Twentymile: The Latest Word on Liability for Independent Contractor Violations



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The Federal Mine Safety and Health Act of 1977 (Mine Act) covers all U.S. stone, sand and gravel mines and makes their "operators" responsible for compliance with mandatory safety and health standards. The Mine Act expressly includes independent contractors within the definition of "operator." But nearly 30 years after the Mine Act's passage, the industry and the Mine Safety and Health Administration (MSHA) still cannot agree on whether a mine owner-operator can also be held liable for violations committed by its independent contractors.

In *Twentymile Coal Company*, decided on March 18, the Federal Mine Safety and Health Review Commission issued a decision that may finally end the debate—with an industry win. While the commission's decision is presently binding, MSHA does not agree with it, and on April 15 petitioned the U.S. Court of Appeals for the District of Columbia Circuit for review of the decision. In this article, we discuss the *Twentymile* decision, the issues we anticipate will be raised on appeal and actions owner-operators may take to avoid liability for contractor violations.

The *Twentymile* Case

Twentymile, a coal company in Colorado, hired Precision Excavating to remove clay from its coal refuse pile, a job for which Precision was to operate and maintain its own equipment. Precision was an experienced independent contractor, familiar with the Mine Act and MSHA's safety standards, and was hired for its special expertise in refuse removal. The contract between Twentymile and Precision expressly required Precision to comply with all MSHA safety and health standards. Although the refuse pile was on Twentymile's mine property, Twentymile did not supervise Precision's operations.

About a week after Precision began its work, an MSHA inspector issued six citations to Precision for alleged safety violations involving the condition of several of its vehicles. When the inspector learned that Twentymile had not examined Precision's equipment when it was first brought onto the mine property, he issued six citations to Twentymile based on the same conditions. He told Twentymile that he was doing so because he perceived there was a problem with contractor violations at the mine and that citing Twentymile would focus Twentymile's attention on that "problem." He also stated that he wanted to teach Twentymile a lesson about failing to inspect its contractors' equipment.

Twentymile contested the citations and took its case to trial. After an administrative law judge agreed with MSHA, Twentymile appealed to the commission.

The Commission's Decision in *Twentymile*

In ruling on the issues, the commission addressed three questions:

- Is MSHA ever permitted under the Mine Act to cite the owner-operator where an independent contractor committed a safety violation?
- If MSHA has discretion to cite an owner-operator, is its decision to do so reviewable by the commission?
- If MSHA's decision to cite an owner-operator is reviewable, what criteria must be used to evaluate whether MSHA exercised its discretion properly?

The commission made short work of the first two questions, saying that

We expect MSHA to urge the court of appeals to tell the commission that it does not have authority to review MSHA's enforcement decisions, and that if a violation occurs on mine property, the owner-operator is liable no matter who committed it.

MSHA may cite an owner-operator, but if it chooses to do so, its decision can be contested and is reviewable by the commission "to guard against an abuse of discretion."

Regarding the third question—how to evaluate MSHA's discretion to cite Twentymile (and owner-operators generally)—the commission looked to case precedent and identified the following five factors that are to be analyzed in each case: which party is in the best position to affect safety; what is the owner-operator's day-to-day involvement in the work being done by the independent contractor; what is the nature of the task for which the independent contractor was hired; whether the owner-operator contributed to the violation; and whether any of the four factors listed in the Preamble to 30 C.F.R. Part 45 (Independent Contractors) applied to the owner-operator. Those factors are whether the owner-operator contributed to the violation by act or omission, contributed by act or omission to the continued existence of the violation, exposed its own miners to the hazardous condition or controlled the condition requiring abatement.

Applying these factors, the commission concluded that MSHA was not justified in citing Twentymile for Precision's violations. Precision was in the best position to catch and eliminate any potential safety hazards on its equipment because it owned and maintained its own equipment and carried out its operations without oversight from Twentymile, and the contract required it to comply with all safety and health standards. It was also clear that Twentymile was not involved in Precision's day-to-day operations—the refuse pile was a "discrete area of the mine site" over which Precision maintained full control.

As for MSHA's criteria, the commission held that unless the threshold for meeting a criterion "extends beyond the minimal level that would be found with virtually every independent contractor violation… the four criteria would be meaningless." Therefore, absent some duty to act (which did not exist), Twentymile's mere failure to prevent Precision's violations was not enough to satisfy MSHA's "contributed-by-omission" criteria. MSHA's third criterion was not met because no Twentymile employee was exposed to any of the cited hazards. Regarding the fourth criterion, MSHA argued that Twentymile, as the owner, was ultimately in "control" of the Precision work site and had retained the right to inspect Precision's equipment and to order it

off the work site. The commission rejected this, stating:

If MSHA were found to have met the control criterion… based on the contractual right to remove [a contractor's] violative equipment, then virtually every production operator could automatically be found liable for its independent contractor's violations, thereby rendering the four-criteria test essentially meaningless.

Potential Issues for Appeal

The *Twentymile* decision provides a measure of certainty about when owner-operators may be held liable for independent contractor violations, but MSHA apparently thinks the only "certainty" should be its authority to cite owner-operators for independent contractor violations whenever it wants. That is the principal reason MSHA has appealed the decision to the D.C. Circuit. We expect MSHA to urge the court of appeals to tell the commission that it does not have authority to review MSHA's enforcement decisions, and that if a violation occurs on mine property, the owner-operator is liable no matter who committed it.

If MSHA prevails, it would be a tremendous victory for the agency because the only issues that owner-operators could then contest for a citation issued for a violation caused by its independent contractors would be: (1) whether the violation occurred; and (2) the application of the six statutory factors used to assess penalties. Owner-operators could not raise an abuse of discretion argument (which is very fact-sensitive and burdensome to litigate).

A Suggested Contractor Checklist for Owner-operators

Owner-operators can take several steps at the outset of independent contractor relationships that should put them within the "safe harbor" mapped by the *Twentymile* decision. While a universal list would be impossible to craft, every independent contractor relationship should begin with a written agreement that requires the independent contractor to:

- obtain its own MSHA I.D. number;
- comply with all federal and state safety and health standards covering the work to be done, and inspect its own equipment for compliance with those standards;
- designate by name the employee who will be responsible for the independent contractor's worksite safety;
- make the independent contractor responsible for safety training of its employees and for providing them with required safety equipment;
- prepare and submit to MSHA its own operations plans (where such plans are required);
- indemnify the owner-operator for civil penalties, costs, and attorney fees in the event the owner-operator is held liable for or is required to defend against violations caused solely by the contractor.

Once an independent contractor is at the owner-operator's mine, the owner-operator should consider taking the following steps to protect employees of both parties and to emphasize the contractor's independence:

- provide and document mine-specific hazard training for all of the independent contractor's employees to protect them from mine hazards (but not hazards stemming from the independent contractor's work);
- where possible, segregate the independent contractor's worksite from the rest of the mine, using fences, separate access gates and signs;
- prohibit miners from going to or through the independent contractor's worksite, except when specifically authorized;
- do not inspect or supervise the independent contractor's worksite, except as necessary to check project progress and compliance with contract specifications;
- check only the independent contractor's equipment that might endanger the owner-operator's miners;
- do not lend employees, tools, equipment or money to the independent contractor, and do not provide services or facilities to the contractor;
- do not accompany MSHA or state inspectors on inspections of the independent contractor's worksite, and do not attend any MSHA closeout conference with the independent contractor;
- do not ask MSHA inspectors for copies of citations or orders issued to the independent contractor (If you want copies, ask the independent contractor to give them to you.)

The safest policy, we believe, is to maintain as much "separateness" as possible—using both the contract and onsite practices to do so. Following the *Twentymile* "checklist" should keep most owner-operators free of liability for independent contractor violations. Of course, it remains to be seen whether the D.C. Circuit Court will reverse the commission's decision and unsettle the law in this area once more.

The *Twentymile* case may finally bring to a close more than 30 years of disputes about who is liable for violations committed by independent contractors at mines. If the commission's decision stands, there will be standards for determining whether an owner-operator is liable for its independent contractors' violations. If the D.C. Circuit Court reverses the *Twentymile* decision and the court says MSHA has unreviewable discretion to cite (or not cite) an owner-operator along with its independent contractors, the issue also may be put to rest (albeit in MSHA's favor.) But we use the word "may" because the D.C. Circuit Court, while highly respected, is only one of 12 U.S. Circuit Courts of Appeals. A different circuit court, in another case, may not agree. If two circuits disagree, the owner-operator liability for contractor violations issue may ultimately wind its way to the Supreme Court. Or, Congress could amend the law. Stay tuned—and keep your contractors independent. ■

Editor's note: The comments in this article do not constitute legal advice or opinion.