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SOL (MSHA) v. OGLE COUNTY HIGHWAY DEPT
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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 80-210-M A.O. No. 11-00151-05001
v.	
OGLE COUNTY HIGHWAY DEPARTMENT, RESPONDENT	Mine: St. Clair Quarry and Mill

DECISION

Appearances: Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner
Walter Z. Rywak, Esq., Ogle County Assistant State's Attorney, Oregon, Illinois, for Respondent

Before: Judge Edwin S. Bernstein

The Secretary of Labor petitioned for the assessment of civil penalties totaling $142 for the following four violations of MSHA standards:

Citation Number	30 C.F.R. Standard	Proposed Penalty
356901	56.14-1	$ 32
356902	56.9-87	$ 44
356903	56.14-1	$ 32
356904	56.14-1	$ 34
	Total:	$142

In various prehearing conferences, the parties agreed that the sole issue separating them was whether or not Respondent is covered by the Federal Mine Safety and Health Act of 1977 (the Act), the authorizing statute for the regulations listed above. The parties requested that this issue be decided on the basis of joint stipulations of fact and cross motions for summary decision filed in accordance with Commission Rule 64, 29 C.F.R. 2700.64. (FN.1) The parties also proposed that if I find Respondent is covered by the Act, the case be settled for the full $142 amount recommended by Petitioner.

The parties stipulated, and I find:

1. I have jurisdiction over this matter and will decide whether Respondent is covered by the Act. Respondent reserves the right to appeal this decision.

2. Respondent, a subdivision of the State of Illinois, operates an open pit called the St. Clair Quarry and Mill, located at Lime Kiln Road off Highway 64, two miles west of Oregon, Illinois, on land leased from Mr. Henry St. Clair.

3. Respondent employs a "single bench" mining method to produce limestone. This limestone is crushed, broken and used to maintain the Ogle County Highway System.

4. In connection with this pit, Respondent owns and uses a crusher and a Caterpillar end loader, and uses county highway trucks. It also utilizes between three and five employees, and produced 11,000 tons of limestone in 1979.

5. Respondent's facility has been inspected since 1979 by the U.S. Department of Labor. Prior to 1979, the facility was inspected, beginning in 1972, by the U.S. Department of the Interior.

6. On November 28, 1979, MSHA Inspector Charles Ambrose conducted an inspection of Respondent's worksite and issued the four citations listed above. On February 6, 1980, MSHA proposed a total of $142 in penalties for these citations.

7. Respondent is not contesting the citations or the penalties in this matter. The only issue in dispute is whether Respondent is covered by the Act.

The Interstate Commerce Issue

Respondent contended that "it is not subject to the Act because [its] activities are purely intrastate and do not affect interstate commerce." In order to decide on this question, it is necessary to examine the constitutional underpinnings of Federal jurisdiction over the mining industry.

Article I, Section 8, Clause 3 of the Constitution gave Congress the power to "regulate Commerce * * * among the several States * * *." The U.S. Supreme Court has a long history of upholding Federal regulation of ostensibly local activity on the theory that such activity may have some effect on interstate commerce.

In Wickard v. Filburn, 317 U.S. 111 (1942), the Court upheld a Federal law regulating the production of wheat which was "not intended in any part for commerce but wholly for consumption on the farm." Id. at 118. The Court stated that:

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> [E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect".

Id. at 125.

In 1975, the Court elaborated on this idea, stating that "[e]ven activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations." Fry v. United States, 421 U.S. 542, 547 (1975). More recently, the Seventh Circuit Court of Appeals relied upon Wickard when it said that the commerce clause "has come to mean that Congress may regulate activities which affect interstate commerce." United States v. Byrd, 609 F.2d 1204, 1209 (7th Cir. 1979) (Emphasis in original.)

These principles have often been relied on by the lower courts in ruling on the coverage of the present Act and its predecessor, the Federal Coal Mine Health and Safety Act of 1969. (FN.2) One leading case is Marshall v. Kraynak, 457 F. Supp. 907 (W.D. Pa. 1978), aff'd, 604 F.2d 231 (3d Cir. 1979), cert. denied, 444 U.S. 1014 (1980). There, the Court upheld the applicability of the 1969 Act to a small mine which was owned and operated entirely by four brothers. No other personnel had worked there for at least seven years and the brothers had no intention of hiring other employees in the future. The brothers contended that all of the coal which they mined was sold and consumed within the State of Pennsylvania and did not involve interstate commerce. Id. at 908. The defendants admitted, however, that more than 80 percent of their production was sold to a paper processing corporation which was "actively engaged in interstate commerce." Id. at 909. The Court held that

"the selling by the defendants of over 10,000 tons of coal annually to a paper producer whose products are nationally distributed enters and affects interstate commerce within the meaning of * * * the Act." Id. at 911.

A similar case was Secretary of the Interior v. Shingara, 418 F. Supp. 693 (M.D. Pa. 1976), involving a mine which was operated entirely by two brothers, Edward and Frederick Shingara. In the words of the Court, "Edward [went] underground, while Frederick [did] the hoisting." Id. at 694. The Court found that the fruits of their labor were sold as follows:

> The Shingara coal is sold primarily to Calvin V. Lenig of Shamokin, Pennsylvania who resells it, along with other coal which he has gathered, to Keystone Filler and Manufacturing Co., Inc. of Muncy, Pennsylvania and Mike E. Wallace of Sunbury, Pennsylvania. Keystone Filler combines the Shingara-Lenig coal with others in order to achieve a particular ash content, dries the mixture, and grinds it into a powder which is shipped to customers outside of Pennsylvania.

Id. The Court stated that "[a]lthough the activity in question here may seem on first examination to be local, it is within the reach of Congress because of its economic effect on interstate commerce." Id. The Court compared the facts of the case to the facts in Wickard and concluded that "the Shingara coal mining activity, which has an even more direct impact on the coal market, also "affects commerce' sufficiently to subject the mine from which it emanates to federal control." Id. at 695.

In both Kraynak and Shingara, the coal in question was being sold to parties who were engaged in interstate commerce. In other mining cases, such facts were not shown, but the courts nevertheless utilized the seminal Wickard decision to find that the activities in question "affected commerce." Marshall v. Kilgore, 478 F. Supp. 4 (E.D. Tenn. 1979), involved a specific agreement between the owner of a coal mine and his buyer that the latter would sell the coal only within the state and not place any of it into interstate commerce. In holding that interstate commerce was still affected, the Court went back to the following passage from Wickard:

> It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and if reduced by rising prices tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce.

478 F. Supp. at 7, citing 317 U.S. at 128. Using this rationale,

the Kilgore Court found that:

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> [I]t is inescapable that the product of the defendant's mine would have an affect [sic] on commerce. The fact that the defendant's coal is sold only intrastate does not insulate it from affecting commerce, since its mere presence in the intrastate market would effect [sic] the supply and price of coal in the interstate market.

478 F. Supp. at 7. See also Marshall v. Bosack, 463 F. Supp. 800, 801 (E.D. Pa. 1978) ("The Act does not require that the effect on interstate commerce be substantial; any effect at all will subject [the operator] to the Act's coverage.")

I am aware of only one case where a Court held that a mine did not affect commerce within the meaning of the Act. Morton v. Bloom, 373 F. Supp. 797 (W.D. Pa. 1973), involved a one-man mine which had no employees. The coal which the defendant produced was sold "exclusively within Pennsylvania." Id. at 798. The Court held that this operation was not the type which Congress intended to cover when it enacted the statute. Id. More significantly, the Court found itself unable to conclude "that defendant's one-man mine operation will substantially interfere with the regulation of interstate commerce." Id. at 799. Even under the Wickard standard, the Court stated that the mine was "one of local character in which the implementation of safety features required by the Act will not exert a substantial economic effect on interstate commerce." Id.

I have carefully reviewed the Court's reasoning in Bloom, and I conclude that it should not be followed in the instant matter. First, I do not believe the Court properly considered all of the possible means by which the Bloom operation could have affected interstate commerce. At one point in the opinion, the Court noted that the "defendant does use some equipment in his mine which was manufactured outside of Pennsylvania * * *." 373 F. Supp. at 798. The Court found that this did not bring the defendant's mine within the ambit of the commerce clause since the purchase of this equipment was "so limited that its use would be de minimis." Id. This reasoning, in my view, runs directly contrary to the Supreme Court's statement in Mabee v. White Plains Publishing Company, 327 U.S. 178, 181 (1946), that the de minimis maxim should not be applied to commerce clause cases in the absence of a Congressional intent to make a distinction on the basis of volume of business. And, as the Court noted in Bosack, the Mine Safety Act does not require that the effect on interstate commerce be substantial. See 463 F. Supp. at 801.

Secondly, and perhaps more importantly, the Court in Bloom did not consider the effects which many one-man coal mining operations, taken together, might have on interstate commerce. Going back once again to the Wickard case, the Supreme Court held that even if the wheat in question was never marketed, "it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce." 317 U.S. at 128.

After a careful review of the facts stipulated by the parties, and the relevant case law on the interstate commerce issue, I find Respondent to be covered by the Act.

Decision and Order Approving Settlement

As stated above, the parties agreed that if Respondent is covered by the Act, they would settle the case for the full $142 amount proposed by MSHA. The settlement motion submitted by the parties contained an analysis of the six criteria in Section 110(i) of the Act as they relate to each of the citations. Specifically, the parties' motion stated that each violation resulted from ordinary negligence on the part of Respondent, and that Respondent "took extraordinary steps to gain compliance" by remedying each of the situations giving rise to the citations listed above. In light of this information, I find that the proposed settlement is sufficiently substantial to effectuate the purposes and policies of the Act and I approve it.

ORDER

Respondent is ORDERED to pay $142 in penalties within 30 days of the date of this Order as follows:

Citation No.	Penalty
356901	$ 32
356902	$ 44
356903	$ 32
356904	$ 34
Total:	$142

Edwin S. Bernstein
Administrative Law Judge

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(FOOTNOTES START HERE.)

~FOOTNOTE_ONE
1 In an Order dated November 17, 1980, the parties were directed, inter alia, to file cross motions for summary decision and supporting briefs no later than December 15, 1980. No motion or brief has been received from Respondent. Therefore, this case will be decided on the basis of Petitioner's brief and the arguments made by Respondent in various earlier submissions.

~FOOTNOTE_TWO
2 Section 4 of the 1969 Act, which was substantially unchanged by the 1977 Amendments Act, provided:

"Each coal 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."

Section 3(b) of the 1969 Act, which was not amended by the 1977 Amendments Act, defined "commerce" as:

"[T]rade, traffic, commerce, transportation, or communication among the several States, or between a place in a State and any place outside thereof, or within the District of Columbia or a possession of the United States, or between points in the same State but through a point outside thereof."

It is clear that in enacting mine safety legislation, Congress intended "to exercise its authority to regulate interstate commerce to "the maximum extent feasible through legislation'." Secretary of the Interior v. Shingara, 418 F. Supp. 693, 694 (M.D. Pa. 1976), quoting S. Rep. No. 1055, 89th Cong., 2d Sess. 1 (1966), reprinted in (1966) U.S. Code Cong. & Ad. News 2072.