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MSHA V. OTIS ELEVATOR
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
October 27, 1989
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket Nos. PENN 87-25-R
PENN 87-26-R
PENN 87-69
PENN 87-86
OTIS ELEVATOR COMPANY

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka, and Nelson,
Commissioners

DECISION

BY: Ford, Chairman; Backley, Doyle, and Nelson, Commissioners:

In this consolidated contest and civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. • 801 et seq. (1982)("Mine Act" or "Act"), we are asked to decide whether Otis Elevator Company ("Otis") is the type of "independent contractor" that falls within the definition of "operator" as set forth in the Mine Act and, if so, whether Otis was properly cited for two violations of 30 C.F.R.

□ 77.501. Commission Administrative Law Judge William Fauver found that Otis was an "independent contractor" and, thus, an "operator" under the Act and sustained both citations. 9 FMSHRC 2038 (December 1987). We granted Otis' petition for discretionary review and consolidated this case, for purposes of briefing and oral argument, with Otis Elevator Company, Docket No. PENN 87-262 ("Otis I"), which also presented as its primary issue Otis' independent contractor status under the Mine Act. In light of our decision issued separately this date in Otis I we affirm the judge's finding that Otis is an operator under the Mine Act, and we also affirm the judge's finding of the two violations of section 77.501.

The Cambria Slope Mine No. 33, an underground coal mine, is owned and operated by BethEnergy Mines, a subsidiary of Bethlehem Steel Corporation ("Bethlehem"). Bethlehem maintains an elevator service contract with Otis to perform maintenance and service on the one

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elevator located at the mine. The elevator is located in the portal building of the mine, in which the miners' changing and shower rooms and the company offices are also located. The elevator shaft is 800 feet deep, with openings at the two working seams of the mine.

The primary function of the elevator is to transport the work force

of approximately 200 miners in and out of the mine both at shift changes and during shifts, as needed. The elevator holds 31 miners and takes two or three minutes for each round trip. Unavailability of the elevator would result in a work delay of about two and one-half hours each shift and a decrease of one-third in the mine's coal production of three thousand clean tons per shift. The elevator also serves as a primary escapeway for some sections, and as an alternate escapeway for others.

The elevator service contract between Bethlehem and Otis became effective August 26, 1981, and under it Otis was paid \$1,300 per month, adjustable annually. Exhibit G-8. The contract provided that Otis would maintain the mine elevator, its parts and equipment, in safe operating condition and provide weekly inspection, maintenance and "on call" emergency repair service. Mine Superintendent Merritts estimated that the weekly maintenance calls involved up to two hours of work if no special problems were encountered and that, during the prior year, an average of two to four additional service calls were made monthly, each taking from one and one-half to three hours. The maximum time spent by Otis employees at the mine was about 20 hours per month. Additionally, every 60 days, Otis performed a required no-load safety test on the elevator.

MSHA penalty assessment reports identify Otis as an operator under the Mine Act, and list previous violations for which civil penalties were paid by Otis when cited for violations of MSHA mandatory safety standards at the Cambria Slope and other mines. Further, Otis had filed and obtained an MSHA Identification Number as an independent contractor pursuant to 30 C.F.R. Part 45.

On October 27 1986, Leroy Niehenke, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), observed Otis employee Gordon Sutter disconnecting electrical leads on the motor of the elevator door at a surface work area of the Cambria Slope No. 33 Mine. In response to Niehenke's questions, Sutter stated that he was not a "qualified person" for performance of electrical work within the meaning of MSHA electrical regulations and was not being directly supervised by a person so qualified. Tr. 151. Niehenke thereupon issued a citation for a violation of the "qualified person" requirements set out in the first sentence of 30 C.F.R. • 77.501 and checked the violation as being of a significant and substantial nature. 1/ Five minutes later, Niehenke issued a second citation,

1/ Section 77.501 provides:

No electrical work shall be performed on electric distribution circuits or equipment, except
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citing a violation under the second sentence of section 77.501, alleging that, while performing electrical work on the motor of the elevator door, Sutter and another Otis employee had locked out the main power disconnect

located in the surface area of the elevator shaft but had failed to tag the device as required by the standard. The switch on the power line had been "locked out" by a padlock placed on the switch by the Otis elevator serviceman, making it impossible for anyone to turn on the electric power until the padlock was removed. Otis contested the citations, the Secretary proposed civil penalties for the alleged violations, and the various proceedings were consolidated and proceeded to hearing before Judge Fauver. Niehenke, MSHA electrical engineer Ron Gossard, and MSHA supervisor Willis Cupp testified that on numerous occasions since 1980 Otis representatives had been informed of the qualification requirements for performing electrical work under section 77.501. Gossard stated that a qualified person would not be required to supervise Otis employees with respect to their specialized elevator electrical work, but that a qualified person would have to be available to insure that all electrical safety precautions were otherwise properly observed for the safety of the miners. Gossard further indicated that the qualified supervisor would not necessarily need to be physically present but only to be available on the property. Gossard also suggested that Otis could have filed a petition for modification pursuant to section 101(c) of the Mine Act, 30 U.S.C. § 811(c), to obtain simplification or modification of the procedures and the requirements for becoming "qualified" as an electrician under section 77.501 since those procedures, requirements and examinations do not specifically apply to an elevator mechanic's work. Cupp testified that an MSHA policy memorandum of October 29, 1979, requires that, in order to assure compliance with MSHA regulations, work performed by manufacturers' service representatives who are not

by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person. Disconnecting devices shall be locked out and suitably tagged by the persons who perform such work, except that in cases where locking out is not possible, such devices shall be opened and suitably tagged by such persons. Locks or tags shall be removed only by the persons who installed them or, if such persons are unavailable, by persons authorized by the operator or his agent.

The term, "qualified person," is defined in section 77.501-1 as:

A qualified person within the meaning of

□ 77.501 is an individual who meets the requirements of • 77.103.

In turn, section 77.103 sets forth an extensive list of requirements necessary for obtaining qualified person status.

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qualified persons must be examined and tested, as necessary, by a qualified person before the machine or equipment is placed in service.

Gordon Sutter, an Otis mechanic's helper, described in detail the specialized electrical and safety training courses and experience required for all Otis elevator mechanics. James Beattie, Otis District Maintenance Supervisor, testified at length as to the particular complexities of elevator repair and maintenance that require qualifications beyond those required for mine electricians. He stated that supervision by a qualified mine electrician was not only unnecessary but could be unsafe if an unqualified person supervised an elevator mechanic's specialized work. Tr. 472-499.

Before the judge, Otis argued that it was not engaged in mine construction or extraction with a continuing presence at the mine, and was not, therefore, an "operator" subject to section 3(d) of the Mine Act under the controlling precedent of *Old Dominion Power Company v. Donovan*, 772 F.2d 92 (4th Cir. 1983). Further, as an elevator service company, Otis contended it was regulated under the Occupational Safety and Health Act of 1970, 29 U.S.C. • 651 et seq. (1982)(the "OSHAct"), and was not subject to MSHA regulation. With respect to the alleged violations of section 77.501, Otis argued that its compliance with the mandatory standard would create a "greater hazard" or a "diminution of safety" in that supervision of Otis' specially trained elevator mechanics by MSHA qualified mine electricians, untrained in elevator repairs, could result in incorrect or dangerous work, thereby putting both Otis employees and miners at risk.

In his decision, the judge rejected Otis' jurisdictional arguments, relying on the definition of "independent contractor" adopted by the Secretary in 30 C.F.R. Part 45 as including "a business that contracts to perform services or construction at a mine." 2/ The judge noted that the Secretary's preamble to the final rule in Part 45 included as "independent contractors," those performing "short-term" and "intermittent" work of "every type," including "minor repairs." 45 Fed. Reg. at 44494 (July 1, 1980). Finding further that the mine elevator was a "critical part of the mine," and that Otis employees have a "substantial recurring presence at the mine" performing "crucial safety repairs on a key facility of the mine," the judge distinguished this case from *Old Dominion*, supra, and held that Otis was an independent contractor as defined by the Secretary and, hence, an operator under the Act. 9 FMSHRC at 2040-41.

As to the alleged violation of the "qualified person" requirements in section 75.501, the judge rejected Otis' defense that compliance with

2/ 30 C.F.R. • 45.2(c) states in relevant part:

"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

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the standard would have created a "greater hazard" or a "diminution of safety." Relying on the Commission's decisions in Penn Allegh Coal Co., 3 FMSHRC 1392 (June 1981) and Sewell Coal Co., 5 FMSHRC 2026, 2029 (December 1983), the judge held that Otis' defense was raised in the wrong forum, since the "greater hazard" defense is not permissible in enforcement proceedings where the operator has not first filed a petition for modification under section 101(c) of the Mine Act. 9 FMSHRC at 2042-43. Nor, he found, did the "gravity of circumstances and presence of danger" exception carved out in Sewell apply under the facts of this case, since Otis had not demonstrated that compliance with the standard would result in a safety or health emergency to mine personnel. 9 FMSHRC at 2043. 3/ Having rejected Otis' affirmative defense, the judge concluded that Otis had violated the standard as charged. He also affirmed the inspector's significant and substantial finding and assessed a civil penalty of \$300 for the violation. He affirmed the second citation for failure to properly tag the disconnect device, found the citation to be technical, and assessed a penalty of \$20.

On review, Otis contends that the judge erred in concluding that it is an "operator" as defined in the Mine Act, that he erred in rejecting Otis' affirmative defense with respect to the first citation, and that substantial evidence does not support his finding that the violation was significant and substantial in nature. 4/

Concerning the jurisdictional issue, we have concluded in Otis I that Otis, by virtue of the services provided and its continuing presence at the mine site, falls within the definition of "operator" set forth in the Mine Act and is, therefore, subject to its jurisdiction. See slip op. at 5-8. The operative facts in the two cases are strikingly similar and the conclusion that we reached in Otis I obtains with equal validity here. As in Otis I, it is evident here that Otis was functioning as an independent contractor on property that plainly is a mine within the Act's scope. Slip op. at 4-8. In Otis I. we held that Otis' continuing maintenance and service work on a mine elevator used to transport miners in and out of the mine bore a close proximity to, and relationship with, the overall extraction process. See slip op. at 7. We reach the same conclusion here. We further conclude as in Otis I, that Otis' contacts

3/ In Sewell, the Commission stated that "emergency situations may arise where the gravity of circumstances and presence of danger may require an immediate response by the operator or its employees, necessitating a departure from the terms of a mandatory standard without first resorting to the Act's modification procedures." 5 FMSHRC at 2029 n. 2.

4/ As to the second violation, Otis agrees on review that its employees had failed to place the tag as required, and argues only that MSHA lacked

jurisdiction to cite Otis as an operator. In light of our holding on that issue, we affirm the judge's finding of violation with respect to the second citation.

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with the Cambria Slope mine were not so rare, infrequent, and attenuated as to bring this case within the holding of *Old Dominion*, supra. See slip op. at 7. We also find that Otis' activities here were not properly subject to OSHA jurisdiction. See slip op. at 7-8. In sum, and for the reasons explained in *Otis I*, we conclude that Otis had a continuing presence at the Cambria Slope mine performing a function substantially related to the extraction process and, therefore, was an operator within the meaning of the Mine Act. Otis is therefore subject to the Mine Act. With respect to the first alleged violation of section 77.501, Otis raises, as it did before the judge, the affirmative defense of "diminution of safety," arguing that application of section 77.501 would actually increase the risk of danger and result in a diminution of safety to both Otis' employees and the miners. Otis further argues that requiring its employees to meet the "qualified person" criteria set out in section 77.501 is unnecessarily and unduly burdensome in that its employees are well qualified by virtue of Otis' own rigorous training requirements and that, in other settings, these employees must comply with regulations under the OSHA Act.

The record in this case leaves little doubt that, prior to being cited for the violations, Otis had long been on notice that MSHA regarded it as subject to the provisions of section 77.501 and had been advised of the requirements for compliance. Rather than seeking relief through the modification procedures of section 101(c) of the Act or achieving compliance through the alternative procedures suggested by MSHA, Otis waited until it was cited for non-compliance and then alleged for the first time the defense of diminution of safety as an excuse for its non-compliance.

In *Penn Allegh*, supra, the Commission held that questions of diminution of safety are to be first pursued and resolved in modification proceedings and cannot be raised in enforcement proceedings, as Otis has attempted to do here. 3 FMSHRC at 1398, 1400. As noted by the judge in his decision, were we to accept Otis' argument, we would be concluding that an operator, not the Secretary, may determine when compliance with a mandatory standard is necessary. Accordingly, we hold that the diminution of safety defense asserted by Otis was improperly raised in this enforcement proceeding.

Moreover, even if that defense were properly raised, we are not convinced that the record of this case establishes that application of the standard would result in a diminution of safety. Otis has described a number of hypothetical scenarios involving interference with trained Otis technicians by supervisors unskilled in elevator work, but has failed

to demonstrate that application of section 77.501 actually has resulted in a diminution of safety to miners or that it will, in fact, do so.

Conversely, we find no basis to rebut the presumption that Otis' mechanics, working with electrical components in both the surface and underground areas of the mine, and admittedly untrained in and unfamiliar with MSHA regulations, may adversely affect the safety of miners.

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Finally, with respect to Otis' argument that MSHA's regulations are unnecessarily burdensome, we observe that compliance with the Mine Act is an essential component of doing business in a mine and that relief from compliance is only available through a section 101(c) petition for modification.

Accordingly, and for the foregoing reasons, we affirm the judge's decision. 5/

5/ In its petition for discretionary review, Otis challenged the judge's finding that the first violation was of a significant and substantial nature but did not discuss the issue in its briefs or at oral argument. Notwithstanding this virtual waiver of the issue, we have examined the record with respect to that finding, and we conclude that the judge's findings in this regard are supported by substantial evidence.

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Commissioner Lastowka, dissenting:

In all material respects, this case and Otis Elevator Co., FMSHRC Docket No. PENN 86-262 ("Otis I"), issued this date, are the same. As in Otis I, the record in this case establishes that Otis Elevator Company: 1) is not engaged in either mine construction or the coal extraction process; 2) does not have a "continuing presence" at the mine; and 3) does not "substantially participate in the running of the mine." Rather, as the record in this case illustrates, Otis' function and presence at the mine is extremely limited. In fact, the elevator inspection and repair service Otis provides at the mine constitutes only one stop on a general service route that "includes elevators in a Sears and Roebuck store, an office building, two banks and a hospital." 9 FMSHRC 2038, at 2039 (ALJ). Therefore, for the reasons more fully set forth in my dissenting opinion in Otis I, I dissent from the majority's affirmance of the administrative law judge's conclusion that Otis Elevator Company is a mine operator.