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SOL (MSHA) v. CAPTIOL AGGREGATES
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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. CENT 79-059-M DOCKET NO. CENT 79-211-M DOCKET NO. CENT 79-300-M DOCKET NO. CENT 79-361-M DOCKET NO. DENV 79-531-M (Consolidated)
v.	
CAPTIOL AGGREGATES, INC., RESPONDENT	DOCKET NO. CENT 80-192-M DOCKET NO. CENT 80-213-M (Consolidated) MINES: Capitol Cement Quarry & Plant and Del Rio Pit and Plant

DECISION

Appearances: Sandra Henderson, Esq., Office of the Solicitor United States Department of Labor, 555 Griffin Square Building Dallas, Texas 75202
For the Petitioner,

Robert W. Wachsmuth, Esq., KELFER, COATNEY & WACHSMUTH, 311 Bank of San Antonio, One Romana Plaza, San Antonio, Texas 78205 For the Respondent,

Richard L. Reed, Esq., JOHNSON, KROZ & VIVES, 2600 Tower Life Building, San Antonio, Texas 78205 For the Respondent.

Before: Judge Virgil E. Vail
Administrative Law Judge

The above-captioned civil penalty proceedings were brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (hereinafter referred to as "the Act"). The violations were charged in 8 citations issued to the respondent following inspections at the respondent's Capitol Cement Quarry and Plant and Del Rio Pit and Plant.

Prior to the presentation of evidence in the above cases, the parties entered into a stipulation wherein specified citations would be settled subject to a ruling on the issue raised by the respondent as to whether the Federal Mine Safety and Health Administration had jurisdiction over the

respondent's two mines involved herein. The parties stipulated to certain facts, presented oral arguments and submitted briefs in support of their respective positions on the question of jurisdiction.

I. Issues

1. Whether respondent's mines involved herein are subject to the Act under 30 U.S.C. 803 (Supp. 1977), and

2. Whether respondent violated standards of the Act.

II. Jurisdiction

The respondent argues that the products from its mines are not sold out of state and do not otherwise affect interstate commerce, and therefore its mines are not subject to regulation under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 803 (Supp. 1977).

The petitioner argues that a de minus effect or even purely intrastate activities may be found to affect interstate commerce.

The undisputed and stipulated facts show that of over 200 customers to whom respondent sells its products there is one customer, the State of Texas, to which sales are used for the purpose of highway construction, within the state of Texas. That it only sells within the feasible shipping and market area of the respondent, which is a 200 mile radius of the plant in San Antonio, Texas. Further, of the 200 customers to whom respondent sells, there are three customers who have requested that their billings be sent to an out-of-state address, but whose products are shipped within the 200 mile radius of respondent's plant and that no materials from the respondent's plants were shipped outside the state of Texas (Tr. 22-26).

Section 4 of the Act provides: "Each coal or other mine, the products of which enter Commerce, or the operations or products of which affect Commerce, and each operator of a mine, and every miner in such mine shall be subject to the provisions of the Act."

Section 3(b) of the Act defines "Commerce" as "trade, traffic, commerce, transportation, or communication among the several States, or between a place in a State and any place outside thereof, or *** between points in the same State but through a point outside thereof."

I conclude that respondent's mine operations come within the Commerce coverage of the Federal Mine Safety and Health Act of 1977. The material mined by the respondent is used for construction of highways in the State of Texas which are used in the regular stream of interstate commerce. Highway construction and maintenance have been held to be within interstate coverage of Federal statutes. See N.L.R.B. v. Custom Excavating Inc., 575 F. 2d 202 (7th Cir. 1978).

In Fry v. United States, 421 U.S. 542, 547 (1975), The Supreme Court said, "Even activity that is purely intrastate in character may be

regulated by Congress, where the activity, combined with like conduct by others similar situated, affects commerce among the States or with Foreign Nations." See Heart of Atlanta Motels, Inc. v. United States, 379 U.S. 241, (1964); Wickard v. Filburn, 317 U.S. 111, (1942). In the oft-quoted case of Wickard v. Filburn, supra, the Supreme Court held that wheat grown by an individual farmer for his own consumption is subject to federal regulations if it exerts a substantial economic effect on interstate commerce. The Court said that, even though the farmer's contribution to the demand for wheat may be trivial, that is "not enough to remove him from the scope of federal regulations where, as here, his contribution taken together with that of many others similarly situated, is far from trivial." At p. 127.

In considering the narrow set of facts submitted in this case, that is the use of materials for state highways, the use of the government postal system for transporting the billings to addresses of customers outside the State of Texas, and use of materials by over 200 customers within the State of Texas, I find that the respondent's mines' products affected commerce, and as such, are subject to the Act.

III. Settlement Proposals

CENT 79-211-M

At the hearing, the parties stated that they had agreed to settle the two Citations nos. 169799 and 169800 which involve citations issued at the Del Rio Pit and Plant and are contained in DOCKET No. CENT 79-211-M. The agreement for settlement provided that Citation no. 169799, with a proposed penalty assessment of $12.00, be reduced to $8.00 and that Citation no. 169800 with a proposed assessment of $22.00 be reduced to $17.00, subject to my ruling on the jurisdictional issue. Having ruled that the mines are covered under the Act, and having considered the proposed settlement and the six criteria as set forth in Section 110(i) of the Act, I conclude the proposed settlements should be approved.

CENT 79-59-M

The Secretary moved at the hearing to vacate Citation no. 169732. The reason given for vacating this citation was a belief that the evidence would not support the charge. Citation no. 169732 is therefore vacated.

CENT 79-361-M, CENT 80-213-M, CENT 80-192-M

At the hearing the parties agreed, subject to my ruling on the jurisdictional matter, that the Secretary would vacate Citation no. 169476 (Docket No. CENT 79-361-M) and respondent would pay the full amount of the proposed penalty assessments for Citation no. 170993 (Docket No. 80-213-M) in the amount of $36.00 and Citation no. 170913 (Docket no. 80-192-M) in the amount of $44.00. After reviewing the record, the statements of counsel,

and considering the six criteria of section 110(i) of the Act, and further, based on my ruling that the mines involved herein are subject to the jurisdiction of the Act, I approve the motion vacating Citation no.

169476 and the proposed settlement of Citation no. 170993 and 170913 for $36.00 and $44.00 respectively.

CENT 79-300-M

The parties entered into a stipulation at the hearing regarding Citation no. 170405 which alleges a violation of 30 C.F.R. 56.9-22. Said standard provides that, "Berms or guards shall be provided on the outer bank of elevated roadways."

The parties agreed that there was no dispute regarding the facts surrounding the issuance of Citation no. 170405 but the respondent contested whether the standard, alleged to have been violated, applied in this instance. The parties stipulated to the facts and then argued the application of said facts to the law in their post-hearing briefs. A decision in this matter was also contingent upon my ruling on the jurisdictional issue.

Citation no. 170405 reads, in part, as follows: "The elevated ramp leading to the solid fuel loading hopper was not equipped with a berm or guard creating a hazard for the operator on the front end loader in case of running off the ramp."

The stipulated facts are as follows:

1. The length of the ramp involved was approximately thirty feet.

2. The height of the ramp at the highest point was approximately four feet.

3. The ramp was only used by a caterpillar front-end loader, or that was the only piece of equipment that used it.

4. The ramp in question was used for dumping solid fuel in the form of petroleum coke into a solid fuel loading hopper. (Tr. 8).

In the respondent's post-hearing brief, he argues that the only question presented here is whether a ramp constitutes an "elevated roadway" within the meaning of the standard cited by the Compliance Officer (p. 14). Although respondent later in his post-hearing brief raises the issue that evidence as to the lack of berms on the ramp was not included in the stipulation. I discard his argument, as the transcript of the hearings indicates the parties understood and agreed that the only issue to be decided was "(w)hether the ramp involved is an elevated roadway within the interpretation of the cited standard." (Tr. 8). This statement was made by the attorney for the respondent and he is bound by such a representation. If he wished to raise the issue of whether there were berms on the ramp the hearing would have been the proper time to do it.

The evidence as stipulated to shows the "ramp" involved herein was approximately thirty feet long, four feet high at the highest point and

used by a front-end loader to dump solid fuel into a loading hopper. (Tr. 8).

The standard, 30 C.F.R. 56.9-22, refers to "elevated roadways" requiring berms or guards. The definition of "roadways" in Webster's Third New International Dictionary is: "A strip of land through which a road is constructed and which is physically altered."

A "road" is defined as: "An open way or public passage for vehicles, persons and animals ... a private way."

In the reference to area travelled by the front end loader herein the parties, at the hearing and in their post-hearing briefs, referred to the structure as a "ramp." Webster's New Collegiate Dictionary (1979 Ed.) defines "ramp" as: "a sloping way: as a sloping low walk or roadway leading from one level to another." (emphasis added).

In view of the above and the fact that this "ramp" was used to drive a piece of machinery back and forth over the structure, I find that the so called "ramp" was a "roadway" as described in the standard.

The respondent argues that the standard requires only installation of a berm on "the outer bank of elevated roadways" (emphasis supplied). This question was considered by the Federal Mine Safety and Health Review Commission and they rejected this argument. The Review Commission stated that, "(i)f protection were extended only to those elevated roads with one open bank, while elevated roads with two open banks were not required to be bermed or guarded, miner safety would certainly be adversely affected." We agree with the Commission that the standard applies to all elevated banks. Secretary of Labor (MSHA) v. Cleveland Cliffs Iron Co., Inc. Docket nos. VINC 76-68-M and VINC 79-240-PM (February 1981).

I find from the stipulated facts that the respondent did violate the standard by failing to provide for berms on the roadway and based upon said stipulation approve a penalty of $52.00.

DENV 79-531-M

On May 16, 1978, federal mine inspector, Dan Haupt, issued Citation no. 169704, alleging a violation of mandatory safety standard 56.5-50(b).(FOOTNOTE.1) The citation charged that, "The 988 caterpillar loader operator was exposed to 168 percent of the permissible limit for an eight hour exposure to noise. Feasible engineering or administrative controls were not being used to reduce this level in order to eliminate the need for hearing protection."

Respondent raises several legal and factual issues concerning the validity of the citation. It is not necessary to address all those arguments in order to determine whether or not the citation should be affirmed.

Mr. Haupt testified that he took a sound level reading of the loader, and since the reading was very high, he decided to sample the noise level of the operator. A DuPont D-100 dosimeter was used in conducting the eight hour test. (Tr. 34). The inspector stated that the readout was 168% of the allowable 100% level, or approximately 93.5 to 94 dBA. (Tr. 42).

On cross examination Mr. Haupt testified that he had received the dosimeter from the district office in Dallas. He was uncertain as to how long he had had it, although it had been at least one year. The dosimeter had been calibrated before it was sent to him and had not been calibrated since that time. (Tr. 50). Furthermore, he tesitifed that he did not know how long it had been since the calibration had been checked prior to the inspection. (Tr. 51). He stated, however, that the calibration was checked on a monthly basis. (Tr. 51 & 63).

In the case of Secretary of Labor v. Maudlin Construction Company CENT 80-114-M (December 18, 1980), I held that dosimeters must be calibrated immediately prior to testing, in order to assure accurate test results. The facts in that case and the one now under consideration are for all practical purposes identical. The burden of proving the accuracy of the test results is with the Petitioner. The record is void of any facts that would persuade me to depart from my previous position.

Therefore, Petitioner having failed to prove the accuracy of the test results, the citation is vacated and the case dismissed.

ORDER

CASE	CITATION NO.	FINAL DISPOSITION
CENT 79-59-M	169732	Vacated
CENT 79-211-M	169799	$ 8.00
	169800	$17.00
CENT 79-300-M	170405	$52.00
CENT 79-361-M	169476	Vacated
DENV 79-531-M	169704	Vacated
CENT 80-192-M	170913	$44.00
CENT 80-213-M	170993	$36.00

It is hereby ORDERED that Respondent pay the penalties totaling $157.00 within forty (40) days from the date of this decision.

Virgil E. Vail
Administrative Law Judge

~FOOTNOTE_ONE
56.5-50 (b) When employees' exposure exceeds that listed in the above table, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce exposure to within permissible levels, personal protection equipment shall be provided and used to reduce sound levels to within the levels of the table.