

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

11 AUG 1980

ITMANN COAL COMPANY, : Contest of Order
Applicant :
v. : Docket No. WEVA 80-8-R
: :
SECRETARY OF LABOR, : Itmann No. 3 Mine
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
and :
: :
UNITED MINE WORKERS OF AMERICA, :
Respondents :
: :
RAY MARSHALL, SECRETARY OF LABOR, : Civil Penalty Proceeding
Petitioner :
v. : Docket No. WEVA 80-230
: A.C. No. 46-01576-03041V
: :
ITMANN COAL COMPANY, : Itmann No. 3 Mine
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

This proceeding arises out of the consolidation of a contest of order and a civil penalty proceeding arising out of that order. On October 1, 1979,

Itmann Coal Company (hereinafter **Itmann**) filed a notice of contest of an order issued under section **104(d)(2)** of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 5 **814(d)(2)** (hereinafter the Act). On March 19, 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. § 75.400. On March 28, 1980, I ordered these cases consolidated under Procedural Rule 12 of the Federal Mine Safety and Health Review Commission (hereinafter Commission), 29 C.F.R. § 2700.12.

A hearing was held in Charleston, West Virginia, on April 17, 1980. **Itmann's** motion for summary decision on part of the proceeding was denied because it was not timely filed. **James** Bowman testified on behalf of MSHA. **Arnold** Rogers testified on behalf of the United Mine Workers of **America** (hereinafter **UMWA**). **Frank** Beard, **Harry** **Farmer**, **David** Bailey, and **Eugene** Kiser testified on behalf of **Itmann**. Following the hearing, **Itmann** and **MSHA** submitted briefs with proposed findings of fact and conclusions of law.

ISSUES

The first general issue is whether the order under section **104(d)(2)** 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 **104(d)** of the Act, 30 U.S.C. § **814(d)**, provides as follows:

(1) If, upon inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety **or** health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

30 C.F.R. § 75.400 provides as follows: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

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

On September 5, 1979, MSHA inspector James Bowman conducted a regular inspection of the **Itmann** No. 3 Mine. He was accompanied by Arnold Rogers, UMWA safety committeeman and walk-around, and Eugene Kiser, an **Itmann** section foreman and company escort. Approximately 1 month prior to this inspection, Inspector Bowman had issued a section 104(a) citation to **Itmann** for the accumulation of combustible hydraulic oil in the car haul area of this mine. Following the issuance of the earlier citation, Inspector Bowman talked to three members of **Itmann** management: Harry Farmer, David Bailey, and Eugene Kiser, about the fact that this area should be examined to prevent accumulations of oil. On the day the order in question was issued, Inspector Bowman indicated that he wanted to return to the car haul area to see how **Itmann** was doing in controlling combustible materials.

Inspector Bowman testified that when he entered the car haul area he observed a large accumulation of hydraulic oil. He made measurements of the various puddles and prepared a detailed sketch of the area (**Exh. C-2**). He described the largest accumulation of hydraulic oil as being a puddle 20 feet long, 4-1/2 feet wide, and 4-1/4 inches deep. He also noted several other smaller puddles of oil, 168 feet of oil-soaked material, and some accumulations of water with oil floating on top. He estimated that there were several hundred gallons of oil on the floor in this area. Oil puddles were

in between and on both sides of the haulage track. He stated that several of the puddles consisted of 100 percent hydraulic oil. He put his shoe in these puddles and found no evidence of water. At the time he made his inspection, Inspector Bowman found no evidence of any cleanup in progress. A pump was present in the area but it was not running. The wire leading to the pump was lying in a puddle of oil. There was no record of any rupture of a hose or other equipment which would account for the large accumulation of oil in this area. Therefore, Inspector Bowman assumed that the spillage was due to normal operating conditions. He estimated that it would take approximately 1 week for this amount of oil to accumulate. Since hydraulic oil is combustible, it could be ignited by sparks from the tracks or a short circuit from the electric pump wire. While he did not find that the condition constituted an imminent danger, he believed that if the oil were ignited it would affect the mine's ventilation and endanger all working sections of the mine.

Based upon his observations, Inspector Bowman issued a section 104(d)(2) order which described the condition as follows:

Combustible material (hydraulic oil) was permitted to accumulate in the No. 2 boom empty branch entry for a distance of approximately 170 feet and in depths ranging from a film to 4-1/2 inches, one pool of oil was approximately 4-1/4 inches deep, 4-1/2 feet wide, and 20 feet in length. Several other pools of oil was present, the deepest of which was 4-1/2 inches. The certified belt conveyor examiner's designated by the operator to make pre-shift examinations on belt conveyor should have seen and reported this condition. The belts are examined every 8 hours. The No. 2 boom was cited on 08-07-79, in Citation No. 0661247 for a similar condition and the operator admitted that this is a known problem area. The writer at the time of the first citation discussed the problem of the oil accumulations with several of the operating officials, and the operator knew the problem existed and should have known the accumulation was

present. The boom man stated that the car haul was using as much oil now as it did prior to 08-07-79. The operator should be aware of the quantity of oil being used at No. 2 boom.

As modified, this order was issued based upon the initial action of a section **104(d)(1)** Order No. 0662681 issued on March 14, 1979.

Arnold Rogers, **UMWA** safety committeeman and walk-around, testified that he agreed with Inspector Bowman's description of the oil which was found in the car haul area on September **5**, 1979. **He** further stated that he splashed a wedge around in the puddles to see whether they contained water. Of all the accumulations of oil noted on Inspector Bowman's drawing, Arnold Rogers found only one small puddle on the right side of the haulage track which consisted primarily of water.

Arnold Rogers further corroborated Inspector Bowman's testimony that the pump was not operating when they arrived in this area. Moreover, the pump was not set in the right place because it was approximately 30 feet away from the largest puddle of oil which he described as being **4-1/2** feet by 18 to 20 feet. The boom operator told Mr. Rogers that they used 25 gallons of oil per day. The chief electrician said that the O-ring on the gasket in the jack was blown causing it to leak oil. Mr. Rogers estimated that it would take a few days to accumulate this much oil.

Eugene Kiser, a section foreman at **Itmann**, accompanied Inspector Bowman as the company escort on the day of this order. Mr. Kiser testified that when they arrived in the car haul area, the pump was running but it was sitting on a higher elevation than the place where the largest accumulation of liquid **was** found. Mr. Kiser stated that a slurry was being pumped into

the mine car at the time. Mr. Kiser testified that the majority of the accumulated liquid in this area consisted of water. He stated that the water had pushed the oil up through the ballast. He further stated that he was going to order 200 tons of ballast to cover this area. Mr. Kiser testified that he was aware of the existence of the oil problem in this area and that is why he had a pump in operation. Although Mr. Kiser contended that the majority of the accumulated liquid was water, he conceded that he found one puddle, 2 feet in diameter and **2-1/4** inches deep, on the right side of car No. 3 which consisted of approximately 50 percent oil. Mr. Kiser further estimated that there was a maximum of 15 gallons of oil on the ground in the car haul area at the time this order was written.

Frank Beard, Vice President of Operations at **Itmann**, testified that he received a call from Eugene Kiser on September 5, 1979, advising him that the inspector had issued a section **104(d)(2)** order. Mr. Beard advised Eugene Kiser that he was coming underground and that nothing should be touched. Vice President Beard arrived in the car haul area 10 or 15 minutes after the call from Mr. Kiser. Frank Beard testified that oil leaks are normal in car spotter units because the oil is under pressure and the seals and hoses rupture.

Vice President Beard testified that he was unable to recall whether the pump was running when he arrived. He stated that the sketch prepared by Inspector Bowman depicting the various accumulations of oil was "fairly **accurate.**" He stated that he was unable to disagree with the dimensions noted on that sketch and that he did not take any measurements. He further

conceded that he did not examine one area noted in the sketch. Vice President Beard contended that most of the puddles were filled with water with a light film of oil on top but stated that no chemical analysis of the puddles was performed. He disagreed with Inspector Bowman about the contents of the puddles and whether the order was proper. He was mad. He estimated that only a few gallons of oil were present. However, he admitted that for day-to-day operation of this section, this amount of oil might be considered "excessive." He recalled that there had been an accident on the prior shift which resulted in oil spillage but stated that there was no record of any such accident. He questioned the belt examiner who had preshifted this area and the belt examiner said he did not see anything wrong.

Vice President Beard testified that he did not believe that there was any accumulation of combustible materials because there was more water than oil in the area. He stated that it was hard to say whether the operator knew about this condition because **Itmann** was aware of the fact that oil does get into this area. It was his opinion that no miner was placed in any danger of injury because of the conditions which he observed in the car haul area on the day the order was issued.

Harry Farmer, general superintendent of **Itmann** No. 3 Mine, accompanied Vice President Beard into the area after the order was issued. He corroborated the testimony of Vice President Beard and Foreman Kiser that most of the puddles were filled with water but had an oil skim on top. He admitted that it was hard to determine how much oil was there. The chief electrician told him that some oil had been spilled on the prior shift due to trouble with the car haul unit. The packing in the jacks is replaced once a week

and oil is lost in that process. He admitted that Inspector Bowman may have talked to him before about the problem of accumulation of oil in this area. Mr. Farmer admitted that he found at least one puddle of oil on the left side of car No. 6 which was 2 feet in diameter and a couple of inches deep.

David Bailey, superintendent at **Itmann** No. 3 Mine, testified that the pump was dry when he arrived with Vice President Beard and General **Super-**intendent Farmer. He stated that the pump was running but it was not doing anything. It needed to be moved. He stirred the various puddles with his hand, shoe, and a piece of wood. On the right side of the tracks, he found primarily water covered with a film of oil. He admitted that he encountered one puddle on the left side of the track which was a mixture of half oil and half water. He described this as being 2 feet in diameter. In his opinion, there was no more than 5 gallons of oil in the entire **area**. He did not believe that there was any danger to miners but stated that if there were a fire, two working sections would be affected.

EVALUATION OF THE EVIDENCE

All of the testimony, exhibits, stipulations, arguments of the parties, and proposed findings of fact and conclusions of law have been considered. MSHA contends that the section **104(d)(2)** order should be affirmed and that a civil penalty should be assessed. **Itmann** contends that the order should be vacated and no penalty should be assessed.

Itmann's first line of defense, as raised in its motion for summary decision on part of the proceeding, is that the section **104(d)(2)** order is

invalid because of "an ineffectual time linkage of the section 104(d) chain of orders at the **Itmann** No. 3 Mine." This assertion requires an examination of the provisions of section **104(d)** of the Act. Section **104(d)(1)** of the Act provides that a citation shall be issued if: (a) there is a violation of a mandatory health or safety standard; (b) the conditions created by the violation do not cause imminent danger; (c) the violation could significantly and substantially contribute to the cause and effect of a safety or health hazard; and (d) the violation is caused by the unwarrantable failure of the operator to comply with mandatory health or safety standards. That same section of the Act then goes on to state that an order of withdrawal may be issued if, within 90 days of the date of the issuance of the citation as described above, there is another violation of any mandatory health or safety standard which was caused by an unwarrantable failure of the operator to comply with such standards. Section **104(d)(2)** provides that where a section **104(d)(1)** order has already been issued, another order of withdrawal shall be issued when, in a subsequent inspection, a similar violation is found until such time as an inspection of the mine discloses no similar violations. As used in this section, "similar" violation does not refer to any substantive similarity.

Eastern Associated Coal Corp., 3 **IBMA** 331 (1974). A "similar" violation is a violation of any mandatory health or safety standard which is caused by the unwarrantable failure of the operator to comply. International Union, United Mine Workers, etc. v. Kleppe, 532 **F.2d** 1403 (D.C. dir. 19761, cert. denied, sub nom., Bituminous Coal Operators' Association, Inc. v. Kleppe, 429 U.S. 858 (1976).

Itmann does not contest the fact that a valid section 104(d)(1) citation was issued. Likewise, **Itmann** does not contest the validity of the section 104(d)(1) order which was issued on March 14, 1979. However, **Itmann** alleges that Order No. 0661235, issued on July 15, 1979, under section 104(d)(2) was modified by another judge as part of an approved settlement between MSHA and **Itmann** and that the decision approving that settlement is controlling here. Since the order in controversy here was not predicated upon the order which was modified in the prior proceeding, that decision approving a settlement is of no import in this case. **Itmann** appears to be under the misapprehension that a section 104(d)(2) order must be issued within 90 days of the issuance of the section 104(d)(1) order. Section 104(d)(2) of the Act contains no time restrictions for the issuance of orders. This chain of orders based upon the operator's unwarrantable failure to comply with mandatory health or safety standards can only be broken at "such time as an inspection of such mine discloses no similar violations." There is no evidence of record in this case to establish that there was any intervening inspection of **Itmann** No. 3 Mine between March 14, 1979, and September 5, 1979, which disclosed no similar violations. **Itmann's** contention that the order is invalid because of an "ineffectual time linkage" is rejected.

The next issue is whether MSHA established a violation of 30 C.F.R. § 75.400. As pertinent here, that section provides that "combustible materials shall be cleaned up and not be permitted to accumulate in active workings." **Itmann** concedes that hydraulic oil is a combustible material. However, **Itmann** contends that the evidence does not establish any accumulation of combustible materials. This controversy concerns the various

puddles of liquid which **MSHA** contends were composed of hydraulic oil and which **Itmann** contends were puddles of water covered with an oil film. No chemical analysis of the contents of the puddles was performed. At the outset, it should be noted that both sides agree that both types of puddles were in existence in this area of the mine. Inspector Bowman and **UMWA walk-around** Rogers testified that they saw puddles of water with an oil film on top. **Itmann** witnesses Farmer, Bailey, and Kiser identified puddles on both sides of the track approximately 2 feet in diameter and a couple of inches deep which were at least half filled with oil. This testimony coupled with **Itmann's** other evidence that it was necessary to disturb the surfaces of the puddles to determine that there was water underneath the oil establishes clearly that **Itmann** had not cleaned up the combustible hydraulic oil but rather permitted it to accumulate in the area around the track in the car haul. **Itmann** presented evidence of hearsay statements of the person who conducted the preshift examination of this area to the effect that there was no accumulation of combustible materials in this area. This evidence is entitled to very little weight in light of **Itmann's** voluntary payment of a civil penalty of \$700 for violating the preshift examination regulation at 30 C.F.R. § 75.303 at the time and place of this occurrence. Secretary of Labor v. **Itmann** Coal Co., Docket No. **WEVA** 80-160 (June 30, 1980).

Itmann has calculated that the largest puddle of oil described by Inspector Bowman, 20 feet by 4-1/2 feet by 4-1/4 inches, would contain more than 238 gallons of oil if there were no water in the puddle. Posthearing brief of **Itmann Coal**' Company at 9. While there may have been some water in this puddle, I find that the puddle consisted primarily of oil as alleged by

Inspector Bowman and Arnold Rogers. Moreover, considering the numerous other puddles of oil and oil-soaked areas at this location, I find Inspector Bowman's estimate of several hundred gallons of oil to be credible. Therefore, I find that **Itmann** has violated 30 C.F.R. § 75.400 as alleged by **MSHA**.

The next issue is whether the section 104(d)(2) order was properly issued in this case. As noted, supra, this section of the Act applies where the violation is due to the "unwarrantable failure" of the operator to comply with mandatory health or safety standards. The term "unwarrantable failure" was defined by the Interior Board of Mine Operations Appeals as follows:

[A]n inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of **due diligence**, or because of indifference or a lack of reasonable care.

Zeigler Coal Company, 7 IBMA 280 (1977). This definition was approved in the legislative history of the 1977 Act. S. Rpt. No. 95-181, 95th Cong., 1st Sess. 32 (1977).

In December 1979, the Commission upheld an order of withdrawal based upon an operator's unwarrantable failure to comply with 30 C.F.R. § 75.400. In Old Ben Coal Company, **VINC** 74-11 (December 12, 1979), the Commission held that the violation was an unwarrantable failure even though the evidence established that the spillage occurred during the previous shift.

Applying the above principles to the facts of this case, it is clear that **Itmann** knew or should have known of the existence of the accumulation of

hydraulic oil in this area. The area had been cited less than 1 month previously for the same condition and Inspector Bowman advised **Itmann** management at that time of its duty to prevent a reoccurrence. **Itmann's** witnesses conceded that there was more hydraulic oil in **this** area than was normal. Whether the one pump was running or not is immaterial since several accumulations have been established and **Itmann** failed to exercise **due diligence** to eliminate this hazard. Even if **Itmann** is correct that the oil spillage occurred on the previous shift, Old Ben Coal Company, supra, compels the conclusion that this accumulation was due to the unwarrantable failure of **Itmann** to promptly eliminate this condition. Therefore, I find that **MSHA** has established that the violation herein was caused by **Itmann's** unwarrantable failure to comply with the mandatory standard.

The final issue to be resolved is the amount of the civil penalty which should be assessed. In assessing a civil penalty, the six criteria set forth in section **110(i)** of the Act shall be considered. As pertinent here, **I** have considered stipulation 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 **Itmann's** negligence and the gravity of the violation.

In upholding the section **104(d)(2)** order herein, I have previously found that **Itmann** was negligent in permitting combustible hydraulic oil to accumulate in the area in question and in failing to clean up this condition. **Itmann's violation of 30 C.F.R. § 75.400** constitute8 ordinary negligence.

The gravity of a violation must be determined in light of the likelihood of an occurrence, the number of miners exposed to potential injury, and the seriousness of potential injury to the miners. Inspector Bowman testified that the condition which he found did not constitute an imminent danger. However, he testified that the accumulation of hydraulic oil could be ignited by sparks coming from the electricity in the rails of the haulage track or from the trailing cable of the **250-volt** water pump which was lying in oil. In the event of a fire, Inspector Bowman testified that carbon monoxide therefrom would be taken to every working section of the mine. On the other hand, **Itmann** presented evidence that the possibility of ignition of hydraulic oil was remote, only two working sections would be affected in the event of a fire, and there was no danger of any injury to miners.

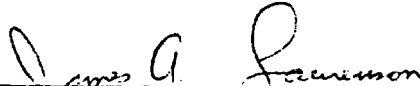
I find **that, in** the event of an ignition of the hydraulic oil accumulation, the miners in two working sections would have been exposed to serious injury. However, the evidence fails to establish that such an occurrence was probable. Considering all of the factors that go into determining the gravity of the violation, I find that this was a serious violation.

Based upon the evidence of **record** and the criteria set forth in section **110(i)** of the Act, I conclude that a civil penalty of \$1,500 should be imposed for the violation found to have occurred.

ORDER

THEREFORE, IT IS ORDERED that the contest of order is DENIED and the subject withdrawal order is AFFIRMED.

IT IS FURTHER ORDERED that **Itmann** pay the sum of \$1,500 within 30 days of the date of this decision for violation of 30 **C.F.R. §** 75.400.



James A. Laurenson, Judge

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