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EASTERN ASSOCIATED COAL V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

EASTERN ASSOCIATED COAL CORPORATION,
APPLICANT

Application for Review

Docket No. MORG 77-74

v.

Federal No. 1 Mine

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

DECISION

This proceeding was brought by Eastern Associated Coal Corporation under section 105(a) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq, (FOOTNOTE 1) to vacate an order of withdrawal issued by two Federal mine inspectors pursuant to section 104(a) of the Act.

The parties submitted prehearing statements pursuant to a notice of hearing and a prehearing conference was held on April 11, 1978, in Pittsburgh, Pennsylvania.

The hearing was held on July 11 and 12, 1978, in Pittsburgh, Pennsylvania. Both sides were represented by counsel, who have submitted their proposed findings and conclusions and briefs following receipt of the transcript. The final brief was filed on March 7, 1979.

Having considered the evidence and the contentions of the parties, I find that the preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. At all pertinent times, Applicant, Eastern Associated Coal Corporation, operated an underground coal mine known as the Federal No. 1 Mine, in Marion County, West Virginia, which produced coal for sales in or affecting interstate commerce.
2. Federal mine inspectors David E. Workman and William H. Reid arrived at the surface refuse area of the Federal No. 1 Mine during the afternoon shift on August 29, 1977. The inspectors were accompanied by Foreman Robert Sabo.
3. The inspectors were sent to the mine by their supervisor in response to an anonymous safety complaint about the air brakes on a Euclid dump truck used in the refuse area.
4. When the inspectors and Mr. Sabo arrived at the refuse site, they observed the Euclid truck approaching them. Mr. Mark Merico, the truck operator, stopped the truck and the inspectors asked him if he had any problems with the brakes on the truck. Mr. Merico told them that when the truck was loaded he had difficulty keeping it under control.
5. Mr. Merico told the inspectors that there was air leaking from the right rear wheel brake. He had complained about the condition to a mechanic who inspected the brakes. The mechanic told Mr. Merico that no leak existed, but made some adjustments to the brakes. Mr. Merico had also entered his observation regarding the brakes in a weekly log maintained by the company. He told the inspectors that when the truck was loaded, he could not stop or hold it on some of the grades in the refuse area.
6. The truck is normally driven on designated roads in the refuse area. These roadways vary from flat plateaus to inclines of about 14 percent. There are curves along some of these roads. At various places, if the truck went out of control, it could run off the roadway severely injuring or killing the driver. The truck is driven on all three shifts to transport slate and other mine refuse from the mine to the refuse area.
7. Pressure for the truck's air brakes is maintained by a compressor. An air pressure gauge keeps the operator informed of the pressure in the system. The normal pressure is 120 pounds per square inch (psi), and in normal operation, the pressure drops about 10 to 20 psi when the brakes are applied. The footbrake and the handbrake are part of a single pneumatic system. A rupture at any point in the system would render the entire braking system inoperative. There is an emergency brake on the truck, but it could not independently stop or hold the truck.

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8. With the truck parked, Mr. Merico applied the brakes while the inspectors observed. They heard a hiss caused by air escaping from the right rear wheel, and saw the air pressure gauge drop from 120 to 70 psi when the brakes were applied. Mr. Merico told the inspectors that the truck could not be safely controlled if the pressure dropped below 90 psi.

9. Inspector Workman decided to test the brakes to determine whether an imminent danger existed. He had conducted similar tests of braking systems on mobile equipment in underground mines. He had previous experience driving large trucks equipped with air brakes, although he had not operated a Euclid dump truck before. At the inspector's request, Mr. Merico loaded the truck and then instructed Inspector Workman in the operation of the truck.

10. Accompanied by Mr. Merico, Inspector Workman first tested the brakes three times by driving up a slight incline in second gear. He testified that the truck was sliding as if he were driving on a road covered with ice. After these tests, he believed the brakes were inadequate but had not decided whether an imminent danger existed.

11. Inspector Workman then drove the truck to an adjacent area where the grade was 14 percent. He drove up the grade and stopped with the front wheels of the truck over the top of the incline. He determined that it was a safe area to conduct a test because it was straight, the downward incline leveled off after about 25 feet, and below there was a sufficient level area for the truck to stop without adequate brakes.

12. Inspector Workman backed down the hill and felt the truck pulling backwards despite his application of the brakes. The truck was in gear at this time. He asked Mr. Merico if he had any problem holding the truck in this type of terrain and Mr. Merico suggested that if he put the truck in neutral and let the truck drift a little, it would be impossible to stop the truck. Inspector Workman asked Mr. Merico if there would be a hazard in following this testing procedure. He was told that if a problem arose, he could put the truck back in gear and would then be able to better control the truck. Mr. Merico also told the inspector, at this point, that he was required in normal operations to back the truck down an incline.

13. Inspector Workman followed the procedure Mr. Merico suggested. He steadily applied the brakes and then pumped them when the rear wheels reached the bottom of the incline. The truck would not stop until it came to the flat plateau at the bottom of the incline. The air pressure gauge dropped to 70 psi during the test.

14. Inspector Workman repeated this test two times with Inspector Reid, Mr. Sabo, and Mr. Merico in the cab of the truck. The

cab of the Euclid truck was large enough to safely accommodate the four men.

15. Both inspectors were satisfied, after these tests, that the brakes were very dangerous. Mr. Sabo agreed that the brakes were unable to stop the truck and that the truck should be parked until the brakes could be repaired. I find that the brakes on the Euclid truck were unable to safely stop or hold the truck on inclines that were regularly used during normal use of the truck. Although it would have been a better practice for the inspector to have the truck driver operate the truck while he accompanied him, I find that the inspector exercised reasonable care in choosing a test site and test procedures to determine whether an imminent danger existed, in light of the inspector's experience and the fact that the regular driver accompanied the inspector and instructed him in the operation of the truck.

16. Following the tests, the inspectors issued an order of withdrawal pursuant to section 104(a) of the Act. The truck was taken out of service and the brake diaphragm was replaced. The cause of the brake problem was the fact that the diaphragm was cracked around the outer rim.

17. Mr. Daniel Bainbridge, a mining engineer for the Applicant, testified that the leak responsible for the hissing noise heard by the inspectors was caused by a small leak in the diaphragm. This type of leak would cause a loss of air pressure when the brakes were applied.

18. There is, according to Mr. Bainbridge, no test to determine when this kind of a leak will completely rupture, although it is more likely that a diaphragm would rupture if the diaphragm were cracked and leaking. Age, lack of lubrication and an unattended leak could all contribute to a rupture of a diaphragm.

19. I find that the leak in the brake diaphragm of the Euclid truck was an unsafe condition. I further find that there was a substantial risk that the diaphragm on the truck would completely rupture, rendering the braking system inoperative and very dangerous to the operator.

20. There was a serious risk that the driver of the Euclid truck would lose control over the truck because of a rupture in the diaphragm. Considering the terrain of the refuse site, I find that the condition cited constituted an imminent danger to the operators of the Euclid truck.

DISCUSSION

The controlling issue is whether the condition of the brake diaphragm cited by Inspectors Workman and Reid constituted an imminent

danger within the meaning of sections 104(a) and 3(j) of the Act.

Section 104(a) provides:

If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the area throughout which such danger exists, and thereupon shall issue forthwith an order requiring the operator of the mine or his agent to cause immediately all persons, except those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger no longer exists.

Section 3(j) states: "'imminent danger' means the existence of any condition or practice in a coal mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

In *Consolidated Coal Company, v. MSHA*, Docket No. MORG 78-335 (decided February 28, 1979), I reviewed the evolving administrative, judicial, and legislative construction of the term "imminent danger" and concluded that an imminent danger order would be valid where a substantial possibility of immediate serious harm existed.

In the *Consolidation Coal Company* decision, *supra*, I stated:

The Interior Board of Mine Operations Appeals, in a decision affirmed by the Seventh Circuit Court of Appeals, construed "imminent danger" as being a situation in which "a reasonable man would estimate that, if normal operations designed to extract coal in the disputed area should proceed, it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger." *Freeman Coal Mining Company*, 2 IBMA 197, 212 (1973), *aff'd sub nom Freeman Coal Mining Company v. Interior Board of Mine Operations Appeals*, 504 F.2d 741, 745 (7th Cir. 1974).

The Fourth Circuit Court of Appeals stated in a case involving an imminent danger order: "The Secretary determined and we think correctly, 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."' *Eastern Associated Coal Corporation v. Interior Board of Mine Operations Appeals*, 491 F.2d 277, 278 (4th Cir. 1974), *aff'g Eastern Associated Coal Corporation*,

2 IBMA 128, 136 (1973). See also: Old Ben Coal Corporation v. Interior Board of Mine Operations Appeals, 523 F.2d 25 (7th Cir. 1975).

Absent legislative history or a decision of the Commission to the contrary, it would appear reasonable to apply the test developed by the Interior Board. The statutory language concerning "imminent danger" in the 1977 Act is the same as the language in the 1969 Act; however, the 1977 legislative history clearly indicates that Congress did not intend that the part of the Board's requirement enunciated in Freeman, supra, that "it is at least as probable as not that the feared accident or disaster would occur before elimination of the danger," be followed by the Commission in interpreting the current Act.

Consolidated Coal Company v. MSHA, supra at p. 6.

This conclusion is based on the legislative history of the 1977 Act. The 1977 Senate Committee Report rejected a construction of "imminent danger" that would require a finding by a Federal mine safety inspector that it would be as likely as not that a serious injury or death would result before a condition might be abated.

The Senate Committee Report states:

The Committee disavows any notion that imminent danger can be defined in terms of a percentage of probability that an accident will happen; rather the concept of imminent danger requires an examination of the potential of the risk to cause serious physical harm at any time. It is the Committee's view that the authority under this section is essential to the protection of miners and should be construed expansively by inspectors and the Commission. * * * S.

Rep. No. 95-181, 95th Cong. 1st. Sess. (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977 at 626 (1978).

The Applicant contends that the inspectors failed to make a reasonable determination that the brakes on the Euclid truck could not be reasonably expected to cause death or serious physical harm before the condition could have been abated. It also contends that the inspectors failed to use reasonable testing procedures. However, it is clear from a preponderance of the evidence that the condition of the air brakes on the Euclid truck was unsafe.

The three witnesses present when the inspection was conducted (Inspectors Reid and Workman and Mr. Merico)(FOOTNOTE 2) all testified that there was air leaking from the right rear wheel and that the brakes were not adequate to stop or hold the truck on a roadway that was regularly used. Mr. Merico, the truck operator, had been concerned about the truck's braking capacity for about 3 weeks prior to the inspection because he had trouble controlling the truck when it was loaded. About 1 week before the inspection, he noticed that the wheel was leaking. The cause of this leak was a cracked diaphragm. According to Applicant's witness, Mr. Bainbridge, it would be impossible to predict when the cracked and leaking diaphragm would rupture completely, although this could happen at any time.

I conclude that it was reasonable for the inspectors to order the truck out of service until the diaphragm could be replaced because there was a substantial possibility of serious injury or death should the truck be continued in use. This condition satisfied the Act's definition of "imminent danger".

Although the Applicant offered evidence that Inspector Workman's "pumping" of the brakes was improper and the brakes should have been applied by steady pressure, this point applies to only part of his tests and does not rebut the other numerous facts that show the brakes were inadequate, including the fact that the psi went down to 70 when the truck driver applied the brakes, that everyone heard the hissing noise, the foreman (who witnessed the tests) agreed that the brakes could not hold properly, the diaphragm was cracked, and the inspector also found the brakes inadequate when he applied steady pressure.

CONCLUSIONS OF LAW

1. The undersigned Judge has jurisdiction over the parties and the subject matter of this proceeding.
2. At all pertinent times, Applicant's Federal No. 1 Mine was subject to the provisions of the Act.
3. The Secretary proved, by a preponderance of the evidence, that the condition of the Euclid Truck's braking system in the mine's refuse area on August 29, 1977, constituted an "imminent danger" within the meaning of the Act.

All proposed findings and conclusions inconsistent with the above are hereby rejected.

