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MSHA V. WELL TECH
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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. VA 92-54<br>A.C. No. 44-01520-03501 JIC |
| v. | : | Virginia Pocahontas #3 |
| WELL TECH INCORPORATED, Respondent. | : | |

DECISION

Appearances: Javier I. Romanach, Esq., Arlington, VA, for Petitioner;
George R. Carlton, Jr., Esq., Dallas, Tx, for Respondent.

Before: Judge Fauver

The Secretary seeks civil penalties for three alleged violations of safety standards under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

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 and further findings in the Discussion below:

FINDINGS OF FACT

1. On August 7, 1991, Federal Mine Inspector Leslie Slowey inspected gas well site #267 of Island Creek Coal Company's Virginia Pocahontas #3 underground coal mine. He inspected the Cooper Drill rig operated by Well Tech Incorporated. Well Tech Incorporated, an independent contractor, had a contract with the mine operator on a call-up basis to service wells used to extract methane from the mine. This process involved withdrawing suction rods, lifting the pump out of the well and servicing or repairing the pump to correct the basis for the call-up by the operator. Well Tech's services were essential to the mine's system of removing methane from the mine. Methane removal was essential to the extraction of coal.

2. Inspector Slowey inspected the drill rig for safety and cited three violations. First, he found that the fan inlets and drive belts for the motor of the drill rig were not properly guarded to keep a person from coming in contact with exposed moving parts, in violation of 30 C.F.R. 77.400(a), for which he issued Citation No. 3778953. He determined that this violation was "significant and substantial."

Second, he found that the drive shaft coupling was not guarded to prevent a person from coming in contact with moving machinery parts, in violation of 30 C.F.R. 77.400(a), for which he issued Citation No. 3778954. He determined this violation was "significant and substantial."

Third, he found that the Cooper Drill rig did not have an operable back-up alarm, in violation of 30 C.F.R. 77.410, for which he issued Citation No. 3778955. He determined this violation was "significant and substantial."

DISCUSSION WITH FURTHER FINDINGS

A threshold issue is whether Respondent is an "operator" within the meaning of the Act. Section 3(d) of the Act provides that:

> "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.

Section 3(d) was added by the 1977 Amendments to the Mine Act to expand the definition of "operator" to include "any independent contractor performing services or construction" at a mine. In Otis Elevator Company v. Secretary of Labor and FMSHRC, 921 F.2d 1285 (D.C. Cir. 1990), the Court held that in 3(d) the "phrase `any independent contractor performing services ... at [a] mine' means just that" and that the Court "need not confront ... whether there is any point 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 since [Otis] conceded that it was performing limited but necessary services at the mine" (921 F.2d at 1290 n. 3, emphasis added). Otis had a contract to service the shaft elevators at the mine.

In Lang Brothers, Inc., 14 FMSHRC 413 (1991), Lang Brothers had an annual contract to clean and plug gas well sites for Consolidation Coal Company, "to ensure that natural gas does not seep through the well into a mining area and create a safety hazard." 14 FMSHRC at 414. In holding that Lang Brothers was an "operator," the Commission stated:

> Lang's work at the well sites ... was integrally related to Consol's extraction of Coal. Cf. Carolina Starlite, 734 F.2d at 1551. The sole purpose of Lang's cleaning and plugging contract with Consol was to facilitate Consol's extraction of underground coal. 14 FMSHRC at 418.

The Commission did not adopt the restrictive interpretation of Old Dominion Power Company v. Secretary of Labor and FMSHRC, 772 F.2d 92(4th Cir. 1985) (implying that an independent contractor must have a "continuing presence at the mine" to be held to be an "operator" under the Act). Rather, it held that the de minimis standard may be measured by the significance of the contractor's presence at the mine as well as the duration or frequency of its presence. The Commission noted that even though Lang's actual presence at the mine to clean and plug wells was for a short period, its activity was an integral part of Consol's extraction process.

In Bulk Transportation Services, Inc., 13 FMSHRC 1354 (1991), the contractor had a contract with a coal mine operator to transport coal from the mine to a generating station 40 miles away. The Commission noted that Bulk had a substantial presence at the mine -- "[T]here is a constant flow of truck drivers in and out ... four to five days a week" 13 FMSHRC at 1359 -- but it focused on the significance of Bulk's activities to the extraction process in determining that Bulk was an operator subject to the Mine Act. "Given the undisputed fact that Bulk was Beth Energy's exclusive coal hauler between Mine No. 33 and the generating station, and given the quantities of coal hauled by Bulk, we agree with the judge that Bulk's services in hauling coal were essential and closely related to the extraction process." 13 FMSHRC at 1359.

Similarly in this case, Well Tech's work on gas well pumps used to remove methane from Island Creek's mine was essential to the extraction of coal. As Inspector Slowey testified, "This mine's ventilation plan requires that the methane be taken out of the mine by vertical drilling. In order to keep the mine going they have to reduce the methane down to a certain percent or the miner will not operate down there." Tr. 42.

Well Tech performed such work at the Virginia Pocanhontas #3 Mine for 578 hours in 1991, the year of the citations. This is substantially more time than Otis mechanics spent at the mine in Otis Elevator Co., supra. There the Court stated that it need not address "whether there is any point 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'" since Otis was "performing limited but necessary services" at the mine. 921 F.2d at 1290 n.3. Well Tech was similarly performing "limited but necessary services" at Virginia Pocahontas #3 mine, and was therefore an "operator" within the

meaning of the Act. (Footnote 1)

In considering the evidence as to the three citations, I find that the inspector's testimony was reasonable and persuasive. Respondent did not present any evidence in rebuttal of his testimony as to the facts concerning the alleged violations.

Citation No. 3778953

Inspector Slowey cited a violation of 30 C.F.R. 77.400(a), alleging that the fan inlets and drive belts for the motor of the Cooper Drill rig were not guarded properly to prevent a person from coming in contact with these moving machinery parts.

Section 77.400(a) states, among other things, that "fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded."

The Commission has held that this standard "imports the concepts of reasonable contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." Thompson Brothers Coal Company, Inc., 6 FMSHRC 2094, 2096 (1984).

Although the fan inlets were toward the front of the cab, opposite the end where the employees usually worked, the inspector testified that there was still a hazard because the employees might come in contact with the moving parts during maintenance or repair work. Tr. 15.

The Commission has held that a violation may be classified as "significant and substantial" if there is a reasonable likelihood that the hazard contributed to will result in an injury of a reasonably serious nature. Texasgulf, 10 FMSHRC 498, 500 (1988). Considering that the machinery guard standard is intended to protect employees from coming in contact with moving machinery parts because of "inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness" (see Thompson Brothers

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1 The Secretary of Labor enforces both the Mine Act and the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq., and has reasonable discretion in determining which of her two enforcement agencies, OSHA or MSHA, should exercise jurisdiction over a given facility or activity. The Secretary is entitled to deference in exercising such discretion. See, e.g., Brock v. Cathedral Bluff Shale Oil Co., 796 F.2d 533, 537 (D.C. Cir. 1986); and Donovan v. Carolina Starlite Co., 734 F.2d 1547 1522 & n.9 (D.C. Cir 1984). See also Southern Railway Company v. Occupational Health Review Commission, 539 F.2d 335 (1976). I find that the Secretary's exercise of discretion to assert Mine Act jurisdiction over Well Tech's operations is reasonable and enforceable.

Coal Company, above), I find that the evidence sustains the inspector's finding that the violation presented a reasonable likelihood of resulting in substantial injury. It is not required that the Secretary prove that injury was more probable than not, but only that there was a "reasonable likelihood" of injury. In practical terms, this requires only a sustantial possibility of injury. See, e.g., judges' decisions in Mountain Coal Co., 14 FMSHRC 1572, 1582-1583 (1992), and Consolidation Coal Co., 14 FMSHRC 748-752 (1991).

Citation No. 3778954

Inspector Slowey cited a violation of 30 C.F.R. 77.400 (a) because the drive shaft coupling for the motor to the rig was unguarded.

He testified that there was a reasonable likelihood that an employee would come in contact with pinch points of the drive shaft and lose a hand or an arm. Tr. 17.

I find that the evidence sustains this charge and the inspector's finding that the violation was "significant and substantial."

Citation No. 3778955

Inspector Slowey cited a violation of 30 C.F.R. 77.410(a)(1) because the drill rig did not have an operable back-up alarm. The standard provides that mobile equipment including trucks (except pickup trucks with an unobstructed rear view) "shall be equipped with a warning device that gives an audible alarm when the equipment is put in reverse."

Inspector Slowey testified that the Cooper Drill rig is in effect a truck mounted derrick. Tr. 29. The drill rig was stationary at the time he was there, and he asked the drill rig operator to put the drill rig in reverse to check the back up horn. He observed that the rig did not have a back up horn. Tr. 32,42.

I find that the evidence sustains this charge and the inspector's finding that the violation was "significant and substantial."

Considering the criteria for assessing civil penalties under 110(i) of the Act, I find that the following penalties ar appropriate for the violations found herein:

| Citation | Civil Penalty |
|---|---|
| No. 3778953 | $39 |
| No. 3778954 | $39 |
| No. 3778955 | $39 |

## CONCLUSIONS OF LAW

1. The judge has jurisdiction in this proceeding.

2. Respondent was an "operator" of the subject mine within the meaning of the Act.

3. Respondent violated the safety standards as cited in Citation Nos. 3778953, 3778954, and 3778955.

## ORDER

WHEREFORE IT IS ORDERED that:

1. Citation Nos. 3778953, 3778954, and 3778955 are AFFIRMED.

2. Respondent shall pay the above civil penalties of $117 within 30 days of the date of this Decision.

William Fauver
Administrative Law Judge

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