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MSHA V. MONTEREY COAL  
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FMSHRC-WDC  
JUL 2, 1985

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)                      Docket No. HOPE 79-323-P

v.

MONTEREY COAL COMPANY

BEFORE: Backley, Acting Chairman; Lastowka and Nelson,  
Commissioners

#### DECISION

BY THE COMMISSION:

This case is before us on petitions for interlocutory review filed by Monterey Coal Company ("Monterey") and Frontier-Kemper Constructors, Inc. ("Frontier-Kemper"), a contractor hired by Monterey to sink a shaft at its Wayne Mine in Wayne County, West Virginia. Monterey seeks review of an order issued by a Commission administrative law judge denying its motion to dismiss it as a party respondent in a civil penalty proceeding instituted by the Secretary of Labor pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act"). Frontier-Kemper seeks review of the judge's decision to allow the Secretary to amend his proposal for penalty to add Frontier-Kemper as a respondent. For the reasons that follow, we dismiss Monterey's petition, reverse the judge's decision adding Frontier-Kemper as an additional respondent, and remand for further proceedings consistent with this decision.

This case had its genesis in a section 107(a) imminent danger withdrawal order issued by the Secretary to Monterey on May 8, 1978. 30 U.S.C. § 817(a). The order alleged that three violations of

mandatory safety standards had contributed to a fatal accident at the Wayne Mine shaft-sinking operation. The Secretary subsequently instituted this action against Monterey, seeking civil penalties for those violations. Monterey contested the penalties and argued that, if any violations had occurred, its contractor Frontier-Kemper was the operator responsible for the violations. In 1979, these proceedings were stayed by the administrative law judge pending the resolution of Secretary v. Monterey Coal Co., FMSHRC Docket No. HOPE 78-469 ("Monterey I"), a case involving Monterey's challenge to a number of 104(d) withdrawal orders arising out of the same accident and presenting the same question of liability.

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Following the termination of the Monterey I litigation, 1/ this proceeding became active again in 1983. At that time the Secretary moved to amend his proposal for penalty to join Frontier-Kemper as an additional respondent and Monterey sought to have the proceedings against it dismissed. The judge granted the Secretary's motion and denied Monterey's. These interlocutory appeals followed.

Frontier-Kemper's argument that joinder is not proper is based on its claim that, under the circumstances of this case, the Commission lacks jurisdiction over it. It asserts that Commission jurisdiction over a mine operator from whom the Secretary is seeking civil penalties for violations of the Mine Act or its mandatory standards only attaches after the operator has been issued a citation or order and has contested the penalty the Secretary proposes for the violation. Frontier-Kemper argues that, absent these prerequisites, the Secretary may not rely on Fed. R. Civ. P. 19 to effect joinder at the Commission level.

The Secretary asserts that the Mine Act does not limit Commission jurisdiction in penalty cases only to operators who have received citations or orders and who have contested proposed civil penalties. He points out that, both in section 105(c) discrimination cases and in section 110(c) penalty cases involving "knowing" violations by agents of corporate operators, this Commission assesses civil penalties against parties who have not been issued a citation or order. In the Secretary's view, joinder is merely an economical device to ensure that all potential parties who could be held liable for the violations at issue in this case are involved in the hearing and to permit the Commission to properly apportion liability among them.

We hold that both the Mine Act and our own rules of procedure prohibit the Secretary from accomplishing joinder of Frontier-Kemper in the manner attempted in this case. Before the Secretary may institute a proceeding before this Commission seeking a civil penalty from an operator for a violation of the Mine Act or a mandatory standard, the operator must have been cited for a violation and been given the opportunity either to contest or to pay the Secretary's proposed civil penalty. This requirement provides both a method by which the parties may dispose of civil penalty matters without Commission involvement in uncontested cases and a framework within which litigation may productively occur in those cases where a dispute exists.

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1/ A Commission administrative law judge originally held that

Monterey could not be held liable for the orders because the violations had been committed by Frontier-Kemper. In 1979, the Commission reversed that holding. 1 FMSHRC 1781. In doing so, it relied on its decision in Old Ben Coal Co., 1 FMSHRC 1480 (October 1979), aff'd, D.C. Cir., No. 79-2367 (Dec. 9, 1980)(unpublished), that, for an interim period following the effective date of the Mine Act, the Secretary's policy of citing only owner-operators for all violations occurring at their mines was valid. The Commission remanded Monterey I for a decision on the merits by the administrative law judge. Monterey's subsequent petition for review in the U.S. Court of Appeals for the Fourth Circuit was dismissed because

(Footnote continued)

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Sections 105(a) and (d) of the Mine Act, 30 U.S.C. §§ 815(a) and (d), provide the basic framework within which civil penalty litigation takes place. Section 105(a) provides that an operator may choose not to contest a proposed penalty and thereby avoid litigation before this Commission. 2/ Concomitantly, section 105(d) clearly conditions the institution of proceedings before this Commission on the operator's filing of a notice of contest of the citation or penalty. The operator's notice of contest may be filed only in response to the Secretary's proposed assessment of penalty, which is itself a consequence of the Secretary's issuance of a citation or order under section 104. We believe that Congress did not intend the Secretary to be able to leap-frog over these procedural steps and begin a civil penalty proceeding against an operator by the filing of a proposal for penalty, in the first instance, before the Commission.

The Commission's procedural rules also reflect, even more explicitly, the need for the Secretary to observe the necessary prerequisites before filing a proposal for penalty. Commission Procedural Rule 25, 29 C.F.R. § 2700.25, states:

The Secretary, by certified mail, shall notify the operator or any other person against whom a penalty is proposed of: (a) The violation alleged; (b) the amount of the penalty proposed; and (c) that such person shall have 30 days to notify the Secretary that he wishes to contest the proposed penalty. If within 30 days from the receipt of the Secretary's notification of proposed assessment of penalty, the operator or other person fails to notify the Secretary that he intends to contest the proposed penalty, the Secretary's proposed penalty shall be deemed to be a final order of the Commission and shall not be subject to review by the Commission or a court.

(Emphasis added). Also, Commission Procedural Rule 27(a), 29 C.F.R. § 2700.27(a), provides a further clear statement of the requirement that the Secretary file a proposal for penalty in response to an operator's notice of contest:

When to file. Within 45 days of receipt of a timely notice of contest of a notification of proposed assessment of penalty, the Secretary shall file a proposal for a penalty with the Commission.

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Fn. 1/ continued

the Commission's remand order was not an appealable order under section 106 of the Mine Act, 30 U.S.C. § 816. *Monterey Coal Co. v. FMSHRC*, 635 F.2d 291 (1980). On remand to the administrative law judge, the case was settled when Frontier-Kemper paid civil penalties totaling \$5,000 and the Secretary agreed to dismiss the action against Monterey.

2/ If an operator simply pays the penalty proposed by the Secretary, he may avoid any litigation. If he neither contests nor pays the proposed penalty, it is deemed a final order of the Commission and may be enforced by the Secretary in an appropriate district court.

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We have considered the Secretary's argument that the procedure followed by him in the instant case is analogous to the penalty procedure utilized in cases brought under sections 105(c) and 110(c) of the Mine Act. We have previously noted that, unlike most other Commission proceedings, section 105(c) discrimination cases are initiated not with the issuance of citations or orders, but instead, with the filing of special complaints before this Commission. Secretary *ex rel* Bailey v. Arkansas-Carbona Co., 5 FMSHRC 2042, 2046 (December 1983). We have therefore specifically provided, in Commission Procedural Rule 42(b), 29 C.F.R. § 2700.42(b), that the Secretary propose a civil penalty at the same time he files a discrimination complaint under section 105(c)(2).<sup>3/</sup> With respect to section 110(c) cases, the Act specifically allows a civil penalty to be assessed against the agent of a corporate operator after a citation or order has been issued to the operator. We also note that in such cases, the Secretary issues a proposed penalty to the agent and, under our rules, *supra*, may only begin Commission proceedings if the agent files a notice of contest. Therefore, in section 105(c) and 110(c) civil penalty cases, both the Mine Act and our procedural rules provide specific procedures for the assessment of civil penalties against an operator who has not been issued a citation or order. Contrary to the Secretary's assertions, we conclude that those situations are not analogous to the case before us.

Our insistence on the need for compliance with the procedural requirements described above also serves a practical purpose and furthers the enforcement scheme contemplated by Congress in the Mine Act. Providing a mine operator with the opportunity to pay a civil penalty before the institution of litigation promotes judicial and administrative economy and can assist more expeditious resolution of enforcement disputes.

For these reasons, we reverse the judge's decision allowing the Secretary to amend his penalty proposal to add Frontier-Kemper as a respondent. We remand the case with instructions to the judge to permit the Secretary to seek modification of the underlying citations and order at issue here to name Frontier-Kemper as operator, and to thereafter follow the appropriate penalty assessment procedures. Cf. *Cowin and Co. v. FMSHRC*, 612 F.2d 838, 841 (4th Cir. 1979) and 694 F.2d 966 (1982).

We remand the Monterey portion of this litigation without opinion. The Secretary has recognized and we have held previously that the allocation of liability between an owner-operator and an independent contractor-operator should be based on the factual

circumstances of each case. 44 Fed. Reg. 44496 (July 1, 1980); Cathedral Bluffs Shale Oil Co., 6 FMSHRC 1871 (August 1984), pet. for review filed sub nom. Donovan v. Cathedral Bluffs Shale Oil Co. (D.C. Cir. No. 84-1492). Correct resolution of the liability issue based on the circumstances of this case cannot occur until Frontier-Kemper's status in the litigation is resolved. In this

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3/ We have also recognized that the Secretary uses his own "special assessment procedure", 30 C.F.R. § 100.5, to propose civil penalties against operators who have been adjudicated liable for discrimination in section 105(c)(3) proceedings to which the Secretary was not a party. An operator who wishes to contest a penalty proposed under this procedure may also file a notice of contest.



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case we granted Monterey's petition for interlocutory review as a matter of proper judicial administration in order to keep the Monterey litigation from proceeding while we considered Frontier-Kemper's appeal. On remand the judge should refrain from further action in Monterey pending the Secretary's attempt to properly propose a penalty against Frontier-Kemper. Thereafter, the judge should proceed to resolve any remaining questions of liability for the subject violations. 4/

Accordingly, we remand this matter for further proceedings consistent with this decision. 5/

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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4/ We note that the present record does not indicate satisfactorily why resolution of the instant litigation that is consistent with the resolution of the Monterey I litigation is not appropriate and in the best interest of all concerned.

5/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves a panel of three members to exercise the powers of the Commission.

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