

CCASE:
MSHA V. CONSOLIDATION COAL

DDATE:
19790517

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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 Nos. VINC 77-16-P
VINC 77-18-P
VINC 77-24-P
VINC 77-26-P
IBMA 77-18

v.
CONSOLIDATION COAL COMPANY
DECISION

These cases were pending before the Interior Department's Board of Mine Operations Appeals on March 8, 1978, and are before the Commission for disposition pursuant to section 301 of the Federal Mine Safety and Health Amendments Act of 1977. 1/ On October 31, 1978, the Commission terminated a stay of these proceedings previously imposed by the Board and requested the parties to file briefs. In response to the Commission's order, counsel for Consolidation Coal Company notified the Commission that, because the relevant facts and issues presented in these cases are similar to those presented in Republic Steel Corp., No. MORG 76-21, these cases should be decided in a manner consistent with the Commission's decision in Republic Steel. Accordingly, Consolidation waived its right to file a brief.

We have determined that the decision in the present cases is controlled by our decision in Republic Steel Corp., Nos. MORG 76-21, et.al (April 11, 1979). As held in Republic Steel 2/ under the Federal Coal Mine Health and Safety Act of 1969, 3/ an owner of a coal mine can be held responsible for any violations of the Act committed by its contractors. Furthermore, in the present cases, as in Republic Steel, the involved notices of violation were issued to the coal mine owner at a time when the district court's order in Association of Bituminous Contractors, Inc. v. Morton, No. 1058-74 (D.D.C., May 23, 1975), was outstanding. 4/ In view of this fact, we can not say that the Secretary acted improperly in proceeding against Consolidation for violations of the Act created by its contractors. Republic Steel, supra, slip op. at 7.

1/ 30 U.S.C. §961 (1978).

2/ A copy of our decision in Republic Steel is being sent to Consolidation with this order.

3/ 30 U.S.C. §801 et seq. (1976) (amended 1977) (hereafter "the 1969 Act" or "the Act"). These cases present no issue under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (1978).

4/ The district court's order was reversed on appeal. *Association of Bituminous Contractors, Inc. v. Andrus*, 581 F.2d 853 (D.C. Cir. 1978).
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For these reasons, the decision of the administrative law judge is affirmed.

Backley, Commissioner, dissenting:

I dissent from the majority opinion and would decline to hold Consolidation liable for the violations of the Act created by its independent contractors in the factual context presented to us in these cases. In each case the parties have stipulated that:

- 1) The conditions or practices described in each of the notices of violation were caused by actions of employees of independent contractors employed by Consolidation;
- 2) There were no employees of Consolidation present at the work site at the time the notices of violation were issued; and
- 3) No employees of Consolidation were subject to any danger as a result of the violations.

The stipulated record makes it clear that the independent contractors were in the best position to prevent the violations.

Thus, for the reasons stated in my dissenting opinion in *Republic Steel Corp.*, Nos. MORG 76-21 and MORG 76X95-P (April 11, 1979), I conclude that the independent contractors, rather than Consolidation, should be held responsible for these violations. Accordingly, I would reverse the Judge's decision and vacate the notices of violation for failure to cite the responsible mine operator. In this regard, the majority again supports the Secretary's selection as to responsibility. Although originally noted in my concurring opinion in
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Cowin and Company, Inc. (No. BARB 74-259, IBMA 75-57, April 11, 1979), the opinions issued today in this case and in *Kaiser Steel Corporation*, No. DENV 77-13-P, make it increasingly clear that the majority is deferring to the prosecutorial discretion of the Secretary regarding the election of which party to proceed against, i.e., the owner of the mine or the independent contractor.