

CCASE:
MSHA V. CALVIN BLACK ENTERPRISES

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FMSHRC-WDC
AUG 20, 1985

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

v.

Docket Nos. WEST 80-6-M
WEST 80-81-M
WEST 80-82-M

CALVIN BLACK ENTERPRISES

BEFORE: Backley, Acting Chairman; Lastowka and Nelson,
Commissioners

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. (1982). Two questions are presented: first, whether Calvin Black Enterprises ("Black") was properly cited for violations of mandatory safety standards arising from the work activities of an independent contractor; and second, whether Black denied entry at two of its mines to inspectors of the Department of Labor's Mine Safety and Health Administration ("MSHA") in violation of section 103(a) of the Mine Act. 30 U.S.C. § 813(a). 1/ A Commission

1/ Section 103(a) of the Mine Act provides:

Authorized representatives of the Secretary [of Labor] or the Secretary of Health and Human Services shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. In carrying out the requirements of this subsection,

(footnote 1 continued)

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administrative law judge concluded that Black was properly cited

for the violations of the safety standards and that Black unlawfully denied MSHA inspectors entry to its mines. 5 FMSHRC 1440 (August 1983)(ALJ). We granted Black's petition for discretionary review. For the reasons that follow, we affirm the judge's decision. Black is the owner-operator of two underground uranium mines, the Markey and Blue Lizard Mines, located near Blanding, Utah. On May 17, 1979, MSHA Inspector Ronald Beason and an inspector-trainee conducted an inspection of the Markey Mine. During the inspection, the inspectors observed a surveying crew, consisting of a geologist and two helpers, working underground without self-rescue devices. The members of the surveying crew were employees of Sanders Exploration Company ("Sanders") with whom Black had contracted for surveying and mapping services. Sanders had been conducting surveying and mapping services intermittently for one year. This surveying crew had been working in the mine for two to three days prior to the inspection. When the inspectors asked the geologist why he was not wearing a self-rescue device, the geologist replied that he had been issued a device but had left it in the crew's jeep, located approximately 750 feet away. The geologist's helpers stated that they had not been issued self-rescue devices or instructed in their use. Inspector Beason issued a citation charging Black with a violation of 30 C.F.R. § 57.15-30. 2/

Footnote 1 end.

no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health and Human Services may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. ... For the purpose of making any inspection or investigation under this Act, the Secretary, ... with respect to fulfilling his responsibilities under this Act, or any authorized representative of the Secretary ..., shall have a right of entry to, upon, or through any coal or other mine.

2/ Section 57.15-30 provides:

Mandatory -- A 1-hour self-rescue device approved by the Mine Safety and Health Administration shall be made available by the operator to all personnel underground. Each operator shall maintain self-rescue devices in good condition.

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The citation was terminated when the geologist's helpers were issued self-rescue devices and the members of the surveying crew were instructed in their use.

During the same inspection, Inspector Beason issued another citation alleging that the surveying crew's use of a gasoline-powered jeep in the Markey Mine violated 30 C.F.R. § 57.4-52 because the mine did not have adequate escape routes -- i.e., crosscuts every 100 feet. 3/ This citation was terminated when the jeep was moved to the mine's surface.

Subsequently, on July 2, 1979, Inspector Beason and an MSHA special investigator visited Black's Blue Lizard and Markey mines for the purpose of conducting inspections. When the inspectors arrived at the Blue Lizard Mine, they were informed by the mine superintendent and the foreman that the mine's owner, Mr. Calvin Black, had issued instructions that no one was permitted on mine property without Mr. Black's written permission. The mine personnel showed the inspectors a notice to that effect and told the inspectors that they were trespassing. 4/ Inspector Beason then read to Black's representatives relevant portions of section 103(a) of the Mine Act (see n. 1) and informed them of MSHA's right to inspect the mine and of the consequences of their refusal to permit an inspection. The inspectors testified that they believed that the atmosphere was sufficiently hostile that they would have been prevented physically from entering the mine. Inspector Beason issued Black a citation alleging a violation of section 103(a) of the Mine Act. Approximately 20 minutes later, after once more requesting and being denied permission to inspect, Inspector Beason issued a withdrawal order pursuant to section 104(b) of the Mine Act. 30 U.S.C. § 814(b). Black continued mining operations following issuance of the withdrawal order.

3/ Section 57.4-52 provides:

Mandatory. Gasoline shall not be stored underground, but may be used only to power internal combustion engines in nongassy mines that have multiple horizontal or inclined roadways from the surface large enough to accommodate vehicular traffic. ... All roadways and other openings shall be connected with another opening every 100 feet by a passage large enough to accommodate any vehicle in the mine.

4/ The notice read:

NOTICE THIS IS PRIVATE PROPERTY. No person without the specific written authorization from the owner and operator will be permitted on this property. Violators will be considered trespassers and the owner and operator will not

be responsible or their safety.... Dated: May 25, 1979.

The notice was signed by Calvin Black.

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After leaving the Blue Lizard Mine, the inspectors went to Black's Markey Mine where a similar confrontation occurred. As a result, Inspector Beason issued another citation alleging a violation of section 103(a) of the Act, and a subsequent section 104(b) withdrawal order. at the Blue Lizard Mine, Black continued mining operations after issuance of the withdrawal order.

The Secretary subsequently proposed civil penalties for the citations and orders, Calvin Black contested the penalties, and a hearing was held before an administrative law judge of this independent Commission. The judge rejected Black's argument that it should not be held liable for the violations committed by the employees of the independent contractor, Sanders. In reviewing the Secretary of Labor's decision to cite the operator for the independent contractor's violation, the judge applied the relevant principles stated in Phillips Uranium Corp., 4 FMSHRC 549 (April 1982) and Old Ben Coal Co., 1 FMSHRC 1480 (October 1979), aff'd No. 79-2367 (D.C. Cir. January 6, 1981). The judge found that the activities that led to the issuance of the citations involved workers untrained in mine safety and extended over a period of one year. 5 FMSHRC at 1442. He determined that the violations endangered not only Sanders' employees, but also Black's employees. He held that Black had a duty "to monitor and control the independent contractor's workers and their activities as they affected general mine safety considerations." Id. The judge therefore found that Black had been properly cited. Noting that Black had not specifically denied the violations, the judge concluded that violations of sections 57.15-30 and 57.4-52 had occurred, and assessed civil penalties.

In deciding whether the operator had unlawfully denied the MSHA inspectors entry into its mines, the judge relied on the language of section 103(a) of the Mine Act which, he noted, requires that no advance notice of an inspection be given. 5 FMSHRC at 1444. The judge found that the inspectors had identified themselves and informed the operator's representatives of the purpose of their visits, and that the inspectors were not required to "force entry" in order to inspect. Id. In addition he found that, although the inspectors were not expressly prohibited from entering the mines, mine personnel--acting on instructions from the mine owner, Mr. Calvin Black-- "effectively prevented access to the mines by demanding that notice and permission precede entry." Id. In reaching these conclusions the judge credited the inspectors' testimony over that of Mr. Black and the superintendent of the Markey Mine. 5 FMSHRC at 1443-44, 1446-47. The judge concluded that the operator's actions

violated section 103(a) of the Act, affirmed the citations, and assessed civil penalties of \$200 for each violation.

On review, Black does not contest the judge's conclusion that sections 57.15-30 and 57.4-52 were violated, but rather argues that it should not be held liable for these violations occurring in connection with the acts of its independent contractor. Black also contends that substantial evidence does not support the judge's conclusion that it violated section 103(a) of the Mine Act. We disagree.

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The Commission initially considered in *Old Ben*, supra, the question of an owner-operator's liability for violations of the Mine Act arising from the work activities of its independent contractors. There the Commission decided that an owner-operator can be held responsible without fault for a violation committed by its contractor, but also stressed that direct enforcement against contractors is vital to the Mine Act's enforcement scheme. 1 FMSHRC at 1481-83, 1486. We held further that the Secretary's decision to proceed against the operator rather than its contractor is subject to Commission review. 1 FMSHRC at 1481-84. The basic test applied by the Commission in reviewing the Secretary's decision to proceed against an operator is whether the choice "was made for reasons consistent with the purpose and policies of the [Mine] Act." 1 FMSHRC at 1485. 5/ In *Phillips Uranium*, supra, the Commission reaffirmed the principles enunciated in *Old Ben* and indicated that in choosing the entity against whom to proceed, the Secretary should look to such factors as the size and mining experience of the independent contractor, the nature of the task performed by the contractor, which parties contributed to the violation, and the party in the best position to eliminate the hazard and prevent it from recurring. 4 FMSHRC at 552-53. We made clear in *Phillips* that we could not approve a Secretarial decision grounded solely on considerations of "administrative convenience" rather than the protective purposes of the Act. 4 FMSHRC at 553. 6/

Applying these principles to the present case, we affirm the judge's conclusion that Black was properly cited for the violations at issue arising from the work of Sanders' employees. The evidence surrounding the violation of section 57.15-30, the self-rescuer standard, supports the judge's conclusions that Black contributed to the violation and was

5/ The Commission rejected the Secretary's position that Commission review should be limited to the question of whether the Secretary abused his discretion in proceeding against the operator. 1 FMSHRC at 1485. In the present case, the Secretary has again argued that the proper standard of review is abuse of discretion. For the reasons

stated in *Old Ben*, we adhere to the standard articulated in that decision and followed by us since. See *Phillips*, supra, 4 FMSHRC at 551.

6/ In both *Phillips* (4 FMSHRC at 552) and our subsequent decision in *Cathedral Bluffs Shale Oil Co.*, 6 FMSHRC 1871, 1872 (August 1984), petition for review filed, No. 84-1492 (D.C. October 1, 1984), we noted the Secretary's adoption in July 1980 of independent contractor identification regulations (30 C.F.R. Part 45) and accompanying enforcement guidelines governing the issuance of citations to independent contractors. The guidelines (44 Fed. Reg. 44497 (July 1980), quoted in *Cathedral Bluffs*, supra, 6 FMSHRC at 1873) are generally consistent with Commission case law in this area. However, they were adopted after the citations in the instant case were issued and the Secretary did not rely upon them before the judge.

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in the best position to eliminate the hazard and prevent it from recurring. Sanders had only three employees at Black's mine, and they were in the mine intermittently performing a relatively small-scale surveying task. The record reflects that Sanders' employees were unfamiliar with self-rescue devices and their use, suggesting that Sanders--or at least the crew in question--was inexperienced in the fundamental requirements of mine safety. On the other hand, Black had continuing responsibility for compliance with the Mine Act at its mines. Because of the limited nature of the work performed by Sanders' employees in the mine, Black was in a position to insure that the self-rescue devices were issued to and used correctly by Sanders' employees. In sum, we find that the judge properly determined that the Secretary's citation of Black was consistent with the purposes and policies of the Mine Act.

We also affirm the judge's conclusion that Black was properly cited for the violation of section 57.4-52, involving the use of gasoline-powered vehicles in a mine without multiple roadways and sufficient crosscuts. The standard is contained in a section of the regulations entitled "Fire Prevention and Control" In issuing the citation, the inspector was concerned that because of the lack of crosscuts, the parked jeep could obstruct all miners in escaping from a fire or air contamination, including air contamination contributed to by the jeep's gasoline exhaust. 5 FMSHRC at 1441. Moreover, there is no question but that fire prevention is a fundamental continuing responsibility of the production-operator. The operator must always have control over mine premises to maintain a comprehensive fire prevention program in compliance with applicable regulations. Accordingly, we affirm the judge's conclusion that Black was the properly cited party.

Concerning the alleged violation of section 103(a) of the Mine

Act, Black argues that its employees were not instructed to deny inspectors access to its mines. Black also contends that the employees at both mines told the inspectors that they were permitted to inspect, and that it was the inspectors who declined to inspect the mines. We reject these arguments.

The law on denial of entry under the mandatory inspection provisions of section 103(a) of the Act is clear. Section 103(a) expressly requires that no advance notice be given an operator prior to an inspection and gives authorized representatives of the Secretary an explicit right of entry to all mines for the purpose of performing inspections authorized by the Act. The Supreme Court has upheld the constitutionality of these provisions. *Donovan v. Dewey*, 452 U.S. 594, 598-608 (1981). Consistent with that decision, we have held that an operator's failure to permit such inspections constitutes a violation of section 103(a). *Waukesha Lime & Stone Co., Inc.*, 3 FMSHRC 1702, 1703-04 (July 1981); *United States Steel Corp.*, 6 FMSHRC 1423, 1430-31 (June 1984).

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Substantial evidence supports the judge's finding that Black's actions amounted to a denial of entry. Upon arrival at the mines, the inspectors properly identified themselves and informed management personnel of the purpose of their presence and of the inspection requirements of the Act. The judge credited the inspectors' testimony that the mine personnel, stating that they were acting upon instructions from Black's owner, informed the inspectors that they were trespassing and needed to obtain Black's written permission before inspecting. The judge's credibility resolutions, on which he based his findings, are reasonable and are supported by the evidence. We agree with the judge that management personnel thus effectively prevented access to the mines whether or not they also physically prevented the inspectors from conducting their inspections. MSHA inspectors are not required to force entry or to subject themselves to possible confrontation or physical harm in order to inspect. Thus, we affirm the judge's conclusion that Black violated section 103(a).

Accordingly, on the bases discussed above, the judge's decision is affirmed. 7/

7/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves a panel of three members to exercise the powers of the Commission.

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Distribution

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