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SOL (MSHA) V. MONTEREY COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

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

CIVIL PENALTY PROCEEDING

Docket No. HOPE 79-323-P
A.C. No. 46-05121-03008F

v.

Wayne Mine

MONTEREY COAL COMPANY,
RESPONDENT

DECISION GRANTING
SECRETARY'S MOTION TO AMEND
AND
DENYING RESPONDENT'S
MOTION TO DISMISS

Before: Judge Fauver

The Secretary has moved (1) to amend his petition for assessment to include as a party respondent Frontier-Kemper Constructors, Inc., an independent contractor, and (2) to amend Exhibit A of his petition for assessment to cite a violation of 30 CFR 77.1900-7 instead of 30 CFR 77-1900-1.

Part (2) of the motion is intended to correct a clerical error, and it conforms to the original 107(a) imminent danger order on which the petition is based. No prejudice will result from allowing this technical amendment. Accordingly, part (2) of the Secretary's motion will be granted.

Respondent moves to dismiss this proceeding on the ground that Respondent is not a proper party respondent. It also opposes the Secretary's motion to amend to include Frontier-Kemper as a respondent.

Frontier-Kemper opposes the Secretary's motion to amend to include it as a respondent, on the ground that the Commission has no jurisdiction to include Frontier-Kemper because it was never issued a citation or order as the basis for this civil penalty proceeding.

DISCUSSION

The 1977 Federal Mine Safety and Health Act, 30 U.S.C. 801, et seq., became effective on March 9, 1978. The Act expands the definition of "operator" beyond the 1969 Mine Act to include "any independent contractor performing services or construction [at a mine]." 30 U.S.C. 802(d). The charges in this case were issued to Monterey in a 107 imminent danger order on May 8, 1978. At that time it was the policy of MSHA to cite owner-operators such as Monterey for violations caused by the acts of independent contractors. This policy was upheld in a number of court and Commission decisions. See, e.g., Bituminous Coal Operators Association v. Secretary of Interior, 547 F. 2d 240 (4th Cir. 1977); Cyprus Industrial Minerals Company v. FMSHRC, 664 F. 2d 1116 (9th Cir. 1981); Old Ben Coal Co., 1 FMSHRC 1480 (1979), aff'd, No. 79-2367, D.C. Cir., January 6, 1981; and U.S. Steel Corporation, 4 FMSHRC 163 (1982).

In explaining the basis for its decision in the Old Ben case, the Commission stated in Phillips Uranium Corporation, 4 FMSHRC 549 (1982):

In our decision in Old-Ben Coal Co., we emphasized that, although an owner-operator can be held responsible without fault for a violation of the Act committed by its contractor, the Secretary's decision to proceed against an owner for such a violation is not insulated from Commission review. 1 FMSHRC at 1483-1484. For the reasons stated in Old Ben we hold that the Commission may review the Secretary's decision in these cases to proceed against Phillips.

The test applied by the Commission in reviewing the Secretary's choice is "whether the Secretary's decision to proceed against an owner for a contractor's violation was made for reasons consistent with the purposes and policies of the 1977 Act." 1 FMSHRC at 1485. Our upholding of the Secretary's choice in Old-Ben, albeit with considerable doubts expressed as to the wisdom thereof, was largely based on the particular chronology of events in that case. The citation in Old Ben was issued only thirty-four days after the 1977 Mine Act had taken effect. 1 FMSHRC 1486 1486 n.7. Recognizing that responsibility for enforcement of the nation's mine safety program had only recently been transferred to the Department of Labor from the Department of Interior, we found that the Secretary's decision to cite Old Ben under an "interim" agency-wide policy to proceed only against owner-operators was, at least at that early stage, a decision not inconsistent with the purposes and policies of the 1977 Act.

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On July 1, 1980, the Secretary published a rule changing his enforcement policy. Under the new policy, independent contractors may be cited for their own violations and in certain cases the "production-operator" may be cited instead of or in addition to the independent contractor. 45 Fed. Reg. 44494-44498.

The facts in the present case place them fundamentally in the same light as the Old Ben case. The order was issued to Monterey less than 2 months after the effective date of the 1977 Mine Act. In line with the Commission's holding in Old-Ben, I find that the Secretary's decision to cite Monterey under an "interim" agency-wide policy to proceed only against owner-operators was, at least at that early date, "a decision not inconsistent with the purposes and policies of the 1977 Act." Accordingly, Monterey's motion to dismiss should be denied.

Considering the long stay of this proceeding pending Monterey's appeals on the issue whether Monterey is a proper party, I find that the Secretary's motion to join the independent contractor as a respondent is not barred by estoppel and is not prejudicial to either Monterey or Frontier-Kemper. Both companies are presumed to have been aware of the specific charges and factual contentions in the 107 order since its issuance in May 1978. First, the order was issued to Monterey, and in its answer to the petition for assessment of civil penalties, Monterey alleged that if there was a violation it was committed by Frontier-Kemper as an independent contractor. Second, the close contractual relationship between Monterey and Frontier-Kemper warrants the presumption that Frontier-Kemper has been on notice, since May 1978, that its contract performance in May 1978 is the subject of the MSHA charges against Monterey.

ORDER

WHEREFORE IT IS ORDERED that:

1. The Secretary's motion to amend is GRANTED and he shall have 15 days from this decision to file the amendments to his petition.
2. Monterey's motion to dismiss is DENIED.

William Fauver
Administrative Law Judge