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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 92-746
W-P COAL COMPANY	:	

BEFORE: Backley, Doyle and Holen, Commissioners(Footnote 1)

DECISION

BY THE COMMISSION:

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)("Mine Act" or "Act"), presents the issue of whether the Secretary of Labor acted permissibly in citing W-P Coal Company ("W-P") for an alleged violation of a mandatory safety standard by its contractor, Top Kat Mining, Inc. ("Top Kat"). Administrative Law Judge Gary Melick concluded that the Secretary's enforcement action against W-P was improper and dismissed the proceeding. 15 FMSHRC 682 (April 1993)(ALJ). For the reasons that follow, we reverse and remand.

I.

Factual and Procedural Background

Under a 1969 lease with the owner, Cole and Crane, W-P holds the mining rights to the No. 21 Mine, a deep coal mine in Logan County, West Virginia. Originally, W-P operated the mine but, in 1988, shifted to contract mining.(Footnote 2) In December 1989, W-P entered into a contract with Top Kat, under which Top Kat extracted the coal in return for royalty payments from W-P based upon the number of tons of clean coal produced. 15 FMSHRC at 683. Top Kat registered

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1 Pursuant to section 113(c) of the Mine Act, 30 U.S.C. 823(c), we have designated ourselves a panel of three members to exercise the powers of the Commission. Chairman Jordan has recused herself in this matter and took no part in the consideration of this decision.

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2 W-P's general business operations consist of buying coal from contract mining companies, processing the coal at its preparation plant, and then selling it. At the time of the alleged violation, W-P had under lease the mining rights to six deep coal mines in Logan County and had mining contracts with five separate mining companies. 15 FMSHRC at 683.

with the Department of Labor's Mine Safety and Health Administration ("MSHA") as the mine's operator. G. Exs. 4, 5.

The agreement between W-P and Top Kat identified Top Kat as an independent contractor responsible for controlling the mine, hiring miners and complying with mine safety and health laws. 15 FMSHRC at 683; R. Ex. 3, Art. IV. A. 1. & 7. The contract obligated Top Kat to indemnify W-P for losses and liabilities, including penalties assessed against W-P for violations of the Mine Act. R. Ex. 3, Art. X. B. Top Kat leased its mining equipment from W-P and was to obtain mining engineering services from W-P. 15 FMSHRC at 684; R. Ex. 3, Art. IV. E. 4. & N. W-P's engineering personnel prepared the mine plan and prepared and updated the mine maps for Top Kat; in connection with those services, they visited the mine on a weekly basis. 15 FMSHRC at 684. During the term of the agreement, Top Kat experienced serious financial problems and W-P provided loans and advances and waived fees. Id.

During 1990 and 1991, MSHA conducted many inspections at the No. 21 Mine and issued to Top Kat numerous citations and withdrawal orders. 15 FMSHRC at 685. W-P participated in discussions with MSHA personnel about enforcement. Id. at 685-86. On September 4, 1991, an MSHA inspector issued to Top Kat a citation alleging a violation of 30 C.F.R. 77.200 for failing to properly maintain the bathhouse floor. G. Ex. 10. The mine was placed on a "special emphasis" inspection program on October 10, 1991, because of its safety and health problems. Shortly thereafter, W-P terminated Top Kat's contract, shut down the No. 21 Mine, and submitted to MSHA an identification form listing Bear Run Coal Company ("Bear Run") as the succeeding contractor-operator.

On November 14, 1991, MSHA modified the bathhouse citation to name W-P as the "co-operator" of the mine and also issued a withdrawal order, pursuant to section 104(b) of the Mine Act, 30 U.S.C. 814(b), alleging failure by W-P to abate the cited condition. MSHA subsequently served W-P with the modified citation and the failure to abate order, and filed a civil penalty petition against W-P and Top Kat as "co-operators" and against Bear Run as successor-in-interest.(Footnote 3) 15 FMSHRC at 682, 687. W-P contested the citation and order, and an evidentiary hearing was held before Judge Melick. The judge dismissed the petitions against Top Kat and Bear Run because those parties had not been served, and only W-P's liability remained in issue. Id. at 682-83.

The judge rejected the Secretary's argument that W-P was liable as a "co-operator," concluding that liability must first rest upon W-P's identity as an "operator," as that term is defined in section 3(d) of the Mine Act, 30 U.S.C. 802(d). 15 FMSHRC at 687. Although he determined that W-P was a statutory operator, the judge held that the Secretary had acted impermissibly in proceeding against W-P. Id. at 687-89. Invoking Phillips Uranium Corp., 4 FMSHRC 549 (April 1982), the judge stated that enforcement actions against an

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3 This case involves one of some 138 civil penalty petitions filed by MSHA against W-P for alleged violations at the No. 21 Mine during the time Top Kat was the contract miner. The other cases were stayed pending resolution of the common issue of whether W-P could properly be cited for those alleged violations.

operator for its contractor's violations should be based on such factors as the size and mining experience of the independent contractor, which party contributed to the violation, and which party was in the best position to eliminate the hazard and prevent its recurrence. Id. at 688. The judge concluded that these factors did not support the enforcement action against W-P, and that the Secretary had proceeded against W-P only to collect civil penalties from a "deeper pocket." Id. at 688-89. The judge concluded that the Secretary's enforcement action was impermissibly based on "administrative convenience" rather than the protective purposes of the Act. Id. Accordingly, he vacated the citation and order and dismissed the civil penalty proceeding.(Footnote 4) Id. at 689.

The Commission granted the Secretary's petition for discretionary review and permitted amicus curiae participation by the American Mining Congress ("AMC") in support of W-P and by the United Mine Workers of America ("UMWA") in support of the Secretary. Oral argument was heard.

II.

Disposition

The Secretary contends that the judge erred in rejecting his contention that W-P was a "co-operator" under the Mine Act and therefore liable for the violations. He asserts further that substantial evidence demonstrates that W-P exercised significant control and supervision over the mine. The Secretary argues that, in any event, his decision to cite an owner-operator or contractor-operator for a violation at the owner's mine is within his broad enforcement discretion, and that such enforcement action is "virtually unreviewable." S. Br. at 17-22. He argues further that, even if judicial review of enforcement discretion were proper, Phillips Uranium no longer represents "current and controlling law." Id. at 28 n.13. Maintaining that every owner-operator exercises primary control over its mine, because each has the power to choose its contractor and to determine how the contractor will operate the mine, the Secretary notes that the Commission and courts have held that an owner-operator may be held liable for its contractor's violations and may also be passively liable for a contractor's violations even if it did not exercise significant supervision over the mine. Id. at 33-34. He contends, moreover, that "administrative convenience" and a "deeper pocket" are permissible factors in the exercise of enforcement discretion. Id. at 27-29. The Secretary additionally contends that the Commission's jurisdiction to review questions of "policy or discretion" under sections 113(d)(2)(A)(ii) & (B) of the Act, 30 U.S.C. 823(d)(2)(A)(ii) & (B), is narrowly confined and does not extend to examination of the Secretary's enforcement decisions. S.

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The judge did not reach W-P's other arguments that the Secretary's enforcement action was an unfair departure from its past practice of regulating the West Virginia contract mining industry; that W-P was deprived of its constitutional rights when it was not accorded the procedural due process attendant to MSHA inspections; that the Secretary failed to issue the citation with reasonable promptness; and that the section 104(b) order was improperly based on a terminated citation. See W-P Br. at 6-7.

Reply Br. at 8-21.

Amicus UMWA submits that the judge erroneously applied the principles in Phillips Uranium. UMWA Br. at 3-7. The UMWA states that an owner-operator may be held responsible without fault for violations committed by its independent contractor, and that the Commission has reviewed the Secretary's enforcement actions in this context by determining whether the Secretary's decision to cite an owner-operator was made for reasons consistent with the purposes and policies of the Mine Act. Id. at 3. The UMWA argues that the Secretary's decision to cite W-P after Top Kat went out of business was reasonable and that the judge's conclusion was improper since it permitted the mine owner to avoid liability for numerous violations. Id. at 6.

W-P and amicus AMC essentially argue that the judge properly dismissed the proceeding because the Secretary's decision to cite W-P was based solely on administrative convenience rather than on concern for the health and safety of miners. They assert that W-P did not control or supervise the mining activities in question, and that the judge correctly applied the Phillips Uranium factors. In the event the Commission reverses the judge, W-P requests remand for consideration of its other defenses.

With regard to the threshold issue raised by the Secretary as to Commission jurisdiction, the Commission has previously held that it is not required to defer to the Secretary's interpretation of Commission jurisdiction. Drummond Co., Inc., 14 FMSHRC 661, 674 n.14 (May 1992); Jim Walter Resources, Inc., 15 FMSHRC 782, 787 (May 1993). The Secretary did not appeal Drummond. The Secretary's reliance on Martin v. OSHRC, 499 U.S. 144 (1991), to support his jurisdictional argument is misplaced. That decision does not address an agency's interpretation of its own jurisdiction. Martin v. OSHRC addresses whether a reviewing court owes deference to the Secretary's or to the Occupational Safety and Health Review Commission's interpretation of ambiguous regulations issued by the Secretary. Furthermore, the decision specifically limits its holding to the "division of powers ... under the [Occupational Safety and Health] Act." 499 U.S. at 157. We note that in Thunder Basin Coal Co. v. Reich, 510 U.S. , 127 L. Ed. 2d 29 (1994), the Supreme Court recognized the Commission's general policy jurisdiction and its role as an independent reviewing body in developing a comprehensive body of law under the Mine Act. 127 L. Ed. 2d at 38 n.9, 42-43.

We reject the Secretary's argument that review of MSHA's enforcement decisions is precluded by well established judicial precedent to the effect that government agencies have virtually unreviewable enforcement discretion. The cases relied on by the Secretary, such as Heckler v. Chaney, 470 U.S. 821 (1985), do not address whether an agency may have exceeded its statutory enforcement authority, but are limited to "an agency's decision not to prosecute or enforce." 470 U.S. at 831 (emphasis added).

We agree with the Secretary that the judge erred by relying solely on Phillips Uranium. That case, decided in 1982, was directed to the Secretary's earlier policy of pursuing only owner-operators for their contractors' violations. Subsequently, the Secretary's policy has been broadened to include pursuit of independent contractor-operators in some instances. It is

now well established that, in instances of multiple operators, the Secretary may, in general, proceed against either an owner-operator, his contractor, or both. Bulk Transportation Services, Inc., 13 FMSHRC 1354, 1360 (September 1991); Consolidation Coal Co., 11 FMSHRC 1439, 1443 (August 1989). The Commission and courts have recognized that the Secretary has wide enforcement discretion. See, e.g., Bulk Transportation, 13 FMSHRC at 1360-61; Consolidation Coal, 11 FMSHRC at 1443; Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 538 (D.C. Cir. 1986). Nevertheless, the Commission has recognized that its review of the Secretary's action in citing an operator is appropriate to guard against abuse of discretion. E.g., Bulk Transportation, 13 FMSHRC at 1360-61; Consolidation Coal, 11 FMSHRC at 1443.

Turning to the facts at hand, we conclude that substantial evidence does not support the judge's conclusion that W-P was only superficially involved in Top Kat's operation. Indeed, many of the judge's factual findings are inconsistent with that conclusion. The record reveals substantial W-P involvement in the mine's engineering, financial, production, personnel and safety affairs. W-P prepared the mine plan, calculated mining projections, prepared and updated mine maps, contacted and visited the mine frequently to discuss production and other matters, waived certain fees owed by Top Kat, advanced funds to Top Kat, met with MSHA personnel regarding mine conditions and enforcement activity, participated in an inspection of the mine, and even arranged and attended a meeting of MSHA and Top Kat to discuss the increasing number of citations, inspections, and orders. See 15 FMSHRC at 684-86. Thus, the record reveals that W-P was sufficiently involved with the mine to support the Secretary's decision to proceed against W-P.

Nonetheless, we reject the Secretary's "co-operator" theory of liability. That term does not appear in the statute and existing case law adequately addresses liability issues where owner-operators and independent contractors are involved. See Bulk Transportation, 13 FMSHRC at 1359-61; Consolidation Coal, 11 FMSHRC at 1442-43. Moreover, at oral argument the Secretary's counsel explained that "co-operator" is merely a term of administrative convenience designed to focus the Secretary's enforcement efforts. Oral Arg. Tr. at 6-8. We agree that, contrary to the judge's suggestion (15 FMSHRC at 688), it was not necessary for the Secretary to establish that W-P was "co-equal" with Top Kat in the operation of the mine.(Footnote 5)

Accordingly, we conclude that the Secretary's enforcement action against W-P was proper and we reverse the judge's decision. We remand for a determination of the remaining liability issues, including resolution of the other constitutional and statutory defenses raised by W-P (n.4, supra).

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In view of W-P's considerable involvement, we do not reach the Secretary's alternate argument that an operator only passively involved with a mine is properly cited for a contractor's violation. Nor do we reach amicus AMC's contention that the Secretary improperly raised this argument for the first time on review.

III.

Conclusion

For the reasons set forth above, we affirm the judge's determination that W-P is an "operator" within the meaning of the Mine Act, reverse his determination that the Secretary acted impermissibly in citing W-P, reinstate this proceeding, and remand for determination of outstanding issues.

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner