

CCASE:

ITMANN COAL V. SOL (MSHA)

DDATE:

19800930

TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

ITMANN COAL COMPANY,		Application for Review
	APPLICANT	
		Docket No. WEVA 80-132-R
v.		
		Itmann No. 3 Mine
SECRETARY OF LABOR,		
MINE SAFETY AND HEALTH		
ADMINISTRATION (MSHA),		
	RESPONDENT	

DECISION

Appearances: Karl T. Skrypak, Esq., Consolidation Coal Company,
Pittsburgh, Pennsylvania, for Itmann Coal Company
David E. Street, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia, Pennsylvania,
for Secretary of Labor, Mine Safety and Health
Administration

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This proceeding arises out of an application for review of an imminent danger order of withdrawal issued on November 14, 1979. On December 7, 1979, Itmann Coal Company (hereinafter Itmann) filed the application for review. A hearing was held in Charleston, West Virginia, on May 20, 1980. James Bowman and Arnold Rogers testified on behalf of the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA). Donny Coleman testified on behalf of Itmann. Both sides submitted posthearing briefs.

ISSUE

The issue is whether the order of withdrawal due to imminent danger was properly issued.

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an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions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."

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.

FINDINGS OF FACT

I find that the evidence of record establishes the following facts:

1. On November 14, 1979, MSHA inspector James Bowman was conducting a regular inspection of Itmann's No. 3 Mine in the area of the Pineville Mains. He was accompanied by Arnold Rogers, union safety committeeman and walkaround, and Donny Coleman, an Itmann industrial engineer and company escort.

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2. During the course of his inspection, Inspector Bowman came around a corner and saw a miner, Doug Shrewsberry, shoveling coal between the tail pulley and the drive pulley with the guard removed and the conveyor belts moving. The miner was working in a precarious position under a moving conveyor belt which was only 37 inches above the floor and between the belt drive and a tail pulley which were 54 inches apart and in motion. The surface on which the miner was standing was damp and slippery and was on a steep slope.

3. After the miner saw the inspector's cap light, he stepped out of the area between the conveyor belts.

4. Upon observing the above condition, Inspector Bowman told Safety Supervisor Coleman that he was issuing an order of withdrawal under section 107(a) of the Act and told Mr. Coleman to turn off the conveyor belts.

5. Thereafter, Inspector Bowman issued a written order of withdrawal due to imminent danger pursuant to section 107(a) of the Act.

6. The miner was questioned in the presence of all three members of the inspection party. He admitted that he had been shoveling coal with the conveyor belts running and unguarded. He further stated that he had been trained and he knew better than to commit such an unsafe act. However, he also stated that he had shoveled coal in this area before with the conveyor belts running and unguarded. He stated that he did not want to stop production and he had not been told to leave the conveyor belts running or to turn them off while performing his duties.

7. It was the practice of the miner, Doug Shrewsberry, to clean the affected area with the conveyor belts running and unguarded.

8. The practice of cleaning the area around the tail pulley and the drive pulley with the conveyor belts running and unguarded could be reasonably expected to cause death or serious physical harm to the miner.

9. The order was terminated approximately 2 hours after it was issued after the miner had been reinstructed by Itmann management concerning safe work habits in turning off the conveyor belts before removing the guard and commencing cleanup of the area.

DISCUSSION

All of the testimony, exhibits, stipulations, and arguments of the parties have been considered. There is no significant dispute of fact in this case. However, Itmann contends that the facts do not support an imminent danger order of withdrawal because the miner was out of the affected area and he was not exposed to any moving parts at the time the order was issued. This defense is similar to the one raised by Itmann in a case I

decided earlier this year. In Itmann Coal Company v. Secretary of Labor, 2 FMSHRC Decs. No. 6 at 1643 (June 26, 1980), Itmann contended that although a miner

~2741

was seen traveling under unsupported roof, no imminent danger existed because the miner was not under unsupported roof at the time the order was issued. I rejected Itmann's defense in that case as follows: "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." Id. at 1655. Itmann did not appeal that decision.

In the instant case, the inspector saw a miner shoveling coal in a precarious position between moving, unguarded conveyor belts. It cannot be rationally asserted that such a miner was not exposed to death or serious physical injury. The mere fact that such miner sees the cap light of the inspector and thereafter steps away from the danger does not eliminate the imminent danger. Under these facts, it was reasonable for the inspector to believe that the practice of cleaning this area in the manner he observed had not ended. This belief was confirmed by the miner's admission that he had cleaned this area in the same precarious manner before. Therefore, this was not a static condition which would not recur after it was abated. Rather, we have here an unsafe practice which would be likely to result in death or serious injury to a miner before it can be abated.

Section 107(a) of the Act specifically provides that the order of withdrawal is to remain in effect "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." (Emphasis supplied.) This section of the Act gives the MSHA inspector the authority and responsibility to continue the order of withdrawal until the conditions or practices that caused the imminent danger no longer exist. Applying the law to the facts of the instant case, I find that Inspector Bowman acted properly in issuing the order of withdrawal due to imminent danger and continuing that order until the miner in question had been reinstructed concerning the need to turn off the conveyor belts before removing the guard or performing any cleanup duties. The imminent danger in this case did not terminate when the miner stepped out of the affected area. At the time this order was issued, there was still an imminent danger under the Act due to the practice of performing this work under unsafe conditions. The inspector would have been remiss if he failed to issue this order.

CONCLUSIONS OF LAW

1. This Administrative Law Judge has jurisdiction of this proceeding pursuant to section 107 of the Act.

2. The inspector properly issued the subject order of withdrawal under section 107(a) of the Act because the practice of cleaning the immediate area around moving and unguarded conveyor belts in this mine constituted an imminent danger within the meaning of the Act.

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ORDER

WHEREFORE IT IS ORDERED that the application for review is DENIED and the subject withdrawal order is AFFIRMED.

James A. Laurensen
Judge