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SOL (MSHA) V. F&F MINING
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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.

F & F MENDISCO MINING COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

DOCKET NO. WEST 80-458-M

MSHA Case No. 42-00472-05006 F

Mine: Rim Columbus

Appearances:

James H. Barkley Esq. and
Katherine Vigil Esq.
Office of Henry C. Mahlman, Regional Solicitor
United States Department of Labor, Denver, Colorado,
For the Petitioner

Gary Cowan Esq.
Grand Junction, Colorado,
For the Respondent

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Federal Mine Safety and Health Administration, (MSHA), charges respondent, F & F Mendisco Company, (Mendisco), with violating Title 30, Code of Federal Regulations, Section 57.12-13, (FOOTNOTE 1) a safety regulation adopted under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq.

After notice to the parties a hearing on the merits was held in Grand Junction, Colorado on August 18, 1981.

ISSUES

The threshold issue is whether respondent, as the lessee mine operator, can prevail on the defense that he was an independent contractor in relation to the owner of the property. (FOOTNOTE 2)

Additional issues are whether respondent violated the regulation, and, if so, what penalty is appropriate.

SUMMARY OF THE EVIDENCE

Jackie Lewis Garrison, in his 19th year, died on the third day of employment with the Mendisco Company (Tr. 47, 50, 51, P16). On the fateful day Garrison was working alone as the grizzly man at the bottom of a two compartment shaft (Tr. 8, 47, 48). The electrocution occurred on the landing in the sump of the mine. A cable carrying 460 volts supplied power to the pump (Tr. 8).

The inspection took place on the day of the fatality. The MSHA inspector observed a bad splice with an exposed lead just below the tie down wire (Tr. 10, 12). There was water on the splice and very little insulation (Tr. 20, 21). If a person contacted the hot lead he would be exposed to 220 volts (Tr. 24). Drawings, photographs of the area, and the defective splice were received in evidence (Exhibits P2-P14).

MSHA witness Craig Miller, an electrical engineer, testified in detail. He dissected the bad splice and concluded that a person could be electrocuted if he contacted the energized wire (Tr. 68, 69). The wires in the splice were corroded and merely twisted together in a knot (Tr. 72).

After visiting the site witness Miller determined that Garrison was electrocuted in this fashion: when he climbed down into the sump he leaned against the ladder and with the wire rope from the tigger motor wrapped around his left wrist he was exposed to the conductor. The wire rope would have ridden down the cable to the bad splice (Tr. 79-80, 91, 98).

John Renowden, an MSHA electrical inspector, as well as a journeyman electrician, inspected the site. He tested all of the electrical systems related to the pump motor. Renowden also concluded that the tugger cable came in contact with the bad splice (Tr. 110-111).

Respondent Mendisco leases this mine from Atlas Minerals (Atlas) (Tr. 28, 30, 37, 47). Mendisco does the mining and Atlas has agreed to install and maintain the electrical system (Tr. 130, 131, 134, 147, 148, R3).

If Mendisco had an electrical problem they would contact Atlas to remedy it. MSHA found no evidence that Mendisco knew of the bad splice (Tr. 41, 49).

DISCUSSION

Mendisco asserts, as a threshold matter, that it is not responsible for the defective wiring. The defense pivots on the basis that Mendisco is an independent contractor as to Atlas. It further relies on its agreement with Atlas and argues that Atlas and not Mendisco should have been cited. Mendisco further relies on the Secretary's guidelines relating to independent contractors.

The independent contractor cases arise in the Commission decision of Republic Steel Corporation, 1 FMSHRC 5, and its progeny. Generally such cases arise when the Secretary seeks to impose a penalty on a mine operator for an act performed by the operator's independent contractor. Cf U.S. Steel Corporation, 4 FMSHRC 163, (February 1982).

Mendisco's reliance on the doctrine is misplaced. In this factual setting Mendisco was the mine operator. It did the mining, its employees were exposed and it could have eliminated the hazard. In these circumstances Mendisco's legal relationship with Atlas is not relevant nor is it a defense.

The recent Commission decision of Phillips Uranium Corporation, CENT 79-281-M (April 27, 1982) is not applicable here. The Phillips doctrine is limited by two factors. These are, first, the owner is not in violation of the Act where he has retained an independent company with experience and expertise in the activity being undertaken, and, two, where the employees of the owner do not perform any work other than to observe the progress of the work to assure compliance with quality control and contract specifications (slip op. 1, 2).

Mendisco further contends that the electrocution could not have occurred as outlined by MSHA's evidence. This contention rests in part on Felix Mendisco's testimony concerning the positioning of the wire tugger cable and a likelihood that the cable could not contact the defective splice. I am not persuaded. At the time of the accident MSHA experts

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considered several theories of how the electrocution occurred. However, at trial, both experts concurred in their views. Their expertise is apparent, one is an electrical engineer and the other a journeyman electrician. I find the electrocution occurred in the same fashion as contended by the MSHA experts.

CIVIL PENALTY

Section 110(i) of the Act [30 U.S.C. 820(i)] provides as follows:

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.

The Secretary proposes a civil penalty of \$4,000 for this violation.

In reviewing the statutory criteria I note that the facts favorable to Mendisco include the lack of any prior violations and the company's small size (Tr. 48, 126). The negligence and gravity are apparent. I hesitate to assess the proposed penalty since it appears that a \$4,000 penalty would be unduly burdensome on the company. On the other hand, the purposes of the Act require a substantial penalty to alert at least this company that the safety and health of miners must have a high priority in the Company's activities. In sum, and in view of the statutory criteria, I conclude that a penalty of \$1,000 is appropriate.

Based on the foregoing findings of fact and conclusions of law I enter the following

ORDER

1. Citation 336665 is affirmed.
2. A penalty of \$1,000 is assessed.
3. Respondent is ordered to pay said sum within 40 days of the date of this order.

John J. Morris
Administrative Law Judge

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~FOOTNOTE_ONE

57.12-13 Mandatory. Permanent splices and repairs made in power cables, including the ground conductor where provided, shall be: (a) Mechanically strong with electrical conductivity as near as possible to that of the original; (b) Insulated to a

degree at least equal to that of the original, and sealed to exclude moisture; and, (c) Provided with damage protection as near as possible to that of the original, including good bonding to the outer jacket.

~FOOTNOTE_TWO

In Cathedral Bluffs Shale Oil Company, WEST 81-186-M, an unrelated case decided this date, the mine owner, retaining project control by contract, defends on the basis that the liability lies with its independent contractor.