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SOL (MSHA) V. PHILLIPS URANIUM
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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 80-208-M ASSESSMENT CONTROL NO. 29-01688-05006
v.	
PHILLIPS URANIUM CORPORATION, RESPONDENT	MINE: NOSEROCK NO. 1

DECISION AND ORDER

STATEMENT OF THE CASE

This proceeding arose through initiation of an enforcement action brought pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1978) [hereinafter cited as "the 1977 Act" or "the Act"]. On June 11, 1980, the Petitioner, the Secretary of Labor, Mine Safety and Health Administration (MSHA) [hereinafter "the Secretary"], and the Respondent, Phillips Uranium Corporation [hereinafter "Phillips"], filed both a Joint Motion for Submission of Proceedings upon Stipulated Facts and a Stipulation with the Commission pursuant to Commission Rule 64, 29 CFR 2700.64.

On August 22, 1980, I issued an Order requesting that the Secretary determine whether, in view of the Federal Mine Safety and Health Review Commission's decision of Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Pittsburg and Midway Coal Mining Company (Docket No. BARB 79-307-P, August 4, 1980), he wished to continue to proceed against Phillips; and if so, whether the Secretary chose to proceed solely against Phillips, or against Phillips and any independent contractor involved. Pursuant to that Order, the Secretary determined to proceed solely against Phillips, although he would not oppose any motion by Phillips to join any independent contractor involved. The Secretary filed a Motion for Summary Decision to that effect on September 24, 1980.

FINDINGS OF FACT

The parties agree, and I concur, that there is no issue in dispute as to any material fact. From the uncontroverted evidence, I find the following facts to be established:

1. Harrison Western Corporation [hereinafter "HW"] was engaged by contract with Phillips as an independent contractor to construct shafts and associated facilities at a proposed underground uranium mine owned by Phillips, designated as Nose Rock No. 1.

2. HW's contract with Phillips requires compliance with all applicable local, state and federal laws, including the 1977 Act and any standards promulgated thereunder.

3. HW began work on construction on or about November 5, 1979, and in the course of its duties had a continuing presence at the mine.

4. On November 11, 1979, an inspection of Nose Rock No. 1 was conducted by a duly authorized representative of the Secretary pursuant to section 103(a) of the 1977 Act.

5. During the course of his inspection, the MSHA inspector observed an employee of HW working in the headframe of the No. 2 shaft about 40 feet above the surface shaft collar. Although wearing a safety belt and line, the employee had not tied his safety line off to protect himself from injury should he fall, contrary to the provisions of 30 CFR 57.15-5.(FOOTNOTE 1)

6. Order of Withdrawal No. 152143 was issued to Phillips by the MSHA inspector for HW's violation of the above-cited mandatory safety standard.

7. During the course of his inspection, the MSHA inspector observed that a walkway on the headframe of the No. 2 shaft, elevated about 40 feet above the surface shaft collar, did not have a handrail for about 3 feet on the shaft side. Men or material might have fallen through this opening, contrary to the provisions of 30 CFR 57.11-12.(FOOTNOTE 2)

8. Citation No. 152144 was issued to Phillips by the MSHA inspector for HW's violation of the above-cited mandatory safety standard.

9. The conditions and practices described in Order of Withdrawal No. 152143 and Citation No. 152144 were abated by employees of HW.

10. MSHA policy in existence at the time the relevant order of withdrawal and citation were issued provided for issuance of citations or orders pursuant to section 104(a) and section 107(a) of the Act for mine safety and health violations to entities identified to MSHA by a Federal Mine Identification Number.

11. A Federal Mine Identification Number may be issued to any entity registering with the Mine Safety and Health Administration upon a demonstration that that entity controls, or is capable of controlling, the activities of the mine and is in a better position than other entities present at the mine to supervise activities affecting the health and safety of mine personnel. However, only one mine identification number is issued at any given mine.

12. Federal Mine Identification Numbers have been issued by MSHA to entities other than mine owners at mines subject to the 1977 Act, however, this is unusual.

13. HW does not possess a Federal Mine Identification Number for Nose Rock No. 1, the Federal Mine Identification Number having been issued to Phillips.

14. Not having a Federal Mine Identification Number, HW could not be issued a citation or order by the MSHA inspector.

15. Phillips, as opposed to the independent contractor, was proceeded against under an MSHA agency-wide policy of directly enforcing the 1977 Act only against owner-operators for contractor violations.

16. MSHA's agency-wide policy of directly enforcing the 1977 Act only against owner-operators for contractor violations was and is an interim policy pending adoption of regulations providing guidance to inspectors in the identification and citation of contractors, and was intended by MSHA to insure consistent, predictable and fair enforcement of the Act.

17. On October 31, 1978, MSHA announced the availability of a draft proposal which would allow identification of certain independent contractors as operators under the Act, by publication at 43 Fed. Reg. 50716 (1978). Forty-five days were given to comment on the draft rule.

18. On August 14, 1979, a proposed regulation for independent contractors, by which MSHA could identify certain independent contractors as operators under the Act, was published at 44 Fed. Reg. 47746 (1979). The comment period for this proposed regulation was to have closed on October 15, 1979.

19. On July 1, 1980, MSHA announced a final rule setting forth procedures and requirements for the identification of independent contractors performing services or construction at mines covered by the 1977 Act. Publication was made at 45 Fed. Reg. 44494 (1980) and the effective date of the final rule was declared to be July 31, 1980.

20. For the limited purpose of agreeing that the amount of any penalties are not in issue in the above-captioned Civil Penalty Proceeding, the parties agree, and I find, that the gravity of the violations, Respondent's negligence with respect to the violations, good faith in abating the violations, history of previous violations and size of business are accurately reflected and set forth in the proposed assessment issued to Phillips.

21. Payment of the proposed penalty will not impair the ability of Respondent to continue in business.

ISSUES PRESENTED

The sole issue presented for determination is whether Phillips, in the absence of direct enforcement of the Act, can be held liable for activities of an independent contractor which constitute violations of regulations promulgated pursuant to the 1977 Act?

DISCUSSION

The issue of owner-operator liability has previously been addressed by the Federal Mine Safety and Health Review Commission. In Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Old Ben Coal Company, (Docket No. VINC 79-119, October 29, 1979) [hereinafter cited as "Old Ben"], the Commission decided that an owner-operator can be held responsible for the violation of the Act committed by its independent contractor. The Commission elaborated:

> "When a mine operator engages a contractor to perform construction or services at a mine, the duty to maintain compliance with the Act regarding the contractor's activities can be imposed on both the owner and the contractor as operators. This reflects a congressional judgment that, insofar as contractor activities are concerned, both the owner and the contractor are able to assure compliance with the Act. Arguably, one operator may be in a better position to prevent the violation. However, as we read the statute, this issue does not have to be decided since Congress permitted the imposition of liability on both operators regardless of who might be better able to prevent the violation." Old Ben at 1483.

Several other decisions of the Review Commission are in agreement. See also Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Republic Steel Corporation, (Docket No. IBMA 76-28, April 11, 1979); Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Kaiser Steel Corporation, (Docket No. DENV 77-13-P, May 17, 1979); Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Monterey Coal Company, (Docket No. HOPE 78-469, November 13, 1979).

The Review Commission in its decision of Old Ben emphasized that the amendment of the definition of "operator" in the Act to include independent contractors makes it clear that contractors can be proceeded against and held responsible for their own violations. "Indeed, %y(3)4B direct enforcement against contractors for their violations is a vital part of the 1977 Act's enforcement scheme." Old Ben at 1483.

The issue of direct enforcement of the Act was addressed again in a recent pronouncement of the Federal Mine Safety and Health Review Commission. In Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Pittsburg and Midway Coal Mining Company, (Docket No. BARB 79-307-P, August 4, 1980), a majority

ruled that in light of publication in

the Federal Register of new enforcement guidelines (see Finding of Fact No. 19) as to when the Secretary of Labor will cite independent contractors, when he will cite owner operators, or when he will cite both, fair enforcement of the Act requires an opportunity for the Secretary to determine whether he will prosecute only the owner-operator. My Order of August 22, 1980, afforded the Secretary just such an opportunity. Pursuant to that Order, the Secretary determined to proceed solely against Phillips.

Examination of the legislative history of the 1977 Act reveals that Congress clearly intended that both the Secretary and the Review Commission should share in the responsibility for the direct enforcement of the Act with respect to independent contractors. The Report of the Senate Committee on Human Resources on Senate Bill 717 expressed this intention when, in commenting on the wording of Title I of the bill, it stated:

> "... the definition of mine "operator" is expanded to include "any independent contractor performing services of 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 Federal Mine Safety and Health Act of 1977. In enforcing this Act, the Secretary should be able to issue citations, notices and orders, and the Commission should be able to assess civil penalties against such independent contractors as well as against the owner, operator, or lessee of the mine. The Committee notes that this concept has been approved by the federal circuit court in Bituminous Coal Operators' Assn. v. Secretary of the Interior, 547 F 2d 240 (C.A. 4, 1977)." S. Rep. No. 95-181, 95th Cong. 1st Sess., 14 (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT, p. 602.

The Conference Report of the committee of conference echoed this sentiment when it reported:

> "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 who may have a continuing presence at the mine. The House amendment had no comparable provision.
>
> The conference substitute conforms to the Senate bill." S. Rep. No. 95-461, 95th Cong. 1st Sess., (37) (1977),

id. at 1315.

Judicial construction of the quoted provision of the Report of the Senate Committee on Human Resources accompanying Senate Bill 717 is revealing. In National Indus. Sand Ass'n. v. Marshall, 601 F. 2d 689 (3d Cir. 1979), the court, in holding that the allocation of responsibility for training programs between mining companies and independent contractors was best left to the initiative of the Secretary, stated:

> "As this excerpt from the legislative history reveals, independent contractors were included in the definition of "operator" because "the Secretary should be able to issue citations, notices, and orders, and the Commission should be able to assess civil penalties against such independent contractors." Congress was clearly concerned with the permissive scope of the Secretary's authority, not with the mandatory imposition of statutory duties on independent contractors." Id. at 703 (emphasis in original).

Taken together, the text of the legislative history and its judicial construction present an indication of the intent of Congress as to the allocation of responsibility for the direct enforcement of the Act with respect to independent contractors. The Secretary, within the permissive scope of his powers, should be able to issue citations, notices and orders against independent contractors as well as against the owner, operator or lessee of the mine. The Commission, within the permissive scope of its powers, should be able to assess civil penalties against independent contractors as well as against the owner, operator or lessee of the mine.

In the case before me, the Secretary, by deciding to proceed solely against Phillips, has effectively limited the ability of the Commission to assess a civil penalty against a responsible independent contractor because the latter has not been brought within the personal jurisdiction of the Commission. While the Federal Mine Safety and Health Review Commission's ruling in Old Ben allows for the imposition of civil penalties against the owner-operator for violations of the Act by an independent contractor, the decision also states that continuation of a policy that forecloses direct enforcement of the Act against contractors provides evidence that the policy in force is grounded upon improper considerations of administrative convenience. Old Ben at 1486-7. I find indications to that effect contained in the record of the present case. (See Petitioner's Motion for Summary Decision).

From the facts as found, it appears that Order of Withdrawal No. 152143 was properly issued for a violation of 30 CFR 57.15-5. It also appears that Citation No. 152144 was properly issued for a violation of 30 CFR 57.11-12. I must therefore resolve the issue of whether Phillips

can, in the absence of direct enforcement of the Act, be held liable for independent contractor activities in the affirmative. Old Ben clearly establishes that the duty to maintain compliance with the Act regarding a contractor's activities can be imposed on both the owner and contractor as operators. Even though the Secretary has unduly prolonged the interim enforcement policy of citing owners only, the owner-operator should be held liable for independent contractor activities which constitute a violation of the Act.

Based upon the foregoing discussion, the facts as found to exist in Findings of Fact No. 20 and No. 21, my finding that the Secretary has continued in a policy that forecloses enforcement of the Act against independent contractors and my finding of a lack of culpability on the part of Phillips, I conclude that penalty assessments in nominal amounts of $1.00 for Order No. 152143 and $1.00 for Citation No. 152144 are appropriate.

CONCLUSIONS OF LAW

1. The undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

2. The conditions found to exist on November 5, 1979, in Finding of Fact No. 5 constitute a violation of the mandatory safety standard contained in 30 CFR 57.15-5.

3. The conditions found to exist On November 5, 1979, in Finding of Fact No. 7 constitute a violation of the mandatory safety standard contained in 30 CFR 57.11-12.

4. Respondent can be held liable for the activities of its independent contractor constituting the violations found to exist in Conclusions No. 2 and No. 3 above.

5. The Secretary has continued in a policy that forecloses enforcement of the Act against independent contractors for activities which constitute violations of regulations promulgated pursuant to the 1977 Act.

6. Respondent is liable for the activities of its independent contractor which constitute the violations found to exist in Conclusions No. 2 and No. 3 above.

7. Penalty assessments in nominal amounts of $1.00 for Order No. 152143 and $1.00 for Citation No. 152144 are reasonable and appropriate under the circumstances.

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ORDER

Based upon the foregoing findings of fact and conclusions of law, Order No. 152143, together with a penalty assessment of $1.00, and Citation No. 152144, together with a penalty assessment of $1.00, are hereby affirmed. Respondent shall pay the affirmed penalties within 30 days of the date of this Decision.

Jon D. Boltz
Administrative Law Judge

~FOOTNOTE_ONE

1 Mandatory. Safety belts and lines shall be worn when men work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

~FOOTNOTE-TWO

2 Mandatory. Openings above, below, or near travelways through which men or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed.