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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. CENT 80-180-M A/O No. 39-00700-05001
v.	Matson Gravel Pit
DAN NEVILLE, D/B/A NEVILLE CONSTRUCTION, RESPONDENT	

DECISION

Appearances: Robert J. Lesnick, Esq., Office of the Solicitor, U.S Department of Labor, Kansas City, Missouri, for Petitioner
Wilson Kleibacker, Esq., Lammers, Lammers, Kleibacker & Casey, Madison, South Dakota, for Respondent

Before: Judge Stewart

The above-captioned case is a civil penalty proceeding brought pursuant to section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (hereinafter, referred to as the Act). The hearing in this matter was held on September 19, 1980, in Brookings, South Dakota.

At the conclusion of the presentation of evidence and oral argument by the part ies on an issue-by-issue basis, a decision was rendered from the bench. The decision is reduced to writing in substance as follows, pursuant to the Commission's Rules of Procedure, 29 C.F.R. 2700.65:

> My ruling on the issue of the jurisdictional question concerning Respondent's impact on interstate commerce is as follows: Section 3 of the Federal Mine Safety and Health Act of 1977 states at Section 3(d) that "operator' means any owner, lessee, or any other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." Section 3(h)(1) of the Act provides that "coal or other mine' means (A) an area of land from which minerals are extracted in nonliquid 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 passage ways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings 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.

The record without question establishes that Neville Construction Company is a person who operates, controls or supervises a mine. It further establishes that the Matson Pit is an area of land from which minerals are extracted in nonliquid form and that there were working structures, facilities and equipment used in and resulting from the work of extracting such minerals from their natural deposits in nonliquid form. It is therefore clear that the Matson Pit was a mine and that Neville Construction Company was an operator within the meaning of the Act.

Section 4 of the Act prescribes that mines subject to the Act are as follows: "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."

The evidence presented has established that the equipment used in the mine or the parts thereof were manufactured in states other than South Dakota (the State in which the Matson Gravel Pit is located), although some of those parts might have been later assembled in the state of South Dakota. In fact, it had been approximately 32 years since one of the pieces of equipment, the crusher, had been brought into the state of South Dakota already assembled.

The evidence establishes that the crushed product from the pit is used in roads in the state of South Dakota, essentially county and city roads. In addition to the use of these products by Mr. Neville in his construction business, some of these products were sold to other companies. Most of these companies that appear were from the state of South Dakota;

however, as Mr. Dan Neville, Jr., has testified, at least one of these companies, the Rupp company, was from the State of Minnesota, even though the contract under which the products were used was in the state of South Dakota.

I therefore find that the products of this mine and the operation of this mine did affect commerce within the meaning of Section 4 of the Act, and that Neville Construction Company, the operator of the mine, is subject to the provisions of the Act.

My ruling on the issue raised by Respondent concerning the unlawful search and seizure is as follows: Section 103(a) of the Act advises that, "Authorized representatives of the Secretary or the Secretary of Health, Education and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health and safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health and safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of the subsection, the Secretary of Health, Education and Welfare may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and his experience under this Act and other health and safety laws. For the purpose of making any inspection or investigation under this Act, the Secretary, or the Secretary of Health, Education and Welfare, with respect to fulfilling his responsibilities under this Act, or any authorized representative of the Secretary or the Secretary of Health, Education and Welfare, shall have a right of entry to, upon, or through any coal or other mine."

The record establishes that Inspector Elvestron was present at the Matson Gravel Pit on the day of the inspection for the purpose of conducting an inspection required

by Section 103(a) of the Act. Upon his arrival at the pit the conditions were obvious and could be seen by a person without requesting leave of the operator to conduct an inspection.

After the inspection had been started, the representative of the operator, Mr. Dan Neville, Jr., did not voice an objection to the inspection or in any way demand that the inspector leave the property. Although the inspector did not have a search warrant, he was not required to have a search warrant under the sections or the provisions of the Act. The inspector initiated the inspection strictly in accordance with the provisions of the Act and the provisions of the regulations promulgated pursuant thereto.

Respondent's counsel has stated that it was familiar with the case law with regard to such inspections. This case law fully establishes the right of the inspector, a representative of the Secretary of Labor, to conduct inspections, such as the inspection conducted by Inspector Elvestron, without a search warrant. I therefore find that the inspection by the inspector was an authorized inspection.

Citation No. 334333 was issued on 9-27-79 by MSHA Inspector Allen Elvestron citing a Violation 56.14-1 of Title 30, Code of Federal Regulations. The condition or practice noted on the citation was as follows: "The drive unit for the Simons crusher was not guarded". The testimony adduced at the hearing has established that the crusher was, in fact, a Cedar Rapids crusher and not a Simons crusher as alleged. This does not affect the issue as to whether or not there was a violation of the mandatory safety standard since more specificity in allegations by MSHA is not required and the Respondent was adequately informed as to the nature of the condition leading to the citation.

30 CFR 56.14-1 provides as follows: "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."

The evidence establishes that the equipment against which the citation was directed did include drive pulleys which are within the provisions of the mandatory safety standard cited. The record further establishes that these parts could be contacted by persons and that they could cause injury to persons.

The inspector has testified that there was a fence which he termed a snow fence approximately three and a half to four feet high, installed as a guard around the equipment. The hazardous part of the equipment or some of it was approximately five feet high, and the fence was so near the equipment that it could be contacted by a person in a manner to result in injury to the person. The snow fence guard was described as a fence through which laths were woven.

The evidence establishes that the crusher had not been operated for approximately one month prior to 9-27-79, the date of the citation, and that the equipment was in the process of being dismantled with the intention of moving it a short distance away. However, there was nothing to prevent the crusher from being used. Since there was a possibility that the machinery could be operated and that a person could be injured, the inadequate guarding did constitute a violation of 30 CFR 56.14-1. As to gravity, I find that although a serious injury might occur, it was improbable that an injury would occur. The testimony establishes that the crusher had not been operated for approximately six months before the date the citation was issued, that the machinery was being dismantled for movement to a different location nearby; and that when the machinery was in operation, it was not in a place which was well traveled by miners or other persons.

The evidence establishes that the operator had made an attempt to guard the machinery by installation of a fence around the equipment. The inspector determined that this fence was too close to the equipment and that a person could be injured due to this proximity of the fence to the equipment. The condition was abated by moving the fence away from the equipment a short distance. I am unable to find that this violation was due to negligence on the part of the operator. Even though the condition was obvious, there was some judgment to be exercised as to the best type of guarding to be used under the circumstances that would allow for maintenance and the application of belt dressing.

Petitioner has acknowledged that the guarding was changed and that a new fence was constructed to abate the violation. I therefore find that the Respondent demonstrated good faith in attempting to achieve rapid compliance after notification of a violation. In consideration of the circumstances of this case and the application of the statutory criteria, I find that an appropriate penalty is $36.00. An assessment of $36.00 is accordingly entered.

The parties proposed settlement of this proceeding with regard to three citations - Nos. 334334, 334335 and 334336. The settlement terms and assertions in support thereof were given by counsel for Petitioner as follows:

> Citation Nos. 334334, 334335, and 334336 are consolidated; in effect eliminating Citations 334335 and 334336. The penalty for the remaining Citation 334334 is raised to the amount set for the three violations, the prior three violations, those amounts totaling $100.00. The citations involved, guarding of the same Cedar Rapids, Iowa, crusher on three separate areas of that crusher, and that the increased hazard and gravity due to the combination would warrant the increased fine.
>
> The Secretary and the Respondent agree that the negligence exhibited was minimal; that the probability of occurrence would be rated improbable; that the Respondent exhibited good faith in his attempts to correct the possible hazards created as listed in the citations now combined; and that the history of the Respondent is good and warrants the settlement. The Secretary believes that the settlement reached is in the interest of the Mine Safety and Health Act of 1977.

The settlement was approved at the hearing as follows:

> The agreed upon settlement is approved. It is found in consideration of the circumstances of this case and of the statutory criteria to be applied under the Act that a penalty of $100.00 is appropriate. A monetary penalty of $100.00 is therefore entered. Respondent is ordered to pay petitioner within 30 days of the date of this order the sum of $136.00.

At the conclusion of the hearing, counsel for Petitioner acknowledged receipt from Respondent the sum of $136 in full payment of the assessed penalties. In view of the payments of the assessed penalties, the above-captioned proceeding was thereupon dismissed.

ORDER

It is ORDERED that the bench decision and approval of settlement rendered in the above-captioned proceeding is hereby AFFIRMED.

It is further ORDERED that the above captioned proceeding is hereby DISMISSED.

Forrest E. Stewart
Administrative Law Judge