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

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| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>PETITIONER | CIVIL PENALTY PROCEEDING<br><br>DOCKET NO. WEST 80-3-M<br>A/C No. 04-03648-05001 |
| v. | |
| VALLEY ROCK AND SAND CORPORATION,<br>RESPONDENT | DOCKET NO. WEST 79-385-M<br>A/C No. 04-03648-05002 W<br><br>MINE: Quail Canyon Pit & Mill |

Appearances:

Linda R. Bytof, Esq., Office of Daniel W. Teehan, Regional Solicitor, United States Department of Labor, San Francisco, California,
For the Petitioner

Peter Amschel Esq.
Hemet, California,
For the Respondent

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges that respondent, Valley Rock and Sand Corporation, violated various regulations adopted under the authority of the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq.

Pursuant to notice of hearing on the merits was held in San Bernardino, California. The parties filed post trial briefs.

ISSUES

The issues are whether Congress may regulate an open pit sand and gravel operation; whether respondent is a "coal or other mine" and extracts "minerals"; whether the 10th Amendment of the Constitution reserves the power of regulation to the State of California; whether the 4th Amendment of the Constitution requires a search warrant; whether respondent is relieved from liability because it is not the present owner; whether OSHA preempts MSHA; and whether the Act agitates and distracts workers increasing their likelihood of industrial injury.

In WEST 80-3-M the Secretary charged that Valley violated the following regulations which are published in Title 30, Code of Federal Regulations.

| Citation | Standard | Penalty |
|---|---|---|
| 371329 | 56.9-22 | $ 56.00 |
| 371330 | 56.14-1 | 44.00 |
| 371331 | 56.11-1 | 34.00 |
| 371332 | 56.12-18 | 44.00 |
| 371333 | 56.14-1 | 44.00 |
| 371334 | 56.9-87 | 44.00 |
| 371335 | 56.9-2 | 44.00 |
| 376068 | 56.14-6 | 52.00 |

In WEST 79-385-M the Secretary charged that Valley failed to comply with various withdrawal orders thereby violating Section 104(b) [30 U.S.C. 814(b)] of the Act.

| Citation | Penalty |
|---|---|
| 371336 | $100.00 |
| 371337 | 100.00 |
| 371338 | 100.00 |
| 371339 | 100.00 |
| 376069 | 100.00 |
| 376070 | 100.00 |
| 376071 | 100.00 |
| 376072 | 100.00 |
| 376073 | 100.00 |
| 376074 | 100.00 |
| 376075 | 100.00 |

After evidence was adduced in these consolidated cases and prior to the close of the Secretary's cases the parties entered into the following stipulation:

> One: If MSHA inspectors were to testify further they would develop facts that would support a violation of the standards in contest. All withdrawal and termination orders in these cases were properly issued.
>
> Two: Respondent's workers were exposed to the hazards or had access to the hazards involved.
>
> Three: The conditions cited involve the possibility of a worker sustaining a minor injury to being fatally injured.
>
> Four: Concerning penalties, Petitioner's evidence would further show that the penalties were proposed in view of the statutory criteria of the Federal Mine Safety & Health Act of 1977 and that the proposed penalties are reasonable and proper unless the affirmative defenses of Respondent prevail.

The affirmative defenses of Respondent to be considered and decided in the decision are as follows:

First Affirmative Defense: The Federal Government has no power under the Constitution of the United States to regulate an open-pit sand and gravel operation.
Second Affirmative Defense: Respondent's operation is not a "coal or other mine" within the meaning of the Act.

Third Affirmative Defense: Respondent does not extract "minerals" within the meaning of the Act.

Fourth Affirmative Defense: Regulation of Respondent's operations is expressly reserved to the State of California by Amendment X of the Constitution of the United States.

Fifth Affirmative Defense: Any evidence of non-compliance with the Act by Respondent should be suppressed for a failure of Petitioner to obtain a search warrant as required by Amendment IV of the Constitution of the United States.

Sixth Affirmative Defense: Respondent is not the present owner of the operation.

Seventh Affirmative Defense: This Act is preempted by provisions of State and Federal Occupational Safety & Health Acts, each of which Respondent has fully complied with.

Eighth Affirmative Defense: Regulation under this Act agitates and distracts employees of Respondent increasing their likelihood industrial injury.
Five: MSHA inspectors inspected the Quail Canyon Pit and Mill on October 11, 1977 and they granted an extension of time to obey previously issued notices until October 27, 1977.

## FINDINGS OF FACT

In view of the stipulation it is not necessary to review the evidence of the MSHA inspectors concerning the violations. I find the following uncontroverted facts to be relevant:

1. Respondent, a sand and gravel operation, removes material at its Quail Canyon pit and mill. The material is crushed, sized, washed, and separated for later sale (Tr. 26).

2. Respondent removes the sand and gravel with earth moving equipment and uses a conveyor belt, grizzles, screens, crushers, bunkers, scales, and motors (Tr. 142, 143).

3. Respondent produces three or four different grades of gravel which are sold to licensed contractors and ready mix manufacturers (Tr. 144).

4. Respondent also sells its sand to the public, to contractors, and material manufacturers (Tr. 135-136).

5. Occasionally respondent will deliver its product if the purchaser is within 50 miles of the plant (Tr. 137).

6. Respondent has never sold its product outside the State of California (Tr. 135, 136).

7. Dean Gross, the manager of the respondent company, permitted the MSHA inspectors to make their inspection although he was not shown a search warrant (Tr. 39, 140, 168).

8. Respondent has two to four workers in the plant (Tr. 26).

## DISCUSSION

Respondent's initial contention is that Congress has no authority to regulate open pit sand and gravel operations.

It is well settled that Congress has broad authority to regulate commercial enterprises engaged in or effecting commerce.

Donovan v. Dewey. - U.S. - , 69 L. Ed. 2d, 262, 101 S. Ct. - .

When Congress adopted the Federal Mine Safety and Health Act of 1977 it found that "the disruption of production and loss of income to operators and miners as a result of coal or other mine accidents or occupationally caused diseases unduly impedes and burdens commerce." Section 2.

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

> (h)(1) "coal or other mine" means (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 if 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.

Section 4 of the Act mandates that the mines which are subject to the Act are:

> 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 shall be subject to the provisions of this Act.

The legislative findings and purpose as declared in Section 2, the broad definition of "coal or other mine" in Section 3, and the declaration of those mines that subject to the Act in Section 4 indicate a Congressional intent to vest the broadest jurisdictional scope constitutionally permissible under the Commerce clause.

An example of the size of the enterprises which have been determined to have an affect on commerce maybe found in the oft cited case of Wickard v. Filburn, 317 U.S., 111, 63 S. Ct. 82. In that case a farmer exceeded his wheat allotment of 11.1 acres by an additional 11.9 acres. The Supreme Court held that the farmer came within the regulatory scheme of the Agricultural Adjustment Act of 1938 even though the farmer's contribution to the wheat market was obviously microscopic in relation to the total market. Cf Godwin v. OSHRC 540 F 2d 1013 (C. A 9 1976). The size of a business enterprise is not controlling unless Congress makes it so N.L.R.B. v. Fainblatt et al 306 U.S. 601, 59 S. Ct. 668, 672.

Congress has found that accidents in all mines disrupt production and cause loss of income to operators which in turn impedes and burdens Commerce, 30 U.S.C. 801(f). Accordingly, even if a mine's products remain solely within a state, any disruption of its operations due to safety and health hazards affects interstate commerce. Marshall v. Kilgore 478 F. Supp 4 (E.D. Tenn, 1979); Marshall v. Bosack 463 F. Supp 800 (E.D. Pa. 1978).

Respondent cites Carter v. Carter Coal Co., 298 U.S. 238, 56 S. Ct 855, 80 L. Ed 1160 (1936); N.L.R.B. v. Johes & Laughlin Steel Corporation 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed 893 (1937) among other cases. None of the cases relied on by respondent involve legislation where the Congress sought to improve the working conditions in areas of safety and health. As the Supreme Court observed in Donovan v. Dewey, supra,; "[a]s an initial matter it is undisputed that there is a substantial federal interest in improving the health and safety conditions in the Nation's underground and surface mines. In enacting the statute, Congress was plainly aware that the mining industry is among the most hazardous in the country and that the poor health and safety record of this industry has significant deleterious effects on interstate commerce."

Respondent's next two contentions are whether a sand and gravel operation are in law subject to the 1977 Act and whether respondent extracts minerals.

It is evident that sand and gravel pits were intended to be within the coverage of the Act. The House Report on the Act cites fatality and injury frequency rates in surface mines; further, the Senate Report in its regulatory impart analysis specifically noted the number and types of mines that would be affected. The report reads as follows:

| Metals and nonmetal mining operations | Number of year round active mines | Intermittent or seasonal mines |
|---|---|---|
| Underground | 629 | 365 |
| Open pit | 1,436 | 350 |
| Crushed stone | 3,510 | 806 |
| Sand and gravel | 5,368 | 2,450 |
| Mills | 858 | 75 |
| Total | 11,801 | 4,046 |
| Grand Total | 21,299 | ------ |

House Report No. 95-312, 95th Congress, 1st Session and Senate Report No. 95-181, 95th Congress, 1st Session reprinted respectively at pages 363 and 645 in Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Congress, 2nd Session (July 1978). Further, the Senate Committee in its report clearly articulated that " . . . [w]hat is considered to be a mine and to be regulated under this Act is 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 Legis. History, at 602.

In addition to the legislative history recent cases have held that sand and gravel operations are subject to the Act. Marshall v. Stoudt's Ferry Preparation Co., 602 F. 2d 589 (3rd Cir. 1979) Cert. denied 444 U.S. 1015 (1980); Marshall v. Cedar Lake Sand and Gravel Co. 480 F. Supp. 171 (E. Wisc, 1979).

In support of its arguments respondent's post trial brief cites the legislative history of the Federal Metal and Non-metalic Mine Safety Act of 1966 (U.S. Code Cong. and Adm. News P. 2874 (1966)). I am not persuaded. The Legislative History of the 1966 Act, which was repealed by the present legislation, is simply not indicative of what Congress intended 11 years later.

Valley's post trial brief asserts that Stoudt's Ferry is distiguishable from the case at bar. I disagree. In Stoudt's Ferry the operator extracted material in a river dredging operation. The court held that the processing of the dredged refuse and selling the resultant product (which was akin to coal) rendered it subject to the Act. Further, in considering the sand and gravel portion of the operation the Court ruled:

> 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.

Respondent argues that the regulation of its business is expressly reserved to the State of California by the 10th Amendment of the United States Constitution.

The Commerce clause, expressed above, disposes of this argument. Further, in U.S. v. California 297 U.S. 175 (1936), the Supreme Court of the United States ruled that the State of California in operating a purely intra-state railroad could not avoid the effects of the Federal Safety Appliciance Act. In National League of Cities v. Usery, 426 U.S. 833 (1976), a leading 10th Amendment case, the Court specifically refused to overrule U.S. v. California.

Respondent's additional affirmative defense asserts that the MSHA inspectors lacked a search warrant. Donovan v. Dewey, supra. decided June 17, 1981 conclusively establishes MSHA's right to conduct warrantless inspections.

Respondent further interposes the defense is that it is not the present owner of the operation.

This defense cannot prevail. Section 3 of the Act contains the following definition:

> "Operator" means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine;

Further, Section 2(e) recites that "the operators of such mines with the assistance of the miners have a primary responsibility to prevent the existence of such conditions and practices in such mines."

If continued owners were a condition of imposing liability under the Act the Congressional mandate would be avoided and completely frustrated by an operator merely disposing of his interest. There is no indication in the Act, nor in the legislative history that Congress intended to relieve an operator of responsibility by terminating his ownership.

Respondent further contends that the Mine Act is preempted by provisions of State and Federal Occupational Safety and Health Acts, each of which respondent asserts it has complied with.

Contrary to respondent's view the OSHA Act, 29 U.S.C. 651 et seq., does not preempt the Mine Safety Act. It is a fundamental rule of statutory construction that specific statutory provisions control over general statutory provisions. Further, House Report 95-312 observed that "[M]ining represents a small segment of the working population, yet the operation is of a nature that is so unique, so complex, and so hazardous as not to fit neatly under the Occupational Safety and Health Act." Legislative History at 357.

Respondent's post trial brief cites an interagency agreement dated April 10, 1979 between MSHA and OSHA. The brief contends that the agreement was published in the Federal Register in Volume 44, No. 75 on Tuesday, April 17, 1979 Notices, 22827-22830

Respondent's reliance on the interagency agreement appears for the first time in his post trial brief. I refuse to consider it. There was no request that official notice be taken of the document. Further, the agreement and its affect on these inspections were not an issue encompassed at the instant hearing.

Respondent's final argument is to the effect that regulation under this Act agitates and distracts employees increasing their likelihood of injury.

No evidence supports this bizarre argument. The hazards to employees here were particularly severe with each condition involving a possible fatal injury (Stipulation #3). The defective conditions involved: a lack of berms; unguarded moving machine parts (2 instances); unsafe access, power switches not labeled; power equipment without an audible warning device; equipment defects; and unguarded machinery. The elimination of these hazards could only improve worker safety.

## CIVIL PENALTIES

Section 110(i), (30 U.S.C. 820(i)), contains the criteria for assessing penalties. Respondent here ignored notices it received starting in 1977 (Tr. 30, Exhibit P-1). There was no compliance and the citations were ultimately terminated in February 1979 because respondent sold its business. However, respondent is a small operator. The parties have stipulated concerning the appropriateness of the penalty and in view of the statutory criteria I affirm the proposed penalties. For the foregoing

For the foregoing reasons I enter the following:

## ORDER

1. All citations and proposed penalties are affirmed.

2. Respondent is ordered to pay the sum of $1,462.00 within 40 days of the date of this order.

John J. Morris
Administrative Law Judge