FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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3 JUL 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	'Civil Penalty Proceedings Docket No. YORK 79-21-M A.C. No. 30-02135-05002
v.		
NEW YORK STATE DEPARTMENT OF TRANSPORTATION,	Respondent	Docket No. WILK 79-102-PM A.C. No, 30-02135-05001 Docket No. YORK 80-2-M A.C. No. 30-02358-05001 Underwood Pit Botsford Pit

DECISION

Appearances: Deborah B. Fogarty, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York, for Petitioner; William S. MacTiernan, Associate Attorney, Legal Services Bureau, New York State Department of Transportation, Albany, New York, for Respondent.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

These proceedings arise out of the consolidation of three civil penalty proceedings brought by the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA) against the New York State Department of Transportation (hereinafter New York), under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), (hereinafter the Act).

Prior to hearing, New York moved to dismiss all three cases for the following reasons:

1. The pits in question are not subject to MSHA jurisdiction;

2. Enforcement of the Act against New York violates the tenth amendment of the Constitution;

3. New York's activities in connection with these proceedings are not within the ambit of the Act "because the products thereof did not enter commerce nor did the operation or products thereof affect commerce."

I denied New York's motions in an order denying motions to dismiss (attached hereto and incorporated herein as an Appendix) for the reasons stated therein. In that order I found that a hearing was required to determine whether the pits in question were "borrow pits" within the definition of that term in the Interagency Agreement between MSHA and OSHA.

MSHA has authority to administer the Act which applies to all "mines." A mine is defined in the Act, 30 U.S.C. 6 802(h), as "an area of land from which minerals are extracted in nonliquid form." The Underwood Pit and the Botsford Pit meet that definition. They are, therefore, mines within-the reach of the Act. Consequently, MSHA would have jurisdiction over them, However, MSHA has issued a formal interagency agreement to define its jurisdiction vis-a-vis the Occupational Safety and Health Administration (hereinafter OSHA) in which it has limited its jurisdiction. Interagency Agreement between MSHA and OSHA, U.S. Department of Labor, dated March 29, 1979. 44 Fed. Reg. 22827 (April 17, 1979). That agreement states that "borrow pits" are subject to OSHA jurisdiction. A borrow pit is defined as:

[A]n area of land where the overburden, consisting of unconsolidated rock, glacial debris, or other earth material overlying bedrock is extracted from the surface. Extraction occurs on a one-time only basis or only intermittently as need occurs, for use as fill materials by the extracting

> party in the form in which it is extracted. No milling is involved, except for the use of a scalping screen to remove larger rocks, wood and trash. The material is used by the extracting party more for its bulk than its intrinsic qualities on land which is relatively near the borrow pit. MSHA-OSHA Interagency Agreement, par. B(7), 44 Fed. Reg. 22827 (1979).

"Milling" is defined in the agreement to include "sizing." "Sizing" is defined as "the process of separating particles of mixed sizes into groups of particles of all the same size or into groups in which particles range between maximum and minimum size."

A hearing was held in Albany, New York, on June 10, 1980. Randall L. Gadway and Ronald Mesa, testified on behalf of MSHA. Gordon Reimels testified on behalf of New York. Upon completion of the taking of testimony, the parties submitted oral arguments.

ISSUES

1. Whether the pits in question are under the jurisdiction of MSHA.

2. Whether the Commission can decide that the Act may be constitutionally enforced against a state.

3. Whether enforcing the Act against the State violates the tenth amendment.

4. Whether the State's activities are within the coverage of the Act.

5. If the pits in question are determined to be under MSHA jurisdiction, whether New York violated the Act or regulations as charged by MSHA and, if so, the amount of the civil penalty which should be assessed.

APPLICABLE LAW

Section 110(i) of the Act, 30 U.S.C. § 820(i), provides in pertinent part as follows:

> In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 C.F.R. § 56.18-10 provides as follows: "Mandatory. Selected supervisors shall be trained in first aid. First aid training shall be made available to all interested employees."

30 C.F.R. § 56.9-87 provides as follows:

> Mandatory. Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up.

30 C.F.R § 56.14-l provides as follows: "Mandatory. Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machinery parts which may be contacted by persons, and which may cause injury to persons, shall be guarded."

30 C.F.R. § 56.9-22 provides as follows: "Mandatory. Berms or guards shall be provided on the outer bank of elevated roadways."

STIPULATIONS

The stipulations in these cases are as follows:

1. The New York State Department of Transportation's sand extraction operation at the Underwood Pit is a yearly operation for the purpose of stockpiling sand for winter snow and ice control for certain highways within Essex County.

2. The Underwood Pit is located at the intersection of Route 9 and Route 87 on the Northway extension of the New York State Thurway which road continues north to Montreal, Canada.

3. The New York State Department of Transportation's sand extraction and stock pile operation at the Underwood Pit in 1978 took place on July 5, 6, 7, 10, 12, 13 and 14.

4. The employees present at the Underwood Pit during the sand removal consisted usually of three employees. On July 6, 1978, four employees were.present at the site.

5. The equipment used in the extraction of sand operation at the Underwood Pit in 1978 consisted of a Telesmith screening plant, a Northwest crane and a Case front-end loader.

6. Except when extracting sand, this equipment is not generally at the Underwood Pit. A front-end loader is kept on site in the winter for the purpose of loading the stockpiled sand into trucks.

7. Randall Gadway is presently employed by the Mine Safety and Health Administration, hereinafter MSHA, as a metal, non-metal mine inspector.

8. Randall Gadway has been employed in the capacity of the safety and health mine inspector by the Mining Enforcement and Safety Administration, hereinafter MESA, predecessor of MSHA and by MSHA since 1975.

9. Prior to his employment with MESA/MSHA, Mr. Gadway was employed in the mining industry since 1966.

10. On July 5, 1978, as a part of his responsibilities, Mr. Gadway inspected Respondent's Underwood Pit.

11. At the time of the inspection, Mr. Gadway observed the screening plant in operation.

12. At the time of the inspection, bulk material was being removed from the bank of the Underwood Pit and was being dumped into a hopper.

13. From the hopper, the extracted material was transported by conveyor belts to the screen.

14. Sand similar in size and quality to beach sand was dropping through the moving screen.

15. The sand dropping through the moving screen was being removed and stockpiled.

16. At the time of the inspection, the reverse signal alarm of the Case front-end loader was not working.

17. Respondent will not raise the defense that the proposed assessments will affect the operator's ability to continue in business.

18. Prior to July 5, 1978, Respondent had no previous history of paid violations at its Underwood Pit facility.

19. Respondent's Underwood Pit is in Region I by designation of the New York State Department of Transportation. Region I includes all of Essex County, New York.

20. The parties stipulate that the four conditions involved in all four citations--that is Citations 220483, and 220484 at the Underwood Pit and 219993 and 219994 at the Botsford Pit, that these conditions were abated within the time specified by the inspector for abatement and that compliance was normal for all four situations.

21. The parties agree that there were no berms in the upper roadway on the north side of the Botsford Pit.

SUMMARY OF THE EVIDENCE

Operations at the Underwood Pit and the Botsford Pit

While the parties arrive at conflicting conclusions from the evidence presented, there is no essential dispute of fact in this case. The Underwood Pit is described as follows: 300 to 400 feet in diameter,

30 to 40 feet high, and a 'IO-degree angle of repose of the material being extracted. The equipment employed at this site consists of the following: shed, crane, screening plant, and front-end loader, On the day of the inspection, July 5, 1978, a foreman and three employees were present at the site. A front-end loader was used to extract loose, unconsolidated material from the face and to dump this material on a hopper. A conveyor belt then transported the material to a shaker screen, No screen of any kind was placed over the hopper so that all material dumped arrived at the shaker screen by the conveyor belt, The raw material dumped at the hopper ranged in size from sand-size particles to fist-size rocks. There was no wood or trash in this material. The shaker screen permitted material approximately one-quarter inch or less to pass through, Larger material was discarded, The material passing through the screen was picked up by a crane and stock-piled approximately, 30 to 40 feet from the plant. Salt was added to the sand which had passed through the screen and the mixture was stockpiled for winter use by New York for ice control on the State highways,

The Botsford Pit consists of five levels which were being mined by various entities. New York was mining only on level 2, In that area, the Botsford Pit is described as being 150 feet in diameter with an 11-foot high face. The material being extracted from the face ranged in size from fine sand to cantaloupe size particles, There were no trees, trash, or large stones in the area being mined. There was an access road to level 2 which was on a grade, The equipment at the Botsford Pit on the day of inspection, June 27, 1979, was as follows: a Barber-Greene screen, a front-end loader, a truck mounted shovel, and two dump trucks. Four employees were present

on the date of inspection. The procedure followed in extracting the minerals and dumping them into the hopper was the same as at the Underwood Pit, However, at the end of the conveyor belt, the Barber-Greene screen permitted particles of up to 1-1/2 inches to pass. All larger size particles were discarded. Gordon Reimels, New York's resident engineer in charge of highway maintenance for the area in question, testified that New York had specifications that 1-1/2 inches was the maximum size to be used as shoulder fill for rebuilding roads, Some of the material passing through the screen was hauled away in dump trucks for reconstructing shoulders along state highways and the remainder was stockpiled for future use. The material which passed through the screen was used by New York for shoulder grade, drainage backfill, and permanent repair of the State roads.

Citation No. 220483

Inspector Randall L. Gadway conducted an MSHA inspection of the Underwood Pit on July 5, 1978. At that time, he asked the foreman and three employees for proof of their current first aid training. None of those present had\ any such proof. The foreman was unable to locate a first aid training certificate and was not sure if his training certificate had been issued within the last 3 years. There was no first aid material at the plant and no ambulance was on the site. Inspector Gadway testified that an employee at the site could sustain a severe injury and would require first aid to keep him alive until he got to a hospital. He testified that New York should have known about this violation since the pit had been previously inspected by MESA, the predecessor to MSHA. He believed that an injury was probable because an injured worker would go into shock if no first aid was adminstered,

Citation No. 220484

On the same day, at the Underwood Pit, Inspector Gadway observed that the backup alarm was not working while the front-end loader was moving in reverse, The operator of the loader had an obstructed view because he could not see a person standing 3 feet behind the loader. No other employee served as an observer for the loader operator. The operator of the loader stated that the backup alarm was malfunctioning and that had been reported. He did not indicate when that report had been made. Although there was no one on foot in the immediate area, there was one worker in the vicinity of the hopper approximately 20 to 30 feet from the loader, In this case, Inspector Gadway did not believe that the violation would have been apparent to New York since his experience indicated that backup alarms easily malfunction, The violation in this case could result in the loader running over a person or vehicle, One person would be affected, The gravity of the violation would range between a miner being brushed to a fatality, Inspector Gadway bel ieved that an accident was probable,

Citation No. 219993

On June 27, 1979, MSHA Inspector Ronald Mesa conducted an inspection of the Botsford Pit. He found that there were 13 exposed idler rollers on the conveyor belt which were not guarded. The pinch points were exposed, The foreman was present and the condition was obvious, One person was exposed to injury. New York should have known of this condition. The violation was abated by welding iron guards against the idler arms.

On the same day, Inspector Mesa found that there was no berm on the elevated access road. This road was elevated 11 feet above the surface below. The condition was obvious. It should have been known to New York, He observed four loads being hauled on the road on that day. One person would be affected by the possibility of a truck overturning. An accident could result in lost work days and permanently disabling injuries. Inspec tot Mesa was unaware of any history of accidents at this pit.

EVALUATION OF THE EVIDENCE

All of the testimony, exhibits, stipulations, and arguments of the parties have been considered, As noted, supra, New York's arguments based upon a lack of jurisdiction due to the tenth amendment to the Constitution and the fact that the products of its operations at the pits in question did not enter commerce or affect commerce have been rejected for the reasons set forth in the Appendix herein. However, there remains the question of whether MSHA has jurisdiction over the pits in question in light of the MSHA-OSHA Interagency Agreement. A resolution of that question depends upon whether either or both of these pits qualify as a "borrow pit" under that Agreement, With regard to the Underwood Pit, the evidence establishes that raw material ranging in size from fine sand to fist-size rocks is screened so that only sand sized particles (one-quarter inch or less) are used in combination with salt by New York to control ice on highways during the winter. As pertinent here, the MSHA-OSHA Interagency Agreement provides, "extraction occurs * * * for use as fill materials by the extracting party in the form in which it is

extracted. * * * The material is used by the extracting party more for its bulk than its intrinsic qualities * * *." While the term "fill" is not defined in the agreement, that term means, "material used to fill a cavity or passage." Dictionary of Mining, Mineral and Related Terms, Bureau of Mines, Department of Interior, 1968. Thus, it is obvious that the material extracted by New York from the Underwood Pit for the purpose of controlling ice on highways during the winter is not "for use as fill materials." It is used for its intrinsic abrasive qualities. Since New York does not use the sand for fill materials, but rather for its intrinsic qualities, the Underwood Pit is not a "borrow pit" within the meaning of the MSHA-OSHA Interagency Agreement.

With regard to the Botsford Pit, the evidence establishes that some of the material processed by New York through the Barber-Greene screen is used as fill materials.. However, New York specifies that only materials up to 1-1/2 inches in diameter can be used as fill material. Since the Barber-Greene screen separates the raw materials into groups which the particles range between maximum and minimum size, i.e., particles ranging from fine sand up to 1-1/2 inches in diameter pass through the screen and particles in excess of 1-1/2 inches in diameter do not pass through the screen, this constitutes "sizing" as defined in the MSHA-OSHA agreement, not as a scalping screen as asserted by New York. Likewise, since "sizing" is included within the term "milling" and "milling" is prohibited in a "borrow pit," the Botsford Pit is not a "borrow pit" within the above agreement. For the above reasons, I find that neither the Underwood Pit nor the Botsford Pit is a "borrow pit" as that term is defined in the MSHA-OSHA Interagency Agreement. Therefore, both pits are subject to MSHA jurisdiction.

Citation No. 220483

This citation alleges the following: "Current first aid training was not provided to selected supervisors and interested employees at the pit," It is required by 30 C.F.R. § 56.18-10 that selected supervisors should be trained in first aid and such training shall be made available to all interested employees. The evidence in this case does not support a finding of a violation of this standard. The evidence establishes only that none of New York's employees at the Underwood Pit on the date of this inspection had a current first aid card, The regulation does not require that the supervisor present at the mine shall have evidence of current first aid training. There is no evidence of record concerning the availability of first aid training to other interested employees. The citation is vacated.

Citation No. 220484

The evidence establishes that the backup alarm on the front-end loader of the Underwood Pit was inoperable at the time of inspection, The operator had an obstructed view to the rear and no observer was present to signal him. I find that MSHA has established a violation of 30 C.F.R. § 56.9-87. The inspector's testimony that the operator could not have been expected to know of this condition prior to the issuance of the citation is rejected for the reason that the loader operator reported the malfunctioning alarm but New York failed to provide an observer for the vehicle as required by the regulation.

Citation No. 219993

The evidence establishes that there were 13 exposed idler rollers on the conveyor belt at the Botsford Pit on the date of the inspection. Pinch

points were exposed which could be expected to result in physical injury. New York is chargeable with ordinary negligence since the condition was obvious and it should have known of the violation. I find that MSHA has established a violation of 30 C.F.R. § 56.14-l.

Citation No. 219994

The evidence establishes that there was no berm on the outer bank of the access road at the Botsford Pit. This was an elevated roadway with an 11-foot drop. This condition was obvious and New York should have known of the existence of the violation. I find that MSHA has established a violation of 30 C.F.R. § 56.9-22.

FINDINGS OF FACT

1. The materials extracted from the Underwood Pit were used on the highways to control ice in winter and not as "fill" and, therefore, the Underwood Pit was not "borrow pit" as that term is defined in the MSHA-OSHA Interagency Agreement.

2. New York's operation of the Botsford Pit involved "sizing" of the raw material and, therefore, the operation of the Botsford Pit was not a "borrow pit" as that term is defined in the MSHA-OSHA Interagency Agreement.

3. There is no evidence of record which establishes that, at the Underwood Pit, New York failed to train selected supervisors in first aid or failed to make first aid training available to all interested employees as alleged in Citation No. 220483.

4. The backup alarm of the front-end loader operated by New York at the Underwood Pit was inoperable at the time the operator of the loader had an obstructed view to the rear and no observer was present to signal the operator as alleged in Citation No. 220484.

5. Exposed moving idler rollers on the conveyor belt at the Botsford Pit could be contacted by persons and cause injury and were not guarded as alleged in Citation No. 219993.

6. No berm or guard was provided on the outer bank of the elevated access road at the Botsford Pit as alleged in Citation No. 219994.

CONCLUSIONS OF LAW

1. An administrative law judge has jurisdiction to determine whether the Act may be constitutionally applied to the facts.

2. Mining sand and gravel is not an integral or essential part of New York's traditional function of road maintenance; therefore, the regulation of such mining by MSHA does not violate the tenth amendment,

3. The mining of sand and gravel by New York affects commerce and is subject to MSHA regulation,

4. New York's operation of the Underwood Pit did not constitute a "borrow pit" and, hence, is subject to MSHA jurisdiction.

5. New York's operation of the Botsford Pit did not constitute a "borrow pit" and, hence, is subject to MSHA jurisdiction.

6. The undersigned judge has jurisdiction over the parties and subject matter of the above proceedings,

7. New York did not violate 30 C.F.R. § 56.14-1 and Citation No. 220483 is vacated and the proposal for a civil penalty thereon is dismissed.

8. New York violated 30 C.F.R. § 56.9-87 by failing to provide a front-end loader with an audible backup alarm as alleged in Citation No. 220484. Based upon the statutory criteria for assessing a civil penalty for a violation of a safety standard, New York is assessed a penalty of $50 for this violation.

9. New York violated 30 C.F.R. § 56.14-l by failing to guard exposed moving machinery as alleged in Citation No, 219993. Based upon the statutory criteria for assessing a civil penalty for a violation of a safety standard, New York is assessed a penalty of $52 for this violation,

10. New York violated 30 C.F.R. § 56.9-22 by failing to provide a berm or guard on the outer bank of an elevated road as alleged in Citation No, 219994, Based upon the statutory criteria for assessing a civil penalty for a violation of a safety standard, New York is assessed a penalty of $52 for this violation,

ORDER

WHEREFORE IT IS ORDERED that Citation No. 220483 is VACATED and the proposal for a civil penalty thereon is DISMISSED.

It is further ORDERED that New York shall pay the Secretary of Labor the above assessed civil penalties in the total amount of $154 within 30 days from the date of this decision.

James A. Laurenson

James A. Laurenson, Judge

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