FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
Washington, DC 20001-2021

October 14, 2003

DRUMMOND COMPANY, INC.,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. SE 2003-101-R
	:	Citation No. 7395286; 03/24/2003
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Shoal Creek Mine
Respondent	:	Mine ID: 01-02901

DECISION

Appearances: Timothy M. Biddle, Esq., Bridget E. Littlefield, Esq., Crowell & Moring, Washington, D.C., for the Contestant;
Thomas A Grooms, Esq., U.S. Department of Labor, Nashville, Tennessee, for the Secretary.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Notice of Contest filed by Drummond Company, Inc. (Drummond) challenging the issuance to it by the Secretary of Labor of an Order alleging a violation of Section 107(a) of the Federal Mine Safety and Health Act of 1977 (the Act).[1] After an answer was filed by the Secretary of Labor a hearing was held in Birmingham, Alabama on July 22, 2003. Subsequent to the hearing the parties each filed a post hearing brief.

I. Findings of Fact and Discussion

A. The Secretary's case

1. The Inspector's testimony

Michael Eugene Pruitt, an MSHA inspector, testified that Drummond's underground Shoal Creek Mine (a coal mine) has a history of methane emissions. According to Pruitt, an examination of Drummond's record at the local MSHA office indicated the mine had nine

[1]This case is hereby **severed** from Docket Nos. SE 2003-99-R et. al.

methane emissions in the year prior to March 24, 2003. Also, the mine liberates 14 million cubic feet of methane in a 24 hour period. Also, Pruitt noted that an accident occurred in February 2001, at Jim Walter's No. 5 mine in which 13 miners were killed, and in which the liberation of methane played a part. According to Pruitt, Entry No. 5 mine is in the same seam of coal as Shoal Creek, the mine at issue.

On March 24, 2003, at approximately 5:45 a.m., Pruitt's field office supervisor, Ken Ely, told him that over the weekend Shoal Creek had a change in ventilation, and had methane problems. Ely asked Pruitt to check it out. Pruitt went to the mine, arriving at approximately 7:15 a.m.. Upon his arrival, he observed men outside the mine and asked Ed Sartain, Drummond's safety inspector, why the men were outside. The latter told him a ventilation change was made over the weekend, and that Drummond was in the process of making another change. Pruitt asked Claude Edwin Sartain, Drummond's safety inspector at Shoal Creek, how much methane was found at the mine. Sartain told him that from two-tenths of a percent to seven-tenths of a percent had been reported in the North Mains section.

Pruitt was told that Henry Johnson, a fireboss on the owl shift, wanted to talk to him. Pruitt testified that at approximately 8:30 a.m. he spoke to Johnson on the surface, and the latter told him that when he had proceeded through a man-door in Entry No. 6 on the North Mains section, heading inby, his portable methanometer ("spotter") issued an audible and visual alarm indicating the presence of more than one percent of methane. According to Pruitt, Johnson checked his spotter and it indicated methane between two to three percent. Pruitt testified that Johnson told him he then went to the face in the North Mains and found eight percent methane, which Pruitt termed as being within the explosive range of between five and fifteen percent. Johnson did not tell Pruitt the time or day this had occurred. Pruitt assumed it was on the third shift that day. According to Pruitt, Johnson also told him that he detected five percent methane near the face in Entry No. 2 outby a rock-fall, six percent in Entry No. 6 and eight percent at the face. According to Pruitt, the men who were present, during his conversation with Johnson, confirmed Johnson's readings. Pruitt indicated that Johnson also told him that the water level in the Entry No. 8 had reached the roof thus blocking the entry.

Pruitt determined a hazard existed in the North Mains due to a methane reading of eight percent methane, and he was concerned about ignition or explosion sources such as electricity, power boxes and water pumps. He was also concerned with rocks falling from the roof causing sparks as there had been a roof fall in the last cross-cut in Entry No. 7, approximately one month prior to March 24. He opined that the roof fall in the last open cross-cut in Entry No. 7 and the condition of water up to the roof in Entry No. 8 caused a ventilation blockage. He concluded that methane was still present in the explosive range in the area between cross-cuts 41 and 40.

At approximately 8:50 a.m. Pruitt went to the office of Jay Vilseck, the manager for operations, and issued an oral Section 107(a) order covering the entire mine due to explosive

levels of methane.[2] Pruitt explained that he didn't want an explosion to occur like the one that had occurred at the Jim Walter No. 5 Mine the previous year. Pruitt stated that in his conversation with Vilseck, he (Vilseck) did not tell him that the problem had been fixed.[3] He also said that not one of Drummond's managers told him that there was no longer a problem with methane at the mine.

On cross examination he conceded that he did not know the methane reading at 8:50 a.m. when he issued his order, and he could have gone to the affected area at that time.

2. Henry Johnson's testimony

According to Johnson, on March 24, at approximately 2:00 a.m., he along with Otha Pennick, and J.D. Aaron were assigned to carry a 30 h.p. pump inby in Entry No. 6. At approximately 2:30 a.m., about three seconds after they and Michael Wayne Sanders, a pump foreman, went through a door located in Entry No. 6 between cross-cuts 38 and 39, Johnson's spotter emitted an audible alarm. He looked at the spotter and it went from two percent, to three percent, to eight percent. The eight percent reading was approximately fifteen to eighteen feet inby the man-door which was located in Entry No. 6 at cross-cut 39. The other miners with him obtained methane readings between five and seven percent At the time of these readings the electric pump was not connected to a power source. Johnson went along the cross-cut to Entry No. 8. As he proceeded to within five or six feet of Entry No. 8, he saw that the water was up to the roof. There was not any movement of air, which normally courses outby in that entry. Johnson had the power cut off in the North Mains area, and started to build temporary curtains or stoppings, as he was very concerned about sparks from the power center located two and one-half cross-cuts from his location. He also was concerned that opening the door in the area, which he thought to be metal, could result in sparks being emitted. Also sparks could be caused by a rock falling or by the action of dragging the pump through the door. However, he checked the roof and rib and did not see any problems. The roof was supported and he did not see any bad roof in the area. Johnson built three curtains to make the area airtight so that the ventilation path would be changed and methane would be pushed out of the area. He did not take any further methane readings. Johnson left the area at approximately 6:35 to 6:45 a.m.

B. Drummond's evidence

Michael Wayne Sanders, a Drummond pump foreman on the owl shift, testified that at

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[2]On March 24, Pruitt subsequently modified the order to allow Drummond to have workers enter the area to take care of the methane. He modified it again to allow miners to return to the rest of the mine with the exception of the north main area where he continued the order until March 27, at which time the order was terminated because permanent controls were put into place to vent methane build-up.

[3]However, according to Johnson, he told Pruitt that three stoppings had been installed to correct the condition.

approximately 3:00 a.m. on March 24, when he heard a miner shout that he detected six and a half percent methane, he told Pennick to shut off the power, and then told Johnson to make sure that everything was shut off. At about 4:00 a.m. Sanders took the men with him outby through the door that they had entered into fresh air. According to Sanders, at about 4:00 a.m., there were no other men on the section.

Sanders then told his supervisor, Scott Meadows, that there were problems with methane on the north main section and help was needed. At approximately 5:00 a.m. he went with Meadows to the section and the latter said to build three temporary brattices to redirect the air. This work was completed at approximately 6:30 a.m. All Sanders' crew had reached the surface by 7:30 a.m.

Scott Meadows, the general mine foremen at Shoal Creek, went inby in Entry No. 6 at approximately 4:00 a.m. on March 24. When he was approximately 50 to 60 feet inby the man-door in Entry No. 6, he observed a methane reading of approximately two-point-two to two-point-five percent, and he was concerned. According to Meadows, all power had been cut off from the North Mains face outby fifteen hundred feet covering all entries in the G-3 south, North Mains and G-4.

Meadows indicated that after the temporary stoppings were built, he was in Entry No. 8 outby cross-cut 38 and could see that water "... was whitecapping from the velocity of the air" (Tr. 176).

At 7:00 a.m. work started on building permanent stoppings to further bleed off the methane. The stoppings were constructed and sealed "around 10:00" (Tr. 179).

Meadows indicated that at approximately 10:00 or 11:00 a.m. after the temporary brattices were constructed a methane reading of five percent was obtained in Entry No. 6 at cross-cut 38. An hour later, methane in Entry No. 7 was found to be five percent. Meadows said that at the time, methane was being released "... at our leisure" (Tr. 188). In addition, Meadows indicated that at different times during the day of March 24, as Drummond was coursing methane from the rock fall in Entry No. 7, the methane readings were five percent, and the pumps were running.

Don Hendrickson, Drummond's production superintendent at Shoal Creek is responsible for ventilation. On March 24, at approximately 5:30 a.m., he was advised by the Communication Organization ("CO") clerk that there was methane in the North Mains section. He went to the section and temporary brattices were being constructed in Entry Nos. 5 and 6, and at cross-cut 40 towards Entry No. 7.

At approximately 6:30 a.m. Hendrickson took methane readings in Entry Nos. 5 and 6 and at cross-cut 40 towards Entry No. 7. He obtained methane readings of one-point-four, four-point-five, and two and one-half percent, respectively. In addition to the temporary brattices, a

curtain was hung in Entry No. 6 inby cross-cut 40 which provided a complete barrier splitting the entry. Another curtain was placed in cross-cut 40 between Entry Nos. 6 and 7 up to the edge of the water. The purpose of the curtains was to sweep these areas immediately of methane and to push it to cross-cut 44, the most inby cross-cut. Also, some blocks were removed from the stopping in the 38 cross-cut between Entry Nos. 7 and 8. According to Hendrickson, after all these changes were made at approximately 6:45 a.m., he monitored air movement in cross-cut 40 and noted it coursing from Entry No. 7 to Entry No. 6. He concluded that the air would have gone across cross-cut 41 through the fall area, and then down Entry Nos. 7 and 8 and back through cross-cut 40 to Entry No. 6.

According to Hendrickson, at about 7:30 to 8:00 a.m., the methane level in Entry No. 5 at cross-cut 38 was four-tenths of a percent; in Entry No. 6 at cross-cut 40 it was five-tenths of a percent; in cross-cut 40, at the edge of the water towards Entry No. 7, it was seven-tenths or eight-tenths of a percent; at cross-cut 38 and Entry No. 8 it was nine-tenths of a percent; and in Entry No. 8 between cross-cuts 38 and 39, at 6:30 a.m., the methane was one-point-two percent. He concluded that there was air movement, and that methane was being vented.

Claude Edwin Sartain, safety inspector at Shoal Creek, testified that on March 24, between 5:30 and 6:00 a.m., he was told that there was some methane accumulation at the North Mains. At 7:30 a.m. he met Pruitt and told him of the accumulation. He also told Pruitt that miners were outside as ventilation changes were ongoing, and Drummond was in the process of correcting the condition. According to Sartain, Pruitt did not make any further inquires of him.

C. Discussion

1. Commission case law

In essence, it is the Secretary's position that MSHA has wide discretion in issuing a Section 107(a) order, and that the standard to be applied in evaluating whether the contest to the 107(a) order should be sustained is whether the inspector abused his discretion. The Secretary argues that if the inspector acted reasonably in issuing the order, it should be sustained and the contest be dismissed. In order to determine the standard to be applied in deciding whether the Secretary met its burden herein of establishing the existence of an imminent danger as defined in Section 3(j) of the Act, supra, I am guided by the following Commission precedent.

In Utah Power and Light Co., 13 FMSHRC, 1617, 1621 (1991), the Commission first reviewed the legislative history of the term "imminent danger" as found in the Act, and concluded that "... the hazard to be protected against by the withdrawal order, must be impending, so as to require the immediate withdrawal of miners." (Emphasis added.) Continuing further, Utah Power & Light Co., supra, at 1622, the Commission held that to support a finding of imminent danger, the inspector must determine "whether the condition presents an impending threat to life and limb". (Emphasis added) The Commission went on to state that only by limiting Section 107(a) withdrawal orders to such impending threats does the imminent

danger provision assume its proper function under the Mine Act. In this connection, the Commission reasoned as follows:

> If the imminent danger provisions of the Act are interpreted to include any hazard that has the potential to cause a serious accident at some future time, 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.'
> Utah Power, supra, at 1622.

The Commission in Utah Power & Light, supra, clarified its earlier ruling in Rochester & Pittsburgh, 11 FMSHRC 2159 (November 1989) wherein the Commission, in discussing imminent danger used the phrase, "at any time". In explaining that phrase, the Commission, in Utah Power & Light Co., supra, at 1622, stated as follows: "The Commission used the phrase, 'at any time,' in the sense of, 'at any moment.' " (Emphasis added) In summarizing, the Commission, in Utah Power & Light, supra, at 1622, held as follows: "To support a finding of imminent danger, the inspector must find that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time," (Emphasis added)

Following Utah Power and Light, supra, the Commission issued Wyoming Fuel Co., 14 FMSHRC 1282 (1992). In Wyoming Fuel, supra, the Commission noted its previous decision in Rochester & Pittsburgh, supra, a 1989 decision which quoted from Eastern Associated, supra, 277, 278, as follows: "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated."

It might appear that the Commission was retreating somewhat from its earlier pronouncement in Utah Power & Light, supra, linking the term "imminent danger" to a degree of imminence, in other words, a time-related situation. That is not the case. In Wyoming Fuel, supra, in the paragraph following the Commission's quote from Eastern Associated Coal, Supra, the Commission, at 14 FMSHRC supra, at 1290, discussed its previous ruling in Utah Power & Light Co., supra and stated that it had held in Utah Power & Light Co., supra, that, "there must be some degree of imminence to support a Section 107(a) order." (Emphasis added.) The Commission in Wyoming Fuel, supra, at 1290, reiterated that in Utah Power & Light Co., supra, at 1621 the Commission had "noted that the word 'imminent', is defined as ready to take place: near at hand: impending ...: hanging threateningly over one's head: menacingly near."

In Wyoming Fuel, supra, at 1290 - 1291, the Commission, in further discussing its prior decision in Utah Power & Light Co., supra, stated that it had previously determined, referring, to Utah Power & Light Co., supra, "that the legislative history of the imminent danger provision supported the conclusion that, 'the hazard to be protected against by the withdrawal order must be impending so as to require the immediate withdrawal of miners'" (Emphasis added). It

appears at least through Wyoming Fuel, supra, that the Commission was maintaining its holding that imminent danger means an imminence of something occurring within a short period of time.

In Island Creek, 15 FMSHRC 339, 346 (1993), the Commission noted its prior holding in Wyoming Fuel, supra, at 1291, that in imminent danger cases the judge must determine, "whether a preponderance of the evidence showed that the conditions or practices, as observed by the inspector could reasonably be expected to cause death or serious physical harm before the conditions or practices could be eliminated."[4] It might be construed that the Commission was retreating from its position that, as stressed by Utah Power and Light, supra, some degree of imminence was required to establish an imminent danger, since Utah Power and Light, supra, was discussed in its decision prior to its discussion of Wyoming Fuel, supra. However, in the most recent discussion by the Commission of imminent danger Blue Bayou Sand and Gravel, 18 FMSHRC 853 (1996) the Commission, after reviewing the definition in the Act of imminent danger and noting language from its prior decision in Rochester & Pittsburgh, 11 FMSHRC supra at 2163, quoted the following language it had set forth in Rochester & Pittsburgh, supra, at 2163: "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." Blue Bayou, supra, at 858. However, it is very important to note that in the same paragraph, the Commission in Blue Bayou, supra, at 858, the most recent commission decision on imminent danger explained as follows quoting from Utah Power and Light, supra: "[t]he Commission has explained that '[t]o support a finding of imminent danger, the inspector must find that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time.' (Emphasis added.) Utah Power & Light Co., 13 FMSHRC 1617, 1622 (October 1991) ("U P & L")."

I conclude that Commission doctrine, at this point in time, requires, regarding the existence of an imminent danger, that it be established by a preponderance of the evidence, that a hazardous condition or practice has a reasonable potential to cause death or serious injury within a short period of time.

An inspector's finding of an imminent danger must be supported "unless there is

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[4]In V.P. Mining Co. 15 FMSHRC 1531, 1535, (1993) the Commission again noted the legislative history of the Act wherein Congress made clear that in defining an imminent danger, the focus is on the potential of the condition to cause serious physical harm "at any time." The Commission noted that this reasoning was adopted by the Commission in Rochester v. Pittsburgh Coal Co., supra, at 2163. However, in affirming the judge's imminent danger findings, the Commission held that the Secretary met his burden of establishing that the hazard "was imminent" (id.). In elaborating on this holding, the Commission stated as follows: "The Secretary's evidence makes clear that the inspector reasonably concluded that the conditions in the ... gob presented an impending hazard requiring that the logwall be shut down immediately." (Emphasis added.) (Id.) Thus, any language in V.P. Mining, supra, which would indicate that a degree of imminence was not required to establish any imminent danger is clearly dictum.

evidence that he has abused his discretion or authority." R&P, 11 FMSHRC at 2164, quoting Old Ben Coal Corp v. Interior Bd. Of Mine Op. App., 523 F.2d 25, 31 (7th Cir. 1975) *emphasis omitted). "An inspector 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 any imminent threat of safety." Blue Bayou Sand and Gravel, Inc., 18 FMSHRC 853, 858-59 (June 1996) (citation omitted).

In determining whether he has abused his discretion, an inspector "is granted wide discretion because he must act quickly to remove miners from a situation he believes is hazardous." Id. At 859. In assessing an inspector's exercise of his discretion, the focus is on "whether the inspector made a reasonable investigation of the facts, under the circumstances, and whether the facts known to him, or reasonably available to him, supported the issuance of the imminent danger order." Wyoming Fuel Co., 14 FMSHRC 1282, 1292 (August 1992).

2. Further Discussion

Considering all the above, I am constrained to find that it has not been established that an imminent danger still existed when Pruitt issued the 107(a) order at 8:50 a.m. In this connection, the inspector failed to make a reasonable investigation of the facts that existed after Johnson left the mine at approximately 6:50 a.m.

Pruitt's decision to issue the Section 107(a) order at 8:50 a.m., was based solely on conditions reported to him by Johnson earlier that morning, i.e., methane readings in the North Mains section at eight percent, diminished air flow due to a recent rock fall in the face of Entry No. 7 water roofing in Entry No. 8, and the presence of ignition or explosion sources such as the power center, electric pumps, and a metal door. Also of concern, was the recent rock fall in the area, and the possibility of additional rocks falling causing sparks. The inspector also considered the following: that there were nine ignitions at the mine in the previous year, that the mine liberates 14 million cubic feet of methane in a 24 hour period, and that in the year 2001, 13 miners were killed in a methane explosion at a nearby mine in the same coal seam as the subject mine.

The inspector's concern about preventing a similar disaster by issuing the 107(a) order was certainly legitimate. Also, there is no evidence that his reliance only on Johnson's statements was not in good faith. However, his testimony has failed to set forth the existence of specific conditions, i.e., that there was a reasonable potential of a methane explosion or ignition causing death or serous injury occurring within a short period of time at the time the order was issued.

According to Pruitt, Johnson did not indicate to him the date or time when the excessive readings were noted. According to Johnson, excessive methane readings, in the explosive range, were taken at approximately 2:30 a.m. on March 24, six hours prior to the issuance of the 107(a) order. At 4:00 a.m., methane readings 50 to 60 feet inby the man-door in Entry No. 6 were in the

range of two point two percent to two point five percent.

Methane readings, at 6:30 a.m., were four percent in Entry No. 6. However, at approximately 7:30 to 8:00 a.m., testing by Hendrickson indicated four-tenths of a percent of methane in cross-cut 38; five-tenths of a percent in Entry No. 6 at cross-cut 41; and seven-tenths or eight-tenths of a percent in cross-cut 40 at the edge of the water near Entry No. 7, and nine-tenths of a percent at cross-cut 38 and Entry No. 8.

After methane levels were found in the explosive range at 2:30 a.m. three temporary stoppings or brattices were constructed to provide better ventilation, and were completed by approximately 6:00 a.m.

Although Johnson had been concerned earlier, at 2:30 a.m., about sparks from opening and closing the metal man-hole door and dragging the water pump, these activities ceased by 6:30 a.m. Further, although rocks falling from the roof were a possible concern, Johnson indicated that he checked the roof and rib; that he did not see bad roof in the area they were in; and that he did not see any problems with roof support. Moreover, by the time he vacated the section, the power was off.

I find that in issuing the imminent danger order at 8:40 a.m., Pruitt relied solely on Johnson's statements to him regarding conditions Although he was not told by Johnson the time and date these conditions were existent, Pruitt assumed, without further investigation, that they existed earlier that day in the mine, i.e., methane levels in the explosive range, and energized power center and electrical equipment. These conditions were existent at approximately 2:30 a.m., six hours before Pruitt issued his withdrawal order at 8:40 a.m. Pruitt did not investigate whether the conditions that constituted an imminent danger at 2:40 a.m., were still in existence at 8:40 a.m. Neither did he investigate whether the overall conditions in the North Mains had changed by 8:40 a.m., so that the danger of a methane explosion was no longer imminent. Had he made "a reasonable investigation" of the facts, he would have learnt that by 8:40 a.m., although a methane reading in Entry No.6 had been four percent at 6:30 a.m., temporary stoppings had been completed, and subsequent methane readings at approximately 7:30 a.m. to 8:00 a.m. indicated four tenths of a percent in cross-cut 38; five tenths of a percent in Entry No. 6 at cross-cut 41 and seven-tenths of a percent in cross-cut 40.

I, thus, conclude that the record does not contain sufficient evidence to establish that when the order was issued there was a reasonable potential of an explosion or ignition causing death or serious injury within a short period of time especially considering the fact that by that time electricity had been removed from a significant area.[5]

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[5]Five percent methane had been observed at approximately 11:00 a.m. and seven percent an hour later and at different times during the day there were readings at five percent. However, the existence of methane at these levels can not be related back in time to 8:50 a.m. when the inspector issued his order, inasmuch as these readings were caused by subsequent action by Drummond intentionally coursing

Accordingly, I find that it has not been established that when the 107(a) order was issued there existed an imminent danger. Therefore the notice of contest is sustained and the Order is Dismissed.

II. Order

It is **Ordered** that Drummond's Notice of Contest be sustained, and that Order No. 7395286 be **Dismissed**.

Avram Weisberger
Administrative Law Judge

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methane from the rock fall and releasing it.