

CCASE:

ITMANN COAL v. SOL (MSHA)

SOL (MSHA) v. ITMANN COAL

DDATE:

19810114

TTEXT:

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

ITMANN COAL COMPANY,
CONTESTANT
v.

Contest of Order
Docket No. WEVA 80-166-R

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

Order No. 657832
November 29, 1979
Itmann No. 3 Mine

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

Civil Penalty Proceeding
Docket No. WEVA 80-380
A.O. No. 46-01576-03051 V

ITMANN COAL COMPANY,
RESPONDENT

Itmann No. 3 Mine

DECISION

Appearances: Karl T. Skrypak, Esq., Pittsburgh, Pennsylvania, for
Itmann Coal Company
Stephen Kramer, Esq., Office of the Solicitor, U.S.
Department of Labor, Arlington, Virginia,
for the Secretary of Labor

Before: Judge Edwin S. Bernstein

The hearing in these consolidated proceedings was held on July 24, 1980, and November 18, 1980, in Charleston, West Virginia. Both the contest proceeding and the penalty case relate to Order No. 657832, which was issued to Itmann on November 29, 1979, for an alleged violation of 30 C.F.R. 75.301. That standard provides in pertinent part: "The minimum quantity of air reaching the last open crosscut in any pair or set of developing entries and in any pair or set of rooms shall be 9,000 cubic feet a minute, and the minimum quantity of air reaching the intake end of a pillar line shall be 9,000 cubic feet a minute." The order alleged:

The quantity of air reaching the intake end of Cabin Creek 6-Panel Longwall (040 Section) was only 7,350 CFM as measured with a smoke cloud; anemometer would not turn sufficiently to read the air quantity. The evening shift foreman stated that he was taking the intake air reading in the crosscut between the No. 1 and 2 entries and that he thought that this was the same place where the day shift foreman and fireboss was [sic] taking their readings. The crosscut was the wrong place to take the intake air reading in that it includes belt conveyor ventilation air. All foremen are trained in ventilation controls and practices annually and should have known this was the wrong location to take intake readings to the pillar line. The tail of the longwall was not cutting out into the tail or return air entry, and the tail of the longwall line was blocked with coal and rock. Two small holes were present leading into the return entry but was [sic] blocked with a roof fall. The return entry had at least two roof falls present in the entry blocking the flow of air. The operator and his agent were aware of the roof falls and should have been aware of the coal blocking the return air entry. The operator should have exercised more caution in determining the quantity of air reaching the intake end of the pillar line in Cabin Creek 6-Panel, a section which liberates methane when coal is being cut. Air reading and other evidence indicates that the air in this section has been low for a significant period of time.

Itmann argued that the existence of less than 9,000 cubic feet a minute (CFM) does not automatically constitute a violation of the standard. The company contended that MSHA must also prove that the operator failed to take certain remedial steps before a citation or order can be issued. MSHA strongly opposed this position, arguing that the regulation is violated anytime air volume dips below the required 9,000 CFM.

Findings of Fact

At the hearing, the parties stipulated:

1. Itmann Coal Company is the owner and operator of the Itmann No. 3 Mine, located in Wyoming County, West Virginia.
2. The Itmann No. 3 Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, and I have jurisdiction over these proceedings.
3. The inspector who issued the subject order and termination was a duly authorized representative of the Secretary of Labor.
4. Copies of the subject order and termination are authentic and may be admitted into evidence for the purpose of establishing their issuance, but not for the truthfulness or relevancy of any statements contained therein.

5. 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 had a total output of 535,357 tons. Mine No. 3-A produced 388,481 tons and Mine No. 3-B produced 146,876 tons. The controlling company, Itmann Coal Company, had a total output of 1,627,963 tons in 1979.

6. The history of previous violations should be based upon the fact that Itmann had a total of 439 assessed violations in the preceding 24 months, during which period there was a total of 856 inspection days.

7. The alleged violation was abated in a timely fashion, and the operator demonstrated good faith in attaining abatement.

8. The assessment of civil penalties in these proceedings will not affect the operator's ability to continue in business.

9. In addition to the order which is the subject of these proceedings, Order No. 662681, dated March 4, 1979, and Citation No. 255612, dated January 30, 1979, were issued under Section 104(d)(1) of the Act.

ISSUES

The issues in these proceedings are:

1. Whether the operator violated 30 C.F.R. 75.301 as alleged;

2. Whether the alleged violation was caused by an unwarrantable failure of the operator to comply with the standard;

3. Whether a written copy of the subject order was served on the operator with reasonable promptness; and

4. If a violation is found, what civil penalty should be assessed taking into account the six criteria in Section 110(i) of the Act. In order to make a determination on this issue, it is necessary to determine whether and to what extent the operator was negligent, and the gravity of the alleged violation.

During the first day of the hearing, James Bowman testified for MSHA, and Donny Coleman testified for the operator. Mr. Bowman is the MSHA inspector who issued the subject order. He testified that on November 29, 1979, he was told by his supervisor at MSHA's Pineville, West Virginia, office that MSHA had been notified about a possible ventilation problem at the Itmann No. 3 Mine. Mr. Bowman was the resident inspector at the mine during the time in question. He immediately went to the mine to check on the condition, arriving there at around 3:15 or 3:30 p.m. He first examined certain records which the operator was required to keep concerning its ventilation program, and issued a citation to the operator for failing to examine a particular return entry for proper ventilation. He then traveled into the

mine, accompanied by Itmann's safety engineer, Donny Coleman.
The two men went to an area known

as the Cabin Creek 6 Panel. This was an area where longwall mining was taking place, but there were no miners at the panel when Mr. Bowman arrived. The inspector began making a ventilation inspection of the area, which is depicted in Operator's Exhibit No. 2 (a copy attached to this decision as an appendix). In this area of the mine, retreat mining was taking place. This means that coal was being cut in an outby direction with the longwall machine. There was a roof fall in the second crosscut outby the longwall face which caused an air blockage. In the first crosscut outby the face, there was an accumulation of rock or gob. The latter crosscut was open and a man could walk through the area. There was no blockage of air in that first crosscut. Mr. Bowman and Mr. Coleman took several air readings at the intake end of the pillar line near the head of the longwall machine. This point is marked with a circled "X" on Operator's Exhibit No. 2 and is located below and to the left of the point marked "Head." The inspector first made an anemometer check in order to determine the velocity of air moving through the area. He obtained a reading of 55, which he ignored since MSHA's inspection procedures do not allow readings below 100 to be used. Mr. Bowman then took a smoke cloud test, designed to measure the volume of air moving through the area. He obtained a reading of 7,350 CFM. The regulation requires 9,000 CFM in such situations. Finally, Mr. Coleman made an anemometer check and obtained a reading of 55. The two men did some calculations and came up with a figure of 7,448 CFM based upon the anemometer readings. Regardless of which figure is used, Itmann's counsel agreed that the reading was below the required air volume.

Mr. Bowman then got into a discussion with Itmann officials concerning the proper point at which the readings should be taken. The Itmann officials contended that the ventilation reading should have been taken in the first crosscut outby the face, where the gob was. This was because there was a split point between that crosscut and the intake end of the pillar line. At the split point, some of the air which came through the crosscut was diverted towards the pillar line and some of it was diverted in another direction. The Itmann officials felt that if the readings had been taken in the crosscut before the air flow reached the split point, the readings would have shown them to be in compliance with the regulation.

Mr. Bowman, Mr. Coleman, and another Itmann official, Mr. Woods, then crawled across the longwall face to the tail of the longwall. Mr. Bowman discovered that there was a "panhandle" of uncut coal at the tail which had been formed during the mining process by not allowing the longwall shear to cut completely across the face. By reducing the distance which the shear traveled on each pass across the face, a solid block of coal about 20 feet long had been created at the tail. There were two small blast holes in this piece of coal. Mr. Bowman felt that this panhandle reduced the amount of air which traveled across the face, and that this was one reason why the air at the split point near the longwall head was diverted away from the intake end of the pillar line. He was told that the panhandle was created so that the longwall machine could not cut into an

adjacent area where a roof fall had occurred. This roof fall can be seen on the left of Exhibit No. 2.

The inspector returned to the other side of the longwall and took an air check immediately outby the split point, where the rest of the air was diverted. He found that between 6,000 and 6,250 CFM were moving through that area.

Mr. Bowman then took a reading at the "total intake" point marked on Exhibit No. 2. This reading was approximately 14,200 cubic feet of air per minute. Putting these two readings together, Mr. Bowman was convinced that a violation existed. He testified: "Through subtraction, you can tell by that that you are going to have low air at the intake end of the pillar line, and that doesn't even take off where the leakage that you get through the other checks and stoppings."

The inspector stated that he issued the order verbally at 1640 hours on November 29, 1979, by informing Mr. Coleman and Mr. Woods of its issuance. He stated that it was normally not his procedure to issue orders in writing until he reached the surface of the mine. He also stated that the abatement of the order was issued at 2130 hours, also verbally. Mr. Bowman could not remember whether he issued the written order on that day or on the following day. He stated that in situations where he does not have printed order forms with him, he ordinarily writes the order on a yellow slip of paper and leaves it with the operator. However, he did not believe he followed this procedure in this situation.

The inspector abated the order after the operator used explosives to remove the panhandle and leveled the rock in the crosscut immediately outby the longwall head. Mr. Bowman then obtained an air reading of approximately 9,700 CFM. The operator also cut a stall chute, which is a small mining entry at the tail end of the longwall perpendicular to the face, which maintained the proper ventilation until the men got past the roof fall at the tail end.

Mr. Bowman testified that in his opinion this was an unwarrantable failure violation for several reasons. First, the operator was required to conduct a preshift examination of the working face and to take an air reading at the intake end of the pillar line. Mr. Bowman felt that the day shift boss had taken the air reading in the wrong location and was aware of the situation at the tail end of the longwall face. Mr. Dickerson later told Mr. Bowman that he had made his preshift examination approximately one hour before Mr. Bowman arrived at the scene. Second, Mr. Bowman was told by the mine foreman, Jim Justice, that there were roof falls in the area which were affecting the ventilation to the face. Mr. Bowman also felt that the operator was taking his preshift readings in the wrong area because even after the violation was abated, he obtained a reading of approximately 9,700 CFM, significantly less than any of the readings which were recorded in the preshift examiner's report book.

According to Mr. Bowman, this mine liberates approximately 1,600,000 cubic feet of methane in a 24-hour period. This

information was obtained from laboratory analyses of air samples taken in the mine. He added that when he was on the section, he made several methane checks and detected concentrations

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as high as one-half percent. Mr. Bowman felt that the lack of ventilation in the area could have contributed to a methane buildup in an area which was inaccessible due to the roof falls. This could have led to a "severe explosion," and Mr. Bowman discussed several possible ignition sources in the area. In addition to this hazard, Mr. Bowman felt that the lack of proper ventilation in the longwall area contributed to excessive concentrations of respirable coal dust in the atmosphere.

On cross-examination, Mr. Bowman repeated that there were no men working in the section when he made his air measurements. He also reiterated that the order was issued and abated verbally, but he was still unsure as to exactly when he issued the written order.

Respondent's first witness was Donny Coleman, an Itmann safety official. He stated that around 3:00 p.m. on November 29, 1979, Mr. Bowman arrived at the mine and informed Mr. Coleman that he wanted to investigate something in the mine. Since the miners on the day shift were coming out of the mine at that time, it was close to 4:00 p.m. before the men could go down into the mine. They proceeded to the Cabin Creek 6 Panel on the longwall section, arriving there around 4:15 or 4:20 p.m.

Mr. Coleman stated that Mr. Bowman took an anemometer reading and a smoke cloud reading. On the basis of the smoke cloud reading, he determined that there were approximately 7,350 CFM present at the intake end of the pillar line. Mr. Bowman also told Mr. Coleman that based upon the anemometer reading and certain mathematical calculations, he found approximately 7,448 cubic feet of air per minute in the area. Mr. Coleman testified that Ernie Woods, another Itmann official, then took two air readings, one at the intake end of the pillar line, and the other outby that point in the crosscut through which the air passes just before it reaches the split point. The points where Mr. Woods took his readings are marked "A" and "B", respectively, on Exhibit No. 2. Mr. Coleman did not testify as to the results of the readings which Mr. Woods took. He did state, however, that there was considerable discussion as to where the "total air intake" reading should be taken. He disagreed that the proper place to take such a reading was the place designated on Exhibit No. 2 by Mr. Bowman. Mr. Coleman felt that this reading should be taken just before the split point where Mr. Woods had taken his "B" reading.

Mr. Coleman denied that Mr. Bowman ever told him that a Section 104(d)(2) order was being issued. He stated that he had been with Mr. Bowman on several previous occasions when the inspector had issued such an order, and that it was Mr. Bowman's custom to hang a red tag on the area affected by the order. Mr. Coleman stated that this procedure had been followed by Mr. Bowman on seven or eight occasions in the one-year period prior to November 29, 1979. Mr. Coleman also discussed the "panhandle" which was created by the longwall machine. He stated that on each pass of the longwall shear across the face, the shear would be stopped a few feet short of the tail end, thus creating a

stump of coal. The purpose of allowing this panhandle to develop was to keep the machine from cutting into the area of the roof fall at the tail end of the

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face where rock could fall in on the machine. Mr. Coleman disagreed with Mr. Bowman as to the width of the panhandle at the time of the inspection. Mr. Coleman contended that the block of coal was only four to six feet wide at that time. He stated that the panhandle would later be removed with explosives and the area shoveled out. In this manner, proper ventilation to the face area would be maintained.

Mr. Coleman also discussed the fact that the operator was required by law to check the face area every two hours for sufficient air flow and for methane. He stated that the day shift foreman would not continue to mine in that area if the air readings fell below 9,000 CFM or if the methane content exceeded one percent.

Throughout his testimony, Mr. Coleman maintained that he was never told by Mr. Bowman that a Section 104(d)(2) order was being issued. However, he did state that after Mr. Bowman took his first air reading showing the air flow to be below 9,000 CFM, Mr. Bowman stated: "This could be an order." Mr. Coleman denied that Mr. Bowman ever stated that he actually was issuing an order. He also denied that a written order was issued to the operator that evening. He added that Mr. Bowman was at the mine for approximately five hours on the following day, November 30, and still did not issue a written order. Finally, around 3:30 p.m. on that day, Mr. Bowman stopped by the mine on his way home and issued a written copy of the order in question, as well as two miscellaneous citations.

Itmann's next witness was Harry Farmer. At the time the order was issued, Mr. Farmer was the general superintendent of the Itmann No. 3 Mine. He testified that the order was not issued on the evening of November 29, when Mr. Bowman first inspected the Cabin Creek 6 Panel. He said Mr. Bowman returned to the mine the following morning for a follow-up inspection of the panel. Again, according to Mr. Farmer, no order was issued, although the possibility of an order was discussed by Mr. Bowman and Mr. Farmer. Mr. Farmer further testified that Mr. Bowman left the mine to change clothes and returned there around 3:00 or 3:00 p.m. It was at this time that company officials first received a copy of the order.

David Bailey, the superintendent of the Itmann No. 3 Mine, testified that Inspector Bowman arrived at the mine at 2:00 or 2:30 p.m. on November 29, 1979, and told company officials that he wanted to go into the mine. Donny Coleman accompanied the inspector. By way of telephone, Mr. Bailey later learned that Mr. Bowman was checking on a possible ventilation problem at the Cabin Creek 6 Panel. However, he was not informed of the issuance of any unwarrantable failure order, and none of the procedures which the company established in such situations were put into effect. Mr. Bailey testified that although no verbal or written order was issued that night, the men did discuss the possibility of an order for an unrelated violation near the longwall panel. It was not until around 3:00 p.m. on November 30 that Mr. Bailey learned that an order was issued relating to the

ventilation situation at the panel. At that time, Mr. Bowman came to the mine in his street clothes with a written copy of the order.

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Mr. Bailey further testified that he was informed of a low air volume reading of approximately 7,200 CFM in the area of the Cabin Creek 6 Panel. He stated that the foreman of the day shift, which came out of the mine shortly before Inspector Bowman went in, had shot the panhandle at the tail end of the longwall. This was after the day shift had completed its required ventilation checks. Mr. Bailey felt that even if the ventilation dropped to 7,200 CFM, the company was not in violation of the standard because no coal was being mined at that time. He added that normal ventilation was restored when the next shift cleaned up the coal that accumulated when the panhandle was shot.

Mr. Bailey also read several excerpts from company records which indicated that the ventilation in this section of the mine around the time in question was never low, and that there was no evidence of a methane problem. Based on this data, he concluded that there was no basis for the inspector's allegation that there were low air readings in the section for any period of time, or that there was a methane problem in the section. He also stated that the proper place to take an air reading in this section was in the first crosscut outby the longwall face (marked "B" on Exhibit No. 2).

Jerry Dickerson testified that he was the shift foreman on the November 29, 1979, day shift. He stated that around 2:30 p.m. that afternoon, he recorded an air reading of 12,600 CFM at the intake end of the longwall. This reading was taken in preparation for shooting the panhandle which had formed at the longwall tail. He shot the block of coal around 3:20 p.m., and then crawled approximately 500 feet back across the face to the longwall head. He stated that he was not required by law to take any more air readings. Since it was near the end of the shift, he told Ernie Woods, the shift foreman on the evening shift, to clean up the coal which Mr. Dickerson had shot.

Mr. Dickerson also testified that the proper place to take a "total intake air reading" in this type of section was the point marked "B" on Exhibit No. 2, and the proper place to take an intake reading for purposes of 30 C.F.R. 75.303 was the point marked "A" on this exhibit. He added that he got the 12,600 CFM reading at point "A."

Asked if he knew or should have known that the air was inadequate when he left the mine, Mr. Dickerson replied: "There is no way that I could tell the difference" in the air flow.

Itmann's final witness was Ernie Woods, who was the section foreman on the longwall evening shift on November 29, 1979. Before going into the section, he was contacted by Mr. Dickerson, who told him about the need to clean up the coal at the tail of the longwall. He stated that he arrived at the section around 4:45 p.m. on that afternoon and found Inspector Bowman and Mr. Coleman were already there. Mr. Woods was informed by Mr. Bowman that there was insufficient air on the section and Mr. Woods began to take anemometer readings. He got a reading of 6,800 CFM and told his men to check the ventilation curtains to make sure

they were in place. He then crawled to the tail end of the longwall with Mr. Bowman and discovered the loose coal

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which Mr. Dickerson had shot on the previous shift. After approximately an hour to an hour and a half of shooting and shoveling the coal at the tail, Mr. Woods was able to reestablish a sufficient air flow. This was at around 6:45 or 7:00 p.m.

Mr. Woods stated that Mr. Bowman did not tell him about the issuance of an unwarrantable failure order and that he did not hear Mr. Bowman tell anyone else in the immediate area or within hearing range about such an order. During the period when he was cleaning up the coal, the face conveyor of the longwall was operating. Mr. Woods stated that Mr. Bowman would not have allowed the men to run this electrical equipment if they were shut down for an unwarrantable failure order. On cross-examination, however, he admitted that MSHA inspectors allowed the operator to run conveyors during the abatement of accumulation violations so that accumulations could be removed. Mr. Woods agreed with Mr. Dickerson that the place to take a "total intake" reading was the point marked "B" on Exhibit No. 2, and the "intake on the head" point was marked "A."

Inspector Bowman was recalled as a rebuttal witness for MSHA. He disagreed with the testimony of Itmann's witnesses concerning the effect which the shot fired by Mr. Dickerson had on the ventilation. Mr. Bowman believed that such a shot would increase rather than decrease the amount of air flowing across the face, since it would spread the material around and open up the area.

With respect to the actual issuance of the withdrawal order, Mr. Bowman stated that he issued it verbally on the section and that he was "reasonably sure" that he issued it in writing that night. He noted that Citation No. 657833, which would be the next citation in the inspector's book of consecutively numbered forms, was issued on the evening of November 29. He also identified Citation No. 657834, saying it was issued around 1:20 p.m. on November 30, 1979.

Donny Coleman was recalled as a rebuttal witness for Itmann. He reiterated his earlier testimony that he was not given a copy of the written order until approximately 3:30 p.m. on November 30. However, he also testified that Citation Nos. 675833 and 657834 were served to him at the same time.

Fact of Violation

I find that Itmann violated 30 C.F.R. 75.301 as alleged. The company did not challenge the inspector's finding that the flow of air at the point marked "A" on Exhibit No. 2 was less than the 9,000 CFM required by the regulation. I also find that this was the proper place to determine the "quantity of air reaching the intake end of [the] pillar line" within the meaning of the standard.

Itmann argued that this finding alone does not automatically mean that the company violated Section 75.301. At the hearing, Itmann cited "the spirit

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of the law that runs through the Section 75.300's, which is the subpart D of the regulations dealing with the ventilation * * *." Counsel for Itmann attempted to draw a comparison between Section 75.301 and Section 75.308, dealing with methane accumulations in face areas. Specifically, he argued that a violation of Section 75.308 exists only "if a mine operator, upon becoming aware of the presence of 1.0 volume percent or more of methane at a working place," fails to take a series of remedial actions. These include making immediate changes or adjustments in the ventilation of the mine, cutting off electrical equipment, stopping all work in the affected area, taking precautions to prevent other areas of the mine from becoming endangered, and withdrawing miners from areas where the methane content is 1.5 percent or higher. Counsel argued that the same criteria should be applied in determining if a violation of Section 75.301 occurred.

I have reviewed Itmann's argument on this point and find it is without merit. The comparison between Section 75.301 and Section 75.308 does not withstand analysis. Section 75.308 reads as follows:

If at any time the air at any working place, when tested at a point not less than 12 inches from the roof, face, or rib, contains 1.0 volume per centum or more of methane, changes or adjustments shall be made at once in the ventilation in such mine so that such air shall contain less than 1.0 volume per centum of methane. While such changes or adjustments are underway and until they have been achieved, power to electric face equipment located in such place shall be cut off, no other work shall be permitted in such place, and due precautions shall be carried out under the direction of the operator or his agent so as not to endanger other areas of the mine. If at any time such air contains 1.5 volume per centum or more of methane, all persons, except those referred to in section 104(d) of the Act, shall be withdrawn from the area of the mine endangered thereby to a safe area, and all electric power shall be cut off from the endangered area of the mine, until the air in such working place shall contain less than 1.0 volume per centum of methane.

In brief, this standard provides on its face that specific remedial actions must be taken when methane concentrations reach a certain level. The standard does not say that a violation occurs as soon as such levels of methane are detected. In sharp contrast, the relevant part of Section 75.301 provides that "the minimum quantity of air reaching the intake end of a pillar line shall be 9,000 cubic feet a minute." [Emphasis added.] The language of this regulation is mandatory, and there are no qualifications on it. Therefore, I reject Itmann's argument and find that a violation of Section 75.301 occurred.

The Unwarrantable Failure Issue

In Eastern Associated Coal Corp., 3 IBMA 331, 356 (1974),
the Interior Board of Mine Operations Appeals stated that an
unwarrantable failure finding

must be upheld where, "on the basis of the evidentiary record, a reasonable man would conclude that the operator intentionally or knowingly failed to comply or demonstrated a reckless disregard for the health or safety of the miners." [Emphasis in original; footnotes omitted.] Similarly, in *Zeigler Coal Company*, 7 IBMA 280, 295-96 (1977), the Board held that an inspector should make a finding of unwarrantable failure "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 lack of reasonable care."

In this case, I do not believe MSHA has sustained its burden of showing that Itmann's violation of the standard was unwarrantable. I find the air blockage which resulted in the ventilation problem was caused by Mr. Dickerson's shooting the panhandle at the end of the day shift. He stated that before the shot, he obtained an air reading of 12,600 CFM, but that he did not take an air reading after shooting the coal. When Mr. Woods' shift came on, the air was down to 6,800 CFM. The men on Mr. Woods' shift immediately went about the task of cleaning up the panhandle area and restoring a proper air flow. Based on this sequence of events, I do not believe the violation of the standard was intentional or knowing or that it demonstrated a reckless disregard for the safety or health of the workers. I accept Mr. Dickerson's testimony that the reduction in air flow was not noticeable without taking an anemometer reading. I further find that Mr. Woods did not have enough time to take his regular preshift reading before being told by Inspector Bowman of the problem. In short, while a violation of the standard occurred, the operator was, at the most, ordinarily negligent. Under these circumstances, the unwarrantability finding must be vacated.

Issuance of the Order

Section 104(a) of the Act provides that citations must be issued "with reasonable promptness." Inspector Bowman stated that he issued the order verbally to Mr. Coleman and Mr. Woods at 4:40 p.m. on November 29, 1979. He was unable to recall when he issued the written order. Mr. Coleman testified that the inspector told him the situation could be an order, but not that it was an order. Mr. Woods did not recall any discussion of an order at the site. The earliest time when the parties can be said to agree that the written order was issued was around 3:00 p.m. the next day, November 30.

Regardless of what transpired underground on November 29, I believe the order was issued with reasonable promptness. The testimony concerning the oral issuance of the order is conflicting, but I do not believe that 24 hours is an undue period of time to elapse before the issuance of a written order. Such orders are carefully scrutinized by operators for the correctness of the information contained therein. In my view, Mr. Bowman wanted to be sure the order was issued on an

appropriate form and that the information in it was correct. He undoubtedly realized that a contest proceeding such as this might result, and that the order which he issued would be an important document in such a proceeding. I also do not believe Congress intended that the "reasonable promptness" standard be construed strictly against MSHA. The last

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sentence of Section 104(a) reads: "The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act." Therefore, I find that the validity of the order is not affected by the method in which it was issued.

Civil Penalty to be Assessed

As stated above, Itmann was negligent in allowing the ventilation in the relevant area to drop below the required minimum. The gravity of the violation was serious since a methane buildup could have occurred and resulted in an explosion. Itmann is a large operator and the assessment of a civil penalty in this matter will not affect its ability to remain in business. The parties stipulated that during the 24-month period preceding the issuance of this order, there were a total of 856 inspection days during which the company had a total of 439 assessed violations. Based upon the criteria in 30 C.F.R. 100.3(c), I find this to be a good prior history. The violation was abated in good faith.

In light of these considerations, I assess a penalty of \$1,000 for this violation.

ORDER

Order No. 657832 is AFFIRMED insofar as it alleges a violation of 30 C.F.R. 75.301. The order's finding that this violation resulted from an unwarrantable failure of the operator to comply with the standard is VACATED. Itmann is ORDERED to pay \$1,000 in penalties within 30 days of the date of this Order.

Edwin S. Bernstein
Administrative Law Judge

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APPENDIX
TABLE