CCASE:
MONTEREY COAL v. SOL (MSHA)
SOL (MSHA) v. MONTEREY COAL
DDATE:
19810713
TTEXT:

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

MONTEREY COAL COMPANY, CONTESTANT	Contest of Citation
v.	Docket No. LAKE 80-413-R Citation No. 775259; 9/11/80
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Monterey No. 1 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. LAKE 81-59 A/O No. 11-00726-03060
v.	No. 1 Mine
MONTEREY COAL COMPANY, RESPONDENT	

DECISION

Appearances: Timothy M. Biddle, Esq., Thomas C. Means, Esq., Crowell & Moring, Washington, D.C., for Contestant-Respondent;
Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, for Respondent-Petitioner.

Before: Judge Charles C. Moore, Jr.

In August of 1979, MSHA approved a modification plan for Monterey's No. 3 Dam. This approval was in accordance with 30 C.F.R. 77.216 which requires that certain water sediment or slurry impoundments be constructed in accordance with approved plans.

On June 13, 1980, MSHA advised Monterey that it made a mistake in approving the plan and that accordingly the approval was withdrawn (see Joint Exhibit No. 1). Thereafter MSHA issued a citation because Monterey was not operating the dam and pond under an approved plan. The question before me is whether MSHA was justified in withdrawing its approval because if not, its subsequent action of issuing a citation was improper. I hold that MSHA was totally unjustified in withdrawing its approval and that accordingly, the subsequent citation was invalid. I further hold that this was not even a close question. The answer was clear from the very beginning and I cannot see how MSHA's engineers, its district manager and his assistant, and Dr. Wu refused to understand.

While the witnesses referred to safety often in their testimony, safety is only indirectly involved in this case. MSHA did not issue its citation and withdraw its approval because the dam in question was unsafe. It withdrew its approval because the dam and pond were not being operated in accordance with the Engineering and Design Manual, Coal Refuse Disposal Facilities prepared by E. D'Appolonia Consulting Engineers, Inc., and published by MSHA's predecessor, the Interior Department's Mining Enforcement and Safety Administration. The publication contains Table 6.6 (see page 6.62 of Joint Exhibit No. 6) which establishes the criteria for determining the size of a design storm that the impoundment must be able to accommodate. Table 6.6 classifies dams as small, intermediate and large and classifies their hazard potential as low, moderate and high. When MSHA approved Monterey's plans, it was agreed that the impoundment size was intermediate and that the hazard potential was low. This resulted in the design storm of 1 percent probability or OPB. Such a storm would occur once in a hundred years. Page 6.63 of Joint Exhibit No. 6 makes it absolutely clear that the size classifications of Table 6.6 are based on the depth of the water "above any settled material." That is the item which MSHA chooses not to understand. The MSHA witnesses argued that the size criteria of Table 6.6 should be based on the depth of the entire impoundment, including the settled materials.

Section 77.216 of Title 30, Code of Federal Regulations, provides that design, construction and maintenance plans are required if an impounding structure can:

> (1) Impound water, sediment, or slurry to an elevation of five feet or more above the upstream toe of the structure and can have a storage volume of 20 acre-feet or more; or
>
> (2) Impound water, sediment, or slurry to an elevation of 20 feet or more above the upstream toe of the structure, or
>
> (3) As determined by the District Manager, present a hazard to coal miners.

From this requirement that impounding structures having a total water slurry or sediment depth of 20 feet or more must be in accordance with a design plan, MSHA jumps to the conclusion that whenever there is a reference to the size of an impounding structure, it must always mean the amount or depth of the water slurry and sediment. In the 268 pages of deposition testimony, there was no scientific or engineering reason given for including or excluding the sediment when determining the size of the impoundment. There was no testimony as to the pressures on the inner surface of the dam below the top of the sediment level comparing that pressure to the pressure which would have been generated at that level if the entire impoundment had consisted of water. But the fact remains that Table 6.6, which MSHA relies on and which it charged Monterey with violating, counts only the water above the settled material in determining the size of a

pond for design storm purposes.

If MSHA thinks a dam is dangerous it can close it with an imminent danger order or it can set up its own standards concerning design storms and charge a mine operator with a violation of those standards. It cannot, however, successfully charge an operator with a violation of the handbook's Table 6.6 and at the same time ignore the definitions of the terms used in that Table. The formula for deriving the circumference of a circle is only valid if "r" equals the radius, and "pi" equals approximately 3.1416. A change in the meaning of any of the terms destroys the effectiveness of the formula and the same is true of Table 6.6. MSHA's withdrawal of its approval was improper and the citation is VACATED.

Charles C. Moore, Jr.
Administrative Law Judge