

CCASE:
SOL (MSHA) V. KENNECOTT COPPER
DDATE:
19800613
TTEXT:

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

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

CIVIL PENALTY PROCEEDING

DOCKET NO. WEST 79-275-M

ASSESSMENT CONTROL NO. 02-00826-05003

v.

KENNECOTT COPPER CORPORATION,
RESPONDENT

MINE: HAYDEN CONCENTRATOR

DECISION AND ORDER

STATEMENT OF THE CASE

This proceeding arose through initiation of an enforcement action brought pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1978) [hereinafter cited as "the 1977 Act" or "the Act"]. On April 28, 1980, Respondent, Kennecott Copper Corporation [hereinafter "Kennecott"], filed with the Commission its Motion for Summary Decision pursuant to Commission Rule 64, 29 CFR 2700.64. Petitioner, the Secretary of Labor, Mine Safety and Health Administration (MSHA) [hereinafter "the Secretary"], responded by filing a brief on May 5, 1980. Kennecott, in turn, filed a reply brief with the Commission on May 7, 1980.

FINDINGS OF FACT

The parties agree, and I concur, that there is no issue in dispute as to any material fact. From the uncontroverted evidence, I find the following facts to be established:

1. Cimetta Engineering Construction Company, Inc. [hereinafter "Cimetta"] was engaged by Kennecott as an independent contractor to install a new ball mill in the reduction plant at Kennecott's Hayden Concentrator and in the course of such duties had a continuing presence at the mine.

~1428

2. On April 11, 1979, a flat bed truck owned and operated by Cimetta was observed by an MSHA inspector who subsequently determined that the truck's brake lights and signal lights were not operating, contrary to the provisions of 30 CFR 55.9-21

3. Citation No. 378845 was issued to Kennecott by the MSHA inspector for Cimetta's violation of the above-cited mandatory safety standard.

4. The Secretary issued a proposed rule setting forth criteria by which the Mine Safety and Health Administration would identify certain independent contractors as operators under the 1977 Act. The proposed rule was published on August 14, 1979 at 44 Fed. Reg. 47746 (1979).

5. No such final rule has, as of yet, been issued.

6. Respondent operates a large mining business.

7. In the twenty-four months prior to this inspection, Respondent had no history of previous violations.

8. The condition cited was corrected within the time specified for abatement in the citation.

9. Payment of the proposed penalty will not impair the ability of Respondent to continue in business.

ISSUES PRESENTED

The following issues are presented for determination:

1. Whether an owner-operator can be held liable for activities of an independent contractor which constitute a violation of regulations promulgated pursuant to the 1977 Act?

~1429

2. Whether the Secretary unduly delayed the issuance of a final rule permitting direct enforcement against an independent contractor for activities which constitute a violation of regulations promulgated pursuant to the 1977 Act?

3. Whether an owner-operator should be held liable for activities of an independent contractor which constitute a violation of regulations promulgated pursuant to the 1977 Act?

4. Whether the \$40.00 penalty assessment proposed for Citation No. 378845 is reasonable and appropriate under the circumstances?

DISCUSSION

The first issue presented for discussion, that of owner-operator liability, has previously been addressed by the Federal Mine Safety and Health Review Commission. In *Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Old Ben Coal Company*, (Docket No. VINC 79-119, October 29, 1979) [hereinafter cited as "Old Ben"], the Commission decided that an owner-operator can be held responsible without fault for the violation of the Act committed by its independent contractor. The Commission elaborated:

"When a mine operator engages a contractor to perform construction or services at a mine, the duty to maintain compliance with the Act regarding the contractor's activities can be imposed on both the owner and the contractor as operators. This reflects a congressional judgment that, insofar as contractor activities are concerned, both the owner and the contractor are able to assure compliance with the Act. Arguably, one operator may be in a better position to prevent the violation. However, as we read the statute, this issue does not have to be decided since Congress permitted the imposition of liability on both operators regardless of who might be better able to prevent the violation." Old Ben at 1483.

Several other decisions of the Review Commission are in agreement. See also *Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Republic Steel Corporation*, (Docket No. IBMA 76-28, April 11, 1979); *Secretary of Labor*

~1430

Mine Safety and Health Administration (MSHA) v. Kaiser Steel Corporation, (Docket No. DENV 77-13-P, May 17, 1979); Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Monterey Coal Company, (Docket No. HOPE 78-469, November 13, 1979).

The second issue presented for discussion, that of undue delay in the issuance of a final rule regarding independent contractor-operators, may now be addressed. The Review Commission in its decision of Old Ben emphasized that the amendment of the definition of "operator" in the Act to include independent contractors makes it clear that contractors can be proceeded against and held responsible for their own violations. "Indeed, ... direct enforcement against contractors for their violations is a vital part of the 1977 Act's enforcement scheme." Old Ben at 1483.

To give full effect to that scheme, the Secretary issued a proposed rule setting forth criteria that would enable MSHA inspectors to proceed directly against independent contractors as operators for their violations of the Act. The due date for comments regarding the proposed rule was October 15, 1979. 44 Fed. Reg. 47746 (1979). Eight months have passed since that due date and no final rule has been issued.

In Old Ben the Secretary asserted that although Old Ben Coal Company "... was proceeded against in accordance with a Secretarial policy of directly

enforcing the Act only against owners, this policy is an interim one pending adoption of regulations providing guidance to inspectors in the identification and citation of contractors." Old Ben at 1486.

However, the Commission noted:

"... [T]here is no indication of when the interim policy will be replaced by a new one. If the Secretary unduly prolongs a policy that prohibits direct enforcement of the Act against

contractors, he will be disregarding the intent of Congress. In view of the Secretary's express recognition of the wisdom and effectiveness of subjecting contractors to direct enforcement, continuation of a policy that forecloses such enforcement will provide evidence that the current policy is grounded on improper considerations of administrative convenience, a basis that would not be consistent with the Act's purpose and policies To use this tool as a mere administrative expedient would be an abuse." Old Ben at 1486-7.

As a matter of law, I cannot find by a preponderance of the evidence that the Secretary has unduly prolonged a policy that prohibits direct enforcement of the Act against independent contractors.

Eight months have passed since the due date for receipt of comment on the proposed rule. That is a long time. Twenty-seven months have passed since the effective date of the Act. That is an even longer time. The wheels of government turn slowly, but turn they must.

Unless he acts, the Secretary will soon cross the line and have taken too long. In light of the Commission's reasoning in Old Ben, I rule that the Secretary has not unduly delayed the issuance of a final rule regarding independent contractors.

Based upon the foregoing conclusion, I must resolve the issue of whether an owner-operator should be held liable for contractor activities in the affirmative. Old Ben clearly establishes that the duty to maintain compliance with the Act regarding a contractor's activities can be imposed on both the owner and contractor as operators. As the Secretary has not unduly prolonged the interim enforcement policy of citing owners only, the owner-operator should be held liable for independent contractor activities which constitute a violation of the Act. Someone must be held responsible for the safety and health of miners. In this circumstance, that responsibility must rest with the owner-operator.

From the facts as found, it appears that Citation No. 378845 was properly issued for a violation of 30 CFR 55.9-2. Respondent operates a large mining business and payment of the proposed penalty will not impair its ability to

~1432

continue in business. Respondent has no history of previous violations and exhibited good faith in the prompt correction of the condition cited. Kennecott's negligence was ordinary and the gravity of the situation created by that negligence was slight. Based on the foregoing discussion, the \$40.00 penalty assessment proposed for this citation is considered by me to be a proper amount.

CONCLUSIONS OF LAW

1. The undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.
2. The conditions found to exist on April 11, 1979, in Finding of Fact No. 2, constitute a violation of the mandatory safety standard contained in 30 CFR 55.9-2.
3. Respondent can be held liable for the activities of its independent contractor constituting the violation found to exist in Conclusion No. 2 above.
4. The Secretary has not unduly delayed the issuance of a final rule permitting direct enforcement against an independent contractor for activities which constitute a violation of regulations promulgated pursuant to the 1977 Act.
5. Respondent is liable for the activities of its independent contractor which constitute the violation found to exist in Conclusion No. 2 above.
6. The \$40.00 penalty assessment proposed for Citation No. 378845 is reasonable and appropriate under the circumstances.

ORDER

Based upon the foregoing findings of fact and conclusions of law, Citation No. 378845 and the proposed penalty assessment of \$40.00 are hereby affirmed. Respondent shall pay the affirmed penalty within thirty days of the date of this Decision.

Jon D. Boltz
Administrative Law Judge

~FOOTNOTE 1

Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used.