

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

February 26, 2009

WEST RIDGE RESOURCES, INC,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEST 2009-504-R
	:	Order No. 8454817-05; 02/13/2009
v.	:	
	:	
	:	
SECRETARY OF LABOR,	:	West Ridge Mine
MINE SAFETY AND HEALTH	:	Id. No. 42-02233
ADMINISTRATION (MSHA),	:	
Respondent	:	

DECISION

Appearances: Kevin N. Anderson, Esq., and Jason W. Hardin, Esq., Fabian & Clendenin, Salt Lake City, Utah, and Daniel W. Wolff, Esq, Crowell & Moring, Washington, DC, for West Ridge Resources, Inc.; Timothy S. Williams, Esq., John Rainwater, Esq., and Derek Baxter, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, and Arlington, Virginia, for the Secretary of Labor.

Before: Judge Manning

This case is before me on a notice of contest brought by West Ridge Resources, Inc. (“West Ridge”) against the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et. seq.* (the “Mine Act”). An expedited hearing was held in Denver, Colorado, on February 20 and 21, 2009.

I. BACKGROUND AND STIPULATIONS

West Ridge operates the West Ridge Mine, a large underground coal mine in Carbon County, Utah. The mine extracts coal in panels using a longwall system. In each panel, two sets of entries are excavated using continuous mining equipment to the very back of the panel. The coal to be mined is between the two sets of entries. The longwall equipment is transported to the back of the panel where it is set up to begin the mining process. Large cutting blades with teeth (the “shearer”) cut the coal along the face. The coal is transported out of the mine on a series of conveyor belts. As the shearer moves along the face cutting the coal, the shields that support the roof move closer to the longwall face along with the other longwall equipment, so that a new cut can be made. The longwall equipment moves toward the main entries of the mine until the panel

is completely mined out. This type of mining is often referred to as retreat mining because the longwall equipment is set up at the back of the panel and the coal is cut as the equipment “retreats” toward the main mine entries.

The West Ridge Mine is under deep cover. In a very real sense, the mine is under a mountain. As discussed below, the mine experienced a series of bounces in late January 2009. When a bounce occurs there is a sudden outburst of coal from the ribs (sides) of an entry. The outburst can also emanate from the working face. One miner was injured as a result of a bounce.

The parties entered into stipulations of fact. The key stipulations are set forth below. I have edited the stipulations slightly as shown in brackets.

4. Since May 2001, West Ridge has utilized a longwall mining system commonly referred to as a two-entry yield pillar system, where, generally, longwall panels are mined one after another, with two entries and 30-foot yield pillars left between them.

5. On August 15, 2008, Allyn Davis, District Manager, Coal Mine Safety & Health (“CMS&H”) District 9, sent a letter to West Ridge discussing the proposed longwall retreat of Panel 13. (Joint Exhibit (“JX”) 1).

7. On September 9, 2008, West Ridge submitted a large roof control plan amendment and accompanying reports. (JX-3).

9. On September 19, 2008, West Ridge submitted to MSHA a Site Specific Mining Plan for Longwall Panel 13, which enclosed the September 17, 2008 report [prepared by Agapito Associates, Inc. (“AAI”)]. (JX-5).

10. On October 8, 2008, Michael Gauna, Mining Engineer, Roof Control Division of MSHA, authored his evaluation of [the site specific plan]. (JX-6).

11. On October 20, 2008, West Ridge sent a letter to [District Manager Davis], enclosing for his review and approval a submittal amending pages 39 and 40 of the current West Ridge Roof Control Plan. (JX-7).

12. On October 27, West Ridge sent a letter to [District Manager Davis] enclosing for his review and approval modifications/amendments to the currently approved West Ridge Roof Control Plan. (JX-8).

13. On October 31, 2008, MSHA sent a letter to West Ridge approving proposed roof control plan amendments. (JX-9).

14. Also, on October 31, 2008, MSHA sent a letter to West Ridge approving the proposed roof control plan to longwall mine Panel 13. (JX-10).

15. West Ridge began to longwall mine Panel 13 in November 2008.
16. On January 24, 2009, a coal burst occurred on the Panel 13 longwall in the tailgate [area of the face]. It damaged mining equipment and caused mining to cease for over an hour. No one was injured. West Ridge reported the incident to MSHA pursuant to 30 C.F.R. § 50.10. MSHA issued an order pursuant to section 103(k) of the Mine Act and terminated the order the next day. (JX-11).
17. On January 26, 2009, a coal burst occurred on the Panel 13 longwall in the tailgate [area of the face]. It damaged equipment and caused mining to cease for over an hour. No one was injured. West Ridge reported the incident to MSHA pursuant to [section 50.10]. MSHA issued an order pursuant to Section 103(k) of the Mine Act (Order No. 8454816) after the bounce occurred. (JX-12).
18. Order No. 8454816 was twice amended to allow West Ridge to move equipment. (JX-13 & 14).
19. On January 29, 2009, MSHA terminated Order No. 8454816 following approval of a roof control amendment (JX-15). Among other things in the amendment, West Ridge agreed to slow the rate of mining from forty-five (45) feet per minute to thirty-two (32) feet per minute on most portions of the longwall face and to twenty (20) feet per minute on the tailgate portion.
20. On January 31, 2009, a coal burst occurred on the Panel 13 longwall in the tailgate [area of the face]. It caused injury to the longwall shearer operator. West Ridge reported the incident to MSHA pursuant to [section 50.10].
21. Following the coal outburst on January 31, 2009, MSHA issued an Order pursuant to Section 103(k) of the Mine Act (Order No. 8454817). (JX-16).
22. Later on January 31, 2009, MSHA issued a modification to the order [No. 8454817-01] to allow West Ridge to bring the shearer to the headgate. (JX-17).
23. On February 1, 2009, MSHA issued a second modification to the order [No. 8454817-02] to allow maintenance on the longwall. (JX-18).
24. On February 2, 2009, MSHA issued a third modification to the order [No. 8454817-02 (sic)] to allow West Ridge to test the feasibility of remotely operating the longwall shearer. [JX-19].
25. On February 5, 2009, West Ridge sent a letter to [District Manager Davis], attaching for his review and approval a request for amendment to the roof control plan to allow for mining the remainder of Panel 13 using remote operation. (JX-20).

26. On February 6, 2009, MSHA sent a letter to West Ridge denying the February 5, 2009, requested amendments and noting several deficiencies. (JX-21).

27. On February 7, 2009, West Ridge sent a letter to [District Manager Davis], attaching for his review and approval a request for amendment to the roof control plan to allow for evaluation of the remote longwall mining system for Panel 13. (JX-22).

28. On February 7, 2009, MSHA issued a fourth modification to the order [No. 8454817-03 (sic)], which allowed for the implementation of the plan to retreat the longwall to a point 35 feet inby crosscut 32 using remote longwall operation and which also stated that, during this time, the performance of the plan would be evaluated to determine feasibility and exposure. (JX-23).

29. On February 7, 2009, MSHA also sent a letter to West Ridge approving the plan to allow for evaluation of the remote longwall mining system for Panel 13. (JX-24).

30. On February 13, 2009, MSHA issued a fifth modification to the order [No. 8454817-05] prohibiting further longwall retreat past crosscut number 32 and referencing a letter from Allyn Davis to Darrell Leonard of February 13, 2009. (JX-25).

31. On February 13, 2009, Allyn Davis also sent a letter to West Ridge indicating the results of MSHA's evaluation and stating that the 103(k) order was being modified to preclude additional mining beyond crosscut 32. (JX-26).

Because the language of Order No. 8454817 and some of the subsequent modifications are important to the disposition of this case, I have set them out below:

Order No. 8454817 (January 31, 2009) states:

A bounce/outburst of coal occurred at approximately 0700 hours on January 31, 2009, located at the tail gate area of the 7th West two-entry longwall section (MMU 003). This event involved the shearer between #134 and #144 shields.

This order is issued to assure the safety of all persons at this operation, until examination and/or investigation of the bounce/outburst area is made to determine that the area is safe. This order will also prohibit any mining of coal on the 7th West section, until this investigation is complete.

Modification No. 8454817-03¹ (February 2, 2009) states:

This modification is to allow the operator to test the feasibility of remotely running the shearer from outby the bounce prone area. The operator may do the following:

1. Install additional lighting
2. Paint the cowl with reflective or fluorescent paint while the shearer is at the headgate
3. Tram the shearer up and down the face
4. Perform any cleanup with the shearer that may be needed
5. Install permissible cameras on the shearer from a safe location and at the tailgate.

This order prohibits the mining of any coal on the 7th West section, except any necessary cleanup to facilitate tramping the shearer.

Modification No. 8454817-04 (February 7, 2009) states:

This order is modified to allow the implementation of the plan, dated February 7, 2009, to retreat the longwall to 35 feet inby crosscut 32. During this time, the performance of the plan will be evaluated to determine feasibility and exposure.

Modification No. 8454817-05 (February 13, 2009) states:

THIS ORDER IS MODIFIED TO PROHIBIT FURTHER LONGWALL RETREAT PAST CROSSCUT NUMBER 32. This modification of the (k) order is based on an evaluation of the feasibility and exposure associated with the February 7, 2009, plan modification. Please see the attached letter from District Manager Allyn Davis to Mr. Darrell Leonard dated February 13, 2009.

The letter from District Manager Davis dated February 13 states, in part, that MSHA had performed an evaluation of the February 7 plan and “the results make it clear that this method of mining presents unacceptable risks to miners.” The letter goes on to state:

Longwall panel 13 is mining under deep cover and in difficult geological conditions. Coal bursts continue to occur on the

¹ This modification was incorrectly numbered -02 by the inspector. In addition, Modification No. 8454817-03, discussed below should have been numbered -04. I have used the correct numbers in this decision.

longwall face. Indeed, significant bounce activity occurred last night and early this morning which indicates that conditions appear to be worsening. A log kept by West Ridge shows numerous instances of miners traveling inby shield No. 125, exposing them to the hazards of coal bursts. The February 7 modification provides no protection for miners performing necessary maintenance at the face, and does not provide for necessary examinations through the tailgate. The need to have access to the entire face during normal mining cannot be overlooked. The February 7 modification did not adequately address safe access to the tailgate, the ability to frequently check the face and tailgate for hazards and methane, prevention of accumulations of combustible material, and routine maintenance. The continued exposure to miners of hazards under the February 7 modification is unacceptable. MSHA cannot allow the mine to continue operating under this modification. Therefore, the 103(k) order will be modified to preclude additional mining beyond crosscut 32.

It is this final modification of the order prohibiting further mining of Panel No. 13 that is the subject of this litigation.

The parties presented numerous witnesses and exhibits at the two day hearing. The Secretary called Peter Del Duca, a mining engineer in the roof control division of MSHA's Coal District 9; Michael Gauna, a mining engineer in the roof control division of MSHA's Technical Support Directorate; Ronald Paletta, a coal mine inspector from MSHA's Price, Utah, office; Kevin Stricklin, Administrator of Coal Mine Safety and Health for MSHA; and Allyn Davis, District Manager for Coal District 9. West Ridge called Bruce Hill, President of West Ridge; Darrell Leonard, Mine Superintendent; Hubert Wilson, Safety Director at the mine; Ernie Martinez, a longwall production foreman at the mine; Adam Mann, an assistant shift foreman; Mike Allred, a longwall production coordinator; and Dr. Syd Ping, a professor of mining engineering at West Virginia University.

Section 103(k) of the Mine Act gives the Secretary authority to issue what are known as control orders at the nation's mines. 30 U.S.C. § 813(k). That section provides:

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 approval of such representative . . . of any plan to recover any person in such mine or to recover the coal . . . or return affected areas of the mine to normal.

II. BRIEF SUMMARY OF THE PARTIES' ARGUMENTS

A. West Ridge

West Ridge argues that the Secretary's decision to modify the section 103(k) order to prohibit the company from mining Panel 13 inby crosscut 32 was unreasonable and was an abuse of the Secretary's discretion. The evidence shows that mining Panel 13 by remote control was very successful because it greatly reduced the exposure of miners to hazards presented by bounces. The parties reached agreement on February 7 that West Ridge would try to mine Panel 13 by remote control under an amended roof control plan and that MSHA would evaluate the plan to determine feasibility and exposure. All of the credible evidence shows that the amended plan worked better than expected and that the exposure of miners to the hazards of bounces was greatly reduced. West Ridge employees were shocked when they learned that all mining in Panel 13 had to stop. MSHA never evaluated the amended roof control plan that authorized remote mining and arbitrarily decided that, because the amended plan could not assure that there would never be any more bounces on the tailgate end of the face, mining should cease in Panel 13.

On the morning of February 13, without any warning, MSHA initiated a conference call to advise West Ridge that it would not be permitted to mine past crosscut 32 in Panel 13. This call included high level MSHA officials such as Ed Clair and Kevin Stricklin. Three local MSHA inspectors had been closely monitoring the longwall section, yet MSHA initiated this conference call after the District Manager had a conversation that morning with only one of these three inspectors. He made no effort to contact the other inspectors or to evaluate the effectiveness of the remote mining system in an objective manner.

The Secretary exceeded her authority when MSHA issued Modification No. 8454817-05. It was an unreasonable use of her power under section 103(k). The initial withdrawal order was issued on January 31 because an outburst had occurred between shields 134 and 144. The order was issued to assure the safety of all persons until an "examination and/or investigation of the bounce/outburst area is made to determine that the area is safe." The company instituted significant technological changes to prevent future injuries. About 95 percent of face bounces occur when the shearer is cutting coal in the tailgate area. The changes instituted by West Ridge, with the approval of MSHA, kept all miners out of the tailgate area as the shearer was cutting coal in that area. The area where the January 31 outburst occurred was 240 feet away in the gob by the time the fifth modification to the order was issued. As a consequence, the area cited in the order was safe. There was no legal justification to modify the order to prohibit further mining. If MSHA had a problem with the amended roof control plan, it should have sought further negotiations or issued a section 104(a) citation, rather than modify the 103(k) order in an illegal manner.

B. Secretary of Labor

The Secretary argues that she has plenary power to issue and modify section 103(k) orders. The Commission cannot and should not disturb her authority unless she has abused her discretion. It is not improper for MSHA to use her authority under section 103(k) to require a mine operator to implement a new roof control plan to ensure the safety of miners. There are no time limitations on the Secretary's use of modifications to section 103(k) orders. MSHA performed an evaluation of the amended plan and determined that it did not adequately protect miner safety. On that basis, MSHA concluded that the subject modification to the order of withdrawal was necessary. MSHA is not required to interview everyone who was involved in the evaluation or to explain why it gave weight to some facts and not others. If some evidence supports MSHA's decision to issue a section 103(k) order or to modify an existing order, it acted reasonably and her decision cannot be overturned by the Commission. The inspector that the district manager interviewed on the morning of February 13 told him that the "energy level" along the face was increasing and that there were numerous bumps and bounces along the face during the graveyard shift of February 12-13. It was reasonable for MSHA to rely on this information, along with other information it received, when it decided to shut down the longwall. In short, MSHA exercised its professional judgment that the amended roof control plan could not safely be used in Panel 13.

III. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Discussion of the Evidence.

At the hearing, everyone agreed that, because the mine operates under deep cover, it is a bounce-prone mine. A mine operator must report a bounce to MSHA under section 50.10 if there is a "coal or rock outburst that causes withdrawal of miners or which disrupts regular mining activity for more than an hour." (30 C.F.R. § 50.2(h)(9)). Including the bounce on January 31, 2009, West Ridge has experienced 15 reportable bounces since January 1, 2003. (GX-1 & GX-2). All but two of these bounces have been on the tailgate side of the longwall. In addition to these reportable bounces, the mine experiences smaller events that need not be reported. These events may make noise and may include outbursts of coal, but they do not need to be reported if nobody is injured or if mining is not disrupted for at least an hour. If there is a violent outburst of coal or rock, mine personnel consider the event to be a bounce. If there is no outburst of coal or rock, or if coal merely sluffs off the face into the panline after a noise, it is not considered to be a bounce.² Because the mine is under deep cover, the longwall face frequently makes noises and coal falls from the face on a regular basis. Indeed, miners get worried if the face is too quiet because it may mean that the pressure is not being released from the coal which could portend a larger bounce in the future.

² The panline carries the freshly cut coal to the stage loader at the headgate where the coal is transferred onto a belt for transportation out of the mine. The panline is adjacent to the coal face.

In general, MSHA had not taken any enforcement action following bounces at the mine because such events are to be expected. MSHA became quite concerned in late January 2009, however, because the mine experienced three reportable bounces within a seven-day period. Peter Del Duca of the District 9 office visited the mine following this bounce. He took photographs which showed that a large amount of coal was expelled from the face near Shield 143.³ (GX-3). Because bounces are more common on the tailgate end of the longwall, West Ridge had built protective guards so that the face, shearer, and the panline are behind these guards. These guards consist of metal framing, called the pig pen, and three-quarter inch belting. (CX-16). The walkway used by miners working in the longwall are on the other side of these guards. The idea of the guarding is to protect miners from coal bursts. As Mr. Del Duca noted, however, employees can be injured by the concussion from the noise or movement of coal. In addition, if the ground shakes, a miner can be knocked off his feet. The photographs taken by Del Duca show that the belting prevented the coal that was expelled from the face from entering the walkway. The belting was severely deformed, however, and protruded into the walkway. (GX- 3b & 3c).

Following the second bounce, Michael Gauna of MSHA Technical Support visited the mine. He took photographs of what he observed. (GX-11). He noted that the bounce damaged the cable tray. (GX-11d). The pig pens and belting material kept coal from entering the walkway.

A miner suffered a fractured rib and a partially deflated lung when another bounce occurred on January 31. He was not hit by any coal. Rather, either the floor vibrated or the concussion from the burst knocked him down and he fell into a shield. After the third bounce, District Manager Davis quickly became convinced that the West Ridge Mine should not be permitted to continue mining Panel 13 and should move on to Panel 14. Kevin Stricklin agreed with Davis on this issue. A meeting was held among mine officials and District 9 personnel to discuss the situation. At this meeting, company management asked if the company could try to develop a system where the shearer could be operated by remote control when it was cutting coal at the tailgate end. The idea behind this proposal is that, because most of the bounces occur as the shearer is cutting coal at the tailgate, the company would try to develop a system in which the miners would not need to be in the tailgate area as coal is being cut. (Ordinarily, two miners walk along the entire length of the walkway as they operate the shearer.) West Ridge asked to test this remote system because it wanted to see if coal could be safely mined with the aim of using the system to mine all of Panel 13. As stated below, MSHA eventually granted the company's request, but it made no commitment that it would be allowed to mine beyond crosscut 32. MSHA preferred that the company remove the longwall equipment and proceed to Panel 14 as soon as possible. In preparation for this experiment, MSHA issued Modification No. 8454817-03. (JX-19).

³ The shields provide roof support along the walkway in the longwall. The shields are numbered 1 through 148. The shields that are considered to be in the tailgate area are between 126 and 148.

The company's attempt to develop a system to mine the tailgate end of the face by remote control was a major undertaking that had never been attempted at any mine in the country. For example, it required changes be made by Joy Manufacturing Company in the program software. The shields normally move up a few at a time but a large number of shields had to move if it was operated remotely. The speed of the shearer had to be changed in the computer program to automatically slow it down in the tailgate area. In addition, more lighting was installed, the cowl for the shearer was painted with a reflective paint, and cameras were installed. Bruce Hill testified that these modifications were made at great cost.

In order for West Ridge to use the remote mining method, an amendment to the roof control plan had to be approved. The company submitted a plan to provide for remote mining on February 5. (JX-20). The plan included the elements that had been discussed at the meeting on February 2. When cutting the tailgate zone from shields 126 through 148, no miners would not be permitted to travel past shield 125. The shearer would travel at a speed of 20 feet a minute while in the tailgate zone and 32 feet a minute along other areas of the face. The shearer would be operated from shield 125 by radio remote control when coal was cut in the tailgate zone. Pig pens and belting guards would be installed all along the tailgate zone up to shield 145. A record book ("log book") would be kept at shield 125 to record such information as the name of any miner who traveled into the tailgate zone and the purpose for each trip. Any bounces were also to be recorded. No miners would be permitted in the tailgate zone for 30 minutes after the coal was cut.

In a letter from District Manager Davis, dated February 6, 2009, MSHA rejected the proposed amendment to the roof control plan. One reason that the plan was not approved was that the 30-minute waiting period was too short. The rejection letter also stated that the "plan should state that the purpose of this plan is to evaluate the use of remote systems with the intent of reaching the next available crosscut to extract the longwall face." (JX-21).

On February 7, the parties held a five-hour meeting at the district office to discuss the plan amendment. West Ridge repeatedly asked to be permitted to mine the remainder of Panel 13, if the remote system performed well. Although MSHA personnel did not make any promises, it also indicated that, if the system worked, it might permit mining to continue beyond crosscut 32. West Ridge submitted a new amended plan and it was approved on February 7.⁴ (JX-22). The amended plan did not specifically state that the intent was to reach the next available crosscut so that the longwall equipment could be removed. The modification to the 103(k) order allowed the implementation of the February 7 plan to retreat the longwall to crosscut 32. It went on to state that, during this time, the performance of the plan would be evaluated to determine feasibility and exposure. (JX-23).

⁴ Kevin Stricklin did not become aware of this amended plan until February 9 and he was surprised because he thought that the company had agreed to remove the longwall equipment from the face as soon as possible.

West Ridge started mining with the remote system on February 8. All of the West Ridge witnesses testified that the remote system operated better than they expected. They had been worried that operating the shearer would be difficult or impossible when it reached the very end of the tailgate near Shield 148. They also noted that miners were no longer exposed to the hazards associated with bounces because miners were prohibited from entering the tailgate area while the shearer was cutting coal there. MSHA sent three inspectors to the mine to monitor the longwall starting on February 10. Each inspector was on the longwall for his assigned shift for three days. The inspectors were Randy Gunderson, Jim Martin, and Ronald Paletta. Inspector Paletta worked the graveyard shift which started at 11:00 p.m. Only Inspector Paletta testified at the hearing.

On February 13, 2009, after he left the mine, Inspector Paletta called District Manager Davis. He told Davis that the longwall face was experiencing coal bursts, bounces, and bumps all along the face. He noted that there was a significant increase in the amount of energy being released along the face when compared to previous shifts. He prepared a memo on the subject. (GX-19). He was concerned that this increased activity would affect the ability of miners to exit the panel down the tailgate entry.

Davis testified that he had previously received a copy of part of the log book that had been kept at shield 125. He testified that he was surprised by the number of times people had traveled into the tailgate zone after February 8. (GX -18; CX-18). He believed that this exposed miners to the hazards that remote mining was designed to prevent. Men went into the tailgate zone to perform such work as cleaning rubble, making repairs, and performing examinations. Davis called Kevin Stricklin to discuss the matter and a conference call was initiated. The call involved a number of people including Stricklin, Davis, Ed Clair, Paletta, and Michael Gauna. The other two inspectors who monitored the performance of the remote mining system were not consulted by Davis or anyone else from MSHA. Paletta related that the number of bounces appeared to be increasing and that they were also occurring in areas that were not in the tailgate zone. Stricklin had also reviewed the log book and he was concerned about the number of times miners went into the tailgate zone. He was also concerned about the number of bounces that had been occurring. At this point, it was agreed that the remote mining system was not adequately protecting miners and that no mining was to occur past crosscut 32 in Panel 13.

Company witnesses testified that MSHA failed to properly evaluate the feasibility of the remote mining system and the exposure of miners to bounces. Several witnesses who worked the graveyard shift with Paletta directly contradicted his testimony. Ernie Martinez, a longwall production foreman, worked the same graveyard shifts as Paletta. He testified that there were no bounces during his shifts. There were some hits and noises but those always occur along the face. No coal was expelled from the face and there were no outbursts of coal. Coal would sluff off after a hit and fall into a panline, but that is a regular occurrence. During the graveyard shift in the early morning of February 13, the shearer had stopped near shield 125. Paletta was sitting on the shield and Martinez was leaning on a piece of equipment. There was a loud noise which startled the group of men. The shearer was not operating so the area was otherwise quiet. Paletta

testified that he said to Martinez, “that was a good bounce,” to which Martinez replied, “Yea, it was a good bounce.” (GX-19). Martinez denied this conversation and testified that when he asked the inspector to rate the little bump from 1 to 10 the inspector said it was a 2.

Adam Mann, an assistant shift foreman, testified that nothing that happened on that same graveyard shift of February 13 was abnormal. He said that the conditions were not at all like the situation on January 24 when there was a major outburst. Mann could not recall any bounces at the headgate. On several occasions, Paletta would ask the person keeping the log book (the log book “umpire”) if he had recorded a particular bump or bounce. Mann testified that Paletta would frequently tell the umpire to record events that were not even close to being bounces. Unless there is an outburst of coal, the event should not be considered a bounce. The log book shows that many more events were recorded as bounces when Paletta was the MSHA representative than when the other two inspectors were present. Mann believed that Paletta was very uncomfortable being on the longwall face and that he was jittery while he was there. Mike Allred, a longwall production coordinator, testified he heard thumping on the graveyard shift, but no bounces. He admitted that there was a bounce on the day shift on February 13, after Paletta had left the mine. That bounce did not need to be reported to MSHA under section 50.10.

West Ridge witnesses also testified that, as the longwall approached crosscut 32, it was traveling under a ridge in the mountain. (GX-1). The longwall was in an area where the stresses would be the highest. Once the longwall retreated beyond crosscut 32, the cover would not be as deep and the stress would be reduced. Dr. Ping testified that he believes that there were several reportable bounces in late January because there was a roof overhang near the tailgate corner at the time.⁵ In other words, the area in the gob near this corner was not caving completely. He attributed this overhang to the fact that, due to geologic conditions, Panel 11 was only partially mined.⁶ *Id.* He testified that better caving is achieved if the gob covers a large area that is not interrupted by intrusions of unmined coal. He also testified that the area under a ridge is a transition zone that puts stress on the tailgate side of the panel being mined and that, as mining progresses past this transition zone, the number of bounces or bumps should decrease.

Bruce Hill and other witnesses testified about the ongoing negotiations between MSHA and the company concerning the method of mining once Panel 14 has been mined. As stated above, each panel bring mined is adjacent to the previous one with yield pillars in between. This is known as panel-panel mining. It is apparent that MSHA wants the company to place a barrier of coal between each panel, in a system known as panel-barrier-panel mining. Although that is

⁵ Dr. Ping is a well-recognized expert in ground control in coal mines. He has authored textbooks on coal mine ground control and longwall mining that are used in mining engineering courses. (CX-2).

⁶ The coal seam at West Ridge has geologic faults and other structures that can interfere with mining. There is also sandstone present, which can adversely affect ground control.

not an issue in this case, Hill suggested that MSHA's actions can only be understood by taking this dispute into consideration.⁷

Mr. Hill and other West Ridge witnesses testified that, during the negotiations over the amended roof control plan for Panel 13 to allow remote mining, the company made clear its objective to mine the remainder of Panel 13. The company would have only mined about half the panel if it could not retreat past crosscut 32. Although MSHA did not make any promises, District Manager Davis gave the impression that, if remote mining worked, West Ridge would be able to mine beyond crosscut 32. It was on this basis that Mr. Hill agreed to try the remote mining system. He testified that if MSHA had told him on February 7 that the company would not be permitted to mine beyond crosscut 32, it is likely that he would have taken steps to have the longwall equipment removed so that the company could begin mining Panel 14. (The company would have been required to have the roof control plan amended to allow the extraction of the longwall equipment). Hill testified that, because the roof in a coal mine deteriorates when mining stops, the company may not be able to safely remove the longwall equipment at the present time. At best, he believes that it will be able to remove some of the equipment near the headgate.⁸

Mine Superintendent Leonard testified that West Ridge has taken extraordinary steps to protect the safety of miners working in the longwall section. Indeed, Mr. Del Duca told him that no other coal mine in the country is doing more. In addition to the actions discussed above, such as the installation of pig pens and belting in the tailgate zone, the company requires all of its miners working in the longwall to wear what it colloquially calls "riot gear." (CX-16). This gear includes a full face mask, chest protector, and knee, shin, and metatarsal protection. The company prohibits anyone from entering the tailgate zone during production, it slows down the rate of production, and it does not allow anyone in the tailgate zone until 45 minutes after coal has been cut to allow the roof to settle. These provisions are in the amended roof control plan.

West Ridge witnesses testified that Davis and Stricklin should not have been alarmed by the fact that miners traveled into the tailgate zone. The men entered the tailgate in accordance with the roof control plan to perform required tasks and conduct required MSHA examinations and tests. Company witnesses testified that 90 to 95 percent of all bounces occur when coal is being cut in the tailgate zone. As a consequence, with all of the protective measures taken by the

⁷ West Ridge left a barrier of coal between Panels 13 and 14. Its witnesses stated that this barrier was placed there to better control water in the mine and ventilation of the panels.

⁸ Because both parties to this proceeding asked that my decision be issued as quickly as possible, I wrote this decision before the expedited transcript had been prepared. As a consequence, I could not include page references to the transcript.

company, miners who work in the tailgate zone 45 minutes or more after the coal is cut are not in serious danger.⁹

Several West Ridge witnesses, including Leonard, Wilson, Mann, and Allred, testified that they discussed the remote mining system with Inspectors Gunderson and Martin. These discussions occurred between February 10 and February 13. The witnesses testified that these inspectors had a more positive attitude toward the safety of the remote mining process than Inspector Paletta. They also said that these inspectors were surprised and upset that they were not consulted before MSHA decided that remote mining was not safe. Hill and Leonard also testified that the objective of the test of remote mining was to see if miners could be protected from bumps, bounces, and outbursts by limiting their exposure and instituting the administrative controls discussed above. Measured by this standard, the test was a complete success. They strongly believe that MSHA wrongly rejected the idea of remote mining, as described in Hill's letter to Davis dated February 15, 2009. (CX-19).

B. Analysis of the Issues.

The parties do not dispute that MSHA had the authority to issue the 103(k) order on January 31, 2009. There had been a reportable accident at the mine. The dispute concerns MSHA's authority to issue Modification No. 8454817-05. (JX-25). West Ridge argues that the original order was issued because of conditions that existed on January 31 in the tailgate area. As stated above, the longwall has mined well beyond the area of concern and the company has instituted significant changes that will prevent future injuries. As a consequence, MSHA was required to terminate the 103(k) order and it did not have the authority to extend it to cover a new situation.

Although it is true that the longwall had retreated past the area where the January 31 bounce occurred, I find that it was within MSHA authority to keep the section 103(k) order in force until it was satisfied that the hazards presented by bounces in the tailgate were fully addressed. The fact that mining had progressed beyond the area of the original accident does not end MSHA's responsibility to "insure the safety" of miners from the same conditions along the tailgate further inby. (Section 103(k)). Section 103(k) allows MSHA to issue such orders as it deems appropriate following an accident until it is convinced that it can safely return the area to normal. This authority includes the power to issue modifications to the original order. The hazard presented in this case was not stationary, but retreated inby with the longwall along the tailgate side. As a consequence, I do not agree with company's argument on this issue.

West Ridge also argues that the dispute in this case is really about the mine's amended roof control plan. If MSHA believed that the plan was not being followed or that it should be modified, it should have negotiated with West Ridge and, if such negotiations were not

⁹ If miners must leave the travelway in the tailgate zone to work behind the pig pens and belt guards, special measures are taken that the company believes protects the miners.

successful, it should have issued a citation under section 104(a). By unlawfully using a section 103(k) order in this instance, the Secretary is denying the company the opportunity to litigate the issue on the merits. The Secretary's burden of proof is significantly reduced when litigating a section 103(k) order.

As I stated at the hearing, I am troubled by the Secretary's use of a section 103(k) order to demand compliance with a roof control plan. MSHA, in essence, rejected the continued use of the amended roof control plan when it issued Modification No. 8454817-05. It is important to note that MSHA did not consider the situation in Panel 13 to constitute an imminent danger because a section 107(a) order was not issued and MSHA allowed West Ridge to continue mining. MSHA used what it considers to be its plenary power under section 103(k) to force West Ridge to abandon Panel 13 without affording the company the opportunity to negotiate the issue or obtain meaningful review before the Commission. I recognize that the previous modification of the 103(k) order stated that it was only issued to allow remote retreat mining to 35 feet inby crosscut 32.¹⁰ That provision was included, however, with the caveat that the plan would be evaluated to determine feasibility and exposure.

Congress granted the Secretary wide discretion under section 103(k). The Commission has the authority to review section 103(k) orders but this authority is limited to determining whether MSHA acted reasonably under the circumstances. *See e.g. Buck Mountain Coal Co.*, 15 FMSHRC 539 (March 1993) (ALJ). I have no doubt that the MSHA officials who participated in the decision to halt mining in Panel 13 did so because they believed that the safety of the miners could not be adequately protected under the amended roof control plan. The issue is whether it was reasonable for MSHA to modify the section 103(k) order rather than issue a section 104(a) citation and, if necessary, a 104(b) order in this case. MSHA believed that the hazard that caused the accident had not been mitigated. Davis and Stricklin were told by Inspector Paletta that bounces were continuing, miners had to enter the tailgate zone more often than originally believed, and miners might not be able to exit the tailgate entry in the event of an emergency.¹¹ In addition, the log book contained information that convinced Davis and Paletta that the conditions at the tailgate were too hazardous for miners. Thus, although I am troubled by MSHA's use of its authority under section 103(k), I hold that it was reasonable for it to issue the subject modification to the order given the unpredictable nature of bounces and the fact that the previous modification only authorized mining up to crosscut 32. The legislative history of section 103(k) is instructive. The Senate report states:

The unpredictability of accidents in mines and uncertainty as to the circumstances surrounding them requires that the Secretary or his authorized representative be permitted to exercise broad discretion

¹⁰ The "35 feet inby" language was included because mesh would have to be bolted to the roof along the face at crosscut 32 if the company were to attempt to remove the longwall equipment.

¹¹ Both designated escapeways were in the headgate entries.

in order to protect the life or to insure the safety of any person. The grant of authority under section [103(k)] to take appropriate actions and . . . to issue orders is intended to provide the Secretary with flexibility in responding to accident situations, including the issuance of withdrawal orders.

(S. Rep. No. 95-181, at 29 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 617 (1978). Based on the above, I reject West Ridge's argument that the Secretary was required to address this issue through a section 104(a) citation.

I am also troubled by the fact that MSHA did not carefully evaluate the feasibility of the amended roof control plan to see whether it protected miners from being exposed to the hazards of bumps and bounces. A reasonably prudent person would interpret the term "evaluate" to include more than what occurred in this instance. Based on the input from one inspector, MSHA determined, in a conference call, that mining should not progress beyond crosscut 32. MSHA did not seek the input of the other two inspectors or evaluate the log book in an analytical manner. More importantly, MSHA did not seek any input from the company to obtain information that might address the concerns that MSHA had. As a consequence, West Ridge managers were honestly surprised when they were told that Panel 13 could not be mined beyond crosscut 32. (CX-19). February 13 was a Friday and the longwall reached that crosscut over the weekend. With the exception of some development mining using a continuous mining machine, the mine has been idle since that weekend and most miners have been furloughed.

As stated above, West Ridge devoted a considerable amount of energy, time, and money to try to develop a remote longwall system that would protect miners. MSHA knew about these undertakings and District Manager Davis seemed interested in seeing whether the system would work. It is rather surprising that MSHA would shut down the longwall in Panel 13 without a more thorough evaluation of the system. For example, both Davis and Stricklin reviewed the raw data in the log book and drew some important conclusions from the information provided without discussing this information with company officials. At the hearing, West Ridge employees testified that some of the conclusions drawn from this review of the raw data were erroneous and that other more logical conclusions could also be drawn from the data.¹² West Ridge was never given the opportunity to discuss the information in the log book with MSHA before it made the decision to issue the contested modification. MSHA did not discuss the issues with Inspectors Gunderson and Martin to see if they agreed with Paletta. West Ridge argues that the decision to disallow remote control mining really came from MSHA headquarters in Arlington and that the decision was more politically based than the agency is willing to admit. It

¹² For example, an extraordinary number of the reported bounces occurred when Inspector Paletta was at the mine. In addition, miners were only in the tailgate zone when the shearer was not operating. The company was never able to discuss with MSHA how these facts affect the safety of miners working on the longwall.

is clear from Administrator Stricklin's testimony that he was not really in favor of the remote mining test and believed that the longwall equipment should have been removed from the panel at the earliest possible opportunity.

I find that, although MSHA did not thoroughly evaluate the effectiveness of the remote longwall system or whether the system adequately protected miners, MSHA's decision to issue the subject modification was reasonable. The process that MSHA used in evaluating the effectiveness of the remote mining system was flawed, but MSHA's concerns were genuine. MSHA could have initially determined on February 7 that it would not consider testing a remote mining system in an amended roof control plan. For example, one reason that it ultimately determined that it would not permit West Ridge to continue operating in Panel 13 under the amended roof control plan was because, under section 75.362(d), frequent tests for methane are required at the working face. This standard would require a miner to enter the tailgate zone on a regular basis. Davis testified that MSHA failed to take this safety standard into consideration when the February 7 amended roof control plan was approved.

In addition, although the evaluation was flawed, as described above, MSHA could have and likely would have issued the same modification had Davis first discussed the matter with the other two inspectors and reviewed the log book with company management. MSHA officials relied heavily on the opinions of its own employees including Del Duca and Gauna, who have extensive roof control experience. They had both been to the mine and had observed firsthand what can happen if there is a coal outburst. Throughout the hearing, witnesses for both MSHA and the company testified that bumps, outbursts, and bounces are unpredictable. Stricklin, Davis, and other MSHA officials were concerned that a bounce could occur when a miner was in the tailgate area and he could be injured despite all of the administrative controls that West Ridge had in place. It is quite clear from the record that discussions with company officials would not have eased these concerns. West Ridge did not, during the period between February 8 and 13, ask the district manager how the amended plan would be evaluated but it simply assumed that the plan would be approved if the company could get the remote mining system to operate.

I also note that, if I were to determine that the Secretary exceeded her authority under section 103(k) and I vacate Modification No. 8454817-05 on that basis, Modification No. 8454817-04 would remain in place. That modification only authorized West Ridge to mine up to crosscut 32, a point the longwall has now reached. I could only order MSHA to again evaluate the mine's experience under the February 7 roof control plan amendments to determine feasibility and exposure. I reject the argument of West Ridge that, if I were to vacate the fifth modification, the mine would be authorized to resume mining Panel 13. I do not have the authority to review or approve roof control plans or to order MSHA to approve such plans.

Commission administrative law judges have vacated orders when an official from the MSHA district office dictated that an order be issued when such official was not at the mine. *See Jim Walter Resources, Inc.*, 29 FMSHRC 1043, 1047-48 (Nov. 2007) (ALJ) (citing *Cumberland Coal Resources, LP*, 28 FMSHRC 545, 555-56 (Aug. 2006) (imminent danger order). Although

Modification No. 8454817-05 was issued by Inspector Martin, it is clear that he did so at the direction of the district office.¹³ In this instance, the matter at issue was directly related to ground control, an area in which district offices are intimately involved during the plan approval process. Thus, I find that the Secretary did not abuse her discretion when Davis, after consulting with Del Duca, Gauna, and Paletta, determined that the subject modification should be issued. Although Davis had not been to the mine in 2009, he relied on information provided by officials who were very familiar with ground control at the mine.

In conclusion, I find that the Secretary acted reasonably when she issued Modification No. 8454817-05, given the broad discretionary authority granted the Secretary under section 103(k) and the unpredictable nature of bounces, bumps, and outbursts at this mine. Despite the problems in the manner in which MSHA evaluated the amended roof control plan, noted above, the explanation provided by District Manager Davis for the subject modification in his letter of February 13 was reasonable. (GX-17). I recognize that reasonable people could disagree whether the amended roof control plan was adequately protecting miners from bounces. The company strongly believes that the plan worked better than expected. I only have jurisdiction to determine whether the Secretary acted reasonably when she issued the subject modification to the section 103(k) order. I cannot substitute my judgment for hers. On this basis, I find that the Secretary did not abuse her discretion and I affirm the modification of the order.

IV. ORDER

For the reasons set forth above, the Notice of Contest is **DENIED**, Modification No.8454817-05 is **AFFIRMED**, and this proceeding is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

Distribution:

Kevin N. Anderson, Esq., and Jason W. Hardin, Esq., Fabian & Clendenin, P.C., 215 State St., Suite 1200, Salt Lake City, UT 84111-2323 (E-mail and Certified Mail)

¹³ Although Inspector Martin was apparently unhappy that he was not consulted before the decision was made to halt mining in Panel 13, there is no evidence that he ultimately disagreed with this decision.

Daniel W. Wolff, Esq., Crowell & Moring, LLP, 1001 Pennsylvania Ave, Washington, DC 20004-2595 (E-mail and Certified Mail)

Timothy S. Williams, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5710 (E-mail and Certified Mail)

Derek Baxter, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd, 22nd Floor, Arlington, VA 22209-2296 (E-mail and Certified Mail)

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