

CCASE:
HELVETIA COAL V. SOL (MSHA)
DDATE:
19801120
TTEXT:

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

HELVETIA COAL COMPANY,
APPLICANT
v.
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

Application for Review
Docket No. PENN 80-143-R
Lucerne No. 6 Mine

DECISION

Appearances: W. Joseph Engler, Jr., Esq., Vice President and
General Counsel, Rochester and Pittsburgh Coal
Co., Indiana, Pennsylvania, for Applicant
Leo J. McGinn, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for Respondent

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This is a proceeding filed by Helvetia Coal Company (hereinafter Helvetia) under section 107(e) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 817(e) (hereinafter the Act), to vacate an order of withdrawal due to imminent danger issued by a Federal mine inspector employed by the Mine Safety and Health Administration (hereinafter MSHA) pursuant to section 107(a) of the Act. The parties filed prehearing statements and the case was heard in Indiana, Pennsylvania, on September 23, 1980.

This matter involves the issue of whether miners were exposed to imminent danger due to the close proximity between a bare energized conductor and the metal frame of a battery charger which was allegedly improperly grounded.

ISSUE

Whether the issuance of the order of withdrawal due to imminent danger was proper.

APPLICABLE LAW

Section 107(a) of the Act, 30 U.S.C. 817(a), provides as follows:

If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

Section 3(j) of the Act, 30 U.S.C. 802(j), states: "imminent danger' means the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

STIPULATIONS

1. Helvetia is the owner and operator of the subject mine.
2. The operator and the mine are subject to the Act.
3. The Administrative Law Judge has jurisdiction over the parties and the subject matter of this proceeding.
4. The inspector who issued the order in question was a duly authorized representative of the Secretary of Labor.
5. Copies of the order are authentic and were properly served upon Helvetia.

FINDINGS OF FACT

I find from the preponderance of the evidence of record the facts as follows:

1. Lucerne No. 6 Mine is owned and operated by Helvetia.
2. William R. Collingsworth, who issued the order in controversy, was an electrical inspector employed by MSHA and a duly authorized representative of the Secretary of Labor at all times pertinent herein.

~3349

3. On January 9, 1980, Inspector Collingsworth performed a regular inspection of the Lucerne No. 6 Mine and issued Order No. 0818207 pursuant to section 107(a) of the Act.

4. The order in question was issued on a battery charger because of the existence of the following conditions:

(a) The ground wire was inadequately secured to the frame of the battery charger;

(b) A bare energized phase conductor was lying loose inside the battery charger in close proximity to the metal frame; and

(c) The bare energized phase conductor in the 480-volt battery charger had a potential of 300 volts.

5. The battery charger in question was located in a narrow travelway where miners were likely to come in contact with it.

6. It was likely that the bare energized conductor would touch the frame of the battery charger at the same time a miner was touching the frame of the battery charger with the result that the miner would be exposed to 100 to 300 volts.

7. A person who is exposed to 100 to 300 volts could be reasonably expected to suffer death or serious physical injury.

DISCUSSION

Helvetia concedes that the ground wire of the battery charger was poorly connected and that there was no ground monitor on this equipment. Helvetia did not dispute the fact that a bare energized conductor in a 480-volt battery charger was in close proximity to the frame of this unit. However, Helvetia contends that the imminent danger order of withdrawal was improper in this case for the following reasons: (1) the alleged hazard was not discovered by the inspector until the battery charger had been de-energized after the issuance of a citation for improper grounding of the unit and the normal practice of abatement of this citation would be to keep the battery charger de-energized until the condition had been corrected; and (2) the occurrence of the hazard was only speculative because the battery charger had a sufficient ground which would open the circuit in the unlikely event of a simultaneous touching of the frame by a miner and the bare energized phase conductor.

Helvetia's first contention that the discovery of the bare energized phase conductor in close proximity to the battery charger frame cannot constitute an imminent danger because the battery charger was de-energized at that time is rejected. In a case involving an imminent danger order, the Fourth Circuit Court of Appeals stated: "[t]he Secretary determined, and we think correctly, that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical

~3350

harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." Eastern Associated Coal Corporation v. Interior Board of Mine Operations Appeal, 491, F.2d 277, 278 (4th Cir. 1974), aff'g. Eastern Associated Coal Corporation, 2 IBMA 128 (1973). See also Old Ben Coal Corporation v. Interior Board of Mine Operations Appeals, 523 F.2d 25 (7th Cir. 1975).

As the above cases indicate, the test is whether the condition could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition was eliminated. The imminently dangerous condition cannot be divorced from normal work activity. Under normal mining operations, the battery charger in question would have been used in the condition discovered by the inspector. The previously discovered grounding violation in the battery charger was the subject of a citation issued under section 104 of the Act rather than a withdrawal order of that equipment. The prior issuance of a citation is irrelevant in determining whether an imminent danger existed.

Helvetia's second contention raises the issue of the likelihood of the occurrence of death or serious physical harm to a miner. The definition of the term "imminent danger" is identical in the 1969 and 1977 Acts. In interpreting the 1969 Act, the Interior Board of Mine Operations Appeals required that before an imminent danger could be found to exist, the evidence must establish that "it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger." Freeman Coal Mining Corp., 2 IBMA 197, 212 (1973). Thereafter, this "as probable as not" standard was approved by the Fourth and Seventh Circuit Courts of Appeals. Eastern Associated Coal Company v. IBMA, 491 F.2d 277 (4th Cir. 1974); Freeman Coal Mining Co. v. IBMA, 504 F.2d 741, 745 (7th Cir. 1975); and Old Ben Coal Corp. v. IBMA, 523 F.2d 25 (7th Cir. 1975). However, in enacting the 1977 Act, the Senate Committee on Human Resources stated:

The Committee disavows any notion that imminent danger can be defined in terms of a percentage of probability that an accident will happen; rather the concept of imminent danger requires an examination of the potential of the risk to cause serious physical harm at any time. It is the Committee's view that the authority under this section is essential to the protection of miners and should be construed expansively by inspectors and the commission.

Leg. Hist. of the Federal Mine Safety & Health Act of 1977, 95th Cong., 1st Sess. (hereinafter Leg. Hist. 1977 Act) at 38.

Earlier this year, the Federal Mine Safety and Health Review Commission announced that: "We * * * do not adopt or in any way approve the "as probable as not" standard * * *. With respect to cases that arise under the [1977 Act], we will examine

anew the question of what conditions or practices constitute an imminent danger." *Pittsburg & Midway Coal Mining Co. v. MSHA*, IBMA 76-57 (April 21, 1980).

Hence, in cases involving imminent danger orders under the 1977 Act, there is no longer a requirement that MSHA prove that "it is just as probable as not" that the accident or disaster would occur. In light of the legislative history of the 1977 Act, it is doubtful that any quantitative test can be applied to determine whether an imminent danger existed. Rather, each case must be evaluated in the light of the risk of serious physical harm or death to which the affected miners are exposed under the conditions existing at the time the order was issued.

In the instant case, Helvetia is in no position to challenge the conditions observed by Inspector Collingsworth since it elected not to designate a management escort for this inspection or to call the miners' representative, who accompanied the inspector, as a witness. Rather, Helvetia's assistant chief engineer, James G. Wiley, testified that the conclusions drawn by the inspector were erroneous. Mr. Wiley stated that the bare energized conductor could not have been touching the battery-charger frame at the time the inspector first saw the unit because such a touching would have energized a ground-fault trip relay which would have tripped the circuit breaker at the power center. He admitted that a person who came in contact with the battery charger at a time when the bare energized conductor was touching the frame would receive an electrical shock although he stated that this would not necessarily be a fatal shock. He stated that if the ground wire on the battery charger was efficient at the time of such a simultaneous touching of the frame by a person and the conductor, the circuit breaker would de-energize the circuit instantaneously and no more than 100 volts would be on the frame. However, he also conceded that if something was wrong with the grounding system, the voltage on the frame could exceed 100.

Inspector Collingsworth testified that, based upon his experience and training as an electrical inspector, the bare energized power conductor with a 300-volt potential in close proximity to the metal frame of the battery charger which had an improperly connected ground wire constituted an imminent danger to people walking in the travelway who could be expected to come in contact with the battery charger. He stated that it was likely that such persons would touch the battery charger because the top of the battery charger was clean, indicating that people did touch it. Even if the bare conductor was not touching the frame at the time of the order, Inspector Collingsworth stated that it could come in contact with the frame by the vibration of the transformer or a person jarring the battery charger while passing it. Inspector Collingsworth's opinions concerning the existence of an imminent danger were corroborated by Michael Yenchek, an electrical engineer employed by MSHA. Mr. Yenchek stated that the ground wire wrapped around the metal screen on the face of the battery charger did not provide a reliable, solid connection. He further testified that even if the circuit breaker opened instantaneously, a person touching the frame of the battery charger would get enough exposure to an electrical current to kill him. He cited examples of persons who were fatally electrocuted by as little as 100 volts. He agreed with

Inspector Collingsworth that the condition of the battery charger as described by the inspector constituted an imminent danger.

I conclude that Helvetia has failed to establish that the imminent danger order was improperly issued. Rather, the preponderance of the evidence establishes that there was a reasonable expectation that the combination of the improperly connected ground wire and the energized bare conductor in close proximity to the metal frame of the battery charger could cause death or serious physical harm to miners before it could be abated. This is particularly true because the battery charger was located in a narrow travelway where the evidence indicated that it would likely be touched by passing miners. Under these circumstances, section 107(a) of the Act authorizes the issuance of a withdrawal order to protect the miners. Helvetia's evidence concerning the adequacy of the circuit breaker system and the slight chance of a serious injury from this condition are rejected because they are less persuasive than the evidence presented by MSHA on these issues. Therefore, Helvetia's application for review is denied.

CONCLUSIONS OF LAW

1. I have jurisdiction over this matter pursuant to section 107 of the Act.

2. The inspector properly issued the subject order of withdrawal pursuant to section 107(a) of the Act because an imminent danger existed in that there was a reasonable expectation that the condition of the battery charger which he found could cause death or serious physical harm before it could be abated.

3. The application for review is denied.

ORDER

THEREFORE, IT IS ORDERED that the application for review is DENIED and the subject withdrawal order is AFFIRMED.

James A. Laurenson
Judge