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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

CONSOLIDATION COAL COMPANY,
APPLICANT

Application for Review

INDUSTRIAL CONTRACTING OF
FAIRMONT, INC.,
APPLICANT

Docket No. MORG 79-108

Order No. 0804505
February 6, 1979

v.

Loveridge Mine

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

UNITED MINE WORKERS OF AMERICA,
RESPONDENT

DECISION

Appearances: Edgar F. Heiskell III, Esq., Haden and Heiskell,
Morgantown, West Virginia, for Applicants
Barbara K. Kaufmann, Esq., and Sidney Salkin, Esq.,
Office of the Solicitor, U.S. Department of Labor,
Philadelphia, Pennsylvania, for Respondent MSHA

Before: Judge Merlin

Statement of the Case

This is a proceeding filed under section 107(e) of the Federal Mine Safety and Health Act of 1977 by Consolidation Coal Company and Industrial Contracting of Fairmont, Inc., an independent contractor, to review an order of withdrawal issued by an inspector of the Mine Safety and Health Administration (MSHA) under section 107(a) of the Act for imminent danger.

By notice of hearing dated April 6, 1979, this case was set for hearing on June 6, 1979, in Pittsburgh, Pennsylvania. The notice of hearing required the filing of preliminary statements on or before May 22, 1979. The applicants and MSHA filed preliminary statements, and the case was heard as scheduled. The applicants and MSHA appeared and presented evidence.

Applicable Statute

Section 107(a) of the Act provides:

If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

Bench Decision

At the conclusion of the taking of evidence, the parties waived the filing of written briefs, proposed findings of fact, and conclusions of law. Instead, they agreed to make oral argument and have a decision rendered from the bench. Upon consideration of all documentary evidence and testimony, and after listening to oral argument, I rendered the following decision from the bench:

This case is an application filed by Consolidation Coal Company and Industrial Contracting of Fairmont, Inc. for review of an order of withdrawal issued by an inspector of the Mine Safety and Health Administration under section 107(a) of the Act for imminent danger. Section 3(j) of the Act defines imminent danger as the existence of any condition or practice 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.

The order in question recites that three people were observed working on steel structure catwalks and platforms approximately 80 feet above the ground without safety belts or other devices to prevent them from falling; that travelways and platforms were not being kept clear of stumbling and slipping hazards; that a safety device was not provided at the top of the ladder and on one side of the platform where men were

walking; and finally, that on the slurry construction where a person could fall through or over the edge, safety belts or lines were not being used where there was a danger of falling.

The evidence indicates that Industrial Contracting of Fairmont, Inc. was building a steel tower for Consolidation Coal Company. On the day in question, a platform was being constructed at the top of the tower, 80 feet from the ground.

The inspector described the platform at the top of the tower in detail. He described how the platform was reached by walking through the large slurry pipe and that at the end of the pipe he had to jump down approximately 3 feet on the platform (Point A on Respondent's Exhibit No. 2). On the floor of the platform where he jumped down there was some loose grating. He further described the floor of the platform as coated with frost or ice which he said was slippery. According to the inspector there was an area of the platform 52 inches long (Point B on Respondent's Exhibit No. 2), which had no handrail and another area of the platform 12 feet long (Point C on Respondent's Exhibit No. 2) which also had no handrail. The width of the walkways next to these areas were only 24 inches and 33 inches, respectively. Both the 52-inch span and the 12-foot span had cables strung across them, which the inspector did not believe would support a man's weight if he grabbed on to them while falling or if he fell on to them. The inspector's testimony is that the men working on the platform had to pass by these unguarded areas in order to reach their area of work (Point D on Respondent's Exhibit No. 2). The inspector also described a 60-foot area around the belt structure where only a handrail, 6 feet off the platform, existed. Finally, and perhaps most importantly, the inspector testified that the men he observed on the platform were not wearing safety belts.

The inspector's assertion that the men were not wearing safety belts is uncontradicted. His description of the areas which had no handrails, but only cables, also is undisputed as is his statement that the men had to pass by these areas to reach the area they were working. His statement regarding the handrail also was not challenged. The applicant's foreman admitted that there was some frost on some of the grating, but he expressed the view that it was not slippery. I find more persuasive the inspector's

testimony that the floor of the platform was slippery. I also accept the inspector's opinion that the cable strung across the 52-inch span and the cable strung across the 12-foot span would not be strong enough to hold a man if he slipped and fell. Otherwise, there would be no necessity to have handrails at all. I further accept the inspector's testimony that, with respect to the 60-foot area, a man could slip and fall beneath the high rail, which was the only handrail installed in that area.

Based upon the foregoing, I conclude an imminent danger existed. At any moment, one or more of the men could have slipped and fallen at any of the places on the high platform described by the inspector with death or serious injury as the certain result. Regardless of how inconvenient safety belts may have been under the particular circumstances, as the applicant's foreman testified they were, these belts should have been worn. As it was, the men were totally unprotected either by safety belts or by adequate handrails at a time when weather conditions were very bad.

Applicant's counsel has argued most diligently that the men working on the platform were experienced. I cannot, however, accept that as a defense to the order. The Act protects all who work in the mines. It is a sad but true fact of life that some of the worst fatalities have befallen the most experienced of miners.

I also recognize that as applicant's counsel has painstakingly pointed out, the platform was in the process of being constructed and the men were bringing their equipment out on to the platform. It is not for me to tell the applicant how to do its work. However, what I cannot do is countenance the applicant's discharge of its construction responsibilities in a manner which exposes its men, even though they may be experienced in their field, to imminent danger.

In light of the foregoing, I find and conclude that an imminent danger existed. The order is upheld and the application for review is dismissed.

I thank both counsel for a very helpful oral argument.

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ORDER

The bench decision is hereby AFFIRMED. Accordingly, it is ORDERED that Order No. 0804505 be UPHELD and that the application for review be DISMISSED.

Paul Merlin
Assistant Chief Administrative Law Judge