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Mixed Signals from MSHA on the Status of Staffing Agencies Under the Mine Act

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The Fourth Circuit recently upheld a citation issued to a coal mine operator for not reporting an occupational injury even though the injury had already been reported by the injured miner's employer (*Dickenson-Russell Coal Co. v. Secretary of Labor*, No. 13-1374 (4th Cir. March 27, 2014)). Given that the injured miner was a temporary laborer, and his legal employer the staffing agency that contracted to provide temporary labor to the mine, the outcome was not surprising – for several years now, the Mine Safety and Health Administration (MSHA) has been pretty clear that, for accident- and injury-reporting purposes, production operators are responsible for reporting the reportable events involving temporary laborers (or contract miners). The premise for this reporting policy is that providers of temporary labor are not like independent contractors: they do not control or supervise mines or mine personnel; they do not perform mining work or services. Rather, staffing agencies merely provide the labor that, in turn, works under the supervision and control of the production operator (or some other independent contractor itself doing actual work at the mine).

There are troubling aspects of the Fourth Circuit's decision, however. First, by its terms, the decision commands every operator that has some level of responsibility over the site of the accident or injury to report the accident or injury even if another responsible operator has already done so. Second, the decision perpetuates the notion that staffing agencies are themselves operators under the Mine Act. This article addresses both points and urges the agency to do the easy and responsible thing to clear up the confusion that it has sown: publish a program policy letter clarifying that staffing agencies are not operators as defined in Section 3(d) of the Mine Act.

The Statute, Regulations, and Policy

Section 3(d) of the Mine Act defines "operator" to include "any independent contractor performing services or construction at" a mine. This definition was included in the Act to make clear what courts had already held was true under the 1969 Coal Act: if you are an entity other than the production operator and in charge of some aspect of work at a mine, you are an operator. The 1969 Act did not say this expressly, but the courts determined it was implicit. With the 1977 Act, Congress added the independent contractor language to remove the ambiguity.

By regulation, operators are required to report within 10 days of the occurrence or diagnosis any accident or occupational injury or illness on MSHA Form 7000-1. The relevant language says: "*Each* operator shall report *each* accident, occupational injury, or occupational illness at the mine" (30 C.F.R. 50.20(a)). Inasmuch as independent contractors are operators, the reporting obligation extends to them. The question inevitably arises whether the reporting obligation falls on the production operator, the independent contractor, or both, when a reportable event occurs at an area over which both operators have some measure of control. Common sense says MSHA only needs to be told once – regardless of who reports, MSHA will have the information necessary for further investigation of its own and for its legitimate statistic-keeping purposes (to the extent the information is erroneous, MSHA is of course authorized to issue a citation to send a message of deterrence). And, to its credit, MSHA states in its Program Policy Manual that, "in order to assure accurate reporting and recordkeeping and to avoid duplication, it is important that production-operators and their independent contractors carefully coordinate their Part 50 [*i.e.*, reporting] responsibilities." So far, so good: one injury, one report.

Staffing agencies are another story, however. In a 2009 Program Policy Letter (the Part 50 PPL), P09-V-02, MSHA formally adopted the policy position that production operators are responsible for reporting the accidents and occupational injuries and illnesses involving temporary miners. MSHA's view was that, "in contrast to a traditional contractor where the contractor is performing a specific task and the contractor maintains supervisory control over its employees," the staffing agency does no such thing: it is not at the mine; it is not responsible for the task and does not supervise its employees. Rather, it is the production operator that supervisors temporary miners no differently than it does the miners on its own payroll, it is the production operator that is responsible for maintaining a safe workplace, and it is therefore the production operator that should be responsible for reporting (and being held accountable for) any accidents or workplace injuries or illnesses suffered by the temporary miner.

MSHA's Litigating Position Sows Confusion

The *Dickenson-Russell* case was more or less a challenge to MSHA's Part 50 reporting policy as it applies to temporary laborers and, as noted, the outcome in MSHA's favor is neither surprising nor disturbing. There is a logic to MSHA's Part 50 reporting policy and, after several years of it being in effect, most production operators by now understand their reporting responsibility in this regard.

Unfortunately, MSHA has been so far unwilling to extend the logic of its Part 50 PPL (the latest reissuance of which is P13-V-02) for enforcement purposes, *i.e.*, it has failed to renounce the notion that staffing agencies can be "operators" for purposes of Mine Act enforcement. Its litigating positions in *Dickenson-Russell* and a 2012 case, *David Stanley Consultants, LLC v. Secretary of Labor*, 34 FMSHRC 2947 (Nov. 2012) (ALJ), illustrate the unnatural dichotomy between MSHA's Part 50 reporting policy and its enforcement policy as they relate to staffing agencies, and in turn foster ongoing confusion about the status of staffing agencies under the Mine Act.

To be fair, the production operator in *Dickenson-Russell* pressed the argument that the staffing agency that supplied the injured miner was an "operator" under the Mine Act. This was an understandable litigating position for it to take and, until the Part 50 PPL was issued, it would have been the proper position to take, as MSHA had previously interpreted the definition of mine operator to include staffing agencies, which frequently have their own MSHA- issued contractor identification numbers. Thus, as operators, staffing agencies, prior to the Part 50 PPL, had an apparent duty to report the mine-related injuries of their employees. But the Part 50 PPL changed that.

The right thing for MSHA to do in *Dickenson-Russell* would have been to adopt the position that staffing agencies are *not*, under any circumstances, "operators" because they themselves neither perform services at a mine nor supervise or control the work being performed at the mine. That position would have carried the day in litigation and been completely consistent with the Part 50 reporting policy reflected in its Part 50 PPL. Instead, MSHA crafted a novel litigating position that distinguished between operators for Mine Act enforcement purposes and operators for Part 50 reporting purposes. Staffing agencies could fall into the former category but be excluded by regulation from the latter category, so the argument went. And that is what the administrative law judge held in the first instance. In his 2013 decision, the ALJ held that irrespective of the staffing agency's "operator" status under Mine Act Section 3(d), it was not an operator for Part 50 reporting purposes (35 FMSHRC 123 (Jan. 2013) (ALJ)). According to the ALJ, the staffing agency's own 7000-1 was "gratuitous" and thus did nothing to obviate the production operator's responsibility to file its own report.

On appeal, that novel distinction (on which the ALJ relied) was apparently abandoned. Indeed, the court of appeals noted that MSHA posited that there were "plausible reasons for the [Part 50] regulation to require potentially overlapping or duplicative accident and injury reports." For its part, the court of appeals assumed for the sake of argument that the staffing agency *was* an operator with reporting obligations of its own and then adopted MSHA's position on appeal that duplicative reporting was a good thing inasmuch as it gives greater assurance that a reportable event will be reported (for example, in the event one of the operators forgets). After all, the court said, the regulation itself says "*each* operator shall report *each*" reportable event. "Each" means "every" such that "where there are two or more operators who are subject individually to the reporting requirement ... *every one* of them must report *every* qualifying accident or injury." (Emphasis by the court.)

In other words, what started out for MSHA as a case calling for nothing more than a simple application of its Part 50 reporting policy – a policy that requires production operators to file the 7000-1 for a reportable event concerning a temporary miner – ended up generating a decision that, by its terms, now requires every operator at a mine to report every accident or injury for which MSHA might find it had some level of responsibility." So much for MSHA's admonition to production operators and independent contractors in its Program Policy Manual to coordinate their reporting obligations to avoid duplication. This author doubts very much that the Fourth Circuit's expansive proclamation is what MSHA intended at the outset of the case, but by failing to do the right thing – to take the simple and disciplined position from the start of the litigation that staffing agencies are not operators under the Mine Act – the agency has helped create a potential compliance nightmare that, at the very least, deserves an additional program policy letter (even if at odds with MSHA's litigating position in the Fourth Circuit) to set MSHA's Part 50 reporting and enforcement policy straight.

MSHA's position in *Dickenson-Russell* reflects an unwillingness on the part of the agency to draw bright lines and acknowledge that not all entities that do business with the mining industry are subject to its enforcement reach. The *David Stanley* case highlights the point. The staffing agency in that case had the misfortune of having supplied temporary miners to the Upper Big Branch Mine (UBB) as of the time of the April 2010 explosion. Seemingly looking for anyone and everyone on which it could place the blame for that tragedy, MSHA issued six citations to the staffing agency, two of which were deemed contributory. Civil lawsuits followed. The company was shocked. That enforcement action was, in this author's opinion, unfounded. (Full disclosure: Crowell & Moring represented the staffing company in the Commission litigation.)

The staffing company defended on the grounds that, as a provider of only temporary labor to UBB, it was not an operator and could not be cited. In support, it relied on MSHA's Part 50 reporting policy and argued that for the same reasons MSHA does not treat staffing agencies as operators for Part 50 reporting purposes they should not be treated as operators for

enforcement purposes – regardless of the issue, staffing agencies do not, by their very nature, supervise or control mine operations or work or "perform services" at a mine within the meaning of the Mine Act's definition of "operator." Indeed, it was the common law notion of an independent contractor controlling its own worksite and supervising its own employees at that worksite that led courts to treat independent contractors as "operators" in their own right under 1969 Act, and in turn led Congress to codify that approach in the 1977 Act. MSHA, however, opposed that position in *David Stanley* on the utterly unprincipled ground that the logic of the Part 50 PPL was not intended to apply outside of the Part 50 reporting context.

Given the agency's litigating position, the ALJ was left to effectively endorse the agency's self-serving distinction between the meaning of "operator" for enforcement purposes and for Part 50 reporting purposes (as the ALJ in *Dickenson-Russell* would later do). To her credit, though, the ALJ vacated the serious citations for the obvious reason that the staffing agency lacked control over the mine operations involving its employees which meant, under Commission precedent, it could not be held liable, notwithstanding its "operator" status.

A More Sound Position

MSHA should clear the brush as a matter of sound policy, rationality, and consistency in interpretation. It should adopt the policy that staffing agencies are not operators under Mine Act Section 3(d) because they do not supervise or control mine operations or the work of mining and, as such, do not perform services at a mine within the meaning of the Mine Act.

As recognized by the ALJ in *David Stanley*, the Commission has held that if an operator does not exercise control or supervision over a worksite, it cannot be held liable under the Mine Act. And MSHA's Part 50 reporting policy recognizes that staffing agencies do not by their very nature do this – they do not exercise supervision over the mine-related work of their employees or the mines to which their employees are detailed. Why is it, then, that in cases like *Dickenson-Russell* the agency does not just take the position that the staffing agency is not an operator, and therefore could not have possibly obviated the production operator's (or an independent contractor's) obligation to file the 7000-1 report by its own reporting of a Part 50 event?

Is it because, as suggested by the *David Stanley* case, MSHA loathes the idea of foreclosing any conceivable enforcement angle it might gin up in the event disaster strikes, as it obviously did at UBB? If that is the motivation, that is unfortunate. (To be fair, it should be noted that the staffing agency in *David Stanley* had, at other times, provided actual mining-related services to UBB (and other mines) that made it – for those *other* purposes and times – an operator. But those other services had nothing to do with the events of the UBB disaster and anyone taking an objective look at the facts would have recognized that.)

In reality, MSHA would give up nothing of substance (and would save itself the administrative frustration of having to process duplicative reports) if it adopted the policy advanced here. That is so because, as was true of the staffing agency in *David Stanley* (albeit in unrelated and immaterial circumstances), if such an entity were to perform an actual mining-related service at a mine, then it would no longer be acting merely as a staffing agency; it would be, in relation to that work, an independent contractor performing services at a mine, and thus an operator. Facts, as well as sound and consistent policies, should still matter, even to MSHA. By MSHA adopting the policy that staffing agencies are not operators, it would do much to clarify the confusion that gives rise to, and in due course is perpetuated by, cases such as *Dickenson-Russell* and *David Stanley*.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Daniel W. Wolff
Partner – Washington, D.C.
Phone: +1.202.624.2621
Email: dwolff@crowell.com