CCASE:
SOL (MSHA) v. KENNECOTT COPPER
DDATE:
19810119
TTEXT:

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. CENT 79-273-M A/O NO. 29-00014-05001
v.	
KENNECOTT COPPER CORPORATION, RESPONDENT	Mine: Kennecott Concentrator

DECISION

APPEARANCES: Richard L. Collier, Esq., Office of the Solicitor, United States Department of Labor, 555 Griffin Square, Suite 501, Dallas, Texas 75202,
for the Petitioner
J. C. Robinson, Esq., Dickson, Young & Robinson, 212 North Arizona Street, Silver City, New Mexico 88061,
for the Respondent

Carlson, Judge:

This proceeding, brought under Section 105 of the Federal Mine Safety and Health Review Act of 1977, 30 U.S.C. 801 et seq. (hereinafter the "Act"), arose out of an inspection conducted by one of petitioner's representatives on April 23, 1979 at respondent's mine near Hurley, New Mexico. As a result of the inspection, one citation was issued charging respondent with a violation of 30 C.F.R. 55.15-5. (FN.1)

On July 29, 1980, counsel submitted stipulations of fact. These stipulations are now approved and therefore, for the purposes of this litigation, establish the following as true: 30 C.F.R. 55.15-5 was in fact violated; the worker committing the violation was an employee of an electrical sub-contractor (Gardner & Zemke) to Burns Construction, the primary contractor; under the terms of the contract between respondent and Burns, the latter functioned as an independent contractor, performing all work, and furnishing and exercising exclusive control over the conduct of

its own employees. The stipulations further establish the sole issue to be decided in this case: Whether respondent, an owner-operator of a mine, may be held responsible for violations committed on its premises by employees within the exclusive control of an independent contractor.

The Federal Mine Safety and Health Review Commission answered this question affirmatively in Secretary of Labor, Mine Safety and Health Administration (MSHA), v. Old Ben Coal Company, 1 FMSHRC 1480 (October 29, 1979), explaining that

> [w]hen a mine operator engages a contractor to perform construction or services at a mine, the duty to maintain compliance with the Act regarding the contractor's activities can be imposed on both the owner and the contractor as operators. This reflects a congressional judgment that, insofar as contractor activities are concerned, both the owner and the contractor are able to assure compliance with the Act. Arguably, one operator may be in a better position to prevent the violation. However, as we read the statute, this issue does not have to be decided since Congress permitted the imposition of liability on both operators regardless of who might be better able to prevent the violation Id. at 1483.

Several other decisions affirm the Commission's position that the Secretary is authorized under the Act to proceed against either the contractor or the mine owner (FN.2).

Although the Old Ben decision upheld the Secretary's policy of citing the mine owners in all cases involving independent contractor violations, it did so on the ground that the policy promoted uniformity and, to that extent, fairness; the Commission indicated, however, that it would strike down the policy if it became apparent that the policy was based on administrative convenience. Responding to the Commission's admonition, the Secretary promulgated new regulations establishing procedures for direct enforcement against independent contractors. These regulations became effective on July 31, 1980. On Augut 4, 1980, the Commission established

interim procedures to guide the disposition of cases pending before the Commission at the time the new regulations became effective. Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Pittsburg and Midway Coal Mining Company, (Docket No. BARB 79-307-P, August 4, 1980). These procedures formed the basis for an order issued in the present case on September 16, 1980, directing the Secretary to inform this judge within 30 days whether he would continue to prosecute only the mine owner, or prosecute the independent contractor, or both. By November 24, 1980, no response had been received; an order to show cause was therefore issued. On December 8, 1980, the Secretary notified this judge, by letter, that he intended to proceed only against respondent. On December 29, 1980, respondent filed a motion to dismiss the proceeding on the ground that the Secretary's unduly delayed response indicated that the policy of uniformally citing mine owners had been based on administrative convenience.

Respondent's motion to dismiss is denied. The term "administrative convenience" as used in the Old Ben decision refers to the pursuit of broad policy objectives rather than to the conduct of an individual attorney in attending to the details of a particular case. The motion might have been more pursuasive had it been filed before the order to show cause was issued and promptly answered.

The merits of the case are controlled by the Old Ben decision. The Pittsburg and Midway decision appears to signal a shift in the Commission's position; however, until the Commission clearly establishes a new position, the Old Ben decision must be followed.

The decision, while approving an "interim policy" of citing mine owners for independent contractor violations, expressed concern that the policy not serve as a pretext for administrative convenience; it states specifically that continuation of the "interim policy" provides evidence that it is based upon "improper considerations of admiminstrative convenience". For this reason, I would adopt the approach taken by Judge Boltz in Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Phillips Uranium Corporation, Docket No. CENT 80-208 (October, 1980). The proposed penalty of $345.00 will therefore be reduced significantly.

ORDER

Accordingly, respondent is ordered to pay a civil penalty of $19.00 within 30 days of this decision.

John A. Carlson
Administrative Law Judge

ÄÄ
(FOOTNOTES START HERE.)

~FOOTNOTE_ONE

1 30 C.F.R. 55.15-5 provides:

Mandatory. Safety belts and lines shall be worn when men work where there is a danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

The citation alleges that an employee of Gardner Zemke, an electrical subcontractor, was signaling another worker while standing on the outside edge of a building, 50 feet above the ground; the ledge was not bounded by handrails, and the employee was not wearing a safety line.

~FOOTNOTE_TWO

2 In National Industrial Sand Association v. Marshall, 601 F2d 689 (3d Cir. 1979), the Third Circuit Court of Appeals interpreted the legislative history of the Act as indicating that

Congress was clearly concerned with the permissive scope of the Secretary's authority, not with the mandatory imposition of statutory duties as independent contrators. Id. at 703.

See also Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Republic Steel Corporation, (Docket No. IBMA 76-28, April 11, 1979); Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Kaiser Steel Corporation, (Docket No. DENV 77-13-P, May 17, 1979); Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Monterey Coal Company, (Docket No. HOPE 78-469, November 13, 1979).