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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 93-812
Petitioner : A. C. No. 15-11012-03525
v. :
 : Camp No. 9 Prep Plant
PEABODY COAL COMPANY, :
Respondent :

DECISION

Appearances: Anne T. Knauff, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee for
Petitioner;
Carl B. Boyd, Esq., Meyer, Hutchinson, Haynes &
Boyd, Henderson, Kentucky, for Respondent.

Before: Judge Maurer

This case is before me based upon a petition for assessment of a civil penalty filed by the Secretary of Labor (Secretary) against the Peabody Coal Company (Peabody) seeking a civil penalty of \$50 for an alleged nonsignificant and substantial violation of 30 C.F.R. 77.516.

Pursuant to notice, the case was heard before me on March 17, 1994, in Owensboro, Kentucky. Both parties have filed posthearing briefs with proposed findings of fact and conclusions of law and I have considered them in the course of my adjudication of this matter.

The citation at bar, Citation No. 3859515, was issued by Inspector Michael V. Moore of the Mine Safety and Health Administration (MSHA) as a result of an inspection at the Camp No. 9 Preparation Plant on March 23, 1993. The citation was issued pursuant to section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., and charges as follows:

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The area enclosed on top of the five coal storage silos is not meeting Article 500-4(b) of the 1968 National Electrical Code. Three 4160 Volt 600 H.P. motor electrical installations and three start/stop enclosures are not meeting the Class I, Division II rating of the 1968 National Electrical Code. The start/stop switches are located at the 600 H.P. motors.

Inspector Moore was the Secretary's only witness. He testified that he is employed by MSHA as an electrical specialist and has been so employed for the last 14 years. He has a BS degree in electrical engineering technology and has worked in the coal industry as an electrician prior to his present government service.

The citation concerned the enclosed areas on top of the five coal storage silos. The silos themselves are made from concrete and are approximately 200 feet high. They were built along with the entire preparation plant in the late 1970's. The enclosed areas on top contain electrical installations, including electrical motors, switches and wiring.

Inspector Moore testified that originally the enclosed area was regarded as a Class I, Division 1 location when the plant was built. Peabody disputes that and there is really no evidence of that, save the inspector's recollection. But, in any event, MSHA, by letter of September 5, 1985, relaxed the standard to the Class II, Division 2 level, contingent on a methane monitor and ventilation being used to meet that classification. The letter specifically warns that "[a] failure of either ventilation or methane monitor will cause the area to revert back to a Class I, Division 1 [location]." This would mean that all of the electrical installations on top of the silos would have to be reclassified Class I, Division 1, which is a more restrictive classification.

The National Electric Code (NEC) defines Class I, Division 1 locations as:

Locations (1) in which hazardous concentrations of flammable gases or vapors exist continuously, intermittently, or periodically under normal operating conditions, (2) in which hazardous concentrations of such gases or vapors may exist frequently because of repair or maintenance operations or because of leakage, or (3) in which breakdown or faulty operation of equipment or processes which might release hazardous concentrations of flammable gases or vapors, might also cause simultaneous failure of electrical equipment.

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The NEC defines Class II, Division 2 locations as:

Locations in which combustible dust will not normally be in suspension in the air, or will not be likely to be thrown into suspension by the normal operation of equipment or apparatus, in quantities sufficient to produce explosive or ignitable mixtures, but (1) where deposits or accumulations of such dust may be sufficient to interfere with the safe dissipation of heat from electrical equipment or apparatus, or (2) where such deposits or accumulations of dust on, in, or in the vicinity of electrical equipment might be ignited by arcs, sparks or burning material from such equipment.

One difficulty with the 1985 MSHA letter to Superintendent Wes Shirkey is that it only speaks of "a methane monitor and ventilation", period, but the Secretary, through the opinion testimony of Inspector Moore, expands on these requirements a good deal. The Inspector interprets these requirements to mean an interlocked system in which the methane monitor deenergizes the electrical equipment at a two percent concentration of methane, and a positive pressure ventilation system.

On the day of his inspection, Inspector Moore found the methane monitor in place and working, but it was not, nor in his opinion, was it ever set up to deenergize the electrical equipment on top of the coal storage silos if the methane concentration had reached two percent in the enclosed areas. The Inspector further opined that this "interlocked" system is a common mining practice throughout MSHA's District 10, where the prep plant is located and Peabody knew it.

On the other hand, Peabody asserts, through the testimony of Wes Shirkey, the addressee of the 1985 letter, that the requirement for a methane monitor only related to a heater that was once installed in the area and that after the heater was removed, there was no need for the methane monitor anymore. Also, Mr. Shirkey points out that the letter merely states "ventilation". It says nothing about a positive ventilation system being required.

But, the Secretary produced an internal memorandum dated November 6, 1992, (GX-1) from the District Manager to Mr. Jerry Collier, a Supervisory Electrical Engineer, that discusses ventilation methods and states, inter alia, that: "For example, an enclosed area on top of a silo would need a positive pressure system within the area." The company had a copy of this memorandum since January of 1993, some two months

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after it was written and at least a month before the citation at bar was issued.

A positive pressure ventilation system is one in which the air from the outside, which is the clean atmosphere, is forced inside the enclosed area. The atmosphere in the enclosed area would have clean air from the outside forced in that would flush out any hazardous concentrations of gas.

When Inspector Moore saw the area on March 23, 1993, the ventilation system was exhausting. This is described by the Inspector as the exact opposite of a positive pressure system, which MSHA has reportedly informed Peabody on more than one occasion is required for this area on top of the silos.

The thrust of Peabody's defense, however, is that the area on top of the silos is improperly classified. It is their position that this area is not a hazardous location, and therefore the electrical requirements they were cited for in the NEC simply do not apply to this location. They, of course, seek the vacation of the citation at bar.

Class I locations are those in which flammable gases or vapors are or may be present in the air in quantities sufficient to produce explosive or ignitable mixtures.

In the case of methane, an explosive concentration would be 5% to 15%. There has been no evidence of any hazardous concentration (5% to 15%) of methane. Inspector Moore testified that by putting an eight foot probe into chute openings, he had secured readings of .5% to 1.1%, but his readings around the motors in question were 0%. Larry Cleveland and Randy Wolfe testified that all readings they had taken or observed in the general air body of the sheltered area were 0%. The evidence was also to the effect that the on-shift readings taken day after day in the enclosed areas have never reported any methane.

Randy Wolfe testified concerning the tests he had conducted inside the silos, where he had gotten .7% as the highest reading, a reading which had dropped off to .4% near the top of the silos where the vents running into the open air has a diluting effect.

With regard to the adequacy of the ventilation system used by Peabody, the enclosed areas were constructed with at least four louvered vents, each having an open area of 32 square feet, six fan openings in the roof and, since the door blew off, there has also been a 15 foot by 30 inch opening in one wall. In addition, there are beltway openings to the outside, one of which (the clean coal belt to the plant) makes a natural chimney for fresh air drafts. The video shown at the hearing amply demonstrated adequate ventilation to me as a practical matter.

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The Inspector even acknowledges it is "breezy" inside the enclosed areas (Tr. 44). And he himself testified at Tr. 36:

Q. In your estimation, was the natural ventilation system in the enclosed area sufficient to prevent the methane content from exceeding one percent?

A. It appeared that way.

The long and short of it is that this is a relatively large area, with a lot of air moving around in it, and no one has ever found any methane out in the general air body outside of the silos and chutes or around the motors. Furthermore, no one has ever found methane even approaching 2%, let alone 5%, in the silos or chutes adjacent to the areas in question. Finally, the only evidence concerning methane readings in the vicinity of the electrical installations in question is that those readings were always 0%.

The Secretary's case, although it was well presented at trial, started from the faulty proposition that the areas in question were properly classified by MSHA and that was the end of the matter. The enforcement action by the inspector proceeded from there with that much taken as a given.

But Peabody, at least from the time of the hearing in this matter, has objected to that threshold issue of classification and indeed, in my opinion, has mounted a successful legal challenge to it. The record evidence in this case is simply insufficient to conclude that the cited areas on top of these silos were hazardous locations due to explosive or ignitable concentrations of methane. I therefore find that they were not Class I locations and I will vacate Citation No. 3859515.

ORDER

Citation No. 3859515 IS VACATED and this proceeding IS DISMISSED.

Roy J. Maurer
Administrative Law Judge

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