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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

OLD DOMINION POWER COMPANY, CONTESTANT	Contest of Citation
v.	Docket No. VA 81-40-R Citation No. 688762-1
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	January 21, 1981 Westmoreland Coal Company's Central Machine Shop
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. VA 81-65 (FN.1) Assessment Control No. 44-03108-03001 F KG2
v.	
OLD DOMINION POWER COMPANY, RESPONDENT	Westmoreland Coal Company's Central Machine Shop

DECISION

Appearances: William D. Lambert, Esq., Ogden, Robertson & Marshall, Louisville, Kentucky, for Old Dominion Power Company
Leo J. McGinn, Esq., Office of the Solicitor, U.S. Department of Labor, for Secretary of Labor.

Before: Administrative Law Judge Steffey

Pursuant to an order issued March 20, 1981, a hearing in the above-entitled proceeding was held on April 22, 1981, in Wise, Virginia, under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(d).

At the conclusion of the hearing, counsel for the parties indicated that they would like to file posthearing briefs. Counsel for Old Dominion Power Company (hereinafter referred to as OD) filed his brief on July 17, 1981, and counsel for the Secretary of Labor and the Mine Safety and Health Administration (hereinafter referred to as MSHA) filed his brief on July 15, 1981.(FOOTNOTE.2)

Issues

Although the parties' briefs discuss identical issues, I have elected to use the phraseology employed in OD's brief to state the issues because all of the issues are hereinafter decided adversely to OD. If OD files a petition for discretionary review, the Commission's determinations will be facilitated by my having arranged my decision so as to track the issues raised in OD's brief. Those issues are listed below:

(1) Is OD an "operator" or "independent contractor" within the scope of the Act?

(2) Are MSHA's regulations defining "operators" arbitrary and capricious and unconstitutional delegations of legislative authority?

(3) Is OSHA responsible for [investigating] the conduct cited by MSHA?

(4) Is a 1-year delay in issuing a citation "reasonable promptness" as required by the Act?

(5) Is any civil penalty justified?

Findings of Fact

My decision will be based on the findings of fact set forth below. My findings include all of the principal facts on which the parties rely in support of their arguments.

1. Old Dominion Power Company is a subsidiary of Kentucky Utilities Company and purchases from its parent company all of the electricity it sells to its customers (Tr. 39). OD does not own or operate any generating facilities. OD's service area is located entirely in Southwestern Virginia and is comprised of the counties of Lee, Wise, Scott, Dickenson, and Russell. OD employs about 80 persons, including service men, meter readers, substation technicians, office clerks, engineers, customer service representatives, and janitors (Tr. 17). Its sales of electricity amount to $24,000,000 on an annual basis (Tr. 23). OD does not own mining properties and is not involved in operating coal mines or any other type of mine (Tr. 18).

2. OD is regulated by the Virginia State Corporation Commission and the rate schedules and contracts under which it sells electric power are on file with that Commission (Tr. 17). OD owns poles, towers, fixtures, wire, conductors, and other facilities used in the transmission, distribution and sale of electrical energy and its facilities are subject to inspection by the Occupational Safety and Health Administration (Tr. 12; 18; 71-72).

3. OD does not normally perform construction work for which it makes a special charge. During the last 10 years, for example, in only four instances did it perform work which it

agrees would permit it to be given the label of a "contractor". Those instances involved the installation of some poles, wires, and metering equipment. In one instance, the charge for the work was between $2,500 and $3,000 and the total amount involved in the other three cases would

not exceed $1,000. The largest charge related to some metering equipment installed for a coal company other than the coal companies specifically involved in this proceeding (Tr. 21-23).

4. OD serves all customers of all types in its service area, including coal companies, manufacturing companies, clothing stores, fast-food restaurants, and residences. It has more residential customers than any other type of customers (Tr. 19). Westmoreland Coal Company is among the customers which OD serves. OD's contracts with Westmoreland and its predecessor, Stonega Coal and Coke Company, date back to 1917 (Tr. 23). The contract with Westmoreland was updated in December 1952, to be effective on January 1, 1953, and provides for specific delivery points and voltages, with the right of Westmoreland to seek additional points of service (Tr. 24). OD presently has about 20 places where service is rendered to Westmoreland, some for Westmoreland's own use and some for operations involving companies which have contracted to mine coal for Westmoreland (Tr. 28).

5. The electrical substation involved in this proceeding was erected on land owned by Penn-Virginia Resources Corporation and leased by Westmoreland. Power from the substation is received for use in a mine which Westmoreland has leased to Elro Coal Corporation and all coal produced by Elro is sold to Westmoreland which, in turn, sells the coal for steam generating purposes (Tr. 13). Westmoreland hired Vanderpool Electric Corporation to construct a transmission line from one of its existing substations to the substation involved in this proceeding (Tr. 43). The substation was constructed by Westmoreland so that Elro could receive power to operate the equipment in its No. 3 Mine and Westmoreland operates the substation and is billed by OD for power received at the substation (Tr. 27-28).

6. The only factilities installed by OD's employees at the substation consist of three current transformers, two potential transformers, and a meter (Tr. 34). Two of OD's employees had been to the substation to install those facilities prior to the time the substation was first energized (Tr. 35). OD did not charge Westmoreland any specific fee for installing the facilities other than the charge which OD makes for power delivered to the substation. OD does not consider the installation made at the substation to be any different from the type of work which is done at any other delivery point to any other type of customer (Tr. 29). Occasionally, OD installs check meters for some of its customers, but when it does so, it only charges its customers the price which it pays for such equipment, plus storage, freight, and handling expenses (Tr. 29). OD normally does not have to send its personnel to a substation more than once each month for the purpose of reading the meter, unless some special problem occurs (Tr. 35). If problems do occur at a substation, the customer calls OD and OD's employees determine what the cause of the problem is and make repairs, acting independently of its customer's employees if the problems are related to the facilities installed by OD (Tr. 81).

7. Inasmuch as this proceeding involves a fatal accident which occurred at the substation discussed above, it is necessary that the substation be

described in some detail. The substation is surrounded by a wire fence and has a gate on one side. The substation's purpose is to reduce the incoming voltage from 12,470 volts to the voltage which is used in Elro's No. 3 Mine (Tr. 26). Exhibit D is a picture of the substation. There are poles and crossbars on the left and right sides of the substation. High voltage comes into the substation from the left side and the voltage is reduced by the large transformers sitting on the ground at the left side of the substation (Tr. 50-51). The facilities installed by OD are situated on the bottom crossbar of the two poles on the right side of the substation. The meter may be seen on the pole in the foreground of Exhibit D and the current and potential transformers are located on the bottom crossbar which is situated just above the meter (Tr. 48).

8. Exhibit E is a picture of the fuse disconnects through which the high voltage passes before entering the transformers for voltage reduction. The fuse disconnects are shown in the middle of Exhibit E and may also be seen on the crossbar closest to the ground on the poles on the left side of Exhibit D (Tr. 52). A fuse link extends between the holders located on each end of the two-part insulators. The high voltage passes through the fuse link unless a short circuit or other problem causes an overload on the system to burn out the element in the fuse link so as to interrupt the flow of current (Tr. 59). Fuse links of several types were described at the hearing and samples of two types were introduced in evidence as Exhibits F and I. Exhibit F is a type which passes through a tube about 1 inch in diameter. The tube is attached to both ends of the fuse holders shown in Exhibits D and E. If the fuse link burns out or power to the substation is interrupted, the tube (or barrel) falls down from the top holder and hangs in a vertical position from the bottom holder, as shown in the diagram which is Exhibit G in this proceeding (Tr. 53-56). The other type of fuse link is similar to the wire described above, but it is not installed inside a tube and therefore may be in place and power may be flowing through it without its exhibiting any signs as to whether it is "alive" with power flowing through it or "dead" with no energy flowing through it (Tr. 58; 101).

9. The substation was first energized about 5 or 6 p.m. on January 21, 1980, by Westmoreland's electrical foreman, Terry Mullins. The next day, January 22, about 8:15 a.m., Mullins talked to OD's superintendent of meters, Jack Carr, on the telephone and expressed to Carr his doubts as to whether Old Dominion's meter at the substation was working properly because no light was visible in the meter and because the disk in the meter was turning counterclockwise. In Carr's opinion, the disk was supposed to turn counterclockwise, but, to make certain that there was nothing wrong with the meter, he sent two employees to the substation to check the meter (Tr. 99-100). The two employees were James Harlow, a substation technician, and Leonard Lambert, a meter man, first class (Tr. 44; 48; 88). Harlow had helped install the current and potential transformers and meter at the substation. Lambert would normally have participated in the installation, but he was on vacation when the equipment was

originally installed sometime in December 1979 (Tr. 88). Lambert had, however, gone to the substation on January 21 and had installed a replacement meter (Tr. 89).

10. When Harlow and Lambert arrived at the substation, Harlow, who was on the side of the van nearest to the substation, jumped out and looked at the fuse disconnects described in Finding No. 8 above. He was used to seeing the type of fuse link which is installed inside a tube. It was foggy and he did not see any tube or wire between the fuse holders or hanging down from the bottom holder, so he concluded that the substation was deenergized. Lambert took Harlow's word for the fact that the substation was deenergized (Tr. 49; 90-91). They did not at first go inside the fence around the substation to look at the meter because they concluded that the meter could not be checked while no power was flowing through it (Tr. 91; 94; 121). Although the substation was energized and there was a hum coming from the transformers (Tr. 49; 105), they apparently did not hear the hum because of noise coming from a nearby generator (Tr. 119).

11. Harlow and Lambert returned to their van, started the engine, and were ready to leave when it occurred to them that the GE transformers they had installed were of a new type and might have a rating of 5 KW instead of the 15 KW which they should have had. They decided to check the nameplate on the transformers to determine their classification. Harlow put on climbing equipment and went up the pole to examine the nameplate. He could not see the plate clearly because of water on it. He reached out with one hand to rub the water off the nameplate and was immediately electrocuted when his hand touched the energized transformer (Tr. 63; 91-96).

12. OD has a safety program and has safety meetings of various kinds on a weekly and quarterly basis (Tr. 67-70). OD's Safety Manual provides in Part III, Section 1, Paragraph 31-1, "Electrical equipment and lines shall always be considered to be energized unless they are positively proven to be deenergized and properly grounded. IF IT ISN'T GROUNDED--IT ISN'T DEAD!" (Exh. H; Tr. 65). Part I, Section 1, of the rules provides in paragraph 11-1(b) that each employee "* * * shall carefully study (not merely read)" the safety rules applying to his duties and specifies that "* * * ignorance will not be accepted as an excuse for their violation." Additionally, the same paragraph provides that employees may be periodically examined on their knowledge of the rules (Tr. 65-66).

13. The fatal accident was investigated by OD and by both OSHA and MSHA. OD's general manager, H. E. Armsey, stated that OSHA did not cite the company for any violation in connection with the accident because the deceased employee "* * * had violated a long-standing rule of the electrical utility industry as well as Old Dominion Power Company's" (Tr. 71). Several of MSHA's employees, including an electrical engineer named Roy Davidson, participated in investigating the accident. After the investigation had been completed, Davidson concluded that OD's employees had violated 30 C.F.R. 77.704 which provides, in pertinent part, that "[h]igh-voltage lines shall be deenergized and grounded before work is performed on them". Davidson explained that in some circumstances, not applicable in this

proceeding, work may be done on high-voltage lines while they are energized (Tr. 114-117). When work is done on energized high-voltage lines, special protective equipment must be utilized. Section 77-704-2(4) prohibits persons from working on energized high-voltage equipment if adverse weather conditions exist. Since it was rainy and foggy on the day of the accident, OD's employees would have acted

in violation of section 77.704 even if they had utilized special protective equipment and clothing (Tr. 136).

14. Although Davidson concluded very shortly after the investigation that a violation of section 77.704 had occurred, confusion arose as to which entity should be cited for the violation because Elro Coal Corporation was using the power received at the substation, Westmoreland owned and operated the substation, and OD's employees did the work which caused the fatal accident (Tr. 109). Davidson first issued a citation to Elro and thereafter was directed to reissue the citation in Westmoreland's name. He reissued it on April 3, 1980, citing Westmoreland for the violation (Exh. 2). After the citation in Westmoreland's name had been sent to the Assessment Office for processing under the civil penalty provisions of the Act, Davidson was directed to vacate the citation issued to Westmoreland and reissue it in the name of OD because, by then, the rulemaking proceedings providing for citing independent contractors for violations occurring at coal mines had been completed (Tr. 111-113). Therefore, Davidson issued Citation No. 668762 on January 19, 1981, as modified on January 21, 1981, citing Old Dominion for a violation of section 77.704 in connection with the fatal accident (Exh.1; Tr. 113).

15. Davidson's statement evaluating the penalty-assessment criteria of negligence, gravity, and good-faith abatement was received in evidence as Exhibit 3. Davidson considered OD to have been nonnegligent because the person who was killed had been told before he left his duty station that the substation had been energized (Tr. 128). Davidson considered the violation to have been very serious since a person was fatally injured (Tr. 128). He believed that OD had shown a good-faith effort to achieve compliance because its employees were reinstructed in safe procedures for making repairs on high-voltage systems within the time provided in the citation (Exh. 3; Tr. 139).

Consideration of Parties' Arguments

1. Is OD an "operator" or "independent contractor" within the scope of the Act?

OD's brief (pp. 9-14) contends that it is not an "operator" or an "independent contractor" within the meaning of section 3(d) of the Act. Section 3(d) defines an "operator" as follows:

> (d) "operator" means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine;

OD's brief (pp. 9-10) begins its argument that it is not an "operator" within the meaning of section 3(d) by noting that the definition of "operator" in the 1969 Act did not specifically refer to independent contractors at all. OD concedes that the definition of "operator" was broadened in the 1977 Act to cover independent contractors, but OD cites language from the

legislative history which, it says, shows that Congress did not intend for an independent contractor to be considered as an "operator" unless such independent contractor has a continuing presence at the mine and unless such independent contractor is "under contract or otherwise, engaged in the extraction process for the

benefit of the owner or lessee of the property and to make clear that the employees of such individuals or firms are miners within the definition of the "[1977 Act].(FOOTNOTE.3)

OD's brief (p. 11) next relies upon a quotation from National Indus. Sand Ass'n v. Marshall, 601 F.2d 689 (3rd Cir. 1979), in which the court stated (at page 701):

> * * * The reference made in the statute only to independent contractors who "perform[] services or construction" may be understood as indicating, however, that not all independent contractors are to be considered operators. There may be a point, at least, at which an independent contractor's contact with a mine is so infrequent or de minimis that it would be difficult to conclude that services were being performed. * * *

OD argues that it is required to serve all customers within its service area, including Westmoreland Coal Company, with electricity. OD claims that its meter is situated in a coal company's substation, but that the substation is a considerable distance from any actual mine site where coal is produced. OD states that the only reason its personnel visit a substation is to install, read, inspect, and repair meters and related equipment. OD claims that its services at a substation are for its own benefit so that it can send a bill to its customer for power it has used. In such circumstances, OD argues that its services are certainly de minimis and that it may not properly be found to be an "operator" within the meaning of section 3(d) of the Act.

OD's next argument (Br., p. 12) is that interpretations of whether a company is an "operator" within the meaning of section 3(d) should be made under the rule of ejusdem generis so that an independent contractor should not be found to be an "operator" unless its activities would justify placing it in the category of an "owner" or "lessee" to which reference is first made in section 3(d). OD points to the National Indus. Sand case, supra, and notes that the court in that case stated that the principle of ejusdem generis had been used by another court in Association of Bituminous Contractors v. Andrus, 581 F.2d 853 (D.C. Cir. 1978), to find that the words "other persons" in section 3(d) includes independent contractors who "control, operate or supervise a coal mine". OD contends, however, that a similar conclusion would be improper as to OD in this proceeding because OD does not have a "substantial participation in the running of" a coal mine as the court in National Indus. Sand case thought was necessary before an independent contractor can be found to be an "operator" within the meaning of section 3(d).

OD's brief (p. 13) next cites a sentence from National Indus. Sand in which the court stated (601 F.2d at 702, fn 43):

> * * * Inclusion as operators of those coal mine construction companies which "do control and supervise the construction work they have contracted to perform" would in all likelihood as Bituminous Contractors presages, constitute a reasonable exercise of the Secretary's authority.

OD argues, on the basis of the above quotation, that finding it to be an independent contractor and an "operator" within the meaning of section 3(d) would disregard the substance of its contacts with the mine operation and would exceed the congressional intent stated in the legislative history.

Finally, OD's brief (p. 13) cites National Independent Coal Operators Ass'n. v. Brennan, 372 F.Supp. 16 (D.C.D.C. 1974), aff'd, 419 U.S. 955, and claims that the court in that case struck down the Secretary's liberal interpretation of the word "operator" so as to include as "operators" under the Act construction companies not involved in the mining process. OD's brief (p. 14) thereafter summarizes its arguments above to the effect that contractors made subject to the Act should be engaged in construction at the mine, or involved in the extraction process, and have a continuing presence at the mine. OD contends that its activities fail to satisfy any of the criteria required for finding it to be an "operator" within the meaning of section 3(d).

When one reads the legislative history and court decisions on which OD relies in the preceding summary of its arguments, it is found that the decisions are all adverse to the arguments which OD makes. As for OD's claims that the legislative history shows that Congress did not intend for an electric power company to be found to be an "operator" under the Act, on the same page from Senate Report No. 95-181 from which OD lifted the quotation I have set forth above, the Committee also stated (Report No. 95-181, p. 14, or Legislative History, supra, p. 602):

> * * * The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possibl[e] interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.
>
> * * * In enforcing this Act, the Secretary should be able to issue citations, notices, and orders, and the Commission should be able to assess civil penalties against such independent contractors as well as against the owner, operator, or lessee of the mine. The Committee notes that this concept has been approved by the federal court in Bituminous Coal Operators' Assn. v. Secretary of the Interior, 547 F2d 240 (C.A.4, 1977).

Thus, before the 1977 Act even became effective, the courts had

already held that independent contractors could be found to be "operators" within the meaning of section 3(d) before that section was specifically amended to include independent contractors as "operators". Moreover, the Fourth Circuit in the Bituminous Coal case referred to in the quotation above from Senate Report No. 95-181, the court stated that the Brennan case, supra, on which OD relies,

"* * * does not furnish persuasive authority for decision of the issues in this case" because the holding in Brennan was made with respect to whether independent contractors had to comply with the "black lung" provisions of Title IV of the Act rather than with the safety regulations which are involved in Titles II and III of the Act (547 F.2d at 245). Consequently, OD's reliance on the Brennan case is misplaced because that decision had nothing to do with whether the Secretary can cite an electrical company for violations of the mandatory safety standards when the electrical company is rendering services for a coal company on mine property.

In the BCOA case cited in Senate Report No. 98-181, the court referred to power lines as one of the facilities which independent contractors might construct on mine property and be found to be operators within the meaning of the Act (547 F.2d at 243). The court held that when a contractor sinks a shaft or places other equipment on mine property, it is performing work on facilities which are "to be used in" the work of extracting or processing coal (547 F.2d at 245). Moreover, the court stated that the "* * * fatality rate for contractors' employees is greater than that for the rest of the coal mining industry". Inasmuch as the Senate Report which OD cites in support of its claim that Congress did not intend for electrical companies to be cited as "operators" shows that the Committee was aware of the holdings of the court in the BCOA case, there is little merit to OD's claim that Congress could not have intended that electrical companies be cited as "operators" when they amended the definition of "operators" to include independent contractors which are "performing services or construction at such mine".

Also OD can take no comfort from the holding of the court in the Assn. of Bituminous Contractors case, supra, in which the court applied the principle of ejusdem generis and found that the term "operator", as used in section 3(d) would include independent contractors because they are similar in nature to "owners" and "lessees" because they supervise and control a "coal mine" as that term is defined in the Act (581 F.2d at 861). The part of the court's rationale which OD fails to consider is that the court did not hold that the independent contractor has to participate in the actual extraction of coal in order to be found to be an independent contractor and an "operator" within the meaning of the Act. The court interpreted the words "controls, or supervises a coal mine" in section 3(d) of the Act to include independent contractors who "control and supervise the construction work they have contracted to perform over the area where they are working" (581 F.2d at 862-863). [Emphasis in original.]

In this proceeding, OD's contract with Westmoreland required Westmoreland to provide OD with (Exh. B, page 2):

> * * *the right, privilege and easement to construct, operate, use and maintain electric power and transmission lines for the transmission of electrical energy, and a telephone line for communication,

> together with all necessary towers, foundations, poles, wires, cables, guy wires, stay wires, braces and all other fixtures and appliances necessary or convenient for said purposes on and over the surface of all those five certain strips or parcels of land situate[d] in Wise and Lee Counties, Virginia * * *

Under OD's rules and regulations on file with the Virginia Corporation Commission, OD is given (Exh. A):

> * * * the right of access to the Customer's premises at all reasonable times for the purpose of installing, reading, inspecting or repairing any meters, devices and other equipment used in connection with its supply of electric service, or for the purpose of removing its property and for all other proper purposes.

In this proceeding, OD installed three current and two potential transformers and a meter at Westmoreland's substation. OD reserved its exclusive right to control, check, read, and repair those facilities at the substation. The substation was located on mine property leased by Westmoreland from Penn-Virginia Resources Corporation (Finding No. 5, supra). OD delivers power to Westmoreland at 20 different locations (Finding No. 4, supra). The evidence, therefore, clearly shows that OD has a contract to construct facilities on mine property and that those facilities are essential to the extraction of coal because cutting machines, continuous-mining machines, roof-bolting machines, conveyor belts, and other mining equipment will operate only when they are connected to a source of electrical power.

In the circumstances described above, the court's opinion in Assn. of Bituminous Contractors, supra, is applicable to OD, including the conclusion reached by the court at 581 F.2d 863:

> * * * If a coal mine owner or lessee contracts with an independent construction company for certain work within a certain area involved in the mining operation, the supervision that such a company exercises over that separate project clearly brings it within the statute. Otherwise, the owner would be constantly interfering in the work of the construction company in order to minimize his own liability for damages. The Act does not require such an inefficient method of insuring compliance with mandatory safety regulations.

2. Are MSHA's Regulations defining "operators" arbitrary and capricious and an unconstitutional delegation of legislative authority?

OD's brief (pp. 14-20) attacks MSHA's regulations on the ground that MSHA abused its discretion in finding (45 Fed. Reg. 44494):

> that it had broad discretion to define the respective compliance responsibilities of owners, lessees or other persons who operate, control or supervise mines [production-operators] and independent contractors working at mines.

OD also objects to MSHA's issuance in this proceeding of a citation based on MSHA's definition of an independent contractor which provides (30 C.F.R. 45.2(c) and 45 Fed. Reg. 44496):

> (c) "Independent contractor" means any person, partnership, corporation, subsidiary of a corporation,

> firm, association or other organization that contracts to perform services or construction at a mine;

OD maintains that it has been improperly found to be an independent contractor in this proceeding because it does not come within MSHA's definition of an independent contractor. OD contends that it has no contract to perform

services at Westmoreland's mine other than the contracts introduced in this proceeding which require OD "* * * to furnish electrical power and to install meters to measure the quantity of electricity being used" (OD's Brief, p. 15). OD again states that its contract with Westmoreland required it to do nothing at the substation here involved that it would not do at any other substation for any other customer. OD argues that it does the same kind of work on farms and residential property that it did for Westmoreland and that it simply can't be found to be an "independent contractor" and an "operator" under the Act on the basis of the type of services and work done by it at Westmoreland's substation (OD's brief, p. 16).

OD continues its attack on MSHA's regulations pertaining to independent contractors by contending that it is an abuse of discretion for MSHA to make a rule which can be interpreted in a fashion which makes OD an independent contractor subject to the provisions of the Act. OD argues that MSHA's claim that it has "broad discretion to define the respective compliance responsibilities of * * * independent contractors" amounts to an unconstitutional delegation of legislative authority by Congress to an administrative agency (Brief, p. 18). OD contends that while "* * * Congress has authority to grant power to an administrative agency to prescribe rules and regulations, that authority does not include the power to make law, because no such power can be delegated by Congress (Brief, p. 18). OD cites Reid v. Memphis Publishing Co., 521 F.2d 512 (6th Cir. 1975) and Manhatten General Equipment Co. v. Commissioner, 297 U.S. 129 (1936), and other cases in support of the foregoing argument.

While it is true that the cases cited by OD do hold that Congress cannot delegate the power to make law to an administrative agency, I do not find from my review of the regulations pertaining to independent contractors that the Secretary of Labor or MSHA promulgated any rules which amounted to "making law". As MSHA's counsel points out in his brief (p. 8), section 508 of the Act authorizes the Secretary to "* * * issue such regulations as each [Secretary] deems appropriate to carry out any provision of this Act." MSHA issued regulations pertaining to independent contractors in conformance with all due process requirements of the Administrative Procedure Act (5 U.S.C. 553). MSHA's brief (p. 8) shows that the rules were properly promulgated in the well-stated explanation quoted below:

> Following the development of a draft proposed rule and the circulation of that draft for comment to interested parties, a notice announcing the availability of the draft proposal was published in the Federal Register on October 31, 1978 (43 FR 50716). As a result of comments concerning the draft proposal, changes in it were made prior to its publication in the Federal Register as a proposed rule on August 14, 1979 (44 FR 44746). A series of public hearings was announced on September 14, 1979 in the Federal Register (44 FR 54540), and the hearings were conducted between October 11 and October 30, 1979. After full consideration of

all comments and testimony concerning the proposed rule, the final rule was published in the Federal Register on July 1, 1980 (45 FR 44494). The final rule became effective July 31, 1980.

One of OD's witnesses stated that OD would have commented on the proposed rules pertaining to independent contractors if OD had been given proper notice of the fact that they had been proposed (Tr. 75-76). I am adopting a paragraph from MSHA's brief as an appropriate reply to that contention (MSHA's brief, p. 9):

> To this objection [lack of proper notice] MSHA responds that it is a well settled principle of law that the publication of regulations in the Federal Register gives legal notice of their contents to all who may be affected thereby. Federal Crop Insurance Corporation v. Merrill, 332 U.S. 380, 384-385, 68 S.Ct. 1, 92 L.Ed. 10 1947); Wolfson v. United States, 492 F.2d 1386, 1392 (Ct.Cl. 1974); Federal Register Act of 1935, 44 U.S.C. 1507 (1978). Therefore, MSHA concludes that Old Dominion had legal notice of the publication of the final rule on independent contractors and that due process was observed.

MSHA certainly did not make law in promulgating the definition of an independent contractor which is set forth in the final rules. Comparison of MSHA's definition of an independent contractor with the definition of "operator" given in section 3(d) of the Act shows that MSHA merely paraphrased the definition of "operator". The legislative history which has been quoted in this decision and in OD's brief shows that Congress added independent contractors to the list of persons who could be cited by MSHA for violations of the mandatory health and safety standards. MSHA did nothing more than comply with the Act when it promulgated the independent-contractor regulations to which OD objects.

Regardless of whether one relies on the definition of "operator" in section 3(d) of the Act, or the definition of an independent contractor given in section 45.2(c) of the regulations, OD's activities at Westmoreland's substation were clearly sufficient to bring OD within the categories of "operator" and "independent contractor". The record shows that OD had a contract with Westmoreland under which OD reserved the exclusive right to install all facilities required to determine the amount of electrical energy supplied to Westmoreland for Elro Coal Corporation's No. 3 Mine. OD's employees installed the necessary metering facilities and had exclusive control over those facilities. OD's exclusive control over those facilities required it to determine whether to send employees out to the substation to check the metering facilities in response to Westmoreland's notification that the metering facilities were not working properly. The checking of the metering facilities by OD's employees resulted in the death of one of OD's employees through failure of that employee to comply with a mandatory safety standard.

Section 103(j) of the Act requires the operator of a coal mine to report all accidents to MSHA. Therefore, Westmoreland had to report to MSHA the fact that a fatal accident had occurred at its substation located on mine property. MSHA is required by

section 103(j) of the Act and by section 50.11 of the regulations to investigate accidents occurring at coal mines. If a violation is found by MSHA's inspectors, they are required by the Act to issue citations or orders. In issuing those citations or orders, they must determine what entity is responsible for the occurrence of the violation. In this instance, the evidence clearly shows that the accident was caused by the failure of OD's employees to follow their own rules as well as the mandatory safey standards.

Since the regulations to which OD is objecting in this proceeding had not been finalized at the time of the accident on January 22, 1980, the inspector first issued the citation here involved to Elro Coal Corporation, and then to Westmoreland, and, finally, to OD because the rules pertaining to citing independent contractors for violations had been finalized between the time the accident occurred in January 1980 and the time the citation was issued to OD on January 21, 1981.

The final assault which OD's brief (p. 20) makes on MSHA's rules pertaining to independent contractors is that they do not take into consideration how remote from actual mining activities a company's work on mine property may be, or how short and infrequent a company's contacts with mine property may be. OD claims that the failure by MSHA to consider such elements is an arbitrary extension of the rules to all companies and is therefore an illegal and arbitrary extension of power. A reading of MSHA's explanatory discussions published in the Federal Register at the time the rules were finalized shows that MSHA had originally considered the very approach advocated by OD, but MSHA rejected that approach because the persons who commented on the proposed rules believed that such an approach would produce arbitrary results. MSHA's explanation, in pertinent part, was stated as follows (45 Fed. Reg. 44495):

> * * * Commenters also objected to the consideration of "major work" and "continuing presence" as irrelevant and arbitrary.
>
> > The commenters' analysis of the concept that independent contractors are generally in the best position to prevent safety and health violations in the course of their own work, and to abate those violations that may occur, has persuaded MSHA that holding all independent contractors responsible for their violations will in the majority of instances improve the overall safety and health of miners. MSHA has concluded that a regulation that would distinguish some contractors from others in formulating a comprehensive enforcement scheme could, at this time, be overly complex, imprecise and lead to arbitrary decisions that would not promote the safety and health of miners. Therefore, MSHA believes that enforcement decisions should be made on the basis of the facts pertaining to each particular case, at least until MSHA gains more experience with independent contractors under the Act. Independent contractors and production-operators will have notice of their compliance responsibilities through this final rule and through enforcement guidelines which will be made available to all interested persons. * * *

As has been indicated above, OD had exclusive control over its facilities and employees and was in the best position to have prevented the fatal accident involved in this proceeding. Therefore, OD was the proper party to be cited for the violation.

In short, OD has shown nothing about the rules pertaining to independent contractors which shows that they were arbitrarily issued or involve an unconstitutional delegation of legislative power to the Secretary of Labor or MSHA.

3. Is OSHA responsible for investigating the conduct cited by MSHA?

OD's brief (pp. 20-21) opens its claim that it should be subject only to OSHA's regulations with an argument that OSHA's and MSHA's regulations are

inconsistent and that OSHA's regulations are better designed to cover the facilities and services performed by electrical utilities than MSHA's regulations are. OD contends that MSHA's regulations would require its employees to be qualified mine electricians, or have at least 1 year of experience in performing electrical work in a mine and complete a coal-mine electrical training program approved by MSHA, or have 1 year of experience in mining activity and pass a series of 5 tests administered by the Secretary. OD cites section 77.103 of the regulations in support of the foregoing argument. The guidelines published in the Federal Register (45 Fed. Reg. 44498) at the time the final rules pertaining to independent contractors were issued suggests that MSHA's training program for independent contractors will be different from that required for employees of operators who are engaged in the actual extraction of coal from mining property. Therefore, I am not certain that OD's claims about the adversity of being subject to MSHA's regulations at mine sites is correct.

Assuming, arguendo, that OD would have to provide its employees with additional training before they are qualified to work at substation on mine property, the facts in this proceeding show that OD could well spend some additional time training its employees. For example, the evidence shows that two men went to check metering facilities at Westmoreland's substation on January 21, 1980. The one who was electrocuted was called a substation technician and the other one was called a meter man, first class. They had been told to find out why a light did not work in the meter and to determine whether the disk in the meter was supposed to turn counterclockwise. The supervisor who sent them to check the meter believed that the meter was supposed to turn counterclockwise. As it turned out, the meter which was installed did not have a light in it (Tr. 50) and the disk was properly turning in a counterclockwise direction (Finding Nos. 8-10, supra). The meter man, first class, had installed the meter on the day preceding the accident and should have known it did not have a light in it (Tr. 89). Yet, when the two employees arrived at the substation, the substation technician incorrectly concluded that the substation was deenergized and stated that he could not check the light in the meter unless electrical energy was flowing through it. The meter man, first class, did not remind the substation technician that the meter did not have a light in it to check, regardless of whether power was flowing in it or not.

Moreover, the substation technician first suggested that a ladder be placed across the fence of the substation against the pole on which the transformers had been installed. Even if the substation had not been energized, he would have violated OD's regulations as to the placement of ladders (Exh. H, Part I, Section 4), when he proposed that they check the nameplate on the transformers by placing a ladder across the fence around the substation in order to get close enough to the transformer to read the nameplate (Tr. 93). It was only because of the counterproposal by the meter man, first class, that the substation technician failed to carry out his proposed use of a ladder to check the nameplate. Although OD claims that the

substation technician had missed only three of the quarterly training sessions given over a 10-year period, his hasty and ill-considered actions on January 22, 1980, show that OD's safety meetings were not making any impression on the work habits of the substation technician. Therefore, I find that OD's objections to having to comply with MSHA's regulations are not a valid reason for me to find that OD

should be considered to be exempt from MSHA's jurisdiction over work done by OD on mine property.

OD's brief (p. 22) next refers to the OSHA-MSHA Interagency Agreement which has been published in the Federal Register (44 Fed. Reg. 22827) and which was introduced in this proceeding as Exhibit J. That agreement provides some general principles which govern the classes of activity over which MSHA and OSHA will assert jurisdiction.

Most of the discussions in the agreement deal with questions of which activity are mining as opposed to milling since MSHA has jurisdiction over mining operations and OSHA generally has jurisdiction over milling activities. OD cites one sentence in the agreement as a basis for arguing that its activities at Westmoreland's substation should be subject to OSHA's jurisdiction. That sentence reads as follows (Exh. J, p. 1):

> * * * Also, if an employer has control of the working conditions on the mine site or milling operation and such employer is neither a mine operator nor an independent contractor subject to the Mine Act, the OSH Act may be applied to such an employer where the application of the OSH Act would, in such a case, provide a more effective remedy than citing as a mine operator or an independent contractor subject to the Mine Act who does not, in such circumstances, have direct control over the working conditions.

The sentence quoted above might be helpful to OD's position in this proceeding if I had not already shown in the preceding part of this decision that MSHA properly found OD to be an independent contractor which is subject to the Mine Act. OD did have direct control over the work it did at the substation and it was appropriate for MSHA to assert jurisdiction under the Mine Act.

OD's brief (p. 22) additionally argues tat the Interagency Agreement makes clear that double regulation is not intended. Although employees of both OSHA and MSHA investigated the fatal accident at Westmoreland's substation, OSHA did not cite any violations and made no contention that it had exclusive jurisdiction to investigate the accident. The Interagency Agreement comes into play only if MSHA and OSHA cannot agree at the local level as to which agency has jurisdiction. OD is correct in pointing out that no formal assignment of jurisdiction as between OSHA and MSHA was agreed upon with respect to the accident which occurred at the substation (OD's brief, p. 23). The accident involved in this proceding seems to have been the first occasion which required the two agencies to determine which had jurisdiction over the activities of an electrical utility at substations on mine property. The Interagency Agreement shows that the primary basis for determining jurisdiction as between MSHA and OSHA depends upon which activities occur on mine property as opposed to milling or manufacturing operations which occur off of mine property. It is clear under the Interagency Agreement that a given company may be subject to the jurisdiction

of both OSHA and MSHA because the Interagency Agreement has a discussion on page 3 pertaining to the determination of the place at which MSHA's jurisdiction ends and OSHA's jurisdiction begins. The outcome of this case will apply in future cases in determining where MSHA's jurisdiction over electric utilities ends and OSHA's begins. It is obvious that any of OD's activities on mine property should henceforth be subject to

MSHA's jurisdiction while OD's activities off of mine property will be subject to OSHA's jurisdiction.

MSHA's brief (pp. 13-17) contains an excellent discussion of why MSHA's jurisdiction was appropriately and properly exercised with respect to the accident which occurred at Westmoreland's substation. One paragraph is especially pertinent and is quoted below (MSHA's brief, pp. 14-15):

> In ruling on the extent as well as the limitations of OSHA jurisdiction under paragraph 4(b)(1) [of the 1970 Occupational Safety and Health Act], the United States Court of Appeals for the Fourth Circuit held that exemption from the Occupational Safety and Health Act applies only when another Federal agency has actually exercised its statutory authority to regulate employee safety. The court stated that when the facts show that a Federal agency has not exercised its statutory authority to regulate employee safety, the OSHA Act applies, but where the Federal agency has exercised its statutory authority to prescribe standards affecting safety or health in the area in which the employee goes about his daily tasks, the authority of OSHA is foreclosed. Southern Railway Company v. Occupational Safety and Health Review Commission, 539 F.2d 335 (1976). Since the issue in this case is an alleged violation on coal mine property of a mandatory safety standard of the Mine Safety and Health Act, the inescapable conclusion must be that OSHA jurisdiction is, as the court has stated, foreclosed.

On the basis of the foregoing discussion, I find that OSHA was not responsible for investigating the conduct of OD's employees at the substation on January 22, 1980, and that the violation found by MSHA's inspector was properly cited under the Mine Act and the regulations promulgated thereunder.

4. Is a 1-year delay in issuing a citation "reasonable promptness" as required by the Act?

OD's brief (p. 23) contends that the citation in this case was not issued to OD with "reasonable promptness" as required by section 104(a) of the Act which provides, in pertinent part, as follows:

> (a) If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. * * * The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

OD states that the OSH Act prohibits the issuance of a citation after the expiration of 6 months following the occurrence of any violation. OD's brief (p. 24) also correctly states that the inspector who wrote the citation here involved did not know of any other instance in which there was a delay of more than 6 months between the occurrence of a violation and the writing of a citation. OD's brief (p. 23) states that the legislative history does not show why Congress failed to set a specific time limitation on the issuance

of citations under the Mine Act. MSHA's brief (p. 12), on the other hand, cites some legislative history from Senate Report No. 95-181 which appears to show exactly why Congress failed to specify an exact period of time. That explanation is quoted below (Report No. 95-181, p. 30, or page 618 of Legislative History):

> * * * There may be occasions where a citation will be delayed because of the complexity of issues raised by the violations, because of a protracted accident investigation, or for other legitimate reasons. For this reason, Section [104(a)] provides that the issuance of a citation with reasonable promptness is not a jurisdictional prerequisite to any enforcement action. * * *

As indicated in Finding No. 14, supra, MSHA's inspector determined very shortly after investigating the fatal accident that a violation of section 77.704 had occurred. He first issued the violation in the name of Elro Coal Corporation, then in the name of Westmoreland, and finally in the name of OD. Therefore, no delay occurred in the determination that a violation had occurred. The delay arose because of the complexity of the law with respect to whether MSHA should cite only a production operator for the violations of independent contractors working on mine property. The inspector first cited the production operators because the law was in a state of confusion as to whether only the production operator (Westmoreland) or the independent contractor, or both, should be cited for violations caused by activities of independent contractors working on mine property.

The Commission first considered the question of whether an operator can be cited for violations by independent contractors in Republic Steel Corp, 1 FMSHRC 5 (1979). In that case, the Commission reversed an administrative law judge's decision in which the judge had held that the independent contractor was liable for the violation there involved. The Commission held that an operator can be cited for the independent contractor's violation even if only the independent contractor's employees are in the area where work is being performed. In footnote 13 at 1 FMSHRC 11, the Commission majority explained, however, that it was not holding that only the operator is liable because it believed that both the independent contractor and the operator could be held to be liable and that both could be cited in a separate or a consolidated proceeding.

The Commission's Republic decision followed the Fourth Circuit's decision in Bituminous Coal Operators Assn. v. Secretary of Interior, 547 F.2d 240 (4th Cir. 1979), already cited above, in which that court held that construction companies are subject to the Act because they work on a facility which is to be used in the work of extracting coal. The court said that construction companies are subject to the Act and must observe the health and safety standards promulgated under the Act. The court held, before the 1969 Act was specifically amended to

include independent contractors as "operators," that construction companies can be "operators" because they control and supervise work at coal mines. The court said that when they sink a shaft or build a tipple, they are controlling a mine because the facility will be used to extract coal. The court also held that a construction company can be found to be an "operator" before any coal has begun to be extracted from the mine

and can be found to be an "operator" if they are working on only a part of a mine. Finally, the court held that the Secretary of Interior could issue notices of violations and orders to construction companies and could assess and collect penalties from them. The court stated that it was up to the Secretary in each case to decide whether the production operator or the construction company, or both, were liable and which or both should be cited.

In Association of Bituminous Contractors, Inc. v. Cecil D. Andrus, 581 F.2d 853 (1978), also previously cited above, the D.C. Circuit made holdings similar to those stated by the Fourth Circuit in the BCOA case, supra.

In Cowin and Company, Inc., 1 FMSHRC 20 (1979), the Commission affirmed a judge's decision finding that an independent contractor should be cited for a violation under the 1969 Act. The former Board of Mine Operations Appeals had reversed the judge on the basis of Order No. 2977 which had been issued by the Secretary of Interior requiring that only the production operator could be cited for violations by the independent contractor. In Kaiser Steel Corp., 1 FMSHRC 343 (1979), the Commission majority held that the production operator could be cited for a violation committed by an independent contractor named Boyles Brothers. In Consolidation Coal Co., 1 FMSHRC 347 (1979), the Commission majority also upheld the citing of a production operator for an independent contractor's violations. The Commission made a similar holding in Monterey Coal Co., 1 FMSHRC 1781 (1979).

In Old Ben Coal Co., 1 FMSHRC 1480 (1979), the Commission also upheld the citing of a production operator for the independent contractor's violation, but the Commission noted that the citation in that case had been written in April 1978 shortly after the 1977 Act became effective. Since the 1977 Act specifically provided for independent contractors to be cited as "operators", the Commission said that if, in future cases, it should find that the Secretary of Labor was citing operators purely for administrative convenience, it would not approve such procedures.

The most recent action taken by the Commission with respect to citing independent contractors, as opposed to production operators, or both, was in Pittsburgh & Midway Coal Mining Co., 2 FMSHRC 2042 (1980), in which the Commission remanded a case to an administrative law judge so that the Secretary of Labor could apply the procedures for citing independent contractors for violations as those procedures were set forth in Volume 45 of the Federal Register at pages 44,494 to 44,498. The Commission indicated in its decision that the Secretary was free to proceed against either the independent contractor or the production operator, or both. The Commission has issued similar orders in at least two other proceedings, remanding the cases for the purpose of allowing the Secretary to apply the rules pertaining to citing independent contractors for violations of the mandatory safety standards (C and K Coal Co., 2 FMSHRC 2047 (1980), and

Phillips Uranium Corp., 2 FMSHRC 2050 (1980)).

My review of the cases involving the issue of whether the Secretary or MSHA should cite the production operator or the independent contractor, or both, for violations occurring at mine sites shows that MSHA was proceeding under a series of legal decisions and that a considerable time elapsed before a consistent policy finally was achieved. In such circumstances, I find that complexities existed in applying the Act which justified the fact that the violation in this instance occurred on January 22, 1980, and was not

charged in a citation issued to OD until January 21, 1981, or 1 day less than a year after its occurrence.

In Salt Lake County Road Department, 3 FMSHRC 1714 (1981), the Commission affirmed a judge's decision which had denied a motion to dismiss a Proposal for Assessment of Civil Penalty which had not been filed within 45 days as provided for by section 2700.27 of the Commission's rules. The Commission stated that section 105(d) of the Act provides that the Secretary is to notify the Commission "immediately" after a notice of contest is filed. The Commission stated that it had implemented the word "immediately" in the Act by using a time period of 45 days in the rules. The Commission stated, however, that the legislative history showed that although Congress wanted prompt notification in order to promote fairness, Congress did not want a penalty case to be vitiated simply because the notification happened, in a rare instance, to be somewhat less than prompt. The Commission also stated that it was appropriate to determine whether the late filing of the Proposal for Assessment of Civil Penalty was prejudicial to the respondent in that case and the Commission held that no prejudice had resulted in that instance.

The evidence in this proceeding shows that no prejudice to OD resulted because of the fact that OD was not specifically cited for a period of 1 year. OD had participated in the thorough investigation which MSHA made into the cause of the accident and MSHA personnel came to OD's office and discussed the fact that MSHA was considering the question of finding OD to be an operator under the 1977 Act pursuant to the new rules which MSHA had promulgated with respect to independent contractors (Tr. 75-78). OD filed a notice of contest of the citation after it was issued and OD has been provided with a hearing and with the opportunity to file a brief in support of its position. Therefore, the fact that the citation was not issued to OD for a year after the violation occurred has not been prejudicial to OD.

(5) Is any civil penalty justified?

OD's brief (p. 24) contends that even if it should be determined that OD is subject to MSHA's jurisdiction, it would be totally inappropriate to assess any civil penalty whatsoever because the accident occurred through no fault of OD. OD notes that the inspector's statement evaluating negligence showed that the inspector did not believe that OD could have known or predicted that the accident would occur and that its occurrence was beyond OD's control. OD argues that the electric utility industry is very safety conscious and that OD has a thorough safety program. OD emphasizes that the employee who was electrocuted was told before he went to the substation that it was energized and that he violated a well-known company rule with which he was very familiar (Finding Nos. 12 and 15, supra). In such circumstances, OD contends that assessment of a penalty would serve no useful purpose.

Even OD's witnesses agreed that a violation of the company's safety rules had occurred (Tr. 64; 96). One of the rules

violated was Paragraph 31-1 in Part III of OD's Safety Manual (Exh. H) and it requires that electrical lines be grounded before work on them is done. Citation No. 688762-1 issued by the inspector cited OD for a violation of section 77.704 which provides, in pertinent part, that "[h]igh-voltage lines shall be deenergized and grounded before

work is performed on them, except that repairs may be permitted on energized high-voltage lines if * * *" certain safeguards are followed. The inspector testified that work can be done on energized lines only under certain conditions and that one of the conditions is that the weather be satisfactory. Inasmuch as it was rainy and foggy on the day of the accident, the inspector said that no work could have been done on the energized high-voltage lines under the weather conditions prevailing on the day of the accident without violating the provisions of section 77.704. Since section 77.704 essentially provides that energized lines be deenergized or grounded and since OD's witnesses agreed that no attempt had been made by either of OD's employees to ground the lines before they worked on them, all the evidence in the record supports a finding that a violation of section 77.704 occurred, and I so find.

Having found that a violation occurred, it is mandatory under the Act that a civil penalty be assessed. The Commission has held in several cases that liability of an operator for violations of the mandatory safety standards is not conditioned upon fault (U. S. Steel Corp., 1 FMSHRC 1306 (1979); Peabody Coal Co., 1 FMSHRC 1494 (1979); and Ace Drilling, Inc., 2 FMSHRC 790 (1980)). The Commission has also held that if a citation or order alleges a violation and one is found to have occurred, a judge may not dismiss the penalty proceeding without assessing a penalty even if a motion to dismiss is filed by counsel for MSHA (Island Creek Coal Co., 2 FMSHRC 279 (1980), and Van Mulvehill Coal Co., Inc., 2 FMSHRC 283 (1980)). Therefore, it is well settled that I may not dismiss the Petition for Assessment of Civil Penalty filed in Docket No. VA 81-65 seeking assessment of a civil penalty for the violation of section 77.704 involved in this proceeding and that I must assess a civil penalty based on the six criteria set forth in section 110(i) of the Act (Tazco, Inc., 3 FMSHRC 1895(1981)).

In connection with the assessment of a civil penalty, it should be noted that a judge is not bound by the assessment procedures which are employed by the Assessment Office in proposing civil penalties (Rushton Mining Co., 1 FMSHRC 794 (1979); Shamrock Coal Co., 1 FMSHRC 799 (1979); Kaiser Steel Corp., 1 FMSHRC 984 (1979); U.S. Steel Corp., 1 FMSHRC 1306 (1979); Pittsburgh Coal Co., 1 FMSHRC 1468 (1979); and Co-Op Mining Co., 2 FMSHRC 784 (1980)). Therefore, my decision with respect to the civil penalty issues is being made on the basis of the evidence presented in this proceeding without regard to the size of any penalty which may have been proposed by the Assessment Office in Docket No. VA 81-65.

Consideration of the Six Criteria

1. Size of OD's Business

As to the criterion of the size of OD's business, I have already indicated in Finding No. 1, supra, that OD is a subsidiary of Kentucky Utilities Company, that it employs 80 persons, and that its annual revenues from the sale of

electricity amount to about $24,000,000 per year. On the basis of those facts, I find that OD is a large operator and, to the extent that the penalty is based on the criterion of the size of respondent's business, the penalty should be in an upper range of magnitude.

2. Effect of Penalties on OD's Ability To Continue in Business

OD's counsel did not introduce any evidence pertaining to OD's financial condition. The former Board of Mine Operations Appeals held in Buffalo Mining Co., 2 IBMA 226 (1973), and in Associated Drilling, Inc., 3 IBMA 164 (1974), that if an operator fails to present any evidence in a civil penalty case pertaining to the operator's financial condition, that a judge may assume that payment of penalties would not have an adverse effect on the operator's ability to continue in business. Therefore, in the absence of any evidence in this proceeding which would support a contrary conclusion, I find that payment of civil penalties will not cause OD to discontinue in business.

3. History of previous violations

As to the criterion of OD's history of previous violations, both the inspector who wrote the citation and MSHA's counsel stated that there is nothing in MSHA's files which show that OD has previously been cited for a violation of the mandatory health and safety standards (Tr. 140). Therefore, the penalty to be assessed in this proceeding will neither be increased nor reduced under OD's history of previous violations.

4. OD's good-faith effort to achieve rapid compliance

The inspector testified that OD reinstructed its employees with respect to the procedures which should be used prior to working on electrical equipment (Finding No. 15, supra). Therefore, I find that OD made a good-faith effort to achieve rapid compliance after being cited for the violation of section 77.704 and that mitigating factor will be taken into consideration in determining the size of the penalty.

5. Degree of Negligence

As indicated in Finding No. 13, supra, the violation of section 77.704 occurred because two of OD's employees went to Westmoreland's high-voltage substation and attempted to check OD's metering equipment without making a careful examination to determine whether the substation was energized and without grounding the lines going into the metering facilities. Section 77.704 requires that high-voltage lines be deenergized and grounded before work is done on them. Although work can be done on energized high-voltage equipment, it would have been a violation of section 77.704-2(4) for the employees to have worked on the energized equipment in this instance because the weather was rainy and foggy.

Two of OD's witnesses, including the employee who survived the encounter with high-voltage equipment, testified that no attempt had been made to ground the equipment before an effort was made to read the nameplate on the transformer. Both of OD's witnesses agreed that they had violated OD's own safety regulations, particularly paragraph 31-1, Part III, of OD's Safety Manual (Finding No. 12, supra). The inspector's statement

also shows that he did not consider OD to have been negligent since he checked the portion of the form used by inspectors for evaluating negligence which states that the failure of the two employees to follow the provisions of section 77.704 "could not have been known or predicted, or occurred due to circumstances beyond the operator's control". Under the "Remarks" portion of the inspector's statement,

the inspector made the following entry: "The employees were told the substation was energized before they left their duty station" (Exh. 3).

MSHA's brief (p. 20) states that "* * * the failure to follow basic safety rules under the Act and under company regulations would indicate at least ordinary negligence on the part of the operator." MSHA's brief, however, does not cite any testimony to show why the company's management should be held to be negligent for failure of experienced employees to follow basic safety rules or the almost identical provisions of section 77.704. In Nacco Mining Co., 3 FMSHRC 848 (1981), the Commission found that the operator was nonnegligent for a violation of section 75.200 in circumstances which showed that a foreman had gone out from under roof support for a distance of 10 to 12 feet in violation of the operator's roof-control plan. The foreman was killed when the roof fell on him. The facts showed that the foreman had received proper training and that he had shown good judgment on prior occasions with respect to following safety regulations, but on the day of the accident, he acted aberrantly and engaged in conduct which was wholly unforeseen. The foreman's action did not expose anyone else to harm or risk. The Commission stated that finding an operator negligent in such circumstances would discourage pursuit of a high standard of care because regardless of what an operator did to insure safety, a finding of negligence would always result.

The evidence in this proceeding shows that OD's management was not as free from fault as the evidence indicated in the Nacco case cited above. As I have already pointed out in this decision in my discussion of the issue of whether accidents on mine property are subject to MSHA's jurisdiction as opposed to OSHA's jurisdiction, OD's superintendent of meters sent two employees on January 22, 1980, to check a meter which he believed was working properly. One of the employees who was sent to the mine had originally installed the meter. The other employee had replaced the meter on January 21, the day before the two employees were sent back to the substation to check the meters. The employee who replaced the meter was a meter man, first class. Westmoreland had only suggested to OD's superintendent of meters that the meter at the substation might be defective because no light was burning in the meter and because its disk was turning counterclockwise (Tr. 99). OD's general manager testified that the type of meter which had been installed did not have a light in it. The superintendent of meters had already told Westmoreland's employee that he thought the meter's disk was supposed to turn counterclockwise. Therefore, the evidence shows that nothing was wrong with the meter which required any checking to be done. Since the meter had no light, no light could have been seen by Westmoreland's employee. The meter's disk was supposed to turn counterclockwise. The fact that the superintendent of meters did not have a discussion with his employees in sufficient detail for them to realize there was no need to check the meters is strong support for a finding that management failed to advise the two employees as to the duties they were expected to perform at the substation.

Unless the employees' supervisor was remiss in his duties of providing the employees with specific information, there is no possible explanation for the meter man, first class, who had installed the meter on the previous day, to have testified that they could not check the light in the meter because the employee who was electrocuted had mistakenly concluded that no electricity

was flowing through the substation. It appears to me that the employees were sent to the substation with indefinite instructions and that management was negligent in providing them with exact information and instructions concerning the work which was required to be done at the substation.

There is also reason to believe that management knew, or should have known, that the employee who was electrocuted had a proclivity for cutting corners with respect to obeying safety precautions. For example, he proposed to check the nameplate on a transformer by leaning a ladder across the fence around the substation against the crossbar on which the high-voltage transformer was located for the purpose of climbing the ladder in order to read the nameplate on the transformer. He proposed to check the nameplate in that fashion to avoid opening the gate to the substation by knocking from the gate a piece of 2 by 4 which had been nailed on the gate to keep it from coming open for easy access by an animal or person who might have gone inside the substation where the danger of electrocution existed.

For the reasons given above, I do not believe that the circumstances showing no fault by management existed in this proceeding to the extent that it did in the Nacco case. I am required to consider the evidence as a whole in making my findings. Therefore, despite the fact that the witnesses professed to believe that OD's management was free of negligence and could not have foreseen the occurrence of the accident, I believe that OD's management failed to give the employees proper instructions before they were sent to the substation and I believe that the actions of the deceased employee at the substation show that he was in the habit of disobeying safety regulations. In the Nacco case, the evidence showed that the foreman who was killed had a history of following safety procedures and that he acted aberrantly on the day he was killed. The evidence in this proceeding shows that the employee who was killed had a history of acting in violation of safety regulations because he violated at least three of the company's own regulations before he was electrocuted. Specifically, he first failed to make a careful visual examination of the disconnects which were clearly visible as shown in a photograph taken during a snow storm on the day following the accident. The wires are easily visible in the photograph even though the photograph was taken from the place where the deceased employee would probably have been standing when he carelessly decided that the substation was deenergized. It is unlikely that the rain or fog prevented him from being able to see the wires on the disconnects, but it he could not see the wires clearly, that was all the more reason for him to have gone inside the substation so as to assure himself that the wires were not there. The mere fact that he was used to seeing a type of disconnect having wires inside a 1-inch tube did not excuse him from making certain that no type of wire was actually running between the upper and lower holders on the disconnects (Finding Nos. 8-10, supra).

The second violation of the safety precautions was that the deceased employee failed to ground the conductors before trying

to read the information on the transformer's nameplate (Tr. 64-65; 96).

The third violation was not carried out because the deceased employee only proposed to place a ladder in an unsafe position in violation of OD's safety regulations for use of ladders (Exh. H, Part I, Section 4). The violation was not carried out because the meter man, first class, who had

accompanied the deceased employee, suggested that they go inside the substation and climb the pole on which the transformer had been installed in order to read the nameplate (Tr. 93).

Based upon my review of the entire record, I find that the violation of section 77.704 was associated with a moderate degree of ordinary negligence.

6. Degree of Gravity

MSHA's brief (p. 20) states that the violation must necessarily be considered to have been serious because the violation resulted in the electrocution of one of OD's employees.

The evidence shows that the substation's purpose was to reduce voltage from 12,470 to a volatage which was needed to operate mining equipment. It would be difficult to find a violation which has more obvious potential for causing electrocution than failure to ground wires which may be transmitting 12,470 volts. Therefore, I find that the violation was extremely serious.

It should also be noted that the deceased employee's failure to make a proper visual examination as to the substation's energized status influenced the other employee who had accompanied him to the substation to assume also that the substation had been deenergized. Thus, the deceased employee's violation of section 77.704 exposed another employee to possible electrocution along with himself. Westmoreland could also have had employees working at the substation. Since one would ordinarily be inclined to rely on the supposed expertise of an employee of an electrical utility company, the violation would have been likely to have exposed any people in the vicinity of the substation to possible electrocution because they would have assumed that OD's employees would not have performed work at the substation without making certain that the substation had been deenergized.

Based on the findings above to the effect that a large operator is involved, that there was a good-faith effort to achieve rapid compliance, that payment of penalties will not cause OD to discontinue in business, that there is no history of previous violations, that there was ordinary negligence, and that the violation was extremely serious, I find that a civil penalty of $3,000 should be assessed.

WHEREFORE, it is ordered:

(A) The Notice of Contest filed in Docket No. VA 81-40-R is denied because Old Dominion Power Company is an independent contractor and operator within the meaning of section 3(d) of the Federal Mine Safety and Health Act of 1977 and was cited by MSHA for a violation under regulations properly promulgated for citing independent contractors for violations occurring on mine property.

(B) Citation No. 668762-1 dated January 21, 1981, is

affirmed.

(C) The Petition for Assessment of Civil Penalty filed in Docket No. VA 81-65 is granted and Old Dominion Power Company, within 30 days from the date of this decision, shall pay a civil penalty of $3,000 for the violation

~2745
of section 77.704 which was violated by Old Dominion as alleged in Citation No. 688762-1 issued January 19, 1981, as modified January 21, 1981.

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

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~FOOTNOTE_ONE

The actual Petition for Assessment of Civil Penalty had not been filed in Docket No. VA 81-65 at the time the hearing was held, but my order issued March 20, 1981, consolidated the civil penalty issues with the issues raised by the Notice of Contest. Therefore, the civil penalty issues are ripe for decision on the basis of the record made in this proceeding.

~FOOTNOTE_TWO

This decision has been delayed by the fact that I was out of the office for 4 weeks because of an eye operation.

~FOOTNOTE_THREE

The quotation above is taken from a paragraph appearing on page 14 of Senate Report No. 95-181, 95th Congress, 1st Session, or page 602 of the Legislative History of the Federal Mine Safety and Health Act of 1977 prepared for the Subcommittee on Labor of the Committee on Human Resources, United States Senate, July 1978.