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SOL (MSHA) V. COWIN & COMPANY
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceedings Docket Nos. HOPE 76-210-P HOPE 76-211-P HOPE 76-212-P
v.	HOPE 76-213-P
COWIN AND COMPANY, INC., RESPONDENT	Beckley No. 1 Mine,

DECISION

Appearances: J. Philip Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner, Secretary of Labor William H. Howe, Esq., Loomis, Owen, Fellman & Howe, Washington, D.C., for Respondent, Cowin and Company, Inc.

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

This case was originally tried under section 109(c) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 819(c). The decision was issued on September 14, 1978. The Fourth Circuit Court of Appeals held on December 28, 1979, that Respondent should not have been charged as an "agent" of an operator under section 109(c) of the Act, but as an operator under section 109(a). Cowin and Company, Inc. v. FMSHRC, 612 F.2d 838, 840 (4th Cir. 1979). The case was remanded so that the administrative record could be reopened "for the submission of additional relevant evidence and arguments before Cowin's civil liability is determined and penalties can be assessed under the proper section." Id. at 841.

By order dated March 27, 1980, I granted leave to amend the petition for assessment of civil penalties to allege liability under section 109(a)(1) of the Act. Respondent's answer was filed on April 18, 1980. The parties have stated that they do not wish to submit additional evidence. A briefing schedule was set on June 4, 1980. Respondent filed a brief on June 26, 1980, and Petitioner filed a reply brief on July 11, 1980. Respondent has elected not to respond to Petitioner's reply brief.

STATUTORY PROVISIONS

Section 109(a)(1) provides:

> The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, except the provisions of title 4, shall be assessed a civil penalty by the Secretary under paragraph (3) of this subsection which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense. In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

Section 109(c) provides:

> Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) of this section or section 110(b)(2) of this title, any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (b) of this section.

FINDINGS OF FACT

The discussions entitled "The Eleven Alleged Violations" (pp. 9-15) and "Appropriate Penalties" (pp. 19-21) in my decision of September 14, 1978, are incorporated herein by reference.

ISSUES

1. Did Respondent violate the standards as charged by Petitioner?

2. Is 30 C.F.R. 77.1903(b) a mandatory standard?

3. Is Respondent an "operator" within the meaning of section 109(a)(1)?

4. Should the case be dismissed because of Petitioner's alleged failure to follow its own procedures for assessment of civil penalties?

DISCUSSION

Four arguments have been raised by Respondent since the remand. Two may be disposed of by referring to my prior decision. Respondent claims that 30 C.F.R. 77.1903(b) is not a mandatory standard upon which an order may be issued and a penalty imposed. This claim was raised and rejected in the first decision, on pages 12-13. Respondent also argues that there were no violations of mandatory standards, referring to its brief filed on July 10, 1978. The first decision also took account of this claim and rejected it. This case is before me "for the submission of additional relevant evidence and arguments." Cowin and Company, Inc. v. FMSHRC, supra. No additional evidence has been offered and these two arguments are not new. The court of appeals considered the whole record and it disagreed only with the finding that Respondent was liable under section 109(c). "No merit" was found in Respondent's other contentions. Id. I have found unpersuasive the additional analysis put forth in support of the first argument since the remand. Respondent's first two arguments are rejected.

Respondent next asserts that the Secretary cannot now deviate from its "operators only" policy of enforcement, adopted in 1975 and sustained by the Commission in MSHA v. Old Ben Coal Company, 1 FMSHRC 1480 (October 29, 1979). According to that policy, Ranger Fuel, the mine operator, would be the party responsible for any violation on the part of Cowin and Company, Inc.

The independent contractor problem has long plagued enforcement of coal mine safety regulations. At the time of the accident on January 7, 1974, the controlling view was that independent contractors could be liable as "operators" under the 1969 Coal Act. Affinity Mining Company, 2 IBMA 57 (1973). In May of 1975, a district court disagreed, after which the Secretary adopted his "operators only" policy. Association of Bituminous Contractors v. Morton, No. 1058-74 (D.D.C. 1975). The petition for assessment of penalties was filed on January 15, 1976. Before the case was decided in September of 1978, two circuit courts had concluded that independent contractors could be liable as "operators," reincarnating the Affinity rule. Association of Bituminous Contractors v. Andrus, 581 F.2d 853 (D.C. Cir., February 22, 1978); BCOA v. Secretary of Interior, 547 F.2d 240, 246 (4th Cir. 1977). Despite this, the Commission in Old Ben approved the Secretary of Labor's "interim" policy of citing only mine operators, for two reasons. First, "unpredictability, confusion and potential unfairness"

were said to be threatened by giving inspectors blanket discretion to decide who is the "operator" for purposes of liability. Second, tolerance for the Secretary's policy was warranted since the Secretary of Labor had been assigned responsibility for mine safety just recently.

The Secretary's new rules on independent contractor liability have been published. 45 Fed. Reg. 44494 (July 1, 1980). No unpredictability, confusion or potential unfairness can result from holding Cowin and Company, Inc., to the section 109(a) standard in any event. The violations were clearly caused by the company and it had ample opportunity to present evidence on all matters bearing on section 109(a)(1) liability.

Furthermore, the simple fact is that, despite the Secretary's policy, the law prevailing at the time of the first decision and still prevailing is that independent contractors may be liable as operators under the 1969 Coal Act. The court, therefore, appears to have decided that continued adherence to the "operators only" policy is insupportable in this case.

Even assuming that the policy is a rule which the Secretary is ordinarily bound to observe, the purpose of the doctrine that an agency is bound by its own rules is "to prevent the arbitrainess which is inherently characteristic of an agency's violation of its own procedures." United States v. Heffner, 420 F.2d 809, 812 (4th Cir. 1970). Rooted as it is in notions of due process, this doctrine is not inflexible. Adherence to agency policy in this case produced a result more arbitrary than departure from it: failure to cite an independent contractor under the provision of law intended by Congress to apply to such entities. Moreover, the decision to depart from the policy was not the result of agency caprice but was directed by a federal court. I conclude that Respondent is subject to liability as an operator under section 109(a)(1).

Respondent's final claim is that the petition should be dismissed since the Secretary failed to follow his own regulations for assessment of civil penalties. Specifically, Respondent states it was not afforded a conference with an assessment officer or a chance to negotiate a reduction in penalties before the assessments became final.

It is true that 30 C.F.R. Part 100, as it read from 1974 to 1978, detailed penalty assessment procedures only for section 109(a) cases. However, Petitioner states in its reply brief that Respondent was, in fact, originally charged as an operator under section 109(a) and thus had the opportunity to avail itself of Part 100 procedures. Due to the change in enforcement policy discussed above, Respondent had to be recharged as an agent of an operator. Petitioner also states that it offered to enter into settlement discussions with Respondent after this case was remanded by the Fourth Circuit.

Respondent's assertion that the procedures in 30 C.F.R., Part 100, were not followed, even if true, is inconsequential. The Petitioner and his predecessor, the Secretary of Interior, always have been vested with prosecutorial discretion to engage in settlement negotiations in civil penalty cases of this nature. Respondent does not contend that it ever requested an opportunity to discuss settlement which was denied by the charging party. Respondent's final claim is rejected.

Petitioner in its reply brief states that the civil penalties previously assessed should remain the same and be reaffirmed. Respondent has not addressed the issue of the appropriate penalty. No new evidence having been introduced, there is no basis to change the penalty originally imposed.

CONCLUSIONS OF LAW

1. Based on my decision of September 14, 1978, I find that Respondent violated the mandatory standards as alleged in Petitioner's amended petition for assessment of civil penalty filed on April 7, 1980.

2. 30 C.F.R. 77.1903(b) is a mandatory standard.

3. Respondent is subject to liability as an operator under section 109(a)(1) of the 1969 Act.

4. The claim that Respondent has not been afforded the procedures in 30 C.F.R., Part 100 even if true does not warrant dismissal of this case.

ORDER

Respondent is ORDERED to pay the sum of $74,000 within 30 days of the date of this decision.

James A. Broderick
Chief Administrative Law Judge