

CCASE:
SOL (MSHA) V. C & K COAL
DDATE:
19800612
TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. C AND K COAL COMPANY,	PETITIONER	Civil Penalty Proceeding Docket No. PENN 79-60 A/O No. 36-03135-03003 C and K Strips
	RESPONDENT	

DECISION

ORDER TO PAY

Appearances: David Street, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for Petitioner, MSHA Bruno
Muscatello, Esq., Brydon, Stepanian and
Muscatello, Butler, Pennsylvania, for
Respondent, C & K Coal Company

Before: Judge Merlin

This case is a petition for the assessment of civil penalties filed by MSHA against the C and K Coal Company. A hearing was held on May 13, 1980.

Prior to the hearing the parties submitted joint stipulations which had been agreed to by counsel. At the hearing I accepted these stipulations (Tr. 4).

Both parties waived the filing of written briefs, and agreed to have a decision rendered from the bench after the presentation of oral argument (Tr. 20). A decision was rendered from the bench setting forth findings and conclusions with respect to the alleged violations (Tr. 20-24).

BENCH DECISION

The bench decision is as follows:

This case is a petition for the assessment of civil penalties filed under section 110 of the Act. The petition contains nine citations. The parties have proposed a settlement in the amount of \$90 for the first violation. This is the amount originally assessed. After review of this citation, I have determined that the proposed settlement is in accordance with the statutory criteria and is therefore approved.

The remaining eight citations which involve various mandatory standards have been the subject of detailed stipulations submitted to me by the Solicitor and operator's counsel. In these stipulations the parties agree, *inter alia*, that the conditions occurred as cited; that the conditions constituted a violation; that the violations were committed by employees of an independent contractor engaged by the operator to erect a drag line for the operator's use; that the independent contractor had sole control over its employees; that only the contractor's employees were exposed to the conditions cited in the petition except for the one citation, Citation 619324, with respect to which respondent's maintenance employee was exposed; that the operator was not negligent with respect to any of these violations; that all but one of the violations were serious; that the operator has a small history; that the operator's ability to continue in business will not be affected by imposition of any penalties; that the violations were abated in good faith; and that the operator is medium in size. Finally, the stipulations set forth that the independent contractor had a separate identification number.

The issue for resolution is whether a penalty should be assessed against the operator for the violations committed by the independent contractor, and if so, the appropriate amount of such penalties.

On October 29th, 1979, the Commission in Old Ben Coal Company, Docket No. VINC 79-119, held that an operator could be held responsible without fault for the violations of the Act committed by its independent contractor. In addition, the Commission decided that the Secretary's determination to proceed against the operator for an independent contractor's violations was reviewable by the Commission. In reviewing the Secretary's determination to proceed against the operator, the Commission stated that the appropriate inquiry was to determine whether the Secretary's decision was made for reasons consistent with the purposes and policies of the Act. The Commission further set forth that the Secretary had represented at that time, *i.e.*, last October, that the policy of enforcing the Act only against owners was an interim one pending adoption of regulations providing guidance to inspectors in the identification and citation of contractors. The Commission expressly noted that the interim policy of citing only owners was not in line with the view expressed by the Secretary in his proposed regulations of how best to enforce the 1977 Act. Nevertheless, the Commission recognized that it takes "some time" for the development of new policies and new procedures and therefore, the Secretary's decision in that case to proceed against the operator was held to be

~1412

grounded on considerations of consistent enforcement. Accordingly, the Commission upheld the citation. Finally, the Commission concluded that if the Secretary "unduly" prolonged the policy that prohibited direct enforcement against contractors he would be disregarding the intent of Congress.

Six and a half months have now elapsed since the Commission's decision in Old Ben. Nine months have elapsed since the Secretary issued his proposed regulations on this matter. During oral argument, the Solicitor advised that the Secretary has held hearings on the proposed independent contractor regulations. The record on these hearings was closed last November but no definitive action has yet been taken. It appears, therefore, that for a substantial period of time this matter has been before the Secretary.

Time is running out for the Secretary in this situation.

Citations of operators, especially where as here the independent contractor has his own identification number, does not advance effective enforcement of the Act. Rather it does just the opposite.

Action by the Secretary on this matter is overdue. I have determined not to dismiss this particular petition and vacate these citations. However, under the circumstances only a nominal penalty against the operator will be assessed.

The Secretary should realize that the day is not far distant when citations such as these will be vacated and when a petition such as this will be dismissed.

As already set forth, I approve a penalty of \$90.00 for the first violation. A penalty of \$1.00 is imposed for each of the eight remaining citations.

The operator is ordered to pay \$98.00 within 30 days from the date of the issuance of the written decision confirming this Bench decision.

ORDER

The foregoing bench decision is hereby, AFFIRMED.

The operator is ORDERED to pay \$98 within 30 days from the date of this decision.

Paul Merlin
Assistant Chief Administrative Law Judge