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H.D. ENTERPRISES V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

H.D. ENTERPRISES, LTD., CONTESTANT	CONTEST PROCEEDING
v.	Docket No. WEVA 87-183-R Order No. 2909306; 4/15/87
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Birchfield No. 1 Mine

DECISION

Appearances: William D. Stover, Esq., Beckley, West Virginia, for Contestant;
Jack E. Strausman, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent.

Before: Judge Melick

This case is before me upon the application for review filed by H.D. Enterprises, Ltd. (H.D.) pursuant to section 107(e)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et. seq., the "Act" to challenge an "imminent danger" withdrawal order issued by the Secretary of Labor pursuant to section 107(a) of the Act.(FOOTNOTE 1)

The order at bar, No. 2909306, issued April 15, 1987, charges as follows:

> The boom and masts of the Grove IMS475A crane was [sic] being swung back and forth underneath the energized high voltage power lines in order to lift cement to the top of the Fan building. It was raining and the boom could easily contact the power lines. When measured with range finder the masts was [sic] 13 feet below the line. Men were also working on top of this building and contacting crane to empty cement.

Section 3(j) of the Act defines "imminent danger" as "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." The limited issue before me in this case is whether such a condition or practice existed at the time the order at bar was drafted. (FOOTNOTE 2)

According to Ernest Thompson, a coal mine inspector for the Federal Mine Safety and Health Administration (MSHA), H.D. Enterprises, a contractor at the Birchfield No. 1 Mine, was in the process on pouring cement on the roof of a new fan building on the morning of April 15, 1987. Thompson observed that a crane was swinging a cement bucket beneath and at "close clearance" to what he presumed were high voltage powerlines. The crane itself was positioned under the powerlines and three workmen were standing on a metal decking onto which the concrete was being poured. The workmen would contact the cement bucket lever as they unloaded the bucket. The metal bucket was, in turn attached to metal ropes suspended from the boom of the crane.

Thompson testified that he did not know the distance between the boom and the powerlines at the time he issued the order but subsequently measured the distance and found that the boom came no closer than 13 feet to the closest powerline. Thompson also acknowledged that he did not know the voltage in the powerlines at the time he issued the order but presumed that there was sufficient voltage to cause electrocution to the workers on the roof should the boom contact the powerlines while someone was touching the lever on the cement bucket. Thompson also believed that an electrical "arc" could occur so that electric current

sufficient to cause electrocution could jump 8 to 10 feet through the air.

Wayne Milan, a graduate electrical engineer and MSHA electrical inspector, testified however that the lowest in height of the series of powerlines at issue was a low voltage ground wire transmitting no more than 40 volts and which could not cause electrocution if contacted. The MSHA expert also opined that electrical arcing could not occur over a distance of more than a few inches. In view of Milan's qualifications I find his testimony to be entitled to significant weight.

Considering Milan's testimony along with the uncontested evidence that the distance between the lower low-voltage ground wire and the high voltage wires was four feet, it is apparent that in reality the hazard about which Inspector Thompson was concerned i.e. the crane boom contacting the high voltage lines and electrocuting the workmen, was not as imminent as first thought. The closest distance between the boom and the high voltage lines was actually some 17 feet and the applicable regulatory standard (30 C.F.R. 77.807.2) permits that distance to be as little as 10 feet. It is also apparent that the inspector was operating under the erroneous belief that electrical arcing could occur over a distance of 8 to 10 feet. The credible testimony of MSHA's electrical expert was that such arcing can occur over a distance of only a few inches. With the benefit of this additional information, which was not known to Inspector Thompson when he issued the order, I cannot find, that the Secretary has met his burden of proof that an "imminent danger" did in fact exist.

I also note that in abating the order, the inspector permitted the crane to continue operating in the same location which he had just found to be "imminently dangerous" (See Government Exhibit 2). This is confirmed by the testimony of crane operator Clinton Stover. The evidence also shows that during this stage of abatement Inspector Thompson was himself standing atop the metal roof of the fan building while the crane was operating in the noted manner. This evidence is not consistent with an "imminent danger".

ORDER

Order No. 2909306 is hereby VACATED.

Gary Melick
Administrative Law Judge
(703) 756Ä6261

FOOTNOTE_ONE

1 Section 107(a) of the Act provides in part as follows:

> 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 caused such imminent danger no longer exist.

FOOTNOTE_TWO

2 While the order was terminated shortly after its issuance, questions regarding the validity of that order are not moot. See Zeigler Coal Co., 1 IBMA 71 (1971).