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SOL (MSHA) V. MAUMEE HAULERS
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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. LAKE 80-192-M A.C. No. 33-03760-05001
v.	Dorr Street Pit Mine
MAUMEE HAULERS AND EXCAVATORS, RESPONDENT	

DECISION

Appearances: Marcella L. Thompson, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for Petitioner;
Robert H. Parker, Vice President, Maumee Haulers and Excavators, Swanton, Ohio, for Respondent.

Before: Judge Lasher

This proceeding arises under section 110(a) of the Federal Mine Safety and Health Act of 1977. A hearing on the merits was held in Toledo, Ohio, on August 19, 1980. After considering evidence submitted by both parties and proposed findings of fact and conclusions of law proferred during closing argument, I entered an opinion on the record. (FOOTNOTE 1) My bench decision containing findings, conclusions, and rationale appears below as it appears in the transcript, other than for minor corrections of grammar and punctuation and the excision of obiter dicta:

> This proceeding arises upon the filing of a petition for assessment of penalty by the Secretary of Labor on March 28, 1980, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a).
>
> The Secretary seeks penalties against Respondent for the commission of two violations cited in Citation Nos. 368929 and 368930, which were issued on July 18, 1979. Citation No. 368929 alleges an infraction of 30 C.F.R. 56.9-11

and Citation No. 368930 alleges an infraction of 30 C.F.R. 56.11-2. These two citations involved the same Insley crane, which was observed on July 18, 1979, in the Respondent's Dorr Street Pit and was seen by the inspector to have the following allegedly violative conditions present: First, that the window in the side door of the crane was cracked and broken; and, second, that a handrail was not provided on the elevated walkway on the crane.

The Respondent, in its response to my prehearing order, indicated two critical issues, one of which I find is ultimately dispositive of this case. The first issue raised by Respondent is that the crane in question was normally operated by a part-owner of the corporation, not an employee. The second issue was that the machine in question (the crane) was out of service and was not in use at the time the inspector cited the allegedly violative conditions. The Respondent admits that the two violations alleged, that is, the window violation and the handrail violations, did exist. Accordingly, I preliminarily conclude that the conditions described in the two subject citations did exist. This, of course, in view of the questions raised by Respondent, does not, in and of itself, constitute a finding that a violation of the Act did in fact occur.

Also preliminarily, I note that the record clearly indicates that the Respondent had no history of previous violations, and in this connection I further note that the two citaions were issued upon the first inspection of the sand pit in question. In addition, I preliminarily find, based upon the stipulation of the parties, that any penalty which I might assess in this case, up to the proposed initial assessment of MSHA, would not affect the Respondent's ability to continue in business. The parties also indicated that the Respondent is a small operator, so there is no (conflict) with respect to that traditional penalty assessment factor. In view of my subsequent finding, I find it unnecessary to evaluate the evidence with respect to negligence and gravity.

The Respondent, in closing argument, reiterated the two questions which had been raised previously in its prehearing submission. The second such issue being that since the cited machine was operated only by the owners of the corporation and not by employees, the jurisdiction of the Secretary, and I would presume the jurisdiction of the Federal Mine Safety and Health Review Commission, would not attach. I find no merit to this contention. The law is relatively clear and settled on the point that a family-owned and family-operated business does come within the (coverage of the) Act. Also, the intent of Congress in enacting this protective legislation extends to

any person, not just miners or employees of these kinds of companies. Accordingly, I find that the Respondent does come within the coverage of the Act, is subject to regulation by MSHA under the Act, and that this entire proceeding is subject to the review function of the Federal Mine Safety and Health Review Commission. See Marshall v. Kraynak, 604 F.2d 231 (3rd Cir. 1979). The fact that the three Parker brothers actually own and engage in some of the work of the mine in question is no bar to their inclusion within the jurisdiction of the Act and I further find that they are miners the same as are their employees. 30 U.S.C. 820(d)(g) provides that a "miner" means "any individual working in a coal or other mine." See Marshall v. Sink, 614 F.2d 37 (4th Cir. 1980).

In its closing argument the Respondent also contended that the two citations were improperly issued based upon the following (stated) logic: "We feel that a machine that is visually out of service should not be subject to the issuance of a citation," or words to that effect. I do find merit in this last contention. The evidence indicates that on July 18, 1979, the inspector, Michael J. Pappas, observed the Insley crane in the pit. Even though there were no tags on this piece of equipment indicating that it was not to be used, the inspector knew the engine was out of service. The investigation by MSHA, both at the time and subsequently, was not such as to indicate that the crane was being operated in the allegedly violative condition described in the two citations. Nor was there any investigation which would indicate that the crane had ever operated in that condition. There is no evidence from employees of the Respondent which indicate that the machine, either before July 18, 1979, or after July 18, 1979, operated in the condition described in the two citations. The inspector was unable to testify that he had ever seen the crane in operation at all.

The president of Respondent, Mr. Ike Parker, testified that he had purchased the subject crane some 3 or 4 months earlier, that is, prior to July 18, 1979, and that it had been broken down and out of repair most of the time in between, and that on July 18, 1979, a new crane was on the premises and being operated by his brother, Conrad Parker. Ike Parker also indicated that he was negotiating with Columbus Equipment Company regarding the purchase of this new Insley crane and that in order to obtain a better trade-in price for the old crane, which was the subject of the two citations, he was attempting to -- and here I paraphrase -- improve the performance of the engine. Ike Parker indicated that the whole back end of the old crane was out. Inferring from his testimony, I find it was in an obvious state of condition to indicate to anyone that it was not in operating condition.

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Section 102(b)(3)(h)(1) of the Act (provides) that a "coal or other mine," can include equipment and machines. It also indicates that for such equipment or machines to be a mine that they, insofar as applicable here, must be "used in, or (are) to be used" in the work of extracting minerals from their natural deposits." The evidence in this record clearly indicates that the machine was out of service at the time the inspector issued the citations. Thus, I find that the equipment in question was not within the definition so as to be subject to the issuance of citations and withdrawal orders. Therefore, I find that the position of Respondent in this case is meritorious and that the two citations in question were improperly issued.2

Accordingly, it is ordered as follows: Citation Nos. 368929 and 368930, issued July 18, 1979, are vacated, and this proceeding is dismissed.

Michael A. Lasher, Jr. Judge

~FOOTNOTE_ONE

1 Tr. 104-112.

~FOOTNOTE_ONE

2 See Plateau Mining Company, 2 IBMA 303 (1973).