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SOL (MSHA) V. JOHNSON'S TRUCKING
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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 84-54 A.C. No. 34-01317-03502 FN6
v.	Heavener Mine No. 1
JOHNSON'S TRUCKING, INC., RESPONDENT	

DECISION

Appearances: Jack R. Ostrander, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Gary Brasel, Esq., Sand Springs, Oklahoma, for Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a civil penalty proposal filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking a civil penalty assessment in the amount of $250 for an alleged violation of mandatory safety standard 30 C.F.R. 77.410.

The respondent filed a timely answer and notice of contest denying the alleged violation, as well as MSHA's enforcement jurisdiction, and a hearing was convened in Tulsa, Oklahoma, on November 28, 1984. Although given an opportunity to file post-hearing proposed findings and conclusions, and briefs, the parties declined to do so. However, I have considered their oral arguments made on the record during the hearing in this case in the course of my decision in this matter.

Applicable Statutory and Regulatory Provisions

1. The Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq., now the Federal Mine Safety and Health Act of 1977.

2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).

3. Commission Rules, 29 C.F.R. 2700.1 et seq.

4. Independent Contractors Regulations, Part 45, Title 30, Code of Federal Regulations, section 45.1 et seq.

Issues

The respondent maintains that it is not a "mine operator" or "independent contractor," and therefore is not subject to the petitioner's enforcement jurisdiction.

Aside from the jurisdictional question, the remaining issues presented are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalty filed, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation based upon the criteria set forth in section 110(i) of the Act.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the respondent's history of previous violations, (2) the appropriateness of such penalty to the size of its business, (3) whether the respondent was negligent, (4) the effect of the penalty on the respondent's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the respondent in attempting to achieve rapid compliance after notification of the violation.
Discussion

The citation in question in this case is a section 104(a) citation, with special "significant and substantial" (S & S) findings, No. 2077404, issued on January 23, 1984, by MSHA Inspector Lester Coleman. Mr. Coleman cited an alleged violation of mandatory safety standard 30 C.F.R. 77.410, and the "condition or practice" cited as a violation is described as follows on the face of the citation form:

> The White haulage truck #370 owned by (Johnson Trucking, Inola, OK. Contractor I.D. No. FN 6), operating in the 001 pit was not provided with an operable automatic warning device which shall give an audible alarm when such equipment is put in reverse.

The record reflects that the citation form, in block #6, identified the mine operator as Turner Brothers, Inc., but that it was subsequently modified to identify the operator as the respondent, Johnson's Trucking, Inc.

Stipulations

The parties stipulated that the Heavener Mine is owned by Turner Brothers, Inc., and that the mine is a coal mine subject to the Act and to the jurisdiction of this Commission (Tr. 6).

The parties stipulated that the cited truck was equipped with an operative warning device, but at the time of the inspection the device was inoperative when the truck was operated in reverse gear (Tr. 7-8).

Petitioner's counsel stipulated that the respondent has no history of prior violations (Tr. 21-22).

Petitioner's Testimony and Evidence Regarding the Alleged Fact of Violation.

MSHA Inspector Lester Coleman testified as to his background and experience, and he confirmed that on January 23 and 24, 1984, he made a general inspection of the mine. He observed the cited no. 370 haulage truck backing down into the pit area, and the automatic back-up horn or warning device was not working (Tr. 48). Two workmen were in the pit cleaning coal, and an end loader was loading a truck. In addition to himself, a foreman, and a mechanic were also present. All were on foot, and he estimated that he and the foreman were 20 to 30 feet from the truck, and that the coal cleaners were another 40 to 50 feet behind the truck (Tr. 49).

Mr. Coleman was of the opinion that the lack of an operative back-up alarm posed a hazard because of the men and equipment operating in the pit. He believed that the truck would be in close proximity to the men performing their various duties in the pit, and that with all of the equipment noise, the men would not hear the truck backing up without an operable alarm (Tr. 50).

Mr. Coleman stated that the truck in question is owned by the respondent. He confirmed that mine superintendent Payne advised him of this fact, and that he personally observed the respondent's logo on the truck cab door. He also confirmed that the respondent had additional trucks operating at the mine site while he was there, and upon inspecting them, he found that the back-up alarms were all operable (Tr. 51).

When asked about the probability of an accident occurring under the conditions which he cited, Inspector Coleman responded as follows (Tr. 54, 56, 58-59):

Q. Mr. Coleman, what in your opinion is the probability of an accident occurring, under the conditions that you have just described?

A. I think it is reasonably likely, some of the statistics that we have gotten in the last seven months, we have had ten fatalities occurring just like this.

Q. Ten fatalities, where?

A. Nation wide.

* * * *

Q. Mr. Coleman, you stated that it was your opinion, that the chance of an accident occurring was reasonably likely. Could you tell the Court what you mean by reasonably likely?

A. Yeah, because of the congestion, people on foot in the area, and the excessive noises from the other equipment, end loaders, back up horns not working, the excessive noise from the other equipment, you know, was--keep you from hearing a truck, just starting to back up.

Q. Okay, but specifically, what do you mean when you say reasonably, likely, what do you mean by this term, reasonably, likely to occur?

A. Well, all the--I can't think of the word that I want to use, everything is there, that can contribute to it.

* * * *

Q. Mr. Coleman, what do you base your opinions on, with regards to the probability of an accident occurring, under these conditions that you have just described for us?

A. Statistics, a lot of it.

Q. Anything else, besides statistics?

A. My experience.

Q. What type of experience do you have pertaining to conditions similar to the ones that we are discussing here today?

A. For the past ten years, I've been an inspector in these mines.

Q. Have you observed any similar accidents?

A. I've never observed one, no.

Q. What type of injuries could occur to an employee, in your opinion, if an accident did occur?

A. Well, in my opinion, you know, anything from broken bones to a death.

Inspector Coleman testified that a mine employee complained to him that the respondent's trucks were equipped with toggle switches so that the drivers could turn the back-up alarms on and off. He stated that he advised Mr. Payne that toggle switches were unacceptable, and that when the defective switch on the cited truck was repaired, it was not to be equipped with a switch (Tr. 51). When he returned to the mine on January 24, 1984, the day after he issued the citation, he found that "the operator made no apparent effort to correct the condition" (Tr. 59). He then issued a section 104(b) withdrawal order on the truck, and he did so because an operative alarm had not been installed. He explained that while an automatic alarm had been installed, it had been equipped with a toggle switch. Under the circumstances, he believed that the toggle switch rendered the alarm "nonautomatic," and that is why he issued the order (Tr. 60).

Inspector Coleman explained that the existence of a toggle switch allows the driver to turn the alarm on and off at his discretion. Since section 77.410 requires that back-up alarms be automatically activated when the vehicle is operated in reverse, the existence of the toggle switch renders the alarm other than automatic. Mr. Coleman confirmed that he has issued similar citations in the past. In his opinion, the use of a toggle switch is a violation of the cited safety standard (Tr. 59-62).

On cross-examination, Mr. Coleman confirmed that when he served the citation on mine superintendent Payne, Mr. Payne informed him that he would contact the respondent and have one of its mechanics repair the alarm (Tr. 63). When Mr. Coleman returned the next day, he asked Mr. Payne whether the alarm had been repaired. When Mr. Payne responded that it had not, Mr. Coleman hung a red tag on the truck removing it from service. He then asked Mr. Payne when the alarm would be repaired, and when Mr. Payne replied "probably 8:00 a.m., the next morning," Mr. Coleman fixed that as the abatement time for the order. When asked why he had not contacted

the respondent, rather than Mr. Payne, Mr. Coleman stated that Mr. Payne was the only "management member" present at the mine. He also stated that he was not obligated to contact the respondent, even though he cited him, because "we have independent contractors from all over the country" (Tr. 64-65).

Mr. Coleman stated that after "red tagging the truck," he next returned to the mine on January 26, 1984. The back-up alarm had been rendered operative, and he terminated the order (Tr. 66). He confirmed that he personally spoke with Mr. Johnson about the matter on the evening of January 24, but not after that (Tr. 67). He indicated that Mr. Johnson was "pretty angry" over his truck being "tied down, closed down" (Tr. 69).

Mr. Coleman stated that he did not speak with the truck driver at the time he initially observed the vehicle backing up into the pit (Tr. 71), nor did he speak with him after Mr. Payne advised him that the alarm had not been fixed (Tr. 77). He confirmed that before he issued the citation, he did not know whether or not the respondent had an MSHA assigned Mine I.D. number. He later confirmed that it did, and he modified the citation to delete Turner Brothers as the "responsible operator," and he substituted the respondent as the operator responsible for the citation (Tr. 73).

Mr. Coleman initially stated that at the time he issued the citation, he did not know whether a toggle switch was installed in the cab of the truck to control the alarm. He believed that Mr. Payne had a responsibility to insure that all trucks coming on mine property were in compliance with the law (Tr. 75). Mr. Coleman later testified that when he returned to the mine on January 24, the day after the citation issued, the cited truck was loaded with coal and the driver was leaving the pit. He stopped the truck and had the driver demonstrate how the alarm was repaired. When he found that a toggle switch had been installed, he decided that abatement had not been achieved (Tr. 79).

Respondent's Testimony and Evidence

James W. Payne, testified that at the time the citation issued he was employed by Turner Brothers as the mine superintendent. He confirmed that Inspector Coleman issued the citation after observing a truck backing up into the pit without the back-up alarm sounding. Mr. Payne also confirmed that Mr. Coleman told him that he was citing Turner Brothers for the Citation, but that he would include Johnson's Trucking Company on the citation (Tr. 97).

Mr. Payne testified that after the issuance of the citation onJanuary 23, 1984, he contacted the respondent's shop, and a mechanic came to the mine that same day (Tr. 97). When Mr. Coleman returned the next day, the truck had been repaired, but since a toggle switch had been installed, Mr. Coleman informed him that it had to be removed. Mr. Payne then contacted the respondent again and informed them that the toggle switch had to be removed (Tr. 98). A part was then ordered by the respondent so that it could be installed on the truck transmission to insure that the back-up alarm operated automatically, and on January 25th, the mechanic came to the mine with the part to install it on the truck (Tr. 99). Present were Mr. Coleman, Mr. Johnson, the mechanic, and Mr. Payne. Mr. Johnson and the mechanic went to the truck to repair the back-up alarm, and Mr. Johnson told Mr. Coleman that it would take 15 minutes to complete the repairs, but Mr. Coleman did not wait, and left the mine. He returned the next day, and terminated the order on the truck (Tr. 100-103).

On cross-examination, Mr. Payne confirmed that he had in the past contacted the respondent's repair garage and the mechanic when any of its trucks needed attention (Tr. 104). He reiterated that the back-up alarm was broken on January 23, but that it was repaired that same day. The alarm was working the next day, January 24, but a toggle switch had been installed. When Inspector Coleman discovered that a toggle switch had been installed, he tagged out the truck. Subsequently, Mr. Johnson and Mr. Coleman were involved in an argument over the closure order and the abatement (Tr . 105-107).

Troy Johnson, confirmed that he was notified about the cited condition on the day that Inspector Coleman issued the citation. The mechanic informed him that a transmission switch had broken, and that he had to order a part to repair it. He and the mechanic picked the part up from the supplier the day after the citation was issued, and they went to the mine site to repair the truck. The truck was repaired within a matter of minutes, but since Mr. Coleman had left the site, the order which he placed on the truck remained in effect until the morning of January 26th (Tr. 111-117). Mr. Johnson explained the reasons for the installation of the toggle switches on his trucks, and he explained that he has no use for back-up alarms on any of his trucks once they leave the mine site (Tr. 119-120). He also explained that his trucks generally have little reason for backing up, and that the normal practice on mine sites is for the truck to "circle in and out of areas" where they are loading, and that it is unusual for the trucks to be operated in reverse (Tr. 123). He confirmed that he was not present when Inspector Coleman

observed the truck which he cited backing up into the pit (Tr. 124). He also confirmed that he was concerned and upset over the fact that the truck was taken out of service by Mr. Coleman (Tr. 125). He identified photographic exhibits R-2(a) through 2(F), as the truck in question (Tr. 128).

The Jurisdictional Question

During his opening statement at the hearing, the respondent's counsel stated that in a prior civil penalty proceeding concerning these same parties, Docket No. CENT 81-78, MSHA's Kansas City Regional Solicitor's Office filed a motion to withdraw its proposal for assessment of civil penalty, and that it did so on the ground that the respondent was not an "independent contractor" within the meaning of the Act (Tr. 11). A copy of the motion is a matter of record, (exhibit R-1), and it states in pertinent part as follows:

> * * * As grounds for this motion, the Secretary states that after a review of the facts and circumstances regarding the issuance of citation 1023638 he has determined that at the time this citation was issued Johnson's Trucking, Inc., was not acting with respect to the mine operator as an "independent contractor' within the meaing of that term as used in section 3(d) of the Act and Part 45 of Title 30 of the Code of Federal Regulations.

Petitioner's counsel stipulated that the motion in question was filed, and he confirmed that it was filed with Commission Judge Charles C. Moore, and that Judge Moore granted the motion and dismissed the prior case by an order entered on January 8, 1982 (Tr. 14). When asked about the supporting reasons for the Kansas City Solicitor's motion to withdraw for lack of jurisdiction, counsel stated that "I'm not really sure," but he went on to explain that he was advised that the solicitor's office advised that "he didn't have control over the work site, and so forth, and I just got the opinion, that maybe they were going under some of the old type of case law decision, with respect to independent contractors" (Tr. 14-15). Counsel confirmed that at the time the motion was filed, MSHA's Independent Contractor regulations had been adopted and published at 30 C.F.R. Part 45 (Tr. 15).

In further explanation as to why the prior case was withdrawn, petitioner's counsel stated as follows (Tr. 16):

> MSHA does have some internal informal guidelines, for when to cite truckers, not having back-up alarms, and it's my understanding in

> the past, that if the truck is not backing up in the pit, that it was just going around in a circle, in a circle and did not back up, that MSHA would not cite the independent contractor.
>
> But if the truck was backing up, then MSHA would cite the independent contractor, and it may be in the prior case, that the truck was not backing up, and that may have been one of the reasons for not doing it. I don't know if that's still MSHA's informal policy or not, but I couldn't find it written anywhere.

Respondent's counsel asserted that the respondent is a general common carrier regulated by the Federal Interstate Commerce Commission and other appropriate state and local authorities, that it has approximately 30 employees, and does a gross annual business of approximately 10 million dollars (Tr. 8). Counsel argued that since the respondent is a certified interstate public carrier who is also regulated by the Department of Transportation, it is in fact a utility service providing services to the general public, and is not an independent contractor. Counsel also maintained that since the cited piece of equipment is a tractor trailer and not a truck, it is not the type of equipment intended to covered by the cited mandatory safety standard section 77.410 (Tr. 11-12). At the close of the petitioner's case, respondent's counsel moved for a dismissal of the case on jurisdictional grounds, and he also asserted that the petitioner had failed to establish a violation (Tr. 91). The motion was denied (Tr. 94).

Respondent Troy Johnson testified that he operates trucking, construction, and ready-mix operations, and that each of these business ventures are incorporated as separate corporations. His trucking business is incorporated as Johnson's Trucking, Inc., and he serves as vice-president of that corporation. He confirmed that his trucking company hauls freight and bulk commodities such as fertilizers, road building materials, different types of iron and copper ore, and coal, and that this operation encompasses an eleven state area (Tr. 30-31). He estimated that the company uses 118 trucks for its haulage business, and these include company owned trucks as well as trucks owned and operated by independent haulage contractors who may perform services for his company (Tr. 36).

Mr. Johnson disputed the assertion that he uses coal haulage "trucks" to haul and deliver coal. While he agreed that there is only one basic kind of equipment used for this purpose, he insisted that they are not "trucks." His position is that they are separate tractor and trailer units which are not within the scope and intent of section 77.410. He identified several photographs as the type of equipment used for hauling coal (Tr. 34, 38; exhibits R-2(a), (c), and (f)). He believed that these units are "unique" tractor and trailer units which are used in conjunction with different types of trailers or "beds." His company has approximately 120 to 130 of these trailer beds, and they are used interchangeably for hauling coal, sand, asphalt, etc. (Tr. 39-41). His company performs its own maintenance on the trucks (Tr. 34).

Mr. Johnson denied that he has any formal contractual arrangements with Turner Brothers, but he did concede that on the day the citation issued, Turner Brothers paid him for hauling coal from its mine (Tr. 31). He explained that he is sometimes compensated by coal brokers for hauling coal which they have purchased, and at other times he is paid by the mine operator who produces it (Tr. 31-32). With regard to his relationship with Turner Brothers, Mr. Johnson indicated that he is simply called and told to come to the mine to pick up and deliver coal which needs to be hauled to one of Turner's customers (Tr. 33). He stated that during the period in question, his trucks were at the mine site "most every day" (Tr. 37), that on any given day he would have as many as five trucks at the site hauling coal, and that some of the trucks would be there for more than one trip (Tr. 37-38).

Mr. Johnson could not state the percentage of time his trucks would be hauling coal, as compared to the haulage of other products, but he did indicate that his trucks also loaded barges from tippling areas, and that he hauled "a lot of the coal that Turner produces, and some of the coal that McNabb produces" (Tr. 36). In response to a question as to whether his trucks regularly enter coal mines, he responded "* * * I will have trucks, at some mines, almost every day, somewhere" (Tr. 37).

Inspector Coleman stated that independent contractors are not required to have a legal identity number until a condition warranting a citation is found (Tr. 88). He confirmed that the person shown on MSHA's indentification records as responsible for safety and health matters at the mine was mine superintendent Payne (Tr. 86).

Findings and Conclusions

The Jurisdictional Question

Section 3(d) of the Act defines "operator" as "any owner, lessee, or other person who operates, controls, or

supervisors a coal or other mine or any independent contractor performing services or construction at such mine." (Emphasis added).

Section 3(g) defines "miner" as "any individual working in a coal or other mine," and section 3(h)(1) defines "coal or other mine" as including, inter alis, "lands, excavations, structures, facilities, equipment, machines, tools, or other property * * used in, or to be used in * * * the work of extracting such minerals from their natural deposits * * *."

The legislative history of the Act clearly contemplates that jurisdictional doubts be resolved in favor of Mine Act jurisdiction. The report of the Senate Committee on Human Resources states:

> The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

S.Rep. 95-181, 95th Cong., 1st Sess. (May 16, 1977) at 14: Legislative History of the Mine Safety and Health Act, Committee Print at 602 (hereinafter cited as Leg. Hist.).

As part of the 1977 amendments to the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1969) (amended 1977) ("Coal Act"), the phrase "any independent contractor performing services or construction at such mine" was added to the Coal Act's definition of operator. The amendment was intended "to settle an uncertainty that arose under the Coal Act, i.e., whether certain contractors are "operators' within the meaning of the Act," and "to clearly reflect Congress' desire to subject contractors to direct enforcement of the Act." Old Ben Coal Co., 1 FMSHRC 1480, 1481, 1486 (October 1979). Accord, Phillips Uranium Corp., 4 FMSHRC 549, 552 (April 1982).

On the facts of this case, MSHA obviously considered the respondent an "independent contractor" subject to the Act. Although the citation was initially served on the mine operator Turner Brothers, Inc., the inspector specifically noted on the face of the citation that the cited truck belonged to the respondent, and he included the respondent's contractor identifiedation number. He subsequently modified the citation to show the respondent as the responsible party.

MSHA's Independent Contractor regulations, which provide certain requirements and procedures for contractors to obtain MSHA identification numbers, Part 45, Title 30, Code of Federal Regulations, section 45.1 et seq., defines an "independent contractor" as follows at section 45.2(c):

> "Independent Contractor' means any person, partnership, corporation, subsidiary of a corporation, firm, association or other organization that contracts to perform services or construction at a mine; * * *

I take note of the fact that section 45.3(a) states that an independent contractor may obtain a permanent MSHA identification number by submitting certain information to MSHA's district manager. Further, by letter and attachments filed on December 20, 1984, in response to my inquiries made during the course of the hearing regarding the procedure for assigning mine identification numbers to contractors, petitioner's counsel submitted a copy of MSHA's policy memorandums concerning certain guidelines for its independent contractor regulations found in Part 45, Title 30, Code of Federal Regulations, particularly with regard to the reporting requirements found in Part 50, Sections 50.20, 50.30, and 50.40 (accident and injury reports, and certain production and maintenance reports and records). Counsel's letter states in pertinent part as follows:

> Please note that these guidelines, as enforced by MSHA, only require that certain independent contractors comply with 30 C.F.R. Part 45 and sections 50.20, 50.30, and 30 C.F.R. Part 50.
>
> However, the fact MSHA does not require certain independent contractors to get ID numbers does not mean they cannot be cited for health and safety violations under the Act.
>
> As explained in the policy memorandum, the "primary purpose of 30 C.F.R. sections 45.3, 45.4 and 50.30 is to collect information that is necessary for MSHA to effectively and efficiently administer the Act.' Therefore, independent contractors who do not spend much time on mine property are not generally required to get an ID number (see paragraph 8 on page 3).
>
> On pages 2 and 3 of the policy memorandum, MSHA lists eight groups of independent contractors who should be required to get ID numbers. However, when MSHA observes a violation committed by an independent contractor who does not fall within one of the eight groups, they assign that independent contractor an ID Number (see page 3, 1(a)).

> In the instant case, it is my understanding that the MSHA inspector, who issued the prior citation which was dismissed, sent in the information and the Kansas City office issued Johnson's Trucking an ID number. Johnson's Trucking did not apply for it.

Included among the groups of "independent contractors" who are required to get MSHA ID numbers are those contractors performing the type of work described by item 8 on page 3 of the policy memorandum submitted by petitioner's counsel. That work is described as follows:

> Material handling within mine property; including haulage of coal, ore, refuse, etc., unless for the sole purpose of direct removal from or delivery to mine property. (Emphasis added).

On the facts of this case, since the sole purpose of the respondent's trucking services at the mine was to transport coal from mine property, it would appear that for purposes of MSHA's Part 50 regulations, the respondent may not be considered to be an independent contractor. However, Guideline #1, which appears at page 3 of the memorandum, goes on to state that contractors who have not been assigned an identification number under section 45.3, may nonetheless be assigned such a number by the appropriate MSHA district or subdistrict office when they are cited for any violation.

After review of all of these regulatory requirements seemingly promulgated to identify who is and who is not an independent contractor, I find them rather confusing and contradictory. One regulation states that an independent contractor may obtain an identification number; another regulation states that no identification number need be assigned if the contractor's work simply involves hauling coal directly from the mine property; and yet another one states that the first time a contractor is observed violating the law, MSHA's district of subdistrict office will gratuitously assign such a number to the contractor. Nowhere in any of this maze of regulatory gobbledygook have I been able to find a direct and succint regulation providing guidelines for a simple, direct, and intelligent system for the identification and tracking of independent contractors for purposes of MSHA's enforcement jurisdiction in cases involving violations of the mandatory safety and health standards found in Title 30, Code of Federal Regulations.

In addition to the prior dismissal by Judge Moore, the respondent's arguments against jurisdiction in this case is its assertion that it had no express written contract

with Turner Brothers to haul its coal, and that its Federal ICC or DOT authorizations to Act as a "public utility" prohibits it from entering into any contractual or "independent contractor" relationships with its customers. Since the respondent did not elaborate further, and has filed no supporting arguments or brief on this question, I am unable to consider this argument in any detail. However, assuming that the respondent's arguments are correct, simply because the ICC and DOT may have issued certain limitations concerning its operational authority, does not negate the fact that it is in a coal haulage business directly related to mining, and the critical question is whether or not its trucking services provided to mine operators may be construed or characterized as services provided by an "independent contractor" within the meaing of the Act.

In a recently decided "independent contractor" case concerning a public utility power company providing certain services to a coal mine operator, Old Dominion Power Company, 6 FMSHRC 1886 (August 29, 1984), the Commission's majority held that the power company was an independent contractor subject to the Mine Act. Several findings by the Commission with respect to the interpretation and application of the term "independent contractor" are relevant in the instant case, and they are quoted below in pertinent part:

> Generally, the term "independent contractor' describes a party who "contracts with another to do something . . . but who is not controlled by the other nor subject to the other's right to control with respect to his . . . conduct in the performance of the undertaking.' Restatement (Second) of Agency, 2 (1958). (6 FMSHRC 1890-91).
>
> * * * the Mine Act is applicable to independent contractors "performing services or construction' at a mine. * * * "Service' has been defined to include: "the performance of work commanded or paid by another;' "an act done for the benefit or at the command of another;' and "useful labor that does not produce a tangible commodity.' Webster's Third New International Dictionary (Unabridged) 2075 (1971). * * * At the time of the events at issue, Old Dominion was at the mine site at the behest of the mine operator to check the equipment to determine whether it was functioning properly and, if necessary, to replace any defective components. In our view, the work performed by Old Dominion constututes the performance of a service and places it within the literal terms of section 3(d). (6 FMSHRC 1891).

> We find it unnecessary to decide in this case whether "there may be a point . . . at which an independent contractor's contact with a mine is so infrequent or de minimis that it would be difficult to conclude that services are being performed.' National Industrial Sand Assoc. v. Marshall, 601 F.2d 689, 701 (3d Cir.1979). See also Legis. Hist., supra at 602, 1315. Rather, we conclude that, if there is a point at which the literal reach of section 3(d) must be tempered, that point is not reached under these facts. Here, Old Dominion's employees were at mine property at the request of the mine operator. The request for Old Dominion's services was made, and responded to, in accordance with a longstanding, and regularly maintained, business relationship defined by a written contract entered into in 1952 as well as custom and practice. * * * The extent of Old Dominion's contact with the mining process cannot be viewed as de minimis. Accordingly, we conclude that in these circumstances, Old Dominion is properly subject to MSHA standards regulating safe performance of electrical work on mine sites. (6 FMSHRC 1892).
>
> We emphasize that by citing Old Dominion for the violation committed by its employees, the Secretary has acted in accordance with the Commission's longstanding view that the purpose of the Act is best effectuated by citing the party with immediate control over the working conditions and the workers involved when an unsafe condition arising from those work activities is observed. Old Ben, supra; Phillips Uranium, supra. By citing the operator with direct control over the working conditions at issue, effective abatement often can be achieved most expeditiously. Id. Citation of Old Dominion is also consistent with the Secretary's conclusion, after rulemaking, that "the interest of miner safety and health will best be served by placing responsibility for compliance . . . upon each independent contractor.' 45 Fed.Reg. 44494, 44495 (July 1, 1980). (6 FMSHRC 1892).

One of the respondent's principal arguments against a finding of jurisdiction is Mr. Johnson's assertion that as a "public utility," he is prohibited by law from providing services as an "independent contractor." Aside from the fact that the respondent has failed to provide any evidentiary or legal support for this conclusion, I take note of the

fact that in the Old Dominion Power Company case the Commission held that the utility company was an independent contractor within the reach of the Mine Act. Except for the absence of any written contract between the respondent in this case and the mine operator, the crucial factors resulting in the Commission's decision in Old Dominion, as enumerated above, are also present in this case, and a discussion of these follows below.

The testimony presented in this case establishes that the respondent is engaged in a trucking business which spans several states, and that it is clearly an inter-state operation. At the time the citation was issued, the respondent's truck was at the mine performing a service for the mine operator. The mine operator mined the coal, and the respondent transported it from the mine. Mr. Johnson confirmed that his trucks were dispatched to the mine on a daily or weekly basis, and that more than one truck would often be at the mine hauling coal on any given day. As a matter of fact, on the day the truck in question was cited, Mr. Johnson had other trucks at the mine site, and after they wre inspected by the inspector, the back-up alarms were found to be in proper working order. The trucks are dispatched to the mine at the request of, and in response to, the needs of the mine operator, and the respondent is compensated for these services. Similar services have also been provided for at least one other mine operator identified by Mr. Johnson (McNabb), and Mr. Johnson confirmed that his trucks are used to haul coal from tipples to coal barges for loading.

The cited violation in this case occurred in the course of work and services being performed by the respondent's employee at a mine which is clearly covered by the Act. The employee was backing the truck up into a pit area where the mining, cleaning, and loading of coal was taking place. Thus, the loading and transportation of the coal from the mine was an integral part of the mining activity, and it seems clear that MSHA's mandatory safety standards apply to that working environment.

The testimony adduced in this case also establishes that the cited truck was owned by the respondent, that the driver was its employee, and there is no evidence that the mine operator exercised any supervision over the driver. The testimony also establishes that the respondent performed its own maintenance on the trucks which it owned and that its own mechanic would make such repairs as required. The respondent repaired the cited truck in question, and abated the violation. Given these circumstances, it seems clear that the respondent was in the best position to insure that all applicable mandatory safety standards were complied with.

On the facts of this case, respondent has not established that its trucking services provided to at least two mine operators was de minimis. On the contrary, the facts presented support a conclusion that the respondent had a continuous arrangement with Turner Brothers to haul its coal, and that several trucks are at the mine on any given day to provide these services. Mr. Johnson candidly admitted that he hauls "a lot of the coal that Turner produces," and when asked whether his trucks regularly enter coal mines, he responded "I will have trucks, at some mines, almost every day, somewhere" (Tr. 36-37). Respondent's counsel indicated that its trucking operation has 30 employees and does ten million dollar gross annual business (Tr. 8).

A secondary jurisdictional defense advanced by the respondent is the assertion that it does not have a written contract with any mine operators for the haulage of coal. This defense is rejected. It seems clear from the record in this case that the respondent provides coal haulage services for mine operators, and that these services are carried out for the mutual benefit of both parties as a regularly acceptable and normal business custom or practice. On the facts of this case, the respondent and its customers have an implied or oral contractual relationship, and it seems that each enjoy the benefits of such a relationship. Under the circumstances, I cannot conclude that the lack of any evidence of an express written contract is relevant or material to the jurisdictional status of the respondent in this case.

After careful consideration of all of the evidence and testimony adduced in this case with respect to the jurisdictional question, I conclude and find that for purposes of this proceeding, Johnson's Trucking Company is an independent contractor within the meaning of the Act, and that at all relevant times was subject to MSHA's enforcement and compliance jurisdiction.

MSHA's Dismissal of the Prior Proceeding

In the answer filed in this case, the respondent asserts that MSHA is not consistent in the manner in which it has enforced the Act, and that the failure of uniform enforcement is discriminatory. While I can readily understand the respondent's frustrations, it should take solace in the fact that when dealing with "independent contractors," consistency and uniformity in the interpretation and application of its promulgated guidelines is not one of MSHA's strong points. The decisional case law which has developed since the adoption of the "independent contractor" regulations attest to the problems created by lack of uniformity and consistency. However, the fact that such inconsistencies arise from time to time, as it has in this case, does not establish a a discriminatory scheme of endorcement.

The prior civil penalty case initiated by the Kansas City Regional Solicitor's Office against this same respondent concerned a citation which was issued because one of its trucks had an inoperable back-up alarm. As indicated earlier, the case was dismissed by Judge Moore on motion by the solicitor's office on jurisdictional grounds. The solicitor withdrew the civil penalty proposal because he made a determination that at the time that particular citation was issued, Johnson's Trucking, Inc., was not acting with respect to the mine operator as an independent contractor within the meaning of section 3(d) of the Act, and MSHA's Part 45, Independent Contractors regulations.

The factual background which prompted the prior dismissal on jurisdictional grounds is not the same as that presented in the case before me for adjudication. I take note of the fact that in the prior case, the situs of the mining operation, as well as the mine operator, were both under the enforcement jurisdiction of MSHA's Kansas City Regional Office. In the case before me, the mining operation, as well as the operator (Turner Brothers), are not the same, and they are within the enforcement jurisdiction of MSHA's Dallas Regional Office. While I am in sympathy with the respondent's frustrations and concern over MSHA's apparent inconsistent jurisdictional positions, I am constrained to adjudicate the case before me on its particular facts. MSHA's prior discretionary decision to withdraw its civil penalty proceeding, mistaken or not, is not binding on me in the instant case, nor is it controlling.

I take particular note of the fact that in the prior case, the attorney who represented the respondent is the same attorney who now represents him in the case before me. Under the circumstances, I believe it is reasonable to assume that he is aware of the facts which prompted MSHA's motion for a dismissal of the prior case. If not, I further believe that he had a duty in this case to come forward with a full argument in support of any conclusion that the respondent is not subject to the Act, or to at least initiate discovery to ascertain any critical distinctions which he believes support a conclusion that the respondent is not within the reach of the Act.

Since this is a civil penalty proceeding, the initial burden of establishing jurisdiction, as well as the alleged fact of violation, lies with the petitioner. While it would have been better for MSHA' attorney to "lay all the cards on the table" at the beginning of the hearing, rather than have me drag it out of him, "card-by-card," he finally conceded

the possibility of a mistake on the part of his counterpart in the Kansas City Solicitor's Office with respect to the jurisdictional question. In response to my questions during the hearing, counsel reluctantly produced an internal memorandum prepared by an MSHA attorney in the Kansas City Regional Solicitor's Office, addressed to the Regional Solicitor, taking issue with another attorney's interpretation of MSHA's Part 45 regulations, as applied to the facts in the prior case. The memorandum was received in camera, and counsel has filed a letter strenuously objecting to the release of the document on grounds of an asserted "government deliberative process privilege," as well as an assertion that the information contained therein is irrelevant to any issue presented in this case.

With regard to the question of relevancy, counsel's objections to the release of the memorandum in question on this ground IS REJECTED. The respondent here has specifically placed the question of jurisdiction in issue. Given the fact that the respondent's answer clearly implied that the facts in both cases were the same, and that it was being charged with the very same violation, the basis for MSHA's prior conclusions and motion for dismissal are certainly relevant. This is precisely the point made earlier in this decision concerning MSHA's inconsistent positions concerning independent contractors. Rather than candidly admitting that a mistake was possibly made, with full disclosure as to the facts, counsel here obviously wishes to spare his colleagues, including the regional solicitor, some embarrassment over an apparent internal disagreement among government attorneys as to the reach of MSHA's Part 45 regulations.

During the course of the hearing in this case, petitioner's counsel offered some insight into a possible explanation as to why the prior case was not pursued. He alluded to the fact that in the prior case, the facts apparently indicated that the cited truck was not backing up at the time the inspector discovered that it had an inoperable back-up alarm, and that since it apparently took a circle route, and did not back up, the independent contractor truck operator driver would not be cited. Since there was not evidence that the truck was backing up, counsel surmized that this influenced the solicitor's decision not to pursue the matter further.

I have reviewed the "internal memorandum" that counsel here so zealously wishes to protect from disclosure, and I will not order that it be released or made a part of the public record in this case. It will remain sealed with the record as an in camera document. I find nothing persuasive

in that document that would lead me to conclude that the respondent, on the facts of the case before me, is not an independent contractor. As a matter of fact, although the author of the in camera document disagreed with one of his fellow attorneys who is not fully identified by name, with respect to the interpretation and application of the term "independent contractor" pursuant to 30 C.F.R. Part 45, he nonetheless concurred and agreed with the ultimate conclusion that the case against the respondent should not be litigated, and that the case should be dismissed.

Fact of Violation

The respondent in this case is charged with a violation of mandatory safety standard section 77.410, which requires certain designated equipment to be equipped with an adequate automatic warning device which shall give an audible alarm when such equipment is put in reverse. The petitioner has established by a preponderance of the evidence and testimony adduced in this case that the cited truck did not have such a required device at the time the inspector observed it operating in reverse, and the respondent has not rebutted this fact. Although the question of the use of a toggle switch has been raised in this case, I need not address that question. Respondent is not cited with using such a device, and I have decided the case on the limited issue as to whether or not the truck in question complied with the requirements of section 77.410. Since I have concluded that it did not, I conclude and find that the petitioner has established a violation, and the citation IS AFFIRMED.

While I have affirmed the citation issued in this case, I feel compelled to comment on the procedures followed by the inspector in issuing the citation. While it is clear that at the time Inspector Coleman cited the truck in question for an inoperable back-up alarm, he had no knowledge regarding the installation of any toggle switch. He simply assumed that the alarm was inoperative because he did not hear it sounding at the time he observed the truck operating in reverse while it was backing up into the pit. In my view, while this is sufficient to sustain a violation, it seems to me that when an inspector finds a condition that he believes constitutes a violation, he should at least determine the cause of the violation so that he may make an informed judgment as to what is required to achieve abatement. Here, the inspector did not initially speak to the driver of the truck, nor did he look into the cab to ascertain whether a toggle switch was installed. He simply "walked away" from the situation, and left it to the mine superintendent to insure that corrective action was taken.

Although Inspector Coleman indicated on the face of his citation that the cited truck belonged to the respondent,

he made no effort at the time he issued it to contact the respondent to specifically put him on notice that he was to take the corrective action. The inspector's explanation that he has to deal with a great number of independent contractors does not justify his failure to immediately notify the respondent of the citation. On the facts of this case, the independent contractor was readily identifiable, and it is inexcusable for an inspector to simply take the "easy route" of citing the mine operator. Inspection practices of this kind do little to enhance safety, but do much to escalate and exacerbate otherwise routine citations, and MSHA should give more attention to such practices.

Since the inspector modified his citation to show that the independent contractor was the responsible party, and since the record here establishes that the respondent was on notice as to the violation, and subsequently abated the condition, I cannot conclude that it has been prejudiced by the inspector's initial failure to name it as the responsible party or to immediately notify it of the violative condition.

I reject Mr. Johnson's assertion that the cited piece of equipment in this case was not a "truck" within the meaning of section 77.410, and that it is somehow a "unique" piece of equipment that is beyond the reach of the standard. Having viewed the photographs of the cited truck, and after consideration of all of the testimony in this case, I find that the cited truck, which consists of a unit composed of a "tractor trailer" and an attached coal carrying bed, constitutes a "truck" within the meaning and intent of section 77.410.

The respondent has not rebutted Inspector Coleman's testimony that at the time he observed the cited truck backing into the pit with an inoperable back-up alarm, two workmen were on foot in the pit cleaning coal, an end loader was loading coal, and the inspector, a mechanic, and a foreman were also on foot. Although the cleanup men were some 40 to 50 feet behind the truck, the other individuals were 20 to 30 feet behind the truck, and the inspector believed that in the normal course of backing up, the truck would be within close proximity of all of these individuals. With the normal equipment noises emanating from the truck and end loader, the inspector believed that the men working in the pit would not hear the truck backing up without an operable audible alarm to warn them, and he believed that, in these circumstances, it was reasonably likely that an accident could occur, and that in such an event, the men would sustain serious or fatal injuries.

Given the foregoing facts, I agree with the inspector's assessment of the likelihood of an accident and injuries. Accordingly, I conclude and find that the violation was significant and substantial, and the inspector's finding in this regard IS AFFIRMED.

Negligence

In view of MSHA's prior self-initiated withdrawal and dismissal of the prior civil penalty proceeding against the respondent for an identical alleged violation of the back-up alarm requirements of section 77.410, including the respondent's reliance on that decision, I conclude and find that the violation in this case resulted from a slight degree of negligence on the respondent's part. The stipulation by the respondent that the cited truck was equipped with an operative device of some sort, although inoperative when the truck was operated in reverse, is at least indicative of the fact that the respondent was not totally oblivious to the fact that the truck was required to be equipped with such a device.

Gravity

I conclude and find that the lack of an operable audible back-up alarm constitutes a serious violation in that the possible failure of the men on foot behind the truck to hear it when it backed up exposed them to a real hazard of being struck.

Good Faith Compliance

Respondent's counsel conceded that the January 24, 1984, section 104(b) withdrawal order was not contested, but he explained that "I think he (the respondent) did, contest it, by just protesting it" (Tr. 81). Counsel conceded that since no formal contest was filed within the statutory time period provided by the Act, that the legality of the order and any issue concerning the reasonableness of the abatement time, is not directly in issue in this civil penalty case, but that I may consider the circumstances in any finding concerning good faith abatement (Tr. 81).

The unrebutted facts in this case establish that immediately upon notification of the violative condition, the respondent dispatched a mechanic to the mine to repair the inoperable back-up alarm. While the record is not absolutely clear as to what transpired after this, it seems apparent to me that the mechanic either installed a toggle switch, or repaired one which had already been installed, but that this met with opposition from the inspector who believed

that such a device was illegal. However, petitioner's counsel conceded that there is no evidence that the respondent was ever told that a toggle switch could not be used (Tr. 84), and testimony of Mr. Johnson and Mr. Payne concerning the respondent's abatement efforts, particularly with respect to the purchase and installation of the part required to render the inoperable alarm "automatic" stands unrebutted by the petitioner. Under the circumstances, I conclude and find that the respondent took reasonable and prompt steps to achieve abatement in this case, and that its efforts in this regard support a conclusion that it exercised good faith in ultimately achieving compliance.

History of Prior Violations

Petitioner's counsel stipulated that the respondent has no history of prior violations (Tr. 21-22), and I adopt this as my finding on this issue.

Size of Business and Effect of Civil Penalty on the Respondent's Ability to Continue in Business

For the purposes of this proceeding, and on the basis of the available information concerning the respondent's trucking operation (30 employees; over 100 trucks; and approximately ten million dollars in annual revenues), I conclude and find that the respondent is a fairly large independent contractor, and that the civil penalty which I have assessed for the violation in question will not adversely impact on its ability to continue in business.

Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, and all of the foregoing facts and circumstances presented in this case, I conclude and find that a civil penalty assessment in the amount of $50 for the citation in question is reasonable.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of $50 for the citation in question, and payment is to be made to the petitioner within thirty (30) days of the date of this decision. Upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge