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October 28, 2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. KEMPTON TRANSPORT, INC., Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. WEST 2014-998 A.C. No. 02-03107-359253 B0279 Docket No. WEST 2015-20 A.C. No. 02-03107-362302 Mine: West Side Pit

DECISION

Appearances: Daniel Brechbuhl, United States Department of Labor, Office of the Solicitor, Denver, Colorado, for Petitioner;

Dell Kempton, Kempton Transport Inc. Phoenix, Arizona for Respondent.

Before: Judge Miller

This case is before me upon a petition 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). These dockets involve nine citations with a total proposed penalty of $1,252.00. The Respondent has indicated that his objection to the citations is that he is not subject to the jurisdiction of the Mine Act. The parties presented testimony and evidence regarding the jurisdiction issue and the citations at a hearing held in Phoenix, Arizona, on October 21, 2015.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Kempton Transport, Inc., is a closely held corporation with its principle place of business in Mesa, Arizona. At the time these citations were issued, Kempton trucks were working at the West Side Pit, a sand and gravel operation located in Mesa County, Arizona. Kempton routinely provides trucking services at various locations for M.R. Tanner companies, including M.R. Tanner mining, the owner of the West Side Pit. Mr. Kempton was approached by Tanner to load gravel and other material at a new construction area near the end of the runway at the small Glendale airport. There was no written contract, but the parties agreed to a price to have the Kempton trucks load sand and gravel at the airport site and transport it across the road to a crusher operation and unload the material at either a stock pile or at the crusher. Tanner

employees loaded the material, and Kempton drivers transported the material. Kempton described the material as "native material" and agreed it was rock, sand and gravel, and dirt.

Kempton explained that the pit area near the end of the runway was not yet developed, but that Kempton was hired for the construction project. The project was construction of a sand and gravel pit at the end of and below the level of the runway. Each of the large Kempton trucks was weighed after loading at this construction site, and then traveled the half mile to dump the material at the Tanner crushing location.

Kempton owns and operates fourteen trucks, four of which were assigned to work on this project for Tanner. Kempton often works for Tanner, and often hauls material between pits and crushers, as well as from pit to pit for various sand and gravel operations. Kempton has not been issued a citation in the past and the drivers at this pit received the required site-specific training. They had not received new miner training.

Kempton began the job hauling from the pit construction area to the crusher in June 2014. The Inspector issued the nine citations at issue here in July 2014. Kempton continued on the job until September 2014, when his trucks were committed to work elsewhere. During the three months that Kempton worked on this job, his trucks were at the pit and crusher five days a week, for an average of eight hours per day. Each truck made about 30 roundtrips per day between loading at the pit and dumping at the crusher.

Kempton argues that it was not an "operator" as defined by the Mine Act since it was only on the property for this job, which was considered a part of the construction of the pit, and not a part of any mining operation. The Secretary argues that Kempton worked as a subcontractor at the sand and gravel operation and therefore was an operator subject to the provisions of the Mine Act. For the reasons that follow, I find that Kempton is a subcontractor working at the mine site and an operator, subject to the jurisdiction of the Mine Act.

The Mine Act's definition of "operator" contemplates production-operators and independent contractors "performing services or construction at such mine." *Berwind Nat'l Resources Corp.*, 21 FMSHRC 1284, 1293 (Dec. 1999)). Kempton asserts that it is not an independent contractor as contemplated by the Act because it had no written contract, it was involved only in construction work as the mine was not yet developed, and it engaged in hauling between the pit and crusher for only a short period of time. The Secretary argues that a written contract is not necessary and that since Kempton was hauling sand and gravel from one area to the crusher to be processed, it was an independent contractor subject to the provisions of the Act.

While the Act does not define "independent contractor," the Secretary's regulations define an "independent contractor" as an entity "that contracts to perform services or construction at a mine." 30 C.F.R. § 45.2(c). In *Joy Technologies Inc.*, the Commission decided that, in determining whether an entity is an independent contractor, the "focus is on the actual relationships between the parties, and is not confined to the terms of [the parties'] contracts. . . . [T]he determination of whether a party is properly designated to be within the scope of section 3(d) of Act is not based upon the existence of a contract, nor the terms of such a

contract." 17 FMSHRC 1303, 1306 (Aug. 1995) (quoting *Bulk Transportation Services, Inc.*, 13 FMSHRC 1354, 1358 n.2 (Sept. 1991)), *aff'd*, 99 F.3d 991 (10th Cir. 1996).

The undisputed facts establish that Kempton had an agreement with Tanner to provide hauling services for Tanner, specifically from the new pit near the airport to the crushing operation about half a mile away. Kempton provided the trucks and the drivers and in return was paid a sum for the work. Clearly, and although not written, the parties had an agreement for work and an unwritten, verbal contract.

In 1989, the Commission addressed the issue of "operator" liability pursuant to the "independent contractor" clause of Section 3(d) in two Otis Elevator Company decisions, *Otis Elevator Co.*, 11 FMSHRC 1896 (Oct. 1989) (hereinafter "*Otis I*") and *Otis Elevator Co.*, 11 FMSHRC 1918 (Oct. 1989) (hereinafter "*Otis II*"). In *Otis I,* the Commission explained that "Section 3(d) [of the 1977] Mine Act expanded the definition of 'operator' under . . .[the 1969 Coal Act] to include 'any independent contractor performing services or construction at such mine.'" 11 FMSHRC at 1900. "[T]he goal of Congress, in expanding the definition of 'operator' . . . to include 'independent contractors,' was to broaden the enforcement power of the Secretary so as to reach not only owners and lessees but a wide range of independent contractors as well." *Id.* at 1900-1901. However, the Commission noted that, in analyzing an independent contractor's contacts with the mine, "not all independent contractors are operators under the Mine Act, and that 'there may be a point, at least, at which an independent contractor's contact with a mine is so infrequent or *de minimis* that it would be difficult to conclude that services were being performed.'" *Id.* (quoting *National Industrial Sand Ass'n*, 601 F.2d 689, 701 (3d Cir. 1979)).

In its *Otis* decisions, the Commission outlined a two pronged test for determining whether an entity is an "operator" pursuant to the "independent contractor" clause of Section 3(d) of the Mine Act. First, one must examine the subject entity's "proximity to the extraction process" and whether that entity's work is "sufficiently related" to that process. *Otis I*, 11 FMSHRC at 1902. In *Otis I*, the Commission determined that the independent contractor, an elevator service contractor, satisfied this prong of the test because its employees "were working in the center of mining activities while servicing equipment essential to the mining process, were exposed to mining hazards, and had a direct effect on the safety of others because of their exclusive control over the safety of the mine elevators[.]" *Id.* Here, Kempton employees were driving large haul trucks on the mine property to be loaded with material, then driving them to a second, separate mine site to unload the material to be crushed and processed. I find the activity to be sufficiently proximate to the extraction process, as, like in *Otis I*, the trucks are in the center of the mining activity. Next, the Kempton employees' work was sufficiently related to the process of removing the sand and gravel and transporting it to a related site for processing. The Kempton drivers were exposed to mining hazards and had a direct effect on the safety of others because of their exclusive control over the operation of the haul trucks.

The second prong of the *Otis* test requires an examination of "the extent of [the entity's] presence at the mine." *Otis I*, 11 FMSHRC 1896, 1902 (Oct. 1989). In *Lang Bros., Inc.*, 14 FMSHRC 413, 420 (Sept. 1991), the Commission stated that "[a]n independent contractor's presence at a mine may appropriately be measured by the significance of its presence, as well as

by the duration or frequency of its presence." I find that Kempton and its employees had an extensive presence at the mine. While Tanner employees extracted the sand and gravel and loaded the mined material onto the trucks, Kempton trucks and drivers controlled the next phase of moving the material to the crusher. They did this five days a week for eight hours a day over the entire term of the contract. In *Joy Technologies Inc.*, the Commission found that substantial evidence supported the ALJ's finding that an independent contractor spending six days at the mine over a two and a half month period, along with an expectation that such contact would continue, satisfied the second prong of the *Otis* test. 17 FMSHRC at 1308; *see also Lang Bros., Inc.*, 14 FMSHRC an413 (Sept. 1991) (sufficient presence found when contractor was present seven to ten days on a non-continuing basis) and *Otis I*, 11 FMSHRC 1896 (Oct. 1989) (sufficient presence found when contractor was present six hours per month). I find that the presence of Kempton drivers and trucks each day amounts to a sufficient and significant presence at the mine. Accordingly, I find that the Secretary has satisfied the second prong of the *Otis* test and that Kempton is an independent contractor.

The parties stipulated at hearing, that if it is found that MSHA has jurisdiction over the Kempton trucks, then there is no further dispute and the citations are admitted as issued. Therefore, I find that the nine citations contained in these two dockets demonstrate the violations and conditions as described in each document. However, after listening to the testimony of Mr. Kempton, I find that he had a good faith belief that the drivers operating the trucks were not required to have new miner training. Therefore, I reduce the negligence in Citation Nos. 8829835 and 8829836 to low and reduce the penalty accordingly to $100.00 for each violation.

II. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires that "in assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria which include the history of violations, the size of the operator, the negligence, gravity, the ability to continue in business and good faith abatement. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is "bounded by proper consideration of the statutory criteria and the deterrent purpose[s] . . . [of] the Act's penalty scheme." *Id.* at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The history of assessed violations was not admitted into evidence because, as the Secretary explained, Kempton did not have a mine ID and had not been cited in the past. Kempton is considered a small operator and the penalties as proposed will not affect its ability to

continue in business. The Respondent demonstrated good faith in abating the citations. The negligence is discussed above. I find that a penalty of $1,186.00 is appropriate.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C.§ 820(i), I reduce the negligence from moderate to low and the penalty to $100.00 each for Citation Nos. 8829835 and 8829836 and assess a total penalty of $1,186.00. Kempton Transport, Inc., is **ORDERED** to pay the Secretary of Labor the sum of $1,186.00 within 30 days of the date of this decision.

Margaret A. Miller
Administrative Law Judge

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