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SOL (MSHA) v. CONCRETE MATERIAL
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Federal 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 79-83-M ASSESSMENT CONTROL NO. 39-00225-05002
v.	
	DOCKET NO. CENT 79-84-M ASSESSMENT CONTROL NO. 39-00225-05003
CONCRETE MATERIALS COMPANY, RESPONDENT	BRANDON ROAD PIT & MILL NO. 1

DECISION

APPEARANCES: Eliehue C. Brunson, Esq., Office of the Solicitor, United States Department of Labor, 911 Walnut Street, Kansas City, Missouri 64106, for the Petitioner; William G. Taylor, Esq., of WOODS, FULLER, SHULTZ & SMITH, 310 South First Avenue, Sioux Falls, South Dakota 57102, for the Respondent.

Before: Judge Virgil E. Vail

INTRODUCTION:

This case, heard under the provisions of the Federal Mine Safety and Health Act of 1977 30 U.S.C. 801 et seq. [hereinafter the Act], arose out of an inspection conducted by representatives of petitioner on October 2, 1978 at respondent's mine near Sioux Falls, South Dakota. As a result of the inspection, two citations and a withdrawal order were issued.

Citation 329050 charges that respondent violated 30 CFR 56.9-87 (FN.1) because a 1971 Chevrolet dump truck, owned by Midwest Excavating Company and leased to respondent, was not equipped with an automatic reverse signal alarm. A penalty of $106.00 was proposed in connection with this citation.

Citation 329067 charges that respondent violated 30 C.F.R. 56.9-2 (FN.2) because a 1967 International dump truck, owned by Midwest Excavating Company and leased to respondent, was not equipped with operating stop lights. A penalty of $72.00 was proposed in connection with this citation.

Citation and withdrawal order number 329068, issued pursuant to 104(a) and 107(a) of the Act, charge that respondent violated 30 C.F.R. 56.9-87 because the 1967 International dump truck was not equipped with an automatic reverse alarm. A specially assessed penalty of $1,000 was proposed in connection with this order. (FN.3)

The parties stipulated that the violations were in fact committed on respondent's property, and that the violations involved vehicles and equipment belonging to an independent contractor as well as its employees (Tr. 4, 5). (FN.4) Respondent contends, however, that as a matter of law it should not be found in violation of the cited standards. First, respondent argues, the premises upon which the violations were committed are not a "mine" within the meaning of the Act, and that the Act, therefore, does not apply. In the alternative, respondent argues that the proper party to have been cited in this case was Midwest, an independent contractor, not respondent, the mine owner. Finally, respondent contends that the policy of citing the mine owner for violations committed by its independent contractor is properly applied only where the employees of the independent contractor are exposed to hazards contemplated by the Act.

Although respondent apparently advances three independent arguments, there are actually only two issues to be decided in this case: Were the violations committed at a "mine" as defined by the Act? Was respondent-owner the proper party to have been cited?

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FACTS:

Respondent owns and operates a sand and gravel pit near Sioux Falls, South Dakota. The entrance to the premises is located approximately one mile southeast of the pit (Tr. 88). Immediately inside the entrance there is an unobstructed, flat area, referred to as the sales area. At the south end of the sales area there is a scale house; toward the north end of the sales area several stockpiles of sand and gravel form an arc which protrudes into the sales area from northwest to southeast. Approximately twenty feet northwest of the stockpiles, in the "pocket" of the arc, is a machine which cleans and classifies the material (Tr. 50, 99; respondent's exhibit 1). The pit is approximately three quarters of a mile northwest of the classifier. Material is transported from the pit to the classifier on a conveyor belt.

Workers check in and out, and receive instructions at the scale house (Tr. 30). Customers (both retail and commercial) drive trucks to the scale house, are weighed-in empty, and then proceed approximately two hundred feet to the north end of sales area where they back up to the stockpiles of sand and gravel. The trucks are loaded by respondent's front end loader (Tr. 65), and then weighed again at the scale house before they exit (Tr. 14, 32, 89, 100). Customers are not permitted outside the sales area (Tr. 90, 114).

On September 28, 1978, a truck owned by the independent contractor Midwest Excavating Company and driven by its employee William Crowder entered respondent's premises and backed up to the stockpiles. Mr. Crowder got out of the truck and was checking under the hood when a second truck owned by Midwest Excavating Company backed into him (Tr. 80, 108).

On October 2, 1978, Richard White and Wilbur Synhorst, inspectors representing the Mine Safety and Health Administration, entered respondent's premises to investigate the accident (Tr. 26). Mr. White inspected a 1971 Chevrolet dump truck located in the stockpile area (Tr. 33), and issued a citation charging that the truck was not equipped with an automatic reverse signal alarm (Tr. 28). Mr. Synhorst issued a citation charging that a 1967 International dump truck, also located in the stockpile area, was not equipped with operating brake lights. He also issued a withdrawal order charging that the same truck lacked an automatic reverse signal alarm (Tr. 13, 45, 77). These two trucks were owned by the independent contractor Midwest Excavating Company.

LAW:

1. Jurisdiction:

The jurisdictional issue in this case is whether the sales area on respondent's premises is part of a "mine" as defined by the Act. Respondent argues that it is not because the sand and gravel is not extracted or prepared there.

The Act defines "coal or other mine" in Section 3(h)(1) as

> (A) An area of land from which minerals are extracted ... (B) private ways or roads appurtenant to such area, and (C) lands, excavations, underground passageways; shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property ... used in, or to be used in or resulting from ... the work of preparing coal or other minerals, ... [Emphasis added].

The Act defines "work of preparing the coal" in section 3(i) as

> [t]he breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and loading of bituminous coal, lignite, or anthracite, and such other work of preparing coal as is usually done by the operator of the coal mine.

Respondent argues that since "work of preparing the coal" is defined broadly, the "preparation of other minerals", which is left undefined by the Act, should be interpreted narrowly; thus, respondent argues, the sales area does not fall within the Act's definition of "mine" because no extraction, milling, crushing or washing of minerals takes place there.

To narrowly construe the term "preparation of other minerals," as contended by respondent, would violate the intent of the Act. Congress passed the Federal Mine Safety and Health Act of 1977 to consolidate and strengthen the enforcement of existing legislation governing coal, metallic, and non-metallic mines. Federal Mine Safety and Health Amendments Act of 1977 S. Rep. No. 181, 95th Cong. 1st Sess. 1-6, reprinted in [1977] U.S. Code Cong. & Ad. News 3401-06. Commenting on the broad definition of "mine", the Senate Committee stated that "what is considered to be a mine and to be regulated under this Act is to be given the broadest possible interpretation and that doubts are to be resolved in favor of inclusion of a facility within the coverage of the Act." This statement indicates that the definition of a mine, and particularly the term "preparing .... other minerals," should be construed broadly.

A broad definition of "mine" was recently applied by the Third Circuit Court of Appeals in Marshall v. Stoudt's Ferry Preparation Company 602 F. 2d 589 (1979), Cert denied ___ U.S. ___, January 7, 1980. In that case, the company purchased material dredged from a riverbed by the Commonwealth of Pennsylvania and transported the material to its plant, where it was processed into two piles. The company contended its premises were not a "mine" under the Act because the activities did not include the extraction or preparation of minerals.

The court rejected the argument and stated in part as follows:

> We agree with the district court that the work of preparing coal as other minerals is included within the Act whether or not extraction is also being performed by the operator. Although it may seem incongruous to apply the label "mine" to the kind of plant operated by Stoudt's Ferry, the statute makes clear that the concept that was to be conveyed by the word is much more encompassing than the usual meaning attributed to it - the word means what the statute says it means - moreover, the record also establishes that the Company processes and sells the sand and gravel it separates from the material dredged from the river. We are persuaded, as was the district judge, that in these circumstances the sand and gravel operation of the company also subjects it to the jurisdiction of the Act as a mineral preparation facility (emphasis added).

I find that the stockpiling and loading of material by the respondent in this case is covered under the Act and falls with MSHA jurisdiction.

2. Proper Party -- Independent Contractor Issue:

The respondent argues that the employees of the independent contractor, Midwest Excavating, were not exposed to mining hazards, and that respondent was therefore not subject to the jurisdiction of the Act. Further, respondent argues that acts of an independent contractor cannot create vicarious liability on the part of the mine owner (respondent's letter dated October 21, 1980).

The issue of whether a mine owner may be cited for violations committed by an independent contractor was considered by the Federal Mine Safety and Health Review Commission in the case of Secretary of Labor (MSHA) v. Old Ben Coal Company, 1 FMSHRC 1480, (1979), wherein the Commission stated as follows:

> When a mine operator engages a contractor to perform construction or services at a mine, the duty to maintain compliance with the Act regarding the contractor's activities can be imposed on both the owner and the contractor as operators. This reflects a congressional judgment that, insofar as contractor activities are concerned, both the owner and the contractor are able to assure compliance with the Act. Arguably, one operator may be in a better position to prevent the violation. However, as we read the statute, this issue does not have to be decided since Congress permitted the imposition of liability on both operators regardless of who might be better able to prevent the violation. Old Ben, supra. at 1483.

See also Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Republic Steel Corporation, (Docket No. IBMA 76-28, April 11, 1979); Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Kaiser Steel Corporation, (Docket No. DENV 77-13-P, May 17, 1979); Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Monterey Coal Company, (Docket No. HOPE 78-469, November 13, 1979).

The Commission further stated in Secretary v. Old Ben Coal Company, supra at 1483 that contractors can be proceeded against and held responsible for their own violations.

At the time the citations were issued, the Secretary of Labor was following his interim enforcement policy of citing only owner-operators for violations committed by their independent contractors. Subsequently, the Secretary published new enforcement guidelines as to when he will cite independent contractors, when he will cite owner-operators, or when he will cite both, either jointly or severally, for violations committed by independent contractors. 45 F.R. 44, 494-98 (1980). In Secretary of Labor (MSHA) v. Pittsburg and Midway Coal Mining Company, (Docket No. BARB 79-307-P, (August 4, 1980), the Commission ruled that in light of the new regulations, the Secretary should be afforded an opportunity to continue to prosecute citations against the operator, independent contractor or both. In my order dated August 28, 1980, I afforded the Secretary such an opportunity in this case. Pursuant to that order, the Secretary determined to proceed solely against Concrete Materials Company.

Since the Secretary has determined to proceed solely against the mine operator, the Old Ben decision is controlling; thus, the operator in this case, Concrete Materials Company, must bear the responsibility for the citations issued against it for the violations of the mandatory safety standards committed by its independent contractor.

3. Penalty:

The parties further stipulated that respondent is a small operator, abated the violations in good faith, and committed one violation within the twenty-four month period preceding the investigation of October 2, 1978 (Tr. 5, 40).

Respondent contends that since Midwest committed the violations, negligence should not figure into a penalty determination. The authority, however, is to the contrary, and supports the proposition that the negligence of an independent contractor may be imputed to the mine owner. Secretary of Labor v. Buffalo Mining Company, 1 MSHC 2266, 2268 (December 10, 1979).

With respect to citation 329068, however, no evidence of negligence was presented at the hearing. If the 1967 International truck were shown to have been involved in the accident, then the absence of a reverse signal alarm four days later would be evidence of negligence. But petitioner failed to establish any connection between the violations and the accident.5 Although Mr. White testified that the International truck was involved in the accident (Tr. 13), he admitted that he had not witnessed the accident and that his information was based solely on what he had learned from other people (Tr. 76, 77). Mr. White also testified that he had not asked respondent to produce the truck involved in the accident; that he just assumed that the trucks involved in the accident on September 28 would be on respondent's premises four days later (Tr. 38, 29; also see 46, 52, 53, 62). No other evidence of negligence was presented.

Since petitioner failed to establish that one of the trucks cited on October 2 had been involved in the accident of September 28, the evidence concerning the cause of the accident (which, incidentally, was contradictory) proves little, if anything, about the gravity of the violations.

The $1,000.00 penalty proposed in connection with citation 329068 assumes that the truck which was cited was also involved in the accident. The record does not establish this connection; a $1,000.00 penalty is, therefore, not warranted. Upon considering the evidence concerning the six statutory penalty criteria set out in 110(i) of the Act, I find that $100.00 is an appropriate penalty. The evidence, however, does support the Secretary's proposals made in connection with citations 329050 and 329067; $102.00 and $72.00 respectively.

CONCLUSIONS OF LAW

1. The violations alleged in citations 329050, 329067 and 329068 occurred at a "mine" within the meaning of the Act, and, therefore, properly fell within the jurisdiction of this Commission.

2. Respondent violated 30 C.F.R. 56.9-87 as alleged in citation 329050, and a penalty of $102.00 is appropriate.

3. Respondent violated 30 C.F.R. 56.9-2 as alleged in citation 329067, and a penalty of $72.00 is appropriate.

4. Respondent violated 30 C.F.R. 56.9-87 as alleged in citation 329068, and a penalty of $100.00 is appropriate.

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ORDER

Pursuant to the foregoing, it is ORDERED that the penalty proposals made in connection with citations 329050, 329067 and 329068 are affirmed. It is further ORDERED that respondent pay the sum of $274.00 within 30 days of this order.

Virgil E. Vail
Administrative Law Judge

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~FOOTNOTE_ONE

1 30 CFR 56.9-87 provides: 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.

~FOOTNOTE_TWO

2 30 C.F.R. 56.9-2 provides: Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used.

~FOOTNOTE_THREE

3 Section 107(a) expressly provides that the issuance of an order under that Sub-section does not preclude the issuance of a citation under Section 104 or a penalty proposal under Section 110. In this case, the withdrawal order is also a citation issued pursuant to 104(a). The penalty assessment is based on the 104(a) citation.

30 C.F.R. 100.4 allows the Secretary to waive the conventional penalty procedures and make a special assessment, documented by a set of narrative findings.

~FOOTNOTE_FOUR

4 Respondent had orally contracted with Midwest Excavating Company to have Midwest move sand from respondent's Brandon Pit to its Ready Mix Plant (Tr. 91, 92, 101). Midwest was to provide the trucks and the drivers, and operate and maintain the trucks (Tr. 92). Midwest paid the drivers, supplied the fuel and determined the hours during which the work would be performed (Tr. 92). Although the drivers were sometimes directed toward the stockpiles by Sweetman employees (Tr. 98, 99), the evidence as a whole indicates that Midwest functioned as an independent contractor rather than as respondent's agent.

~FOOTNOTE_FIVE

5 It is important to emphasize at this point that the violation did not consist of the accident but of the failure to install and maintain reverse alarms and brake lights on the truck.