

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 31, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2001-18
Petitioner	:	A.C. No. 46-07809-03525
v.	:	
	:	Kiah Creek Preparation Plant
PEN COAL CORPORATION/KIAH	:	
CREEK DIVISION,	:	
Respondent	:	

SUMMARY DECISION

Before: Judge Bulluck

This case is before me upon a Petition for Assessment of Penalty filed by the Secretary of Labor, through her Mine Safety and Health Administration (“MSHA”), against Pen Coal Corporation (“Pen Coal”), pursuant to section 105(d) of the Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), for an alleged violation of 30 C.F.R. § 77.1109(c)(1).

The parties filed Joint Stipulations (“JS”), Joint Findings of Fact (“JF”) and Joint Exhibits (“JEx.”), and cross Motions for Summary Decision and Responses, pursuant to 29 C.F.R. § 2700.67, asserting, among other things, that there are no genuine issues as to any material facts in this case.

I. Joint Stipulations

1. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction to hear and decide this civil penalty proceeding, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977.

2. Pen Coal Corporation is the owner and operator of the Kiah Creek Preparation Plant.

3. Operations of the Kiah Creek Preparation Plant are subject to the jurisdiction of the Act.

4. Pen Coal Corporation may be considered a large mine operator for purposes of 30 U.S.C. § 820(i).

5. The maximum penalty which could be assessed for this violation, pursuant to 30 U.S.C. § 820(a), will not affect the ability of Pen Coal Corporation to remain in business.

6. The inspector was acting in his official capacity as an authorized representative of the Secretary of Labor when he issued Citation No. 7192431.

7. A true copy of the citation listed in Paragraph 6 was served on Pen Coal Corporation or its agent, as required by the Act.

8. The citation listed in Paragraph 6 is authentic and may be admitted into evidence for the purpose of establishing its issuance, and not for the purpose of establishing the accuracy of any statements asserted therein.

9. MSHA's Proposed Assessment Data Sheet accurately sets forth: (a) the number of assessed penalty violations charged to the Pen Coal Corporation, Kiah Creek Preparation Plant, for the period from January 1997 through March 1999, and (b) the number of inspection days per month for the period from January 1997 through October 2000.

10. MSHA's Assessed Violations History Report, R-17 Report, may be used in determining appropriate civil penalty assessments for the alleged violation.

II. Joint Findings of Fact

1. On October 29, 1997, Terry Price, MSHA supervisor, held a meeting with Bruce Short, general manager for Pen Coal; Bill Gilkerson, T&R Trucking; and Millard Brewer, truck foreman for T&R Trucking. During the meeting, Price explained overlapping compliance measures to ensure compliance.

2. On April 24, 1998, Pen Coal and T&R Trucking ("T&R") entered into a Coal Transportation Agreement, whereby T&R would provide services as an independent contractor for the haulage of coal to Pen Coal's Kiah Creek Preparation Plant (the "preparation plant"). A copy of the Coal Transportation Agreement is attached as Exhibit 1.

3. Without Pen Coal's knowledge, on or about August 18, 2000, T&R subcontracted with Bill Walters Trucking to perform coal haulage services for T&R to the preparation plant.

4. On August 24, 2000, Bill Walters, the principal of Bill Walters Trucking, was driving the Western Star coal truck, number SR59-4.

5. Bill Walters was hauling coal from the Copley Trace surface mine to the Kiah Creek

Preparation Plant.

6. On August 24, 2000, truck number SR59-4 was not equipped with a portable fire extinguisher.

7. Truck number SR59-4 was owned, maintained, serviced and driven exclusively by Bill Walters, a principal/employee of Bill Walters Trucking.

8. On August 24, 2000, MSHA Inspector Johnny E. Brown issued Citation No. 7192431 to Pen Coal for violation of 30 C.F.R. § 77.1109(c)(1). The citation charged low negligence, but was modified on October 3, 2000 at a conference to charge no negligence, stating, "In this particular instance, the negligence is reduced to one level below that of the contractor." A penalty of \$55.00 was assessed. A copy of Citation No.7192431 is attached as Exhibit 2.

9. On August 24, 2000, Inspector Brown issued Citation No. 7192430 to T&R Trucking for a violation of 30 C.F.R. § 77.1109(c)(1). A copy of Citation 7192430 is attached as Exhibit 3.

10. No citation was issued to Bill Walters Trucking for its failure to equip truck number SR59-4 with a portable fire extinguisher.

11. At the time of the August 24, 2000 inspection, Inspector Brown told J.R. Mullins, Pen Coal's safety director, that he had previously been instructed by his supervisors to write the next violation by Pen Coal's contractor as a citation against Pen Coal.

12. T&R has its own maintenance and service department, which is responsible for inspecting, maintaining and servicing trucks used for haulage of coal to the preparation plant.

13. Pen Coal did not hire or contract with Bill Walters Trucking to perform services for Pen Coal.

14. Neither Pen Coal's employees, equipment nor activities contributed to the absence of a portable fire extinguisher on truck number SR59-4.

15. The violation was committed by Bill Walters Trucking's principal/employee.

16. The violation was abated by the principal/employee of Bill Walters Trucking.

17. Neither T&R nor Bill Walters Trucking submit inspection, maintenance or service reports to Pen Coal.

18. Pen Coal does not provide supplies, materials, machinery or tools to T&R or Bill Walters Trucking.

19. Pen Coal does not supervise the employees of T&R or Bill Walters Trucking.

20. Pen Coal employees never drive, ride in, or otherwise use vehicles owned by T&R or Bill Walters Trucking.

21. Pen Coal had no notice or reason to believe that T&R would subcontract with a subcontractor that would fail to equip its truck with a portable fire extinguisher.

22. Bill Walters Trucking had never worked as a contractor for Pen Coal or as a subcontractor for T&R at the preparation plant prior to approximately August 18, 2000.

23. The portable fire extinguisher in Western Star trucks, such as SR59-4, is stored inside the cab of the truck behind the driver's seat. It is not possible to tell from the outside of the truck whether the fire extinguisher is in place or not.

24. Pen Coal's employees had not observed that truck number SR59-4 was not equipped with a portable fire extinguisher.

25. Pen Coal's employees were not exposed to the danger posed by the absence of a portable fire extinguisher.

26. The loader operator, who was an employee of an independent contractor and who was the only employee working in the area, was stationed outside and was provided with and had access at all times to his own portable fire extinguisher.

III. Joint Exhibits

1. Coal Transportation Agreement
2. Citation No. 7192431
3. Citation No. 7192430
4. Violation history of T&R Trucking at the Kiah Creek Preparation Plant
5. Conference Report dated October 2, 2000

IV. Factual Background

As an independent contractor of Pen Coal at its Kiah Creek Preparation Plant, T&R Trucking ("T&R") hauls coal from Pen Coal's various mines to the preparation plant, and from the preparation plant to one of Pen Coal's various coal loading facilities (JF 2). On or about

August 18, 2000, without Pen Coal's knowledge, T&R subcontracted with Bill Walters Trucking ("Bill Walters") for assistance in its coal haulage services to the preparation plant (JF 3). Subsequently, on August 24, 2000, principal/employee Bill Walters, operating a Western Star truck, was hauling coal from the Copley Trace surface mine to the preparation plant (JF 4, 5). MSHA Inspector Johnny E. Brown inspected Walters' truck at that time and discovered that it was not equipped with a portable fire extinguisher, which is normally stored in the cab behind the driver's seat (JF 6, 23). As a consequence, Inspector Brown cited T&R and Pen Coal, but not Bill Walters, respecting this condition (JF 8, 9, 10). Citation No. 7192430, issued to T&R, alleged a violation of 30 C.F.R. § 77.1109(c)(1), for failure to equip the coal truck with a portable fire extinguisher; T&R did not contest the citation. Citation No. 7192431, at issue in this proceeding, charges Pen Coal with a "non-significant and substantial" violation of 30 C.F.R. § 77.1109(c)(1), describing the violation as follows:

The Western Star Coal Truck company number SR59-4 was not equipped with a portable fire extinguisher

(JE 2). The citation was abated twenty minutes later by principal/employee Bill Walters (JF 16).

V. Findings of Fact and Conclusions of Law

A. Fact of Violation

30 C.F. R. § 77.1109(c)(1) requires the following:

Mobile equipment, including trucks, front-end loaders, bulldozers, portable welding units, and augers, shall be equipped with at least one portable fire extinguisher.

The parties are in agreement that the violation occurred (JF 6, 15). The dispute arises out of Pen Coal's position that the Secretary abused her discretion in citing the operator for a violation which none of its employees, equipment or activities caused (JF 7, 14). Pen Coal argues that it does not inspect the trucks of its contractors and is under no legal requirement to do so, and that it is reasonable for the company to have relied on T&R to maintain its vehicles and those of any subcontractor in good working condition. Furthermore, Pen Coal points out, none of its employees work with or alongside Bill Walters employees, it does not supervise T&R or Bill Walters employees, and the sole employee working in the area when the citation was issued (contract loader operator) had been provided with his own portable fire extinguisher. Finally, Pen Coal contends, citing Pen Coal for the violation at issue is based upon the Secretary's erroneous position that she has unfettered discretion to hold the operator liable for every violation on its property, irrespective of the circumstances.

The Secretary argues that the production operator bears the overall responsibility for health and safety at the mine, as well as compliance with applicable laws and regulations, and

that Pen Coal, although without fault, is strictly liable for all violations of the Act occurring on mine property, including those committed by its contractors. Moreover, the Secretary points to several citations issued to T&R exclusively, and overlapping compliance discussions MSHA held with Pen Coal and T&R management as a consequence, to establish that Pen Coal had been put on notice that it was liable for the violations of its contractors. Finally, the Secretary asserts that Pen Coal was cited for the instant violation because the operator was not providing any oversight of its independent contractors' inspection and maintenance programs, and that the decision to cite both operator and contractor was consistent with the safety promotion purpose of the Act.

Commission and court precedent support the Secretary's authority to hold an operator, although faultless itself, strictly liable for all violations of the Act occurring on its mine site, whether committed by its own employees or those of its contractors. *Mingo Logan Coal Company*, 19 FMSHRC 246, 249 (February 1997), *aff'd*, 133 F.3d 916 (4th Cir. 1998)(table) (citing *Bulk Transportation Services, Inc.*, 13 FMSHRC 1354, 1359-60 (September 1991); *Cyprus Indus. Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1119 (9th Cir. 1981)). In instances of multiple operators, the Commission has also recognized the Secretary's "wide enforcement discretion" in proceeding against an operator, its independent contractor, or both, for violations committed by a contractor. *Id.* (citing *Consolidation Coal Co.*, 11 FMSHRC 1439, 1443 (August 1989); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 534, 538-39 (D.C. Cir. 1986) (reversing 6 FMSHRC 1871 (August 1984)). In recognizing the Secretary's enforcement authority, however, the Commission has noted its role in guarding against "abuse of discretion". *W-P Coal Co.*, 16 FMSHRC 1407, 1411 (July 1994). A litigant challenging the Secretary's enforcement discretion bears a heavy burden of establishing that there is no evidence to support the Secretary's decision or that the decision is based on a misunderstanding of the law. *Extra Energy, Inc.*, 20 FMSHRC 1, 5 (January 1998) (citing *Mingo Logan*, 19 FMSHRC at 249-50 n. 5).

In reaching a conclusion as to whether an enforcement action constitutes an abuse of the Secretary's discretion, the Commission has considered, among other factors, the operator's day-to-day involvement in the mine activities, whether the operator is in the best position to affect safety, and whether the enforcement action is consistent with the purpose and policies of the Act. *Id.*

Review of the contract between Pen Coal and T&R for coal haulage services in no way delegates to T&R operation of Pen Coal's mines, including the Kiah Creek Preparation Plant, and the contract also contemplates subcontracting by T&R. Therefore, as production operator with the overall responsibility of running the plant, Pen Coal was properly held strictly liable for Bill Walters' failure to equip his truck with a portable fire extinguisher during its operation at Kiah Creek, despite the fact that no negligence was attributed to Pen Coal. Moreover, Pen Coal's reliance on the fact that it was ignorant of T&R's contract with Bill Walters neither negates its overall responsibility of assuring compliance with applicable standards and regulations nor relieves it of liability. On the contrary, it emphasizes the soundness of holding the production operator liable. See, for example, the Commission's conclusion in *Mingo Logan*,

19 FMSHRC at 251, that holding a production operator liable for its independent contractors' violations provides an incentive to use contractors with strong health and safety records, where it quotes the Ninth Circuit's rationale in *Cyprus*, 664 F.2d at 1119-20:

The Court stated that holding owner-operators liable for violations committed by independent contractors promotes safety because "the owner is generally in *continuous* control of the *entire* mine" and "is more likely to know the federal safety and health requirements." *Id.* at 1119. The court also posited that "[i]f 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." *Id.*

In this case, while Pen Coal was under no legal obligation to inspect T&R's and Bill Walters' trucks, its failure to inspect or monitor inspection of its contractors' trucks contributed to the violation. It is reasonable to conclude, for example, that Pen Coal's review of its contract truckers' daily inspection reports would have disclosed T&R's contract with Bill Walters and the condition of all trucks operating on the mine property. To the extent that Pen Coal failed to exercise any compliance oversight whatsoever, in light of repeated citations issued to T&R for safety violations and after MSHA had explained overlapping compliance, Pen Coal was negligent and courted being cited for the violations of its trucker contractors. Under these circumstances, I find that the Secretary did not abuse her discretion in citing both T&R and Pen Coal for the violation of Bill Walters.

B. Penalty

While the Secretary has proposed a civil penalty of \$55.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(j). *See Sellersburg Co.* 5 FMSHRC 287, 291-92 (March 1993), *aff'd*, 763 F.2d 1147 (7th Cir. 1984).

In assessing the appropriate penalty for this violation, I have considered the stipulations of the parties that Pen Coal is a large operator (JS 4), and that the proposed penalty will not affect the company's ability to remain in business (JS 5). The parties have provided T&R's history of violations, and while I note three similar violations within the same year, I do not find its history to be an aggravating factor in assessing the penalty. I also find the violation to be relatively serious, given the truck's mobility from coal mine to preparation plant on public roads, as well as on mine properties, thereby potentially exposing individuals and property in close proximity to the hazards of a burning truck. Moreover, considering that Pen Coal's failure to insure inspection of the numerous trucks operating in its mine facilities contributed to the violation, I ascribe low negligence to the company. Therefore, having considered Pen Coal's large size, ability to remain in business, history of violations, seriousness of violation, low degree of negligence, good faith abatement and no other mitigating factors, I find that the \$55.00 penalty proposed by the Secretary is appropriate.

ORDER

Accordingly, the Secretary's Motion for Summary Decision is **GRANTED**, Respondent's Motion for Summary Decision is **DENIED**, Citation No. 7192431 is **AFFIRMED**, as modified to reflect low negligence, and Pen Coal Corporation is **ORDERED** to pay a civil penalty of \$55.00 within 30 days of the date of this decision. Upon receipt of payment, this case is **DISMISSED**.

Jacqueline R. Bulluck
Administrative Law Judge

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