

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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WASHINGTON, D.C. 20006

February 26, 1997

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
 : Docket No. WEVA 93-392
v. :
 :
MINGO LOGAN COAL COMPANY :

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners¹

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. (1994) ("Mine Act" or "Act"). At issue is whether Commission Administrative Law Judge Roy J. Maurer properly determined that mine operator Mingo Logan Coal Company ("Mingo Logan") was liable for a training violation, under 30 C.F.R. 48.5,² committed by one of its independent contractors. 17 FMSHRC 156 (February 1995) (ALJ). The Commission granted Mingo Logan's petition for discretionary review. For the reasons that follow, we affirm the judge's decision.

I.

¹ 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.

² Section 48.5(a) provides in pertinent part:

Each new miner shall receive no less than 40 hours of training as prescribed in this section before such miner is assigned to work duties.

Factual and Procedural Background

Mingo Logan leases and operates the Mountaineer Mine, an underground coal mine in Mingo County, West Virginia. 17 FMSHRC at 157; Tr. 42. In 1991, Mingo Logan contracted with independent contractor Mahon Enterprises ("Mahon") for the performance of various construction services in the mine. 17 FMSHRC at 157. On March 2, 1992, Mahon was hired to construct an underground belt conveyor system. *Id.*

On August 3, 1992, Inspector Robert Rose of the Department of Labor's Mine Safety and Health Administration ("MSHA") conducted an audit of Mahon's training records and discovered that four employees had received "newly employed experienced miner training" when, according to the records, the four employees did not qualify as "experienced miners." *Id.* Later documentation indicated that three of the miners were properly classified and that only Timothy Sargent did not meet the regulatory definition of an experienced miner and therefore received improper training. *Id.* at 158-59. Sargent should have received training for "newly employed inexperienced miners" as required by section 48.5(a). *Id.* at 158. The training for newly employed experienced miners takes approximately four hours, whereas the training for inexperienced miners lasts 40 hours and covers mining topics in much greater detail. Tr. 68-69, 157, 167-68. Compare 30 C.F.R. 48.5 and 48.6.

Mahon was cited and paid a civil penalty for this violation. 17 FMSHRC at 158. The inspector also issued a section 104(a) citation to Mingo Logan alleging a violation of section 48.5 for failing to ensure that Mahon's employee was properly trained. *Id.* The inspector testified that he issued the citation under MSHA's policy of overlapping compliance which provides that, if employees of both the operator and the independent contractor are affected by the violation, both

entities should be cited. *Id.*; Tr. 60.³

Mingo Logan contested the violation on the grounds that the violation was committed entirely by Mahon and, contractually, Mingo Logan had no authority to hire, fire, train or supervise Mahon employees. 17 FMSHRC at 159.

Following an evidentiary hearing, the judge concluded that Mingo Logan was liable for the violation. *Id.* at 160. The judge reasoned that MSHA had the discretion to (1) hold Mingo Logan strictly liable for all violations of the Act that occur on the mine site and (2) cite both the

³ Volume III, Part 45 of MSHA's Program Policy Manual 6 (7/1/88 Release III-1) ("PPM") states in pertinent part that:

"[O]verlapping" compliance responsibility means that there may be circumstances in which it is appropriate to issue citations or orders to both the independent contractor and to the production-operator for a violation. Enforcement action against a production-operator for a violation(s) involving an independent contractor is normally appropriate in any of the following situations: . . . (3) when the production-operator's miners are exposed to the hazard In addition, the production-operator may be required to assure continued compliance with standards and regulations applicable to an independent contractor at the mine.

17 FMSHRC at 158 n.1; R. Ex. 3. The policy was first set forth in the Enforcement Policy and Guidelines for Independent Contractors published at 45 Fed. Reg. 44,497 (July 1980). The PPM and the Guidelines For Independent Contractors are collectively referred to herein as the AGuidelines."

production-operator and the independent contractor for a violation committed by one of the contractor's employees. *Id.* at 159. Relying on *W-P Coal Co.*, 16 FMSHRC 1407 (July 1994), the judge explained that the Commission reviews the Secretary's enforcement decisions for an abuse of discretion, and determined that Inspector Rose did not abuse his discretion in citing Mingo Logan for the training violation. *Id.* at 159-60. The judge concluded that the violation was not S&S and that Mingo Logan's negligence was "nil." *Id.* at 160-63. He assessed a penalty of \$100. *Id.* at 164.

Mingo Logan challenged the judge's liability determination in a petition for discretionary review, which was granted by the Commission.

II.

Disposition

Mingo Logan contends that the judge erred in concluding that the Secretary's decision to proceed against Mingo Logan was not an arbitrary or capricious exercise of discretion. PDR⁴ at 4. Mingo Logan also asserts that the judge erred in failing to address the Secretary's argument that his enforcement discretion is complete and unreviewable. *Id.* at 5. It contends that the Secretary's citation violates the Guidelines and that its change of compliance policy must be published in the Federal Register. *Id.* at 6-7. Additionally, Mingo Logan asserts that the judge erroneously (1) altered the Secretary's burden of proof for establishing overlapping compliance and (2) concluded that Mingo Logan employees were exposed to the alleged hazard created by an independent contractor, even though this fact was not established by substantial evidence. *Id.* at 11-12. Further, Mingo Logan argues that the Secretary's decision to pursue it for an independent contractor's training violation fails to further the protective purposes of the Act. Reply Br. at 13.

The Secretary responds that the judge's decision should be upheld because the Secretary has unreviewable enforcement discretion to cite a production-operator, its independent contractor, or both, for violations of the Mine Act committed by the independent contractor's employee. S. Br. at 8. In the alternative, the Secretary asserts that, even if he does not have unreviewable discretion, the judge properly concluded that the Secretary did not abuse his discretion in deciding to cite Mingo Logan. *Id.* Additionally, the Secretary contends that substantial evidence supports the judge's finding that the inspector did not abuse his discretion in deciding to cite Mingo Logan based upon one of the grounds specifically set forth in the Guidelines for citing production-operators for violations of their independent contractors. *Id.* at 8-9, 25-31. The Secretary adds that, in any event, he is not bound by the criteria set forth in the

⁴ Pursuant to Commission Rule 75, 29 C.F.R. 2700.75, Mingo Logan designated its petition as its opening brief; in addition, Mingo Logan filed a reply brief to which it attached its post-hearing brief to the judge.

Guidelines and, thus, even if Mingo Logan were correct that substantial evidence fails to support the judge's decision that the Secretary properly applied the Guidelines, the judge correctly determined that Mingo Logan violated section 48.5. *Id.* at 9, 21-23.

The parties stipulated that Mingo Logan was the operator with the overall responsibility of running the mine. 17 FMSHRC at 156-57; Tr. 40. As the judge recognized, MSHA may hold Mingo Logan, because of its operator status, strictly liable for all violations of the Act that occur on the mine site, whether committed by one of its employees or an employee of one of its contractors. 17 FMSHRC at 159. This conclusion is clearly supported by Commission precedent. For instance, in *Bulk Transportation Services, Inc.*, 13 FMSHRC 1354 (September 1991), the Commission held that "the Act's scheme of liability [that] provides that an operator, although faultless itself, may be held liable for the violative acts of its employees, agents and contractors." *Id.* at 1359-60. See also *Cyprus Indus. Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1119 (9th Cir. 1981) ("Mine owners are strictly liable for the actions of independent contractor violations.").

The judge also properly explained that MSHA has the discretion to cite both the operator and the independent contractor for a violation committed by a contractor. 17 FMSHRC at 159. In *Consolidation Coal Co.*, 11 FMSHRC 1439, 1443 (August 1989), the Commission held that the Secretary did not abuse his discretion by proceeding against both an operator and its independent contractor. The D.C. Circuit in *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 534, 538-39 (D.C. Cir. 1986) (reversing 6 FMSHRC 1871 (August 1984)), similarly determined that the Secretary could cite both the operator and independent contractor for a violation committed by the independent contractor.

Furthermore, in W-P, the Commission held that, "in instances of multiple operators," the Secretary has "wide enforcement discretion" and "may, in general, proceed against either an owner-operator, his contractor, or both." 16 FMSHRC at 1411. The Commission, nevertheless, recognized that "its review of the Secretary's action in citing an operator is appropriate to guard against abuse of discretion."⁵ *Id.* In that case, the Commission determined that the Secretary

⁵ A litigant seeking to establish an agency's abuse of discretion bears a heavy burden. *See, e.g., In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819,

1844 (November 1995), *appeal docketed*, No. 95-1619 (D.C. Cir. Dec. 28, 1995) (appellate court loath to disturb matters that are subject to review for an abuse of discretion). Abuse of discretion may be found "only if there is no evidence to support the decision or if the decision is

based on an improper understanding of the law." *Utah Power & Light Co., Mining Division*, 13 FMSHRC 1617, 1623 n.6 (October 1991) (citing *Bothyo v. Moyer*, 772 F.2d 353, 355 (7th Cir. 1985)).

acted permissibly in citing W-P, even though an independent contractor operated the mine. *Id.* Although it did not run the mine, W-P maintained substantial involvement in the mine's engineering, financial, production, personnel and safety affairs. *Id.* As the operator with overall responsibility of running the mine (17 FMSHRC at 156-57), Mingo Logan's involvement in day-to-day mining activities surpasses that of the operator in *W-P*.

In addition, substantial evidence supports the conclusion that the Secretary met the Guidelines' standard for enforcement action against a production-operator. According to the Guidelines, such action is appropriate "when the production-operator's miners are exposed to the hazard." R. Ex. 3; 45 Fed. Reg. 44,497. As the production-operator at the time of the citation, Mingo Logan had 160 to 170 employees working with 137 Mahon employees at the mine. 17 FMSHRC at 157; Tr. 72, 134, 197. Mahon and Mingo Logan employees were often in the same general vicinity at various locations in the mine. Tr. 60-61, 197. Mingo Logan's employees worked in close enough proximity to Mahon's employees so that an undertrained, inexperienced Mahon miner put employees of both Mahon and Mingo Logan at risk. The record revealed that, although the belt on which Sargent worked was exclusively staffed by Mahon employees, Mingo Logan employees were located in the adjoining entries and James Matthew Murray, the Safety Technician at Mountaineer Mine, testified that if Sargent lit a cigarette or created another hazard, Mingo Logan employees could be exposed to a potentially dangerous condition. Tr. 111, 153-56. These factors, along with the evidence indicating Mingo-Logan's substantial involvement in the mine's day-to-day affairs, lead us to conclude that the Secretary did not abuse his discretion in proceeding against Mingo Logan for this violation.⁶

We note that even if the Secretary had failed to abide by the Guidelines, that fact would not prove fatal to his enforcement decision. In *Cathedral Bluffs*, the D.C. Circuit squarely rejected an argument identical to Mingo Logan's here that the Secretary's decision to cite it was not in accord with the Guidelines and that, if the Secretary intends to abandon its independent contractor policy, he should do so by notice published in the Federal Register. As the court explained, even though published in the Federal Register, the Guidelines expressly warned that it was only a "general policy" that does not alter the "overall compliance responsibility of production-operators" of "assuring compliance with the standards and regulations which apply to work being performed by independent contractors at the mine." 796 F.2d at 538 (citing 45 Fed. Reg. at 44,497). In *D.H. Blattner & Sons, Inc.*, 18 FMSHRC 1580, 1586 (September 1996),

appeal docketed, No. 96-70877 (9th Cir. Oct. 21, 1996), the Commission recently reaffirmed that the Guidelines are non-binding on the Secretary. Consequently, the Secretary need not give notice by publication in the Federal Register in circumstances where he does not follow the Guidelines.

⁶ Because we conclude that the Secretary's citation satisfied the Guidelines, we do not reach Mingo Logan's contention that the judge erred by shifting the burden of proof under them.

Finally, Mingo Logan's assertion that the citation against it fails to promote the protective purposes of the Mine Act is inconsistent with the rationale of the Ninth Circuit in *Cyprus*, 664 F.2d at 1119-1120. There the court stated that holding owner-operators liable for violations committed by independent contractors promotes safety because "the owner is generally in *continuous* control of the *entire* mine" and "is more likely to know the federal safety and health requirements." *Id.* at 1119. The court also posited that "[i]f the Secretary could not cite the owner, the owner could evade responsibility for safety and health requirements by using independent contractors for most of the work." *Id.* We agree with the Secretary that holding a production-operator liable for violations of their independent contractors, provides operators with an incentive to use independent contractors with strong health and safety records. Here, where Mingo Logan is the lessee and production-operator for the entire mine, the same considerations apply.⁷

⁷ In light of our conclusion, we do not address the Secretary's argument that he has unreviewable discretion to cite the operator, its independent-contractor or both. Accordingly, we also reject Mingo Logan's argument that the judge erred by failing to reach this issue. Because it was not a necessary basis of his holding, the judge did not need to address the Secretary's point, just as we do not reach it on review. *INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) ("As a general rule courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach.")

III.

Conclusion

For the foregoing reasons, we affirm the judge's determination that mine operator Mingo Logan was liable for the violation of 30 C.F.R. 48.5(a) committed by one of its independent contractors.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

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