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SOL (MSHA) V. ITMAN COAL
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

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

v.

ITMANN COAL COMPANY,
RESPONDENT

Civil Penalty Proceeding

Docket No. HOPE 78-690-P
A/O No. 46-01576-02021

Itmann No. 3 Mine

DECISION APPROVING SETTLEMENT
AND
ORDERING PAYMENT OF CIVIL PENALTY

Appearances: John H. O'Donnell, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner
Karl T. Skrypak, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Cook

A petition for assessment of civil penalty was filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (Act) in the above-captioned proceeding. An answer was filed and a prehearing order was issued. Subsequent thereto, various motions and related documents were filed requesting approval of a settlement and dismissal of the proceeding. The statements contained in these filings are set forth below.

Information as to the six statutory criteria contained in section 110 of the Act has been submitted. This information has provided a full disclosure of the nature of the settlement and the basis for the original determination. Thus, the parties have complied with the intent of the law that settlement be a matter of public record.

An agreed settlement has been reached between the parties in the amount of $229. The assessment for the alleged violations was $310.

The alleged violations and the settlement are identified as follows:

Notice or Order No.	Date	30 CFR Standard	Assessment	Settlement
7-0056	4/12/77	70.100(b)	$90	$ 9
7-0139	7/22/77	75.200	220	220

The initial motion to approve settlement and dismiss was filed by the Petitioner on January 2, 1979, proposing to settle Notice No. 7-0056, April 12, 1977, 30 CFR 70.100(b) (alleged respirable dust violation) for $9 and Order No. 7-0139, July 22, 1977, 30 CFR 75.200 (alleged roof violation) for $110. On January 31, 1979, an order was issued indicating that the proposed settlement for the alleged respirable dust violation could be approved1, but that the information contained in the record was insufficient for purposes of determining that the public interest would be adequately protected by approval of the settlement for the alleged roof violation. Accordingly, the request for approval of settlement was denied. The motion set forth the following reason in support of the settlement of the alleged respirable dust violation: "(FOOTNOTE 1). The respirable dust standard violation %y(3)5C is covered by the blanket agreement approved by Judge Kennedy in May of 1978."

The Petitioner filed its second motion for approval of settlement on July 19, 1979, reiterating the previously submitted settlement proposal for the alleged respirable dust violation, but proposing to settle the alleged roof violation for $220. On September 12, 1979, an order, similar to the January 31, 1979, order, was issued denying the Petitioner's request for approval of settlement.

Since the alleged roof violation has been the sole impediment to a disposition of this case short of an evidentiary hearing, it is appropriate to set forth the allegations pertaining to it contained in the petition for assessment of civil penalty. The order of withdrawal, a copy of which accompanied the petition, states the following:

> Loose, inadequately supported roof and loose overhanging brows were observed at numerous locations along the sugar run track haulageway from survey station spad 3977 inby for approximately 650 feet to an area near station spad 4260. Several areas along the above-mentioned haulageway were observed where bolt spacing exceeded 10 feet and some of the installed bolts were inaffective due to sloughing. The ribs in three fallen areas were not supported. Numerous crossbars (6 inches by 8 inches by varying lengths) installed in the affected area were broken and/ or sagged (to what appeared to be a maximum load) due to excessive weight. Four men were working approximately 200 feet inby the beginning of the affected area and the operator stated that they had closed the area for rehabilitation purposes; however, no danger signs were observed and the conditions were not listed in the preshift examiner's book on this date.

On October 5, 1979, the Respondent filed a motion to approve settlement and dismiss stating, in part, as follows:

1. On or about December 28, 1978, the original motion to approve settlement was filed by MSHA. On January 31, 1979, the Judge issued a decision disapproving the proposed settlement. Since then the parties reviewed the entire matter in light of the Judge's disapproval. They believed that a second proposed settlement would have been an appropriate disposition of the case. However, they recognized that reasonable men might differ and there might be more than one proper disposition for any case. Therefore, on July 18, 1979, a different settlement was proposed.

The Judge, in his decision disapproving the original proposed settlement, stated that the proposed settlement of the alleged violation of 30 CFR 70.100(b) could be approved as proposed. Therefore, the second motion dealt only with the settlement of the alleged violation of 30 CFR 75.200. The Judge disapproved the second settlement on September 12, 1979.
This, the third proposed settlement of the alleged violation of 75.200 is for $220, i.e., 100 percent of the amount proposed by the Office of Assessments.

2. This amount is proper. (At any hearing the operator would produce testimony that only men working to correct the condition went inby the beginning of the affected area.) MSHA could produce no testimony to the contrary. The inspectors who signed the Order would testify that the miners they observed inby were working to correct the condition.

3. Respondent is a large operator.

4. Payment of the proposed assessment will have no effect on Respondent's ability to remain in business.

5. Respondent's history of previous violations has been submitted in prior proposals by MSHA.

6. Respondent demonstrated good faith in attempting to achieve rapid compliance.

7. The alleged violation was the result of ordinary negligence.

8. The alleged violation was not serious under the circumstances.

9. The previously submitted Proposed Assessment and Inspector's Comment Sheets are hereby incorporated by reference.

NEW MATTER

10. The mine was on vacation from July 3, 1977, through July 17, 1977.

11. Shortly after vacation, management became aware of the roof and rib conditions in the general area from spad 3977 through spad 4260 along the Sugar Run Track Haulageway. Management does not agree that the entire area presented a problem. There were only a few areas where work had to be done.

12. Management closed what it considered to be the affected area on or about July 19, 1979. No persons except those authorized by the operator to enter the place to work at eliminating the condition traveled into the subject area.

13. A plan was posted describing the rehabilitation work being done.

14. On Wednesday, July 20, 1979, Inspector Sammy Bell inspected the Itmann No. 3 B Mine. Before the inspector went underground, Superintendent Glen Blankenship informed him that an area of the Sugar Run Track Haulageway had been closed for repairs. Only experienced and certified people were working in the area under the supervision of a certified foreman. The track was closed not being used ÕsicÊ for any reason. Inspector Bell and Lee Stewart, mine foreman, traveled to the subject area. When he returned to the surface, Mr. Bell discussed the situation with Superintendent Blankenship and Mine Foreman Stewart. Inspector Bell stated that he knew the area was closed and work was already being performed to rehabilitate the area. However, Mr. Bell said that he intended to discuss the situation with the MSHA roof control experts at his office. Inspector Bell left the mine without issuing any notices or orders in the subject area.

15. Two days later, on Friday, July 22, 1977, Inspector Bell returned to the mine followed by Inspectors Charles Hambric and Hubert McKinney. All inspectors were told by Superintendent Blankenship that the area was closed and that work was already being performed to correct the condition. The three inspectors, Superintendent Blankenship and Mine Foreman Stewart traveled to the subject area. After observing the subject area for about thirty (30) minutes the Inspectors verbally issued a closure order. They came to the surface and after calling their MSHA supervisor, wrote the subject 104(a) Order.

16. The allegation that men were working two hundred (200) feet inby the beginning of the affected area is totally false. The operator had already rehabilitated the first two hundred (200) feet of the area to the point where the men were working. A difference of opinion arose as to whether more work was needed on certain brows found outby where the men were working.

17. There were no other crews working anywhere near the area of the mine.

18. Since the operator had complied with the roof control plan by posting a plan for the rehabilitation work, it did not feel that hanging a danger sign and making an entry in the pre-shift examination book were necessary. MSHA agreed with this argument at the time or they would have issued an additional notice of a violation of 30 C.F.R. Section 75.303.

19. Respondent strenuously contends that a violation of Section 75.202 may have existed but that alleged violation was certainly not an imminently dangerous condition as evidenced by the fact that Inspector Bell himself permitted the same conditions, practices and procedures to exist for over two (2) days from the time he first observed them.

Paragraph Nos. 2, 3, 4, 5, 6, 7 and 9 merely restate the justifications advanced by the Petitioner in its July 19, 1979, motion. In paragraph No. 8, supra, Respondent classifies the alleged violation as "not serious under the circumstances," whereas the Petitioner's July 19, 1979, motion classified it as "moderately serious in the circumstances."

On October 18, 1979, the Petitioner filed a motion requesting that the Respondent's settlement motion be approved, stating, in part, as follows:

> The Respondent, Itmann Coal Company, has moved that 104(a) Order of Withdrawal No. 1 SRB/HM/SRB (7-0139) which issued on July 22, 1977, citing 30 CFR 75.200, be approved by Respondent's payment of $220.00 (which amount was received by the Office of Assessments on August 7, 1979). The payment is in the same amount as that proposed by the Assessment Officer, see Form A0-21c attached, which shows the points assessed pursuant to 30 CFR 100.3 in each of fifteen categories by which the proposed civil penalty of $220.00 was determined. The Office of the Solicitor by reference adopts the allegations and attachments contained in its previous two motions for approval of settlement, which show the Respondent is a large operator, payment will have no effect on its ability to remain in business, that there have been 478 previously paid violations and 34 paid 30 CFR 75.200 violations, that a normal degree of good faith was demonstrated in abating the condition after the order of withdrawal issued, that the violation was the result of ordinary negligence, and, in view of the fact that the area had been closed, that the violation was only moderately serious.
>
> The Office of the Solicitor notes the new material submitted by the Respondent and deems it additional reasons why the settlement in the amountof $220.00

should be approved as being a reasonable amount under
the facts shown.

On November 27, 1979, an order was issued noting that the last paragraph in the above-quoted passage appeared to be an adoption of the "new matter" submitted by the Respondent on October 5, 1979.

The order stated that:

> [i]f the Petitioner intends this as an adoption, then the Petitioner is ORDERED to file with the undersigned Administrative Law Judge, within 20 days of the date of this order, an affirmative statement that it adopts the "new matter" submitted by the Respondent on October 5, 1979, as an accurate statement of facts and as additional reasons in support of the proposed settlement.

On December 5, 1979, the Petitioner responded to the November 27, 1979, order as follows:

> The undersigned attorney on behalf of the Mine Safety and Health Administration (MSHA) responds to the Order that MSHA either expressly adopt or reject the various Respondent's "new matter" quoted in the Order as follows:
>
> 1. The Order quotes a statement by the Petitioner reading, "The Office of the Solicitor notes the new material submitted by the Respondent and deems it additional reasons why the settlement in the amount of $220 should be approved as being a reasonable amount under the facts shown." This statement was intended only as acknowledgement that at a hearing Respondent's witnesses would testify as alleged in support of the allegations designated by the Respondent as "new matter" so it is appropriate to consider in approving settlement. The Petitioner had already stated its position in two motions to have the settlement approved, and had indicated in a telephone conference call that there was little more it could offer. The Respondent at that time offered to reveal its position and subsequently by the "new matter" did so.
>
> 2. Federal Coal Mine Inspectors Charles D. Hambric, Jr., and Herbert (not Hubert) McKinney have each communicated by telephone more than once with the undersigned attorney and we have discussed in depth the quoted material in the above mentioned Order, and the undersigned attorney has read to each Inspector the Response to each statement and MSHA's comment which the Inspectors have agreed is, in their respective opinion, true. Sammy R. Bell is a former Federal coal mine inspector no longer employed by the Federal Government. Mr. Bell is believed to reside in Crab Orchard, West Virginia, and so he should be available as a witness in response to an appropriate subpoena. Nevertheless, since Mr. Bell is not a

present employee of MSHA, the Office of the Solicitor has at present only office records and the recollection of Messrs. Hambric and McKinney and other MSHA personnel to develop Mr. Bell's position concerning the issuance of the subject order of withdrawal.

3. Brief Statement of Facts: (According to Inspectors Hambric and McKinney): There had been a substantial unplanned roof fall in the underground bituminous coal mine and Respondent's personnel, as a result, had hauled away a substantial amount debris. The area was along a rail haulageway used, or to be used, at least after the unplanned roof fall as a haulageway for supplies only. Inspector Bell had briefly observed the beginning of the area where the unplanned roof fall has occurred [sic] a few days prior to July 22, 1977 (the day the subject order of withdrawal issued), and had been concerned with the manner in which the roof had been and was planned to be rehabilitated. There appears to have been a discussion between former Inspector Bell and unknown Management personnel in which the latter justified the roof rehabilitation plan posted for the reasons that only supplies would be hauled on the travelway and miners had verbally been ordered to stay out of the area. Mr. Bell took no action at that time based upon his cursory view of the scene, but obviously he was concerned because he, upon returning to the MSHA Office, through office channels, requested a roof control specialist be assigned to return with him to the mine while an inspection was made of the entire area affected by the unplanned roof fall. In response to former Inspector Bell's request, Mr. Hambric and Mr. McKinney (roof control specialists) returned with Mr. Bell to the mine on July 22, 1977, where a careful inspection of the entire area taking several hours (not thirty minutes, as suggested by the Respondent) was made by the three inspectors. The Inspectors are looking for, but have not located, a mine map which would show the distance of the area affected by the roof fall but suggests that as much as 1,000 feet was involved. The Inspectors were alarmed to observe that there was a power center at the rear of the area where the roof was substandard. Under certain conditions mine personnel must go to the power center to inspect equipment and possibly reset breakers and perform other services. True, the power center can be reached by traveling in a long loop so it can be entered from the rear, but this route is so much longer and more difficult than passing under the area where the roof was substandard that all three MSHA inspectors were concerned that mine personnel would use the haulageway to reach the power center instead of using the haulageway only to haul supplies as the Mine Operator insisted it would be used. The Respondent was only

opening up the area by removing debris and taking down roof where necessary so track haulage equipment could pass, insisting that that was all that was necessary since the area would only be used to haul supplies. The three inspectors required that loose brows be supported by roof bolts or taken down, and other work, as described in the order of withdrawal, be done. We emphasize that Mr. Bell had not previously inspected the area, other than superficially, before the three inspectors on July 22, 1977, went over every bit of it. The three inspectors were unanimous in the opinion that the roof and rib conditions observed by them during the inspection constituted an imminent danger. The area had not been posted with a danger sign although the miners had verbally been told to stay away from the area unless authorized to work on the roof rehabilitation. The three inspectors verbally issued a 104(a) order of withdrawal after completing their inspection. Then, the inspectors returned to the surface where a discussion was had with mine personnel who, although recognizing that the roof presently posed a danger, were of the opinion that the verbal orders issued to prevent employees from entering the area were adequate and no danger sign need be posted, and Management was of the opinion that its posted plan to rehabilitate the area was sufficient. The Inspectors and MSHA take the position that, since the roof and ribs were admittedly inadequately supported, there was a violation of 30 CFR 75.200 in the absence of dangering off the area. A verbal order to prevent entrance to the area is only effective as to miners who hear the order, so a physical sign is necessary warning miners to stay away. In this connection, the two Inspectors (Messrs. Hambric and McKinney) agree that an experienced miner should have been able to look at the mine roof after the fall and know enough not to continue under it. The witnesses agree that the roof control plan to rehabilitate the area was posted as required by the roof control plan whenever there had been an unplanned roof fall; however, MSHA is uncertain as to the relevancy of this fact since the Respondent has not been charged with violating this part of the roof control plan.

MSHA's Position on Each Allegation Under "New Matter" and Our Comment:

4. Responding to paragraph numbered ten of Respondent's Motion, Inspectors Hambric and McKinney state they have no exact recollection but the allegation is probably true.

COMMENT: A miners' vacation is normally taken about this time of the year.

5. Concerning paragraph numbered eleven of Respondent's Motion, the Inspectors agree that the allegations therein are

true except the two MSHA employees consider that several areas rather than "a few areas" had to have work done, and refer to the order of withdrawal for a description of what had to be done.

COMMENT: The difference of opinion appears to be a difference of opinion as to whether the area had to be made safe for pedestrian traffic or merely safe as a haulageway for supplies. There does not appear to be much difference between the parties as to the physical condition of the area, merely a difference of opinion among experts as to what was needed to be done.

6. Concerning paragraph numbered twelve, MSHA agrees that Management had verbally ordered that no one except authorized personnel enter the area, and we do not know when or how that order issued, so the allegations are true.

COMMENT: The area had not been dangered off and MSHA urges that, in view of the dangerous condition of the roof and ribs, a danger sign must be posted to prevent a violation of 30 CFR 75.200. Furthermore, MSHA is concerned that the verbal order would not preclude persons from approaching the power station by traveling under the roof area under discussion.

7. Concerning the allegation contained in paragraph numbered thirteen, as stated previously, MSHA agrees that such a plan was required after a roof fall and it had been posted. The allegation is true.

COMMENT: Posting of such a plan would not be in lieu of posting a danger sign.

8. Concerning the allegations in paragraph numbered fourteen of Respondent's Motion, because Mr. Bell is no longer a Government employee we were unable to discuss the matter with Mr. Bell. However, the allegations are supported in part by certain MSHA records, and we believe the allegations are probably true.

9. Concerning the allegations in paragraph numbered fifteen, the two Inspectors are uncertain as to what day Mr. Bell first saw the area of the unplanned roof fall, but agree it could have been July 20, 1977. The three inspectors went over the entire area so it took several hours rather than thirty minutes. The other allegations in the paragraph are true.

COMMENT: The reason the inspectors telephoned the MSHA office for advice was because, although they agreed the condition constituted an imminent danger, they were uncertain whether to follow through with what they had verbally told Respondent's personnel underground and issue a written 104(a) imminent danger order of withdrawal or instead to issue an order of withdrawal under 103(f) of the 1969 Coal Mine Act since there had been an unplanned roof fall which is an accident. The three inspectors were properly instructed by Mr. Bell's supervisor that where an inspector considers a condition of imminent danger exists, it is mandatory that a 104 (a) order of withdrawal issue even though the situation also meets some other provision of the Act (such as 103(f)). Thus, the three inspectors drafted and each signed and issued the subject order of withdrawal.

10. Concerning paragraph numbered sixteen of the Motion, the two inspectors insist that they observed four miners working approximately 200 feet inby the beginning of the area affected by the unplanned roof fall, so MSHA denies all but the last sentence of that paragraph.

COMMENT: The Inspectors were dissatisfied with some of the work which Management considered completed, which would be the reason for the above disagreement. The Inspectors observed loose bolts and loose brows (see order of withdrawal) and insisted the same be corrected. Management insisted that since the area would be used only to haul supplies, such work was unnecessary.

11. The allegation in paragraph numbered seventeen of the Motion is true.

COMMENT: Nevertheless, the two Inspectors were concerned that at some time miners may travel the haulageway to obtain access to the power center, so they insisted that places dangerous to pedestrian traffic in the area be corrected.

12. Concerning paragraph numbered eighteen, MSHA agrees, as stated previously, that the required plan to rehabilitate the area where the unplanned roof fall had occurred had been posted. MSHA agrees that Respondent's personnel did sincerely believe that it was not necessary to post a danger sign and make an entry in the preshift examination book, but the opinion of Respondent's personnel was erroneous and contrary to law. MSHA denies the allegation or reasoning of the second sentence of paragraph numbered eighteen.

COMMENT: Even though the conditions were less than an imminent danger, the fact that dangerous roof and rib conditions existed caused there to be a violation of 30 CFR 75.200 since no danger sign was posted. This is true even though the condition was being corrected before the inspection. Concerning the second sentence of paragraph numbered eighteen, inspectors often have a choice of mandatory safety standards that can appropriately be cited as a result of a particular condition or practice observed, and sometimes an inspector will cite only the standard of standards most pertinent or best supported by what the inspector personally observed. Since the three Inspectors did not have personal knowledge as to when the mine roof fell, the Inspectors cited 30 CFR 75.200 based on the conditions which each inspector had personally seen rather than the circumstantial evidence which would be required under the circumstances to support 30 CFR 75.303. Furthermore, a 30 CFR 75.303 violation would not have been an imminent danger. The failure to cite 30 CFR 75.303 is not evidence that the Inspectors did not consider that a danger sign must be posted. The Respondent's reasoning lacks validity.

13. Concerning paragraph numbered nineteen, MSHA denies the allegations contained therein.

COMMENT: Obviously Inspector Bell did not recognize that a condition of imminent danger existed when he observed the area earlier, but he did not proceed far enough into the area to recognize the potential of the problem. Mr. Bell merely saw enough to recognize that a MSHA mine roof control specialist should inspect the area, and then he left. Whether there was a 30 CFR 75.202 violation is not relevant to this proceeding. This is not a face area or near a face area, and even the administrative law judges are divided on the issue as to whether other than the first sentence of 30 CFR 75.202 relates to a mine area other than "at or near each working face." There was a violation of 30 CFR 75.200 which requires that the roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. Obviously, Respondent recognized the roof and ribs in this area were inadequately supported or the verbal order requiring the miners to not enter without authorization would not have issued, but the area should have been dangered off so there is a violation of the mandatory safety standard. Considering the speed with which a loose brow can fall, we consider there was an imminent danger if pedestrian traffic were present, not otherwise. In this connection we note that the Respondent's personnel did assure the Inspectors that the area would only be used to haul supplies, but

the Inspectors were not satisfied because of the location of the power center and required additional work to be done.

14. The Office of the Solicitor suggests that $220.00 is a reasonable amount to assess as a civil penalty for these reasons:

a. The Respondent is correct that there is no imminent danger in the event there is no pedestrian traffic, and Respondent insists that the haulageway would only be used to haul supplies.

b. MSHA inspectors admit that the power center can be reached by a route other than passing under the substandard roof.

c. The Respondent was attempting to correct the condition before any inspector observed it.

d. There was a question between MSHA experts and Management experts as to whether the work was being done properly; however, the fact that Inspector Bell had to obtain the aid of MSHA roof control specialists demonstrates that the problem was somewhat complicated and lent itself to a diffence of opinion among experts.

e. The Respondent was sincere in its erroneous belief that the verbal instructions to stay out of the area sufficed, without a danger sign.

The reasons given above by counsel for the parties for the proposed settlement have been reviewed in conjunction with the information submitted as to the six statutory criteria contained in section 110 of the Act. After according this information due consideration, it has been found to support the proposed settlement. It therefore appears that a disposition approving the settlement will adequately protect the public interest.

ORDER

Accordingly, IT IS ORDERED that the proposed settlement, as outlined above, be, and hereby is, APPROVED.

IT IS FURTHER ORDERED that the Respondent be, and hereby is ASSESSED a civil penalty in the agreed-upon amount of $229.

Since the Respondent has paid the agreed upon settlement amount of $220 for the alleged violation of 30 CFR 75.200, IT IS FURTHER ORDERED that the petition for assessment of civil penalty be, and hereby is, DISMISSED as relates to such alleged violation.

IT IS FURTHER ORDERED that the Respondent pay a civil penalty in the agreed-upon amount of $9 for the alleged violation of 30 CFR 70.100(b) within 30 days of the date of this decision if such amount has not been paid to date.

John F. Cook
Administrative Law Judge

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FOOTNOTES START HERE

~FOOTNOTE_ONE

1 The attached copy of a decision in Secretary of Labor, Mine Safety and Health Administration v. Consolidation Coal Company, Docket No. MORG 78-339-P (September 29, 1978) sets forth the reasoning for such settlement approval.