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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

WYOMING FUEL COMPANY, CONTESTANT	CONTEST PROCEEDINGS
v.	Docket No. WEST 90-238-R Order No. 3077023; 6/12/90
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Golden Eagle Mine Mine ID 05-02820

DECISION

Appearances: Lawrence J. Corte, Esq., Lakewood, Colorado, for Lakewood, Colorado, for the Contestant; Robert J. Murphy, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Respondent.

Before: Judge Morris

This case is before me pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (the "Act"), to challenge an order issued under section 107(a) of the Act to Wyoming Fuel Company ("WFC").

After notice to the parties an expedited hearing on the merits was held in Denver, Colorado, on June 26, 1990.

The parties filed post-trial briefs.

Procedural Issues

The judge believes certain procedural issues should be initially considered.

WFC moved for an expedited hearing. The Secretary opposed the motion in this case as she did in other unrelated cases involving the same parties (WEST 90-112-R, WEST 90-113-R, WEST 90-114-R, WEST 90-115-R and WEST 90-116-R).

The issue is again raised in this decision and the Commission is invited to consider the issue anew.

To support of its motion for expedition, WFC relies on the statutory requirements set forth at section 107(a) of the Act. The cited section provides as follows:

> (e) Relief from orders; hearing; order; expedited proceeding.
>
> > (1) Any operator notified of an order under this section or any representative of miners notified of issuance, modification, or termination of such an order may apply to the Commission within 30 days of such notification for reinstatement, modification or vacation of such order. The Commission shall forthwith afford an opportunity for a hearing . . . and thereafter shall issue an order, based on findings of fact, vacating, affirming, modifying, or terminating the Secretary's order. The Commission and the courts may not grant temporary relief from the issuance of any order under subsection (a).
> > (2) The Commission shall take whatever action is necessary to expedite proceedings under this subsection. (107(e), (1) and (2), Emphasis added).

In opposition to the motion the Secretary states the section 107(a) order in this case and other cases were modified to permit mining activity. The Secretary also contends that if all orders issued under section 107 were expedited on request, there would no longer be any capability for expeditious hearings.

The Secretary further asserts the Congressional intent of section 107(a) is to assist operator's where an emergency situation exists. In short, the Secretary argues Congress intended to allow an expedited hearing only in the case of an active closure order, where the mine is not being allowed to produce and it suffering a great hardship as a result of an MSHA order.

It is also urged that the matter of whether a hearing should be expedited rests with the sound discretion of the presiding judge.

The Secretary also contends the Commission Rules are so structured that expedited hearings are allowed only in emergency situations.

Discussion

It is a basic rule of construction that where the language is clear the statute must be enforced as it is written unless it can be established that Congress clearly intended the words to have a different meaning. Chevron, USA v. NRDC, 467 U.S. 837, 842-43, 104 S.Ct. 2778 (1984); United States Lines v. Baldridge, 677 F.2d 940, 944 (D.C. Cir. 1982); Phelps Dodge Corp. v. FMSHRC, 681 F.2d 1189, 9th Cir. (1982); Freeman United Coal Mining Co., 6 FMSHRC 1577, 1578 (1984).

The statutory requirement, stripped of surplus language, is that "any operator . . . notified of an order, etc., may apply within 30 days . . . for a vacation of such order, etc." In such a situation, "the Commission shall expedite proceedings."

It is uncontroverted here that an order was issued under the authority of section 107(a) of the Act. Further, the contest was filed within 30 days.

The foregoing uncontroverted facts require that this case be expedited. I agree with the Secretary that Congress may have intended an expedited hearing only in the event of an active closure order. However, the wording of section 107 does not disclose such an intent.

Further, the structure of the Commission's Rules do not support the Secretary. Commission Rule 52, 29 C.F.R. 2700.52, provides as follows:

> 2700.52 Expedition of proceedings
>
> (a) Motions. A motion of a party to expedite proceedings may be made orally, with concurrent notice to all parties, or served and filed by telegram. Oral motions shall be confirmed in writing within 24 hours.
>
> (b) Timing of hearing. If the motion is granted, a hearing on the merits of the case shall not be scheduled with less than four days notice, unless all parties consent to an earlier hearing.

A fair reading of the statute and the Commission rules indicate that expeditious hearings involving section 107(a) orders are generally not left to the discretion of the presiding judge; further, expedited hearings are not necessarily restricted to "emergency" situations.

I agree the failure to read "emergency situation" into the Act and Rule 52 could render the expedited hearing process meaningless. However, the writer has never found the expedited hearing process to be burdensome, nor have any litigants attempted to "overload" the Commission with requests for expeditious proceedings. If this were to become a problem interfering with the Commission's duties of adjudicating disputes under the Mine Act, and Commission would no doubt amend Rule 52. In such circumstances the appellate courts would accord great deference to the Commission's interpretation of its own rules. Lucas Coal Company v. Interior Board of Mine Operations Appeal, 522 F.2d 581 (1975).

In sum, under the Mine Act, contestant is entitled to an expedited hearing when a section 107(a) order is involved.

If the order here had been issued under section 104(d) of the Act there would be a totally different result.1 Under section 105(B)(2), [30 U.S.C. 815(b)(B)(2)], the Commission may grant temporary relief from a section 104(d) order only under very restrictive conditions. These are:

> (A) a hearing [before MSHA] has been held in which all parties were given an opportunity to be heard;
>
> (B) the applicant shows that there is substantial likelihood that the findings of the Commission will be favorable to the applicant; and
>
> (C) such relief will not adversely affect the health and safety of miners.
>
> No temporary relief shall be granted in the case of a citation issued under subsection (a) of (f) of section 104. The Commission shall provide a procedure for expedited consideration of applications for temporary relief under this paragraph.

In sum, I reaffirm my previous order granting WFC an expedited hearing.

Stipulation

At the commencement of the hearing the parties stipulated as follows:

1. The Golden Eagle Mine is owned by Wyoming Fuel Company and the mine is subject to the Act.

2. In 1989, the mine produced 900,000 tons of coal.

3. The Commission and Administrative Law Judge have jurisdiction over this matter.

4. The imminent danger orders involved in this case were properly served on the operator and can be received in evidence.

Summary of the Case

The evidence concerning the underlying facts is uncontroverted. The conflict arises from the conclusions to be drawn from such facts.

Donald L. Jordan and Steve Salazar, both experienced in mining, testified in the case.

On June 12, 1990, MSHA Inspector Jordan was involved in a saturation inspection at the Golden Eagle Mine. The operation of this gassy mine involves a continuous miner development combined with a retreating longwall.

At approximately 7:50 a.m., Inspector Jordan, Messers. Salazar, the general mine foreman, and Ralph Sandoval, a union escort, went to the northwest No. 1 tailgate section.2

As the group started into the section they were told not to enter the area. Section Foreman Kretoski had notified all personnel to stay out; he had also posted the neck of the unit. The miners were being withdrawn because a methane concentration in excess of 1.5 percent had been detected. Mr. Salazar reaffirmed the order of withdrawal. Further, section mechanic Ben Chavez was on his way to deenergize the power.

Messers. Jordan and Salazar then went to the No. 1 return and took air samples. They agreed the methane concentration in the area exceeded 1.5 percent. In fact, the concentration was 1.7 percent. (Tr. 20, 22, 66) They continued on to the No. 4 return. The methane concentrations fluctuated from .9 to 1 percent. The belt entry concentration was two-tenths of one percent. Inspector Jordan and Mr. Salazar then drove to the face area. They found that a curtain in the No. 2 entry was choaking off most of the air.

The methane concentrations at the face ranged between 0.3, 0.5 and 0.8 percent. Mr. Salazar indicated it would probably

take the rest of the day shift for the concentration to go below one percent.

After returning from the face the two men walked the entry, a distance of about 1400 feet. In that distance they found the methane concentration varied from 1.4 to 1.7 percent. (Tr. 86-89)

Inspector Jordan stated he would have to write a section 107(a) Order so he would be in control of the situation. When the order was written WFC had already withdrawn the personnel and deenergized the power. (Tr. 69) Mr. Salazar did not believe an imminent danger exited. (Tr. 71-84)

At 2:00 p.m., the concentration was 1.3 percent. Inspector Jordan modified his order and he authorized production to resume if the concentration went below one percent. At 4:30 p.m., mining resumed when the concentration dropped between 0.8 to 0.9 percent.

The graveyard shift mined until 4:00 a.m. At that time the methane escalated to 1.4 percent. Mr. Salazar informed the crew not to let it reach 1.5 percent; the crew was withdrawn.

On the 19th, MSHA Inspector Mel Shively wrote a section 104(a) citation when he found the methane concentration was still holding at 1.2 percent. On June 21st at approximately 4:30 p.m., Inspector Jordan abated his prior section 107(a) order.

When the order was originally written management was complying with 30 C.F.R. 75.309(b).

In Mr. Salazar's opinion, Inspector Jordan issued the section 107(a) order as a control device. Inspector Jordan believed he was complying with his obligations under the Mine Act when he issued the order.

Discussion

This case involves the construction of relevant portions of the Act.

Section 107(a), under which the order here was issued, provides for procedures to counteract dangerous conditions. The section, in part, provides as follows:

> Procedures to Counteract Dangerous Conditions
>
> Sec. 107. (a) 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. 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.

On the facts presented here, it would appear that no condition of imminent danger existed within the ordinary meaning of section 107(a). The methane concentration had not reached an explosive range. In addition, the inspector and the mine superintendent walked inby No. 1 entry for 1400 feet. The methane concentrations in the walk remained constant at 1.4 percent to 1.7 percent. However, the fact that the two men walked the entry indicates they both believed no condition of imminent danger existed.

Congress has legislated many facets of mining. One such mandate is set forth in 30 U.S.C. 863(h)(2) which provides:

> (2) If, when tested, a split of air returning from any working section contains 1.5 volume per centum or more of methane, all persons except those persons referred to in section 814(d) of this title, shall be withdrawn from the area of the mine endangered thereby to a safe area and all electric power shall be cut off from the endangered area of the mine, until the air in such split shall contain less than 1.0 volume per centum of methane. [Emphasis added]

The above statutory provision has also been codified in the Secretary in regulations at 30 C.F.R. 75.309(b).

Whether the described methane concentrations are held to be a "per se imminent danger" (as ruled by Judge Joseph B. Kennedy)3 or a Congressionally mandated imminent danger is not critical to a resolution of the issues.

The meaning of the foregoing statutory provisions is amplified by the legislative history of the 1969 Act. In reviewing Section 204(i)(2) the Senate Committee stated as follows:

> This section requires that men be withdrawn by the operator or inspector, if he is present, and power shut off from a portion of a mine endangered by a split of air returning from active underground workings containing 1.5 percent of methane. The presence of 1.5 percent of methane in the air current returning from active underground working places indicates that considerably larger amounts of methane may be accumulating in the air at places in the mine through which the current of air in such split has passed. Safety requires that employees be withdrawn from the portion of the mine which is endangered by the possibility of an explosion of any such accumulation of methane, and that all electric power be cut off from such portion of the mine, until the cause of the high percentage of methane in such returning air is ascertained and the quantity of methane in such returning air is reduced to no more than 1.0 percent.

Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 185. To like effect see also, CF&I Steel Corporation, 3 FMSHRC 2819, 2823 (1981) (Boltz, J.).

WFC's initial argument is that the presence of 1.7 percent methane does not trigger a section 107(a) order because there can be no per se imminent dangers under the Act. In support of its position WFC relies on the frequently stated tests of imminent danger. Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals, 523 F.2d 25, 32 (7th Cir. 1975) (quoting Freeman Coal Mining Corp., 2 IBMA 197, 212 (1973), aff'd sub nom. Freeman Coal Mining Co. v. Interior Board of Mine Operations Appeals, 504 F.2d 741, 743 (7th Cir. 1974)). Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2164 (1989).

WFC's argument should be addressed to the Congress, not to the Commission. The statute, as stated above, clearly defines a 1.5 percent concentration methane to be an area of the mine that is endangered. It requires withdrawal of all miners from such an area.

> In sum, I agree with Inspector Jordan's view that: . . . when I encounter 1.5% methane regardless of the situation, if I am in fact present, that I am obligated to issue an imminent danger [order] until the imminent danger has in fact been removed (Tr. 37).

The cases relied on by WFC address the issue of "imminent danger." However, more critically, these cases do not involve methane concentrations exceeding 1.5 percent.

The case of Mid-Continent, 1 IBMA 250, also cited by WFC, supports the Secretary and not WFC. In the cited case, the Board stated that "neither the Act nor the Regulations provide that a mere presence of methane gas in excess of 1.0 volume per centum is, per se, a violation." 1 IBMA at 253. However, as noted, Congress has mandated that 1.5 percent methane requires remedial action by the operator as well as the inspector, if he is present.

Based on Mid-Continent, WFC further suggests a method of enforcing 75.309 without the need of resorting to a section 107(a) order.

MSHA can consider WFC's proposal, but this case is not a rule-making proceeding, but a contest concerning the validity of the order issued by the Secretary's representative.

WFC also argues that the Secretary's per se imminent danger rule cannot be reconciled with pending changes proposed in her regulations.4

WFC states that, in her proposed changes to the regulations, the Secretary does not require miners to be withdrawn until the methane concentration attains 2.0 percent. 54 Fed. Reg. at 2415.

I agree. It appears the Secretary's proposed regulations, not yet enacted, clarify, reorganize, and update existing ventilation standards promulgated more than 15 years ago. The proposal also recognizes new technology available in mines.

The Secretary has broad rule-making powers. However, this case is necessarily determined on existing requirements and not on the proposed changes. The changes, which are in the proposal state, may never be adopted.

For the foregoing reasons, I conclude that Inspector Jordan properly issued Order 3077023. Accordingly, I enter the following:

ORDER

The contest of Order No. 3077023 is DISMISSED.

John J. Morris
Administrative Law Judge

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FOOTNOTES START HERE

1. See Order in Medicine Bow Coal Co., WEST 90-117-R, March 13, 1990.

2. This area is circled on the mine map, Exhibit C2.

3. Consolidation Coal Company v. Secretary of Labor, 4 FMSHRC 1960 (1982).

4. 54 Federal Register 2383, 2415 (1988).