FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 25, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2009-693-M
v.	:	
	:	
AMES CONSTRUCTION, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

DECISION

BY: Jordan, Chairman; Young, Cohen, and Nakamura, Commissioners

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"), Judge Margaret Miller upheld a citation charging Ames Construction, Inc., ("Ames") with a violation of 30 C.F.R. § 56.9201. 32 FMSHRC 347 (Mar. 2010) (ALJ). Section 56.9201 provides that "[e]quipment and supplies shall be loaded, transported, and unloaded in a manner which does not create a hazard to persons from falling or shifting equipment or supplies." The Commission granted Ames's Petition for Discretionary Review, which challenges the judge's determination that Ames violated the safety standard in section 56.9201. For the reasons that follow, we affirm the judge's decision in result.

I.

Factual and Procedural Background

This proceeding concerns the events surrounding a delivery of pipes at the Kennecott Tailings Facility near Magna, Utah, and a fatal accident which occurred in connection with the delivery. Ames contracted with Kennecott to construct and raise a tailings dam, pipe, and roadways at the Kennecott Tailings Facility. 32 FMSHRC at 347 (citing Stip. 4, Tr. 261-262). As the construction at the facility progressed, it was necessary to extend a pipeline used to transport waste product. Tr. 55-56. Consequently, Ames regularly received deliveries of pipes at the property. Approximately 60 to 70 loads of pipe were delivered to the facility during 2008. Tr. 226-27.

The pipes were manufactured by WL Plastics and purchased by Kennecott. Gov't Ex. 5 at 8; Tr. 65. At the WL Plastics factory, pipes were loaded onto the trailer of a delivery truck bound for the Tailings Facility. Tr. 65. In this instance, the delivery truck was owned by Bob Orton Trucking ("Orton") and driven by an employee of Orton. 32 FMSHRC at 348. The driver, William Kay, was 81 years old and had 55 years of experience as a truck driver. *Id.,* Stip. 28.

On October 29, 2008, Kay arrived at the Tailings Facility with a trailer loaded with nine pipes, each of which was about 50 feet in length and 3,000 pounds in weight. *Id.* (citing Tr. 65). After arriving at the facility, Kay stopped at the Ames office. *Id.* at 349 (citing Tr. 151). Ames employees check with each driver to determine if the driver holds a hazard card. Tr. 55. On this particular morning, Kay displayed his Kennecott hazard card, which indicated that he had received hazard training. 32 FMSHRC at 348 (citing Tr. 88, Gov't Ex. 11). However, the hazard training Kay had received did not involve the unloading of materials from a truck. *Id.* (citing Tr. 104, 118).

According to the policy at the Tailings Facility, Ames's employees would escort outside drivers while they were on the property. Stip. 9. Greg Davis, a member of the Ames crew, retrieved a truck to use while escorting Kay to the pipe unloading area. Tr. 204. While walking to the truck, Davis observed the load of pipes and noticed that it lacked chocks, which are normally included to prevent rolling. Tr. 204. Additionally, he observed that the dunnage was smaller than the four-by-four blocks normally used.[1] Tr. 204.

Davis, along with two additional members of the Ames crew, James Hilton and Juan Florez, escorted Kay to the unloading area. 32 FMSHRC at 349 (citing Tr. 151). The Ames crew drove the separate truck during the approximately eight-mile long drive. *Id.* (citing Tr. 154). Upon reaching the designated unloading area, only Florez exited the Ames truck. *Id.* (citing Tr. 160; Stip. 12, 13). Davis instructed the truck driver, Kay, to "stay right here." Stip. 13. Davis and Hilton then left to retrieve a forklift located elsewhere on the facility. Stip. 12. Florez remained with Kay, but the two did not speak while they waited at the site. Stip. 14, 16.

Normally the Orton drivers do not unload the truck on their own, but do participate in the unloading process by loosening the straps that secure the load with a long tool that they carry in the truck. 32 FMSHRC at 349 (citing Tr. 90). The remainder of the process is performed by the contractor who is in charge of the site. *Id.*

After the Ames truck left, Florez crossed the road and remained for several minutes before returning to the unloading area. 32 FMSHRC at 349. On his return, Florez waited near the passenger side of the truck for the crew to arrive with the forklift. *Id.* During their time

[1] Dunnage is wood placed down the length of the trailer between each level of pipe, in order to maintain the stability of the load. Tr. 16, 129. It creates a separation between the pipes so the forklift cover can fit neatly between the pipe sections as they are unloaded, so it does not damage the pipe. Tr. 46-47.

together at the unloading area, Florez observed Kay near his toolbox. *Id.* Florez's attention was on the road when he heard a loud crack. *Id.* The noise came from a pipe which had dislodged and rolled off the trailer. Stip. 17. Kay had removed all of the straps from the load without any supplemental support. Stip. 17. Kay received fatal crushing injuries from the pipe. Stip. 17. At the time of the accident, Davis and Hilton had not yet returned to the unloading area with the forklift. Stip. 18.

At the conclusion of the accident investigation, MSHA issued Citation No. 6328009 to Ames for an alleged violation of the safety standard in section 56.9201 and designated the violation as "significant and substantial" ("S&S").[2] Ames subsequently contested the citation as well as the associated civil penalty, which was proposed to be $13,268.

On March 23, 2010, the judge issued a decision, after a hearing on the merits, in which she concluded that the pipes were not unloaded safely as required by section 56.9201, that the violation was "S&S," and that Ames was strictly liable for the violation.[3] 32 FMSHRC at 351-54. She found that the unloading process began when the truck was parked at the unloading area and a member of the Ames crew was present for the purpose of unloading. *Id.* at 351. The judge also found that the truck driver was "transporting the pipes for the use of Ames, on property that was under the control of Ames." *Id.* at 350. The judge found "it [was] Ames' responsibility to unload the pipes." *Id.* at 349. Finally, she stated that once the unloading process began, "Ames was responsible for doing it correctly." *Id.* at 351. In concluding that Ames was strictly liable for the violation, the judge erroneously believed that Orton was a subcontractor of Ames and relied, in part, on the Commission's decision in *Mingo Logan Coal Co.*, which states that "the Act's scheme of liability provides that an operator, although faultless itself, may be held liable for violative acts of its employees, agents and contractors." 19 FMSHRC 246, 249 (Feb. 1997) (quoting *Bulk Transp. Serv., Inc.,* 13 FMSHRC 1354, 1359-1360 (Sep. 1991)).

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[2] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety and health hazard."

[3] Citation No. 6328010 was issued to Orton for a violation of the same safety standard and alleged a violative condition or practice identical to the condition described in Citation No. 6328009. A civil penalty of $35,000 was proposed for Citation No. 6328010. Orton and MSHA agreed to a reduction in the penalty to $5,000. In the Decision Approving Settlement, Judge Miller stated that the settlement terms were based on the respondent's "financial condition and the impact the originally assessed penalty would have had on the operator's ability to continue in business." *Bob Orton Trucking*, Docket No. WEST 2009-774, Unpublished Order (June 17, 2010).

II.

<u>Disposition</u>

Ames contends that the judge erred factually in determining that Orton was its subcontractor. A. Br. at 9-10. Ames further contends that its employees could not have prevented the accident. A. Br. at 11-12, 15. Ames maintains that in the absence of a contractual relationship with Orton, it is not liable for the violation of section 56.9201. Instead, it asserts that it was a third party "bystander," and therefore the liability scheme applied by the judge was "wholly misplaced." A. Br. at 13-15. Additionally, Ames disputes that it was in a supervisory position at the time the driver began to unstrap the load. A. Br. at 15-16; Reply Br. at 8-9. Thus, Ames denies that it engaged in any activity which violated section 56.9201. A. Br. at 15-17. Finally, Ames contends that the Secretary, in urging Ames's liability for the acts of an unrelated third party, is "unjustifiably expanding the potential for liability to an unconscionable extent." A. Br. at 17-19; Reply Br. at 3-8.

The Secretary concedes that the judge's finding that Orton was a subcontractor of Ames is not supported by the record. S. Br. at 8. However, the Secretary asserts that Ames is strictly liable for the violation of the safety standard in section 56.9201 because it controlled the pipe unloading area and supervised the unloading of the pipes. S. Br. at 8-10. She argues that an operator is strictly liable for violations that take place under its control or supervision. S. Br. at 10-19.

At the outset, we recognize that the judge was incorrect in stating that Orton was a subcontractor of Ames. However, in view of the judge's findings regarding Ames's supervision of the unloading process, her error about Orton being Ames's subcontractor does not control the outcome of this appeal.[4]

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[4] The Secretary litigated the case before the judge on the theory of Ames's strict liability for the violation based on its control of the pipe unloading area and supervision of the unloading process. The Secretary's theory was clearly set forth in her written Pre-Hearing Statement, and in her opening statement at trial. Tr. 22-24. Hence, Ames cannot claim surprise, even though the judge's decision relied on the erroneous conclusion that Orton was Ames's subcontractor. As the Supreme Court stated in *Dandridge v. Williams,* 397 U.S. 471, 475-76 n.6 (1970), "[t]he prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court. As the Court said in *United States v. American Ry. Express Co.*, 265 U.S. 425, 435-36 (1924), '[I]t is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it'" (other citations omitted). *See also BethEnergy Mines, Inc*., 15 FMSHRC 981, 985 n.4 (June 1993), citing *Sec'y on behalf of Price v. Jim Walter Res., Inc*., 12 FMSHRC 1521, 1529 (Aug. 1990) (citations omitted).

We conclude that the issue of Ames's liability in this case is appropriately resolved by referring to the plain language of the Mine Act and the undisputed facts in the record. Ames has stipulated that during the relevant period of time it "was a contractor constructing a tailings dam and raising the tailings dam, pipe, and roadways at the Kennecott Tailings Facility near Magna, Utah." Stip. 4. As such, Ames was an operator of the mine, since section 3(d) of the Mine Act defines that term as "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." 30 U.S.C. § 802(d). Ames' concession that it was a contractor constructing a tailings dam places it squarely within the statutory definition of "operator."

Section 110(a) of the Mine Act provides that "[t]he operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard . . . shall be assessed a civil penalty by the Secretary . . . ." 30 U.S.C. § 820(a). This provision has been held to impose liability for violation of a standard against an operator without regard to fault. *Allied Products Co. v. FMSHRC*, 666 F.2d 890, 893-94 (5th Cir. 1982); *Sewell Coal Co. v. FMSHRC*, 686 F.2d 1066, 1071 (4th Cir. 1982); *Western Fuels-Utah, Inc.,* 10 FMSHRC 256, 260-61 (Mar. 1988), *aff'd on other grounds,* 870 F.2d 711 (D.C. Cir. 1989); *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989).

Since a violation of a mandatory standard occurred at a mine at which Ames is an operator, under the plain meaning of section 110(a), Ames could be found strictly liable for that violation. Ames maintains, however, that the Mine Act's liability scheme should not apply to a situation like the one here, in which the Secretary seeks to hold independent contractor Ames liable for a violation committed by a third party with which Ames has no contractual relationship. A. Br. at 17-19.

Section 110(a) imposes strict liability for violations which occur at a mine. However, as the D.C. Circuit has noted, strict liability "means liability without fault[;] [i]t does not mean liability for things that occur outside one's control or supervision." *Sec'y of Labor v. National Cement Co. of Cal., Inc.*, 573 F.3d 788, 795 (D.C. Cir. 2009) (citation omitted). Here, because Ames supervised a process, the unloading of pipes, it is responsible for the violation that occurred. Ames's emphasis on its lack of a contract with Orton trucking is, at bottom, an argument that it lacked the level of control needed to justify imposition of strict liability for violations committed by Orton drivers. Because, as discussed below, we conclude that Ames was cited for an unsafe condition that occurred in connection with an activity for which it had supervisory responsibility, we find the lack of a contract to be immaterial to our determination.[5]

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[5] Although we recognize that a contractor may also be liable under the Mine Act for violations which occur within an area of the mine which the contractor controls, we need not reach that issue in this case, because Ames is liable on the basis of its supervision of the unloading process.

Indeed, this approach is consistent with the Commission's decision in *Joy Technologies, Inc.*, 17 FMSHRC 1303 (Aug. 1995). In that case, Joy entered into a contract with the mine operator for the sale of equipment. Although Joy made follow-up visits to the mine to troubleshoot the equipment, it argued that it was not an independent contractor under the Mine Act because there was no contract to perform those services. The Commission nevertheless determined that Joy could be held liable for the Mine Act's training requirements, noting "'[o]ur focus is on the actual relationships between the parties, and is not confined to the terms of their contracts.'" 17 FMSHRC at 1306 (quoting *Bulk Transp. Serv.*, 13 FMSHRC at 1358 n.2). This principle was cited approvingly by the Tenth Circuit. *Joy Techs., Inc.*, 99 F.3d 991, 995-96 (10th Cir. 1996). Accordingly, in determining that liability is appropriately imposed against Ames, we have considered its relationship with Orton's drivers, particularly during the unloading process, a process which Ames supervised and controlled. This focus is consistent with our case law, albeit in a different context.[6]

Ames was cited for a violation of 30 C.F.R. § 56.9201, which requires that "[e]quipment and supplies shall be . . . unloaded in a manner which does not create a hazard to persons from falling or shifting equipment or supplies." The judge found that it was "Ames' responsibility to unload the pipes from the truck." 32 FMSHRC at 349. Not only is this finding supported by substantial evidence, it is not even seriously disputed by Ames. *See* Tr. 264-65 (testimony of Robert Parker, Ames's Industrial Division Manager, that unloading the pipes was Ames's responsibility under its contract with Kennecott). Indeed, Ames stipulated:

> Orton drivers are instructed to follow the policies and procedures of the recipient regarding safety and the unloading process. Orton drivers are instructed to follow the instructions of the supervisor of the unloading process.

Tr. 271.

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[6] We therefore reject Ames's contention that the imposition of strict liability in this context is a "new policy," which has been implemented without the benefit of rulemaking or even deliberate internal policy-making, and that its lack of notice that the statute would be enforced in the manner that it was in this case deprives it of due process. A. Reply Br. at 6, 8. The imposition of liability on a contractor for violations that occur during a process supervised by the contractor is not a new policy. It is entirely consistent with, and indeed required by, the Mine Act's fundamental imposition of responsibility for activities undertaken, controlled or supervised by any contractor as an operator regulated under the Act. *See* 30 U.S.C. § 802(d) (definition of operator regulated under the Act includes "independent contractors"). In this case, we are simply applying this well-established legal principle to a novel set of facts. Thus, we also disagree with our dissenting colleague's statement that we are "[b]reaking new ground." Slip op. at 9.

Moreover, the record contains a Safety, Health, and Environmental Action Plan (SHEAP), which is a site-specific project safety plan detailing the safety requirements imposed on Ames by Kennecott. Tr. 240-41; Gov't Ex. 8; Stip. 21. The SHEAP includes a section on the safe unloading of materials using forklifts. Tr. 240-41; Gov't Ex. 8, sec. 3.g., at 3. Under the section entitled "Ames Construction Safety Management – Authority," the SHEAP provides: "Supervisors, foremen and safety supervisors are authorized to stop work that would place employees, equipment or property in immediate danger, and to ensure that all unsafe conditions are corrected." Gov't Ex. 8, at 5. Obviously, the ability to stop unsafe work implies supervisory authority.

The operator's own Job Safety Analysis ("JSA") also supports the judge's finding that Ames was responsible for unloading the pipes. The JSA is a document used by Ames that identifies the potential hazards of forklift operations. Gov't Ex. 9. The JSA recommends that forklift operators "make sure [the] load is secure before removing straps from truck or trailer." Gov't Ex. 9; Stip. 19. At the time of the incident, Ames crew members were familiar with the JSA. 32 FMSHRC at 349 (citing Tr. 140).

However, the operator argues that Florez was without power or authority to prevent Kay from proceeding with the unloading. A. Br. at 15-16. The record does not support this view. Ames controlled the drivers' access to the site and, upon admission, escorted them to the unloading area. 32 FMSHRC at 349 (citing Tr. 151). Orton drivers were required to follow the instructions of the supervisor of the unloading process. Tr. 271. Florez himself testified that it was his responsibility to ensure that Kay stayed safe. Tr. 167. Moreover, the Ames superintendent at the facility testified that on past occasions, he had prevented drivers from taking actions he believed were dangerous. Tr. 229. At oral argument, Ames's counsel acknowledged that on previous occasions Ames employees had stopped truck drivers from loosening the straps. Oral Arg. Tr. 18. In any event, whether Kay would have refused to obey instructions from Ames's agents is beside the point, because no attempt was made to prevent him from beginning the unloading process, or to prevent him from encountering any other hazards. Tr. 169-74.

Ames disputes that the unloading of pipes had begun when Kay was killed, because the operator had not intended it to commence as of the time when Kay began to loosen the straps. This position is untenable as a matter of law and common sense. The judge found that unloading had in fact begun at that point: "[O]nce [Ames] escorted Kay to the loading site and left an employee with him . . ., the unloading process had begun and Ames was responsible for doing it correctly." 32 FMSHRC at 351. The judge further found that the unloading began with Kay loosening a number of straps running the entire length of the flatbed, and that Florez should have seen this and stopped Kay from proceeding. *Id.* (citing Tr. 114-15).

According to the judge, unloading began with the first steps necessary to the process. Not only is her finding supported by substantial evidence, it would defy logic to hold otherwise. Before Kay's intervention, the pipes were on the truck. Afterward, at least one had departed the truck as a result of human activity. This is "unloading" by any reasonable definition.

III.

Conclusion

In summary, Ames was an operator of the mine pursuant to the clear language of section 3(d) of the Mine Act, because it was a contractor performing services at the mine. As such, it is liable under section 110(a) of the Mine Act, without regard to fault for the violation at issue, since the unloading of the pipes from the trucks (which was the subject of the citation) was Ames's responsibility. Accordingly, we conclude that the judge's decision that Ames violated 30 C.F.R. § 56.9201 should be affirmed in result.

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Mary Lu Jordan, Chairman

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

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Patrick K. Nakamura, Commissioner

Commissioner Duffy, dissenting:

I would reverse the judge and vacate the citation.

As I see it, strict liability of mine operators under the Mine Act is derived from the interrelationship of sections 104(a) and 110(a) of the statute. The former imposes liability on an operator who "has violated" the Act, a mandatory standard, an order, or a rule promulgated under the Act. 30 U.S.C. § 814(a). The latter imposes liability for a civil penalty sanction on an operator of a mine "in which a violation occurs." 30 U.S.C. § 820(a). Thus, an operator can be held liable for violations it commits outright or through its agents, or it can be held liable if a violation occurs anywhere within a location deemed to be a mine that is owned, controlled, or supervised by that operator. The Commission has explicitly found section 110(a) to be the ultimate source of operator liability:

> The liability of an operator is governed by section 110(a), 30 U.S.C. § 820(a), which states: "*The operator of a . . . mine in which a violation occurs* of a mandatory health or safety standard . . . shall be assessed a civil penalty. . . ." (Emphasis added). The occurrence of the violation is the predicate for the operator's liability.

Asarco, Inc.–Northwestern Mining Dep't, 8 FMSHRC 1632, 1635 (Nov. 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989).

In the instant case, the mine site where the violation occurred included multiple employers, among them independent contractor Ames. Rather than look to section 110(a), and determine whether Ames was an "operator" of the mine for purposes of the violation of 30 C.F.R. § 56.9201, the majority departs from Commission precedent and allocates liability not by reason of the area of the mine where the violation occurred, but, rather, by reason of the "process" for which a given "operator" is responsible. Indeed, the majority explicitly declines to reach the issue of whether Ames could be held liable on the basis that it controlled the area where the violation of section 56.9201 occurred. Slip op. at 5 n.5.

While I appreciate that the majority is attempting to resolve the issue this case presents on grounds as narrow as possible, I cannot join them. Breaking new ground in finding the source of an operator's liability, as the majority does, may result in unforeseen problems.

I instead conclude that *if* Ames is liable at all for the violative conduct of Mr. Kay, it would be on the basis that Ames was in control of the area encompassing the Kennecott Tailings Facility where the fatal accident took place. However, I further conclude that Ames should not be held strictly liable for the violation committed by Mr. Kay because he was not an employee of Ames and because he engaged in unforeseeable conduct that cannot be attributable to Ames.

In *Western Fuels–Utah, Inc*., 10 FMSHRC 256 (Mar. 1988), then Chairman Ford in his dissent in that case made a compelling argument in favor of allowing an operator to assert an affirmative defense against a citation if the operator could show that it was blameless and that the violation was owing to the unforeseeable and idiosyncratic conduct of its employee. *Id*. at 263-72. The Chairman's position did not prevail among three of his colleagues (*id.* at 258-62), or on appeal to the D.C. Circuit (*Western Fuels–Utah, Inc. v. FMSHRC*, 870 F.2d 711 (D.C. Cir. 1989)), but I firmly believe the principles upon which he based his dissent are fully applicable in instances such as are presented in this case, where the violative conduct is carried out by a *non-employee* of the cited operator. It may well be that a principle adopted under the OSHA statute should also be applicable here:

> Fundamental fairness would require that one charged with and penalized for violation be shown to have caused, or at least to have knowingly acquiesced in, that violation. Under our legal system, to date at least, no man is held accountable, or subject to fine, for the totally independent act of another.

Brennan v. OSHRC, 511 F.2d 1139, 1145 (9th Cir. 1975).

Just because the Secretary may be authorized to take a particular action, doesn't necessarily mean that she should. This is just such an instance. I would therefore encourage Ames to seek judicial review of whether the strict liability doctrine under the Mine Act should apply to an operator when a non-employee of that operator engages in unforeseeable conduct that violates the Act or the standards.

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Michael F. Duffy, Commissioner

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