FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 29, 2013

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. BLACK ENERGY, INC., Respondent	CIVIL PENALTY PROCEEDINGS Docket No. KENT 2011-157 A.C. No. 15-18316-236334-01 5RG Docket No. KENT 2011-158 A.C. No. 15-18316-236334-02 5RG Mine: White Star No. 1

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION

Before: Judge McCarthy

These cases are before me upon two petitions for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) ("Mine Act"). Black Energy, Inc. has filed a motion for summary decision seeking to vacate the order and citations in these cases for lack of jurisdiction. The Secretary opposes the motion, but has agreed to vacate Citation No. 7447652. Therefore, Citation Nos. 7447646, 7447648, 7447650, 7447656, 7447660, 8234034, 8234027, and 8234032 and Order No. 8234030 still remain in dispute. For the reasons set forth below, the motion is denied.[1]

I. Factual Background

Black Energy supplies miners to underground coal mines and possesses a MSHA contractor identification number. P. Ex. 4, 7 at 31.[2] It provides contract payroll services (e.g.,

[1] References to Black Energy's Motion for Summary Decision, Reply in Support of Motion for Summary Decision and Supplemental Memorandum in Support of Motion for Summary Decision are abbreviated as "R. Mot.," "R. Rep.," and "R. Memo.," respectively. References to the Secretary's Response to Respondent's Motion for Summary Decision and Supplemental Response to Respondent's Motion for Summary Decision are abbreviated as "P. Resp.," and "P. Supp.," respectively. Exhibits attached to Respondent's and the Secretary's filings are designated as "R. Ex." and "P. Ex.," respectively.

[2] Black Energy's website states:

accepting job applications and checking training records) and conducts drug testing on its miners, both as a condition of employment and randomly after hiring. R. Mot. at 3; P. Ex. 7 at 20–21. Black Energy also prescribes rules for its employees to follow when reporting workplace accidents. P. Ex. 9A–9E.

On August 28, 2009, Black Energy entered into a contract with White Star Mining to provide miners at the White Star #1 underground coal mine. R. Ex. 2. The contract provides, in relevant part, that:

> BLACK ENERGY, INC. hereby proposes to *provide workers* to WHITE STAR MINING on a contract basis. BLACK ENERGY, INC. [a]cknowledges that the workers are employees of BLACK ENERGY, INC. and that they are responsible for the payment of all payroll taxes, unemployment insurance, and workers' compensation.

R. Ex. 2 (emphasis added).

On August 31, 2010, MSHA inspector Matthew Prewitt and his supervisor James Haggar issued seven citations to both White Star and Black Energy. On September 15, 2010, Prewitt issued an additional three citations and one order to each entity. R. Mot. at 2.

Subsequently, on September 15, 2010, Black Energy entered into another contract with White Star to "provide workers." That contract included the following provision: "[s]aid mine is responsible to pay for all foreman, electricians, and owners, and agrees to direct the entire workforce." R. Ex. 2. Black Energy claims that it added this provision at MSHA's insistence. R. Supp. at 5 (citing P. Ex. 7 at 38–39). [3]

II. Principles Of Law

Under Commission Rule 67, a motion for summary decision shall be granted only if the entire record . . . shows: (1) That there is no genuine issue as to any material facts, and (2) That the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b); *see also Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981) ("[A] party must move for summary decision and it may be entered only when there is no genuine issue as to any material

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> We are a Mining Contractor that supplies labor to underground coal mine[s]. We offer a large selection of labor to help run the day to day workings of a mine. If you need a miner for a day or an extended period of time give us a call [and] one of our friendly staff will be glad to help with pricing.

P. Ex. 4.

[3] Black Energy states that it "bowed" to MSHA's demands on how to conduct its business by adding this language to its contracts. R. Supp. at 5; *see also* R. Ex. 2.

fact and when the party in whose favor it is entered is entitled to it as a matter of law."). When considering a motion for summary decision, the judge must draw all "justifiable inferences" from the evidence in favor of the non-moving party. FED. R. CIV. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). The judge should only grant a summary decision "upon proper showings of the lack of a genuine, triable issue of material fact." *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Celotex Corp.*, 477 U.S. at 322).

III. Discussion

The issue under review is whether Black Energy is an operator as defined by section 3(d) of the Mine Act. 30 U.S.C. § 802(d). Section 3(d) defines an "operator" as "any owner, lessee or other person who operates, controls, or supervises a . . . mine *or* any independent contractor performing services or construction at such mine." 30 U.S.C. § 802(d) (emphasis added).[4] The parties dispute whether control or supervision is needed to consider an independent contractor an operator for purposes of section 3(d), and to what extent Black Energy had actual supervisory control over its miners at the White Star mine.

Black Energy argues that liability under the Mine Act is dependent upon a contractor having control or supervision. R. Mot. at 6. Black Energy further contends that it is a "labor contractor" that had no supervisory control at the mine site, and therefore cannot be liable under the Mine Act because its activities do not satisfy the definition of "operator." *See, e.g.,* R. Mot. at 4; R. Supp. at 3–4.[5] Black Energy states that its "only function was to provide payroll services." R. Supp. at 9.

The Secretary rejects Black Energy's contention that control is needed to impose liability on an entity as an operator under the Mine Act, and that Black Energy is an "independent contractor" within the plain language of section 3(d) of the Act. P. Supp. at 2–3, 5. The Secretary contends that the plain language of section 3(d) indicates that "any" independent contractor, irrespective of its amount of control, is an operator under the Mine Act. P. Supp. at 3–4 (citing *Otis Elevator Co. v. Sec'y of Labor*, 921 F.2d 1285, 1290 (D.C. Cir. 1990)). In the alternative, the Secretary argues that should an element of control be required for an independent contractor to satisfy the Act's statutory definition of "operator," then the facts establish that Black Energy had some control over its miners. P. Supp. at 5. Accordingly, the Secretary maintains that there are genuine issues of material fact regarding whether Black Energy can be

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[4] The plain language of section 3(d) of the Act indicates that "or" should be interpreted disjunctively. 30 U.S.C. § 802(d); *see* 1A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 21:14 (7th ed. 2012) ("Generally, courts presume that 'or' is used in a statute disjunctively unless there is clear legislative intent to the contrary.").

[5] Black Energy states that it resolved any uncertainty that it was not an operator by modifying the language in its clients' contracts to appease MSHA. R. Supp. at 4-5 (citing P. Ex. 4 at 38-39).

cited under the Mine Act for violations committed by its miners who work in coal mines; the actual working relationship and contractual relationship between Black Energy and White Star; and Black Energy's acknowledgment that it provides a "large selection of labor" and can provide a miner for a day or an extended period of time. P. Resp. at 2.

The Commission has stated that "[b]ecause the forms of participation and authority vary from entity to entity, the question of whether an entity meets the statutory definition of "operator" must be resolved on a case-by-case basis." *Berwind Natural Res. Corp.*, 21 FMSHRC 1284, 1293 (Dec. 1999). Accordingly, when reviewing the Secretary's decision to designate an entity, in this case Black Energy, as an operator under the Mine Act, the Commission must determine, based on the totality of the circumstances, whether the cited entity has a "substantial involvement" with the mine. *Id.* This involves reviewing and evaluating *all* forms of participation and involvement by the entity in the mine's engineering, financial, production, personnel, and health and safety matters, with no single factor controlling. *Id.* (emphasis added). Hence, the issue is not one of control or supervision, but rather the scope of services performed by the entity alleged to be an operator, or more specifically an independent contractor, under section 3(d) of the Mine Act.[6]

Black Energy concedes that it provides "contractor services." R. Supp. at 7. To ascertain whether a cited entity is an independent contractor requires focusing on the nature of the relationship between the mine and the alleged contractor. *See, e.g., N. Illinois Steel Supply Co. v. Sec'y of Labor*, 294 F.3d 844, 848–49 (7th Cir. 2002) (reasoning that because the cited entity performed minimal activity at the mine, its conduct could not be construed as performing services at the mine); *Joy Techs., Inc. v. Sec'y of Labor*, 99 F.3d 991, 1000 (10th Cir. 1996) (finding that Joy was an operator under the Mine Act because it sent a service representative onto the mine property to carry out his job and perform services for the mine); *Otis Elevator*, 921 F.2d at 1291 (concluding that the cited entity was an operator under the Act because it was contracted to perform services at mines); *Old Dominion Power Co. v. Donovan*, 772 F.2d 92, 97 (4th Cir. 1985) (concluding that Congress' intent was only to include independent contractors engaged in mine construction or the extraction process within the definition of "operator" in section 3(d)). There is an important distinction between sending one's employees into the mine to perform contracted services, and de minimis activities, like making deliveries to designated areas. *N. Illinois Steel Supply Co.,* 294 F.3d at 848–49 (distinguishing the case from *Otis Elevator* and *Joy Techs.* based on whether the cited entity's employees went into the mine or below ground) (citing *Joy Techs.*, 99 F.3d at 994; *Otis Elevator*, 921 F.2d at 1287).

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[6] An "independent contractor" is "any person, partnership, corporation, subsidiary of a corporation, firm, association or other organization that contracts to perform services or construction at a mine." 30 C.F.R. § 45.2(c); *but see Old Dominion*, 772 F.2d at 97 (finding the regulation's definition of "independent contractor" not controlling due to congressional intent and previous interpretation of the Act's definition of "operator").

The Commission has set forth a two-pronged test to determine whether an independent contractor comes within the definition of "operator" under section 3(d) of the Mine Act. *Otis Elevator Co.*, 11 FMSHRC 1896 (Oct. 1989) (Otis I) and *Otis Elevator Co.*, 11 FMSHRC 1918 (Oct. 1989) (Otis II), *aff'd Otis Elevator Co. v. FMSHRC*, 921 F.2d 1285 (D.C. Cir. 1990). First, the Commission examines the entity's proximity to the extraction process and whether its work is "sufficiently related" to that process. *Otis I*, 11 FMSHRC at 1902. Second, the Commission examines "the extent of [the entity's] presence at the mine." *Id*. As part of the second prong of this test, the Commission has looked to whether the entity's contact with the mine is de minimis. *Id*. at 1900–01.

Consequently, the Commission focuses "on the actual relationships between the parties, and is not confined by the terms of their contracts." *Bulk Transp. Servs., Inc.*, 13 FMSHRC 1354, 1358 n.2 (Sept. 1991). While the parties' contractual relationship evidences the parties' actual working relationship, the existence of a contract and its terms is not dispositive of whether a party falls within the scope of section 3(d) of the Act. *Id*. Finally, it is worth mentioning that the Commission's jurisprudence has left unresolved whether liability without fault can be assigned to an independent contractor. *See Ames Const., Inc. v. FMSHRC*, 676 F.3d 1109, 1111 (D.C. Cir. 2012) ("But we need not decide here whether liability without fault could ever be assigned to an operator satisfying only the second part of [section] 3(d).").

Based on this precedent, I conclude that a genuine issue of law exists regarding whether the Secretary must establish that Black Energy had to exercise control or supervision before being subject to Mine Act jurisdiction. Accordingly, summary decision is not appropriate as a matter of law.

Regarding the nature of services performed by Black Energy at the White Star mine, Black Energy maintains that it only provided payroll services. R. Supp. at 9. It did, however, require employee notification of workplace injuries and it conducted drug testing on employees that could result in termination. P. Supp. 5. Accordingly, I further find that there are genuine issues of material fact in dispute regarding Black Energy's participation and involvement with White Star's mining personnel, and whether its activities were solely limited to payroll services. *Accord Berwind*, 21 FMSHRC at 1293 (listing factors).

In addition, the contract between Black Energy and White Star states that Black Energy will "provide workers" to White Star. R. Ex. 2. There is no mention that Black Energy's contractual services are limited to payroll services. While Black Energy maintains that it only provided payroll services (R. Supp. at 9), the Secretary contends that there are issues involving both the actual working relationship and contractual relationship between White Star and Black Energy. P. Resp. at 2; *see also Bulk Transp.*, 13 FMSHRC at 1358 n.2 (stating that the Commission must look at the actual working relationship between the contracting parties, not just their contract).

On this record, I find that there is a material issue of fact regarding the meaning of the

phrase “provide workers” within the actual working relationship of the parties under the two contracts executed by Black Energy and White Star. This is especially true in light of Black Energy’s contention that its contractual modification purportedly altered its contractual relationship with White Star in a way that changed its liability under the Mine Act.

In sum, I find that genuine issues of material fact and law exist concerning Black Energy’s status as an operator under section 3(d) of the Mine Act. The determination of whether Black Energy is an operator for purposes of section 3(d) of the Mine Act requires that additional evidence be fully developed at a hearing. If it is determined that Black Energy is an operator under the Act, then the issue regarding the validity of the citations and order must be resolved at trial. Accordingly, I find that Black Energy has failed to establish its entitlement to summary decision under Commission Rule 67.

IV. Order

Black Energy’s Motion for Summary Decision is **DENIED**. A conference call will be scheduled shortly to set this matter for hearing.

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

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