

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

February 28, 2001

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. LAKE 99-78-RM
	:	LAKE 99-120-M
NORTHERN ILLINOIS STEEL	:	
SUPPLY COMPANY	:	

BEFORE: Jordan, Chairman; Riley, Verheggen, and Beatty, Commissioners

DECISION

BY THE COMMISSION:

This consolidated contest and civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”). At issue is the decision of Administrative Law Judge David F. Barbour to affirm a citation issued to Northern Illinois Steel Supply Company (“Northern Illinois”) alleging a violation of 30 C.F.R. § 56.15005.¹ 22 FMSHRC 246 (Feb. 2000) (ALJ). The Commission granted Northern Illinois’ petition for discretionary review challenging the judge’s holding that Northern Illinois was an “operator” under section 3(d) of the Mine Act, 30 U.S.C. § 802(d), and thus subject to the Mine Act’s jurisdiction. For the reasons that follow, we affirm the judge’s decision.

I.

Factual and Procedural Background

Northern Illinois sells prime domestic steel products such as bars, rods, and plates to businesses and individuals. 22 FMSHRC at 248; Tr. 9, 11, 28. It is not involved in installation or fabrication on its customers’ premises. Tr. 52. One of Northern Illinois’ customers is Vulcan Materials Company (“Vulcan”), a company which operates the Lemont quarry in Romeoville, Illinois. 22 FMSHRC 247; Tr. 49. The Lemont quarry is a mine subject to the jurisdiction of the

¹ 30 C.F.R. § 56.15005 provides, in pertinent part: “Safety belts and lines shall be worn when persons work where there is danger of falling”

Department of Labor's Mine Safety and Health Administration ("MSHA"). 22 FMSHRC at 247. Steel is delivered from Northern Illinois' plant to the quarry on flatbed trucks owned or leased by Northern Illinois and operated by Northern Illinois drivers. *Id.* at 248.

Once the trucks reach the delivery point at the Lemont quarry, the steel is unloaded using Vulcan-owned and operated equipment. *Id.* Vulcan uses either a crane with a hoist, a forklift, or a loader to unload the steel from the truck. *Id.* at 249. When steel is lifted by a crane, a hook is attached to the crane's hoist line to lift the steel from the flatbed truck. *Id.* Up to and including the time of the subject inspection, a Northern Illinois driver usually facilitated the unloading process by walking around the truck and releasing the restraints binding the load. *Id.* Occasionally, the driver also climbed onto the loaded flatbed to guide the hook into the lifting chain surrounding the load, an act described as "rigging" the load. *Id.* Rigging requires someone to stand on the steel on the flatbed truck. Tr. 93. Northern Illinois has made steel deliveries to Vulcan, usually once or twice a week, for approximately two years. 22 FMSHRC at 248. On each visit to Vulcan's mine, Northern Illinois employees work approximately 20-30 minutes. *Id.* at 247; Joint Ex. 1 ¶5. In 1998, Northern Illinois employees spent a total of 68 hours at Vulcan's mine. 22 FMSHRC at 247; Joint Ex. 1 ¶5.

On January 28, 1999, MSHA inspector Denis Libertoski approached Vulcan's maintenance shop and saw a Northern Illinois flatbed truck with a load of steel parked about 100 feet from the shop. 22 FMSHRC at 249. The steel was to be used in building a catwalk, handrail, and platform at the crusher. *Id.*; Tr. 68-70. Libertoski observed a man standing on top of the steel, rigging the load so that it could be lifted from the truck. 22 FMSHRC at 249. As the inspector walked towards the truck, he saw that the man standing on the steel was not wearing a safety belt and line. *Id.* Libertoski talked with the person and determined that he was a Northern Illinois employee. *Id.* at 250. Although a Vulcan employee was running the equipment used to unload the steel and two other miners were in the area, no Vulcan supervisors were present when Libertoski saw the Northern Illinois employee on the steel. *Id.* at 249-50; Tr. 145-46, 153, 185. A Vulcan management official arrived as Libertoski walked towards the truck. 22 FMSHRC at 250. Libertoski cited Northern Illinois for a violation of 30 C.F.R. § 56.15005 because the Northern Illinois employee was working without a safety belt and line. *Id.* Northern Illinois contested the citation and related civil penalty on the ground that it was not an "operator" subject to the Mine Act's jurisdiction.

In affirming the citation, the judge concluded that Northern Illinois was an "operator" under section 3(d), 30 U.S.C. § 802(d). *Id.* at 252. The judge noted that, in enacting the Mine Act, Congress intentionally expanded the statutory definition of the term "operator" from its definition under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) ("Coal Act") to include independent contractors, and that the Secretary retains some discretion as to whether a regulation applies to a particular independent contractor. *Id.* at 250-51. He reasoned that, because a Northern Illinois employee drove the steel truck and rigged the steel, because Vulcan was not supervising the rigging of the steel, and because Northern Illinois' delivery of steel was performed pursuant to its contract with Vulcan, Northern Illinois was an

independent contractor. *Id.* at 251-52. The judge then applied a two-pronged test — developed by the Commission in its *Otis Elevator Co.* decisions, 11 FMSHRC 1896 (“*Otis P*”), and 11 FMSHRC 1918 (“*Otis IP*”) (Oct. 1989) — used to determine whether an independent contractor should be deemed an operator for purposes of Mine Act jurisdiction. Under the first prong of that test, the judge found that Northern Illinois performed a service at the Lemont quarry, and that the service was closely related to the mining process. *Id.* at 252. Under the second prong, the judge found that Northern Illinois had a significant presence at the Lemont quarry. *Id.*

II.

Disposition

Northern Illinois maintains that the judge erroneously concluded that it was performing a service by delivering its products to Vulcan. PDR at 6-7. Northern Illinois also claims that the judge, in finding that the services Northern Illinois performed were closely tied to Vulcan’s mining process, erred by focusing on the eventual use of the steel delivered rather than the relationship between the work Northern Illinois employees performed and the mining process. *Id.* at 7.²

The Secretary responds that the judge correctly determined that Northern Illinois was performing a service at the Lemont quarry on the day the citation was issued. S. Resp. Br. at 8-10. The Secretary also argues that, under any of the various legal tests that have been used by the Commission and the courts to determine independent contractor-operator status under section 3(d) of the Mine Act, Northern Illinois is an independent contractor-operator. *Id.* at 10-20.

A. Whether Northern Illinois is an Independent Contractor

The Mine Act regulates each coal or other mine affecting commerce and “each operator of such mine.” 30 U.S.C. § 803. Section 3(d) of the Act defines “operator” as “any owner, lessee or other person who operates, controls, or supervises a . . . mine or any independent contractor performing services or construction at such mine.” 30 U.S.C. § 802(d). The definition of “operator” in section 3(d) of the 1969 Coal Act did not expressly include independent contractors. As the Commission has noted, Congress’ inclusion of language in section 3(d) to include independent contractors under the definition of “operator” represents an intentional expansion in the coverage of that statutory term. *Bulk Transp. Servs., Inc.*, 13 FMSHRC 1354, 1357 (Sept. 1991).

Our first inquiry is thus to determine whether Northern Illinois is an independent contractor under the Mine Act. The term “independent contractor” is not defined in the Act, but MSHA regulations define “independent contractor” as “any person, partnership, corporation,

² Aside from disputing the judge’s conclusion that it is an operator, Northern Illinois does not contest the finding of violation or the significant and substantial designation.

subsidiary of a corporation, firm, association or other organization that contracts to perform services or construction at a mine.” 30 C.F.R. § 45.2(c). In ascertaining whether a company is an independent contractor of a mining company, the Commission and courts have focused on the nature of the relationship between the mine and its alleged contractor. *See Joy Techs., Inc. - Coal Field Operations*, 17 FMSHRC 1303, 1306 (Aug. 1995), *aff’d*, 99 F.3d 991, 996 (10th Cir. 1996); *Joy Techs., Inc. v. Sec’y of Labor*, 99 F.3d 991, 996 (10th Cir. 1996). Under this precedent, the determination whether a company is considered an independent contractor depends on the nature and extent of services the company performed at a mine. *Joy*, 17 FMSHRC at 1306 (concluding that Joy was an independent contractor by virtue of its services performed at a mine); *Joy*, 99 F.3d at 998 (deferring to MSHA’s interpretation that “independent contractor status is to be based . . . on the performance of significant services at the mine”).

In the instant matter, Northern Illinois does not challenge the judge’s finding that its employees hauled loads of steel once or twice a week onto Vulcan’s property, or his finding that Northern Illinois’ employees usually got out of the truck and unlocked the chain holding down the steel. Also, on the day the citation issued — and on prior occasions — a Northern Illinois truck driver helped to rig a load of steel for unloading. 22 FMSHRC at 249, 252; Tr. 177. Further, the judge credited Libertoski’s testimony that Northern Illinois’ delivery and assistance in unloading steel was work which Vulcan would have had to perform had Northern Illinois not acted. 22 FMSHRC at 252.³ We therefore conclude that the activities of Northern Illinois’ employees at the Lemont Quarry taken as a whole, including delivery, unlocking, and unloading of steel for Vulcan’s benefit fall within the meaning of “services” as used in section 45.2(c) and provide substantial evidence to support the judge’s determination that Northern Illinois is an independent contractor under section 3(d).⁴

B. Whether Northern Illinois is an “Operator”

In *Otis I* and *Otis II*, the Commission set forth a two-pronged test to determine whether an independent contractor comes under the Mine Act’s definition of “operator.” First, we examined the independent contractor’s proximity to the extraction process and whether its work is “sufficiently related” to that process. *Otis I*, 11 FMSHRC at 1902. Second, we examined “the

³ Terry Croxford, manager of construction projects for Vulcan, also testified that, if Northern Illinois had not delivered the steel to the Lemont quarry, Vulcan would have had to buy or lease a flatbed truck or contract with a third party for hauling services. Tr. 40-41, 97-98.

⁴ We are also not persuaded by Northern Illinois’ contention (N. Br. at 7) that its delivery of steel and periodic assistance in the steel’s unloading constituted only completion of a sale of its own products rather than a service. The Commission and the Tenth Circuit have held that a company’s performance of work in connection with a sale may constitute “services” that qualify the company as an independent contractor under the Act. *See Joy*, 17 FMSHRC at 1304, 1306; *Joy*, 99 F.3d at 999.

extent of [the contractor's] presence at the mine.” *Id.* As part of the second prong of this test, we have looked to whether the contractor’s contact with the mine is de minimis. *Id.* at 1900-01.

In analyzing Northern Illinois’ proximity to the extraction process — the first prong of the Commission’s test — we observe that Croxford testified that steel, such as that regularly delivered by Northern Illinois, “basically holds everything together” and that the Lemont quarry’s conveyors, crushers, and the platforms surrounding and supporting them are all made of steel. Tr. 44-45, 47-49. Croxford also testified that the steel delivered on the day the citation issued was to be used on several projects at the Lemont quarry, including building a catwalk, a handrail, and a platform at the crusher. Tr. 68-70.

Northern Illinois’ involvement at the Lemont quarry is comparable to the involvement of operators in other cases in which we have determined that the cited independent contractor was an operator under section 3(d). For instance, in our *Otis I* decision, we stated: “We are satisfied that a mine elevator used for daily transport of the work force into and out of the mine has a sufficient proximity in nature and purpose to the extraction process to be fairly considered . . . ‘an essential ingredient involved in [that] process.’” 11 FMSHRC at 1902 (alterations in original) (citations omitted). And in *Lang Bros., Inc.*, we held that, “[i]n cleaning and plugging the gas wells, Lang performed services clearly related to the extraction process.” 13 FMSHRC 413, 420 (Sept. 1991) (published Mar. 1992). Thus, although the services performed by the contractors in *Otis* and *Lang Bros.* did not directly involve extraction, we held that they were nonetheless a necessary part of the extraction process. Accordingly, we conclude that substantial evidence supports the judge’s finding that the services Northern Illinois provided are sufficiently close to the extraction process to satisfy the first prong of the Commission’s operator test.

Northern Illinois’ frequent visits to the Lemont quarry and the services it provided there to Vulcan also support the judge’s finding that the extent of Northern Illinois’ presence at the mine satisfied the second prong of the test.⁵ It is uncontroverted that Northern Illinois delivered steel, unlocked the restraints on the flatbed truck, and assisted in unloading the steel at the Lemont quarry for 20-30 minute increments, once or twice each week on the mine site, for a total of 68 hours during calendar year 1998. Such involvement is comparable to the involvement of other independent contractors we have determined satisfied the second prong of our operator test. For example, in *Joy* we determined that the company’s four reported visits to a mine over a ten-week period constituted a sufficient presence at the mine to satisfy the second prong. 17 FMSHRC at 1304, 1308.

In *Lang Bros.*, we held that the contractor’s one-time performance of services for seven to ten days was more than de minimis. 13 FMSHRC at 420. We also concluded that an

⁵ Frequency of visits to a mine is certainly a material factor to consider whether a particular enterprise’s involvement at the mine is “more than de minimis.” However, frequency alone is not determinative of that question or we would be sweeping parcel courier services and the local pizza delivery shop under the coverage of the Mine Act.

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," and found that the importance of the contractor's services to the extraction process along with its "blanket contract" with the mine to clean and plug gas wells, satisfied the second prong of the Commission's operator test. *Id.* In this proceeding, the steel delivered by Northern Illinois is vital to the construction and repair of Vulcan's facilities used in the extraction operation. We also observe that the actions of Northern Illinois' employees along with the frequency of their visits to the mine site contribute to a presence at the Lemont quarry that is more than de minimis. *See Nat'l Indus. Sand Ass'n v. Marshall*, 601 F.2d 689, 701 (3d Cir. 1979).

The courts of appeals for the Tenth and D.C. Circuits have articulated a different approach to the determination whether an independent contractor is an operator under the statute. In *Otis Elevator Co. v. Sec'y of Labor*, 921 F.2d 1285 (D.C. Cir. 1990), and *Joy*, 99 F.3d 991, the Tenth Circuit and D.C. Circuits held that section 3(d), "by its terms . . . extends to 'any independent contractor performing services . . . at [a] mine.'" *Otis*, 921 F.2d at 1290 (quoting 30 U.S.C. § 802(d) (emphasis added)); *see Joy*, 99 F.3d at 999 ("[T]he definition of 'operator' in section 3(d) of the Mine Act is clear and means just what it says — an operator includes 'any independent contractor performing services . . . at [a] mine.'"). Thus, under the reasoning of the courts of appeals in *Otis* and *Joy*, once a company is determined to be an independent contractor performing services at a mine, it qualifies as an operator under section 3(d). Under the rationale of the *Otis* and *Joy* court of appeals decisions, because we have determined that Northern Illinois is an independent contractor, it follows that the company is necessarily an operator under section 3(d). *See Joy*, 99 F.3d at 999-1000; *Otis*, 921 F.2d at 1289-91.

Treating Northern Illinois as an operator under the Mine Act is fully consistent with the remedial purposes of the Act. As we have previously stated, "such questions of statutory coverage must be resolved within the Act's overall purpose of protecting miners' safety and health." *W.J. Bokus Indus., Inc.*, 16 FMSHRC 704, 708 (Apr. 1994) (citing *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1553-55 (D.C. Cir. 1984)); *see also* 30 U.S.C. § 801 (stating that goal of Mine Act is to prevent death and injury to any individual working at a mine); *Sec'y of Labor v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1437 (D.C. Cir. 1989) (stating that Congress "intended the [Mine] Act to be liberally construed" to protect the health and safety of miners). Here, Libertoski testified that there was a potential that the Northern Illinois worker could have fallen from the load of steel on which he was standing at the time the citation issued, a potential exacerbated by the cold, wet conditions present at that time. Tr. 144. Also, Croxford and Libertoski testified that if unloading steel is performed incorrectly, the load could fall to the ground, potentially injuring miners or other people below. Tr. 100, 142. Thus, interpreting section 3(d) to cover Northern Illinois under the particular facts of this case fully adheres to the principle that the Mine Act should be construed to protect miner safety.

In sum, based on the totality of the circumstances presented here, we affirm as supported by substantial evidence the judge's conclusion that Northern Illinois is an independent contractor-operator under section 3(d) of the Mine Act.⁶

III.

Conclusion

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

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

⁶ What is not at issue here, and therefore beyond the scope of this decision, is the incidental presence at a mine of delivery personnel or drivers who are not exposed to mining hazards, such as the danger of falling encountered here.

Distribution

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