FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION.

OFFICE OF ADMINISTRATIVE LAW JUDGES
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APR 20 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 89-143
	:	A.C. No. 36-00845-03501
v.	:	
	:	Cambria Slope
BULK TRANSPORTATION SERVICES, INC., Respondent	:	

DECISION

Appearances: James Culp, Nanci Hoover, Esqs., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner;
Thomas E. Weiers, Jr., Esq., Rich, Fluke, Tishman & Rich, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated 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 $54, for an alleged violation of mandatory safety standard 30 C.F.R. § 77.807-3. The respondent filed a timely answer denying the alleged violation, and a hearing was held in Indiana, Pennsylvania. The parties filed posthearing briefs, and I have considered their arguments in the course of my adjudication of this matter.

Issues

The issues presented are (1) whether the respondent is an independent contractor and the proper party responsible for the alleged violation; (2) the appropriate civil penalty that should

be assessed against the respondent for the alleged violation based upon the criteria found in section 110(i) of the Act; and (3) whether the violation was "significant and substantial." Additional issues raised by the parties are identified and discussed in the course of this decision.

Applicable Statutory and Reaulatorv Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.

2. Sections 110(a) and (i) of the 1977 Act, 30 U.S.C. § 820(a) and (d).

3. MSHA's Independent Contractor regulations, Part 45, Title 30, Code of Federal Regulations.

4. Commission Rules, 20 C.F.R. § 2700.1 et seq.

Petitioner's unopposed oral motion made at the hearing to amend its pleadings to reflect an alleged violation of mandatory safety standard 30 C.F.R. § 77.807-3, rather than 30 C.F.R. § 77.807-2, was granted (Tr. 10).

Stipulations

The parties stipulated to the following (Tr. 10-13):

1. A true and correct copy of the contested citation was properly served on the respondent by a duly authorized representative of the Secretary of Labor, and the citation and termination may be admitted for the purpose of establishing their issuance, and not for the truthfulness of the statements asserted therein.

2. For the purposes of the size of the respondent's business, the parties agree that the respondent company does not have any annual coal production.

3. The respondent's history of prior violations consists of "zero violations" during the 24-month period preceding the issuance of the contested citation.

4. A civil penalty assessment for the alleged violation, if established, will not adversely affect the respondent's ability to continue in business.

5. At the time of the alleged violation, the respondent was under contract with the Beth Energy Mines Incorporated to haul coal from its Cambria Coal

Preparation Plant to sites designated by Beth Energy Mines Incorporated.

6. The respondent subcontracted with one James R. Krumenaker, an independent trucker, to haul coal pursuant to its contract with Beth Energy Mines Incorporated, in accordance with a motor vehicle leasing agreement' which is included as respondent's exhibit R-2.

7. The respondent registered with the Beth Energy Mines Incorporated, the production operator, the information required by MSHA regulation 30 C.F.R. § 45.4.

8. The coal being hauled by trucker James R. Krumenaker was being placed into the stream of Interstate Commerce, and it was being hauled from the Cambria Mine to the Pennsylvania Electric (Penelec) Power Plant at Homer City, Pennsylvania.

9. The parties further stipulated to the admissibility of exhibits P-l and P-2, and R-l through R-4 (Tr. 19).

Discussion

The undisputed and stipulated facts establish that on or about January 4, 1989, MSHA Inspector Nevin J. Davis went to the Cambria Coal Preparation Plant mine site owned and operated by Beth Energy Mines Incorporated in response to information which he had received that the mine fan and power were out of commission because something had come in contact with an overhead high-voltage powerline. After arriving at the site, the inspector found that a coal haulage truck being operated by Mr. James Krumenaker, whose truck was leased to the respondent, had come in contact with the power wire. Mr. Krumenaker had raised the bed of his truck to get rid 'of some snow and ice while he was parked under the power wire waiting for the truck to be loaded with coal. Although the truck was damaged when the bed contacted the wire, Mr. Krumenaker jumped from the truck after it contacted the wire and he was not injured. Since there were no injuries, the incident was not a "reportable accident" and it was not reported to MSHA.

The facts further show that at the time of the incident, the respondent had a contract with Beth Energy Mines to haul coal from the Cambria Preparation Plant to various locations designated by Beth Energy Mines. Mr. Krumenaker's load was scheduled to be delivered to the Pennsylvania Electric (Penelec) Power Plant at Homer City, Pennsylvania. The respondent, owned no trucks of its own, but had lease agreements with several independent coal haulers, including Mr. Krumenaker, to haul coal for

Beth Energy from the Cambria Preparation Plant to customers designated by Beth Energy. After completing his inquiry of the incident, Inspector Davis issued section 104(a) **"S&S"** Citation No. 2889508, to the respondent citing an alleged violation of mandatory safety standard 77.807-2. As noted earlier, the citation was amended to charge an alleged violation of section 77.807-3. The cited condition or practices states as follows:

> A coal truck being operated by an independent contractor for Bulk Transportation Services, Inc., **(PUC # A101351CCMC154209)** came into direct contact with an overhead energized high voltage transmission line **(46KV)** in and around the immediate area of the Penelec Substation. This truck was stopped directly under this high voltage transmission cable when the truck bed was inadvertently raised in the upwards position for the purpose of removing snow and ice from the inside of the truck bed and came directly into contact with the high voltage transmission cable. No injuries occurred at this time, however, several of the truck tires were destroyed.

MSHA's Testimony and Evidence

MSHA Inspector Nevin J. Davis confirmed that he issued the citation in question, and he explained that he was informed that the mine fan and power were out of commission because something had come in contact with a high-voltage powerline and shorted out the power. Mr. Davis stated that he determined that a haulage truck operated by James Krumenaker came into contact with the powerline after Mr. Krumenaker raised the truck bed to get rid of some snow and ice while parked under the powerline.

Mr. Davis stated that the truck was on the property to pick up and haul coal from the mine to another site. He confirmed that he cited the respondent with the violation because it was the only independent contractor who was on the list maintained by the mine operator Beth Energy Mining Company pursuant to 30 C.F.R. § 45.4. Mr. Davis explained further that the truck had a decal on it identifying the respondent as the truck operator and he assumed that the driver, Mr. Krumenaker, was employed by the respondent. He confirmed that Mr. Krumenaker was not listed as an independent contractor performing services at the mine.

Mr. Davis stated that he made a gravity finding of **"highly likely,"** and considered the violation to be S&S, because he believed that the driver could have suffered fatal injuries by the truck coming in contact with the high-voltage line. He stated that the contact blew out eight of the truck's tires and that the driver was very upset.

Mr. Davis stated that he based his low negligence finding on the fact that the driver may not have been aware of the fact that he had stopped his truck under the high-voltage line. He stated that the incident occurred at 4:45 a.m. and that the visibility was poor. Mr. Davis confirmed that the high-voltage line was located at an appropriate height above the truck, and that the height and location of the line did not violate any MSHA standard.

Mr. Davis stated that the truck driver told him that he had raised the truck bed to remove snow and ice before loading the truck. Mr. Davis confirmed that the respondent had a contract with Beth Energy to haul coal and that it made no difference to him whether or not the respondent had a sub-contract with anyone else. He also confirmed that the driver informed him that he had no haulage contract with Beth Energy (Tr. 20-28).

On cross-examination, Mr. Davis confirmed that although Mr. Krumenaker did not indicate that he was an employee of the respondent, he assumed that he was because of the respondent's sign on the truck. Mr. Davis stated that he is authorized to issue a citation to an independent contractor for a violation even though the contractor may not be designated as an independent contractor on the mine operator's records.

Mr. Davis confirmed that the violation was abated by David Gould, Beth Energy's plant foreman, and that Mr. Gould instructed Mr. Krumenaker to be aware of the high-voltage line. Mr. Davis further confirmed that if the powerline was not located at the proper height, he would have issued a citation to Beth Energy.

Mr. Davis stated that the State of Pennsylvania PUC number must be displayed when the coal haulage truck is hauling coal. He confirmed that he served the citation *on* the respondent because he determined that the truck driver was hauling coal off the mine property which was owned and operated by Beth Energy (Tr. 29-33). He confirmed that even if Mr. Krumenaker were not an employee of the respondent, it would have made no difference to him because he relied on the fact that Mr. Krumenaker was hauling coal for the respondent (Tr. 34).

Mr. Davis confirmed that the driver was parked in his empty truck while waiting to load and raised his truck bed to free it of ice and snow which may have presented a tipping hazard and did not realize that he was under the overhead powerline, Since the driver jumped out of the vehicle when it contacted the wire, he was not injured, and the incident was not considered to be a reportable accident (Tr. 40). He confirmed that he spoke with the driver who informed him that he did not know that the wires were overhead (Tr. 41).

Mr. Davis stated that the sign on the truck was a wooden board which were standard on all of the respondent's trucks, and since it contained the respondent's name, he assumed that the truck belonged to the respondent. He did not ask the driver whether he worked for the respondent, and simply assumed that he did because of the sign (Tr. 43). If the driver had told him that he was an independent contractor, he would "probably" have issued a citation to him and a citation to Beth Energy for not listing the driver on its records as an independent contractor (Tr. 43).

Mr. Davis confirmed that Beth Energy did not have a sign warning drivers about low overhead clearances. He did not cite Beth Energy because it was difficult for Beth Energy to control a driver's raising of his bed, and Beth Energy usually instructed people "about raising beds and stuff like that" (Tr. 44). He confirmed that the location of the power wire met MSHA's minimum over head clearance distance requirements under section 77.807-2. He described the truck as a regular triaxle coal haulage truck with a "telescopic" boom jack for raising the bed (Tr. 46-47).

Mr. Davis confirmed that he spoke with the respondent after issuing the citation and explained what he had done, and that the respondent took the position that it was not responsible for the violation. Mr. Davis then suggested that the respondent seek a conference with MSHA's district manager, but it did not prevail on its position that the citation should not have been served on the respondent (Tr. 51).

Mr. Davis identified exhibits R-3 and R-4, as copies of two prior citations he issued on January 29, 1987, to Beth Energy at the Cambria Preparation Plant for violations of section 77.1710(d) and 77.1608(c) when he observed that a truck driver was not wearing a suitable hard hat while at the dumping silo, and that the driver was exposed to a hazard while in an area where coal dumping operations were taking place. He confirmed that the citations were subsequently modified after Beth Energy protested during an MSHA conference, and the modifications reflect that they were reissued to Bulk. Mr. Davis confirmed that Bulk was subsequently absolved of any responsibility for the citations, but he could not recall who they were reissued to (Tr. 53). Respondent's counsel explained that after convincing MSHA during a conference that the cited conditions were caused by another independent contractor MSHA advised Bulk that they would be reissued to that contractor and they are not included as part of Bulk's violation history (Tr. 54-55). Inspector Davis confirmed that this was the case, and he indicated that the citations were issued by MSHA "orally" to the other unidentified independent contractor (Tr. 56-57).

In response to a bench question as to the distinctions between the prior enforcement actions where MSHA absolved the

respondent from any responsibility for the two prior violations, and the instant case, Mr. Davis responded "the only way I can answer that is that at that time that was MSHA policy, I guess. It was taken out of my hands and turned over to my supervisor and he handled it" (Tr. 58). A copy of the MSHA district manager's comments concerning the conference held with the respondent concerning the contested citation states as follows (exhibit P-3):

> The following citation was conferenced and the information provided by the operator did not justify any change. Mr. Merlo stated that he has over 70 independent drivers who haul under his PUC number and contract with Beth Energy Mines, Inc. He also informed me that he pays the drivers for what they haul, however, in his opinion they are not his employees and if the citation would have been issued to one of his people there would be no problem. At this point in the conference Mr. Merlo produced a contract that is held between his company and all independent drivers which holds all drivers responsible for fines and penalties arising out of the use of their equipment. A review of the contract between Mr. Merlo and his independent drivers and a discussion with Beth Energy Mines Inc., revealed that the Independent Contractor Register required under Part 45.4 is on file with the production operator listing Bulk Transportation Services, Inc., as the contractor. Therefore the citation stands as issued.

Inspector Davis confirmed that he has never cited a construction subcontractor, and that pursuant to MSHA policy, if there are contractors and subcontractors present "I would think we cite the contractor" (Tr. 68).

Respondent's Testimony and Evidence

Charles J. Merlo, Jr. confirmed that he is the owner and president of the respondent company. He stated that including himself, the company has a total of three employees, and he identified the other two employees as a dispatcher and a bookkeeper. He further confirmed that the company owns no trucks and has no truck drivers on its payroll.

Mr. Merlo stated that the company has been granted authority by the Pennsylvania Public Utilities Commission to haul coal within a 45-mile radius, and in certain designated counties. He stated that he acts as a broker to haul coal for the Beth Energy Mining Company, a subsidiary of the Bethlehem Steel Corporation, and he identified a copy of a contract that he has with Beth Energy (exhibit R-l). He confirmed that he uses the services of independent haulage truck owner/operators or other trucking

companies to haul the coal for Beth Energy, and that these individuals are subcontractors authorized by the contract.

Mr. Merlo explained the procedure followed by his subcontractors to haul the coal from the Beth Energy plant, and he confirmed that the trucking companies or truck owners call his dispatcher to ascertain the available coal which needs to be hauled and these subcontractors are free to accept or reject any particular coal hauling job.

Mr. Merlo stated that he does not control the work of the subcontractor coal haulers, does not supply them with any work rules, and is not responsible for their hazard training. He believed that the hazard training for the haulage drivers is provided by Beth Energy at the mine site.

Mr. Merlo identified exhibit R-2 as a copy of his leasing contract with Mr. Krumenaker, and he confirmed that Mr. Krumenaker owns his own truck and is responsible for maintaining it, and for all insurance, social security, and workmen's compensation coverage. He confirmed that Mr. Krumenaker is also responsible for the payment of all fines for traffic and over-weight violations, and that the expenses incurred in connection with the damage to the truck in question were paid by Mr. Krumenaker or his insurance carrier.

Mr. Merlo stated that Mr. Krumenaker was compensated for his services once a month, and that he paid him a fixed sum-for each ton of coal he hauled and delivered. The amount of coal hauled and delivered by Mr. Krumenaker was computed by invoices submitted to the respondent by Mr. Krumenaker, and the coal tonnage was determined by the weight scales at the Pennsylvania Electric Company (Penelec) facility where the coal was delivered.

Mr. Merlo stated that the only control he exercises over his subcontractors concerns where the coal is to be picked up and where it is to be delivered. He explained that the subcontractor haulage truck owner/operator will call the respondent's dispatcher to ascertain where to pick up and deliver a particular amount of coal, and that the truckers then pick up and deliver the coal and bill the respondent for payment based on the coal tonnage weighed at Penelec when it is delivered.

Mr. Merlo stated that he has no employees located at the Beth Energy mine site, and he believed that there was nothing he could have done to prevent the incident in question. He confirmed that Beth Energy has notified him by letter in the past about haulage truck drivers speeding or not wearing hard hats, and that he has simply passed this information on to the truck drivers concerned.

Mr. Merlo stated that his company does not perform any regular services at the mine site, and does not perform the actual coal hauling services. This is done by contract with the subcontractor coal haulers. Respondent's counsel stated that Mr. Merlo is a trucking broker who makes sure that "coal gets moved to point A or B and arranges for people to do it" and is not involved in the selling of the coal (Tr. 79). Mr. Merlo confirmed that he has had the contract with Beth Energy since 1985 or 1986, has no supervisors at the mine site, and performs no construction work there. The trucks are loaded at the mine site for transportation from the mine, and they do not haul coal to the mine. He confirmed that some of the owner/operator truck contractors which he uses also work for other trucking carriers, and that some of these truckers have refused to haul coal for him when they can do better with other carriers, and that there is constant change, and truckers "come and go" (Tr. 85).

Mr. Merlo confirmed that he does not provide his trucking contractors with any safety rules because they are contractually responsible for these matters. He has no training responsibilities for the drivers and believes that they are hazard trained at the mine site (Tr. 86). Mr. Krumenaker has never been employed by him, and he exercises no day-to-day control over him other than to tell him where the coal is to be picked up and delivered, and to make sure that he is insured (Tr. 90). He confirmed that the citation was abated by Beth Energy by instructing Mr. Krumenaker. He also confirmed that he has never been previously cited by MSHA for any violations other than the prior two citations issued by Mr. Davis which were subsequently found not to be his responsibility (Tr. 92).

Mr. Merlo identified copies of the two prior citations issued by Inspector Davis to a truck driver employed by the Shaffer Trucking Company, one of his subcontractors. Mr. Merlo stated that the citations were issued when the driver was observed on his truck bed at a dumping point on the mine site without wearing a hard-hat. He stated that the citations were initially served on Beth Energy, but were subsequently modified at a conference to show the respondent as the responsible party. Mr. Merlo stated that when he protested this to MSHA, the citations were again modified and served on Shaffer Trucking Company. Mr. Merlo confirmed that this was done orally, and he believed that Shaffer Trucking paid the civil penalty assessments attributed to its employee truck driver. Mr. Merlo stated that he sees no distinction between the instant case and the past citations served on Shaffer Trucking, and he believed that the contested citation in this case should have been served on Mr. Krumenaker as the contractor in control of his truck, and the individual whose actions resulted in the violation (Tr. 93-96).

On cross-examination, Mr. Merlo stated that he had no knowledge that Mr. Krumenaker had any agreement with Beth Energy to

haul coal. He confirmed that Beth Energy contacts him and informs him how many coal loads are available, and that it is in his interest to make sure that the coal is hauled by the truckers who may call in for the jobs (Tr. 103). The truckers are required by state law to display his company identification decals when they are operating on his behalf. The agreement that he has with Mr. Krumenaker is the same agreement that he has with the 70 to 100 truckers which he uses, more than half of whom are owner/operators (Tr. 109). He confirmed that he leases Mr. Krumenaker and his truck, and he cannot let anyone else drive it since Mr. Krumenaker owns it and controls who drives it (Tr. 116).

Inspector Davis was recalled by the Court, and he confirmed that the prior two citations which he issued were issued because of two violations by one single truck driver in the employ of Shaffer Trucking Company. Mr. Davis stated that he initially served the violation on Beth Energy Mines because it had someone at the coal silo area in question supervising the loading and should have observed the violations (Tr. 128-130). He believed that Shaffer Trucking had its own MSHA ID number, and was readily identifiable, but that Mr. Krumenaker in this case did not have any number identifying him as an independent contractor, and he had no knowledge that Mr. Krumenaker was in fact an independent contractor (Tr. 132). When asked whether it made any sense from an enforcement point of view not to cite Mr. Krumenaker simply because he had no assigned ID number of record, Mr. Davis responded "with independent contractors, its tough. That's why we try to get back to that 45.4 to try and hold it for some reasonable justification or responsibility by that history" (Tr. 133). He confirmed that MSHA's regulation does not say anything about subcontractors (Tr. 134). Respondent's counsel confirmed that when the two prior citations were transferred from Beth Energy to the respondent, the respondent did not have an MSHA ID number, but subsequently obtained one (Tr. 139).

Petitioner's Arauments

MSHA asserts that Bulk was an independent contractor for Beth Energy, was registered as such by Beth Energy in accordance with 30 C.F.R. § 45.4, and was also identified as an independent contractor in the agreement it had with Beth Energy. MSHA points out that Bulk was performing a service at Beth Energy's mine in that it was the contractor who picked up and delivered coal to Beth Energy's customers, it was the exclusive carrier for coal delivered to the Penelec power station, and it hauled coal for Beth Energy at least 4 or 5 days a week. Under these circumstances, MSHA concludes that in order to be consistent with the expansive definition of "operator" found in the Act, and as noted by the Commission in Otis Elevator Company, 11 FMSHRC 1896, 1901-1902 (October 1989), bulk must be considered an operator under the Act.

MSHA argues that Bulk used subcontractor truck drivers who operated under its PUC authority to haul the coal from Beth Energy, and that these drivers, who typically varied from week to week, provided "a constant flow of truck drivers in and out ... working for Bulk." The lease agreement between Bulk and its subcontractors provided for periodic vehicle inspections by Bulk, and the agreement between Beth Energy and Bulk provided that Bulk would "also inspect each motor vehicle after loading in order to assure the safe movement of the load and vehicle in compliance with any law, regulations or requirement relating to the transportation performed under this Agreement." In addition, MSHA points out that it was Beth Energy's practice to send a letter to Bulk detailing any problems that had been noted with Bulk drivers, so that Bulk could notify the drivers themselves. MSHA concludes that contrary to Bulk's position, it is clear that it had the power to exercise control over its subcontractor drivers, and indeed exercised such control.

With regard to the prior citations issued by MSHA in 1987, which were initially issued to Beth Energy, and subsequently issued to Bulk, and then vacated and modified to cite Bulk's subcontractor, MSHA cites several estoppel decisions and takes the position that its prior actions in this regard does not estop it from citing Bulk for the violation in this case. MSHA concludes that who it may or may not have previously cited is not dispositive of the issue presented in this case, which is whether or not MSHA correctly cited Bulk. MSHA takes the position that it has retained wide enforcement discretion with regard to its ability to cite either the production operator, the independent contractor, or both, and that unless it has abused its discretion, its decision on whom to cite should stand. Consolidation Coal Company, 11 FMSHRC 1439, 1443 (August 1989) (citing Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 538 (D.C. Cir. 1986).

MSHA maintains that it has not abused its discretion by citing Bulk for the violation. In support of this conclusion, MSHA asserts that Bulk is responsible for supplying truck drivers who are willing to pick up and deliver coal, and that the drivers are not paid by Beth Energy, do not report for work to Beth Energy, and cannot be hired or fired by Beth Energy. MSHA points out that because of the constant flux of drivers in and out, only Bulk would have records of who picked up coal on any given day. Further, Bulk has, in the past, instructed its drivers to wear hard hats, at Beth Energy's request, and that Bulk can choose to hire or not to hire any driver that applies for work. Under these circumstances, MSHA concludes that Bulk clearly exercises authority over these drivers in a way that Beth Energy cannot, and that Bulk's attempt to disregard its responsibilities under the Act merely because its truck drivers are contractors and not its employees cannot stand.

MSHA argues that Bulk is fulfilling an integral role in the mine extraction process and cannot insulate itself from its responsibilities created from this role by contractual agreement with Beth Energy. In view of the-fact that Bulk has reserved for itself the power to inspect'the trucks and has the ability to inform all truck drivers of any information it feels is pertinent to the job, MSHA concludes that holding Bulk responsible for the actions of the truck drivers is logical. MSHA believes that between Beth Energy and Bulk, Bulk is the entity most able to exercise control over the drivers, and that between Bulk and the drivers, Bulk has the continuing association with the mine, and the opportunity to be aware of the specific problems that may exist there. Accordingly, MSHA concludes that its policy decision to hold Bulk liable for the cited violation is based on sound reasoning and does not constitute an abuse of its discretion.

With regard to the alleged violation of 30 C.F.R. § 77.807-3, MSHA takes the position that the truck which was operated by Bulk's contractor, Mr. Krumenaker, was a piece of equipment that was being operated on the surface of the mine, and that Mr. Krumenaker was required to pass under the energized high-voltage line in order to pick up and deliver the coal. MSHA points out that since Mr. Krumenaker had raised his truck bed, the clearance between the truck and the overhead powerline was less than that required by the standard. Further, since Mr. Krumenaker's raised truck bed contacted the energized power-wire, MSHA concludes that Bulk failed to take any precautions to deal with or prevent accidents of this kind, and violated the cited standard.

With regard to the inspector's "significant and substantial" violation finding, MSHA asserts that the inspector's uncontradicted testimony establishes that the violation was significant and substantial and that it is the type of violation which presents a high possibility for a fatal accident. Contact with an energized powerline could result in the electrocution of anyone operating or standing near the piece of equipment that makes contact if that person should touch the truck and the ground at the same time. Although the incident in question did not result in any injury to the driver, the tires were blown out on the truck, indicating the seriousness of the hazard. Citing Secretary v. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981), MSHA concludes that the "significant and substantial" violation test established by that case has been met, and that the inspector's finding should be affirmed.

Respondent's Arguments

The facts show that Bulk had an agreement with Beth Energy to arrange for transportation of coal from Beth Energy's Cambria

Mine to the Pennsylvania Electric Power Plant, as well as to other sites designated by Beth Energy. Bulk asserts that it is a broker of coal transportation services and as such cannot be deemed an "operator" under the Act and liable for civil penalties. In support of its argument, Bulk points out that it discharges its contractual obligation to Beth Energy by engaging subcontractor carriers and independent owner/drivers to transport the coal which is loaded by Beth Energy personnel at the mine. Bulk further points out that other than the owner of the company, it only employs a dispatcher to find drivers to haul the available coal for each day, and a bookkeeper to arrange for payment of the amounts invoiced by the subcontractors and to insure proper payment from Beth Energy. Bulk maintains that it does not operate any portion of the mine, performs no construction work, and does not supervise any employees at the site. Since its subcontractor truckers are loaded by Beth Energy, and the drivers do not normally get out of their trucks when picking up coal until immediately before they reach the highway to cover their loads with a tarp, Bulk asserts that there are no activities for it to supervise or oversee at the site which could arguably make it a production operator.

Conceding the fact that the definition of "operator" was expanded by the 1977 Mine Act to include independent contractors performing services or construction at a mine site, Bulk nonetheless argues that the expanded definition is not so widely encompassing and cannot be read to include any person or entity which may have any connection, contractual or otherwise, with a mine owner, particularly when such a person or entity does not maintain a presence on the mine site. Bulk concludes that such a construction of the statute would cause any entity with a contract to perform any service with a mine owner, whether or not it related to the extraction process or mine construction, subject to civil penalties. Bulk further concludes that it is apparent from the legislative history of the Act that only independent contractors actually performing services at the mine site, such as construction or extraction related work, are to be included as "operators" with the same statutory compliance obligations as mine owners or mine production operators.

Bulk maintains that its relationship with its independent owner/drivers and other trucking companies is a bona fide arms-length contractual relationship which is customary in the transportation business and one which was not intended to avoid liability under the Act. Bulk asserts that its subcontractor truckers are not its employees or agents, and since they are either "persons" or "firms" that "contract to perform services at a mine" and actually work at the mine site to pick up coal and haul it to its destination, they, and not Bulk, are the independent contractors under the Act's regulations.

Bulk points out that the owner/drivers own and maintain their own vehicles and are generally engaged in occupations and provide services apart from their work with Bulk inasmuch as they regularly refuse to take loads offered because of more lucrative work they have been given. There-is a written contract which details the rights the parties have with respect to each other (Tr. 87). There is no contractual requirement that the subcontractors must accept every load offered. There is also no training provided by Bulk because the subcontractors are already "permitted" operators. The carrier subcontractors are not paid by the hour, the mile, by salary, or in any other manner, except by the actual tonnage hauled and only on a monthly basis after submitting invoices. The subcontractors, such as Mr. Krumenaker, pay their own fines and all costs and expenses incident to the operation of their vehicles. Under all of these circumstances, Bulk concludes that it is not the independent contractor performing services at the mine site and is not subject to civil penalties under the Act.

Assuming arguendo that it is subject to the jurisdiction of the Act as an "operator," Bulk submits that MSHA abused.its discretion by citing it for the violation incurred by its independent subcontractor James Krumenaker, the owner and operator of the truck which contacted the over powerline in question, because the Act requires that the proper party "operator" responsible for the violation be held liable. Bulk maintains that the proper party "operator" is Mr. Krumenaker.

In support of its conclusion that Mr. Krumenaker is the proper party to be charged with the violation, Bulk asserts that there is no dispute that the acts of Mr. Krumenaker were the cause of the issuance of the citation to Bulk. Bulk relies on the testimony of Inspector Davis who confirmed that the citation was issued because Mr. Krumenaker's truck came in contact with the high-voltage line, and he assumed that Mr. Krumenaker was employed by Bulk. Bulk points out that Inspector Davis admitted that he did not question Mr. Krumenaker to determine whether the truck was in fact was owned by Bulk or whether Mr. Krumenaker was an employee of Bulk. Bulk also points out that the inspector cited Bulk because it was listed on Beth Energy's register as an independent contractor pursuant to MSHA's requirements in 30 C.F.R. § 45.4, and Mr. Krumenaker was not.

Bulk asserts that there is no evidence that it had any presence on the mine site at the time of the violation, that it did not contribute to the conditions which caused the violation by Mr. Krumenaker, and that it could not have anticipated or prevented the violation. Bulk cites the testimony of Mr. Merlo that there was nothing Bulk could have done to either prevent or minimize the chances of Mr. Krumenaker raising his truck bed at 5:00 a.m., while waiting in line for coal and coming in contact with the high voltage wire. Under these circumstances, Bulk

concludes that MSHA abused its discretion by citing Bulk instead of Mr. Krumenaker, the "operator" with direct control over the hazard, and the operator who is in the best position to abate the hazard.

Citing Phillips Uranium Cornoration, 4 FMSHRC 549 (April 1982), Affinitv Minins Company, 2 IBMA 57, 80 I.D. 229 (1973), Old Ben Coal Co., 1 FMSHRC 1480 (October 1979), and Old Dominion Power Company, 6 FMSHRC 1886 (August 1984), Bulk asserts that in this case MSHA has reverted to its previously discredited policy of citing, for administrative convenience purposes, an entity (Bulk) merely in contractual privity with the person causing a violation rather than the actual violator (Mr. Krumenaker) in a situation where the cited party (Bulk) did not contribute or have control over the circumstances of the violation. Recognizing the fact that MSHA has retained wide enforcement discretion in choosing which of two or more operators it will cite for a violation, Bulk nonetheless believes that this discretion is not unlimited and must be exercised rationally and consistently with the intent and purposes of the Act. Although it is clear that Bulk did not own the truck or employ the driver, it was cited simply because the inspector assumed that the driver was an employee of Bulk and operated a truck owned by Bulk and because Bulk was listed on the mine operator's registry as an independent contractor. Under these circumstances, Bulk concludes that MSHA ignored both the status of the violating party and the circumstances of the violation and cited Bulk purely for administrative convenience because it was listed as an independent contractor.

Bulk argues further that MSHA abused its enforcement discretion by failing to consistently enforce the Act and regulations inasmuch as it has in the past vacated citations issued to Bulk in its capacity as a coal carrier broker when it was found that Bulk's independent subcontractors actually caused the violations. In support of this argument Bulk relies on the record in this case which establishes that in 1987, two separate citations were originally issued to Beth Energy by MSHA for violations concerning a driver employed by one of Bulk's subcontractors, Shaffer Trucking. Beth Energy, at an MSHA manager's conference, convinced the district manager that Bulk, as the party with whom it contracted for the coal haulage service, was the proper party against whom the citations should issue. The citations were modified and issued to Bulk. Bulk then contested the issuance of the modified citations at a district manager's conference and claimed that the citations should issue to Bulk's independent subcontractor, Shaffer Trucking, because it employed the driver and owned the truck involved in the violations, and not Bulk. The district manager, then called Mr. Merlo and informed him that the citations would be vacated as to Bulk. The citation were later issued to Shaffer Trucking. Inspector Davis, who issued

the violations in 1987, confirmed that the two citations previously issued to Bulk were vacated and modified to charge Bulk's subcontractor with the violations.

In this case, after receiving the citation issued by Inspector Davis, Bulk again requested a conference with MSHA and raised the identical defense it raised in connection with the other citations issued in 1987. However, contrary to the district manager's decision in 1987, MSHA refused to either vacate the citation issued to Bulk, or to reissue it to Mr. Krumenaker. The district manager relied on the fact that Bulk was listed as the independent contractor on a register maintained by Beth Energy pursuant to 30 C.F.R. § 45.4. Bulk maintains that the 1987 citations are identical in terms of who the responsible party for the violations should be. When asked to distinguish the facts presented in this case and MSHA's prior actions in vacating the citations issued to Bulk and reissuing them to its subcontractors, Inspector Davis could not distinguish these actions except that there may have been a "mistake" in the handling of the 1987 citations: or MSHA's policy may have changed; or the MSHA supervisor just "handled it." Bulk takes the position that none of these reasons justify the disparate and inconsistent handling of the contested citation in this case.

Bulk argues that MSHA properly vacated the 1987 citations because the purposes of the Act are best effectuated by "citing the party with immediate control over the working conditions." Bulk believes that MSHA has shown no connection between the acts of its subcontractor, Mr. Krumenaker, except to say that Bulk is the entity listed on Beth Energy's independent contractor register. Bulk submits that MSHA's refusal to vacate the violation is unsupportable and is a blatant reversal of its prior decisions concerning the citation of Bulk when its acts do not contribute to the violations of another operator. Bulk concludes that the purposes of the Act are not furthered by inconsistent and unpredictable MSHA enforcement decisions such as those made in connection with violations found to have been caused by Bulk's independent subcontractors. For these reasons, even if Bulk is found to be an operator subject to civil penalty assessments, it believes that the citation issued in this case should be vacated and that MSHA should be compelled to act consistent with its prior decisions concerning violations by Bulk's subcontractors.

Bulk acknowledges that owners or production operators of a mine can be held strictly liable for the violations of their independent contractors. However, Bulk asserts that there is no basis under the Act to hold it vicariously liable for any independent acts of its subcontractors, and that MSHA is erroneously attempting to hold Bulk to the same strict liability standards imposed by the Act upon "owners" of a mine or "production operators." Bulk points out that it is undisputed that it is not a production operator or owner of a mine, and does not operate any

portion of a mine or supervise any personnel at any mine site. Therefore, Bulk concludes that the basis of its alleged strict liability cannot then be because it is a production operator or owner inasmuch as it does not control or own the Beth Energy mine.

Bulk asserts that MSHA apparently believes that Bulk, by virtue of its subcontractor relationship with a person or entity performing services at a mine, is strictly liable for its subcontractors' violations even if it did not contribute to the occurrence of the violation. In support of this conclusion, Bulk points out that it was cited because it was listed as the contractor on Beth Energy's register, and that during the hearing, MSHA's counsel stated that any person with a contract with the production operator and who is registered as a contractor pursuant to MSHA's regulations is strictly liable for its subcontractor's violations. Bulk concludes that MSHA's position is not supported by the Act or the controlling regulations and cases.

Assuming that MSHA may legally equate Bulk with a production operator and hold it strictly liable for its subcontractors' violations, Bulk maintains that MSHA has clearly abused its discretion when it issued the citation contrary to the provisions of MSHA's General Enforcement Policy for Independent Contractors contained in its Program Policy Manual (exhibit E to Bulk's posthearing brief).

Bulk asserts that MSHA's enforcement policy guidelines do not support citing only bulk and not its subcontractor, Mr. Krumenaker, if Bulk's liability is the.same as that of the "production operator." Consequently, since it is not a production owner, Bulk concludes that it cannot be held strictly liable for its subcontractor's violations. Even if it were held to such a standard, Bulk further concludes that citing Bulk is not supported by MSHA's own policy concerning independent contractors, and that Mr. Krumenaker should have been cited because:

1. There was no. testimony from either the Secretary or Bulk remotely indicating that Bulk in any manner contributed to Mr. Krumenaker's violation when he raised his truck bed and inadvertently made contact with the high voltage wires.

2. Bulk did not contribute to the continued existence, if any, of the violation.

3. No Bulk employees were subject to the hazard and only the subcontractor himself was in immediate danger.

4. There was no testimony indicating that Bulk had any control over the condition that needed abatement: namely, that the subcontractor in the future exercise more caution and care while driving his truck near similar hazards.

With regard to the removable sticker reciting Bulk's public authority numbers, which was on Mr. **Krumenaker's** truck, Bulk asserts that it is regulated by the Pennsylvania Public Utility Commission (PVC) and is only authorized to haul coal in certain defined areas, and its independent contractors must operate within Bulk's PUC authority and display on the truck **Bulk's** PUC numbers so that PUC may enforce its territorial authorizations. Bulk points out that when the truckers are not hauling under its PUC authority, the stickers are removed, and the fact that they indicate that independent contractors may be hauling under **Bulk's** PUC authority does not mean that the contractors hold themselves out as Bulk's employees or agents or that they should be viewed in any other way than as independent contractors operating as required by Pennsylvania law under the proper carrier's authority.

Finally, Bulk argues that there is'no evidence **that its** negligence in any way contributed to Mr. **Krumenaker's** violation. Bulk concedes that it cannot completely shield itself from statutory liability by using independent contractors, and if it uses subcontractors that it knows or should know have a proclivity to violate safety rules'or operate their trucks illegally or in an unsafe condition, ***it*** may contribute to a violation and properly be held accountable. However, in this case, Bulk maintains that it was not negligent in subcontracting coal loads to Mr. Krumenaker, and that the Act does not require it to personally supervise its independent contractors to such an extent that it insures that the isolated incident such as the one involving Mr. Krumenaker does not occur. Bulk concludes that any negligence concerning the violation should exclusively be attributable to Mr. Krumenaker.

Findinss and Conclusions

The Jurisdictional *Issue*

Bulk takes the position that it is not an **"operator"** under the Act, has no employees present at the mine site, and is simply a coal haulage broker who has a customary and normal bona fide arms-length contractual relationship with its independent owner/drivers and other trucking companies whose services it utilizes to fulfill its obligation to haul coal pursuant to an agreement with the production mine operator. MSHA takes the position that Bulk was an independent contractor for the mine operator and was identified as such pursuant to **MSHA's** independent contractor regulations, as well as in its agreement with the

mine operator. MSHA further points out that Bulk was performing a service at the mine in that it was the exclusive contractor who picked up and delivered the coal to at least one of the mine operator's customers, and also picked up and delivered coal to other customers.

Section 4 of the Act provides as follows: "Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act."

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: Lesislative Historv of the Mine Safety and Health Act, Committee Print at 602 (hereinafter cited as Leg. Hist.).

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 anv independent contractor nerforming services or construction at such mine." (Emphasis added).

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: * * *"

The addition of the phrase "any independent contractor performing services or construction at such mine" as part of the 1977 amendments to the Coal Act was intended "to settle any 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 Corn., 4 FMSHRC 549, 552 (April 1982).

The legislative history of the Mine Act clearly shows that the goal of Congress, in expanding the definition of **"operator"** to include "independent **contractors,"** was to broaden the enforcement power of the Secretary so as-to reach not only owners and lessees but a wide range of independent contractors as well. In explaining this amendment, the key Senate report on the bill enacted into the Mine Act referred not only to those independent contractors involved in mine construction but also to those **"engaged** in the extraction **process."** S. Rep. No. 181, 95th Cong., **1st Sess.** 14 **(1977), reprinted in** Senate Subcommittee on Labor of the Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 602 (1978) **("Legis. Hist.").** Similarly, the Conference Report referred to independent contractors **"performing** services or construction" and **"who** may have continuing presence at the mine." S. Conf. Rep. No. 461, 95th Cong. 1st Sess. 37 **(1977),** reprinted in Lesis. Hist. 1315.

The thrust of Bulk's jurisdictional argument is its assertion that it is not a mine production operator or owner, has no employees at the mine site, performs no construction work at the mine site, and is engaged in no activities at the mine site requiring any supervision on its **part.** Bulk maintains that the only independent contractor **"operators"** performing services at the mine site are its trucking subcontractors and owner drivers, and not Bulk, and that Bulk is simply a transportation **"broker"** who merely brokers coal hauling jobs to these "independent contractor" entities. **In** support of these conclusions, Bulk's focus is on whether or not there is an employer/employee relationship between Bulk and the independent contractor and subcontractor truckers whose services it uses to haul coal, and whether or not Bulk exercises any supervision or other control over these independent coal haulers. Bulk concludes that no such relationship exists, and that it is not an independent contractor performing services at the mine.

In Otis Elevator Company, (Otis I), 11 FMSHRC 1896 (October 1989), and Otis Elevator Company, (Otis II), 11 FMSHRC 1918 (October 1989), the Commission affirmed the decisions of Judge Fauver and Judge Maurer holding that an elevator service company that inspected, serviced, and maintained **a** mine elevator under a contract with the mine operator was an independent contractor **"operator"** subject to the Act and to **MSHA's** enforcement jurisdiction. The Commission affirmed the Judges' findings that Otis had a continuing, regular, and substantial presence at the mine site performing services on an elevator which was a key facility and essential ingredient involved in the coal extraction process. In making its determination, the Commission relied on the expanded definition of "operator" found in the Act, and examined the independent contractor's proximity to the extraction process and the extent of its presence at the mine to determine whether the

independent contractor was an operator under the Act. This same analysis is relevant and appropriate in this case.

The evidence in this case establishes that Bulk is a Delaware Corporation engaged in the business of providing coal transportation services to Bethlehem Steel Corporation's Beth Energy Division. Bulk has stipulated that at the time of the alleged violation, it had a contract with Beth Energy to haul coal from its Cambria Slope Preparation Plant to sites designated by Beth Energy, and that the coal hauled by Mr. Krumenaker on that day was being placed into the stream of interstate commerce. Bulk also stipulated that it was registered as an independent contractor of Beth Energy pursuant to MSHA's regulations found in Part 45, Title 30, Code of Federal Regulations, and pursuant to Bulk's contract with Beth Energy, Bulk was at all times considered an independent contractor and not the agent or representative of Beth Energy (Contract, Article VII, Section 7.1, Exhibit R-l).

Bulk's contract with Beth Energy commenced on October 1, 1986, and will terminate on December 31, 1991, unless further extended for an additional 3 years, at the option of Beth Energy. Pursuant to two additional agreements noted in the contract under "Scope of Work," Bulk was designated to pick up, deliver, and unload all of the coal from Beth Energy to Penelec. One agreement provides for deliveries of approximately 30,000 tons of raw coal monthly to Penelec, and the second agreement provides for deliveries of approximately 20,000 tons of clean coal monthly to Penelec. Bulk was obligated to deliver and unload any additional increased quantities of coal in accordance with delivery schedules established by Beth Energy.

Although it is true that Bulk does not own any of the coal haulage trucks, and that the drivers are not employed by Bulk, the fact remains that Bulk provides and performs services for the mine operator Beth Energy at the mine, albeit through the use of subcontractor and owner/operator truck drivers. Under the terms of the contract, Bulk was obligated to pick up the coal at the mine site and have it delivered and unloaded at the customer destinations designated by Beth Energy. The coal is loaded by Beth Energy's miners. Although Bulk chose to use subcontractors to transport and deliver the coal, with Beth Energy's blessings, Bulk was nonetheless legally obligated for the performance of the services called for under the contract. Beth Energy had no direct dealing with the subcontractors, and it looked to Bulk to provide its coal transportation needs. Given the large volumes of coal required to be transported by Bulk, and the fact that Bulk had the exclusive right to transport all of Beth Energy's coal to Penelec, I conclude and find that bulk was performing an essential service for Beth Energy which was closely related to the mine extraction process and was indeed an essential ingredient of that process. Beth Energy is obviously in the

business-of marketing its coal, and without the means for transporting it to its customers through the services provided by Bulk, it would not remain in business very long.

As noted earlier, Bulk's contract to provide transportation services for Beth Energy's coal was for a 5-year period, subject to renewal at Beth Energy's option. The contract included two agreements for the transportation of coal on a regular monthly basis. Although the subcontractors used by Bulk had the option of accepting or declining to make themselves available to Bulk to transport Beth Energy's coal, any subcontractors utilized by Bulk to provide the services to Beth Energy, were legally operating under Bulk's state public utility approval. Bulk's owner Charles Merlo testified that he had "a constant flow of truck drivers" working for Bulk when it provided its transportation services to Beth Energy (Tr. 85), and I find no evidence that Bulk's services to Beth Energy were ever interrupted by Bulk's inability to retain subcontractor or owner/operated trucks to transport and deliver coal. Mr. Merlo confirmed that coal is hauled from the mine on an average of 4 to 5 days a week, and that there are occasions when it is hauled 6 days a week (Tr. 107). Under all of these circumstances, I conclude and find that Bulk had a continuous presence at the Beth Energy Mine.

In view of the foregoing findings and conclusions, I conclude and find that at all times relevant to this proceeding, Bulk was an independent contractor subject to the Act and to MSHA's enforcement jurisdiction, and Bulk's arguments to the contrary are rejected.

Fact of Violation

Bulk is charged with a violation of mandatory safety standard 30 C.F.R. § 77.807-3, which states as follows:

> When any part of any equipment operated on the surface of any coal mine is required to pass under or by any energized high-voltage powerline and the clearance between such equipment and powerline is less than that specified in section 77.807-2 for booms and masts, such powerlines shall be deenergized or other precautions shall be taken. (Emphasis added).

MSHA takes the position that the truck operated by Mr. Krumenaker was a piece of equipment that was being operated on the surface of the mine, and that Mr. Krumenaker was required to pass under the energized high-voltage line in order to pick up and deliver the coal. MSHA points out that since Mr. Krumenaker had raised his truck bed, the clearance between the truck and the overhead powerline at that point in time was less than that required by the standard. Further, since Mr. Krumenaker's raised truck bed contacted the energized powerwire, MSHA concludes that

Bulk failed to take any precautions to deal with or prevent accidents of this kind.

Although the inspector found that the high-voltage line in question was located at an appropriate height above the truck, and that the height and location of the line did not violate any mandatory standard, the fact remains that by raising his truck bed while parked directly below the line, Mr. Krumenaker caused the clearance between the raised boom or mast of his truck and the line to be less than that stated in section 77.807-2. In such a situation, the standard required that the line be deenergized or other precautions taken to avoid contact with the line. Since this was obviously not done, I conclude and find that a violation of section 77.807-3, has been established.

Estoppel Issue

Bulk takes the position that MSHA's inconsistent and unpredictable enforcement decisions with respect to the prior vacation of two citations issued to Bulk in 1987, and its subsequent refusal to vacate the citation issued in this case, justifies the dismissal of this action. As correctly stated by MSHA, the argument advanced by Bulk is essentially one of equitable estoppel. In Secretary of Labor v. King Knob Coal Company, Inc., 3 FMSHRC 1417, 1422 (June 1981), the Commission rejected the doctrine of equitable estoppel, but viewed the erroneous action of the Secretary (mistaken interpretation of the law leading to prior non-enforcement) as a factor which may be considered in mitigation of any civil penalty assessment. The Commission stated in relevant part as follows at 1421-1422:

> [T]his restrained approach is buttressed by the consideration that approving an estoppel defense would be inconsistent with the liability without fault structure of the 1977 Mine Act. See El Paso Rock Quarries. Inc., 3 FMSHRC 35, 38-39 (1981). Such a defense is really a claim that although a violation occurred, the operator was not to blame for it.
>
> Furthermore, under the 1977 Mine Act, an equitable consideration, such as the confusion engendered by conflicting MSHA pronouncements, can be appropriately weighed in determining the appropriate penalty (as the judge did here).

See also: Midwest Minerals Coal Company, Inc., 3 FMSHRC 1417 (January 1981); Missouri Gravel Co., 3 FMSHRC 1465 (June 1981); Servtex Materials Company, 5 FMSHRC 1359 (July 1983). In Emery Minins Corporation v. Secretary of Labor, 3 MSHC 1585, the Court of Appeals for the Tenth Circuit, in affirming the Commission's decision at 5 FMSHRC 1400 (August 1983), stated as follows at 3 MSHC 1588:

> As this court has observed, "courts invoke the doctrine of estoppel against the government with great reluctance" . . . . Application of the doctrine is justified only where "it does not interfere with underlying government policies or unduly undermine the correct enforcement of a particular law or regulation" Equitable estoppel "may not be used to con- &d& a clear Congressional mandate," . . . as undoubtedly would be the case were we to apply it here ....

This case presents a rather unique factual situation in that the production mine operator, Beth Energy, had a contract with its independent contractor Bulk which required Bulk to transport clean and raw coal from the Beth Energy mine site. Beth Energy paid Bulk for this service. Since Bulk did not own or operate any trucks, and with the approval of Beth Energy, Bulk utilized the services of subcontractor trucking companies or independent truck owner/operators such as Mr. Krumenaker to perform its contractual coal transportation obligations to Beth Energy. Bulk paid its subcontractors for their services. In this scenario, there are conceivably three separate entities who may be considered culpable "operators" subject to the Act, and accountable for the violation in question, namely, Beth Energy, Bulk, and Mr. Krumenaker. The issue as framed by Bulk is whether or not MSHA's decision to proceed only against Bulk for the alleged violation, rather than against the production operator, or Bulk's subcontractor driver/owner Krumenaker, was made for reasons consistent with the purposes of the 1977 Mine Act.

In Phillips Uranium Cornoration, 4 FMSHRC 549 (April 1982), the Commission reiterated that the inclusion of independent contractors as "operators" subject to the Act clearly reflected Congress' desire to subject contractors to direct enforcement of the Act, and that MSHA's independent contractor regulations reflect that the interest of miner safety and health will be best served by placing responsibility for compliance on each independent contractor.

There is no evidence that Mr. Krumenaker or any of the other unidentified subcontractors who may have been used by Bulk to transport coal from the Beth Energy mine site had MSHA independent contractor ID numbers. The only entity identified and registered as an independent contractor pursuant to MSHA's regulations at 30 C.F.R. § 45.4, was Bulk. I find no evidentiary support for Bulk's conclusion that the 70 to 100 subcontractor truck operators used by Bulk to perform its contract obligations with Beth Energy are in fact independent contractors pursuant to the Act and MSHA's regulations. Although one may or may not assume that they are, absent any facts or evidence as to the extent of their presence at the mine site, and absent any further

information with respect to the factors that one must consider to make such a determination, I cannot conclude that each and every subcontractor conceivably used by Bulk to transport coal on any given day is an independent contractor subject to the Act.

The lease agreement between Bulk and Mr. Krumenaker was for 1 year, and it provides for the lease of Mr. Krumenaker's truck by Bulk for the "transportation of property." Under the terms of the lease, Bulk and Mr. Krumenaker had an independent contractor relationship which was not intended to create an employee-employer relationship. In short, Mr. Krumenaker was an independent contractor leasing his truck, and himself as the driver, to Bulk. Mr. Krumenaker had no contract with Beth Energy to perform any services at the mine. As a matter of fact, his lease agreement with Bulk does not mention the haulage of coal or any particular commodity, and Bulk was free to contract with anyone of its choosing to transport any "property," including the services of Mr. Krumenaker and his truck under their lease agreement. The respondent's owner, Mr. Merlo, confirmed that his lease agreement with Mr. Krumenaker is typical of leases that he has with 70 to 100 trucking concerns, more than half of whom are owner/operators.

With regard to Mr. Krumenaker, aside from the fact that he was at the mine site to pick up a load of coal on the day his truck contacted the overhead power wire, there is no evidence to establish the frequency or extent of his presence at the mine site, or the frequency of his exposure to potential mine hazards. Although the lease agreement between Bulk and Mr. Krumenaker was for 1 year, and it was executed on November 3, 1988, 2-months prior to the issuance of the violation on January 4, 1988, there is no evidence or testimony as to how often bulk utilized the service of Mr. Krumenaker to haul coal from the Beth Energy site, or how often Mr. Krumenaker may have been there prior to the incident in question. The evidence establishes that there was a constant change of subcontractors, that they "come and go," and that the variety of subcontractors used by Bulk to perform its contract with Beth Energy often worked for other truck carriers, and they had the option of working or not working for Bulk. When they did work for Bulk, the services they provided were to Bulk and not to Beth Energy. Under all of these circumstances, although the record may support a reasonable conclusion that Mr. Krumenaker was a subcontractor or independent contractor performing work for Bulk on the day he contacted the overhead power' line, I cannot conclude that it establishes that he was subject to the Act as an independent contractor performing services for Beth Energy, or that he was otherwise within the reach of MSHA's enforcement jurisdiction.

The record reflects that MSHA's decision to vacate the prior citations issued to Bulk was made orally, and there is no documentation detailing MSHA's rationale in taking this action.

Although the respondent's assumption that the vacation of the citations was based on **MSHA's** finding that Bulk did not cause the violations may be reasonable, the fact remains that shortly after the citations were vacated, Bulk applied for and received its own independent contractor ID number (Tr. 140). When Inspector Davis issued the citation and cited Bulk in the instant case, he did so because Bulk was the only readily identifiable contractor with an assigned MSHA ID number of record, and he assumed from Bulk's decal on the truck operated by Mr. Krumenaker, that he was an employee of Bulk. **MSHA's** subsequent refusal to vacate the citation was based on the fact that Bulk was registered as the independent contractor of Beth Energy (exhibit F-3).

Bulk's assertion that it exercised no control over its subcontractor drivers is not well taken. The record in this case reflects that the decision to hire or not hire any subcontractor truck driver was within the sole discretion of Bulk, and that Bulk paid the drivers for their services. Further, as pointed out by MSHA, the lease agreement **between Bulk** and its subcontractors provided for periodic inspections by Bulk of the subcontractors vehicles, and the agreement between Beth Energy and Bulk provided for Bulk's inspection of each'vehicle after loading at the mine site in order to assure safe movement of the load and vehicle. Notwithstanding Mr. **Merlo's** testimony that Beth Energy has never required Bulk to have anyone present at the mine site, since the trucks were loaded at the site, Bulk was obligated under its contract to inspect the trucks after loading in order to assure that any coal loads are transported safely from the site.

Mr. Merlo confirmed that Beth Energy has had occasion to bring to Bulk's attention the fact that a contract driver may be speeding or not wearing his hard hat, and that this would be done by **"a** letter outlining the way we want our truckers to conduct themselves" (Tr. 91). Bulk in turn would communicate Beth Energy's safety concerns to the drivers by including any such letters in the drivers pay vouchers. Mr. Merlo further confirmed that he could refuse to use the services of any truckers who may have bad traffic records, and that he would not hire any truckers who may be cited by MSHA for safety violations (Tr. 103). Under all of these circumstances, I conclude and find that Bulk did in fact exercise/control over its subcontractor drivers, and that it may be held accountable and liable for violations of **MSHA's** standards, on an equal footing with the production mine operator and any other independent contractor or subcontractor found subject to the Act.

The question of whether to cite the mine operator or an independent contractor for a violation of a mandatory safety or health standard is within **MSHA's** enforcement discretion, and unless MSHA abuses its discretion, its decision should be affirmed. As the Commission note in Consolidation Coal Company,

11 FMSHRC 1439, 1443, (August 1989), and the cases cited therein "[C]ourt precedent makes clear that the Secretary has retained wide enforcement discretion and that courts have traditionally not interfered with the exercise of that discretion."

It is true that the circumstances concerning MSHA's decision to vacate the citations issued to Bulk in 1987, and to serve them on one of Bulk's subcontractors, were no different than the circumstances under which the contested citation was issued to Bulk in this case. It is also true that MSHA's refusal to vacate the citation was contrary and inconsistent with its prior vacation of the citations. However, I cannot conclude that MSHA acted arbitrarily and capriciously by refusing to vacate the contested citation. The oral decision by an MSHA supervisor to vacate the prior citations 2-years prior to the issuance of the contested citation in this case did not estop Inspector Davis from issuing the citation and citing Bulk on January 4, 1989, on the basis of the information then available to him. Since the evidence does not establish that Mr. Krumenaker was in fact an independent contractor subject to MSHA's enforcement jurisdiction, and since the inspector determined that Beth Energy did not violate the cited standard, I conclude and find that citing Bulk for the violation in question in this case was reasonable and proper, and Bulk's arguments to the contrary are rejected.

Significant and Substantial Violations

A "significant and substantial" violation is described in section 104(d)(l) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(l). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety-contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Minins Comnanv, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Minins Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(l), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Minina Comnanv, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Minina Comoanv, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texassulf. Inc., 10 FMSHRC 498 (April 1988); Youshioshenv & Ohio Coal Comoanv, 9 FMSHRC 2007 (December 1987).

Although Mr. Krumenaker was not injured when his raised truck bed contacted the energized high-voltage line, the contact with the 46,000 volt line caused eight of the tires on his truck to "blow out" (Tr. 27). Inspector Davis believed that in the event Mr. Krumenaker had grounded himself by touching the truck or ground at the time contact was made with the power line, it would have been reasonably likely that he would have suffered fatal injuries (Tr. 26). I believe that Mr. Krumenaker was fortunate and lucky that he was not seriously injured or fatally electrocuted when his truck came in contact with the high-voltage line in question. Under the circumstances, I conclude and find that the violation was significant and substantial, and the inspector's unrebutted and credible finding in this regard IS AFFIRMED.

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

Based on the stipulations by the parties, I conclude and find that the respondent is a small independent contractor subject to the Act, and that the payment of the civil penalty assessment for the violation in question will not adversely affect its ability to continue in business.

History of Prior Violations

The record reflects that the respondent has no prior history of assessed violations, and I have taken this into account in

assessing a civil penalty for the violation which I have affirmed in this case.

Neslisence

Mr. Krumenaker was not called as a witness and he did not testify in this case. As previously noted, there is no evidence or testimony as to whether or not this was his first trip to the mine, or whether he had been there before and was familiar with the site. The inspector's testimony that Mr. Krumenaker may not have known that he was parked under the high-voltage line suggests that he either did not realize he was parked under the line because it was dark, or because this was his first visit to the mine site and he was not familiar with the location of the overhead line. In either case, I do not find it unreasonable to expect a truck driver to get out of his truck and look around for possible overhead obstructions or other potential hazards before raising his truck bed to clear it of frozen coal. In the instant case, I believe that Mr. Krumenaker was in a better position than Bulk to avoid contact with the overhead powerline. Of course, if it could be shown that Bulk was familiar with the mine site and was aware of the potential hazard resulting from a truck with its raised truck bed coming in contact with the overhead line, then Bulk would be negligent. However, I find no such evidence in this case, and I cannot conclude that Bulk could have reasonably anticipated or prevented the violation.

With regard to Beth Energy's negligence culpability, although the evidence establishes that the height and location of the high-voltage line complied with MSHA's standards, the inspector confirmed that Beth Energy had posted no warning signs, and it would appear that the'area was not lighted so as to enable a truck driver to see the overhead line when it was dark. Although the inspector believed that it was difficult for Beth Energy to control a driver's raising of his truck bed, and that Beth Energy "usually" instructed people about raising their truck beds, he was not certain that this was the case, and there is no evidence or testimony to reflect that Beth Energy ever issued any warnings to Bulk or any of the drivers who came to its property to pick up coal.

Assuming that Beth Energy installed and maintained the high-voltage line in question, and given the fact that it had control of the area where the trucks were expected to travel while picking up and loading coal, including the location where Mr. Krumenaker was parked at the time his truck contacted the line, I believe that Beth Energy knew or should have known that a driver stopped or parked under the high-voltage line might raise his truck bed and come in contact with the line. Under the circumstances, I believe that Beth Energy was obliged to either increase the height of its line to take into account the extended height of a raised truck bed, or at least post a warning sign or

provided overhead lighting for the line so that a driver is made aware of the potential hazard.

In view of the foregoing, I conclude and find that the violation did not result from Bulk's negligence. However, the fact that it was not negligent does not absolve Bulk from liability and may not serve as a defense to the violation. As previously noted, I have found and concluded that as an independent contractor subject to the Act, Bulk was properly charged with the violation in question, and the fact that MSHA did not also cite Mr. Xrumenaker, the driver, or Beth Energy, the mine operator, was not arbitrary or capricious, and was within MSHA's enforcement discretion.

Gravity

For the reasons stated in my "S&S" findings, I conclude and find that the violation in question was serious.

Good Faith Compliance

The inspector confirmed that the violation was abated by Beth Energy's plant foreman by instructing Mr. Xrumenaker to be aware of the high-voltage line, and a copy of the citation reflects that it was terminated on the same morning that it was issued. I conclude and find that the violation was promptly abated in good faith.

Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the six statutory civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that in the absence of any negligence on the respondent's part, a reduction in the initial proposed civil penalty assessment of $54 is warranted in this case. Accordingly, I assess a civil penalty in the amount of $25, against the respondent.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of $25, for the violation in question, and payment is to be made to the petitioner within thirty (30) days of the date of this decision and order. Upon receipt of payment by the petitioner, this matter is dismissed.

George A. Koutras
Administrative Law Judge

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