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PIKEVILLE V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

PIKEVILLE COAL COMPANY, CONTESTANT	Contest of Order Docket No. PIKE 79-66
v.	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Order No. 65134 December 20, 1978 Chisholm Mine

DECISION

Appearances: John M. Stephens, Esq., Stephens, Combs & Page, Pikeville, Kentucky, for Contestant
Darryl A. Stewart, Assistant Solicitor, Mine Safety and Health Administration, U.S. Department of Labor, for Respondent

Before: Judge Lasher

This proceeding arose under section 110(a) of the Federal Mine Safety and Health Act of 1977. A hearing on the merits was held in Lexington, Kentucky, on December 20, 1979, at which both parties were well represented by counsel. After considering evidence submitted by both parties and proposed findings of fact and conclusions of law proferred by counsel during closing argument, I entered a detailed opinion on the record.(FOOTNOTE 1) It was found that the violation charged in the withdrawal order did occur. My oral decision, containing findings, conclusions and rationale appears below as it appears in the record aside from minor corrections in grammar and punctuation:

> This proceeding involves an imminent danger withdrawal order, No. 065134, issued on December 20, 1978, which is the subject of both a penalty proceeding and an application for review.
>
> Turning first to Docket No. PIKE 79-66, which is the proceeding for review of the order, the issue presented is

whether or not the physical conditions described in the order did exist, and if so, if such conditions constitute an imminent danger, as that term is defined in section 107(a) of the 1977 Federal Mine Safety and Health Act.

I preliminarily note that whether or not an imminent danger exists is not dependent upon the existence of an actual violation of any of the mandatory safety and health standards.

I also preliminarily note that two violations of such standards were specifically stated in the withdrawal order, one of which, the violation of 30 CFR 75.403, has been previously dismissed upon motion by the Government, and properly I think, when it appeared that the sampling technique was inadequate.

The withdrawal order describes the condition as follows: "Loose coal and inadequate rock dust in depths of three and a half inches to ten inches deep in the Numbers 2 through 8 Entries and connecting rooms, including the last open cross-cut outby the face." The withdrawal order contains other language which I deem it unnecessary to quote.

The evidence presented indicates that the depth of the accumulations was from 3-1/2 to 10 inches, based upon the testimony of the inspector, which I do find credible.

The inspector also indicated, and I find, that the accumulations ran from 50 to 100 feet in six of the entries and for approximately 200 feet in the No. 4 entry.

I find that the condition existed on an active working production shift and that had an imminent danger existed some 10 employees would have been exposed.

Since I conclude that there is really no serious question, nor has there really been a strong challenge to the evidence indicating the existence of the accumulations as described in the order, I do find that the accumulations did exist. The question then becomes whether or not these physical conditions constitute an imminent danger.

The record reveals that the inspector arrived on the section in the area where the accumulations existed at approximately 9 o'clock on the morning of December 20, 1978. At that time, he observed the accumulations but made no measurements. Nor did he take any samples of the accumulations to determine combustibility.

The inspector did visually observe the accumulations and believed that they had been inadequately rock dusted, that there was "a thin layer" of rock dust over the material which appeared to him to be very black. On the other hand, at 9 o'clock in the morning, the inspector, visually observing this condition, took no action. He returned approximately 2 to 2-1/2 hours later and the condition was found to have remained present in the area. At this time, the inspector who is an "electrical inspector," and who was not equipped with a sampling kit containing sampling equipment to measure combustibility, did take samples, but these were processed in such a way that the same appeared to be inadequate for proper sampling analysis. This led in turn to the dismissal of one of the two violations specifically cited in the withdrawal order, that in 30 CFR 75.403.

The inspector testified that there was present in the area where the accumulations were present a roof bolting machine which had splices in its cable, but he also indicated that the splices were adequate and that there was nothing wrong with the splices. He also testified that occasionally shuttle cars were known to come in and out of the area but that there were none at the time he observed the condition.

I thus find that there was only one potential, I underline potential, ignition source in the area. In concluding that an imminent danger has not been established in this case, I emphasize that one of the bases for finding no imminent danger is that this was not the type of situation one normally would encounter with respect to ignition sources where the imminent danger flows out of accumulations. In this case, there was no evidence indicating that there were sparks actually flying from any piece of machinery or equipment. There was no evidence, for example, that there was a belt roller grinding in accumulations or that there was arcing from some defective piece of equipment. Nor was there evidence in this case that there were numerous potential ignition sources which would perhaps increase the likelihood that a spark or a fire would result from it, which in turn would be aggravated by the existence of accumulations or which would combine with accumulations to create an explosion.

Here we have, really, one piece of equipment which is in operable condition. I find that while there was a hazard, that it is not shown to be imminent. It is not shown to be urgent.

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In that same connection, I note that the inspector observed substantially the same situation at 9 o'clock and yet, did not do anything about it. So this detracts somewhat, in my thinking--had this been a blatant or a clear cut situation where one senses urgency or imminence to a hazard, and a serious hazard, that one would act to clear the area upon the initial observance of the same.

The Government's evidence with respect to imminent danger, and its position in this case, is also deteriorated by the fact that the evidence of combustibility of the material has substantially fallen by the wayside by the problem with the sampling technique, which led to the dismissal of the 75.403 charge and which in turn, I do note, was described by the inspector in the withdrawal order itself.

So for those various reasons, I am unable to conclude that an imminent danger did exist and, accordingly, Order No. 065134, dated December 20, 1978, is ordered vacated, the application for review in this case, having been found to be meritorious.

ORDER

The application having merit, Order of Withdrawal No. 065134 is VACATED.

Michael A. Lasher, Jr.
Judge

~FOOTNOTE 1
Tr. 146-151.