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

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

Civil Penalty Proceeding  
Docket No. VINC 79-119-P  
A.O. No. 12-00329-03004-V

v.

Old Ben No. 2 Strip Mine

OLD BEN COAL COMPANY,  
RESPONDENT

DECISION

Appearances: Rafael Alvarez, Esq., Office of the Solicitor, U.S.  
Department of Labor, Chicago, Illinois, for Petitioner;  
Edmund J. Moriarty, Esq., Chief Counsel, Old Ben Coal  
Company, Chicago, Illinois, for Respondent.

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE AND FINDINGS OF FACT

This is a civil penalty proceeding. Respondent is charged with a single violation of the mandatory standard contained in 30 CFR 77.1710(g) occurring on April 12, 1978. A hearing was held in St. Louis, Missouri, on April 10, 1979. Joseph Hensley testified for Petitioner. Robert Tooley and Dale Wools testified for Respondent. At the conclusion of the hearing, each party waived its right to file proposed findings of fact and conclusions of law.

The facts are essentially not in dispute. ANSCO, Inc., was constructing a bucket building on Respondent's premises under a contract with Respondent. The building was intended to be used for maintenance and repair of the buckets which Respondent used in extracting coal. On April 12, 1978, one of ANSCO's employees was observed working 15 to 20 feet in the air standing on an I-beam on the side of the building. He was not wearing a safety belt and there was danger of his falling.

The contract between Respondent and ANSCO provided that ANSCO was to erect the building for a fixed sum according to certain specifications. Under the terms of the contract and in carrying it

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out, ANSCO was independent of any control by Respondent. Its employees were supervised by its own supervisor and Respondent did not hire, fire, direct or control them in their duties. There were no employees of Respondent close to the area where the alleged violation occurred except Dale Wools, Old Ben mine inspector, who accompanied the Federal inspector, Joseph Hensley. When the violation was observed, Hensley told Wools that he was writing a citation and Wools told the ANSCO employee to come down. The ANSCO supervisor was not in the immediate vicinity at that time. The employee admitted that he had been instructed to wear a safety belt, but thought he could finish his job before the supervisor returned.

On April 11, 1978, Inspector Hensley was at the same site and noticed ANSCO employees in elevated places without safety belts. Hensley discussed this situation with the ANSCO supervisor who promised to instruct his men about the requirements for safety belts. No citations were written as a result of these occurrences.

#### ISSUES

1) Whether Respondent, a coal mine operator, is responsible in a penalty proceeding under the Federal Mine Safety and Health Act of 1977 for violations which involve only the employees of an independent contractor.

2) If so, what is the appropriate penalty?

#### STATUTORY PROVISIONS

Section 110(a) of the Federal Mine Safety and Health Act of 1977 provides:

The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than \$10,000 for each such violation.

Section 3(d) of the Act provides:

"Operator" means any owner, lessee, or other person who operates, controls or supervises a coal or other mine or any independent contractor performing services or construction at such mine.

#### REGULATION

30 CFR 77.1710 provides in part:

Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be

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required to wear protective clothing and devices as indicated below:

\* \* \* \* \*

(g) Safety belts and lines where there is danger of falling \* \* \*.

#### THE REPUBLIC STEEL AND COWIN CASES

On April 11, 1979, the day following the hearing in this case, the Commission issued its decisions in Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Republic Steel Corporation, Docket Nos. MORG 76-21 and MORG 76X95-P (79-4-4) and in Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Cowin and Company, Inc., Docket No. BARB 74-259 (79-4-5). Both of these cases arose under the Federal Coal Mine Health and Safety Act of 1969. The 1969 Act defined "operator" as "any owner, lessees or other person who operates, controls or supervises a coal mine." In Cowin, the Commission held that Cowin and Company, a construction contractor under contract with a coal mine owner "was an 'operator' of a 'coal mine' under the 1969 Act \* \* \*." In Republic, the Commission held that "as a matter of law under the 1969 Act an owner of a coal mine can be held responsible for any violations of the Act committed by its contractors."

The legal issue here is therefore a narrow one: Does the specific inclusion in the 1977 Act of independent contractors within the definition of operator affect the liability of coal mine operators for violations of such contractors? The fact that an independent contractor is an "operator" and thus liable under the Act for safety violations, does not necessarily exclude the liability of the coal mine operator, as the two Commission decisions clearly illustrate. I interpret the decisions to give the Secretary discretion under the 1969 Act to assess a penalty for a violation committed by an independent contractor against the contractor or against the mine operator. The fact that a contractor is an operator by explicit statutory language rather than by construction, should logically not limit the Secretary's discretion. The legislative history does not support Respondent's position that Congress intended to limit or withdraw the liability of coal mine operators for acts or omissions of independent contractors. See JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, S. REP. NO. 95-461, 95th CONG., 1st SESS. (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 1315.

#### CONCLUSIONS OF LAW

1. Respondent, Old Ben Coal Company, is liable as a matter of law under the Federal Mine Safety and Health Act of 1977 for violations of safety standards committed by its contractor, ANSCO, Inc.

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2. On April 12, 1978, Respondent violated the safety standard contained in 30 CFR 77.1710(g), because the employee of ANSCO was not required to wear a safety belt when working on a high place.

3. The violation was serious, since it could have resulted in a fatality or serious injury.

4. The evidence does not establish that the violation resulted from Respondent's negligence. The employee in question was not directly or indirectly under Respondent's control. I do not accept the position that a violation of a safety standard is negligence per se. Such a position makes the specific inclusion of negligence as a criterion for determining the amount of the penalty, nonsensical.

5. Respondent is a large operator. There is no evidence that a penalty will have any effect on its ability to continue in business.

6. There is no evidence concerning Respondent's previous history of violations.

7. Respondent demonstrated good faith in attempting to achieve rapid compliance after being notified of the violation.

I conclude, based on the above findings of fact and conclusions of law, and considering the statutory criteria in section 110(i) of the Act, that an appropriate penalty for the violation is \$750.

ORDER

WHEREFORE Respondent is ORDERED to pay within 30 days of the date of this decision the sum of \$750 as a penalty for the violation found herein to have occurred.

James A. Broderick  
Chief Administrative Law Judge