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MSHA V. U.S. STEEL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
February 25, 1982
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)
Docket No. BARB 76-95
v. IBMA 77-1

U.S. STEEL CORPORATION

DECISION

This case arises under the Federal Coal Mine Health and Safety Act of 1969. 1/ United States Steel Corporation (U.S. Steel) challenges an administrative law judge's decision holding it responsible for a violative condition created by an independent contractor working for U.S. Steel. For the reasons that follow, we affirm the judge's decision.

U.S. Steel contracted with American Drilling and Boring Company to perform drilling services at U.S. Steel's Lynch No. 37 Mine. American extracted cores from the earth to determine the strata and coal seams. On September 17, 1975, an MSHA inspector conducted a special inspection of the drilling operation under section 103(g)

1/ 30 U.S.C. $ 801 et seq. (1976)(amended 1977). On March 8, 1978, this case was pending on appeal before the Department of Interior's Board of Mine Operations Appeals. Accordingly, it is before the Commission for disposition. 30 U.S.C. $ 961 (Supp. III 1979). The Mine Safety and Health Administration (MSHA) has been substituted for its predecessor agency, the Mining Enforcement and Safety Administration (MESA).

~164

of the Act. The inspector issued a section 104(a) imminent danger withdrawal order to U.S. Steel. 2/ The order stated in part:

> The No. 1 Acker Core drill ... was not maintained in safe operating condition in that the clutch assembly was broken, and there was no possible way for the drill operator to stop the drill in case of an emergency (section 77.404).

U.S. Steel filed an application for review of the order. The administrative law judge upheld the order and dismissed the

application for review. U.S. Steel raises three issues on review: (1) whether it was properly cited for a condition created by its independent contractor; (2) whether the judge erred in finding an imminent danger existed at the time the order was issued, and (3) whether the judge erred in ruling that the order was legally issued.

The liability argument raised by U.S. Steel is identical to the argument rejected by the Commission in Republic Steel Corporation, 1 FMSHRC 5 (1979), and Kaiser Steel Corporation, 1 FMSHRC 343 (1979). Accordingly, based on our decisions in Republic and Kaiser, we affirm the judge's holding that U.S. Steel was properly cited for the condition created by its independent contractor. See also Cyprus Industrial Minerals Co. v. FMSHRC, 664 F.2d 1116 (9th Cir. 1981)(quoting Republic decision with approval), and Harman Mining Corp. v. FMSHRC, No. 81-1189, 4th Cir. (December 24, 1981).

We also reject U.S. Steel's argument that an imminent danger did not exist at the time the order was issued. The judge found that "principles of common sense and reason support the inspector's determination that the operator of the machine could be seriously injured in the event that he could not disengage the clutch and stop the machine." Having carefully reviewed the record, we find that the evidence amply supports the judge's finding that an imminent danger existed at the time the order was issued. See Pittsburgh & Midway Coal Mining Co., 2 FMSHRC 787 (1980). Thus, the judge's finding is affirmed.

2/ Section 104(a) provided:

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.

~165

U.S. Steel's final argument is that the order was void because neither American nor U.S. Steel was served with a copy of the Union's complaint as provided for in section 103(g) of the Act. 3/ The only evidence on this issue is the inspector's testimony that he did not know whether U.S. Steel had been provided a copy of the complaint. This testimony falls short of establishing that U.S. Steel in fact was not served with the complaint. Also, U.S. Steel has not demonstrated

how it was prejudiced by the alleged failure of service. Accordingly, we affirm the judge's finding that the order was validly issued.
For the above reasons, the decision of the judge is affirmed.
Frank F. Jestrab,
Commissioner
A. E. Lawson,
Commissioner

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3/ Section 103(g) provided in part:
Whenever a representative of the miners has reasonable grounds to believe that a violation of a mandatory health or safety standard exists, or an imminent danger exists, such representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners, and a copy shall be provided the operator or his agent no later than at the time of inspection, ... Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provisions of this title.
~166
Collyer, Chairman concurring:
Although my personal views on the issue of an owner-operator's liability for contractor violations under the 1969 Coal Act may be more in accord with the views expressed by Commissioner Backley in his dissent in Republic Steel, I concur with the result reached by the majority here. The 1969 Coal Act, under which the violation at issue arose, was amended during the pendency of this appeal. In previous cases construing the Coal Act, a majority of the Commission resolved the question presented adversely to U.S. Steel's position. Republic, supra; Kaiser, supra. I believe that no useful purpose would be served by re-examining this issue in the context of the 1969 Act. Accordingly, I vote to affirm.
Backley, Commissioner dissenting:
Again, for the reasons expressed in my dissenting opinion in Republic Steel, 1 FMSHRC at 12-19, I must disagree with my colleagues. I believe it clear that U.S. Steel was cited improperly for the violations committed by its independent contractor.
~167
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