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

ITMANN COAL COMPANY, APPLICANT	Contest of Order
v.	Docket No. WEVA 80-226-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Itmann No. 3 Mine

DECISION

Appearances: Karl T. Skrypak, Esq., Counsel for Itmann Coal Company, Pittsburgh, Pennsylvania, for Applicant
Michael Bolden, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent

Before: Judge William Fauver

This proceeding was brought by Itmann Coal Company under section 105(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., to review an order of withdrawal issued by a federal mine inspector under section 104(d)(2) of the Act. The case was heard at Charleston, West Virginia. Both parties were represented by counsel, who have submitted their proposed findings, conclusions, and briefs following receipt of the transcript.

Having considered the contentions of the parties and the record as a whole, I find that the preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. At all pertinent times, Applicant, Itmann Coal Company, operated a coal mine known as the Itmann No. 3 Mine in Wyoming County, West Virginia, which produced coal for sales in or substantially affecting interstate commerce.

2. The Cabin Creek belt conveyor at Mine No. 3 is about 1,300 feet long. The mine liberates about 1,600,000 cubic feet of methane in a 24-hour period and there are extra exhaust fans at the tailpiece to draw methane out of the mine.

3. On January 21, 1980, federal inspector James F. Bowman checked Applicant's mine report books and noticed and entry on January 10 that the Cabin Creek crossbelt conveyor needed rock dusting. No subsequent entry showed that action had been taken to rock dust this area. A notation on the evening shift on January 11 read: "The CC5 cross needs cleaning between the airlocks and rock dusting." There was a similar entry for the evening shift on January 17. On the day shifts of January 11 and January 17, 1980, Charles Martin apparently rock dusted the Cabin Creek 5 panel crossbelt. Applicant's Exhibit No. 5 is a statement by Charles Martin that he rock dusted the Cabin Creek 5 crossbelt on January 11. The corrective action for January 17 was not reported in the books until after the January 21 inspection.

4. Normally, a certified belt examiner inspects the mine to see that surfaces are rock dusted and, if rock dusting is needed, he makes a notation in the report books. Regular employees are not authorized to change the report books so that, even if the condition has been corrected, the belt examiner's notation in the report books remains unchanged until he makes another inspection of the area and is satisfied that surfaces are rock dusted.

5. Inspector Bowman told Mr. Donnie Coleman, Applicant's safety supervisor, about the entries in the books and said that he wanted to see why no action had been taken. The inspector prepared to go underground with his rock-dust kit, which contained a 20-mesh screen to screen out oversized particles, a small collecting pan, and a brush.

6. Inspector Bowman and Mr. Coleman inspected the Cabin Creek belt beginning at the 6 panel 1 header 5 panel cross tailpiece. There were two electricians working on a transformer when they arrived and the belts were in operation.

7. They proceeded from the tailpiece along the left side of the belt for about 100 feet and came to a series of cribs just beyond two rectifier starting boxes. The inspector observed float coal dust in this area, and took a "skim" sample from the cribs. A skim sample is a sampling technique generally used to test float coal dust. This method is not described in the MSHA inspectors' Underground Manual, but it is taught to inspectors in training courses. The sample is taken by brushing into the collection tray an area of float coal dust about 6 inches wide and one-sixteenth to one-eighth inch deep. The inspector placed the samples in a plastic bag and sealed the bag. He did not first pass the sample through a screen.

8. They proceeded along the belt to an entry about 20 feet from an airlock. The inspector took a skim sample of float coal dust from cinder blocks that had been removed from a stopping and stacked in the entry. The inspector also took a skim sample from behind a crib about 10 feet from the cinder blocks. He placed both samples in a bag and marked the bag.

9. Inspector Bowman and Mr. Coleman continued along the

belt and, between the last area he sampled (above) and an airlock, the inspector observed that the floor was extremely black and that the ribs and roof were

covered with float coal dust. He also observed that the area beneath the accumulations had been rock dusted. The heaviest concentrations of float coal dust were near an airlock and a series of cribs; in this area he took a "half-floor" sample by scraping a band about 1 inch deep and 6 inches wide over half the floor width. He could not take a sample on the other side of the belt because the belt was in operation and there was no crossover and no cut-off switch to stop the belt. The cut-off switches are at either end of the belt. However, he could see accumulations on the other side. He screened the half-floor sample, placed it in a bag and tagged it for analysis.

10. About 600 feet from the above sample, the inspector took his last sample, which was another half-floor sample, inby the belt head near a 13,200-volt cable and underneath and on the right side of the belt, where he found accumulations of loose coal, coal dust, and float coal dust. The accumulations ranged in depth from a quarter of an inch to about 18 inches.

11. After the inspector took this sample, he told Mr. Coleman that he was going to issue a section 104(d)(2) order of withdrawal. He later issued the order that day. The order of withdrawal reads in part:

> Where rock dust was applied in Cabin Creek 5 cross belt conveyor entry it was not maintained to the required 65 per-centum. Samples were taken. The belt examiner's report book stated the conveyor entry needed rock dusted from the airlock to the tailpiece, a distance of approximately 600 feet and this violation had been repeatedly reported since 01-10-80, and no corrections were shown. The mine foreman and superintendent were countersigning the reports.

12. Inspector Bowman believed that the operator knew or should have known of the cited conditions and of the danger of accumulations of combustible material. Sources of ignition in the Itmann No. 3 Mine included belt idlers, high-voltage cables, belt-control cables, high-voltage transformers, open-type belt-control boxes, and a high spot at the tail of the Cabin Creek crossbelt that presented a methane problem.

13. It was the inspector's opinion that the accumulations occurred over at least 3 days with maximum production from all sections feeding that belt.

14. Frank Beard, vice president of Itmann Coal Company, was at the No. 3 Mine when Mr. Bailey told him that an order had been issued underground. He told Mr. Bailey not to let anyone perform any cleaning until he (Mr. Bailey) had a chance to inspect the cited area. Mr. Beard traveled the belt from the head to the tailpiece, observing the ribs, roof, floor and underneath the belt. When he reached the tailpiece, he turned around and walked back to the belt head, observing those areas again. In his opinion, the belt looked proper with the exception of an area at the airlocks and some gray areas at the tailpiece.

15. When Mr. Beard returned to the surface, he told his supervisor, Mr. Warren Sharpenberg, that the area was in good shape and the order should not have been issued. They decided to take their own representative band samples at 100-foot intervals from the belt head to the tailpiece. They believed these samples would be more accurate and more representative than the few taken by the inspector. Normally, Applicant took rock-dust samples every 200 feet.

16. On January 21, Mike Canada, a safety inspector for Itmann Coal Company, took 17 band samples along the Cabin Creek 5 panel crossbelt. He began taking samples about 21 feet inby the crossbelt drive and the last sample was taken 30 feet outby the tailpiece. The belt was not running, so that he could take samples on both sides of the belt.

17. There were no MSHA personnel or other company personnel present while he took the samples. He was aware of the areas examined by Inspector Bowman and he attempted to get samples from those areas. None of his samples cut directly over the inspector's samples; however, some were fairly close. One sample taken at an airlock was within 1 foot of the inspector's sample.

18. He followed MSHA's procedure for band sampling, making a trough across the floor that was about 1 inch deep and 6 inches wide.

19. The areas sampled by Mr. Canada appeared dry and well rock dusted, with the following exceptions: Generally, on the offside of the belt, which is not normally walked, it was dark gray at spot locations (a grayish color indicates that float coal dust is beginning to deposit on rock-dusted surfaces); the No. 6 sample appeared slightly damp and Mr. Canada observed a 12-foot spillage on the left side of the belt; the No. 9 sample appeared damp and black and he observed a film of float coal dust on the surface; the No. 10 sample appeared damp and float coal dust was measured at a one-half-inch to a one-fourth-inch over heavily rock-dusted surfaces; the Nos. 11 through 17 samples appeared dry with visible float coal dust. However, the laboratory analyses showed that all of Mr. Canada's samples exceeded 65 per centum in incombustible content, which is the minimum set by the safety standard.

20. Government Exhibit No. 3 is a record of the laboratory results of the samples taken previously by Inspector Bowman on January 21, and shows the following:

Sample No.	Area	Type	Percent Incombustible Content
1	100 feet outby tailpiece from crib	skim	58.3

2	40 feet inby airlock from cinder blocks	skim	50.0
3	10 feet inby airlock	half-floor	39.0
4	70 feet inby belt drive, offside	half-floor	19.0

21. The MSHA Underground Manual provides in relevant part:

> Collection of dust samples to determine the incombustible content. The usual samples of mixed dust should be collected by the band or perimeter method of the entry or room, including a 1-inch depth of the material on the floor. Dust from the roof, ribs and floor should be combined into one "band" sample. If the amount collected is more than required, the sample should be mixed thoroughly, coned and quartered to cut the bulk to the desired amount. Occasionally, it may be necessary to take more than one strip, but in such case, the total width of the strip must be the same for the roof, each rib and floor. The plastic bag shall be filled for at leat half the length of of the bag. Separate samples of dust from either the roof, ribs or floor may be collected when deemed necessary. Where the coalbeds are so thick that it is impractical and unsafe to collect full perimeter samples, the inspector shall collect a floor sample and a sample from the ribs to the maximum height at which this can be done safely and practicably. The rib sample and the floor sample may be either combined or prepared separately. When rib samples are collected and reported separately, the incombustible content of the rib sample may be assumed to represent the incombustible content of the entire rib and roof surface at the sampling location.

DISCUSSION WITH FURTHER FINDINGS

Based on the order of withdrawal issued on January 21, 1980, the Secretary has charged Applicant with a violation of 30 C.F.R. 75.403, which provides

> Where rock dust is required to be appiled, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 65 per centum, but the incombustible content in the return aircourses shall be no less than 80 per centum. Where methane is present in any ventilating current, the per centum of incombustible

> content of such combined dusts shall be increased 1.0 and 0.4 per centum for each 0.1 per centum of methane where 65 and 80 per centum, respectively, of incombustibles are required.

Applicant contends that the incombustible content of the Secretary's samples is inaccurate because the inspector did not follow the proper procedures for taking dust samples. Applicant argues that the two skim samples and the two half-floor samples represented less than 1 cubic foot in an entry of about 104,000 cubic feet and that Inspector Bowman's sampling techniques were arbitrary and capricious and not in accordance with the MSHA Underground Manual for inspectors. Applicant contends that its 17 band samples followed proper procedures and should be accepted over the government's samples.

The Secretary contends that Inspector Bowman's sampling techniques, although not stated expressly in the MSHA Underground Manual, "are used by the inspectors and are recognized in scientific literature." The Secretary argues that a charge of a violation of the cited standard depends initially on the inspector's visual observation, that the inspector observed many accumulations along the 1,300-foot belt, and that his observations and conclusions were later supported by laboratory analysis.

The usual method of collecting dust samples to measure incombustible content is the perimeter (or band-sample) method. The MSHA Underground Manual, which was published on March 9, 1978, considers the band sample the most accurate method of measuring incombustible content. However, the procedures outlined in the Manual are flexible and the half-floor and skim sample methods, although not contained in the manual, are recognized and approved procedures used by federal mine inspectors and are part of the inspectors' training course. In this case, there were reasonable grounds for the inspector's procedures: (1) a running conveyor and obstructions warranted the half-floor samples and (2) accumulations on the cribs and cinder blocks warranted the skim samples, since cribs and cinder blocks are not the floor, ribs or roof.

I find that the samples taken by Inspector Bowman are reliable, in accordance with accepted sampling procedures, and establish a violation of the rock-dusting standard. The accumulations observed by him, and confirmed by laboratory analysis, were visually evident and, by the exercise of reasonable care, should have been detected and corrected by the operator before the inspection. A finding of an unwarrantable failure to comply is therefore supported by the evidence. Also, the evidence of ignition sources and potential methane liberation in the areas of accumulation justify a finding that the violation could significantly and substantially contribute to the cause and effect of a mine safety hazard.

CONCLUSIONS OF LAW

1. The undersigned Judge has jurisdiction over the parties and the subject matter of the above proceeding.

2. The Secretary proved by a preponderance of the evidence that dust samples taken in the Cabin Creek 5 crossbelt conveyor entry in Applicant's No. 3 Mine were in excess of 65 per centum and that Applicant therefore violated 30 C.F.R. 75.403, as charged in Order of Withdrawal No. 657867. Several entries in the company's report books showed the need for cleaning and rock-dusting and, as of the January 21 inspection the books did not show that the cited areas had been rock-dusted.

3. The Secretary proved by a preponderance of the evidence that the violation was the result of an unwarrantable failure by the operator to comply with the rock-dusting standard.

4. The Secretary proved by a preponderance of the evidence that the violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard.

All proposed findings and conclusions inconsistent with the above are hereby rejected.

ORDER

WHEREFORE IT IS ORDERED that the order of withdrawal issued on January 21, 1980, is AFFIRMED and the contest of order for review thereof is DISMISSED.

WILLIAM FAUVER JUDGE