FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE N.W., SUITE 9500
WASHINGTON, D.C. 20001
(202) 434-9933

August 8, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 2010-509
Petitioner	:	A.C. No. 46-08884-206855
v.	:	
	:	
COAL COUNTRY MINING,	:	Mine No. 58
Respondent	:	

ORDER ON SECRETARY'S MOTION TO STRIKE RESPONDENT'S AFFIRMATIVE DEFENSES

Before the Court is the Secretary's Motion to strike Respondent's affirmative defenses. (Motion). The Motion notes that on October 14 and 15, 2009, the Respondent was an independent contractor employed by Pay Car Mining, Inc and that, during an inspection of Pay Car's No. 58 mine, 19 citations were issued to Pay Car. Subsequently, the Secretary determined that Coal Country was jointly liable for those citations, six of which remain at issue in this docket. Essentially, Coal Country asserts that it was only a labor broker which provided employees to Pay Car but had no supervisory control over those employees. Related to that defense, Respondent asserts that the Secretary cannot cite an independent contractor where it lacks control over the mine and its equipment. Motion at 2, 3.

The Secretary notes that Coal Country was an independent contractor employed Pay Car and that, following an inspection in October 2009, MSHA determined that the Respondent was jointly liable for the alleged violations.[1] Citing *Secretary of Labor v. Bulk Transportation Services*,13 FMSHRC 1354 (1991), it notes that a labor broker is an independent contractor "when their employees' or subcontractors' work is 'essential and closely related to the extraction process and [it] had a sufficient presence at the mine." The Secretary then adds that the Respondent's degree of control over the mine or its employees does not alter the independent contractor status. Motion at 2-3, citing *Joy Technologies, Inc. v. Secretary of Labor,* 99 F.3d 991 (1996) and *Secretary of Labor v. Twentymile Coal Co*., 456 F.3d 151 (2006) ("*Twentymile Coal*"). Nor, the Secretary further notes, does the fact that another operator at the mine may have

[1] The Secretary's Petition merely asserts that the Respondent was an "operator" of the mine; it provides nothing to explain the nature of the Respondent's activities at the mine.

more authority over employees or equipment prevent the agency from looking to multiple entities fitting the definition of an "operator" under the Mine Act. *Id.* at 3, citing *Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Old Ben Coal Co.,* 1 FMSHRC 1480, 1483 (1979).

Though described as a "*Motion* in Opposition to the Secretary's Motion," the Respondent effectively filed an *Opposition* to the Secretary's Motion and it will be referred to as such. ("Opposition"). Respondent maintains that the Secretary has incorrectly characterized its defenses.

The Respondent first asserts an "Impossibility of Compliance" defense. It maintains that it had no control to achieve compliance with the regulations, as it lacked control over the men or machinery. Instead, its responsibilities were limited to "receiv[ing] employee hours according to time sheets forwarded to [it] by Pay Car Mining and to issue a check to the employees. The Respondent did not hire [or] fire any employees . . . the Respondent would [only] pay the employee hours and employment cost . . .." Opposition at 3. Further, Respondent notes that it had no "authority to discipline or sanction employees or [intervene] in the operator's safety or MSHA approved plans." *Id.* In sum, after citing a number of other examples of what it did *not* do at the mine, the Respondent emphasizes that its service to the mine "was bookkeeping which did not require a presence at the mine other than to deliver checks." *Id.* at 4. Consistent with this argument, the Respondent notes that it had no production operator I.D. number issued, a fact which made sense as it was "not involved in the extraction process at all." *Id.* at 5. Respondent adds that Pay Car settled the *same* underlying violations, for which Coal Country also has been cited, in Docket No. WEVA 2010-423.[2]

The Secretary filed a Reply, noting that the thrust of Respondent's defense is that it "was merely a labor broker that performed no services at the No. 58 Mine." Reply at 1. However, it observes that the Respondent registered with MSHA as an independent contractor, receiving a four digit identification number in that status. The Secretary adds that the Respondent must have been providing services at the mine as it applied for legal identity with MSHA under 30 C.F.R. Part 41. That Part provides that an operator includes an independent contractor "performing services" at the mine. *Id.* at 2. It then notes that the Respondent's Articles of Incorporation describe its business as the extraction of coal. The Secretary suggests that Pay Car and the Respondent made their arrangement concerning employees in order to limit *Pay Car's* workers' compensation costs and that by Coal Country's act of placing the employees on its

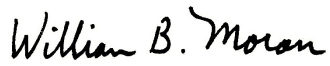
---

[2] Further, along with its contentions, as described above, Respondent maintains there is no unity of ownership between Pay Car and Coal Country. *Id.* at 6, citing *Berwind Natural Resources*, 21 FMSHRC 41 (Dec. 16, 1999). Apart from the unhelpful incorrect cite to *Berwind*, which is at 21 FMSHRC 1284, this case is not about parent and subsidiary corporations and in any event it affirms that the Secretary may consider multiple entities as operators. Parties should take care to correctly cite references to case law both as to the source and the substance of the reference.

payroll, instead of Pay Car's, it obligated Coal Country to comply with the Mine Act. Based on these arguments, the Secretary urges that the Court strike the Respondent's defense that mere labor brokers are precluded from liability under the Mine Act and its defense that the Secretary is precluded from citing an independent contractor that lacks control over the mine and the mine equipment. *Id.* at 3.

Upon consideration, the Court **GRANTS** the Secretary's Motion, but with significant caveats. In the one instance the Court is aware of in which the Commission attempted to draw lines concerning the type of mine operator covered by the Mine Act, the D.C. Circuit held that the Secretary's decisions regarding whether to cite the owner operator, an independent contractor, *or both* parties, are effectively unreviewable. *Twentymile Coal*. That Court observed that the definition of an operator encompasses "any independent contractor performing *services* or construction at [a] mine."[3] *Twentymile Coal* at 152 (emphasis added). The Court of Appeals pointed out that agency action is not reviewable when such action "is committed to agency discretion by law." *Id.* at 156. That is the situation here; the Secretary's decision as to whom to prosecute is entirely within its unreviewable discretion.

The Secretary should not make too much of this ruling as, if the facts turn out to be as the Respondent contends,[4] it will only be a Pyrrhic victory. That is because, while the Respondent fits the Act's definition of an operator, by virtue of providing "services" at the mine, if those services are entirely of an administrative or paperwork nature, as Respondent contends, then its denomination as an 'operator" may be akin to a nameplate or operator in name only and the *penalty* assessed for the alleged violations may, appropriately, be drastically reduced from the proposed assessment amounts.



William B. Moran
Administrative Law Judge

---

[3] Ironically, in *Twentymile Coal* the independent contractor paid the citations; it was the Twentymile that was objecting to liability. However, that twist and distinction from this case do not alter the principles set forth by the District of Columbia Circuit.

[4]Importantly, no facts have been established at this point in time as to the nature of the Respondent's role as an operator.

Distribution

Matthew Ross, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd, 22nd Floor West, Arlington, VA 22209-2247

James F. Bowman, Bowman Industries, LLC, P.O. Box 99, Midway, WV 25878