

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

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 93-114
Petitioner	:	A.C. No. 15-11012-03521
v.	:	
	:	Camp No. 9 Prep Plant
	:	
PEABODY COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: MaryBeth Bernui, Esq., Office of the Solicitor,
U. S. Department of Labor, Nashville, Tennessee,
for the Petitioner;
Carl B. Boyd, Jr., Esq., Henderson, Kentucky, for
the Respondent.

Before: Judge Amchan

Statement of Facts

This matter arises from an inspection conducted on September 18, 1992, by MSHA Electrical Inspector Michael Moore at Respondent's Camp 9 Preparation Plant. The September 18 inspection was a follow-up to an inspection he had performed on September 10, 1992 (Tr. 12-13, 27 - 28). On September 10, Mr. Moore sampled for methane underneath the cover of a conveyor belt at the bottom of the raw coal storage silo at the Preparation Plant and had obtained readings of 5.2 percent and 5.4 percent methane.

As the result of these readings, he issued an imminent danger order and a citation alleging a violation of 30 C.F.R.

77.201, which prohibits a methane concentration of more than percent in a structure, enclosure, or facility. Respondent contested this citation and order, both of which were ultimately vacated pursuant to a decision by Administrative Law Judge Roy J. Maurer, Peabody Coal Company, 15 FMSHRC 746 (ALJ April 1993).

As part of its effort to abate the citation and order of September 10, Respondent installed piping and a 25 horsepower fan to draw air out from under the cover of the raw coal belt conveyor. The fan was located inside the piping, 3 to 5 feet from and outside of the raw coal silo, 60 feet from the covered conveyor (Tr. 14, 65-66). When Inspector Moore examined the fan on September 18, he found two things wrong with it. First of all, it was plugged in with a flexible cord and secondly, its motor was not approved for a Class I location, in that it was not explosion-proof.

On September 18, Inspector Moore issued Respondent 2 citations alleging violation of 30 C.F.R. 77.516. That standard requires that all wiring and electrical equipment installed after June 30, 1971, meet the requirements of the National Electrical Code (NEC) then in effect.

Citation 3547316 alleges a non significant and substantial violation of the standard in that the cord to the fan drawing air from the raw coal conveyor did not meet the requirements of Article 400-4 of the NEC. This article forbids the use of flexible cord as a substitute for the fixed wiring of a structure (Exh. G-2). MSHA contends that rigid conduit was required because the raw coal silo is a permanent structure (Tr. 15, 56).

Citation 3547318 alleges a significant and substantial violation of section 501 of the NEC. Pursuant to section 501-8, motors in Class I, Division 1 and in Class I, Division 2 locations must be explosion proof (Exh. G-4). A Class I location is defined by section 500-4 of the NEC as "those in which flammable gases or vapors are or may be present in the air in quantities sufficient to produce explosive or ignitable mixtures." (Exh. R-1)

The Issues

Respondent contends that citation 3547316 is invalid because its exhaust fan was not a permanent installation. The fan was installed solely to terminate the imminent danger order and citation issued on September 10, which Peabody contested (Tr. 91). Upon vacation of this order and citation by Judge Maurer, Respondent removed the fan (Tr. 39).

It is unclear whether Petitioner's theory is that rigid conduit was required because the fan was a permanent installation or because the flexible cord constituted part of the wiring of the raw coal silo, which is a permanent structure (Tr. 14 -15). In either case, I conclude that the Secretary has failed to prove a violation of Article 400-4.

I find nothing in the record that would permit me to conclude that the flexible cord was part of the wiring of the raw

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coal silo. Similarly, when the citation was written, Mr. Moore may have regarded the presence of the fan permanent, but Respondent did not. Respondent installed the fan only to terminate the September 10 citation and order, and fully intended to remove it if it prevailed before the Commission. Therefore, I vacate citation 3547316.

Citation 3547318 was also issued pursuant to Mr. Moore's findings on September 10. Judge Maurer has made a finding that the results of his sampling under the belt cover were invalid. However, the question remains whether the Secretary has established that the fan was located in a Class I location. There is no dispute that the fan was not explosion-proof, as required if it was located in a Class I location.

The record establishes that methane is released, at least some of the time, when coal is fed onto the covered belt conveyor (Tr. 97). The record does not establish anything definitive about the concentration of methane or potential concentration of methane underneath the cover. More importantly, there is nothing definitive concerning methane concentrations or potential concentrations at the fan. The methane readings at the fan on September 18 were zero (Tr. 41). All of Peabody's methane readings in the vicinity of the fan were zero (Tr. 88-89).

The Secretary's case is predicated on the theory that, if there is methane under the cover of the belt conveyor, you can never tell when you might have an ignitable or explosive concentration of methane at the end of the ductwork where the fan was located (Tr. 43-44). Respondent contends that the airflow of the belt conveyor and the effect of the fan itself removed whatever methane was present at the feeder (Tr. 104 - 108).

I conclude that, based on the record in this case, the Secretary's evidence is far too speculative to establish that the fan was located in a Class I location. The Secretary has not established that methane could have been present in explosive or ignitable concentrations at the location of the cited fan motor. Therefore, I vacate citation 3547318.

ORDER

Citations 3547316 and 3547318 are hereby VACATED and this case is dismissed.

Arthur J. Amchan
Administrative Law Judge
703-756-6210

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