CCASE:
CONSOLIDATION COAL V. MSHA
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CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. PENN 92-739-R
	:	Order No. 3699507; 7/2/92
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Dilworth Mine
	:	Mine I.D. No. 36-04281

DECISION

Appearances: Daniel E. Rogers, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Contestant;
Nancy Koppelman, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent

Before: Judge Melick

This case is before me upon the notice of contest filed by Consolidation Coal Company (Consol) pursuant to Section 107(e) of the Federal Mine Safety and Health Act of 1977, 30 C.F.R. 801, et seq., the "Act," to challenge an "imminent danger" order of withdrawal issued by the Secretary under Section 107(a) of the Act.

The withdrawal order at issue charges as follows:

> There were two hot hangers and a third hanger found arcing across the insulator found on the G-main haulage. The first one found at the mouth of the 1-D switch was found with the insulator on fire. The flame was from 1 to 3 inches in height. The second hot hanger found just outby 73 and 1/2 crosscut had the roof coal and rock hot to the touch and was smoking when found. The third danger inby the 75-G mains crosscut was not hot but found to be arcing across the insulator. These are trolley wire hangers and the wire is 550 volts d.c. A citation will accompany this order.

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an order requiring the operator of such mine to cause all persons except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering such area until an authorized representative of the Secretary determines that such imminent danger and the conditions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 practice which cause such imminent danger no longer exists.

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. This definition was not changed from the definition contained in the Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801, et seq. (1976) (Amended 1977) ("Coal Act"). The Senate Report for the Coal Act states that an imminent danger is present when "the situation is so serious that the miners must be removed from the danger forthwith when the danger is discovered without waiting for any formal proceeding or notice." S. Rep. No. 411, 91st Cong., 1st Sess. 89 (1969), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess. Part I, Legislative History of the Federal Coal Mine Safety and Health Act of 1969 at 215 (1975) (quotes Coal Act Legislative History). It further states that the "seriousness of the situation demands such immediate action" because "delays, even of a few minutes, may be critical or disastrous." See Utah Power and Light Company, 13 FMSHRC 1617 (1991).

In Rochester and Pittsburgh Coal Company v. Secretary, 11 FMSHRC 2159 (1989), the Commission set forth the analytical framework for determining the validity of imminent danger withdrawal orders issued under section 107(a) of the Act. The Commission indicated that it is first appropriate for the judge to determine whether the Secretary has met her burden of proving that an "imminent danger" existed at the time the order was issued. The Commission also suggested, however, that even if an imminent danger had not then existed, the findings and decision of the inspector in issuing a section 107(a) order should nevertheless be upheld "unless there is evidence that he as abused his discretion or authority." Rochester and Pittsburgh, supra, at p. 2164 quoting Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals, 523 F.2d at p. 31 (7th Cir. 1975).

The order at issue, No. 3699507, in fact charges three separate incidents as constituting separate grounds for issuance of the withdrawal order. It is not disputed that the first incident was discovered at approximately 8:30 a.m. on July 2, 1992, by an inspection party consisting of Ronald Hixson, a coal mine inspector for the Mine Safety and Health Administration (MSHA), Morton Whoolery, the union walkaround, and Patrick Wise, Consol's inspection escort. It is further undisputed that at around that time an underground trolley wire was found to be on fire with flames 1 to 3 inches in height.

Martin Whoolery, who corroborated the testimony of Inspector Hixson in essential respects, recalled that they first saw a glow in the distance and, as they approached, observed that the hanger was actually on fire. Whoolery testified that Wise then called the dispatcher and pulled the power. At that point Whoolery removed and replaced the old insulator. According to the expert testimony of Ron Gossard, an electrical engineer and MSHA supervisor, there was a high probability of ignition of roof coal by the open flames, particularly coal in the Pittsburgh seam, which is easily ignited and once ignited spreads rapidly.

Inspector Hixson confirmed that had the fire not been discovered as soon as it was, there was a chance for a major mine fire. There was coal in the roof, there was sloughage of coal on the mine floor and wood cribs were nearby the open flame. Hixson also observed that the hot mine roof could fall taking down the trolley wire in its entirety. With the air velocity in the mine at approximately 535 cubic feet per minute at the location of the fire, the fire would also likely spread rapidly. Hixson also observed that the instant mine liberates 1 to 1.5 million cubic feet of methane in a 24 hour period and the condition was accordingly that much more aggravated. In addition to the inspection party itself, pumpers and the fireboss would also have been exposed to the hazard.

Consol's escort, Patrick Wise, also saw the hot hanger from about 800 feet away as it was glowing and arcing. He acknowledged that the condition was dangerous and had it not been corrected was an imminent danger.

Within this framework of undisputed evidence it is clear beyond all doubt that the condition found at the first location at approximately 8:30 a.m. on July 2, 1992, was indeed an "imminent danger." The oral order of withdrawal

issued by Inspector Hixson at that time and subsequently committed to writing in Order No. 3699507 is accordingly affirmed.

Inasmuch as the Secretary was unable to prove by a preponderance of the evidence that even an oral order of withdrawal had been issued by Inspector Hixson prior to the abatement of the second and third conditions cited I cannot affirm those parts of the order. Inspector Hixson himself testified that he could not recall whether he even told Wise that a Section 107(a) order was being issued on the second condition. He further acknowledged that he did not tell Wise that persons inby had to be withdrawn following the discovery of the second and third conditions. Wise testified that it was only after they had replaced the smoking hanger at the second location that he asked Inspector Hixson "I assume this will be the same as the other one" and Hixson responded "Yes."

ORDER

Order of Withdrawal No. 3699506 is AFFIRMED and the Contest herein is DISMISSED.

Gary Melick
Administrative Law Judge
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