CCASE:
PEABODY COAL V. SOL (MSHA)
DDATE:
19790629
TTEXT:

Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

PEABODY COAL COMPANY, APPLICANT	Application for Review
v.	Docket No. DENV 78-557 Order No. 390240; 8-1-78
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Seneca Surface Mine
AND	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. DENV 79-286-P A/O No. 05-00304-03001
v.	Seneca Strip Mine
SENECA COALS LIMITED, RESPONDENT	

DECISION

Appearances: Thomas F. Linn, Esq., Peabody Coal Co., Denver, Colorado, for Applicant/Respondent
Robert A. Cohen Esq., Office of the Solicitor, U.S. Department of Labor, for Respondent/Petitioner

Before: Judge Chares C. Moore, Jr.

The two above-captioned cases involve, one order of withdrawal and a review thereof, plus a penalty case involving the same order. The fact that the names of the operator's of the mines in the two cases are different is a technicality which is unimportant to this decision. It was agreed at the hearing that Peabody Coal Company is the operator and is therefore both the applicant in the review case and the respondent in the penalty case.

On August 1, 1978, Inspector Padgett issued order of withdrawal No. 390240 because a bulldozer was observed building a road in the middle of a blasting area on the high wall within 3 to 5 feet of charged holes. The order was issued under 107(a) of the Act as an imminent danger, but also charged a violation of 30 CFR 77.1303(g). The inspector later modified his order at the instructions of his superior to state that the blasting holes were, "loaded holes" rather than "charged holes" as he had stated in the original order.

Government's Exhibit No. 2 is a sketch of the area involved in the violation. The exhibit shows the blasting pattern and indicates each hole that was included in that pattern as well as which holes were completely packed with explosives, which holes had booster type primers stored near them and which had merely been drilled but not further prepared for blasting. The exhibit shows and the testimony supports the fact that the bulldozer operator did build a road between rows of holes and that there were nine loaded holes on his right-hand side and three loaded holes on his left-hand side. At this point in this decision, I am using the term "loaded hole" to describe a hole in which detonating cord (Primacord) has been secured to a booster primer and lowered to the bottom of the hole, ammonium nitrate slurry or ANFO has been added on top of the primer, the hole has been tamped and a short length of the primacord is sticking out of the top of the hole.

In view of the fact that the columns of holes where 25 feet apart and the bulldozer blade was approximately 14 feet across, if the dozer operator stayed exactly in the middle, his blade would have been within 5-1/2 feet of the loaded holes on each side of the blade. When the order was issued, the bulldozer operator was backing between the loaded holes towards 2 cases of primacord that he had not noticed when he came into the area but boxes which he might or might have not seen if he had continued to back out between the loaded blasting holes. The question is whether or not this situation constituted an imminent danger and whether or not it involved a violation of 30 CFR 77.1303(g).

The regulation alleged to have been violated states: "Areas in which charged holes are awaiting firing shall be guarded, or barricaded and posted, or flagged against unauthorized entry." While there is a dispute about whether holes which have been loaded with explosives but not fitted with a detonating device are charged holes awaiting firing, there's no question but that this particular area was posted and flagged against unauthorized entry. The inspector and the other witnesses so testified. The posting against unauthorized entry, regardless of whether an unauthorized vehicle actually enters, prohibits the finding of a violation of this section. The section requires posting and the area was posted. It was the inspector's position that a violation occurred because the bulldozer operator was unauthorized to enter the area, but he was in fact clearly authorized and ordered to enter the area by an assistant supervisor at the mine. Whether he should have been authorized is another question but there is no doubt but that he was in fact authorized.

I am furthermore convinced that a charged hole awaiting firing is a hole which has not only been loaded with explosives but is also equipped with some sort of firing device, meaning either a blasting cap or a similar device with a time delay mechanism contained therein. This view is supported by the recommended decision of Judge Switzer promulgated on November 16, 1977, involving proposed amendments to

rules for metal and nonmetal mining encompassed in 30 CFR 55, 56, and 57. It is also supported by the memorandum of September 9, 1974, from the Assistant Administrator of Coal Mine Health and Safety which contains the following paragraph: "For the present, we will define a "loaded hole" as one that contains explosives or blasting agents with a primer and that it does not become a "charged hole" until a detonator is introduced into the system." (See p. 2 of Petitioner's Exhibit No. 1). That same exhibit states that public hearings were scheduled in November 1974, for the purpose of amending 30 CFR 77.1300 to include a definition of "charged hole" to mean any hole containing explosives or blasting agents with a primer. If the rule had been promulgated, as proposed, it would be clear that MSHA was correct and that a hole with everything but the detonator could be considered a charged hole. The rule was not amended, however.

MSHA did place in its inspector's manual published March 9, 1978, (Govt. Exh. 3) on page 321, the following sentence: "Holes containing explosives or blasting agents, tamped and ready for firing are defined as charged holes." Obviously inspector Padgett was following the manual when he deemed the holes as charged, and insofar as MSHA is concerned he was correct in his decision. But MSHA cannot change the law by adding words to its manual.(FOOTNOTE 1) It had the opportunity to change the code of Federal regulations and did not do so. I find the holes were not "charged" and I think it is equally obvious that until the blasting cap is added they are not "ready for firing." The civil penalty portion of the above action is accordingly decided in Peabody's favor and the complaint is dismissed.

This leaves the question of whether or not there was an imminent danger. Obviously the inspector who appeared to be a dedicated and sincere law enforcement official believed there was an imminent danger, or he would not have issued the order. He had been taught at the Bureau of Mines school in Beckley that primacord could be detonated by being run over by a bulldozer. Although he thought the chance of the bulldozer operator detonating any of the pieces of primacord sticking out of the blasting holes was rather remote, he thought there was a definite possibility of an explosion should the bulldozer run over the 2 cases of coiled primacord. He had been taught at Beckley that a coil of primacord would explode if crushed. The operator of the bulldozer, Mr. Cobb was equally concerned about his own safety and was very nervous about operating between loaded blasting holes. He said "no powder is safe."

Despite the sincerity of the inspector, and the operator of the bulldozer, however, the other testimony in the case convinces me that primacord and cast primers are extremely safe explosives. The main explosive used in the mine, ANFO (meaning ammonium nitrate and

~719
fuel oil) and ammonium nitrate slurry are extremely insensitive explosives.(FOOTNOTE 2) They cannot be exploded with a blasting cap except under unusual circumstances and an efficient explosion cannot be obtained with primacord alone. For an efficient explosion, the primacord must be attached to the cast primer or booster before either the slurry or the ANFO can be efficiently detonated. But in the entire explosive train, the least sensitive element is the primacord. Mr. Hynes a professional engineer with a degree in mining gave convincing testimony as to the safety of primacord. If it is placed against a steel wall and impacted with the army equivalent of the french 75 cannon, detonation can occur. Short of that, however, and nothing in the mine even approaches that degree of heat and pressure, primacord or detonating cord will not explode. While it will burn, the burning will not cause detonation. It takes a blasting cap, another explosion such as a dynamite explosion next to it or the impact of a French 75 to set it off. I cannot find that there was an imminent danger because of the possibility of the bulldozer running over the primacord. I make a similar finding regarding the cast primers but point out that there was no evidence that the bulldozer operator operated near those charges.

I find that no imminent danger existed and accordingly vacate Order of Withdrawal 390240.

Charles C. Moore, Jr.
Administrative Law Judge

ÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄ

FOOTNOTES START HERE

~FOOTNOTE_ONE

1. The letter from MSHA's attorney dated June 11, 1979, indicates that MSHA no longer supports the statement in the manual.

~FOOTNOTE_TWO

2. It was, however, ammonium nitrate fertilizer mixed with diesel fuel oil which blew up Texas city in 1947.