

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
Washington, DC 20001-2021

November 18, 2003

DRUMMOND COMPANY, INC.,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. SE 2003-99-R
	:	Order No. 7679499; 3/19/2003
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Shoal Creek Mine
Respondent	:	Mine ID: 01-02901

DECISION

Appearances: Timothy M. Biddle, Esq., and Bridget E. Littlefield, Esq., Crowell & Moring, LLP, Washington, DC, for the Contestant.
Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, TN 37215, for the Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Notice of Contest filed by Drummond Company, Inc. (Drummond) challenging the issuance to it by the Secretary of Labor of an Order alleging a violation of Section 107(a) of the Federal Mine Safety and Health Act of 1977 (the Act). After an Answer was filed by the Secretary of Labor, a hearing was held in Birmingham, Alabama on July 22, 2003, and continued in Washington, DC, on September 3, 2003. Subsequent to the hearing, each party filed proposed findings of fact and a brief.

Findings of Fact

Drummond operates the Shoal Creek Mine, an underground coal mine. On March 19, 2003, at approximately 1:50 p.m., after MSHA Inspector John Terpo had completed an inspection of part of the mine and was preparing to leave, he entered the office of Drummond safety inspector Ed Sartain. Sartain informed him that Wayne Cox, a certified examiner, had found 6.4% methane in Entry No. 1 of the G-2 longwall (old faces). Terpo testified that Sartain indicated to him that some ventilation controls were missing or damaged, that in the last open cross-cut the curtains had been rolled up, and that a permanent stopping separating Entries No. 2 and No. 3 was down. Terpo and Sartain then went to look at the mine map in order for Terpo to determine what area was affected by the methane. Terpo determined that the problem affected

Entries No. 1, No. 2, and No. 3 in the old faces area of the G-2 longwall panel. At 2:05 p.m., Terpo orally issued an imminent danger order to Sartain identifying the affected area as Entries No. 1, No. 2, and No.3 of the old faces of the G-2 longwall panel.

According to Terpo, when he was informed by Sartain about the existence of 6.4% methane, which is in the explosive range, he was concerned because he knew the mine liberated eight million cubic of methane in a twenty-four hour period, and there had been three methane ignitions during the quarter in which he issued the imminent danger order. Also, he knew that the Shoal Creek Mine was mining the Blue Creek Seam, the same seam of coal in which the Jim Walter No. 5 Mine, approximately 30 miles from the site in question, was mining when it experienced a fatal explosion. Further, he was concerned about the presence of electrical water pumps in the area where the excessive methane had been located. He explained that these electrical pumps constituted an ignition source in the presence of methane in the explosive range, i.e., between five and fifteen percent. Additionally, he testified that Sartain told him there were eight people working in the area.

Terpo opined that the presence of methane in an explosive range is an imminent danger if there is “power in the area” (Tr. 157), and personnel working in the area. He explained that, accordingly, he issued the 107(a) order “... because there was methane in excess of five percent in an area where personnel were working and where there was power.” (Tr. 178). In essence, he further explained the basis of his order by noting that at approximately 2:00 p.m. he had been told that methane existed, and no one told him that the condition had been corrected and no longer existed.

Discussion

The Secretary argues, in essence, that in determining the validity of a Section 107(a) withdrawal order the standard to be applied is, citing Blue Bayou Sand and Gravel, 18 FMSHRC 853 (1996), and V-P Mining Co., 15 FMSHRC 1531 (1993), is whether the inspector abused his discretion. Thus, the Secretary argues that the legitimacy of the 107(a) order must be measured “... against what the inspector reasonably and in good faith found – through his investigation – to be occurring at the mine at the moment when he issued the order.” Thus, the Secretary argues that Terpo acted reasonably and in good faith in issuing the withdrawal order after he was told by Sartain, a Drummond safety inspector, that an explosive amount of methane had been found in Entry No. 1, G-2 longwall panel (old faces). In further arguing that Terpo’s decision was not an abuse of his discretion, the Secretary refers to all the surrounding circumstances that concerned Terpo, including the mine’s high rate of methane liberation, history of ignitions, its location in the same seam as another mine that had experienced a fatal explosion, the presence of electrical water pumps in the area in question, and the presence of eight miners underground. The Secretary further asserts, citing Terpo’s testimony, that the only information he had when he issued the order in question was the presence of an explosive level of methane without any notification that its cause had been identified and corrected. Thus, at the time he issued his order, he had not found that the “conditions or practices which caused some imminent danger no longer

exists [ed]” (Section 107(a), supra, of the Mine Act).

Further Discussion

Section 107(a) of the Act requires an inspector to issue a withdrawal order upon a finding by inspection or investigation that “an imminent danger exists”. Section 3(j) of the Act defines an “imminent danger” as “... the existence of any condition ... 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 [.]”

In a recent decision, I reviewed the current body of commission law regarding the standard to be applied in deciding whether the Secretary met its burden of establishing the existence of an imminent danger as defined in Section 3(j) of the Act, supra. Drummond Co. Inc., 25 FMSHRC –, (October 14, 2003). I concluded that Commission doctrine requires that it be established by a preponderance of evidence that a hazardous condition or practice has a reasonable potential to cause death or serious injury within a short period of time. Drummond Co. Inc., supra, –, slip op. at 7, and cases cited therein.

On the other hand, the Secretary asserts that the correct standard to be applied, under recent Commission case law, is whether the inspector acted reasonably and in good faith. I find, that for the reasons that follow, applying either standard the Secretary has failed to establish that the 107(a) Order herein was validly issued.

Assuming arguendo that the standard to be applied is whether the inspector acted reasonably and in good faith in concluding that an imminent danger existed when he issued his order, the Secretary has failed in its burden in establishing that the facts known to Terpo or were reasonably available to him supported the imminent danger order (see Wyoming Fuel Co., supra). Thus, the evidence adduced fails to establish that the facts known to Terpo or were reasonably available to him supported the issuance of the imminent danger order. (See, Wyoming Fuel Co., supra, at 1292). The only facts known to Terpo regarding excessive methane readings consist of statements made to him by Sartain regarding the finding of methane at six point four percent in the areas at issue. However, Terpo indicated that Sartain did not tell him at what time the excessive methane readings were taken. In addition, there is no evidence that he knew what the methane readings were at the time he issued his order. In evaluating Terpo’s exercise of discretion it is also necessary to focus on the specific facts Terpo took into account in reaching the decision that conditions in the area in question constituted an imminent danger. His testimony on direct examination is unclear regarding specifically what facts supported his imminent danger order. In his initial testimony on direct examination regarding the sequence of events, he testified that after he learned the existence of methane in an explosive range and determined the affected area, he issued the 107(a) order. He did not further elaborate on any other facts supporting the order. In subsequent testimony on direct examination, Terpo indicated “concerns” he had after being informed of the presence of methane. He was concerned that the mine liberates more than eight million cubic feet of methane, that the mine experienced three

methane explosions in the same quarter as the issuance of his order and that methane was liberated from the same coal seam located in a neighboring mine causing a fatal explosion. Terpo agreed that the former two facts “[had] an impact on his decision to issue ... the danger order (Tr. 151-152). (Emphasis added.)

In evaluating the reasonableness of Terpo’s issuance of the 107(a) Order, it is necessary to consider his specific findings regarding the existence of an imminent danger. The only testimony in this regard is found in his cross-examination, which according to the Secretary, summarizes these findings. He was asked as follows: “Is it an imminent anytime [methane between five and fifteen percent] exists?” (Tr. 167). He answered as follows: “If there are personnel working in the area and there is power in the area, yes it is an imminent danger.” (Tr. 167).

It thus appears that there is not any clear indication in Terpo’s testimony that he considered the presence of methane in an explosive amount, alone, to constitute an imminent danger. In his opinion, such a finding is conditioned on the presence of: (1) personnel working in the area, and (2) power in the area. Terpo’s knowledge of the existence of these factors is based solely on what Sartain told him regarding these conditions. It is significant to note that Sartain told him that Drummond had de-energized all power to the area, and that he, Sartain, had told personnel to withdraw, “with the exception of personnel needed to determine the problem and correct it” (sic.) (Tr. 173). There is no evidence that Terpo had knowledge of any fact to contradict Sartain’s statements to him. Terpo did not conduct any other investigation to learn if men had already been withdrawn.

In summary, Terpo’s testimony indicates methane is an imminent danger if there is power in the area. However, the only facts he knew indicated that there was no power in the area. Within this framework, I find that his decision to issue a 107(a) order was, accordingly, not reasonable.

Further, had Terpo made a reasonable investigation, he would have found that according to Norwood Brown, the day-shift longwall production foreman, on the date in question, after it was discovered that various ventilation controls were missing or improperly installed, and prior to the issuance of the imminent danger order, these conditions were rectified, methane testing revealed levels below one point five percent, and there was not any electrical power to the longwall area.

Thus, the record fails to establish that there was a reasonable potential of a methane explosion or ignition causing death or serious injury occurring within a short period of time at the time the order was issued.

Accordingly, for all the above reasons, I find that it has not been established that the 107(a) Order herein was validly issued. Therefore the Notice of Contest is sustained, and the Order is Dismissed.

Order

It is **Ordered** that Drummond's Notice of Contest be **Sustained** and that Order No.7679499 be **Dismissed**.

Avram Weisberger
Administrative Law Judge

Distribution:

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