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MSHA V. CONSOLIDATION COAL  
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION  
WASHINGTON, D.C.  
August 24, 1989

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

v. Docket No. WEVA 87-343

CONSOLIDATION COAL COMPANY

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,  
Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1982)("Mine Act" or "Act"), involves three citations issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Consolidation Coal Company ("Consol") at its Arkwright No. 1 Mine in Osage, West Virginia, for alleged violations of mandatory electrical safety standards. Consol contended before Commission Administrative Law Judge Avram Weisberger that, because the electrical equipment cited for the violations was exclusively owned and operated by its independent contractor, Frontier-Kemper, Inc. ("Frontier"), MSHA should not have cited Consol for Frontier's alleged violations. Judge Weisberger rejected Consol's arguments as to liability and determined, inter alia, that Consol had violated the standards in all three instances. 10 FMSHRC 745 (June 1988)(ALJ). The Commission granted Consol's petition for discretionary review, which asserted that the judge erred in finding Consol liable, without regard to fault, for its contractor's activities. We conclude that Consol could properly be cited for the violations in question, and we affirm.

The underlying facts are not in dispute. Consol contracted with

Frontier to construct, by "raise boring" methods, an 830-foot deep mine ventilation shaft in the Jake's Run area of the Arkwright No. 1 Mine. "Raise boring," also referred to as "up-drilling," is a method of shaft building whereby the shaft is drilled to the surface from an underground location, following a small diameter pilot hole. Frontier is one of the

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few specialists in this particular method of shaft drilling and construction.

At a preconstruction conference, Frontier and Consol discussed Frontier's requirements for performing the work and apportioned responsibilities for roof/rib control, ventilation, and the conduct of preshift and on-shift examinations. It was agreed that electric power would be brought to the work site via Consol's power center, that Frontier would run its cables from the power center, and that Frontier employees would not leave their work site during the shift. Frontier also agreed that its certified electricians would conduct inspections of Frontier electrical equipment and that Consol would conduct all other required examinations. Subsequently, Consol performed those other examinations, hazard-trained Frontier personnel, transported Frontier personnel in and out of the mine, and instructed Frontier personnel as to escape routes. Consol personnel did not direct the Frontier work force in any way. 1/

On June 9 and 10, 1987, MSHA Inspector Edwin Fetty, accompanied by MSHA Inspector Alex Volek, inspected the Main Butt Section in the Jake's

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1/ Consol management at the Arkwright No. 1 Mine based its relationship with Frontier upon a Consol memorandum, "Inspection of Independent Contractors," issued to mine personnel on or about December 31, 1985. The memorandum provides in pertinent part that:

[T]he following are recommended when inspecting Consol properties on which independent contractors are working:

No inspection of the workplace of contractor's employees should be made;

If you casually observe contractor's employees either committing an unsafe act or violating state or federal statutes or regulations, the contractor's supervisor may be so informed. Consol personnel should not attempt to require the contractor or the contractor's employees to make corrections, or otherwise take specific actions;

If it appears that Consol employees may be endangered by the actions of contractor's employees, all endangered Consol employees should be withdrawn from the affected area(s) and the contractor's supervisor should be informed of the actions taken and the reasons

for taking such actions and;

If it appears that Consol property is endangered by the actions of the contractor's employees the contractor's supervisor should be notified.

Exh. RX-4 (emphasis in original).

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Run area of the Arkwright Mine. Fetty, who specializes in electrical/mechanical problems, made the spot inspection because another inspector had informed him of a reported ignition at the Frontier up-drilling site. Inspector Volek had been assigned to "key in" on independent contractors because their accident rate had risen.

Inspector Fetty observed the violative conditions in issue on June 9 and took enforcement actions against Frontier on that date, including issuance of a withdrawal order and citation pursuant to section 104(d) of the Mine Act. 30 U.S.C. 814(d). Because no responsible Consol official was present at the time, he returned the next day and issued three section 104(a) citations to Consol. Frontier paid the civil penalties proposed by MSHA for its violations but Consol contested the alleged violations issued to it.

With respect to the first violation, Inspector Fetty found that an oil pump motor on a rotary blower was not equipped with a fail-safe device designed to cause a circuit breaker to open when either the pilot or the ground wire was broken. The citation issued to Consol pursuant to section 104(a) of the Mine Act, 30 U.S.C. 814(a), alleged a violation of 30 C.F.R. 75.902. 2/ Inspector Fetty also opened the circuit breaker box for a 540 amp, 500 hp. blower motor owned by Frontier and observed that the circuit breaker was set at 12,000 amps. The inspector testified that the proper setting for a circuit breaker is from five to ten times the amperage on the equipment serviced by the circuit, so that the circuit breaker should have been set for a maximum of 5,400 amps. The citation issued to Consol pursuant to section 104(a) of the Mine Act alleged a violation of 30 C.F.R. 75.518-1. 3/ In addition, the inspector examined the conducting cable to the same blower motor. He determined that the cable was inadequate to carry safely the 540 amps drawn by the blower motor. The citation issued to Consol pursuant to section 104(a) of the Act alleged a violation of 30 C.F.R.

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2/ 30 C.F.R. 75.902 provides in pertinent part:

[L]ow- and medium-voltage resistance grounded systems shall include a fail-safe ground check circuit to monitor continuously the grounding circuit to assure continuity which ground check circuit shall cause the circuit breaker to open when either the ground or pilot check wire is broken....

3/ 30 C.F.R. 75.518-1 provides in pertinent part:

A device to provide either short circuit

protection or protection against overload which does not conform to the provisions of the National Electric Code, 1968, does not meet the requirement of 75.518...

At the hearing, Fetty testified that he issued the above citations to Consol in addition to Frontier because the violations occurred in Consol's mine, Consol employees were working there a portion of the time, and any of the cited conditions could affect other employees and areas of the mine if, for example, a fire occurred. Inspector Volek understood that no Consol people were allowed into the Frontier work area to do anything or to direct the Frontier employees but stated that Consol had overall responsibility for safety of the mine and should have made an effort to ensure Frontier's compliance with standards. Volek indicated that in determining whether to recommend that Fetty issue the citations to Consol, he considered the nature of the violations, Consol's work relationship with Frontier, and the fact that the violations occurred underground and could pose a potential hazard to Consol's own employees. Volek testified that there are some situations where only one party--the production-owner or the independent contractor--would be cited, but that in some circumstances, as here, both would be held responsible.

Before the judge, Consol conceded that it was "the rule" of the United States Courts of Appeals for the 4th, 9th and D.C. Circuits that "the production operator can be held strictly liable for the violations of its independent contractor, permitting the Secretary of Labor to cite either the owner or the contractor or both," and asserted that it did not contest the fact that Consol is an "operator" under the Mine Act. Consol Post-Hearing Brief at 12-13. Consol argued, however, that the appropriate inquiry was whether the Secretary's enforcement discretion was properly exercised in this case. Contending that it was not, Consol asserted that Commission precedent, particularly Phillips Uranium Corp., 4 FMSHRC 549 (April 1982), in which the Commission reversed the judge who had upheld the citations against the operator, permitted a Commission judge to consider the circumstances relevant to the citing of a production-operator as opposed to its independent contractor and that the judge should adhere to Commission guidance in this regard.

The judge rejected Consol's arguments and determined that the rationale in Phillips, supra, was inapposite to the instant proceeding. He stated that Phillips involved a situation where only the operator was cited for violations in connection with shaft construction by an independent contractor. The judge held that Phillips was not controlling on the issue of whether the operator and the independent contractor, who had been separately cited for the violations, were jointly liable under the Mine Act. 10 FMSHRC at 749. The judge concluded that Consol was properly cited by the Secretary, based on a line of court and Commission cases holding, in essence, that "the owner

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4/ 30 C.F.R. 75.513-1 provides in part that:

An electric conductor is not of sufficient size to have adequate carrying capacity if it is smaller than is provided for in the National Electric Code, 1968....

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of a mine is liable for the independent contractor's safety violations without regard to the owner's fault." *Id.* The judge cited *Bituminous Coal Operators Association v. Secretary of Interior*, 547 F.2d 240 (4th Cir. 1977); *International Union, United Mine Workers of America v. FMSHRC*, 840 F.2d 77 (D.C. Cir. 1988); *Cyprus Indus. Minerals Company v. FMSHRC*, 664 F.2d 1116 (9th Cir. 1981); *Old Ben Coal Company*, 1 FMSHRC 140 (October 1979), *aff'd* No. 79.2367 (D.C. Cir. January 6, 1981); and *Republic Steel Corporation*, 1 FMSHRC 5 (April 1979). 10 FMSHRC at 749-50. The judge went on to affirm the three citations and assess civil penalties of \$20 for each of the three violations.

On review, Consol does not take issue with the Secretary's authority to cite either the owner, the independent contractor or both for violations of the Mine Act. Rather it challenges whether the Secretary properly exercised that authority in choosing to cite Consol as well as its independent contractor. Court precedent makes clear that the Secretary has retained wide enforcement discretion and that courts have traditionally not interfered with the exercise of that discretion. *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538 (D.C. Cir. 1986). In this instance, the Secretary pursued enforcement action against both a production operator and its contractor for electrical violations occurring in an underground mine setting wherein the employees of both the production operator and the independent contractor were exposed to potential hazards occasioned by the violations. We have carefully reviewed the record, the judge's decision, and the parties' arguments. We hold that the judge's conclusion that the Secretary's discretion was not abused in citing Consol in addition to Frontier for these particular violations is supported by the record, summarized above, relating to the violations and the inspectors' reasons for citing both parties, and is also supported by applicable precedent. See, e.g., *Old Be*, *supra*. 1 FMSHRC at 1481-86; *Intl. U., UMWA v. FMSHRC*, *supra*, 840 F.2d at 83; *Brock v. Cathedral Bluffs Shale Oil Co.*, *supra*, 796 F.2d at 537-38; *BCOA v. Secretary*, *supra*, 547 F.2d at 246.

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Accordingly, we affirm.  
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