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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 No. PENN 86-262

OTIS ELEVATOR COMPANY

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

DECISION

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

In this 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 Commission Administrative Law Judge Roy J. Maurer erred in concluding that Otis Elevator Company ("Otis") was the type of independent contractor that falls within the definition of "operator" as set forth in the Mine Act, and whether substantial evidence of record supports his determination that Otis violated 30 C.F.R. 75.1725(a) by improperly installing a governor rope on a mine elevator. 9 FMSHRC 1933 (November 1987)(ALJ). 1/ We granted Otis' petition for discretionary review and its motion to consolidate this proceeding for purposes of briefing and oral argument with Otis Elevator Company, Docket Nos. PENN 87-25-R, 87-26-R, and 87-86. For the reasons set forth below, we affirm the judge's conclusions in the present proceeding as to both issues presented.

1/ 30 C.F.R. 75.1725(a) provides:

> Mobile and stationary machinery and equipment shall be maintained in safe operating condition and

machinery or equipment in unsafe condition shall be removed from service immediately.

I.

Factual and Procedural Background

Otis is a company engaged in the business, among other things, of providing maintenance and repair services to all types of elevators. Elevators serviced by Otis are located in various establishments including office buildings, hospitals, factories, residential buildings, and mines. In the case at hand, Otis serviced two elevators located in the Greenwich No. 1 underground coal mine of the Pennsylvania Mines Corporation ("PMC").

The work relationship between PMC and Otis was governed by the terms of an elevator service and maintenance contract, which commenced January 1, 1986, and continued in force during all of 1986. The contract covered five elevators located in mines owned by PMC, including the North Portal elevator and the Main A elevator located in the Greenwich No. 1 Mine. Exh. G-1.

Essentially, the terms of the contract required Otis to provide its own qualified personnel to maintain PMC's elevators in proper and safe operating condition. Specifically, the contract required Otis to "regularly and systematically examine, adjust, lubricate as required, and repair or replace if warranted" all electrical and mechanical parts and accessory equipment of the elevator apparatus; to renew all wire ropes and all travelling cables as necessary; to periodically examine all safety devices and governors; and to make a customary annual no-load safety test, a sixty-day test, and a five-year full-load safety test. The contract also included "emergency shutdown callback service" and "trouble between ... regular examinations service." Exh. G-1.

Ron Riva, chief electrician at PMC's No. l Mine for 13 years, testified that Otis employees "worked with [him]" in that they either reported to him when coming onto mine property or corrected elevator problems as indicated by Riva or any other foreman. Riva explained that the weekly maintenance by Otis included checking tips, brushes, ropes, switches, and "really anything that pertained to elevator maintenance," and that, under the 60-day safety test, Otis also "might" [measure] the ropes." Tr. 22-24. According to Riva, Otis also shortened or replaced hoist ropes and governor cables and, in general, performed "troubleshooting" duties on an emergency "anytime" basis to restore elevator service when PMC employees were unable to do so. Tr. 24. Riva estimated that Otis' weekly inspections required about one and a half hours, if no special problems were involved. He stated that Otis was called for service more frequently during the winter when mine elevators experience more problems because of cold temperatures.

Otis employees were not supervised by PMC employees. They normally carried out their duties in the "penthouse" (the surface area housing the elevator controller and motor), the shaft (the area within which the elevator ascends and descends), and the underground pit area (the bottom of the shaft where the switches and controls are located). According to Riva, both elevators at the No. 1 Mine were used to transport the production crews into and out of the mine, an average of

200 people each day at the Main A elevator and 50 at the North Portal. Both elevators also served as mine escapeways required by regulations of the Department of Labor's Mine Safety and Health Administration ("MSHA").

On March 3, 1986, Leroy Niehenke, an MSHA electrical inspector with ten years experience in inspecting mine elevators, issued the section 104(a) citation in question, alleging a violation of 30 C.F.R. 75.1725(a) in that two Otis employees had installed a new governor rope on the North Portal elevator in an unsafe manner, creating a hazard to the mine employees. The Secretary filed a petition for assessment of civil penalty and this matter proceeded to hearing before Judge Maurer.

Before the judge, Otis argued that it was not engaged in mine construction or extraction work, did not control any area of the mine, and did not maintain a continuing presence at the mine. On this basis, it contended that it was not an "operator" within the meaning of the Mine Act under what it viewed as the controlling legal precedents of National Indus. Sand Ass'n v. Marshall, 601 F.2d 289 (3rd Cir. 1979), and Old Dominion Power Company v. Secretary of Labor & FMSHRC, 772 F.2d 92 (4th Cir. 1985). Otis further argued that its activities were properly subject to regulation under the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq. (1982)(the "OSHAct"), not the Mine Act. As to the alleged violation of 30 C.F.R. 75.1725(a), Otis contended that the mandatory standard was so vague as to be unenforceable and that, in any event, the inspector used improper criteria in determining that a violation occurred.

In finding Otis to be an operator within the meaning of the Mine Act, the judge rejected Otis' interpretations of National Sand and Old Dominion, supra. National Sand, the judge stated, held only that an independent contractor working on mine property is not an "operator" under the Act if its contact with the mine is so infrequent or de minimis that it would be difficult to conclude that services were being performed. 9 FMSHRC at 1935-36. The judge also distinguished Old Dominion, involving an electric utility, in which the utility's only contact with the mine was inspection, maintenance and monthly reading of an electric meter for billing purposes. After finding that the employees of Old Dominion Power Company ("Old Dominion") rarely, if ever, went on mine property and hardly, if ever, came into contact with mining hazards, the Fourth Circuit found that the utility was not an operator. 9 FMSHRC at 1936-37. Contrasting the facts in this case with those involved in the court decisions, the judge concluded that Otis' contractual obligations and performance thereof constituted a continuing and substantial, as opposed to d minimis, presence at Greenwich No. 1 Mine. 9 FMSHRC at 1937. Although noting that the elevator was not used to transport coal and was not, therefore, a part of the coal extraction process per se, he nevertheless found that because the North

Portal elevator transported approximately 20 percent of the work force into and out of the mine on a daily basis and was additionally a designated escapeway, it was an "essential ingredient involved in the coal extraction process." Id. Last, he determined that Otis was the party responsible for the cited violation and was also the one best suited to both correct it and prevent its recurrence. Id. Accordingly, the judge

determined that Otis was properly subjected to Mine Act jurisdiction.

As to the violation of the mandatory standard, the judge, citing Alabama By-Products Corporation, 4 FMSHRC 2128 (December 1982), involving a similar challenge to section 75.1725(a), concluded that the standard was not "so overbroad and/or so vague" as to be unenforceable. 9 FMSHRC at 1937-38. While agreeing that the inspector had relied in part on American National Standards Institute ("ANSI") standards not incorporated into the MSHA regulations, the judge found that the standards did provide some "guidance" as to the proper method for configuring the elevator's wire rope terminations. 9 FMSHRC 1940. He concluded that the elevator governor assembly and, therefore, the elevator, were in unsafe condition within the meaning of section 75.1725(a), and thus he upheld the inspector's finding as to a violation of the standard. 9 FMSHRC at 1940-42. The judge also affirmed the inspector's designation of the violation as being of a significant and substantial nature and assessed a civil penalty of $750.

II.

Coverage of Otis under the Mine Act

We begin by considering whether Otis was an "operator" subject to the coverage of the Mine Act. Before us, Otis argues that it is a business entity subject to regulation by the Occupational Safety and Health Administration ("OSHA") under the OSHAct, rather than by MSHA, that it is not engaged in mine construction or extraction and that it does not maintain a "continuing presence" at the PMC mine. Therefore, Otis asserts that under the controlling precedent of Old Dominion, it is not an "operator" or " independent contractor" within the meaning of section 3(d) of the Mine Act. 2/ We disagree.

2/ The relevant sections of the Mine Act are:

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;

* * *

(h)(1) "coal or other mine" means (A) an area of land

from which minerals are extracted in non liquid 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

Section 3(d) of the Mine Act expanded the definition of "operator" under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1976)(amended 1977)("1969 Coal Act"), to include "any independent contractor performing services or construction at such mine." This Commission has consistently recognized that the inclusion of independent contractors within the statutory definition of "operator" clearly reflects Congressional desire to subject such contractors to direct enforcement by MSHA under the Mine Act. See. e.g., Old Ben Coal Co., 1 FMSHRC 1480, 1481, 1486 (October 1979), aff'd, No. 79-2367 (D.C. Cir. December 9, 1980) (unpublished opinion); Calvin Black Enterprises, 8 FMSHRC 1151, 1155 (August 1985). We also recognize that not all independent contractors are operators under the Mine Act, and that "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

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> property including impoundments, retention dams, and tailing 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 of this [Act], "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].

30 U.S.C. 802(d) & (h)(1) & (2) & 803.

difficult to conclude that services were being performed." National Sand, supra, 601 F.2d at 701. See also Old Dominion, supra.

We have no difficulty in finding that Otis, from a practical and economic standpoint, is an independent contractor performing services at PMC mines. Plainly, Otis is an independent business entity that, by contract with PMC, has the sole responsibility for examining mine elevator equipment owned by PMC and maintaining it in safe operating condition. There is also no question that the elevators serviced by Otis fall within the definition of "coal mine" under section 3(h) of the Act (n.2, supra), as "structures, facilities, machinery, or equipment used in the work of extracting coal."

The legislative history of the Mine Act clearly shows that the goal of Congress, in expanding the definition of "operator" in the Mine Act to include "independent contractors," was to broaden the enforcement power of the Secretary so as to reach not only owners and lessees but a wide range of independent contractors as well. In explaining this amendment, the key Senate report on the bill enacted into the Mine Act referred not only to those independent contractors involved in mine construction but also to those "engaged in the extraction process." S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), reprinted in Senate Subcommittee on Labor of the Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 602 (1978)("Legis. Hist.") Similarly, the Conference Report referred to independent contractors "performing services or construction" and "who may have continuing presence at the mine." S. Conf. Rep. No. 461, 95th Cong. 1st Sess. 37 (1977), reprinted in Legis. Hist. 1315.

Two important court decisions have addressed the meaning of and relationship between the terms "independent contractor" and "operator" in the Mine Act. In National Sand, the Third Circuit, construing the definition of "operator" in the Mine Act, concluded that "some, if not all, independent contractors are to be regarded as operators," with the understanding that there may be a point at which the services provided or the degree of involvement in mining activities is so remote or so infrequent that they cannot be considered as operators. National Sand, 601 F.2d at 701. The Fourth Circuit, in Old Dominion, held that Congress intended to include as operators, "only those independent contractors who are involved in mine construction or extraction and who have a continuing presence at the mine." 772 F.2d at 96 (emphasis added). Finding that the employees of Old Dominion an electric utility, "rarely go upon mine property," that they hardly if ever came into contact with the hazards of mining," and that their "only presence on the mine site was to read an electric meter once a month and to provide occasional equipment servicing,

the Court concluded that the utility's contacts were "so rare and remote from the mine construction or extraction process, [it did] not meet this definition of 'operator.'" 772 F.2d at 96, 97 (emphasis added).

To adopt in this case the restrictive interpretation of Old Dominion urged by Otis would, we believe, 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.

Obviously, "mine construction" and the "extraction process" include a myriad of specialized services essential to those activities. It would have been difficult, in our view, for Congress to have envisioned that myriad and enumerated them under section 3(d) of the Act. Rather than being in conflict with National Sand, we read the Fourth Circuit's Old Dominion decision as examining the independent contractor's proximity to the extraction process and the extent of its presence at the mine to determine whether the independent contractor is an operator under the Mine Act. Considering the factual basis relied on by the Fourth Circuit in Old Dominion, we find that the services performed by Otis and the continuity of its presence at the mine site are entirely different qualitatively and in magnitude.

In Old Dominion, as noted, the Court found that the power company employees' sole contact with the mine was the inspection, maintenance and monthly reading of the power company's meter, for billing purposes, and that its employees rarely went upon mine property and hardly, if ever, came into contact with mining hazards. The substation in which the meter was located was in a remote area of mine property and was isolated by a locked chain link fence. 772 F.2d at 93, 96. In contrast, Otis employees worked in areas of the PMC mine property that were clearly working areas of a mine, totally regulated by MSHA. Otis employees worked both on the surface and in underground sections of the mine elevator system, in areas where miners normally worked and travelled, and they were exposed to many of the same hazards as the PMC miners. Otis' contacts with the PMC mine were certainly more frequent and of a longer duration than the contacts involved in Old Dominion.

Moreover, the mine elevator was used to transport some 20 percent of the mine's work force into and out of the mine on a daily basis and was also a designated escapeway--a work setting far different from the isolated, remote electric substation involved in Old Dominion. The Fourth Circuit spoke in terms of involvement in or proximity to the extraction process. 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, in the judge's words, "an essential ingredient involved in [that] process." 9 FMSHRC at 1937. Since Otis' employees were working in the center of mining activities while servicing equipment essential to the mining process, were exposed to mining hazards, and had a direct effect on the safety of others because of their exclusive control over the safety of the mine elevators, we likewise conclude that their work was sufficiently

related to the overall extraction process to bring Otis within the Mine Act's ambit.

Finally, Otis urges that its presence on the PMC mine ought to be regulated under the OSHAct rather than under the Mine Act. The Secretary of Labor enforces both the OSHAct and the Mine Act, and exercises administrative discretion in determining which of her two enforcement agencies, OSHA or MSHA, should exercise jurisdiction under potentially conflicting circumstances. Court precedent makes clear that

the Secretary is entitled to great deference in interpreting and enforcing the Mine Act. See e.g., Brock v. Cathedral Bluff Shale Oil Co., 796 F.2d 533, 537 (D.C. Cir. 1986). As the Court made clear in Cathedral Bluffs, that deference is particularly due with respect to the Secretary's "view of the effect of [her] own actions taken under the Act...." Id. See also Donovan v. Carolina Stalite Co., 734 F.2d 1547, 1552 & n.9 (D.C. Cir. 1984).

In addition, section 4(b)(1) of the OSHAct, 29 U.S.C. 653(b)(1), states in pertinent part:

> Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies ... exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

Addressing the question of overlapping jurisdiction under the OSHAct, the Fourth Circuit, in Southern Railway CompanY v. Occupational Health Review Commission, 539 F.2d 335 (1976), concluded that exemption from the OSHAct applies whenever another federal agency has actually exercised its statutory authority to regulate employee safety. 539 F.2d at 339. The Court stated that when the facts show that a federal agency has not exercised its statutory authority to regulate employee safety, the OSHAct applies, but where another federal agency has exercised its statutory authority over standards affecting safety or health in the area in which the employee goes about his daily tasks, the authority of OSHA is foreclosed. Id. See also Taylor v. Moore McCormack Lines, Inc., 621 F.2d 88, 91 (4th Cir. 1980). There is no indication in this record that OSHA had ever attempted to regulate Otis activities on mine property. See Exh. G.1, G-9.

As we have already noted, the record in this case demonstrates that the areas in which Otis employees worked were areas of the mine completely regulated by MSHA. Otis employees worked both on the surface and underground in areas where miners normally worked and travelled and were exposed to many of the same hazards. We also note that Otis had earlier registered with MSHA as an independent contractor pursuant to 30 C.F.R. Part 45 and paid civil penalties for previous violations under the Mine Act.

Accordingly, we affirm the finding of the judge that Otis, by virtue of the services provided and its continuing presence at the mine site, as required by the contract between it and PMC falls within the definition of "operator" set forth in the Mine Act and is, therefore, subject to its

jurisdiction.

III.

The violation of 30 C.F.R. 75.1725(a)

We address the question of the violation of section 75.1725(a). The citation issued by Inspector Niehenke with respect to the elevator's governor stated:

~1904

> The smelter socket termination and Crosby Clamp termination were not properly made because the basket was not poured with smelter to the top of the small end of this basket and holes in the smelter existed on the wide end of this basket. The Crosby Clamp termination was made with the (2) 1/2" saddles on the dead end of this wire rope and there should be (3) three Crosby Clamps used on this 1/2" wire rope termination.

In general, a governor is a device for regulating or controlling the speed of the engine or motor. See Bureau of Mines, U.S. Dep't of Interior, Dictionary of Mining, Mineral, and Related Terms 501 (1968) ("DMMRT"). The governor rope, a one-half-inch diameter steel rope, is attached at the top of the elevator car to a lever and to the bottom of the car by bolt clamps. At the top of the shaft, the rope passes through a sheave wheel (a grooved wheel that guides or supports a cable or rope between the load and the hoisting engine (DMMRT 997)), which is located directly underneath the governor mechanism. At the bottom of the shaft, the rope runs over a second sheave wheel. These wheels turn as the rope moves, causing the flyballs on the governor mechanism to rise as the speed of the rope increases. The governor mechanism senses the speed of the elevator through the governor rope, and if the elevator speed exceeds 125 percent of its rated speed, centrifugal force applied to the flyballs raises them to the point where two metal jaws in the governor mechanism clamp down on the governor rope. In turn, the governor pulls up the lever at the top of the car, activating the safeties and stopping the descent of the elevator car. (The actual raising and lowering of the elevator during normal operation is controlled by other ropes attached to the top of the elevator car.)

The alleged violation involved the manner in which the governor rope had been attached at both the top and bottom of the elevator car. At the top of the car the rope is attached to the safety lever by means of a socket, a tapered metal basket about 2Â inches in length. The rope is passed through an opening in the smaller end, about five inches of the rope's end is unraveled, and the separated strands are then twisted into a "rosette" shape so as to make the end of the rope larger than the opening through which it had passed. The rosette is then pulled back into the socket, and "babbitt" (a molten alloy of tin, copper and antimony (see DMMRT 69; Tr. 105)) is poured over the rosette, filling up the socket. When the babbitt hardens, it produces a secure connection between the rope and the socket.

Inspector Niehenke testified that the babbitt had not adhered to and covered the wire rope, an indication that insufficient babbitt had been

poured into the socket to provide a secure connection of sufficient strength. Niehenke believed that in an emergency, this problem would have caused the governor rope, in a free fall, to come out of the socket, thus failing to activate the lever and the safeties and allowing the elevator to continue in an uncontrolled fall.

Niehenke also testified that the governor rope should be attached to the bottom of the car by three "U" bolts, called Crosby clamps, but

that in the cited instance only two bolts had been used. Further, he stated that they had been installed with the "U" end of the bolt placed over the "live" end of the rope (the end of the rope attached to the equipment) rather than over the "dead" end (the end of the rope that is looped around and cut off). In the inspector's opinion, the "U" bolts should have been placed over the "dead" end of the rope because, as installed, the rope wires could be crushed, resulting in the failure of the connection.

Niehenke's criteria for inspecting elevator ropes and the methods for properly attaching a governor rope were essentially based on the directions and specifications set out in the ANSI publication "Wire Ropes for Mines," and on the MSHA "Inspector's Manual" for elevators. Tr. 58, 60, 63-68, 70, Exh. G-5, G-7. MSHA regulations themselves do not set requirements for proper elevator wire rope terminations, nor are the ANSI standards incorporated by reference into the MSHA regulations. Tr. 103-06.

Ronald Gossard, an MSHA electrical engineer, testified that the conditions described by the inspector indicated unsafe terminations on the governor rope. Given these conditions, Gossard believed that the elevator would operate safely until the governor mechanism was activated, at which time the terminations and the safety mechanisms would fail. Gossard added that failure to fill the basket with babbitt would also allow moisture, consisting of acidic mine water, to accumulate in the basket and quickly corrode the rope in that location.

James Beattie, District Maintenance Supervisor for Otis, stated that even without any babbitt in the socket, the "rosetted" rope end could not possibly be pulled through the small end of the basket and the connection would not fail. Tr. 185-88. In support of his opinion, Beattie showed a videotape of a laboratory test performed by Otis on a one-half inch wire rope, with an unbabbited socket at one end, and one "U" bolt correctly installed at the other. When a force of 3,200 pounds was applied, there was no slippage at either connection. Exh. R-7, Tr. 189-200. Beattie also stated that three "U" bolts were unnecessary and, while he would have changed the rope attachments had he seen them, he did not consider them to be unsafe.

Before the judge, Otis contended that section 75.1725(a) is unconstitutionally vague because it fails to specify the standard of conduct required in order to comply with its terms, and because MSHA has improperly cited ANSI standards as mandatory regulations in alleging a violation under the Mine Act.

On review, Otis contends that section 75.1725(a) is vague as applied,

to the extent that the judge used the ANSI standards to determine what a "reasonably prudent person" would do with respect to the equipment in question pursuant to the test set forth in Alabama By-Product, supra. Otis also relies on Jim Walter Resources, Inc., 3 FMSHRC 2488, 2490 (November 1981), in which the Commission held that the ANSI wire rope criteria imposed no mandatory requirements under MSHA regulations.

ln Jim Walter Resources, the Commission held that the wording of former standard 30 C.F.R. 77.1903(b), which provided that ANSI standards "shall be used as a guide," was too ambiguous to impose a mandatory duty upon operators since it employed both mandatory and advisory language. 3 FMSHRC at 2490. The Commission agreed, however, that, in the absence of applicable mandatory standards, "an operator's consultation with recognized authorities on safe work practices is desirable." 3 FMSHRC at 2490 n. 4. In Alabama By-Products, construing the same standard involved here, the Commission held that analysis of an alleged violation under the general language used in this regulation "is appropriately measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation." 4 FMSHRC at 2129. We find the judge's decision consistent with these decisions.

The judge's decision carefully explains that the ANSI standards were referred to only as guidelines in determining the condition of the rope terminations, not as mandatory safety standards by which the violation was established. He expressly stated that the ANSI standards "provide some guidance to the inspector and myself" in determining whether the rope assembly was unsafe, and that non-compliance with those standards was not per se determinative of a violation--but rather was merely "a single piece of the equation." 9 FMSHRC at 1740. The judge, with equal clarity, applied the Alabama By-Products reasonably prudent person test in finding the existence of a violative condition. 9 FMSHRC at 1937-42. We therefore conclude that the judge correctly applied Commission precedent set out in Alabama By-Products and Jim Walter Resources, supra, and that, to the extent he relied on testimony concerning ANSI standards, he correctly considered them only as guidelines, not as mandatory standards, for purposes of a proper application of the reasonably prudent person test.

Finally, we consider Otis' argument that the finding of a violation is not supported by substantial evidence of record. That standard of review requires a weighing of all probative record evidence and an examination of the fact finder's rationale in arriving at the decision. See, e.g., Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951); Arnold v. Secretary of HEW, 567 F.2d 258, 259 (4th Cir. 1977). In order to satisfy that standard, this Commission has consistently held that a judge must sufficiently summarize, analyze and weigh the relevant testimony of record, and explain his reasons for arriving at his decision, thereby affording the Commission a sufficient basis for review on substantial evidence grounds.

In this instance, the judge has carefully summarized the testimony of

the inspector and the two expert witnesses in detail. We agree, as the judge found, that the factual testimony of the inspector concerning the condition of the governor rope terminations was essentially unrebutted by Otis. The judge's decision weighs the opinion testimony of the expert witnesses and, in our view, adequately states the judge's rationale in accepting the testimony of MSHA's witness that the babbitted termination would likely fail in an emergency situation. Our

In Jim Walter Resources, the Commission held that the wording of former standard 30 C.F.R. 77.1903(b), which provided that ANSI standards "shall be used as a guide," was too ambiguous to impose a mandatory duty upon operators since it employed both mandatory and advisory language. 3 FMSHRC at 2490. The Commission agreed, however, that, in the absence of applicable mandatory standards, "an operator's consultation with recognized authorities on safe work practices is desirable." 3 FMSHRC at 2490 n. 4. In Alabama By-Products, construing the same standard involved here, the Commission held that analysis of an alleged violation under the general language used in this regulation "is appropriately measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation." 4 FMSHRC at 2129. We find the judge's decision consistent with these decisions.

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reading of the record also supports the judge's conclusion that this testimony was basically unrebutted by Otis. The decision further describes the contents of the video taped laboratory experiment conducted by Otis and sets forth the judge's reasons for finding the test unpersuasive (the absence of those environmental conditions in which the equipment must operate and failure to account for the effect that an initial shock load would have on the inadequately babbitted termination). The Commission has consistently stated that a judge's findings of fact and credibility resolutions will not be overturned lightly, and we find no basis in the record of this proceeding that would justify our taking that extraordinary step. See e.g., Hall v. Clinchfield Coal Co., 8 FMSHRC 1624, 1629 (November 1986). 3/

IV.

Conclusion

Accordingly, we affirm the judge's decision.

Ford B. Ford, Chairman

Richard V. Backley
Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

3/ In its petition for discretionary review, Otis challenged the judge's finding that the 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 also examined the record with respect to that finding. We are mindful, as was the judge, of the consequences of any serious elevator failure. We conclude that the judge's findings in this regard are supported by substantial evidence and are consistent with applicable Commission precedent.

Commissioner Lastowka, dissenting:

The issue before us appears relatively straightforward: does the periodic maintenance and repair work performed by Otis Elevator Company on elevators at an underground mine site render Otis a mine "operator" within the meaning of the Mine Act. Because of the Mine Act's expansive definitions of the terms "mine" and "operator", the Secretary of Labor's assertion that Otis is an "operator" does have a certain surface appeal. I believe, however, that a deeper inquiry is required and that when the roots of the definitional debate before us are traced with exactitude, including a careful analysis of applicable judicial precedent, the conclusion that Otis Elevator Company is not a mine operator is compelled.

To be sure, if the definition of "operator" set forth in the Mine Act is given a purely literal reading, Otis loses. Otis is an "independent contractor performing services ... at [a] mine." 30 U.S.C. 802(d). The fact is, however, that the definition does not come before us as a tabula rasa, and in order to undertake a proper analysis the extensive legislative and judicial writings directly bearing on its meaning must be considered. 2A Sutherland Statutory Construction 18.01 (4th ed. 1981).

The appropriate starting point for analysis of the meaning of the Mine Act's definition of "operator" is the definition that was set forth in the Mine Act's predecessor statute, the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1976) (the "Coal Act"). Section 3(d) of the Coal Act defined "operator" as "any owner, lessee, or other person who operates, controls, or supervises a coal mine." Thus, the Coal Act made no specific reference as to the Act's application to independent contractors performing work at a mine site. Consequently, soon after the start of enforcement of the Coal Act litigation arose over how the Act was to be applied to the work activities of such independent contractors.

ln Laurel Shaft Construction Co., 1 IBMA 217 (1972), the Department of Interior's Board of Mine Operations Appeals held that an independent contractor retained to construct a ventilation shaft at a mine was an "operator" of a "mine" within the meaning of the Coal Act's definitions and subject to the Act's requirements. Subsequently, however, in a suit for declaratory judgment filed in federal district court it was held that coal mine construction companies that performed construction work at mine sites on behalf of mine operators were not "operators." Associated Bituminous Contractors v. Morton, No. 1058-71 (D.D.C., May 23, 1975). ln accordance with this decision, the Secretary of Interior adopted a policy requiring that mine operators be charged for all violations of the Coal Act committed by independent contractors.

Following the Secretary's change in enforcement policy, the Bituminous Coal Operators' Association ("BCOA") in turn filed another action in federal district court seeking a declaratory judgment that mine operators are not responsible for violations committed by independent construction companies. The district court held that although construction contractors were not "operators" under the Coal Act, they were "agents" of the mine operator. On this basis, the court concluded that mine operators could be held liable for violations of the Coal

Act committed by their "agent" contractors. BCOA v. Hathaway, 100 F.Supp. 371 (W.D. Va. 1975). The appeal of this decision led to the Fourth Circuit's landmark decision in BCOA v. Secretary of Interior, 547 F.2d 210 (4th Cir. 1977).

At the outset of its decision in BCOA v. Secretary, the Fourth Circuit summarized the types of work usually performed at mine sites by the contractors claiming to be outside the Coal Act's jurisdiction:

> Mining companies frequently employ independent, general contractors for both surface and subsurface construction work. These construction companies build coal preparation plants, tipples, conveyor equipment, storage silos, bath houses, office buildings, power lines, roads, drag lines, and shovels. They also construct underground facilities, such as shafts, slopes, and tunnels. Their work may be done before or after the mine is in operation. The construction companies, however, do not process the coal that they remove.

647 F.2d at 243.

The court rejected the argument that such activities fell outside the Coal Act s definition of "mine." The court stated: "When a contractor sinks a mine shaft, excavates a tunnel, or builds a coal preparation plant, it is constructing a facility "to be used in" the work of extracting or processing coal." Id. at 245 (emphasis added). The court observed that workers engaged in such activities are frequently exposed to the same hazards as miners, giving as an example an instance where a construction contractor hired by a mine operator to excavate three shafts failed to comply with mine safety standards and caused a methane explosion. Id. The court therefore concluded that "construction companies must observe the health and safety standards set forth in the Act and the regulations that implement it", and that "the Act authorizes the Secretary to ...[proceed] against a construction company that violates the Act while it is exercising supervision and control over a facility that is to be used for extracting or processing coal." Id. at 245, 246 (emphasis added).

The next major event in the development of the issue before us is the amendment of the definition of mine "operator" by the Federal Mine Safety and Health Act of 1977. 30 U.S.C. 801 et seq. (1982) ("Mine Act"). The litigation authorized above had not gone unnoticed during Congress' consideration of extensive amendments to the Coal Act. In direct response to this litigation, Congress amended the definition of "operator" to read as follows:

> "[O]perator" 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.

3O U.S.C. 8O2(d)(emphasis added). The Senate Committee Report accompanying the proposed definitional amendment explained:

> [T]he definition of mine "operator" is expanded to include "any independent contractor performing services o[r] construction at such mine." It is the Committee's intent to thereby include individuals

or firm who are engaged in construction at such mine, or who may be under contract or otherwise engaged in the extraction process for the benefit of the owner or lessee of the property and to make clear that the employees of such individuals or firms are miners within the definition of the Federal Mine Safety and Health Act of 1977. In enforcing this Act, the Secretary should be able to issue citations, notices and orders, and the Commission should be able to assess civil penalties against such independent contractors as well as against the owner, operator, or lessee of the mine. The Committee notes that this concept has been approved by the federal circuit court in Bituminous Coal Operators' Assn. v. Secretary of the Interior, 547 F.2d 240 (C.A.4, 1977).

S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), reprinted in Senate Subcommittee on Labor of the Committee on Human Resources, 96th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 602 (1978)("Legis. Hist.")(emphasis added).

The Joint Explanatory Statement of the Conference Committee also specifically addressed the reason for the change in the definition:

> The Senate Bill modified the definition of "operator" to include independent contractors performing services or construction at a mine. This was intended to permit enforcement of the Act against such independent contractors, and to permit the assessment of penalties, the issuance of withdrawal orders,and the imposition of civil and criminal sanctions against such contractors who may have a continuing presence at the mine.

S. Rep. No. 95-461, 95th Cong. 1st Sess. 37; Legis. Hist. at 1315 (emphasis added).

After passage of the Mine Act but prior to its effective date, the U.S. Court of Appeals for the District of Columbia Circuit issued its decision in the appeal of the district court's decision in ABC v. Morton, supra, interpreting the Coal Act's definition of "operator". ABC v. Andrus, 581 F.2d 853 (D.C. Cir. 1978). Largely guided by the Fourth Circuit's decision in BCOA v. Secretary, the D.C. Circuit held that "an independent construction company, which operates, controls, or supervises excavation work on shafts, slopes, or tunnels to be used in the work of extracting coal from a coal mine is an 'operator of a coal mine' within the meaning and purposes of" the Coal Act. 581 F.2d at 862 (emphasis added) (footnote omitted). Notable in its decision is the court's discussion of the familiar rule of statutory construction, ejusdem generis.1/ Applying this

l/ The maxim ejusdem generis is described as follows:

> Where general words follow specific words in an enumeration describing the legal subject, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words. (citations and footnote omitted).

rule, the court concluded that the general phrase "other person" in the definition of "operator" referred to " the persons of the same class as those enumerated by the specific words. Thus the other persons must be similar in nature to owners and lessees." 581 F.2d at 882 (footnote omitted).

Importantly, this same interpretative principle has guided the two courts of appeals that have construed the Mine Act's amended definition of "operator." ln National Industrial Sand Ass'n v. Marshall, 601 F.2d 689 (3d Cir. 1979) ("NISA"), the court was faced with a challenge to miner training regulations promulgated by the Secretary of Labor. ln the course of its decision the court addressed the proper interpretation to be given to the definition's inclusion of "independent contractor[s] performing services or construction at such mine." The court stated:

> The reference made in the statute only to independent contractors who "perform[] services or construction" may be understood as indicating ... 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[], control[], or supervise[]" 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 as operators.

601 F.2d at 701 (emphasis added) (footnote omitted). As support for its conclusion, the Third Circuit quoted the D.C. Circuit's discussion of the doctrine of ejusdem generis, noting that the rationale of ABC v. Andrus "also sheds light on the 'independent contractor' phrase in the definition of operator under the Mine Act." 601 F.2d at 701-O2 n. 42.

The Fourth Circuit thereafter completed the case law circle concerning the interpretation of "operator" with the issuance of its decision in Old Dominion Power Co. v. Donovan, 722 F.2d 92 (4th Cir. 1985). In Old Dominion an employee of an electric utility was electrocuted while on a service call to an electrical substation owned by the mine operator and located on mine property. The Secretary charged Old Dominion with failure to comply with a mandatory mine safety standard prohibiting working on energized high-voltage lines. Rejecting Old Dominion's argument that it was not a mine "operator", the Commission upheld the Secretary's authority to proceed against Old Dominion under the Mine Act on the basis that Old Dominion was an independent contractor performing services at a mine and

therefore fell within the Act's definition of "operator." On appeal, however, the Fourth Circuit reversed the Commission and in doing so reviewed the extensive legislative and judicial history summarized above and set forth a framework for analysis of the independent contractor issue before us.

2A Sutherland, supra, at 47.17.

The court found that the legislative history, including the reference to its previous decision in BCOA v. Secretary:

> make[s] clear Congress' intent to define as "operators" only those independent contractors who are engaged in mine construction or the extraction process, and who have a "continuing presence at the mine.

772 F.2d at 97 (emphasis added). The court further noted the Third Circuit's holding in NlSA v. Marshall, supra, that designation of independent contractors as "operators" "requires substantial participation in the running of the mine" by the contractors. Id. Importantly, the court rejected the claim that deference must be accorded the Secretary's view of whether a contractor is an operator because of the inconsistent positions that have been expressed by the Secretary on the independent contractor issue. Id. See Natural Resources Defense Counsel v. E.P.A., 790 F.2d 289, 290 (3d Cir. 1986).

z The court traced in detail the Secretary's comments accompanying the proposal of criteria to be used in identifying independent contractors as "operators". 772 F.2d at 97-98 n.6; 11 Fed Reg. 17,716-53 (1979). The court noted the Secretary's stated agreement with the NISA decision that not all contractors are appropriately cited as "operators" rather a contractor's "substantial participation in the running of the mine is required. The court referenced the Secretary's reliance on a contractor's performance of "major work" at a mine as a basis for deeming the contractor an "operator", which work includes "extraction and production, construction of cleaning plants and sinking of shafts and slopes." Id. quoting 44 Fed Reg. at 47,717-48. The court quoted the Secretary's statement that "it is improbable that independent contractors performing most repair or general maintenance work would have effective control over an area of the mine." Id. (emphasis by the court). The court "Is emphasized the Secretary's view that a "continuing presence" at a mine by a contractor is important to its status as an "operator": "[A]n independent contractor's regular, essentially uninterrupted presence at a mine while performing work is related to the contractor's ability to effectively control an area of the mine". Id., quoting 44 Fed. Reg. at 47,748 (emphasis by the court).

Based on its review of the history of the Secretary's interpretation of the definition of "operator", the Fourth Circuit concluded:

> Although MSHA retreated from its proposed criteria in the final rule, it nowhere stated in the preamble to the final rule that its earlier construction of the legislative history and case law had been wrong.

> The unequivocal explication of the history accompanying the proposed rule thus remains MSHA's principal pronouncement on the history of |section] 3{d), and further confirms our conclusion that Congress intended to define as "operators" only those independent contractors who are engaged in mine construction or extraction and who have a "continuing presence" at the mine.

772 F.2d at 97-98 n.6 (emphasis added).

Applying these principles to the facts before it, the Fourth Circuit concluded that Old Dominion is not an "operator" under the Mine Act, but is appropriately regulated under the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq. (1982). 772 F.2d at 96. The court observed that "Old Dominion's only contact with the mine is the inspection, maintenance, and monthly reading of a meter." Id. It pointed out that the utility's employees "perform no activities or functions on mine property which they do not perform elsewhere." Id. It emphasized that "Old Dominion's employees are otherwise totally regulated by OSHA", and that "MSHA seeks to regulate those few moments every month when electric utility workers read or maintain meters on mine property". Id. The court noted that Old Dominion's employees "hardly, if ever, come into contact with the hazards of mining" (id.), and that the utility's "contacts are rare and remote from the mine construction or extraction process." 772 F.2d at 97. In sum, the court: concluded that because Old Dominion did not have a "continuing presence" at the mine and did not "substantially participate" in the running of the mine, it was not a mine "operator" within the meaning of section 3(d) of the Mine Act. Id.

Applying this extensive background and the Fourth Circuit's Old Dominion decisional framework to the record before us, the conclusion that Otis Elevator Company is not a mine "operator" is likewise compelled. Although the Secretary and the majority here attempt to justify their contrary conclusion by emphasizing factual distinctions between the nature of the work performed by Otis and that performed by Old Dominion, in all controlling legal respects the cases are the same. Indeed, the essential basis for the Secretary's arguments for finding Otis to be an "operator" might best be understood when viewed in the light of her disagreement with and call for Commission rejection of the Fourth Circuit's decision in Old Dominions it is clear that Otis is not the type of independent construction contractor that was involved in the long-running dispute under the 1969 Coal Act as to whether such contractors were "operators". Otis is not involved in the building of surface facilities such as "preparation plants, tipples, conveyor equipment, storage silos, bath houses, office buildings, power lines, roads, drag lines, and shovels." BCOA v. Secretary, 517 F.2d at 243. Nor is Otis involved in the construction of "underground facilities, such as shafts,

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3/ Among her arguments, the Secretary asserts that liability can ipso facto be imposed on Otis simply because Otis provides services at a mine. The Secretary asserts: "Section 3(d) provides quite simply that if the contractor 'performs services ***, it is covered. This language is unambiguous." Sec. Br. at 24. She further argues:

To the extent that the Fourth Circuit may have

> intended the interpretation ... as urged by Otis, the Secretary disagrees and urges the Commission in performing its role as an adjudicative body with particular expertise under the Mine Act to reject that interpretation, notwithstanding what may be the position of the panel that decided Old Dominion.

Id. at n.9.

slopes, and tunnels." Id. In fact, it has never been argued in this case that the inspection and maintenance work performed by Otis at the mine site constitutes "construction" work. 9 FMSHRC at 1935. Therefore, the sole possible basis for finding Otis to be an "operator" is whether Otis performs "services" at the mine within the meaning of the Mine Act.

The legislative history set forth above indicates that, apart from construction contractors, Congress intended to include as "operators" those contractors who are "engaged in the extraction process for the benefit of the owner or lessee of the property" and who "have" continuing presence at the mine." Legis. Hist. at 602, 1315 (emphasis added). Accord. Old Dominion Power Co., 772 F.2d at 97. The Third Circuit and the Fourth Circuit, in NISA v. Marshall and Old Dominion, respectively, further explain that a contractor performing services can be considered an "operator" only if it "substantial[ly] participat[esl in the running of the mine." 601 F.2d at 701; 772 F.2d at 97. Thus, whether Otis is an "operator" depends on whether the work that Otis performs at the mine is such that Otis can fairly be characterized as: 1) being engaged in the extraction process; 2) having a continuing presence at the mine; and 3) substantially participating in the mine's operation. On the basis of the record before us, it is clear that Otis meets none of these tests.

Although Otis is an independent contractor, it is not engaged in the extraction process. lt is not uncommon in the mining industry for a mine owner to hire a contractor to run its extraction operations. That, however, is not the case here. Pennsylvania Mines Corporation ("PMC"), the owner of the underground coal mine, itself engages in the extraction and processing of its coal. If PMC had hired a contractor to mine its coal, then that contractor would be engaged in the extraction process and would be an "operator" within the meaning of the definition. Otis was not hired by PMC to take part in the extraction process. Otis' contract with PMC was for a far more limited and specialized role, aptly summarized by the judge as follows:

> As a practical matter, [Otis responsibilities under the contract] amounted to Otis conducting weekly inspections of the elevators, performing bi-monthly safety tests and responding to trouble calls and repairing the elevator:s on an as-required basis.

9 FMSHRC at 1934. Although it is true, as the Secretary and the majority assert, that an elevator used to transport miners underground is an integral component of a mine's physical plant, it does not follow that simply because an outside contractor is called to service such equipment the contractor therefore becomes "engaged in the extraction process."

Indeed, if repair of equipment important to a mining operation were to be the controlling criterion for determining "operator" status, the result in Old Dominion would have been different, for not even the elevators that Otis was servicing, nor the rest of the mine's electrical equipment for that matter, could operate properly without safe and effective transmission of electricity. To conclude that the nature of the service that Otis provided here is sufficient to thrust it into the mine's "extraction process" is to dilute that requirement for "operator" status beyond any recognizable limit.

A similar dilution occurs if, on the facts before us, Otis is found

have a "continuing presence at the mine." Otis' service contract called for it; to conduct weekly inspections, to perform safety tests every two months, and to perform repairs on an as-needed basis. The Secretary's proof as to Otis' presence at the mine pursuant to the contract falls far short of establishing a "continuing presence." The most that the Secretary can point to in this regard is that the performance of the weekly elevator inspections took an Otis employee, on average, only one and one-half hours per week. Tr. 41-44; Sec. Br. at 3; 9 FMSHRC at 1935. The Secretary's witness also alluded to a hoist rope replacement operation that would take four or five Otis employees 20 hours to complete, but the witness did not know how often Otis performed this task. Tr. 11-15. Including unspecified repair calls, the witness stated: "I would say counting all the call backs and stuff like this, I wouldn't doubt that you can say they was there weekly." Tr. at 25.

This evidence cannot be found to establish that Otis had a "continuing presence at the mine" within the meaning of the legislative history and the case law. It certainly does not meet the "regular, essentially uninterrupted presence at a mine" formulation of "continuing presence" previously expressed by the Secretary and referenced by the Fourth Circuit in Old Dominion. 772 F.2d at 98-99 n.6 (quoting 44 Fed Reg. at 47,748).

The third element entering into the determination of whether an independent contractor is an "operator" is whether the contractor "substantially participates in the running of the mine." NISA, 601 F.2d at 701; Old Dominion, 772 F.2d at 92. What has been set forth above is generally sufficient to also overcome any claim that Otis' work under the elevator service contract "substantially" involved Otis in the running of the mine. In this regard, however, it is important to also note that even the administrative law judge found that Otis did not "control any area of the mine." 9 FMSHRC at 1935. This finding by the judge is in accordance with the terms of the governing contract. Gov. Ex. 1 at 3. Certainly, where a contractor's only duty is to periodically service mine elevators and the contractor does not control any area of the mine, it cannot be said that such contractor "substantially participates in the running of the mine."

In sum, the evidence establishes that although Otis performs services at a mine site, neither the nature of its work nor the extent of its presence at the mIne is sufficient to justify its classification as a "mine operator." To conclude otherwise, I believe, is to ignore applicable judicial precedent. To do so might be appropriate if that precedent was obviously flawed or fundamentally misguided. Here, however, the applicable case law is largely the product of a court of appeals intimately involved

in the historical development of the issue before us. As Otis correctly observes, the "Fourth Circuit is no bit player in the development of the law concerning who is and who is not an operator as the term is used in the [Mine] Act." Otis Reply Br. at 8. Although this case arises in the Third Circuit, that court's decision in NISA v. Marshall adhering to the rationale of the Fourth Circuit's BCOA decision, and the Fourth Circuit's approving cross-reference to the NlSA decision in Old Dominion, indicate a common judicial interpretation of the issue before us warranting adherence by the Commission.

Accordingly, I conclude that Otis Elevator Company is not a mine operator and I dissent from the majority's affirmance of the judge's decision.

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