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MSHA V. PHILLIPS URANIUM
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
April 27, 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket Nos. CENT 79-281-M CENT 79-282-M CENT 80-6-M CENT 80-124-M
v.	
PHILLIPS URANIUM CORPORATION	

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket No. CENT 80-208-M
v.	
PHILLIPS URANIUM CORPORATION	

DECISION

These cases arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (Supp. III 1979), involve the same parties, and present identical issues. We therefore consolidate and dispose of them in this decision. Docket Nos. CENT 79-281-M, CENT 79-282-M, CENT 80-124-M, and CENT 80-6-M are hereinafter referred to as "Phillips I". Docket No. CENT 80-208-M is referred to as "Phillips II".

The common issue presented is whether the administrative law judge in each case erred in upholding citations and orders issued by the Secretary of Labor to Phillips Uranium for violations of the 1977 Mine Act arising from the work activities of independent contractors engaged by Phillips.

Facts

These cases were submitted to the judges on the basis of stipulations of facts and motions for summary decision. The stipulations in each case established the same material facts. Phillips owned mining rights and was conducting mining activities subject to the Mine Act at a proposed uranium mine. Phillips retained large, independent companies with experience and expertise in shaft sinking and related underground construction. As a matter of law, these

contractors are "operators" under the Mine Act's definition. 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.

The stipulations also established the following: MSHA's policy at the time the citations and orders were issued was to cite only operators with a "Federal Mine Identification Number." None of the involved contractors possessed such an identification number. The identification number for the subject site was possessed by Phillips. Phillips was proceeded against under an MSHA policy to directly enforce the Act against only owner-operators for contractor violations. This policy was an interim policy pending MSHA's adoption of regulations governing the issuance of identification numbers to contractors and the direct citation of contractors so identified.

Procedural Background

The 1977 Mine Act became effective on March 9, 1978. The Act imposes a duty on mine operators to comply with its provisions and includes in its definition of "operator," "any independent contractor performing services or construction at such mine." 30 U.S.C. $ 802(d). The citations at issue in Phillips I were issued to Phillips between February and August 1979. The citation and order at issue in Phillips II were issued to Phillips in November 1979.

In August 1979 the Secretary published a proposed rule addressing the citation and identification of contractors as operators. 44 Fed. Reg. 44746-47753. On July 1, 1980, the Secretary published the final rule. 45 Fed. Reg. 44494-44498. This rule became effective on July 31, 1980.

Shortly before the Secretary's final rule was published, motions for summary decision were filed in the present cases. Cross-motions for summary decision in Phillips I were submitted in May 1980. A joint motion for summary decision in Phillips II was submitted in June 1980.

On June 5, 1980, before the publication of the final rule, the judge decided Phillips I finding on the basis of the Commission's decision in Old Ben Coal Co., 1 FMSHRC 1480 (1979), aff'd No. 79-2367, D.C. Cir., January 6, 1981, that the citations were properly issued to Phillips. The Commission granted Phillips' petition for discretionary review of the judge's decision. On August 4, 1980, the Commission remanded Phillips I to the judge for the limited purpose of allowing

the Secretary the opportunity to determine, in light of the subsequent adoption of his final rule, whether to continue to proceed against Phillips only. or to proceed against the contractor, or both. On remand the Secretary responded that it was not in his "interest" to
~551
substitute or join the contractor. He stated, however, that he would not oppose a joint motion by Phillips and the contractors to substitute the contractors, or a motion by Phillips to implead the contractor, if such motions were filed. In view of this response the judge returned the record to the Commission. 1/

The judge in Phillips II also issued an order allowing the Secretary an opportunity to redetermine whether, in light of the new regulations, he would continue to proceed against Phillips only. The Secretary again responded that he would proceed solely against Phillips, but would not oppose a motion by Phillips to join the contractor. Following this response, the judge affirmed the citation and order issued to Phillips on the basis of the Old Ben decision. We granted Phillips' petition for discretionary review.

Discussion

In our decision in Old Ben Coal Co., we emphasized that, although an owner-operator can be held responsible without fault for a violation of the Act committed by its contractor, the Secretary's decision to proceed against an owner for such a violation is not insulated from Commission review. 1 FMSHRC at 1483-1484. For the reasons stated in Old Ben we hold that the Commission may review the Secretary's decision in these cases to proceed against Phillips.

The test applied by the Commission in reviewing the Secretary's choice is "whether the Secretary's decision to proceed against an owner for a contractor's violation was made for reasons consistent with the purposes and policies of the 1977 Act." 1 FMSHRC at 1485.

1/ Shortly after the judge returned the record in Phillips I to the Commission, Phillips and American Mine Services (AMS)(the contractor that created the violative condition at issue in Docket No. CENT 79-281-M), entered into a contractual agreement in which AMS agreed to be voluntarily substituted as the respondent in Docket No. CENT 79-281-M. AMS also tendered a check to Phillips, endorsed to the MSHA's Office of Assessments, for the full amount of the penalty proposed by MSHA. Phillips indicated to the Secretary that the primary objective of the substitution was to remove the citation from Phillips' history of violations.

In his brief on review, the Secretary states that he would not oppose a remand of Docket No. CENT 79-281-M for the substitution of AMS. Although the Secretary has not initiated the substitution, and in the absence of the efforts made by the operators would be content

to continue against Phillips, we will grant a remand in this docket so that AMS can be substituted and Phillips dismissed. In light of the agreement between Phillips and AMS, and in view of our discussion in this decision, we find that the purposes of the Act will be served by allowing the substitution.

~552

Our upholding of the Secretary's choice in Old Ben, albeit with considerable doubts expressed as to the wisdom thereof, was largely based on the particular chronology of events in that case. The citation in Old Ben was issued only thirty-four days after the 1977 Mine Act had taken effect. 1 FMSHRC 1486 n.7. Recognizing that responsibility for enforcement of the nation's mine safety program had only recently been transferred to the Department of Labor from the Department of Interior, we found that the Secretary's decision to cite Old Ben under an "interim" agency-wide policy to proceed only against owner-operators was, at least at that early stage, a decision not inconsistent with the purposes and policies of the 1977 Act.

The facts in the present cases place them in a fundamentally different light. The citations and orders here were issued in a period extending from 11 to 17 months after the 1977 Act took effect. Furthermore, more than two years after the Act's effective date, and well after the Commission's decision in Old Ben, the Secretary continued to proceed against Phillips, as owner-operator, by submitting the cases on motions for summary judgment. Finally, the cases were submitted shortly before the Secretary published his final regulations on identifying and proceeding against independent contractors, and even thereafter the Secretary refused to apply the regulations against the very operators who would be held accountable under the regulations.

As we previously have observed, "direct enforcement against contractors is a vital part of the 1977 Act's enforcement scheme." 1 FMSHRC at 1483. "[T]he amendment of the 1977 Act's definition of operator to include independent contractors intended to accomplish a specific purpose, i.e., to clearly reflect the Congress' desire to subject contractors to direct enforcement of the Act." 1 FMSHRC at 1486. MSHA itself acknowledges that direct enforcement against contractors best serves the health and safety of the miners. In the preamble to its contractor regulations MSHA stated:

During the course of the rulemaking process, MSHA has been persuaded that the interest of miner safety and health will best be served by placing responsibility for compliance with the Act, standards and regulations upon each independent contractor.

* * *

The commentors' analysis of the concept that independent

contractors are generally in the best position to prevent safety and health violations in the course of their own work, and to abate those violations that may occur, has persuaded MSHA that holding all independent contractors responsible for their violations will improve the overall safety and health of miners.

45. Fed. Reg. 44494. 44495 (emphasis added).

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The shortcomings of the Secretary's decision to proceed against Phillips here are made all the more evident by viewing the facts in light of the basic statutory scheme. Large, skilled contractors were retained for their expertise in an important and familiar facet of mine construction, i.e., the sinking of shafts and related underground construction activities. The hiring of contractors to perform the specialized task of shaft construction is common in the mining industry. The contractors, conceded to be "operators" subject to the Act, failed to comply with various safety standards. Yet Phillips, rather than the contractors, was cited; penalties were sought against Phillips, rather than the contractors; the violations would be entered into Phillips' history of violations, rather than the contractors' histories, resulting in increased penalties for Phillips rather than the contractors in later cases; 2/ Phillips, rather than the contractors could be subjected to the stringent section 104(d) sequence of citations and orders; and Phillips rather than the contractors could be subjected to the stringent section 104(e) pattern of violation provisions. Compared to Phillips' burden in bearing the full brunt of the effects of the violations committed by the contractors, the contractors would proceed to the next jobsite with a clean slate, resulting in a complete short-circuiting of the Act's provisions for cumulative sanctions should the contractors again proceed to engage in unsafe practices.

We previously have observed that "[i]n many circumstances ... it should be evident to an inspector at the time that he issues a citation or order that an identifiable contractor created a violative condition and is in the best position to eliminate the hazard and prevent it from recurring." 1 FMSHRC at 1486. This precise situation was evident to the inspector when he issued the citations and orders in these cases, was evident to the Secretary's attorneys in preparing and submitting these cases against Phillips, and most assuredly was evident to the Secretary after adoption of his final regulations on independent contractor violations. 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, 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.

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2/ In his motion to dismiss as moot, denied this date, the Secretary asserts that under his penalty assessment regulations violations are not counted in an operator's history after two years. As the Secretary is well aware, in assessing penalties under the Act the Commission and its judges are not bound by the Secretary's penalty assessment regulations. 30 U.S.C. $ 110(i); 29 C.F.R. $ 2700.29(b). Cf Co-op Mining Co., 2 FMSHRC 784, 785 (1980). See also 30 C.F.R. $ 100.2. Therefore, the fact that the Secretary, for his purposes, may choose to discount violations that occurred more than two years in the past is not determinative of an operator's history in cases contested before the Commission.

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Accordingly, the decisions of the administrative law judges in Docket Nos. CENT 79-282-M, CENT 80-6-M, CENT 80-124-M and CENT 80-208-M are reversed, the citations and orders are vacated and the petitions for assessment of civil penalties are dismissed. Docket No. CENT 79-281-M is remanded so that Phillips can be dismissed and AMS substituted, and for further proceedings consistent with this decision. See n. 1, supra

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Commissioner Lawson dissenting:

In Old Ben, supra, the Commission agreed with the Secretary's decision to proceed against only the owner-operator. We held that:

"It was not the intention of Congress to limit the number of persons who are responsible for the health and safety of the miner, nor to dilute or weaken the obligation imposed on those persons, ... we find that, as a matter of law under the 1977 Act, Old Ben, as an owner-operator, can be held responsible without fault for the violation of the Act committed by its contractor. When a mine operator engages a contractor to perform construction or services at a mine, the duty to maintain compliance with the Act regarding the contractor's activities can be imposed on both the owner and the contractor as operators. ... Arguably, one operator may be in a better position to prevent the violation.

However, as we read the statute, this issue does not have

to be decided since Congress permitted the imposition of liability on both operators regardless of who might be better able to prevent the violation." (Emphasis added).
Old Ben, supra, at 1483.
The rationale supporting the Commission's conclusion that owner-operators are responsible for contractor-operators' violations under the 1977 Act also has recently been firmly endorsed by two Courts of Appeals. In Harman Mining Corporation v. FMSHRC, No. 81-1189 (4th Cir. December 24, 1981), the court stated:
"Based upon our analysis of the statute, we held that the owner of a mine is liable "regardless of who violated the Act or created the danger" (citing Bituminous Coal Operators Association v. Secretary of Interior, 547 F.2d 240 (4th Cir. 1977)).
In Cyprus Industrial Minerals Company v. FMSHRC, 664 F.2d 1116 (9th Cir. 1981) the court held:
"In addition, mine owners are strictly liable for the actions of independent contractor violations under the Coal Act and the present (1977 Act)." (Citations omitted). The Secretary presents sound policy reasons for holding owners liable for violations committed by independent contractors. For one thing, the owner is generally in continuous control of conditions at the entire mine. The owner is more likely to know the federal safety and health requirements. If 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. The Secretary should be able to cite either the independent contractor or the owner depending on the circumstances.
~556
A mine owner cannot be allowed to exonerate itself from its statutory responsibility for the safety and health of miners merely by establishing a private contractual relationship in which miners are not its employees and the ability to control the safety of its workplace is restricted" (citing Secretary of Labor v. Republic Steel Corp., 1 FMSHRC 5 (1979)). (Emphasis added).
Less than two months ago, this Commission again found that an owner-operator "was properly cited for the condition created by its independent contractor." U. S. Steel Corporation, 4 FMSHRC 163, 164 (February 25, 1982).
The majority here chooses to ignore precedent and instead asserts

that the Secretary must at this late date discontinue the cases it has successfully prosecuted against the owner-operator in these dockets. This is even more anomalous since, in Phillips I, this Commission remanded that case to the Secretary, and offered him the choice of continuing these dockets against the owner-operator, proceeding only against the contractor-operator, or against both. In light of the majority's decision today, that offer was obviously a sham. The Secretary is now ordered to start anew and, on two year old violations, issue new citations against Phillips' contractors in these now stale dockets.

It bears emphasis that in Old Ben (also affirmed by the D.C. Court of Appeals; No. 79-2367 (1981)), (supra at 1486), we criticized the Secretary only if he "unduly prolongs the policy that prohibits direct enforcement of the Act against contractors." (emphasis added), indicating that the Secretary's formerly inflexible policy of proceeding only against owner-operators for contractor-operator's violations would not be permitted to continue indefinitely. 1/

This precedent--the only one cited by the majority--therefore reached a result contrary to that the majority herein now endorses.

1/ The length of time taken by the Secretary for the development of a new policy was, in any event, not unduly prolonged. The proposed rule was published in the Federal Register on October 31, 1978 (43 F.R. 50716), and forty-five days allotted for public comment thereon. Comments were received from more than seventy-five organizations and individuals. The comments were analyzed and a new proposed rule published on August 14, 1979 (44 FR 47746-53). Six public hearings were held on the proposal. During this period of public comment the agency received some eighty written comments, and the hearings generated testimony from seventy-three witnesses extending over six hundred and sixty-five transcript pages, in addition to one hundred and fifty-five pages of written statements submitted at the hearings. The time consumed in promulgating a final rule was thus largely due to the extensive public participation throughout the entire rulemaking process, and the Secretary's commendable and sensitive response thereto.

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The citations in Phillips I were issued prior to the Commission's decision in Old Ben. To the extent therefore that the majority opinion, as it does, relies on Old Ben in criticizing the Secretary's initiation of the Phillips I action against the owner-operator, it is obviously misdirected.

In Phillips II, the citation and order were issued only thirteen days after the Commission's Old Ben decision, and nothing

in the record reveals awareness by any Secretarial personnel of that decision. The majority's contention that issuance of either the Phillips I or II citations and order was in defiance or contravention of this now asserted Old Ben prohibition is therefore unsupported. The judges in both Phillips' I and II decided these cases with full cognizance of and in reliance on the Commission's decision in Old Ben, and neither found any fault in the Secretary's prosecution of Phillips.

More narrowly, of course, the Commission did not--and indeed could not--prohibit the Secretary's direct enforcement of the Act against an owner-operator. As the Senate Committee Report on the 1977 Act noted:

"In enforcing this Act, the Secretary should be able to issue citations, notices, and orders, and the Commission should be able to assess civil penalties against such independent contractors as well as against the owner, operator, or lessee of the mine. The Committee notes that this concept has been approved by the federal circuit court in Bituminous Coal Operators' Assn. v. Secretary of the Interior 547 F2d 240 (C.A. 4, 1977)." (Emphasis added).

S. Rep. 95-181, 95th Cong., 1st Sess. 14 (1977).

The majority here chooses to quote only the preamble to the "contractor regulations" upon which it places such great emphasis. 2/ The regulations themselves, however, fail to support that selective quotation:

2/ Indeed, even the quoted material relied upon by the majority sanctions prosecution of owner-operators; viz... in the majority of instances" the Secretary may proceed against contractor-operators. Obviously, therefore, he is not bound to do so in other instances (page 4, supra).

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"General Enforcement Policy for Independent Contractors.

...

MSHA's general enforcement policy regarding independent contractors does not change the basic compliance responsibilities of production-operators. Production-operators are subject to all provisions of the Act, standards and regulations which are applicable to their mining operation. This overall compliance responsibility of production-operators includes assuring compliance with the standards and regulations which apply to the work being performed by independent contractors at the mine. As a result, independent contractors and production-operators

both are responsible for compliance with the provisions of the Act, standards and regulations applicable to the work being performed by independent contractors.

...

Enforcement action against production operators for violations involving independent contractors is ordinarily appropriate in those situations where the production-operator has contributed to the existence of a violation, or the production operators' miners are exposed to the hazard, or the production-operator has control over the existence of the hazard. Accordingly, as a general rule, a production-operator may be properly cited for a violation involving an independent contractor: (1) when the production-operator has contributed by either an act or an omission to the occurrence of a violation in the course of an independent contractor's work, or (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, or (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." (Emphasis added).

Here, Phillips I had been decided, and Phillips II had been submitted to the judge below for decision prior to the time the Secretary declined to discontinue these cases, abatement had been completed, and between twelve and eighteen months had expired since the various citations and order in these dockets had been issued. Further, the Secretary had specific authorization so to proceed. The then Assistant Secretary of Labor for Mine Safety and Health had issued a memorandum dated October 31, 1980 which stated:

~559

"Effect of New.MSHA Independent Contractor Policy on Cases Pending at the time of the Policy Change. ...On a case-by-case basis, counsel for the Secretary will either dismiss the case against the operator or move to join the contractor as a party. No action will be taken on fully tried cases or cases submitted on the record." (Emphasis added).

The Secretary's response to the Commission's orders did not therefore represent any abuse of discretion, and no precedent to the contrary is cited by the majority, since none exists.

Nor are the facts herein exculpatory of Phillips, which had not only selected these contractors, but continually inspected their work

and reserved the right to terminate their services. The agreements between Phillips and its contractors provide that Phillips' "... representatives shall at all reasonable times have access to the work wherever it is in preparation or progress". (Exhibit 1 to stipulation at page 3). Of Phillips' sixty-five contractually enumerated "job title[s]", as of February 1, 1979, nineteen were specifically authorized access to the contractor's construction areas. Of these, seven were authorized daily entry, ten were permitted entry "occasionally" and two on a semi-weekly basis. Five categories of Phillips' employees were authorized entry into the contractor's area "to maintain Phillips equipment." (Exhibit B to stipulation).

This periodic intermingling of personnel thus resulted in the exposure of Phillips' employees to the hazards here involved on a regular, substantial, and continuous basis. Broad participation by Phillips in its contractors' operations is perhaps most notably memorialized in its agreements with its contractors, which provide that Phillips "reserves the right of suspending the whole or any part of the work to be done hereunder at any time its best interest appears to be served by so doing." (Exhibit 1 to stipulation, page 11). (Emphasis added).

The Commission acknowledged the importance of these factors in Republic Steel Corporation, supra:

"It bears emphasis that the miners of an independent contractor are invited upon the property of the mine owner to perform work promoting the interests of the owner. A mine owner cannot be allowed to exonerate itself from its statutory responsibility for the safety and health of miners merely by establishing a private contractual relationship in which miners are not its employees and the ability to control the safety of its workplace is restricted." 1 FMSHRC 5, 11 (1979).

The majority's professed concern with the possibility that these violations would become part of Phillips history of violations, rather than its contractors, and possibly result in increased penalties for Phillips for any subsequent violations is equally baseless. It is sufficient to note that these violations are over two years old, and thus cannot, under the Secretary's Regulations, be part of Phillips history of violations. 30 C.F.R. 100.3(c).

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While the majority feels that Phillips "could" be subjected to the "stringent" section 104(d) sequence of citations and orders, and 104(e) pattern of violations provisions of the Act, this prediction is to say the least speculative, as well as totally unsupported on the record. The majority's anxiety over possible section 104(e) "pattern" violations, cannot conceal the fact that

such actions have never been instituted against Phillips, or any other operator, owner or contractor. Indeed, the Secretary over the four year history of this Act, appears to be totally disinterested in enforcement of section 104(e). Suggestions to the contrary are consequently not only historically unfounded but misleading.

The majority's unsupported conclusion that the Secretary's decision not to discontinue its (successfully tried) actions against Phillips "... were not consistent with the purpose of the Act and must fail." thus fails to stand up to even minimal critical analysis. No owner-operator henceforth need worry about penalty proceedings or enforcement under the Act, nor indeed the safety or health of miners. It need only contract with or establish a separate corporate entity to do shaft sinking, construction, or any other mining activities, and thereby contractually evade its responsibility under the Act for the safety and health of the miners.

To understate the case considerably, this hardly seems in accord with the "purpose of the Act" and the protection of the health and safety of the miners whom the Congress has declared to be "... the first priority and concern of all in the coal or other mining industry..." Section 2(e).

To exonerate or pardon an operator found responsible under the Act, in particular after full hearings and judicial decisions to the contrary, hardly seems designed to improve or insure miner safety and health; indeed, quite the contrary. The Secretary saw no reason post-trial to dismiss these cases against the mine owner-operator, which had been found legally liable, nor do I. Contrary to the majority's suggestion, the issue here is not whether the Secretary's decisions were "consistent with the purpose of the Act"; it is rather whether the Secretary abused his discretion by continuing to proceed against the owner-operator. There is no basis for the majority to find that the Secretary's decision was made for any reason in derogation of either the Secretary's, the Commission's, or the courts' mandates. The Secretary's continuing as appellee in these cases was, to the contrary, in full accord and conformity with those commands. This owner-operator should not be permitted to contract away its responsibility for compliance with the Act, particularly in the context of its very substantial involvement with its contractors' operations.

I therefore dissent.

A.E. Lawson,
Commissioner

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