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SOL (MSHA) V. TOP KAT MINING
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 92-746
	:	A.C. No. 46-05801-03618
v.	:	
	:	No. 21 Mine
TOP KAT MINING, INC., W-P COAL COMPANY, Respondents	:	
	:	
BEAR RUN COAL, INC., Successor-In-Interest	:	

DECISION

Appearances: Gretchen Lucken, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Kurt A. Miller, Esq., Thorp, Reed and Armstrong, Pittsburgh, Pennsylvania, for Respondent W-P Coal Company;
No appearance on behalf of Top Kat Mining, Inc., or Bear Run Coal, Inc.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., the "Act", charging Top Kat Mining, Inc., (Top Kat) and W-P Coal Company (W-P) as mine operators and Bear Run Coal, Inc. (Bear Run) as a successor-in-interest with two safety violations at the No. 21 Mine and seeking civil penalties for those violations.(Footnote 1) The Secretary's motion to withdraw Citation No. 3136609 was granted and, as the petition has been amended,

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1 This civil penalty case is one of at least 138 separate cases filed by the Secretary against W-P at the No. 21 Mine. Since the threshold issues presented herein are common to all of the cases this case was selected upon agreement of the parties to litigate those common issues as a "test case" and the others have been placed on stay pending final disposition of this case.

only one violation under the mandatory standard at 30 C.F.R. 77.200 remains at issue.(Footnote 2) At hearing the petition for civil penalty against Top Kat and Bear Run were dismissed for failure to execute service on those parties. Accordingly, only the liability of W-P as an operator of the No. 21 Mine remains at issue.

Background

It is not disputed that during relevant times W-P was engaged in the business of purchasing coal from contract mining companies, processing that coal at a W-P preparation plant, and selling and distributing the coal to the Wheeling-Pittsburgh Steel Corporation. W-P's offices and its preparation plant are located in Logan County, West Virginia. These are its only facilities. W-P leases the mineral rights to six deep mines in Logan County and has contract mining agreements with five different contract mining companies. Under those agreements, the contract mining companies mine the coal in exchange for a royalty payment from W-P based on the amount of clean coal produced. This arrangement is common in southern West Virginia, where approximately 80 to 90 percent of all deep mines are operated on a contract-mining basis.

This case involves a deep mine known as the No. 21 Mine, located near Stirrat, West Virginia. W-P leases the mineral rights to that mine pursuant to a 1969 lease with the owner of the mine, Cole and Crane. W-P operated this mine from 1978 until January 1988, when it entered into a contract mining agreement with Deer Run. Dear Run terminated its contract with W-P in November 1989, and a new contract was awarded to Top Kat on December 29, 1989. There is no dispute that W-P and Top Kat are separate and distinct companies and have no common owners, officers, employers or facilities and there has been no interchange of employees between the companies.

The contract between W-P and Top Kat was a standard industry form. Under the contract, Top Kat agreed to assume complete control over the operation of the No. 21 Mine, including the hiring of miners and the administration of health and safety matters. W-P, in turn, agreed to pay Top Kat $21.00 for each ton of clean coal produced. The contract further provided, in relevant part, as follows:

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2 This Citation, No. 3750647, was issued September 4, 1991, and alleges as follows:

"The No. 21 bathhouse facilities was [sic] not maintained in good repair to prevent accidents and injuries to employees in that there was an area of the bathhouse floor approximately 2-1/2 foot by 2-1/2 foot that was rotten and the wood was wet and weak (ready to collapse at any time)."

> III(H). Owner and Contractor understand, agree and reaffirm and hereby covenant, each with the other, that in every respect in the performance of this Contract, Contractor shall stand in a relationship with Owner as that of an independent contractor and is in no manner a servant, agent, employee, shareholder, joint venturer or partner of Owner, and that this Contract shall be construed accordingly. Except as specified herein to the contract, Contractor shall do the work required hereby according to its own manner and methods, without the right of direction or supervision by Owner and Owner shall have the right to look to Contractor only for the results required and to be accomplished hereunder.

There is no dispute that W-P complied fully with all provisions of the contract throughout Top Kat's operation of the No. 21 Mine.

Under the contract, W-P also agreed to provide engineering services at the mine in exchange for a fee deducted from Top Kat's royalty payments. These engineering services, which W-P provides at all of its contract mines, included the preparation and updating of the mine map. Top Kat would indicate to W-P what section Top Kat wanted to mine and W-P engineers would then make projections for that particular area. This provision was included in the contract because, under the terms of its lease with Cole and Crane, W-P is required to submit mining projections and plans to them for their approval before mining. Similar provisions requiring the mine or mineral rights owner to provide engineering services are common in the contract mining industry. Pursuant to the contract, W-P's Chief Engineer, Joseph Dotson, and members of his engineering crew also visited the mine approximately once a week to set spads or update the mine map. The engineering crew did not direct Top Kat where to mine coal, other than in conformity with the mine projections.

Under the contract, W-P also permitted Top Kat to use W-P equipment located on the mine premises for a fee of $1.50 per ton of coal produced. Effective in early 1990, W-P waived this fee because of the poor condition of the equipment and Top Kat's financial problems. W-P also loaned Top Kat $75,000 for the purchase of a wage bond required by West Virginia law. In making that loan W-P required Top Kat to execute a security agreement and promissory note. W-P was reimbursed for that loan with interest, at the rate of $6,000 per month.

W-P also permitted Top Kat to order supplies from its supply house deducting the cost of those supplies, plus a 10 percent service charge, from subsequent royalty payments.

W-P had an identical supply arrangement with all five of its contract miners. This type of supply house arrangement is also common in the contract mining industry.

During the period when Top Kat was the contract miner at the No. 21 Mine, W-P President Vernon Cornett recommended two persons to Top Kat for jobs as foremen. Top Kat was free however to accept or decline those recommendations. W-P management also telephoned Top Kat on a daily basis to ascertain production levels. If Top Kat was having production problems such problems would typically be reported during these calls. W-P President, Vernon Cornett, and W-P Safety Director, Mickey Senator, visited the mine infrequently, Cornett visiting approximately once a month to check the coal stockpile and Senator occasionally visiting to check on the roadways and mine maps.

During 1991, Top Kat began experiencing financial troubles. At the request of Top Kat's president, W-P advanced money to meet its payroll and other obligations. W-P recouped this money from Top Kat by deducting those advances from subsequent royalty payments.

During the time that Top Kat was the contract miner at the No. 21 Mine, MSHA conducted a number of health and safety inspections. MSHA never provided W-P with notice that an inspection was about to begin, did not invite W-P to participate in any inspection, did not invite W-P to participate in any pre-inspection conferences and cited only Top Kat as the operator of the mine. Moreover, the Secretary has never cited W-P for failing to register with MSHA as an operator of the No. 21 Mine.

During late 1990 and 1991, there was an increased number of MSHA inspections and Top Kat was issued an increased number of citations and orders. This resulted in decreased coal production. Apparently believing that the increased MSHA activity may have been caused by a personality conflict between MSHA and Top Kat, W-P Safety Director Mickey Senator requested a meeting between MSHA and Top Kat management in late 1990 or early 1991. Senator attended the meeting in an effort to resolve the apparent conflict.

Around February 1991, MSHA held meetings at the Logan Field Office with Top Kat representatives concerning the mine map and ventilation plan for the No. 21 Mine. W-P's engineer, Joseph Dotson and Mickey Senator, attended some of those meetings.

Around August 1991, Top Kat's President, William Adkins, requested that Cornett send Mickey Senator to accompany MSHA inspectors on the next inspection. Top Kat apparently made this request because Top Kat knew that Senator was experienced

with mine safety and health matters and with the local MSHA office. Cornett thereafter sent Senator to accompany MSHA inspectors and a Top Kat representative on an inspection on August 26 and 27, 1991. The inspection involved a shutdown of the belt lines. According to Senator, his role in the inspection was to observe the interaction between the MSHA and Top Kat representatives to determine whether a personality conflict was indeed the cause of the increased number of citations and orders, and to mediate any personality problem. Senator maintains that he understood that Top Kat was the sole operator of the No. 21 Mine and had sole responsibility for health and safety matters at the mine. He maintains that he therefore did not pay close attention to any health or safety violation cited during that inspection, nor did he take notes concerning those alleged violations. Moreover, he did not direct or advise Top Kat concerning abatement of the alleged violations.

Cornett, Senator and Dotson also visited the Logan Field Office on occasion to discuss the No. 21 Mine and the other mines to which W-P leased the mineral rights. The discussions as they pertained to the No. 21 Mine were general discussions concerning whether Top Kat was going to be able to mine coal. In contract mining situations, it is apparently common for representatives of the owner or lessee to meet with MSHA representatives.

On September 4, 1991, MSHA issued Citation No. 3750647 against Top Kat for allegedly having failed to maintain the flooring of a bathhouse at the No. 21 Mine, in alleged violation of 30 C.F.R. 77.200. According to Tyrone Stepp, the issuing inspector, the bathhouse had "basically rotten, deteriorated floor." MSHA did not give W-P notice of the inspection, did not invite W-P to participate in the inspection, and did not invite W-P to attend the pre- or post- inspection conference.

In October 1991, Vernon Cornett met with William Adkins to discuss Top Kat's continued operation of the No. 21 Mine. Adkins informed Cornett that MSHA had put the No. 21 Mine on target status, and that Top Kat was shutting down the mine to deal with its health and safety problems. Cornett noted the production irregularities that Top Kat experienced over the preceding year, and further noted that Top Kat had been unable to resolve its problems with MSHA. Cornett then told Adkins that he, Cornett, did not see how Top Kat could continue to operate. Although W-P had the right to terminate the contract for Top Kat's failure to meet minimum production levels, W-P did not do so.

In late October 1991, Lawrence Fowler, the District Manager of the MSHA District Office covering the Logan Field Office, telephoned Noah Ooten, the MSHA Superintendent

responsible for the No. 21 Mine. In that conversation, Fowler instructed Ooten to modify the outstanding citations against Top Kat to name W-P as a "co-operator." After Fowler instructed Ooten to modify the citation, a representative of MSHA's collection office visited the Logan Field Office to search for records to support MSHA's theory of co-operator liability. The Solicitor's Office subsequently advised Ooten on the language the Logan Field Office should use in modifying the citation. Ooten then instructed his inspector to modify the citations.

MSHA modified the citation in this case, Citation No. 3750647, at 9:32 a.m. on November 14, 1991, more than a month after Top Kat had ceased operations. Approximately one hour later, and without having served W-P with the modified citation, MSHA issued Order No. 3742534 against W-P for allegedly having failed to abate Citation No. 3750647. At approximately 1:00 p.m. on November 14, 1991, MSHA served W-P with the modification of Citation No. 3750647. and Order No. 3742534.

Before the modifications, MSHA did not notify W-P that W-P was considered to be a "co-operator" of the No. 21 Mine nor that it would seek to hold W-P liable for safety and health violations at the No. 21 Mine.

Analysis

A preliminary issue raised in this case is whether W-P was an "operator" within the meaning of the Act. The term "operator" is defined in Section 3(d) of the Act as any "owner, lessee, or other person who operates, controls, or supervises a coal or other mine ...". Since there is no dispute that W-P was an "owner" and "lessee" of the subject mine, W-P was therefore an "operator" and subject to liability for violations committed by its contractors at this mine. Harman Mining Corporation v. Federal Mine Safety and Health Review Commission, 671 F.2d 794 (4th Cir. 1981), Secretary v. Calvin Black Enterprises, 7 FMSHRC 1151 (1985), Secretary v. Phillips Uranium Corp., 4 FMSHRC 549 (1982). See also Bituminous Coal Operators' Assoc., Inc. v. Secretary of Interior, 547 F.2d 240 (4th Cir. 1977), similarly construing provisions of Section 3(d) of the Federal Coal Mine Health and Safety Act of 1969 identical to those of Section 3(d) at issue herein. W-P's position, with which the Secretary is in agreement, that a mine owner or lessee can be liable as an "operator" only if the facts establish the exercise of control or supervision over the operation of the mine is therefore erroneous as a matter of law. In this case the Secretary also maintains that W-P is liable as a "co-operator" based on the alleged control and supervision it exercised at the mine. The term "co-operator" is not defined in the Act, however, and any liability on the part of W-P in this case must rest upon a finding that it was an "operator" under Section 3(d) of the Act.

W-P next argues that the Secretary's decision in this case to proceed against W-P was not consistent with the purposes of the Act and that the citation must be vacated under the principles set forth in Phillips Uranium, supra, at 551-553. In the Phillips case the Commission reaffirmed the principles enunciated in Old Ben Coal Co., 1 FMSHRC 1480 (1979) that in choosing the entity against whom to proceed, the Secretary should look to such factors as the size and mining experience of the independent contractor, which parties contributed to the violation, and the party in the best position to eliminate the hazard and prevent it from recurring. 4 FMSHRC at 552-53. The Commission stated in Phillips that a Secretarial decision grounded solely on considerations of "administrative convenience" rather than the protective purposes of the Act could not be approved. See also Secretary v. Calvin Black Enterprises, supra.

Applying these principles to the present case, I find that the Secretary has failed to establish that he has proceeded against W-P in this case on anything other than administrative convenience in an attempt to collect civil penalties from a "deeper pocket." Indeed, the Secretary readily acknowledges that one reason for selecting W-P for prosecution herein apparently after discovery that the contractor could not pay the civil penalties was W-P's "resources." Beyond that the Secretary has essentially refused to reveal the reasoning, if any, behind his selection of W-P for prosecution citing a "deliberative process" privilege. The result is that there is no evidence that the Secretary considered the factors enunciated in the Phillips decision.

Moreover, what little evidence there is in this case suggests that, under the Phillips criteria, W-P was not the appropriate entity to proceed against. Top Kat was clearly in charge of the day-to-day mining activities and because only Top Kat had crews of working miners at the mine during relevant times it may reasonably be inferred that it was the primary contributor to the violative condition, that it was in the best position to eliminate the hazard, and that it was best prepared to prevent it from recurring. Finally, it was Top Kat's employees who were primarily exposed to the cited hazard. While the Secretary also argues that W-P exercised co-equal supervision over the mining activities the facts do not support this argument.

The limited evidence that is available demonstrates moreover that the decision to select W-P for prosecution was in fact based on administrative convenience. For example MSHA did not cite W-P until after Top Kat ceased operations and was no longer in business. Moreover MSHA inspectors were at the No. 21 Mine frequently during 1990 and 1991, at which time they had ample opportunity to observe the relationship between Top Kat and W-P.

If citing W-P for violations at the No. 21 Mine would in fact have promoted the health and safety of miners, MSHA should have cited W-P at the time of the alleged violations.

In addition, Noah Ooten from MSHA's Logan Field Office testified that, after Top Kat ceased operations, a representative of MSHA's Mount Hope District Office advised him that MSHA would be modifying the outstanding citations against Top Kat to name W-P as a "co-operator." According to Ooten, a representative of MSHA's collection agency subsequently visited the Logan Field Office to search for evidence to justify citing W-P as a "co-operator." The decision was also made by MSHA's Office of Assessments and was made before the Secretary's investigation into the facts which he now contends support W-P's liability.

It may reasonably be inferred from these facts that the Secretary's motivation in citing W-P was therefore primarily to obtain a "deep pocket" to ensure collection of penalties. The idea that the purpose of charging W-P was to advance the health and safety interests of miners appears to have been only an afterthought not consistent with the actual sequence of events. Under the circumstances I find that the Secretary has not complied with the criteria set forth in Phillips Uranium, and this case must accordingly be dismissed. In light of this determination there is no need to decide whether the citations in this case could have been otherwise legally amended within the framework of Wyoming Fuel Company, 14 FMSHRC 1282 (1992).

ORDER

The civil penalty proceedings in Docket No. WEVA 92-746 are hereby dismissed as against Top Kat Mining, Inc., and Bear Run Coal, Inc., for failure to execute service. Furthermore, Citation No. 3750647 and Order No. 3742534 are vacated and these civil penalty proceedings are dismissed against W-P Coal Company for the reasons stated in the above decision.

Gary Melick
Administrative Law Judge
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