CCASE:
SOL (MSHA) V. D. BLATTNER
DDATE:
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 93-123-M A.C. No. 26-02214-05501
v.	:	Yankee Project
D.H. BLATTNER & SONS, INC., Respondent	:	Docket No. WEST 93-286-M A.C. No. 45-03280-05502
	:	Van Stone Mine
D.H. BLATTNER & SONS INC., Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEST 94-5-RM
v.	:	Citation No. 4138847; 9/2/93
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Aurora Mine

DECISION

Appearances: Robert Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington Virginia, for Petitioner;
Michael S. Lattier, Esq., GOUGH, SHANAHAN, JOHNSON & WATERMAN, Helena, Montana, for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges Respondent, D.H. Blattner & Sons, Inc. ("Blattner"), with violating the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq. (the "Act").

A hearing was held in Sparks, Nevada, on December 8-9, 1993. The parties filed post-trial briefs.

ISSUES

The issues are whether Blattner, an independent contractor, is required to file a legal identity report (Form 2000-7) as provided in 30 C.F.R. 41.20.

The cited regulation provides as follows:

> Subpart C--Operator's Report to the Mine Safety and Health Administration
>
> 41.20 Legal identity report.
>
> Each operator of a coal or other mine shall file notification of legal identity and every change thereof with the appropriate district manager of the Mine Safety and Health Administration by properly completing, mailing, or otherwise delivering Form 2000-7 "legal identity report" which shall be provided by the Mine Safety and Health Administration for this purpose. If additional space is required, the operator may use a separate sheet or sheets.

SUMMARY OF THE CASES

These consolidated cases involve three separate citations for failure to file a legal identity report. The first citation, issued on September 14, 1992, relates to the Yankee Pit or Yankee Project Mine located in the state of Nevada.

The second citation, issued on November 2, 1992, relates to the Van Stone Mine, located in the state of Washington.

The third citation, issued on September 2, 1993, relates to the Aurora Partnership Mine, located in the state of Nevada.

Although worded somewhat differently, each citation charges Blattner with violating 30 C.F.R. 41.20 (1992) in that Blattner failed to file a "Form 2000-7 Legal Identity Report." Blattner contests the three citations and the proposed penalties.

EVIDENCE

The evidence offered by each party is essentially uncontroverted. Blattner's evidence shows it is a construction company founded in the early 1900s. It has been involved in various heavy construction activities for most of this century. Blattner did not become involved in mining until approximately 1979. (Tr. 314). Bill Blattner, the president of the company, estimated its

mining activity ranges from 30 to 60 percent of its total work at any given time. It continues be involved in heavy construction activities, such as highway construction, which continues to be a major part of its business. (Tr. 315).

Prior to the issuance of the citations at issue herein, Blattner obtained a three-digit contractor identification number. Blattner used that number on all jobs at the mines in which it worked. Prior to the issuance of the citations, Blattner was never asked to file a legal identity report. (Tr. 318). Blattner is currently working at nine mines providing essentially the same type of service at each mine. (Tr. 315-316).

1. Yankee Project.

On October 17, 1991, Blattner entered into a contract with USMX, Inc., to provide certain services for USMX at their Yankee Project Mine, which is an open pit, heap leach gold mine. (Jt. Ex. 1). The services which Blattner provides at the mine include, primarily, loading ore and waste onto their haul trucks, hauling that material to stockpiles and waste dumps, and dumping the material at the appropriate places. Blattner retained a subcontractor, ICI, to perform the drilling and blasting work. Blattner is paid on the basis of the tonnage of material hauled. It does not receive any royalties. (Tr. 319-320).

USMX was in charge of the project and had overall control and direction of the project. (Kentopp Dep. at 14, 36, 37). It simply hired Blattner to provide equipment and manpower. (Kentopp Dep. at 45). USMX did all the planning and engineering for the project and also ran the crushing and leaching operation. Blattner had no input in the design of anything at the mine. (Kentopp Dep. at 8, 10, 20).

It was necessary for USMX personnel to be on-site daily to run the mine. They could not have run the mine by telephone. (Kentopp Dep. at 11). USMX surveyors worked in the pit area daily laying out pit limits, laying out blast patterns, collecting blast hole samples, cutting stakes for drilling, laying out grade stakes during the mining, and staking out the boundaries to determine who the pit was to be mined. (Kentopp Dep. at 11, 18, 19, 20).

USMX engineers were in the pit to insure Blattner was mining according to the plans. This required daily on-site monitoring by USMX. Any work that was defective could be rejected by USMX. (Kentopp Dep. at 21-22). USMX geologists were in the pit directing Blattner as to what was ore and what was waste and where to dump the ore and waste. USMX personnel were in contact with Blattner personnel several times a day. There were weekly pro-

duction meetings between USMX and Blattner. USMX gave Blattner direction as to where it should be mining and how it should be accomplished. (Tr. 541-542).

ICI, the drilling and blasting subcontractor, supervised and trained its own employees. ICI provided its own safety training to its employees. Blattner had no involvement in the training and safety training of ICI's employees. ICI provided and maintained its own equipment. ICI determined itself how it should best accomplish its job; however, it was provided with certain specifications and direction by USMX. (Tr. 540-541).

MSHA admitted at the hearing that USMX was responsible for production at the mine. (Tr. 544).

2. Van Stone Mine.

On November 19, 1990, Blattner entered into a contract with Equinox Resources (Equinox) to provide certain services for Equinox at the Van Stone mine. The Van Stone mine is a lead and zinc mine. Blattner provided the same type of service to Equinox as it did for USMX; namely, it loaded the ore and waste, hauled it to the dump sites and stockpile, and dumped the material. Blattner retained subcontractor Roundup Powder for drilling and blasting. (Tr. 497).

Equinox had approximately 43 employees at the mine. Those employees included surveyors, engineers, supervisors, crusher and mill workers, and mill maintenance personnel. (Tr. 493). Equinox's employees were in contact with Blattner's employees on an hourly basis. Surveyors were in the pit almost all day and geologists were in the pit at least half a day every day. (Tr. 504). Equinox's geologists were in the pit directing Blattner at all times. They told Blattner employees what was ore and what was waste. (Tr. 500). It was absolutely necessary for Equinox's mine manager, Hans Gertsma, and other Equinox employees to be on-site to supervise their contractors, including Blattner. (Tr. 494).

Equinox controlled everything Blattner did at the mine. This included specifying how many trucks Blattner could have on the road, when and where it should repair them, where it should drill, where to bring the ore and waste, and whom it employed. (Tr. 495). Equinox provided all the specifications regarding how drilling and blasting should be accomplished. Equinox monitored every blast and required adjustments as needed. (Tr. 498-500). Equinox required Blattner and Roundup Powder to attend daily meetings with its geologists, surveyors, and mine superintendent to discuss what was going to take place that day and what Equinox needed regarding where the mining would be conducted. (Tr. 501).

Safety on the property was totally the responsibility of Mr. Gertsma. Equinox made sure that Blattner conducted safety meetings. Blattner and Equinox employees jointly attended MSHA training sessions. The safety and health of Blattner's employees was very important to Gertsma. He was just as concerned about the safety and health of Blattner's employees as he was about production at the mine. (Tr. 508-509, 537).

Equinox had overall control and direction as to how the mine was run. Equinox was the operator of the mine. It was responsible for the mining being conducted in the pits. Equinox was responsible for securing all necessary permits to conduct the mining. Blattner was simply hired to move material. (Tr. 509, 520-521, 533-534).

Blattner's relationship with Roundup Powder was the same as its relationship with ICI at the Yankee Project. (Tr. 474).

3. Aurora Partnership Mine.

On June 16, 1993, Blattner entered into a contract with The Aurora Partnership (Aurora) to provide certain services to Aurora at the Aurora Partnership Mine. (Jt. Ex. 3). Aurora Partnership Mine is an open pit, heap leach gold mine. Blattner provides the same type of services for Aurora as it does at the Yankee Project and Van Stone mines. Blattner itself provides the loading, hauling, and dumping work for Aurora. It has ICI as a subcontractor who provides the drilling and blasting services, while Fisher Industries, another subcontractor, provides crushing services. (Tr. 445).

Aurora has approximately 24 employees working at the mine. These employees work in all areas of the mine on a daily basis. Their services are necessary to operate the mine. (Tr. 398). Aurora provides all the exploration, all the mine planning and engineering, delineation of the ore bodies, development of the mine plan and schedule, oversees the mining of the ore body, oversees that Fisher is crushing to specifications, operates the heap leach process, and obtains all necessary permits to mine. (Tr. 401-402).

It is necessary for Jim Burt, the general manager for Aurora, and other Aurora personnel, to be on the property to supervise Blattner. Selective mining practices are critical. In order to ensure that dilution of the ore is minimized, it is vital for Aurora to oversee the day-to-day operations at the mine. This job could not be done by telephone. (Tr. 399-400).

Aurora personnel are in the pit approximately 80 percent of the time on a daily basis. They are in contact with Blattner personnel on a daily basis, continually providing them with information. (Tr. 421-422). Blattner cannot mine any material

until Aurora determines what it is and gives its approval. Aurora's geologist is in the pit continually directing Blattner's employees bucketload by bucketload as to what is ore and what is waste. The geologist also specifies whether Blattner should use a loader or a shovel. (Tr. 414, 454).

Aurora is concerned with safety in the mine. An Aurora employee goes into the pit on a daily basis to monitor stope control. (Tr. 403). Aurora also places one of its employees in the pit as a spotter, whose job was to overlook the walls and check for movement. (Tr. 461). Mr. Burt is very concerned about the safety of Blattner's employees. Aurora periodically conducts safety audits on Blattner to ensure that Blattner's operation is safe and that it meets with Aurora's satisfaction. Anything Aurora sees that is unsafe, it instructs Blattner to correct. Aurora requires Blattner to report to it any safety concerns raised by Blattner employees and requires those concerns to be addressed. Aurora also has the right to have any of Blattner's unsafe equipment shut down and removed from the premises. (Tr. 404, 408-409, 440).

As Mr. Burt testified at the hearing, Blattner is their contractor. Aurora has overall responsibility for the mine. Aurora directs Blattner and Blattner is under its control with regard to mining. As the owner, Aurora is responsible for overseeing the contractors on the site. (Tr. 424, 429).

APPLICABLE STATUTES

The Federal Mine Safety and Health Act of 1977 provides:

Section 2

(a) The first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource--the miners; [30 U.S.C.A. 801(a)]

Section 3

(d) "Operator" means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine; [30 U.S.C.A. 802(d)]

Section 102

(h) In addition to such record as are specifically required by this Act, every operator of a coal or other mine shall establish and maintain such records, make such reports, and provide such information as the Secretary or the Secretary of Health, Education and Welfare may reasonably require from

time to time to enable him to perform his functions under the Act. [30 U.S.C.A. 813(h)]

DISCUSSION

The citations involved here concern alleged violations of 30 C.F.R. 41.20. The regulation is set forth above. Stripped of its surplusage, it requires "each operator" of a coal or other mine to file notification of legal identity ... or otherwise deliver a Form 2000-7 "Legal Identity Report."

In view of the wording of 41.20, it is necessary to consider the meaning of the term "operator."

Part 41 relates to the "notification of legal identity" forms. Subpart A, 41.1(a), defines an operator as follows:

> 41.1 Definitions.
>
> (a) Operator means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any designated independent contractor performing services or construction at such mine.

As it relates to the instant case and, stripped of its surplusage, 41.1(a) identifies, in part, as an operator:

> " ... any designated independent contractor performing services at such mine."

It is apparent that Blattner meets the statutory definition of an "operator."

I

The Secretary is not limited to dealing with Blattner strictly as an independent contractor merely because Blattner had a contractor's I.D. Number at another mine property.

Blattner claims that because it is an "independent contractor," the Secretary has no authority to deal with it as an "operator" in any other context, for example, as a "person who controls or supervises a coal or other mine." In other words, Blattner's legal position is that the term "independent con-

tractor" and all other terms in the Mine Act which define the term "operator" are mutually exclusive. (Emphasis added).

A review of the case law under the 1969 Coal Act clearly demonstrates the lack of merit in Blattner's position. Under the 1969 Coal Act, the term "operator" is defined as " ... any owner, lessee, or other person who operates, controls, or supervises a coal mine." In Association of Bituminous Contractor v. Andrus, 581 F.2d 853 (D.C. Cir. 1978), the D.C. Circuit Court of Appeals addressed the issue of whether an independent contractor could be classified as an "operator" under the Coal Act. In reversing the decision of the lower court and holding that an "independent contractor" was an operator under the Coal Act, the court clearly rejected the conclusion that only one party on a mine property (which Blattner claims would be the property owner) could actually operate, control, or supervise the mine. The court stated:

> There is always an owner of a coal mine, yet the statute includes lessees and "other persons" within the definition of operator as well. So there must be some cases where the person who operates, controls, or supervises is not the owner; 581 F.2d 862.

The court also specifically rejected the concept that independent contractors, when they are on mine property, are not in control of the actual mining activities, but are only performing a service under the direct supervision of the property owner.

> It is not a stretching of the statute to hold that companies who profess to be independent of the coal mine owners as these construction companies purport to be, do control and supervise the construction work they have contracted to perform over the area where they are working. If a coal mine owner of lessee contracts with an independent construction company for certain work within a certain area involved in the mining operation, the supervision that such a company exercises over that separate project clearly brings it within the statute. Otherwise, the owner would be constantly interfering in the work of the construction company in order to minimize his own liability for damages. The Act does not require such an inefficient method of insuring compliance with mandatory safety regulation; 581 F.2d 862, 863.

Also, a reading of the term "production operator" found in 30 C.F.R. 45.2(d) reveals that with the exception of adding the words "or other mine" it is defined with the identical language as "operator" in Section 3(d) of the 1969 Coal Act. Since the courts have previously held that the language of Section 3(d) of the 1969 Act includes independent contractors, there is no reason for the presiding administrative law judge to hold that the same language in Part 45.2(d) of the regulations now excludes independent contractors. In following decisions of the Federal Courts, by adding the independent contractor's language to the definition of "operator" in Section 3(d) of the 1977 Mine Act, Congress clearly did not intend to limit the underlying premise of those decisions that "other persons" besides a property owner can control and supervise specific areas of mines.

Furthermore, in cases litigated under the 1977 Mine Act, the Federal Courts have held that Congress was clearly aware that there could be more than one operator of a single mine. See International Union, UMWA v. FMSHRC, 840 F.2d 77, 82 (D.C. Cir. 1988).

The Secretary submits that it follows that in situations where there are multiple operators of a single mine, there can be multiple "production operators" at that mine, to which MSHA can assign separate legal identification numbers.

II

The Decision of MSHA to require D.H. Blattner to comply with the provisions of 30 C.F.R. 41.20 is within the agency's enforcement discretion.

30 C.F.R. 41.20, which implements the statutory report filing requirements of Section 109(d) of the Mine Act, requires each operator of a mine to file a notification of legal identity with the appropriate MSHA District Manager. The method of notification prescribed in the regulation is for an operator to complete and return to MSHA Form 2000-7, Legal Identity Report. Since all contractors performing mining services at a mine are "operators" under the 1977 Mine Act, the Secretary could require all contractors to comply with the provisions of 30 C.F.R. 41.20. The fact that he is requiring only those contractor who also meet the definition of a production operator to comply with the regulation is clearly within his discretion to enforce the regulations in a manner which he believes will best serve the objectives of the Mine Act.

In Secretary v. Bulk Transportation services Inc., 13 FMSHRC 1354 (September 1991), the Commission recognized, in affirming a citation issued to Bulk Transportation for a violation committed

by one of its subcontractors, that some contractors do, in fact, exercise direct supervision and control of their subcontractors on mine property.

On page 1361 of its decision, the Commission stated:

> Significantly, the record shows that Bulk has a continuing relationship with BethEnergy and may be in the best position to influence the safety practices of all its drivers. Bulk chooses its drivers and may refuse to retain those drivers who cause safety violations. (Tr. 101-103). We believe that it is unreasonable to require the Secretary to pursue each of Bulk's 70 to 100 contractors.

Furthermore, it is well-established that an Agency's decision to enforce its statute by adopting one remedy as opposed to another, lies within the Agency's unreviewable discretion as long as that remedy is not inconsistent with the purposes of the statute. See NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). In view of the testimony of the MSHA witnesses that at the three mines at issue, D.H. Blattner was a production operator and also was directly responsible for the safety and health of the miners working under its control, requiring Blattner to comply with 30 C.F.R. 41.20, directly promotes the safety goals of the Act.

The evidence demonstrates that Blattner exercised direct supervision and control over the ore extraction process and the health and safety of the miners so involved.

Yankee Pit Mine

MSHA Inspector Steve Cain testified that before he began his inspection at the mine, he met with USMX's safety director (the property owner), who explained to him Blattner was doing the extraction of the mineral in the pit area and supplying it to USMX to process at its mill. (Tr. 28, 29). Blattner hired its own subcontractors including ICI Explosives, who did the blasting in the pit area. (Tr. 37). According to Inspector Cain, no USMX personnel supervised the employees of Blattner or its subcontractors during the extraction process. (Tr. 39).

Inspector Cain further testified that the most important factor to him was who was in control of the health and safety of the miners. (Tr. 34). Only the legal identity report (Form 7000-7002) which is specific for each mine site, and not a contractor I.D. number provides that information to MSHA. Blattner had its own safety director, did its own training, and was responsible for all health and safety activities in the pit area. (Tr. 38).

Van Stone Mine

MSHA Supervisor Colin Galloway testified that the Van Stone Mine was an open pit zinc mine, located in Northeastern Washington. Blattner began working on the property in the spring of 1992. After an MSHA staff meeting where the subject of Blattner's activities on mine property was discussed, he asked Don Downs, one of his inspectors, to find out what Blattner was doing at the Van Stone Mine. (Tr. 126). Downs informed him that Blattner was doing the mining in the pit area and Equinox (the property owner) was running the mill. (Tr. 126). Prior to issuing a citation, he spoke to Hans Gertsma, the manager for Equinox, and Steve Prozinski, the safety director for Blattner. Galloway told Prozinski that Blattner was a production operator and would need to file for a seven-digit legal identification number, because it was responsible for the health and safety of miners in the pit area. (Tr. 130). Only after Prozinski informed Galloway that Blattner was not going to comply with 30 C.F.R. 41.20 did Galloway issue the citation.

Aurora Partnership

MSHA Inspector Robert Morley testified that Blattner took over the mining activities at the Aurora Mine from Lost Dutchman, who previously had a seven-digit legal I.D. number. (Tr. 167). He issued his citation 30 days after he was informed by Bob Cameron, Blattner's safety director, that Blattner was doing the mining at Aurora. (Tr. 171). Morley had a letter from Larry Turner, Aurora's senior mine engineer, dated July 29, 1993, stating that Blattner would be the prime contractor for mining activities and the drilling and blasting would be handled by a subcontractor, ICI Explosives. Also, the letter indicated that Blattner would be the prime contractor for crushing activities on the property and that Fisher Industries, a subcontractor would be doing the actual crushing. The letter stated that both subcontractors would be under Blattner's direct control as the prime contractor. (Gov't. Ex. 8).

III

MSHA correctly based its decision to issue the citations to Blattner, not on the contractual relationship between the parties, but upon a determination of what Blattner was actually doing on mine property.

All three MSHA inspectors who issued the citations testified that they did not consider the written contracts between Blattner and the property owners, prior to taking enforcement action. MSHA inspectors are not trained to review complex con-

tracts, but to issue citations based upon conditions they actually observe or have determined to exist. In Bulk Transportation at page 1358, the Commission agreed stating:

> On focus is the actual relationship between the parties and is not confined by the terms of their contracts.

While a written contract may be evidence of a contractual relationship (in this case a long-term relationship between Blattner and the property owners), what is important is that MSHA be actually aware of who was in control of the worksite.

Nevertheless, the Secretary submits that the specific language of the contracts clearly supports the conclusion, that in those areas of the mines covered by the contracts, Blattner was in control of mining activities including the health and safety of the miners.

For example, the contract between USMX and Blattner at the Yankee Project states:

Article 5 Contractor's Responsibilities:

> Supervision and Superintendence: Contractor shall supervise and direct all work and shall ensure that same is conducted in a competent and efficient manner. Contractor shall be solely responsible for the means, methods, techniques, sequences, and procedures of the work and for coordinating all aspects of the work to meet the owner's objectives, including without limitation the objectives of mining the property for the production and segregation of ore and waste. Contractor shall be responsible to see that all work complies fully with the requirements of this Agreement. Owner nevertheless shall have the right to provide overall planning, oversight, and direction for the work to be performed pursuant to the agreement. However, it's specifically understood and agreed that, because of the contractor's expertise relative to the work for which it has been re-retained, matters regarding the site, specific manner of accomplishing any task, issues of safety precautions, safety programs and site safety relative to the officers and em-employees, and scope of work of the contractor shall be exlusively within the province, discretion, and control of the contractor.

A fair reading of the language of the USMX Blattner contract makes it apparent that the actual supervision of the miners is Blattner's responsibility. USMX retains some planning and oversight functions for the work, but Blattner is in direct control.

IV

> The specific language of MSHA's Program Policy Manual (PPM) should not be a controlling factor in determining the issues in this case.

Each of the MSHA inspectors who testified at the hearing stated they relied upon the specific language of the Mine Act and the regulations and the discussion with their supervisors, in determining to issue the citations to Blattner. MSHA's Program Policy Manual (PPM) was given a limited role in their respective decision. The Secretary believes that the MSHA inspectors made the correct decision, because a review of Part 41 and 45 in the PPM makes it clear that the issues in this case are not adequately addressed in the manual and that other sources of information must be considered.

On page 1, part 41 of the PPM Gov't Ex. 6, the following statement regarding the manual's use is made.

> These are general guidelines for the assignment of new identification numbers and will apply to the majority of operations. Individual circumstances may arise where district personnel will have to decide on a case-by-case basis, whether operations are related or independent for the purposes of assigning identification numbers.

In determining how much weight to give the MSHA's PPM, the Judge is guided by the decision in King Knob Coal Company, Inc., 3 FMSHRC 1417, 1420 (1981), wherein the Commission stated:

> Regarding the Manual's general legal status, we have previously indicated that the Manual's instructions are not officially promulgated and do not prescribe rules of law binding on this Commission ... . In general, the express language of a statute or regulation unquestionably controls over material like a field manual.

In view of the foregoing, any language in the Manual which could be construed as in conflict with the specific language or intent of Section 109(d) of the Mine Act, or Parts 41 and 45 of 30 C.F.R. should be given no weight. In addition, Blattner pro-

duced no evidence that it relied upon the specific language in the PPM to its detriment.

V

The MSHA inspectors who issued the citations at issue, properly relied upon their supervisors' judgment and experience in taking enforcement action against Blattner.

As the testimony of the MSHA witnesses confirmed, the decision to require Blattner to comply with the provisions of 30 C.F.R. 41.20 was not a routine matter within MSHA. (Tr. 209). The decision involved matters of policy and the proper classification of mine operators working on mine property. In addition, Blattner was the first contractor operator who actually refused to file a Form 7000-7002, when requested by MSHA. Under the circumstances, it was prudent of the inspectors to consult with their supervisors, including Mr. Gomez, the District Manager, and inform them of the situation. It is not usual for senior MSHA officials, who have been briefed on the facts, to make final decisions on the enforcement action. See Peabody Coal v. Mine Workers, 1 FMSHRC 1785 (November 1979), 1 MSHC 2220, 2223.

VI

Blattner was not the victim of a selective enforcement policy by MSHA with regard to the compliance with 30 C.F.R. 41.20.

According to the testimony of Bill Blattner Jr., President of D.H. Blattner & Sons, his company has only been required to comply with the notification requirements of 30 C.F.R. 41.20 at three properties in MSHA's Western District and not in the other locations where Blattner was doing work for mine owners. (Tr. 319). Even assuming Mr. Blattner's assertion was correct and his company was performing similar work at its other operations (an allegation which was not the focus of this hearing) MSHA's lack of enforcement action at Blattner's other operations would not be a bar to MSHA's present enforcement position. The Secretary cannot be estopped from citing a violation simply because that same condition was not cited during a previous inspection, or not cited at another mine. Therefore, collateral estoppel cannot be used to prevent government agencies from carrying out their statutory enforcement responsibilities. See, Emery Mining Corporation v. Secretary of Labor, 744 F.2d 1411, 1416 (10th Cir. 1984) and King Knob Coal Co., Inc., 3 FMSHRC 1417, 1421-1422 (1981).

Furthermore, Vernon Gomez, presently MSHA's Administrator for Metal and Nonmetal, stated in his deposition that as far as he was aware, the notification requirements of 30 C.F.R. 41.20, were being applied equally across the country. He also testified that, as the former District Manager of the Rocky Mountain and Western MSHA districts, there was no difference in MSHA's district enforcement policies and agreed that if Blattner's operations in Montana were similar to those at the Yankee Pit, the Montana operation should also be required to have a seven-digit legal I.D. number; see Gomez Transcript of Deposition, pp. 120-123 (April 30, 1993).

Mr. Gomez also specifically denied that MSHA's enforcement policy with regard to compliance with 30 C.F.R. 41.20 has anything to do with increased funding for MSHA. The budget for MSHA districts is determined by the number of miners within a district and not by the number of seven-digit I.D. numbers. (Gomez Tr. 60, 119). Clearly, Blattner's attempt to imply that MSHA really had "other motives" for requiring contractors to file legal identity forms has no credibility.

It is also obvious from a review of the record in this case that Blattner failed to establish how it suffered any harm from MSHA's enforcement of 30 C.F.R. 41.20 at the three properties where Blattner was cited. It has already been established that irrespective of the notification requirements of 30 C.F.R. 41.20, Blattner, as a contractor on mine property, can be cite as an "operator" for any violations of the mandatory standard which occurred on mine property under its control. Also, there was no evidence introduced that Blattner's civil penalty assessments would increase if it complied with 30 C.F.R. 41.20.

When Mr. Blattner was asked why his company refused to file a seven-digit legal I.D. form, he replied concerning potential problems with his bank and insurance company, but could not provide any details. (Tr. 330-332). He also testified that Blattner entered into contracts with owner-operators based on the assumption that Blattner would be providing a service to them and not that Blattner would be the operator of the mine.

The Secretary asserts that, regardless of Mr. Blattner's assumption to the contrary, he does not understand the fact that under the Mine Act, Blattner is an operator when working on mine property. Also, that any of the company's liabilities for health

FOOTNOTE 1

An agency's motivation for taking a particular legal action is irrelevant to determining whether an agency's action was authorized under a statute. See Hammond v. Hull, 131 F.2d 23 (D.C. Cir. 1942).

and safety violations has essentially nothing to do with which legal I.D. form MSHA requires it to file.

The Secretary submits that Blattner failed to establish that it was treated differently than any other of the major contractor/operators in the Western District. As Paul Belanger, an MSHA supervisor testified, a number of other contractors including Degerstrom, Brown & Root, and Selland Construction, who were doing similar work to Blattner's, were requested to file a legal I.D. form and every contractor complied except Blattner. (Tr. 203). Also, he stated that the contractors filed these I.D. reports prior to 1992, when the Gomez memorandum was issued. (Tr. 207).

Penalties

In assessing a civil penalty, I have considered Blattner's size, the effect of the penalty on the the operator's ability to continue in business, Blattner's prior history, negligence, gravity, and good faith.

I further conclude that the penalties assessed in the order are appropriate.

For the foregoing reasons, I enter the following:

ORDER

1. WEST 93-123-M: Citation No. 4137837 and the proposed penalty of $50.00 are AFFIRMED.

2. WEST 93-286-M: Citation No. 3644861 and the proposed penalty of $50.00 are AFFIRMED.

3. WEST 94-5-RM: This contest proceeding is DISMISSED.

John J. Morris
Administrative Law Judge

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