraper other than the brake system, the inspector first testified, "I guess you could run into something . . . ." Tr. 49. We must attribute this remarkable statement to the inspector's lack of any objective knowledge regarding the operation of a scraper. Mr. Farwell, the scraper operator, testified quite clearly that you can slow and stop a scraper without "running into something," (Tr. 148), and eventually the inspector agreed he also knew that the scraper could have stopped immediately. Tr. 49-50.

This acknowledgment alone should have been fatal to any pretense of appropriate concern and discretion, especially after the inspector's ludicrous testimony about "running into something." The inspector, in fact, testified that he knew that, relying upon the parking brake or emergency brake, the scraper operator actually could stop the scraper immediately through means other than the brakes if danger arose. Tr. 50. Regardless of the inspector's overall unfamiliarity with a scraper, he knew the operator could stop the scraper immediately. That recognition demolishes the need for an imminent danger order.

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[6] Of course, a miner may not perceive the danger. In this case, however, the inspector testified that the scraper operator was his primary concern. Tr. 44-45. Therefore, the scraper operator's testimony is important because he identifies many objective reasons that were, or should have been, known by the inspector, thus showing any alleged concern for the operator was wholly and objectively misplaced.

[7] A scraper drops its load by opening doors underneath the scraper so the loaded material falls directly below it. Tr. 146. The equipment does not lift a bed to dump material.

The inspector's recognition that the scraper operator could easily have stopped the scraper in case of any perceived danger creates an insoluble and undiscussed conundrum for the majority. If the inspector knew, or should have known, that the scraper operator could stop the scraper virtually immediately to avoid any danger from continuing movement, then there can be no reasonable expectation of serious injury or death.

Despite this, the majority endorses the inspector's literally incredible, unreasonable belief, without any assertion of expertise or reasoning, that stopping from two mph could reasonably be expected to seriously injure or kill the scraper operator, who was wearing a seatbelt inside the cab.[8] Tr. 50. Aside from the inspector's testimony that is unsupported, non-expert, and clearly runs counter to the human experience of equipment drivers, the Secretary presented absolutely no evidence of how a stop from a speed of two mph could reasonably be expected to seriously injure a driver wearing a seatbelt.[9] Without any evidence, it is impossible for the Secretary to overcome the obvious and commonsense understanding that seat-belted drivers are completely uninjured, let alone not seriously or fatally injured, when stopping their vehicles traveling at two mph.

Fourth, under the facts of this case, the inspector's issuance of the section 104(a) order clearly precludes any reasonable basis for issuance of an imminent danger order. Upon observing defective brakes in operation, it was entirely proper for the inspector to issue a section 104(a) citation and to order immediate abatement. He took that action. Having received such a citation, it was incumbent upon Respondent to cause the scraper to stop and to remove it from service until completion of brake repair. In this case, it had a duty to take that action as quickly under the 104(a) citation as under the imminent danger order. Knife River took that action. That being so, there is no basis to find that the brakes that slowed the scraper to two mph under extremely high stress would be reasonably expected to cause a fatality or serious injury before the citation could be abated. In other words, with the issuance of the 104(a) citation, there was no basis to find an objectively reasonable expectation of death or injury before abatement.

Fifth, we must again note — and in fact cannot stress enough — that the inspector's actions belie any notion of an imminent danger. Having seen the scraper completely stop at the bottom of the hill and then continue, there is no evidence that the inspector took or ordered emergency action to try to get in touch with the driver. There would be no excuse for such inaction if the inspector actually thought the driver was in imminent danger of death or serious injury. The inspector himself testified that the operator's representatives were only a few yards away from the truck where they had left their radios. Tr. at 85. While the majority suggests we believe the inspector should have "[tried] first to singlehandedly abate the potential danger," slip op. at 6 n.10, nothing in the record explains why he did not order the operator's representatives

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[8] The inspector testified that he knew the driver was wearing a seatbelt. Tr. 76.

[9] It should be noted that the scraper, a fairly-long piece of equipment, was in an enclosed roadbed and thus could not logically have even encountered the walls containing its travel head-on. It seems even less likely that any serious consequences could fall upon the driver from an *oblique* low-speed collision.

to run to retrieve their radios and order the scraper to stop immediately, if he believed an imminent danger existed.

The imminent danger provision in section 107(a) exists for one purpose: to prevent serious injuries or loss of life by empowering an inspector to order immediate withdrawal and cessation of mining activity until the danger no longer exists. An inspector who fails to follow through under such circumstances is either derelict or does not believe that an imminent danger truly exists, because a reasonable person would never permit the continuation of the activity giving rise to the danger. Whether the inspector should have single-handedly sought to abate the violation is immaterial: it is beyond argument that the Act conferred on him the power — and the duty — to take the steps necessary to protect miners from the immediate risk of serious injury or death, if such danger reasonably appeared to exist. It is also beyond argument that the inspector not only failed to take any immediate action, he let the scraper continue its loop through the mine.

Here again the majority stumbles over inconvenient facts. If the inspector was truly concerned about the scraper imperiling its operator at the site of the embankment, there can certainly be no argument whatsoever that the inspector should have used whatever time was available — as the machinery ponderously made its way to the dump site — to ensure the equipment was stopped and removed from service at once so that the danger could be abated. Thus, the majority entirely ignores the immediacy component essential to the issuance and enforcement of imminent danger orders.

Of course, as noted above, the inspector actually knew the driver was returning upgrade to the top of the slope and so waited at the top of the grade for the driver to return, i.e., he took no action at all despite his purported belief that the scraper operator was in mortal peril. Such action, or rather inaction, is wholly inconsistent with a finding of an imminent danger of death or serious injury to the driver.

Finally, in an effort to support an unsustainable decision, the majority turns to incorrectly characterizing the testimony and imagining areas and events not supported by any evidence. The testimony could not be clearer that the inspector decided to issue the imminent danger order when and because he observed the scraper crawling down the ramp at two mph.[10]

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[10] Q. Inspector, I'd like to start with the order numbered 8699159 behind GX1 [imminent danger order]. Why did you issue this order?
A. I issued this order when I observed a scraper unable to stop on a grade.

Tr. 30.

Q. When the service brakes didn't stop the scraper on the ramp, what did you do?
A. I turned to the agents of the operator and explained that if I was seeing what I thought I was seeing -- in other words, a scraper not stopping on a grade -- that was clearly an eminent [*sic*] danger-

As the testimony turned out, it became clear that movement down the 14% grade at two mph did not present an imminent danger. By focusing on the two or three minute trip after the scraper stopped, the majority effectively concedes that the condition for which the inspector issued the order, the scraper crawling down the grade at two mph and capable of stopping at any moment, did not constitute an imminent danger.

Rather than vacating the unwarranted order, the majority attempts to shift the focus away from the reason for which the inspector issued the order — the controlled descent down the ramp. To do so, they create a rationale for which there is no evidence. Not only does the evidence show the order was issued for the passage down the ramp, but also there is no meaningful testimony or other evidence to support an imminent danger when the scraper resumed travel after stopping at the bottom of the ramp.

Every witness testified that the scraper came to a complete stop at the bottom of the ramp. Indeed, the inspector, albeit after initially refusing to admit it, saw this complete stop. Further, the inspector also testified that he knew the scraper would then complete an upgrade "loop" to the top of the grade from where he departed — a loop that took all of 1.5 to 3 minutes. Tr. 39, 42, 159. Thus, the inspector knew from his personal observation both that the scraper stopped even when it was transporting a 70,000 pound load at the bottom of the grade. He further knew the operator would drop the load and return to the top of the grade within a couple of minutes.

To build its theory for an imminent danger order, the majority cites a passage in the transcript where the inspector testified that an embankment was under construction. Slip op. at 4 (citing Tr. 34). The majority does not take into account the fact that the embankment was under construction.[11] Embankments are not built from the top to the bottom. The scraper was transporting material to build the embankment or to provide a base for its construction. There is no possibility that the scraper could overtravel an embankment when it was transporting material to build the embankment, and the inspector did not offer any such testimony. The majority notes

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> type situation and that they needed to get that piece of equipment stopped immediately and remove it from service so that the condition could be corrected to protect people.

Tr. 41.

[11] An embankment is

> A linear structure, usually of earth or gravel, constructed so as to extend above the natural ground surface and designed to hold back water from overflowing a level tract of land, to retain water in a reservoir, tailings in a pond, or a stream in its channel, or to carry a roadway or railroad; e.g. a dike, seawall, or fill.

Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 186 (2d ed. 1997). The drop area is the place where the scraper deposits material for the floor of the impoundment or for use in constructing the embankment

the inspector testified that the scraper could "depart" the embankment. It is impossible to fathom the meaning of that statement. If the inspector simply means the scraper would leave the area to which it was bringing material for construction then it is nothing more than saying he knew the scraper would continue its two-minute loop to the starting point. If it is expressing some sort of concern about overtraveling an embankment, then it is simply a demonstration that the inspector failed to grasp that the material was being used to build the embankment so the scraper was not in any danger of falling from an embankment. This error, however, is only the beginning of the fatal flaws in the majority's effort to save the order.[12]

In one passage the inspector, while focusing on the ramp, mentions "multiple grades." He said, "[t]he equipment's in operation in that condition; the equipment's on a grade not stopping -- not able to stop in an area with multiple grades." Tr. 43-44. The majority attempts to use this passing reference for which no evidence was presented to sustain its theory. Nowhere in the inspector's testimony or the exhibits is there evidence of multiple grades. Other than this passing reference there is no testimony by any witness about multiple grades in the area. Were any such grades actually present? The inspector focused only on the ramp for which he did a test to measure the percent slope. There is no evidence of grades in the drop area or any imminent danger from any grades after the scraper left the 14% ramp because there is no evidence about any such grades.

There are photographs in the record that show the area below the ramp and the area where the embankment was going to be constructed. Those photographs do not depict any discernable grades and, again, the inspector did not offer any testimony about the drop area such as the existence, size, spacing, slope, etc. of any grades. The inspector did not testify that he saw the drop area, knew what it looked like, or of what it consisted. His testimony was that he stopped watching after the scraper reached the bottom of the ramp. In any event, neither the inspector nor anyone else suggests that there was anything even minimally approaching the 14% grade of the ramp.[13]

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[12] The inspector did testify to a fear that the scraper might depart the drop site. However, he did not provide any testimony about what that meant. Obviously, the scraper had to leave the drop site to return to the top of the ramp. That does not support an imminent danger. The inspector does not say how a scraper can overtravel a wide open area from which an embankment is being constructed. The majority uses scraps of testimony to support an unsustainable conclusion. Even assuming for argument's sake that this was the inspector's primary concern, he obviously had more time available for intervention between the issuance of the order and the scraper's arrival at the embankment site. While the inspector's testimony about what happened in that time is somewhat cloudy, it is clear that he did not use the time to order the operator to intercept the scraper on its way to the embankment site.

[13] The majority complains that operator witnesses did not testify about the drop area. That is unsurprising. As noted at the outset of our dissent, the testimony demonstrates that the inspector based his order on the transit down the ramp. The majority's reliance upon a passing and unsupported reference to unknown "grades" in the drop area is simply part of its effort to reassign the issuance of the order to an area of land that clearly played no role in the inspector's decision to issue the order while the scraper was on the ramp.

There is no testimony about the speed of the scraper after it reached the bottom of the ramp.[14] There is no testimony asserting that the scraper could not have easily stopped at any place on its return to the start area. The majority has accepted that the scraper operator could stop the scraper immediately after descending a 14% ramp carrying 70,000 pounds, but then fabricated a proposition that it presented an imminent danger on the return to the top of the grade. If, as the majority essentially admits, the failure to stop when traveling with 70,000 pounds down a 14% grade is not an imminent danger, it defies logic to suggest that an imminent danger existed on its return trip with the scraper empty and traveling upgrade. However, even if such a theory might be plausible, there is not substantial evidence in the record to support it.

In short, there is no evidence about grades in the drop area or on the return trip, there is no evidence about speed, there is no evidence contending that the scraper could not stop, there is much evidence that it could quickly stop, and there is no evidence about the effect of such a stop. Indeed, the testimony shows that the scraper stopped by using brakes alone while still carrying the 70,000 pound load and had stopped effectively all morning in areas off the 14% ramp. Further, as noted, there is no testimony about any grade including the length or steepness of a grade. Finally, there is no evidence that if a grade actually existed, why the same techniques useable on the 14% ramp would not have worked as effectively.

Here, the majority rejects the real reason the inspector issued the imminent danger order but creates out of whole cloth an alternate theory for which the Secretary did not present any evidence. The majority is simply unwilling to overturn a clearly meritless order.

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[14] The majority asserts the scraper would travel at faster speeds. Slip op. at 5 n.8. Although it is logical to think the speed would increase, the Secretary presented no evidence of the speed at which the scraper drops its load or that the brakes would not work at such unknown speed for the brief period until it dropped its load. Nor does it explain why the same measures that could have slowed or stopped the scraper on the ramp would not work in the drop area. They also assert the scraper would not be protected by overtravel barriers. Perhaps, this comes from their misperception of how an embankment is constructed. In fact, there is no evidence about the drop area (its dimensions, topography, total size, perimeter, etc.) or how it could be "overtraveled." As elsewhere in its opinion, the majority does its own construction — it constructs theories for which there is no evidence.

CONCLUSION

In closing, we affirm that an inspector should not hesitate in issuing an imminent danger order when he perceives a reasonable expectation of death or serious injury before a dangerous condition can be abated. However, in this case, the imminent danger order, without doubt, is not objectively reasonable. The Commission should not summarily affirm such clearly erroneous orders based upon inconsistent testimony and obvious post-hoc rationalizations. Here, a review of the record as a whole demonstrates there was no objectively reasonable basis for the issuance of an imminent danger order. We respectfully dissent.

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William I. Althen, Commissioner

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