

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
(703) 756-6225

21 AUG 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. DENY 79-579-PM
Petitioner : A.O. No. 39-00055-05005
v. :
: Homestake Mine
HOMESTAKE MINING COMPANY, :
Respondent :

DECISION

Appearances: Phyllis K. Caldwell, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; Timothy M. Biddle and John T. Scott, Attorneys, Crowell & Moring, Washington, D.C., for Respondent.

Before: Judge Edwin S. Bernstein

On May 5, 1980, at a hearing pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 801 et seq., and 29 C.F.R. § 2700.50 et seq., counsel for Petitioner moved to withdraw Citation and Order No. 331402. The parties explained the motion as follows:

MISS CALDWELL: * * * This was an imminent danger, 107-A.

Homestake does not now and did not contest the imminent danger part of that, or they would have filed an application for review at the time that this order was issued.

* * * * *

That states that 'Shafts shall be kept in good repair and clean of hazardous material.'

In order to sustain a penalty on this violation, the Secretary must initially prove the violation and then prove the six statutory criteria.

Homesteke has raised what we feel is a very solid legal defense. Homestake does not have any disagreement with the facts. There are no facts at issue. They have agreed to the findings that Mr. Donley and the other people made at that point that are stated in the citation. So there is nothing, factually, at issue.

THE COURT: What are the essential findings in the citation that they have agreed to?

MR. BIDDLE: Your Honor, I can perhaps answer that quickly and go on from there. The allegation in the citation is that several shaft sets were out of alignment. Homestake, has advised the Government and also given it copies of materials to back it up that Homestake did, in fact, know that the shaft sets were out of alignment several days prior to the issuance of the citation and was in the process of repairing them at the time.

Homestake believes that that's **all** that is required under the regulation. It simply says that they must be kept in good repair.

THE COURT: So your defense is based upon the contention that you **were** in the process of repairing these.

MR. BIDDLE: That's correct, Your Honor. And I think the Government would agree that the shaft sets were out of alignment in the first place due to no fault of Homestake.

THE COURT: All right. Do you agree that they were in the process of repairing them?

MISS CALDWELL: Yes. And that is what *was* found by Mr. Donley and the other people who inspected it that day.

They issued the order because they felt it was an imminent danger and because of the other two conditions which existed and which were taken care of by the other two withdrawal orders which are not at issue.

So the imminent danger for which they issued that did exist, and that was not disagreed with by Homestake.

THE COURT: And this was kind of a situation of guilt by association. They found the other conditions, and they issued a citation with respect to this one even though Homestake was, in good faith, repairing this condition at the time; is that correct?

MISS CALDWELL: Correct, Your Honor. That's one of the legal problems we see with this in trying to prove this and sustain it legally.

We also feel, Your Honor, I might add that this condition was taken care of in good faith, and that there is no longer a **danger**, to the employees at this location because of this citation.

THE COURT: Well, certainly, if they discover a condition and if they were in the process of repairing it, they can't do anything more. I think the motion is well-grounded, and I will approve the motion to dismiss. I dismiss this citation.

This bench decision is AFFIRMED and the citation is DISMISSED.



Edwin S. Bernstein
Administrative Law Judge

Distribution:

Phyllis K. Caldwell, Attorney, Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

Timothy M. Biddle, John T. Scott, Attorneys, Crowell & Moring, 1100 Connecticut Ave., NW., Washington, DC 20036 (Certified Mail)