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

CONSOLIDATION COAL COMPANY, APPLICANT	Application for Review
v.	Docket No. WEVA 80-360-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Ireland Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. WEVA 80-694 A.C. No. 46-01438-03084H
v.	Ireland Mine
CONSOLIDATION COAL COMPANY, RESPONDENT	

DECISION

Appearances: William H. Dickey, Jr., Esq., Pittsburgh, Pennsylvania, for Consolidation Coal Company
Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor

Before: Judge James A. Laurenson

Jurisdiction and Procedural History

This proceeding arises out of the consolidation of an application for review of an order of withdrawal and a civil penalty proceeding based on that order. On May 5, 1980, Consolidation Coal Company (hereinafter Consol) filed an application for review of an order of withdrawal issued under section 107(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 817(a) (hereinafter the Act). A hearing was held in Pittsburgh, Pennsylvania, on October 9, 1980. Jack P. Skwortz, Donald L. Moffitt, Jr., Billy O. Wise, and Harold E. Wayt testified on behalf of the Secretary of Labor (hereinafter MSHA). Raymond McCool, Floyd H. Capehart, and Leon E. Heck testified on behalf of Consol.

At the hearing, I directed the parties to introduce whatever evidence they believed necessary for the assessment of a civil penalty based upon the order being reviewed. On October 31, 1980, MSHA filed a proposal for assessment of a civil penalty against Consol for violation of 30 C.F.R. 77.202. On November 28, 1980, I ordered these cases consolidated under Procedural Rule 12 of the Federal Mine Safety and Health Review Commission, 29 C.F.R. 2700.12, and directed the parties to file any additional evidence which they wished to be considered on the amount of the civil penalty. Following the hearing, Consol and MSHA submitted briefs.

ISSUES

The issues are whether the order due to imminent danger was properly issued, and whether Consol violated the Act or regulations as charged by MSHA and, if so, the amount of the civil penalty which should be assessed.

STIPULATIONS

The parties stipulated the following:

1. Ireland Mine is owned and operated by Consol.

2. Consol and the Ireland Mine are subject to the jurisdiction of the Act.

3. The inspector who issued the subject order was a duly authorized representative of the Secretary of Labor.

4. A true and correct copy of the subject order was properly served upon the operator in accordance with section 104(a) of the Act.

5. Copies of the subject order and termination are authentic 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.

APPLICABLE LAW

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

> 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 cause 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 110(a) of the Act, 30 U.S.C. 820(a), provides:

> 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.

Section 110(i) of the Act, 30 U.S.C. 820(i), provides in pertinent part as follows:

> 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.

Section 4 of the Act, 30 U.S.C. 803, provides: "Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act."

Section 3(d) of the Act, 30 U.S.C. 802(d), provides: ""Operator' means 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."

Section 3(h)(1) of the Act, 30 U.S.C. 802(h)(1), provides:

> "Coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailing ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling

of such minerals, or the work of preparing coal or

> other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

Section 3(i) of the Act, 30 U.S.C. 802(i), provides: '"Work of preparing the coal' means the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine."

Section 3(j) of the Act, 30 U.S.C. 802(j), provides: "'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."

30 C.F.R. 77.202 provides: "Coal dust in the air of, or in, or on the surfaces of, structures, enclosures, or other facilities shall not be allowed to exist or accumulate in dangerous amounts."

Summary of Facts

On April 2, 1980, in response to a safety complaint, MSHA inspectors Jack P. Skwortz and Donald L. Moffitt made a spot inspection of the No. 58 belt and belt drive at the Ireland Mine. The No. 58 belt line extended for 1,300 feet from a transfer building owned by Consol to a fourth floor room of station No. 2 owned by Ohio Power Company (hereinafter Ohio Power). The head roller, drive belt, motor and electrical equipment for the belt were located in the fourth floor room of station No. 2. Station No. 2 is owned by Ohio Power. Consol owned the belt line. Ohio Power was responsible for the maintenance of station No. 2. Consol was responsible for maintenance of the belt line. Consol regularly sent its employees into the fourth floor room of station No. 2 to perform maintenance work on the belt line equipment located there.

When the inspectors entered the fourth floor room of station No. 2, they observed float coal dust of a depth of 1 to 5 inches covering the entire area. They also observed several possible ignition sources: an unprotected, energized light bulb in a hopper beneath the belt, a high-voltage disconnect switch located within 17 inches of the hang line which was covered with float coal dust, and the belt rollers. The inspectors testified that the light bulb could have been broken by a piece of coal resulting in a spark and a subsequent explosion; that if the switch had been thrown, an arc could have been created which could ignite the nearby float coal dust; and that an improperly maintained roller could go bad causing a spark which would ignite

float coal dust.

The inspectors believed that the combination of float coal dust, possible ignition sources, hazards caused by maintenance of the belt, and a possible suspension of the dust when the belt was running, could cause an explosion in the room. They also testified that such an explosion could travel up the belt line to the Consol transfer station. The inspectors testified that these conditions constituted an imminent danger. They therefore issued Order of Withdrawal No. 631153 which stated:

> Dangerous amounts of coal and coal dust was allowed to accumulate on the drive motor and equipment for the #58 belt drive for the headroller. Float coal dust ranging from 1 inch to 5 inches was allowed to accumulate on all the beams and channels on the 4th floor of the Power plant station #2 building. Coal float dust was also present around the head roller and on the beam located 17 inches from the enclosure for knife blade switches for the 150 HP motor. The voltage on this motor was 4160 volts AC 3 phase. 1/10 of 1 per cent methane was also detected in the building with the belt stopped.

Consol management had been previously informed by its miners that float coal dust was present in the room. Ohio Power "cleaned" the room by blowing the dust off surfaces with compressed air. This method did not completely dispose of the dust. Ohio Power began cleaning the area with water after the order was issued. On April 2, 1980, after the float coal dust had been cleaned, Inspector Moffitt modified the order so that operations could continue in the area. On April 10, 1980, Inspector Skwortz terminated the order because a program to prevent float coal dust accumulations had been instituted.

Discussion of the Evidence

The first issue raised by these facts is whether the fourth floor room of station No. 2 was a "mine" subject to the Act. In determining the limits of the Act, the intent of the legislators is of primary importance.

The Act is a remedial statute, the "primary objective [of which] is to assure the maximum safety and health of miners." U.S. Senate, Committee on Human Resources, Subcommittee on Labor, Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Cong., 2d Sess. at 634 (1978). Cf. Freeman Coal Mining Company v. IBMOA, 504 F.2d 741, 744 (7th Cir. 1974). In interpreting remedial safety and health legislation, "[it] is so obvious as to be beyond dispute that * * * narrow or limited construction is to be eschewed * * * [L]iberal construction in light of the prime purpose of the legislation is to be employed." St. Mary's Sewer Pipe Co. v. Director, U.S. Bureau of Mines, 262 F.2d 378, 381 (3rd Cir. 1959); Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772, 782 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1975). Concerning the definition of "mine," the Senate Committee stated:

[T]he structures on the surface or underground, which are used or are to be used in or resulting from the preparation

> of the extracted minerals are included in the definition of "mine". The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possibl[e] interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

U.S. Senate, Committee on Human Resources, Subcommittee on Labor, Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Cong. 2d Sess. at 14 (1978).

Section 4 of the Act states that: "Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act." Several sections of the Act must be examined to determine the meaning of the term "mine." "Mine" is defined in section 3(h)(1) of the Act as: "Structures, facilities, equipment, machines, tools or other property * * * on the surface * * * used in, the milling of such minerals, or the work of preparing coal or other minerals." The "work of preparing the coal" referred to in section 3(h)(1) of the Act is defined in section 3(i) as follows: ""Work of preparing the coal' means the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine."

I find that the fourth floor of station No. 2 is a "mine" as defined by the Act. Upon considering the function of the station and the room housing the belt line, I find that the fourth floor room of station No. 2 is a structure used in the preparation of coal in that it is used in the loading of coal. The station room cannot be separated from the belt line. It is therefore a "mine" subject to the provisions of the Act.

The second issue raised by these facts is whether Consol was the operator of this "mine". "Operator" is defined in section 3(d) of the Act as: "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."

The facts indicate that neither Consol nor Ohio Power had exclusive control over the fourth floor room of station No. 2 which housed belt No. 58. Station No. 2 is located on Ohio Power's property. Ohio Power was responsible for the maintenance of the building. However, Consol was responsible for the maintenance of the belt itself and regularly sent miners into the building to work on the belt. I find that under these circumstances, the station and room housing the belt cannot be separated from the belt itself in deciding the Act's applicability to it. I therefore find that both Consol and Ohio Power had a degree of control over the area. Consol can, therefore,

be considered the "operator" of the "mine" as those terms are defined under the Act. See, Republic Steel Corporation, Docket Nos. IBMA 76-28 et al. (April 11, 1979).

The next issue is whether the condition described constitutes an imminent danger. An "imminent danger" is described in section 3(j) of the Act, 30 U.S.C. 802(j), as follows: "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."

Consol contends that the test for the existence of an imminent danger was set forth in Freeman Coal Mining Co. v. Interior Board of Mine Operations Appeals, 504 F.2d 741 (7th Cir. 1974), which held that the test was whether "it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger." Id. at 743. However, the "just as probable as not" test has been rejected by the drafters of the Act, Legislative History of the Federal Mine Safety and Health Act of 1977, (95th Cong., 1st Sess.), and by the Commission in Pittsburg & Midway Coal Mining Co. v. MSHA, IBMA 76-51 (April 21, 1980). As I stated in Helvetia Coal Company, PENN 80-143-R (November 20, 1980):

> 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 determining whether an imminent danger exists, 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. Here, the evidence of record establishes that there were accumulations of float coal dust in a room where miners were regularly sent to perform maintenance work and that several possible ignition sources were present. If normal operations were permitted to proceed, one of those ignition sources could ignite the float coal dust which could reasonably be expected to cause death or serious physical harm to any miner in the room. I therefore find that the preponderance of the evidence establishes that an imminent danger was present.

MSHA also attempted to prove that if an explosion had occurred in the fourth floor of station No. 2, it would continue along the 1,300-foot belt line into the transfer station. I do not find that MSHA proved this assertion.

Civil Penalty

In the civil penalty proceeding, MSHA asserts that Consol violated 30 C.F.R 77.202 which prohibits accumulations of coal dust. I have found that there was 1 to 5 inches of float coal dust throughout the fourth floor of station No. 2. I find this to be an accumulation within the meaning of 30 C.F.R. 77.202. Consol has therefore violated 30 C.F.R. 77.202.

MSHA proposed that a civil penalty in the amount of $6,000 be assessed for this violation. Consol is a large company and the assessment of a penalty will have no effect on its ability to remain in business. Its prior history of violations shows six previous violations of 30 C.F.R. 77.202. The testimony at trial indicates that Consol knew or should have known of this problem. Consol is, therefore, chargeable with ordinary negligence. I have found that this violation could result in an explosion which could kill or severely injure any miners in the area. Ohio Power has corrected the condition and has taken steps to insure that the condition will not reoccur. The only mitigating factors in assessing a penalty are Consol's assertion that Ohio Power was solely responsible for keeping the area clean and that Consol frequently complained to Ohio Power about this problem. Ohio Power was contractually obligated to keep the area clean. The contract, however, does not relieve Consol from its responsibility under the Act.

However, it should be noted that Inspector Skwortz had not previously inspected the fourth floor room of station No. 2 because when he got as far as the outside door to this building, he "was informed that my jurisdiction ended there and that the rest of it belonged to the power company." Hence, until the issuance of this order, MSHA had never claimed jurisdiction over the area in controversy. This fact as well as Consol's assertion that Ohio Power had sole responsibility for cleaning the area and that Consol had made prior complaints to Ohio Power about this problem, indicate that the penalty proposed by MSHA is excessive.

Based upon all of the evidence of record and the criteria set forth in section 110(i) of the Act, I conclude that a civil penalty in the amount of $1,000 should be imposed for the violation found to have occurred.

Conclusions of Law

1. The Administrative Law Judge has jurisdiction over these proceedings pursuant to sections 105 and 107 of the Act.

2. The fourth floor room of station No. 2 is a "mine" subject to the Act.

3. Consol was the operator of the "mine."

4. An imminent danger existed in the fourth floor room of station No. 2 because accumulations of float coal dust and several possible ignition sources were present which could

reasonably be expected to cause death or serious physical harm to miners if normal mining operations were permitted to continue.

5. Consol violated 30 C.F.R. 77.202 by permitting accumulations of dangerous amounts of coal dust in the fourth floor of station No. 2.

6. Consol's application for review of Order No. 631153 is denied.

7. Under the criteria set forth in section 110(a) of the Act, a civil penalty in the amount of $1,000 shall be imposed for a violation of 30 C.F.R. 77.202.

ORDER

WHEREFORE IT IS ORDERED that the application for review of Order No. 631153 is DENIED.

IT IS FURTHER ORDERED that Consol pay the sum of $1,000 within 30 days of the date of this decision as a civil penalty for the violation of 30 C.F.R. 77.202.

James A. Laurenson Judge