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MSHA V. OTIS ELEVATOR
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FMSHRC-FCV
MAY 2, 1988

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

v.

OTIS ELEVATOR COMPANY,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. PENN 87-97
A.C. No. 36-02404-03501 B-70

Greenwich No. 2 Mine

DECISION

Appearances: Linda M. Henry, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Gary L. Melampy, Esq., Reed, Smith, Shaw & McClay, Washington, D.C., 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 section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801, et seq., (the "Act") for two alleged violations of the regulatory standard found at 30 C.F.R. $ 77.205(b).1/

The issues before me are the respondent's status as an "operator" under the Act, and whether the respondent, if properly charged as an operator in this instance with violating the subject regulation, violated that regulation as alleged, and, if so, whether those violations were of such a

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1/ $ 77.205(b) Travelways and platforms or other means of access to areas where persons are required to travel or work, shall be kept clear of all extraneous material and other stumbling or slipping hazards.

nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, i.e., whether the violations were "significant and substantial." If violations are 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 October 23, 1987. The parties have filed posthearing 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. 2690794 issued on October 29, 1986, cites a violation of 30 C.F.R. $ 77.205(b) and the cited condition or practice is described as follows:

> Otis elevator personnel have created a slipping hazard when they oil the suspension ropes and grease the bearings on the suspension rope shieve (sic) drum on the 580 portal shaft elevator. An excess of oil and grease has fallen on to the travelway below this shieve (sic) drum. Employees of this coal operator have to use this travelway when they make their daily elevator examinations.

Section 104(a) "S&S" Citation No. 2690795 also issued on October 29, 1986, cites another violation of 30 C.F.R. $ 77.205(b) and the cited condition or practice is described as follows:

> Otis Elevator personnel have created a slipping hazard when they oiled the suspension ropes and also when they greased the bearings on the suspension rope shieve (sic) drum on the Cookport Elevator. An excess of oil and grease has fallen on to the travelway below this shieve (sic) drum. Employees of this coal operator have to use this travelway when they make their daily examination on the Cookport Shaft Elevator.

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 elevators including the Cookport and 580 Shaft Elevators at PMC's Greenwich No. 2 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 these services, Otis received $2,604.61 per month for the 580 Shaft Elevator and $2,633.29 per month for the Cookport Shaft Elevator at the Greenwich No. 2 Mine.

There is an attachment to this contract, signed for Otis by one Carl M. Dick as Branch Manager, that arguably registers Otis as an independent contractor, including providing an address for service of MSHA citations. Further, Government Exhibit No. 9 is a Bureau of Mines Legal Identity Report which also identifies the Corporation as an independent contractor providing "servicing".

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

> For the purpose of this Act, the term--
>
> * * * * * * *
>
> (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. 2 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". I have previously so held in Secretary v. Otis Elevator Co., 9 FMSHRC 1933, 1935 (November 10, 1987) appeal docketed, No. PENN 86-262 (December 18, 1987). That case involved an elevator at PMC's Greenwich No. 1 Mine which was being serviced and maintained by Otis pursuant to the same contract as is herein involved.

Otis contends that it is not an "operator" subject to the jurisdiction of the Mine Act notwithstanding its service contract with PMC because of its allegedly minimal presence at the mine. The company argues that the U.S. Courts of Appeals for the Third and Fourth Circuits have concluded, based on the Act's language and its legislative history, that Congress did not intend to classify all independent contractors who might have employees on mine property as "operators" within the meaning of the Act, citing National Industrial Sand Association v. Marshall, 601 F.2d 689 (3d 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.
>
> * * * * * * *
>
> 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 96-97.

In stark contrast to the Old Dominion factual situation, I find as a fact that Otis' contractual obligations and performance thereof constituted a substantial, as opposed to a de minimis continuing presence at the Greenwich No. 2 Mine. Pursuant to its service contract, an Otis maintenance examiner conducted a weekly routine inspection of the elevators and performed any necessary maintenance work as well as preventive maintenance at that time. Every other month, he would also be required by the terms of the contract to conduct a no load safety test. Additionally, Otis responded to service calls at each elevator on average at least once per month, with more frequent calls during the winter months. Furthermore, during 1986 (the term of this contract), the Otis technician had on one or more occasions added oil to the automatic lubricating boxes for the hoisting ropes and greased the bearings on the deflector sheaves on these two elevators. Oil from these ropes and grease from these bearings are most likely the

source of the accumulations of oil and grease complained of in the citations at bar. I note here parenthetically, however, that the inspector has not, nor has anyone else, ever determined who was responsible for the specific accumulations he found on October 29, 1986. Quite frankly, as I will discuss later in this decision, it could very well have been the coal operator's employees who were responsible for the excess accumulations the inspector found. Both Otis and PMC employees had equal access to the elevator equipment, and as I will discuss later, both entities had their own motivations to lubricate or over-lubricate it.

Otis also urges and I am satisfied that they do not extract coal from the mine or perform construction work at the mine nor exclusively control any portion of the mine, including the elevators at issue herein. I also agree that they did not maintain a daily presence at the mine. Nevertheless, they were an independent contractor performing substantial services on critical equipment at the mine. These elevators, although not used to transport coal out of the mine and thus, not per se part of the coal production or extraction process, are used as "man-trips" to transport the production crews into and out of the mine and additionally, are designated escapeways for the mine.

Otis employees regularly and frequently inspect, service and repair these elevators and while Otis does not have exclusive physical control over the elevators themselves, it most certainly did have the responsibility by way of contractual obligation for their inspection, maintenance and repair. Therefore, I agree with the Secretary, as I have before, that the Otis Elevator Company is exactly the type of independent contractor which Congress intended be subject to the Mine Act.

FACT OF VIOLATION - 30 C.F.R. $ 77.205(b)

On October 29, 1986, Inspector Niehenke observed an accumulation of oil on the platform below the deflector sheave on both the Cookport and 580 Shaft Elevators. He described the accumulation as covering the entire platforms with anywhere from a thin film to a quarter of an inch of light-colored oil. There were also scattered piles of grease, approximately an inch high, on the platforms, below the sheave wheels in this oil. These platforms were used by mine personnel at least weekly at that time to perform their required inspections of the elevator equipment. Mr. Gach, the Greenwich employee who was responsible for inspecting the elevators, testified that there was no other way to inspect the sheave wheels or hoisting ropes without going out onto these platforms.

Based on the foregoing, I find that the oil accumulations found by Inspector Niehenke on the two platforms presented an unquestionable slipping hazard and therefore constituted violations of the cited mandatory safety standard as alleged in the two citations at bar.

The harder question is which operator, Otis or PMC, is responsible for these violations.

RESPONSIBILITY FOR THE VIOLATION -- STRICT LIABILITY UNDER THE MINE ACT

The Commission has often held that an operator is liable, without regard to fault, for violations of the Act or its regulations committed by its employees. The majority most recently re-affirmed this principle in Western Fuels-Utah, Inc., 10 FMSHRC (March 25, 1988).

It is also clear that there can be more than one "operator" at any particular time in a given mine. As I have already found in this case, Otis was an independent contractor type operator during the term of its contract while PMC remained the mine operator or "owner-operator" throughout the same time period.

The Secretary states and I agree that MSHA may cite either the independent contractor or the mine operator for violations committed by independent contractor employees. Both the Commission and the federal courts have held that owners of coal mines can be held strictly liable for violations of the Act committed by their independent contractors. Republic Steel Corp., 1 FMSHRC 5, 9 (1979); Old Ben Coal Co., 1 FMSHRC 1480, 1481-83 (1979); Cyprus Industrial Minerals Co. v. FMSHRC, 664 F.2d 1116, 1119 (9th Cir. 1981). However, I am unaware of any authority that stands for the obverse proposition--that the independent contractor is strictly liable for the actions of the coal operator's employees. That very well may be the factual situation we are confronted with in this case, although there is no direct evidence of that. In fact, there is no direct evidence of any identifiable individual or entity that is responsible for the violative condition found by Inspector Niehenke. It is clear that there were two violations extant and that someone's negligence was the cause of their existence. It remains unknown, however, who the negligent actor was and by whom he was employed.

Inspector Niehenke, in his discretion, exercised his judgment and cited Otis Elevator Company for causing the two

violations at bar, rather than the coal operator. I note, however, that the coal operator did not escape unscathed. PMC was also issued two citations that day by Inspector Niehenke for violations of the identical mandatory standard for permitting the slipping hazard to exist on the same two elevator platforms. It appears to me as though the inspector is making the two pools of oil serve double duty as the basis for four rather than two citations, because had he also alleged that PMC was responsible for causing the violative accumulations, since the same mandatory standard is involved, the four "violations" would have merged into two, one for each elevator.

The inspector arrived at his decision to cite Otis, rather then PMC, primarily on the basis of talking with Mr. Gach and his alternate, Mr. Burskey (Tr. 109-110):

> I asked them if they oiled the ropes. They told me no, they did not. They were given instructions not to oil the ropes. I asked them who they thought could have done this, and they felt Otis done it, because Otis does the service contract work on the elevators. That's basically now I came to the conclusion that the contract operator certainly had involvement in these proceedings.

At trial, however, Mr. Gach, who was responsible for servicing the elevators prior to the contract with Otis, admitted that on occasion he still serviced the elevators (Tr. 23):

Q. Did you ever fill the box with oil when the Otis Elevator people were the contractors?

A. I probably did it once or twice in the years they were there. If you went up there, I was doing my inspection, and the box was dry, you would have to put oil in it.

The inspector did not ask the assigned Otis employee or any Otis employee for that matter what work he had performed on the elevator or who he thought might be responsible for the accumulations. Had he done so, Mr. Shaffer presumably would

have told him, as he did testify, that at the beginning of 1986 he used to add oil to the lubricating boxes 2/ whenever he thought the ropes needed lubrication. Otherwise, he let them run dry. PMC, however, was concerned that the ropes be lubricated at all times because MSHA had cited it for instances in the past when the hoisting ropes had become rusted. So, beginning in May, 1986, Shaffer added oil to each lubricating box during his inspections at the insistence of mine management. He categorically denies, however, taking any further action with regard to lubricating the ropes at any time during the term of the contract. He specifically denies ever applying oil to those portions of the ropes which do not pass by the lubricating boxes. 3/ He stated that such lubrication was unnecessary because those 20-30 feet of rope also do not go over the sheave wheel and therefore the internal hemp core of the rope provides sufficient lubrication for those lengths. Shaffer also specifically denies ever adjusting or replacing the wicks on the lubricating devices or in fact doing anything to them other than putting oil in the boxes.

With regard to the grease droppings, Mr. Shaffer testified that he greased the bearings on the deflector sheaves on the two elevators in May of 1986. That was the one and only time he greased those bearings and he never noticed more than a drop or two of grease leaking out of those bearings in the

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2/ There were automatic lubricating devices consisting of a lubricating box which holds a quantity of oil and a wick made from a felt pad, installed in the elevator machine room for each of the nine hoisting ropes. The wick extends out of the box so as to be near the rope without actually touching it. The oil is then applied electrostatically to the rope as it passes near the wick. Once the ropes are coated with a thin film of oil, the electrostatic action stops until the rope becomes dry again. At that point, oil is again applied to the rope by electrostatic action.

3/ Mr. Gach described a procedure that he has used to manually oil the 20-30 feet of rope that do not pass by the lubricating boxes at Tr. 30:

> "There is a certain amount of ropes on the sheave wheel that don't go through the oil, and you have got to go down there with a brush and brush oil on them. I think there are in the neighborhood of twenty feet of rope that won't go through the oil."
>
> He described this as a "messy" procedure and opined that perhaps the Otis technician had done this and not cleaned up after himself.

nearly 6 months between May and October of 1986. Prior to that time, when Otis first took over the maintenance on the elevators from the coal operator, he states those bearings were grossly over-greased and that he had to clean them up weekly, but that by May of 1986, he had the old over-greasing under control.

I find the testimony of Lynn Shaffer to be cogent and internally consistent throughout. I therefore find that testimony to be very credible and I do credit it in making this decision.

The testimony of Mr. Gach by comparison contradicts the Secretary's allegations in places and is internally inconsistent on a critical bit of evidence. He first stated at (Tr. 38-40):

Q. When had you last had occasion to be on the platform before the citation?

A. It was probably two or three days.

Q. About the time the Otis employee was there?

A. I would say so.

Q. Sometime after he was there?

A. Yes.

Q. But before Leroy [Inspector Niehenke] was there?

A. Yes.

* * * * * * *

Q. Did you see an oil accumulation on that day; the last day prior to the inspection?

A. No.

Q. This is the same for both of these two elevators I take it?

A. Yes.

Then later he testified at (Tr. 56):

Q. The last time you were on the platform there was no accumulation?

A. I'm absolutely sure there wasn't, and I'm sure Otis was there afterwards.

My reading of the record herein including the fact that PMC was very concerned with lubricating these ropes leads me to believe that it is at least as likely that an overzealous PMC employee over-lubricated these ropes and bearings, as an Otis employee.

Apropos this point, Inspector Niehenke was cross-examined concerning his testimony at an earlier hearing about another citation he issued at PMC's North Portal elevator (Tr. 151-153):

Q. I am reading from page 126 of your testimony at a hearing, which is PENN 86-262, which was given on March 31, 1987.

> "Question. On February 27 you issued a citation to the mine operator, but on March 3 you issued a citation to Otis?" "Answer. That is correct."

* * * * * * *

Q. The previous citations that you issued were issued to the mine operator because the ropes were over lubricated?

A. Yes.

* * * * * * *

Q. So, you were testifying that the mine operator, Greenwich Collieries, was responsible for over lubrication of the governor ropes on February 27?

A. Yes.

Q. Would you agree that the services that Otis provided to the Cookport and 580 elevators did not differ in any way in the services Otis provided to the North Portal elevator?

A. They provide the same service, yes.

Q. And you determined in issuing your citation that it was the mine operator that was responsible for the over lubrication of the ropes on the North Portal elevator?

A. I couldn't establish it was Otis.

On redirect examination, he reiterated (Tr. 156-157):

Q. Mr. Niehenke, remembering back to the March hearing and what you were talking about there, when you issued those citations on the governor ropes to Greenwich Collieries, why did you issue them to Greenwich instead of to Otis?

A. Because I couldn't establish that Otis put the lubrication on the ropes.

The same problem exists for the Secretary in this case. She cannot establish that Otis put the lubrication on the ropes or over-greased the bearings. In sum, she cannot establish that Otis was the responsible operator. I also find and conclude that the party who was in the best position to eliminate the hazard was the party who in fact did abate the violation, the coal mine operator. Furthermore, I expressly reject the Secretary's contention that Otis can be held strictly liable for violative conditions that were caused by the coal mine operator's employees.

I am not persuaded that the Secretary has met her burden of proof on the issue of whose employees caused these violative conditions and absent a preponderance of the evidence which would tend to establish that it was an Otis employee, I do not believe the citations were properly issued to Otis. Accordingly, I am going to vacate the two citations at bar.

ORDER

It is ORDERED THAT:

1. Section 104(a) Citation Nos. 2690794 and 2690795 ARE VACATED.

2. MSHA's petition for assessment of a civil penalty IS DISMISSED.

Roy J. Maurer
Administrative Law Judge

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