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SOL (MSHA) V. OTIS ELEVATOR
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. PENN 86-262 A.C. No. 36-02405-03501 B70
v.	
OTIS ELEVATOR COMPANY, RESPONDENT	Greenwich No. 1 Mine

DECISION

Appearances: James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, PeNnsylvania, for Petitioner;
Gary L. Melampy, Esq., Reed, Smith, Shaw & McClay, Washington, DC, for Respondent.

Before: Judge Maurer

STATEMENT OF THE CASE

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., (the "Act") for an alleged violation of the regulatory standard found at 30 C.F.R. 75.1725(a). (FOOTNOTE 1)

The issues before me are the respondent's status as an "operator" under the Act, the alleged vagueness of the cited standard, whether the respondent, if properly charged as an operator in this instance with violating a valid regulation, violated that regulation as alleged, and, if so, whether that violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, i.e., whether the violation was "significant and substantial." If a violation is found, it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

The case was heard in Pittsburgh, Pennsylvania, on March 31, 1987. The parties have filed post-hearing briefs and proposed findings and conclusions, and they have been considered by me in the course of this decision.

Section 104(a) "S & S" Citation No. 2689913, issued on March 3, 1986, cites a violation of 30 C.F.R. 75.1725(a) and the cited condition or practice is described as follows:

> Gary Belks and John Namestrik employees of the Otis Elevator Co. installed a govenor (sic) rope on the North Portal Elevator that created a hazard to the employees at this mine because this govenor (sic) rope was not installed properly. The smelter socket termination and Crosby Clamp termination were not properly made because the basket was not poured with smelter to the top of the small end of this basket and holes in the smelter existed on the wide end of this basket. The Crosby Clamp termination was made with the (2) 1/2" saddles on the dead end of this wire rope and there should be (3) three Crosby Clamps used on this 1/2" wire rope termination.

RESPONDENT'S STATUS AS OPERATOR

All during 1986 the Otis Elevator Company (Otis) had a contract with the Pennsylvania Mines Corporation (PMC) to furnish and provide supervision, labor, equipment, tools, materials and spare parts to inspect and maintain two elevators, including the North Portal Elevator, at PMC's Greenwich No. 1 Mine. This maintenance and service contract provided that Otis would maintain the elevator equipment in safe operating condition and more specifically that Otis would regularly and systematically examine, adjust, lubricate, repair or replace elevator parts, as required. Under the terms of this contract, Otis was further obliged to examine periodically all safety devices and governors and make periodic no load and full load safety tests. As a practical matter, this amounted to Otis conducting weekly inspections of the elevators, performing bi-monthly safety tests and responding to trouble calls and repairing the elevators on an as-required basis. In consideration for the performance of this service, Otis received $2,600.60 per month for the North Portal Elevator and $2,646.64 per month for the other elevator at the Greenwich No. 1 Mine.

Interestingly, an attachment to this contract, signed for Otis by one Carl M. Dick as Branch Manager, arguably registers Otis as an independent contractor, including providing an address for service of MSHA citations.

The Act contains a rather broad definition of "operator" at section 3(d):

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For the purpose of this Act, the termÄ Ä

** ** ** **

> (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 (emphasis added).

Against the background that Otis is an elevator service company whose employees, pursuant to a service contract between Otis and PMC performed inspections and conducted safety tests on a regular basis on the two elevators at the Greenwich No. 1 Mine as well as performing more extensive maintenance and repair work on those elevators on an as-needed basis, it seems patently clear to me that the language of section 3(d) of the Act intended to include them within the definition of "operator."

Otis, however, contends that, on average, their employees are only in the mine once a week, for an average visit of 1.5 hours. The argument being that this is a minimal presence which is insufficient to bring them under the Mine Act. I note, however, that the very citation at bar was issued as a result of elevator repair work done by their employees on one of those visits. Otis also alleges and I am satisfied that they do not perform construction work at the mine nor control any area of the mine. Contrary to their assertion, however, that they do not maintain a continuing presence at the mine, I disagree and find that in the performance of their contractual obligations to PMC at Greenwich No. 1, they did indeed have a continuing presence at the mine for all of 1986.

For legal authority, Otis cites National Industrial Sand Association v. Marshall, 601 F.2d 689 (3rd Cir.1979), and Old Dominion Power Co. v. Donovan, 772 F.2d 92 (4th Cir.1985).

Both cases are distinguishable. In National Industrial Sand Association, the issue the court was faced with was substantially different. The issue before the Third Circuit was whether the Secretary was statutorily authorized to include fewer than all independent contractors as operators for purposes of the training regulations. The Court, however, at the beginning of its analysis did set forth some general guidance:

> "Operator' is defined in the Mine Act as "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.' As this definition indicates, some, if not all, independent contractors are to be regarded as operators. 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. 601 F.2d at 701 (footnote omitted).

Old Dominion, supra, while an enforcement proceeding similar to the instant case, presents a very different situation factually. In Old Dominion, the utility's contacts with the mine were truly de minimis.

> The sole revenue derived by Old Dominion from its relationship with Westmoreland is for the sale of electric power. Old Dominion does not perform any maintenance at the substation, or of the transmission or distribution lines leading to and from the substation. Old Dominion's employees install equipment to measure voltage and amperage for its meter, maintain the meter and read it approximately once per month for purposes of billing. 772 F.2d at 93.

In holding that the MSHA regulations do not apply and were not intended to apply to electric utilities whose sole relationship to the mine is the sale of electricity, the Court stated that:

> Old Dominion's only contact with the mine is the inspection, maintenance, and monthly reading of a meter for the purpose of sending a bill to a mine company for the sale of electricity. Petitioner's employees rarely go upon mine property and hardly, if ever, come into contact with the hazards of mining.
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> ** ** ** ** **
>
> MSHA seeks to regulate those few moments every month when electric utility workers read or maintain meters on mine property.
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> ** ** ** ** **

> Plainly, Congress intended to exclude electric utilities, such as Old Dominion, whose only presence on the site is to read the meter once a month and to provide occasional equipment servicing. 772 F.2d at 96Ä97.

In stark contrast to the Old Dominion factual situation, I find as a fact that Otis's contractual obligations and performance thereof constituted a substantial, as opposed to a de minimis continuing presence at the Greenwich No. 1 Mine. Further, although the elevator is not used to transport coal and is not per se a part of the coal production or extraction process, I nonetheless find and conclude that because the North Portal elevator transports approximately 20% of the work force into and out of the mine on a daily basis and is additionally a designated escapeway, it is an essential ingredient involved in the coal extraction process.

I also find and conclude that the party responsible for the cited condition and who was in fact in the best position to eliminate the hazard, if there was a hazard, and prevent it from recurring was none other than the Otis Elevator Company. Inspector Niehenke, in his discretion, exercised his judgment and cited Otis for the alleged violation as the operator responsible for the installation of the governor rope on the North Portal elevator. I concur in at least that portion of his decision.

VAGUENESS OF THE CITED REGULATION

Respondent Otis also asserts that 30 C.F.R. 75.1725(a) is unconstitutionally vague because it does not establish any standards by which a person can determine what the regulation requires of them in order to comply with its terms. There is no doubt that the regulation is a very subjective standard which on its face simply requires that machinery and equipment "be maintained in safe operating condition."

Broadness, however, is not necessarily a fatal defect in a safety standard. The Commission has previously held that many such standards must of necessity be "simple and brief in order to be broadly adaptable to myriad circumstances." KerrÄMcGee Corp., 3 FMSHRC 2496, 2497 (1981). Furthermore, in a case involving this very same regulation, Alabama ByÄProducts Corp., 4 FMSHRC 2128 (1982), the Commission rejected the operator's contentions of unconstitutional vagueness and stated the following test:

> [I]n deciding whether machinery or equipment is in safe or unsafe operating condition, we conclude that the alleged violative condition is appropriately

measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation. 4 FMSHRC at 2129.

Applying this test to the facts of this particular case, I specifically reject Otis' argument that this standard is so overbroad and/or vague so as to be unenforceable, and so will instead decide the fact of violation of the cited standard in this case on the merits.

FACT OF VIOLATIONÄ Ä30 C.F.R. 75.1725(a)

MSHA electrical Inspector Leroy Niehenke testified as to his training and experience, and he confirmed that he had conducted an inspection of the North Portal elevator at the Greenwich No. 1 Mine on February 27, 1986. As a result of this inspection, he felt that the governor rope should be replaced, and it subsequently was, by Otis Elevator Company personnel.

On March 3, 1986, Inspector Niehenke returned to see to it that the governor rope had been replaced, and he determined that it had. He got on top of the elevator car and checked the suspension rope and governor rope terminations. He noticed that the newly babbitted socket termination on the governor rope attached to the safety linkage on the top of the elevator car had several holes in the babbitt material on the larger end of the basket termination. He testified further that the babbitt material was not adhering to the wires that came through the socket and there was also no babbitt visible from the small end of the basket, which indicated to him that there was a void of babbitt material inside the basket, adversely affecting the efficiency of the termination.

The governor is attached to the elevator car by a one-half inch diameter steel governor rope attached at the top and bottom of the car. At the top of the car, the rope is attached by means of a babbitted socket termination. This socket is a tapered basket approximately 2 1/2 inches long with a small end and a larger end. The small end of the socket is provided with an opening that is slightly larger than one-half inch in diameter so that the 1/2Äinch rope can pass through it. The socket termination is made by unravelling approximately five inches of the rope at one end to spread out the lays of the rope, turning them inward to form

a rosette, and pulling them into and towards the small end of the tapered socket. Once the rosette is pulled into the socket, a molten alloy of tin, copper and antimony ("babbitt") is poured into the socket. At the bottom of the car, the governor rope is attached to the car by means of U-bolts known as "Crosby clamps."

Inspector Niehenke found fault with this lower termination of the governor rope also because he felt there should be three (3) Crosby clamps on the termination vice the two (2) he found there and they were installed with the U-bolts on the live-end of the rope as opposed to the dead-end as he stated they are supposed to be installed. The "live-end" of the rope being the end of the rope that is attached to the equipment as opposed to the "dead-end" where the rope is merely turned around and cut off. There is nothing attached to the "dead-end." The problem being, according to the inspector, that the U-bolts will crush these wires and the termination can fail. Even the Otis expert testified that the U-bolts should be placed on the dead-end of the rope to prevent kinking the live-end, damaging the rope lays and losing strength in the rope.

The basic facts concerning the top and bottom terminations as testified to by Inspector Niehenke have not been rebutted in any manner by Otis. The more difficult issue is what do those now established facts mean vis-a-vis the safety of the elevator or any component of it. In order to establish the regulatory violation cited herein, the Secretary bears the burden of proof that the equipment, the elevator or some part of it, was rendered "unsafe" by Otis' installation of the governor rope.

The elevator in question is supported by nine suspension ropes during normal operation, any one of which is capable of supporting the entire weight of the car. The governor rope performs no hoisting or suspension function. It is attached at the top of the car to a lever which activates the mechanical safeties for the elevator if the car exceeds 125% of its rated speed. The governor senses the speed of the elevator through the governor rope. As the elevator moves up and down, the governor rope runs over two sheave wheels located at the top and bottom of the elevator shaft. This movement of the rope causes the wheels to turn and the flyballs on the governor to spin. As the elevator speed increases, the centrifugal force on the flyballs causes them to rise. If and when the elevator speed would exceed 125% of its rated speed, it would cause the flyballs to rise to the point where two metal jaws in the governor mechanism would release and clamp down on the governor rope, causing the rope to pull up the governor rope lever situated on top of the elevator car, activate the safeties, and stop the car.

During normal operations, the load on the lower termination (the Crosby clamps) is the weight of the lower sheave wheel and the weight of the rope. In the event the safeties are activated in an overspeed condition, there is no load on the rope termination on the bottom of the car because the tension on the governor rope at that time would be exerted between the governor jaws and the safety lever on the top of the car (the socket termination). The load exerted on the socket termination on the top of the car to set the mechanical safeties is on the order of 250Ä300 pounds of pull (force). That is the force required to pull up the governor rope lever on top of the car, which in turn activates a spring which applies the safeties and stops the car. The maximum possible tension on the socket termination would be approximately 1000 pounds, as the governor jaws are designed to release the rope when the level reaches 1000 pounds, by which time the safeties should have been activated. I find that if it were possible for either end termination to fail under any load it would ever be subjected to in normal or emergency conditions, I would find that condition to be an "unsafe" one, and in violation of 30 C.F.R. 75.1725(a).

Inspector Niehenke uses the American National Standard for Wire Rope for Mines as a guideline for inspecting mine elevators. More specifically, in this case, he used portions of these ANSI standards to check and ultimately reject as unsatisfactory the two terminations made on the governor rope. Neither of the terminations were done in accordance with the ANSI standards, as the unrebutted testimony of the inspector clearly establishes.

There are no objective mine safety regulations establishing standards for elevator governor rope terminations. Neither are the ANSI standards incorporated by reference therein. Therefore, non-compliance with the ANSI standards does not in and of itself establish either a violation of the regulations or a finding that an unsafe condition exists on a piece of machinery or equipment. However, the ANSI standards do provide some guidance for the inspector and myself as to the proper configuration of wire rope terminations.

The ultimate issue in this case is, however, did those terminations render the governor rope assembly unsafe. The fact that the terminations did not comply with the ANSI standards is but a single piece of the equation.

Two individuals testified as expert witnesses in this case. Mr. Ronald Gossard, an MSHA engineer, testified for the Secretary. In response to a hypothetical question framed based on the facts in evidence, he opined that the elevator as it existed at the time the citation was written would operate safely until

such time as the governor was needed to apply the safeties. At that point, the terminations, especially the one at the top of the car, could fail. He testified that because the small end of the socket termination basket was not filled with babbitt material and since that is the end of the rope termination that faces upward in the shaft, moisture could collect inside the termination and quickly corrode the rope at that point. He further testified that the way the socket termination was described in the record, if and when the elevator car ever went into an overspeed condition and the governor jaws clamped down on the governor rope, the shock load on the poorly made termination could cause it to fail in service. With regard to the lower termination made with Crosby clamps, his concern was that if the clamps came loose prior to an overspeed operation of the governor, you would have a loose rope dangling in the hoistway which could become entangled with the suspension ropes or the elevator counterweight.

Mr. James Beattie, a maintenance supervisor for Otis, testified as an expert for the respondent. He stated unequivocally that it is impossible to pull a rope such as the one in question that has been "rosetted" back through a socket termination like the one at bar, even if that termination has no babbitt poured into it at all. He stated that when you turn the lays of the rope back and make the rosette, you increase the diameter of the rope. Thereafter, if you pull on that rope to attempt to force it back through the basket, all you accomplish is to wedge it tighter into the socket. Once it tightens up in the socket, that is all the further it will move. He further opined that before you would pull the rope back through the socket, you would either first break the rope or the socket.

Mr. Beattie backed up his opinion with a test which essentially confirmed his opinion. The test was not, however, performed on the installation that Inspector Niehenke cited as unsafe. The test was performed in controlled conditions at a machine shop in Pittsburgh. He made up a 1/2Äinch wire rope installation with a socket termination on one end and a single Crosby clamp on the other end. At the socket end, he unraveled and looped the wire lays into a rosette and pulled it handtight into the socket. No babbitt was poured into the socket to secure the rope. On the other end, a single Crosby clamp, correctly installed, however, was used to secure the rope. He then imposed a load of approximately 3200 pounds on this assembly, with no slippage once the rosette fully tightened up inside the socket termination. There was no slippage noted whatsoever at the Crosby clamp end. From this test he concluded that an unbabbitted socket termination would sufficiently withstand the load required to activate the governor rope lever and therefore the safeties on the elevator car.

On cross-examination, however, Mr. Beattie allowed that to do a quality job on the socket termination you would have to use babbitt in the socket termination and you should fill it to the top of the shackle and be able to see babbitt in the small end of the basket. He also conceded that if the job was as Inspector Niehenke testified, and that is unrebutted, he would recommend that it be changed out. On redirect-examination, he reiterated that even so, it was not unsafe.

Weighing the totality of the evidence in this record, I find that the elevator governor assembly and therefore the elevator, should the governor ever have been needed at some future time, were in an unsafe condition within the meaning of 30 C.F.R. 75.1725(a). In so holding, I find that the condition of the wire rope terminations at both the babbitted and clamped ends of the governor rope were as Inspector Niehenke described them. This factual evidence was unrebutted by Otis. I credit the expert testimony of Mr. Gossard concerning the hazards he associated with the condition as described, particularly the likelihood of corrosive damage to the rope because of the poorly made socket termination in an area where acidic moisture could quickly corrode the rope, and his opinion that the emergency operation of the governor would introduce an initial shock load on the babbitted termination that could fail a poorly made one. These points were unrebutted by Otis as well. Also persuasive is the fact that although respondent's expert did not think the situation as described in the record was "unsafe" he nevertheless would recommend that it be changed out.

The respondent's case consisted of the expert testimony of Mr. Beattie and video-taped evidence of a stress test performed on a wire rope with an unbabbitted socket termination on one end and a single Crosby clamp termination on the other. This test demonstrated that the assembly as configured should withstand a force on the order of ten times as great as the force necessary to pull the lever that activates the safeties. However, neither Mr. Beattie or the stress test dealt with the corrosion issue or the effect that the imposition of an initial shock load would have on the poorly babbitted termination. I agree with the Secretary that the stress pull test performed under what might be considered laboratory or "ideal" conditions is an entirely different situation than what actually exists in the mine given the environmental conditions that the equipment must operate in there.

The Commission has stated in Mathies Coal Co., 6 FMSHRC 1 (1984), that to establish a significant and substantial violation the Secretary must show that the violation contributed to a hazard, and that the hazard contributed to would, with

reasonable likelihood, result in an injury of a reasonably serious nature. The inspector and the Secretary's expert were of the opinion that the hazard contributed to here was ultimately the failure of the elevator governor assembly to halt an overspeeding car because of the failure of one or the other of the governor rope terminations. Of particular concern was the babbitted socket termination on top of the car. Had the governor failed to halt the car in such an emergency, the inspector would expect fatal injuries to the miners on board the elevator. I find the evidence establishes that if the violative condition had been allowed to continue unabated, the defects found in the terminations by Inspector Niehenke combined with the corrosive environmental factors the equipment would be exposed to over time would indeed contribute to a hazard reasonably likely to result in injury and/or death should the elevator's governor assembly system be needed in an emergency to halt an overspeeding car. Therefore, I find the violation to be a "significant and substantial" one and serious.

Furthermore, the violation clearly resulted from the respondent's negligence since it was their employee who was directly responsible for the inadequate and as found herein, unsafe, installation of the governor rope. Considering all of the above and the rest of the statutory criteria enumerated in section 110(i) of the Act, including the respondent's good history of prior violations and good faith abatement of the violation herein, I find that an appropriate penalty for the violation is $750, as proposed.

ORDER

It is therefore ORDERED that Citation No. 2689913 IS AFFIRMED. It is further ORDERED that Respondent pay the sum of $750 within 30 days of the date of this decision as a civil penalty for the violation found herein.

Roy J. Maurer
Administrative Law Judge

FOOTNOTE_ONE

1 75.1725(a) Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.