CCASE:
SOL (MSHA) V. JOY TECHNOLOGIES INC.,
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 93-129
	:	A.C. No. 05-04452-03501 BBO
v.	:	
	:	Sanborn Creek Mine
JOY TECHNOLOGIES INC.,- COAL FIELD OPERATIONS, Respondent	:	

DECISION

Appearances: Margaret Miller, Esquire, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
W. Scott Railton, Esquire, Reed, Smith, Shaw and McClay, McLean, Virginia, for Respondent

Before: Judge Melick

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," charging Joy Technologies, Inc. (Joy) with one violation of the standard at 30 C.F.R. 48.28(a). A preliminary issue is whether Joy is subject to jurisdiction under the Act as a mine "operator." If Joy is found to be within such jurisdiction, then the general issue is whether Joy violated the cited standard and, if so, what is the appropriate penalty to be assessed.

The subject Sanborn Creek Mine is an underground coal mine operated by the Somerset Mining Company (Somerset). Joy is the manufacturer of mining equipment and parts. Joy sells its equipment and provides followup services to its customers, such as expert advice on repairs and assistance in obtaining parts. Joy maintains that while it sold equipment to and provided such followup services for the Sanborn Creek Mine it was neither an "operator" nor an "independent contractor" as defined in the Act and that therefore the Secretary had no jurisdiction under the Act to issue the order at bar.

The Order, No. 3581501, was issued April 7, 1992, pursuant to Section 104(g)(1) of the Act,(Footnote 1) by Coal Mine Safety and Health Inspector Larry Ramey for the alleged failure of Joy Service Representative Dixson McElhannon to have received eight hour annual refresher training required by the cited standard. There is no dispute that McElhannon had not received the training.

McElhannon had been employed by Joy as a service representative since August 1990. He is experienced as a miner, is a certified mechanic and is considered to be an expert in the mechanics of Joy mining equipment. McElhannon's job as a service representative for Joy includes acting as a "troubleshooter" for Joy equipment at mines where such equipment is used. In that capacity he often determines what parts are necessary, orders the parts and ascertains that the parts are delivered. McElhannon maintains that he does everything but the installation of the parts. In addition, when new equipment is shipped, he determines that the equipment is properly unloaded, that it is not damaged, and that it performs as it should. McElhannon testified that he continues to visit his customers regularly even after the manufacturer warranties have expired and that Joy provides such services for as long as its equipment is being used.

The evidence shows that the Sanborn Creek Mine had been reopened and coal production resumed in August, 1991 by Somerset. The documentary evidence shows that between January 24, 1992 and the date the instant order was issued on April 7, 1992, McElhannon had performed services on a number of occasions at the Sanborn Creek Mine in his capacity as a Joy service representative (Exhibit M-2). McElhannon acknowledged at hearing that he was also present in this capacity at this mine at other times not documented.

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1 Section 104(g)(1) of the Act provides as follows:

> If, upon any inspection or investigation pursuant to section 103 of this Act, the Secretary or an authorized representative shall find employed at a coal or other mine a miner who has not received the requisite safety training as determined under section 115 of this Act, the Secretary or an authorized representative shall issue an order under this section which declares such miner to be a hazard to himself and to others, and requiring that such miner be immediately withdrawn from the coal or other mine, and be prohibited from entering such mine until an authorized representative of the Secretary determines that such miner has received the training required by section 115 of this Act.

On the Joy sales/service report dated January 24, 1992, McElhannon noted as follows:

> Went under ground to trouble shoot cutter gear box problems. Discovered right hand high speed gear on cutting motor was bad. Also cutter head hinge pin was missing (found in magnet). They decided to run machine on afternoon shift anyway and do repairs on weekend.

On the February 19, 1992 report, McElhannon noted as follows:

> Assisted mine mechanic in a complete remove rebuild and replacement of complete cutter head on the machine.
>
> Replaced all bearings and seal throughout cutter case and both pinion bevel gears.

On the March 2, 1992 report, McElhannon noted as follows:

> Assisted mine mechanics unloading new shuttle car installed electrical nip checked out every-thing on car. Found atmospheric relief valve on boom. Lift leaking through. Talked to Kim Ball to have valve replaced on warranty. Valve Part Number 571668. They cut side boards off of car and took it underground 3-4-92.

On the March 3, 1992 report, McElhannon noted as follows:

> Assisted mine mechanics unloading new shuttle car. Hooked up power and checked car operation. No problems were found.
> They will cut sideboards off and the car will go underground 3-5-92.

Finally, on the April 6, 1992 report, McElhannon noted as follows:

> Assisted mine mechanics unloading machine as it arrived on mine property. On 4-7-92 we started reassembling new miner and on 4-11-92 we took miner underground and on 4-13-92 miner went into production.
> The machine is currently in a seven foot coal seam on 20 foot cut as is not cutting to full potential. They are developing a lower seam with more height and have asked for a variance for 40 ft cuts which will increase production dramatically.

On April 6, 1992, Joy delivered a new continuous miner to the Sanborn Creek Mine. It was delivered in sections on three trucks and was unloaded and placed in the maintenance shop. On April 7, 1992, MSHA Inspector Larry Ramey entered the maintenance shop while Somerset Maintenance Supervisor Bill Pecharich and his crew were assembling the new miner. Joy Service Representative McElhannon was also present at this time and was using a remote control device to move the main frame of the continuous miner to help a mechanic pin it together. Ramey observed another person standing at this time in front of the cutter heads on the continuous miner.

Section 3(d) of the Act defines the term "operator" 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 ... ." In Otis Elevator Company v. Secretary of Labor and FMSHRC, 921 F.2d 1285 (D.C. Cir. 1990), the court held that in Section 3(d) the "phrase 'any independent contractor performing services ... at [a] mine' means just that" and that the court "did 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). Otis had a contract to service the shaft elevators at a 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 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 Stalite, 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.

Within the above framework of law and evidence it is clear that Joy Service Representative McElhannon had been performing limited but necessary services at the Sanborn Creek Mine before and at the time of the issuance of the order at bar. It may reasonably be inferred that these services were essential to the extraction of coal in that McElhannon determined that the Joy mining equipment, including a continuous mining machine was properly delivered, put together and in good working order. McElhannon further performed followup services for Joy mining equipment at the Sanborn Creek Mine providing "troubleshooting" advice in the underground area of the mine, ordering parts, and assisting in specific repairs of mining equipment. The continued operation of mining equipment, including continuous miners and shuttle cars, is essential and closely related to the extraction of coal and its removal from the mine. Joy's representative was therefore clearly performing limited but necessary services at the Sanborn Creek Mine and Joy was therefore an "operator" within the meaning of the Act. Otis Elevator Company, supra, 921 F.2d at 1290 n. 3.

In reaching these conclusions I have not disregarded Joy's argument that it did not in fact have a contract to perform services at the Sanborn Creek Mine and that it was presumably therefore not an independent contractor. While there is insufficient evidence in the record to conclude whether or not such a specific service contract existed, it is undisputed that Joy, as a vendor, sold mining equipment (and parts) to be used at the Sanborn Creek Mine and that Joy, through its service representative, performed continuing services in connection with those contracts of sale. Under the circumstances Joy was an independent contractor. See, e.g., 41 Am Jur. 2d Independent Contractors, 18.

Joy also argues that it is not responsible as a mine operator because it was not "continually present" at the Sanborn Creek Mine. However, the appropriate legal test to be applied includes consideration not merely of the duration and

frequency of the contractor's presence at the mine, but also the significance of its presence usually expressed in terms of how essential and closely related such services are to the extraction process. See Otis Elevator, supra; Lang Brothers, supra; Bulk Transportation, supra.

Since there is no dispute that McElhannon had not received the safety training required by 30 C.F.R. 48.28(a) as charged in Order No. 3581501, the violation is proven as charged. However, in light of the inability of the Secretary to have shown that McElhannon did not have, through other experience, training and resources, the requisite knowledge that would be incorporated in the subject training I am unable to find that the violation was "significant and substantial" or of high gravity. In addition, in light of the good faith legal position taken by Joy in this case that it was not subject to the Act's jurisdiction, a finding of negligence is inappropriate. Under the circumstances and considering all of the criteria under Section 110(i) of the Act, I find that a civil penalty of $100 is appropriate.

ORDER

Joy Technologies, Inc. is hereby directed to pay a civil penalty of $100 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge
703-756-6261

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