CCASE:
EASTERN ASSOC. COAL V. MSHA
DDATE:
19820503
TTEXT:
FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
May 3, 1982
EASTERN ASSOCIATED COAL
CORPORATION

v. Docket No. PlTT 76X203

SECRETARY OF LABOR, IBMA 77-28
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

DECISION
This case arose under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. $ 801 et seq. (1976)(amended 1977)("the Coal Act"). 1/ Apart from the merits of this case, a procedural issue must first be addressed. The Commission requested supplemental memoranda and held oral argument on the question of whether under the Coal Act an operator could obtain review of a notice of violation independent of a civil penalty proceeding or a proceeding to review the validity of a withdrawal order. Attention was focused on this issue due to the decision of the United States Court of Appeals for the District of Columbia Circuit in UMWA v. Andrus (Carbon Fuel Co.), 581 F.2d 888 (1978), cert. denied sub nom. Carbon Fuel Co. v. Andrus, 439 U.S. 928 (1978). In Carbon Fuel the court, in essence, held that under the Coal Act notices of violation not involving an imminent danger could not be reviewed on the merits prior to the issuance of a withdrawal order or institution of civil penalty proceedings.
In Howard Mullins v. Andrus, 664 F.2d 297 (D.C. Cir. 1980), the D.C. Circuit again was confronted with a Coal Act case involving review of a notice of violation. Mullins was pending when the decision in Carbon Fuel was issued and the court refused to retroactively apply its Carbon Fuel holding. Balancing the factors relevant to retroactive application of a newly announced principle, the court concluded that retroactive application of its Carbon Fuel holding was not warranted. 664 F.2d at 302-305. Therefore, in Mullins the court proceeded to review the merits of the notice of violation therein at issue.
For reasons similar to those of the D.C. Circuit in refusing to retroactively apply its Carbon Fuel holding, we believe that it is unnecessary at.this late date for us to resolve whether, in our view,

Carbon Fuel or precedent established by other courts and the Board of Mine Operations Appeals correctly resolved the issue of reviewability 1/ 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).

~836

of the merits of notices under the 1969 Coal Act. 2/ The Coal Act was substantially amended in 1977 and this case and three others 3/ are the only remaining Coal Act cases posing this issue. Because of the age of these cases, and because we can perceive no realistic adverse impact that reviewing the merits of the three remaining cases could have on miner safety and health, we will proceed to review the merits at this time.

This case involves the interpretation of 30 C.F.R. $ 77.215(j). The standard provides in pertinent part:

All fires in refuse piles shall be extinguished, and the method used shall be in accordance with a plan approved by the District Manager.

On June 22, 1976 an inspector of the Mining Enforcement and Safety Administration ("MESA") inspected a burning refuse pile located on the surface of an underground bituminous coal mine owned and operated by Eastern Associated Coal Corporation ("Eastern"). The pile is composed of refuse deposited by the previous owner of the mine, Delmont Fuel Company. At the time of the inspection in this case, the pile was not being used as a depository for mine refuse and had not been so used since 1953. The refuse pile is located 2 miles from the Eastern mine's main portal and 800 to 1,000 feet from Eastern's preparation plant. The refuse pile is 1,800 feet long and 400 feet wide. To the west of the refuse pile is a railroad track running to the mine's preparation plant. To the east are two roads - one on mine property, the other on township property.

The inspector was advised before he left his office that a plan to extinguish the fire had not been submitted to the MESA district manager for approval. When the inspector arrived at the mine, he saw smoke rising from the pile at several points and smelled a strong sulphurous odor. Trash was observed at the base of the pile. Motorcycle tire tracks were observed on the pile. 4/ Red dog had been removed from the pile. 5/ After viewing the pile the inspector issued a notice alleging a violation of $ 77.215(j). The notice stated:

2/ Lucas Coal Co. v. IBMOA, 522 F.2d 581, 587 (3d Cir. 1975); Lucas v. Morton, 358 F. Supp. 900, 903-904 (W.D. Pa. 1973 (3 - judge court);

Reliable Coal Corp., 1 IBMA 50 (1971); Freeman Coal Mining Co., 1 IBMA (1970). But see United States v. Fowler, 646 F.2d 859 (4th Cir. 1981) (agreeing with rationale of Carbon Fuel).

3/ Inland Steel Coal Co., VINC 77-164, IBMA 77-66 (unabated notice); Florence Mining Co. et al., PITT 57-15, etc, IBMA 77-66 (unabated notice); Alabama By-Products Corp., BARB 76-153, IBMA 76-114 (abated notice).

4/ It cannot be determined from the record who was responsible for the trash or the tracks. Eastern's miners, however, are instructed never to go onto the pile and no evidence was introduced that any ever did. Moreover Eastern conducts no work on or at the pile.

5/ Red dog. Material of a reddish color resulting from the combustion of shale and other mine waste in dumps on the surface. U.S. Department of the Interior, Dictionary of Mining, Mineral and Related Terms 904 (1968). Red dog is commonly used for road repair. Although Eastern had in the past allowed the township to remove red dog from the pile, this permission had been revoked one-half year before the inspection.

~837

A plan has not been submitted to the District Manager on the method that will be used to extinguish the existing fire in the inactive refuse pile....

Eastern claimed that the notice was invalidly issued because the cited standard does not apply to the subject refuse pile. The administrative law judge agreed. The judge held that, when a burning refuse pile is part of an underground mine, in order to prove a violation of the standard the Secretary must show: the pile is on mine property; the pile is located in a surface work area of the underground mine 6/; and the pile presents a real or potential hazard to a miner in the normal course of his employment. The judge held that the Secretary had proved the first element, but not the latter two.

The judge's conclusion that the regulation only applied to refuse piles located in "surface work areas where miners would reasonably be expected to work or travel in the normal course of their employment" was based upon his interpretation of section 101(i) of the Coal Act. He found that section 101(i) "authorizes the Secretary to promulgate mandatory safety standards for surface coal mines and for surface work areas of underground coal mines." 7/ (Emphasis added by judge). He concluded, "the Act by its very terms limits the Secretary's authority to regulate surface areas of underground mines and that limitation is specifically directed to a work area...." (Emphasis added by judge). 8/ The judge cited to the title of 30 C.F.R. Part 77 and to 30 C.F.R. $ 77.1 as evidence that the Secretary recognized such a limitation. Part 77 is entitled: "Mandatory safety standards, surface

coal mines and surface work areas of underground coal mines." (Emphasis added). 30 C.F.R. $ 77.1, the scope provision for Part 77, states:

_____

6/ The judge defined "surface work area" as:

Any surface area of a coal mine which could present a hazard to the health and safety of miners in places where they could reasonably be expected to work or travel in the normal course and scope of their employment.

7/ Section 101(i), 30 U.S.C. $ 811(i) (1976), stated:

Proposed mandatory health and safety standards for surface coal mines shall be published by the Secretary, in accordance with the provisions of this section, not later than twelve months after the date of enactment of this Act. Proposed mandatory health and safety standards for surface work areas of underground coal mines, in addition to those established for such areas under this Act, shall be published by the Secretary, in accordance with the provisions of this section, not later than twelve months after the date of enactment of this Act.

8/ The judge noted the following statements appearing in the preamble when the refuse pile regulations were adopted:

The final regulations will provide the operator with flexibility in constructing refuse piles and impounding structures which will present no hazard to coal miners in their work.

(footnote 8, cont'd)

~838

This part 77 sets forth mandatory safety standards for bituminous, anthracite, and lignite surface coal mines, including open pit and auger mines, and to the surface work areas of underground coal mines, pursuant to section 101(i) of the [Coal Act].

(Emphasis added).

We find that the judge erred in concluding that a burning refuse pile must be located in a surface work area of an underground coal mine to be subject to the standard and that the Secretary must prove a burning refuse pile presents a real or potential hazard to a miner in the normal cause of his employment.

Section 101(a) of the Coal Act, 30 U.S.C. $ 811(a)(1976), granted the Secretary the authority to promulgate mandatory standards. That section stated:

The Secretary shall, in accordance with the procedures set forth in this section, develop, promulgate, and revise ... improved mandatory safety standards for the

protection of life and the prevention of injuries in
a coal mine....
(Emphasis added). Section 3(h) of the Coal Act, 30 U.S.C.
$ 802(h)(1976), defined "coal mine" as:
[A]n 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....
This definition is broad enough to include refuse piles, and it does not indicate that the term was meant to be limited by whether work or travel transpired at or near the enumerated areas or structures. Section 77.215(j) was promulgated in the Federal Register "under the authority of section 101(a) of the 1969 Act." 40 Fed. Reg. 11775 (1975). We conclude that section 101(a)'s mandate to promulgate safety standards for the protection of life and the prevention of injuries in a "coal mine," as that term is defined in section 3(h), brings refuse piles in surface areas of underground mines under the Secretary's jurisdiction.
footnote 8 cont'd.)
... A further addition is the requirement in 77.215(j) and
77.216(e) that the fire extinguishing operations on refuse piles
and impounding structures be conducted in accordance with an
approved plan. This new requirement is justified by the
hazardous nature of the extinguishing operation and the necessity
to ensure that miners employed in extinguishing operations are
fully acquainted with the procedures to be used. (Emphasis added
by judge). 40 Fed. Reg. 775-76 (1975).
~839
In our view, section 101(i), in essence, was a procedural provision, not jurisdictional. It required the Secretary to publish the proposed mandatory health and safety standards for surface coal mines and "for surface work areas of underground coal mines" "not later than twelve months after the date of enactment of [the Coal Act]". The purpose of this section was to ensure that the Secretary acted promptly in proposing mandatory standards for surface mines and surface work areas of underground mines. Quick action by the Secretary was needed because the Coal Act itself contained no statutory standards pertaining to surface coal mines and very few statutory standards specifically relating to surface areas of underground mines. An analysis of the bills from which section 101(i) ultimately emerged indicates that although the term "surface work areas" appeared in Senate bill S. 2917, in section 219(c), the purpose of that section was to "require that proposed mandatory safety standards be developed

and published ... as soon as possible, but not later than twelve months after enactment." U.S. Senate Committee on Labor and Public Welfare, Legislative History of the Federal Coal Mine Health and Safety Act of 1969, 94th Cong., 1st sess., at 213. The House bill, H.R. 13950, had a similar provision for the rapid publication of proposed mandatory standards, but its provisions were restricted to surface coal mines. Section 101(h) of the House bill stated:

> Proposed mandatory safety standards for surface coal mines shall be developed and published by the Secretary not later than twelve months after the enactment of this Act.

At conference the Senate provision was essentially adopted because it included a requirement that standards be published for surface work areas of underground mines as well as for surface coal mines. Legis. Hist. at 1509. Although neither the Senate Committee report nor the Conference Report explains why the term "surface work area" was used rather than "surface area," we believe it to have been a case of imprecise draftsmanship, rather than an attempt to restrict regulatory jurisdiction to "surface work areas". As we have noted, the broad grant of authority in the Act afforded the Secretary jurisdiction to regulate "an area of land and all ... property, real or personal ... upon, under, or above the surface ... used in ... to be used in, or resulting from, the work of extracting in such area bituminous coal". Restricting the Secretary's authority to only those portions of the surface areas where work or travel occurred, or could be expected to occur, would be inconsistent with the otherwise broad applicability of the Act.

Moreover, there are logical limits to literalism, one of which is when it leads to an incongruous result plainly at variance with the policy of a statute when viewed as a whole. United States v. American Trucking Associates, 310 U.S. 534, 543-544, (1940). The judge's finding that section 101(i) limits the Secretary's authority in regulating surface portions of underground mines to work areas leads to such a result. Under it, although a burning refuse pile in a non-work area of an underground mine would not be subject to $ 77.215(j), an identical refuse pile in a non-work area of a surface mine would be, there being no "work area" language pertaining to surface mine standards. Thus, we conclude that the Coal Act, specifically section 101(i), did not restrict the Secretary to regulating only surface work areas of underground mines.

~840

Eastern argues, however, that even if section 101(i) does not limit the Secretary, he voluntarily imposed such a restriction upon himself. Eastern notes, as did the judge, the title of Part 77, and the "scope" provision at $ 77.1, both quoted supra. The phrase

"surface work area", as used in both the title and the standard, clearly is taken from section 101(i). Indeed, 30 C.F.R. $ 77.1 concludes with the statement that the standards are set forth "pursuant to section 101(i)." In view of our conclusion that the words "surface work areas of underground coal mines" are not used in a jurisdictional sense in section 101(i), we conclude that they do not acquire that sense by their repetition in the standards adopted by the Secretary. 9/

We also disagree with the judge's holding that the Secretary must establish "that the pile presents a hazard, real or potential, which can reasonably be expected to expose a miner to danger in the normal and reasonable course of his employment." During the promulgation of the refuse piles standards the Secretary published in the Federal Register findings of fact based upon public hearings. 39 Fed. Reg. 38,661 (1974). His general finding with respect to refuse piles was that "[c]oal refuse piles ... can present a hazard to health and safety." His specific finding with respect to burning refuse piles was that "[b]urning refuse piles present a health and safety hazard, and that hazard will be decreased or eliminated when the burning pile is extinguished by any safe and effective reasons." Id. Thus, the standard's requirement that burning refuse piles be extinguished in accordance with an approved plan is premised upon the finding that such piles are hazardous. That finding having been made, the Secretary need not prove anew the hazardous nature of burning refuse piles in every enforcement proceeding. 10/ To prove a violation of $ 77.215(j), as with most standards, non-compliance with the standard's terms need only be shown, i.e , the refuse pile is burning and a plan has not been filed. Cf. Vecco Construction Co., 1977-78 CCH OSHD •22,247 (OSHRC).

9/ Because we reverse the judge's finding that in order to establish a violation of $ 77.215(j) the Secretary must establish that the refuse pile is located in a surface work area, we need not determine whether, as the Secretary argues, the judge adopted too restrictive a definition of the term "surface work area."

10/ Evidence as to the actual extent of the hazard presented by a particular burning refuse pile is, of course, relevant in determining the gravity of a violation for penalty purposes.

~841

Accordingly, the judge's decision is reversed and the case is remanded for further proceedings consistent with this decision.

A. E. Lawson,
Commissioner

11/ Chairman Collyer assumed office after this case had been considered at a Commission decisional meeting and took no part in

the decision. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary and is not required for the Commission to take official action. The other Commissioners reached agreement on the disposition of the case prior to Chairman Collyer's assumption of office, and participation by Chairman Collyer would therefore not affect the outcome. In the interest of efficient decision-making, Chairman Collyer elects not to participate in this case.
Former Commissioner Nease participated in considering this case and also voted to reverse the judge's decision, but resigned from the Commission before the decision was ready for signature.
~842
Distribution
Sally Rock, Esq.
Eastern Associated Coal Corporation
1728 Koppers Building
Pittsburgh, PA 15219
Michael McCord, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203
Mary Lu Jordan, Esq.
UMWA
900 15th St., N.W.
Washington, D.C. 20005
Charles W. Newcom, Esq.
Sherman & Howard
2900 First of Denver Plaza
633 Seventeenth St.
Denver, Colorado 80202
Administrative Law Judge George Koutras
FMSHRC
5203 Leesburg Pike, lOth Floor
Falls Church, Virginia 22041