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ITMANN COAL CO. V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

ITMANN COAL COMPANY,
APPLICANT

Application for Review

v.

Docket No. WEVA 79-119-R
Withdrawal Order No.
0660641

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

Issued: April 26, 1979

Itmann No. 3 Mine

Appearances: Karl T. Skrypak, Esq., Consolidation Coal
Company, Pittsburgh, Pennsylvania, for Applicant
David E. Street, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia, Pennsylvania,
for Respondent
Mary Lu Jordan, Esq., for the United Mine Workers
of America, Washington, D.C.

Before: Judge Kennedy

DECISION AND ORDER

On April 26, 1979 at 2:45 a.m., a haulage accident occurred at applicant's Itmann No. 3 Mine. At 7:45 a.m. an accident control and withdrawal order issued pursuant to section 103(k), 30 U.S.C. 813(k), (Footnote 1) of the Mine Act "to ensure the safety of the miners until an investigation can determine the cause or causes" of the accident. The equipment

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and area covered by this order were "locomotive No. 784 and the trolley system between No. 5 rectifier and No. 6 rectifier." The Order was modified at 9:00 a.m. to permit the equipment involved to be moved out of the area.

At 3:15 p.m. on the same day order of withdrawal No. 0660641 issued pursuant to section 107(a), 30 U.S. 817(a), (Footnote 2) of the Act on the finding that an imminent danger existed "due to [a] kink in the trolley wire which caused the trolley pole of the locomotive No. 784 to become disengaged from such wire and the pole became free swinging along an area of trolley wire supports and striking such supports forcing the pole to swing across the locomotive striking and injuring two employees." The equipment and area which were covered by this order were "[a]ll track haulage locomotives that are designed [to] permit the pole to free swing if disengaged from the wire and trolley system from No. 5 to No. 6 rectifier stations." The Order was modified at 10:00 p.m." to allow the use of haulage motors that do not have free swinging trolley poles."

On April 29, 1979 at 11:45 a.m., the section 107(a) imminent danger order was terminated because "[t]he track haulage equipment at the Itmann #3 mine that have [sic] free swinging trolley poles have been modified to prevent the poles from swinging across the motor decks when they become disengaged from the trolley wire."

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At 12:00 noon on the same day, the section 103(k) control order was terminated because "[t]he investigation of the serious haulage accident has been completed and the trolley wire and the modifications to the haulage equipment appeared to be adequate for the resumption of use."

The captioned Application for Review was filed on May 11, 1979, alleging that the condition described did not constitute an imminent danger and that the order was invalidly issued. On September 6, 1979, applicant filed a motion for summary decision pursuant to 29 C.F.R. 2700.64, by which it seeks a finding that a section 107(a) imminent danger closure order may not properly be issued in an area and on equipment already covered by a section 103(k) control order. On September 24, 1979, the United Mine Workers of America filed their opposition to applicant's motion, and on September 26, 1979, the Secretary filed his opposition. There being no genuine issue as to the material facts, (Footnote 3) the matter stands ready for summary decision of the question of law presented.

Applicant admits that the section 103(k) order was properly issued to control the scene of the accident so that a thorough investigation could be conducted. Applicant further concedes that the Secretary may cite an operator for any violations of the Act or of the mandatory standards which are disclosed by the investigation. (Footnote 4) Applicant contends, however, that as a matter of law "it is impossible for MSHA to make the necessary section 107(a) imminent danger finding when miners have been withdrawn from the area by the section 103(k) Order." (Motion p. 5) It is further

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suggested that since section 103(k) grants the Secretary broad authority to make recommendations as to corrective action to be taken before the Order was terminated, and since the miners had already been withdrawn, the issuance of a section 107(a) imminent danger order during the accident investigation was unauthorized. (Id.)

The only authority cited by applicant in support of its position is my decision in Eastern Associated Coal Corp., HOPE 73-663 (February 12, 1974), affirmed as modified 4 IBMA 298 (June 25, 1975). This reliance, however, is clearly misplaced since I held merely that in the absence of a condition or practice constituting an imminent danger an imminent danger closure order may not be used for control purposes. In that case I vacated the imminent danger order because the inspector had no reason to believe that the fatal haulage accident was the result of an imminent danger, no inspection or investigation had disclosed the existence of such a danger, and the order was issued solely for control purposes. I pointed out that section 103(f) of the 1969 Act, the parallel provision of section 103(k) of the 1977 Act, is an independent grant of authority that permits federal mine inspectors to take control of the scene of an accident and to issue any type of order, including imminent danger orders, appropriate to insure the safety of persons in the mine. Anticipating the very issue which applicant raises here I clearly stated:

So that there be no misunderstanding as to the scope of our ruling, we wish to emphasize that the operator does not contend, nor do we hold, that a section 104(a) order of withdrawal may not be appropriate and warranted within the meaning of section 103(f) where a proper surface or underground inspection at the scene of a mine accident discloses the existence of an imminent danger. Id. at p. 17.

Indeed, this decision is in accord with a line of cases which have rejected applicant's position. In Valley Camp Coal Co., 1 IBMA 243 (December 29, 1972), the operator argued that an imminent danger order could not properly issue when all personnel had voluntarily withdrawn from the mine prior to the inspection. Rejecting this contention the Board stated:

Valley Camp bases its argument on an erroneous belief that an order of withdrawal cannot properly be issued if no miners are in the mine when the order is issued. We previously rejected this argument in

UMWA District #31 v. Clinchfield Coal Co., 1 IBMA 31, 41 (1970), wherein it was held that because an order of withdrawal not only takes the miners out of the mine, but also keeps them out until the danger has been eliminated, an order of withdrawal may be issued when no miners are in the mine. 1 IBMA at 248.

Thus, the mere fact that miners have been withdrawn prior to the issuance of an imminent danger order does not invalidate that order. In *Eastern Associated Coal Corp. v. IBMA*, 491 F.2d 277 (4th Cir. 1974), it was held that an imminent danger order is valid even though prior to issuance the operator had voluntarily withdrawn the miners and was in the process of abating the condition. The validity of an imminent danger order depends solely upon whether the condition or practice could reasonably be expected to cause death or serious physical harm "if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." 491 F.2d at 278. The purpose of the imminent danger order is not only to withdraw the miners, but also to keep them withdrawn until the condition is corrected.

The question of the effect of simultaneous closure orders was first considered in *Roscoe Page, et al. v. Valley Camp Coal Co.*, 6 IBMA 1 (January 28, 1976). The miners who were idled by an unwarrantable failure withdrawal order filed for compensation. The operator defended on the ground that no miners were idled by the order because they had previously been withdrawn by an accident control order pursuant to section 103(f) of the 1969 Act. The Board rejected the contention that the control order invalidated the overlapping unwarrantable failure order. 6 IBMA at 6.

Finally, in a decision directly on point, *Peabody Coal Co., VINC 77-40, 77-50* (March 1, 1978), affirmed (Sept. 7, 1979), it was held that miners were entitled to compensation as a result of the valid issuance of an imminent danger order even though a control order was already in effect. This follows because, "the purpose of [an imminent danger] withdrawal order is not only to remove the miners but also to insure that they remain withdrawn until the imminent danger has been eliminated." *Id.* at p. 7.

Thus, it is apparent that in the case at hand the section 103(k) control order was issued for the purpose of facilitating the investigation of the haulage accident. When the inspector determined that the cause of the accident which killed one miner and seriously injured another was an

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3 The United Mine Workers takes issue with applicant's characterization of the 107(a) order as covering "essentially the same" area and equipment as the 103(k) order. This contention is, however, not material to the determination of the question of law presented.

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4 Since the condition which caused the accident, namely the kink in the trolley wire, was not a violation of a mandatory safety standard, a penalty will not be assessed. At this stage of the proceeding, it is unnecessary to express any opinion or finding with respect to the claim that the condition constituted an imminent danger. Whether the condition merits the issuance of an improved standard that might require inspection of trolley wires for conditions that may result in fatalities or injuries is not before us.