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WYOMING FUEL v. SOL (MSHA)  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges  
The Federal Building  
Room 280, 1244 Speer Boulevard  
Denver, CO 80204

WYOMING FUEL COMPANY,  
Contestant

v.

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Respondent

CONTEST PROCEEDING

Docket No. WEST 90-217-R  
Order No. 3241309; 5/5/90

Golden Eagle Mine  
Mine I.D. 05-02820

DECISION

Appearances: Lawrence J. Corte, Esq., Wyoming Fuel Company,  
Lakewood, Colorado, for the Contestant;  
Margaret A. Miller, Esq., U.S. Department of  
Labor, Office of the Solicitor, Denver, Colorado,  
for the Respondent.

Before: Judge Morris

This contest case is before me pursuant to Section 107(e)(1)  
of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.  
801, et seq. (the "Act"). Contestant Wyoming Fuel Company ("WFC")  
seeks to invalidate Order No. 3241309 issued on

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May 5, 1990, under 107(a) (Footnote 1) of the Act. WFC further seeks to invalidate modifications of the order.(Footnote 2)

#### ISSUES

The issues presented are whether a condition of imminent danger existed so as to justify the 107(a) order. If the order was properly issued, did MSHA abuse its discretion in the subsequent modifications and in keeping the 107(a) order in effect.

Order No. 3241309 closed the No. 7 Entry South Mains from Crosscut No. 5 to Crosscut No. 13. This area was adjacent to the longwall face shield system at the Golden Eagle Mine. All personnel were withdrawn from this portion of the mine because of the alleged imminent danger. The order reads as follows:

The following conditions which collectively constitute an imminent danger were observed in entry #7 third South mains longwall recovery room, and longwall face, roof conditions have deteriorated, causing (header?) cribbing to break and crush, wooden cribbing crushed.

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Order No. 3241309 was modified six times during the period from May 5 through May 9, 1990.

The first of these modifications was Order No. 3241309-01 which reads:

Wooden cribbing material was installed from #5 Crosscut to #13 crosscut #7 entry South Mains Recovery room, and outby areas. Therefore, Order #3241309 in [sic] modified to allow personnel to enter the longwall recovery area, under the following condition in longwall recovery plan dated 5/5/90 (MSHA Order No. 3241309-01, "Subsequent Action" at section II, "Justification for Action").

The second modification was Order No. 3241309-02:

Order #3241309 is modified to add additional information. Item #8 Condition or Practice: The cribbing over a total of 11 persons were observed installing wooden cribs in area of deteriorated roof conditions due to forward abutment pressure. (MSHA Order No. 3241309-02, "Subsequent Action" at section II, "Justification for Action").

Subsequent modifications permitted only those persons necessary to work underground as specified in the longwall recovery plan, item 2. (MSHA Order No. 3241309-03, "Subsequent Action" at section II, "Justification for Action").

Later on May 8, 1990, the 107(a) Order was modified again to allow workers to install additional roof support to the location of the shield face support system.

Finally, in modifications number five and six to the MSHA Order, WFC was allowed to move the longwall.

The fifth modification was Order No. 3241309-05, issued at 7:20 p.m. the evening of May 8, 1990. It stated the specific methods that WFC must employ to continue its full recovery effort of the longwall. It provides as follows:

Order #3241309 in modified to allow recovery of longwall system under the following conditions:  
Item #1 Steel I Beam used as support;  
Item #2 Maximum 10 foot advance cuts;  
Item #3 Maximum 10 foot width of fact entry;  
Item #4 all cutting and welding must comply;  
CFR 30 Part 75.11106.

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Item #5 Air reaching headgate face 38,000 CFM;

Item #6 Double row of cribbing in headgate roadway;

Item #7 Replace damaged fibercrete cribbing with wooden cribs prior to recovery;

Item #8 13 foot wide roadway approach and 10 foot wide roadway on face line;

Item #9 8 foot resin bolt are to be used except where hand held drill must be used with 6 foot resin bolts for roof support. When EIMCO roof bolt is used 8 foot resin bolt must be used;

Item #10 Resupport removal shields with wooden cribbing material. (MSHA Order No. 3241309-05, "Subsequent Action" at section II, "Justification for Action").

An expedited hearing was held in Denver, Colorado, on September 21, 1990. The Secretary objected to the expedition of the hearing for an imminent danger order; however, prior rulings involving the parties were held applicable. (Tr. 4-6).

The Commission has been invited to consider the issue of whether WFC is entitled to an expedited hearing. Accordingly, it is unnecessary to again review the issues here. (Footnote 3) See Wyoming Fuel Company, 12 FMSHRC 1604 (August 1990), (Review Granted, September 1990); see also, Wyoming Fuel Company, WEST 90-112-R - WEST 90-116-R (Decision issued October 22, 1990).

#### SUMMARY OF THE CASE

This case involves a credibility determination concerning the conditions in the Golden Eagle Mine in May 1990.

By way of background: at the time the 107(a) order was issued the Company's mining procedure consisted of a longwall operation of 110 shields.

The initial stage of a longwall operation involves its installation. This takes place in a "start-up room." Once the coal has been extracted the longwall equipment is removed in what is called a "recovery room." In that location the purpose is to safely support and protect the recovery room so the longwall assembly can be fully and safely extracted in a minimum amount of time (Tr. 15).

The Golden Eagle Mine uses a retreating longwall process. Such a process is the easiest because once you begin to mine the

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coal you leave any problems you encounter behind you (Footnote 4) (Tr. 24, 25). (The arrows on Ex. S-1 show the direction of advance of the longwall).

Barrier pillars are generally located in a position adjacent to the main entries. (They are shown in green on Ex. S-1). The 200 foot barrier pillars at Golden Eagle provides protection for the entries. (Seven entries are shown in Exhibit S-1).

The longwall mining system advances when the shields are lowered and pulled against the armored face conveyor (AFC). The cutting shear is above the AFC. As the shear cuts into the face the coal falls into the AFC. (Tr. 34, 37). (Exhibit S-2 illustrates some of the testimony.)

As the longwall advances toward the barrier pillar it puts stress on the coal in front of it (Tr. 26, 30). The coal barrier protects the entries from ground movement which generally results in floor heave or rib sloughage (Tr. 27).

Once the longwall assembly reaches the barrier all coal extraction activity stops and the longwall equipment is removed. (Tr. 28).

The height of the coal seam extracted is about six feet. During the longwall process, with the shields in place, it is normal for miners to stand up inside and travel the apron. In the Golden Eagle Mine the face was 550 feet long. (Tr. 44). This is a typical width in the western United States. (Tr. 45).

#### FINDINGS OF FACT

1. Melvin Shively, an MSHA inspector and a person experienced in mining, received a telephone call from Rick Callor, WFC's health and safety manager. Mr. Callor stated the company was experiencing a problem in their recovery area of the longwall section (Tr. 129, 131).

2. Upon arriving at the mine, Mr. Shively and the company safety supervisor, Frank Perko, went directly to the No. 7 entry. (Tr. 132).

3. In the entry the inspector observed miners installing wooden cribbing. He also saw massive cracking in the fiber cribbing. There was a lot of pressure on the cribbing (Tr. 133).

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(Exhibits S-7I, S-7G, S-7H and S-7L are photographs (Footnote 5) showing the condition of the fiber cribbing.)

4. The fiber cribbing was broken and the roof was working a little bit and taking pressure. The roof was in the mold where pressure was being transferred over the top of the area (Tr. 134).

5. Bolts were popping, the roof was moving and timbers were cracking. Fiber cribbing was also breaking, cracking and crumbling off to the side (Tr. 135).

The wooden cribbing was as shown in Exhibits S-7B and S-7N. Exhibit S-7A shows a fiber crib that had broken and crushed away. A wooden cribbing had been installed behind it in an effort to maintain support (Tr. 136).

6. The wooden cribbing was moving and taking a lot of weight (Tr. 136).

There was a rib cutter in the roof. (A rib cutter is a crack in the roof that runs the length of the entry.) There was also a lot of "rash". That is, an area where you lose a lot of coal top. The top moves and falls out. Rocks, roof and coal laying on the mine floor indicated some of the roof had fallen (Tr. 137).

7. Sap or moisture was leaking from the wooden cribbing (Tr. 137, 138).

The inspector had to crawl into the tailgate area. There were 111 shields and "a bunch" were down (Tr. 139).

8. At 1315 hours Inspector Shively issued an imminent danger order to protect employees from the hazardous roof conditions he had observed. The inspector believed a roof fall could cause a fatality in the area (Tr. 140, 141). The roof was still moving. Continual movement causes additional cracks and fractures in a roof. (Tr. 144).

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9. The imminent danger order affected No. 6 to No. 13 entry as well as No. 6 to No. 13 crosscut of the No. 7 entry of the third south main (Tr. 141, 142).

10. The 107(a) order was modified to allow cribbing to be done from a safe location. In other words, "crib your way" into the area (Tr. 142). The inspector said seven miners, monitored by a certified person, could work from a safe location (Tr. 143).

11. The second modification to the Order allowed eleven miners in a cribbing crew (Tr. 144).

12. The third modification resulted from the company's plan as to how they were going to continue cribbing and recover this area (Tr. 144).

13. The company proposed to come into the headgate area and install bridge planking and rock-lock (Tr. 145). The third modification allowed the company time for the work to be done as shown in the equipment recovery plan. The plan had been submitted by management's Rick Callor (Tr. 145).

14. Modification No. 5 contains the conditions WFC had to comply with to work in the area. The ten items were based on information received from tech support people and Mr. Smith [Lee Smith] (Tr. 146).

15. The order has not been terminated (Tr. 147). In Inspector Shively's opinion the installation of additional support in the No. 7 entry should only be done while protecting the personnel doing the work (Tr. 148, 151).

16. The order was directed to the miners to require them to work from a safe location, and make a safe travelway into the area (Tr. 149). Without necessary support, the biggest part of the entry would have been lost (Tr. 149).

17. Mr. Shively agreed the operator complied in good faith with the modifications.

18. In Inspector Shively's opinion danger of a roof collapse is still present. As a result the 107(a) order is still in effect because of the possibility of roof failure within the area at any given time. (Tr. 156).

19. A lot of the cribs were failing (Tr. 158). Without the cribs the entry would have been lost (Tr. 159). The cribbing was squeezing and bending. (Tr. 160).

20. In Inspector Shively's opinion the removal of the intermediate pillar caused the No. 7 entry recovery room to fail. (Tr. 166).

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21. The area subject to the order was about 700 feet in a straight line. (Tr. 168). The cracks indicated the roof had failed; it was cracked and broken. (Tr. 169).

22. The conditions observed by the inspector told him the miners needed protection. If the 200 foot barrier pillar had been in place the roof would not have been cracked or broken. (Tr. 170).

23. The inspector told management the miners had to work from a safe location. (Tr. 173).

24. LEE SMITH, an MSHA field office supervisor, is a roof control specialist (Tr. 11, 12). At the direction of MSHA's district manager Mr. Smith went to the Golden Eagle mine arriving there May 8, 1990. (Tr. 45).

25. Mr. Smith found the longwall system was experiencing unstable ground conditions. The width of the barrier pillar was zero (where the longwall had mined through) to 15 feet.

26. The No. 7 entry, closest to the barrier, was in stages of failure. There was stress transference; where the roof and rib met the area was experiencing failure. (Tr. 46). There were large cavities in the mine roof. The cribs were receiving a great deal of weight and they were beginning to roll and come away from the mine roof. (Tr. 47). Cribs installed in a uniform fashion are depicted in Exhibit S-6B; the function of crib was described by the witness. (Tr. 48).

27. Exhibits S-7A, B, C, D, E, and F show the cribs in Entry No. 7 were receiving great stress; pitch was flowing down the crib; they were attempting to roll out. They were in almost total failure. (Tr. 49, 50).

28. The wooden cribs were installed to replace the failed fibercrete cribs and to preserve the longwall recovery room. But the cribs were not able to support the roof (Tr. 50). The crib shown in Exhibit S-7C was in failure. It is not safe to travel in an area where a crib has failed. (See Exhibit S-7C). (Tr. 51, 54).

29. The roof had tension fractures, cracks and sloughage indicating it had failed (Tr. 51).

The fibercrete cribs in Entry No. 7 had all failed. Exhibits S-7I, H, G, L and N show the failed cribs. (Tr. 52-53). Roof and floor heaves were a problem here. (Tr. 54).

30. The condition of the cribs indicated to Mr. Smith that the roof was already in failure. The cribs were rolling, a great

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deal of sloughage, apparent cutters, and fallen away roof bolts indicated a roof fall was imminent. (Tr. 55).

31. Popping and breaking sounds indicated the coal ribs were failing or attempting to move. (Tr. 56).

32. The remnants of the barrier pillar between the base and the No. 7 entry had yielded and was turning to rubble. It had lost its load carrying capacity. (Tr. 56). The conditions found by Mr. Smith existed along the entire face of the longwall.

33. The longwall shield assemblies from shield No. 70 to No. 90 had collapsed from the stress (Tr. 57; see Exhibits S-3G and S-3E). Further, the burst values in the hydraulic system were weeping. (Tr. 58). The shields were almost sitting on top of the spill plates. (Tr. 59).

34. The company was resupporting the headgate area at the stage loader. The beams were to hold the roof in place until the longwall assembly could be extracted. (Tr. 61).

35. It would be very difficult to safely and fully extract the longwall. (Tr. 61). The shields had lost their ability to move up and down and the jacks could not travel. (Tr. 62). In order to remove the shields the operator would probably remove under the coal the jack to have room to maneuver.

36. The longwall had received abnormal stress. In Mr. Smith's opinion the longwall panel overrode the barrier pillar and was attempting to equalize itself on the coal pillars between No. 7 and No. 6 entries. (Tr. 64).

37. The longwall was in danger of going solid. That is, there would be no possibility of travel between the longwall shield and the apron. (Tr. 64). (Exhibits S-3D and S-3F show miners crawling to the face).

38. The wooden cribs shown in S-7B, C, D, and E are in an advanced stage of failure. Floor fractures are evident in Exhibit S-7B. Roof fractures show in Exhibit S-5A and S-5B indicate the roof is in failure. (Tr. 65). The roof failure indicate a roof fall is imminent; it provides a serious hazard to the miners (Tr. 65).

39. On May 8th the roof in No. 7 entry was in mid-failure and it was going to fall. (Tr. 67).

40. The roof can fail to the point where the operator may not be able to remove the shields. In such circumstances the operator may wait a year or two for the area to stabilize and then remove the equipment. However, the conditions may

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deteriorate to the point where the longwall would be lost. (Tr. 67, 68).

41. On May 8th, the operator was not employing a normal method to recover the longwall. (Tr. 69).

42. On May 8th, Mr. Smith did not consider the No. 7 entry to be a safe working place. (Tr. 71). He entered the middle entry of the tailgate and walked 1200 to 1400 feet looking for signs of unstable roof conditions. (Tr. 71).

43. Mr. Smith was aware of the 107(a) order and its modification to allow mines to work in the area. (Tr. 72).

44. As a result of his visit to the mine Mr. Smith's seven or eight recommendations were incorporated into Inspector Shively's order as modification No. 5. (Tr. 73). (Judge's Exhibit 1).

45. Based on his observations of May 8th, Mr. Smith believed the imminent danger order was properly in place. (Tr. 83). If the roof had failed a serious injury or death could have occurred.

The immediate roof had separated from the main roof. (Tr. 84).

46. Mr. Smith was not aware of any longwall recovery method that does not leave a barrier pillar between the longwall and the main entry development. (Tr. 86).

RICK CALLOR testified for WFC. He serves as the operator's manager of health, safety and human resources. He is experienced in mining. (Tr. 199, 200).

He has been involved in six or seven longwall removals. (Tr. 200). In a conventional longwall move he has observed adverse roof conditions. (Tr. 201).

On May 5, 1990, Mr. Callor advised MSHA that the shear of the longwall would no longer pass under the shields. This was due to the limited space. In view of this situation the company decided to use a different method of longwall recovery.

Mr. Callor did not accompany the inspector underground. (Tr. 202). The previous night Mr. Callor did not feel there was a condition of imminent danger. However, he believed Inspector Shively sincerely felt such a condition existed.

Mr. Callor and Inspector Shively discussed 103(k) versus a 107(a) order. (Tr. 203). The inspector said he would issue control order and no assessments would be involved.

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The company brought in a continuous miner and set up an entirely new recovery room. This was necessary because they could not advance the longwall into the predriven recovery room. (Tr. 204).

The original order was modified to allow the company to reenter that portion of the No. 7 entry that was the subject of the imminent danger order. (Tr. 205). No more than eleven miners could work in the area. (Tr. 207).

While Mr. Callor did not feel there was a condition of imminent danger, he thought Inspector Shively immediately took care of his concerns by showing the men the method he wanted them to use in installing temporary supports. The work as required under the modifications was completed no later than 24 hours after the issuance of the order. (Tr. 208, 211). At the time of the hearing, WFC still remains under Order No. 3241309. (Tr. 208).

In his prior experience with 107(a) orders Mr. Callor had seen modifications as specific as in modification number 5, but he did not believe it was common practice to use 107(a) in this fashion. (Tr. 216).

The completion of the room, as far as being cribbed, was completed in less than 24 hours. In Mr. Callor's opinion that abated the 107(a) condition. (Tr. 218).

The company had decided to mine through the pillar but the shear stuck before it reached the recovery room. (Tr. 220). After the decision was made to go with the predriven recovery room the No. 7 entry was the company's choice as the recovery room. (Tr. 221).

Some fibercrete cribs had taken an enormous amount of weight. Mr. Callor also saw coal sloughage from the roof or ribs. The shields were weeping but they did not fail but kept the roof totally intact throughout the entire recovery of the longwall. (Tr. 222).

The company began wooden cribbing after the failure of the fiber cribs. Mr. Callor did not see total failure of any of the wooden cribs. (Tr. 223).

While Mr. Callor was there, the MSHA team and others went through the entire section after some cribbing had been done. (Tr. 224). The cribbing was installed as an additional precaution. (Tr. 225).

In Mr. Callor's opinion the pressure from the gob overrode the shield system and the No. 7 entry. (Tr. 225). After overriding the system it sat down on the pillar between entries

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number 5 and 6. As a result the company was able to remove the shields and longwall. However, the roof came down low enough that the shear could not be removed. (Tr. 226).

Mr. Callor was upset because MSHA interfered with management decisions. (Tr. 227, 228).

The use of an I-beam as required in MSHA's modification order causes more hazards (due to clearances) than conventional roof control methods. (Tr. 228, 229). Mr. Callor did not feel the company would lose the longwall before MSHA came in. (Tr. 231).

Mr. John DeMichiei, MSHA's District Manager, approved the recovery plan. (Tr. 237, Ex. P-2).

On Page 4 of Exhibit P-3 Mr. Callor marked in red the area of the original citation. (Tr. 241, 241, Ex. P-3). The company put in an additional 50 wooden cribs (Tr. 242). The cribs were about five feet apart for 550 feet. (Tr. 243). Prior to using the area as a recovery room the company installed 8 foot roof bolts between 6 foot bolts. Also chain link fence was installed as shown in Exhibit S-7a. (Tr. 244). The company also installed wood cribs between all of the fiber cribs. (Tr. 245).

The No. 7 entry was not used to recover the longwall but the area adjacent to the No. 7 entry was mined out for that purpose. (Tr. 245, 246).

The entry is still standing but all the shields have been removed so the longwall face is now a part of the gob except at the very bottom of the headgate entry. (Tr. 248).

MSHA modified the order to allow the company to apply mobay chemical. This was previously approved in the roof control plan. (Tr. 251).

CHARLES W. McGLOTHLIN, Vice-President and general manager of WFC, reports directly to Chuck Batty, CEO of WFC. (Footnote 6)

Mr. McGlothlin, a person experienced in mining and management, has been employed by Kaiser Coal, Atlantic Richfield, Bethlehem Coal, and others. He holds a degree in mining engineering from West Virginia University.

The witness explained in detail the type of rock formation in the mine, as well as the company's mining plan in relation to the predriven recovery room.

Mr. McGlothlin was aware of the section 107(a) order issued in this case, as well as the condition in the mine. Mr. McGlothlin further examined the panel of photographs previously received in evidence, as well as Exhibits P-4 and P-12.

In the witness's opinion, no condition of imminent danger existed. The cribbing, as demonstrated by the photographs, was contorted, bent, and twisted. Moreover, no wooden pillars had failed. The bent, twisted, and contorted wooden pillars were basically performing their function of supporting the roof. One can anticipate pressure on the wooden pillars will produce some contortion in the pillars.

Mr. McGlothlin agreed that some fibercrete pillars had failed. Further, the company had anticipated there would be pressure on the wooden pillars; however, it underestimated the extent of the pressure that actually occurred.

The witness described the engineering studies that had been done by the United States Bureau of Mines on the application of a predriven recovery rooms for longwall equipment recovery at the Golden Eagle mine. A copy of the Bureau of Mines study on the use of predriven recovery room for longwall recovery was received into evidence. It was the opinion of the witness, based on his experience as a mining engineer and the technical information he had reviewed, that use of a predriven recovery room was a safe and acceptable method for longwall recovery.

Mr. McGlothlin explained the longwall mining equipment had to come out the headgate entry. Also maintenance and safety precautions were implemented in the headgate entry (Tr. 255).

The company felt that the best alternative, with convergence at the longwall face, was to remove part of the barrier pillar, secure that area and reconstruct a suitable recovery room (Tr. 257).

Exhibit P-7 shows, in the background, a predriven and designated recovery area in No. 7 entry. The photograph was taken around May 15th (Tr. 258, 259).

Cribs and meshing material supported the roof in the recovery room (Tr. 260, Exs. P-8, P-9, P-10).

Exhibit P-12 shows the first shield pulled out. Only two shields flushed in to the point were they did not put any crib blocks under it (Tr. 264).

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The Secretary's photographs Exs. S-4A, S-4B, S-4C and S-4E are not in the area effected by the section 107(a) order (Tr. 265).

Mr. McGlothlin believed Inspector Shively had a concern for the way the cribs were being built. That concern was satisfied in a matter of hours and from that time forward no imminent danger existed (Tr. 266).

He did not see any reason for the continuance of the imminent danger order. (Tr. 267).

Mr. McGlothlin agreed the section 107(a) order impacts the No. 7 entry and the longwall support shield system (Tr. 268).

The No. 7 entry was originally the planned recovery room (Tr. 270). The company had mined into the barrier pillar. The barrier that remained varied from zero to a maximum of eight feet, or an average of four feet (Tr. 271). To successfully complete the longwall recovery the company planned to remove all of the barrier pillar and end up in the recovery room, i.e., the No. 7 entry. The plan was not completely successful nor was it a complete failure (Tr. 272). This method has been used in four different mines, in West Virginia and Pennsylvania (Tr. 273).

On May 5th there were cracks and cutters in the roof. Because of the cracks the company set additional supplemental supports on May 5th (Tr. 274, 275).

The cutters in the roof indicated the abatement pressure had completely traversed the No. 7 entry and had come to rest outby the pillar between No. 6 and No. 7 entry. The pillars are the primary roof support in a mine.

On May 4th and 5th, Mr. McGlothlin noticed fiber cribbing failure but no wooden cribs had failed prematurely.

The wooden cribs in photographs S-7B, C and D had not failed. They could not have been knocked out with anything short of a 100 ton hydraulic jack (Tr. 276, 278).

On May 3rd the roof was converging. After May 6th there was isolated roof movement (Tr. 277). In two instances when removing the shields the roof "crushed in". This was not a roof failure (Tr. 279).

Mr. McGlothlin agrees that on May 5th the mechanically anchored roof bolt had lost complete effectiveness. However, the resin bolts had not lost full integrity (Tr. 280).

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The crib in Exhibit P-4 was installed between May 3rd and May 6th (Tr. 280, 281). Exhibit P5 indicates a convergence of four and a half feet in the entry.

It was Mr. McGlothlin's decision to mine this area using the new longwall method as opposed to the barrier pillar method (Tr. 282).

Page 4 of Exhibits P-1 states it is not possible to give the exact type and amount of supports required to insure recovery room stability. Mr. McGlothlin underestimated the amount of support needed to effectively transfer the roof pressure across the recovery entry (Tr. 284).

The longwall was recovered in five and one half weeks; this is average time in the United States (Tr. 287, 288).

The fiber cribbing appearing in Exhibit P-7 was present in the area before the section 107(a) order was issued. The wooden cribs to the right in Exhibit P-7 were put in place after the order was issued (Tr. 292).

The wooden cribs, in Exhibit P-9, were installed after the section 107(a) was issued but they were not part of the order (Tr. 294).

The recovery room shown in Exhibit P-8 did not exist when the section 107(a) order was issued (Tr. 295).

#### FURTHER FINDINGS OF FACT

47. BILLY OWENS, on MSHA mining engineer, is a person experienced in mining (Tr. 296-298).

Mr. Owens is Chief of the Ground Support Division. He visited the Golden Eagle Mine on May 8th (Tr. 298).

48. The witness described the area subject to the order and, he marked the area on Exhibit P-3 (Tr. 300, 301).

49. In the No. 7 entry fibercrete cribs had totally failed. They had blocking on top that was completely squeezed out. Wooden cribbing down the right side of the entry was in a state of failure. Many of the crib blocks had rolled. Timbers were barren. A cutter ran the entire right side of the entry. The main roof had suffered a shearing failure and was torn along the pillar line (Tr. 303).

50. The failed fibercrete cribs are shown in Exhibits S-7I, S-7H, S-7G. The failed timber is shown in Exhibit S-7J and the failed wooden cribbing is shown in Exhibits S-7B and S-7C (Tr. 305).

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51. The wooden cribs in S-7B and S-7C are designed so the load will be parallel to the vertical axis of the cribbing. More loading, as on S-7C, can blow the crib out at any time (Tr. 306).

52. On May 8th there were no large tension cracks in the roof. The roof had roof bolts and wire mesh in it (Tr. 306).

53. There was evidence of severe roof movement. The mining height of the entry was 6-1/2 to 7-1/2 feet; or a resulting 3 feet of convergence (Tr. 307). This is enough movement to destroy supports, cribs, posts and timbers (Tr. 309).

54. There was also horizontal and vertical movement in the roof which was in a state of failure. The roof was not stabilized (Tr. 308, 309).

Management told MSHA that the shields, from No. 70 to No. 90, were down about 42 inches (Tr. 309). Over two or three days this is a large amount of convergence.

55. The majority of the roof bolts appeared in good shape; however, along the cutter area the last row of bolts in the entry provided no support (Tr. 310).

56. Exhibit S-11, a photograph, depicts an area along the edge of the coal pillar between entry No. 7 and No. 6. It shows the cutter raveling out of the roof (Tr. 311). The tearing of the roof and the formation of the roof cutter exposed the roof bolt (Tr. 314).

57. Cutters were beginning to migrate in the crosscuts from entry No. 7 to entry No. 6. In entry No. 6 there were no cutters or roof problems but the pillars were beginning to show weight and sloughage was starting (Tr. 316).

58. The company told MSHA that shields No. 70 to No. 90 were all the way down. This indicated a crushing out of the entire pillar (Tr. 318).

59. When a cutter exists along the sides of an entry, such as in the Golden Eagle Mine, it essentially wipes out the support from one side of the entry to the other side. The entire roof support system can fail (Tr. 319, 320).

60. The area between the tips of the longwall shields and the new cribs in No. 7 entry were in a state of failure (Tr. 322). Given what he knew of the conditions on May 5th, Mr. Owens did not consider it safe to attempt the longwall recovery. However, additional supports and Mobay Chemical had improved the situation (Tr. 322).

61. If a portion of the roof fell it would be 10 to 12 feet thick. The majority of roof falls are 18 inches thick. (Tr. 325).

62. Photograph S-3F shows Mr. Pulse across the longwall face with the shields sitting down on the spill plate. The tensor mesh was trapped so tight that you could not move the mesh between the shield and the spill plate (Tr. 327).

63. The roof bolts are exposed as shown in Exhibit S-4A (Tr. 329). The witness discussed Exhibits S-5A, S-5B, S-6 and S-7 (Tr. 229, 230).

64. Given the conditions shown in Exhibit S-7 you would expect a roof fall but you would not know when (Tr. 330).

65. There were two meetings with management. The company brought up nine or ten points. MSHA's District Manager approved the points to be included in the modification of the 107(a) order (Tr. 333).

66. Modification No. 5 required, among other things, a steel I-beam from above the shields and over the cribbing (Tr. 334).

67. The ten items in modification No. 5 were discussed with management on May 8th. Recommendations were made by MSHA since this was the operator's plan for recovery (Tr. 335, 336).

65. All of the items were proposed by WFC. MSHA made recommendations for four of the items (Tr. 336). There was no pressure and the matter was expedited (Tr. 337).

68. Unexpected problems mandated that the situation be carefully watched (Tr. 339).

69. The method of longwall recovery as shown in Exhibit P-1 is experimental and needs to be treated as such (Tr. 340). It needs to be monitored (Tr. 341).

#### DISCUSSION

The Mine Act defines an imminent danger as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. 802(j). This definition is unchanged from the definition contained in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1976) (amended 1977) (the "1969 Coal Act"). The Senate report on the Mine Act explains that the Secretary's authority to issue imminent danger orders "should be construed expansively by inspectors and the Commission." S. Rep.

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No. 181, 95th Cong., 1st Sess. 38 (1977), 626. Legislative History of the Federal Mine Safety and Health Act of 1977, at 626 (1978) (Legis. Hist.).

In discussing the concept of imminent danger the Commission recently stated:

In analyzing [the] definition [of imminent danger], the U.S. Courts of Appeals have eschewed a narrow construction and have refused to limit the concept of imminent danger to hazards that pose an immediate danger. See, e.g., *Freeman Coal Mining Co. v. Interior Bd. of Mine Op. App.*, 504 F.2d 741 (7th Cir. 1974). Also, the Fourth Circuit has rejected the notion that a danger is imminent only if there is a reasonable likelihood that it will result in an injury before it can be abated. *Eastern Associated Coal Corp. v. Interior Bd. of Mine Op. App.*, 491 F.2d 277, 278 (4th Cir. 1974). The court adopted the position of the Secretary that "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." 491 F.2d at 278. (Emphasis in original.) The Seventh Circuit adopted this reasoning in *Old Ben Coal Corp. v. Interior Bd. of Mine Op. App.*, 523 F.2d 25, 33 (7th Cir. 1975).

*Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (1989).  
*Cyprus Empire Corporation*, 12 FMSHRC 911, 918 (May 1990).

The Seventh Circuit has further recognized the importance of the inspector's judgment in issuing an imminent danger order:

Clearly, the inspector is in a precarious position. He is entrusted with the safety of miners' lives, and he must ensure that the statute is enforced for the protection of these lives. His total concern is the safety of life and limb. . . . We must support the findings and the decisions of the inspector unless there is evidence that he has abused his discretion or authority. (Emphasis added)

*Old Ben*, supra, 523 F.2d at 31; *Rochester & Pittsburgh*, 11 FMSHRC at 2164.

The hazards of roof falls are well known. See, e.g., *UMWA v. Dole*, 870 F.2d 662, 664 (D.C. Cir. 1989) (citing the preamble to the promulgation of MSHA's current roof support standards, 53 Fed. Reg. 2354 (January 27, 1988)).

Here, Inspector Shively observed miners installing wooden cribs in entry No. 7. The unstable condition of the roof (described in detail in Facts 3 through 7) caused him to believe that a roof fall would cause a fatality if the miners did not install the cribs from a safe location. In short, he directed them to "crib their way" into the entry.

WFC's witnesses Callor and McGlothlin differed from Inspector Shively's views that a condition of imminent danger existed in the No. 7 entry. However, they both conceded the inspector had a "concern" for the way the cribs were being built (McGlothlin at 266). Callor believes Inspector Shively sincerely felt a condition of imminent danger existed (Callor at 203). In any event, WFC's witnesses failed to testify as to any credible facts to rebut Inspector Shively's testimony.

For the above reasons, I conclude that imminent danger order Number 3241309 issued May 5, 1990, should be affirmed and the contest relating thereto should be dismissed.

WFC contends the mere good faith belief of the inspector is not enough to sustain the section 107(a) order for an extended period of time. There must in fact be an imminent danger and such determination must be based on an objective standard and a consideration of all of the facts (Brief, page 1).

WFC's arguments require a review of the evidence as to the scope of the imminent danger when the modifications were issued.

The situation in the Golden Eagle mine came about when the company tried an experimental longwall recovery procedure. Simply put, WFC attempted to mine through the 200 foot barrier pillar and use No. 7 entry as a predriven recovery room. The effort was less than fully successful and the shears stuck leaving only a minimal barrier pillar, some zero to eight feet. Mining through the pillar caused massive damage and instability to the roof. The credible evidence established the conditions as found in the facts. (Shively, Facts 3-8; 18-22.) Inspector Shively described the area affected by the order to be No. 6 to No. 13 entry and No. 6 to No. 13 crosscuts (Fact 9). Compare with overview of Exhibit P-3, pg. 4).

Two days later witness Lee Smith, a roof control specialist, described the unstable roof conditions (Facts 24-39). If anything, the roof conditions had deteriorated in the two days since Inspector Shively issued his order. Billy Owens, an MSHA engineer, also fully detailed the roof conditions (Facts 45-61).

I am not unmindful of the testimony of Mr. McGlothlin which runs contrary to MSHA's evidence. However, I do not find his testimony as to the condition of the roof and the cribs to be credible. The photographs clearly rebutt his views. For example, see Exhibits S-5A, S-5B, S-6B, S-7A, S-7B, S-7C, S-7D, S-7E, S-7J, S-7I, S-7H, S-7G, S-7L, S-7K. Further, see Exhibit S-8C showing a severely twisted I-beam. I-beams simply are not made to conform to such a configuration.

Mr. McGlothlin also attempts to persuade the Judge that the Secretary's exhibits S-4A, S-4B, S-4C and S-4E were not in the area affected by the order. (Tr. 265.) However, I reject that view. The Secretary's agents were not shown to have been elsewhere in the mine. Further, the photographs were an evidentiary focus of the Secretary's case.

Mr. McGlothlin's testimony further conflicts with the company's letter to MSHA issued the day the order was issued. The letter states, in part, "[t]he abduement [sic] pressure has caused the shields to yield to the point where the shearer cannot continue cutting. The pressure has also caused the supplemental support (fibercrete and wooden cribs) in the recovery room to fail." (Exhibit P-3).

I credit MSHA's evidence that the condition of imminent danger due to roof fall continued to exist in the 700 foot area encompassing Entry No. 7, the remains of the barrier pillar and the shields of the longwall.(Footnote 7)

In sum, a preponderance of the substantial, reliable and probative evidence establishes the facts as set forth in paragraphs 1 through 69 of this decision.

WFC contends that MSHA cannot impose mandatory obligations when it issues a section 107(a) order.

Case law precedent supports WFC's position. In *Eastern Associated Coal Corporation*, 4 IBMA 1 (1975) the Interior Board of Mine Operations Appeals considered such an issue. 4 IBMA at 21.

However, MSHA falls within the exception as explained by the Board:

Although we hold that section 104(a) allows only an order to withdraw persons and does not authorize the Secretary to issue any other kind of direct order, the Board

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emphasizes that, in drafting a section 104(a) order, an inspector has the discretion and ought, after consultation with responsible mine officials, to include the terms upon which the withdrawal order will be terminated, that is to say, the actions which must be taken to remove at least the "imminence" of the subject hazard. While these terms would in no sense be mandatory or subject to enforcement in a federal district court, they would notify an operator as to what must be done if it wishes to resume operations rather than close down permanently the area described in the order. 4 IBMA at 25.

In the instant case Mr. Callor was "upset" because he believed MSHA interfered with management decisions (Tr. 227, 228). However, it is uncontroverted that WFC submitted the plan for recovery of the longwall. All items were proposed by the Company. There was no pressure and the matter was expedited (Tr. 335-337).

The above facts indicate that WFC was complying with MSHA's conditions for withdrawal of the 107(a) order.

WFC further asserts that MSHA's actions were inconsistent with the claim of imminent danger. Specifically, it is claimed MSHA permitted travel over the area for five weeks and also let the work force retrieve longwall equipment over a period of several weeks.

Under section 107(a) MSHA may permit individuals in an area of imminent danger. These individuals are named in section 104(c).

It is true the longwall equipment was removed. However, considerable efforts had been made at abating the imminence of the danger. Accordingly, I am unable to conclude that MSHA permitted miners to work under the unstable roof.

WFC also states that the mere existence of signs of dangerous conditions do not establish existence of an imminent danger.

I disagree. The signs of dangerous conditions can and often do establish a basis for expert witnesses to reach their conclusions of the underlying hazard.

WFC finally claims that MSHA abused its discretion in leaving the order in effect when an imminent danger no longer

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existed. The facts concerning the unstable roof have been previously explored.

For the foregoing reasons, WFC has not sustained it's burden of proof in this contest case.

Accordingly, I enter the following:

ORDER

1. Order No. 3241309 and all modifications thereof are AFFIRMED.

2. The contest of Order No. 3241309 is DISMISSED.

John J. Morris  
Administrative Law Judge

Footnotes start here:

1. The cited portion of the Act provides as follows:

Procedures to Counteract Dangerous Conditions

Sec. 107. (a) If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

2. The contest filed by WFC places modifications 1 through 6 in contest. However, the evidence indicates there were 9 modifications to the original order. (See Judge's Exhibit 1).

3. In the case at bar, the contested order, No. 3241309, was not terminated (Tr. 147, 156, 209).

4. Left behind can be a combination of fallen roof material, floor heave, etc. It is commonly called "gob" (Tr. 25, 34).

5. Some of the photographs in this case were presented on a single cardboard panel. The Secretary explained that a presentation had been made involving the photographs. At that time the photographs were grouped by circled numbers 1, 2, 3, 4, 5 and 6. The same presentation was made at the hearing. Each photograph was identified with its identifying number adjacent to it. Each photograph was also identified on the back by the same number that appears adjacent to it.

6. At the hearing a portion of Mr. McGlothlin's testimony was inadvertently taped over. However, the parties were able to reconstruct the lost testimony without requesting a reopening the hearing. (See Judge's orders of August 24, 1990 and January 18, 1991.)

7. The area affected by the order was identified on Exhibit P-3, Page 4.