FEDERAL MINE SAFETY **AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2. 10TH FLOOR
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FALLS CHURCH, VIRGINIA 22041

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2 6 JUN 1980

ITMANN COAL COMPANY, Applicant	:	Application for Review
	:	Docket No. WEVA 80-7-R
v.	:	
	:	Itmann No. 3 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	
and	:	
UNITED MINE WORKERS OF AMERICA, Respondents	:	
RAY MARSHALL, SECRETARY OF LABOR, Petitioner	:	Civil Penalty Proceeding
	:	Docket No. WEVA 80-194
v.	:	A.C. NO. 46-01576-03037H
ITMANN COAL COMPANY, Respondent	:	Itmann No. 3 Mine

DECISION

Appearances: Karl T. Skyrpak, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Itmann Coal Company;
James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Secretary of Labor, Mine Safety and Health Administration;
Mary Lu Jordan, Esq., Washington, D.C., for United hine Workers of America.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This proceeding arises out of the consolidation of an application for review of an imminent danger order of withdrawal and a civil penalty Proceeding arising out of that order. On October 1, 1979, Itmann Coal Company

(hereinafter Itmann) filed an application for review of an order of withdrawal based upon imminent danger. On February 21, 1980, the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA) filed a proposal for assessment of a civil penalty against Itmann for violation of 30 C.F.R. § 75.200. On March 28, 1980, I ordered these cases consolidated under Procedural Rule 12 of the Federal Mine Safety and Health Review Commission, 29 C.F.R. § 2700.12.

A hearing was held in Charleston, West Virginia, on April 16 and 17, 1980. Itmann's motion to dismiss the United Mine Workers of America (hereinafter UMWA) as a party was denied. James A. Bowman testified on behalf of MSHA. Arnold Rogers testified on behalf of the UMWA. Robert Crouse, John Zachwieja, and David Bailey testified on behalf of Itmann. Upon completion of the taking of testimony, all three parties submitted oral arguments.

DISMISSAL OF PETITION FOR ASSESSMENT OF CIVIL PENALTY FOR ORDER NO. 0657194

At the outset of the hearing, MSHA moved to withdraw the proposal for assessment of a civil penalty insofar as it related to Order No. 0657194. The reason for this motion was that the order was vacated in a review proceeding of that order before another judge. It was MSHA's position that there was no violation of the Act or a mandatory safety or health standard. Neither Itmann nor the UMWA opposed the motion to dismiss.

Therefore, MSHA's motion to dismiss the part of this proceeding concerning the petition for assessment of a civil penalty for Order No, 0657194 is granted.

ISSUES

The first general issue is whether the order of withdrawal due to imminent danger was properly issued. The second general issue is whether Itmann violated the Act or regulations as charged by MSHA and, if so, the amount of the civil penalty which should be assessed.

APPLICABLE LAW

Section 107(a) of the Act, 30 U.S.C. § 817(a), provides as follows:

> 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.

Section 3(j) of the Act, 30 U.S.C. § 802(j), states: "'imminent danger' means 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 C.F.R. § 75.200 provides in pertinent part as follows: "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. * * * No person shall proceed beyond the last permanent Support * * *."

Section 110(i) of the Act, 30 U.S.C. § 820(i), provides in pertinent part as follows:

> In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

STIPULATIONS

The parties stipulated the following:

1. Itmann is the owner and operator of the Itmann No. 3 Mine, located in Wyoming County, West Virginia.

2. Itmann and the Itmann No. 3 Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction of this case pursuant to section 107 of the 1977 Act.

4. The inspector who issued the subject order and termination was a duly authorized representative of the Secretary of Labor.

5. A true and correct copy of the subject order and termination were properly served upon the operator in accordance with section 107(d) of the 1977 Act.

6. Copies of the subject order and termination are authentic, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

7. The appropriateness of the penalty, if any, to the size of the operator's business, should be determined, based upon the fact that in 1979 the Itmann No. 3 Mine produced an annual tonnage of 535,357 and the controlling company, Itmann, had an annual tonnage of 1,627,963.

8. The history of previous violations should be determined based on the fact that the total number of assessed violations in the preceding 24 months is 382 and the total number of inspection days in the preceding 24 months is 832.

9. The alleged violation was abated in a timely manner and the operator demonstrated good faith in obtaining abatement.

10. The assessment of a civil penalty in this proceeding will not affect the operator's ability to continue in business.

SUMMARY OF THE EVIDENCE

Undisputed Evidence

The order of withdrawal in controversy here was issued on September 4, 1979, and provides as follows:

> A beltman working in Beetree No. 2 belt conveyor entry (active travelway) approximately two crosscuts outby the drive was observed traveling under unsupported roof in a fall area. A roof fall had occurred on the off side of the belt conveyor causing the supports in the area to be destroyed and ineffective leaving unsupported roof above the fall and the beltman traveled through the area exposing himself. The operator did not support or otherwise control the area to protect persons from falls of roof or rib.

The undisputed evidence indicated that a massive roof fall had occurred approximately 4 years before the date on which the order was issued. In the area in question, the roof had fallen through the crosscut rib to rib. The roof fall in question was described as being 17 to 20 feet wide, 40 to 48 inches high, and approximately 90 feet long. Since it was impossible for Itmann to remove this massive roof fall which covered the conveyor belt in question, it used dowty jacks to support the end of the rock which was protruding over the belt. After the edge of the rock had been elevated, the

belt was able to run under the roof fall. The rock in question did not block passage on the travel side of the belt but it did block passage on the off side of the belt, After the roof fell, no action was taken to support the roof or block persons on the off side of the belt from crossing over the roof fall and under unsupported roof.

On the day in question, Marty Bowers and another belt cleaner were assigned to clean the belt area in question. Bowers was not the regular belt cleaner in this area. The belt foreman was not in the vicinity of this area at the time of this occurrence. The area in question was traveled and belts were cleaned once a week unless there were spills or mechanical problems.

MSHA inspector James Bowman was accompanied by union safety committeeman Arnold Rogers and Itmann safety supervisor Robert Crouse. As Inspector Bowman approached the large rock, he saw Bowers travel over the roof fall under unsupported roof. Thereupon, he issued a section 107(a) imminent danger order of withdrawal. Thereafter, timbers and planks were erected on the roof fall to prevent any other miners from going over the fall and under the unsupported roof.

MSHA proposed that a civil penalty in the amount of $2,000 be assessed for the violation of 30 C.F.R. § 75.200.

Evidence by MSHA and UMWA

James A. Bowman testified that he has been a federal mine inspector for 6 years. At the time he issued the imminent danger order, he interviewed beltman Marty Bowers whom he saw crossing the roof fall under unsupported

roof. Bowers told him that he had crossed this area several times. The area had been freshly rock dusted approximately 2 days previously and the tracks through the rock dust indicated that it had been traveled over several times. Bowman believed that if normal mining operations continued, Bowers or some other belt cleaner would have crossed the area again. In the opinion of Inspector Bowman, there was a very real likelihood of injury or death if normal mining operations continued.

Inspector Bowman testified that he believed that Itmann should have known about the rock fall since it was required to check the belts three times a day. He further believed that miners were encouraged to cross this area because there was no off-on switch in the area and no cross-over was provided. A miner crossing the rock fall would go under approximately 12 feet of unsupported roof. Inspector Bowman believed that this was a serious violation because approximately half of the fatalities in underground mines are due to roof falls.

Inspector Bowman did not go under the unsupported roof but checked it visually from the travel side of the belt. He observed that the ribs were broken and the roof appeared to be cracked and unstable above the fall.

Inspector Bowman could not remember exactly when he issued the imminent danger order or whether the miner was under unsupported roof at the time. The primary factor he considered in issuing the imminent danger order was seeing the man on top of the roof fall.

Arnold Rogers testified that he has worked at the Itmann No. 3A Mine since 1960. He was the union safety committeeman who accompanied Inspector

Bowman on the day the order was issued. He was traveling approximately 6 to 7 feet behind the inspector at the time he saw a man on top of the rock that was protruding over the belt. He saw this man take two steps. When he got closer to the rock, he could see that it had been traveled over. In his opinion, one trip over this rock would not account for all the tracks he observed. He heard Marty Bowers say, "I've traveled several times before."

Mr. Rogers stated that he observed the unsupported roof from the travel side of the belt. It appeared to be broken and unstable. He had attended safety classes given by Itmann and had been told not to go under unsupported roof.

Evidence by Itmann

Robert Crouse was Itmann's safety supervisor at the time of this occurrence. He accompanied Inspector Bowman and Arnold Rogers on the day in question. At the time Marty Bowers crossed under the unsupported roof, Mr. Crouse was approximately 45 to 50 feet behind Inspector Bowman. He was running to catch up. Inspector Bowman told him, "You've just got a 107(a) order." Mr. Crouse testified that Marty Bowers said he knew better than to go under unsupported roof. Bowers further stated that this was not his regular work area and the belt foreman did not know it was his practice to cross this area. Robert Crouse further testified that the other belt cleaner who was working with Bowers at the time stated that the regular practice in this area was to turn off the conveyor belt, have the belt cleaner on the off side cross the belt to the travel side and walk around the rock, cross

the belt to the off side, and turn the belt on. Mr. Crouse stated that the off side of the belt was not used as a regular travelway. Rock dusting was performed from the travel side of the belt. However, Mr. Crouse conceded that the off side of the belt in the area in controversy could be traveled more than once a week in the event of spillage.

Mr. Crouse visually observed the unsupported roof in question and it appeared to be smooth, flat, solid sandstone. He had been through this area many times before with federal and state inspectors and no one had ever cited it. Mr. Crouse did not believe that an order-of withdrawal was required since the condition would have been abated just as fast if a section 104(a) citation had been issued. Itmann management had no way of knowing that a miner would go under the unsupported roof. Mr. Crouse conceded that he did not think it was a safe practice to go under unsupported roof, but he did not think that Bowers was in any imminent danger while he was under the unsupported roof in question and that any imminent danger certainly did not exist after Bowers was out from under the unsupported roof.

John Zachwieja was the mine superintendent of the mine involved in this controversy. He did not go into the area on the day of the order. However, he testified that after abatement, he examined and sounded the roof. He testified that the sandstone did not form a complete arch but it was not smooth. While there appeared to be crack in the roof, it was firm on sounding, Mr. Zachwieja testified that in his opinion there was no imminent danger after the miner got off the rock,

David Bailey was the mine superintendent of the 3A Mine on the day in question. He was not in the area when the order was issued but the belt

cleaners were under his jurisdiction. He suspended Marty Bowers for 5 days without pay following this incident. Mr. Bailey testified that the rock in question had fallen in approximately 1975 and its condition was unchanged up to the day of this order. In Mr. Bailey's opinion, Marty Bowers was totally safe when he was on the rock even though he was under unsupported roof, This was so because the roof in question was solid and strong. In his opinion, there was no imminent danger. He suspended Mr. Bowers because Mr. Bowers did not know that the top was solid and the next time he went under unsupported roof he might be killed.

EVALUATION OF THE EVIDENCE

All of the testimony, exhibits, stipulations, and arguments of the parties have been considered. MSHA and the UMWA contend that the imminent danger order of withdrawal should be affirmed and that the civil penalty, as proposed, should be assessed. Itmann contends that the imminent danger order of withdrawal should be vacated or, in the alternative, modified to a section 104(a) citation. In the event a violation is established, Itmann argues that a civil penalty of approximately $150 would-be appropriate.

One of the arguments advanced by Itmann is that the inspector chose the wrong remedy. Itmann argues that there was no need for a section 107(a) withdrawal order and that a section 104(a) citation would have accomplished the same result. The Interior Board of Mine Operations Appeals gave this type of argument short shrift in Eastern Associated Coal Corp., 2 IBMA 128, 137 (1973) as follows:

> We have considered and we reject Eastern's argument that the inspector exceeded his authority for the reasons that he could or probably should have taken alternative actions, such as issuing notices of violation or doing nothing, which in Eastern's view would have accomplished the same result. This argument could be raised in almost every case. However, we are not called upon here to decide whether the inspector chose the most appropriate of several alternatives, but rather we are called upon to decide whether the action he did take was a proper and lawful exercise of authority under the Act.

The Seventh Circuit Court of Appeals discussed the "precarious position of the inspector and the test it applied to determine the validity of orders of withdrawal based upon imminent danger.

> 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. On the other hand, the coal mine operator is principally concerned with dollars and profits. We must support the findings and the decisions of the inspector unless there is evidence that he had abused his discretion or authority. [Emphasis supplied.]

Old Ben Coal Corp. v. IBMA, 523 F.2d 25, 31 (7th Cir. 1975).

I agree with the determination of the Interior Board of Mine Operations Appeals that the issue in this case is the validity of the order in controversy and not whether some other remedy should have been chosen.

The evidence establishes that a belt cleaner employed by Itmann traveled over a roof fall and under approximately 12 feet of unsupported roof on the date in question. This occurrence was observed by the inspector and the union walkaround. The inspector determined that, based upon extensive tracks through the rock-dusted roof fall, it was the practice of miners to travel under this unsupported roof. This evidence was corroborated by the testimony

of the union walkaround. On this issue I find that the testimony of the inspector and union walkaround was more persuasive and credible than the testimony offered by Itmann that a different practice was followed in this area. The physical facts, the admission of the belt cleaner and the cumbersome procedure advanced by Itmann for belt'cleaners to circumvent the roof fall support the finding that it was the practice of belt cleaners to travel under the unsupported roof.

On the issue of the validity of the imminent danger order of withdrawal, Itmann posits its defense on Old Ben Coal Co., 6 IBMA 256 (1976). In Old Ben, the Interior Board of Mine Operations Appeals affirmed a holding that imminent danger did not exist where a miner had been riding on top of the locomotive with his feet hanging over the side and the miner got off the locomotive prior to the issuance of the order. The Board held:

> These provisions of the Act make it clear that an imminent danger withdrawal order can be properly issued only if an imminent danger exists at the time of issuance. No provision is made for issuance where a danger is speculative, has subsided or has been abated. The mere existence of this policy, allowing men to ride on locomotives, did not constitute an imminent danger. Id at 261.

While the rationale of Old Ben may be faulted, I find that it is distinguishable from the instant case. This is so because Old Ben held that the practice of allowing men to ride on locomotives did not constitute an imminent danger and, hence, no imminent danger existed at the time the order was written. In the instant case, I find that it was the practice of miners to travel under unsupported roof in the area in question and that such practice could be expected to cause death or serious physical harm before

the practice could be abated. Hence, even though the miner was no longer under the unsupported roof at the time the order was issued, the practice of miners going under the unsupported roof constituted an imminent danger under the Act.

There was no support of the roof or other control to prevent miners from going under the unsupported roof. I find that the credible evidence of record establishes that the roof in question was cracked and unstable. I have considered the testimony presented by Itmann that the roof in question was sound and had stood for 4 years. However, the preponderance of the credible evidence supports the inspector's conclusion that persons going under this unsupported roof would be exposed to death or serious physical harm. This finding is based upon the testimony of Inspector Bowman, UWMA walkaround Arnold Rogers, and some of the testimony of Itmann superintendent John Zachwieja. The contrary testimony is rejected.

Since the roof in question was cracked and unstable, I find that the preponderance of the evidence establishes that the condition of the roof coupled with the practice of traveling under it could be expected to cause death or serious physical harm before the condition and practice could be abated. Therefore, I find that the order of withdrawal under section 107(a) due to imminent danger was properly issued in this case.

MSHA proposed the assessment of a civil penalty against Itmann for violation of 30 C.F.R. § 75.200 in that a miner traveled under unsupported roof and the operator did not support or otherwise control the area to Protect persons from falls of roof or rib. Itmann does not dispute the fact

that the belt cleaner traveled under unsupported roof. While Itmann concedes that the roof was not supported, it contends that it had no knowledge that miners would go under such unsupported roof.

The fact that a miner employed by Itmann traveled under unsupported roof establishes a violation of 30 C.F.R. § 75.200. However, I have also found that the condition of this roof had been present for approximately 4 years and that it was the practice of belt cleaners to travel under this roof. Under these circumstances, I find that Itmann knew or should have known of this condition and practice. Itmann's failure to take action to prevent the violation in question amounts to ordinary negligence.

As I have previously noted, a roof fall could cause death or serious physical harm. One person would be exposed to such an occurrence. Stipulations 7 through 10 have been considered in assessing a civil penalty. Based upon all of the evidence of record and the criteria set forth in section 110(i) of the Act, I conclude that a civil penalty of $2,000 should be imposed for the violation found to have occurred.

ORDER

Therefore, it is ORDERED that the motion to dismiss the part of this proceeding concerning the proposal for assessment of civil penalty for Order No. 0657194 is GRANTED.

It is FURTHER ORDERED that the application for review is DENIED and the subject withdrawal order is AFFIRMED.

It is FURTHER ORDERED that Itmann pay the sum of $2,000 within 30 days of the date of this decision for violation of 30 C.F.R. § 75.200.

James A. Laurenson

James A. Laurenson, Judge

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