

CCASE:

SOL (MSHA) V. CONTINENTAL OIL

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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 Proceeding

Docket No. DENV 79-554-PM  
A/O No. 41-02789-05001F

v.

Dixon Underground Mine

CONTINENTAL OIL COMPANY,

RESPONDENT

DECISION

Appearances: Robert Fitz, Office of the Solicitor, U.S. Department  
of Labor, Dallas, Texas, for Petitioner Karl Skrypak,  
Esq., Consolidation Coal Company, Pittsburgh,  
Pennsylvania, for Respondent

Before: Judge Stewart

The above-captioned case is a civil penalty proceeding brought pursuant to section 110(FOOTNOTE 1) of the Federal Mine Safety and Health Act of 1977 (hereinafter, the Act), 30 U.S.C. 820(a). At the hearing in this matter held in Corpus Christi, Texas, the parties entered into stipulations, called witnesses and presented documentary evidence.

At the conclusion of the hearing, the parties were informed of their right to submit proposed findings of fact and conclusions of law. It was agreed that this submission would be deferred until 30 days after a decision was rendered by the Federal Mine Safety and Health Review Commission regarding the liability of owner-operators and independent contractors. After the pertinent decisions, Old Ben Coal Company, Docket No. VINC 79-119 (October 29, 1979), and Monterey Coal Company, Docket No. HOPE 78-469 et seq. (November 13, 1979), were issued, an order was issued requiring that those parties desiring

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to submit briefs do so on or before 30 days after receipt of the transcript. The parties did not file proposed findings of fact and conclusions of law or any other brief within the specified time.

The stipulations presented by the parties at the outset of the hearing were as follows:

1. The Dixon Underground Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, Pub. L. 95-164 (Act), dated November 9, 1977.

2. The Administrative Law Judge has jurisdiction over this proceeding under the 1977 Act.

3. The subject order, and termination thereof, were properly served by a duly authorized representative of the Secretary of Labor upon an agent of Respondent at the dates, times, and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of any statements asserted therein.

4. The assessment of a civil penalty in this proceeding will not affect the Respondent's ability to continue in business.

5. The alleged violation was abated in a timely fashion and the operator demonstrated good faith in attaining abatement.

6. The appropriateness of the penalty, if any, to the size of the operator's business should be determined based on the fact that in 1978 the Dixon Underground Mine, I.D. No. 41-02789, was a noncoal mine. The underground mine had been open for only 3 days; less than 100 hours had been worked at the underground mine; and the size of the controlling company, if found to be Continental Oil Company (now known as Conoco, Inc.), would be over 6 million annual hours worked or if found to be Coast Mining Company would be under 60,000 annual hours worked.

7. The Respondent did not have any history of previous violations at the underground mine in that the average number of violations assessed per year in the preceding 24 months was 0 and that the average number of violations assessed per inspection day in the preceding 24 months was 0.

8. As far as the gravity criteria is concerned: The event occurred; it was a fatal injury; affecting one (1) person.

9. A violation of 30 C.F.R. 57.3-20 occurred in the subject underground mine being excavated by Coast Mining Company, an independent contractor working under a contract with Continental Oil Company.

The stipulations establish that at the time of the citation, the Dixon Underground Mine was a small mine which had been open for only 3 days and less than 100 hours had been worked. The mining operations of Continental Oil Company (hereinafter Conoco), the controlling company, were large with over 6 million hours worked.

The Dixon Underground Mine had no history of previous violations. The assessment of a civil penalty in this proceeding will not affect the Respondent's ability to continue in business.

The gravity of the violation is high. The accident resulted in a fatality.

The alleged violation was abated in a timely fashion and the operator demonstrated good faith in attaining abatement after notice of the violation.

The parties also stipulated that a violation of 30 C.F.R. 57.3-20 occurred in the subject underground mine being excavated by Coast Mining Company, an independent contractor working under a contract with Continental Oil Company. This establishes that there was a violation by the operator and that Coast Mining was an independent contractor. Therefore, two issues remain. The initial question is whether Respondent Conoco can be held liable for the stipulated violation. If Respondent is liable for the violation, the negligence of Respondent must be determined, along with other statutory criteria, to ascertain the amount of the civil penalty that must be assessed.

There is no serious dispute as to the material facts established by the record in this case. On March 1, 1978, Respondent, Conoco, entered into a contract with Coast Mining Company (hereinafter, Coast) under which the latter, as an independent contractor, would remove ore reserves remaining in the walls of Respondent's pits. Coast was a small corporation which existed for 4 months, from May to September 1978. Donald Buddecke was its owner and president, as well as supervisor of its mining operations.

The proposed method of mining was experimental. It had been conceptualized and developed by Donald Buddecke. A small drift would be cut into a pit wall. A slusher sitting outside the drift would pull a bucket back and forth to remove the ore. The slusher had been designed and built by Mr. Buddecke. Hypothetically, no miner would be required to proceed into the excavated area so ground support would, therefore, be unnecessary.

Mining on a day-to-day basis was to be carried out by Robert Ousley. In testimony, Donald Buddecke stated that Robert Ousely

was to be the "laborer-contractor." He was to be paid on the basis of tons of ore extracted, but worked under the supervision of Donald Buddecke.

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Coast began operations at the Dixon Underground Mine on August 8, 1978. The Dixon Mine was located in Respondent's Dickson Pit, also designated as Man Site No. 13. The first drift was cut with a front-end loader. After 3 days of operation, the initial drift had been extended approximately 25 feet. Its height was approximately 7 feet and its width 5-1/2 feet.

On the afternoon of August 10, 1978, two individuals were present at the Dixon Mine. The first of these was Robin Buddecke, the son of Donald Buddecke and an employee of Coast. The second individual was Robert Ousley. Donald Buddecke had left for Corpus Christi to obtain supplies on the prior evening. He was scheduled to return on the evening of August 10. Donald Buddecke testified that he had left orders for Robert Ousley and Robin Buddecke to begin timbering the roof in the drift to a distance of 15 or 20 feet. He stated that he ordered that no one proceed into the drift past the timber-supported roof unless they were in the front-end loader.

At approximately 4 p.m. on August 10, 1978, a roof fall occurred in the Dixon Underground Mine. The fall resulted in the death of Robert Ousley. He had proceeded approximately 15 feet inby the mouth of the drift. Timbering had been installed only at the mouth of the drift and no roof support had been installed inby the mouth.

Robin Buddecke was unable by himself to extricate Mr. Ousley. He drove 2 miles to the nearest active Conoco site, the Franklin Pit, and obtained the assistance of Conoco personnel. A mine foreman and several other Conoco employees proceeded to the Dixon Mine and removed Robert Ousley's body from the drift. Roland Henry, one of Respondent's mine superintendents, arrived at the Dixon Mine 30 minutes after being notified of the accident. Horace Harper, manager of the Conquista Project, arrived at 5:30 p.m.

After the accident, operations ceased at the Dixon Underground Mine. James Sweeney, one of Respondent's safety engineers, filed a document with MSHA noting the closing of the mine. He completed the actual closure of the mine pursuant to instructions given by Alex Baca, an MSHA inspector.

MSHA began its investigation of the accident on August 11, 1978. On August 14, 1978, Alex Baca issued an order of withdrawal pursuant to section 107 of the Act. He described the condition or practice as follows: "No means of ground support was being used at the time of the fatal accident; the drift was approximately 25 to 40 feet in the pit wall and only one timber set had been installed at the entrance." Inspector Baca terminated the order after the mine had been barricaded and permanently sealed with waste material.

Inspector Baca cited Respondent because "Continental had the ID Number, so, as far as (the inspector) was concerned, (Donald Buddecke) was part of Continental Oil Company, although he was the owner of Coast Mining Company." In the opinion of the

inspector, "Coast was conducting the operation at the Dixon Mine, but doing so without an identification number; if Coast had been mining in another area--one to which an identification number had not been

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assigned to Conoco--it would have been mining illegally." The identification number for the Dixon Underground Mine was issued in Conoco's name on August 11, 1978. That is, it was issued after the fatality.

Donald Buddecke had attempted to obtain an identification number for Coast. He testified that he had been informed by an MSHA official that he could not be given an identification number because he did not own the mine. James Sweeney provided assistance to Coast in its effort to obtain an identification number in Coast's name. Mr. Sweeney testified that this was not normally done but "this (was) a special project and we wanted to assist these people to get a mine ID number because we just couldn't be responsible for their safe conduct on the job." He stated that he was unsuccessful in his attempt because MSHA officials felt that the legal definition of "independent contractor" had yet to be determined.

The witnesses generally agreed that the comparative expertise of Donald Buddecke and that of Conoco was such that Conoco employees were not accorded supervisory authority over Coast's operations. Conoco approved the mining methods to be used, but had no involvement in the actual mining. The contractors and employees of Coast were subject only to Coast control and supervision. Donald Buddecke was given a free hand to carry on the mining operations at the Dixon Mine as he saw fit.

Conoco contractually reserved the right to inspect Coast operations and require correction of unsatisfactory work. The clause reads as follows: "Conoco shall have the right of access to the work herein contemplated and shall have the right of inspection thereof. If, as a result of such inspection, it is Conoco's opinion that contractor's work is unsatisfactory, such unsatisfactory condition shall be promptly corrected by contractor at contractor's expense." Donald Buddecke testified that the clause was standard and was intended to be a broad statement; its scope might encompass conditions affecting safety if Coast was committing a flagrant violation, including improper timbering practices.

A number of Conoco's supervisory employees had been present in the Dickson Pit on August 10, 1978, prior to the occurrence of the accident. Horace Harper testified that he had been at the pit on August 10, 1978, at approximately 9 a.m. for 15 to 20 minutes. His purpose was to make sure that nobody was interfering with Coast. He had not received complaints of such interference. James Sweeney had been in the vicinity of the Dixon Mine at 4 o'clock on August 10, 1978, to take pictures of the Dixon Mine for a project newsletter. These individuals had no authority and made no effort to advise or supervise Coast employees on these occasions.

Conoco had completed its own mining in the Dickson Pit prior to Coast's initiation of mining operations on behalf of Conoco. The only active presence of Conoco in the Dickson Pit was an



operative water pump.

The question as to whether Respondent can be held liable for the stipulated violation must be answered in the affirmative. Section 110(a) of the

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Act requires that: "The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary \* \* \*." Conoco was the owner of the Dixon Underground Mine and, as such, was the operator of that mine.(FOOTNOTE 2) Consequently, it is subject to the assessment of civil penalties pursuant to section 110(a). This is so despite the fact that the violation was due to acts by Coast whose status at the time was that of an independent contractor. An owner-operator can be held responsible without fault for a violation of the Act committed by a contractor. The Federal Mine Safety and Health Review Commission has recently ruled on this question in two cases, Secretary of Labor, Mine Safety and Health Review Commission v. Old Ben Coal Company (MSHRC Docket No. VINC 79-119) (now pending before the Circuit Court of Appeals of the District of Columbia, Docket No. 79-2367), and Monterey Coal Company v. Secretary of Labor, Mine Safety and Health Administration and United Mine Workers (MSHA Docket Nos. HOPE 78-469 through HOPE 78-476), now on appeal to the Fourth Circuit Court of Appeals. In Old Ben, the Commission held that the Secretary of Labor retained the discretion under the Act to cite the mine owner even though the 1977 Amendments amended the definition of "operator" to include "any independent contractor performing services or construction" at a mine. In Monterey Coal, the Commission, citing Old Ben, reversed an administrative law judge's ruling decision in which he had held the owner not liable.

The remaining issue to be determined under the statutory criteria is whether Respondent was negligent.(FOOTNOTE 3) The record does not support a finding of negligence on the part of Respondent. No showing was made that Respondent knew or should have known of the failure to comply with the mandatory standard. Clearly, Conoco had no actual knowledge of the violation of the mandatory standard. Those Conoco employees who had been in the immediate vicinity of the Dixon Mine observed the portal of the mine but could not and did not observe roof conditions within the mine. They had neither the general authority under the contractual agreement between the parties nor the expertise to supervise the two Coast employees.

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Moreover, it was not established that Respondent should have known of the conditions or practices which led to the death of Robert Ousley. The immediate cause of the accident was the failure of the deceased to heed instructions of Donald Buddecke to the effect that he should not proceed under unsupported roof. Although Respondent contractually reserved a measure of control over the broader aspects of Coast's operations, it did not supervise Respondent's employees or exercise control over day-to-day mining operations, including matters of safety during daily operations. Respondent could not have known that Robert Ousley would proceed unprotected under unsupported roof.

The Federal Mine Safety and Health Review Commission, on August 4, 1980, issued its decision in Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Pittsburgh & Midway Coal Mining Company (P&M). That case was remanded to the judge to allow Petitioner an additional opportunity to elect the parties against which it desired to proceed.

In view of the Commission's decision, an order was issued affording the Secretary of Labor an opportunity to determine whether to continue to prosecute the citations against Conoco, or the independent contractor which was claimed to have violated the standards cited, or both.

The Secretary complied with that order by filing the following response: "In response to your September 11, 1980 order to elect parties against which petitioner is to proceed, please be advised that the Secretary of Labor elects to proceed against only Continental Oil Company. The Secretary of Labor elects not to proceed against Coast Mining Company." (FOOTNOTE 4)

In consideration of the stipulations, findings of fact and conclusions of law contained in this decision, an assessment of \$500 is appropriate under the criteria of section 110 of the Act:

ORDER

It is ORDERED that Respondent pay the sum of \$500 within 30 days of the date of this decision.

Forrest E. Stewart  
Administrative Law Judge

~FOOTNOTE\_ONE

1 Section 110(a) of the Act reads as follows:

"The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary 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."

~FOOTNOTE\_TWO

2 In section 3(d) of the Act, the term "operator" is defined to mean "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine."

~FOOTNOTE\_THREE

3 Section 110(i) of the Act provides:

"The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission 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 person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors."

~FOOTNOTE\_FOUR

4 Subsequent to that response by the Secretary, Conoco filed a letter stating that it would seem appropriate that an order to furnish information be issued against the Secretary to ascertain the basis of his election. The letter, which was not in the form of a motion, suggested that such order be patterned after the enforcement guidelines concerning independent contractors listed in 45 Federal Register 128 at 44497 (July 1, 1980). All evidence already having been presented at the hearing prior to the time of the promulgation of the guidelines, no order for additional information was issued.