

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET NW, 6TH FLOOR  
WASHINGTON, D.C. 20006

September 20, 1996

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

v.

D.H. BLATTNER & SONS, INC.

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Docket Nos. WEST 93-123-M  
WEST 93-286-M  
WEST 94-5-RM

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners<sup>1</sup>

DECISION

BY THE COMMISSION:

In these consolidated contest and civil penalty proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”), Administrative Law Judge John J. Morris determined that D.H. Blattner & Sons, Inc. (“Blattner”), an independent contractor, was required to file an operator legal identity report under 30 C.F.R. § 41.20.<sup>2</sup> 16 FMSHRC 1762 (August 1994) (ALJ). For the reasons set forth below, we affirm his decision.

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<sup>1</sup> Commissioner Holen participated in the consideration of this matter, but her term expired before issuance of this decision. Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

<sup>2</sup> Section 41.20, entitled “Legal identity report,” provides, in part:

Each operator of a coal or other mine shall file notification of legal identity and every change thereof with the appropriate district manager of the Mine Safety and Health Administration by properly completing, mailing, or otherwise delivering form 2000-7 “legal identity report” which shall be provided by the Mine Safety and Health Administration for this purpose.

## I.

### Factual and Procedural Background

Blattner is a construction company engaged in a variety of projects, including highway construction and mining. 16 FMSHRC at 1763-64. These cases involve three citations issued to Blattner for failure to file a legal identity report at three separate mining operations: the Yankee Project and Aurora Partnership Mines in Nevada and the Van Stone Mine in Washington State. *Id.* at 1763. Prior to the issuance of the citations, Blattner obtained a contractor identification number pursuant to 30 C.F.R. § 45.3,<sup>3</sup> which it used on all of its jobs at mines. *Id.* at 1764.

#### A. Yankee Project

The Yankee Project Mine is an open pit, heap leach gold mine<sup>4</sup> owned by USMX, Inc. (“USMX”). 16 FMSHRC at 1764. Prior to the citation at issue, USMX had a mine identification number, No. 26-02190, covering the entire operation. Tr. 51; R. Ex. 1. The mine contains a pit area, a crushing and leaching operation adjacent to the pit, and a mill area that is 5 miles away. Tr. 46, 49-51; R. Ex. 10. On October 17, 1991, Blattner entered into a contract with USMX to perform services in the pit, including drilling, blasting, loading, hauling and dumping ore and waste material. 16 FMSHRC at 1764; J. Ex. 1, at 14-16. Blattner retained a subcontractor, ICI Explosives (“ICI”), to perform drilling and blasting work. 16 FMSHRC at 1764.

In September 1992, Steven A. Cain, an inspector with the Department of Labor’s Mine Safety and Health Administration (“MSHA”), inspected the Yankee Project Mine and learned that

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<sup>3</sup> Section 45.3, entitled “Identification of independent contractors,” provides, in part:

- (a) Any independent contractor may obtain a permanent MSHA identification number. To obtain an identification number, an independent contractor shall submit to the District Manager in writing the following information:
  - (1) The trade name and business address of the independent contractor;
  - (2) An address of record for service of documents;
  - (3) A telephone number at which the independent contractor can be contacted during regular business hours; and
  - (4) The estimated annual hours worked on mine property . . . .

<sup>4</sup> Heap leaching is a process to extract gold by use of cyanide carbon solution. Tr. 27.

Blattner was extracting ore from the pit and supplying it to USMX to process. *Id.* at 1771. He discovered from the Safety Director at USMX, Ken Gubler, that USMX basically had nothing to do with Blattner's safety program and that Blattner was responsible for the safety of its employees and those of ICI in the pit. *Id.*; Tr. 29-30. Cain consulted with MSHA Supervisory Mine Inspector Paul Belanger. Tr. 30-31, 207. Belanger telephoned Yankee Project and learned from USMX Manager of Operations Jim Kentopp that USMX was responsible for the mill and the crushing but had no involvement in the daily supervision of Blattner's operation in the pit. Tr. 214-15.

After consultation with other MSHA officials, Belanger determined that Blattner needed to submit a legal identity report. Tr. 31, 207-08; Deposition of Vernon Gomez, MSHA Administrator of Metal/Nonmetal Mines dated April 30, 1993, at 95 (incorporated into the record at Tr. 556). When Blattner refused to comply, Inspector Cain issued a citation on September 14, 1992, for failure to file such a report. Tr. 31; Gov't Ex. 1. Under protest, Blattner completed a legal identity report and the citation was terminated. Gov't Ex. 1. As a result, two legal identity numbers, one covering the pit where Blattner operated and the other covering the milling and crushing operations run by USMX, were assigned to the project. Tr. 59-61; Gov't Ex. 1; R. Ex. 1.

#### B. Van Stone

The Van Stone Mine is an open pit lead and zinc mine owned by Equinox Resources, Inc. ("Equinox"). 16 FMSHRC at 1765, 1772. On November 19, 1990, Blattner contracted with Equinox to perform services such as blasting, loading and hauling of ore and waste materials. 16 FMSHRC at 1765; J. Ex. 2, at 2. Blattner retained a subcontractor, Roundup Powder, for drilling and blasting. 16 FMSHRC at 1765.

After an MSHA staff meeting where the subject of Blattner's activities was discussed, MSHA Supervisory Inspector Collin Galloway asked an inspector to investigate Blattner's responsibilities at the mine. *Id.* at 1772. The inspector reported that Blattner was in charge of mining operations in the pit and that Equinox was running the mill. *Id.*

Inspector Galloway informed Blattner that, because it was responsible for safety in the pit, it needed to file a legal identity report. *Id.* When Blattner refused, he issued a citation. *Id.* Blattner completed a legal identity report and the citation was terminated. Gov't Ex. 2. As a result of Blattner's filing, the Van Stone Mine was assigned two separate mine identity numbers, one for the pit and one for the mill. Tr. 137-38, 149.

### C. Aurora Partnership

The Aurora Partnership Mine is an open pit, heap leach gold and silver mine owned by the Aurora Partnership (“Aurora”). 16 FMSHRC at 1766; Tr. 165. It consists of a pit, where the ore is extracted, and, approximately a mile away, a mill for processing gold and silver from the ore. Tr. 165-66, 176. On June 16, 1993, Blattner entered into a contract with Aurora to provide services in the pit, including drilling, blasting, crushing, loading and hauling ore and non-ore material, and preparing and maintaining haul roads and pit walls. 16 FMSHRC at 1766; J. Ex. 3, at 4. Blattner subcontracted the drilling and blasting work to ICI and the crushing to Fisher Industries. 16 FMSHRC at 1766.

Blattner took over the mining activities from Lost Dutchman Construction (“Lost Dutchman”), which previously had submitted a form 2000-7 and was assigned a legal identity number. 16 FMSHRC at 1772. Aurora was assigned a separate legal identity number for the milling and leaching operation. Tr. 177.

On an inspection of Aurora in June 1993, Inspector Robert Morley learned that Blattner might be replacing Lost Dutchman. Tr. 168-71. He informed Blattner’s job superintendent, Bob Cameron, that Blattner would need to fill out a report and assume Lost Dutchman’s legal identity number. Tr. 171. Morley left a report for Blattner to complete. Tr. 172. On July 29, 1993, Larry Turner, Senior Mine Engineer for Aurora, notified MSHA in writing that Blattner would serve as the prime contractor for mining activity. 16 FMSHRC at 1772. Cameron also informed Morley that, as of August 2, Blattner would be mining the property. Tr. 171. On September 2, Morley visited the mine, learned that Blattner had not filed a report, and issued Blattner a citation. 16 FMSHRC at 1772; Tr. 171; Gov’t Ex. 3. Under protest, Blattner completed a legal identity report and assumed Lost Dutchman’s identity number. Tr. 177, 193-94; Gov’t Ex. 3. Blattner filed a notice of contest disputing the citation.

The three proceedings were consolidated for trial. The only issue before the judge was whether Blattner was required to file a legal identity report under section 41.20. 16 FMSHRC at 1763. After an evidentiary hearing, the judge found that Blattner “exercised direct supervision and control over the ore extraction process and the health and safety of the miners so involved” at the three mines. *Id.* at 1771. In concluding that Blattner qualified as an operator obliged to complete a legal identity report, the judge reasoned that “requiring Blattner to comply with [section 41.20] directly promotes the safety goals of the Act.” *Id.* at 1768, 1771. The judge affirmed the Secretary’s proposed penalties of \$50 for each of the two civil penalty proceedings and dismissed Blattner’s contest. *Id.* at 1777.

## II.

### Disposition

Blattner does not dispute that it is an operator under the Act. B. Br. at 14. Rather, relying on MSHA's Enforcement Policy and Guidelines for Independent Contractors, 45 Fed. Reg. 44,494, 44,497, 44,498 (1980) ("Enforcement Guidelines") and Part 45 of MSHA's Program Policy Manual ("PPM"), Blattner maintains that, under the regulatory scheme, it is only required to submit information required of independent contractors. *Id.* at 8, 11-14, 23-27. Blattner contends that, because it is neither a "designated independent contractor" under 30 C.F.R. § 41.1(a), or a "production-operator" under 30 C.F.R. § 45.2(d), it cannot be required to file a legal identity report. *Id.* at 9-11, 16-23. Blattner further argues that MSHA's decision to require independent contractors to file operator reports constitutes a major policy change and, as such, is invalid because the change was not implemented pursuant to proper rulemaking procedures. *Id.* at 27-32.

The Secretary asserts that his interpretation of his own implementing regulations should be given deference. S. Br. at 11-12. The Secretary also argues that Blattner meets the definition of operator in section 41.1(a), by its plain terms, because it (1) "control[led] or supervise[d]" the three mines and (2) qualified as a "designated independent contractor." *Id.* at 14-15 & n.3. The Secretary contends that substantial evidence supports the judge's finding that Blattner was a production-operator at each of the three mines. *Id.* at 27-28. According to the Secretary, the Enforcement Guidelines and the PPM are non-binding and specifically provide MSHA with the discretion to require independent contractors to file operator identity reports. *Id.* at 17-26. The Secretary maintains that the decision to require Blattner to file legal identity reports reflects his longstanding interpretation of the Part 41 reporting requirements and does not constitute a substantive rule subject to rulemaking requirements. *Id.* at 33-34. The Secretary further argues that he cannot be estopped from acting on a violation even if he did not cite an identical condition in the past. *Id.* at 34-35.

Section 109(d) of the Mine Act provides that "[e]ach operator of a . . . mine subject to this chapter shall file with the Secretary the name and address of such mine and the name and address of the person who controls or operates the mine." 30 U.S.C. § 819(d). Section 3(d) defines an operator 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). Section 103(h) further authorizes the Secretary to require an operator to provide information and reports as are necessary to the Secretary to administer the Mine Act. 30 U.S.C. § 813(h).

The Secretary's implementing regulations mirror the statutory provisions. Section 41.20 provides that "[e]ach operator . . . shall file notification of legal identity . . . by properly completing, mailing, or otherwise delivering form 2000-7 'legal identity report.'" An operator is defined in section 41.1(a) as "[1] any owner, lessee, or other person who operates, controls, or

supervises a coal or other mine or [2] any designated independent contractor performing services or construction at such mine.”

Based on Blattner’s status as an operator under the plain terms of section 41.1(a), we conclude that the Secretary properly cited Blattner for failing to file an operator’s legal identity report under section 41.20.<sup>5</sup> Blattner qualifies as a “person<sup>6</sup> who operates, controls, or supervises a coal or other mine” within the meaning of section 41.1(a). Further, substantial evidence<sup>7</sup> supports the judge’s determination that “Blattner exercised direct supervision and control over the ore extraction process and the health and safety of the miners so involved.” 16 FMSHRC at 1771. The three MSHA inspectors who issued the citations testified that Blattner supervised and was responsible for safety in the pits of the three mines. Tr. 37-39, 126, 128, 135-36, 175-76, 188-90. Blattner witnesses also testified that Blattner supervised, trained and directed its employees and subcontractors in the pit areas. Tr. 430-31, 520-21, 544-47. Blattner had its own equipment, which it maintained. Tr. 37. Blattner played a predominant role in the pits. As former Senior Mine Engineer at Aurora, Larry Turner, testified, Blattner had 45 to 50 employees, including subcontractor employees, in the pit whereas Aurora had only a small force. Tr. 263-64. He also testified that Blattner ran its own safety program and performed supervision in the pit. Tr. 262-63, 266; Gov’t Ex. 8. The contracts between Blattner and the owners specify that Blattner was to supervise the work it had contracted to perform. J. Ex. 1, at 3-4; J. Ex. 2, at A-15; J. Ex. 3, at 8. The record showed that Blattner was responsible for administering safety programs in the pits. Tr. 37-38, 130, 262, 430-32, 523-24. In addition, Blattner hired, directly

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<sup>5</sup> Because Blattner meets the definition of an operator under the first clause of section 41.1, the Commission does not reach the question of whether Blattner is also a “designated independent contractor” under the second clause of section 41.1(a).

<sup>6</sup> 30 C.F.R. § 41.1(b) defines “person” as “any individual, sole proprietor, partnership, association, corporation, firm, subsidiary of a corporation, or other organization.”

<sup>7</sup> The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge’s factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support [the judge’s] conclusion.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). While we do not lightly overturn a judge’s factual findings and credibility resolutions, neither are we bound to affirm such determinations if only slight or dubious evidence is present to support them. *See, e.g., Krispy Kreme Doughnut Corp. v. NLRB*, 732 F.2d 1288, 1293 (6th Cir. 1984); *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1263 (7th Cir. 1980). We are guided by the settled principle that, in reviewing the whole record, an appellate tribunal must also consider anything in the record that “fairly detracts” from the weight of the evidence that supports a challenged finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

paid, and was responsible for subcontractors who performed blasting and drilling in the three mines as well as crushing at Aurora. Tr. 38, 431-32, 437, 523-24, 544-47; Gov't Ex. 8.<sup>8</sup>

We reject Blattner's contention, as did the judge, that it cannot be both an independent contractor under Part 45 and an operator under the reporting requirements of section 41.20. See 16 FMSHRC at 1768-70. Nothing in the language of the Part 41 and Part 45 regulations states that the coverage in each provision is mutually exclusive. The Commission has recognized that an entity may be both an operator and an independent contractor. *Joy Technologies Inc. - Coal Field Operations*, 17 FMSHRC 1303, 1306-09 (August 1995); *Lang Brothers, Inc.*, 14 FMSHRC 413, 419-20 (September 1991) (published March 1992). See also *Ass'n of Bituminous Contractors v. Andrus*, 581 F.2d 853, 861-62 (D.C. Cir. 1978) (independent contractor qualifies as an operator under the Coal Act). Thus, the fact that Blattner filed an independent contractor report under section 45.3 did not relieve it from filing an operator report under section 41.1(a). We do not reach Blattner's argument that it is not a production-operator under section 45.2(d) and therefore does not have to file a legal identity report. Blattner's status under Part 45 is not determinative of whether it must file an operator report under Part 41.<sup>9</sup>

Blattner's contentions that the citations are invalid because they are contrary to MSHA's PPM and Enforcement Guidelines are also unpersuasive. As the judge correctly pointed out, the Enforcement Guidelines and the PPM are not binding on the Secretary or the Commission. *King Knob Coal Co.*, 3 FMSHRC 1417, 1420 (June 1981) ("[T]he Manual's 'instructions are not officially promulgated and do not prescribe rules of law binding upon [this Commission].' . . . [T]he express language of a statute or regulation 'unquestionably controls' over material like a . . . manual.") (citations omitted); *Bulk Transportation Services, Inc.*, 13 FMSHRC 1354, 1360 (September 1991). In *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538-39 (D.C. Cir. 1986), the court held that the specific Enforcement Guidelines at issue here were non-binding on the Secretary because they were general statements of policy, "replete with indications that the Secretary retained his discretion to cite production-operators as he saw fit." Moreover, the Enforcement Guidelines and the PPM give the Secretary the discretion to require an independent contractor to file an operator report. The preface to the Enforcement Guidelines states that they

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<sup>8</sup> Blattner's argument that it did not exercise "prime and overall responsibility" over the properties, see B. Br. at 19-20, is unpersuasive. Section 41.1(a) does not require an operator to have overall responsibility for the mine property.

<sup>9</sup> We are also unmoved by Blattner's argument that confusion will be created by assigning multiple mine numbers to one property. The Fourth Circuit long ago recognized under the Coal Act that there can be multiple mines at a single site. *Bituminous Coal Operators' Ass'n v. Secretary of Interior*, 547 F.2d 240, 246 (4th Cir. 1977). Congress specifically approved *Bituminous Coal Operators' Ass'n* in enacting the Mine Act. S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978).

are for the guidance of MSHA inspectors in making their “individual enforcement decisions.” 45 Fed. Reg. at 44,495. The guidelines caution that nothing in them is meant to alter the basic compliance responsibilities of production-operators. 45 Fed. Reg. at 44,497. Additionally, the PPM provides that “[m]illing operations that receive ores from an underground or a surface mine on the same property may be assigned a separate identification number or may share the same identification number as the mine.” Gov’t Ex. 6 (PPM) at 1.

Thus, we also reject Blattner’s additional contention that, because the citations represent a change in MSHA rule and policy, the Secretary must proceed by notice and comment rulemaking. Since section 41.20 applies to Blattner by its clear terms, rulemaking was not needed. When a governmental action “restates an obligation imposed by . . . regulations,” it is not subject to notice and comment rulemaking. *State of Indiana, Dept. of Public Welfare v. Sullivan*, 934 F.2d 853, 856 (7th Cir. 1991). Moreover, as a factual matter, substantial evidence supports the judge’s rejection of Blattner’s claim that the citations signified a change in MSHA policy. *See* 16 FMSHRC at 1777. The record contains evidence that MSHA required a number of other contractors to file such a report prior to 1992, the year in which Blattner claims the policy changed. Tr. 203, 207; Gomez Dep. at 80; Gov’t Ex. 6 (PPM) at 9 (dated July 1, 1988) (independent contractor classified as a mine operator is required to file legal identity report). Although some conflicting testimony on this point exists (*see* Tr. 142-43, 182-83), the judge made a credibility determination that no change in policy occurred; such determinations are not to be overturned lightly and are entitled to great weight. *In Re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (November 1995).

We also reject Blattner’s argument that the Secretary abused his discretion in citing it for a violation of section 41.20. “The Commission and courts have recognized that the Secretary has wide enforcement discretion,” which is reviewable by the Commission. *W-P Coal Co.*, 16 FMSHRC 1407, 1411 (July 1994), (citing *Bulk Transportation*, 13 FMSHRC at 1360-61); *Consolidation Coal Co.*, 11 FMSHRC 1439, 1443 (August 1989); *Brock v. Cathedral Bluffs*, 796 F.2d at 538. In this case, we find no basis to conclude that the Secretary abused his discretion.

Blattner argues, in effect, that the Secretary should be estopped from enforcing the regulation because the Secretary had not required Blattner and other similarly situated contractors to file such reports in the past. As we have already noted, the judge determined that the Secretary required other contractors to file such reports in the past, and we see no basis for overturning that finding.

Accordingly, we conclude that Blattner plainly met the regulatory definition of operator and that the Secretary properly required Blattner to file an operator legal identity report.



III.

Conclusion

For the reasons set forth above, we affirm the judge's determination that Blattner violated section 41.20 by failing to file a legal identity report and accordingly affirm the penalties assessed as well as the dismissal of the contest proceeding.

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Mary Lu Jordan, Chairman

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Marc Lincoln Marks, Commissioner

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James C. Riley, Commissioner