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SOL (MSHA) V. W-P COAL
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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 |
| W-P COAL COMPANY, Respondent | : | |

DECISION

Appearances: Mark Malecki, Esq. (on the remand brief), Gretchen Lucken, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Kurt A. Miller, Thorp, Reed and Armstrong, Pittsburgh, Pennsylvania, for Respondent;
Michael Heenan, Esq., Smith, Heenan and Althen, Washington, D.C., for Amicus Curiae, American Mining Congress.

Before: Judge Melick

This case is before me upon remand by the Commission, 16 FMSHRC 1407, 1412 (1994). Issues directed to be reviewed on remand include arguments framed by Respondent, W-P Coal Company (W-P) that the Secretary failed to issue the citation at bar with reasonable promptness; that the section 104(b) order was improperly based upon a terminated citation; FOOTNOTE 1 that W-P was deprived of its constitutional rights when it was purportedly not accorded the procedural due process attendant to Mine Safety and Health Administration (MSHA) inspections; and that the Secretary's enforcement action was an unfair departure from its purported past practice of regulating the West Virginia contract mining industry. Depending upon the disposition of these procedural issues, it may then be necessary to determine whether the violation existed as charged and, if so, what is

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1/ In a supplemental brief filed after the Commission remand, the Secretary stated that he had since vacated this order. Issues regarding the validity of that order are accordingly now moot.

the appropriate civil penalty to be assessed considering the criteria under section 110(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act."

Background

Under a 1969 lease with the owner, Cole and Crane, W-P holds the mining rights to the subject No. 21 Mine, a deep coal mine in Logan County, West Virginia. Originally W-P engaged in coal extraction at the mine but, in 1988, shifted to contract mining. In December 1989, W-P contracted with Top Kat Mining, Inc. (Top Kat) to extract the coal in return for royalty payments from W-P based upon the tonnage of clean coal produced. At that time Top Kat filed a legal identity report with MSHA as operator of the No. 21 Mine.

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. During 1990 and 1991, MSHA conducted a number of inspections at the No. 21 Mine and issued a number of citations and withdrawal orders to Top Kat. During this time W-P participated in discussions with MSHA personnel about enforcement problems at the mine. On September 4, 1991, an MSHA inspector issued a number of citations to Top Kat including Citation No. 3750647, alleging a violation of 30 C.F.R. 77.201 (later amended to charge a violation of 30 C.F.R. 77.200) for failing to properly maintain the bathhouse floor. FOOTNOTE 2 The mine was placed on a "special emphasis" inspection program on October 10, 1991, because of its alleged safety and health problems. Shortly thereafter, W-P terminated Top Kat's contract, shut down the No. 21 Mine, and submitted to MSHA a legal identity report listing Bear Run Coal Company (Bear Run) as the successor contractor-operator.

On November 14, 1991, MSHA modified the citations, including the bathhouse citation at issue, to name W-P as the "co-operator" of the mine and also issued a withdrawal order, pursuant to section 104(b) of the Act, alleging failure by W-P to abate the cited condition. As noted, that order has since been vacated by the Secretary. MSHA subsequently served W-P with the modified citation and filed a civil penalty petition against Top Kat, against W-P on the theory that it was a "co-operator" and against

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2/ This case involved one of some 138 civil penalty petitions filed by MSHA against W-P for a number of alleged violations at the No. 21 Mine during the time Top Kat was the contract miner. The other cases have been stayed pending resolution of the common issues.

Bear Run as successor-in-interest. FOOTNOTE 3 The petitions against Top Kat and Bear Run were dismissed at hearing because those parties had not been served, and only W-P's liability remained at issue.

Following trial, it was held in the initial decision that W-P was a mine operator under the Act, but under the criteria established by the Commission in Phillips Uranium Corp., 4 FMSHRC 549 (1982), the Secretary had not met his burden of proving that he acted permissibly in proceeding against W-P. As noted, the Commission reversed the latter findings holding that too much reliance was placed upon the Phillips Uranium decision and remanded the case for determination of remaining issues.

Issues on Remand

W-P claims that the Secretary's enforcement action in this case was an unfair departure from its purported past practice of regulating the West Virginia contract mining industry. In this regard, W-P appears to assert that it had been the uniform MSHA policy prior to the instant enforcement action to cite only the contract miner for health and safety violations in contract mining situations.

While there is record support that MSHA had never before cited W-P as lessee/operator for violations at the No. 21 Mine during its contract with Top Kat and that, at least in the areas under the inspection authority of the Logan, West Virginia, MSHA Subdistrict Office, it was probably not the practice to cite such lessee/operators, W-P certainly has not established by record evidence the proposition that there was such a uniform industry-wide Secretarial policy (Tr. I-119, 200, 236 and 237).FOOTNOTE 4 No such inference can properly be drawn from the record evidence cited by W-P. Clearly, Noah Ooten, a supervisor for the Logan, West Virginia, MSHA Field Office was not speaking in the context of a national or even a West Virginia Secretarial policy when he testified. More particularly, the fact that Ooten was unaware of instances in which MSHA had previously cited a mineral rights owner or lessee for violations of a contract miner clearly does

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3/ In his original petition filed in this case, the Secretary proposed a civil penalty of $1,176 for the violation. At oral argument following remand, the Secretary acknowledged that a 35 percent reduction of this proposed penalty would be appropriate since he had vacated the "section 104(b)" failure-to-abate order, and now acknowledges that whoever the mine operator is, it is entitled to full credit for good faith abatement.

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4/ Transcript references to the September 24, 1992, proceedings will be prefaced by "I," to the September 25, 1992 proceedings by a "II," and oral argument on October 17, 1994, by a "III."

not prove that in fact it had never before occurred (Tr. I-119). It is disingenuous to suggest otherwise. The same is true for W-P's references to the testimony of MSHA Inspector Stepp (Tr. I-200, 236-237). The Secretary maintains moreover that as a matter of law no such regulation or uniform policy statement existed then or now exists. In any event, W-P has failed to establish by record evidence that any such uniform industry-wide Secretarial policy existed and this being an essential premise to its argument, that argument must accordingly fail. FOOTNOTE 5

Moreover, W-P cannot fairly claim lack of prior notice that the acts of its contractor could lead to liability in light of the long established case law. In one of its earliest decisions, the Commission placed the mining industry on notice that private contractual assignments of liability and private characterizations of parties would not shield operators from liability. In Secretary v. Republic Steel Corp., 1 FMSHRC 5, 11 (1979), issued 10 years before W-P contracted with Top Kat, the Commission concluded, within the framework of the identical definition of "operator" in the Federal Coal Mine Health and Safety Act of 1969, that a "mine operator cannot be allowed to exonerate itself from its statutory responsibility for the safety and health of miners merely by establishing a private contractual relationship in which miners are not its employees and the ability to control the safety of its workplace is restricted."

In the case of Cyprus Industrial Minerals Co. v. Federal Mine Safety and Health Review Commission, 664 F.2d 1116 (9th Cir. 1981), the Federal Circuit Court of Appeals also anticipated the situation herein, where the owner/lessee contracts extraction and safety functions to another entity and then argues that the owner/lessee is not liable for ensuing violations. In the Cyprus case, the Court stated:

> The Secretary presents sound policy reasons for holding owners liable for violations committed by independent contractors. For one thing the owner is generally in continuous control of the conditions at the entire mine. The owner is more likely to know the federal safety and health requirements. If the Secretary could not cite the owner, the owner could evade responsibility for safety and health requirements by using independent contractors for most of the work. The Secretary should be able to

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5/ The evidence that MSHA had not previously taken enforcement action against W-P as lessee/operator of the No. 21 Mine may nevertheless be considered in mitigation of negligence. See King Knob Coal Co., 3 FMSHRC 1417 (1981) and Decision infra, p. 10-11.

> cite either the independent contractor or the owner depending on the circumstances. Id. at 1119.

More recently the rationale for holding owner/lessee operators liable under the Act was restated and reinforced in Bulk Transportation Services, Inc., 13 FMSHRC 1354, 1359 (1991), wherein the Commission wrote:

> Thus, an owner is held liable for the acts of its contractor not merely because the owner has continuous control of the entire mine but, rather, because the Act's scheme of liability provides that an operator, although faultless itself, may be held liable for the violative acts of its employees, agents and contractors.

It is further noted that W-P actually anticipated its liability for violations of the Act when it provided in its contract with Top Kat a duty for Top Kat to indemnify W-P for any penalties assessed against W-P for the actions of Top Kat (Respondent's Exhibit No. 3, pps. 13-14, 58-59).

In any event, even assuming that the Secretary had not always cited off-site owner/lessee operators in the past, the Secretary cannot, because of such inaction, be estopped from otherwise legal enforcement action under the Act. See King Knob Coal Co., 3 FMSHRC 1417, 1421-1422 (1981), Bulk Transportation Services, Inc., 13 FMSHRC 1354, 1361 (fn. 3), and U.S. Steel, 15 FMSHRC 1541, 1546-47 (1993).

The next claim presented on remand is the assertion that W-P was deprived of its constitutional rights when it was purportedly not accorded the procedural due process attendant to MSHA inspections. FOOTNOTE 6 In particular, however, W-P asserts it was denied rights provided mine operators under Section 103(f) of the Act. Section 103(f) provides in pertinent part that "a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post- inspection conferences held at the mine."

The short answer to this contention, however, is that W-P waived these rights granted to mine operators by failing to file a legal identity report identifying itself as a mine operator as required by Section 109(d) of the Act and under 30 C.F.R.

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6/ At oral argument W-P counsel added that this "due process" claim was intended to fall within the protections of the Fifth Amendment, U.S. Constitution.

41.10 -41.13 and 41.20. FOOTNOTE 7 It is, of course, a wel established principle of law that even constitutional rights may be waived and forfeited. See Yakus v. United States, 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944), and Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). As noted at trial, the rights accorded mine operators under Section 103(f) of the Act can only be provided to an entity if the Secretary is appropriately informed through a legal identity report that he is in fact an operator of the mine (Tr. I-119, 155, 205-207). In the instant case, it is undisputed that W-P had not filed the requisite legal identity report as an operator of the No. 21 Mine during relevant times and accordingly I find that it has waived its rights under Section 103(f) to be informed of the right to accompany an inspector and the right to attend any pre-inspection conference. FOOTNOTE 8

W-P also maintains that MSHA failed to include it in a post-inspection "close-out" conference and "10-day" safety and health conference. However, according to the testimony of MSHA Inspector George Cavendish, which I find credible, W-P President Vernon Cornett was in fact informed of W-P's right to post-inspection conferences following the issuance to him of, among other things, the citation at bar (Tr. I-230-231) and that Cornett did not request any such conferences (Tr. I-138). In addition, it is acknowledged that W-P officials were aware of their rights to such conferences and elected not to seek such conferences (Tr. III-120-124). In this regard, W-P also maintains that such post-inspection conferences would in any event have been meaningless. Under the circumstances, I find that W-P waived its rights to post-inspection conferences by knowingly electing not to seek such conferences.

In its final argument to vacate the citation, W-P argues that MSHA failed to issue the citation with "reasonable promptness" as prescribed by Section 104(a) of the Act. That section provides in part as follows:

> If upon inspection or investigation the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has

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7/ 30 C.F.R. 41.11(a), for example, provides in part that "the operator of a coal or other mine shall, in writing, notify the appropriate district manager of the Mine Safety and Health Administration in the district in which the mine is located of the legal identity of the operator."

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8/ Alternatively, W-P may be barred by estoppel from claiming a denial of such rights by having failed to have properly notified the Secretary through a legal identity report that it was an operator entitled to such rights.

> violated any mandatory health or safety standard, he shall with reasonable promptness issue a citation to the operator . . . . The requirements for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

It is undisputed that in the present case the inspection that resulted in the issuance of Citation No. 3750647 took place on September 4, 1991. The Secretary issued the citation against Top Kat on that date and modified the citation to name W-P as a co-operator on November 14, 1991. The Secretary served W-P with a copy of the modified citation in December 1991 or January 1992. Accordingly, there was a delay of approximately 71 days between the date of the inspection and the date of the issuance of the citation against W-P and a delay of approximately 3 to 4 months between the date of the inspection and the date of service of the citation on W-P.

W-P argues that this delay violates the mandate of Section 104(a). This argument ignores, however, the effect of the last sentence of Section 104(a) that "the requirement for the issuance of the citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act." Moreover, the Act's legislative history explains:

> There may be occasions where a citation will be delayed because of the complexity of issues raised by the violations, because of a protract[ed] accident investigation, or for other legitimate reasons. For this reason, Section [104(a)] provides that the issuance of a citation with reasonable promptness is not a jurisdictional prerequisite to any enforcement action. H.Rep. No. 181, 95th Cong. 1st Sess. 30 (1977), reprinted in Senate Sub-Committee on Labor, Legislative History of the Federal Mine Safety and Health Act of 1977 (Leg. Hist.), at 618 (1978).

In the case at bar, I do not find that a delay of as long as four months would not have been reasonably prompt under the circumstances. It is readily apparent from the background of this case that the delay herein was due in large part to uncertainty regarding the identity and degree of liability of all responsible mine operators. Indeed, part of the uncertainty may have been the result of W-P's own failure to have filed a legal identity report with the Secretary identifying itself as an operator of the subject mine. Had W-P filed a legal identity report as an operator it may reasonably be inferred that the citation would have been served upon W-P at a much earlier time (See Tr. I-119, 155, 205-207). Thus, not only do I find that the citation was issued with "reasonable promptness"

within the meaning of Section 104(a) of the Act, but that, in addition, I find that W-P waived its right to any earlier service of the citation by its own failure to have filed a legal identity report. See Old Dominion Coal Power Co., 6 FMSHRC 1886, 1894 (1984), rev'd on other grounds, Old Dominion v. Donovan, 772 F.2d 92 (4th Cir. 1985).

Since the procedural objections raised by W-P have been rejected herein, the only remaining issue is whether the violation charged in Citation No. 3750647 did in fact occur and, if so, was it a "significant and substantial" violation and what is the appropriate civil penalty to be assessed. The citation charges as follows:

> The # 20 bath house facility was not maintained in good repair to prevent accidents and injuries to employees in that there was an area of the bath house floor approximately 2-1/2 foot by 2-l/2 foot that was rotten and the wood was wet and weak, (ready to collapse anytime)

The cited standard, 30 C.F.R. 77.200, provides that "all mine structures, enclosures, or other facilities (including custom coal preparation) shall be maintained in good repair to prevent accidents and injuries to employees."

The testimony of MSHA Inspector Tyronne Stepp is undisputed that the bathhouse floor was "basically rotten." Indeed, Top Kat official William Adkins, sole officer and stockholder of Top Kat, admitted that there was a "big hole" in the floor. The bathhouse door was unlocked and according to Stepp "any person walking on a rotten deteriorated floor . . . are [sic] subject to slip[ping] and hurt[ing] an ankle [and] if it gives way you are subject to break[ing] a leg." Within this framework of evidence the violation has clearly been proven as charged.

Stepp further opined that the violation was "significant and substantial" because "it's reasonably likely . . . due to the amount of traffic in the bathhouse . . . you have several coal miners in and out different shifts occasionally." A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that 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 (1981). In Mathies Coal Co., 6 FMSHRC 1,3-4 (1984), the Commission explained:

> In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary 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.
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> See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (1987) (approving Mathies criteria).

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 Mining Co., 6 FMSHRC 1834, 1836 (1984), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. U.S. Steel Mining Co., Inc., 6 FMSHRC 1473, 1574 (1984); see also Halfway, Inc., 8 FMSHRC 8, 12 (1986) and Southern Oil Coal Co., 13 FMSHRC 912, 916-17 (1991).

With the above framework I conclude that the violation was indeed "significant and substantial" and of high gravity. In reaching these conclusions I have not disregarded the testimony of William Adkins that the bathhouse was "not supposed to have been used." However, I can give such speculative and self-serving testimony but little weight in light of the fact that the bathhouse door was unlocked and the premises openly accessible.

In determining an appropriate civil penalty under section 110(i) of the Act, the following factors must be considered: "[t]he operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation."

The Secretary acknowledges that there is nothing in the record to support a finding regarding "the size of the business of the operator charged," and notes that this was a small mine (Tr. III-31). The Secretary also acknowledges that whoever the operator is deemed to have been, it is entitled to full credit for good faith abatement (Tr. III-29). The Secretary further acknowledges that there is nothing in the record regarding the history of violations of any operator at the subject mine (Tr. III-37). W-P has not shown how a civil penalty would affect its ability to continue in business. Gravity has already been determined to be high.

The Secretary argues, finally, that W-P's negligence should be based upon both its own negligence in contracting with Top Kat and upon an imputation of Top Kat's negligence. The record is devoid, however, of any evidence that before contracting with Top Kat, W-P had knowledge of, or that in fact Top Kat had a prior history of, safety and/or health violations or that W-P should in any way have been placed on notice of any deficiencies in Top Kat's past safety and/or health performance. Accordingly, there is no basis for the Secretary's contention that W-P was negligent in its selection of Top Kat as its contractor.

The Secretary further argues, but without reference to record evidence, that W-P was negligent in "failing to intervene when it became evident that [Top Kat] was in serious non-compliance." While there is record evidence that Top Kat had received prior citations, the record also shows, contrary to the Secretary's allegations, that W-P officials in fact met with MSHA representatives in an attempt to resolve safety problems between MSHA and Top Kat. Indeed, this is the same evidence the Secretary has cited in maintaining that W-P was a co-operator. More specifically, however, there is no evidence that W-P had any knowledge of Top Kat's non-compliance with the mandatory standard at issue in this case. Accordingly, I find the Secretary's argument herein to be without merit.

I further reject the Secretary's attempt to impute Top Kat's negligence to W-P through an agency theory at this late stage in the proceedings. In this regard, the Secretary has claimed Top Kat was negligent in this case because it should have known of the violation. According to Inspector Stepp "you walk on [the bathhouse floor] every day . . . it's obvious (Tr. I-197). However, the Secretary's theory, from the beginning of this case when the civil penalty petition was filed, has been that W-P was a "co-operator" responsible based upon its own exercise of "control and supervision over the operation of the No. 21 Mine" (See also Tr. I-11, 15-16). It is only since trial and Commission remand after the "co-operator" theory had been twice rejected that the Secretary changed his theory of W-P's responsibility to one based upon the imputed negligence of Top Kat as an agent of W-P. While this additional theory could perhaps have at some point in time been included in an amended pleading (amended petition for civil penalty) upon appropriate motion under FED. R. CIV. P. 15, it comes too late at this stage of the proceedings and would clearly be prejudicial to W-P. See 3 Moore's Federal Practice 15.08[4]. To allow an amendment to the petition now would deny W-P an opportunity it would otherwise have had at trial to defend against such a theory by presenting evidence that an agency relationship may not in fact have existed between Top Kat and W-P.

In any event, overriding any finding of negligence against W-P is the fact that even though the Secretary had knowledge of

W-P's relationship as lessee of the mining rights at the No. 21 Mine, he had never previously charged W-P with any violations at the mine (Tr. I-166). This lack of prior enforcement against W-P (as well apparently as against other mineral rights owners and lessees under the inspection authority of the Logan, West Virginia MSHA Field Office), including the failure to enforce the legal identity reporting requirements against W-P, may properly be considered in mitigation. See King Knob Coal Co., 3 FMSHRC 1417 (1981). Under the circumstances, I find W-P chargeable with but little negligence and find that a significant reduction in civil penalty to $250 is appropriate.

ORDER

Citation No. 3750647 is AFFIRMED and W-P Coal Company is directed to pay a civil penalty of $250 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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