

ON APPEAL TO THE COMMISSION

FEDERAL MINE SAFETY AND HEALTH  
REVIEW COMMISSION

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

SECRETARY OF LABOR'S RESPONSE BRIEF

M. PATRICIA SMITH  
Solicitor of Labor

HEIDI W. STRASSLER  
Associate Solicitor

W. CHRISTIAN SCHUMANN  
Counsel, Appellate Litigation

SAMUEL CHARLES LORD  
Attorney

U.S. Department of Labor  
Office of the Solicitor  
1100 Wilson Blvd., 22<sup>nd</sup> Fl.  
Arlington, VA 22209-2296  
(202) 693-9370  
(202) 693-9361 (fax)

TABLE OF CONTENTS

STATEMENT OF THE ISSUES ..... 1

STATEMENT OF THE CASE ..... 1

    A. The Facts ..... 1

    B. The Judge’s Decision ..... 6

SUMMARY OF THE ARGUMENT ..... 7

ARGUMENT ..... 9

    I. PRINCIPLES OF STATUTORY INTERPRETATION ..... 9

    II. ABUSE OF DISCRETION REVIEW OF AN IMMINENT DANGER DETERMINATION IS PROPERLY CONDUCTED FROM THE PERSPECTIVE OF A REASONABLE INSPECTOR UNDER THE CIRCUMSTANCES CONFRONTED BY THE ISSUING INSPECTOR AT THE TIME OF ISSUANCE ..... 11

    III. THE MEANING OF “IMMINENT DANGER” IS CONTROLLED BY THE STATUTORY DEFINITION ..... 16

    IV. SUBSTANTIAL EVIDENCE SUPPORTS THE JUDGE’S DECISION ..... 26

        A. The explosive concentration of methane in the last open crosscut of the continuous miner section was an imminent danger ..... 26

        B. The Section 107(a) withdrawal order did not duplicate a mandatory standard ..... 28

    V. JWR’S CLAIMS OF PROCEDURAL ERROR ARE ERRONEOUS ..... 29

        A. The reports of prior methane ignitions were properly admitted ..... 29

        B. The bottle sample testing result showing 9.11 percent methane was properly admitted ..... 32

        C. The judge did not err by not drawing the inference that JWR sought regarding the inspector’s notes ..... 32

        D. The judge did not treat CMI Getter as an expert witness ..... 34

## STATEMENT OF THE ISSUES

1. Whether “abuse of discretion” review of an imminent danger determination is properly conducted from the perspective of a reasonable inspector under the circumstances confronted by the issuing inspector at the time of issuance.

2. Whether the statutory definition of “imminent danger” means, or may be reasonably interpreted to mean, a condition or practice that presents a risk of death or serious injury if normal mining operations are permitted to continue in the affected area before the condition or practice can be abated.

3. Whether importing into the statutory analysis dictionary definitions of the term “imminent,” or a similar requirement that an injury-producing accident be expected to occur “within a short period of time,” is inconsistent with the statutory definition of “imminent danger.”

4. Whether substantial evidence supports the judge’s ruling that the explosive concentration of methane in the last open crosscut of a working section was an imminent danger.

5. Whether the judge acted within her discretion in making evidentiary rulings that were adverse to the operator.

## STATEMENT OF THE CASE

### A. The Facts

Mine No. 7 is a large underground coal mine in Alabama. This case involves an MSHA inspector’s imminent danger determination based on an explosive concentration of methane of at least 5.6 percent in the last open crosscut of a continuous miner section. Methane is ignitable at concentrations of one to two percent, and explosive in the range of five to 15 percent. Tr. 60; Texasgulf, Inc., 10 FMSHRC 498, 501 (April 1988). Methane is highly flammable and may be

ignited by a mere spark. Eastern Associated Coal Corp., 13 FMSHRC 178, 185 n.4 (Feb. 1991). Because of methane's volatility, Congress described the requirement to adequately ventilate areas where the gas may accumulate as "one of the more important safety standards under the ... Act." S.Rep. No. 181, 95<sup>th</sup> Cong. 1<sup>st</sup> Sess. 41 (1977), reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977 ("Legis. Hist."), at 629 (1978). Historically, methane explosions have resulted in great loss of life in coal mines.

Mine No. 7 is an exceptionally gassy mine. It liberates over 29 million cubic feet of methane per 24 hour period, Sec. Exh. R-5 (see Box 13 "Methane Liberation"), a daily amount that is 29 times higher than the threshold amount required to subject an underground coal mine to the maximum frequency of methane spot inspections contemplated under the Act. See 30 U.S.C. § 813(i) (5-day spot inspections). The primary coal seam at Mine No. 7 is the Blue Creek Seam. Sec. Exh. R-5 (Box No. 7 of Ignition Reports); Tr. 159, 175. As the Commission has observed, the Blue Creek Seam is "an extremely soft seam that tends to liberate high quantities of methane." Jim Walter Res., 28 FMSHRC 579, 580 (Aug. 2006). Indeed, the Commission has described JWR's No. 5 Mine, another Tuscaloosa County coal mine cutting in the Blue Creek Seam, as being "one of the gassiest" mines in the country before it experienced two methane explosions on September 23, 2011, that resulted in 13 fatalities. 28 FMSHRC at 583; 595.

Before February 14, 2011, when the Section 107(a) order in this case was issued, frequent methane ignitions at Mine No. 7 drew the attention of personnel at the local MSHA field office in Bessemer, Alabama, including the inspector who issued the Section 107(a) order in this case. Tr. 35. Beginning with an ignition on January 12, 2010, and ending with an ignition on the morning of February 14, 2011, a few hours before the Section 107(a) order in this case was issued, Mine No. 7 experienced 17 separate methane ignitions, including 11 on continuous

miner sections. Sec. Exh. R-5 (continuous miner section ignitions on 1/12/10, 3/30/10, 4/14/10, 4/28/10, 5/14/10, 5/17/10, 5/20/10, 6/8/10, 6/16/10, 11/19/10, 2/14/11). Those ignitions occurred in a variety of locations throughout the continuous miner sections, including at the working faces (ignitions of 1/12/10, 4/14/10, 4/28/10, 5/14/10, 5/17/10, 5/20/10, 6/8/10) and in entries immediately outby the faces (ignitions of 3/30/10, 2/14/11). The ignition on the morning of February 14, 2011, for instance, occurred as the mining machine graded hard rock bottom while backing out of the face area, resulting in a yellow, orange, and red flame that lasted for approximately two minutes before miners extinguished the fire using seven fire extinguishers and a water hose. Sec. Exh. R-5.

The Section 107(a) order in this case was issued by MSHA Coal Mine Inspector (“CMI”) Alveriado Lee Getter. CMI Getter had been an MSHA inspector for six years at the time of trial. Tr. 26. He was formerly a ventilation specialist in the Birmingham district office, and was the acting supervisor in the Bessemer field office. Tr. 26; Sec. Exh. R-5 (box 30). CMI Getter had inspected Mine No. 7 during his initial training and during three quarterly inspections. Tr. 33. In total, CMI Getter had inspected Mine No. 7 over 100 times. Tr. 33.

On the morning of February 14, 2011, CMI Getter arrived at the No. 8 continuous miner section as part of a methane spot inspection. Tr. 46. There were eight individuals working on the section: a continuous miner operator, a miner operator helper, an electrician, two shuttle car operators, two roof bolters, and a section foreman. Tr. 50. CMI Getter observed energized equipment throughout the section, including a continuous mining machine, a roof bolter, and shuttle cars that were travelling through the entries.

When CMI Getter reached the intersection of the No. 2 entry and the last open crosscut, he found a loose rib on one of the corners. Tr. 51, 92. CMI Getter told the company

representative that the loose rib could become hazardous, and the company representative then ordered the roof bolter operators to move the roof bolter into the intersection and pin the loose rib. Tr. 51-52.

While still in the intersection of the No. 2 entry and the last open crosscut, CMI Getter noticed that a rock fall had created a large cavity, 15 feet wide by 10 feet long, in the roof. Tr. 52; 75; Sec. Exh. R-1 (drawing). Inside the larger cavity was a second cavity three feet across and 12 inches high. Sec. Exh. R-1 (drawing). The upper cavity was within the Mary Lee seam, another gassy coal seam according to the company's witness. Tr. 159; 175.

Concerned that the roof cavities might accumulate methane, CMI Getter asked the continuous miner operator to use his extendable methane detector probe to measure the air in the cavity, which was 13 feet above the mine floor. Tr. 56. The first time the miner operator stuck the probe into the main cavity, the methane reading "shot up" to 4.6 percent. Tr. 57. The miner operator immediately pulled the probe back down out of fear that the high methane would burn up the sensor in the spotter. Tr. 57. After the miner operator allowed the methane reader to bleed back down to .3 or .4 percent, he again extended the probe into the cavity, this time reaching the top of the main cavity where the smaller cavity started. Tr. 58. The methane reading reached 5.6 percent, a concentration in the explosive range, before the probe was again retracted for fear that it would be burned out by the high methane. Tr. 58-60.

CMI Getter issued an oral withdrawal order pursuant to Section 107(a) that removed miners from the area of the last open crosscut intersection in the No. 2 entry. Sec. Exh. R-1. CMI Getter determined that an imminent danger existed because of the multiple sources of sparking that could ignite the methane pocket and cause an explosion. As CMI Getter explained at trial, sparking can occur when the bits of a continuous miner head strike hard rock; when a

conveyor chain on the continuous miner loads coal onto a shuttle car, causing metal-on-metal contact; when a roof bolt machine pins rib with metal bolts; or when pieces of rock knock against one another during a roof or rib fall. Tr. 62-63; 76. When he issued the withdrawal order, CMI Getter was especially concerned by the location of the explosive concentration of methane in one of the busiest areas of the section. Tr. 61-62. Energized equipment passed through the intersection of the No. 2 entry and the last open crosscut, and at that moment the roof bolt machine was being moved towards the intersection in order to pin the loose rib. Tr. 63. As reflected in CMI Getter's handdrawn map, the continuous miner was positioned in the No. 2 entry at the time and, if normal operations were permitted to continue in the area, would have loaded coal onto shuttle cars immediately outby, in the intersection with the explosive methane pocket. Tr. 62. Finally, the roof in the intersection had already started falling, since the cavity in the intersection had itself been caused by roof falls from both the rock middleman and the Mary Lee coal seam. Tr. 76.

Immediately after CMI Getter issued the Section 107(a) withdrawal order, those miners who were needed to abate the condition began adjusting and adding ventilation curtains in an effort to course a higher velocity of air into the cavity.<sup>1</sup> Tr. 69. After approximately two hours, the concentration of methane in the cavity was diluted below one percent, and the Section 107(a) order was terminated. Tr. 70.

CMI Getter suspected that the concentration of methane in the cavity may have been even higher than 5.6 percent, because the earlier reading was aborted out of concern that the methane detector would burn out. Tr. 60. Roughly 15 to 20 minutes after issuing the withdrawal order, he obtained a bottle sample from the roof cavity. Tr. 65. The bottle sample was sent to MSHA's

---

<sup>1</sup> Under Sections 107(a) and 104(c) of the Act, those persons who are needed to eliminate the condition or practice described in the withdrawal order are not subject to withdrawal. 30 U.S.C. §§ 814(c); 817(a).

testing center for analysis. Testing revealed that the methane concentration in the cavity had been 9.11 percent, an amount well into the explosive range. Tr. 67, Sec. Exh. R-3.

B. The Judge's Decision

On December 22, 2011, the judge issued a decision affirming the Section 107(a) withdrawal order. In her decision, the judge credited CMI Getter's testimony and analysis. Dec. at 7. The judge noted that "CMI Getter had inspected the No. 7 mine many times and was aware of the unusual number of ignitions at the mine in recent months and particularly in the No. 8 section." The judge noted that a number of ignition sources existed in the continuous miner section, including an energized continuous miner that either had been cutting at the face or was about to cut into the face, the energized roof bolter, the shuttle cars, and the energized cables. The judge found that the hazard presented by the explosive mixture of methane was exacerbated by its location near the face. Ibid. Although no citations were issued for permissibility violations, the judge ruled that that fact did not change the imminent danger analysis because of the many pieces of machinery in the area that were energized and moving. The judge noted that CMI Getter believed that the 5.6 percent methane concentration was "only the beginning" and that the mixture was greater than what was shown when the methane detector was partially extended into the cavity. The judge found that CMI Getter's investigation had been reasonable under the circumstances, and that "the seriousness of the situation demanded immediate action from the inspector." Ibid.

The judge rejected JWR's argument that there was no "imminence" to the danger. "The cavity was located near the No. 2 entry, in a very busy area," the judge observed, "with equipment moving through, a continuous miner prepared to cut coal, and a roof bolter prepared for operation." Dec. at 8. Shuttle cars were also being operated in the intersection. In addition,

the judge found that, in the continued course of mining, the methane in the cavity would have migrated towards the face where cutting was planned for that shift, pushed along by ventilating air moving in by up the No. 2 entry. Ibid.

The judge also rejected JWR's argument that the Section 107(a) withdrawal order impermissibly duplicated 30 C.F.R. § 75.323(b)(2). The judge disagreed that JWR was in the process of removing power or men from the area when the oral Section 107(a) order was issued by CMI Getter. Dec. at 9. Assuming for the sake of argument that JWR had been in the process of evacuating and powering down the section, the judge ruled that there was no duplication issue because Section 107(a) imposes a duty on an inspector to issue withdrawal orders, while the mandatory standard imposes a separate duty on an operator to withdraw miners. Dec. at 9.

#### SUMMARY OF THE ARGUMENT

This case involves review of a Section 107(a) withdrawal order issued by an MSHA inspector based on an explosive pocket of methane gas in the last open crosscut of a continuous miner section. The primary issue before the Commission on appeal is whether substantial evidence supported the judge's finding that the conditions observed by the inspector were an "imminent danger" within the meaning of Section 3(j) of the Act, 30 U.S.C. § 802(j).

As a preliminary matter, the Commission should hold that the abuse of discretion standard of review is properly applied from the perspective of a reasonable inspector under the circumstances confronted by the issuing inspector at the time of issuance. Abuse of discretion review must consider the exigencies surrounding the inspector's decision, and must give effect to the principle that any uncertainty regarding the appropriate action should weigh in favor of withdrawal. The Secretary requests that potentially misleading language from two prior

Commission decisions be clarified in accordance with other case law about the abuse of discretion standard.

As an additional preliminary matter, the Commission should hold that an “imminent danger” means, or may be reasonably interpreted to mean, a condition or practice that presents a risk of death or serious injury if normal mining operations are permitted to continue in the affected area before the condition or practice can be abated. This conclusion is based on the language of Section 3(j) itself, Court and Commission precedent, the legislative history, and the Secretary’s enforcement and accident-investigation experience. The Secretary respectfully suggests that the Commission revisit portions of prior decisions that imply it is necessary to prove that an injury-producing accident was “imminent” under dictionary definitions of the term, or had a reasonable potential to occur “within a short period of time.”

Turning to the primary issue on appeal, the Commission should affirm the judge’s ruling that an imminent danger existed because the ruling is supported by substantial evidence. Based on the circumstances confronted by the issuing inspector, a reasonable inspector could determine for multiple reasons that the explosive concentration of methane in the last open crosscut of a working section was an imminent danger. The Commission should reject JWR’s duplication argument because the Section 107(a) order and the mandatory standard impose separate and independent duties on the Secretary and the operator, respectively.

Finally, the Commission should reject various claims of procedural error made by the operator because no procedural errors occurred.

## ARGUMENT

### I

#### PRINCIPLES OF STATUTORY INTERPRETATION

This case involves the interpretation of statutory provisions in the administrative context, and the familiar two-step Chevron analysis therefore applies. If the meaning of the statute is plain and unambiguous, the Commission must “give effect to the unambiguously expressed intent of Congress.” Wolf Run Mining Co. v. FMSHRC, 659 F.3d 1197, 1200 (D.C. Cir. 2011); Sec’y of Labor v. Excel Mining, LLC, 334 F.3d 1, 6 (D.C. Cir. 2003) (quoting Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984)). “To determine whether the meaning of a statutory provision is plain, the court’s analysis begins with ‘the most traditional tool of statutory construction, reading the text itself.’” Wolf Run, 659 F.3d at 1200 (quoting City of Tacoma v. FERC, 331 F.3d 106, 114 (D.C. Cir. 2003)). In addition to the language of the statutory provision at issue, a reviewing court also considers “the language and design of the statute as a whole.” Wolf Run, 659 F.3d at 1200 (quoting Halverson v. Slater, 129 F.3d 180, 184 (D.C. Cir. 1997)).

If the statute is silent or ambiguous with respect to the issue presented, a reviewing court defers to the Secretary’s interpretation so long as that interpretation is “a permissible construction of the statute.” Wolf Run, 659 F.3d at 1200-01; Sec’y of Labor ex rel. Bushnell v. Cannelton Indus., Inc., 867 F.2d 1432, 1435 (D.C. Cir. 1989) (quoting Chevron, 467 U.S. at 843). The Secretary’s litigating position before the Commission is an exercise of her delegated lawmaking powers and is therefore deserving of deference. Sec’y of Labor v. Nat’l Cement Co. of California, 573 F.3d 788, 791 (D.C. Cir. 2009) (quoting RAG Cumberland Res. v. FMSHRC, 272 F.3d 590, 596 n.9 (D.C. Cir. 2001)). Both the Commission and a reviewing court must

defer to the Secretary's reasonable interpretation of ambiguous Mine Act provisions. Olson v. FMSHRC, 381 F.3d 1007, 1011 (10<sup>th</sup> Cir. 2004); Excel Mining, 334 F.3d at 6. In the split enforcement structure of the Mine Act, deference is due to the Secretary instead of the Commission because, "by virtue of the Secretary's statutory role as enforcer, the Secretary comes into contact with a much greater number of regulatory problems than does the Commission, which encounters only those regulatory episodes resulting in contested citations." Martin v. OSHRC, 499 U.S. 144, 154 (1991). Accord Sec'y of Labor on behalf of Wamsley v. Mutual Mining, Inc., 80 F.3d 110, 114 (4<sup>th</sup> Cir. 1996). Because of her "historical familiarity and policymaking expertise," the Secretary is accorded deference when assessing the effect of a particular statutory interpretation on the administration of the Mine Act. Id.

Because the Mine Act is a remedial safety statute, its provisions must be broadly interpreted to promote miner safety and health. Donovan o/b/o Anderson v. Stafford Construction Co., 732 F.2d 954, 961 (D.C. Cir. 1984) ("The Mine Act must be broadly interpreted in order to further the congressional aim of making this Nation's coal and other mines safe places to work."); Sec'y of Labor v. FMSHRC (Jim Walter Resources), 111 F.3d 913, 920 (D.C. Cir. 1997); Walker Stone Co., Inc. v. Sec'y of Labor, 156 F.3d 1076, 1082 (10<sup>th</sup> Cir. 1998).

This principle is especially pertinent in the context of Section 107(a) of the Act, because Congress expressly directed that the imminent danger provisions be broadly interpreted due to their important safety role. "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." S.Rep. No. 181, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 37-38 (1977), reprinted in Senate Subcommittee on Human Resources, 95<sup>th</sup> Cong., 2<sup>nd</sup> Sess., Legislative History of the Federal

Mine Safety and Health Act of 1977 (“Legis. Hist.”) at 625-26 (quoted in Cyprus Empire, 12 FMSHRC 911, 918 (May 1990)). See also Wyoming Fuel, 14 FMSHRC 1282, 1290 (Aug. 1992) (noting that the courts of appeals have “eschewed a narrow construction” of the imminent danger provisions).

## II.

### ABUSE OF DISCRETION REVIEW OF AN IMMINENT DANGER DETERMINATION IS PROPERLY CONDUCTED FROM THE PERSPECTIVE OF A REASONABLE INSPECTOR UNDER THE CIRCUMSTANCES CONFRONTED BY THE ISSUING INSPECTOR AT THE TIME OF ISSUANCE

The Commission reviews an issuing inspector’s<sup>2</sup> imminent danger determination under the “abuse of discretion” standard of review. Cumberland Coal, 28 FMSHRC 545, 555 (Aug. 2006), aff’d on other grounds 515 F.3d 247 (3d Cir. 2008); Rochester & Pittsburgh Coal (“R&P”) 11 FMSHRC 2159, 2164 (Nov. 1989); Old Ben Coal Corp. v. IBMA, 523 F.2d 25, 31 (7<sup>th</sup> Cir. 1975). “Abuse of discretion” is equivalent to “arbitrary and capricious” and “reasonableness” review. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 377 n. 23, 378 (1989). A court applying the abuse of discretion standard must consider whether the agency action was “based on a consideration of the relevant factors and whether there has been a clear error of judgment.” Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). Although the review is “searching and careful, the ultimate standard of review is a narrow one,” and the court “is not empowered to substitute its judgment for that of the agency.” Ibid.; Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 43 (1983); Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 286 (1974). An agency is not required to demonstrate “to a court’s satisfaction” that its decision was

---

<sup>2</sup> For the sake of convenience, and because imminent danger orders are usually issued by inspectors, this brief speaks in terms of “the issuing inspector.” Section 107(a), however, specifies that an imminent danger order may be issued by any “authorized representative of the Secretary.” 30 U.S.C. § 817(a).

the best option available; it is sufficient that the agency's action "is permissible under the statute" and that "there are good reasons for it." FCC v. Fox Television, 129 S.Ct. 1800, 1810 (2009).

Under abuse of discretion review, a court must restrict its review to the information that was "before the agency at the time its decision was made." IMS, P.C. v. Alvarez, 129 F.3d 618, 623 (D.C. Cir. 1997). An agency cannot be found to have abused its discretion on the basis of information that was not reasonably available to it when it exercised its discretion. See Walter O. Boswell Mem'l Hosp. v. Heckler, 749 F.2d 788, 792 (D.C. Cir. 1984) ("If a court is to review an agency's action fairly, it should have before it neither more nor less information than did the agency when it made its decision.").

Applying these general principles of abuse of discretion review in the imminent danger context, the review should be conducted from the perspective of "a reasonable man, given a qualified inspector's education and experience," Freeman Coal Mining Co. v IBMA, 504 F.2d 741, 743 (7<sup>th</sup> Cir. 1974), who is confronted by the circumstances the inspector had before him at the time the determination was made. See Wyoming Fuel, 14 FMSHRC 1282, 1291-92 (Aug. 1992) (holding that an inspector's imminent danger determination must be evaluated "under the circumstances" based on "the facts known to him, or reasonably available to him"); Island Creek Coal Co., 15 FMSHRC 339, 346, 348 (March 1993) (determining the reasonableness of the inspector's action "given the particular circumstances" and "based on the information available at the time"). Because abuse of discretion review is conducted from the perspective of the reasonable inspector familiar with the scene, it must be sensitive to the special and often exigent circumstances in which an inspector exercises his discretion. Unlike the vast majority of agency actions, which are collectively made after an opportunity or even an obligation to collect and

consider multiple sources of information, see generally Overton Park, 401 U.S. 402 (reviewing agency approval of highway construction through a public park); Nat'l Industrial Sands Ass'n v. Marshall, 601 F.2d 689, 699 (3d. Cir. 1979) (reviewing notice and comment rulemaking under the Mine Act), imminent danger orders are issued by an MSHA inspector who “must act quickly to remove miners from a situation he believes is hazardous.” Blue Bayou Sand & Gravel, 18 FMSHRC 853, 859 (June 1996); Wyoming Fuel, 14 FMSHRC at 1291 (“[A]n inspector must act with dispatch to eliminate conditions that create an imminent danger.”) And because the consequences of making an incorrect determination that there is no imminent danger can be lethal, “the benefit of any doubt” about the existence of an imminent danger must be “cut in favor of withdrawal.” Dist. 6, UMWA v. IBMA, 562 F.2d 1260, 1267 (D.C. Cir. 1977). The reviewing court must remain mindful to evaluate the evidence from the “precarious position” of an inspector who encounters a potential imminent danger, knowing that “he is entrusted with the safety of miners’ lives, and he must ensure that the statute is enforced for the protection of these lives.” Old Ben, 523 F.2d at 31.

Supreme Court case law in an analogous context demonstrates why it is essential to evaluate the evidence from the perspective of a reasonable inspector familiar with the scene. In Fourth Amendment law, the “emergency aid exception” to the warrant requirement permits a law enforcement officer to enter a home without a warrant if the officer has a reasonable basis<sup>3</sup> for concluding that there is an imminent threat of violence. Ryburn v. Huff, 132 S.Ct. 987, 990

---

<sup>3</sup> As mentioned above, “abuse of discretion” and “reasonableness” are equivalent standards of review. Oregon Natural Res. Council, 490 U.S. at 377 n.23. Even if there were a meaningful difference, the “emergency aid” cases that the Supreme Court reviews under a reasonableness standard are still applicable because the Mine Act establishes reasonableness as the standard of review in imminent danger cases. Although Section 3(j) does not expressly refer to judicial review of an inspector’s imminent danger determination, such review is implied by the use of the term “reasonably.” See Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 56 (2005) (holding that the statute is the “touchstone of the inquiry” when determining the applicable judicial standard of proof or review under a statutory cause of action); Steadman v. SEC, 450 U.S. 91, 96 (1981).

(2012) (per curiam); Michigan v. Fisher, 130 S.Ct. 546, 548-49 (2009). Because “police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving,” the reasonableness of the officer’s action in such cases “‘must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.’” Fisher, 130 S.Ct. at 549 (quoting Graham v. Connor, 490 U.S. 386, 396-97 (1989)); Brigham City, Utah v. Stuart, 547 U.S. 398, 406 (2006). It would not “meet the needs of law enforcement or the demands of public safety,” the Supreme Court has explained, for a reviewing court “far removed from the scene and with the opportunity to dissect the elements of the situation” to use hindsight to “second guess[] a police officer’s assessment, made on the scene, of the danger presented by a particular situation.” Fisher, 130 S.Ct. at 549; Ryburn, 132 S.Ct. at 991-92.

As is true for an MSHA inspector faced with what he believes to be imminent danger, a police officer does not have the luxury of gathering “ironclad proof of a likely serious, life-threatening injury” before taking action. Fisher, 130 S.Ct. at 549. Nor could an officer or an inspector ever gather “ironclad proof” of such injury, since “[o]nly when an apparent threat has become an actual harm can officers rule out innocuous explanations for ominous circumstances.” Ibid. (quoting Brigham City, 547 U.S. at 406). The same reality applies in the imminent danger context, where “it often will only be the fact of the hindsight of a devastating explosion which will prove conclusively that the danger was on the point of happening.” Freeman Coal, 504 F.2d at 745. As with the reasonableness review in “emergency aid” cases, abuse of discretion review of imminent danger determinations must be an “objective inquiry into appearances” from the perspective of a reasonable inspector familiar with the scene, Fisher, 130 S.Ct. at 549, and should

not require more evidence than needed to cause a reasonable inspector to issue a withdrawal order under the circumstances.

While the principles of abuse of discretion review set forth above reflect existing Court and Commission case law, the Secretary respectfully requests that the Commission clarify language in past imminent danger decisions that, when taken out of context, could be read to countenance effectively *de novo* review. In Utah Power & Light, (“UP&L”), the Commission stated that “an inspector, albeit acting in good faith, abuses his discretion, making a decision that is not in accordance with law, if he orders the immediate withdrawal of miners in circumstances where there is not an imminent threat to safety.” 13 FMSHRC 1617, 1622-23 (Oct. 1991). The Secretary does not dispute that the mere “good faith” or subjective opinion of the issuing inspector is not enough to satisfy abuse of discretion review. Objective reasonableness under the circumstances is enough, however, and the UP&L language could be misconceived to require the Secretary to prove the actual existence of an imminent danger to a judge’s satisfaction, which is more than abuse of discretion review requires. Fox Television, 129 S.Ct. at 1810; Overton Park, 401 U.S. at 416.

The Secretary has the same concern about the Commission’s comment that “the judge applied the appropriate analysis” in a case where the ALJ stated:

I recognize the fact that any judgment call by an inspector with respect to the existence of an imminent danger situation, when balanced against the safety of miners, must necessarily be made quickly and without delay. However, in any subsequent proceeding challenging the order, any imminently dangerous situation, which the inspector may have believed existed at the time he issued the order, must be proven.

Island Creek, 15 FMSHRC at 343, 346. The Secretary respectfully requests that the Commission clarify that these portions of its past decisions should not be taken out of context, and that an imminent danger determination should be affirmed as long as it was reasonable under the

circumstances and facts known or available to the inspector at the time of issuance. See Wyoming Fuel, 14 FMSHRC at 1291-92 (evaluating an inspector's determination "under the circumstances" based on "the facts known to him, or reasonably available to him"); Island Creek, 15 FMSHRC at 348 (determining reasonableness "given the particular circumstances" and "based on the information available at the time"); IMS, P.C., 129 F.3d at 623 (restricting abuse of discretion review to a consideration of the information available at the time discretion was exercised).

### III.

#### BECAUSE "IMMINENT DANGER" IS A MINE ACT TERM OF ART, THE STATUTORY DEFINITION CONTROLS

"Imminent danger" is a "term of art" with a statutory definition set forth in Section 3(j) of the Act. 30 U.S.C. § 802(j); Dist. 6, UMWA, 562 F.2d at 1261. Because Congress provided a statutory definition of "imminent danger," that definition controls. Burgess v. United States, 128 S.Ct. 1572, 1577 (2008) (statutory definitions "control the meaning of statutory words in the usual case") (citing Lawson v. Suwannee Fruit & S.S. Co., 336 U.S. 198, 201 (1949)).

Therefore, "imminent danger" means what the statute says it means: "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 USC § 802(j).

The Secretary interprets the clause "could reasonably<sup>4</sup> be expected to cause death or serious harm" to mean that the cited condition or practice presents a risk of death or serious harm. Critically, the Secretary does not interpret Section 3(j) to require that an inspector predict when a death or serious injury-producing accident will occur. This reading is consistent with the

---

<sup>4</sup> As discussed *supra* in footnote two, the Secretary interprets the word "reasonably" in Section 3(j) to establish the standard of review of an imminent danger determination, while "could [] be expected to cause death or serious harm before such condition or practice can be abated" provides the substantive benchmark for determining the existence of an "imminent danger."

legislative history, which indicates that an imminent danger is not defined “in terms of a percentage of probability that an accident will happen,” but instead focuses on “potential of the risk to cause serious physical harm at any time.” Legis. Hist., at 626 (quoted in UP&L, 13 FMSHRC at 1622; R&P, 11 FMSHRC at 2164). Additionally, the Secretary reads the clause “before [the] condition or practice can be abated” to mean that there is a risk of death or serious injury if normal mining operations are permitted to continue in the affected area before the condition or practice can be abated. This formulation is consistent with descriptions of the imminent danger inquiry set forth in existing Court and Commission case law. See R&P, 11 FMSHRC at 2163 (asking “whether, given the continuation of normal mining operations, the condition could have seriously injured [a miner] at any time before the dangerous condition was eliminated”) (emphasis in the original); Eastern Assoc. Coal Corp. v. IBMA, 491 F.2d 277, 278 (4<sup>th</sup> Cir. 1974) (“[A]n 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.”).

Instead of a timing-focused inquiry centered on predicting when an injury-producing accident will occur, which would be unrealistic for the reasons discussed in the next paragraph, the statutory definition of imminent danger dictates a more functional analysis. Normal mining operations in an affected area should not continue while abatement is still pending, if continuing normal operations would present a risk of death or serious injury. In such a scenario, an inspector has the discretion to issue a Section 107(a) withdrawal order for the affected area that directs the operator to fix the hazardous condition or practice first, before resuming normal operations. Just as Section 104(b) grants an inspector the discretion to require immediate compliance with the Act rather than extend the period of time for abatement of a violation, 30

U.S.C. § 814(b); Energy West Mining Co., 18 FMSHRC 565, 569 (April 1996), aff'd, 111 F.3d 900 (D.C. Cir. 1997), the imminent danger provisions grant to the inspector the discretion to take action to halt normal mining operations in an affected area until a condition or practice that poses a risk of death or serious injury can be abated. The risk that death or serious injury will occur before the condition or practice can be abated is the temporal element or “degree of imminence” that Congress intended to address in the imminent danger provisions. See UP&L, 13 FMSHRC at 1621 (“The language of the Act and its legislative history make clear that Congress intended that there must be some degree of imminence to support a section 107(a) order.”).

The foregoing interpretation of Section 3(j) is based primarily on the language of the statute and existing case law, but is also informed by the Secretary’s enforcement and accident investigation experience. See Martin, 499 U.S. at 154; Mutual Mining, 80 F.3d at 114 (accorded deference to MSHA as the enforcement agency). Experience shows that the timing of most mine accidents cannot be predicted. Even where underlying conditions and practice create the risk of an accident, most accidents are triggered by inherently unpredictable events, such as ignitions, electrical arcs, roof falls, or a moment’s inattention on the part of a miner.<sup>5</sup> Because

---

<sup>5</sup> A sampling of MSHA fatal accident investigation reports from 2011 illustrates this reality. See MSHA Coal Accident Investigation Report (“CAI-”) CAI-2011-03 (Feb. 11, 2011) (fatality triggered by inattention of machine operator where a hazardous traffic pattern already created an underlying risk); CAI-2011-09 (June 29, 2011) (fatality triggered by a falling rib where adverse rib conditions throughout the section created an underlying risk); CAI-2011-10 (July 11, 2011) (fatality triggered by locomotive operator sticking head outside of moving locomotive where low vehicle clearance created a risk of accidental contact); Metal Accident Investigation Report (“MAI-”) MAI-2011-06 (June 4, 2011) (fatality triggered by inattention of miner when an unguarded floor opening and a lack of fall protection created a risk of freefall); MAI-2011-07 (Aug. 9, 2011) (fatality triggered by accidental contact with a head roller when a narrow travelway and low clearance created the risk of entanglement with belt structure); MAI-2011-03 (Feb. 24, 2011) (fatality triggered by a failure to lock and tag out a belt where a lack of safe access caused miners to routinely work on top of the belt during maintenance). The Commission may take judicial notice of these reports, which are referenced for their general accident narratives and not for any specific conclusions that could be the subject of reasonable dispute. See Jim Walters Res., 7 FMSHRC 1348, 1355 n.7 (Sept. 1985); Union Oil Co. of California, 11 FMSHRC 289, 300 n.8 (March 1989) (stating that notice may be taken if the extra-record information “is commonly known, or can safely be assumed, to be true” and is not the “subject of reasonable dispute”).

potentially deadly events such as methane explosions cannot be predicted, there should be no requirement to predict when an accident will occur in order to issue an imminent danger withdrawal order. See Stafford Construction, 732 F.2d at 961 (general principle that the Mine Act is to be broadly interpreted to achieve remedial safety purpose); Legis. Hist. at 625-26; Cyprus Empire, 12 FMSHRC at 918 (specific principle that the imminent danger provisions are to be broadly interpreted to effectuate their “essential” role). Instead, Section 3(j) should be interpreted, consistent with its language and the legislative history, to require that a condition or practice pose a risk of death or serious injury if normal mining operations are permitted to continue in the affected area before the condition or practice can be abated.

The Secretary recognizes that her interpretation of Section 3(j) set forth above conflicts to some degree with aspects of past Commission rulings on the meaning of “imminent danger.” First, the Commission has occasionally referred to dictionary definitions of the word “imminent”—including the definitions “ready to take place: near at hand: impending: hanging threateningly over one’s head: [or] menacingly near”—when evaluating whether a condition or practice was an “imminent danger.” See Island Creek, 15 FMSHRC at 345; UP&L, 13 FMSHRC at 1621. It is unclear from those decisions whether the Commission actually held that these dictionary definitions were authoritative, or whether they were just aids in support of the Commission’s correct conclusion that Section 3(j) contains a temporal element. See UP&L at 1621 (beginning an “imminent danger” analysis by setting forth the dictionary definitions of “imminent,” without expressly incorporating those definitions into the analysis). Whether or not the Commission intended to incorporate dictionary definitions of “imminent” into the “imminent danger” analysis, such definitions do not apply because Congress provided a statutory definition of the term. See FDIC v. Meyer, 510 U.S. 471, 476 (1994) (statutory terms should be construed

in accordance with their ordinary or natural meaning only when they are not defined in the statute). And importing phrases such as “impending” or “menacingly near” into the “imminent danger” analysis defeats the purpose of Section 107(a), i.e., to remove miners from risk of death or serious injury, because those terms suggest that the timing of an injury-producing accident can be predicted. Because Commission trial judges have read past Commission decisions to incorporate dictionary definitions of “imminent” into the “imminent danger” analysis, see, e.g. BethEnergy Mines, Inc., 16 FMSHRC 935, 966 (April 1994) (ALJ); U.S. Steel Group, Minnesota Ore Operations, 15 FMSHRC 1153, 1162 (June 1993) (ALJ), the Secretary respectfully requests that the Commission clarify that the statutory definition, and not dictionary definitions, controls.<sup>6</sup>

Second, the Commission has held that an imminent danger must have a “reasonable potential to cause death or serious injury within a short period of time.” Cumberland, 28

---

<sup>6</sup>The Secretary believes that her arguments regarding past references to non-statutory definitions of the term “imminent danger” are an integral part of the fundamental issue before the Commission, i.e., whether there was an “imminent danger” in this case within the meaning of the Act. If the Commission disagrees and views the Secretary’s arguments as raising a new issue on appeal, and therefore potentially subject to a finding of waiver, the Secretary requests that the Commission exercise its “fair measure of discretion to determine what questions to consider and resolve for the first time on appeal.” Roosevelt v. E.I. Du Pont de Nemours & Co., 958 F.2d 416, 419 n.5 (D.C. Cir. 1992) (citing Hormel v. Helvering, 312 U.S. 552, 555-559 (1941)). The question of whether dictionary definitions of “imminent” apply in this context will recur in future Section 107(a) proceedings. Resolution of the question now will reconcile partially conflicting case law, and ensure both that inspectors will have the full authority intended by Congress to remove miners from harm and that operators will have notice of the extent of that authority. See Roosevelt, 958 F.2d at 419 n.5 (citing City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 255-257 (1981)) (granting discretionary appellate review is appropriate for “important” and “recurring” questions of law). For the same reasons, there is “good cause” under Section 113(d)(2)(A)(iii) of Act to exercise discretionary appellate review. 30 U.S.C. § 823(d)(2)(A)(iii). The legislative history suggests that Section 113(d)’s purpose was to provide an adequate opportunity to develop a factual record at trial, and does not preclude Commission consideration of important, purely legal questions that do not require factfinding. See Legis. Hist. at 637; Manalapan Mining Co., 18 FMSHRC 1375, 1389 (Aug. 1996) (split decision) (finding good cause to consider an important legal question that required no additional factfinding). Clarification of this legal issue now will promote judicial efficiency in future proceedings, the other goal of Section 113(d). Ibid.; Fact Concepts, 453 U.S. at 255-257. See Bjes v. Consolidation Coal Co., 6 FMSHRC 1411, 1417 (June 1984) (review by the Commission of an important and recurring question of law that was implicated in the issue before the judge, even if it was not articulated at the time).

FMSHRC at 571 (emphasis added); UP&L, 13 FMSHRC at 1622. Apart from the fact that it is unclear what is a “short period of time” means in this context, the phrase is problematic because it is materially different from the time frame established in Section 3(j) of the Act, and because it could limit the authority that Congress granted the Secretary to issue Section 107(a) orders where there is an unsafe work “practice.” 30 U.S.C. § 802(j). Unlike the word “condition,” which implies an existing state of being, the word “practice” connotes habitual or routine conduct that will recur in the future. Merriam Webster’s Collegiate Dictionary, 914 (10<sup>th</sup> ed. 1993) (defining “practice” as “a repeated or customary action” and “the usual way of doing something”). Therefore, the “within a short period of time” language could apply to improperly prevent an inspector from issuing a Section 107(a) order that is based on an unsafe work practice that will recur in the future, and pose a risk of death or serious injury at that time. Instead of the “reasonable potential to cause death or serious injury within a short period of time” formulation, the appropriate timing inquiry is whether there is a risk of death or serious injury if normal mining operations are permitted to continue before the practice can be abated. See R&P, 11 FMSHRC at 2163; Eastern Assoc., 491 F.2d at 278; Old Ben, 523 F.2d at 33.

The first appearance in the case law of the dictionary definitions of the word “imminent” and the “within a short period of time” language was in the 1991 Utah Power & Light decision. 13 FMSHRC at 1621-23. In that decision, the Commission held that the legislative history, the definition of “significant and substantial” (“S&S”) violations, and the “extraordinary” nature of Section 107(a) withdrawal orders compelled the adoption of the “within a short period of time” language. As the UP&L Commission acknowledged in a footnote, its decision was a departure from previous Court precedent. Id. at 1621 n.5 (“Several courts have rejected the arguments of mine operators that imminent danger[] orders can be issued only for conditions that create an

immediate danger of death or serious injury”). Because of the acknowledged conflict with Court case law, and the substantive reasons that follow, the Secretary respectfully requests that the Commission revisit those portions of the UP&L decision regarding dictionary definitions of “imminent” and the “short period of time” language.

First, although the UP&L Commission found that the Act’s legislative history “makes clear that imminence is required,” id. at 1621 n.5, that conclusion was based on a selective reading of the legislative materials and omitted countervailing portions of the legislative record. See Exxon Mobil v. Allapattah Services, 545 U.S. 546, 568 (2005) (cautioning that “[j]udicial investigation of legislative history has a tendency to become...an exercise in looking over a crowd and picking out your friends.”) (citations omitted). While the UP&L decision accurately observed that the legislative history includes the terms “impending” and “immediate,” the decision did not address those parts of the legislative record that repeated the statutory definition of “imminent danger” or those that emphasized that the focus is on the risk to miners at any time, not on the probability of an injury-producing accident. Legis. Hist. at 625-26.<sup>7</sup> Legislative history must demonstrate a “clearly expressed legislative intent” before a court may “question the strong presumption that Congress expresses its intent through the language it chooses.” INS v. Cardoza-Fonseca, 480 U.S. 421, 432 n.12 (1987). A complete reading of the legislative record

---

<sup>7</sup> The UP&L court did not consider the following sentences:

The Committee disavows any notion that imminent danger can be defined in terms of a percentage of probability that an accident will happen; rather the concept of imminent danger requires an examination of the potential of the risk to cause serious physical harm at any time.... The Committee intends that the Act give the necessary authority for the taking of action to remove miners from risk.... The imminent danger withdrawal order is designed to afford miners immediate protection in those situations where a condition or practice in a mine could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.”

Legis. Hist. of Mine Act at 625-26.

shows that there is no unambiguous evidence of Congressional intent that the term “imminent danger” should be interpreted according to dictionary definitions that lead to a different result than the statutory definition.

Second, the UP&L decision concluded that imminent danger determinations must be limited to “impending threats” or else “the distinction is lost between a hazard that creates an imminent danger and a violative condition that ‘is of such nature as could significantly and substantially contribute to the cause and effect’ of a mine safety hazard.” UP&L, 13 FMSHRC at 1622 (quoting 30 U.S.C. § 814(d)(1)). An imminent danger condition or practice is already distinguishable from an “S&S” designation, however, without any need to restrict imminent dangers to “impending threats” that must occur “within a short period of time.” An imminent danger is a condition or practice, may occur in the absence of any violation of a mandatory standard, and results in an immediate withdrawal order to remove miners from harm. 30 U.S.C. §§ 802(j); 817. In contrast, S&S is a special designation only associated with violations of mandatory standards, and may serve as a basis for a withdrawal order only if accompanied by additional special findings. 30 U.S.C. §§ 814(d)(1) (“unwarrantability” finding required); 814(e) (“pattern of S&S violations” finding required). While it is generally true that a statutory provision should be interpreted “to harmonize and give meaningful effect to all” of a statute’s provisions, where a statute’s “various pieces hang together” already, without conflict, there is no need for further efforts to harmonize them. New Process Steel, L.P. v. NLRB, 130 S.Ct. 2635, 2640 (2010). The imminent danger and S&S provisions of the Act are not interdependent and do not potentially conflict with each other, so the impulse in UP&L to harmonize the provisions by restricting the scope of imminent danger was misguided.

Beyond these fundamental statutory distinctions, imminent danger conditions and S&S determinations are subject to different legal tests. An S&S violation is “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” 30 U.S.C. §§ 814(d)(1); 815(e)(1). Under Mathies and its progeny, an S&S finding is appropriate where the violation of a mandatory standard contributed to a discrete mine hazard and where the contributed-to hazard (not the violative condition itself), assuming it comes to pass, is reasonable likely to result in a serious injury. See Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan 1984); Cumberland Coal Res. (“Cumberland II”), 33 FMSHRC 2357, 2364-2366, 2368 (Oct. 2011) (appeal pending, D.C. Cir. No. 11-1464); Musser Engineering & PBS Coals, 32 FMSHRC 1257, 1280-81 (Oct. 2010). In contrast, an imminent danger is more than a condition that could merely contribute to the cause and effect of a mine hazard; it is itself a hazardous condition or practice that poses a risk of death or serious injury if normal mining operations are permitted to continue before it can be abated.<sup>8</sup>

Third, the UP&L Commission described MSHA’s authority to issue Section 107(a) withdrawal orders “without affording the operator the right of prior review” as an “extraordinary power,” and therefore concluded that “[o]nly by limiting section 107(a) withdrawal orders to such impending threats does the imminent danger provision assume its proper function under the Mine Act.” UP&L, 13 FMSHRC at 1622. The Secretary’s authority to issue Section 107(a) withdrawal orders without prior judicial review, however, is no different in principle from her “considerable authority” to issue withdrawal orders to mine operators without prior review in a

---

<sup>8</sup> JWR claims that the ALJ’s decision fails to recognize the difference between imminent danger and S&S, which, in JWR’s view, is “the degree of certainty that the alleged hazard will come to fruition and cause injury.” Br. at 5. As discussed above, there are fundamental differences between these Mine Act concepts, but the “degree of certainty” of injury is not one of them. The law on S&S does not require proof of the likelihood “that the violation itself will cause injury.” Musser, 32 FMSHRC at 1281; Cumberland II, 33 at 2365.

variety of other circumstances. Wyoming Fuel, 13 FMSHRC 1210, 1215 (Aug. 1991). See 30 U.S.C. §§ 813(j) & (k) (accident control orders); 814(b) (failure to abate withdrawal orders); 814(d) (unwarrantable failure withdrawal orders); 814(e) (pattern of violations withdrawal orders); 814(f) (unabated respirable dust overexposure withdrawal orders); 814(g) (untrained miner withdrawal orders). Even if Section 107(a) withdrawal orders were distinguishable from those other withdrawal orders that are issued without prior judicial review, that distinction is an insufficient reason to rewrite the statutory definition of “imminent danger” provided by Congress. As the Seventh Circuit observed:

When Congress acted to vest inspectors with power to order a coal mine owner immediately to withdraw employees from a mine when the inspectors find imminent danger of a disaster existing, Congress was fully informed that the coal mine owner would suffer economic loss as a result of correcting the dangerous conditions before permitting the employees to return to work. Congress also well knew that gas and fire do not wait to cause explosions while notices are served and hearings are held. Congress meant for inspectors to have the authority it gave to them.

Old Ben, 523 F.2d at 36-37.

For the foregoing reasons, the statutory definition of “imminent danger” provided in Section 3(j) controls, and should be interpreted to cover situations where there is a risk of death or serious injury if normal mining operations are permitted to continue in the affected area before the condition or practice can be abated. The Secretary should not be required to show that an injury-producing accident is “imminent” within dictionary definitions of the term, or will occur “within a short period of time.”

#### IV.

##### SUBSTANTIAL EVIDENCE SUPPORTS THE JUDGE'S DECISION

- A. The explosive concentration of methane in the last open crosscut of the continuous miner section was an "imminent danger"

Substantial evidence supports the judge's conclusion that the inspector acted within his "considerable discretion" under the Act in ordering the withdrawal of miners from the area of the last open crosscut. Island Creek, 15 FMSHRC at 348; R&P, 11 FMSHRC at 2164. "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." R&P, 11 FMSHRC at 2163 (quoting Consol. Edison Co. v. NLRB, 302 U.S. 197, 229 (1938)). Viewing the evidence from the perspective of CMI Getter at the scene, there were many reasons why a reasonable inspector could find an imminent danger. Indeed, a reasonable inspector could conclude that not issuing an imminent danger order, and allowing normal mining conditions to continue in the affected area, would have been "gambling with human lives." Freeman Coal, 504 F.2d at 744.

Given the circumstances encountered by CMI Getter, a reasonable inspector would have several independently sufficient reasons to conclude that there was a risk of death or serious injury if normal mining operations were allowed to continue in the affected area, the last open crosscut intersection in the No. 2 entry, if the explosive methane pocket was not first diluted. CMI Getter knew that Mine No. 7 is an exceptionally gassy mine that was experiencing frequent methane ignitions. Sec. Exh. R-5. He knew that the methane pocket only needed a spark to explode, and that it was located in one of the busiest areas of the eight-person continuous miner section. He knew that roof falls, which are capable of igniting methane because falling rocks strike other rocks and produce sparks, had already occurred in the intersection. Tr. 62-63; 76. He knew that both cutting coal and loading coal can ignite methane, and that if normal mining

operations continued in the No. 2 entry, the mining machine would cut coal at the face and load it onto shuttle cars in the same intersection as the methane pocket. Tr. 51-52; 61-63. And he knew that the rib bolting machine was about to pin loose ribs with metal bolts, an activity that can cause sparks, in the same intersection as the explosive methane pocket. Tr. 51-52; 61-63; 92. Under these circumstances, it was reasonable for CMI Getter to insist that the methane pocket be eliminated before normal mining operations continued in the last open crosscut intersection in the No. 2 entry.

Substantial evidence also supports the judge's finding that CMI Getter's investigation was reasonable under the circumstances. JWR faults CMI Getter for issuing the withdrawal order without first checking the methane readings in other parts of the section, including the faces. Br. at 19. Viewing the evidence from the perspective of a reasonable inspector at the scene, however, there was no reason to delay the issuance of the Section 107(a) order in order to first travel around the section taking methane readings elsewhere. CMI Getter already knew that there was an explosive concentration of methane in the last open crosscut, that equipment was moving throughout the crosscut, and that the roof bolter was at that moment moving towards the intersection to pin a loose rib. Given what he already knew, his decision to pause normal mining operations in the affected intersection when he did was reasonable.

In conclusion, CMI Getter's "imminent danger" determination was eminently reasonable and certainly not a "clear error in judgement." Overton Park, 401 U.S. at 416. Substantial evidence therefore supports the judge's ruling.<sup>9</sup>

---

<sup>9</sup> In its brief, JWR insists that the judge applied a *per se* rule that an explosive concentration of methane in a working section is an "imminent danger." Br. at 6-9. This is simply not true. The judge's decision rested on the totality of circumstances present at the time the Section 107(a) order was issued, including the location of the explosive pocket of methane in one of the busiest areas of the continuous miner section and the proximity of the methane to a multitude of potential ignitions sources. ALJD at 7-10.

B. The Section 107(a) withdrawal order did not duplicate a mandatory standard

JWR argues that the Section 107(a) withdrawal order issued by CMI Getter duplicated 30 CFR § 75.323(b)(2), a mandatory standard that requires an operator to withdraw all persons, except those referred to in Section 104(c) of the Act, if 1.5 percent or greater methane is present in a working place. JWR claims that the company representative initiated the process of withdrawing miners from the section pursuant to the mandatory standard before CMI Getter issued the Section 107(a) withdrawal order, and that the order was therefore without effect. JWR's argument is incorrect both on the facts and the law.

As a factual matter, the ALJ concluded that CMI Getter, and not the operator, caused workers to withdraw from the area. Dec. at 9 ("I do not agree that JWR was in the process of removing power or men from the area when the verbal order was issued by Getter.") This ruling is supported by substantial evidence in the form of CMI Getter's testimony that he instructed the company representative to deenergize the section. Tr. 107:10-12.

Even assuming that the company representative initiated the withdrawal, JWR is wrong on the law. JWR bases its argument on a 1991 Wyoming Fuel decision<sup>10</sup> that it misreads. 13 FMSHRC 1210 (Aug. 1991). In that case, a mandatory standard required a foreman to order the withdrawal of miners from the section after methane in excess of 1.5 percent was detected in a return entry. 13 FMSHRC at 1211. A nearby MSHA inspector then issued a Section 107(a) order, "not because he found that the specific conditions in the mine created an imminent danger", but because he felt "obligated" to do so by the mandatory standard requiring an operator to withdraw miners under the circumstances. Id. at 1213. The Commission held that there had

---

<sup>10</sup> As JWR observes in its brief, the ALJ decision confused a 1992 Commission decision also named Wyoming Fuel and also pertaining to Section 107(a) orders, 14 FMSHRC 1282, with the 1991 case on which JWR relied. ALJD at 8-9. This confusion does not change the correct conclusion that the ALJ made on this legal issue.

been no imminent danger because the inspector had not determined that an imminent danger existed and only issued the Section 107(a) order out of a mistaken sense of obligation. Contrary to JWR's assertion, Br. at 22, the Commission did not base its decision on duplication grounds.

The Commission case law on unlawful duplication asks whether multiple standards "impose separate and distinct duties on an operator." Spartan Mining, 30 FMSHRC 699, 716 (Aug. 2008) (emphasis added); Western Fuels-Utah, Inc., 19 FMSHRC 994, 1003-04 (June 1997). In the very 1991 Wyoming Fuel decision relied upon by the operator, the Commission explained that the mandatory standard, unlike Section 107(a), was "directed to the operator rather than the Secretary." 13 FMSHRC at 1215. The fact that the Section 107(a) and the mandatory standard impose separate and distinct duties on the Secretary and the operator settles the duplication question.<sup>11</sup> To make the answer still more clear, the Wyoming Fuel decision went on to say that, "[o]f course, if an inspector does find that conditions at the mine created an imminent danger, as defined in section 3(j), 30 U.S.C. § 802(j), he is required to issue a section 107(a) order." Id. at 1215 n.5. This is precisely the scenario presented in this case: CMI Getter issued the withdrawal order not out of a misplaced sense of obligation under a mandatory standard, but because he determined that the explosive methane pocket in the last open crosscut was an imminent danger.

## V

### JWR'S CLAIMS OF PROCEDURAL ERROR ARE ERRONEOUS

#### A. The reports of prior methane ignitions were properly admitted

JWR claims that Secretary's Exhibit R-5, which consists of MSHA investigation reports regarding 17 methane ignitions occurring at Mine No. 7 between January 20, 2010, and the morning of February 14, 2011, was improperly admitted because the ignition reports were

---

<sup>11</sup> This is effectively what the ALJ concluded. Dec. at 9.

“irrelevant” and their admission violated due process. Br. at 30-31. JWR’s claim is lacking in merit.

Commission Procedural Rule 63(a) states that “[r]elevant evidence, including hearsay evidence, that is not unduly repetitious or cumulative is admissible.” 29 CFR § 2700.63(a). Although the Commission has not defined “relevant evidence,” it follows the definition provided in the Federal Rules of Evidence. Pero v. Cyprus Plateau Mining Corp., 22 FMSHRC 1361, 1366 (Dec. 2000). “Relevant evidence” means “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” F.R.E. 401. The courts consider Rule 401 to set “a low threshold of relevancy.” Pero, 22 FMSHRC at 1366 (citing In re: Paoli R.R. Yard PCB Litig., 35 F.3d 717, 782-83 (3d Cir. 1994); Hurley v. Atlantic City Police Dep’t, 174 F.3d 95, 109-10 (3d Cir. 1999)).

Abuse of discretion is the standard when the Commission reviews an ALJ’s evidentiary rulings. Turner v. Nat’l Cement Co. of California, 33 FMSHRC 1059, 1077 (May 2011). Deference to the trial court is “the hallmark of abuse-of-discretion review,” General Elect. Co. v. Joiner, 522 U.S. 136, 143 (1997), and “the Commission cannot merely substitute its judgment for that of the administrative law judge.” Turner, 2011 WL 2286883 at \*16. See also Sprint/United Management Co. v. Mendelsohn, 552 U.S. 379, 384 (2008) (stating that a trial court “is accorded a wide discretion in determining the admissibility of evidence”).

Because the prior ignition records were relevant for two independently sufficient reasons, the judge acted within her wide discretion in admitting them. First, CMI Getter was well aware of the past ignitions at the mine 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, and

so were directly relevant to the judge's review of CMI Getter's decision. Wyoming Fuel, 14 FMSHRC at 1291; Island Creek, 15 FMSHRC at 346. Second, the ignition reports verified CMI Getter's testimony that Mine No. 7 had experienced a high number of prior ignitions, and were therefore relevant to the positive credibility determination made by the judge regarding his testimony. See Quinland Coals, 9 FMSHRC 1614, 1623 (Sept. 1987) (where a preshift examiner testified that he frequently reported hazardous conditions on preshift reports, summaries of those reports were "relevant and material to the issue of credibility").

JWR also contends that admission of the ignition reports denied it a fair hearing because the Secretary disclosed the reports on the eve of trial. Tellingly, JWR makes no argument as to how it was legally prejudiced by the disclosure of ignition reports on the eve of trial--nor could it, since it was well aware of its own mine's ignition history and, indeed, management employees had participated in each of MSHA's investigations of the ignitions. See Exh. R-5 (box 15 of ignition reports identifying participating management officials). The exclusion of trial testimony because of a failure to supplement discovery is a matter "committed to [the] sound discretion" of the trial judge. In re: Contests of Respirable Dust Sample Alteration Citations, 17 FMSHRC 1819, 1853 (Nov. 1995) (citing Phil Crowley Steel Corp. v. Macomber, Inc., 601 F.2d 342, 344 (8<sup>th</sup> Cir. 1979)). Where the operator was fully aware of its own ignition history and indeed participated in the MSHA investigation that resulted in the ignition investigation reports, the judge did not abuse her discretion and there has been no "undue prejudice or fundamental unfairness." Id.

Even assuming that it was an abuse of discretion for the judge to admit the ignition reports, which it was not, that error was harmless. The operative part of the judge's decision, the "Discussion and Conclusions of Law" section, devotes half of one sentence to the prior ignitions.

Dec. at 7 (“Inspector Getter...was aware of the unusual number of ignitions at the mine in recent months and particularly in the No. 8 section.”). The finding that an unusual number of ignitions had occurred at Mine No. 7 was testified to by CMI Getter, so the judge’s decision only depends on the ignition reports for the detail that many of the ignitions occurred “in the No. 8 section.” Because the judge placed no substantial reliance on that detail, the asserted error was harmless. Quinland Coals, 9 FMSHRC at 1624 (where judge did not rely on reports in his legal conclusion, any error in accepting the reports was harmless).

B. The bottle sample testing result showing 9.11 percent methane was properly admitted

JWR claims that it was reversible error for the judge to admit the results of the bottle sample obtained by CMI Getter from the roof cavity 10 to 15 minutes after the issuance of the Section 107(a) order. CMI Getter testified that he believed that the concentration of methane was higher than the 5.6 percent shown by the methane probe before it was quickly retracted to avoid a burn-out. Tr. 60. The result of the bottle sample confirmed CMI Getter’s belief, and showed a concentration of methane that was 3.5 percent above the probe’s readout even after efforts to ventilate the cavity had begun. Sec’y Exh. R-3. The bottle sample result is therefore relevant and material to the positive credibility determination the judge made regarding CMI Getter. Quinland Coals, 9 FMSHRC at 1623. In addition, any error in admitting the sample result was harmless, given that the judge did not mention the 9.11 percent bottle sample result in the discussion section of her opinion. Id. at 1624.

C. The judge did not err by not drawing the inference that JWR sought regarding the inspector’s notes

JWR’s next assignment of error, a complaint that the judge did not give due consideration to CMI Getter’s inspection notes, is also ill conceived. Br. at 33-34. JWR points to what it

insists is an inconsistency between CMI Getter's testimony and his notes. On cross-examination, CMI Getter was asked to respond to a compound and confusing statement, contained in a leading question, pertaining to whether "the cavity was ventilated but not properly to dilute methane in the highest point of the cavity." Tr. 126. CMI Getter responded that the statement was not accurate. Tr. 126. JWR then "impeached" CMI Getter by pointing out that the same statement appeared in his inspector notes. Tr. 126. CMI Getter attempted to clarify what he meant in his notes, and appeared to say that the main part of the cavity--and not just the highest point in the cavity--was also insufficiently ventilated. Tr. 127. Without following up on this clarification, JWR moved to admit the inspector notes as impeachment evidence. The judge, understandably unconvinced by the claim of impeachment or its materiality, admitted the notes "for what they're worth." Tr. 128. The next thing JWR's counsel did was sit down and end the cross-examination. Tr. 128. On this record, the operator claims reversible error. Br. at 34.

"A basic rule of evidence provides that prior inconsistent statements may be used to impeach the credibility of a witness." United States v. Hale, 422 U.S. 171, 176 (1975). "As a preliminary matter, however, the court must be persuaded that the statements are indeed inconsistent." Ibid. The judge declined to draw the adverse inference JWR sought from the alleged inconsistency between the notes and the testimony. The record supports the judge's decision. JWR's counsel asked a compound and confusing question; tried to impeach on the basis of unsworn inspection notes that were not prepared with any of the formality of, for instance, a deposition; received an explanation from the witness that attempted to clarify the prior statement; and then sat down. For multiple reasons, the judge did not abuse her discretion in declining to agree with JWR about the supposed inconsistency.

D. The judge did not treat CMI Getter as an expert witness

JWR claims that the judge *sua sponte* designated CMI Getter as an expert witness in her decision because at one point she described him as a ventilation “expert.” Br. at 34. The judge did not treat CMI Getter as an expert witness. The full sentence that prompts JWR claim of error reads “[CMI Getter] is a ventilation expert, and is aware that methane above 5 percent is volatile and explosive.” Dec. at 7. The fact that methane above 5 percent is explosive is common knowledge in the mining industry and has been previously noticed by the Commission. Texasgulf, 10 FMSHRC 498, 501 (April 1988). Commonly known information in the mining industry (and the mining legal community) is a far cry from the “scientific, technical, or other specialized knowledge” that requires qualification as an expert under the Federal Rules of Evidence. F.R.E. §§ 701; 702. JWR has cited no authority for the proposition that a judge who uses the term “expert” once in passing to describe a witness with years of relevant experience in the commonly known basics of coal mining somehow treated that witness as an “expert witness”.

CONCLUSION

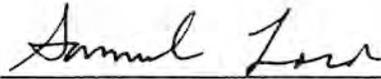
For the foregoing reasons, the Secretary urges the Commission to affirm the ALJ’s decision finding that CMI Getter, faced with an explosive pocket of methane in a busy intersection of the last open crosscut of a working section, acted within his discretion in issuing a Section 107(a) imminent danger withdrawal order.

Respectfully submitted,

M. PATRICIA SMITH  
Solicitor of Labor

HEIDI W. STRASSLER  
Associate Solicitor

W. CHRISTIAN SCHUMANN  
Counsel, Appellate Litigation



---

SAMUEL CHARLES LORD  
Attorney  
U.S. Department of Labor  
Office of the Solicitor  
1100 Wilson Blvd., 22<sup>nd</sup> Floor  
Arlington, VA 22209-2296  
(202) 693-9370 (phone)  
(202) 693-9361 (fax)

Attorneys for the Secretary of Labor, MSHA

CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2012, a copy of the foregoing Response Brief was served by U.S. mail and electronic mail on:

John B. Holmes, III, Esq.  
Maynard Cooper & Gale PC  
1901 Sixth Avenue North  
2400 Regions Harbert Plaza  
Birmingham, AL 35203-2618

jholmes@maynardcooper.com

A handwritten signature in cursive script, appearing to read "Samuel Lord", written in black ink.

Samuel Charles Lord