CCASE:
MSHA V. COWIN
DDATE:
19790411
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
April 11, 1979

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. COWIN AND COMPANY, INC.,

Docket No. BARB 74-259
IBMA 75-57

DECISION

This case is before the Commission on remand from the U.S. Court of Appeals for the District of Columbia Circuit. United Mine Workers of America v. Kleppe, No. 76-1980 (D.C. Cir., May 26, 1978). 1/ The issue before the Commission is whether Cowin and Company, Inc. (Cowin) properly was issued a withdrawal order pursuant to section 104(a) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. $ 801 et seq. (1976) (amended 1977) [the "1969 Act"]. 2/ For the reasons that follow, we affirm the decision of the administrative law judge upholding the withdrawal order and dismissing Cowin's application for review.

Cowin, a construction contractor, contracted with U.S. Pipe and Foundry Company to construct new shafts at a coal mine owned by U.S. Pipe. On November 3, 1973, when Cowin was engaged in the concrete lining of one of the shafts, its worksite was inspected and a section 104(a) order was issued. The order stated that violations of the standards at 30 CFR $$ 77.1903(c), 77.1905(b), 77.1906(c), 77.1907(a) and (b), 77.1908(b), and 77.1908-1 existed, and described the violative conditions as follows:

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1/ The court remanded this case to the Secretary of Interior. It is before the Commission for disposition pursuant to 30 U.S.C. $ 961 (1978).

2/ Section 104(a) of the 1969 Act provides:

If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the area throughout which such danger exists, and thereupon shall issue forthwith an order requiring the operator of the mine or his agent to cause immediately all persons, except those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering,

such area until an authorized representative of the Secretary determines that such imminent danger no longer exists.

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The Ingersoll-Rand utility air hoist was being used to transport men and was not equipped with an accurate depth indicator. A qualified hoistman was not operating the hoist and a second person qualified to stop the hoist was not in attendance. No record was maintained to indicate that the hoist had been inspected prior to hoisting of men. The hoist rope was not equipped with an adequate number of rope clamps and the bucket was not provided with two bridle chains, a wooden pole was being used for a bucket guide and a crescent wrench was used to operate the air valves.

Cowin filed an application for review of the withdrawal order and a hearing was held. On April 3, 1975, the administrative law judge issued his decision affirming the withdrawal order, finding that an imminent danger existed at the time of the issuance of the order. On appeal, the Interior Department's Board of Mine Operations Appeals reversed the judge's decision and vacated the withdrawal order. Cowin and Co., Inc., 6 IBMA 351 (1976). The Board based its decision solely on its holding in Republic Steel Corp., 5 IBMA 306 (1975), rev'd, Republic Steel Corp. v. Interior Board of Mine Operations Appeals, 581 F.2d 868 (D.C. Cir. 1978), in which the Board held that, in accordance with Secretarial Order No. 2977, "the owner or lessee of a coal mine is the sole party to be held absolutely liable for violations committed by a coal mine construction contractor regardless of the circumstances." 5 IBMA at 310 (emphasis added). 3/ The United Mine Workers of America petitioned the Court of Appeals for the District of Columbia Circuit to review the Board's decision. On May 26, 1978, the court of appeals granted the UMWA's motion to summarily vacate the Board's decision and remanded for further proceedings not inconsistent with the court's decisions in Association of Bituminous Contractors, Inc. v. Andrus, 581 F.2d 853 (D.C. Cir. 1978), and Republic Steel Corp. v. IBMOA, supra.

We conclude that Cowin was an "operator" 4/ of a "coal mine" 5/ under the 1969 Act for the reasons stated in Association of Bituminous

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3/ For a discussion of the background and history of Secretarial Order 2977, see our decision in Republic Steel Corp., Nos. MORG 76-21 and MORG 76X90-P, issued this date.

4/ Section 3(d) of the 1969 Act provides:

"[O]perator" means any owner, lessee, or other person who operates, controls, or supervises a coal mine.

5/ Section 3(h) of the 1969 Act provides:

"[C]oal mine" means an area of land and all structures,

facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or methods, and the work of preparing the coal so extracted, and includes custom coal preparation facilities.

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Contractors v. Andrus. supra, 581 F.2d at 861-862, and Bituminous Coal Operators' Association, Inc. v. Secretary of Interior, 547 F.2d 240, 244-246 (4th Cir. 1977). We further conclude that the withdrawal order at issue in this case was properly issued to Cowin. Cowin does not argue that its failure to comply with the cited standards did not constitute an imminent danger. Rather, Cowin argues that its failure to comply with the standards should be excused because an "emergency" condition existed. Even if it is assumed that an "emergency" warrants the vacation of an otherwise properly issued imminent danger withdrawal order, there is no support in the record for the assertion in Cowin's brief on appeal that an emergency existed. In fact, the only evidence relevant to this issue is testimony by the inspector that he was not aware of the existence of any emergency. 6/ Accordingly, the administrative law judge's decision is AFFIRMED. 7/

Jerome R. Waldie,
Chairman

Frank F. Jestrab,
Commissioner

A.E. Lawson,
Commissioner

Marian Pearlman
Nease, Commissioner

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6/ Cowin also argues in its brief on appeal that the Part 1977 standards cited in the withdrawal order are inapplicable. Cowin did not raise this argument before the judge. We do not address this argument raised for the first time on appeal. Clinchfield Coal Co., 6 IBMA 319 (1976). Cf. section 113(d)(2)(A)(iii) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1978).

7/ Cowin has not raised any question on appeal concerning the assignment of the burden of proof in this proceeding. Therefore, we do not reach the judge's discussion of this issue. But see Old Ben Coal Corp. v. IBMOA, 523 F.2d 25, 39-40 (7th Cir. 1975) (on petition for rehearing).

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Backley, Commissioner, concurring in result:

While concurring with the result reached in this case, I would hold Cowin liable as the proper party to be charged on somewhat different grounds.

This case was remanded for further proceedings not inconsistent with the court's decision in Association of Bituminous Contractors, Inc. v. Andrus, 581 F.2d 853 (D.C. Cir. 1978), hereafter referred to as ABC), and Republic Steel Corp. v. IBMOA, 581 F.2d 868 (D.C. Cir. 1978), (hereafter referred to as Republic). I fully agree with the conclusion that Cowin was an "operator" of a coal mine under the Federal Coal Mine Health and Safety Act of 1969. 1/ That conclusion is clearly consistent with the court's decision in ABC which construed the term "operator" to include independent construction companies. 2/ It is less clear to me how my colleagues arrive at the conclusion that Cowin, rather than the owner of the coal mine, is the proper party to whom the order of withdrawal should have been issued, particularly in light of the majority opinion in Republic Steel Corp., Nos. MORG 76-21 and MORG 76X90-P, issued this date.

The court's remand instructions in this case were that our decision was to be guided not only by the court's decision in ABC but also Republic. As noted in my dissenting opinion in Republic Steel Corp., I read the court's decision in Republic for the proposition that this Commission was asked by the court to make a policy determination as to which of the options available in allocating liability would most effectively assure the safety and health of the miner. I can find no discussion of this point in my colleagues' opinion in this case.

It is noted that, following remand, the parties were requested to state their positions regarding the action that should be taken by this Commission. The Secretary took the following position: In a situation involving a violation or hazard created by an independent contractor the Secretary "has the option to cite either the independent contractor or the coal mine operator [owner], and having made its election in this case, the decision of the Administrative Law Judge should stand." 3/

When the decisions issued today in Republic and Cowin are read together, one conclusion is inescapable: the majority has deferred in both cases to the discretion of the Secretary regarding the election of

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1/ 30 U.S.C. $801 et seq., (1976) (hereafter "the Act" or the 1969 Act.")

2/ Although the 1969 Act did not explicitly include independent contractors as "operators," the Federal Mine Safety and Health Amendments Act of 1977 [Pub. L. 95-164] modified the definition of

"operator" to include "any independent contractor performing services or construction at such mine." 30 U.S.C. $802(d) (1978).
3/ Conference before the Chief Administrative Law Judge Broderick, August 22, 1978, (TR. 8).
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which party to proceed against, i.e.. the owner or the independent contractor.
For me, the question of which party is the responsible operator is a factual determination to be made on a case-by-case basis. As noted in my dissent in Republic, supra, I am convinced that the responsibility for the health and safety of the miners should be placed on the party most able to prevent violations or hazards and to correct them quickly should they occur. This test is especially valuable in circumstances, such as present in this case, where the inspector at the mine site determines there is an imminent danger to the miners. I am in complete agreement with the following statement of the Board of Mine Operations Appeals when this case was before them:
The citing of an operator who may be far removed from the danger site may result in procedural and administrative delay never contemplated by the authors of the Act and permit a sufficient time lag for the feared disaster to become a reality.
6 IBMA 351 at 365
In the facts of this case, Cowin was cited for the imminent danger complained of even though it had been hired by U. S. Pipe and Foundry Company to construct three shafts at a coal mine owned by U. S. Pipe. The situation is similar to that in Republic in many aspects. In both cases, an independent construction contractor, employed by the owner of a mine, was working on mine property. In both cases control and supervision of the work activity in that portion of the mine where the violation or hazard occurred rested with the independent contractor. The contractor in both cases was also in the best position to remedy the situation.
I find little difference in the two cases as far as the proper disposition of liability is concerned. Thus, I would conclude that Cowin is the proper operator to be charged in the subject order of withdrawal.
Accordingly, I would affirm the Administrative Law Judge's decision for the reasons stated.