FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

January 31, 2008

EMERALD COAL RESOURCES, LP,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. PENN 2007-192-R
	:	Order No. 7019863; 03/20/2007
v.	:	
	:	
SECRETARY OF LABOR,	:	Mine: Emerald Mine No. 1
MINE SAFETY AND HEALTH	:	Mine ID: 36-05466
ADMINISTRATION, (MSHA),	:	
Respondent	:	

ORDER DENYING CONTESTANT'S MOTION FOR SUMMARY DECISION, AND GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

This case is before me on a Notice of Contest filed by Emerald Coal Resources, LP ("Emerald"), challenging an order issued pursuant to section 103(k) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 813(k).[1] The parties have filed cross-motions for summary decision. For the reasons set forth below, I find that there exists no genuine issue as to any material fact, and that the Secretary is entitled to summary decision as a matter of law. Accordingly, Order No. 7019863 is affirmed.

Facts [2]

Emerald No. 1 Mine is located in Waynesburg, Greene County, Pennsylvania, and operated by Emerald Coal Resources, LP. On March 20, 2007, at 5:15 p.m., an unplanned roof fall occurred in the mine above the anchorage zone of the roof bolts in the Three Mains Left

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[1] While the Act does not specifically provide for review of section 103(k) orders, the Commission has jurisdiction to review such orders under an abuse of discretion standard. *Eastern Ass. Coal Co.*, 2 FMSHRC 2467 (Sept. 1980).

[2] Emerald included in its motion a statement of facts, supported by documents attached as exhibits. The Secretary's motion included a statement of facts, supported by declarations of MSHA inspector Thomas H. Whitehair II and supervisory inspector Russell J. Riley. Neither party contested facts asserted by the other party. Therefore, they shall be considered established for purposes of deciding the motions. 29 C.F.R. § 2700.67(d).

haulage track at the No. 14 room intersection. The fall was 20 feet long, 18 feet wide and 12 feet high. High voltage and communication cables were buried by the fall. No persons were injured. Three shifts of 150 miners each worked at the mine. The miners frequently traveled the track haulage under the area where the roof fall occurred. At the time of the fall, the majority of miners traveled in buses along the haulage. The track haulage also served as an escapeway.

The roof fall was reported to MSHA at 5:58 p.m. that same day. Shortly thereafter, MSHA's Ruff Creek Field Office Supervisor, Russell Riley, issued a verbal order to Emerald pursuant to section 103(k) of the Act. Later that day, MSHA Inspector Thomas Whitehair traveled to Emerald Mine No. 1 to investigate the incident. By the time Whitehair had arrived, all four sides of the fall had been timbered off, the power had been shut off, and the cable was being rerouted around the fall. The escapeway had also been redesignated and marked. Whitehair issued Order No. 7019863 pursuant to section 103(k) of the Act.[3] The Order required that "only persons who are needed to conduct the investigation of the accident may enter or remain in the affected area." The Order was then modified to require that "prior to cleaning up the fall, the mine operator will submit and have approved by the MSHA District Manager a plan detailing this process." The modification required that the mine inform the inspector of the methods it intended to use to clean up the roof fall. Whitehair, who has 20 years of experience as an inspector, and 14 years of experience in the coal mining industry, including training and experience as a roof control specialist, determined that the information was necessary to ensure that the affected area could safely and effectively be returned to normal, and that the miners working in the area, including the miners engaged in clean-up, would be protected from hazards from additional roof falls. Whitehair stated that he was prepared to accept a handwritten plan in order to speed up the process. The operator did not supply a plan before Whitehair left the mine.

The initial clean-up plan submitted by the operator did not address the machinery that would be used or the method of clean-up. Whitehair was concerned about the safety and health of the miners working on the clean-up of the roof fall, and the length of time they would be exposed to the unsupported roof while setting temporary supports. He requested that the plan contain this specific information. On March 22, 2007, the 103(k) Order was terminated upon receipt of the new plan containing the requested information. Emerald continued to mine coal while the 103(k) Order was in effect.

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[3] Section 103(k) provides that "In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal." 30 U.S.C.§ 813(k).

Emerald's Motion for Summary Decision

The sole issue raised by Emerald in its motion, and its chief argument in opposition to the Secretary's motion, is that a roof fall above a roof bolt anchorage zone that does not result in an injury does not meet the definition of "accident" under the Act. Consequently, the MSHA inspector had no authority to issue the subject Order.

As defined in the Act, "'accident' includes a mine explosion, mine ignition, mine fire, or mine inundation, or injury to, or death of, any person." 30 U.S.C. § 802(k). The Secretary's regulations further define the term "accident," explicitly including an unplanned roof fall:

> *Accident means* . . . [a]n unplanned roof fall at or above the anchorage zone in active workings where roof bolts are in use; or, an unplanned roof or rib fall in active workings that impairs ventilation or impedes passage.

30 C.F.R. § 50.2 (h)(8). Emerald contends that the regulation impermissibly expands the definition of the term accident, beyond the events itemized in the statute. The Secretary argues that the term "accident" should be broadly construed to implement the purpose of the Act, and Congress' use of the word "includes" in the statutory definition demonstrates that the incidents listed are merely examples, and therefore, not exclusive.

Emerald advances several statutory interpretation arguments, urging that the plain wording of the statute precludes inclusion of unplanned roof falls in the definition of an accident. The short answer to Emerald's argument is that the statute itself specifies that unplanned roof falls are accidents for purposes of section 103. Section 103(d) provides, in pertinent part:

> **(d) Accident Investigations; records**
>
> All accidents, *including unintentional roof falls* (except in any abandoned panels or in areas which are inaccessible or unsafe for inspections), shall be investigated by the operator or his agent to determine the cause and the means of preventing recurrence. . . . (emphasis added).

30 U.S.C. § 813(d). The statutory language is indeed plain. Unplanned roof falls in active workings of a mine are accidents under section 103, and satisfy the precondition for issuance of an order pursuant to section 103(k).

Emerald's restrictive statutory interpretation arguments must be rejected, and its motion will be denied.[4] Emerald also makes arguments that are based on the conditions as they existed

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[4] In addition, the Commission has accepted the Secretary's argument that "the word 'includes' . . . is a term of enlargement [and] that an event not specifically listed in the definition

at the time Whitehair issued the Order.[5] However couched, these arguments go to whether Whitehair abused his discretion when he issued the Order, and will be dealt with below.

The Secretary's Motion for Summary Decision

Section 103(k) gives an inspector the authority to issue a 103(k) order "as he deems appropriate to insure the safety of any person in the coal or other mine." 30 U.S.C.§ 813(k). As observed in *Miller Mining Co. v. FMSHRC*, 713 F.2d 487, 490 (9th Cir. 1983), "[s]ection 103(k) gives MSHA plenary power to make *post-accident* orders for the protection and safety of all persons."

Whitehair issued the Order because he was concerned about the safety and health of miners working and traveling in the track haulage. Based upon his extensive mining experience, including training as a roof control specialist, he was also concerned about the safety and health of miners assigned to clean up the roof fall, including the length of time that miners would be exposed to unsupported roof while setting temporary roof supports. He modified the Order to require Emerald to supply information on the methods it intended to use in the clean-up process. When a plan was supplied, it did not identify the machinery to be used or the method of clean up. In order to assure the safety of miners, he needed to know the type of temporary roof support, the procedure to be used, and the type and length of roof bolt. When he obtained that information, and was satisfied that the plan sufficiently protected the safety and health of the miners involved, he terminated the order.

The Secretary contends that, in light of these facts, Whitehair did not abuse his discretion. Emerald argues that issuance of the 103(k) Order was an abuse of discretion because it conflicted with 30 C.F.R. § 75.212, and was contrary to MSHA policy. Those arguments are easily rejected.

Section 75.212 specifies procedures to be followed when rehabilitating areas where a roof fall has occurred or the roof has been removed by mining machines or blasting. It requires preparation of a plan, but not approval by MSHA. Emerald argues that the requirement in the 103(k) Order that MSHA approve the clean-up plan contradicts the regulation, and amounts to an error of law and an abuse of discretion. However, section 103(k) specifically requires that an operator obtain the approval of the Secretary's representative, i.e., an MSHA inspector, of any

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falls within the definition of 'accident' if it is 'similar in nature or present[s] a similar potential for injury or death as a mine explosion, ignition, fire, or inundation.'" *Aluminum Company of America*, 15 FMSHRC 1821, 1825-26 (Sept. 1993) (*ALCOA*). Emerald's argument that an unplanned roof fall is dissimilar to the events itemized in the statutory definition is unconvincing.

[5] Emerald correctly points out that the statute provides for the issuance of a section 103(k) order, "when the inspector is present" at the mine. Accordingly, it is Whitehair's issuance of the Order after he arrived at the scene that must be reviewed.

plan to recover coal or return an area affected by an accident to normal. Emerald cites to no authority that would suggest that the Secretary's promulgation of the regulation was intended to, or could, obviate the specific provision of the statute, or restrict an inspector's discretion to issue appropriate orders to assure the safety of miners in an area affected by an accidental roof fall. Clearly it does not.

Emerald's "policy" argument is also flawed. It represents that MSHA's database, accessible through its web-site, contains "numerous recent reported roof falls in District 2 for which no 103(k) order was issued." Cont. Opp. at 17. It argues that the data shows that unplanned roof falls above the anchorage point routinely do not result in issuance of a section 103(k) order. Therefore, Whitehair's issuance of the order was unreasonable. It also argues that the data evidences a common agency practice, analogous to agency policy, and that Whitehair's decision was contrary to that policy and an abuse of discretion.

Assuming that Emerald has correctly interpreted the information available from MSHA, and that MSHA inspectors were on the scene of those roof falls, whether or not they chose to exercise their discretion and issue a section 103(k) order is hardly probative of whether Whitehair properly exercised his discretion here. This is particularly so when there is no information presented as to the circumstances any such inspectors might have been presented with.

Emerald's arguments are rejected. An unplanned roof fall occurred above the anchorage zone in the "active workings" of the mine, i.e., on a haulage track and escapeway. It was an accident within the meaning of section 103(k) of the Act. Whitehair personally inspected the fall area and determined that the Order and its subsequent modifications were necessary to ensure the safety and health of miners traveling in the area and working on the clean-up. He did not abuse his discretion in issuing the Order.

ORDER

Based on the foregoing, I find that there is no genuine issue as to any material fact, and that the Secretary is entitled to summary decision as a matter of law. Accordingly, Emerald's Motion for Summary Decision is **DENIED**. Respondent's Motion for Summary Decision is **GRANTED**, and Order No. 7019863 is **AFFIRMED**.

Michael E. Zielinski
Administrative Law Judge

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