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SOUTHERN OHIO COAL V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SOUTHERN OHIO COAL COMPANY, CONTESTANT	CONTEST PROCEEDING
	Docket No. LAKE 90-37-R
v.	Order No. 3324186; 2/1/90
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Meigs No. 31 Mine Mine I.D. # 33-01172

DECISION

Appearances: David M. Cohen, Esq., Lancaster, Ohio, for Contestant;
Patrick M. Zohn, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio for Respondent.

Before: Judge Melick

This case is before me under 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 against the Southern Ohio Coal Company (Southern Ohio) on February 1, 1990, pursuant to section 107(a) of the Act. The order reads as follows:

> A serious accident has occurred in which a miner was injured due to the practice of moving equipment using a wire rope without a guard or barrier or without persons being in a safety zone of 1 1/2 times the length of exposed wire rope. Safety contacts will be made of all personnel who work underground to assure the policy of moving equipment with the use of wire rope is adhered to.

> 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an order requiring the operator of such mine to cause all persons except those referred to in section 104(c), to be withdrawn from, and to be prohibited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 the imminent danger no longer exist.

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. In this case it is charged that a "practice" rather than a "condition" existed i.e. "the practice of moving equipment using a wire rope without a guard or barrier or without persons being in a safety zone of 1 1/2 times the length of exposed wire rope."

In Rochester and Pittsburgh Coal Co. v. Secretary of Labor, 11 FMSHRC 2159 (1989), the Commission considered two methods for determining the validity of an imminent danger withdrawal order issued under section 107(a) of the Act. First the Commission agreed that substantial evidence existed to support the judge's findings that an "imminent danger" existed at the time the order was issued. The Commission also concluded in that decision that apparently even if an imminent danger had not existed, the findings and the decisions of the inspector in issuing the order should nevertheless be upheld "unless there is evidence that he has abused his discretion or authority". Rochester and Pittsburgh, supra 2164 quoting from Old Ben Coal Corp. v. Interior Board of Mine Operation Appeals, 523 F.2d 25 at 31 (7th Cir. 1975).

For the reasons that follow I do not find in this case that an "imminent danger" existed at the time the order was issued. Furthermore, I find that the issuing inspector did indeed abuse his discretion and authority in issuing the order under the circumstances herein.

The issuing MSHA inspector, Donald Osborne, was conducting an electrical inspection on February 1, 1990, in the subject Meigs No. 31 Mine when he learned that an accident had occurred the day before, injuring miner Bill Yoho. The facts surrounding the accident are not in dispute. The evidence shows that on January 31, 1990, at about 1:30 p.m., at the 6 Right off the 6 East Mains area at the No. 15 crosscut several miners were in the process of removing an air compressor with a 15 ton track mounted locomotive. They had rigged a sheave block attached to the track to pull the compressor at a right angle to the direction of the locomotive. As they were pulling the compressor toward the track it became stuck, a chain link failed and the wire rope snapped back striking Mr. Yoho in the face and head. The wire rope was 40 feet long and Yoho was admittedly standing within 1 1/2 lengths of the rope.

Inspector Osborne testified that while no regulatory violation existed in this case, the use of a wire rope within a safety zone of 1 1/2 times the length of the rope constituted an "imminent danger". In support of his view Osborne cited a memorandum issued by the corresponding MSHA district manager on September 3, 1987, setting forth the safety requirements to be followed when wire ropes are used to move equipment i.e. a safety zone 1 1/2 times the length of the wire rope or the use of a cage or barrier. Osborne testified that the memo was in fact discussed with Southern Ohio officials, including officials at the Meigs No. 31 Mine, on January 9, 1988.

Osborne testified that the "practice" about which he was concerned was of not protecting employees when using wire ropes. He acknowledged that since he was citing a "practice" and not a "condition" he noted in the order that "no area [was] affected". Osborne conceded however that he did not know whether the procedure followed in this instance was indeed a "practice" at the subject mine. When asked how he determined that the cited procedure was a "practice", Osborne stated only that "I didn't know that it was [a practice]; however I did not know that it wasn't" (Tr .47).

The threshold issue in this case is whether the cited procedures constituted a "practice" within the meaning of section 3(j) of the Act.

The word "practice" is defined, as relevant hereto, in Webster's New Collegiate Dictionary, G & C Merriam Company, 1979, as "a repeated or customary action" or "the usual way of doing something". The issuing inspector clearly did not have any direct evidence that the cited event was a "repeated or customary action" or was "the usual way of doing something" within this meaning. Nor could such findings be made by inference i.e. an inference could not be drawn from the observation of one incident that there was a "practice" of performing the cited procedure. See Mid-Continent Resources 6 FMSHRC 1132 (1984); Garden Creek Pocahontas 11 FMSHRC 2148 (1989). Accordingly the Secretary has failed to sustain her burden of proving that a "practice" existed at the time the order was issued. There was therefore no "imminent danger" within the meaning of section 3(j) of the Act.

Moreover by the failure of the issuing inspector to have conducted further investigation to determine whether the cited procedures were indeed sufficiently repetitive to constitute a "practice" I conclude that the inspector abused his discretion and authority in issuing the order at bar. It is clearly improper for the inspector to infer that the cited events were a "practice" from the absence of evidence that

they were not a practice. The Secretary has the burden of proving each and every element supporting its withdrawal order and she cannot shift that burden. For this additional reason the imminent danger withdrawal order must be vacated.

ORDER

Withdrawal Order No. 3324186 is vacated.

Gary Melick
Administrative Law Judge