

CCASE:
MADISON BRANCH MANAGEMENT V. SOL (MSHA)
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TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

MADISON BRANCH MANAGEMENT, : CONTEST PROCEEDINGS
Contestant :
 :
v. : Docket No. WEVA 93-218-R
 : Order No. 3976643: 3/1/93
 :
SECRETARY OF LABOR, : Docket No. WEVA 93-219-R
MINE SAFETY AND HEALTH : Citation 3976644; 3/1/93
ADMINISTRATION, (MSHA), :
Respondent : Docket No. WEVA 93-220-R
 : Citation 3976647; 3/4/93
 :
 : Job. No. 3 46-05815
 :
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION, (MSHA), : Docket No. WEVA 93-373
Petitioner : A.C. No. 46-05815-03520
v. :
 : Madison Branch Job No. 3
MADISON BRANCH MANAGEMENT, :
Respondent : Docket No. WEVA 93-412
 : A.C. No. 46-05815-03521
 :
 : Mine: Job No. 3
 :
 : SOL No. 93-41226
 :
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION, (MSHA), : Docket No. WEVA 03-415
Petitioner : A.C. No. 46-05815-03501HWZ
 :
v. :
 :
PROTECTIVE SECURITY SERVICES, : Job No. 3
Respondent :

MOTION DENYING RESPONDENTS' MOTIONS FOR SUMMARY DECISION
AND
NOTICE OF HEARING

These consolidated proceedings concern Petitions for the Assessment of Civil Penalties filed by the Secretary against Protective Security Services (the independent contractor) and Madison Branch Management (the operator) for alleged violations

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related to the fatality of a night watchman. The victim, employed by Protective Security Services, succumbed to carbon monoxide poisoning at Madison Branch Management's No. 3 Surface Mine during the early morning hours of March 1, 1993. During a conference call on January 5, 1994, the respondents, through counsel, informed me that they wished to file Motions for Summary Decision on the jurisdictional issue. Accordingly, on January 13, 1994, I continued this matter in order to give the parties an opportunity to file the subject motions. I now have for consideration the respondents' Motions for Summary Decision and the Secretary's Opposition, as well as the parties' responsive pleadings.

The fundamental facts of this case that give rise to the jurisdictional question can be briefly stated. Allen Garrett, the decedent, was employed by Protective Security Services as a part-time weekend security guard. Garrett was assigned to work weekends at the Madison Branch Management's No. 3 surface mine facility near Lynco, Wyoming County, West Virginia. Garrett routinely reported to work at the mine site on Saturday nights at 10:00 p.m. He was relieved by another security guard on Sunday mornings at 10:00 a.m. Garrett would then report back to work on Sunday night at 10:00 p.m. and would leave at 6:00 a.m. Monday morning when personnel from Madison Branch Mining would report to work. There was no coal production during the weekend shifts when Allen Garrett and other security personnel employed by Protective Security Services were present. Garrett's job duties included observing activities at the mine site and making written reports of his observations. Garrett was not permitted to operate any equipment, nor engage in any activity other than observing and reporting.

On Sunday, February 28, 1993, at approximately 10:00 p.m., Garrett reported to the No. 3 Mine in his Ford Bronco II vehicle. Garrett's shift was scheduled to terminate the following morning on March 1, 1993, at 6:00 a.m. At approximately 6:10 a.m. that morning, a truck driver observed Garrett's vehicle parked at the top of the main haulroad. The truck driver approached Garrett to ask him to move his vehicle. He found Garrett lying unconscious on the floor of his vehicle. Garrett was immediately transported via ambulance to a local hospital where he was pronounced dead on arrival. The cause of death was carbon monoxide intoxication.

Investigating authorities concluded that Garrett fell asleep in his vehicle and succumbed to carbon monoxide poisoning sometime between 12:48 a.m., when the last entry in Garrett's log book was made, and 6:10 a.m. when he was found by the truck driver. At the time Garrett's body was discovered, the engine in his vehicle was running, the dome light was on, and, the heater was running on high.

The respondents assert they are not subject to the Federal Mine Safety and Health Act of 1977 (Mine Act) because Protective Security Services is not an "operator" and Allen Garrett was not a "miner" within the statutory definition of those terms. In furtherance of their jurisdictional objection, the respondents rely on the statutory language and legislative history as well as the Circuit Court decisions in *National Indus. Sand Ass'n v. Marshall*, 601 F.2d 289 (3rd Cir. 1979), and *Old Dominion Power Company v. Secretary of Labor & FMSHRC*, 772 F.2d 92 (4th Cir. 1985). They maintain these authorities support their contention that Protective Security Services is not an "operator" because it did not have a continuing presence at the mine and because it was not engaged in the extraction process.

Section 3(d) of the Mine 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." 30 U.S.C. 802(d). The term "miner" is broadly defined in the Mine Act, as "any individual working in a coal or other mine." 30 U.S.C. 802(g). The phrase "coal or other mine" includes mine property, whether on the surface or underground. 30 U.S.C. 802(h)(1). In examining these terms, it is noteworthy that the predecessor legislation to the current Mine Act, known as the Federal Coal Health and Safety Act of 1969, 30 U.S.C.

801 et. seq., defined "operator" as "any owner, lessee, or other person who operates, controls or supervises a coal mine." The current Mine Act adopted in 1977, expanded the definition of "operator" to include "any independent contractor performing services or construction at such mine." 30 U.S.C. 802 (d).

Thus, as noted by the Commission in *Otis Elevator Company*, 11 FMSHRC 1896, 1901 (October 27, 1989, aff'd *Otis Elevator Co. v. Sec'y of Labor*, 921 F.2d 1285 (D.C. Cir. 1990), the history of the Mine Act clearly reflects a legislative intent to broaden the Secretary's enforcement power over a wide range of independent contractors as well as mine operators. (Footnote 1) In this regard, the Commission has broadly construed the terms "operator" and "miner"

1 The Senate Subcommittee report regarding section 3(d) of the Mine Act referred to independent contractors engaged in mine "construction" or "extraction." S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977). The Conference Report referred to independent contractors as those "performing services or construction ...who may have a continuing presence at the Mine." S. Conf. Rep. No. 461, 95th Cong. 1st Sess. 37 (1977). In *Otis Elevator*, the D.C. Circuit analyzed the legislative intent of section 3(d). The Court concluded section 3(d) was inclusive and stated "Congress has written section 3(d) to encompass 'any independent contractor performing services at a mine' (emphasis added)." 921 F.2d at 1291.

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to be applicable to those performing services as a construction worker, elevator mechanic, laboratory technician or clerk-typist working at a mine site. See *Lancashire Coal Company*, 13 FMSHRC 875, 886 (June 1991), rev'd on other grounds, *Lancashire Coal Co. v. Sec'y of Labor*, 968 F.2d 388 (3rd Cir. 1992). Thus, the statutory language and legislative history are not supportive of the respondents' jurisdictional objections.

Nor, am I persuaded by the respondents' primary reliance on the Third and Fourth Circuit holdings in *National Sand* and *Old Dominion*, respectively. The *National Sand* decision noted there may be a point at which the services provided or the degree of involvement in mining activities is so remote or infrequent that such services cannot be properly considered as performed by "operators." 601 F.2d at 701. In *Old Dominion*, the court concluded only those independent contractors involved in mine construction or extraction, or, that have a continuing presence at the mine, should be considered as "operators." 772 F.2d at 96. Thus, the court determined an electric utility's meter reader who briefly entered the mine premises approximately once each month had mine contacts that were "so rare and remote from the mine construction or extraction process [that the utility did] not meet [the statutory] definition of 'operator'." 772 F.2d at 96, 97.

Considering jurisdictional objections similar to those proffered by the respondents, the Commission in *Otis Elevator*, concluded that the Court's decisions in *National Sand* and *Old Dominion* should be narrowly construed. 11 FMSHRC at 1898, 1901-02. As noted above, *National Sand* and *Old Dominion* were concerned with activities that were, "so infrequent or de minimis" (601 F.2d at 701) or "so rare and remote" (772 F.2d at 97) that these activities did not give rise to Mine Act jurisdiction. I do not construe the services regularly provided by Protective Security Services personnel during eight to ten hour shifts each weekend beginning in the early morning hours on Saturdays and ending at 6:00 a.m. on Mondays as de minimis. Moreover, these services provided throughout each weekend at the mine site constitute the requisite "continuing presence" to afford Protective Security Services "operator" status under the Mine Act. As the D.C. Circuit Court of Appeals concluded in affirming the Commission's narrow application of *National Sand* and *Old Dominion*, "...contracts to perform services at mines...subject [the independent contractor] to regulation under the Mine Act." See *Otis Elevator*, 921 F.2d at 1291.

The respondents also rely on the fact that no coal production occurred at the Madison Branch Mine site during the decedent's last shift or during the shifts of any other security personnel employed by Protective Security Services. The production status at the time an individual is exposed to a hazard attributable to a statutory violation or a violation of a

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mandatory safety standard is not dispositive. The goal of the Mine Act is to "prevent death and serious physical harm" to any individual working at a mine site. 30 U.S.C. 801, 802(g). Thus, it is the employee's presence at the mine site, rather than mining activities, that provides the basis for Mine Act jurisdiction.

Finally, Protective Security Services' reliance on *Falcon Coal Company, Inc. v. Clemons*, 873 F.2d 916 (6th Cir. 1989), and *Frost v. Benefits Bd.*, No. 85-4034, 821 F.2d 649 (6th Cir. June 26, 1987) (unpublished) is misplaced. These cases held that a night watchman, and, a delivery man who transported lunches to coal miners working underground, were not "miners" and, therefore, not entitled to black lung benefits under the Black Lung Benefits Act. 30 U.S.C.A. Section 802 (h)(2), (i) 402(d). However, entitlement to black lung benefits is not at issue in this proceeding.

In view of the above, I conclude that the security services provided to Madison Branch Management provide an adequate basis for concluding that Protective Security Services is an "operator" as defined by section 3(d) of the Mine Act. An owner-operator is liable for the violative act of its contractor. *Bulk Transportation Services, Inc.*, 13 FMSHRC 1354, 1359-60 (September 1991). In such instances, the Secretary has the discretion to proceed against both the owner-operator and the contractor. *Id.* Having concluded that there is a jurisdictional basis for the citations issued to Protective Security Services, the independent contractor in this matter, it follows that there is a jurisdictional basis for the citations issued to Madison Branch Management.

Although I have concluded that the respondents are subject to the Mine Act, I have not addressed the propriety of the citations in issue. The substantive merits of these citations involve issues of fact that must be resolved through the hearing process.

ORDER

Consequently, I conclude that there is a jurisdictional basis for the citations in issue. Accordingly, the respondents' Motions to Dismiss on jurisdictional grounds ARE DENIED.

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In view of my disposition of the jurisdictional issue, the parties are advised that the consolidated hearing in these proceedings will be conducted in the vicinity of Beckley, West Virginia, commencing at 9:00 a.m. on Tuesday, April 12, 1994. The parties will be further advised of the hearing location in Beckley.

Jerold Feldman
Administrative Law Judge

Distribution:

Patrick L. DePace, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

James A. Walker, Esq., White & Browning Bldg., Suite 201, 201 1/2 Stratton Street, P.O. Box 358, Logan, WV 25601 (Certified Mail)

Mr. George L Mathis, Protective Security Service & Investment, P.O. Box 14666, Logan, WV 25601 (Certified Mail)

Christopher B. Power, Esq., Robinson & McElwee, P.O. Box 1791, Charleston, WV 25326 (Certified Mail)

Mr. Durwin Logan, Madison Branch Management, Inc., P.O. Box 250, Man, WV 25635 (Certified Mail)

Robert Stropp, Esq., UMWA, 900 15th St., N.W., Washington, D.C. 20005 (Certified Mail)