CCASE:
SOL (MSHA) v. MADISON GRANITE
DDATE:
19810327
TTEXT:

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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceedings Docket No. WEST 80-101-M A/O No. 02-01510-05003
v.	
MADISON GRANITE COMPANY, RESPONDENT	Docket No. WEST 80-426-M A/O No. 02-1510-05005 Docket No. WEST 80-485-M A/O No. 02-01510-05006 Docket No. WEST 80-484-M A/O No. 02-01510-05007V Crushed Granite Operations

DECISION

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner, MSHA;
W. T. Elsing, Esq., Phoenix, Arizona, for Respondent, Madison Granite Company.

Before: Judge Merlin

These cases are petitions for the assessment of civil penalties filed by the Government against Madison Granite Company. Pursuant to the agreement of counsel, these cases were consolidated for hearing and decision. A hearing was held on March 3, 1981.

Prior to going on the record, the parties agreed to the following stipulations (Tr. 4-5):

(1) The operator is the owner and operator of the subject mine.

(2) The operator and the mine are subject to the jurisdiction of the Act, and I have jurisdiction of these cases, subject, however, to the filing of briefs by the parties on the issue of whether coverage actually exists pursuant to the Commerce Clause of the Constitution. I, therefore, reserved

ruling on this question, and in accordance with the request of the parties, afforded them 20 days from the date of the close of the hearing to submit briefs on this issue.

(3) The inspector who issued the subject citations was a duly authorized representative of the Secretary, and the operator's witnesses are accepted as experts, generally, in mine health and safety.

(4) True and correct copies of the subject citations and order were properly served upon the operator.

(5) The imposition of any penalty herein will not affect the operator's ability to continue in business.

(6) All alleged violations were abated in good faith except for the one violation where a withdrawal order was issued.

(7) The operator's history of prior violations is moderate.

(8) The operator's size is small.

At the hearing, documentary exhibits were received and witnesses testified on behalf of MSHA and the operator (Tr. 6-148). Decisions were rendered from the bench setting forth findings, conclusions and determinations with respect to each alleged violation. At the close of the hearing, I stated that these decisions would not be affirmed until I had considered the parties' briefs concerning the issue of whether or not this mine was covered by the Act pursuant to the Commerce Clause of the Constitution. The parties have, however, failed to file briefs concerning this issue and have not given any explanation for their failure to do so.

Despite the parties' failure to submit briefs, I have considered the coverage issue and have determined that the operator is properly subject to the Act. As the Chief Judge of this Commission has stated, Congress intended to exercise its full authority under the Commerce Clause when it enacted this statute. Secretary of Labor v. Cash & Carry Gravel, Inc., LAKE 80-48-M (November 13, 1980). In the request for admissions which respondent answered and which were made a part of the record by agreement of the parties, respondent stated that the products excavated from the subject facility are sold commercially within the State of Arizona. In Marshall v. Kilgore, 478 F. Supp. 4 (E.D. Tenn. 1979), the court held that the fact that the defendant's coal was sold only intrastate did not insulate it from affecting commerce since its mere presence in the instrastate market would affect the supply and price of coal in the interstate market. See the decision of Judge Bernstein of this Commission in Secretary of Labor v. Rockite Gravel Company, LAKE 80-130-M (December 4, 1980) and all the decisions cited therein. Moreover, the respondent has admitted that in the performance of excavation, its employees handle, use, or otherwise work with machinery and equipment which is manufactured or produced outside the State of Arizona. I believe the purchase

and utilization of this equipment further supports the determination that the

operator is covered under the Act. Judge Bernstein specifically considered this issue and I adopt his rationale. Therefore, the bench decisions which appear hereinafter are hereby affirmed. The bench decisions are as follows:

Docket No. WEST 80-101-M

Citation No. 380220 was issued when the inspector found no one at the mine trained to give first aid in case of an accident, a violation of 30 C.F.R. 55.18-10. After hearing testimony from the inspector and the operator's assistant to the president, I found that a violation existed. I held that the violation was of moderate gravity, accepting the testimony of the operator's witness with regard to the proximity of the nearest hospital (Tr. 12). Finally, I found the operator negligent, but held that the operator's negligence was mitigated by the fact that this citation had been issued during only the second inspection of this operator under the Act. In light of the foregoing and particularly bearing in mind the operator's small size, I assessed a penalty of $40 (Tr. 13-14).

Citation No. 379242 was issued when the inspector found that records of the continuity and resistance readings of the electrical grounding system were not available at the plant, a violation of 30 C.F.R. 55.12-28. After hearing testimony from the inspector, I found that a violation did exist for the failure to keep records. I found that this was not a serious violation because the witness testified that the citation was issued for a failure to have the required records, and not for a failure to perform the required tests (Tr. 16). I further found the operator to be guilty of ordinary negligence. In light of the foregoing and bearing in mind the operator's small size, I assessed a penalty of $10 (Tr. 16).

Docket No. WEST 80-426-M

Citation No. 383582 was issued when the inspector observed that the employee operating the D-8 Caterpillar dozer was being exposed to 764 percent of the permissible limit for noise during his work shift and that feasible engineering or administrative controls were not being used to reduce the noise level in order to eliminate the need for the use of hearing protection, a violation of 30 C.F.R. 56.5-50(b). After two extensions of the termination due date, 104(b) Withdrawal Order No. 382390 was issued because of the operator's failure to abate this violation. The inspector who issued the citation testified that he conducted a full-shift noise survey of this dozer and determined that the operator of the dozer was being exposed to 764 percent of the permissible noise level (Tr. 20). He testified that most of the noise seemed to be coming from the floorboard near the firewall of the dozer, and that the operator of the dozer was wearing an earplug-type of hearing protection (Tr. 22-23). MSHA's Western District Health Specialist testified that an engineering package was available to the operator at a cost of less than $1,000 that would result in quite a significant reduction in noise exposure to the operator of the dozer, such that the piece of equipment

would almost be in compliance with the regulation (Tr. 35-36). He testified that excessive noise exposure of this type would ultimately result in hearing loss (Tr. 40), and that the

danger of hearing loss existed even though the dozer operator was wearing ear protection (Tr. 40). The supervisory mine inspector of MSHA's Phoenix field office testified that he issued the withdrawal order concerning this piece of equipment because the plant foreman told him the operator had refused to install the necessary controls (Tr. 47). The assistant to the president of the operator testified that measures were taken to control the noise problems on the dozer (Tr. 49). On cross-examination, he stated that it was "very possible" that these measures were implemented after the withdrawal order for failure to abate had been issued (Tr. 51). The testimony from MSHA regarding the feasibility of noise controls was uncontradicted. After considering the testimony concerning this citation, I found that a violation existed (Tr. 54). I found this violation to be serious because of the danger of permanent hearing loss to the operator of the equipment, but that the seriousness of this violation was somewhat mitigated by the wearing of ear protection (Tr. 55). I further concluded that the operator had failed to abate this violation in good faith. The statement by the foreman that he was not using the bulldozer does not support the inference that it had been taken out of service. There is a substantial difference between a piece of equipment not being used at the moment and that same piece of equipment being taken out of service (Tr. 55). After again taking into account the operator's small size and moderate history of previous violations, I assessed a penalty of $350 (Tr. 56).

Citation No. 383583 was issued when the inspector observed that the operator of the 619C Caterpillar scraper was exposed to 277 permissible limit for noise during his work shift and that feasible engineering or administrative controls were not being used to reduce the noise level, a violation of 30 C.F.R. 56.5-50(b). This violation was terminated without the issuance of a withdrawal order when this piece of equipment was permanently removed from service. Most of the testimony taken for Citation No. 383582 concerned this citation as well. In addition, the inspector testified that the operator of this piece of equipment was subject to 277 percent of the permissible noise level (Tr. 25). MSHA's health specialist testified that an engineering package similar to that for the dozer was available for the scraper as well, which testimony was uncontradicted (Tr. 38-39). MSHA's supervisory inspector testified that he observed this scraper after the plan foreman told him it had been removed from service and it appeared to him that various parts, including tires, had been removed from the scraper and it had been retired from service (Tr. 48). For the same reasons set forth concerning Citation No. 383582, I found that a violation also existed with regard to the scraper. I found this violation to be of moderate gravity because the level of noise the equipment operator was exposed to was not as great as it was for Citation No. 383582 and because the operator was wearing ear protection. Again, taking into account the operator's small size and moderate history of violations, I assessed a penalty of $60 (Tr. 56).

Citation No. 371208 was issued when the inspector observed that a tail pulley of a conveyor was not guarded, a violation of

30 C.F.R. 56.14-1. The inspector testified that there was a walkway right next to the conveyor which allowed people to come in close proximity to the conveyor (Tr. 59). He stated that six or seven people worked in the area at a variety of jobs (Tr. 60). He further testified that this lack of guarding was in plan view (Tr. 61), and

stated that on each previous inspection of this plant, the operator had received citations for guarding violations (Tr. 64). Based upon this testimony, I found a violation existed. I found the violation was serious and the operator negligent. Considering all of the criteria, including the operator's small size, I assessed a penalty of $100 (Tr. 66).

Citation No. 371217 was issued when the inspector observed another unguarded tail pulley, a violation of 30 C.F.R. 56.14-1. The inspector testified that there was guarding along the sides of this pulley but not behind the pulley, and that what guarding did exist was inadequate in that a person could reach around the sides of the guards (Tr. 66-67). He also testified that the pulley was located in an area where persons could come in contact with it and that it would be very easy to guard these tail pulleys (Tr. 67-68). Based upon the testimony, I found a violation existed. I found that negligence and gravity were mitigated somewhat by the fact that there was some guarding around the sides of the tail pulley. Accordingly, I assessed a penalty of $75 (Tr. 73).

Citation No. 371213 was issued when the inspector observed another unguarded tail pulley, a violation of 30 C.F.R. 56.14-1. The inspector testified that this pulley was unguarded and was easily accessible to persons (Tr. 74). Based upon this testimony, I found a violation existed. I found the violation was serious, the operator negligent, and assessed a penalty of $100 (Tr. 75).

Citation No. 382392 was issued when the inspector observed that a guard was not provided for a portion of the V-belt drive of the sand return conveyor, a violation of 30 C.F.R. 56.14-1. The inspector testified that this drive was unguarded and that there was a platform located 6 feet below the drive on which people could walk which made the drive accessible to persons (Tr. 76). He also testified that because the drive is 6 feet above the platform, a person would have to reach up to contact the belt drive and become entangled in it (Tr. 76). Based upon this testimony, I found a violation existed. I found the operator negligent, the violation serious, although the gravity was mitigated by the belt drive being located 6 feet above the platform, and assessed a penalty of $75 (Tr. 79).

Citation No. 371219 was issued when the inspector observed that oxygen bottles were not secured, a violation of 30 C.F.R. 56.16-5. The inspector testified that two full oxygen bottles were not secured since they were not chained up (Tr. 84). He stated that the bottles could be tipped over rather easily and the caps could be knocked off, which would release the oxygen (Tr. 84). He testified that the operator should have known about this and secured these bottles (Tr. 85). The assistant to the president of the operator testified that the caps were screwed on the bottles, and it would be very difficult for the caps to come off the bottles (Tr. 86). He further testified that since the bottles were full they must have just been delivered and the operator simply had not got around to placing them in the rack

(Tr. 87). Based upon the testimony, I found that a violation had occurred. I found that the violation was potentially serious but that the gravity was substantially

mitigated because the cylinders would have to fall over and the tops come off before the cylinders would be "set off." Finally, I accepted the operator's testimony that the two bottles had not been there very long, which substantially mitigated the factor of negligence. I assessed a penalty of $30 (Tr. 89).

Citation No. 371220 was issued when the inspector observed a front-end loader to be without an operable backup alarm, a violation of 30 C.F.R. 56.9-2. The inspector testified that a backup alarm was present but was inoperable (Tr. 89). The Solicitor stated that the Government had no evidence with regard to how long this had been inoperable and therefore could not sustain a charge of a high degree of negligence (Tr. 91). Based upon this testimony, I found a violation existed. I found the violation was serious, and accepted the Solicitor's representation concerning the degree of negligence. Accordingly, I assessed a penalty of $60 (Tr. 91).

Docket No. WEST 80-484-M

Order No. 371216 was issued when the inspector observed that a tail pulley guard was not provided for the conveyor leading from the shaker screen, a violation of 30 C.F.R. 56.14-1. The inspector testified that this unguarded tail pulley was located on ground level where persons could easily contact the moving parts (Tr. 80). The inspector stated that the foreman knew this condition existed but he had not had the time to correct it (Tr. 81). Based upon this testimony, I found a violation occurred. I found that the operator was negligent and the violation was serious, and I assessed a penalty of $125 (Tr. 82).

Citation No. 371210 was issued when the inspector observed that various roadways were without berms, a violation of 30 C.F.R. 56.9-22. This citation concerned three different locations that were alleged to have been without berms. Both the inspector and the operator's assistant to the president testified with regard to this citation. The first location was the roadway leading to where equipment is refueled. Based upon the inspector's undisputed testimony that there was no berm at this location (Tr. 93), I found a violation existed. I found this violation was serious. Based upon the testimony of the operator's assistant to the president that there had previously been a berm but that a new road had recently been cut and a new berm had not yet been installed (Tr. 105), I found the negligence of the operator mitigated. At the other two locations, the feed hopper area and the roadway leading to the feed hopper, I accepted the testimony of the inspector who was present at the time the citation was issued, to the effect that the area in question was not an intersection (Tr. 115), and rejected the contrary testimony of the operator's witness, who was not present at the time the citation was issued (Tr. 110). Based upon that testimony, I found a violation existed. I found the condition to be serious and the operator negligent. Based upon the foregoing, I assessed a penalty of $250 (Tr. 120).

Order No. 382391 was issued when the inspector observed a

conveyor without emergency stop guards along the rollers of the conveyor, a violation of

30 C.F.R. 56.9-7. The inspector testified that a travelway existed where a person could come in close proximity to the moving conveyor rollers (Tr. 122). He stated that emergency stops or a handrail had once been in place here, but they had deteriorated (Tr. 123). All plant personnel would be exposed to this hazard (Tr. 124), since they regularly walked along this travelway (Tr. 127-128). Based upon this testimony, I found that a walkway existed within the meaning of the standard and that a violation did exist. I further found that the operator was negligent and that the violation was serious. Based upon the foregoing and the operator's small size and moderate history, I assessed a penalty of $100 (Tr. 129).

Docket No. WEST 80-485-M

Citation No. 371211 was issued when the inspector observed that strain relief clamps had not been provided for wiring at two locations, a violation of 30 C.F.R. 56.12-8. The inspector testified that the wires leading into the motor of the short hopper conveyor were not properly insulated to protect the equipment from being energized (Tr. 130). He further testified that this condition was visible (Tr. 123). Based upon this uncontradicted testimony, I found that a violation existed at both locations. I found that the violation was serious and the operator negligent. I assessed a penalty of $150 (Tr. 142).

Citation No. 382393 was issued when the inspector observed that records were not kept of daily inspections for conditions which could adversely affect safety and health, a violation of 30 C.F.R. 56.18-2(b). Based upon the testimony of the inspector, I found a violation existed. I further found the operator negligent and this violation to be nonserious. Based upon the foregoing and the operator's small size, I assessed a penalty of $20 (Tr. 144).

Citation No. 383368 was issued for a failure to maintain a record of tests measuring the continuity and resistance of the grounding system, a violation of 30 C.F.R. 56.12-28. The inspector testified that the foreman had told him that these records should be kept at the main office, but that the last safety director had quit and had lost the records (Tr. 144). Based upon the inspector's testimony, I found that a violation existed. I found the violation was nonserious and that the operator was negligent. I assessed a penalty of $20 (Tr. 148).

ORDER

The foregoing bench decisions are hereby AFFIRMED. The operator is ORDERED to pay $1,565 within 30 days from the date of this decision.

Paul Merlin
Assistant Chief Administrative Law Judge