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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. VA 80-171 Assessment Control No. 44-04880-03027 V
v.	
ABSOLUTE COAL CORPORATION, RESPONDENT	No. 1 Mine

SUMMARY DECISION

A notice of hearing was issued on August 10, 1981, in the above-entitled proceeding providing for a hearing to be held on September 16, 1981. Prior to the date of the hearing, counsel for the parties filed on September 15, 1981, a joint stipulation of undisputed material facts and a motion for summary decision pursuant to 30 C.F.R. 2700.64. Counsel for the parties also indicated that they would file briefs in support of their respective positions. Counsel for respondent(FOOTNOTE.1) submitted on November 3, 1981, a memorandum in support of his request for summary decision and counsel for the Secretary of Labor submitted on November 19, 1981, a memorandum in reply to respondent's memorandum.

Stipulations

The parties' stipulations are set forth below:

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

2. Absolute Coal Corporation and its No. 1 Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq.

3. Absolute Coal Corporation owns and operates the No. 1 Mine located in Bee, Dickenson County, Virginia.

4. A violation of mandatory safety standard 30 C.F.R. 75.316 occurred on January 2, 1980, at Absolute's No. 1 Mine as charged in Withdrawal Order No. 0686121.

5. A violation of mandatory safety standard 30 C.F.R. 75.200 occurred on January 2, 1980, at Absolute's No. 1 Mine as charged in Withdrawal Order No. 0686122.

6. The civil penalty of $2,000.00 that has been proposed for the violation charged in Withdrawal Order No. 0686121 is reasonable in light of the six statutory criteria set forth in Section 110(i) of the Act.

7. The civil penalty of $2,000.00 that has been proposed for the violation charged in Withdrawal Order No. 0686122 is reasonable in light of the six statutory criteria set forth in Section 110(i) of the Act.

8. On or about October 26, 1979, Respondent retained Apple Mountain Coal Company (Joe Davis) as a contract miner (hereinafter the "contractor"), for the Absolute No. 1 Mine, pursuant to a Contract Mining Agreement ("Agreement") and equipment lease. (See Discovery Documents.)

9. These contracts constitute the only relationship or affiliation between Respondent and the contractor. (See Respondent's Answers to Petitioner's Interrogatories; "Answers" No. 3, 12, 15, et al.).

10. On or about January 2, 1980, Petitioner issued citations for violations of federal law committed by the contractor. (See answer No. 12).

11. On July 1, 1980, Petitioner promulgated certain amendments to 30 C.F.R. Part 45 and further published an Enforcement Policy and Guidelines for Independent Contractors ("Guidelines") 45 F.R. 44494-98.

When respondent's counsel submitted his memorandum in support of his request for summary decision, he prefaced his arguments with four paragraphs under the heading "Statement of Material Facts Concerning Which There Is No Material Dispute". His memorandum does not specifically state that counsel for the Secretary has jointly agreed to sponsor the additional "Statement of Material Facts" and, while the Secretary's counsel does not deny the accuracy of the additional "Material Facts", she does not state that she agrees with them or that she participated in their preparation. Except for Stipulation No. 11 above, which is simply a statement of that which has been published in the Federal Register, the additional facts are taken from materials which respondent supplied in reply to petitioner's interrogatories and the additional statement of facts appears to be accurate. Therefore, I have added the four additional statements of material fact set forth in the preface to respondent's memorandum to the original stipulations submitted by the parties. The four additional statements appear as Nos. 8 through 11 in the stipulations above.

Issue

The only issue raised in respondent's memorandum (p. 2) is whether respondent should be cited or assessed penalties for violations of law committed by a third-party contract miner.

Consideration of Parties' Arguments

Respondent Should Not Be Cited for the Violations Here Involved

In support of its argument that it should not be cited for the violations involved in this proceeding, respondent's memorandum (p.2) relies upon the provisions of its mining agreement with Apple Mountain Coal Company, or contractor, to argue that the contractor should be held liable for the violations. Respondent refers to the provisions of the mining agreement for the purpose of showing that the contractor was obligated (1) to produce the coal reserves until they were exhausted, (2) to conduct mining operations in a workmanlike manner, (3) to comply with all applicable laws and regulations, (4) to indemnify respondent against any breach of MSHA's regulations or the Act, (5) to accept the coal properties as they existed at the time the agreement was signed in October 1979, and (6) to perform as an independent contractor with power to control the acts of its employees. Respondent uses the aforesaid contractual obligations to reach a conclusion that it was the contractor's responsibility to comply fully with the Act and the regulations promulgated thereunder.

After having asserted that the contractor was liable for its own violations, respondent's memorandum (p. 3) proceeds to review MSHA's comments in the Federal Register (Stipulation No. 11, supra) pertaining to MSHA's decision to cite independent contractors for violations which occur as a result of their work at coal or other mines. Respondent emphasizes MSHA's comments to the effect that health and safety interests at mines will best be served by placing responsibility for compliance with health and safety standards on independent contractors because they are in the best position to prevent safety and health violations in the course of their work and to abate any violations which may occur.

While respondent concedes that MSHA's comments in the Federal Register show that MSHA might hold production-operators liable for violations in some circumstances, respondent argues that those circumstances do not apply in this instance because (1) it was the contractor, not respondent, who failed to comply with the mine's ventilation plan, (2) it was the contractor, not respondent, who failed to comply with the mine's roof-control plan, and (3) it was the contractor's employees, not respondent's employees, who were exposed to hazardous conditions because of the contractor's violations. For the foregoing reasons, respondent contends that only the contractor should be cited for the violations observed by the inspector on January 2, 1980 (Stipulation Nos. 4 and 5, supra).

Petitioner's reply memorandum (pp. 1-2) argues that respondent was properly cited for the violations of section 75.316 and 75.200 because (1) respondent retained the U.S. Department of Labor Legal Identification Number for the mining property involved and also obtained all necessary licenses and permits for authorization to produce coal from respondent's No. 1 Mine, (2) respondent retained the right to have all coal produced from the mine delivered to respondent's preparation plant, (3) respondent reserved the right to enter upon the mine property at

all suitable times for the purpose of inspecting the contractor's operations, (4) respondent may require the contractor to cure any potential violations of legally mandated health or safety standards, and (5) respondent owned all the equipment which the contractor used to produce coal. Petitioner concludes from the aforementioned extensive control which respondent exercised over the contractor's operations, that respondent was properly cited for the violations which occurred at respondent's mine.

Petitioner's reply memorandum (p. 3) also argues that an owner of a coal mine should not be able to escape all statutory duties and responsibilities under the Act by entering into contracts under which the owner seeks to transfer all of the owner's obligations under the Act to the contractor who is carrying out the owner's interest in seeing that coal is produced.

I believe that petitioner has correctly pointed out that respondent retained so much control over the operation of the No. 1 Mine that MSHA may properly hold respondent liable for the violations which occurred at respondent's mine. Respondent controlled the operations at the the mine to an even greater extent than petitioner's reply memorandum has indicated. It should be noted that the mining agreement allows the contractor to be paid only $16.50 per ton for clean coal delivered to respondent's preparation plant. From the payment of $16.50 per ton, respondent deducts 50 cents per ton to hold in escrow. The mining agreement also provides that the contractor must deliver a minimum amount of coal per month. If the contractor fails to deliver the minimum monthly tonnage, respondent reserves the right to cancel the agreement and retain all money held in escrow. Respondent also deducts 50 cents per ton from the $16.50 payable to the contractor to reimburse respondent for supplies which the contractor is required to obtain from respondent.

Respondent owns the mining equipment required for the contractor's production of respondent's coal. The only rent which the contractor has to pay for use of respondent's equipment is the contractor's obligation to fulfill the terms of the mining agreement described above. Of course, the contractor has to pay for any repairs which have to be made to respondent's equipment and the contractor must pay for or replace any lost or stolen equipment. The contractor is also required to carry insurance and pay the premiums on insurance covering respondent's equipment.

It is obvious from the above-described provisions of the agreements between respondent and contractor, that respondent has absolute control over the operation of the No. 1 Mine and that the agreements place such severe economic limitations on the contractor that the contractor will find it very difficult to make a profit from extracting respondent's coal. Moreover, the financial constraints placed upon the contractor by respondent will put pressure on the contractor to scrimp on compliance with safety standards in order to save money. An indication of the contractor's lack of funds is shown by the inspector's language in Order No. 686122 which states that the contractor was installing only three rows of roof bolts instead of the four rows required by the roof-control plan. The roof bolts were supposed to have been no more than 48 inches apart, but they were 67 to 68 inches apart, or 20 inches farther apart than they should have been. One way to save money, of course, is to install as few roof bolts as possible. Nothing is more hazardous in an underground coal mine than failing to install an adequate number of roof bolts. The violation of section 75.316 cited in Order No. 686121 also shows a failure of the contractor to supply adequate materials because, according to the inspector's order,

the contractor was using line curtain only 48 inches long to ventilate the face area at a time when the mining height was 55 inches.

As I have previously noted, respondent's memorandum (p. 3) concedes that MSHA's comments in the Federal Register refer to circumstances under which it would be appropriate to cite the production-operator for violations, as well as

the independent contractor, but respondent claims that MSHA's comments about citing production-operators do not apply to the circumstances which exist in this proceeding. The comments to which respondent refers are set forth below (45 Fed. Reg. 44,497):

> * * * Accordingly, as a general rule, a production-operator may be properly cited for a violation involving an independent contractor: (1) when the production-operator has contributed either an act or an omission to the occurrence of a violation in the course of an independent contractor's work, or (2) when the production-operator has contributed by either an act or omission to the continued existence of a violation committed by an independent contractor, or (3) when the production-operator's miners are exposed to the hazard, or (4) when the production-operator has control over the condition that needs abatement. * * *

An examination of the above-quoted comments of MSHA in light of the facts in this proceeding shows that respondent comes within MSHA's guidelines under which the production-operator should be cited, in either a separate or joint proceeding, for violations committed by the independent contractor. Although respondent had reserved the right to inspect the contractor's production operations to determine whether the contractor was complying with all safety regulations (Agrement, par. 7), respondent either did not make such inspections or failed to assure that the contractor was complying with the health and safety standards. Such failures constituted an "omission" within the meaning of MSHA's guidelines which would make respondent liable for the violations which occurred while the contractor was producing respondent's coal.

An "act" by respondent which would make respondent liable for being cited for the contractor's violations is the insertion in the agreement between respondent and the contractor of a minimum monthly volume of coal which the contractor is required to produce or run the risk of having the agreement canceled with escrowed funds being retained by respondent (Agreement, pars. 3(c) and 13). Cancellation of the contractor's agreement with respondent would also have exposed the contractor to loss of any funds which it had expended for insurance and repairs on respondent's equipment. Clearly, respondent exercised sufficient control over the production of coal at its No. 1 Mine to subject it to being cited for violations committed by the contractor at its No. 1 Mine.

Petitioner Should Apply its Enforcement Policy Retroactively

The last portion of respondent's memorandum (pp. 3-4) is devoted to contending that MSHA's policy for citing independent contractors for violations of the mandatory health and safety standards should be applied retroactively. Respondent supports its argument about retroactive application of the policy of

citing independent contractors by reference to a number of persuasive court decisions, but it is unnecessary to consider those cases because MSHA has already retroactively applied its policy of citing independent contractors for violations of the mandatory standards. In fact, the most recent actions taken by the Commission with respect to citing independent contractors, as opposed to production-operators, or both, was in Pittsburgh & Midway Coal Mining Co., 2 FMSHRC 2042 (1980), in which the Commission remanded a case to

an administrative law judge so that the Secretary of Labor could determine whether to apply the procedures for citing independent contractors for violations as those procedures were set forth in Volume 45 of the Federal Register (Stipulation No. 11, supra). The Commission indicated in its decision that the Secretary was free to proceed against either the independent contractor or the production-operator, or both. The Commission has issued similar orders in at least two other proceedings, remanding the cases for the purposes of allowing the Secretary to apply the rules pertaining to citing independent contractors for violations of the mandatory safety standards (C and K Coal Co., 2 FMSHRC 2047 (1980), and Phillips Uranium Corp., 2 FMSHRC 2050 (1980)).

My decision issued November 30, 1981, in Old Dominion Power Company, Docket No. VA 81-40-R, describes a factual situation in which MSHA applied its procedures for citing independent contractors on a retroactive basis. In the Old Dominion case, an electric power company had installed some metering facilities in a substation located on a coal operator's mine property. One of the power company's employees was electrocuted while performing some work at the substation. The accident occurred on January 22, 1980. After inspecting the site of the fatal accident, an MSHA inspector cited the production-operator for a violation of the mandatory safety standards. After the promulgation of MSHA's regulations providing for the citing of independent contractors, the inspector modified his citation to allege that the power company, or independent contractor, should be cited for the violation instead of the production-operator. The citation was issued against the power company on January 21, 1981, or almost a year after the production-operator had been cited for the violation and about 6 months after the rules for citing independent contractors had been promulgated.

Petitioner's reply memorandum (p. 4) first argues that MSHA's regulations for citing independent contractors should not be applied retroactively. Petitioner's reply memorandum (p. 5) then takes a realistic alternative position and argues that even if the policy for citing independent contractors is applied retroactively, that respondent should be held liable in this proceeding. In support of petitioner's claim that respondent should be held liable, petitioner again refers to the facts in this proceeding which show that respondent retained control of the mine property, retained the right to inspect the operator's activities to assure that the contractor complied with the safety standards, provided the equipment used in mining operations, and otherwise controlled the mining operations sufficiently to be held liable for the violations which occurred at respondent's mine.

As I have indicated above, the Commission has not ruled that MSHA is precluded from proceeding against an owner or a production-operator in any given situation. It is only necessary that MSHA advance reasons for having cited the production-operator in addition or instead of the independent contractor. In this proceeding, MSHA's inspector first wrote the orders in the name of the contractor and then modified the orders

to cite respondent because the inspector found that respondent was still shown in MSHA's files as the company which had filed the Legal Identity Report required by 30 C.F.R. 41.10. If respondent wished to have the contractor shown as the operator of the No. 1 Mine, it should have filed, pursuant to section 41.12, a change showing that respondent was no longer operating the No. 1 Mine.

Respondent's failure to file a change in its Legal Identity Report and its retention of complete control over the mine and all mining operations make it liable for being cited for the violations of section 75.316 and 75.200 as alleged in Order Nos. 686121 and 686122. Inasmuch as respondent has already stipulated that the penalties of $2,000 proposed by the Assessment Office for each violation is reasonable in light of the six assessment criteria set forth in section 110(i) of the Act (Stipulation Nos. 6 and 7, supra), the order accompanying this decision will require that respondent pay penalties totaling $4,000.00.

Nonexistence of an Independent Contractor in This Proceeding

While I have considered the parties' arguments in this proceeding under the assumption that the facts warrant treatment of Apple Mountain Coal Company as an independent contract (Stipulation No. 8, supra), Apple Mountain does not really come within the meaning of an independent contractor as that term is used in the regulations promulgated by MSHA in the Federal Register in Volume 45, pages 44,494 through 44,498.

If one examines the definition of the word "operator" as that term was modified by the 1977 Act, it may be seen at a glance that the independent contractor is described in the last clause of that definition which provides as follows: ""operator' means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." The facts in this proceeding show that Apple Mountain would qualify as an "operator" under the foregoing definition, but it would qualify under the word "lessee" because Apple Mountain had become the lessee of respondent's mining equipment and had become the "person" who operated a coal mine for the purpose of producing coal for respondent which was and still is the owner of the No. 1 Mine here involved.

When MSHA promulgated its rules for citing independent contractors, it defined an "independent contractor" in section 45.2(c) as "* * * any person, partnership, corporation, subsidiary of a corporation, firm, association or other organization that contracts to perform services or construction at a mine," whereas a "production-operator" was defined in section 45.2(d) as "* * * any owner, lessee, or other person who operates, controls or supervises a coal or other mine". MSHA's definition of an independent contractor would clearly exclude Apple Mountain as a qualified "independent contractor" and would obviously include Apple Mountain as a "production-operator".

One of the primary reasons for MSHA's having promulgated Part 45 of the Code of Federal Regulations was to establish a procedure whereby actual independent contractors could obtain an indentification number for use by an inspector when he is writing citations or orders for the purpose of alleging that an independent contractor has violated a health or safety standard. The inspector used an independent contractor's identification number when he issued the citation to which I referred in the Old

Dominion case, supra. Apple Mountain, as the entity which actually produced the coal at respondent's No. 1 Mine, would not qualify for an independent contractor's identification number under section 45.3 because Apple Mountain was not performing mere services or construction at respondent's No. 1 Mine. Additionally, Apple Mountain would have had no need to comply with section

45.4 of the regulations because they require independent contractors to report to the production-operator the type of work to be performed at the production-operator's mine and the place at the mine where such work is to be performed. Section 45.5 also requires production-operators to provide a complete description of independent contractors' work at their mines, and keep a record of their names and addresses for service of documents, and be able to supply such information to MSHA upon request.

Although respondent was the owner and therefore a production-operator at the time the orders here involved were written, Apple Mountain was also a production-operator at the time the orders were written. Therefore, neither Apple Mountain nor respondent was obligated to keep a record of the type of information required by section 45.4 because there was no independent contractor performing services or construction work at respondent's mine at the time the orders involved in this proceeding were written. Since both Apple Mountain and respondent were production-operators, they were both liable for the violations that occurred at respondent's mine and either or both of them could have been cited for the violations, but the inspector properly issued the orders in the name of the production-operator which had filed a Legal Identity Report with MSHA showing that respondent was the production-operator in charge of all operations at the No. 1 Mine at the time the orders were issued on January 2, 1980.

WHEREFORE, it is ordered:

Absolute Coal Corporation, as the operator of the No. 1 Mine on January 2, 1980, was properly cited for violations on January 2, 1980, and shall, within 30 days from the date of this decision, pay civil penalties totaling $4,000.00 which are allocated to the respective violations as follows:

Order No. 686121 1/2/80	75.316	$ 2,000.00
Order No. 686122 1/2/80	75.200	2,000.00
Total Civil Penalties Assessed in This Proceeding		$ 4,000.00

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

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~FOOTNOTE_ONE

After the decision in this proceeding had been written, but before the decision had been issued in final form, the attorney who wrote respondent's memorandum in this proceeding filed a letter on December 23, 1981, stating that he no longer is employed by respondent and that respondent's parent, AOV Industries, Inc., has initiated bankruptcy proceedings. Therefore, this decision is being sent to the attorney who represents respondent's parent in the bankruptcy proceedings instead of to the attorney who wrote respondent's memorandum.