

CCASE:
MSHA V. CATHEDRAL BLUFFS SHALE OIL
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FMSHRC-WDC
NOV 5, 1986

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

v. Docket No. WEST 81-186-M

CATHEDRAL BLUFFS SHALE OIL
COMPANY

BEFORE: Backley, Doyle, Lastowka and Nelson, Commissioners

ORDER

BY THE COMMISSION:

This civil penalty case is before us on remand from the U.S. Court of Appeals for the District of Columbia Circuit. *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533 (D.C. Cir. 1986). At issue is the liability of a production-operator for a violation of a mandatory safety standard committed by its independent contractor.

Cathedral Bluffs Shale Oil Company is a partnership between Occidental Shale Oil Co. ("Occidental") and Tenneco Shale Oil Co. Occidental contracted with the Gilbert Corporation ("Gilbert") to perform certain construction work at a mine at which Occidental is the operating partner. During an inspection of the mine, an inspector from the Department of Labor's Mine Safety and Health Administration cited Occidental for a violation of a mandatory safety standard committed by Gilbert. Occidental contested the citation and the civil penalty proposed by the Secretary. (Gilbert also was issued a citation for the same violation, but chose to pay the penalty instead of contesting.) Following a hearing on the merits, Commission Administrative Law Judge John J. Morris held the Commission's decision in *Phillips Uranium Corp.*, 4 FMSHRC 549 (April

1982), to be "dispositive", and, "on the authority of Phillips", he vacated the citation. 4 FMSHRC 902 (May 1982)(ALJ).

On review, the Commission agreed with the judge's result. However, the Commission concluded that the judge had read Phillips too broadly and had misapplied it as directly controlling the disposition of the case. 6 FMSHRC 1871 (August 1984). The Commission noted that prior to

~1622

citing Occidental for the independent contractor's violation, the Secretary published enforcement guidelines articulating his policy for issuing citations and orders when violations of the Act and mandatory safety and health standards are committed by independent contractors. The Commission concluded that "[T]he appropriate inquiry is whether the record reflects proper application of the Secretary's ... independent contractor enforcement policy." 6 FMSHRC at 1873. Holding that the record did not support a conclusion that the Secretary acted within his enforcement guidelines when he cited Occidental, the Commission affirmed the dismissal of the citation. 6 FMSHRC at 1876-77.

The Secretary appealed, and the court concluded that the Commission improperly viewed the Secretary's enforcement guidelines as a "legislative (i.e., substantive) rule ... which restricts his enforcement discretion." Cathedral Bluffs Shale Oil Co., supra, 796 F.2d at 537. The court stated:

Because the Commission improperly regarded the Secretary's general statement of his enforcement policy as a binding regulation which the Secretary was required strictly to observe, its decision dismissing the citation of Occidental must be reversed and remanded for further action consistent with this opinion.

796 F.2d at 539.

Accordingly, the matter is remanded to the administrative law judge to determine the liability of Occidental for the violation of its independent contractor in light of the court's opinion. 1/

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

1/ Chairman Ford did not participate in the consideration or

disposition of this matter.

~1623

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