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SOL (MSHA) V. CATHEDRAL OIL
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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.

CATHEDRAL BLUFFS SHALE OIL COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

DOCKET NO. WEST 81-186-M

A/C No. 05-03140-05005

Mine: Cathedral Bluffs Shale

Appearances:

James H. Barkley Esq. and
Katherine Vigil Esq.
Office of Henry C. Mahlman, Regional Solicitor
United States Department of Labor
Denver, Colorado 80294,
For the Petitioner

James M. Day Esq.
Cotten, Day and Doyle
Washington, D.C. 20036,
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, Cathedral Bluffs Shale Oil Company, (Cathedral), with violating Title 30, Code of Federal Regulations, Section 37.19-100, (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 17, 1981.

ISSUE

The issue is whether MSHA may impose liability on an owner-operator where such owner has retained an independent company with experience and expertise in sinking shafts and where the owner's exposed employees are quality control and safety inspectors. (FOOTNOTE 2)

SUMMARY OF THE EVIDENCE

On the date of this inspection there was a chain but no safety gate at level 1050. The shaft bottom was one hundred feet below this station (Tr. 41). If miners were in the shaft they could be struck by falling objects (Tr. 7, 8, 41).

Occidental Shale Oil Company (Occidental), as the owner-operator contracted with the Gilbert Corporation of Delaware (Gilbert) (Tr. 11, 12, R1). Gilbert was to serve as the contractor in sinking shafts at the Cathedral Bluffs Shale Oil project (Tr. 20, R1). Portions of the contract received in evidence indicates considerable reliance by Occidental on the expertise of Gilbert (R1).

On September 4, 1980, MSHA inspector Michael Dennehy issued Citation 327786 against the operator and the contractor. (FOOTNOTE 3) The citation was against the operator, Occidental, because they engineered the shaft and had quality control men checking on its completion (Tr. 20). However, the inspector conceded that he had never seen any Occidental employees other than quality inspectors (FOOTNOTE 4) working in the shaft (Tr. 17). Gilbert, the contractor, had a continuing presence on the project and its workers were exposed to the hazard (Tr. 19, 31).

According to the contract Gilbert, who is designated as an independent contractor, (R1, page 1) agrees to comply with all applicable laws, rules, and regulations (R1, page 15).

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Witness Chuck Inman, the Occidental surface safety inspector, testified that Gilbert was in charge of safety and that he did not have the right to enter the shaft alone (Tr. 43, 44).

Witness Don McClung, Occidental's safety and health manager, indicated he had no control over safety and health in this particular shaft other than by contract (Tr. 56, 60). Any hazards observed by Occidental employees should be reported to Gilbert. The hazard would either be fixed or Gilbert would lose its contract (Tr. 50).

DISCUSSION

The recent Commission decision of Phillips Uranium Corporation, CENT 79-281-M (April 27, 1982), is dispositive of this case. The Commission holds that liability for a violation may not be imposed against an owner-operator where the owner has retained an independent company with experience and expertise in the activity being undertaken and where the owner's exposed employees do not perform any other work other than to observe the progress of the contractor's activities to assure compliance with quality control and contract specifications, (slip op. 1, 2). I further note that Gilbert in this case was sinking mine shafts. This is the same specialized activity undertaken by the contractor in Phillips.

Petitioner in his post trial brief contends that Occidental is liable because its employees were exposed to the hazard and it had the authority to require abatement.

Concerning the Occidental employees exposed to the hazard: the evidence at best shows the only Occidental employees possibly exposed were checking quality control in the shaft. I agree that in January 1980 Ron Parker, an Occidental safety inspector, took underground gas samples and I further agree that Don McClung, the Occidental Safety and Health manager, had been down the shaft two or three times (Tr. 47-49). However, in my view, such activities fall within the the doctrine expressed in Phillips.

Petitioner further argues that one hundred Occidental employees were exposed. However, the evidence does not stretch as far as petitioner contends. There may be one hundred Occidental employees at the Occidental site but except as indicated above no witness places any such employees in the shaft (Tr. 67-68).

I agree with petitioner's contention that Occidental had a right to abate the hazard. Such a right was by contract.

On the authority of Phillips, I conclude that the citation issued here should be vacated.

