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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. PENN 80-267 A.O. No. 36-02347-03015
v.	Preparation Plant
BRADFORD COAL COMPANY, INC., FUEL FABRICATORS, INC., INDIANA STEEL AND FABRICATING CO., RESPONDENTS	

DECISION AND ORDER

On June 16, 1981, this matter came on for a hearing on (1) cross motions for summary decision filed by Fuel Fabricators Co., Inc., and the Secretary, (2) a motion to dismiss by Indiana Steel and Fabricating Co., and (3) a motion to implead a third party respondent. By order of June 1, 1981, Bradford Coal Co. was dismissed from the case.

The cross motions are supported by a stipulation of material facts and waiver of an evidentiary hearing. Indiana Steel moved to dismiss on the ground it paid the only penalty with which it was charged.(FOOTNOTE.1) Fuel Fabricators opposes this motion on the ground that Indiana Steel as general contractor was legally responsible for the five violations in question. Based on an independent evaluation and de novo review of the circumstances, I conclude the motion to dismiss as to Citation No. 846927 should be denied but as to the other four electrical violations it is granted. As to the four electrical violations, the Secretary's motion for summary decision against Fuel Fabricators is granted and the cross motion denied.

Findings of Fact

1. At all times pertinent, Fuel Fabricators and Indiana Steel and Fabricating Company were mine operators and statutory

agents within the meaning of section 3(d) and (e) of the Mine Safety Law. 30 U.S.C. 802(d) and (e).

2. At the time the violations alleged occurred, Fuel Fabricators, the owner-operator, had overlapping control over and supervisory responsibility for compliance with the Mine Safety Law at the site of the preparation plant in question.

3. Except as indicated, at the time the violations alleged occurred, Indiana Steel, the builder-operator, had overlapping control over and supervisory responsibility for compliance with the Mine Safety Law at the site of the preparation plant in question.

4. The stipulated and undisputed (FOOTNOTE.2) facts show Fuel Fabricators and Indiana Steel were jointly and severally liable for the condition set forth in Citation No. 846927.

5. The stipulated facts show Fuel Fabricators and its electrical contractor and statutory agent, Meyer Brothers of Philipsburg, Pennsylvania, were responsible for the electrical equipment violations found in Citations Nos. 846929, 846930, 846931 and 846932.

6. The stipulated facts show Indiana Steel had no responsibility for creation or abatement of the conditions on the electrical equipment.

Conclusions of Law

1. The claim that the construction site and the construction activity at the new coal preparation plant were not subject to regulation under the Mine Safety Law is without merit. I find Congress intended to subject the construction activity involved in building the new plant to MSHA jurisdiction and regulation from the time the first miner-employees entered the site to commence work on the new plant. The fact that Fuel Fabricators failed to file an identity report within 30 days after it opened the mine site was no ground for denying MSHA jurisdiction to regulate that activity. The express terms of the Act as well as its legislative history show Congress intended coverage of the Mine Safety Law to be as broad as the constitutional power conferred by

the Commerce Clause. United States v. Dye Construction Company, 510 F.2d 78, 83 (10th Cir. 1975). The objective was to make maximum use of the commerce power to improve occupational safety and health in the Nation's mines and to avoid the disruptions to production that impede and burden commerce. Charles T. Sink, Dkt. No. HOPE 75-679 (Dept. of Int., OHA, OALJ, May 19, 1975), aff'd. 1 MSHC 1362 (1975); Secretary v. Shingara, 1 MSHC 1450 (M.D. Pa. 1976); Marshall v. Bosack, 1 MSHC 1671 (E.D. Pa. 1978); Energy Fuel Nuclear, Inc., 1 MSHC 1747 (1979); Sun Landscaping & Supply Co., 1 MSHC 2444 (1980).

Congress, has plenary power to regulate activities in and affecting interstate commerce and in this instance has specifically determined that the construction of structures and facilities including "custom coal preparation facilities" that are "to be used in" the processing of coal to be sold either locally or in interstate commerce is an activity subject to regulation. 3(h)(1) of the Mine Safety Law. 30 U.S.C. 802(h)(1). Cases cited, supra. See also, Texas Utilities Generating Company, 1 MSHC 2091 (1979); Heart of Atlanta Motel v. U.S., 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964); Wickard v. Filburn, 317 U.S. 111 (1942). As the stipulated facts and the reasonable inferences to be drawn therefrom show, there was apparently a steady flow of construction materials to the mine site from the time Indiana Steel began its construction of the $17,000,000 facility. I find, therefore, there was a direct nexus between the construction activity at the mine site and the flow of goods and materials in commerce. United States v. Dye Construction Company, supra. I also find that even if all of the construction materials used in the new plant were produced and purchased wholly within the state of Pennsylvania the business of building coal preparation plants is a class of activity the cumulative effect of which clearly affects interstate commerce. Usery v. Lacy, 628 F.2d 1226 (9th Cir. 1980); Godwin v. OSHRC, 540 F.2d 1013 (9th Cir. 1976) and cases cited supra.

2. As the foregoing shows, Fuel Fabricators' suggestion that the Act does not apply until the coal preparation plant becomes operational, i.e., actually processes coal for sale in or affecting commerce is also without merit. Texas Utilities Generating Company, supra; Energy Fuel Nuclear, Inc., supra. In enacting the Act, Congress made a specific finding that "the disruption of production and the loss of income to operators and miners as a result of coal or other mine accidents or occupationally caused diseases unduly impedes and burdens commerce." 30 U.S.C. 801(f). Thus, Congress has determined that a class of activity, unsafe mine operations,

including construction operations has a substantial economic effect on commerce. I conclude therefore that the construction activity that precedes production activity at the mine site in question is included in the class of activity that as a matter of law affects interstate commerce. This coverage I find is consistent with the congressional purpose to reach as broadly as constitutionally permissible working conditions and practices in the nation's mines, since nonuniform coverage would give unsafe employers a competitive advantage. The "substantial economic effect" test makes irrelevant any determination of what is "in" or "out" of the "current of commerce". United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942). An activity that takes place wholly intrastate may be subjected to congressional regulation because of the activity's impact in other states--regardless of whether the activity itself occurs before or during or after interstate movement. United States v. Rock Royal Cooperative, Inc., 307 U.S. 533, 569 (1939). Accord: Shreveport Rate Cases, 234 U.S. 342 (1914). As the Supreme Court has noted: "There is a basis in logic and experience for the conclusion that substandard labor conditions among any group of employees, whether or not they are personally engaged in commerce or production, may lead to strife disrupting an entire enterprise." Maryland v. Wirtz, 392 U.S. 183, 192 (1968). See also, Perez v. U.S. 402 U.S. 146 (1971); Marshall v. Bosach, supra; Marshall v. Kraynak, 1 MSHC 1685 (W.D. Pa. 1978); Godwin v. OSHRC, supra; Usery v. Lacy, supra; Island County Highway Dept., 2 MSHC 1174 (1980); Ogle Co. Highway Dept., 2 MSHC 1255 (1981).

3. Under the Mine Safety Law, Fuel Fabricators, the owner-operator, and its independent contractors Indiana Steel and Meyer Brothers were responsible for mine safety hazards which they either created or had responsibility for abating at the new preparation plant. Old Ben Coal Company, 1 MSHC 2177 (1979), aff'd, unpublished order, (D.C. Cir. December 9, 1980), see, 2 MSHC 1065; Republic Steel Corporation, 1 MSHC 2002 (1979); A.B.C. v. Andrus, 581 F.2d 853 (D.C. Cir. 1978); BCOA v. Secretary, 547 F.2d 240 (4th Cir. 1977); S. Rpt. 95-181, 95th Cong., 1st Sess. 14 (1977).

4. In the execution of their responsibility for enforcement of the Act, the Secretary and the Commission are authorized to assess and to apportion or allocate civil penalties between independent contractors and owner-operators. In the exercise of its adjudicatory oversight power, the Commission has the ultimate authority to determine de novo the allocation of responsibility for contested violations. BCOA v. Secretary, supra at 247; NISA v. Marshall, 1 MSHC

2033, 2040-42 (3rd Cir. 1979); Old Ben, supra; Secretary v. Morton Salt, Dkt. CENT 80-59-M, Order On Motion To Dismiss Third-Party Petition, dated April 14, 1980, review denied, 2 FMSHRC (May 1980); 45 Fed. Reg. 44,497 (General Enforcement Policy for Independent Contractors); 30 C.F.R. 45.2(c).

5. The stipulated and undisputed facts show Fuel Fabricators and Indiana Steel shared functional control over the area involved in the violation cited in Citation No. 846927 in that the latter was responsible for placing the combustible debris within 25 feet of the flammable liquid storage tank and the former for removal of the same. I conclude that by entering into a joint arrangement and responsibility for accumulation and removal of the debris these parties shared equal responsibility for compliance and for the violation that admittedly occurred.

6. Based on an independent evaluation and de novo review of the circumstances including the gravity (low) and the negligence (slight), I find, after taking into account the other statutory criteria, that the amount of the penalty warranted is that recommended by MSHA, namely, $130, one half of which is assessed against Fuel Fabricators and the other half against Indiana Steel.(FOOTNOTE.3) The violation will be recorded as part of the prior history of both operators.

7. The stipulated facts show the four electrical violations were perpetrated as the result of actions by Fuel Fabricators and/or its electrical contractor Meyer Brothers. The undisputed facts show Indiana Steel had neither functional nor supervisory responsibility for these violations. While the owner operator is automatically responsible for violations by its independent contractors, I can find nothing in the law or its underlying policy that makes independent builder-operators vicariously liable for violations by owner-operators and other contractors working on the same site in the absence of a showing that with the exercise of due diligence the general contractor should have been aware of the violation and taken realistic action to abate the same in order to protect its own employees or subcontractors. Compare, Anning-Johnson Co. v. OSHRC, 516 F.2d 1081 (7th Cir. 1975); Grossman Steel & Aluminum Corp., 4 OSHRC, BNA, 1185 (1975) with Central of Georgia R.R. v. OSHRC 576 F.2d 620 (5th Cir. 1978).

8. I note that the contract between Fuel Fabricators and Indiana Steel expressly limits the latter's responsibility for indemnification of Fuel Fabricators to violations committed by Indiana Steel or its subcontractors. Thus, in addition to the fact that Fuel Fabricators was not at liberty to contract out its statutory responsibility as owner-operator, so also, it may not seek to have the Commission impose a duty of contribution or indemnification where there is no basis in fact for finding the independent contractor jointly or severally liable. I realize that the right to indemnification may arise without agreement and by operation of law to prevent a result which is regarded as unfair or unjust. This remedy, however, it limited to indemnitees who are personally free from fault such as where an owner-operator is held vicarously liable for the violations of a culpable independent contractor. W. Prosser, Handbook of the Law of Torts, 51 at 310-311 (4th ed. 1971).

9. While it might have been logical for MSHA to charge Meyer Brothers as well as Fuel Fabricators with the four electrical violations, this is no defense to Fuel Fabricators.(FOOTNOTE.4) The fact that another employer may be jointly responsible is irrelevant to a finding of violation by the employer actually cited. Central of Georgia R.R. v. OSHRC, supra, 576 F.2d 625.

10. Based on an independent evaluation and de novo review of the circumstances, I find Fuel Fabricators and not Indiana Steel was responsible for the four electrical violations. I further find that in each instance the gravity was low and the negligence ordinary and after taking into account the other statutory criteria the amount of the penalty warranted for each violation is that recommended by MSHA, namely:

Citation	Amount
846929	$122
846930	140
846931	66
846932	140

ORDER

Accordingly, it is ORDERED:

1. That Fuel Fabricators' motion to implead third party respondent or for summary decision is DENIED;

2. That Indiana Steel's motion to dismiss is DENIED as to Citation 846927 and otherwise GRANTED;

3. That the Secretary's motion for summary decision against Fuel Fabricators is GRANTED IN PART and otherwise DENIED;

4. That for the five violations found, Indiana Steel pay a penalty of $65 and Fuel Fabricators a penalty of $533 on or before Wednesday, June 30, 1981 and that subject to payment the captioned matter be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

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~FOOTNOTE_ONE

At the hearing, Indiana Steel declined an evidentiary hearing to dispute the facts set forth in the stipulation or to brief its claim that the Commission is without authority to determine de novo the "responsible operator" in a multi-respondent penalty proceeding.

~FOOTNOTE_TWO

Where the parties fail to show there is a disputed issue of fact, it is unnecessary to hold an evidentiary hearing. Costle v. Pacific Legal Foundation, 445 U.S. 198 (1980).

~FOOTNOTE_THREE

At the hearing, Indiana Steel agreed to drop any further contest of this violation and to pay a penalty of $65.00.

~FOOTNOTE_FOUR

Meyer Brothers was not cited because its presence at the site had long since been terminated.