FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. BEELMAN TRUCK CO., Respondent	CIVIL PENALTY PROCEEDINGS Docket No. CENT 2014-47-M A.C. No. 23-00542-333827 Docket No. CENT 2014-48-M A.C. No. 23-00542-333827 Mine: Mississippi Lime

ORDER ON RESPONDENT'S MOTION FOR SUMMARY DECISION

Before: Judge Moran

On July 2, 2014 Respondent Beelman Truck Co. ("Beelman" or "Respondent") filed a motion for summary decision,[1] seeking dismissal of the two citations issued in connection with these dockets. For the reasons which follow, Respondent's Motion is denied as premature.

Beelman Truck is a transportation company whose drivers haul coal, limestone and other bulk commodities. As self-described in its Memorandum in support of its motion, Beelman notes that "[o]ne of its clients [,] Mississippi Lime Company, ("Mississippi Lime") [is] "a large underground limestone extraction and crushing operation in [Sainte] Genevieve, Missouri." Beelman Memorandum at 1. Beelman admits that its employees "transport coal and other bulk commodities to [ ] locations at Mississippi Lime's mine site [and that Beelman] also pick[s] up loads of finished limestone from Mississippi Lime to be delivered to offsite customers." Although Respondent concedes that on occasion its drivers self-load limestone at the mine site, it paradoxically asserts that Beelman employees do not otherwise participate in the loading process and, describing themselves as "mere third party transporters[,]" it notes that they "do not directly partake in the mineral extraction process." Beelman Memorandum at 2.

On August 30, 2013, a Beelman truck driver, Mr. Terry Hunt, apparently had a heart attack and died, in association with the task of delivering coal to the Mississippi Lime mine site. It is alleged that Mr. Hunt drove through a berm and crashed into a ditch. To the Court's understanding, it is not definitively known whether the heart attack preceded or followed the

[1] A bevy of documents, both procedural and substantive, followed the initial motion. All submissions were reviewed and considered.

crash. Subsequent to that event, MSHA issued citations to Beelman, alleging violations of 30 C.F.R. §§50.10(a) and 50.12. The former alleges that Beelman failed to contact MSHA without delay and within 15 minutes of an accident at a mine and includes a proposed penalty assessment of $5,000 (five thousand dollars), while the latter asserts that Beelman altered the accident scene before the MSHA accident investigation was completed, by removing the truck involved. That alleged violation has a $100 (one hundred dollars) proposed assessment. Respondent contends that it is only a vendor, not an operator, under the Mine Act and also that since the truck driver died at a nearby hospital, not at the mine site itself, there was no reportable "accident" under 30 C.F.R. §50.2(h)(1) and (4). Beelman Memorandum at 2.

As will be set forth in more detail, Beelman contends that it is not an operator under the Mine Act and that, even if it is so considered to be one, it is not an operator under the 30 C.F.R. Part 50 definition of that term.[2]

Beelman's motion for Summary Judgment.

Beelman's Motion acknowledges that for summary judgment to be granted, there must be no genuine issue of material fact and, if that hurdle is passed, the moving party must then show that it is entitled to summary decision as a matter of law. In support of the first obstacle, Beelman lists some 20 "facts" [3] it describes as "undisputed material facts" related to: its relationship with Mississippi Lime; its activity while on Mississippi Lime's property; and those facts related to Mr. Hunt's heart attack while he was on Mississippi Lime's property.[4]

Addressing its arguments that it is not an "operator" under the Mine Act, nor under Part 50, Beelman first contends that it was simply a "vendor completing a sale" and as such it does not fall within the defintion of an operator under the Act. After noting that under section 802(d) of the Mine Act, an operator is defined as "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," it looks to *Northern Illinois Steel Supply Co.*, 294 F.3d 844, (7th Cir. 2002) as support for its contention. Beelman refers to the *Northern Illinois Steel* case because of its factual similarities to this matter and because the Seventh Circuit considered Northern Illinois' activities to be *de minimus* and as such fell short of constituting services performed at a mine. Similarly, Beelman contends that its minimal activities at Mississippi Lime "do not rise to the level tha could be construed as 'services performed at a mine'" because it "strictly offers bulk commodity transportation services to and from Mississippi Lime's [ ] mine site . . . [and

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[2] Beelman also contends that as the truck driver, Mr. Hunt, died at a nearby hospital, not the mine and that as the cause of his death, a heart attack, is not an "illness" those are additional reasons to vacate the alleged reporting violation. Despite that contention, Beelman adds that the Court need only consider its claim that it is not an operator.

[3] Beelman enumerates some 20 (twenty) "facts" which it identifies as uncontested. The Secretary begs to differ on the ground that discovery has not been completed and that, apart from that, some of its initial requests for information have not been supplied to it.

[4] A twenty-first fact simply lists the two citations issued to Beelman.

therefore] does not participate directly in the mineral extraction process." Beelman Memorandum at 8-9. Beelman does acknowledge that "[o]n occasion, Beelman drivers will travel to a predetermined pick up location at Mississippi Lime to pick up a load of finished limestone product. . . . [but] that Beelman drivers only travel to the designated location once requested to by Mississippi Lime [and that] [o]nce at the designated location, Mississippi Lime employees generally complete the entire loading process without the assistance of Beelman employees. [Thus Beelman argues that] unlike in Northern Illinois Steel Supply Co., Beelman drivers do not assist or otherwise facilitate Mississippi Lime employees [but it admits that] [o]n rare occasions (only when picking up Code-L and Hydrated Lime), estimated to be less than fifteen percent of the time, Beelman employees will utilize a self load out whereby they load their trucks by simply pushing a button on the self load out. [However, Beelman dismisses this activity, arguing that] "[u]sing the self load out feature . . . is no different than the NIC employees in Northern Illinois Steel helping the operator 'rig' the steel [and that] [i]f anything, merely pushing the self load out button is less of an activity." Beelman Memorandum at 9. Regarding its reliance on the *Northern Illinois Steel Supply* decision, it is noted that Beelman is based out of Illinois and the Mississippi Lime operation in issue is in Missouri. The Seventh Circuit includes Illinois, but not Missouri.

Beelman anticipates a problem with its reliance upon the *Northern Illinois Steel Supply* citation, because it recognizes that two other federal circuit courts have rejected the interpretation of minimal independent contractor activity advanced by the Seventh Circuit. It attempts to distinguish those cases, *Otis Elevator Company v. Secretary of Labor*, 921 F.2d 1285 (D.C. Cir. 1990) and *Joy Technologies, Inc. v. Secretary of Labor*, 99 F.3d 991 (10th Cir. 1996), both of which it admits stand for the contention that "*any* independent contractors, including Beelman, are "operators" under the Mine Act." Beelman Memorandum at 10. However, Beelman notes that those decisions were decided before the *Northern Illinois Steel Supply* decision and then suggests that, in any event, those cases suggest that "there may be a point at which an entity's contacts with a mine would be so attenuated as to remove it from the jurisdiction of MSHA," and therefore those Circuits did not reject a *de minimis* services defense to MSHA jurisdiction. Beelman Memorandum at 10.

Beelman then turns to its alternative contention that, even if it is an operator under the Mine Act definition, at section 802(d), it is not an operator under the narrower definition of the term, per 30 C.F.R. § 50.2(c)(2). In this regard it notes that under that regulatory provision, "Operator means [t]he person, partnership, association, or corporation or subsidiary of a corporation operating a metal or nonmetal mine, and owning the right to do so, and includes any agent thereof charged with responsibility for the operation of such mine." *Id.* at 12. It also observes that the decision of another administrative law judge held that, although an independent contractor might meet the definition of an operator under the Mine Act, it was not an operator under Part 50's use of that term. Beelman at 12-13, citing *Dickenson –Russell Coal Co.*, VA 2009-393-R (Jan. 16, 2013) (ALJ Feldman) *affd. Dickenson –Russell Coal Co., LLC v. Secretary of Labor*, 747 F.3d 251 (4th Cir. 2014).

The Court first notes that decisions of other administrative law judges are of no precedential effect. Their impact is limited to the persuasive impact of their decisions, if any. Beyond that observation, the Court considers the *Dickenson –Russell Coal Co.* case to be an odd source for reliance, because the 4th Circuit affirmed that *every* operator subject to the reporting requirement had the duty to report a qualifying accident. There, it was in fact the independent contractor who reported the incident while the operator contended that action relieved it of its own duty to report it. The administrative law judge issued a summary decision, holding that the operator still had a duty to report. In its decision the 4th Circuit stated "As mandated by these regulations, *Each operator* shall report *each* accident, occupational injury, or occupational illness at the mine. . . . [and that] [a]ccordingly any person or entity qualifying as an 'operator' under this regulation was required to report within 10 days accidents or injuries occurring at the operator's mine by filing an MSHA Form 7000–1. . . . The Part 50 regulations include their own definition of the term 'operator' that is identical to the statutory definition except that it does not expressly include 'independent contractor' within the meaning of 'operator' [but that despite this omission] [t]here may be multiple 'operators' engaged simultaneously at a single mine even though only one of them owns the mine. [citing] *Speed Mining, Inc. v. Fed. Mine Safety & Health Review Comm'n,* 528 F.3d 310, 315 (4th Cir. 2008).[5]" 747 F.3d 251 at 254.

It is true that the administrative law judge held that Part 50 controlled the definition of an operator in the context of the litigation, but as the independent contractor *did in fact* report the injury and the issue was whether Dickenson had to report it as well, the judge, unnecessarily in this Court's view, as it was not a required determination, held that the independent contractor's reporting of the incident was "gratuitous."[6] *Id. at* *256. Thus, it should be emphasized that *Dickenson* was not about the independent contractor's obligation to file a report, though the judge commented upon it anyway. Thus, the administrative law judge's comments about the independent contractor were purely dicta.

Continuing with its argument that it is not an operator under the Part 50 definition of that term, Beelman notes that it does not own the right to operate the Ste. Genevieve mine site, has no corporate relationship to Mississippi Lime and, as it has stated several times in its submission, it is "simply an unaffiliated third party who exclusively provides bulk transportation services to and from the Ste. Genevieve mine site. *Id.* at 17. Referring again to the administrative law judge's reasoning in *Dickenson –Russell Coal Co.*, Beelman adds that it was not an agent either,

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[5] The case was different in other respects as well. The independent contractor supplied miners to work at Dickenson. The employee, who was injured while employed by the independent contractor, was under the control of Dickenson.

[6] The 4th Circuit noted that *Auer* deference, which is akin to *Chevron* deference, is due where an agency is interpreting its own regulation *and* the matter is ambiguous. *Auer v. Robbins,* 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997), instead of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), which establishes the deferential framework for reviewing agency interpretations of statutes. Where the regulation is ambiguous, the Court noted that "the agency's interpretation controls unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'" The Court in *Dickerson* added its "review of the agency's interpretation in this context is therefore 'highly deferential.'" 747 F.3d 251 at 257.

because it was not " 'operating controlling or supervising' mining activities at the mine when its employee was injured." *Id.* at 18.[7]

Finally, Beelman contends that even if it is determined to be an "operator" under the Mine Act or Part 50 definitions of that term, no "accident" occurred "because the official place of death was the emergency department of the Ste. Genevieve County Memorial Hospital, [and therefore] not [at] a mine site under MSHA jurisdiction." It notes that the citation was based on "30 C.F.R. § 50.2(h)(1) which provides that a reportable accident occurs whenever there is 'a death of an individual at a mine.' . . . [and that] [i]t is undisputed that on September 12, 2013, Ste. Genevieve County Coroner Leo C. Basler, issued a letter stating that at 10:53 am on August 30, 2013, Mr. Hunt arrived by ambulance to the ER at Ste. Genevieve County Memorial Hospital [and that] . . . Mr. Basler's letter further explicitly states that **"Mr. hunt was pronounced dead in the ER at 11:11 AM by Dr. Bruce Harrison"** and that the **"[o]fficial place of death is ER, Ste. Genevieve County Memorial Hospital, Aug. 30, 2013, at 11:11 AM."** Beelman Memorandum at 20 (emphasis in original).

The Secretary's Answer and Objection to Respondent's Motion for Summary Decision. ("Secretary Opposition")

Pursuant to 29 C.F.R. §2700.67(d), the Secretary filed its opposition to Beelman's Motion. The Secretary's primary response is that there are material facts in dispute and that discovery is not complete and that those reasons make the motion for summary judgment premature and therefore inappropriate. The Secretary then proceeds to identify a host of items, each identified as "undisputed" by Beelman but, for reasons identified in its Opposition, it contends are in dispute. Sec's Opposition at 3-9, listing disputed items "a" through "u." Most of these reasons rest upon discoverable information which the Secretary has not yet come into possession. Copies of agreement(s) between Beelman and Mississippi are needed and it is likely that depositions will be in order as well.

Addressing the legal arguments, the Secretary asserts that "Beelman is an Operator under Section 3(d) of the Mine Act because it is an independent contractor performing services at a mine site and that a heart attack is a reportable injury since it is a serious injury that could reasonably lead to death." *Id.* at 9. The Secretary goes on to note that "Beelman is a bulk commodity transportation company . . .[with] duties [ ] to haul product in and out of Mississippi Lime's mine site. Drivers drive trucks down a common access road. The inspector has observed Beelman employees perform duties associated with hauling. . . . These duties include hooking up hoses for pneumatic loading and using harnesses to access the top of their bulk tanker trucks to open and close the hatches. . . . Beelman has a steady line of trucks at the mine daily. . . . The

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[7] In support, Beelman points out that its "employees never operate, supervise, or take part in the mineral extraction process at Mississippi Lime; Beelman employees never repair or maintain equipment owned by Mississippi Lime; at no time do Beelman employees operate or use any Mississippi Lime equipment or machinery during the delivery and unloading of product; Beelman employees do not assist Mississippi Lime in the loading of product; and most importantly, once on Mississippi Lime property, Beelman employees, including Mr. Terry Hunt on the day of his heart attack, are/was under the complete control and supervision of Mississippi Lime personnel." *Id.* at 19.

truck traffic is nearly constant. . . . The quarry operator, Mississippi Lime, requires and receives a high volume of coal from Beelman to manufacture its product, dry lime, for sale and distribution into the stream of commerce." *Id.*

The Secretary maintains that Beelman certainly fits within the definition of an operator under the Mine Act, noting that the definition at section 3(d) includes "any independent contractor performing services or construction at such mine[.]" Noting the analytical steps to be applied in interpreting the provisions of the Mine Act, beginning with whether the intent is unambiguously expressed, then moving to deference to the Secretary's reasonable interpretation if a provision is ambiguous, and finally that, as a remedial statute, it is to be liberally construed, the Secretary points out that "[b]ecause Beelman has over one hundred (100) trucks driving on the mine site and down common access roads on the mine site daily[,] both its drivers and Mississippi Lime's miners at the mine site are exposed to safety hazards present at the mine site and created by Beelman's activities at the mine site. One of Beelman's many drivers, decedent Mr. Hunt, drove through a berm and crashed into a ditch. This type of safety hazard should be anticipated due to the sheer volume of Beelman trucks at the mine site on a daily basis." Opposition at 10-11.[8]

The Secretary contends, citing cases such as "*Musser Engineering, Inc.* 32 FMSHRC 1257, 2010 WL 4563000, *Otis Elevator Co. v. Secretary of Labor,* 921 F.2d 1285, 1290 (D.C. Cir. 1990), *Joy Technologies, Inc. v. Secretary of Labor*, 99 F.3d 991, 999-1000 (10th Cir. 1996), *Northern Illinois Steel Supply Co. v. Secretary of Labor*, 294 F.3d 844, 848-49 (7th Cir. 2002) that this activity far exceeds any *de minimus* characterization, and that Beelman's activities are "integral" to the mine's activity.[9] It also notes that in *Bulk Transportation Services, Inc*., "[a] coal hauling company was found to have a 'presence' at the mine that was not *de minimis* but rather was sufficient for MSHA jurisdiction, when "there is a constant flow of truck drivers in and out . . .," and that they generally haul four to five days per week, [and that] Bulk agreed to transport approximately 30,000 tons of raw coal and 20,000 tons of clean coal per month, the Commission found Bulk, "was an independent contractor-operator…services in hauling coal were essential and closely related to the extraction process." Sec. Opposition at 12.

The Secretary also references that the Tenth Circuit, speaking to the statutory provision, has held that "MSHA's interpretation -- that independent contractor status is to be based not on the existence of a service contract or control [over mining-related operations], but on the

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[8] Without prejudging the issue, the Court would note that the facts in this case appear to be remarkably different from those addressed by this Court in "*Hanson Aggregates Midwest*, KENT 2012-1283-M (August 5, 2013) (ALJ Moran) (holding that a heart attack was an "illness" and not an "accident" and thus not a reportable event under 30 C.F.R. § 50.10(b))," Beelman's characterization of the holding, as cited in Beelman's Memorandum at 2-3. The Court would comment that at least at this point in the uncompleted development of the facts, whether they are ultimately contested or not, there appears to have been an accident preceding the heart attack, a colorable distinction from *Hanson*.

[9] The Secretary also identifies another factual dispute in that it asserts "the inspector has observed Beelman employees hooking up hoses for pneumatic loading and using harnesses to access the top of their bulk tanker trucks to open and close the hatches. (Secretary's Exhibit 2) Both activities are integral parts of the mine's activity of producing dry lime and then loading it into tanker trucks for distribution into the "stream of commerce[.]" Opposition at 11.

performance of significant services at the mine -- is a reasonable construction of the statute entitled to deference." *Id.* at 12, citing *Joy Technologies*, 99 F.3d 991 at 998 (10th Cir. 1996).[10]

The Court, in noting the Secretary's contentions, is not deciding these issues now, for the same reason that it is denying Beelman's motion - it is premature to do so at this point.[11]

Conclusion.[12]

On the basis of the preceding discussion, Respondent's Motion for Summary Judgment is DENIED. The legal determinations cannot be reached until the factual issues have been resolved. One does not reach that second, legal determination, hurdle to summary judgment until the first hurdle, involving the facts, has been successfully surmounted. This decision does not foreclose a later examination in the context of a renewed motion for summary judgment, although it is possible, if the material facts are not in dispute, that the Court may then be dealing with cross-motions on the legal issues. The Secretary should immediately begin its discovery, if it has not already done so. The parties are directed to file a status report to the Court within 60 (sixty) days and to also submit that report to the Court's email at: wmoran@fmshrc.gov.

SO ORDERED.

William B. Moran

William B. Moran

[10] The Secretary also contends that, even taking Beelman's *de minimus* argument, its activities exceed such a test and therefor meet such a measure for it to qualify as an independent contractor.

[11] The Secretary briefly speaks to the issue of whether a heart attack is a reportable injury. Sec. Opposition at 14-15. The Court has already made some preliminary observations on this issue, but again in the context of this Motion, it believes it would be premature to resolve this question.

[12] Subsequent to the motion and opposition, the Respondent filed a Reply, the Secretary filed a motion to strike that Reply, the Respondent filed "suggestions" in opposition to the Reply and the Secretary then filed a reply in opposition to Respondent's Reply. Respondent's Reply refers to Rule 56 of the Federal Rules of Civil Procedure and it contends that courts are not required to allow parties to conduct discovery. The Court, upon reviewing the submissions, as described above, certainly is of the view that the Secretary did more than provide "the slightest showing" to defeat the motion for summary judgment. The Court is also of the view that, absent some gross failure or delay, not present here, it would be inappropriate to curtail the search for the facts, where discovery is incomplete. Further, determinations in motions for summary judgment are within the Court's informed discretion, which discretion the Court has exercised here. The Court has addressed the other contentions, essentially re-raised in Beelman's Reply, and concluded that summary judgment is premature at this time. **In the future, the parties are directed to first seek the Court's approval before filing replies.**