



**MINE ESCAPES SPECIAL SCRUTINY DESPITE POOR SAFETY RECORD**

Two of 12 recent fatalities in the Coal sector occurred at M-Class Mining, LLC’s MC#1 underground mine in Illinois, yet the mine has not been targeted for special enforcement emphasis by MSHA.

William-Daniel Payne, 25, was killed May 14 after becoming pinned between a roof bolting machine and the coal rib, and 36-year-old Dallas Travelstead died November 4 when he was struck by a large rock.

MSHA’s impact inspection program targets mines that “merit increased agency attention and enforcement due to poor compliance

history or particular compliance concerns.” MSHA has listed nine criteria that could land a mine into this special emphasis program, subjecting it to one or more intense, monthly wall-to-wall inspections. Any one of the criteria could spur an inspection; meeting two or more presumably increases the likelihood.

MC#1 satisfies at least three of the criteria: fatalities; a poor compliance record, the latter by virtue of 171 alleged significant and substantial (S&S) violations issued over the 12-month period ending April 30; and a high injury rate. S&S enforcement actions are taken when an inspector believes an alleged violation is reasonably likely to lead to serious injury. With 18 non-fatal days lost (NFDL) injuries last year, including four to contractors, the mine exceeded the national NFDL rate.

MC#1 has never had an impact inspection, even after two other fatalities occurred previously at the 306-person retreat mining operation. A contract worker fell 38 feet to his death through a hole in a work platform in September 2009. Less than eight months later, another contract worker was fatally injured in a pinning accident on the surface. MSHA’s impact inspection program began the same month as MC#1’s second fatality.

MSHA also singles out the worst offenders through its pattern of violation (POV) program. Based on its fatality and S&S records, MC#1 is flirting with pattern designation status. An

**The Inside Scoop**

**Industry, Government Lawyers Exchange Views at Forum . . . . . 2**

*Cases, Issues Aired at Law Institute*

**Opinion: MSHA Sets Stage for UBB Rerun . . . . . 5**

*Familiar Response to Fatality Trend*

**Legal Briefs . . . . . 7**

*Noteworthy Civil Penalty Cases*

**Reorganization of Small Mine Office Underway . . . . . 10**

*Merger Set to Be Done by Late June*

**Guest Column: MSHA Sows Confusion Over Staffing Agency Status . . . . . 11**

*Part 50 Reporting at Issue*

## Guest Article

# MSHA SOWS CONFUSION OVER STAFFING AGENCY STATUS

By Dan Wolff, Esq.

Although not surprising, the Fourth Circuit's recent decision to uphold a citation issued to a coal mine operator for not reporting an occupational injury even though it had already been reported by the injured worker's employer is troubling. (*Dickenson-Russell Coal Co. v. Secretary of Labor*, No. 13-1374 (4<sup>th</sup> Cir. March 27, 2014)).

The injured miner was a temporary laborer, and his legal employer was the staffing agency that contracted to provide temporary labor to the mine. Thus, the decision was no surprise because, for several years, MSHA has made clear that, for accident- and injury-reporting purposes, it holds production operators responsible for notifying it of reportable events involving temporary laborers or contract miners.

The agency's premise is that providers of temporary labor are not independent contractors because they do not control or supervise mines or mine personnel nor perform mining work or services. Rather, staffing agencies merely provide labor which, in turn, works under the supervision and control of the production operator or under some other independent contractor doing work at the mine.

The case is troubling, though, for two reasons. First, by its terms, the decision commands every operator with some level of responsibility over the site of the accident or injury to report, even if another responsible operator has already done so. Second, it perpetuates the notion staffing agencies are themselves operators under the Mine Act. The result is confusion, which MSHA could easily clear up through a policy directive.

### **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. The definition was included to make clear what courts had already held 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.

The relevant language of MSHA's reporting regulation (30 C.F.R. 50.20(a)) states: “*Each* operator shall report *each* accident, occupational injury, or occupational illness at the mine” (our emphasis). 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 in an area over which both have some measure of control.

Common sense says MSHA only needs to be told once. For, regardless of who reports, MSHA will have what it needs for its own investigation and for its legitimate statistic-keeping purposes. To MSHA's credit, its Program Policy Manual (PPM) states 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, since reissued as P13-V-02, the agency formally took the position that

production operators are responsible for reporting accidents, occupational injuries, and occupational illnesses involving temporary miners. In so doing, MSHA drew a distinction between the “traditional contractor” and the staffing agency. The contractor, MSHA said, performs “a specific task and the contractor maintains supervisory control over its employees.” But the staffing agency does no such thing: it is not at the mine, is not responsible for the task, and does not supervise its employees. Rather, the production operator supervises temporary miners no differently than it does miners on its own payroll. Moreover, the production operator is responsible for a safe workplace. Therefore, the production operator 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

*Dickenson-Russell* 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 not surprising. There is logic to the policy, and, after several years of being in effect, most production operators understand their reporting responsibility.

Unfortunately, MSHA has been unwilling to extend the logic to enforcement, i.e., it has failed to renounce the idea that staffing agencies can be “operators” for purposes of Mine Act enforcement. Its litigating positions in *Dickenson-Russell* and in a 2012 case, *David Stanley Consultants, LLC v. Secretary of Labor*, 34 FMSHRC 2947 (Nov. 2012) (ALJ), illustrate the unnatural dichotomy between the agency’s reporting and enforcement policies 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 the staffing agency that supplied the injured miner was an “operator” under the Mine Act. Its

litigating position was understandable and, until the Part 50 PPL came along, it would have been proper, too. That is because 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 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* “operators” under any circumstances because they neither perform services at a mine nor supervise or control work performed there. That position would have carried the day in litigation and been completely consistent with its Part 50 PPL.

\*

Instead, MSHA got cute, crafting 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, so the argument went. And that is exactly what the administrative law judge (ALJ) held. In his 2013 decision, the ALJ ruled that, irrespective of the “operator” status of the staffing agency under Mine Act Section 3(d), it was not an operator for Part 50 reporting purposes (35 FMSHRC 123 (Jan. 2013)). 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, the ALJ said.

On appeal, that novel distinction (on which the ALJ relied) was apparently abandoned. The court of appeals noted that MSHA posited there were “plausible reasons for the [Part 50] regulation to require potentially overlapping or duplicative accident and injury reports.” So much for MSHA’s consistency in its litigating position. For its part, the court of appeals

assumed for the sake of argument the staffing agency *was* an operator with reporting obligations of its own. Then, it adopted MSHA's position on appeal that duplicative reporting was a good thing inasmuch as it gives greater assurance a reportable event will be reported, e.g., in the event one of the operators forgets. After all, the court said, the regulation itself says "*each* operator shall report *each*" reportable event, meaning 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).

Thus, what began 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 now requires every operator at a mine to report every accident or injury for which MSHA might find it had some level of responsibility. Ignored is MSHA's own admonition in its PPM to production operators and independent contractors to coordinate reporting to avoid duplication.

We doubt very much 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 state that staffing agencies are not operators under the Mine Act – MSHA has helped create a potential compliance nightmare. At the very least, this matter 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 its unwillingness to draw bright lines and acknowledge that not all entities doing business with the mining industry are subject to its enforcement reach. *David Stanley* highlights the point. There, the staffing organization had

the misfortune of having supplied temporary miners to the Upper Big Branch Mine (UBB) at the time of the April 2010 explosion. Looking around for anyone on whom to place blame, MSHA issued six citations to the staffing agency, two deemed contributory. Civil lawsuits followed. The company was shocked. That enforcement action was, to us, truly outrageous (full disclosure: Crowell & Moring represented the staffing agency 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, the company contended.

Indeed, it was the common law notion of an independent contractor controlling its own worksite and supervising its own employees at that worksite which led courts to treat independent contractors as "operators" in their own right under 1969 Act. Congress codified that approach in the 1977 Act. MSHA, however, opposed that position in *David Stanley* based on its contention that the logic of the Part 50 PPL was not intended to apply outside of the Part 50 reporting context.

In light of the agency's utterly unprincipled 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. This meant, under precedent established by the Federal Mine Safety and Health Review Commission, 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 exercise these functions either. Why is it, then, that in cases like *Dickenson-Russell* the agency does not just take the position 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 *David Stanley*, 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 this is its motivation, that is unfortunate. To be fair, we note parenthetically that the staffing agency had at other times provided mining-related services to UBB and other mines, a relationship that for those *other* purposes and times would have made it an operator. But that was not the case at UBB at the time of the disaster.

In reality, MSHA would give up nothing of substance; indeed, it would save itself the administrative frustration of having to process duplicative reports, if it adopted the policy advanced here. 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 like *Dickenson-Russell* and *David Stanley*.

Dan Wolff is a partner and litigator in Crowell & Moring’s Environment and Natural Resources Group in Washington, D.C. He counsels clients on a host of federal regulatory programs, including in particular the Federal Mine Safety and Health Act of 1977. Dan regularly represents his mining clients in federal district and appellate courts around the country, and in administrative hearings before the Federal Mine Safety and Health Review Commission and its administrative law judges.

### FUNNY STUFF

Written decisions from judges of the Federal Mine Safety and Health Review Commission sometimes contain unusual language. Here are three examples (our comments appear in italics):

- “At hearing, Respondent would present evidence that the Respondent does not allow this cable to spend a great duration of time on the mine floor.” (*Respondent has it up and earning its keep most of the time.*)
- The operator contends that this citation should be unlikely.” (*Unfortunately, it’s not.*)
- “In support of this, no visible dusk was present to indicate that the sprays were not working.” (*Seeing them operate in broad daylight presents a different picture entirely.*)