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SOL (MSHA) V. AMAX COAL WEST
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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. WEST 94-289
	:	A. C. No. 48-00732-03523
v.	:	
	:	Belle Ayr Mine
AMAX COAL WEST INCORPORATED, Respondent	:	

DECISION

Appearances: Ann M. Noble, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado for Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll, P.C., Pittsburgh, Pennsylvania for Respondent.

Before: Judge Hodgdon

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Amax Coal West Incorporated, pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815 and 820. The petition alleges two violations of the Secretary's mandatory health and safety standards and seeks a penalty of $100.00. For the reasons set forth below, I vacate the citations and dismiss the petition.

This case was heard on August 30, 1994, in Gillette, Wyoming. MSHA Inspector Lewis H. Klay Ko testified for the Secretary. Randall L. Rahm, Clyde W. Witcher, James L. Phipps, Jr., and Terry R. Bosecker testified on behalf of Amax. The parties also filed post-hearing briefs which I have considered in my disposition of this case.

BACKGROUND

Amax operates the Belle Ayr Mine in Campbell County, Wyoming. The mine consists of a strip coal mine, preparation and loading facilities. Among Amax's customers are two utilities, Northern Indiana Power and Service Company (NIPSCO) and Southwest Electric Power Company (SWEPCO).

NIPSCO and SWEPCO contracted with NALCO, a chemical company, to spray a dust suppressant on their coal after it had been loaded into railroad cars. NALCO, in turn, hired Commercial Building Systems (CBS) to perform the spraying at the Belle Ayr Mine. In addition, NALCO entered into a verbal agreement with Amax to be allowed to install two large tanks on mine property and to use Amax's power and water in order to carry out the spraying operation. NALCO leased the tanks from Jim's Water Service, which installed them on the site.

One of the tanks held water, and the other tank held a surfactant. FOOTNOTE 1 The water and the surfactant were mixed together for spraying on the coal. NALCO was experimenting with the most effective mixture of the two for suppressing dust.

Both NALCO and CBS have MSHA identification numbers issued under Section 45.3 of the Secretary's Regulations, 30 C.F.R. 45.3. The CBS employee responsible for carrying out th spraying of the coal came to the mine only when a train with coal for one of the utilities needed spraying or when it was necessary to perform maintenance on the spraying equipment.

On November 10, 1993, Inspector Klay Ko issued two citations to Amax for violations found on the two tanks. The citations were subsequently modified on November 24, 1993. Citation No. 3588795 alleges a violation of Section 77.206(c), 30 C.F.R. 77.206(c), and states that: "The green 20' (feet) tall wate tank and the 20' (feet) tall serfactant [sic] tank, vertical ladder on each one was not provided a backguard. The serfactant [sic] tank is tan in color." (Pet. Ex. 2.) Citation No. 3588796 sets out a violation of Section 77.206(f), 30 C.F.R. 77.206(f), and asserts that: "The green 20' (feet) tall water tank and the 20' (feet) tall tan serfactant [sic] tank.[sic] The vertical ladder on each one did not project at least 3' (feet) above the landing." (Pet. Ex. 3.)

Inspector Klay Ko was accompanied on the inspection by his supervisor, Larry Keller. Both were aware that the tanks were leased and used by CBS and NALCO. The inspector testified that he issued the citations to Amax, rather than to CBS or NALCO, because "the contractor was not on the mine property that I could issue the citation to. The production operator was." (Tr. 18.)

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1/ A "surfactant" is a "[s]urface active agent, a substance that affects the properties of the surface of a liquid or solid by concentrating in the surface layer." Bureau of Mines, U.S. Department of Interior, A Dictionary of Mining, Mineral, and Related Terms 1107 (1968).

It seems obvious from these facts that either CBS or NALCO should have been the recipient of the citations. The question in this case is whether Amax could be issued the citations. Amax argues that the inspector abused his discretion in issuing it the citations and that they should, therefore, be vacated and the civil penalty petition dismissed. I conclude that Amax is correct.

Prior Commission Decisions

While it is clear that the Secretary has wide enforcement discretion, there is little guidance on if, when or how he can abuse this discretion. In Phillips Uranium Corp., 4 FMSHRC 549 (April 1982), the Commission vacated citations and orders issued to an operator, holding that they should have been issued to an independent contractor. In that case, Phillips owned mining rights and was conducting mining activities at a proposed uranium mine. It retained independent contractors to construct shafts and related underground construction. None of the contractors had MSHA identification numbers.

The Commission found that:

> The citations and orders alleging violations of the Act described activities or omissions of the contractors' employees or conditions of the contractors' equipment or facilities relating to the work the contractors were engaged to perform. Phillips' employees, equipment or activities did not cause or contribute to the alleged violations. Phillips' employees did not perform any work for the contractors, but they did inspect and observe the progress of the work to assure compliance with quality control and contract specifications. The alleged violations were abated by employees of the contractors.

Id. at 549-550.

In holding that the contractors should have been cited, the Commission said:

> The Secretary's insistence on proceeding against Phillips appears to be a litigation decision resting solely on considerations of the Secretary's administrative convenience, rather than on a concern for the health and safety of miners. In choosing the course that is administratively convenient, the Secretary has ignored Congressional intent, the

> Commission's clear statements in Old Ben [1 FMSHRC 1480 (October 1979)], and the intent of his own regulations, and has subjected the wrong party to the continuing sanctions of the Act. The Secretary's decisions to continue against Phillips were not consistent with the purposes of the Act and must fail.

Id. at 553.

The Commission next took up the issue in Cathedral Bluffs Shale Oil Co., 6 FMSHRC 1871 (August 1984). In that case, which also involved an independent contractor performing shaft construction, both the operator and the contractor had been cited. The contractor did not contest the citation, but the operator did. The Commission held that the fact that both the operator and the contractor had been cited, and the fact that the Secretary had formally adopted a policy concerning the issuance of citations for violations of the Act committed by independent contractors, FOOTNOTE 2 distinguished the case from Phillips.

However, the Commission went on to find that the Secretary had failed to properly follow his own policy in citing the operator. It stated:

> We emphasize that in this case an independent contractor with a continuing presence at the mine site was cited for a violation it committed in the course of its specialized work; the contractor did not contest the citation; and the hazardous condition was abated promptly. Given these facts and the lack of any demonstrated exposure of Occidental employees or control by the production-operator other than routine verification of work performed, we believe that harm, rather than good, would be done to the goal of achieving maximum mine safety and health if such a strained interpretation and application of the Secretary's enforcement policy were upheld. Therefore, we decline to interpret the Secretary's regulations and guidelines to require precisely what their adoption was intended to avoid.

6 FMSHRC at 1876.

The same day the Commission issued its decision in Cathedral Bluffs, it issued a decision in Old Dominion Power Co., 6 FMSHRC

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2/ 44 Fed. Reg. 44497 (July 1980). Except for the introductory language, the criteria considered by the Commission in these guidelines was identical to the criteria presently contained in MSHA's Program Policy Manual, the text of which is found on p. 9, infra.

1886 (August 1984). In that case, Old Dominion Power Company was cited for a violation which resulted in a fatal accident to one of its employees at an electrical substation located on property leased by Westmoreland Coal Company from Penn-Virginia Resources. Although there were a number of issues in the case, the Commission found with respect to whether Old Dominion was properly cited with the violation, that it was an independent contractor and, consequently, properly cited. It held:

> We emphasize that by citing Old Dominion for the violation committed by its employees, the Secretary has acted in accordance with the Commission's longstanding view that the purpose of the Act is best effectuated by citing the party with immediate control over the working conditions and the workers involved when an unsafe condition arising from those work activities is observed. Old Ben, supra; Phillips Uranium, supra. By citing the operator with direct control over the working conditions at issue, effective abatement often can be achieved most expeditiously. Id.

Id. at 1892.

Both Cathedral Bluffs and Old Dominion Power were reversed by federal courts of appeal. The Fourth Circuit in Old Dominion Power Co. v. Donovan, 772 F.2d 92 (4th Cir. 1985), held that Old Dominion had such minimal contacts with the mine that it was not an "operator" under the Mine Act. Id. at 97. As a result, the court did not address the issue of whether the "independent contractor" was the appropriate entity to cite.

In Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 539 (D.C. Cir. 1986), the court reversed the Commission because "the Commission improperly regarded the Secretary's general statement of his enforcement policy as a binding regulation which the Secretary was required to strictly observe . . . ." Consequently, no opinion was offered on whether the citation could have been issued to the operator, but the case was remanded to the Commission for further action consistent with the opinion. FOOTNOTE 3 Id.

The next occasion that the Commission had to address this issue was in Consolidation Coal Co., 11 FMSHRC 1439 (August 1989). As in Phillips Uranium and Cathedral Bluffs, this case

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3/ The Commission remanded the case to the Administrative Law Judge "to determine the liability of Occidental for the violation of its independent contractor in light of the court's opinion." Cathedral Bluffs Shale Oil Co., 8 FMSHRC 1621, 1622 (November 1986). There is no further, published record of the case.

involved shaft construction by an independent contractor. As in Cathedral Bluffs both the operator and the independent contractor had been cited for the violations and the independent contractor did not contest the citations. Relying on Phillips Uranium, the operator had argued at trial that the Secretary had not properly exercised its enforcement discretion in citing the operator.

The judge had concluded that Phillips Uranium was not applicable in a case where both the operator and the independent contractor had been cited. Id. at 1442. The Commission affirmed the judge, stating:

> In this instance, the Secretary pursued enforcement action against both a production operator and its contractor for electrical violations occurring in an underground mine setting wherein the employees of both the production operator and the independent contractor were exposed to potential hazards occasioned by the violations. We have carefully reviewed the record, the judge's decision, and the parties' arguments. We hold that the judge's conclusion that the Secretary's discretion was not abused in citing Consol in addition to Frontier for these particular violations is supported by the record, summarized above, relating to the violations and the inspectors' reasons for citing both parties, FOOTNOTE 4[] and is also supported by applicable precedent. See, e.g., Old Ben, supra, 1 FMSHRC at 1481-86; Intl. U., UMWA v. FMSHRC, supra, 840 F.2d at 83; Brock v. Cathedral Bluffs Shale Oil Co., supra, 796 F.2d at 537-38; BCOA v. Secretary, supra, 547 F.2d at 246.

Id. at 1443.

In Bulk Transportation Services, Inc., 13 FMSHRC 1354 (September 1991), the Commission affirmed a judge's decision which held that the Secretary did not abuse her discretion in citing Bulk, an independent contractor of Bethlehem Steel, rather than James Krumenaker, a subcontractor leasing a truck and driver to Bulk. Stating that "[w]e believe that it is unreasonable to require the Secretary to pursue each of Bulk's 70 to 100 subcontractors," the Commission held that the judge's decision was "supported by applicable precedent, which clearly establishes that the Secretary has wide enforcement discretion. See, e.g.

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4/ The reasons given for citing both parties were that the violations occurred in Consol's mine, Consol's employees worked in the area where the contractor's employees were working part of the time, the cited conditions could affect other employees and areas of the mine and Consol's work relationship with Frontier. Id. at 1442.

Consolidation Coal Company, 11 FMSHRC 1439, 1443 (August 1989); Cathedral Bluffs, 796 F.2d at 537-38; Old Ben, 1 FMSHRC at 1481-86." Id. at 1361.

Most recently, the Commission decided W-P Coal Co., 16 FMSHRC 1407 (July 1994). That case involved a decision to cite W-P, the company that held the mining rights to a mine, in addition to Top Kat, the company W-P had contracted with to perform the mining. The judge had relied on Phillips Uranium in concluding that the Secretary had impermissibly cited W-P based on "administrative convenience" rather than the protective purposes of the Act.

In reversing the judge, the Commission said:

> We agree with the Secretary that the judge erred in 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's 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 the 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., 790 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.

Id. at 1411. The Commission went on to examine W-P's involvement in the mining operation and concluded that "the record reveals that W-P was sufficiently involved with the mine to support the Secretary's decision to proceed against W-P." Id.

Analysis and Conclusions

Applying this precedent to the case at hand, it appears that this case is most like Phillips Uranium. However, although the Commission has not expressly overruled Phillips Uranium, it severely limited its applicability in W-P Coal. Consequently, since this case does not involve "the Secretary's earlier policy

of pursuing only owner-operators for their contractors' violations," I conclude that Phillips Uranium is not pertinent.

Old Dominion and Cathedral Bluffs would also seem to support a finding that the Secretary abused his discretion in citing Amax. Although both cases were subsequently overruled by the courts, neither was overruled on the issue of whether the operator, in Cathedral Bluffs, or the independent contractor, in Old Dominion, should or should not have been cited for the violation. Therefore, it would seem that the reasons given by the Commission for concluding that the operator should not have been cited, with the exception of its holding that the Secretary's guidelines were binding, and that the independent contractor was correctly cited would still provide guidance today.

On the other hand, it may also be significant that since Cathedral Bluffs, there have been no Commission decisions finding an abuse of the Secretary's discretion in citing either the operator or the independent contractor or both. The later cases, Consolidation Coal, Bulk Transportation and W-P Coal, seem to have been decided on the degree of involvement between the operator and the independent contractor. Therefore, I conclude that while Cathedral Bluffs and Old Dominion may be instructive in this case, they are not dispositive.

Were it not for the Commission's statement in W-P Coal that Commission review guards against an abuse of discretion by the Secretary in issuing a citation, one might conclude from the most recent cases that the Secretary is free to cite the operator, the independent contractor, or both, as he sees fit. However, by stating that it will guard against an abuse of discretion the Commission has clearly implied that there is some limit to the Secretary's enforcement decisions. While the Commission has never set out what that limit is, and the term "discretion" indicates the absence of a hard and fast rule, it does mean that the Secretary cannot act arbitrarily or capriciously. Langnes v. Green, 282 U.S. 531, 541 (1931).

While acknowledging that the Secretary has wide enforcement discretion, it appears that if ever there was a case where the Secretary abused this discretion in citing an operator instead of an independent contractor, this is it. Amax has virtually no involvement with NALCO or CBS. The independent contractor was not hired to perform services for Amax, but for two of Amax's customers. The contractor was not retained by Amax, but by the customers. Conversely, in all of the cases discussed above, there was a contractual relationship between the operator and the independent contractor.

Although the violations occurred within Amax's property area, they occurred on property leased to NALCO. FOOTNOTE 5 The location of the tanks was not in the same area that Amax's miners were working. Nor did any of Amax's employees have any duties that would require them to go into the NALCO area. The cited conditions could only affect Amax employees if an employee deliberately went out of his way to go to the tanks and then decided to climb the tanks. The violations could have no effect on any of Amax's mining operations or employees performing those operations anywhere in the mine.

While failing to follow his own guidelines concerning enforcement against independent contractors is not binding on the Secretary, not following them may well be an indication of an abuse of discretion. Volume III, Part 45, of MSHA's Program Policy Manual 6 (07/01/88 Release III-1) states that "[i]nspectors should cite independent contractors for violations committed by the contractor or by its employees. Whether particular provisions apply to independent contractors or to the work they are performing will be apparent in most instances." (Pet. Ex. 4.) Clearly, under this standard NALCO should have been cited.

The manual also advises that:

> Enforcement action against a production-operator for a violation(s) involving an independent contractor is normally appropriate in any of the following situations: (1) when the production-operator has contributed by either an act or by an omission to the occurrence of a violation in the course of an independent contractor's work; (2) when the production-operator has contributed by either an act or omission to the continued existence of a violation committed by an independent contractor; (3) when the production-operator's miners are exposed to the hazard; or (4) when the production-operator has control over the condition that needs abatement. In addition, the production-operator may be required to assure continued compliance with standards and regulations applicable to an independent contractor at the mine.

Id.

None of these situations are present in this case. Amax did not contribute to the violations in any way. It did not

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5/ Originally, this was a verbal agreement. Subsequent to the violations, the NALCO's operation moved to a different site on Amax property and the lease was reduced to writing. (Tr. 44-45.)

construct the tanks, make arrangements for their use and placement or use the tanks for any of its mining operations. Nor were the tanks used by the contractor in connection with any of Amax's mining operations.

To argue that permitting the tanks on the property and failing to inspect them for possible violations are acts or omissions contributing to the occurrence of a violation, as the Secretary does, is to argue that there can never be a situation when the contractor rather than the operator should be cited. By that standard, Amax would always be responsible for every violation occurring on its property. Under that standard Amax had an obligation to inspect another contractor's pickup truck, which was cited the same day, for a defective parking brake. (Tr. 25.) Yet even the inspector agreed that the contractor was the proper entity to cite in that case.

Amax did not contribute by act or omission to the continued existence of a violation committed by an independent contractor for the same reasons it did not contribute to the occurrence of the violation. Interestingly, the Secretary argues that (1) applies in this case, but (2) does not. Yet it would seem that the reasons he gives for (1) being applicable, that Amax permitted the tanks on the property and did not inspect them, would also apply to (2).

Amax's miners were not exposed to the hazards. None of them had duties that required them to work around the tanks or to climb the ladders on the tanks. None of Amax's employees had any reason to be in the vicinity of the tanks, as tanks were not in an area normally travelled by those employees, and the ladders were on the opposite side of the tanks. (Tr. 89.) To argue that this guideline applies in this case because an Amax employee was not prevented from climbing the ladders would stretch the guideline beyond relevance.

Finally, it is obvious that Amax had no control over the condition needing abatement. It had no authority to put a backguard on the ladders, put handholds at the top of the ladders, remove the ladders from the tanks or in any meaningful way correct the situation. The fact that, having been issued a citation, Amax directed CBS to remove the tanks from its property does not demonstrate that Amax had control over the condition needing abatement. Clearly, the entity having control over the violative conditions was CBS or NALCO.

The manual's guidelines all indicate that the contractor, rather than Amax, should have received the citations. To argue, as the Secretary does, that solely by permitting NALCO to be on its property Amax's conduct satisfies the guidelines would render the guidelines superfluous and unnecessary.

In this case, the only reason given for citing Amax instead of CBS or NALCO is that no one from either of those companies was present at the time the inspector wanted to issue the citation. This reason does not even rise to the level of administrative convenience since that term is generally used in connection with convenience in prosecuting the case. See, e.g., W-P Coal at 1409. Here, only convenience in serving the citation was involved. Even if a representative of the contractor was not immediately present to accept the citations, the citations could have been served by mail. FOOTNOTE 6 Consequently, there was no reason not to cite the independent contractor.

ORDER

In view of the above, I conclude that the Secretary abused his discretion in citing the production-operator rather than the independent contractor for the violations in this case. Accordingly, Citation Nos. 3588795 and 3588796 are VACATED and the Petition for Civil Penalty is DISMISSED.

T. Todd Hodgdon
Administrative Law Judge

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6/ Section 45.5, 30 C.F.R. 45.5, provides that "[s]ervice of citations, orders and other documents upon independent contractors shall be completed upon delivery to the independent contractor or mailing to the independent contractor's address of record."

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