CCASE:
ALUMINUM COMPANY V. MSHA
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ALUMINUM COMPANY OF AMERICA, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. CENT 92-362-RM
	:	Order No. 4107581; 9/11/92
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Point Comfort Operations
	:	Mine ID 41-00320

DECISION

Appearances: Timothy P. Ryan, Esq., Eckert Seamans Cherin & Mellott, Pittsburgh, Pennsylvania, for Contestant; Gretchen Lucken, Esq. Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for Respondent.

Before: Judge Maurer

This proceeding concerns a Notice of Contest filed by the contestant pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, challenging the legality and propriety of a section 103(k) order issued at its Bayer Alumina Plant on September 11, 1992. An expedited hearing was requested and subsequently held on October 6, 1992, in Victoria, Texas, and the parties appeared and participated fully therein. After the Secretary rested, contestant moved that the section 103(k) order at issue herein be vacated. I granted that motion on the record at the hearing. For the purposes of ruling on contestant's motion, I accepted as true all the factual testimony in the record and all the Secretary's expert testimony as well, save their legal conclusions that a section 103(k) order was an appropriate legal device to address the instant mercury contamination problem at the contestant's Point Comfort Facility. Pursuant to the Rules of Practice before this Commission, this written decision confirms the bench decision I rendered at the hearing.

Order No. 4107581, issued pursuant to section 103(k) of the Act on September 11, 1992, by Supervisory Inspector Fink, states as follows:

> Mercury contamination has occurred at all the R-300 facility and area approximately 70 feet west extending to the paved roadway parallel to the R-300 facility to

> be covered by this 103(k) order. In order to protect the health and safety, all persons are prohibited from entering this area, except with the approval of the District Manager or his representative pending further investigation of the extent of the hazard.

In my opinion, there is no question that the Secretary has turned up a serious incidence of mercury contamination at the contestant's R-300 facility and adjacent area and it must be dealt with. The sooner the better. I only disagree with the legality of the means the Secretary has chosen to address the problem.

Section 103(k) of the Mine Act states:

> In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

An "accident" is a necessary precondition to the issuance of a section 103(k) order and there has been no discernible accident proven by the Secretary in this case. Simply calling it an "accident" does not make it so. Likewise, forming an "accident committee," does not make whatever that committee is investigating an "accident." Furthermore, although the list is not meant to be exclusive or exhaustive, I note that mercury contamination, or indeed any type of chemical spills or contamination is not included in the definition of "accident" provided by section 3(k) of the Mine Act. Nor is this type of situation included in the definition of "accident" in the MSHA regulations found at 30 C.F.R. 50.2(h).

Legal niceties aside, the Secretary urges that as a remedial statute, the Mine Act should be interpreted broadly to effectuate its important health and safety purposes. I certainly agree with that proposition but the basis for my vacation of the order at bar is the very candid testimony of Inspector Fink, the man who issued the contested section 103(k) order in the first instance.

Inspector Fink testified that the section 103(k) order was actually issued to force compliance with several sections of 30 C.F.R. Part 56. He also agreed that section 104 of the Act or in a proper case, section 107(a), was the more usual compliance

tool. Most importantly, in response to questioning by the court, he admitted that the result obtained by the issuance of the 103(k) order could have also been obtained by regular enforcement of the mandatory standards pursuant to section 104 of the Act. The inspector testified at Tr. 133:

> Q. Okay, so basically those . . . standards, if they were enforced, would do everything that you want to do with this 103(k) order, correct?
>
> A. Yes sir, if they were enforced, by all parties concerned.

By his qualification, the inspector meant that the section 104 enforcement would only be effective if the company complied. But I believe that the mechanism exists in section 104 to force compliance upon even the most reluctant operator if it is properly used.

I also believe that Inspector Fink was directed to issue the instant 103(k) order by the district manager because MSHA was concerned about what they perceived to be a lack of compliance disposition on the part of ALCOA concerning previous citations issued to the company with regard to the mercury contaminated area. In a reactive manner, MSHA impermissibly stretched the law to force compliance with the applicable mandatory standards when the Mine Act has an existing, readily usable and legal mechanism to do exactly that in section 104 or in the proper case, 107.

If violations of mandatory standards were involved, as they apparently were, MSHA should have proceeded apace with enforcement under section 104. This course of action was embarked on, but later abandoned by MSHA in favor of the quicker fix thought to be available in section 103(k). Moreover, if at any time MSHA determines that an imminent danger is involved, an imminent danger withdrawal order under section 107(a) could be issued. But a section 103(k) accident control order is not a legally viable option in this situation. An "accident" is a statutory precondition to its issuance, and without torturing the terminology, simply cannot be found herein.

ORDER

In view of the foregoing findings and conclusions, the contested section 103(k) Order No. 4107581, issued on September 11, 1992, IS VACATED, and the Notice of Contest filed by the contestant IS GRANTED.

Roy J. Maurer
Administrative Law Judge

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