

CCASE:
SOL (MSHA) V. MORTON SALT
DDATE:
19800414
TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

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

Civil Penalty Proceeding

Docket No. CENT 80-59-M
A.O. No. 16-00512-05009

v.

Weeks Island Mine

MORTON SALT DIVISION,
MORTON-NORWICH PRODUCTS, INC.,
RESPONDENT-THIRD PARTY
PETITIONER

FRONTIER-KEMPER CONTRACTORS,
THIRD-PARTY
RESPONDENT

ORDER ON MOTION TO DISMISS THIRD-PARTY PETITION

Third-party respondent Frontier-Kemper Contractors (FKC) moves to dismiss the third-party petition under Rule 12(b) of the Federal Rules of Civil Procedure on the grounds (1) that the Commission lacks jurisdiction to assess a penalty against an independent contractor sued as a third-party respondent, (2) that the third-party petitioner has no right of contribution to a civil penalty assessed and/or allocated by the Commission and therefore has failed to state a claim on which relief can be granted, and (3) that the Department of Labor having exercised its prosecutorial discretion to grant independent contractors immunity from the law, enforcement by MSHA and the third-party petitioner through the Commission is prejudicial and discriminatory. Third-party petitioner Morton Salt opposes this motion as does counsel for the Secretary.

With regard to the question of the jurisdiction of the Commission over independent contractors, it should be noted that section 3(d) of the Act, 30 U.S.C. 802(b)(2), defines "operator" as including "any independent contractor performing services or construction at such mine." The Commission's jurisdiction over independent contractors was recognized in Old Ben Coal Co., VINC 79-119, 1 FMSHRC Decisions 1480 (October 29, 1979). This is based on an unequivocal expression of congressional intent:

. . . [T]he definition of mine "operator" is expanded to include "any independent contractor performing services or construction at such mine". It is the Committee's intent

to thereby include individuals or firms who are engaged in construction at such mine, or who may be, under contract or otherwise, engaged in the extraction process for the benefit of the owner or lessee of the property and to make clear that the employees of such individuals or firms are miners within the definition of the [1977 Act].

S. Rep. No. 95-181, 95th Cong., 1st Sess., at 14; Legislative History of the Federal Mine Safety and Health Act of 1977, at 602 (1978) [hereinafter cited as Leg. Hist.]

* * * * *

The Senate bill modified the definition of "operator" to include independent contractors performing services or construction at a mine. This was intended to permit enforcement of the Act against such independent contractors, and to permit the assessment of penalties, the issuance of withdrawal orders, and the imposition of civil and criminal sanctions against such contractors . . .

S. Conf. Rep. No. 95-461, at 37; Leg. Hist. at 1315.

I conclude, therefore, that the Commission and the Presiding Judge have both personal and subject matter jurisdiction over third-party respondent Frontier-Kemper Contractors.(FOOTNOTE 1)

With regard to whether the third-party petition states a claim upon which relief may be granted, the record shows: (1) FKC admits the violation was committed by its employees, (2) FKC has agreed to pay or indemnify Morton Salt for any penalty assessed by the Commission for the violation charged, and (3) the contract between FKC and Morton Salt gives the latter an enforceable right to indemnification or contribution against FKC for any penalty found warranted by the Commission. It is apparent, therefore, that FKC "is or may be liable" to Morton Salt within the meaning of Rule 14 of the Federal Rules of Civil Procedure. Additionally, Bituminous Coal Operator's Association v. Secretary, 547 F.2d 240, 247

~2185

(4th Cir. 1977) holds that the mining company and its independent contractor are "jointly and severally liable" to the government for violations committed by the contractor, and that "the proper allocation of liability in light of the myriad factual situations that may arise" is best determined by the Commission after litigation. Here, the third-party petition seeks to have the contractor joined since otherwise it alone "must defend itself . . . and faces a civil penalty . . . for acts perpetrated by the third-party respondent." In these circumstances, I find the third-party petition states a claim upon which relief can be granted.

Finally, I find the claim of prejudice is without merit. Section 110(a) of the Act, 30 U.S.C. 820(a), requires that a civil penalty "shall be assessed" for any and all violations charged. Further, section 110(i), 30 U.S.C. 820(i), states "the Commission shall have authority to assess all civil penalties provided in this Act." As the BCOA case recognizes the power to assess includes the power to allocate among those jointly and severally liable. It should be noted that the Secretary's proposals for civil penalties are advisory only, and in no way binding on the Judge who is required to make an independent evaluation and de novo review of the evidence when exercising the Commission's independent statutory authority to assess and allocate penalties. Shamrock Coal Co., BARB 78-82-P, 1 FMSHRC Decisions 469 (June 7, 1979).

Nothing in the act or its legislative history supports the view that the exercise of the Commission's independent jurisdiction to assess and allocate penalties is dependent upon or subject to control by the Secretary. See e.g., 29 C.F.R. 2700.27; 105(d); 110(k). Indeed, a policy of nonenforcement against contractors "grounded solely on improper considerations of administrative convenience" is clearly contrary to the purposes and policies of the Act. Old Ben, supra, 1 FMSHRC Decisions at 1487. Because the parties are in no way precluded from presenting an appropriate motion to approve settlement of this matter, the Part 100 procedures are no bar to the Commission's assertion of jurisdiction.

Accordingly, it is ORDERED that the motion to dismiss the third-party petition be, and hereby is, DENIED. It is FURTHER ORDERED that third-party respondent file and serve its answer on or before Friday, April 25, 1980.

Joseph B. Kennedy
Administrative Law Judge

~FOOTNOTE ONE

1 It should be noted that where the court has jurisdiction over the aggregate of facts that constitutes the petitioner's claim, it needs no additional ground of jurisdiction to determine a third-party claim which rests on the same core of facts. Where the original cause is properly before the court, there is

ancillary jurisdiction over a related third-party controversy.
See, 3 Moore's Federal Practice 14.26; Wright, Law of Federal
Courts 76.