

CCASE:
SOL (MSHA) V. SUN LANDSCAPING & SUPPLY
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Federal Mines Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND
HEALTH ADMINISTRATION (MSHA),
PETITIONER

CIVIL PENALTY PROCEEDING
DOCKET NOS. WEST 79-278-M
WEST 79-334-M

v.

SUN LANDSCAPING AND SUPPLY COMPANY,
RESPONDENT

A/O CONTROL NOS. 02-01915-05001
02-01915-05002

WHITE MARBLE MINE

DECISION

Appearances: Mildred L. Wheeler, Esq., Office of the
Solicitor, United States Department of
Labor, 450 Golden Gate Avenue, Box 36017,
Room 11071, Federal Building, San Francisco,
California 94102, for Petitioner W. T. Elsing,
Esq., 34 West Monroe, Suite 102, Phoenix,
Arizona 85003, for Respondent

Before: Judge John J. Morris

STATEMENT OF THE CASE

In two cases petitioner, the Secretary of Labor, on behalf
of the Mine Safety and Health Administration, charges that
respondent, Sun Landscaping and Supply Company, violated various
mandatory safety regulations promulgated under the Federal Mine
Safety Act of 1969, 30 U.S.C. 801 et seq., (amended 1977).

Pursuant to notice, a hearing on the merits was held on
March 19, 1980 in Phoenix, Arizona.

Glenn R. Peaton testified for MSHA. Al Leon testified for
Sun Landscaping and Supply Company. MSHA waived its right to
file a post trial brief. SUN filed a brief.

ISSUES

The issues are whether MSHA has jurisdiction over SUN, and
if jurisdiction exists, did the alleged violations occur.

JURISDICTION

MSHA argues SUN was in "full operation" crushing white marble on the day of the inspection and is therefore subject to the Act (Tr 44).

I reject MSHA's contention since the statutory test is not whether a mine is in "full operation" but whether its products enter commerce or affect commerce, 30 U.S.C. 803. Commerce is defined as interstate commerce, 30 U.S.C. 802 3(b).

SUN's position is that jurisdiction can only be based on a finding that SUN is involved in interstate commerce.

To review SUN's argument, it is necessary to consider the uncontroverted facts. On the day of the inspection SUN, with 7 employees, had been in operation for three days. SUN intended to mine white marble, crush it, and sell it for landscaping supplies (Tr 21, 55, 58).

The issue is whether the described activity and SUN's future intentions establish coverage under the Act.

A case similar to the factual situation here can be found in *Godwin v. OSHRC* 540 F2d 1013 (9th Cir. 1976). In that case merely engaging in the activity of clearing land for later intended grape production was held to affect commerce. The Court observed that clearing land is an integral part of the manufacture of wine and therefore commerce is "affected" by the activity. The same reasoning applies here. The setting up of its mining facilities by SUN, with an intent to sell minerals in the future, affects commerce.

In *Godwin* the Court of Appeals was considering the coverage of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.). In the OSHA Act an employer is subject to the Act if his activities "affect commerce" 29 U.S.C. 652(6). This exact terminology appears in Section 4 of the Federal Mine Act, 30 U.S.C. 803.

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Since there is no language to restrict the broad coverage implied in the Federal Mine Act and in view of the declared intent of the Congress in relation to the safety and health of miners, I conclude that jurisdiction extends to new operations as here where there is an intent by a mine operator to sell products in the future.

An example of the size of enterprises which have been determined to have an affect on commerce may be found in *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82 (1942). In *Wickard* a farmer exceeded his wheat allotment of 11.1 acres by an additional 11.9 acres. The farmer's contribution to the wheat market was obviously microscopic in relation to the total market. Nevertheless, the farmer was held to come within the regulatory scheme of the Agricultural Adjustment Act of 1938 (as amended).

Katzenbach v. McClung, 379 U.S. 294, 85 S. Ct. 377, 13 L. Ed, 2d 290 (1964) a civil rights case, cited by SUN does not support its view. In *Katzenbach*, the Court declined to overturn a Congressional Act when the legislators have a rational basis for following a chosen regulatory scheme necessary for the protection of interstate commerce.

The power of Congress in the field of protecting the safety and health of the miners is broad and sweeping. Congress has determined that the disruption of production and loss of income to operators and miners as a result of mining accidents unduly impedes and burdens commerce. *Marshall v. Bosack* 463 F. Supp. 800 (E. D., Pa. 1978).

Martin v. Bloom 373 F. Supp. 797 (W. D., Pa. 1973), a District Court decision involving a one man company, relied on by SUN is not binding on the Commission nor does it, in the writer's view, correctly state the law. For three District Court cases holding a directly contrary view see *Marshall v. Kilgore* 478 F. Supp. 4

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(E. D. Tennessee, 1979); *Marshall v. Bosack*, supra, and *Secretary of Interior. United States Department of Interior v. Shingara*, 418 F. Supp. 693 (M. D. Pa., 1976). Also, compare the United States Court of Appeals decision in *Marshall v. Kraynak* 604 F.2d 231 (3rd Cir. 1979).

SUN's motion to dismiss for lack of jurisdiction is DENIED.

ALLEGED VIOLATIONS

The facts pertaining to the alleged violations are enumerated in the hereafter numbered paragraphs. The facts are essentially uncontroverted and they are set forth after each of the contested regulations.

WEST 79-278-M

Citation 381350 alleges a violation of 30 C.F.R. 55.9-12.

The cited standard provides:

55.9-12 Mandatory. Cabs of mobile equipment shall be kept free of extraneous materials.

1. The federal inspector observed fluid leaking from under the dash of SUN's loader (Tr 18).
2. If the loader caught fire, the operator could be burned (Tr 18, 19).
3. From its size the leak appeared a week or more old (Tr. 19).

Citation 381353 alleges a violation of 30 C.F.R. 55.4-22. The cited standard provides:

55.4-22 Mandatory. Each mine shall have available or be provided with suitable firefighting equipment adequate for the size of the mine.

4. The SUN office manager said there were no fire extinguishers on the property (Tr 20).
5. SUN should have three fire extinguishers for its shop which featured welding, cutting and grinding (Tr 21, 22).
6. Oil and grease were stored in the shop (Tr 22).

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Citation 381354 alleges a violation of 30 C.F.R. 55.14-1. The cited standard provides:

55.14-1 Mandatory. Gears; sprockets; chains, drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.

7. Pinch points 3 feet above the ground on 10 conveyors were unguarded. (Tr 23, 24)

8. A maintenance person could be cut or lose a limb if he was caught by the pinch points (Tr 23).

9. The pinch point of the skirt board of each conveyor should be guarded (Tr 22-23).

Citation 381355 alleges a violation of 30 C.F.R. 55.9-7. The cited standard provides:

55.9-7 Mandatory. Unguarded conveyors with walkways shall be equipped with emergency stop devices or cords along their full length.

10. In lieu of emergency stop devices, MSHA accepts a handrail guard (Tr 25).

11. Two workers were affected (Tr 26).

12. The employer by observing the conveyor could have known there were no rails or emergency stop cords available (Tr 26).

Citation 381356 alleges a violation of 30 C.F.R. 55.4-2. The standard provides:

55.4-2 Mandatory. Signs warning against smoking and open flames shall be posted so they can be readily seen in areas or places where fire or explosion hazards exist.

13. Diesel tanks or the oil storage areas had no signs on them (Tr 26, 27).

14. The hazard of fires affected seven workers (Tr 27).

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Citation 381357 alleges a violation of 30 C.F.R. 55.11-27. The cited standard provides:

55.11-27 Mandatory. Scaffolds and working platforms shall be of substantial construction and provided with handrails and maintained in good condition. Floor boards shall be laid properly and the scaffolds and working platform shall not be overloaded. Working platforms shall be provided with toeboards when necessary.

15. There was a generator plant on a 4 foot high flat bed trailer (Tr 28).

16. The trailer had a 2 to 3 foot walkway without a railing (Tr 28, 29).

17. The hazard of slipping with resulting fractures or bruises was present here (Tr 29).

Citation 381358 alleges a violation of 30 C.F.R. 55.7-2. The cited standard provides:

55.7-2 Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used.

18. A Chicago pneumatic air track drill had two missing bolts and nuts; this could permit the hose to come off at its connection (Tr 30).

19. The hazard occurs from the whipping action caused by the 100 psi if the hose comes off (Tr 30).

20. Two employees were affected (Tr 31).

Citation 381359 alleges a violation of 30 C.F.R. 55.13-21. The cited standard provides:

55.13-21 Mandatory. Except where automatic shutoff valves are used, safety chains or other suitable locking devices shall be used at connections to machines of high-pressure hose lines of 3/4-inch inside diameter or larger, and between high-pressure hose lines of 3/4-inch inside diameter or larger, where a connection failure would create a hazard.

21. A bull hose requires a safety chain (Tr 32).

22. A coupling could come loose and the hose could strike a worker (Tr 32, 33).

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Citation 381360 alleges a violation of 55.9-22. The cited standard provides:

55.9-22 Mandatory. Berms or guards shall be provided on the outer bank of elevated roadways.

24. Part of the roadway leading from the plant to the pit and used by company trucks lacked a berm to support a vehicle (Tr 34, 35).

25. The hazardous portion was one quarter of a mile from the pit along the 15 to 20 foot wide road (Tr 34).

26. If a vehicle went over the edge it would drop 60 to 70 feet (Tr 34).

Citation 381383 alleges a violation of 55.6-20(i). The cited standard provides:

55.6-20 Mandatory. Magazines shall be:

(i) Posted with suitable danger signs so located that a bullet passing through the face of a sign will not strike the magazine.

27. There were explosives (12 cases of dynamite) in the SUN ten foot square magazine (Tr 37, 38, 51).

28. Hunters in this open range country could shoot at the warning signs which were attached to the magazine itself (Tr 37, 38).

Citation 381384 alleges a violation of 55.6-20(j). The cited standard provides:

55.6-20 Mandatory. Magazines shall be:

(j) Used exclusively for storage of explosives or detonators and kept free of all extraneous materials.

29. The magazine contained 3 drill steel, 3 hoses, and a drill machine (Tr 40).

30. This equipment can cause sparks which could result in an explosion.

Citation 381385 alleges a violation of 55.6-20(k). The cited standard provides:

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55.6-20(k) Mandatory. Magazines shall be:

(k) Kept clean and dry in the interior, and in good repair.

31. There was a lot of rat litter on the floor of the magazine (Tr 41).

32. The hazard arises from the natural bleeding of nitro from dynamite (Tr 42, 49).

33. Sparks from shoes could create a fire hazard (Tr 42).

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Citation 381349 alleges a violation of 30 C.F.R. 55.15-1. The cited standard reads:

55.15-1 Mandatory. Adequate first-aid materials, including stretchers and blankets, shall be provided at places convenient to all working areas. Water or neutralizing agents shall be available where corrosive chemicals or other harmful substances are stored, handled, or used.

34. The SUN manager said there were no stretchers or blankets on the site (Tr 10-11).

35. The nearest hospital was 40 to 50 miles away (Tr 11).

36. Seven workers were affected (Tr 11).

Citation 381351 alleges a violation of 55.11-1. The cited standard reads:

55.11-1 Mandatory Safe means of access shall be provided and maintained to all working places.

37. Workers had to climb the conveyors and the shaker itself to service it (Tr 13-16).

38. The 15 foot high shaker had to be serviced daily (Tr 15).

39. A fall from this height could be fatal (Tr 15).

Citation 381352 alleges a violation of 55.11-1. The standard is the same as in preceding citation.

40. The shaker at this location is about the same as Citation 381351 (Tr 17).

41. Three workers were affected (Tr 17).

CONCLUSIONS OF LAW

Respondent violated all of the citations in contest herein. In considering the statutory criteria for the assessment of civil penalties, I deem the proposed penalties to be appropriate. The uncontroverted factual basis supporting each citation is set forth after each citation number.

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1. Citation 381350 (Facts 1, 2, 3)
2. Citation 381353 (Facts 4, 5, 6)
3. Citation 381354 (Facts 7, 8, 9)
4. Citation 381355 (Facts 10, 11, 12)
5. Citation 381356 (Facts 13, 14)
6. Citation 381357 (Facts 15, 16, 17)
7. Citation 381358 (Facts 18, 19, 20)
8. Citation 381359 (Facts 21, 22, 23)
9. Citation 381360 (Facts 24, 25, 26)
10. Citation 381383 (Facts 27, 28)
11. Citation 381384 (Facts 29, 30)
12. Citation 381385 (Facts 31, 32, 33)

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13. Citation 381349 (Facts 34, 35, 36)
14. Citation 381351 (Facts 37, 38, 39)
15. Citation 381352 (Facts 40,41)

Based on the foregoing findings of fact and conclusions of law, I enter following:

ORDER

All citations herein and the proposed civil penalties therefore are AFFIRMED.

John J. Morris
Administrative Law Judge