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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
November 22, 1989

ROCHESTER & PITTSBURGH
COAL COMPANY

Docket No. PENN 88-152-R

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka, and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This proceeding was brought under section 107(e)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1982) (the "Mine Act") by Rochester and Pittsburgh Coal Company ("R&P") to review an imminent danger withdrawal order issued by an authorized representative of the Secretary of Labor ("Secretary") at R&P's Greenwich No. 2 Mine. 1/ Commission Administrative Law Judge Gary Melick found that an imminent danger existed and upheld the withdrawal order. For the reasons that follow, we affirm.

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1/ Section 107(e)(1) provides in pertinent part:

> Any operator notified of an order under this section or any representative of miners notified of the issuance, modification, or termination of such an order may apply to the Commission within 30 days of such notification for reinstatement, modification or vacation of such order. The Commission shall forthwith

> afford an opportunity for a hearing (in accordance with section 554 of title 5 but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, vacating, affirming, modifying, or terminating the Secretary's order.

30 U.S.C. 817(e)(1).

On February 25, 1988, Robert L. Coy, a plumber at R&P's Greenwich No. 2 Mine was assigned to repair a leaking, six-inch water pipe. With the assistance of other miners, he repaired the pipe with a new 0-ring and other parts. The pipe was parallel to and directly underneath the Main T Number 1 coal conveyor belt (the "belt"). The repair crew started the belt after the repairs were completed.

After the belt was started, Coy noticed that the pipe was sagging at one location. He walked underneath the moving belt to pick up a concrete block to place under the sagging pipe. At that location, the pipe was supported by a 52-inch high concrete block wall that was under and perpendicular to the belt. As Coy was placing the block on this wall under the pipe, Gerry I. Boring, an inspector of the Secretary's Mine Safety and Health Administration (MSHA), observed Coy under the moving belt in a stooped position. Inspector Boring asked Coy what he was doing and Coy replied that he was retrieving a block. The inspector immediately issued an imminent danger withdrawal order pursuant to section 107(a) of the Mine Act requiring that Coy be immediately removed from under the moving belt. 2/ Inspector Boring observed that the mine floor in that location was covered with wet, soupy accumulations of coal and other material that ranged between eight and fifteen inches in depth. After Coy came out from under the belt, Inspector Boring measured the height of the belt near where he observed Coy. The distance from the top of the accumulations to the edge of the belt was 64 inches.

Inspector Boring issued the imminent danger order because Coy was working under a moving belt that was a short distance above him and the inspector believed that a danger of contact was present. The inspector required that Coy immediately be removed from the danger and instructed

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2/ Section 107(a) provides in pertinent part:

> If, upon any inspection or investigation of a coal or other mine which is subject to this chapter, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 814(c) of this title, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist.

30 U.S.C. 817(a).

as to the hazards of working under a moving belt. 3/ The inspector also issued a citation under section 104(a) of the Mine Act, 30 U.S.C. 814(a), alleging a violation of 30 C.F.R. 75.1722(a), a mandatory safety standard requiring that exposed moving machine parts on mechanical equipment be guarded. 4/

The belt carried coal from various working sections of the mine to the main P belt, its dumping point, which was located outby Coy. The belt was supported by chains attached to the mine roof and was tilted at an angle in Coy's work area as it approached the main P belt. The inspector observed Coy under the moving belt approximately three to four feet inby the concrete block wall that supported the water pipe. Because the belt was at an angle in relation to the mine floor, the distance between the floor and the belt would increase if Coy approached the concrete block wall and would decrease if he walked inby away from the wall. Coy is 67 inches tall. Administrative Law Judge Melick determined that at the location Coy was observed, the belt was between 72 and 79 inches above the solid mine floor, considering the eight to fifteen inches of wet accumulations and the 64 inches between the accumulations and the bottom belt. 10 FMSHRC 1580. These findings were not contested by R&P and are supported by substantial evidence.

At the hearing, Inspector Boring testified that Coy's presence under the belt presented four hazards. First, he stated that the belt could break, strike Coy, knock him down and possibly drag him back through the bottom roller that was inby Coy. Second, the inspector was concerned that a defective belt splice lacer could hang down, catch Coy and drag him. (A splice lacer is a metal device that resembles a three-

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3/ In the withdrawal order, the inspector stated:

> Observed Robert Coy (UMWA) standing under the operating Main T No. 1 belt conveyor (near the belt head). The clearance between the bottom of the belt and the coal accumulation on the mine floor is 64 inches. Mr. Coy had been repairing a water line and was retrieving a block from underneath said belt when observed. Exposed machine parts which may be contacted by persons and which may cause injury to persons shall be guarded. 30 C.F.R. 75.1722(a).

Gov. Exh. 6. The inspector stated that the order was immediately terminated because:

> Mr. Coy removed himself from under the belt

immediately. Joe DeSalvo, safety inspector, instructed Mr. Coy about hazards involved with working under moving belts. Gov. Exh. 6.

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4/ The administrative law judge vacated the citation and the Secretary did not seek review before the Commission.

inch long staple that is riveted to the belt and is used to interlock sections of belt.) The third hazard of concern to the inspector was that Coy could sustain an eye injury from the fine coal that falls from the underside of the belt. Finally, Inspector Boring was concerned that Coy's arm or hand could come in contact with the belt if he slipped in the wet accumulations on the mine floor. The inspector testified that if he touched the bottom of the moving belt he could be knocked over and sustain a serious head, arm or hand injury.

Coy and another miner, Dennis Kopp, testified that they did not consider it hazardous to go under the moving belt at that location because they believed the clearance was sufficient. Coy stated that for the entire eight to ten seconds he was under the belt he was stooped over. Paul Enedy, a mining engineer employed by R&P, testified that the belt was unlikely to break because it was in good condition and that if it did break it would likely break at the top without a risk of injury to Coy. He also testified that it is uncommon for belts to break or become defective at a splice.

The administrative law judge upheld the inspector's finding of an imminent danger and affirmed the withdrawal order. He determined that although there was "no evidence in this case that the belt was worn or otherwise likely to break or that any of the splices were deficient, ... the other hazards were such that the cited condition 'could reasonably be expected to cause serious physical harm' if not discontinued." 10 FMSHRC 1581. Thus, it is apparent that the judge relied upon the inspector's testimony that Coy could have been seriously injured if he came in contact with the belt or if debris fell off the belt into his eyes.

R&P's challenge to the administrative law judge's decision is a narrow one. In its petition for discretionary review, R&P raises two issues. First it argues that the judge failed to recognize that the condition (Coy s presence under the moving belt) was an isolated event that would not have continued or recurred. It maintains that the judge improperly assumed that the condition would continue when he held that harm could result from the condition "if not discontinued." 1 FMSHRC 1581. R&P emphasizes that it is undisputed that it is the normal practice at the mine to deenergize a belt whenever work is to be performed under it. Thus, it contends that the judge failed to decide the case on the basis of the precise facts presented.

Second, R&P argues that the condition cited by the inspector could not reasonably be expected to cause death or serious physical harm. It contends that the evidence shows that the likelihood of a serious injury resulting from Coy's presence under the belt was too remote to constitute

an imminent danger.

The Secretary argues that if an inspector encounters a condition that he reasonably determines to present the potential of death or serious physical harm, he is required to issue a section 107(a) order of withdrawal. She maintains that if the inspector's conclusion that an imminent danger existed was reasonable at the time it was made, the order should be upheld. She argues that Inspector Boring's

determination was reasonable and substantial evidence supports the judge's affirmance of the order.

The Mine Act defines an imminent danger as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." Section 3(j) of the Mine Act; 30 U.S.C. 802(j). This definition was not changed from the definition contained in the Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1976)(amended 1977)(the "Coal Act").

In analyzing this definition, the U.S. Courts of Appeals have eschewed a narrow construction and have refused to limit the concept of imminent danger to hazards that pose an immediate danger. See e.g., Freeman Coal Mining Co. v. Interior Bd. of Mine Op. App., 504 F.2d 741 (7th Cir. 1974). Also, the Fourth Circuit has rejected the notion that a danger is imminent only if there is a reasonable likelihood that it will result in an injury before it can be abated. Eastern Associated Coal Corp. v. Interior Bd. of Mine Op. App., 491 F.2d 277, 278 (4th Cir. 1974). The court adopted the position of the Secretary that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." 491 F.2d at 278 (emphasis in original). The Seventh Circuit adopted this reasoning in Old Ben Coal Corp. v. Interior Bd. of Mine Op. App., 523 F.2d 25, 33 (7th Cir. 1975).

Applying this precedent to the first issue raised by R&P, the question is whether, given the continuation of normal mining operations, the condition could have seriously injured Coy at any time before the dangerous condition was eliminated. Contrary to R&P's contentions, it was proper for the judge to consider the hazards presented by the condition if normal mining operations were allowed to continue before Coy was removed from under the moving belt. The Secretary has consistently interpreted the definition of imminent danger to exclude consideration of abatement time and, as discussed above, this interpretation has been supported by the courts. Thus, the judge was correct to analyze the hazards without assuming that the condition would have been quickly discontinued.

Whether Coy's presence under the moving belt could reasonably be expected to cause physical harm is a question of fact. We must affirm a judge's finding of fact if it is supported by substantial evidence. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." Consolidation Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). In assessing whether a

finding is supported by substantial evidence, the record as a whole must be considered including evidence in the record that "fairly detracts" from the finding. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). Measured against this standard, we find substantial evidence in the record to support the judge s findings. R&P offered little evidence to rebut the two hazards relied upon by the judge to affirm the order. The judge determined that the miner might

(1) "contact the belt (presumably by extending an arm) and break a finger or be knocked against a wall" and (2) "sustain serious eye injuries from debris falling off the belt." 10 FMSHRC at 1581. On review, R&P simply argues that the chance of either of these two events occurring is remote. The judge determined otherwise and his findings are supported by the record.

In addition, R&P's focus on the relative likelihood of Coy being injured while under the moving belt ignores the admonition in the Senate Committee Report for the Mine Act that an imminent danger is not to be defined "in terms of a percentage of probability that an accident will happen." S. Rep. No. 181, 95th Cong., 1st Sess. 38 (1977), reprinted in Senate Subcommittee on Labor of the Committee on Human Resources, 95th Cong., 2nd Sess, Legislative History of the Federal Mine Safety and Health Act of 1977 at 626 (1978). Instead, the focus is on the "potential of the risk to cause serious physical harm at any time." Id. The Committee stated its intention to give inspectors "the necessary authority for the taking of action to remove miners from risk." Id.

R&P's argument also fails to recognize the role played by MSHA inspectors in eliminating imminently dangerous conditions. Since he must act immediately, an inspector must have considerable discretion in determining whether an imminent danger exists. The Seventh Circuit recognized the importance of the inspector's judgment:

> Clearly, the inspector is in a precarious position. He is entrusted with the safety of miners' lives, and he must ensure that the statute is enforced for the protection of these lives. His total concern is the safety of life and limb.... We must support the findings and the decisions of the inspector unless there is evidence that he has abused his discretion or authority. (emphasis added).

Old Ben, supra, 523 F.2d at 31.

Applying this rationale, the question is whether Inspector Boring abused his discretion when he determined that Coy could be seriously injured while working under the moving belt. The hazards of working under a moving belt are well known as evidenced by R&P's policy against such a practice. Inspector Boring observed a miner working under a moving belt, where the clearance was tight, picking up a concrete block and placing it on a wall to support a pipe located less than a foot below the moving belt. While he was primarily concerned with what might happen if the belt or a belt lacer broke, the inspector also believed that the miner could be

seriously injured if he contacted the belt. The evidence demonstrates that the floor was covered with wet, soupy accumulations, that Coy's hands were close to the belt when he placed the block under the pipe and that Coy could have slipped and inadvertently contacted the moving belt. The fact that the belt was not parallel to the floor and the accumulations made walking difficult, increased the chance that Coy could come in contact with the belt. Finally, the inspector testified that if Coy contacted the belt he could have fallen and seriously injured himself. Based on this evidence and

the findings of the administrative law judge, we cannot conclude that the inspector abused his discretion.

We thus conclude that the judge's finding of an imminent danger is supported by substantial evidence. Accordingly, we affirm the judge's decision.

Richard V. Backley, Commissioner
Joyce A. Doyle, Commissioner
James A. Lastowka, Commissioner
L. Clair Nelson, Commissioner

Distribution

Joseph A. Yuhas, Esq.
Pennsylvania Mines Corporation
P.0. Box 367
Ebensburg, PA 15931

Tina Gorman, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Administrative Law Judge Gary Melick
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041