

U.S. Department of Labor

Office of Administrative Law Judges
Seven Parkway Center - Room 290
Pittsburgh, PA 15220

(412) 644-5754
(412) 644-5005 (FAX)



Issue Date: 10 May 2005

CASE NO. 2005-MSA-2

In the Matter of:

McELROY COAL COMPANY,
McELROY MINE
Petitioner

v.

MINE SAFETY & HEALTH ADMINISTRATION
Party Opposing Petition

and

HOYA CLEMONS (Miners' Representative)
Party-In-Interest

DECISION AND ORDER APPROVING SETTLEMENT
and
ORDER OF DISMISSAL

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 951-961 and its regulations, 30 C.F.R. Part 44. On January 5, 2004, McElroy Coal Company (Petitioner) petitioned the Mine Safety and Health Administration (MSHA) for modification of the application of 30 C.F.R. § 75.364(b)(2) and § 75.364(b)(4) to its McElroy Mine in Marshall County, West Virginia.

30 C.F.R. §§ 75.364(b)(2) and (b)(4) state:

(b) Hazardous conditions. At least every 7 days, an examination for hazardous conditions at the following locations shall be made by a certified person designated by the Operator:

(2) In at least one entry of each return air course, in its entirety, so that the entire travelway is traveled.

(4) At each seal along return and bleeder air courses and at each seal along intake air courses not examined under § 75.360(b)(5).

On September 2, 2004, MSHA denied the petition, stating the alternative method proposed by the petitioner does not provide for the same measure of protection afforded by the standard. On October 18, 2004, the Petitioner filed a request for a hearing with the Office of Administrative Law Judges. Subsequently, the case was assigned to the undersigned. A hearing

was scheduled for March 15-17, 2005 in Pittsburgh, Pennsylvania. On April 28, 2005, the parties jointly submitted a signed Settlement Agreement and Consent Findings for approval, pursuant to 30 C.F.R. § 44.27.

The parties also agree that:

1. The record on which this Order is entered includes consideration of the petition, the administrative record, the Proposed Decision and Order, and the special terms and conditions incorporated into the Agreement;
2. Any rule or order issued in this proceeding has the same effect as if made after a full hearing;
3. They waive any further procedural steps before the presiding Administrative Law Judge and the Assistant Secretary; and
4. The parties agree to waive any right to challenge or contest the validity of the findings and order made in accordance with the Agreement and recognize that this Agreement does not waive any party's right to petition to revoke this modification pursuant to 30 .C.F.R. § 44.52 should circumstances change.

ORDER

I have carefully examined the Settlement Agreement and Consent Findings between the parties. Following that review, I have concluded that the Settlement Agreement and Consent Findings are consistent with the requirement of 30 C.F.R. § 44.27, and therefore, are accepted. The petition of McElroy Coal Company in this matter is therefore dismissed. This Order constitutes the final agency action in this matter.


DANIEL L. LELAND
Administrative Law Judge

UNITED STATES DEPARTMENT OF LABOR

CASE NO. 2005-MSA-2

_____))
In the Matter of))
)) Petition for Modification
))
MCELROY COAL COMPANY, INC.)) MSHA DOCKET NO. M-2004-001-C
))
Petitioner.)) McElroy Mine
))
_____)

SETTLEMENT AGREEMENT AND CONSENT FINDINGS

After discovery, mine visits, and negotiations, the parties have reached an agreement in the above matter. Therefore, the parties submit to the following agreement and findings:

1. On January 5, 2004, McElroy Coal Company (hereinafter "McElroy" or the petitioner") petitioned the Mine Safety and Health Administration ("MSHA" or "respondent") under Section 101(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act) for a modification of the application of 30 C.F.R. § 75.364(b)(2) and § 75.364(b)(4) to its McElroy Mine, Marshall County, West Virginia. A copy of McElroy's petition is attached as Exhibit A. In sum, the petitioner alleged that due to a roof fall and a very heavy top, the area outby the No. 1 seal at One North Seals has deteriorated to the point that travel in that areas has become extremely hazardous. Attempts to rehabilitate

those areas would jeopardize the safety of persons working or traveling in those areas. The relevant entries do not return air that has passed through any active working section in the mine, thus eliminating the possibility of any float coal dust accumulation. Three citations were issued for the roof conditions and failure to travel the return in its entirety and to examine existing seals in the return.

2. The mandatory safety standards petitioned to be modified, 30 C. F. R. § 75.364(b)(2) and (b)(4), state in pertinent part:

(b) *Hazardous conditions.* At least every 7 days, an examination for hazardous conditions at the following locations shall be made by a certified person designated by the operator:

.....

(b)(2) In at least one entry of each return air course, in its entirety, so that the entire travelway is traveled.

(b)(4) At each seal along return and bleeder air courses and at each seal along intake air courses not examined under § 75.360(b)(5).

3. MSHA examined McElroy's proposal, conducted a field investigation, and issued a Proposed Decision and Order denying the modification petition on September 2, 2004. At that time,

MSHA concluded that, although rehabilitation of these areas may be considered hazardous, similar rehabilitation projects had been successfully accomplished at this mine during normal mining operations. For example, when a roof fall had blocked the No. 5 Main Belt Entry it was cleared and rehabilitated without injury to any worker. MSHA was also concerned that, under the proposed alternative method, there was no effective evaluation of the seals and the aircourses between the seals and the stoppings separating the track entry to which leakage of noxious and explosive gases could occur. Therefore, on September 2, 2004, McElroy requested a hearing on the petition on September 28, 2004.

After a mine visit by MSHA officials on February 17, 2005, it was determined that the roof conditions had deteriorated further requiring extensive clean-up and that not all the seals could be evaluated safely at that time. Further exchange of discovery had occurred in which McElroy proposed additional measures and, after the most recent mine site visit, MSHA proposed additional measures to address its safety concerns specific to this mine and its conditions.

4. Whereby, the parties have resolved their dispute concerning the petition and agree that McElroy may employ an alternative to complying with 30 C.F.R. §75.364(b)(2) and (b)(4) in the One

North Seals of the McElroy Mine. The alternative method will be as set forth in McElroy's petition as modified with required terms and conditions as follows:

(A) Air monitoring stations must be established at the following locations:

1. Station Number 1 shall be located in the air course outby the Number One seal. (See Map, Exhibit A, attached).

2. Station Number 2 shall be located in the entry toward Main East inby the Number Six seal of One North Seals. (See Map, Exhibit A).

3. A monitor connected to the mine-wide monitoring system must be located at Station No. 2, in the airflow on the downwind side of the sealed area as shown on Petitioner's Exhibit A, and must continuously monitor for methane and oxygen with alert levels at 1% methane and alarm levels at 1.5% methane and 19.5% oxygen.

4. When alert levels at the monitor are reached, a certified person must immediately investigate the affected area to evaluate the condition. At alarm levels, power must be de-

energized to the adjacent track entry and all miners must be evacuated from the affected area. No miners shall be permitted to enter the area except for those persons necessary to correct the conditions.

5. If investigation at the alert levels determines that the seals are compromised or are not functioning for the intended purpose of separating active areas from the worked-out areas for ventilation purposes, then the areas petitioned must be resealed in accordance with applicable standards.

6. It is agreed that the monitor at Station 2 is not to be considered a designated atmospheric monitoring system under MSHA regulations; however, McElroy agrees to the following:

a) The monitor utilized must be of a type approved by the Secretary of Labor and appropriate for the use for which it is to be installed.

b) The monitor must be installed as part of the McElroy's mine-wide monitoring system such that methane and oxygen will be monitored continuously.

c) The monitor must be installed by qualified persons and must be maintained in safe operating condition.

d) The monitor must be calibrated every 31 days in accordance with manufacturer specifications, by a qualified person, and with known concentrations of methane and oxygen.

e) All calibrations and daily examinations of the monitor will be recorded.

f) If alert or alarm levels are reached, they will be recorded.

(B) All monitoring stations and the approaches to such stations shall at all times, be maintained in a safe condition.

(C) Tests for methane, oxygen, and quantity and quality of air shall be determined daily by a certified person at each station. The date, initials of examiner, time, and results of these evaluations shall be recorded in a book, or on a date board, that shall be provided at the monitoring stations. Such results shall also be recorded in a book kept on the surface and made accessible to all interested parties.

(D) A diagram showing the normal direction of the air current flow at each station shall be posted at each monitoring station. Such a diagram shall be maintained in a legible condition. Any change in the flow of the air currents shall be reported to the mine foreman for immediate investigation.

(E) Methane gas or other harmful, noxious, or poisonous gases shall not be permitted to accumulate in this airway in excess of legal limits. An increase of 0.5 percent methane above the last previous methane reading shall cause an immediate investigation of the affected area. If, at any time, the air quantity at any of the monitoring stations indicates a change in air quantity of ten percent, an immediate investigation of the affected area shall be conducted.

(F) The monitoring stations shall be shown on the mine ventilation map and shall be a part of the approved ventilation plan for the mine.

(G) McElroy must also have:

a certified person

(1) conduct a daily inspection of seal six,

(2) take air readings at monitoring stations 1 and 2 designated in the area as part of a daily examination, and

(3) conduct a pre-shift examination of the five stoppings that are constructed between the track entry and the seals in question to ensure that there is no migration of noxious or potentially hazardous gas from inby the seals to the track entry area;

and must ensure that:

(4) The five stopping areas separating the track entries and the seals are cleaned of extraneous materials and have adequate roof support above them to permit adequate access to and examination of the stoppings

(H) McElroy must install a magnehelic gauge in one of the stoppings, and inspect it as part of the pre-shift inspection and provide immediate notice of any migration of gases through the seals and stoppings.

(I) Additionally, McElroy must monitor for the existence of water accumulation by way of a test pipe which is currently in seal six.

5. The parties and parties in interest likewise agree that these agreed upon changes to the MSHA conditions are and do assure adequate protection to miners and will at all times guarantee to the miner at the affected mines at least the same measure of protection afforded to the miners by the standards set forth in 30 C. F. R. § 75.362(b) (2) and (b) (4).

6. This Order shall have the same effect as if made after a full hearing.

7. The entire record on which the Order is based shall consist solely of the Settlement Agreement and Consent Findings and other non-conflicting information included in the petition and the administrative record.

8. The parties waive any further procedural steps before this Court.

9. The parties waive any rights to challenge or contest the validity of this order and decision entered into in accordance with this Settlement Agreement and Consent Findings and recognize that this agreement does not waive any

party's right to petition to revoke this modification pursuant to 30 C. F. R. 44.52 should circumstances change.

Accordingly, the parties hereby stipulate and agree that the above-captioned proceedings shall be, and hereby are, dismissed as ordered by the administrative law judge in approving the agreement and consent findings.

Respectfully submitted,

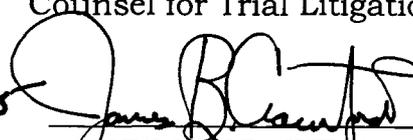
Administrator for Coal Mine Safety and Health

HOWARD RADZELY
Solicitor of Labor

EDWARD P. CLAIR
Associate Solicitor

MARK R. MALECKI
Counsel for Trial Litigation


Date: 4/14/05
Rodger L. Puz
Counsel for Petitioner
Dickie, McCamey & Chilcote, P.C.
Two PPG Place, Suite 400
Pittsburgh, PA 15222


Date: 4/14/05
JAMES B. CRAWFORD
Attorney for the
Administrator
1100 Wilson Blvd., 22nd Floor
Arlington, Virginia 22209-2247


Date: 04/14/05

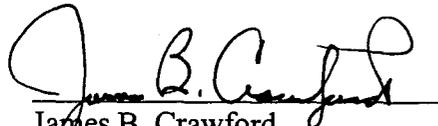
Hoya Clemons
For the Party-in-Interest United Mine Workers of America

CERTIFICATE OF SERVICE

The undersigned certifies that service of the Settlement Agreement and Consent Findings of Fact was made by facsimile and by U. S. mail, postage prepaid, on this 15th day of April, 2005, upon: *by original sent by u.s. mail, 1st class on 25th April 2005 JBC*

Rodger L. Puz
Dickie, McCamey & Chilcote.
Two PPG Place, Suite 400
Pittsburgh, Pennsylvania 15222-5402

Hoya Clemons
Miners' Representative
3509 Wood Street
Wheeling, WV 26003


James B. Crawford
Trial Attorney

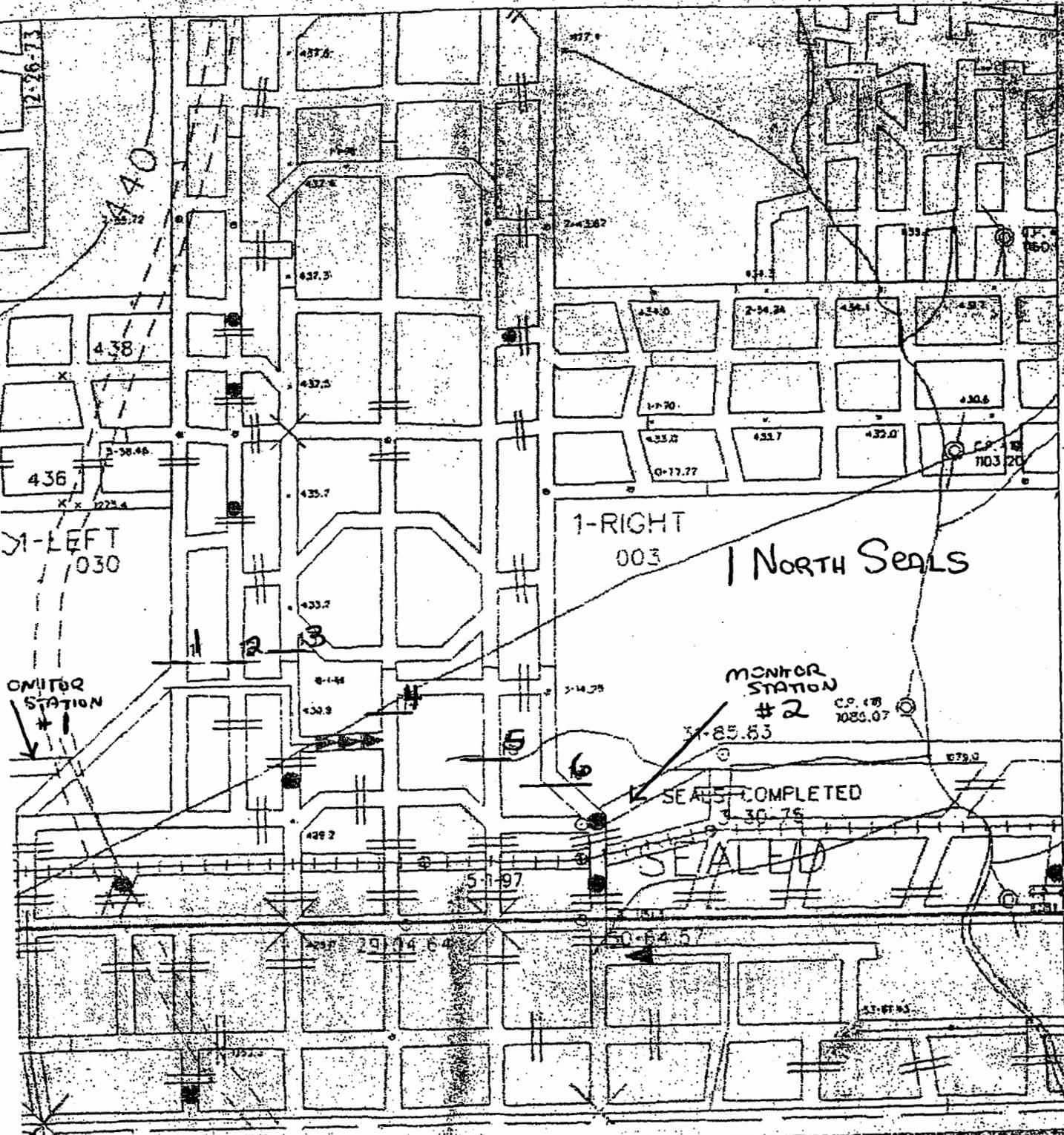


EXHIBIT A