

CCASE:
SOL (MSHA) V. PERRY SISK
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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March 16, 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 92-141
Petitioner : A.C. No. 34-01692-03501JNG
: v. : Docket No. CENT 92-163
: A.C. No. 34-01692-03502JNG
PERRY SISK, :
Respondent : Kanima Mine

DECISION

Appearances: Ernest A. Burford, Esq., Office of the Solicitor,
U.S. Department of Labor, Dallas, Texas,
for Petitioner;
Perry Sisk, pro se, Checotah, Oklahoma,
for Respondent.

Before: Judge Lasher

This proceeding arises on the filing by the Secretary of Labor of two complaints proposing penalties in the above two dockets pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a) wherein the Secretary seeks assessment of penalties for a total of eight alleged violations, seven in Docket No. CENT 92-141 and one in Docket No. CENT 92-163.

At the hearing of these two consolidated proceedings in Little Rock, Arkansas, on January 21, 1993, a bench decision was rendered (T. 57-63) which decision is here AFFIRMED.

It is noted that the actual occurrence of the violative conditions and practices described in the eight citations was conceded by Respondent both prior to and during the hearing (T. 12, 34), who made a substantial challenge, however, to the question of the jurisdiction of the Mine Safety enforcement process over his particular operation and on that basis contends that there being no jurisdiction there of course could not be violations of the Act of implementing regulations.

At the outset of the hearing the parties stipulated that the Administrative Law Judge had jurisdiction to determine the matter

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and also that the penalty levels reflected in MSHA's initial proposed penalties would not affect the ability of the Respondent to continue in business.

It was also stipulated and it also appears (See Ex. D-1) that Respondent has not history of previous violations and that Respondent, upon notification by MSHA of the occurrence of the violations, proceeded in good faith to timely abate the same. (Footnote 1)

Based on the evidence presented of record I find that Respondent is a sole proprietorship owned by Mr. Sisk and that in September 1991, when the citations in question were issued, approximately 11 total employees were on the payroll. At this time Respondent had a contract with Inter-Chem Coal Co., Inc., coal brokers, to pick up coal at the Kanima Mine owned by Wendall Johnson.

Respondent was not a subcontractor of Wendall Johnson who owned the surface coal mine in question where Respondent picked up the coal for delivery elsewhere, but rather, was an independent contractor as is more fully shown subsequently.

The Kanima Mine, located five miles east of Stigler, Haskell County, Oklahoma, had a stockpile located some one and one-half miles from the entrance to the mine at which were located scales.

Respondent's contract with Inter-Chem which ran for a period of approximately ten weeks called for Respondent to pick up coal from the stockpile and deliver the same to Oklahoma Gas and Electric Power Plant in Muskogee, some 70 miles distant.

Respondent used four trucks, each having its own driver (Mr. Sisk drove one of the trucks himself) who would, on a typical day, arrive at the mine at approximately six a.m., proceed to the stockpile, load the trucks (taking approximately 20 minute total), and then proceed to Muskogee. The trucks would be weighed before being loaded and again after being loaded. While the truck was being weighed, it would be necessary for the truck driver to get out of the truck and go into the scale house, a distance of approximately five steps, to sign a ticket. After delivery of the coal to Muskogee, the trucks on a typical day would return to the Kanima Mine and repeat the process. On a typical day during the ten-week period, each of the four drivers

1 In terms of the mandatory statutory penalty criteria, there remain for subsequent consideration the size of the Respondent and the seriousness of the violations and any negligence involved in the commission thereof, since I do subsequently determine that there does exist jurisdiction over the Respondent under the 1977 Mine Act.

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would pick up and deliver four loads at the Kanima Mine. The four truck drivers were employees of Mr. Sisk.

Mr. Sisk did not have an identification number assigned by MSHA until after the subject citations were issued.

The primary business of Wendall Johnson, doing business at the Kanima Mine, was selling coal from the stockpile in question.

Mr. Sisk, as reflected by his assumption of the responsibility for abating the infractions cited by MSHA and the other clear evidence of the employment relationship with the truck drivers in question shown in the record, had control over and the responsibility for the safety of the working conditions of these employees.

In the 1977 Amendment to the Mine Safety Act, Congress amended the definition of a "mine operator" to include "any independent contractor performing services or construction at such mine," 30 U.S.C. 802(d).

The Mine Act declares that the "operators" of the nation's mines have primary responsibility for preventing the existence of unsafe and unhealthful conditions, 30 U.S.C. 801(e). In *Bituminous Coal Association v. Secretary of Interior*, 547 F.2d, 240, 246-247 (4th Cir., 1977), herein BCOA, the Court interpreted the definition of "operator" to include independent contractors performing services at the production-operator's mine, and held that the Secretary has the power to cite the independent contractor, the operator, or both, for independent contractor violations.

The Secretary's administrative rule on independent contractors found at part 45, 30 C.F.R. (see 45.2, definitions), defines independent contractor as "any person, partnership, corporation, subsidiary of a corporation, firm, association, or other organization that contracts to perform services or construction at a mine." Here, it is clear that the Respondent fits this definition of independent contractor, since he is a person performing services at a mine. This is in accord with the Senate Committee report on the 1977 Amendments, stating that, "It is the intent of this committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act." Senate Report No. 91-181, 95th Congress, reprinted in U.S. Code and Congressional Administrative News (1977), 3401, 3414.

Here also, the Respondent's connection was more than just a one-time or brief incursion on mine property such as occurred in the case of an electric facility company employee meter reader who read a meter monthly near a mine access road in *Old Dominion Power Co. v. Donovan*, 722 F.2d 82 (4th Cir. 1985). In that case, the Fourth Circuit determined there was no jurisdiction, since the meter employee rarely went on to mine property. By contrast,

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in this case, Respondent's employees during the period in question regularly were on mine property performing work directly related to the business of the mine itself. The contacts here occurred every day over a period of some ten weeks. See Secretary v. Lang Brothers, Inc., 14 FMSHRC 413 (Sept. 24, 1991) for the proposition that such a period of time and exposure constitutes much more than a de minimus contact. (Footnote 2)

CONCLUSIONS OF LAW:

1. Respondent is subject to the provisions of the 1977 Mine Act:
2. Respondent having so conceded, the eight violations described in the eight citations contained in the two subject dockets are found to have occurred.

PENALTY ASSESSMENT:

In addition to the penalty assessment factors previously found, it is further determined that Respondent is a small operator and that the gravity and negligence determination made by the Inspector on the fact of the citations, there being no challenge to the contrary, are accurate. Based on these findings, I find no reason to either raise or lower the MSHA's proposed assessment in this matter.

ORDER

Respondent SHALL, within 30 days from the issuance of this written decision, PAY to the Secretary of Labor the total sum of \$285.00 (\$50.00 for Citation No. 3407357 in Docket No. CENT 92-163; \$39 each for Citation Nos. 3407346, 3407347, 3407349, 3407355, 3407356; and \$20.00 each for Citation Nos. 3407348 and 3407359.

Michael A. Lasher, Jr.
Administrative Law Judge

² As Petitioner contends, Respondent had a "continuing presence" at the mine (T. 56).

Distribution:

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