

CCASE:  
CONSOLIDATION COAL V. SOL (MSHA)  
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CONSOLIDATION COAL COMPANY, : CONTEST PROCEEDING  
Contestant :  
v. : Docket No. PENN 92-502-R  
: Order No. 3679001; 3/28/92  
SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH : Robena Prep Plant  
ADMINISTRATION (MSHA), : Mine I.D. No. 36-04172  
Respondent :

DECISION

Appearances: Daniel E. Rogers, Esq., Consolidation Coal  
Company, Pittsburgh, Pennsylvania, for  
Contestant;  
Anthony G. O'Malley, Jr., 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 the Consolidation Coal Company (Consol) to challenge a  
control order issued by the Secretary of Labor under Section  
103(k) of the Federal Mine Safety and Health Act of 1977,  
30 U.S.C. Section 801, et seq., the "Act."

Section 103(k) of the Act provides that "in the event  
of any accident occurring in a coal or other mine, an author-  
ized 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."

The order at bar, No. 3679001, issued March 28,  
1992, states as follows:

A structural failure occurred when the  
600 ton coal surge bin between CC4 and  
CC5 belts fell from its support tearing  
out the up-river side of the building  
structure and severing 2,300 volt power  
cables and beams supporting the building.  
This order was issued verbally by

Robert W. Newhouse at 0100 hours on 3/28/92 to assure the safety of persons at the Preparation Plant and to preserve evidence until an examination or investigation can be made to determine that this area is safe. Only those persons selected from company officials, state officials, the miners' representatives and other persons who are deemed by MSHA to have information relevant to the investigation may enter the affected area.

There is no dispute that the Robena Prep Plant, where the alleged accident occurred, was a "mine" within the meaning of the Act. Consol argued however, through a full day of evidentiary hearings, that the above order was invalid in that no "accident" occurred within the meaning of the Act.<sup>1</sup> The term "accident" is defined in Section 3(k) of the Act as including "a mine explosion, mine ignition, mine fire, or mine inundation, or injury to, or death of, any person."

Whether or not the admitted structural failure of the Robena Prep Plant coal surge bin itself constituted an "accident" within the meaning of Section 3(k) of the Act, the evidence that a mine ignition and mine fire occurred on March 27, 1992, cannot be disputed. This evidence confirms the information received by the issuing inspector on March 28, 1992, around 3:00 a.m., upon which he relied in issuing the Section 103(k) order at bar.

According to issuing MSHA Inspector William Wilson's undisputed testimony, when he appeared at the Robena Prep Plant around 2:50 a.m., on March 28, 1992, to investigate an "accident," he was told by Consol Safety Director Jim Hunyady that the surge bin structure had failed and that there had been a small fire which they put out quickly. Bob Campbell, the mine safety committeeman, also confirmed to Wilson that there had been some small fires following the collapse of the coal surge bin. Campbell himself recalled telling Inspector Wilson at this meeting, before Wilson had issued his order, that there had been some fires in the coal. Within this framework of undisputed evidence, Wilson could reasonably have concluded that an "ignition" and a "mine fire" had occurred and that the issuance of a section 103(k) order was appropriate. Significantly, the evidence developed after the order was issued fully

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1 In its Post-Hearing brief Consol apparently now concedes the issue. So that no question remains, the issue is nevertheless discussed herein.

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corroborates the information provided to Wilson when he issued the order, and confirmed that his actions were prudent and reasonable. These facts also clearly show that he did not abuse his discretion or authority.

Riverman John Markatan testified at hearing that around 9:00 or 9:30 p.m. on March 27, 1992, after loading a barge, and as he proceeded to the riverman's shanty approximately 75 yards from the surge bin, he noticed a sudden power loss followed by a loud "ripping" sound. As he started toward the window of the shanty he heard a loud muffled explosion, saw a bright yellow flash of light and felt heat on his face. He jumped to the floor immediately. When he looked outside he saw that the river bank and debris in the barges were on fire. Flashes, sparks and fire were also coming out of the coal bin. The fire was one foot or less in height and lasted for about one and a half hours.

Wallace Wright, a river boat pilot for Consol, was standing below the river tipple around 9:30 to 9:45 that night when he suddenly looked up and saw a large fire about 100 feet in height. There was fire in the bin itself and two small fires in the coal.

Robert Campbell, Chairman of the Mine Safety and Health Committee, arrived at the plant shortly after receiving a call about an explosion at the surge bin. When he arrived there was a fire on the river side of the bin with coal burning in several areas, including an area in which he thought was an acetylene tank.

Consol's own witness, Daniel Yanchek, the Robena Prep Plant Superintendent, also saw the coal fires following the surge bin failure. When he arrived at the plant around 11 o'clock that night the coal fires were still burning in the coal spilled beneath the bin.

Finally, the testimony of MSHA's specialist in the investigation of fires and explosions, Steven Luzik, provides convincing corroboration that an ignition of coal had in fact occurred at the "explosion" site. Luzik, a graduate chemical engineer who is an MSHA supervisory general engineer and former branch chief of its Industrial Safety Division, testified that he investigated the site on March 31, 1992, to determine whether a fire or explosion had in fact occurred. His observations, documented in photographs (see Gov't Exhibit Nos. 3.1, 3.2, and 3.3), showed evidence of burned material, including partly combusted coal dust. Comparing samples taken from the unburned area of coal spillage with burned samples, the MSHA laboratory performed proximate analysis and x-ray

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spectrographic analysis test on the samples (Government Exhibit No. 5). Luzik was able to conclude that what appeared to have been burned coal had a high ash content thereby indicating combustion. He further concluded that both solid and dust coal particles had burned. It was Luzik's overall opinion that, while there had not been a large explosion, the collapse of the bin caused a suspension of coal dust followed by the cable rupturing causing an arc and ignition of the unconfined coal dust.

Within this framework of evidence, it is clear beyond all doubt that indeed a mine ignition and mine fire had occurred at the Robena Prep Plant on the evening of March 27, 1992. It may be reasonably inferred from Yanchek's testimony in conjunction with the undisputed testimony of Campbell, Wright, and Markatan, that the fires had continued burning from at least the time of the "explosion" around 9:30 p.m. until after Yanchek arrived at 11:00 p.m. Under the circumstances there was an "accident" at the Robena Prep Plant within the meaning of Section 103(k) as alleged.

Consol next makes the bald assertion that the issuance of the 103(k) order was precluded because the area where the surge bin collapsed had previously been "dangered off" by mine management. This contention is however without any legal support. The fact that management may have "dangered off" an area, whatever that means, may certainly be considered by the issuing inspector in his safety evaluations, but cannot bar the issuance of a section 103(k) order.

In its post-hearing Brief, Consol, for the first time, also claims that Inspector Wilson was not "present" within the meaning of Section 103(k) when he issued the order at bar. Consol argues, without any citation of authority, that Wilson's acknowledged presence at the mine was insufficient and that he must be present precisely at the accident scene itself when he issues such an order. It is a well-established rule, however, that a statute should not be construed in a way that is foreign to common sense or its legislative purpose. Consolidation Coal Co., 14 FMSHRC 956 (1992); Clinchfield Coal Co., 11 FMSHRC 2120 (1989).

If Consol's suggested interpretation of section 103(k) were to prevail, then many control orders under that section could not be issued simply because the Secretary's representative would have no access to the precise scene of an accident, e.g., the site of an explosion in the depths of an underground mine. Such a construction is both contrary to legislative purpose and common sense and is accordingly

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rejected. It is only required that the inspector issue the 103(k) order when present at the mine where the accident occurred. See also 1 Coal Law and Regulation 10.08, Vish, McGinley and Biddle.

Under all of the circumstances, the issuance of Order No. 3679001 by Inspector Wilson in the early morning hours of March 28, 1992, under Section 103(k) was reasonable and in compliance with that section of the Act.

ORDER

Order No. 3679001 is hereby AFFIRMED and the contest of said order DISMISSED.

Gary Melick  
Administrative Law Judge  
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