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SOL (MSHA) V. OLD DOMINION POWER
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FEDERAL MINES SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, D.C. 20006
August 29, 1984

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

v. Docket Nos. VA 81-40-R
VA 81-65

OLD DOMINION POWER COMPANY

DECISION

This consolidated proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et se . (1982)("Mine Act"). The major issue on review concerns whether the Department of Labor s Mine Safety and Health Administration (MSHA) properly charged Old Dominion Power Company ("Old Dominion") with a violation of the Mine Act. A Commission administrative law judge answered this question in the affirmative. 3 FMSHRC 2721 (November 1981)(ALJ). For the reasons that follow, we agree, but conclude that a penalty lower than that assessed by the judge is appropriate.

On January 22, 1980, a fatal accident occurred at an electrical substation located on property leased by Westmoreland Coal Company ("Westmoreland") from Penn-Virginia Resources. The electrical substation is an open air facility enclosed by a wire fence, and is adjacent to a mine access road. Westmoreland paid for the construction of the substation, which is comprised of utility poles, power lines, transformers, an electric meter, and a meter box. Electricity is transmitted on incoming lines to the substation, where it is stepped-down, or reduced, and then transmitted to a coal mine operated by Elro Coal Company ("Elro"), which leases the mine from Westmoreland. The electricity is used to power Elro's coal producing equipment. Elro sells all the coal it extracts to Westmoreland for resale to other customers.

Electricity at the mine site is provided by Old Dominion Power Company, a public utility doing business in southwest Virginia. Old Dominion transmits, distributes, and sells electricity. Although most of its customers are non-commercial, it sells electricity to some commercial and industrial customers. Old Dominion meters the electricity sold to its customers. Old Dominion installs, owns and maintains all such meters which are regularly read by Old Dominion employees. Customers are billed on the basis of kilowatt hours used. In conformance with this practice, Old Dominion meters Westmoreland's substation. On a monthly basis an Old Dominion meter reader arrives at the substation, reads the meter, and visually inspects it. If any of the substation's components needs attention, Old Dominion's metering department is informed and an employee is sent to the substation to correct any problem. Old Dominion also owns and maintains five transformers at the substation. Old Dominion has its own key to the substation to allow access by its employees.

In his decision the Commission's administrative law judge succinctly summarized the events giving rise to this litigation:

> The substation was first energized about 5 or 6 p.m. on January 21, 1980, by Westmoreland's electrical foreman, Terry Mullins. The next day, January 22, about 8:15 a.m., Mullins talked to [Old Dominion's] superintendent of meters, Jack Carr, on the telephone and expressed to Carr his doubts as to whether Old Dominion's meter at the substation was working properly because no light was visible in the meter and because the disk in the meter was turning counterclockwise. In Carr's opinion, the disk was supposed to turn counterclockwise, but, to make certain that there was nothing wrong with the meter, he sent two employees to the substation to check the meter. The two employees were James Harlow, a sub-station technician, and Leonard Lambert, a meter man, first class. Harlow had helped install the ... transformers and meter at the substation. Lambert would normally have participated in the installation, but he was on vacation when the equipment was originally installed sometime in December 1979. Lambert had, however, gone to the substation on January 21 and had installed a replacement meter.
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> When Harlow and Lambert arrived at the substation, Harlow, who was on the side of the van nearest to the substation, jumped out and looked at the fuse disconnects... . He was used to seeing the type of fuse link which is installed inside a tube. It was foggy and he did not see any tube or wire between the fuse holders or hanging down from the bottom holder, so he concluded that the substation was deenergized. [1/] Lambert took Harlow's word for the fact that the substation was deenergized. They did not at first go inside the fence around the substation to look at the meter because they concluded that the meter could not be checked while no power was flowing through it. Although the substation was energized and there was a hum coming from the transformers, they apparently did not hear the hum because of noise coming from a nearby generator.

1/ Old Dominion's general manager described the weather that day as extremely bad ... [i]t was raining and fog was coming and going." Tr. 60.

> Harlow and Lambert returned to their van, started the engine, and were ready to leave when it occurred to them that the GE transformers they had installed were of a new type and might have a rating of 5 KW instead of the 15 KW which they should have had. They decided to check the nameplate on the transformers to determine their classification. Harlow put on climbing equipment and went up the pole to examine the nameplate. He could not see the plate clearly because of water on it. He reached out with one hand to rub the water off the nameplate and was immediately electrocuted when his hand touched the energized transformer.

3 FMSHRC at 2724-25 (transcript citations omitted).

MSHA investigated the accident and determined that there had been a violation of 30 C.F.R. 77.704, a mandatory mine safety standard. 2/ Thereafter, MSHA issued to Old Dominion a citation alleging a violation of that standard. 3/ Old Dominion contested the citation and a hearing was held. The administrative law judge concluded that Old Dominion was cited properly, affirmed the citation, and assessed a penalty of $3,000 for the violation. We granted Old Dominion's petition for discretionary review and heard oral argument. 4/

The primary issue before us is whether, on the facts of this case, Old Dominion properly was found to be subject to the Mine Act. That determination must be made through interpretation and application of sections 3(d), 3(h)(1) and (2), and 4 of the Act. 30 U.S.C. 802(d), (h)(1) and (2), and 803. For ease of reference we s forth the sections below:

2/ The standard states in part: "High voltage lines shall be deenergized and grounded before work is performed on them." There is no dispute that the terms of the standard were violated by the conduct of Old Dominion's employees.

3/ As stated by the judge, [c]onfusion arose as to which entity should be cited for the violation because Elro Coal Corporation was using the power received at the substation, Westmoreland owned and operated the substation, and [Old Dominion's] employees did the work which caused the fatal accident." 3 FMSHRC at 2726 (transcript citation omitted). MSHA originally cited Elro. In April 1980, however, the citation was modified to name Westmoreland as the responsible operator. Finally, in January 1981, the citation was again modified to charge Old Dominion for the violation. The Department of Labor's Occupational

Safety and Health Administration ("OSHA") also investigated the accident but took no enforcement action.

4/ In view of the nature of the issue presented, we requested additional industry and labor viewpoints to assist us in our deliberations. The Edison Electric Institute ("EEI") thereafter participated as an amicus curiae. The arguments of EEI, in its brief and at oral argument, have been most helpful to us in considering the important issues in this case.

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Sec. 3. For the purposes 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;

* * *

(b)(1) "coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment;

(h)(2). For purposes of titles II, III, and IV, "coal mine" means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities;

* * *

Sec. 4. Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act.

We first address whether the site of the alleged violation, the substation, was a "coal mine" or part of a "coal mine" as that term is defined by the Mine Act. Old Dominion attempts to differentiate portions of the geographic tract of land leased by Westmoreland Coal Company into "mine" and "non-mine" areas. It asserts that portion of land at which coal is actually extracted from the ground is a "mine," whereas other areas somewhat removed in distance from the specific extraction locale, including the area of land on which the substation is located, should not be interpreted as being a mine or a part thereof. This narrow view of what constitutes a mine conflicts with the Act's expansive definition set forth above. Sections 3(h)(1) and (2)'s broad definition of coal mine undoubtedly covers a portion of a geographic tract of land leased to a coal operator on which is located an electrical substation providing power for mining operators on that same tract of land. The substation certainly qualifies as an "area of land," or a "structure," "facility," "machinery," "equipment," or "property" on such land, "used in ... the work of extracting coal." See S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977). reprinted in Senate Sub-committee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 602 ("Legis. Hist."). "[I]t is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possibl[e] interpretation, and it is the intent of the Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.") See Donovan v. Carolina Stalite Co., 734 F.2d 1547 (D.C. Cir. 1984), and cases cited therein. We therefore conclude that the substation is part of a coal mine and that the Mine Act and its standards can be applied to regulate working conditions at that site.

Because it is not disputed that a violation of the cited MSHA standard occurred in the course of work performed by Old Dominion employees, our next inquiry is whether Old Dominion was properly cited under the Mine Act for this violation. Section 4 of the Mine Act places the responsibility for compliance on mine "operators." Therefore, Old Dominion can be cited for a violation only if, on the facts of this case, it is an "operator." Section 3(d) defines an 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." We conclude that, on the facts of this case, Old Dominion was an independent contractor performing services or construction at the mine and, therefore, was properly cited for the violation committed by its employees.

As part of the 1977 amendments to the Federal Coal Mine Health

and Safety Act of 1969, 30 U.S.C. 801 et seq. (1969)(amended 1977)("Coal Act"), the phrase "any independent contractor performing services or construction at such mine" was added to the Coal Act's definition of operator. The amendment was intended "to settle an uncertainty that arose under the Coal Act, i.e , whether certain contractors are 'operators' within the meaning of the Act," and "to clearly reflect Congress' desire to subject contractors to direct enforcement of the Act." Old Ben Coal Co., 1 FMSHRC 1480, 1481, 1486 (October 1979). Accord, Phillips Uranium Corp., 4 FMSHRC 549, 552 (April 1982).

Generally, the term "independent contractor" describes a party who "contracts with another to do something ... but who is not controlled by the other nor subject to the other's right to control with respect to

his ... conduct in the performance of the undertaking." Restatement (Second) of Agency 2 (1958). Insofar as its relationship with Westmoreland Coal Company is concerned, we have no difficulty in concluding that Old Dominion is an "independent contractor" as that term is commonly used at law. Pursuant to contract Old Dominion is granted an easement to construct and maintain electric power and transmission lines on and over the mine operator's property. Substations on the property and "other points to be later designated" are to be provided power by Old Dominion. The mine operator has the contractual right "to connect any additional electric power or transmission lines, from time to time, with any line or lines of [Old Dominion]." In order to determine the amount of electricity used by the mine operator and the payment due, Old Dominion "has the privilege of metering each delivery point," and it does so on a monthly basis. In order to perform such metering, Old Dominion has access to mine property and its own key to the substation. Thus, it is clear that Old Dominion has a contractual obligation with Westmoreland and the requisite freedom from control in performing its obligation, and was serving as an independent contractor.

By its terms, however, the Mine Act is applicable to independent contractors "performing services or construction" at a mine. Old Dominion urges that this language limits the reach of the Mine Act to less than all "independent contractors," and that it is beyond that limit. We next examine whether Old Dominion was "performing services or construction" within the meaning of section 3(d). "Service" has been defined to include: "the performance of work commanded or paid for by another"; "an act done for the benefit or at the command of another"; and "useful labor that does not produce a tangible commodity." Webster's Third New International Dictionary (Unabridged) 2075 (1971). Pursuant to its contract with the mine operator, Old Dominion provided electricity at a suitable voltage and metered its consumption for billing. Old Dominion also provided labor to maintain the electrical system, including its meters and transformers as well as equipment owned by the mine operator, in proper and safe working condition. Old Dominion's employees had helped install the transformers at the substation, and had installed a replacement meter. 3 FMSHRC at 2424. At the time of the events at issue, Old Dominion was at the mine site at the behest of the mine operator to check the equipment to determine whether it was functioning properly and, if necessary, to replace any defective components. In our view, the work performed by Old Dominion constitutes the performance of a service and places it within the literal terms of section 3(d). 5/

We find it unnecessary to decide in this case whether "there

may be a point ... at which an independent contractor's contact with amine is so infrequent or de minimis that it would be difficult to conclude that services are being performed." National Industrial Sand Assoc. v. Marshall, 601 F.2d 689, 701 (3d Cir. 1979). See also Legis. Hist., supra at 602, 1315. Rather, we conclude that, is there is a point at which the literal reach of section 3(d) must be tempered, that point is not reached under

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5/ Based on our conclusion that Old Dominion was performing services, we need not inquire further as to whether Old Dominion's work also qualifies as "construction" under section 3(d).

these facts. Here, Old Dominion's employees were at mine property at the request of the mine operator. The request for Old Dominion's services was made, and responded to, in accordance with a longstanding, and regularly maintained, business relationship defined by a written contract entered into in 1952 as well as custom and practice. The services or work to be rendered by Old Dominion included examination of an electrical facility providing power to the mine and the performance of any necessary repairs, services essential to the mine's operation. Old Dominion's assistance to Westmoreland in installing, maintaining, repairing, and replacing electrical equipment had been rendered in the past, was being rendered at the time of the events at issue, and was to be anticipated in the future. The extent of Old Dominion's contact with the mining process cannot be viewed as de minimis. Accordingly, we conclude that in these circumstances, Old Dominion is properly subject to MSHA standards regulating safe performance of electrical work on mine sites.

We emphasize that by citing Old Dominion for the violation committed by its employees, the Secretary has acted in accordance with the Commission's longstanding view that the purpose of the Act is best effectuated by citing the party with immediate control over the working conditions and the workers involved when an unsafe condition arising from those work activities is observed. Old Ben supra; Phillips Uranium, supra. By citing the operator with direct control over the working conditions at issue, effective abatement often can be achieved most expeditiously. Id Citation of Old Dominion is also consistent with the Secretary's conclusion, after rulemaking, that "the interest of miner safety and health will best be served by placing responsibility for compliance ... upon each independent contractor." 45 Fed. Reg. 44494, 44495 (July 1, 1980).

Old Dominion argues that its work activities, whether on or off a mine site, should be regulated pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. 651.et se . (1982)("OSH Act"). The Secretary of Labor enforces both the Mine Act and the OSH Act and has considerable administrative discretion in determining which of the two statutes should be applied in circumstances where either reasonably could be applied. In the present case, the Secretary has made the determination that compliance with the standards promulgated under the Mine Act is preferable, and this determination is entitled to deference. Nor does the Secretary's decision to proceed under the Mine Act run counter to the dictates of the OSH Act, which anticipates the potential for overlapping agency jurisdiction and eliminates the potential conflict by providing that the OSHAct shall not apply to "working conditions of employees with respect to which other federal

agencies ... exercise statutory authority to prescribe or. enforce standards ... affecting occupational safety and health." 29 U.S.C. 653(b)(1). Here, MSHA has statutory authority and has exercise that authority under the Mine Act.

We note that amicus curiae EEI has initiated discussions with the Secretary concerning whether regulation by OSHA of the work activities of electrical utilities on mine sites, rather than by MSHA, is more appropriate. We encourage these discussions. Because of the Secretary's discretion in this area, such discussions are a necessary first step in addressing the concerns articulated by EEI on behalf of the electrical utilities that it represents. We will observe with interest the progress of these discussions.

In sum, we conclude that the Secretary's decision in this case to hold Old Dominion responsible for the violative act committed by its employees is within his statutory authority, is consistent with the purposes and policies of the Act, and should not be disturbed.

We address three other challenges raised by Old Dominion to the legality of the Secretary's issuance of the citation. Old Dominion argues that the Secretary's definition of "independent contractor" at 30 C.F.R. 45.2(c) has been applied to it in an arbitrary and capricious manner, and that proper application would not result in its designation as an independent contractor. 6/ We disagree. On its face the regulation simply incorporates the definition of "person" in section 3(f) of the Mine Act, 30 U.S.C. 802(f), with the definition of "operator" in section 3(d). As such, the regulation does not differ substantively from the terms of the Act itself, and the reach of the regulation is coextensive with the Mine Act.

Old Dominion also argues that the language of a continuing resolution on appropriations, enacted on December 15, 1981, sheds light on the question of the Mine Act's coverage of its activities. H.J. Res. 370, 95 Stat. 1183 (1981), provided funding for a portion of fiscal year 1982 to various federal agencies and departments. In part, the resolution prohibited MSHA from enforcing the Mine Act "with respect to any independent construction contractor who is engaged by an operator for the construction, repair or alteration of structures, facilities, utilities ... located on (or appurtenant to) the surface areas of any coal or other mine, and whose employees work in a specifically demarcated area, separate from actual mining or extraction activities." H.J. Res. 370, 132, 95 Stat. 1199 (1981). We conclude that this provision has no bearing on the question before us. The violation, the Secretary's citation of Old Dominion, the hearing below, and the administrative law judge's decision all preceded the enactment of the continuing resolution. "Resolution 370 did not otherwise vitiate the force of the original authorization. Mine operators subject to the Act remained under the same substantive legal obligations, the implementing standards and regulations promulgated under the Act remained in force; and the statutory basis for enforcement litigation remained in effect." Carolina Stalite Co., 734 F.2d at 1558. See also Secretary on behalf of Cooley, 6 FMSHRC 516, 525 n. 3 (March 1984). Also, "[w]hatever enforcement powers it took from MSHA were returned to the agency when Res. 370 was superseded seven months later by a supplemental appropriations bill. H. R. 6685, 204, 96 Stat. 180, 192 (1982)." Carolina Stalite, 734 F.2d at 1557 n. 15.

6/ 30 C.F.R. 45.2(c) provides:

> "Independent contractor" means any person, partnership, corporation, subsidiary of a corporation, firm, association or other organization that contracts to perform services or construction at a mine.

Old Dominion:s final challenge to the validity of the citation is that the citation must be dismissed because it was not issued to Old Dominion with "reasonable promptness" after the occurrence of the violation. As previously set forth in note 3, although the violation occurred in January 1980, a citation was not issued to Old Dominion until January 1981. Section 104(a) of the Mine Act requires that "[i]f ... the Secretary ... believes that an operator ... has violated this Act, or any mandatory ... standard, ... he shall, with reasonable promptness, issue a citation to the operator." 30 U.S.C. 814(s). Old Dominion asserts that the one-year delay before it wa cited violates section 104(s)'s mandate. This argument ignores the effect of the last sentence of section 104(a): "The requirement for the issuance of s citation with renewable promptness shall not be s jurisdictional prerequisite to the enforcement of any provision of this Act." The Mine Act's legislative history explains:

> There may be occasions where s citation will be delayed because of the complexity of issues raised by the violations, because of s protract[ed] accident investigation, or for other legitimate reasons. For this reason, section [104(s)] provides that the issuance of a citation with reasonable promptness is not a jurisdictional prerequisite to any enforcement action.

Legis. Hist. at 618. The administrative law judge accurately described the development of the case law concerning independent contractor liability and the course of MSHA's rulemaking activities during the test of the events st issue. See 44 Fed. Reg. at 44494. The legal issue posed here concededly is novel. Most important, however, Old Dominion has not shown that it was prejudiced by the delay. Indeed, Old Dominion was aware from the time of its employee's fatal accident that an investigation involving its actions was being conducted by MSHA, and it has been given a full and fair opportunity to participate in all stages of this proceeding. Accordingly, we affirm the judge's rejection of Old Dominion's argument that the citation must be dismissed because of the delay in its ultimate issuance to Old Dominion.

Old Dominion's final argument is that, even if it was cited properly for the violation, no penalty for the violation should be assessed because the employees' violative actions were beyond its control and could not have been foreseen. In particular, Old Dominion argues that the judge's findings concerning its negligence are not supported by the record We reject Old Dominion's argument that no penalty should be assessed. [B]oth the text and legislative history

of section 110 [of the Mine Act] make clear that the Secretary must propose a penalty assessment for each alleged violation and that the Commission and its judges must assess some penalty for each violation found." Tazco, Inc., 3 FMSHRC 1895, 1897 (August 1981). We conclude, however, that the record does not support the judge's findings concerning Old Dominion's negligence and that a penalty lower than that assessed by the judge is appropriate.

Section 110(i) of the Mine Act requires that in assessing civil penalties the Commission "shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation." 30 U.S.C. 820(i). Only the judge's findings regarding negligence are at issue on review.

The MSHA inspector who issued the citation found that the violation "could not have been known or predicted, or occurred due to circumstances beyond the operator's control." The inspector further remarked that "the employees were told the substation was energized before they left their duty station." Exh. 3 (Inspector's Statement). Yet, the judge proceeded to find the operator negligent. This finding was based primarily on two conclusions he drew from the evidence: (1) Old Dominion failed to instruct the employees properly before they were dispatched to the substation; and (2) Old Dominion knew or should have known that the deceased employee "had a proclivity for cutting corners .... [and] disobeying safety regulations." 3 FMSHRC at 2743. We conclude that these findings are not supported by substantial evidence of record.

The surviving employee, Lambert, testified that Old Dominion's meter superintendent, Jack Carr, told him on the morning of January 22 that Westmoreland's electrical foreman had informed Carr that he thought a light was out in the substation's meter and that a transformer might be bad. Lambert also testified that Carr told him that the substation had been energized. Old Dominion's general manager testified that Harlow and Lambert had been told before going to the substation that it was energized. Thus, the record establishes that Harlow and Lambert were told specifically that the substation was energized, the meter might not be functioning properly, and a transformer might be bad.

We have held previously, for purposes of considering the section 110(i) penalty criteria, that when a rank-and-file employee's actions violate the Act, ',the operator's supervision, training and disciplining of its employees must be examined to determine if the operator has taken reasonable steps to prevent the rank-and-file miner's violative conduct." Southern Ohio Coal Co. 4 FMSHRC at 1459, 1463-64 (August 1982) (emphasis in original); A.H. Smith Stone Co., 5 FMSHRC 13, 15 (January 1983). The Secretary elicited no evidence that Old Dominion's supervision, training or disciplining of its employees was inadequate. Nor did he attempt to further demonstrate what Old Dominion should have done to meet its duty of care. There is, for example, no testimony concerning Old Dominion's customary

procedures in such a situation or analogous procedures in the industry. The MSHA inspector's testimony was restricted to the negligent actions of the employees themselves. Meter superintendent Carr neither testified nor was deposed. The only testimony regarding Old Dominion's safety procedures was given by Old Dominion's general manager who testified as to the comprehensiveness of the company's program, the experience of Harlow and Lambert, and the specific safety directive which prohibits Old Dominion employees from working on energized, ungrounded high voltage wires. The judge seems to have overlooked the evidence of record and simply inferred Old Dominion's negligence from the fact of the violation. We hold that this was error

and that substantial evidence of record does not support a finding that the instructions of management, or lack thereof, contributed directly or indirectly to the violation at issue. See Southern Ohio Coal Co., 4 FMSHRC at 1465; Nacco Mining Co., 3 FMSHRC 848 (March 1981).

The judge's further finding that Old Dominion should have known Harlow had a proclivity for unsafe acts also lacks adequate evidentiary support. The judge based his finding upon events which occurred the day of the accident, after Harlow had left management's direct supervision. The appropriate question is whether management reasonably could have foreseen Harlow's negligent conduct. The record contains no evidence of past unsafe conduct by Harlow or of a careless attitude on his part. In fact, the only evidence of Harlow's conduct before the fatal accident suggests that Old Dominion had reason to believe Harlow was concerned with safety. Old Dominion's general manager described Harlow as a "very capable" and "safety conscious" employee, who had missed only three safety meetings in the past 10 years. Tr. 66. 69-70. Lambert described him as "one of the most safety conscious men we had." Tr. 91. We therefore conclude that substantial evidence does not support the judge's finding that Old Dominion knew or should have known that Harlow would act in an unsafe manner while engaged in the work which resulted in a fatal accident.

Because, based on the above, we conclude that substantial evidence of record does not support the judge's finding that Old Dominion was negligent, we must modify the penalty assessed by the judge. Southern Ohio Coal Co., 4 FMSHRC at 1465. Old Dominion has not contested the judge's findings that it is a large operation; that payment of civil penalties under the Act will not affect its ability to continue in business; that it has no history of prior violations; that a good faith effort to achieve abatement was made; and that the gravity of the violation was extremely serious. Given these findings and our conclusion that negligence was not established, we find that a penalty of $1,000 is appropriate and consistent with the Act.

Accordingly, we affirm the judge's conclusion that, on the facts of this case, Old Dominion is an independent contractor and an operator within the meaning of section 3(d) of the Mine Act, and was properly cited for the violation of 30 C.F.R. 77.704. We vacate the judge's finding of negligence and his assessment of a $3,000 penalty, and a civil penalty of $1,000.

Commissioner Lawson concurring and dissenting:

The Commission is in agreement that Old Dominion is an independent contractor and an operator within the meaning of the Act. There is also no dispute that Old Dominion violated the Act and that such violation resulted in the death of miner James Harlow. However, as in Southern Ohio Coal Co., 4 FMSHRC 1459 (August 1982) and U.S. Steel Corp., 6 FMSHRC 1423 (June 1984), I dissent from my colleagues' reduction of the penalty imposed. Here, as there, the majority finds, without explanation, "...that s penalty lower than that assessed by the judge is appropriate." Going beyond even the generous dispensations granted the violative operator in those cases, they have reduced by two=thirds the exceedingly moderate penalty set by the judge below. And, once more, the majority has failed to provide a reasoned analysis to support reducing the penalty to $1000 for the miner killed as a consequence of this violation.

Old Dominion s employee was electrocuted because he concluded erroneously that the substation was not energized. He reached this conclusion because he looked for but did not see the barrel fuse disconnect that was customarily used when energizing substations. His fellow miner, William Lambert, also looked and failed to observe the anticipated disconnect. Because of this, they: were unaware that the substation was energized, since Westmoreland s electrical foreman had installed s different type fuse link when he energized the substation the day before this fatality took place. It is undisputed that Harlow and Lambert were told at the time they were given their work assignment that the substation was energized. It is also undisputed that Old Dominion had never energized a substation without the use of a barrel fuse. However, Old Dominion did not energize this substation, Westmoreland did. 1/

The testimony of Old Dominion's General Manager, H. E. Armsey, is revealing:

> Q. Would you explain what the investigation revealed that Mr. Harlow thought or saw when he looked at these?
> A. Yes, sir. In our operation there is a barrel that would fit between these two termination points that would include a fuse link. And if there is no connection between the upper terminal and the lower terminal, then it is thought that the facility is de-energized and that there is an air gap there. But during the investigation it would [sic] found that there was a physical connection through the utilization of a fuse link rather than the fuse barrel.

1/ These miners confusion was understandably enhanced because the transformer at the substation was the first of its type that Old Dominion had purchased and installed.

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Q. And inside that would be a fuse, or a conductor which contains little fuses down here?
A. Yes, sir.
Q. And they would be enclosed inside a barrel, like that.
A. That is correct.
Q. And these barrels were all gone? There were none there? There were just none there?
A. That is correct.
Q. But your investigation determined that just the little wire which normally is inside it had been.wired across?
A. That is correct.
Q. So when Mr. Harlow looked up there, he didn't see this....the barrel because it wasn't there and he didn't see this but it was there?
A. That is correct.

Tr. at 53-4

Q. So the best that you can determine is, the cause of Mr. Harlow's death is because he thought there was no energy because this is missing?
A. He was looking for a big barrel and he didn't see it and recognize the fact that there was a jumper across what ordinarily would be a path used here. And he said that the substation was de-energized, even though he had been told before they left the storeroom that the substation was energized.

Tr. at 61-2 (emphasis added).

The corporate negligence of Old Dominion is thus directly established in this case because of its failure to ascertain the type of installation at the assigned worksite before its employees were dispatched to "check our equipment" (Tr. 82). This failure to instruct Harlow and Lambert as to the equipment and conditions they would encounter resulted in the death of miner Harlow, as the judge below found. As noted in my dissenting opinion in Southern Ohio Coal Co., "[w]hile one can perhaps conceive of a case in which the only negligence could be that of the rank and file miner, this is not that case." 4 FMSHRC at 1471 (emphasis in original).

Old Dominion argues that the violative conduct of its employees was unforeseeable and beyond its control. To the contrary, Old Dominion failed to determine the type of fuse connection used by Westmoreland at this mine site. Harlow and Lambert thus looked for and did not see the barrel disconnect that Old Dominion had--without

exception--installed in all of its other substations, one with which they were familiar. It was therefore certainly foreseeable that they would, as both did, assume that this station was not energized. To find Old Dominion free of any negligence

in this instance is thus to reward the same self-induced ignorance and see-no-evil approach to safety recently disavowed by the majority in Roy Glenn, Agent of Climax Molybdenum Co., FMSHRC Docket No. WEST 80-158-M (July 17, 1984). As in that case, where my colleagues did not dispute my enunciation of management's statutory duty to maintain safe and healthful working conditions, the exercise of forethought is required from those in positions of supervisory responsibility. This operator failed to meet that responsibility, which does not terminate merely because the employee is out of sight. Having failed to "ascertain before these miners were dispatched to this substation to work on a 12,000 volt system whether the fuse connection installed by Westmoreland was of the standard configuration with which its employees were familiar, Old Dominion cannot now be permitted to escape the consequence of its negligent inaction. The combination of supervisory and non-supervisory negligence in this case proved disastrous.

My colleagues reject the bases for the judge's finding of negligence, the only challenged aspect of the judge's analyses of the statutory penalty assessment criteria set forth in section.110(i) of the Act. They then substantially reduce the penalty imposed. 2/ However, the decision below does not suggest, much less states that any dollar, percentage, or other numerical value is assigned to the "negligence" criteria. The judge's conclusion that the violation was extremely serious, a gravity determination that is not disputed, would itself support the judge's penalty assessment. Nevertheless, the majority does not independently evaluate Old Dominion's negligence on the basis of record evidence or cure what it views as deficits in the judge's opinion by itself assigning numerical or other objective indicia to the penalty assessment factors. Rather, my colleagues' opinion is entirely silent as to the dollar amounts to be assigned to five of the section 110(i) criteria, although it does not dispute the gravity of the violation--obviously maximum in view of the death of miner Uarlow. No future guidance is therefore furnished to mine operators or the Secretary. Conclusorily glossing over the two-thirds penalty reduction falls far short of being statutorily satisfactory or in accord with the Act.

The Act establishes a standard of strict liability for violations thereof, i.e., no fault or negligence is required to establish a violation. Here, however, it is unquestionable that there was a violation of the Act, and both supervisory as well as non-supervisory miner negligence. It is a truism that a corporation can only act through its employees, and nowhere in the Act, the legislative history, or our precedents is there any suggestion that operator negligence is to be disregarded if attributable in part to a non-supervisory miner. To artificially allocate penalty dollars

between an operator and its employee miners provides a ready avenue for an operator to escape penalties and their intended deterrent effect. The operator which structures its operation to avoid supervisory responsibility will now be rewarded. Neither the resulting reduced penalty nor this denied supervision is in accord with the intent of the Act and with the mandatory penalty assessment processes required by the Act.

2/ The majority in this case goes out of its way to reduce the penalty set by the judge below, notwithstanding the fact that the operator's petition for review presented only the contention that no penalty should have been assessed, a contention clearly without merit under this Act. Section 110(a). Indeed, counsel for Old Dominion on oral argument made no mention of the penalty imposed.

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Providing a means for the avoidance or drastic reduction of penalties undercuts compliance by weakening the strict liability and stringent penalty scheme established by the Mine Act. The majority's importing of a tort standard of liability into the penalty sections of the Act, with all its concomitant complexities, is to graft on to our statute concepts never envisioned by its drafters. Although my conclusion regarding Old Dominion's negligence in this matter is based on considerations somewhat different than those utilized by the judge, the result is the same. For the reasons set forth above, and as the judge below found, the majority's assertion that substantial evidence does not support a finding that the directions of management, or lack thereof, contributed to the violation at issue, is thus in error. 3/

The penalty assessed by the judge, based in major part on the high gravity of the violation, is in accord with the congressional intent expressed in the Mine Act's legislative history. Legis. Hist. at 603, 628-30. As the Senate Committee Report notes:

> In short, the purpose of a civil penalty is to induce those officials responsible for the operation of a mine to comply with the Act and its standards.
>
> In overseeing the enforcement of the Coal Act the Committee has found that civil penalty assessments are generally too low and when combined with the difficulties being encountered in collection of assessed penalties...the effect of the current enforcement is to eliminate to a considerable extent the inducement to comply with the Act or the standards, which was the intention of the civil penalty system.

S. Rep. No. 95-181, Legis. Hist. at 629 (emphasis added).

3/ Overturning substantial evidence has been unsuccessfully attempted by this Commission before, to its subsequent embarrassment. As the Court of Appeals for the District of Columbia Circuit stated:

> [T]he Commission is statutorily bound to uphold an ALJ's factual determinations that are supported by substantial evidence.

Donovan v. Phelps Dodge Corp., 709 F.2d 86, 90 (D.C. Cir. 1984), see Nacco Mining Co., 3 FMSHRC 848 (April 1981).

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The Commission has stated,

> The determination of the amount of the penalty that should be assessed for a particular violation is an exercise of discretion by the trier of fact. Cf. Long Manufacturing Co. v. OSHRC, supra, 554 F.2d [03] at 908 [8th Cir. 1977]. This discretion is bounded by proper consideration of the statutory criteria and the deterrent purpose underlying the Act's penalty assessment scheme.

Sellersburg Stone Co., 5 FMSHRC 287, 294 (March 1983), aff'd 736 F.2d 1147 (7th Cir. 1984). As in Sellersburg,

> Although the penalties assessed by the judge far exceed those proposed by the Secretary before hearing, based on the facts developed in the adjudicative record [I] cannot say that the penalties assessed are inconsistent with the statutory criteria and the deterrent purpose behind the Act's provision for penalties. Hence, [I] find that the judge's penalty assessments do not constitute an abuse of discretion.

Id. at 295, quoted in part, 736 F.2d at 1153.

I therefore dissent to the reduction of the penalties imposed.

A. E. Lawson, Commissioner

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Collyer, Chairman, dissenting:

My colleagues and I agree that the fatal accident which led to this litigation occurred st the site of s mine. Therefore, regulations of the Mine Safety and Health Administration of the Department of Labor properly cover all activities at the Elro substation. While amicus curiae Edison Electric Institute has raised very serious questions about application of MSHA standards to high voltage power lines, such questions must be resolved in the first instance between the industry and the Department.

However, my colleagues also decide today that s power company's metering of electrical usage by mine is sufficient to turn the power company itself into an operator under the Mine Act. By the adoption of this decision, the majority implicitly holds that every vendor who approaches mine property is a mine operator subject to all of the requirements of the Act. This, I am sure, will be news to all public utilities, to other mine vendors - and to the Congress of the United States. I dissent.

My colleagues have glossed over the facts of Old Dominion's relationship with Westmoreland because those facts hamper the ease with which they reach their result. However, on the facts contained in this record, I conclude that Old Dominion acted as a vendor of electricity, not a provider of services at the Elro substation. The contrary decision of the majority is reached on the basis of conjecture and a stretching of the record testimony with which I cannot agree.

The facts are undisputed. Westmoreland Coal Company leased part of its land holdings to Elro Coal Company to mine coal at a new mine. The mined coal was to be sold by Elro to Westmoreland. In preparation for the new mine, Elro contracted with the Vanderpool Electric Corporation to build transmission lines from Old Dominion's high power lines to Westmoreland property where a substation could be built. Old Dominion had nothing to do with building the transmission lines to the substation. Westmoreland then built the Elro substation to reduce the incoming power to the proper voltage for use in the mine. The reduction in power was accomplished by large transformers. Old Dominion had nothing to do with the ownership or construction of the substation. In December 1979, when the substation was completed, Old Dominion installed metering equipment - and only metering equipment - at the substation for its billing purposes, so that it could measure the amount of electricity used by Westmoreland and Elro. The metering equipment required five smaller transformers to

reduce the power to a measurable level. Thereafter, Old Dominion would only visit the substation to read the meter on a monthly basis. The substation had been energized for one day at the time of the accident, which occurred when Old Dominion employees came to the site to check the operation of the meter.

On these bare facts, the majority erroneously concludes that Old Dominion was providing the requisite services under Section 3(d) of the Mine Act to transform the public utility into a mine operator.

I cannot agree that Old Dominion was "providing services" for Westmoreland or Elro at this substation. The power company metered electricity usage for its own billing purposes, not for any purposes of the production operators. All the ownership, construction, maintenance, operation and repair of the substation were solely under Westmoreland's control. Old Dominion installed its meter not to "provide services" to the mine, but solely in order to measure the quantity of electricity that it, as a vendor, sold to the mine.

The majority opinion skips over these crucial distinctions by concluding:

> The services or work to be rendered by Old Dominion included examination of an electrical facility providing power to the mine and the performance of any necessary repairs, services essential to the mine's operation. Old Dominion's assistance to Westmoreland in installing, maintaining, repairing, and replacing electrical equipment had been rendered in the past, was being rendered at the time of the events at issue, and could be anticipated in the future.

Dec. at 7. The totality of evidence relating to the "examination" of this substation by Old Dominion does not support the majority's conclusion and, in fact, underscores that Old Dominion's sole interest at the substation was in its own metering equipment.

Q. Would [a meter reader on the monthly visit] perform any inspection or services over the other five articles?

A. Only visual and only by probably a meter reader that is not a meter man. He might check the general appearance of the equipment to see if there was anything that he saw that was out of line or might need attention.

Tr. 36 (emphasis in original). My colleagues turn this limited testimony about a visual inspection of "five articles" into a service performed for Westmoreland. This is not an accurate reading of the record. As prior testimony makes clear, the

"formers installed by Old Dominion so that electricity could pass through the meter without damage to the meter. Any "examination" that would occur would be only a visual check of Old Dominion's own equipment, used exclusively to meter the mine's use of electricity. Such an "examination" would not provide any service to the mine operator, but only to the vendor.

Uncontradicted testimony consistently limited the power company's role at the Elro substation to its metering equipment. Old Dominion General Manager H. E. Armsey testified that Old Dominion would not be involved in repair and restoration of power at the substation after an industrial accident or weather damage unless there were a problem involving the metering equipment. If the Elro mine lost power, Elro would call Westmoreland because Westmoreland has the inhouse expertise. While Armsey agreed that if Westmoreland had questions itself, it would be "logical" for it to call Old Dominion, that was because "if the meter doesn't run, we don't sell electricity." Tr. 38. I cannot agree with the apparent conclusion of my colleagues that an unspecified occasion of major difficulty with the substation at some time in the future, which may lead Westmoreland to seek advice from Old Dominion, and which advice the power company may provide in order to continue to sell electricity, is sufficient provision of services to turn Old Dominion into a mine operator.

The limited involvement of Old Dominion with the Elro substation was clearly explained in uncontradicted testimony by General Manager Armsey:

> Q. And at this substation what facilities or what properties did Old Dominion have there?
>
> A. Our only facilities were the metering equipment which measures the energy that would be used at this location.
>
> Q. Who has the responsibility to maintain this substation and the transmission lines in and lines out?
>
> A. Someone other than Old Dominion Power Company. We weren't involved with the transmission line and substation.

Tr. 27. This degree of presence by Old Dominion at the substation would be less than that of a service representative from Xerox Corporation, who would install, maintain, repair and replace defective dry copier equipment in the mine office used for

mine plans, shift assignments and the like. By its decision, and the expansive terms it adopts, the majority has declared that Xerox is also a mine operator. I cannot believe that Congress intended this result.

To the contrary, Congress clearly excepted vendors such as Old Dominion from the reach of the definition of "operator." As even the Secretary of Labor recognized throughout most of the tortuous history of his independent contractor regulations, Congress intended that the only mine contractors who could be held liable as operators were those having some continuing presence st s mins site. In the Supplementary Information accompanying MSHA s initial independent contractor proposed rule, the Secretary specifically noted that:

> Congress' intention that the Act be enforced against independent contractors that have a continuing presence at a mine is explicitly stated in the legislative history. The Conference Report provides that inclusion of independent contractors in the definition of operator was intended to permit enforcement of the Act against independent contractors "who may have a continuing presence at the mine." S. Rep. No. 95-461, 95th Cong., 1st Sess. 37 (1977).

44 Fed. Reg. 47746, 47748 (Aug. 14, 1978) (emphasis added). As the Secretary additionally recognized, limiting the statutory term "operator" to those independent contractors who have a significant degree of involvement in mine operations is also consistent with judicial constructions of the Mine Act. For example, the Third Circuit has pointed out:

> 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. Such a reading of the statute is given color by the fact that other persons deemed operators must "operate[s], control[s], or supervise[s]" a mine. Designation of such other persons as operators thus requires substantial participation in the running of the mine; the statutory text may be taken to suggest that a similar degree of involvement in mining activities is required of independent contractors before

they are designated operators.

National Industrial Sand Association v. Marshall, 601 F.2d 689, 701 (1977) (emphasis added). See also, Association of Bituminous Contractors, Inc. v. Andrus, 581 F.2d 853, 861-862 (D.C. Cir. 1978); Bituminous Coal Operators Association v. Secretary of the Interior, 547 F.2d 240, 246-247 (4th Cir. 1977).

In his final rule, however, the Secretary appears to have abandoned the requirement that an independent contractor have a continuing presence at a mine in order to be considered an operator. In the preamble to the final rule, the Secretary stated that "as a general rule, MSHA will issue citations . . . to independent contractors for violations . . . committed by them and their employees." 45 Fed. Reg. 44494 (July 1, 1980). In support of this broad statement, the Secretary said that 'MSHA has concluded that a regulation that would distinguish some contractors from others in formulating a comprehensive enforcement scheme could, at this time, be overly complex, imprecise and lead to arbitrary decisions . . . ." 45 Fed. Reg. at 44495. To the extent that the final rule is not reconciled by the Department of Labor and this Commission with the express Congressional intention that only those contractors with a "continuing presence" at a mine site be considered operators, it reflects an erroneous and over-reaching reading of the Act.

Whatever the merit to the Secretary's decision that it would be less complex and, thus, more administratively convenient to consider all independent contractors as operators, that convenience cannot legally override Congress' express distinction between those contractors who can be cited as operators (contractors "providing services or construction" with a "continuing presence") and those who cannot (all others).

By its definition of services ("an act done for the benefit or at the command of another"), the majority includes the apocryphal Coca Cola man coming onto mine property to refill the Coke machine in the office. While I was once confident that the majority would, if asked directly, agree that the Coca Cola Company and the Xerox Corporation are merely vendors, not mine operators, the majority decision fails to provide any basis for such a distinction and, in fact, negates the Congressional directive. In order to include this power company within the statutory definition, the majority has had to stretch the definition so far that it will now encompass every vendor approaching mine property.

I would hold that the Secretary erroneously cited a nonoperator and would vacate the citation and penalty. I dissent from the majority's failure to do so.

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