CCASE:
PEABODY COAL V. SOL (MSHA)
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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PEABODY COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. KENT 92-1107-R
	:	Order No. 3547306; 9/10/92
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. KENT 92-1108-R Citation No. 3547307; 9/10/92
	:	Camp No. 9 Prep Plant
	:	Mine ID 15-11012
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 93-177 A. C. No. 15-11012-03522
v.	:	Camp No. 9 Prep Plant
PEABODY COAL COMPANY, Respondent	:	

DECISION

Appearances: David R. Joest, Esq., Peabody Coal Company, Henderson, Kentucky, for Contestant/Respondent; Mary Beth Bernui, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for the Secretary.

Before: Judge Maurer

STATEMENT OF THE CASE

Contestant, Peabody Coal Company (Peabody) has filed Notices of Contest pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(d), challenging the issuance of a section 107(a) imminent danger order and a section 104(a) significant and substantial (S&S) citation which were both issued on September 10, 1992, at its Camp No. 9 Preparation Plant. The Secretary of Labor (Secretary) has filed a petition seeking a civil penalty of $700 for the alleged violation of 30 C.F.R 77.201 charged in the contested citation. The proceedings have been consolidated for purposes of hearing and decision.

Pursuant to notice, the cases were heard in Evansville, Indiana, on January 29, 1993.

The general issues before me include: (1) whether the condition cited in the contested imminent danger order was in fact an imminent danger warranting the withdrawal of miners; (2) whether Peabody violated the cited mandatory safety standard found at 30 C.F.R. 77.201, and if so, whether that violation was S&S; and (3) the appropriate civil penalty to be assessed for the violation, should any be found.

Both parties have filed post-hearing proposed findings of fact and conclusions of law, which I have considered along with the entire record herein. I make the following decision.

STIPULATIONS

The parties have agreed to the following stipulations, which I accept (Tr. 5, Joint Exhibit No. 1):

1. Peabody Coal Company is subject to the Federal Mine Safety and Health Act of 1977.

2. Peabody Coal Company, Camp No. 9 Preparation Plant, has an affect upon interstate commerce within the meaning of the Federal Mine Safety and Health Act of 1977.

3. Peabody Coal Company and its Camp No. 9 Preparation Plant are subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and stipulate that the administrative law judge has the authority to hear these cases and issue a decision.

4. Peabody Coal Company produced 82,713,677 tons of coal in the year 1992.

5. A reasonable penalty will not affect Peabody Coal Company's ability to remain in business.

DISCUSSION AND FINDINGS

Order No. 3547306, issued pursuant to section 107(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the Act), charges as follows:

> The following condition which constitutes an imminent danger was observed in the tunnel located below the raw coal storage silo. Methane concentrations of 5.2% to 5.4% were measured one foot

above the coal on No. 3 raw coal belt outby No. 1A and No. 1B raw coal feeders.

A separate citation will be issued for the violation included in this Order of Withdrawal.

Citation No. 3547307, issued pursuant to section 104(a) of the Act, charges as follows:

The raw coal storage silo tunnel is not being ventilated so as to maintain concentrations of methane below 1.0 volume per centum. Methane concentration of 5.2% to 5.4% was measured one foot above the coal on No. 3 raw coal belt outby No. 1A and No. 1B raw coal feeders.

FINDINGS OF FACT

1. The order and citation were issued at 9:10 a.m., on September 10, 1992, by MSHA Inspector Michael V. Moore during a CBC inspection of the Camp No. 9 Preparation Plant.

2. During the course of his inspection that day, Inspector Moore was accompanied by MSHA Inspector Ted Smith, Peabody Safety Manager Larry Cleveland, and miner's representative Sammy Thomas; all of whom testified in this proceeding, save Inspector Smith.

3. During his inspection, Inspector Moore took a series of methane readings utilizing a methanometer at several locations throughout the preparation plant and of particular significance herein, in the area underneath the raw coal storage silo. This area consists of a ground-level space in the silo structure open to the outdoors through an opening approximately 20 feet by 20 feet. The area underneath the silo contains two coal feeders which feed raw coal from the silo storage area above onto a coal conveyor beltline which conveys coal out through the 20 feet by 20 feet opening to the preparation plant.

4. The portion of the coal conveyor beltline which is located under the raw coal storage silo is covered by a tight-fitting metal cover which serves to contain coal dust. This cover has openings behind each of the feeders and is replaced at the tail end of the beltline by a metal mesh guard. The cover extends approximately to the point at which the beltline exits the area under the silo; at this point it is replaced by an arched corrugated metal cover with openings in the sides.

5. Inspector Moore obtained various readings indicating the presence of methane gas. He obtained one reading in the 2.2 to 2.4 percent range by opening an inspection door between the two feeders of the silo and holding his methanometer above the coal flow under the belt cover while the conveyor belt was running. He obtained another reading in excess of 2 percent methane by opening an inspection door in the chute area. He obtained two additional readings in excess of 2 percent methane further down the beltline toward the outside. These four readings were each taken above the coal flow on the running belt inside the belt enclosure.

Inspector Moore then proceeded to the area where the belt enclosure comes out of the silo and enters the corrugated metal belt cover outside of the silo. He positioned himself on top of the belt enclosure and placed his methanometer through the opening of the covered belt at the point where it ends, holding it above the coal flow and obtained a methane reading of 5.2 to 5.4 percent. Inspector Moore then obtained another methanometer and retested this area holding both methanometers above the coal flow, and both methanometers measured 5.2 to 5.4 percent methane. He then extended his arm inside the corrugated metal cover over the beltline outside the silo and obtained a reading of 3.7 percent methane.

6. All the other methane readings taken by the inspector in the area underneath the silo showed 0-1 percent concentrations of methane gas. These readings were all taken in the general atmosphere under the silo, as opposed to inside the belt enclosure itself.

7. Peabody employees regularly take methane readings of the general atmosphere in the area underneath the raw coal silo, but do not take them under the beltline cover while the coal is flowing. Typically, methane is not detected in the general atmosphere under the coal silo.

8. Several tests were run by Mr. Randy Wolfe, Supervisor of Safety Engineering at Peabody subsequent to Inspector Moore's issuance of the order and citation at bar. He measured airflow at the end of the covered section of the beltline (location R-4 on Joint Exhibit 2) and found an average airspeed of 276 feet per minute; and an average airflow volume of 552 cubic feet per minute with the belt running but the exhaust fan off. In order

to determine the airspace volume between the coal and the beltline cover, Wolfe had the belt stopped several times and took measurements. He found that the clearance between the coal and the belt cover ranged from 10-1/2 to 6 inches (the coal surface undulated because of the way the feeders work) and averaged 8-3/4 inches between the top of the coal and the belt. He also checked for methane when the beltline was stopped with coal on the belt and found none. Based on these measurements and observations, it was Wolfe's opinion that methane was being liberated while the coal was being fed onto the beltline, and this methane was carried outward to the end of the covered area by the natural ventilation created by the openings in the beltline cover (at the tail and behind each feeder) and the movement of the peaks and valleys of the coal. Wolfe also opined based on his measurements that it would have been impossible for Inspector Moore to take his readings underneath the cover of the beltline and still be at least 12 inches away from the flowing coal.

FURTHER DISCUSSION AND CONCLUSIONS

The mandatory safety standard set forth at 30 C.F.R. 77.201 requires that with regard to surface installation "[t]he methane content in the air of any structure, enclosure or other facility shall be less than 1.0 volume per centum."

It is well recognized in the mining industry that methane measurements made closer than 12 inches from the point of methane liberation are not representative of the general atmosphere being sampled because of the undue influence of the methane source itself.

Inspector Moore testified that he tried to take his methane readings at least 12 inches from the coal on the beltline because this was "the accepted practice underground and I related it to the surface . . . ." He conceded that had he measured closer to the coal than 1 foot, he would expect a higher methane reading than he would have obtained 12 inches or more away from the coal. Taking the reading at least 1 foot off the top of the coal flow allows the natural ventilation to dilute any methane that may be there.

Inspector Moore, however, was unwavering in his testimony that he took the six methane readings identified on Joint Exhibit 2, and discussed herein, supra, at least 12 inches away from the coal on the beltline. But he also testified that he took five of these readings below the plane of the tight-fitting beltline cover. The sixth was taken under the corrugated metal

beltline cover outside the silo. On the other side, Mr. Wolfe, who actually measured coal heights at several points while the belt was stopped, testified that there was only 6 to 10 1/2 inches of clearance between the coal (which varied in height) and the belt-enclosing cover.

I am convinced by Mr. Wolfe's testimony that Inspector Moore's methane measurements must have been taken less than 12 inches from the top of the coal while it was running on the beltline. Wolfe's analyses, tests and measured observations are more inherently trustworthy than Moore's "eyeball" estimate of this distance which he made while the belt conveyor was in motion.

Accordingly, I find and conclude that the methane readings taken by Inspector Moore that formed the basis for the order and citation at issue herein, would have been some indefinite amount lower had they been taken at least 12 inches off the coal. However, notwithstanding that fact, I am still going to give the Secretary the benefit of the doubt that even though they would be somewhat lower than stated, they would still be in excess of 1 percent.

Turning to the mandatory safety standard at issue herein, Peabody called Donald W. Mitchell as an expert witness in the mine safety field. Earlier in his career, he had participated in the drafting of the regulations which appear in the 30 C.F.R. 77.200 series as the immediate supervisor of the task forc group responsible for their preparation. He testified that 30 C.F.R. 77.201 was a surface safety standard adapted from the underground safety standards, and based on his involvement in preparing the rule, it was his opinion that section 77.201 was never intended to apply to methane concentrations in such relatively confined areas such as the space under the cover of covered beltlines; and that "enclosure" as that word is used in the standard, was contemplated to apply to much larger areas such as control rooms and that type of enclosure within a preparation plant. In the context of the area under the raw coal silo at Peabody's Camp No. 9 Preparation Plant, he opined the standard would be designed to limit methane in the atmosphere in the structure generally, not specifically in that confined space under the belt cover. Mr. Mitchell further testified that he was not familiar with any previous instance in which an MSHA inspector has taken methane measurements underneath the cover of a beltline. Inspector Moore agreed that it was a new practice in his own experience.

I concur with Mitchell and Peabody. A covered beltline is not a "structure, enclosure or other facility" within the meaning

of 30 C.F.R. 77.201. The enclosed area under the raw coal storage silo where the covered beltline is located is the "structure, enclosure or facility" for purposes of the standard, which is violated if the methane concentration in the general atmosphere of the structure exceeds one percent by volume.

Irrespective of the interpretation of the mandatory safety standard alleged to have been violated, it is also alleged that the methane levels found by Inspector Moore represented an imminent danger.

Section 3(j) of the Act defines an imminent danger as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. 802(j). In Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989), the Commission noted that "the U.S. Courts of Appeals have eschewed a narrow construction and have refused to limit the concept of imminent danger to hazards that pose an immediate danger." (citations omitted). The Commission noted further that the courts have held that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." Id., quoting Eastern Associated Coal Corp. v. Interior Bd. of Mine Op. App., 491 F.2d 277, 278 (4th Cir. 1974). The Commission also adopted the Seventh Circuit's holding that an inspector's finding of an imminent danger must be supported "unless there is evidence that he has abused his discretion or authority." 11 FMSHRC at 2164 quoting Old Ben Coal Corp. v. Interior Bd. of Mine Op. App., 523 F.2d 25, 31 (7th Cir. 1975).

In Utah Power & Light Co., 13 FMSHRC 1617, 1627 (October 1991), the Commission reaffirmed that an MSHA inspector has considerable discretion in determining whether an imminent danger exists. However, the Commission held in these cases that there must be some degree of imminence to support an imminent danger order and noted that the word "imminent" is defined as "ready to take place[;] near at hand[;] impending ...[;] hanging threateningly over one's head[;] menacingly near." 13 FMSHRC at 1621 (citation omitted). The Commission determined that the legislative history of the imminent danger provision supported a conclusion that "the hazard to be protected against by the withdrawal order must be impending so as to require the immediate withdrawal of miners." Id. Finally, the Commission held that an inspector abuses his discretion, in the sense of making a

decision that is not in accordance with law, if he issues a section 107(a) order without determining that the condition or practice presents an impending hazard requiring the immediate withdrawal of miners. 13 FMSHRC at 1622-23.

The Commission has also held that, in an imminent danger case, the judge must determine "whether a preponderance of the evidence shows that the condition or practice, as observed by the inspector, could reasonably be expected to cause death or serious physical harm, before the condition or practice could be eliminated." Wyoming Fuel Co., 14 FMSHRC 1282, 1291 (August 1992). The Commission went on to explain that, in making such a determination, a judge "should make factual findings as to whether the inspector made a reasonable investigation of the facts, under the circumstances, and whether the facts known to him, or reasonably available to him, supported issuance of the imminent danger order." 14 FMSHRC at 1292.

The Commission has also very recently held that:

> While the crucial question in imminent danger cases is whether the inspector abused his discretion or authority, the judge is not required to accept an inspector's subjective "perception" that an imminent danger existed. Rather, the judge must evaluate whether, given the particular circumstances, it was reasonable for the inspector to conclude that an imminent danger existed. The Secretary still bears the burden of proving his case by a preponderance of the evidence. Although an inspector is granted wide discretion because he must act quickly to remove miners from a situation that he believes to be hazardous, the reasonableness of an inspector's imminent danger finding is subject to subsequent examination at the evidentiary hearing.

Island Creek Coal Co., Docket Nos. VA 91-47-R, 91-48-R, and 91-49-R, 15 FMSHRC _____ (March 3, 1993).

Inspector Moore testified that the high level of methane found inside the enclosed belt conveyor and the presence of coal dust on the belt could cause an explosion which would result in bodily injury such as burns or death to any personnel working in the area. He also testified that the possibility of an explosion was intensified by the presence of an ignition source in that roof bolts, mining machine bits, and other types of metal objects found intermittently mixed in the coal in the silo could strike the metal structure of the silo and create a spark.

Additionally, the Secretary presented testimony by Clete Stephan, an expert in the field of explosions related to coal mining. Mr. Stephan stated the methane levels found by Inspector Moore were within the explosive range and that the addition of coal dust on the belt conveyor would heighten the explosibility of the methane. Mr. Stephan also testified that there were four potential ignition sources that could have been present including: spontaneous combustion in the silo, metal to metal contacts such as Inspector Moore discussed, the possibility of welding or cutting by Peabody employees in the area of the silo and rollers on the belt conveyors which can become stuck and generate enough friction to increase the temperature on the beltline.

It is undisputed that cutting or welding is not performed while the raw coal beltline at Camp No. 9 Preparation Plant is running. Mr. Mitchell discounted the possibility of methane ignition by spontaneous coal combustion due to the lack of any history of such combustion at Camp No. 9, and the fact that the type of coal handled has little tendency to spontaneous heating. Based on the nature of the materials likely to be present on the belt and the amount of energy available, Mitchell did not believe that sparking or friction due to materials on the belt striking the beltline cover was a likely ignition source, and he did not believe that rollers becoming stuck and heated was a likely ignition source because studies have shown that temperatures associated with stuck rollers are below the ignition temperatures of either coal or methane and because there were no accumulations of coal dust around the rollers. Mitchell also considered and discounted static electricity as an ignition source because the beltline is grounded for its entire length and because the humidity is high. Mr. Mitchell also considered the possibility of ignition due to electrical equipment, which was not likely because the electrical equipment within the facility was designed to be incapable of igniting a vapor or gas.

In choosing Mr. Mitchell's opinion over that of Mr. Stephan, I have considered that Mitchell's opinions were based, at least in part, on his personal inspection of the raw coal silo, an investigation into the operational history of the facility and on the physical data gathered by Mr. Wolfe, including the important factor that the inspector's methane readings had to have been taken within 6 to 10 1/2 inches of the coal vice a minimum of 12 inches, as is standard practice. Mr. Stephan, on the other hand, was not sure he had ever visited the facility in question and he had accepted the inspector's methane readings at face

value. Therefore, his opinions were necessarily of a general nature, not specifically related to conditions and practices at this facility or taking into consideration the manner in which the readings were obtained and they accordingly carry less weight than Mitchell's in resolving the issues in these cases.

Mr. Mitchell and others testified that the standard practice in measuring methane was to measure at least 12 inches from the coal in order to obtain a measurement representative of the "general body" of the atmosphere being measured. High percentage concentrations of methane coming out of the surface of the coal (as in these cases) are unavoidable and do not represent a hazard in the absence of an ignition source. He also testified that ignition of methane under the belt cover was not likely due to the absence of an ignition source but that even if an ignition should occur it would be a "deflagration" rather than an explosion and would not endanger anyone who might be in the area, which is in and of itself, a rarity. Mr. Shirkey estimated that typically about 15 minutes per shift of work would be performed in the area under the raw coal storage silo. A certain volume of gas is required, according to Mr. Mitchell; you need more than a small pocket of air in the explosive range in order to sustain an explosion.

Furthermore, the highest methane reading obtained by Inspector Moore and the one cited in the order and citation was taken at position R-4 in Joint Exhibit No. 2. At that location, the methane is virtually outside; it is within inches of being outside and the potential ignition sources in that area are as a practical matter, nil.

Finally, it is undisputed that the covered beltline under the raw coal storage silo at Camp No. 9 has been in existence and in substantially the same condition and configuration since approximately 1981. It is also uncontested that no fires and/or explosions have occurred on the beltline in that time. Yet the Secretary contends, based on the methane levels measured by Inspector Moore on September 10, 1992, that a methane ignition is "imminent." Mr. Stephan testified that an explosion will definitely occur, and that the only question is when. This discrepancy between actual experience and the Secretary's theory defies explanation, and has not been explained to my satisfaction in this record.

Inspector Moore's readings in excess of 1 percent methane under the beltline cover do not represent a concentration of methane in excess of 1 percent in the general atmosphere of the structure in violation of 30 C.F.R. 77.201 and do not represent an imminent danger in the absence of an ignition source, or a

sufficient volume of methane to cause any real damage, assuming an ignition. Accordingly, Order No. 3547306 and Citation No. 3547307 will be vacated herein.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. Section 107(a) Order No. 3547306 IS VACATED and Peabody's contest IS GRANTED.

2. Section 104(a) Citation No. 3547307 IS VACATED and Peabody's contest IS GRANTED.

3. The captioned cases ARE DISMISSED.

Roy J. Maurer
Administrative Law Judge

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