

CCASE:  
CONSOLIDATION COAL V. SOL (MSHA) V. UMWA  
DDATE:  
19791025  
TTEXT:

~1689

Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)  
Office of Administrative Law Judges

CONSOLIDATION COAL COMPANY,  
APPLICANT

Application for Review

v.

Docket No. PENN 79-72-R

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

Order No. 0622333

June 8, 1979

Renton Mine

UNITED MINE WORKERS OF AMERICA,  
RESPONDENT

DECISION

Appearances: Michel Nardi, Esq., Consolidation Coal Company,  
Pittsburgh, Pennsylvania, for Applicant  
Barbara K. Kaufmann, Esq., Office of the  
Solicitor, U.S. Department of Labor, Philadelphia,  
Pennsylvania, for Respondent MSHA

Before: Judge Merlin

Statement of the Case

This is a proceeding filed under section 107(e) of the Federal Mine Safety and Health Act of 1977 by Consolidation Coal Company to review an order of withdrawal issued by an inspector of the Mine Safety and Health Administration (MSHA) under section 107(a) of the Act for imminent danger.

By amended notice of hearing, this case was set for hearing on October 10, 1979, in Pittsburgh, Pennsylvania. The notice of hearing required the filing of preliminary statements. The applicant and MSHA filed preliminary statements, and the case was heard as scheduled. The applicant and MSHA appeared and presented evidence.

Applicable Statute

Section 107(a) of the Act provides:

If, upon any inspection or investigation of a coal or other mine which is subject to this Act, 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an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions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. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

Bench Decision

At the conclusion of the taking of evidence, the parties waived the filing of written briefs, proposed findings of fact, and conclusions of law. Instead, they agreed to make oral argument and have a decision rendered from the bench. Upon consideration of all documentary evidence and testimony, and after listening to oral argument, I rendered the following decision from the bench (Tr. 123-126).

This case is an application for review of a withdrawal order for imminent danger. Imminent danger is defined in the Act 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.

The evidence shows there was loose and scaly roof in the track haulageway. According to the inspector, the roof had cracks and there were two or three places he saw where rocks had fallen out. The inspector said the fallen rock could have been there for a few hours or a few days. He testified that he believed an imminent danger existed because there was so much of it, i.e., such a large area was involved.

The extent of the area involved is, however, not a sole basis for a finding of imminent danger. What is crucial

~1691

is the time element, that is, that the condition cannot be abated before the reasonable expectation of death or serious physical harm. In other words, the nature of the peril posed is the relevant inquiry. Accordingly, based upon the inspector's own testimony, a finding of imminent danger must be vacated.

In addition, however, the testimony of the operator's witnesses further demonstrates that an imminent danger did not exist. The operator's safety escort expressed the view that the roof was not going to come down immediately and that places where the roof could be scaled could be taken care of before they fell. So, too, the mine superintendent stated that the roof did not look like it would fall out right away, and the mine foreman said that it is a rare occurrence for rock such as this to fall out spontaneously and that usually it falls because it is pried out. The mine foreman also testified that the two or three pieces of fallen rock the inspector saw came from rock intentionally pried out by men the foreman had working in the area. I accept the foregoing testimony of the operator's witnesses. In this connection I particularly note that the day the inspector issued the subject order was only the second time he had been in the mine, whereas the operator's witnesses possessed a far greater familiarity with the area and with the roof.

The Solicitor introduced evidence regarding a roof fall and accident in the area, which occurred three days before the subject order was issued. I do not find evidence of the prior fall persuasive regarding the existence of an imminent danger here, because in the prior instance a locomotive had knocked out roof supports, causing the fall, a situation not presented in this case. However, the evidence regarding the prior fall is interesting because the operator's witnesses testified without contradiction that many MSHA experts, including roof control experts, were present in the subject area to investigate the roof fall and accident, but did not cite the roof as deficient in any respect, although as the operator's mine superintendent pointed out, they would have done so had anything been out of order.

In addition, uncontradicted evidence from all the operator's witnesses indicating that after the withdrawal order was issued, the subject area was traveled many times by the inspector and the operator's personnel militates

~1692

against a finding of imminent danger. If the inspector really believed an imminent danger existed, I do not think he would have walked the area or allowed the operator's people to walk it so many times. In this connection also I note the undisputed testimony from the operator's witnesses that the inspector first stated he would issue a withdrawal order for unwarrantable failure. When told by the mine superintendent that this could not possibly be correct, because the area had just been worked on after the recent accident, he then changed the order to one for imminent danger.

I cannot overlook any of these circumstances, and all of them indicate to me that an imminent danger did not exist.

According to the evidence, the subject area was mined 20 or 30 years ago. Moisture conditions, particularly in the summer, cause flaking and scaling. Continual vigilance on the part of the operator is therefore, called for. I am mindful that roof falls are serious and that as the former Board of Mine Operations Appeals of the Department of Interior stated in Zeigler Coal Company 2 IBMA at 220, they constitute a principal cause of serious injury in the mines. Roof conditions are consequently not to be taken lightly. However, every roof condition is not an imminent danger. Here the overwhelming evidence demonstrates that an imminent danger did not exist.

The order is therefore, vacated.

ORDER

The bench decision is hereby AFFIRMED. Accordingly, it is ORDERED that Order No. 0622333 be VACATED and that the operator's application for review be GRANTED.

Paul Merlin  
Assistant Chief Administrative Law Judge