CCASE:
SOL (MSHA) V. PEABODY COAL
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19940124
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 92-1079
	:	A.C. No. 15-11012-03520
v.	:	
	:	Camp 9 Preparation Plant
	:	
PEABODY COAL COMPANY, Respondent	:	

DECISION

Appearances: Brian W. Dougherty, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for Petitioner;
David R. Joest, Esq., Henderson, Kentucky, for Respondent.

Before: Judge Amchan

Statement of Facts

On the morning of July 21, 1992, MSHA Inspector Philip Dehart examined a refuse pile at Respondent's Camp 9 Preparation Plant (Tr. 12). This pile, which consists of debris from washed coal, is approximately 100 feet high and bigger than 100 feet x 100 feet horizontally (Tr. 21). Mr. Dehart found 2 pools of water on the refuse pile. One was about 40 feet by 20 feet and an inch deep and the other was about 35 feet by 20 feet and also an inch deep (Tr. 13 - 14).

Mr. Dehart issued Respondent Citation No. 3551344, which alleged that the refuse pile was not graded to allow for proper drainage and that the inadequate grading violated Peabody's approved plan for the refuse area (Exh G-1). Water on the refuse pile creates a potential fire hazard due to spontaneous combustion (Tr. 10 - 11). However, MSHA apparently did not consider the water on Camp 9's refuse pile to present a hazard to miners as of July 21, 1992 (Tr. 19 - 20).

The citation referenced 30 C.F.R. 77.215 as the regulation violated. However, there is no standard requiring a mine operator to comply with an approved refuse pile design plan (See Tr. 22 - 25).

At trial, the Secretary argued that the facts in this case establish a violation of 30 C.F.R. 77.215(e). This issue has been tried with the consent of Respondent (Tr. 25). Section 77.215(e) requires:

> Refuse piles shall not be constructed so as to impede drainage or impound water.

Respondent's position on the merits is that the refuse pile was not designed to impound water (Tr. 45). The 2 pools of water observed by Inspector Dehart were the result of heavy rains the previous evening and differential settling of the refuse in the pile (Tr. 40). Peabody contends it complied with the regulation by reshaping the refuse pile as soon as it could do so safely (Tr. 44).

Peabody submits that there is no way to avoid differential settling and that to prevent a hazard developing from standing water it reshapes the pile with rubber-tired vehicles. Respondent argues that, to do this before the pile dries, would be hazardous to the operators of its dump trucks, bull dozers and scrapers.

Moreover, Respondent contends that the pile was not constructed to impound water. In fact, it is designed so that water will drain off the pile and flow away from the pile (Tr. 40 - 42).

Issues

The issues in this case are whether the fact that there were standing pools of water on Respondent's refuse pile establishes that water was impounded and, if so, whether the evidence establishes that the pile was constructed so as to impede drainage or impound water. I conclude that the Secretary has not met his burden of proof on either of these issues.

The testimony of Gordon Ingram, an engineering supervisor for Respondent at Camp 9, that the accumulation of water on July 21 was unavoidable is uncontroverted. This testimony is also not inconsistent with Mr. Dehart's testimony that dessication cracks indicated that there had been other pools of standing water on the pile before July 21.(Footnote 1)

The word impounded suggests a purposeful rather than an

1The citation alleged a violation only with regard to the 2 pools of water observed on July 21, 1992 (Exh. G-2). Moreover, the record does not establish that the dessication cracks could only have been present if Respondent failed to take reasonably prompt steps to reshape the refuse pile after a rainstorm.

accidental accumulation of water. In some circumstances, one could reasonably conclude that the lack of any corrective action to remove water, which had accidently accumulated, might be an impoundment. However, Mr. Ingram's uncontroverted testimony establishes that the accumulation of water in this case was the unavoidable result of differential settling of the refuse. It also establishes that Respondent tried to remove the water as soon as it was reasonably safe to do so.

Moreover, even if any accumulation of water is an impoundment, there is no evidence in this record to support a finding that Respondent's refuse pile was constructed to impede drainage or impound water within the meaning of section 77.215(e). However, I agree with petitioner that, in some circumstances, a failure to take timely corrective action to remove water that has collected on a refuse pile may violate section 77.215(e).

A refuse pile is in an ongoing state of construction. Therefore, a failure to timely reshape areas in which water has collected may be "construction" within the meaning of the standard. However, the record, in this case, does not establish that the water present on the refuse pile on July 21, 1992, was present due to any intentional act of Respondent or a failure to take reasonably prompt abatement measures.

In conclusion, it has not been established that the refuse pile was constructed so as to impede drainage or impound water. I, therefore, vacate Citation No. 3551344.

ORDER

Citation No. 3551344 is hereby VACATED and this case is dismissed.

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

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