FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JUN 19 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	: Civil Penalty Proceedings : Docket No. VINC 79-93-P : A.O. No. 12-01433-03002
v.		
JOHN L. HAVILAND, ROBERT P. HAVILAND, AND CLEVE RENTSCHLER, d/b/a/ HAVILAND BROTHERS COAL COMPANY,	Respondent	: Docket No. VINC 79-102-P : A.O. No. 12-01433-03003 : Haviland Strip Mine

DECISIONS

Appearances: Rafael Alvarez, Esq., Office of the, Solicitor, U.S. Department of Labor, Chicago, Illinois, for the petitioner; George A. Brattain, Esq., Terre Haute, Indiana, for the respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), charging the respondent with two alleged violations of certain mandatory safety and health standards found in Part 71, Title 30, Code of Federal Regulations. Respondent filed timely answers and a hearing was convened in Terre Haute, Indiana, on July 1, 1980, and the parties appeared and participated therein. In view of a pending court action taken by the Secretary at the time the hearing was conducted, respondent's participation was limited to a jurisdictional argument asserting that respondent is not subject to the Act because it is a small, family-owned business, whose products are sold only intrastate within the State of Indiana, and to a limited cross-examination of petitioner's witnesses. Aside from its jurisdictional arguments, respondent offered no defense to the citations and presented no testimony or other evidence disputing the citations. The hearing was recessed and continued until May 19, 1981, when a second hearing was conducted for the purpose of permitting respondent to present its case. The parties appeared, but the respondent again declined to present any testimony or evidence in defense of the citations, and reasserted its previously advanced jurisdictional arguments.

Attached to, and incorporated by reference herein, is a copy of a previous order issued by me on January 22, 1981, summarizing the arguments presented by the parties at the July 1, 1980, hearing, as well as the testimony and evidence presented by the petitioner in support of its case, and certain stipulations and agreements entered into by the parties, including matters which are part of the record in the litigation pending in the district court.

Issues

In addition to the jurisdictional question, the issues presented in these proceedings are (1) whether respondent has violated the provisions of the Act and implementing regulation as alleged in the proposals for assessment of civil penalties filed in these proceedings, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of these decisions.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Findings and Conclusions

The thrust of respondent's defense in this case is the assertion that it operates a small family-owned mining operation as a part-time venture employing no one but the owners, and that any coal which is mined is sold strictly intrastate to local customers.

. Respondent contends that its operation does not meet the definition of "interstate commerce" as provided by law, and asserts that it is not subject to the Act since its activities are conducted solely within the State of Indiana, and because its activities do not in any way affect commerce. In order to decide 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 regulations 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 "even if appellee's activity be local-&d 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. 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 7 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 Calbin 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 into a powder which is shipped to customers outside of Pennsylvania.

And, at pages 694-695:

> Congress intended to regulate commerce to "the maximum extent feasible through legislation." S. Rep. No. 1055, 89th Cong. 2d Sess. 1 (1966) U.S. CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS, 89th Cong. 2d Sesa. 2072.
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> Even if it were determined that the Shingara coal,does not "enter commerce" it must be concluded, under the extremely expansive intepretations given to the regulatory power of Congress, that the activity in question "affects commerce" and is thereby subject to the Act. Cf. Heart of Atlanta Motel V. U.S., 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed2d 258 (1964); Katzenback v. McClung, 379 U.S. 294, 85 S.Ct, 377, 13 L.Ed.2d 290 (1964). Although 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. See Beckman v. Mall, 317 U.S. 597, 63 S.Ct. 199, 87 L.ed. 488 (1942).

The Shingara 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."

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 induced 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.

The Kilgore Court found it "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").

In Kraynak, the Court rejected the argument that since there were no miners, other than the partners, the Act's provisfons did not apply to the mine, and in so doing stated as follows:

> The legislative history of the Act clearly indicates that Congress did not intend to create a special class of mines exempt from its coverage. The framers were concerned specifically with the Nation's attitude permeating the coal industry that mining was a hazardous occupation. Despite the hazardous nature, the Human Resources Committee was determined that these hazards be substantially reduced or eliminated. 1977 U.S. Code, Cong. and Adm. News, Vol., 3 page 3403. To this effect, the Committee announced that it was essential that there be a common regulatory program for all operators and equal protection under the law for all miners.
>
> By requesting support for differentiation-between owner-operated mines from non-owner miners where employees labor, the defendants seek to place a value on an owner-operator's life as far below that of a miner in any employer-employee setting. The fact that one is part owner of an enterprise does not, in and of itself, give a court leave to allow such an owner the right to expose himself to unnecessary harm where Congress has otherwise directed.

Marshall v. Anchorage Plastering Company and OSAHRC, (9th Cir.), No. 75-2747, February 2, 1978, 6 OSHC, held that a company that used equipment and materials from out of state and used telephone and mails was engaged in business affecting interstate. commerce and is subject to the Occupational Safety and Health Act. The court stated that: "It has been clear since Wickard v. Filburn, 317 U.S. 111 (1942), that an activity which in itself has a minimal effect on commerce is still subject to regulation if similar activities, taken as a whole, might have an impact."

Godwin v. Occupational Safety and Health Review Commission, 540 F.2d 1013 (9th Cir. 1976), involved a company which was clearing land for purposes

of growing grapes. During the administrative adjudication of that case, the Review Commission held that the company was not engaging in a business affecting commerce because at the time of the citation and hearing it had not completed its plans to plant a vineyard and hence had not engaged in a business affecting commmerce. The court reversed the Commission, and, in doing so, cited the Congressional statement of findings and declaration of purpose and policy found in the Occupational Safety and Health Act of 1979, 29 U.S.C. § 651, the legislative history of the Act citing loss of life and injuries resulting from job-related hazards, and other circuit court decisions interpreting the phrase "affecting commerce" which appears in the Act, 29 U.S.C. § 652(5). The court concluded that Congress intended the coverage of the Act to be as broad as the commerce clause, and cited Fry v. United States, 421 U.S. 542 (1975), which held "even 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."

Perez v. United States, 402 U.S. 146 (1971), held that Congress may make a finding as to what activity affects interstate commerce, and by making such a finding it obviates the necessity for demonstrating jurisdiction-under the commerce clause in individual cases. Thus, it is not necessary to prove that any particular intrastate activity affects commerce, if the activity is included in a class of activities which Congress intended to regulate because it finds that the class affects commerce.

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 the Congress intended to cover when it enacted the statute. 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, a6 the court noted in Bosack, the Mine Safety Act does not require that the effect on interstate commerce be substantial. See 463F. 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 purchase6 in the open market. Home-grown wheat in this sense competes with wheat in commerce." 317 U.S. at 128. Similarly, in the instant case, the coal which the respondent supplies to it6 customer supplies the need6 of that customer and'would otherwise be reflected by purchases in the open market. I believe that such a practice in the open market would have enough of an effect, direct or indirect, on commerce to bring respondent within the purview of the commerce clause, and thus the Act. My conclusion in this regard is further supported by the following fact6 adduced in these proceedings.

Judge Noland's order of February 24, 1978, includes a finding that while Log Cabin Coal Company sells the coal it purchases from the respondent to the Logansport Municipal Utility Company, Logansport, Indiana, "there is no evidence concerning the area of customers serviced by the utility" (pg. 5, Judge's Order). However, a deposition by the Mayor of Logansport, taken on March 29, 1978, reflect6 that he also serves a6 the utility 6upervisor. He states that 30 percent of the utility coal 'consumption is purchased from Log Cabin,. that the utility services the city of Logansport, a6 well as an area approximately 5 mile6 surrounding the city in all directions, that the utility ha6 in excess of 12,000 meters encompassing residential, commercial, and industrial customers, excluding approximately 200 street lights. Some of its commercial customers include Alfa Industries; Electric Storage Battery, Krause Milling, Wilson and Company, the General Tire and Rubber Company, and Con-rail, formerly the Penn Central Railroad Company. The Mayor also indicated that there are approximately 18 manufacturing plants in the city, employing 9,000 to 10,000 people.

The Mayor'6 deposition reflects that the public utility operates under the rule6 of the Federal Power Commission, that it is a publicly owned electrical generating utility, and that it also purchases some of ifs coal from Island Creek Coal Company, located in the State of Kentucky. He also indicated that the utility has purchased coal from out of state broker6 during a strike for use by the utility, a6 well a6 from the State of Indiana Public Service Commission. He had no knowledge of the respondent's coal mining operations.

Also included in the record are the March 29, 1978 depositions of Donald D. Kampenga, general manager of Essex Controls Division Electra-Mechanical Group, a subsidiary of United Technologies, a Connecticut Corporation; Edward E. Boyles, Customer Services Supervisor, General Telephone Company of Indiana; and Harry A. Bahnaman, General Manager, Wilson Produce Company, all located in Logansport, Indiana.

Mr. Kampenga testified as to the scope and extent of Essex Control's operations in Logansport, the use of power in the plant, and the fact that its products are sold to the Carrier, Whirlpool, Frigidaire, General Electric, and Westinghouse Corporations, both within and outside the State of Indiana.

Mr. Broyles testified that the General Telephone Company of Logansport supplies local and long-distance service for some 18,000 telephones in its service area, including 2,000 business phones, and that the company purchases power from the Logansport Municipal Utility to change its batteries, which in turn operates the telephone equipment.

Mr. Bahnaman testified that Wilson Product of Logansport is a hog slaughtering and food processing plant which is headquartered in Oklahoma City, Okalhoma. Ninety percent of the products produced in the Logansport plant are shipped outside the State of Indiana by truck and railroad. Power for the operation of the Logansport plant is purchased from the Logansport Utility Company and it is used to operate most of the plant equipment and machinery. The plant is one of the biggest consumers of electricity in Logansport, and it sells products in Iowa, Oklahoma, Minnesota, Kentucky, and Massachusetts. The plant is regulated by the U.S. Department of Agriculture, OSHA, and several State agencies.

The record also contains the March 28, 1978, depositions of John and Robert Haviland, and they include the following testimony.

1. The surface coal mine which is operated and mined by the respondents. consists of approximately 20 acres, five of which have already been mined.

2. The equipment used by the respondents in the mining operation includes a dump truck, tractor, front-end loader, backhoe, and a drag line, all of which is operated by use of diesel full or gasoline.

3. The coal which is mined is loaded onto trucks by means of a loader for sale to the Log Cabin Coal Company.

4. The sales of coal to Log Cabin are consumated by telephone calls initiated by the respondents as well as by Log Cabin, or in person by Log Cabin, and payment is made by Log Cabin by chech which is usually delivered by Log Cabin to the respondents.

5. While no coal has been mined since January 1978, production was curtailed because of a strike and the presence of UMWA pickets at respondents mine. However, respondent intends to continue mining coal and to continue selling its coal to Log Cabin Coal Company.

In addition to the aforesaid depositions of John and Robert Haviland, the record also contains a transcript of their testimony of January 4, 1978, before District Court Judge Noland, as well as the testimony of Cleve Rentschler. That testimony includes the fact that respondents operate a surface strip mine consisting of some 20 acres of coal, that during the calendar year 1977, two acres were mined, yielding 9,000 tons, that the expenses and profits are shared by the three respondents who operate the mine, that for the preceding years of operations, the respondents received eight dollars a ton for the coal which they mined, that they employ no other employees, and that the coal is sold to the Log Cabin Coal Company located in Brazil, Indiana.

In its Memorandum of Points and Authorities in support of its motion for summary judgment filed with the Court, the Secretary makes the following arguments:

1. A search warrant is not required for an inspection conducted by MSHA pursuant to the Act.

2. The operation of a mine is a "Class of Activity" found by Congress to affect interstate commerce. In support of this argument, the Secretary traces the legislative history of the laws regulating the coal mining industry, including an assertion that Congress has rejected coverage of the law based on the number of persons working in a mine, and specifically, found that mining affects interstate commerce.

3. The record in this proceeding clearly establishes that the coal mined by the respondent affects interstrate commerce in that it is consumed at Logansport, Indiana where it is converted to electrical power to. supply part of the needs of the local community of Logansport through a local utility company, as well as the needs of several manufacturers whose products directly enter interstate commerce. The Secretary also notes-that during a 1978 strike when respondents were not mining coal, the Logansport utility was forced to purchase coal from a supplier in the state of Kentucky at higher prices and that this establishes an effect on interstate commerce.

The Federal Coal Mine Health and Safety Act of 1969, and the 1977 Amendments are remedial legislation and should be given a liberal interpretation. This was the intent of the Congress and it has been echoed in several court decisions; See Legislative History, page 1025, "In adopting these provisions, the managers intend that the Act be construed liberally when improved health or safety to miners will result." In a case involving the 1952 Coal Mine Health and Safety Act, the predecessor of the 1969 Act, the Third Circuit Court of Appeals stated as follows in St. Mary's Sewer Pipe Co. v. Director of U.S. Bureau of Mines, 262 F.2d 378, 381 (3d Cir. 1959):

> The statute we are called upon to interpret is the out-growth of a long history of major disasters in coal mines. The death toll from mine disasters became so appalling and voluntary compliance with the safety standards set by the Bureau of Mines so haphazard that in 1952 Congress determined to make compliance with the safety standards mandatory. It is so obvious as to be beyond dispute that in construing safety or remedial legislation narrow or limited construction is to be eschewed. Rather, in this field liberal construction in light of the prime purpose of the legislation is to be employed.

The St. Mary's Sewer case was cited by the Fourth Circuit in Reliable Coal Corporation v. Morton Et Al., 478 F.2d 257, 262 (4th Cir. 1973), a case involving the 1969 Act. The court quoted the above excerpt and said "We find this observation equally appropriate to the case at hand." Other courts have echoed this liberal construction and application of the. See Freeman Coal Mining Company v. Interior Board of Mine Operations Appeals, 504 F.2d 741 (7th Cir. 1974); Old Ben Coal Corporation v. IBMA, supra; Franklin Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772 (D.C. Cir. 1974).

The legislative history of the 1977 Act clearly contemplates that jurisdictional doubts be resolved in favor of Mine Act jurisdiction. The report of the Senate Committee on Human Resources states:

> The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

S. Rep. 95-181, 95th Cong., 1st Sess. (May 16, 197) at 14; Legislative History of the Mine Safety and Health Act, Committee Print at 602 (hereinafter cited as Leg. Hist.).

The Federal Mine Safety and Health Act of 1977 is intended to assure safe and healthful working conditions for the American miner, and Congress clearly stated its findings and purposes in this regard in the 1969 Act as well as in the 1977 Act which extended the jurisdiction of the Coal Act to all mining activities. The Congressional findings and purposes are set forth as follows in section 2 of the 1969 Act, and is equally applicable to all mines:

> (a) the first priority and concern of all in the coal mining industry must be the health and safety of its most previous resource--the miner;

(b) deaths and serious injuries from unsafe and unhealthful conditions and practices in the coal mines cause grief and suffering to the miners and to their families;

(c) there is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal mines in order to prevent death and serious physical harm, and in drder to prevent occupational diseases originating in such mines;

(d) the existence of unsafe and unhealthful conditions and practices in the Nation's coal mines is a serious impediment to the future growth of the coal mining industry and cannot be tolerated;

(e) the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of such conditions and practices in such mines;

(f) the disruption of production and the loss of income to operator; and miners as a result of coal mine accidents or occupationally caused diseases unduly impedes and burdens commerce. [Emphasis added.]

Section 3(b) defines "commerce" in part as follows: "Trade, traffic, commerce, transportation, or communications, among the several states, or between a place in a state and any place outside thereof, * * *." (Emphasis in original.)

Section 3(g) defines a miner as follows: "'Miner' means any individual working in a coal or other mine."

Section 4 stated as follows with regard to what mines are subject to the Act. "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." (Emphasis in original.)

The matter of determining if a mining operation affects commerce takes into consideration many variables, whereas determining if a mine product enters commerce is resolved by the single proof of its entry. In analyzing section 4 of the Act, I conclude that Congress intended the "enter commerce" and "affect commerce" clauses to be alternatives either of which subjects a mine to the provisions of the Act. However, I conclude that the‘intent of the 1977 statute, as well as the preceding 1969 legislation, as manifested in the legislative history, is to be broadly construed to apply to all of the nation's mines as a class of activity which affects commerce, and the cases cited above support that conclusion. Accordingly, I accept petitioner's "class of activities" jurisdictional arguments and conclude the respondent's

mining operation is covered by the.1977 Act, and its arguments to the contrary are rejected. I also find that respondent's sales of 'coal to Log Cabin Coal Company affect commerce within the meaning of the Act, and this also *serves* to bring the respondent within its reach.

In a recent case decided in the Ninth Circuit, Marshall v. Wait, 628 F.2d 1255 (1980), the Court of Appeals held that a small family-owned rock quarry had not impliedly consented to a warrantless'inspection of its premises by the Secretary pursuant to the Act. The court found that while a rock quarry falls within the definition of a "mine" as that term is defined by the 1977 Act, the Secretary had not established to the Court's satisfaction that the respondent's excavation of decorative rock was a pervasively regulated activity so as to bring it within the warrantless search exceptions noted by the Supreme Court in United States v. Biswell, 406 U.S. 311 (1972), and Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970). The Court recognized that an industry's history of regulation is a relevant factor in determing the constitutionality of subjecting its operators to nonconsensual warrantless searches, cited the coal mining industry as an example of such an industry, and relying on Marshall v. Sink, 614 F.2d 37 (4th Cir. 1980), impliedly observed that small, owner-operated mines may be subjected to warrantless searches, 628 F.2d 1255.

In several other court decisions which'1 find relevant to the instant proceedings, the courts have recognized the right of the Secretary to inspect small, family-owned mining operations, and a discussion of these decisions follows below.

On September 15; 1978, in the case of Ray Marshall v. Jesse Kintzel, Et Al., Civil Action No. 78-13 (E.D. Pa., filed September 14, 1978), the Kintzel brothers, doing business as the Kintzel Coal Company, were permanently enjoined in part as follows:

> (1) From denying the Secretary of Labor or his authorized representative entry to, upon *or* through the Kintzel Coal Company, Lykens No. 6 Mine.
>
> (2) From refusing 'to permit. the inspection of the Kintzel Coal Company, Lykens No. 6 Mine.

In Marshall v. Thomas Wolfe, d/b/a Wolfe Coal Company, Civ. No. 79-1850 (E.D. Pa.) (July 20, 1979), a Federal court enjoined the company from denying entry to MSHA inspectors for the purpose of conducting a mine inspection. The judge rejected arguments advanced by the mine operator that the Act does not apply to mines without miner-employees. See also Marshall v. Donofrio, 605 F.2d '1196 (3rd Cir. 1979), aff'g., 465 F. Supp. 838 (E.D. PA. 1978), cert. denied No. 79-848 (February 19, 1980), where the same district court judge issued an identical ruling and decision as in Wolfe Coal Company.

Kintzel and Wolfe are examples of small, family-owned mining companies, similar to the respondent's where the courts have found them subject to the

Act, and enjoined the owners from denying entry to MSHA's inspectors for the purpose of conducting inspections pursuant to the Act.

Fact of Violations

In Docket No. VINC 79-102-P, the respondent is charged with a violation of the provisions of mandatory standard 30 C.F.R. § 71.101(a) for failure to submit initial respirable dust samples to determine the amount of respirable dust to which mine employees are exposed. The initial citation, No. 256040, was issued on August 14, 1978 (Exh. P-9), and after expiration of the initial abatement time and non-compliance by the respondent, the inspector issued a withdrawal order pursuant to section 104(b) of the Act on September 15, 1978 (Exh. P-9), requiring the removal of all personnel from the mine.

In Docket No. VINC 79-93-P, the respondent is charged with a violation of the provisions of mandatory standard 30 C.F.R. § 71.302(a), for failure to conduct an initial noise survey concerning the noise levels to which miners may be exposed during the course of their work shift, and for failure to report the results of the survey to MSHA as required by the cited standard. The initial citation, No. 1 B.E.P., was issued on October 12, 1977 (Exh. P-31, but was subsequently modified on August 14, 1978, to correct an erroneous citation to the regulatory standard initially cited by the inspector and to clarify the fact that the citation was being issued under the 1977 Act (Exh. P-6). Subsequently, on August 14, 1978, the inspector issued a withdrawal order, No. 256242, after finding that the respondent had failed to abate the condition cited, and the order notes that the respondent had ordered the inspector off its mine property (Exh. P-7). It should be noted that since the issuance of the citations in question in these cases, and the subsequent court suit filed by the Secretary, MSHA has made no further attempts to inspect the mine site in question, and as far-as I know the respondents are still mining coal contary to the requirements of the withdrawal orders which have been issued by MSHA.

Petitioner has presented evidence and testimony in support of the citations in question in these proceedings, and this is reflected in the attached January 22, 1981, order which I issued. However, while the respondent has had two full opportunities to present evidence and testimony in its defense, it has declined to do so on the ground that it does not recognize my authority and jurisdiction to proceed with the administrative adjudication of these dockets. Aside from its jurisdictional arguments, respondent maintains that since the Secretary has seen fit to bring an injunction action in the United States District Court, the Secretary is bound by his action and that only the District Court has jurisdiction to conduct a trial on the merits of these cases. Respondent has vehemently objected to what it believes is "forum shopping" on the part of the petitioner in these cases. In support of this argument, respondent cites the case of Bituminous Coal Operators' Association, Inc., v. Marshall, 83 F.R.D. 350 (D.DC. 1979). After review of that decision, I conclude that it does not support the position taken by the respondent. In the BCOA case, District Court Judge Gessel dismissed the suit and-noted that under the Act, Congress did not intend that the District Courts review the merits of orders and citations issued against mine operators, and he

specifically stated that when an operator is adversely affected by any enforcement action taken by the Secretary, the proper procedure to follow is to allow the matter to run its course through the administrative procedure6 established for review through this Commission and then to an appropriate court of appeals.

While it is true that Judge Gessel noted an exception when the Secretary institutes an injunctive action against an operator pursuant to section 108 of the Act, as has been done in these cases, I take note of the fact that the District Court here has issued no further order6 or dispositions staying or otherwise inhibiting the Secretary from proceeding with its case before the Commission. As a matter of fact, even though counsel for the respondent stated in a motion of April 30, 1979, for a continuance and change of hearing site that the court would issue a stay "at any time," no such order has been forthcoming and the matter has been pending with the court since 1978. Under the circumstances, I find nothing in section 108 which prohibits me from bringing these cases to finality through the issuance of my decisions in matters which are before me for adjudication. In my view, hearing6 before this Commission provide a more than adequate mechanism for adjudicating all of the issues which are before the District Court, including the Constitutional and jurisdictional questions raised by the respondents, Secretary of Labor v. Kenny Richardson, BARB 78-600-P, decided by the Commission on January 19, 1981.

The record adduced in this case reflects that the Secretary's court action was initially filed in the District Court on December 20, 1977, and as indicated above, while the court denied the Secretary's request for an injunction, it also denied the respondent'6 motion to dismiss the suit. The matter has been pending since that time, and aside from the filing of briefs, the court has made no further disposition of the matter other than to transfer it to another judge, and the Secretary has taken no further action to advance the case on the Court's docket or to otherwise initiate any action seeking to bring that suit to finality.

I take note of the fact that prior to the filing of the court action by the Secretary, MSHA had on previous occasions inspected the respondent'6 mining operations in 1976 or 1977, and Inspector Bailey issued several citations. Respondent's prior history of violation6 include6 citations which were issued on April 11, October 12, and November 28, 1977. The citation6 which are in issue in the instant proceeding6 have ripened into withdrawal order6 and I have no information that the respondent has ever challenged those orders apart from its defense in the court suit and in its answers to the petitions for assessment of civil penalties filed here.

In view of the foregoing, I conclude and find that the petitioner has established the fact of violation6 as to both citation6 which were issued in these proceeding6 and under the circumstances, both citations issued in these docket6 are AFFIRMED.

Size of Business and Effect of Civil Penalties on Respondent's Ability to Continue in Business.

In its answer of January 22, 1979, to the proposal for assessment of civil penalties, respondent asserted that it had and has no employees and was self-employed. However, the record establishes that respondent's mining operation is carried on by a partnership consisting of the two Haviland brothers, and a brother-in-law, Cleve Rentschler. Respondent's counsel explained the scope and extent of respondent's mining operation for the years 1977 through 1979, an-d the parties agree that respondent is a small operator (Tr. 215-221; pgs. 3-4 of my previous order of January 22, 1981).

Respondent has offered nothing to suggest that the civil penalties assessed for the two citations in question will adversely affect the respondent's ability to continue in business. Accordingly, absent any evidence to the contrary, I find that they will not.

Good Faith Compliance

The record reflects that the citations-issued in these cases have not been abated and that the withdrawal orders are still outstanding. Further, it seems obvious to me that the respondent's failure to comply, as well as its refusal to permit any MSHA inspectors on its property, stems from its belief that it is not subject to the law. In these circumstances, I conclude that the question of good faith compliance is inapplicable in these cases.

History of Prior Violations

Petitioner has submitted a computer print-out which indicates that for the period October 13, 1975 to August 14, 1978, respondent has been served with eight citations for various violations of mandatory safety standards. While the print-out reflects total assessments amounting to $757, it also indicates that the respondent has made no payments for any of the assessed violations. Inspector Bailey confirmed that the respondent defaulted on several of the previous citations and that petitioner referred them to the Department of Justice for collection action (Tr. 155-156).,

-Two of the eight citations listed on the print-out are those which are in issue in these proceedings. The remaining six, which are unpaid, do not in my view, warrant any additional increases in the penalties which have been assessed against the respondent for the two citations which I have affirmed.

Gravity

Since the respondent has failed to submit any dust samples or to make any noise survey, I have no way of knowing whether respondent is in or out of compliance with those standards. Consequently, I am unable to determine the specific seriousness or gravity of the citations which are the subject of'these proceedings.

Negligence

Inspector Bailey testified that he had previously conducted inspections at respondent's surface mining operation and had issued other citations for violations which he found. These citations were issued prior to' the filing of the injunction action by the Secretary. Accordingly, I conclude that the respondent was not oblivious to the fact that it was required to comply with the provisions of the Act as well as with the mandatory safety and health standards promulgated pursuant to the law. In the Circumstances I conclude and find that the respondent failed to exercise reasonable care to prevent the condition cited in these cases, and that its failure in this regard amounts to ordinary negligence.

Penalty Assessment and Order

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the following civil penalties are reasonable and appropriate:

Docket No. VINC 79-102-P

Citation No.	Date	30 CFR Section	Assessment
256040	08/14/78	71.101(a)	$100

Docket No. VINC 79-93-P

Citation No.	Date	30 CFR Section	Assessment
1 B.E.P.	10/12/77	71.302(a)	$125

Respondent IS ORDERED to pay the civil penalties assessed, in the amounts indicated above, within thirty (30) days of the date of these decisions, and upon receipt of payment by the petitioner, these cases are dismissed.

George A. Koutras
Administrative Law Judge

Attachment

Distribution:

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