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MSHA V. BULK TRANSPORATION SERVICES
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
September 20, 1991

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

v. Docket No. PENN 89-143

BULK TRANSPORTATION SERVICES, INC.

BEFORE: Backley, Doyle, Holen and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988) ("Mine Act" or "Act"). It presents the issues of whether Bulk Transportation Services, Inc. ("Bulk") is an "operator" within the meaning of section 3(d) of the Mine Act; if so, whether it was liable for a violation of 30 C.F.R. 77.807-3 committed by its subcontractor, James Krumenaker; and whethe the Secretary of Labor abused her discretion by citing Bulk, rather than Mr. Krumenaker. 1/ Commission Administrative Law Judge George A. Koutras determined that Bulk was an independent contractor-operator within the meaning of the Mine Act, that the Secretary had not abused her discretion by citing Bulk rather than Krumenaker,

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1/ Section 3(d) of the Mine Act, 30 U.S.C. 802(d), provides:

> "operator" means any owner, lessee. or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine....

The original citation alleged a violation of 30 C.F.R. 77.807-2.

P. Exh. 1. That citation was amended at the hearing to allege a violation of 30 C.F.R. 77.807.3, which provides:

> When any part of any equipment operated on the surface of any coal mine is required to pass under or by any energized high.voltage powerline and the clearance between such equipment and powerline is less than that specified in 77.807-2 for booms and masts, such powerlines shall be deenergized or other precautions shall be taken.

that a violation of section 77.807-3 had been established, and that the violation was of a significant and substantial nature. 12 FMSHRC 772 (April 1990) (ALJ). The Commission granted Bulk's petition for discretionary review. For the reasons that follow, we affirm the judge's decision.

I.

Factual Background and Procedural History

In 1986, Bulk entered into a five-year contract with Bethlehem Steel Corporation, BethEnergy Division ("BethEnergy"), to transport both raw and clean coal from BethEnergy's Mine No. 33, in Cambria County, Pennsylvania, to the Homer City Generating Station ("Generating Station"), about 40 miles away in Homer City, Pennsylvania. R.Exh. 1. The Generating Station is jointly owned by Pennsylvania Electric Company and New York State Electric & Gas Corporation. Bulk is the exclusive transporter of coal from BethEnergy's Mine No. 33 to the Generating Station (Tr. 110) and performed its contractual obligations to Beth Energy through subcontractors, one of which was Krumenaker. In the subcontract, Krumenaker agreed to lease Bulk a truck and driver.

Bulk has three employees: Charles Merlo, president of the company, a dispatcher and a bookkeeper. None of the employees work at the No. 33 site. Typically, Bulk's dispatcher completes a work roster for the following day be calling the mine and determining the number of coal loads that need to be transported to the Generating Station. Bulk's subcontractors call the dispatcher to see if there is work for them the following day; however, there is no contractual requirement that Bulk provide work to each subcontractor who requests it. The next morning, each scheduled subcontractor travels to the mine its truck is loaded with coal by BethEnergy miners, and the subcontractor transports the coal to the Generating Station.

On January 4, 1989, Nevin Davis, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), went to BethEnergy's Mine No. 33 after being informed that the power and fans were off at the mine. Inspector Davis discovered that the power outage had been caused when Krumenaker raised the bed of his truck in order to clear the ice and snow from it before receiving a load of coal. The bed touched the energized 46KV powerline above the truck. Although eight of the truck's tires were blown, Krumenaker jumped from the truck and was not injured.

Inspector Davis observed that Krumenaker's truck had a "Bulk" sign on it, and assumed that Krumenaker was employed by Bulk. The inspector

obtained BethEnergy's list of independent contractors, required to be maintained pursuant to 30 C.F.R. 45.4, and noted that Bulk's name was on the list and that Krumenaker's name was not.

Based upon his observations, Inspector Davis issued Bulk a citation alleging a violation of section 77.807.2. (see n. 1 supra). Inspector Davis found the violation to be of a significant and substantial nature because he believed that the driver could have suffered fatal injuries when the truck bed made contact with the powerline. The citation was terminated after BethEnergy's plant foreman instructed Krumenaker, and the other truck drivers,

to be aware of the powerline. BethEnergy, subsequent to the incident, also posted warning signs. Inspector Davis did not cite BethEnergy for the violation because he determined that the powerlines were at a proper height and believed that it was difficult for BethEnergy to exercise control over truck drivers when raising their truckbeds.

Following an evidentiary hearing, the judge found that Bulk was an independent contractor-operator subject to liability under the Mine Act, and that the Secretary had not abused her discretion by citing Bulk rather than Krumenaker. 12 FMSHRC at 789-98. The judge noted that in Otis Elevator Co., 11 FMSHRC 1896 (October 1989)("Otis I"), and Otis Elevator Co., 11 FMSHRC 1918 (October 1989)("Otis II"), the Commission had held that whether an independent contractor is a statutory operator depends, in part, on the independent contractor's relationship to the extraction process and the extent of its presence at the mine. 12 FMSHRC at 791. Applying the Commission's Otis test, the judge reasoned:

> Although it is true that Bulk does not own any of the coal haulage trucks, and that the drivers are not employed by Bulk, the fact remains that Bulk provides and performs services for the mine operator BethEnergy at the mine, albeit through the use of subcontractor and owner/operator truck drivers. Under the terms of the contract, Bulk was obligated to pick up the coal at the mine site and have it delivered and unloaded at the customer destinations designated by BethEnergy. The coal is loaded by BethEnergy's miners. Although Bulk chose to use subcontractors to transport and deliver the coal, with BethEnergy's blessings, Bulk was nonetheless legally obligated for the performance of the services called for under the contract. BethEnergy had no direct dealings with the subcontractors, and it looked to Bulk to provide its coal transportation needs. Given the large volumes of coal required to be transported by Bulk, and the fact that Bulk had the exclusive right to transport all of BethEnergy's coal to [the Generating Station], I conclude and find that Bulk was performing an essential service for BethEnergy which was closely related to the mine extraction process and was indeed an essential ingredient of that process. BethEnergy is obviously in the business of marketing its coal, and without the means for transporting it to its customers through the services provided by Bulk, it would not remain in business very long.

12 FMSHRC at 792-93. Subsequent to the judge's decision, the Commission's Otis decisions were affirmed by the United States Court of Appeals for the District of Columbia Circuit. Otis Elevator Co. v. Secretary & FMSHRC, 921 F.2d 1285 (1990).

The judge further concluded that the Secretary did not abuse her

discretion by citing Bulk, rather than Krumenaker. The judge found no evidence that Krumenaker was a bona fide independent contractor and determined that Bulk, contrary to its assertions, did exercise control over its subcontractors. 12 FMSHRC at 795-98. Finally, the judge determined that a violation of section 77.807-3 had occurred and that the violation was significant and substantial. 12 FMSHRC at 794, 798-99. He assessed a civil penalty of $25 against Bulk. 12 FMSHRC at 801.

II.

Disposition of Issues

A. Whether Bulk is an independent contractor-operator

Section 3(d) of the Mine Act expanded the definition of "operator" previously contained in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1976) (amended 1977)("Coal Act"), to include "any independent contractor performing services or construction at such mine." The legislative history of the Mine Act demonstrates that the goal of Congress in expanding the definition of "operator" was to broaden the enforcement power of the Secretary to reach a wide range of independent contractors, not just owners and lessees. The Report of the Senate Human Resources Committee explained that the definition of operator was expanded in order to "include individuals or firms who are ... engaged in construction at such mine, or who may be, under contract or otherwise, engaged in the extraction process... ." S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), reprinted in Senate Subcommittee on Labor of the Committee on Human Resources, 95th Cong., 2nd Sess. Legislative History of the Federal Mine Safety and Health Act of 1977, at 602 (1978)("Legis. Hist."). The Conference Report likewise explained that the expanded definition "was intended to permit enforcement" of the Act against independent contractors "performing services of construction" and "who may have a continuing presence at the mine." S. Conf. Rep. No. 461, 95th Cong. 1st Sess. 37 (1977), reprinted in Legis. Hist. at 1315. The Commission has consistently recognized that the inclusion of independent contractors in the statutory definition reflects a Congressional purpose to subject such contractors to direct MSHA enforcement under the Mine Act. Otis I. 11 FMSHRC at 1900, and authorities cited therein.

The Commission, in its Otis decisions, concluded that an independent contractor performing elevator maintenance and repair operations at underground coal mines was an operator within the meaning of the Act. The Commission, however, indicated that "not all independent contractors are operators under the Mine Act, and that 'there may be a point ... at which

an independent contractor's contact with a mine is so infrequent or de minimis that it would be difficult to conclude that services were being performed.'" Otis I. 11 FMSHRC at 1900-01, quoting Nat'l Indus. Sand Ass'n v. Marshall, 601 F.2d 689, 701 (3d Cir. 1979).

In its opinion affirming the Commission's Otis decisions, the D.C. Circuit held that section 3(d) of the Act "does not extend only to certain 'independent contractor[s] performing services ... at [a] mine; by its terms, it extends to 'any independent contractor performing services ... at [a] mine.'" Otis, 921 F.2d at 1290 (emphasis in original). The Court noted that:

it need not confront" the issue of whether there is a point at which an independent contractor ceases to be an operator because its contact with a mine was so infrequent or de minimis because, in Otis, the contractor had conceded that it performed "limited but necessary" services at the mines. 921 F.2d at 1290 n.3.

In the present case, the judge determined that Bulk was an independent contractor-operator within the meaning of section 3(d) of the Act because Bulk performed an essential service for BethEnergy, transportation of mined coal, which the judge found was closely related to the extraction process, and because Bulk had a continuing presence at the mine. 12 FMSHRC at 792-93. We conclude that the judge's determination that Bulk is a statutory operator is amply supported by the record.

Bulk does not dispute that it is an independent contractor and that it has been assigned an MSHA independent contractor identification number pursuant to 30 C.F.R. 45.3. Rather, it argues that it is not an independent contractor-operator within the meaning of the Mine Act and its regulations because it was merely a "transportation broker" and, accordingly, was not engaged in the extraction process, did not have a continuing presence at the mine, and did not substantially participate in the mine's operations. The judge examined the nature of Bulk's services as though Bulk were the party actually hauling coal, rather than serving merely as a transportation broker. We agree with the judge that, under the facts of this case, Bulk cannot avoid liability through the use of subcontractors rather than employees, after contractually obligating itself to be BethEnergy's exclusive hauler of coal from Mine No. 33 to the Generating Station. The fact that Bulk chose to perform its obligations through the use of subcontractors rather than employees did not modify Bulk's position as BethEnergy's exclusive coal hauler at the No. 33 Mine. 2/

Nor are we persuaded by Bulk's argument that it does not maintain a physical presence at the mine. Each of Bulk's subcontractors drives under Bulk's Pennsylvania Public Utility Commission number and places a Bulk nameplate on its truck. Tr. 23, 73, 97. Bulk maintains that its subcontractors do so only to comply with Pennsylvania law. B. Br. at 21. Whatever may be the legal relationship between Bulk and its subcontractors, the fact remains that these subcontractors could not perform the relevant coal haulage services at the mine without Bulk's authority. Those subcontractors could not maintain an independent physical presence at the mine for the relevant services because Bulk had the exclusive contract for coal haulage from the mine to the Generating Station.

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2/ Our focus is on the actual relationships between the parties, and is

not confined by the terms of their contracts. Reference to the contractual relationships between the parties is made because the contracts are evidence of the parties' actual relationships. Moreover, the determination of whether a party is properly designated to be within the scope of section 3(d) of the Act is not based upon the existence of a contract, nor the terms of such a contract.

Further evidence supports the judge's determination that Bulk's services were essential and closely related to the extraction process and that Bulk had a sufficient presence at the mine. 12 FMSHRC at 792-93. Merlo testified that "there is a constant flow of truck drivers in and out ... working for us," and that they generally haul four to five days per week. Tr. 85, 107. Under its contract with BethEnergy, Bulk agreed to transport approximately 30, 000 tons of raw coal and 20,000 tons of clean coal per month to the Generating Station. R-Exh. 1, sections 1.1, l.2. Given the undisputed fact that Bulk was BethEnergy's exclusive coal hauler between Mine No. 33 and the Generating Station, and given the quantities of coal hauled by Bulk, we agree with the judge that Bulk's services in hauling coal were essential and closely related to the extraction process. 12 FMSHRC at 782.

Accordingly, we affirm the judge's holding that Bulk is an independent contractor-operator within the meaning of the Mine Act. We note, however, that our holding is limited to the haulage services context of this case, where the violative conduct occurred at a mine.

B. Whether Bulk should be held liable for the acts of Krumenaker

Bulk argues in the alternative that, even if it is considered an operator, it is not an "owner-operator" and, therefore, should not be held liable for a violation committed by its subcontractor. Quoting Cyprus Industries v. FMSHRC, 664 F.2d 1116, 1119 (9th Cir. 1981), Bulk argues that owners or production-operators are held liable for violations caused by independent contractors because "they are generally in 'continuous control of conditions at the entire mine.'" B. Br. at 9 (emphasis in Court's decision). Bulk contends that it did not exercise control over its subcontractors or have responsibility for safety over an identifiable part of the mine. B. Br. at 9-11. We reject such a narrow reading of Cyprus. In Cyprus, the Court stated that one policy reason for holding owners liable for the violations committed by independent contractors is that an owner is "generally in continuous control of conditions at the entire mine." 664 F.2d at 1119. The Court did not state or imply that this was the only reason why owners should be held liable for acts of their contractors or that, if for some reason, an owner did not exercise such general control over the entire mine, it could not properly be held liable for the acts of its contractors.

To the contrary, settled liability law under the Mine Act clearly demonstrates that the basis for holding an owner-operator liable for the violative conduct of another is its general system of liability. The Commission and various courts have recognized that the Mine Act (as well as its predecessor, the Coal Act) sets forth such a scheme of liability

without fault. See, e.g., Bituminous Coal Operators' Association v. Secretary of Interior, 547 F.2d 240, 246-47 (4th Cir. 1977)("BCOA"); Cyprus, 664 F.2d at 1119; Sewell Coal Co., v. FMSHRC, 686 F.2d 1066, 1071 (4th Cir. 1982); International Union, United Mine Workers of America v. FMSHRC, 840 F.2d 77, 83-84 (D.C. Cir. 198); Asarco, Inc. -- Northwestern Mining Dept. v. FMSHRC & AMC, 868 F.2d 1195-1197-98. Thus, an owner has continuous control of the entire mine but, rather because the Act's scheme of liability provides that an operator, although

faultless itself, may be held liable for the violative acts of its employees, agents, and contractors. Because Bulk is a statutory operator, it may be held liable for the violative acts of its subcontractor, Krumenaker.

C. Whether the Secretary abused her discretion by citing Bulk rather than Krumenaker

Bulk argues that the Secretary abused her discretion in citing it rather than Krumenaker. Bulk argues that the enforcement action taken against it was contrary to the provisions of MSHA's "Enforcement Policy and Guidelines for Independent Contractors," set forth in MSHA's Program Policy Manual ("Policy Manual"). These guidelines provide that enforcement action may be taken against an operator principal for the violative acts of its independent contractor in any of the four following contexts: the principal contributed to the violation; the principal contributed to the continued existence of the violation; the principal's employees were subjected to the hazard created by the violation; or the principal has control over the condition requiring abatement. III Policy Manual Part 45, at 6. Bulk argues that none of these circumstances apply to it. B. Br. 28-29.

In instances of multiple operators, the Secretary may, in general, proceed against either an owner-operator, its contractor, or both, for a violation. Cyprus, 664 F.2d at 1119; Old Ben Coal Co., 1 FMSHRC 1480, 1483 (October 1979). If Krumenaker is not an "operator," clearly, the Secretary did not abuse her discretion by failing to cite him. We conclude, however, that even if it is assumed that Krumenaker constitutes a statutory operator, the record supports a conclusion that the Secretary did not abuse her discretion by citing Bulk.

Preliminarily, the Secretary's citation of Bulk was not inconsistent with the Policy Manual criteria. The guidelines states that enforcement action may be appropriate in any of the four described situations. III Policy Manual Part 45, at 6. Bulk had substantial control over the condition requiring abatement, which satisfies the fourth criterion. Although BethEnergy later posted warning signs and instructed Krumenaker and the other drivers to take precautions around the powerlines (Tr. 30.31), BethEnergy also looked to Bulk to ensure safe practices among its drivers. Merlo testified that whenever BethEnergy has a safety complaint about one of Bulk's drivers, it contacts the subcontractor "on the site," and eventually notifies Bulk by letter so that Bulk can inform the drivers and correct the safety problems. Tr. 114-15. Bulk then passes BethEnergy's complaint on to the subcontractor involved, usually by including BethEnergy's letter in the subcontractor's pay voucher. Tr. 91. (The inspector's contemporaneous investigative notes contain a statement

that BethEnergy had informed Bulk of the violation and that Bulk had warned its drivers accordingly. See P-Exh. 2, p. 5.) We also note that Bulk's contract with BethEnergy provides that Bulk is responsible for violations of law and inspecting the haulage trucks "to assure safe movement ... in compliance with any law...." R-Exh. 1, section 5.1. In any event, as held by the D.C. Circuit in Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 538-39 (1986), the Secretary's criteria are merely expressions of general policy and are not binding regulations that the Secretary is required to observe.

Significantly, the record shows that Bulk has a continuing relationship with BethEnergy and may be in the best position to influence the safety practices of all its drivers. Bulk chooses its drivers and may refuse to retain those drivers who cause safety violations. Tr. 101-103. We believe that it is unreasonable to require the Secretary to pursue each of Bulk's 70 to 100 subcontractors.

The judge's conclusion that the Secretary did not abuse her discretion in citing Bulk, rather than Krumenaker, is supported by applicable precedent, which clearly establishes that the Secretary has wide enforcement discretion. See, e.g., Consolidation Coal Company, 11 FMSHRC 1439, 1443 (August 1989); Cathedral Bluffs, 796 F.2d at 537-38; Old Ben, 1 FMSHRC at 1481-86. 3/

Accordingly, for the reasons set forth above, we affirm the judge's decision.

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3/ Bulk also argues that it has been subjected to inconsistent enforcement action by the Secretary because, in the past, MSHA vacated citations issued to Bulk on the basis that the citations should have been issued to one of Bulk's subcontractors who actually committed the violations. B. Br. at 29. Under the Mine Act, as we have held, equitable estoppel does not generally apply against the Secretary. King Knob Coal Co., 3 FMSHRC 1417, 1421-22 (June 1981).

4/ Chairman Ford did not participate in the consideration or disposition of this matter.