

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

August 14, 1995

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEST 93-129
	:	
JOY TECHNOLOGIES INC. -	:	
COAL FIELD OPERATIONS	:	

BEFORE: Jordan, Chairman; Doyle, Holen and Marks, Commissioners

DECISION

BY: Jordan, Chairman; Doyle and Holen, Commissioners

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1988) ("Mine Act" or "Act"). It presents the issues of whether Joy Technologies Inc. - Coal Field Operations ("Joy") is an independent contractor-operator within the meaning of section 3(d) of the Mine Act, 30 U.S.C. ' 802(d),¹ and, if so, whether it was liable for a violation of 30 C.F.R. ' 48.28.² Commission Administrative Law Judge Gary Melick concluded that Joy was an operator under the Mine Act and that it was liable for the

¹ Section 3(d) of the Mine Act provides:

"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[.]

30 U.S.C. ' 802(d).

² Section 48.28(a), which implements the refresher training requirement of section 115(a) of the Mine Act, 30 U.S.C. ' 825(a), provides: "Each miner shall receive a minimum of 8 hours of annual refresher training as prescribed in this section." Section 115(a) of the Mine Act provides in part: "all miners shall receive no less than eight hours of refresher training no less frequently than once each 12 months" 30 U.S.C. ' 825(a).

violation. 15 FMSHRC 2147 (October 1993) (ALJ). The Commission granted Joy's petition for discretionary review. For the reasons that follow, we affirm the judge's decision.

I.

Factual and Procedural Background

Joy manufactures, sells and services mining equipment, and has provided equipment to Somerset Mining Company for use at its Sanborn Creek Mine, an underground coal mine. 15 FM SHRC at 2147. Joy employs service representatives who, after an equipment sale, provide follow-up services to customers. *Id.* at 2147-48; Tr. 13.

Dixon McElhannon is the Joy service representative for the Sanborn Creek Mine. 15 FM SHRC at 2148. His responsibilities include assuring that equipment is delivered in proper condition, advising and assisting in assembly and repairs, and procuring necessary parts. *Id.* at 2147-48; Tr. 13-14, 34-35, 43-44. He "troubleshoots" when problems arise with Joy equipment. 15 FM SHRC at 2148; Tr. 13. McElhannon performs services both on the surface and underground. Tr. 36; Stip. 10; Ex. M-2. Consistent with Joy's policy, McElhannon's service calls at Sanborn Creek Mine continued after the warranties on Joy equipment expired. 15 FMSHRC at 2148; Tr. 46.

Service reports filed by McElhannon show that, during the 22 month period from January 24 through April 7, 1992, he visited the mine on at least four occasions, twice for two-day periods, for a total of six days. 15 FM SHRC at 2148-50. McElhannon also visited the mine on other occasions but did not prepare a report. *Id.* at 2148.

During his visit on March 2 and 3, McElhannon assisted in the unloading of two new shuttle cars. *Id.* at 2149. He checked the cars to ensure that they were in working condition, provided technical assistance in identifying a problem with one of the cars, and obtained a replacement part. *Id.*

On April 6, 1992, he visited the mine to oversee the unloading and assembly of a new Joy continuous miner and to ensure that it worked properly when assembled. *Id.* at 2149-50; Tr. 31-32. After unloading, the miner was taken in sections to the maintenance shop; assembly of the miner began on April 7. 15 FMSHRC at 2150. While assisting in the assembly, McElhannon operated the remote control to move the mining machine so that the maintenance workers could insert pins. *Id.*

That same day, Inspector Larry Ramey from the Department of Labor's Mine Safety and Health Administration ("MSHA") arrived in the shop to continue his inspection of the mine. Tr. 62-63; 15 FMSHRC at 2150. At that time, the maintenance workers were having some difficulty with the equipment's hydraulic system. Tr. 64-65, 106-07. Ramey observed McElhannon at the remote controls, raising and lowering the cutter head. Tr. 64-65. A coal miner was standing in front of the head while it was being raised and lowered. 15 FMSHRC at 2150; Tr. 63-65. Ramey

believed that the equipment operator was endangering the safety of that miner; the inspector was primarily concerned that the head could become energized and strike the employee, causing his death. Tr. 63-64. Ramey determined that McElhannon had not received refresher training within the preceding year and issued Order No. 3581501, which required the withdrawal of McElhannon from the mine pursuant to section 104(g)(1) of the Mine Act,³ 30 U.S.C. § 814(g)(1). 15 FMSHRC at 2148; Tr. 66, 71; Ex. M-3.

Following an evidentiary hearing, the judge concluded that Joy was an independent contractor-operator subject to liability under the Mine Act. 15 FM SHRC at 2150-52. He based his determination on Joy's performance of "continuing services in connection with . . . contracts of sale." *Id.* at 2151. The judge also found that "Joy's representative was . . . performing limited but necessary services at the Sarborn Creek Mine . . ." *Id.* Relying on section 3(d) of the Act, on *Otis Elevator Co. v. Secretary of Labor*, 921 F.2d 1285 (D.C. Cir. 1990), and on the Commission's decisions in *Bulk Transportation Services, Inc.*, 13 FM SHRC 1354 (September 1991), and *Larg Brothers, Inc.*, 14 FM SHRC 413 (September 1991), the judge concluded that, because Joy was providing essential services closely related to the extraction process, Joy's presence at Sarborn Creek Mine was sufficient to make Joy an operator within the meaning of Section 3(d) of the Act. 15 FM SHRC at 2151-52.

³ Section 104(g)(1) of the Mine Act provides in part:

If . . . the Secretary . . . shall find employed at a . . . mine a miner who has not received the requisite safety training as determined under section 115 of this Act, the Secretary . . . 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 . . . mine, and be prohibited from entering such mine until . . . the Secretary determines that such miner has received the training required by section 115 of this Act.

The judge also found that, because McElhannon had not received annual refresher training, Joy had violated section 48.28(a). *Id.* at 2152. He concluded that the violation was not significant and substantial and assessed a civil penalty of \$100. *Id.*

II.

Disposition

A. Whether Joy is an Independent Contractor

Joy asserts that it is not an independent contractor within the meaning of section 3(d) of the Mine Act. It relies on the definition of independent contractor set forth in 30 C.F.R. ' 452⁴ and argues that it has not contracted to perform services at Sarborn Creek Mine. J. Br. at 9-11. The Secretary responds that section 3(d) of the Mine Act does not require the existence of a contract to establish independent contractor-operator status. S. Br. at 22 n8.

We reject Joy's argument that the absence of a service contract precludes a finding that Joy is an independent contractor. In *Bulk*, the Commission stated:

Our focus is on the actual relationships between the parties, and is not confined to the terms of their contracts. . . . [T]he determination of whether a party is properly designated to be within the scope of section 3(d) of the Act is not based upon the existence of a contract, nor the terms of such a contract.

13 FMSHRC at 1358 n.2. Moreover, it is settled law that an entity may be held to be an independent contractor based on its performance of work "in connection with, or for the

⁴ Section 452 states:

As used in this part:

. . . .

(c) *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

purpose of carrying out, the contract of sale" 41 A m Jur2d, Independent Contractors
' 18. We conclude that the regulation's reference to "contracts to perform services" is not
restricted to written contracts and encompasses services performed incident to a contract of sale.
Accordingly, we affirm the judge's conclusion that Joy is an independent contractor.

B. Whether Joy is an Operator

The parties also disagree on the appropriate standard for determining operator status under section 3(d) of the Mine Act. Asserting that it provided only limited services at Sanborn Creek Mine and, therefore, was not an operator, Joy argues that the Commission cases cited by the judge were wrongly decided. J. Br. at 11-20. Relying on the decision of the United States Court of Appeals for the Fourth Circuit in *Old Dominion Power Co. v. Donovan*, 772 F.2d 92 (1985), in which the court held that a power company that installed, maintained and read an electric meter monthly at a substation separated by a chain link fence from the rest of the mine property was not an operator within the meaning of section 3(d), Joy urges the Commission to adopt a narrow definition of operator. J. Br. at 15-22.

The Secretary responds that the Commission should adopt the broad definition of operator set forth by the United States Court of Appeals for the D.C. Circuit in *Otis Elevator Co. v. Secretary of Labor*, i.e., that section 3(d)'s reference to "any" independent contractor performing services at a mine "means just that -- any independent contractor . . ." S. Br. at 8-9, quoting 921 F.2d at 1290 (footnote omitted) (emphasis in original). In the alternative, the Secretary contends that, in light of the frequency of McElhannon's visits to the mine, his travels underground, and the importance of his work to the mining and transporting of coal at Sanborn Creek Mine, Joy is an independent contractor-operator either under the Commission's line of cases interpreting the term "operator" or under *Old Dominion*. S. Br. at 13-20.

As the Commission has noted, section 3(d) of the Mine Act expanded the definition of "operator" contained in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) (amended 1977), to include "any independent contractor performing services or construction at such mine." E.g., *Bulk Transportation*, 13 FMSHRC at 1357. In the *Otis Elevator Co.* cases, 11 FMSHRC 1896 (October 1989) ("*Otis I*") and 11 FMSHRC 1918 (October 1989) ("*Otis II*"), *aff'd on other grounds*, 921 F.2d 1285, the Commission set forth a two-pronged test for determining whether an independent contractor may be considered an operator under section 3(d). First, "the independent contractor's proximity to the extraction process" and whether its work is "sufficiently related" to that process are examined. *Otis I* at 1902. The Commission has found a contractor's activity to be sufficiently related to the extraction process where its employees are exposed to mining hazards and have "a direct effect on the safety of others . . ." *Id.* Second, the Commission examines "the extent of [the contractor's] presence at the mine." *Otis I*, 11 FMSHRC at 1902. The Commission has formulated this test as whether the contractor's "contacts with the . . . mine were not so rare, infrequent, and attenuated as to bring this case within the holding of *Old Dominion* . . ." *Otis II*, 11 FMSHRC at 1922-23. As the Commission noted in *Otis I*, "there may be a 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." 11 FMSHRC at 1900-01, quoting *National Indus. Sand Ass'n v. Marshall*, 601 F.2d 689, 701 (3d Cir. 1979).

We conclude that Joy's presence at Sanborn Creek Mine was sufficient to satisfy the test set forth in the Commission's *Otis* cases and their progeny. As to the first prong of the

analysis, the parties stipulated that the continuous miner is an "essential piece of mining equipment." Tr. 34; Stip. 5. McElhannon testified that the Joy shuttle cars used at the mine are essential to the mining process. Tr. 41. We agree with the judge that, in troubleshooting problems with the Joy continuous miner and shuttle cars, providing technical assistance related to the unloading, assembly and operation of Joy equipment, and securing needed parts, Joy's representative engaged in activities essential to the extraction process. Coal could not be mined without the continuous miner and shuttle cars. The first prong is also satisfied because, in performing his service work in the maintenance shop and underground, McElhannon was exposed to the hazards of the Sanborn Creek Mine and his work directly affected the safety of miners. The withdrawal order was issued because Inspector Ramsey believed that McElhannon's operation of the continuous miner was endangering the safety of an employee working nearby. We conclude that substantial evidence supports the judge's determination that Joy's work is sufficiently related to the extraction process to satisfy the first prong of the Commission's operator test.

As to the second prong of the test, Joy's contacts with the mine were more than *de minimis*. McElhannon visited Sanborn Creek Mine regularly. He spent at least six days at the mine during a 22 month period, and his contacts could be expected to continue. Joy was present at the mine at least as frequently as the contractors in *Otis I* (six hours per month) and *Lang Bros.* (seven to ten days on a non-continuing basis). As the judge concluded, Joy's contacts were sufficient to establish that services were being performed. 15 FMSHRC at 2151. Moreover, in *Lang Bros.*, the Commission explained that "[a]n independent contractor's presence at a mine may appropriately be measured by the significance of its presence, as well as by the duration or frequency of its presence." 14 FMSHRC at 420. We conclude that substantial evidence supports the judge's determination that Joy's presence at Sanborn Creek Mine also satisfies the second prong of the Commission's operator test.

We are not persuaded by Joy's argument that, based on *Old Dominion*, we should narrowly construe the term "operator." In *Old Dominion*, the court set forth a two-part test for determining whether a contractor is an operator under the Mine Act: whether the contractor is "engaged in the extraction process" and whether it has a "continuing presence at [a] mine." 772 F.2d at 96-97.

In *Otis I*, the Commission declined to construe *Old Dominion* narrowly, stating:

To adopt . . . [a] restrictive interpretation of *Old Dominion* . . . would . . . frustrate Congress' clear intent, when it expanded the definition of "operator" in the Mine Act, to broaden and facilitate direct regulation of independent contractors on mine property.

11 FMSHRC at 1901-02. The Commission's interpretation of *Old Dominion* is consistent with recent case law in the Fourth Circuit. In *United Energy Services, Inc. v. MSHA*, 35 F.3d 971 (4th Cir. 1994), decided after the filing of the briefs in this case, the court did not narrowly construe the term operator.® The contractor in *United Energy* maintained a conveyor belt, a small portion

of which was located on mine property, that was used to transport coal waste to an adjacent power plant. *Id.* at 973. The court stated:

[T]he activities of United Energy's employees are part of the coal preparation process and thus are sufficiently a part of the mining process to qualify United Energy as an independent contractor covered by the Act. We therefore conclude that United Energy had contacts with the mine site of sufficient frequency and of such a nature as to meet those requirements for being an "independent contractor" performing services at a coal mine. *Cf. Otis Elevator Co. v. Secretary of Labor*, 921 F.2d 1285, 1290-91 (D.C. Cir. 1990) (interpreting statutory language to include *any* independent contractor performing services at a mine).

Id. at 976 (emphasis in original).

In light of our disposition, we do not reach the Secretary's argument that the Commission should adopt the operator test set forth by the D.C. Circuit in its decision affirming *Otis I and II*.

Clearly Joy would be a statutory operator under that test.

C. Joy's Other Contentions

We reject Joy's contention that it should not be held to have violated § 4828(a) because it could not have provided the necessary training. As the Secretary points out, Joy may arrange with Sarborn Creek Mine to provide the training, as was done to abate the cited violation. S. Br. at 22-23. Nor does Joy's liability for the violation in this case automatically subject it to liability for all health and safety violations at the mine, as Joy argues. J. Br. at 2122. The Secretary notes that, "[i]f a regulation pertains to a matter over which Joy and its employees truly have no control, there is no reason to expect that Joy would be held responsible for a violation of that regulation." S. Br. at n.10. *See also III MSHA Program Policy Manual 6* ("some provisions of the Act, standards or regulations may not be directly applicable to independent contractors or their work"). In any event, Joy may challenge future citations if it believes the owner-operator should have been the object of the Secretary's enforcement action. "[T]he Commission has recognized that its review of the Secretary's action in citing an operator is appropriate to guard against abuse of discretion." *W-P Coal Co.*, 16 FM SHRC 1407, 1411 (July 1994) (citations omitted).⁵

⁵ In its Petition, Joy also assigned as error the judge's failure to address its contention that McElhannon was not a "miner." Pet. at 9. We do not address this issue because Joy did not argue it in its brief. *See Asarco Mining Co.*, 15 FMSHRC 1303, 1304 n.3 (July 1993).

III.

Conclusion

For the foregoing reasons, we affirm the judge's decision.

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Commissioner Marc Lincoln Marks, concurring:

I concur in the result reached by my colleagues in this case; however, I reach that common result by means of a different analytical path.

Specifically, in my view, the D.C. Circuit's opinion in *Otis Elevator Co. v. Secretary of Labor*, 921 F.2d 1285 (D.C. Cir. 1990) ("*Otis Elevator*") represents the most reasoned approach to interpreting the term "operator" under section 3(d) of the Mine Act, 30 U.S.C. § 802(d). The D.C. Circuit in *Otis Elevator* strictly construed section 3(d) of the Mine Act, which provides that the term "operator" includes "any independent contractor performing services . . . at [a] mine." Section 3(d) of the Mine Act (emphasis added). The court stated that "any" meant "any independent contractor performing services at a mine." 921 F.2d at 1290, quoting Section 3(d) of the Mine Act (emphasis in original). The D.C. Circuit found no warrant in the plain language of the Act, or in the legislative history, for diluting the term "any." *Id.*; *cf. Old Dominion Power Co. v. Donovan*, 772 F.2d 92 (4th Cir. 1985); *Bulk Transportation Services, Inc.*, 13 FM SHRC 1354 (September 1991); *Larg Brothers, Inc.*, 14 FM SHRC 413 (September 1991); *Otis Elevator Co.*, 11 FM SHRC 1896 (October 1989); and *Otis Elevator Co.*, 11 FM SHRC 1918 (October 1989). Neither do I. Along with the D.C. Circuit, I leave open the question of 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." 921 F.2d at 1290, n.3.

In my view, this case presents the Commission with an opportunity to align its interpretation of this section of the Mine Act with that set forth in *Otis Elevator*. In contrast to my colleagues, I take this opportunity and adopt *Otis Elevator*. Applying *Otis Elevator*, I conclude that the record amply supports the judge's determination that Joy, an independent contractor,⁶ was performing services at a mine. Specifically, the record reveals that Joy's representative: (1) was troubleshooting problems with the Joy shuttle car and continuous miner; (2) provided technical assistance related to the unloading, assembly, and operation of Joy equipment; (3) secured needed parts; and (4) operated a continuous miner in a way that resulted in the instant citation. Such activities clearly constitute the performance of services at a mine by an independent contractor.

Finally, I agree completely with the analysis employed by my colleagues in rejecting Joy's impossibility defense. See slip op. at 7.

Marc Lincoln Marks

⁶ For the reasons set forth by my colleagues, I agree that Joy is an independent contractor. See slip op. at 4.