CCASE:
MSHA V. KAISER STEEL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
May 17, 1979

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Docket No. DENV 77-13-P

v.

KAISER STEEL CORPORATION

DECISION

On October 10, 1978, Administrative Law Judge Koutras issued his decision assessing a $1,500 penalty against Kaiser Steel Corporation for a violation of the Federal Coal Mine Health and Safety Act of 1969. 1/ On November 17, 1978, the Commission granted Kaiser's petition for discretionary review of the administrative law judge's decision. For the reasons that follow, we affirm the judge's decision.

Kaiser Steel Corporation owns and operates the Sunnyside No. 1 Mine. Kaiser planned to construct an additional air shaft and decided to have a hole drilled at the mine site to determine the depth and quality of the bed rock. Boyles Brothers Drilling Company, an independent contractor, contracted with Kaiser to perform the exploratory drilling.

Boyles moved its drill rig onto the Kaiser mine property on August 1, 1975. On the morning of August 5, the drill rig was positioned on the surface over the Sunnyside No. 1 Mine and a hole approximately 46 feet deep was drilled. After the drilling ceased, employees of Boyles Brothers began to dismantle the drill. Mark Finch, a driller helper employed by Boyles, climbed about 30 feet up the drill rig mast as part of his duties in dismantling the drill. Finch was not wearing a safety belt. As Finch prepared to descend the drill rig mast, he fell to the metal deck below and was fatally

injured.

Shortly after the accident occurred, the Mining Enforcement Safety Administration (MESA) was notified and a section 103(f) order was issued requiring the withdrawal of persons from the area so that an investigation could be conducted. 2/ A safety belt was found on the deck of the rig

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1/ 30 U.S.C. $ 801 et seq. (1976) (amended 1977) ("the 1969 Act" or "the Act"). This case presents no issue under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $801 et seq. (1978).

2/ Section 103(f) of the 1969 Act provides:

> In the event of any accident occurring in a coal 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 mine, and the operator of such mine shall obtain the

in an empty 5-gallon grease bucket; the belt was greasy from being stored in the bucket. At the time of the accident, a safety belt could not have been used effectively because the drill rig lacked a lifeline to which the belt could have been attached. The $ 103(f) withdrawal order was modified on August 6, 1975, to allow the installation of a lifeline on the rig. On August 6, 1975, a notice of violation of 30 CFR $ 77.1710(g) was issued to Kaiser. 3/

On December 2, 1976, MESA filed a petition for assessment of civil penalty and a hearing was held in July, 1978. 4/ In his decision issued on October 10, 1978, the administrative law judge found that a violation of the cited standard occurred and that Kaiser was liable for the violation.

On review, Kaiser advances several arguments why the judge erred in assessing a civil penalty against Kaiser for a violation created by its contractor. First, Kaiser acknowledges that under the 1969 Act a mine owner can be held responsible for violations of the Act created by its contractors. It argues, however, that the purposes of the Act are best effectuated by holding the contractor responsible for violations that it creates. Therefore, Kaiser submits that the Commission should not hold it responsible for the violation in the present case. We reject this argument for the reasons stated in our decision in Republic Steel Corp., Nos. MORG 76-21 and 76X95-P (April 11, 1979). As explained in Republic Steel. Kaiser can be held responsible for any violation of the 1969 Act created by its independent contractors at a mine that Kaiser owned. Furthermore, because the district court's order in Association of Bituminous Contractors, Inc. ("ABC") v. Morton. No. 1058-74 (D.D.C., May 23, 1975), rev'd sub nom. ABC v. Andrus. 581 F.2d 853 (D.C. Cir. 1978), was outstanding at the time that the involved notice was issued to Kaiser, we cannot say that the Secretary acted improperly in proceeding against Kaiser for the violation at issue. Republic Steel Corp., supra.

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footnote 2/ cont'd.

approval of such representative in consultation with appropriate State representatives, when feasible, of any plan to recover any person in the mine or to recover the mine or to return affected areas of the mine to normal.

3/ This standard provides:

$77.1710 Protective clothing; requirements.

Each employee working in a surface work area of an underground coal mine shall be required to wear protective clothing and devices as indicated below * * * (g) Safety belts

and lines where there is danger of falling.

4/ The case was stayed pending the decisions in Bituminous Coal Operator's Association v. Secretary of Interior, 547 F.2d 240 (4th Cir. 1977), and Association of Bituminous Contractors, Inc. v. Andrus, 581 F.2d 853 (D.C. Cir. 1978).

Kaiser's second argument is that it cannot be held responsible for its contractor's violation on the basis of Secretarial Order No. 2977. 5/ Kaiser argues that the Secretarial Order signaled a change in MESA's enforcement policy of which it had no notice at the time of the violation at issue. Therefore, in Kaiser's view the Order cannot be applied retroactively to hold it responsible for the violation. However, Kaiser is not being held responsible for its contractor's violation on the basis of Secretarial Order 2977. Rather, Kaiser's responsibility is bottomed on the Commission's interpretation of the duties and obligations that the 1969 Act imposed on an owner for a contractor's violations. Republic Steel Corp., supra.

Kaiser's third argument is that it did not violate 30 CFR $77.1710 (g) as alleged in the notice of violation. Kaiser argues that, because it required its own employees to use appropriate safety equipment and diligently enforced this requirement, it fulfilled its duty under the standard. Kaiser cites the decision of the Board of Mine Operations Appeals in North American Coal Corp., 3 IBMA 93 (1973), as support for its assertion. Kaiser misunderstands the basis upon which it is being held responsible for the violation of 30 CFR $ 77.1710(g). As discussed, under the 1969 Act an owner of a mine can be held responsible for any violation of the Act committed by its contractors. To avoid responsibility for a contractor's violation, as when charged with a violation that the owner directly commits, an owner must establish that contrary to the Secretary's proof the violation did not occur. In the present case, under the rationale of the Board's decision in North American Coal Corp., supra, Kaiser was required to establish that the deceased employee s failure to wear a safety belt tied-off to a lifeline was contrary to an effectively enforced requirement. Kaiser does not dispute that its safety equipment requirement did not extend to its contractor's employees. Furthermore, Kaiser did not establish that the employee's failure to wear appropriate safety equipment was contrary to an effectively enforced requirement imposed by its contractor. To the contrary, the evidence in this case leads to the inference that the contractor had no such effective requirement. Accordingly, a violation of the standard was established for which Kaiser, as owner of the mine, can be held responsible. 6/

5/ For a discussion of the background and history of Secretarial Order 2977, see our decision in Republic Steel Corp., supra.

6/ Because Kaiser has not established the proof required under North American, we need not reach the question of whether we agree with the rationale of that decision.

Kaiser's final argument is that the $1,500 penalty assessed by the judge is excessive. The judge's decision reflects that the penalty was assessed after careful consideration of the statutory penalty criteria and the facts of this case. We have reviewed the record and conclude that the penalty assessed is appropriate.

The judge's decision is affirmed.

A. E. Lawson, Commissioner

Backley, Commissioner, dissenting:

In view of the fact that the factual situ presented in this case is not unlike that presented in Republic Steel Corp., Nos. MORG 76-21 and MORG 76X95-P (April 11, 1979), I would reverse the decision of the Administrative Law Judge on the rationale set forth in my dissenting opinion in that case.