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DONOHO CLAY v. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

DONOHO CLAY COMPANY, APPLICANT	Contest of Citation
v.	Docket No. SE 80-109-RM
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Donoho Mill & Mine

DECISION

Appearances: Charles E. Parks, Esq., for Applicant;
Murray Battles, Esq., Office of the Solicitor,
U.S. Department of Labor, for Respondent.

Before: Judge Fauver

This proceeding was brought by Donoho Clay Company under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., to review the validity of a citation issued by a federal mine inspector pursuant to section 104(a) of the Act. Jurisdiction to adjudicate a civil penalty has been added to this proceeding by consent of the parties. The cases were heard at Birmingham, Alabama. Both parties were represented by counsel, who have submitted their proposed findings, conclusions, and briefs following receipt of the transcript.

Having considered the contentions of the parties and the record as a whole, I find that the preponderance of the reliable, probative and substantial evidence establishes the following:

FINDINGS OF FACT

1. At all pertinent times, Applicant, Donoho Clay Company, operated a clay pit, known as the Donoho Mill & Mine, in Calhoun County, Alabama, which produced clay for sales in or substantially affecting interstate commerce.

2. The clay pit is about 2-1/2 miles west of Anniston, Alabama, and about 5 miles from a processing plant also operated by Applicant. Applicant normally employs about 20 people at the plant and about two at the clay pit. Employment records are maintained separately and the employees are not inter-mingled between pit and plant. Annual clay production is about 120,000 tons.

3. Applicant's clay is a naturally occurring clay refractory. The clay deposit at the pit is over 100 feet thick and lies just beneath a shallow soil overburden. Front-end loaders are used to mine the clay, which is then dumped into trucks and hauled by independent contractors to the plant for processing.

4. At the plant, the unprocessed clay is tested by grade, transported by belt conveyors through crushing machines, rotary driers to remove moisture, and then through a series of screens to remove remaining by-products, which are returned to storage facilities for later use. The screened material is then discharged into an open area for mixing and blending according to customer specifications. As blending materials, Applicant uses silicon rock, sand, and clay, which are also mined from its pit, and at times pitch and coke, which are purchased from outside sources. The material is finally transferred to packaging stations for bagged- or bulk-shipping.

5. Applicant's final product (trade name "Meltzona") is used primarily in the fireclay industry and requires only the addition of water by customers. Meltzona is used primarily by steel and iron manufacturers, as a lining for brick and ceramic furnaces, ladles, and cupolas to extend their lives by acting as a buffer to the molten metal. As Meltzona gradually burns away or corrodes, it must be reapplied.

6. On June 24, 1980, federal inspector Bill Alverson, and Bart Collinge, a supervisory mining engineer, requested permission to inspect Applicant's clay-processing plant. Permission was refused and Inspector Alverson charged Applicant with a violation of section 103(a) of the Federal Mine Safety and Health Act of 1977, as follows (Citation No. 83079):

> On 6/24/80, Mr. C.F. Johnson, Co-owner, refused to allow Billie G. Alverson, an authorized representative of the Secretary, entry into the company's clay mill for the purpose of conducting an inspection of the mill pursuant to Sec. 103(a) of the Act. Mr. Johnson stated that the mill is not subject to the mine Act jurisdiction. Mr. Johnson was advised that the mill is subject to the mine Act jurisdiction.

7. On June 25, 1980, Inspector Alverson returned to inspect Applicant's plant, was again refused admittance, and issued an order of withdrawal under section 104(b) of the Act. This order (No. 83080) reads in part:

> Mr. C.F. Johnson, Co-owner, continued to deny Billy G. Alverson, an authorized representative of the Secretary, the right of entry into the company's Donoho Clay Mill for the purpose of conducting an inspection of the mill in accordance with the requirements of Sec. 103(a) of the Act on 6/26/80 after expiration of the time allowed for Mr. Johnson to comply.

These alleged violations have not been abated.

8. Since 1972, MSHA or its predecessor, MESA, has inspected Applicant's plant and pit 19 times. The Occupational Safety and Health Administration (OSHA) has never inspected the plant or pit.

DISCUSSION WITH FURTHER FINDINGS

Based on the citation and order of withdrawal, the Secretary charges a violation of section 103(a) of the Act, which provides in part:

> Authorized representatives of the Secretary * * * shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person * * *.

The basic issue is whether Applicant's plant is a milling operation, and therefore part of a "mine" under section 3(h)(1) of the Act and subject to MSHA's jurisdiction, or whether it is a refining operation, and therefore subject to OSHA's jurisdiction under the MSHA-OSHA Interagency Agreement (discussed below).

This is an issue of first impression, and the parties propose that if a violation is found, the assessed penalty be minimal to reflect the test-case nature of the proceeding.

On April 22, 1974, OSHA (Department of Labor) and MESA (MSHA's predecessor in the Department of Interior) entered into a Memorandum of Understanding to resolve jurisdictional disputes between the two agencies. In March 1978, the Secretary of Labor assumed statutory responsibility for enforcing both the Occupational Safety and Health Act and the Mine Act. Since March 1978, the Secretary of Labor has had jurisdiction over both agencies and, through them, discretion in determining the enforcement boundries of each. On March 29, 1979, the agreement between OSHA and MESA was superseded by an "MSHA-OSHA Interagency Agreement,"which recognized the Secretary's dual enforcement role and the continuity of enforcement principles of the earlier agreement.

Section A(3) of the Interagency Agreement explains its purpose and general principles as follows:

This agreement is entered into to set forth the general principle and specific procedures which will guide MSHA and OSHA. The agreement will also serve as guidance to employers and employees in the affected industries in determining the jurisdiction of the two statutes involved. The general principle is that as to unsafe and unhealthful working conditions on mine sites and in milling operations, the Secretary will apply the provisions of the Mine Act and standards promulgated thereunder to eliminate those conditions. However, where the provisions of the Mine Act either do not cover or do not otherwise apply to occupational safety and health hazards on mine or mill sites (e.g., hospitals on mite sites) or where there is statutory coverage under the Mine Act but there exist no MSHA standards applicable to particular working conditions on such sites, then the OSH Act will be applied to those working conditions. Also, if an employer has control of the working conditions on the mine site or milling operation and such employer is neither a mine operator nor an independent contractor subject to the Mine Act, the OSH Act may be applied to such an employer where the application of the OSH Act would, in such a case, provide a more effective remedy than citing as a mine operator or an independent contractor subject to the Mine Act who does not, in such circumstances, have direct control over the working conditions.

The legislative history of the Mine Act indicates a Congressional intent to resolve jurisdictional doubts in favor of coverage under the statute. 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 possibly [sic] 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. No. 95-181, 95th Cong., 1st Sess. 14 (1977), reprinted in, Legislative History of the Federal Mine Safety and Health Act of 1977 at 602 (1978). Section B(5) of the Interagency Agreement recognizes the Congress' intent that doubts be resolved in favor of coverage under the Mine Act.

Section 3(h)(1) of the Mine Act defines "coal or other mine" as:

> (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities,

> equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment. [Emphasisadded.]

Under the Act, covered mining operations include the milling of mine products; however, the Act does not define "milling." Appendix A of the Interagency Agreement defines "milling" as: "[T]he art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives. The essential operation in all such processes is separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated." The types of milling processes over which MSHA has jurisdiction under the Interagency Agreement include crushing, grinding, pulverizing, sizing, concentrating, washing, drying, roasting, pelletizing, sintering, evaporating, calcining, kiln treatment, sawing, and cutting stone, heat expansion, retorting (mercury), leaching, and briqueting.

Section B(6)(b) of the Agreement provides that OSHA's jurisdiction includes the following, whether or not located on mine property: Brick-, clay pipe-, and refractory-plants; ceramic plants; fertilizer product operations; concrete batch-, asphalt batch-, and hot mix-plants; smelters and refineries. "Refining" is defined in the appendix to the Agreement as "the point where milling, as defined, is completed, and material enters the sequential processes to produce a product of higher purity." "Refine" is also defined in A Dictionary of Mining and Related Terms (U.S. Department of Interior, 1968), as: "To free from impurities; to free from dross or alloy; to purify, as metals; to cleanse."

The dominant activity of Applicant's plant is the milling of clay, which includes crushing (defined by the Agreement as "the process used to reduce the size of mine material into smaller, relatively coarse particles"); sizing, (defined as "the process of separating particles of mixed sizes into groups of particles of all the same size, or into groups in which the particles range between maximum and minimum sizes"); and kiln treatment (defined as "the process of roasting, calcining, drying, evaporating, and otherwise upgrading mineral products through the application of heat"). These key processes are all defined as "milling" by the Agreement, which recognizes "milling" as a part of mining operations subject to MSHA's jurisdiction.

Applicant's mixing and blending of the clay with other products does not increase the purity of the clay, but simply changes its nature and level of refractoriness. I do not find that these changes are a "refining" process. Even if considered "refining," the mixing and blending are not sufficient in kind or degree to justify inclusion of the plant operations under OSHA's jurisdiction as opposed to MSHA's. Meltzona is a naturally occurring refractory clay that requires principally milling processes to produce a marketable product. Under the purview of the Act and the Interagency Agreement, doubts such as may exist here are to be resolved in favor of jurisdiction by MSHA, not OSHA.

I conclude that Applicant's plant facility is subject to MSHA's jurisdiction and that Applicant violated section 103(a) of the Act as charged.

CONCLUSIONS OF LAW

1. The undersigned judge has jurisdiction over the parties and subject matter of these proceedings.

2. Applicant violated section 103(a) of the Act by refusing entry to a federal mine inspector to inspect its clay processing plant, as alleged in Citation No. 83079 and Order of Withdrawal No. 83080.

3. Based upon the statutory criteria for assessing civil penalties, Applicant is assessed a penalty of $1 for this violation.

ORDER

WHEREFORE IT IS ORDERED that:

1. The above-mentioned citation and order of withdrawal are AFFIRMED and the notice of contest is DISMISSED.

2. Applicant shall pay the Secretary of Labor the above-assessed civil penalty, in the amount of $1, within 30 days from the date of this decision.

WILLIAM FAUVER JUDGE