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SOL (MSHA) V. CATHEDRAL BLUFFS SHALE OIL
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, D.C. 20006
AUGUST 29, 1984

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA) Docket No. WEST 81-186-M

v.

CATHEDRAL BLUFFS SHALE OIL COMPANY

DECISION

This civil penalty case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et se . (1982). At issue is whether a Commission administrative law judge erred in dismissing a citation issued to Cathedral Bluffs Shale Oil Company for a violation arising from the work activities of an independent contractor. 4 FMSHRC 902 (May 1982)(ALJ). We affirm the judge's dismissal of the citation, but for the reasons detailed below.

Cathedral Bluffs is a Colorado partnership between Occidental Oil Shale, Inc. and Tenneco Shale Oil Company. Occidental is the partnership's operating partner and, for purposes of this case, is referred to as the "production-operator" of the Cathedral Bluffs mine. On February 8, 1978, Occidental contracted with Gilbert Corporation for the development of three underground vertical shafts at the Cathedral Bluffs site at Rio Blanco, Colorado. On September 4, 1980, a Department of Labor Mine Safety and Health Administration (MSHA) inspector conducted an inspection of the ventilation and escapeway shaft, the "V&E" shaft, then under development by Gilbert. At the time of the inspection this vertical shaft descended about 1125 feet. Landings, or stations, were cut horizontally into the shaft walls at predetermined levels. The MSHA inspector observed that, contrary to the requirements of 30 C.F.R. 57.19-100, the 1050 landing was not equipped with substantial safety gates constructed so that material

would not go through or under them. 1/ Instead, a chain was hung across the landing which could not prevent objects from falling down the shaft. The inspector issued citations alleging a violation of section 57.19-100 to both Gilbert and Occidental.

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1/ 30 C.F.R. 57.19-100 provides:

> Mandatory. Shaft landings shall be equipped with substantial safety gates so constructed that materials will not go through or under them; gates shall be closed except when loading or unloading shaft conveyances.

The violative condition was abated promptly by the erection of a conforming safety gate. Gilbert did not contest the citation issued to it by the inspector, and accordingly, that citation became a final order by operation of law. 30 U.S.C. 815(a). Occidental, however, did contest the citation issued to it and the penalty proposed by the Secretary of Labor. It is the propriety of the issuance of the citation to Occidental, under these circumstances, that is before us.

The Commission's administrative law judge held that our decision in Phillips Uranium Corporation, 4 FMSHRC 549 (April 1982), was "dispositive", and "on the authority of Phillips" he vacated the citation. The judge read Phillips as establishing a per se rule that:

> liability for a violation may not be imposed against an owner-operator where the owner has retained an independent company with experience and expertise in the activity being undertaken and where the owner's exposed employees do not perform any other work other than to observe the progress of the contractor's activities to assure compliance with quality control and contract specifications.

4 FMSHRC at 902. Finding that the facts of the present case fell within this perceived rule, the citation was vacated.

On review the Secretary argues that the judge erred in applying Phillips as controlling precedent. The Secretary asserts that the citations at issue in Phillips were issued under MSHA's former "interim" policy of citing only owner-operators for independent contractor violations. Since then, however, new independent contractor identification regulations have been adopted and were in effect at the time the citation was issued to Occidental. 44 Fed. Reg. 44494 (July 1, 1980)(adopting new 30 C.F.R. Part 45). Moreover, the Secretary argues that in issuing the citation, the inspector relied upon and correctly applied the enforcement guidelines formally published by the Secretary in the Federal Register as an appendix to the independent contractor identification regulations. 44 Fed. Reg. 44497. Accordingly, the Secretary submits that Phillips is not controlling and that the citation issued to Occidental for the violation committed by its independent contractor must be upheld as a proper exercise of his enforcement authority.

We agree with the Secretary that the judge read Phillips too broadly and misapplied it as directly controlling the disposition of this case. Contrary to the Secretary's assertions, however, we find that under a proper application of governing legal principles, and in

light of relevant factual findings by the judge and the record considered as a whole, the judge's dismissal of the citation must be affirmed.

The present case stands in a procedural posture different in a crucial respect than that presented to us in Phillips. In Phillips the Secretary had instituted proceedings solely against the production operator for violations committed by an independent contractor. He had done so, well after our admonition in Old Ben Coal Co., 1 FMSHRC 1480 (October 1979),.aff'd. No. 79-2367, D.C. Cir. (January 6, 1981), that his interim "owners-only" citation policy placed administrative convenience

ahead of miner safety. He had refused to proceed against the culpable contractor even after he had adopted regulations and enforcement guidelines articulating a policy of holding contractors responsible for violations committed by them. Accordingly, we held that the Secretary:s decision to proceed against Phillips, and not against the contractor, had totally negated the intended effect of the Act's provisions requiring the imposition of cumulative sanctions against independent contractors, and that the Secretary had so acted simply because it was administratively convenient for him to seek penalties from the production-operator. For these reasons, the citations were vacated.

In contrast to the procedural posture of Phillips, the violation at issue in this case occurred subsequent to the Secretary s adoption of his new independent contractor regulations and enforcement guidelines. Through these vehicles the Secretary abandoned his interim "owners-only" policy and established a new, formal policy governing the issuance of citations to independent contractors. Purportedly in accordance with this new policy in the present case the Secretary cited Occidental as well as its contractor for the contractor's failure to guard the shaft landing. Therefore, the rationale we relied on to vacate the citation at issue in Phillips is not relevant here. Rather, the appropriate inquiry is whether the record reflects proper application of the Secretary's new independent contractor enforcement policy. As explained below, we hold that it does not.

The Secretary's formally adopted policy regarding the issuance of citations for violations of the type committed by independent contractors provides:

> 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-operator's 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 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.

44 Fed. Reg. 44497 (July 1980). 2/

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2/ In his brief, the Secretary stresses the rulemaking process he followed in adopting the independent contractor regulations and the

(Footnote continued)

Throughout this proceeding the Secretary has relied on criteria (3) and (4) as the basis for sustaining the citation issued to Occidental. We conclude that the Secretary has failed to establish in the record the requisite support to conclude that these criteria were met in the present case.

According to the Secretary's third criterion, a production-operator appropriately may be cited for a violation committed by an independent contractor when the production-operator's employees are exposed to the hazard created by the violation. Viewed as a whole, the record before us is devoid of substantial probative evidence of such exposure. The MSHA inspector testified that at the time that he observed the lack of a safety gate at the 1050 landing, the lowest landing then developed, no miners were below the landing. He further testified that he had never seen Occidental employees at the bottom of the shaft. 3/ No other evidence by the Secretary specifically places any Occidental employee at the bottom of the shaft at any point during the indeterminate period that the 1050 landing lacked safety gates. There is general testimony in the record to the effect that "quality control" inspectors and "safety inspectors" employed by Occidental observed Gilbert's work as it progressed. There is no convincing, specific testimony, however, concerning the frequency and duration of such visits, or whether any such Occidental employee in-fact was exposed to the hazard posed by the improperly guarded 1050 landing. Although there is testimony that an employee of Occidental took gas samples in the shaft, including the bottom area, at unspecified intervals, the extent of this employee's presence in the shaft cannot be determined and no evidence establishes that he was at the shaft bottom at a time when the 1050 landing lacked guards. Thus, a finding of exposure of any Occidental employee to the cited hazard can only be based on a large amount of inference and conjecture, rather than on probative record

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Fn. 2/ continued

corresponding enforcement guidelines. Sec. Brief at 15-18. He emphasizes that "the Secretary decided to develop his prosecutorial policy through the public procedure of rulemaking" (Brief at 16 n. 12), and that "these formally published guidelines give clear public notice of the Secretary's policy in exercising his discretionary policy." Brief at 17. We agree with the Secretary that his independent contractor enforcement guidelines are distinguishable from the provisions of his internal Inspector's Manual which were found to be without legal effect in King Knob Coal Co., 3 FMSHRC 417 (June 1981).

3/ The inspector did state that during his inspection of the shaft certain Occidental employees accompanied him to the shaft bottom. The presence of these employees at the shaft bottom cannot be relied on to support a finding of exposure. Section 103(f) of the Act provides miners and operators with the right to designate representatives to accompany inspectors "for the purpose of aiding such inspection." 30 U.S.C. 813(f). Any suggestion that exercise of this "walkaround" right, which is intended to advance mine safety and health, can be relied on as a basis to impose liability on an operator or increase the gravity of a violation must be rejected.

evidence. Although circumstantial evidence can be relied on in appropriate circumstances to establish a violation under the Mine Act, the degree of inference and speculation necessary to be indulged in here to support a finding of exposure, would require us to ignore the Secretary's obligation to prove the existence of a violation. This we will not do.

Assuming arguendo that the record could be viewed as supporting a reasonable conclusion that Occidental's quality control and safety inspectors were, to some extent, exposed to the violative condition, we would nonetheless conclude that such incidental exposure could not support the citation issued to Occidental. If sufficient exposure were to be found on these facts, the Secretary's much-heralded independent contractor citation policy effectively would be reduced to a "paper tiger" lacking any substantive or practical effect. Independent contractors are engaged by mine operators because of their expertise in specialized tasks. The relationship between production-operators and independent contractors is, by definition, governed by contract. 4/ That relationship also is defined to provide a contractor freedom from the production-operator's control in the actual performance of the task it is hired to accomplish. Equally endemic to such a contractual relationship is the right of the production-operator to determine if the services or goods contracted for have, in fact, been satisfactorily provided. This necessitates, to varying degrees, a monitoring and inspection of the progress of the work being performed and an inspection and acceptance of the work once completed.

The present case presents a typical contractual relationship. See Exh. R-1. Occidental contracted with Gilbert Corporation for the development of three vertical underground shafts. As we observed in Phillips, supra, "the hiring of contractors to perform the specialized task of shaft construction is common in the mining industry." 4 FMSHRC at 553. Because Gilbert was retained for its expertise in shaft sinking, it necessarily was given control over the performance of this specialized work. In fact, no Occidental employee was permitted to enter the shaft unless accompanied by a Gilbert employee. In accordance with contractual and industrial reality, however, Occidental necessarily retained the right to monitor the work being performed to determine if the contract were being discharged properly. The frequency and duration of the visits by Occidental personnel to the shaft is impossible to determine from the record. It is clear, however, that Occidental's presence in the shaft was no more than reasonably can be expected in any such contractual relationship and did not involve the production-operator in the particulars of the

work being performed. It is certainly clear that, contrary to the statement in the

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4/ As generally used at law, the term "independent contractor" describes a party that "contracts with another to do something ... but who is not controlled by the other nor subject to the other's right to control with respect to his ... conduct in the performance of the undertaking." Restatement (Second) of Agency 2 (1958).

Secretary's brief, the record does not establish "constant Occidental employee exposure" to the hazard posed by the unguarded landing. Sec. brief at 20. We cannot conclude that the limited access of Occidental's employees to the work activities of its contractor, as demonstrated by this record, satisfies the exposure criterion in the Secretary's enforcement guidelines without rendering the guidelines meaningless.

We also must reject the Secretary's assertion that the present facts satisfy the fourth criterion in his enforcement guidelines for citing production-operators for contractor violations, i.e., "control over the condition that needs abatement." As discussed above, it is true that Occidental reserved certain rights in its contract with Gilbert, including the right to monitor and inspect work provided and the right to terminate the contract in whole or in part if Gilbert "persistently disregard[ed]" applicable laws, including the Mine Act. (Exh. R-1, paragraphs 7 and 20.) The Secretary points to these contractual provisions as proof that in this case Occidental had "control over the condition that needs abatement" within the purview of his fourth criterion. We find this assertion unpersuasive. The rights reserved by Occidental are basic contractual rights universally reserved in well-drafted contracts in this industry and others. To hold that the mere presence of such language in contracts between production operators and independent contractors satisfies the criterion of "control" under the Secretary's independent contractor enforcement guidelines, would vitiate the very essence of the guidelines. The plain fact is that if the contractual provisions in this case constitute "control" for citation purposes, every production-operator could be cited for every contractor violation. This result has long been criticized as ineffective enforcement of mine safety statutes and was ostensibly abandoned by the Secretary upon the adoption of his new policy. See e.g., Association of Bituminous Contractors v. Andrus, 581 F.2d 853, 863 (D.C. Cir. 1978); Phillips Uranium, supra; and Old Ben, supra, (majority and dissenting opinions).

We hold that before a production-operator can be deemed to "control" a contractor's activities sufficient to justify the issuance of a citation to it for a contractor's violation, some functional nexus, beyond the contractual nexus reflected here, must be demonstrated linking the production-operator's involvement with the contractor's violation. We emphasize that in this case an independent contractor with a continuing presence at the mine site was cited for a violation it committed in the course of its specialized work; the contractor did not contest the citation; and the hazardous

condition was abated promptly. Given these facts and the lack of any demonstrated exposure of Occidental employees or control by the production-operator other than routine verification of work performed, we believe that harm, rather than good, would be done to the goal of achieving maximum mine safety and health if such a strained interpretation and application of the Secretary's enforcement policy were upheld. Therefore, we decline to interpret the Secretary's regulations and guidelines to require precisely what their adoption was intended to avoid.

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Accordingly, as modified by this decision, the administrative law judge s dismissal of the citation issued to Occidental is affirmed.

Commissioner Lawson dissenting:

The principles established in Old Ben Coal Co., 1 FMSHRC 1480 (1979)("Old Ben"), in conformity with the legislative intent and express endorsement of Bituminous Coal Operators' Association, Inc., 547 F.2d 240 (4th Cir. 1977) ("BCOA"), 1/ continue to be eroded by this Commission majority. In Old Ben the Commission stated:

> 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 ... 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 ... Congress permitted the imposition of liability on both operators regardless of who might be better able to prevent the violation.

1 FMSHRC at 1483. In Phillips Uranium Corp., 4 FMSHRC 549 (1982) ("Phillips"), the Commission backtracked by selectively quoting Old Ben:

> 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.

4 FMSHRC at 553. No longer relying on statutory support, but instead criticizing the Secretary's adherence to "administrative convenience," 2/ id, the Commission vacated the citations, orders, and petitions for assessment of civil penalty issued to the owner-operator.

In this case, where Occidental's own employees were exposed to the hazard cited and where Occidental has impermissibly delegated its safety responsibilities via contractual assignment to Gilbert, the Commission has backtracked further. Having heeded the admonition in Phillips against proceeding only against the owner-operator but not the culpable independent contractor, the Secretary is now barred from proceeding against both. Apparently, now the Secretary cannot guess

correctly against whom he may proceed. Borrowing an analogy used in other safety and health litigation by the U.S. District Court for the District of

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1/ The principles of BCOA were subsequently reaffirmed by the U.S. Court of Appeals for the Fourth Circuit in Harman Mining Corp. v. FMSHRC, 671 F.2d 794 (4th Cir. 1971), and endorsed by the U.S. Court of Appeals for the Ninth Circuit in Cyprus Industrial Minerals Co. v. FMSHRC, 664 F.2d 1116, 1119-20 (9th Cir. 1981), quoting Republic Steel Corp., 1 FMSHRC 5 (1979).

2/ The criticism was directed towards the Secretary's then-existing policy to proceed only against an owner-operator.

Columbia in National Congress of Hispanic American Citizens v. Marshall, No. 2142-73 (D.C.D.C. Oct. 30, 1981), 1981 CCH OSHD %25, 750 at 32,163, the Commission's development of the law in this area is reminiscent of Alice in Wonderland: each step forward brings us two steps backward.

My colleagues rely on the Secretary's enforcement policy to preclude enforcement against this owner-operator. Again they use selective quotation. Preceding the material from the guidelines cited by the majority is the following statement in the preamble to these regulations:

> However, as was fully discussed in the preambles to the draft and proposed rules, the legislative history to the revised definition and the case law makes it clear that the production-operator remains ultimately responsible for the safety and health of persons working at the mine.

45 Fed. Reg. 44494 (1980). 3/ Further, and included in that enforcement policy itself, is the following:

> 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. [Emphasis added.]

45 Fed.Reg. 44497 (1980).

It is beyond dispute that under the 1977 Act, owner-operators are jointly and severally liable for violations involving independent contractors at their mines. As noted in Cyprus Industrial Minerals Co. v. FMSHRC 664 F.2d 1116 (9th Cir. 1981),

> [T]he addition of "independent contractors" to Section 3(d) [of the 1977 Mine Act] did not require the Secretary to cite

only the independent contractor. The addition permitted the Secretary to cite the independent contractor, the owner or both. [Emphasis in original]

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3/ Of course, what existing case law and the Act's legislative history made clear was that both owner-operators and independent contractors were liable for violations of the Mine Act.

> In addition, mine owners are strictly liable for the actions of the independent contractor violations under the Coal Act and the present Act.

664 F.2d at 1119 (citations omitted). The regulations at 30 C.F.R. Part 45 provide the mechanism for implementing independent contractor liability under the statute. It is clear from the preamble, as well as the policy statement, that production-operators are no less liable today than was the case prior to their issuance. However, the Secretary's guidelines are now being used by the majority to preclude enforcement. In Old Ben, the Commission stated that the proper standard for reviewing Secretarial enforcement decisions "is for the Commission to determine whether the Secretary's decision to proceed against an owner for a contractor's violation was made for reasons consistent with the purpose and policy of the 1977 Act." 1 FMSHRC at 1485. In this case, it is the decision of the Secretary that is consistent with the purpose and policy of the 1977 Act, not the decision of the Commission majority.

MSHA's policy indicated that enforcement actions against production operators is "ordinarily appropriate," as a "general rule," under the following circumstances:

> (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.

The Secretary maintains, on the basis of record evidence, that this enforcement action against Occidental is consistent with the Act and the published guideline criteria. He makes specific reference to criteria 3 and 4 establishing exposure and control, with ample supporting citation to record testimony and exhibits. I agree that the record supports the Secretary on both grounds, but need go no further than criteria 3.

The contract between Occidental and Gilbert provided:

> Contractor understands that operator and/or other contractors will be working in and around areas where

work is to be performed under this contract.

(Exh. R-1 at 4). The evidence establishes not only that Occidental employees in fact regularly worked in the shafts under construction, but that Occidental ignored its statutory obligations to these same miners. Occidental's manager of health, safety and security testified as follows:

Q. Mr. McClung, I'm not sure my notes are correct, so what I do is make sure they are either correct or you will correct me. I have you down as saying in your testimony ... that you had no power to control safety underground.
A. That's right, other than contractually.
Q. Which you mean to say, you have every right to do under the contract?
A. Under the contract, I can go to Occidental management should a situation warrant.
Q. Now, as I read this contract, Occidental had employees under the ground; isn't that true?
A. They have shaft inspectors, true.
Q. So your testimony, that while they were underground, even though they were Occidental employees, you abdicated all responsibility for safety?
A. It is part of the Gilbert contract.
Q. That is not what I'm asking whether or not it was the contract. I just asked you what you did.
A. We did not actively inspect the shaft.
Q. Did you have a responsibility for safety then when they were underground?
A. For their's?
Q. Yes.
A. If you are speaking of the safety inspectors, they were under the full control of Gilbert.
Q. The shaft inspectors?
A. Yes.
Q. Do you assume their responsibility whatsoever for the safety of your employees while they are underground; is that your testimony?
A. Yes, we have got to do it that way.
Q. You did that pursuant to contract?
A. Correct.
Q. Irrespective of what the statutes might have said?
A. (No response.)
Q. It must be your testimony, that under the contract you had no rights, regardless of what the statutes said, to do anything to protect the safety of your employees; is that true?
A. If that is a question, if they were in imminent danger situation, I would expect them to get out of the shaft.
Q. That was your expectation?
A. Yes.
Q. If they thought they were in imminent danger situations?
A. Yes.
Q. Now, the people that were down there were safety inspectors to inspect the quality of workmanship, they weren't trained safety

individuals, were they?
A. No.
Q. So whether or not they were in a hazardous situation may or may not be apparent to them because they weren't trained; isn't that true?
A. That is the responsibility of Gilbert.

Q. I didn't ask you whether or not it was the responsibility.
A. Of course, they weren't trained to recognize it.
Q. Whether or not they were trained for it though, you abdicated [sic] your responsibility, even though they weren't trained to work underground; isn't that true?

A. I don't believe that you are describing that correctly.
Q. Tell me how I am wrong.
A. They had to be accompanied by Gilbert employees to be there.
Q. Do they have to be accompanied by Gilbert safety officers?
A. The management of Gilbert's supervision has got to assume safety.
Q. Under the contract, as I understand it, Occidental had people down there to inspect materials furnished by Gilbert; isn't that true?
A. I believe that is a portion of their job.
Q. They had to inspect the workmanship performed by Gilbert?
A. That is true.
Q. They had the right to conduct inspections and they make test of the work performed by Gilbert?
A. That is true.

Tr. 60-63. The majority inexplicably finds this evidence regarding exposure of Occidental's quality inspectors inconclusive, notwithstanding McClung's acknowledgement that they were in the shaft and that responsibility for their safety was contractually assigned to Gilbert. McClung's testimony is corroborated by Occidental safety inspector Inman who testified that he had been "down the shaft" and that he had seen a shaft inspector in the V&E shaft "on the day that the citation was issued." Tr. 38. 4/ In addition, the MSHA inspector testified that he was told by miner Dyer, a quality inspector employed by Occidental, that "he spent everyday in the shaft ... wherever they [Gilbert employees] were working." Tr. 20-21. It is clear beyond peradventure that Occidental's miners were exposed to the hazards of this mine, and Gilbert's shaft sinking operations.

The majority also asserts, assuming arguendo that exposure to mine hazards by Occidental's shaft inspectors was established, that the Secretary's guidelines would be meaningless if "incidental" exposure (slip op. at 5) by Occidental's inspectors, for the purpose of monitoring Gilbert's work performance, was held to be sufficient to satisfy the exposure criterion. My colleagues would also find persuasive the fact that the relationship between Gilbert and Occidental is governed by contract. There is, of course, no statutory or other support for the suggestion that operator Occidental's statutory duty to maintain safe working conditions depends on the

job classification of the exposed miner. Nor is there any suggestion in the preamble to Part 45, or in the enforcement policy itself, that degrees of exposure are even relevant. As to the majority's reliance on the contract between Occidental and Gilbert, it is elementary that a private agreement between parties cannot

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4/ Since Inman himself was the shaft inspector who accompanied the MSHA inspector, this evidence of exposure cannot relate to an Occidental representative exercising section 103(f) walkaround rights. See slip op. at 4 n.3.

control or alter statutory duties. An operator may not delegate this statutory duty to prevent safety and health hazards, nor may this Commission properly endorse contractual shifting of the strict liabilities established by the Act, Congress, and the Courts. See Cyprus Industrial Minerals Co. v. FMSHRC. 664 F.2d 1116, 1119-20 (9th Cir. 1981), quoting Republic Steel Corp., 1 FMSHRC 5, 11 (1979); Central of Georgia Railroad Company v. OSHRC, 576 F.2d 620, 624-5 (5th Cir. 1978); Frohlick Crane Service, Inc. v. OSHRC, 521 F.2d 628, 631 (lOth Cir. 1975).

In addition to rejecting this evidence establishing the exposure by Occidental's inspector miners to the hazards of the mine, the majority also rejects record evidence establishing exposure to at least one other Occidental employee whose job it was to take gas samples in the shaft. Again, McClung's testimony is revealing:

Q. What occasion would he have to go underground?
A. He [miner Parker] would go underground to--since we were declared gassy in January of 1980, he would take gas samples and random gas samples.
Q. When you say we were classified as gassy?
A. The Cb tract, the Cathedral Bluffs.
Q. When you say Cb, you mean Cathedral Bluffs?
A. Yes.
Q. What then would be his duties after that shaft was classified as gassy?
A. What would be his duties?
Q. Yes.
A. Because we wrote the petition for the ventilation program, he would have to assure that we had proper ventilation through the area in the mine.
Q. Now, at the time the citation was issued, the Cb tract had been declared gassy, had it not?
A. Yes.
Q. But at that time, you have just three development shafts; is that correct?
A. That is correct.
Q. So I assume that he would inspecting for methane, the accumulation in the shaft and in the stub landing also?
A. Basically he checked return air and ventilation at the bottom of the shaft.
Q. And he was doing that prior to September of 1980?
A. Yes, his job is basically that.

Tr. 48-9. In sum, the job of Occidental's employee was to take gas

samples and check the ventilation system at the bottom of the shaft pursuant to the ventilation plan adopted by Occidental after this mine was declared gassy by MSHA. His job function was therefore unrelated to contractor Gilbert's work. Nevertheless, the Commission majority again finds insufficient evidence of this employee's exposure and whether he was at the shaft bottom at a time when the cited landing lacked guards.

The record does not contain the ventilation plan that Occidental followed. However, the mandatory ventilation standards applicable to gassy metal and nonmetal underground mines, codified at 30 C.F.R. 57.21-20 through 57.21-74, supplies at least the minimum examinatio requirements that must be followed.

> 57.21 Gassy mines
>
> Gassy mines shall ... be operated in accordance with the mandatory standards in this section.
>
> VENTILATION
>
> 57-21-59 Mandatory. Preshift examinations shall be made of all working areas by qualified persons within 3 hours before any workmen, other than the examiners, enter the mine.

Gilbert had begun the shaft sinking operation in 1978 and had a continuing presence at the mine since that time. At the time of citation the shaft had been excavated by Gilbert to a level approximately 70 to 80 feet below the 1050 landing. The record does not indicate how long it had taken Gilbert to excavate from the 1050 level to that lower level or how long the cited landing had been unguarded. It is self-evident, however, that all of it could not have been accomplished since the last ventilation system preshift examination was conducted by Occidental's employee. There is no basis in this record to assume that Occidental had failed to meet its obligation to take regular "gas samples and random gas samples" in this gassy mine. Nor does this record suggest that under continued normal mining conditions the violation would have been abated before Occidental's employee performed additional ventilation checks and methane sampling. See U.S. Steel Mining Co., Inc., PENN 83-336 (July 11, 1984); U. S. Steel Mining Co., Inc., PENN 83-63 (August 28, 1984).

Accordingly, based on the testimonial and documentary evidence of record, there is substantial evidence to support the Secretary's assertion that Occidental's employees were constantly exposed to the cited hazard. This enforcement action against Occidental is consistent with controlling precedent, the statute, the legislative history, the regulations and policy statement, and the facts before us.

I therefore dissent.

A. E. Lawson, Commissioner

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