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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

OTIS ELEVATOR COMPANY,
PETITIONER

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

CONTEST PROCEEDINGS

Docket No. PENN 87-25-R
Citation No. 2690792; 10/27/86

Docket No. PENN 87-26-R
Citation No. 2690793; 10/27/86

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

v.

OTIS ELEVATOR COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDINGS

Docket No. PENN 87-69
A.C. No. 36-00840-03501 B70

Docket No. PENN 87-86
A.C. No. 36-00840-03502 B70

Cambria Slope Mine 33

DECISION

Appearances: Linda M. Henry, Esq., Philadelphia, PA,
for Secretary of Labor;
W. Scott Railton, Esq., Reed, Smith, Shaw
& McClay, Washington, DC, for Otis Elevator Company.

Before: Judge Fauver

These consolidated actions were brought under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. Otis Elevator Company seeks to vacate two citations and the Secretary seeks civil penalties against Otis for the alleged violations. The key issue is whether Otis is subject to the provisions of the Act.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, probative, and reliable evidence establishes the following:

FINDINGS OF FACT

1. Otis is an independent contractor that regularly inspects, services and repairs a deep shaft elevator at Cambria Slope Mine No. 33, which is operated by Beth Energy

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Mines, a subsidiary of Bethlehem Steel Corporation. Otis' contract with Bethlehem Steel Corporation calls for weekly inspection and maintenance of the elevator and repairs on an as-needed basis. The mine produces coal for use in or substantially affecting interstate commerce.

2. Otis employs elevator mechanics in two capacities. Some mechanics are maintenance examiners, who perform weekly inspections and preventive maintenance work on elevators. The other mechanics respond to service calls outside the scope of the routine inspections. Maintenance examiners, service mechanics, and helpers operating out of the Johnstown, Pennsylvania office of Otis service the elevator at the Cambria Slope Mine No. 33. The mine elevator is on a route that includes elevators in a Sears and Roebuck store, an office building, two banks and a hospital. The maintenance examiners, service mechanics, and helpers perform the majority of their work on elevators in above-ground facilities.

3. Otis has an identification number assigned by MSHA for independent contractors who are subject to the Act.

4. Otis' maintenance examiners spend between one and two hours a week inspecting and doing maintenance work on the mine elevator. If problems are discovered, the examiners may remain longer at the mine. Service mechanics and helpers average two to four "call back" trips to the mine each month. These range from one and a half to nine hours per visit depending on the repairs needed. On the average, Otis employees inspect or repair the mine elevator two times a week and spend up to 20 hours a month at the mine. In addition, Otis employees conduct a "no load" safety test of the elevator every 60 days.

5. The elevator transports miners 800 feet underground, stopping at two coal seams. The elevator is the primary escapeway for 60 miners on each shift, and an alternative escapeway for 60 other miners. It was selected as the primary escapeway because it is the easiest and fastest way to exit the mine. Its other primary function is to transport all the production crews. Over 200 miners use the elevator each day to travel to and from their work underground. If the elevator were not available to transport the miners for their shift work, production of coal would be directly affected. The mine superintendent, Peter Merritts, estimated that production would decrease as much as 3,000 clean tons a day if the elevator were not available to transport the miners during a shift change. Also, the elevator is used to transport small tools used by the miners.

6. Otis has control over, and responsibility for, the inspection, maintenance, and repair of the mine elevator. It has the responsibility for ensuring safe and reliable

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elevator transportation for all production miners as well as as personnel using the elevator as an escapeway.

7. On October 27, 1986, MSHA Inspector Niehenke issued Citation 2690793 because Otis employees failed to tag an elevator electrical circuit while they were doing electrical work on the elevator. They had locked out the circuit, but they did not place a tag on the circuit. He issued Citation 2690792 because the Otis employees were doing electrical work on the elevator but they were not qualified as coal mine electricians or being supervised by a qualified coal mine electrician.

DISCUSSION WITH FURTHER FINDINGS

In the 1977 Amendments to the Mine Safety Act, Congress amended the definition of a mine operator to include "any independent contractor performing services or construction at such mine." 30 U.S.C. 802(d).

The Act defines "coal or other mine" as " an area of land from which minerals are extracted and shafts, slopes, tunnels and workings, structures, facilities on the surface or underground, used in the work of extracting such minerals" 30 U.S.C. 802(h). The Senate Committee reporting on the 1977 Amendments stated that, "it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act." S.Rep. No. 95Å181, 95th Cong., reprinted in U.S.Code & Cong.Adm. News (1977) 3401, 3414.

The Secretary's administrative "final rule" on independent contractors, found at Part 45, 30 C.F.R., defines independent contractor as a person or business that "contracts to perform services or construction at a mine." The preamble to the final rule reinforces the definition of independent contractor as one who performs service and repair work. The general discussion in the preamble states that the 1977 Act clarified that "independent contractors performing services or construction at mines are subject to the Act." 45 Fed.Reg. at 44494 (July 1, 1980). The commentary also states that independent contractors may perform "short-term" and "intermittent" work at the mines, and that they may be engaged in every type of work from a new mine construction to minor repairs. The Secretary particularly rejected litmus tests for identifying contractors and stated that "enforcement decisions should be made on the basis of the facts pertaining to each particular case." 45 Fed.Reg. 44494.

Exposure of employees of an independent contractor to the same hazards as employees of the mine operator is an important consideration in determining application of the

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Act. Bituminous Coal Oper. Ass'n v. Secretary of the Interior, 547 F.2d, 240 (4th Cir.1977). Another important consideration is the point that employees of independent contractors unschooled in mine health and safety may pose a threat to the safety of all persons working at the mine. National Industrial Sand Ass'n v. Marshall, 601 F.2d 689, 703 (3rd Cir.1979).

The Fourth Circuit has held that employees of an electric utility company who read a meter monthly near a mine access road were not subject to the Act. Old Dominion Power Co. v. Donovan, 722 F.2d 92 (4th Cir.1985). (FOOTNOTE 1) The meter was isolated by a chain link fence. The Fourth Circuit found that the meter employees "rarely go upon mine property, and hardly, if ever, come into contact with the hazards of mining." 772 F.2d at 93.

In contrast to that case, Otis employees perform frequent and substantial safety inspections and repairs of the mine elevator. Its employees have a continuing, regular presence at the Cambria Slope Mine No. 33. They visit the mine every week to inspect and service the elevator and in an average month they also perform repairs at the mine four to six times. In January, 1986, for example the repair reports show six visits to the mine in addition to the four weekly maintenance visits, for a total of ten days at the mine.

The mine elevator is a critical part of the mine. It is used as a "mantrip" for all of the production crews. If the elevator breaks down, production could be cut by as much as one third. The elevator is also an escapeway for part of the mine, and as such is subject to MSHA regulations. Thus, Otis employees have a substantial, recurring presence at the mine and they perform crucial safety repairs on a key facility of the mine. They are not "rare" visitors, "remote" from the dangers of the mine as were the employees in Old Dominion. Otis more than meets the Act's broad definition of independent contractor. If a point exists where a contractor's contacts with a mine are too minimal to bring it under the scope of the Act, that point is not met here.

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Inspector Niehenke properly cited Otis for the violations in this case. Otis employees created both violative conditions. They did not tag the circuit they locked out and they performed electrical work on the elevator without the supervision of a qualified mine electrician. As its employees created the conditions, Otis was in the best position to remedy the violations.

With regard to Citation 2690792, Otis violated the plain language of the regulation. Otis employees were performing electrical repair work and they were neither qualified by the Secretary as coal mine electricians nor being supervised by a qualified mine electrician. Performing electrical work on the mine elevator without certified training and knowledge of mine safety and health rules and requirements presented a discrete safety hazard. This violation could reasonably be expected to result in an accident if persisted in over an indefinite period. The injuries likely in the event of an accident could reasonably be expected to be serious. The inspector's finding of a "significant and substantial" violation in Citation 2690792 will therefore be affirmed.

Otis also violated the safety standard cited in Citation 2690793. Otis had not tagged out the circuit its employees were working on. Thus there was a violation of 30 C.F.R. 77.501. Inasmuch as the Otis employees had locked out the circuit, the violation did not present a discrete hazard to the Otis employees or the operator's miners. The inspector therefore did not rate this violation "significant and substantial."

Well before the inspection in these cases, Otis was expressly informed by MSHA of its enforcement position that the Act applied to Otis' contract work at the subject mine. Otis disregarded this position and chose to work without complying with the Act and mine safety standards. The inspector's allegation of an "unwarrantable" failure to comply with the standards cited in Citations 2690792 and 2690793 will therefore be affirmed.

Otis' defense that its compliance with the Act and mine safety standards would create a "greater hazard" or a "diminution of safety" is raised in the wrong forum. The Commission has held that the "greater hazard" or "diminution of safety" defense is not permissible where the operator has not first filed a petition for modification with the Secretary of Labor. In Penn Allegheny Coal Co., 3 FMSHRC 1392 (1981), the operator contended that application of the Secretary's regulation would endanger the safety of the miners. The Commission noted that 101(c) of the Act was specifically designed to resolve such questions, and held that the operator could not wait until it was cited for a

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violation of a safety regulation to raise such an issue in an enforcement proceeding:

We cannot endorse this short circuiting of the Act's modification procedures. We believe it is important that questions of diminution of safety first be pursued and resolved in the context of the special procedure provided for in the Act, i.e., a modification proceeding.

The Commission has recognized one narrow exception to this requirement. In *Sewell Coal Co.*, 5 FMSHRC 2029 (1983), the Commission stated:

We realize that emergency situations may arise where the gravity of circumstances and presence of danger may require an immediate response by the operator or its employees, necessitating a departure from the terms of a mandatory standard without first resorting to the Act's modification procedures. In such conditions, an exception to the Act's modification and liability provisions may be necessary in order to further the Act's primary goal, the protection of miners. *Penn Allegh* did not present such a situation, nor does this case. Rather, these cases involve only the operator's ability to conduct safely routine mining operations on a continuing and regular basis. Therefore, we reserve for a case appropriately raising such an issue detailed consideration of any emergency exception to the general rules on modification and liability.

Otis has done that which the Commission expressly forbids: it has unilaterally determined that it may conduct its operations at a mine site in a "safer" manner than would be achieved by compliance with mandatory safety standards. Absent the narrow circumstances of an emergency situation, Otis may not raise this defense in an enforcement proceeding. It may not sit back and wait until it is cited for a safety violation to allege that greater hazards would exist if it complied with the standards cited. Otis has not shown that an emergency threatening the safety or health of personnel justified its non-compliance with the cited safety standards.

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Considering all the criteria for a civil penalty in 110(i) of the Act, a civil penalty of \$300 for Citation 2690792 and \$20 for Citation 2690793 are found appropriate.

CONCLUSION OF LAW

1. The Commission has jurisdiction in these proceedings.
2. Otis Elevator Company violated the safety standard as charged in Citation 2690792.
3. Otis Elevator Company violated the safety standard as charged in Citation 2690793.

ORDER

WHEREFORE IT IS ORDERED that:

1. Citation 2690792 is AFFIRMED.
2. Citation 2690793 is AFFIRMED.
3. Otis Elevator Company shall pay the above civil penalties of \$320 within 30 days of this Decision.

William Fauver
Administrative Law Judge

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~FOOTNOTE_ONE

1 The Fourth Circuit relied on the criteria in MSHA's "proposed rule," which initially identified an independent contractor as one involved in "major work" and having a "continuing presence" at the mine. 772 F.2d at 97, fn. 6. However, in promulgating the final rule MSHA specifically retreated from these two criteria. The Secretary is not bound by proposals published in the Federal Register that fail to survive in the final rule.