FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

December 16, 1997

SECRETARY OF LABOR,	:		
MINE SAFETY AND HEALTH	:		
ADMINISTRATION (MSHA)	:		
	:		
v.	:	Docket Nos.	CENT 96-124-M
	:		CENT 96-158-M
WILLIAMS NATURAL GAS COMPANY	:		

BEFORE: Jordan, Chairman; Marks, Riley and Verheggen, Commissioners[1]

DECISION

BY THE COMMISSION:

[1] Commissioner Beatty assumed office after this case had been considered and decided. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Beatty has elected not to participate in this matter.

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (AMine Act@ or AAct@). At issue is whether Williams Natural Gas Company (AWNG@), an operator of an interstate natural gas pipeline system with facilities located on mine property, is an Aoperator@ within the meaning of section 3(d) of the Mine Act, 30 U.S.C. ' 802(d),[2] and whether the Department of Transportation (ADOT@) has preempted the jurisdiction of the Department of Labor=s Mine Safety and Health Administration (AMSHA@) over natural gas pipeline facilities located on mine premises. Administrative Law Judge Jerold Feldman concluded that WNG is an operator under the Mine Act and that the DOT regulations do not preempt MSHA jurisdiction. 19 FMSHRC 287 (February 1997) (ALJ). WNG filed a petition for discretionary review, which the Commission granted. For the reasons that follow, we affirm the judge=s decision.

I.

Factual and Procedural Background

WNG operates an interstate pipeline for transmission of natural gas and owns pipeline facilities and meter buildings, also referred to as sheds, located on the property of the Independence Quarry and Mill and the Monarch Cement Company, both located in Kansas. 19 FMSHRC at 287, 291; S. Cross Mot. for Summ. Dec., Ex. B, Timmons Aff. at 1-2 (ATimmons Aff.@). The Independence Quarry and Mill and Monarch Cement Company are mines subject to MSHA jurisdiction.[3] 19 FMSHRC at 288. WNG transports natural gas purchased by the mines, which it considers to be its customers. *Id.* at 287. WNG exclusively controls the pipelines and buildings, which are kept locked and to which only WNG has access. *Id.* at 288; Timmons Aff. &4. WNG performs all maintenance activities at the sheds, the areas surrounding the sheds, and on the pipelines. Timmons Aff. &6. A pipeline carrying hazardous waste operated by a third party is located about 20 feet above the sheds at the Independence Quarry and Mill. Jt. Stip. &9; Timmons Aff. &7. WNG employees visit the meter buildings weekly and Amust be ready to access its pipeline facilities at any time to respond to emergencies.@ WNG. Mot. for Summ. Dec. at 5 n.2, 10. The gas WNG transports to the mines arrives under high pressure. Timmons Aff. &9.

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[2] Section 3(d) of the Mine Act provides:

> Aoperator@ 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).

[3] The judge rendered his decision based on cross motions for summary decision. 19 FMSHRC at 287. Stipulations of fact were received in Docket No. CENT 96-124-M, relating to the Independence Quarry and Mill. However, as the judge noted, the facts of the captioned dockets are similar, and the parties therefore agreed that Ain the absence of specific factual distinctions raised by either party, the arguments made in CENT 96-124-M shall also apply to CENT 96-158-M [relating to the Monarch Cement Company].@ *Id.*

At the WNG meter buildings, the gas is monitored and transformed into quantities and pressures that are useful in the production process. *Id.* The mines use the natural gas transported by WNG to start large kilns that are necessary to produce cement. *Id.* at &8.

On January 23, 1996, MSHA Inspector James W. Timmons visited the Independence Quarry and Mill and issued Citation No. 4363655 to WNG alleging a violation of 30 C.F.R. ' 56.4101[4] for failing to post signs prohibiting smoking or open flames at its meter buildings located on mine property.[5] Jt. Stip. 6. The citation charged that A[t]here was dryed [sic] vegetation and other combustables [sic] in and around the buildings@ and that A[t]he meter houses were approximately 10 feet from a walkway and a roadway.@ S. Pet. for Assessment of Civl Penalty, July 15, 1996, Ex. A. The citation as originally issued alleged that the violation was not significant and substantial (AS&S@).[6] MSHA later proposed a civil penalty of $69. *Id.*

On April 8, 1996, Inspector Timmons visited the Monarch Cement plant and issued Citation No. 4357036 to WNG alleging a similar violation of section 56.4101. Timmons Aff. &10. The citation charged that A[t]here was a person observed smoking in the area at the time of inspection@ and that Aemployee cars and trucks [are] parked . . . approximately [five feet] from [the pipeline].@ S. Pet. for Assessment of Civil Penalty, Sept. 12, 1996, Ex. A. The Secretary proposed a penalty of $50 for this violation. *Id.*

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[4] Section 56.4101 provides:

> Readily visible signs prohibiting smoking and open flames shall be posted where a fire or explosion hazard exists.

30 C.F.R. ' 56.4101.

[5] The citation alleges the existence of four WNG buildings, but the parties later stipulated that the violation relates to two natural gas pipeline meter buildings. Jt. Stip. 6.

[6] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. ' 814(d)(1), which distinguishes as more serious any violation that Acould significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.@

In its answers, WNG admitted the absence of warning signs at all four buildings at both mines. WNG Ans., Aug. 12, 1996, at 2; WNG Ans., Sept. 30, 1996, at 2. WNG disputed that a fire or explosion hazard existed. *Id.*

The judge framed the dispositive issue as Awhether WNG=s provision of natural gas through its meter buildings and pipeline facilities located on mine property constitutes the requisite >performance of services= at a mine by an independent contractor[,]@ thereby subjecting the contractor to MSHA jurisdiction under section 3(d) of the Mine Act.[7] 19 FMSHRC at 289. The judge stated that the federal courts of appeals are split as to the correct interpretation of the independent contractor-operator language contained in section 3(d). 19 FMSHRC at 289. He contrasted the ostensibly narrow interpretive approach taken by the Fourth Circuit in *Old Dominion Power Co. v. Secretary of Labor*, 772 F.2d 92 (1985), with the broad, plain language approach of the courts of appeals in *Otis Elevator Co. v. Secretary of Labor*, 921 F.2d 1285 (D.C. Cir. 1990), *aff=g* 11 FMSHRC 1896 (October 1989) (A*Otis I*@) and 11 FMSHRC 1918 (October 1989) (A*Otis II*@), and *Joy Technologies, Inc. v. Secretary of Labor*, 99 F.3d 991 (10th Cir. 1996), *aff=g* 17 FMSHRC 1303 (August 1995), *cert. denied*, ___ U.S. ___, 137 L.Ed.2d 818, 117 S.Ct. 1691 (1997). *Id.* at 289-91. Noting that Athe mine sites in these proceedings are located . . . within the appellate jurisdiction of the Tenth Circuit[,]@ the judge viewed *Joy Technologies*, rather than *Old Dominion*, as Athe controlling case law[.]@ *Id.* at 291. Based on the stipulations that WNG Amaintains meter buildings and pipeline facilities on mine property through which it provides natural gas energy to mine operators[,]@ and WNG=s admission that it is an independent contractor, the judge concluded that, under *Joy Technologies*, WNG is an operator subject to Mine Act jurisdiction. *Id.* In addition, he rejected WNG=s argument that it did not provide Asignificant services@ to the mines, characterizing WNG=s provision of natural gas for mining operations as Asignificant, if not indispensable, services that are fundamental to the extraction process.@ *Id.* at 291-92.

The judge rejected WNG=s claim that DOT regulation of WNG=s interstate natural gas pipelines preempted MSHA jurisdiction over WNG. 19 FMSHRC at 292. He assessed civil penalties of $119 for both violations. *Id.* at 293.

II.

Disposition

[7] The judge erroneously found that A[t]he likelihood of explosion is not in issue because the violations in question have been designated as nonsignificant and substantial.@ 19 FMSHRC at 288 n.1. In fact, MSHA modified Citation No. 4363655 on February 15, 1996, to allege an S&S violation based on results of a test indicating an explosive atmosphere in and around one of the WNG buildings. S. Pet. for Assessment of Civil Penalty, July 15, 1996, Ex. A. However, the Secretary has not appealed the non-S&S finding to the Commission; accordingly, we do not address the likelihood of explosion.

1. Whether WNG is an Operator

Relying on *Old Dominion*, WNG argues that it is not an operator under the Mine Act. PDR. at 2-4.[8] WNG contends that the Secretary failed to satisfy the *Old Dominion* criteria. *Id.* at 2-3. WNG criticizes the judge=s reliance on the appellate court decisions in *Otis Elevator* and *Joy Technologies*. *Id.* at 3-4. In the alternative, WNG argues that, even under *Joy Technologies*, it does not provide significant services required for a finding of operator status. *Id.* at 4-5.

The Secretary responds that the judge correctly found WNG to be an operator under the courts of appeals= *Otis/Joy* rationale. S. Br. at 8-9. The Secretary points out that the only two circuits to which an appeal from this case can be taken, the Tenth and D.C. circuits, have both held that section 3(d) includes within its ambit Aany independent contractor performing services . . . at [a] mine.@ *Id.* at 8, 9 n.6, *citing Joy*, 99 F.3d at 999-1000. She urges the Commission to adopt the *Otis/Joy* framework. *Id.* at 8-9. The Secretary also contends that the judge properly rejected WNG=s argument that it does not perform Asignificant services@ at the mines. *Id.* at 10-12. In the alternative, the Secretary argues that WNG satisfies the requirements for operator status under the tests used by both the Commission and the Fourth Circuit. *Id.* at 13-17.

[8] Pursuant to Commission Procedural Rule 75(a), 29 C.F.R. ' 2700.75(a), WNG designated its petition for discretionary review as its brief.

Section 3(d) of the Mine Act expanded the definition of Aoperator@ contained in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. ' 801 et seq. (1976) (amended 1977), to include Aany independent contractor performing services or construction at such mine.@ We conclude that WNG falls within the broad scope of the term Aoperator@ under the analysis adopted by the courts of appeals for the D.C. and Tenth Circuits, which have appellate jurisdiction in this matter.[9]

In its opinion affirming in result the Commission=s decision in the *Otis Elevator Co.* cases, the D.C. Circuit based its analysis on a strict reading of section 3(d). Referencing that section=s definition of Aoperator@ as Aany independent contractor performing services or construction at [a] mine[,]@ the court stated: AWe think that . . . phrase . . . means just that **C** *any* independent contractor performing services at a mine.@ 921 F.2d at 1290 (footnote omitted); *see* 30 U.S.C. ' 802(d). The court explicitly rejected the *Old Dominion* approach limiting section 3(d) to contractors involved in the extraction process who have a Acontinuing presence@ at the mine. 921 F.2d at 1290. The court found these limitations contrary to the express terms of section 3(d), and was not persuaded by the legislative history relied upon by *Old Dominion*. 921 F.2d at 1290-91. For the same reasons, the D.C. Circuit also rejected what it termed Athe Commission=s diluted version of the *Old Dominion* criteria,@ i.e., the limitation that Asection 3(d) extends to an independent contractor only if it provides a service sufficiently related to the extraction process and only if it maintains a presence in a mine that is neither rare nor infrequent.@ *Id.* at 1290. In its decision on appeal in *Joy*, the Tenth Circuit adopted the D.C. Circuit=s approach and rejected both the *Old Dominion* framework and the Commission=s *Otis* test. *Joy Technologies*, 99 F.3d at 999.[10]

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[9] *See* 30 U.S.C. ' 816(a)(1).

[10] As set forth in his concurring opinion in *Joy*, 17 FMSHRC at 1311, Commissioner Marks believes that the D.C. Circuit approach in *Otis*, that has been followed by the Tenth Circuit in *Joy*, is the most reasoned approach to interpreting the term Aoperator@ under section 3(d) of the Mine Act, and would adopt that approach in all cases before the Commission. Like those courts

of appeals, Commissioner Marks rejects both the *Old Dominion* framework and the Commission=s *Otis* test. Commissioner Marks also disagrees with the concern of Commissioners Riley and Verheggen (at n.11) that the Tenth and D.C. Circuit approach does not include a de minimis limitation on independent contractor liability. As discussed in his *Joy* opinion, 17 FMSHRC at 1311, the D.C. and Tenth Circuits expressly provide for and leave open the question of whether there may be a point at which an independent contractor=s Acontact with a mine is so infrequent or de minimis that it would be difficult to conclude that services were being performed.@ *Otis*, 921 F.2d at 1290 n.3 (citation omitted); *see also Joy*, 99 F.3d at 1000.

Application of the approach of the Tenth and D.C. Circuits supports the judge=s determination that WNG is an operator. WNG does not dispute that it is an independent contractor. *See* 19 FMSHRC at 291. WNG was clearly performing a service on mine property **C** assuring the delivery of natural gas to the mines and transforming the natural gas into quantities and pressures required to start large kilns necessary to produce cement at the mines. We therefore affirm the judge=s conclusion that WNG is an operator based on the rationale of the Tenth and D.C. circuits only insofar as this matter arises within the appellate jurisdiction of those circuits.[11]

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[11] Commissioners Riley and Verheggen are unwilling to accept the approach of the Tenth and D.C. circuits any further than their *Otis* and *Joy* decisions control the outcome of this particular case, arising as it does within the appellate jurisdiction of those circuits. They choose not to abandon the Commission=s *Otis* cases, which set forth a two-pronged test for determining whether an independent contractor is an operator under section 3(d). First, the Commission examines the independent contractor=s Aproximity@ to the mining process and whether its work is Asufficiently related@ to that process. *Otis I*, 11 FMSHRC at 1902. Second, the Commission examines Athe extent of [the contractor=s] presence at the mine.@ *Id*. Commissioners Riley and Verheggen are particularly unwilling to abandon the holding in *Otis I* that Athere 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.@ *Id*. at 1900-01 (quoting *National Indus. Sand Ass=n v. Marshall*, 601 F.2d 689, 701 (3d Cir. 1979)). Such a de minimis

We reject WNG=s argument that the Tenth Circuit decision in *Joy* is distinguishable because in that case the contractor was performing Asignificant services.@ First, the Tenth=s Circuit=s Aoperator@ test does not require proof that Asignificant@ services were performed. As the Secretary points out, S. Br. at 10 n.7, the Tenth Circuit discussed Asignificant services@ only in the context of addressing Joy=s contention that it was not an independent contractor, a status WNG does not dispute. The court made clear that it found Joy to be an operator because its representative Aperformed services at the mine.@ 99 F.3d at 1000. In any case, substantial evidence supports the judge=s finding that WNG=s services are Asignificant, if not indispensable,@ in that production of cement apparently cannot take place without them.

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limitation on independent contractor liability is difficult to reconcile with the *Otis* and *Joy* decisions of the Tenth and D.C. circuits. *See Otis*, 921 F.2d at 1290 & n.3; *Joy*, 99 F.3d at 1000.

As to whether WNG=s presence at the quarries was sufficient to satisfy the Commission=s *Otis* test, Commissioners Riley and Verheggen agree with the judge=s characterization of WNG=s provision of natural gas to the quarries as a Asignificant, if not indispensable, service[] that [is] fundamental to the extraction process.@ *See* 19 FMSHRC at 291. They also find that, in light of the weekly visits by WNG employees to the meter buildings located on mine property, WNG=s presence at the quarries was both frequent and highly significant. They thus conclude that WNG=s presence at the quarries satisfies both prongs of the Commission=s *Otis* test.

B. Preemption

We reject WNG=s argument that MSHA regulations are preempted by DOT regulation of interstate natural gas pipelines. WNG provides no statutory or case law support for this proposition. *United Gas Pipeline Co. v. Terrebonne Parish Police Jury*, 319 F.Supp. 1138, 1140 (E.D. La. 1970), and *Tenneco Inc. v. Public Serv. Comm=n*, 489 F.2d 334, 336 (4th Cir. 1973), both cited by WNG, held that the Natural Gas Pipeline Safety Act of 1968 preempted *state* establishment and enforcement of safety standards related to interstate transmission of gas by pipeline. Neither case stands for the proposition that DOT regulations preempt regulations of other *federal* agencies that may affect interstate gas pipelines in some way. Moreover, the Mine Act contains no language akin to section 4(b)(1) of the Occupational Safety and Health (AOSH@) Act, 29 U.S.C. ' 653(b)(1), which expressly preempts regulations issued under the OSH Act where Aother Federal agencies@ have Aexercise[d] statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.@ And WNG has not cited language in the federal pipeline safety laws preempting regulations issued by other federal agencies. In this connection, we note that the specific preemption provision contained in the existing federal pipeline safety statute, 49 U.S.C. ' 60104(c) (1994), preempts only state safety standards Afor interstate pipeline facilities or interstate pipeline transportation.@ It does not preempt federal safety standards applicable to mines.[12]

[12] Also, as the Secretary points out (S. Br. at 21), DOT=s regulations governing prevention of accidental ignition do not appear to conflict with MSHA=s regulations. Title 49 C.F.R. ' 192.751(c) requires the operator to A[p]ost warning signs, where appropriate,@ in order to Aminimize the danger of accidental ignition of gas in any structure or area where the presence of gas constitutes a hazard of fire or explosion.@ *See Panhandle Eastern Pipe Line Co. v. Madison County Drainage Bd.*, 898 F. Supp. 1302, 1315 (S.D. Ind. 1995) (federal pipeline safety law did not preempt state statute authorizing relocation of pipeline where operator could comply with both state and federal requirements).

III.

Conclusion

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

_____
Mary Lu Jordan, Chairman

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Marc Lincoln Marks, Commissioner

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James C. Riley, Commissioner

_____
Theodore F. Verheggen, Commissioner

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