

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2. 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

(703) 756-6230

3 1 JUL 1980

ITMANN COAL COMPANY,
Applicant : Application for **Review**
v. :
SECRETARY OF LABOR, : Docket **No.** WEVA 80-9-R
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Respondent :
and :
LOCAL UNION NO. 9690, DISTRICT 29, : Complaint for Compensation
UNITED MINE WORKERS OF AMERICA, :
Complainant : Docket No. WEVA 80-129-C
v. :
ITMANN COAL COMPANY, :
Respondent :
and :
SECRETARY OF LABOR, : Civil Penalty **Proceeding**
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA **80-211**
Petitioner : A.C. **No. 46-01576-03038H**
v. :
 : **Itmann** No. 3B Mine
ITMANN COAL COMPANY, :
Respondent :

DECISION

Appearances: Karl T. Skrypak, 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 Mine Workers of America.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

On September 13, 1979, an Inspector employed by the Mine Safety and Health Administration (hereinafter MSHA) issued an order of withdrawal for all areas of Mine No. 3B of the **Itmann** Coal Company (hereinafter **Itmann**). The order of withdrawal was based upon the inspector's finding of an imminent danger pursuant to section 107(a) of the Federal Mine Safety and Health Act of 1977, 30 **U.S.C. §** 817(a) (hereinafter the Act). The order also alleged a violation of 30 **C.F.R. §** 75.329. On September 28, 1979, **Itmann** filed an application for review of that order. On December 6, 1979, Local Union No. 9690, District 29, United Mine Workers of America (hereinafter **UMWA**) filed a complaint for compensation under section 111 of the Act, 30 **U.S.C. §** 821. On February 26, 1980, MSHA filed a proposal for assessment of civil penalty. The three cases were consolidated pursuant to 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 14, 15, and 16, 1980. Carl Worthington testified on behalf of MSHA. Bernard B. Shrewsberry and Arnold Rogers testified on behalf of the UMWA. Frank Beard, John **Zachwieja**, Harry Farmer, and **Arvil R.** Bailey testified on behalf of **Itmann**. All three parties filed posthearing briefs.

ISSUES

1. Whether the order of withdrawal due to imminent danger was properly Issued:

2. Whether **Itmann** violated the Act or regulations as charged by MSHA and, if so, the amount of the civil penalty which should be assessed.

3. Whether employees at the mine were idled by the order in question and, if so, whether they are entitled to receive compensation and, if so, the amount of compensation which they are entitled to receive.

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."

Section 111 of the Act, 30 U.S.C. § 821, provides as follows:

If a coal or other mine or area **of** such mine is closed by an order issued under section 103, section 104, or section 107, all miners working during the shift when such order was

issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift. If a coal or other mine or area of such mine is closed by an order issued under section 104 or section 107 of this title for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser. Whenever an operator violates or fails or refuses to comply with any order issued under section 103, section 104, or section 107 of this Act, all miners employed at the affected mine who would have been withdrawn from, or prevented from entering, such mine or area thereof as a result of such order shall be entitled to full compensation by the operator at their regular rates of pay, in addition to pay received for work performed after such order was issued, for the period beginning when such order was issued and ending **when** such order is complied with, vacated, or terminated. The Commission shall have authority to order compensation due under this section upon the filing of a complaint by a **miner** or his representative and after opportunity for hearing subject to section 554 of title 5, United States Code.

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.

Section **303(z)(2)** of the Act, **30 U.S.C. § 863(z)(2)** and **30 C.F.R.**

§ 75.329 provide in pertinent part as follows:

[A]11 areas from which pillars have been wholly or partially extracted and abandoned areas, as determined by the Secretary or his authorized representative, shall be ventilated by bleeder entries or by bleeder systems or equivalent means, or be sealed, as determined by the Secretary or his authorized representative. When ventilation of such areas is required, such ventilation shall be maintained so as continuously to dilute, render harmless, and carry away methane and other explosive gases within such areas and to protect the active workings of such mine from the hazards of such methane and other explosive gases. Air coursed through underground areas from which pillars have been wholly or partially extracted which enters another split of air shall not contain more than 2.0 volume per **centum** of methane, when tested at the point it enters such other split. When sealing is required, such seals shall be made in an approved manner so as to isolate with with explosion-proof bulkheads such areas from the active workings of the mine;

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 over all three proceedings.
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 coal 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 (No. 3A equals 388,481 and No. 3B equals 146,876) and the controlling company, **Itmann** Coal Company, 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 attaining abatement.

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

11. That by a certain closure order dated October 2, 1969, **issued in** accordance with section 203(a)(1) of the Federal Coal Mine Safety Act, as amended, and as modified on October 9, 1969, the area described on the face of said order and modification was closed (see operator's Exhibit No. 2). Approximately 10 years later on September 13, 1979, Imminent Danger Order No. 0640580 was issued pursuant to section 107(a) of the 1977 Act as a result of an inspection in part of the same area which was still under the **above-**mentioned closure order.

12. The miners on the day shift of September 13, 1979, were **paid by Itmann** for the balance of their shift after the order was issued and the miners scheduled to work the afternoon shift on September 13, 1979, were paid for 4 hours of that shift.

13. The maximum number of days' wages to which the miners who were idled by this order would be entitled is 5 days' wages.

SUMMARY OF THE EVIDENCE

On October 2, 1969, a federal mine inspector issued an order of withdrawal due to imminent danger for the entire Sugar Run section of **Itmann** No. 3 Mine. The order was based on a finding of "loose coal, coaldust, and float dust * * *." One week later, following a cleanup and rock dusting of part of the affected area, the order was revised to reopen part of the affected area "to a point 100 feet **inby** the junction of the West Mains and that the Closure Orders remain in effect in all areas **inby** this point." Rather than attempting to abate the conditions that led to the closure orders for the part of the mine that remained closed, **Itmann** chose to abandon that part of the mine. Under 30 **C.F.R. §** 75.329, **Itmann** had the choice of sealing the abandoned area or ventilating the area by bleeder entries or bleeder systems. **Itmann** chose to ventilate the abandoned part of the mine. A ventilation plan for that purpose was approved by **MSHA**.

In 1977, **MSHA** officials met with **Itmann** management to discuss the **Gov-**ernment's concern about the accumulation of explosive methane gas in the abandoned areas of **Itmann's** No. 3B Mine. The **Itmann** No. 3B Mine is classified by **MSHA** as very gassy because it liberates **1,700,000** cubic feet of methane in 24 hours. Following that meeting, **MSHA** inspectors traveled the bleeder system in the abandoned areas of this mine in 1978 and found that the bleeder system was working properly. No violations were found in 1978. According to Frank Beard, Vice President of Operations at **Itmann**, one more inspection of the abandoned area prior to the time of the issuance of the instant order was performed by an **MSHA** inspector.

On September 13, 1979, Inspector Carl Worthington was assigned to conduct a ventilation saturation inspection of the abandoned areas of the mine. He initially checked the methane content of the air coming from the abandoned area at the point where it entered another split of air. He found .63 percent methane at this place. He then entered the abandoned area and continued to test for methane and air velocity. At a point approximately 1,500 feet in by the point where the two splits of air meet, he found 1.11 percent methane and 840 cubic feet of air per minute. At a point approximately 2,200 feet in by the two splits of air, he found 1.78 percent methane and very slight movement of air. He continued in by until he reached a room approximately one-half mile in by the first point. At that place, he found methane as recorded on the digital methanometer at 9 percent and as subsequently analyzed in bottle samples between 9.0 and 10.21 percent and no movement of the air as demonstrated by the release of a chemical smoke cloud. Thereupon, he ordered the safety lamp extinguished and informed Itmann that it had a section 107(a) order of withdrawal.

Inspector Worthington testified that he issued the order of withdrawal for the following reasons: (1) methane in the range of 9 percent is explosive; (2) the methane could be ignited by a spark from a roof fall and there was a high potential for roof falls in this area; (3) the volume of methane in the explosive range filled the room from floor to roof; and (4) an explosion in the abandoned area could disrupt the ventilation and contaminate the active working sections of this mine with poisonous gas. He further testified that the accumulation of explosive methane was caused by stoppings which

were crushed and leaking. Hence, the air coursed through the bleeder system **was** "short circuited" before it entered the gob area.

With regard to the probability of an ignition of the methane which would affect the miners working in the active West Main workings, Inspector Worthington expressed his opinion that such an occurrence was "very possible" and "not remote." On cross-examination by **Itmann's** counsel, he testified that he would place the probability of such an occurrence at that time in the SO-50 range. He feared a probable disaster in which poisonous gases would be coursed into the active workings of the mine resulting in serious injury or death to the 60 miners working there. **On** cross-examination, the inspector testified concerning his knowledge of approximately 10 incidents in his district where methane had been ignited by roof falls. He conceded that none of those incidents occurred at this mine but further stated that this mine had a history of methane ignitions and liberation of methane.

As part of his order of withdrawal, Inspector Worthington alleged that **Itmann** violated 30 **C.F.R. §** 75.329. He testified that the bleeder system for the abandoned area was inadequate to "dilute, render harmless, or carry away methane" because the stoppings were crushed and there was no ventilation of the area where methane in the explosive range was found. Inspector Worthington stated that he released a chemical smoke cloud in the room where the high concentration of methane was found and "smoke would not move; it just mushroomed up against the top; there was no movement at all there." He further testified that **Itmann** knew or should have known of this condition notwithstanding the 1969 closure orders for the following reasons: **Itmann**

personnel had been **in** the abandoned areas while accompanying **MSHA** inspectors; and **Itmann** prepared a mine map of the abandoned area which was marked for the route of travel to avoid roof falls into the place where the accumulation of methane was found. **Itmann's** approved plan for the ventilation of the bleeder system required it to travel the bleeder system "if safe." At no time prior to the issuance of the order herein did **Itmann** assert that it would be unsafe to travel the bleeder system.

Following the issuance of the order, the mine was closed for 10 working days until the condition was abated. At the **time** the order was terminated only **.9** percent methane was found in the area where there had been 10 percent previously.

Bernard Shrewsberry, a safety inspector employed by the **UMWA**, testified that he had **witnessed "balls of fire"** resulting from sandstone roof falls in **other mines**. Arnold Rogers, a **UMWA** safety committeeman at **Itmann** No. 3 Mine, testified that he witnessed sparks resulting from roof falls and roof bolts that had been subjected to pressure in **Itmann** Mine No. 1.

Itmann does not challenge **MSHA's** evidence concerning the percentage of methane found or the fact that there was no movement of air in the area where explosive methane was found. Rather, **Itmann** posits its defense on its interpretation of 30 **C.F.R. § 75.329** and the conclusion that no imminent danger existed. **Itmann's** position and evidence are as follows: (1) the proper place to take a methane reading to determine whether 30 **C.F.R. § 75.329** has been violated is at the point where air coming from the abandoned area enters another split of air; (2) the possibility of a roof fall igniting the methane

where it was found in the explosive range is less than 1 percent; and (3) even **if there** were an ignition of methane, the explosion would not affect ventilation to the active workings of the mine which would endanger the **health and safety of the miners and any possible explosion could certainly not cause serious injury** or death to any miner.

Itmann's Vice President Frank Beard testified that prior to the issuance of the order in controversy, there had been two meetings between MSHA and Itmann concerning the problem of methane developing in the abandoned area of **Itmann's No. 3B Mine. MSHA advised Itmann that the abandoned areas would be inspected for methane and ventilation. At no time prior to the issuance of the order herein, did Itmann contend that the 1969 closure orders prevented** it from inspecting the abandoned areas. however, Mr. Beard stated that based upon his 16 years of coal mine employment, he never knew of any operator which traveled its bleeder system and inspected **it for methane. He believed that it was** dangerous to send men into this abandoned area. **Itmann was never told by MSHA to take methane readings inside the abandoned area. For the foregoing reasons, Vice President Beard stated that there was no way Itmann could have been aware of this violation.**

On the issue of the possible existence of an imminent danger, Vice President Beard testified that he had observed roof falls at 3B and other mines but had never seen any such fall emit a spark. However, he conceded that methane in the range of 9 to 10 percent was the most dangerous and that the lack of air flow would increase the hazards connected with the presence of methane. He further conceded that the presence of float coal and coal

dust would increase the severity of any possible explosion and the extent of the area affected. Based upon Inspector Worthington's testimony of 10 prior ignitions of methane in the 700 mines in this district, Vice President Beard attempted to compute a probability of such an ignition in the area as less than 1 percent. Although he indicated that he had some experience with coal mine explosions, he conceded that no one could be sure what route an explosion would take. He further stated, "I don't know if it would have done any damage to any other part of the mine down in the area where the people * * * were working at that time." He did not think that an explosion would affect the active workings of the mine but if it short circuited the ventilation of the mine, the miners would know the ventilation was disrupted and would have 30 to 35 minutes to walk out of the mine.

John Zachwieja', who had been superintendent of the 3B Mine for **approx-**imately 2 months at that time of this order, corroborated much of the testimony of Vice President Beard. In addition, Superintendent Zachwieja expressed his opinion that 30 **C.F.R. §** 75.329 only requires the operator to keep bad air off the active workings of the mine. He testified that **Itmann** 3B has a resident MSHA inspector on the premises every day because of the amount of methane liberated. He also conceded that roof bolts subject to pressure could pop out and cause sparks and that the lack of air movement in the abandoned area would cause him concern. However, he contended that there was no imminent danger because the probability of a roof fall causing an ignition of methane was **"nil"** and no matter how much air was put into the abandoned gob area, it would never remove all **of the** methane. He further stated that the area between the place where the two splits of air met and

the place where methane was found in the explosive range was filled with roof falls' which had occurred during the 10 years of closure, the top had sagged, and roof bolts were broken.

Section foreman Eugene Kaiser stated that when he was an hourly employee in 1970, he helped to drive two entries in the closed area to establish the bleeder System at the suggestion of the Federal Government.

The **UMWA** and **Itmann** stipulated the identity of miners affected by the order of withdrawal, their daily rates of pay, and the number of days that they worked during the time this mine was closed by the order as set forth in the Appendix hereto and incorporated herein. The parties further stipulated that no more than 10 working days would have been scheduled at the **Itmann** No. 3B Mine had no order been issued.

EVALUATION OF THE EVIDENCE

Imminent Danger

The definition of the term "imminent danger" is identical in the 1969 and 1977 Acts. In interpreting the 1969 Act, the Interior Board of Mine Operations Appeals required that before an imminent danger could be found to exist, the evidence must establish that "it is at least -just as probable as not that the feared accident or disaster would occur before elimination of the danger." Freeman Coal Mining Corp., 2 IBMA 197, 212 (1973). Thereafter, this "as probable as not" standard was approved by the Fourth and Seventh Circuit Courts of Appeals. Eastern Associated Coal Company v. IBMA, 491 F.2d 277 (4th Cir. 1974); Freeman Coal Mine Co. v. IBMA, 504 F.2d 741, 745 (7th Cir. 1975); and Old Ben Coal Corp. v. IBMA, 523 F.2d 25 (7th Cir. 1975).

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However, in enacting the 1977 Act, the Senate Committee on Human Resources stated:

The Committee disavows any notion that imminent danger can be defined in terms of a percentage of probability that an accident will happen; rather the concept of imminent danger requires an examination of the potential of the risk to cause serious physical harm at any time. It is the **Committee's** view that the authority under this section is essential to the protection of miners and should be construed expansively by inspectors and the commission.

Leg. Hist. of the Federal Mine Safety & Health Act of 1977, 95th Cong., 1st **Sess.** (hereinafter Leg. Hist. 1977 Act) at 38.

Earlier this year, the Federal Mine Safety and Health Review Commission (hereinafter Commission) announced that:

"We . . . do not adopt or in any way approve the 'as probable as not' standard With respect to cases that arise under the [1977 Act], we **will** examine anew the question of what conditions or practices constitute an imminent danger."

Plttsburg & Midway Coal Mining Co. v. MSHA, IBMA 76-57, April 21, 1980.

Hence, **in** cases involving imminent danger orders under the 1977 Act, there is no longer a requirement that MSHA prove that "it is just as probable as not" that the accident or disaster would **occur**. In light of the **legisla-** tive history of the 1977 Act, it is doubtful that any quantitative test can be applied to determine whether an imminent danger existed. Rather, each case must be evaluated in the light of the risk of serious physical harm or death to which the affected miners are exposed under the conditions existing at the time the order was issued.

I agree with the Senate Committee on Human Resources that imminent danger cannot "be defined in terms of a percentage of probability that an accident will happen" Therefore, I reject the testimony of Inspector Worthington that the probability of such an occurrence was 50 percent. Likewise, I reject **Itmann's** evidence that the possibility of such occurrence was approximately 1 percent or nil. I find that the facts of the instant case establish the following: (1) A large volume of methane in the most explosive range of 9 to 10 percent existed in an abandoned area of the mine where there was no effective ventilation; (2) roof falls of sandstone and roof bolts can cause sparks sufficient to ignite methane in the range of 9 to 10 percent; (3) there is a history of roof falls **in** the abandoned area of this mine; and (4) an ignition of methane at the point where it was found in the explosive range in the abandoned area of this mine could result in a severe explosion which could affect the ventilation of the active workings of the mine, and **expose the** miners at these places to death or serious physical harm before the condition could reasonably be abated. Although I have rejected the inspector's estimate of a **50-percent** chance of this occurrence, I find that the evidence of record supports his other testimony that the occurrence of the above potential accident is "very possible" and "not remote." based upon the legislative history of the 1977 Act, and the decision of the Commission In Pittsburg & Midway Coal Mining Company v. MSHA, supra, I conclude that under the facts herein, the Inspector acted properly in Issuing the order of withdrawal due to imminent danger because there was a reasonable expectation that the condition which he found could cause death or serious physical harm before it could be abated.

Violation of Mandatory Safety Standard

The pertinent part of section 303(z)(2) and 30 C.F.R. § 75.329 **is** as follows:

When ventilation of such areas **is** required, such ventilation shall be maintained 80 **as** continuously to dilute render harmless, and carry away methane and other explosive gases within such areas and to protect the active working⁸ of the mine from the hazard⁸ of such methane and other explosive gases. Air coursed through underground areas from which pillars have been wholly or partially extracted which enters another split of air shall not contain more than 2.0 volume per centum of methane when tested at the point it enter⁸ such other split.

It should be noted that this regulation was mandated by section **303(z)(2)** of the Act which was carried over in its entirety from the same section in the 1969 Federal Coal Mine Health and Safety Act.

MSHA and the **UMWA** contend that this section requires that when a **venti-**lation system is used in an abandoned area, a two-pronged test be met: (1) the ventilation system continuously dilute, render **harmless**, and carry away methane and other explosive gases; and (2) air from abandoned areas which enters another split of air shall not contain more than 2 percent methane. **Itmann** contend⁸ that this regulation should be read as a whole and, if read as a whole, only requires one thing: that air from abandoned areas which enters another split of air shall not contain more than 2 percent methane.

The legislative history of section 303(z)(2) of the 1969 Act indicate⁸ that Congress intended for there to be a two-pronged test regarding **ventila-**tion of abandoned areas. The Conference Report states in pertinent part:

When ventilation is required, the Secretary or his inspector must be satisfied that the ventilation in such areas will be maintained so as continuously to dilute, render harmless, and carry away methane and other explosive gases within such areas and to protect the active workings of the mine from hazards of such methane and other explosive gases. * * * As an additional safeguard when ventilation is required, the conference agreement provides that air coursed through underground areas from which pillars are wholly or partially extracted which enters another split of air shall not contain more than 2.0 volume per centum of methane, when tested at the point it enters such other split. The managers intend that this latter provision not be construed as permitting accumulations of methane near or in the explosive range in the pillared or abandoned areas on the basis that the methane in the return does not exceed such percentage. [Emphasis added.]

Leg. Hist. of the Federal Coal Mine Health and Safety Act of 1969, 91st , 2d Sess. (hereinafter Leg. Hist. 1969 Act) at 1044.

Section 303(z) of the 1969 Act was derived from sections 303(p), (q) and (r) of the original House Bill. In the House Report, the intent of those sections is stated. The Report states in pertinent part:

Methane, however, also accumulates in areas from which pillars have been removed and in other abandoned areas of a mine. These areas are often inaccessible because the roof has been deliberately allowed to fall or caving has otherwise occurred. In these cases, it is not usually possible to determine methane concentrations without great physical risk, and in many instances, the areas are completely inaccessible. In addition, during the time pillars are being removed and the roof permitted to fall in a planned sequence, ventilation of the area can best be accomplished with present technology by ventilating the area in a systematic manner.

These pillared and abandoned areas that are no longer being mined are not tested as frequently as working places, nor can they be given the same attention a working place receives. Consequently, these areas represent a great potential source of explosions, which can lead to widespread underground destruction with attendant loss of life.

Sections 303(p), (q), and (r) are all directed toward solving this difficult problem. It is the intent of these

three sections to require that the areas of mines described above be made as safe as present technology **will** permit so that the possibility of disasters from this source can be reduced or eliminated. There is general agreement among mining and safety engineers that bleeder systems are difficult to maintain **in** satisfactory conditions over long periods of time and they do not eliminate explosive concentrations of gas in the gob because of bypassing of air when the gob area extends over long distances. Sections 303(p), (q), and (r) require that when bleeder entries or systems or equivalent means are permitted instead of sealing, they shall be effective. This means that, where no superior method of ventilation is available, one of these may be approved **by an** authorized representative of the Secretary. When bleeder entries or systems are approved, they shall be used only under conditions where they can be adequately maintained, over short distances. Bleeder air shall not contain more than 2 volume per centum of explosive gases when sampled at a point immediately before entering another split of air.

Leg. Hist. 1969 Act at 578-79.

This language makes it clear that **Itmann's** argument on this issue **is** incorrect. Just because the percentage of methane is below 2 percent does not mean that an operator has not violated this section of the Act. **Even** if the percentage of methane in the air from the **abandoned area** which enters another split of air is below 2 percent, the operator violates this section if it has not maintained ventilation "so as continuously to dilute, render harmless, and carry away methane and other explosive gases" in the abandoned area. The legislative history states that this regulation means **that** "such ventilation will be adequate to insure that no explosive concentrations of methane or other gases **will** be in this area." Leg. Hist. 1969 Act at 1044.

All parties concede that the methane content of the air from the abandoned area of this mine at the point where it entered another split of air was less than 2 percent. However, I have already found that 30 **C.F.R. §** 75.329 also requires that the ventilation of the abandoned area "be

maintained so as continuously to dilute, render harmless, and to carry away methane and explosive gases within such areas" Inspector Worthington testified that there was no movement of the air at the place where methane in the explosive range was found. **Itmann** presented no **evidence** to contradict this testimony. Accordingly, I find that **Itmann** violated 30 C.F.R. § 75.329 by failing to maintain ventilation of the abandoned area of its mine as required by this regulation. **Itmann's** belated assertion that it was unsafe for its employees to travel the abandoned area and that any such travel would be in violation of the 1969 closure orders is rejected and will be discussed under the criteria for assessing a civil penalty.

Civil Penalty

Since I have found that **Itmann** violated 30 C.F.R. § 75.329, the next issue is the amount of the civil penalty to be assessed. In assessing a civil penalty, the six criteria set forth in section 110(1) of the Act shall be considered. As pertinent here, I have considered Stipulations Nos. 7 through 10 concerning **Itmann's** previous history, size of business, ability to continue in business, and good faith in attempting to achieve rapid compliance. The remaining **criteria** to be discussed are whether **Itmann** was negligent and the gravity of the violation.

Itmann was notified by MSHA late in 1977 that the Government was concerned about the possible accumulation of explosive gases in the abandoned area of this mine. During the 2 years after that notice, **MSHA** inspected the abandoned area on two occasions prior to the inspection on which the instant order was issued. At no time prior to the issuance of this order did **Itmann** claim that it was unsafe to travel the abandoned area or that such travel

would be in violation of the 1969 closure orders for the abandoned section. The evidence establishes that **Itmann** prepared a mine map of the abandoned areas showing roof falls which had occurred since the 1969 orders and **assigne** its employees to accompany **MSHA** Inspectors into the abandoned area without protest. The conclusion to be drawn from this evidence is that **Itmann** knew that it was required to properly ventilate the abandoned area and could not rely solely upon the percentage of methane at the point where the air coming out of the abandoned area entered another split of air. Hence, its failure to adequately ventilate the abandoned area of the mine constitutes ordinary negligence.

In upholding the order of withdrawal based on imminent danger herein, I have previously found that miners employed in the active workings of the mine were exposed to serious physical harm or death due to the condition that existed. The evidence establishes that more than 40 miners worked in the affected area on each shift for three shifts a day. Therefore, I find that this was a very serious violation.

Based upon the evidence of record and the criteria set forth in section **110(1)** of the Act, **I** conclude that a civil penalty of \$2,000 should be imposed for the violation found to have occurred.

Entitlement of Miners

Section 111 of the Act provides in pertinent part:

If a coal or other mine or area of such mine is closed by an order issued under section 104 or section 107 of this title for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested

parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for 1 week, whichever is the lesser.

The purpose of the section is outlined at page 634 of the Legislative History of the 1977 Act which states:

Miners entitlements resulting from closure orders

As the Committee has consistently noted, the primary objective of this Act is to assure the maximum safety and health of miners. For this reason, the bill provides at Section 112 [enacted as section 1111 that miners who are withdrawn from a mine because of the issuance of a withdrawal order shall receive certain compensation during periods of their withdrawal. This provision, drawn from the Coal Act, is not intended to be punitive, but recognizes that miners should not lose pay because of the operator's violations, or because of an imminent danger which was totally outside their control. It is therefore a remedial provision which also furnishes added incentive for the operator to comply with the law.

I have already found the following facts to be established by the preponderance of the evidence: **(1) Itmann's** 3B Mine was closed by an order properly issued under section 107 of the Act; **(2) Itmann** failed to comply with the mandatory safety standard set forth at 30 C.F.R. § 75.329 and that failure caused the mine to be closed; and **(3)** the mine in question was closed for 10 working **days**. Based upon the above findings, it follows that all miners who were idled by this order are entitled to full compensation "at their regular rates of pay for such time as the miners are idled by such closing, or for 1 week, whichever is the lesser." **Itmann** and the UMWA stipulated the identity of the miners affected by the order, their daily rates of pay, the number of **days** they worked and the number of days they were idled during the time this mine was closed. These stipulations are included the Appendix to this decision which is attached hereto and incorporated herein.

However, **Itmann** and the UMWA disagree on the amount of compensation owed.

Itmann's position is as follows:

Section 111 only provides for the miner to be compensated for a maximum of one week (5 days). Therefore, any time that an individual was permitted to work by **Itmann** during the ten (10) day period must be subtracted from the maximum five (5) day compensable period to determine compensation due.

By way of illustration, **Itmann** contends that a miner who worked for 5 of the 10 days that the mine was closed would be entitled to no compensation under section 111.

On the other hand, the **UMWA's** position is as follows:

The UMWA contends that the number of days worked by a particular miner should be subtracted from the total number of days that the 3B mine would have been in operation between September 13 and September 28, 1979, had the order not been issued (in this case 10 days) in order **to** determine how many days a miner was actually idled by the order. If the period of time the miner was idled is five or more days, the miner would be awarded only five days compensation. If the period of time the miner was idled is less than five days, then the miner would be awarded compensation only for the one, two, three or four days the miner was actually idled.

Applying the **UMWA's** position to the prior illustration, the UMWA contends that the miner who worked for 5 of the 10 days the mine was closed would be entitled to 5 days' wages under section 111 of the Act.

While the specific issue concerning the determination of "all miners who are idled due to such order" under section **111** of the 1977 Act has not been decided by the Commission, a similar issue has been addressed in three recent **cases**. In Youngstown Mines Corporation, Docket No. HOPE 76-231, August 15, 1979, the union sought compensation under section **110(a)** of the 1969 Act. MESA issued a withdrawal **order** under section 104(b) of the 1969

Act because the operator failed to abate a violation. All workers on **the** shift when the order was issued were assigned to abatement work. The workers on the next shift (the night shift) were also assigned to abatement work. After 4 hours they were sent home. Section **110(a)** of the 1969 Act provides in pertinent part:

If a coal mine or area of a coal mine is closed by an order issued under section 104 of this title, all miners working during the shift when such order was issued who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. If such order is not terminated next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift * * *. [Emphasis added.]

The miners on the night shift were paid for the first 4 hours of the shift (the time they worked on abatement), but were not paid for the remainder of **the** shift. The miners filed a claim for compensation for the 4 hours of the shift they did not work.

On appeal, the operator contended that section **110(a)** requires that an operator compensate the next working shift only for the first 4 hours following a withdrawal order. The operator argued that the miners were idled by the withdrawal order for the first 4 hours of their shift **even though** they worked on abatement during that time and that they were only entitled to **com-** pensation for those first 4 hours.

The Commission rejected the operator's interpretation of section **110(a)**. The Commission held that the miners were idled after they stopped work and were entitled to compensation for those 4 hours that they were idled because of the withdrawal order. The Commission reasoned that but for the withdrawal

order, the miners would have worked the entire shift. Therefore, they were idled for 4 hours by the order. They were entitled to compensation for those 4 hours. The reasoning in Youngstown Mines, Inc., was affirmed by the Commission in Kanawha Coal Company, Docket No. HOPE 77-193, September 28, 1979, and in Peabody Coal Company, Docket No. 77-50, November 14, 1979.

In the instant case, **Itmann** contends that under section 111 "any time that an individual was permitted to work by **Itmann** during the ten (10) day period must be subtracted from the maximum five (5) day compensable period to determine compensation time." Under the reasoning of Youngstown Mines, Inc., supra, this argument is rejected. The miners were idled by the withdrawal order. The amount of time that they were idled is the period of withdrawal minus the period of alternate work which they performed. **They** are entitled to be compensated for that period, up to a maximum of 1 week.

However, Stipulation No. 12 in this matter provides that **miners on** the day shift of September 13, 1979, were paid by **Itmann** for the balance of their shift after the order was issued (4 hours) and the miners who were scheduled to work the evening shift on that day were paid for 4 hours of that shift. Hence, all miners on the day and evening shift have already received one-half day's wages as compensation under this order. Section 111 clearly provides that the maximum amount of compensation that can be awarded under section 111 due to a closure order is 1 week. Stipulation No. 13 in this case provides that the maximum number of days' wages to which miners who were idled by the order would be entitled to 5 days' wages. Since the miners on the day and afternoon shifts have already received one-half day's wages, the period for which they can receive compensation is the number of days

they were idled minus the 4 hours for which they have already been compensated. The maximum compensation which they can receive in this matter is 4-1/2 days' wages. Since the miners on the midnight shift received no compensation under this order, the period for which they can receive compensation is the number of days they were idled up to 5 days.

I have applied the foregoing principles to the schedules of miners employed in this mine and the amount of compensation due to each miner is set forth in the Appendix. For the day and evening shift, the amount of compensation due each miner is determined by multiplying the stipulated period for which they were idled by the order minus the 4 hours for which they have already been compensated (up to 4-1/2 days) times their daily rate of pay. For the midnight shift, the amount of compensation due each miner is determined by multiplying the stipulated period they were idled by the order (up to 5 days) times their daily rate of pay. The total amount of compensation owed by **Itmann** to the 148 miners idled by this order is **\$46,194.73**.

The only remaining issue is the amount of interest, if any, which is awardable in this matter. The UMWA contends that the miners are entitled to 12 percent interest on the compensation owed. **Itmann** does not address this issue in its brief. The UMWA concedes that "in the cases decided to date, the Commission has awarded interest at the rate of 6 percent per annum" However, the UMWA argues that the Commission should follow the precedent of the National Labor Relations **Board** which, in 1977, abandoned 6 percent interest on back pay awards and followed the Internal Revenue Service "adjusted prime interest rate" which is currently 12 percent. The policy supporting the higher rate of Interest is as follows: to encourage prompt **compliance with** Commission orders; to encourage the operators to comply with

the health and safety provisions of the Act; and to fully compensate the miners for their **losses**. I am aware that other judges of the Commission have awarded interest in excess of 6 percent per annum. Although the **UMWA** presents a persuasive argument in support of its position in **favor of** higher interest, I am constrained to follow the decision of the Commission in Peabody Coal Company, Docket No. VINC 77-50, November 14, 1979, where it modified a judge's decision on interest to a rate of 6 percent per annum from the date compensation was due up to the date on which payment is made. If this policy is to be changed, it is for the Commission to make the change.

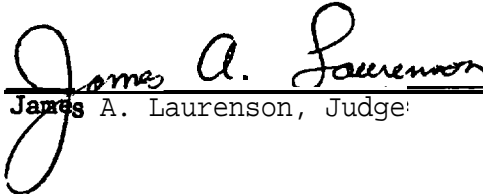
There is no evidence of record to establish the precise dates on which each of the miners was idled. However, since the order in question was issued on September 13, 1979, **I** find that the amount of compensation ordered paid herein was due to each of the miners 1 week thereafter: September **20, 1979**. Therefore, **Itmann** is ordered to pay each miner the amount of compensation due as set forth in the Appendix plus interest at the rate of 6 percent per annum from September 20, 1979, to the date payment is made.

ORDER

WHEREFORE, IT IS 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 as a civil penalty for the violation of 30 **C.F.R.** § 75.329.

IT IS FURTHER ORDERED that **Itmann** pay the amount of **\$46,194.73** as compensation to the 148 individual miners as set forth in the Appendix which is attached hereto and incorporated herein plus interest at the rate of 6 percent per annum from September 20, 1979, to the date payment is made.


James A. Laurenson, Judge

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APPENDIX

<u>Miners</u>	<u>Daily Fate</u>	<u>DAY SHIFT</u>		<u>Days of Compensation Due</u>	<u>Amount of Compensation Due</u>
		<u>Days Worked</u>	<u>Days Idled</u>		
Paul Hypes	70.38	3	7	4-1/2	\$316.71
David Goode	70.38	1	9	4-1/2	316.71
Kenneth Woods	70.38	1	9	4-1/2	316.71
Jerry Christian	70.38	0	10	4-1/2	316.71
Kenny Dancy	75.68	3	7	4-1/2	340.56
Patricia Cook	70.38	4	6	4-1/2	316.71
Rickey Tawney	70.38	3	7	4-1/2	316.71
Phyllis Alfrey	70.38	4	6	4-1/2	316.71
Danny R. Mitchem	70.38	3	7	4-1/2	316.71
Shirley Rollins	70.38	2	8	4-1/2	316.71
Ronnie Seed	70.38	2	8	4-1/2	316.71
Jimmy Clyburn	70.38	4	6	4-1/2	316.71
James Whitlow	70.38	2	8	4-1/2	316.71
Freddie Fox	70.38	2	8	4-1/2	316.71
Shales Elkins	69.38	10	0	0	0
James Elswick	78.92	5	5	4-1/2	355.14
Bobby Linsey	70.96	1	9	4-1/2	319.32
Douglas Morgan	70.96	0	10	4-1/2	319.32
Phillip Martin	70.38	7	3	2-1/2	175.95
Richard Mutterback	72.74	0	10	4-1/2	327.33
Ernest' Carroll	70.38	0	10	4-1/2	316.71
Dominick Delgrande	78.92	9	1	1/2	39.46
Ronnie Tignor	70.38	3	7	4-1/2	316.71
Milton Parsell	70.96	5		4-1/2	319.32
Harrison Belcher	70.96	3	5	4-1/2	319.32
Loren McGrady	75.68	5	5	4-1/2	340.56
Melvin Thorn	72.74	5	5	4-1/2	327.33
David Repass	78.92	6	4	3-1/2	276.22
David Chipman	78.92	5	5	4-1/2	355.14
Jack Garretson	78.92	0	10	4-1/2	355.14
Gary' Lilly	78.92	2	8	4-1/2	355.14
Larry E. Bailey	78.92	5	5	4-1/2	355.14
Carlos Hatfield	70.38	5	5	4-1/2	316.71
Deward Dillion	78.92	10	0	0	0
Frank Campbell	72.74	3	7	4-1/2	327.33
Johnny Lane	78.92	4	6	4-1/2	355.14
Doug Perkins	78.92	0	10	4-1/2	355.14
Thomas Dailey	72.74	5	5	4-1/2	327.33
Charles Lindsay	65.79	7	3	2-1/2	164.48
Terry Acord	70.38	4	6	4-1/2	316.71
Leon Bailey	72.74	4	6	4-1/2	327.33
Ronald Campbell	78.92	0	10	4-1/2	355.14

DAY SHIFT (continued)

<u>Miners</u>	<u>Daily rate</u>	<u>Days Worked</u>	<u>Days Idled</u>	<u>Days Compensation Due</u>	<u>Amount of Compensation Due</u>
Rose Sansom	70.38	0	10	4-1/2	\$316.71
Frankie Campbell	75.68	0	10	4-1/2	340.56
Frank Chipman	72.74	5	5	4-1/2	327.33
Michael Brubaker	70.38	2	8	4-1/2	316.71
Frank Critee	72.74	3	7	4-1/2	327.33
Rodney Mitchem	70.38	3	7	4-1/2	316.71
Kenner Dancy	78.92	2	8	4-1/2	355.14
Robert Bailey	72.74	2	8	4-1/2	327.33
Sherry Osborne	70.38	3	7	4-1/2	316.71
Charles Dancy	78.92	5	5	4-1/2	355.14
Gary Puckett	78.92	4	6	4-1/2	355.14
Walter McKinney	70.38	5	5	4-1/2	316.71
Wayne Pennington	78.92	9	1	1/2	39.46
Garland Morgan	75.68	5	5	4-1/2	340.56
Billy J. Farruggia	78.92	9	1	1/2	39.46
Virgil Harden	78.92	5	5	4-1/2	355.14
Robert Bryson	78.92	2	8	4-1/2	355.14
Gary Naylor	78.92	4	6	4-1/2	355.14
Darrell Worley	78.92	5	5	4-1/2	355.14
Paul Blankenship	75.68	4	6	4-1/2	340.56

EVENING SHIFt

<u>Miners</u>	<u>Daily Rate</u>	<u>Days Worked</u>	<u>Days Idled</u>	<u>Days of Compensation Due</u>	<u>kount of Compensation Due</u>
Charles Cole	80.52	6	4	3-1/2	\$281.82
Jess Cole	80.52	6	4	3-1/2	201.82
John Cunningham	74.34	6	4	3-1/2	260.19
Terrell Miller	74.34	7	3	2-1/2	185.85
Roy Hall	80.52	3	7	4-1/2	362.34
Richard Bekker	80.52	1/2	9-1/2	4-1/2	362.34
James Repass	80.52	6	4	3-1/2	281.82
Robert Payne	80.52	0	10	4-1/2	362.34
Randy Lambert	80.52	0	10	4-1/2	362.34
Thomas Johnson	80.52	6	4	3-1/2	281.82
Steve Lester	80.52	0	10	4-1/2	362.34
Johnny Hollingshead	74.34	0	10	4-1/2	334.53
Roger Hollingshead	80.52	0	10	4-1/2	362.34
Edward Gendron	80.52	8	2	1-1/2	120.78
Jerry Lusk	80.52	5	5	4-1/2	362.34
William Thompson	74.34	0	10	4-1/2	334.53
Freddy Dunford	74.34	6	4	3-1/2	260.19
Gary Shrewsbury	77.28	6	4	3-1/2	270.48
Ward Johnson	80.52	9	1	1/2	40.26
Richard T. Gray	80.52	5	5	4-1/2	362.34
Mert Privett	80.52	9	1	1/2	40.26
Galen Clay	71.98	7	3	2-1/2	179.95
Quincy Murdock	71.98	7	3	2-1/2	179.95
Shirley Altizer	71.98	8	2	1-1/2	107.97
Larry Rogers	71.98	5	5	4-1/2	323.91
James Archie	71.98	7	3	2-1/2	179.95
Jimmy Trent	71.98	1	9	4-1/2	323.91
Charles Cadle	71.98	0	10	4-1/2	323.91
John Becklehimer	80.52	6	4	3-1/2	281.82
Jack Goff	72.56	0	10	4-1/2	326.52
Roger Lester	80.52	4-1/2	5-1/2	4-1/2	362.34
Richard Blackburn	80.52	3-1/2	6-1/2	4-1/2	362.34
John Hughes	71.98	2	8	4-1/2	323.91
Darrell Lilly	71.98	9	1	1/2	35.99
Johnnie Farley	77.28	0	10	4-1/2	347.76
Allen Proffitt	71.98	1-1/2	8-1/2	4-1/2	323.91
Ernest Mullins	71.98	10	0	0	0
Jimmie Kincaid	71.98	2	8	4-1/2	323.91
George Adkins	80.52	5-1/2	4-1/2	4	322.08
A. Sizemore	80.52	3-1/2	6-1/2	4-1/2	362.34
William Ramsey	77.28	4	6	4-1/2	347.76
Danny Stabbs	74.34	1	9	4-1/2	334.53
David Blankenship	74.34	7	3	2-1/2	185.85

MIDNIGHT SHIFT

<u>Miners</u>	<u>Daily Rate</u>	<u>Days Worked</u>	<u>Days Idled</u>	<u>Days Compensation Due</u>	<u>Amount of Compensation Due</u>
William Faulkner	75.14	3	7	5	\$375.70
Stephen Scott	75.14	3	7	5	375.70
Richard L. Belcher	81.32	0	10	5	406.60
Ronnie Shrewsbury	81.32	0	10	5	406.60
Richard Howell	81.32	4	6	5	406.60
Mark Hylton	75.14	2	8	5	375.70
Joseph Pierce	81.32	9	1	1	81.32
William Peters	81.32	3	7	5	406.60
Danny Tiller	75.14	0	10	5	375.70
Donald Skaggs	81.32	5	5	5	406.60
Carl Belcher	81.32	1	9	5	406.60
Esther O'Dell	72.78	7	3	3	218.34
Bennie Webb	78.08	2	8	5	390.40
Jack Casteel	81.32	0	10	5	406.60
Arnold Rogers	81.32	8	2	2	162.64
James Lankford	75.14	2	8	5	375.70
Charles Marquis	75.14	5	5	5	375.70
Deborah Meadows	72.78	5	5	5	363.90
Jerry Rotenberry	81.32	2	8	5	406.60
Granville McKinney	81.32	0	10	5	406.60
Roger Bailey	75.14	0	10	5	375.70
Bernard Atwood	81.32	6	4	4	325.28
Larry G. Bailey	81.32	5	5	5	406.60
Brett 'Duncan	75.14	5	5	5	375.70
Alan Handy	81.32	6	4	4	325.28
Roy Osborne	81.32	9	1	1	81.32
Frank Echols	81.32	4	6	5	406.60
John McKinney	81.32	2	8	5	406.60
Gregory Hatfield	81.32	4	6	5	406.60
Hubert Scott	68.92	10	0	0	0
Roger Redden	73.36	2	8	5	366.80
William Jones	73.36	6	4	4	293.44
James Cooper, Jr.	81.32	3	7	5	406.60
Stanley Wriston	72.78	3	7	5	363.90
Raymond Ortiz	72.78	5	5	5	363.90
Clyde McKinney	78.08	3	7	5	390.40
Bernard Campbell	72.78	5	5	5	363.90
Darrell Doss	72.78	4	6	5	363.90
Ronald Winston	72.78	2	8	5	363.90
Johnny Hopkins	72.78	7	3	3	218.34
Larry Lovejoy	72.78	7	3	3	218.34
William Duncan	72.78	0	10	5	363.90
George Cook	72.78	0	10	5	363.90
Robert Mullins	72.78	6	4	4	291.12
Paul Christian	72.78	6	4	4	291.12
Clarence Dickens	81.32	7	3	3	243.96
Bobby Bailey	81.32	6	4	4	325.28