FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, DC 20004-1710

September 30, 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 2011-407-R
JIM WALTER RESOURCES, INC.	:	

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

DECISION

BY: Young, Nakamura, and Althen, Commissioners:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). At issue is an imminent danger order issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") pursuant to section 107(a) of the Mine Act, 30 U.S.C. § 817(a),[1] to Jim Walter Resources, Inc. ("JWR") at its No. 7 Mine, an underground coal mine in Alabama. The order alleges elevated levels of methane at 5.6 percent in a roof cavity within the mine.

On December 22, 2011, the Administrative Law Judge issued a decision in this case affirming the section 107(a) withdrawal order. 33 FMSHRC 3211 (Dec. 2011) (ALJ). The operator filed a petition for discretionary review of the Judge's decision, which the Commission granted. For the reasons that follow, we affirm the Judge's decision.[2]

[1] Section 107(a) provides in relevant part 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 to be withdrawn from" the relevant area until the danger no longer exists. 30 U.S.C. § 817(a).

[2] On this same date, the Commission is issuing a separate decision in a case involving very similar issues. *Jim Walter Res. Inc*., Docket No. SE 2012-681-R.

I.

Factual and Procedural Background

A. Factual Background

On February 14, 2011, MSHA Inspector Lee Getter was conducting a five-day spot inspection[3] of the No. 8 Section of JWR's No. 7 Mine, due to the fact that the mine was liberating over one million cubic feet of methane in a 24-hour period. Tr. 34. During the inspection, Getter observed a continuous miner operator, a helper, an electrician, two roof bolters, two shuttle car operators, and a supervisor working in the No. 8 Section. Tr. 50. The continuous miner was located at the face of the No. 2 entry, and the roof bolter was located in the last open crosscut between the No. 2 and 3 entries. Tr. 50. Getter also observed another inspector taking dust samples in the section. Tr. 49. Counting the other inspector and her traveling party, Getter testified that there may have been 10 to 12 people in the section at the time of his inspection. Tr. 50.

During the inspection, Getter noticed a roof cavity that was located at the intersection between the No. 2 and 3 entries, about 40 feet back from the face. Tr. 51-52. The cavity was about 5½ feet deep, and contained a smaller, upper cavity that was approximately 1½ feet deep, which left four feet in the larger, main cavity. Tr. 98-99.

Upon discovering the cavity, Getter instructed the continuous miner operator to raise a methane detector into the cavity. About halfway into the first, larger cavity, the methane reading shot up to 4.6 percent. The miner operator quickly pulled the probe back in order to avoid the possibility of burning out the detector in the face of quickly rising gas levels. The miner operator then attempted another methane reading. Tr. 57-58. The second time, the detector was pushed to the edge of the smaller, upper cavity, and the reading showed 5.6 percent methane. Tr. 58. Getter testified that, during this time, one of the roof bolters was about to pin a loose rib that was located nearby the pocket of methane, which would have produced sparks. Tr. 63, 163.

Upon discovering the methane, Getter issued a section 107(a) imminent danger withdrawal order, directing the operator to cease mining operations in the area. The order alleged that the operator had "allowed methane levels to reach 5.6%" in the roof cavity. Gov't Ex. 1, at 1.

JWR subsequently contested the imminent danger order. On December 22, 2011, the Judge affirmed the order.

[3] Under section 103(i) of the Mine Act, any mine that liberates more than "a million cubic feet of methane . . . during a 24-hour period" is required to have an MSHA inspector inspect the mine "every five working days at irregular intervals." 30 U.S.C. § 813(i). The No. 7 Mine liberates more than one million cubic feet of methane in a 24-hour period and therefore is subject to a spot inspection every five days. Tr. 34.

B. The Judge's Decision

1. Whether the Inspector Abused His Discretion in Issuing the Imminent Danger Order

The Judge held that Inspector Getter did not abuse his discretion by finding an imminent danger at the roof cavity. She concluded that Getter reasonably believed that an ignition of the methane in the cavity was likely to occur. She credited Getter's testimony that a methane concentration of over 5 percent is in the explosive range,[4] and that with such a high level of methane, everything becomes a possible ignition source, including the slightest friction and even clothing static. 33 FMSHRC at 3217.

The Judge also found that various ignition sources existed in the area. *Id*. at 3213, 3217; Tr. 64. Specifically, the Judge credited Getter's testimony that a continuous miner was prepared to begin cutting coal nearby the roof cavity, which would have produced sparks igniting the methane. She also credited Getter's testimony that a roof bolter was energized and moving through the area to begin roof bolting a loose rib, which would have produced sparks nearby the roof cavity. 33 FMSHRC at 3213, 3217; Tr. 62-63. She emphasized that the last open crosscut is the "busiest area," with many miners traveling through the area, and that the area contained a significant amount of energized equipment and cables. 33 FMSHRC at 3214, 3218. Finally, the Judge noted that a roof fall, which created the cavity, had occurred within the previous few days, and that roof falls can also constitute ignition sources. Accordingly, the Judge credited Getter's description of the scene as "volatile" and sensitive — "a ticking time bomb." 33 FMSHRC at 3214, 3218, Tr. 64.

The Judge further found that the mine's ventilation system was reasonably likely to push the methane downward toward the mining machines and cables. She emphasized that the air in the cavity "was not being adequately diluted, as evidenced by the high levels of methane that remained" in the cavity. *Id*. at 3218. She found that, under normal mining operations, the methane would have migrated to other areas, pushed along by air that would not adequately dilute the mixture. *Id*. Based on these reasons, the Judge found that Getter reasonably believed that an ignition of methane was likely to occur, and that he did not abuse his discretion in issuing the section 107(a) withdrawal order. *Id*. at 3220.

2. Whether the Imminent Danger Order was Duplicative

The Judge also rejected the operator's argument that the section 107(a) order was duplicative. The operator claimed that the order was unnecessary because JWR had already

[4] The explosive range of methane is between 5 and 15 percent. *Knox Creek Coal Corp*., 36 FMSHRC 1128, 1135 n.13 (May 2014); *Texasgulf, Inc*., 10 FMSHRC 498, 501 (Apr. 1988). While methane may ignite at 1 percent, things change dramatically when the reading is over 5 percent. There is no longer simply a danger of ignition. Rather, there is the potential to ignite an explosive mixture of methane and other gases.

issued its own withdrawal order under 30 C.F.R. § 75.323(b)(2)[5] so that no mining activities would have been taking place by the time Getter issued the imminent danger order. The Judge, however, found that there was no indication that JWR was in the process of removing power or miners from the area when Getter discovered the excessive quantities of methane. Specifically, the equipment in the section was energized, and the miners were preparing to produce coal by the time Getter had arrived. 33 FMSHRC at 3219; Tr. 163 ("[b]y the time we got ready to start running, Lee came up . . . ").

The Judge further concluded that, as a matter of law, section 75.323(b)(2) and section 107(a) "impose separate and distinct [legal] duties" on an operator. 33 FMSHRC at 3219. Accordingly, she held that the imminent danger order was not duplicative.

3. Whether Various Pieces of Evidence were Admissable

The Judge made several evidentiary rulings that were adverse to the operator. Specifically, the operator had objected to reports of prior methane ignitions at the mine, as well as a bottle sample test result showing methane at 9.11 percent, which was observed by the inspector after he issued the section 107(a) withdrawal order. Over renewed objections, the Judge admitted both pieces of evidence. Tr. at 19, 40, 68-69; Sec'y Ex. 3, 5, 6. The Judge reasoned that Getter was well aware of the prior ignitions at the time that he issued the section 107(a) order (Tr. 35) and that those ignitions were facts known to him that supported his imminent danger finding. The Judge further reasoned that the 9.11 percent methane reading was relevant because it independently confirmed Getter's testimony about the methane level in the roof cavity exceeding 5 percent. 33 FMSHRC at 3213.

[5] Section 75.323(b)(2) provides that "[w]hen 1.5 percent or more methane is present in a working place or an intake air course, including an air course in which a belt conveyor is located, or in an area where mechanized mining equipment is being installed or removed — [e]veryone except those persons referred to in § 104(c) of the Act shall be withdrawn from the affected area[,] and[,] [e]xcept for intrinsically safe AMS [Atmospheric Monitoring Systems], electrically powered equipment in the affected area shall be disconnected at the power source." 30 C.F.R. § 75.323(b)(2).

II.

Disposition

A. The Judge Properly Concluded that the Inspector Did Not Abuse His Discretion in Issuing the Imminent Danger Order.[6]

Section 107(a) of the Act provides in relevant part 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. Section 3(j) 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) (emphasis added).[7]

An inspector's issuance of a section 107(a) imminent danger order is reviewed under an "abuse of discretion" standard. *Island Creek Coal Co*., 15 FMSHRC 339, 345-47 (Mar. 1993); *Utah Power & Light Co*., 13 FMSHRC 1617, 1627 (Oct. 1991). A section 107(a) order will be upheld if the Secretary proves by a preponderance of the evidence that the inspector reasonably concluded, based on information known or reasonably available to the inspector, that an imminent danger existed. *Island Creek*, 15 FMSHRC at 346-47.

Here, we conclude that substantial evidence supports the Judge's finding that the inspector reasonably concluded that the methane in the roof cavity was reasonably expected to cause death or serious physical harm before it could be abated.[8]

---

[6] Commissioners Althen and Young note for the record their disagreement with the concurring opinion of the Chairman and Commissioner Cohen for the reasons set forth in their dissenting opinion in *Jim Walter Res. Inc*., 37 FMSHRC __, slip op. at 1-6, No. SE 2012-681-R, issued on the same day as this decision.

[7] The parties offer two different interpretations of what constitutes an "imminent danger." The Secretary claims that he need not prove that death or serious injury is reasonably expected to occur within a "short period of time," and that the Commission caselaw setting forth this requirement conflicts with the statutory definition of "imminent danger" in section 3(j). The operator, by contrast, argues that the requirement of a "short period of time" is correct and that an actual, ready ignition source is required to sustain an imminent danger order in the context of methane accumulations. We need not reach this issue in this case, however, because the result will be the same under either interpretation.

[8] When reviewing a Judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'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)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest*

First, Inspector Getter knew that the roof bolting process would have created sparks that were reasonably likely to come into contact with the methane in the nearby roof cavity, had the operator pinned the loose rib. James Woods, the section coordinator, testified that the roof bolting process would have occurred 25 feet away from the roof cavity. Tr. 190. Although 25 feet is not directly next to the cavity, it is close enough that sparks could reach the roof cavity and come into contact with the methane. Getter also testified that the roof bolting process tends to "sling" sparks. Tr. 63. Specifically, according to Getter, during the pinning process "you've got metal cutting rock . . . which creates heat, which creates sparks." Getter added that "when they insert a pin into the roof, you've [also] got metal to metal from the roof bolt and actually what's called the Decatur plate on the roof bolt that once spun up against tends to *sling* sparks also and create heat." *Id.* (emphasis added). Getter noted that "[t]here have been cases where ignitions have occurred from the actual holes where they're inserting roof bolts." *Id.* As a result, the argument that the distance between the pinning process and the methane was great enough to prevent an ignition is unpersuasive.[9]

Second, the fact that the continuous miner had many moving parts that could produce sparks and cause ignitions was information reasonably available to Getter. On direct examination, Getter testified about numerous prior ignitions that had occurred at the mine. He stated that "the commonality for all of the [prior] ignitions was the continuous mining machine cutting into the hard rock bottom." Tr. 45; Gov't Ex. 5-E. Although the continuous miner was located 40 feet inby the methane pocket (Tr. 114), the miner could have travelled closer to the roof cavity, producing sparks from the roof antenna that could ignite the methane.[10] Furthermore, any methane ignitions at the continuous miner could have been propagated by the methane in the roof cavity. Tr. 114.

Third, we conclude that Getter's knowledge of the prior methane ignitions at the mine constitutes an independent reasonable basis for his issuance of the section 107(a) order. Tr. 75-

---

Material Co., 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

[9] We find unpersuasive the operator's argument that the methane monitor on the roof bolter would have mitigated the threat of any explosion by detecting the methane in the roof cavity and shutting down the roof bolter. The roof bolter only extended up to the roof line, which was 7 to 7½ feet high. The methane, by contrast, existed *above* the roof line, within the cavity. Tr. 83-85. Thus, the methane monitor on the roof bolter would have failed to extend high enough into the roof cavity to detect the methane. Furthermore, the roof bolter would have been 25 feet away from the methane. In any event, the Commission has declined to give probative value to mine operators' reliance on redundant safety measures. *Buck Creek Coal Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995); *Amax Coal*, 18 FMSHRC 1355, 1359 n.8 (Aug. 1996).

[10] On direct examination, Woods testified that the side of the continuous miner had an antenna welded onto it in order to gauge the height of the entry and ensure that the roof would be no lower than 84 inches. Tr. 163-64. He also admitted on cross-examination that the antenna would often scrape the roof and could possibly cause sparks. Tr. 190-92.

76, 176. Getter testified that he had been aware of "quite a few" of the prior ignitions at the mine through "[d]iscussions in the office," and that the mine had actually experienced an ignition on a different section the same day that Getter did his inspection at the mine for the instant case. Tr. 34-35.

Fourth, the existence of the prior roof fall is information that was reasonably available to Getter and relevant to his imminent danger finding. Woods admitted on cross-examination that the prior roof fall creating the cavity occurred *two days* before Getter issued the imminent danger order. Furthermore, Woods conceded that such roof falls constitute ignition sources that can interact with methane in the area. Tr. 176. As a result, Getter had a reasonable basis for issuing the section 107(a) order. Accordingly, we find that the Judge's decision was based on substantial evidence. [11]

B. The Imminent Danger Order Was Not Duplicative of the Operator's Withdrawal Order Under Section 75.323(b)(2).

We reject JWR's claim that the section 107(a) order was duplicative and unreasonable. The operator claims that the section 107(a) order was unnecessary because the operator's withdrawal order under section 75.323(b)(2) was already in effect, so that mining activities would have ceased by the time Getter issued the order. This claim, however, is controverted by the fact that the operator had no plans to delay coal production until *after* Getter discovered the excessive quantities of methane. Tr. 163, 227-28. This necessitated issuance of the order.[12]

Furthermore, even if JWR could prove that it had been planning to halt coal production before the inspector discovered the methane, the caselaw governing allegedly duplicative enforcement actions does not support it. The issue is whether multiple standards "impose separate and distinct duties" on an operator. *Spartan Mining Co.*, 30 FMSHRC 699, 716 (Aug. 2008); *Western Fuels-Utah. Inc*., 19 FMSHRC 994, 1003-04 (June 1997). In a situation

[11] By contrast, we conclude that substantial evidence does not support the Judge's finding that Getter reasonably concluded that the methane would have migrated to other areas of the mine towards the cable and equipment. 33 FMSHRC at 3218. According to Getter, the airflow was ventilating the roof cavity in an upwards direction. Tr. 69-70, 87. Although this upwards ventilation was improved upon abatement by repositioning a blower curtain, Getter testified that "methane is lighter than air" and "rises to the top." Tr. 87. Therefore, we conclude that substantial evidence does not support the Judge's finding that the airflow would have pushed the methane downwards before it could be abated. Regardless, however, this constitutes harmless error because substantial evidence still exists to support the Judge's decision, as shown *supra*.

[12] It would be odd and contrary to the Act's enforcement scheme if operators could issue a withdrawal order under section 75.323(b)(2) upon learning of a dangerous condition from an MSHA inspector, in order to avoid the consequences of a section 107(a) order. "The strict liability nature of the Act does not allow for this sort of gamesmanship." *Wake Stone Corp*., 36 FMSHRC 825, 829 (Apr. 2014) (refusing to allow operator to insist on a pre-operational examination upon learning of an impending MSHA inspection, in order to avoid liability for failing to maintain service horn in working condition).

analogous to that in this case, the Commission explained that, unlike section 107(a), the mandatory withdrawal standard in question, 30 C.F.R. § 75.309(b), was "directed to the operator rather than the Secretary." *Wyoming Fuel Co.*, 13 FMSHRC 1210, 1215 (Aug. 1991). Section 75.309(b) is similar to section 75.323(b)(2) in that they both require operators to shut down power and withdraw miners from dangerous areas of a mine. In the same way, section 107(a) and the mandatory standard in this case "impose separate and distinct duties" between the Secretary and the operator. Accordingly, we conclude that the section 107(a) order is not duplicative.

C. The Judge Acted Within Her Discretion In Making Evidentiary Rulings that Were Adverse to the Operator.

We reject JWR's claims of evidentiary and procedural error. First, we conclude that the Judge properly admitted the reports of the prior methane ignitions at the mine (Gov't Exs. 5A-5M) because Getter was well aware of the prior ignitions at the time that he issued the section 107(a) order (Tr. 35) and those ignitions were thus "facts known to him" that supported his imminent danger finding. We further find that the operator cannot plausibly claim that the Secretary's late disclosure of the reports shortly before the trial denied the operator a fair hearing, because the operator makes no argument as to how it was legally prejudiced by the late disclosure.

Second, we conclude that the Judge properly admitted the bottle sample testing result showing 9.11 percent methane because it independently corroborates Getter's testimony. Getter testified at the hearing that when testing the methane in the roof cavity, he had observed an increased reading and he believed that the methane may have actually been at a greater level due to the height of the cavity. Tr. 58, 68.

Third, we find that the Judge did not err by declining to draw the credibility determination that the operator sought on cross-examination regarding the issue of how high up in the roof cavity the methane existed. On cross-examination, the operator attempted to use the inspector's notes to impeach his testimony on this issue, and to show that the methane was located not in the main part of the cavity, but in the upper cavity only. Although the Judge admitted the notes into the record, she stated that she "[didn't] hear . . . any inconsistent statement" on this issue and that she would allow the notes in "[f]or what they're worth." Tr. 127-28. The Commission has recognized that a judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Eastern Assoc. Coal Corp.*, 32 FMSHRC 1189, 1196–97 n.8 (Oct. 2010); *Dynamic Energy, Inc.*, 32 FMSHRC 1168, 1174 (Sept. 2010).

Finally, we reject JWR's argument that the Judge improperly treated Getter as an expert witness. The full sentence in the Judge's decision that prompts the operator's claim of error reads that "[Getter] is a ventilation expert, and is aware that methane above 5 percent is volatile and explosive." 33 FMSHRC at 3217. The fact that methane above 5 percent is explosive is common knowledge in the mining industry and has been previously noted by the Commission. *Texasgulf*, 10 FMSHRC at 501. Commonly known information in the mining industry is a far cry from the "scientific, technical, or other specialized knowledge" that requires qualification as an expert under the Federal Rules of Evidence. *See* Fed. R. Evid. 701, 702. As a result, we conclude that the Judge did not treat Getter as an expert witness.

III.

Conclusion

For the reasons stated above, we affirm the Judge's finding of an imminent danger.

Michael G. Young, Commissioner

Patrick K. Nakamura, Commissioner

William I. Althen, Commissioner

Chairman Jordan and Commissioner Cohen, concurring:

We agree with the majority that there is substantial evidence to support the Judge's conclusion that the inspector reasonably concluded that the accumulation of methane in the roof cavity was reasonably expected to cause serious physical harm before it could be abated, and that there were multiple proximate potential ignition sources. However, we believe that it is not necessary to reach that issue.

Rather, we conclude that the detection of an explosive concentration of methane, by a mine inspector, in active workings within an underground coal mine (i.e., an area where miners work or travel pursuant to 30 C.F.R. § 75.2), justifies the issuance of an imminent danger order requiring the immediate withdrawal of miners, without the need to determine the presence of a ready ignition source. We explain the bases of that conclusion in our separate opinion issued as part of the Commission's concurrently issued decision concerning a separate incident of an explosive accumulation of methane at Jim Walter Resources' No. 7 mine. *See Jim Walter Res*. 37 FMSHRC __, No. SE 2012-681-R.

Mary Lu Jordan, Chairman

Robert F. Cohen, Jr., Commissioner