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SOL (MSHA) v. C.F. & I. STEEL
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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

v.

C.F. & I. STEEL CORPORATION
RESPONDENT

CIVIL PENALTY PROCEEDING

DOCKET NO. WEST 79-241

MSHA CASE NO. 05-00296-03013

MINE: Allen

DECISION AND ORDER

APPEARANCES:

Jerry R. Atencio
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For the Petitioner

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For the Respondent

BEFORE:

Judge Jon D. Boltz

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 September 13, 1979, Petitioner, the Secretary of Labor, Mine Safety and Health Administration (MSHA) [hereinafter "the Secretary"], filed with the Commission his Proposal for Penalty. Respondent, C F & I Steel Corporation [hereinafter "C F & I"], duly contested the proposal for penalty by filing an answer with the Commission on October 16, 1979. Pursuant to notice, a hearing was held in Pueblo, Colorado, on June 17, 1980.

FINDINGS OF FACT

1. On February 20, 1979, an authorized representative of the Secretary conducted a spot inspection for liberation of excessive quantities of methane at C F & I's Allen Mine pursuant to section 103(i) of the Act.

2. The inspector conducted tests and took samples to determine whether any excessive methane accumulations were present. On the basis of methane detector readings showing concentrations of 1 to 2% methane, three vacuum bottle air samples were taken along the conveyor belt line of a particular section. The samples, upon analysis, subsequently revealed methane accumulations in amounts of 1.42 to 1.86%.

3. Order of Withdrawal No. 387764 was issued for excessive concentrations of methane pursuant to the imminent danger provision of the Act, section 107(a). The order of withdrawal encompassed the entire section.

4. At the time the imminent danger withdrawal order was issued, and immediately prior thereto, C F & I was doing all it possibly could do to rectify the situation as it existed. No production was ongoing. Only authorized personnel were within the subject area. No power was energized in the section at the time the order was issued or prior to its termination. The only work being performed were attempts to establish a greater volume of ventilation.

5. The accumulation of methane in the conveyor belt line was caused by a lack of adequate ventilation. The inadequate flow of air was due to an improperly secured check curtain which regulated the air intake to the section.

6. Even in this condition of disrepair, sufficient quantities of air were being delivered to the last open crosscut in the belt line section to prevent the concentration of methane from increasing to the explosive range. The explosive range of methane in air is in concentrations of 5 to 15%.

7. The inspector did not mark the "CITATION" box on the order of withdrawal issued to C F & I. The "ORDER OF WITHDRAWAL" box was

marked with an "X" and "107-a" was indicated as the "TYPE OF ACTION" undertaken. Under "PART AND SECTION" the inspector listed "75.326" (30 CFR 75.326). (FN.1)

ISSUES PRESENTED

The following issues are presented for determination:

1. Whether the conditions which existed in C F & I's Allen Mine, at the time the order of withdrawal was issued, constituted an imminent danger?

2. Whether a violation of a mandatory safety and health standard, capable of supporting a penalty, occurred at C F & I's Allen Mine?

DISCUSSION

"Imminent danger" is legislatively defined in section 3(j) of the Act to mean ". . . 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 [.]" 30 U.S.C. 803(j). The term has also received judicial construction.

In Eastern Assoc. Coal Corp. v. Interior Bd. of Mine Op. App., 491 F.2d 277 (7th Cir. 1974), the Court of Appeals construed a virtually identical definition contained in the Federal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1976) (amended 1977). In that case, the Court stated that ". . . an imminent danger exists when the condition or practice observed 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 is eliminated." Id. at 278. Similarly, the Fourth Circuit construed an ". . . "imminent danger' as being a situation in which a reasonable man would estimate that, if normal operations designed to extract coal in the designated area should proceed, it is just as probable as not that the feared accident or disaster would occur before elimination of the danger." Freeman Coal Mining Co. v. Interior Bd. of Mine Op. App., 504 F.2d 741, 745 (4th Cir. 1974).

Both courts affirmed decisions of the former Interior Board or Mine Operations Appeals which incorporated into the definition of imminent danger the clause: ". . . if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." Eastern Associated Coal Corporation, 2 IBMA 128, 136 (1973). Accord, Freeman Coal Mining Corporation, 2 IBMA 197, 212 (1973). That proviso was not included in the legislative definition formulated by Congress, but all of the courts which have considered the issue have agreed that the Board legitimately inserted the clause. The courts' reasoning was that unless miners were to engage in production, there would be no ongoing exposure to the dangerous condition. See, McCoy Elkhorn Coal Corporation v. Secretary of Labor, Mine Safety and Health Administration (MSHA), 2 FMSHRC 1143, 1148 (1980).

The conditions which existed at C F & I's Allen Mine on February 20, 1979, did not constitute an imminent danger under the definitions to which I have just referred. Prior to issuance of the withdrawal order, C F & I had voluntarily removed all miners from the area. No production was in progress. No power was energized in the affected section. The only work being performed were attempts to establish a greater volume of ventilation,

and that work was being performed by those persons who would have been authorized to be in the area had a section 107(a) order of withdrawal been in effect. (FN.2)

There was no evidence of an intent to return miners to production until the situation had been rectified. Had such an intent been demonstrated by C F & I, my conclusion would be different. In issuing the order of withdrawal, I believe that the inspector was properly motivated in his concern that miners not be returned to the affected area until the condition had been corrected. However, at the moment that the order to withdrawal was issued, no imminent danger then existed. Therefore, I find that the order is invalid and should be vacated.

Even after an imminent danger order of withdrawal has been vacated, the violation alleged therein may still be the subject of a civil penalty proceeding. Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Van Mulvehill Coal Co., Inc., 2 FMSHRC 283, 284 (1980). "That allegation, unless itself properly vacated, survives a vacation of the order it is contained in, and, if proven, the assessment of a penalty under section 110 is required." Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Island Creek Coal Company, 2 FMSHRC 279, 280 (1980). I must, therefore, determine whether a violation of a mandatory safety and health standard, capable of supporting a penalty, occurred at C F & I's Allen Mine.

Under the above-mentioned precedents, whether Order of Withdrawal No. 387764 was properly issued pursuant to section 107(a) of the Act is not relevant to the assessment of a penalty for any proven violations cited in that order. The underlying allegation contained in the order provides a sufficient basis for any potential penalty assessment. It follows that whether the 107(a) order contained a legally sufficient 104(a) citation is likewise irrelevant to the penalty assessment determination. Therefore, it is not necessary that I rule on the significance of the fact that the "CITATION" box on the order was not marked and how that fact affects the sufficiency of the order as a section 104(a) citation.

The mandatory safety and health standard allegedly violated was 30 CFR 75.326 (see footnote, page 3). The Allen Mine was opened prior to March 30, 1970, therefore only the second portion of section .326 is applicable. Clause (b) of that section contains a required standard with respect to methane accumulations. Clause (a) contains no similar provision. In order for the methane standard contained in clause (b) to be applicable, it must be demonstrated that the belt haulage entries were not necessary to ventilate the active working places. No evidence is contained in the record regarding the necessity vel non of utilizing the belt haulage entries for ventilation of active working places. Therefore, I have no basis upon which to determine whether clause (a) or clause (b) is relevant. Consequently, without evidence establishing the relevancy of the cited section, I cannot sustain the violation of 30 CFR 75.326 alleged in Order of Withdrawal No. 387764.

Another factor of importance in my decision is the fact that the inspector who issued the 107(a) withdrawal order did not himself believe that C F & I had violated 30 CFR 75.326. On redirect examination, in response to a question regarding his opinion as to whether or not there was a violation, the inspector stated:

> "I felt that in this instance, since the company had recognized the condition and were taking steps to rectify it, I didn't feel personally there was a violation of .326." (Tr. 47).

This admission by the inspector provides further grounds for my refusal to sustain the violation of 30 CFR 75.326 alleged in Order of Withdrawal No. 387764.

CONCLUSIONS OF LAW

1. The undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

2. The conditions which existed at C F & I's Allen Mine on February 20, 1979, did not constitute an imminent danger at the moment that Order of Withdrawal No. 387764 was issued.

3. The order was invalid and should be vacated.

4. The alleged violation of 30 CFR 75.326 contained in Order of Withdrawal No. 387764 was not proven by a preponderance of the evidence.

5. The allegation was not sustained and should be vacated.

ORDER

Based upon the foregoing findings of fact and conclusions of law, Order of Withdrawal No. 387764 and the violation alleged therein are hereby VACATED. This matter is hereby DISMISSED WITH PREJUDICE.

Jon D. Boltz
Administrative Law Judge

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(FOOTNOTES START HERE.)

~FOOTNOTE_ONE

1 75.326 Aircourses and belt haulage entries.
[STATUTORY PROVISIONS]

In any coal mine opened after March 30, 1970, the entries used as intake and return air courses shall be separated from belt haulage entries, and each operator of such mine shall limit the velocity of the air coursed through belt haulage entries to the amount necessary to provide an adequate supply of oxygen in such entries, and to insure that the air therein shall contain less than 1.0 volume per centum of methane, and such air shall not be used to ventilate active working places. Whenever an authorized representative of the Secretary finds, in the case of any coal mine opened on or prior to March 30, 1970, which has been developed with more than two entries, that the conditions in the entries, other than belt haulage entries, are such as to permit adequately the coursing of intake or return air through such entires, (a) the belt haulage entries shall not be used to ventilate, unless such entries are necessary to ventilate, active working places, and (b) when the belt haulage entries are not necessary to ventilate the active working places, the operator of such mine shall limit the velocity of the air coursed through the belt haulage entries to the amount necessary to provide an adequate supply of oxygen in such entries, and to insure that the air therein shall contain less than 1.0 volume per centum of methane.

~FOOTNOTE_TWO

2 Section 104(c) of the Act reads:

"(c) The following persons shall not be required to be withdrawn from, or prohibited from entering, any area of the coal or other mine subject to an order issued under this section:

"(1) any person whose presence in such area is

necessary, in the judgment of the operator or an authorized representative of the Secretary, to eliminate the condition described in the order;

"(2) any public official whose official duties require him to enter such area;

"(3) any representative of the miners in such mine who is, in the judgment of the operator or an authorized representative of the Secretary, qualified to make such mine examinations or who is accompanied by such a person and whose presence in such area is necessary for the investigation of the conditions described in the order; and

"(4) any consultant to any of the foregoing."