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SOL (MSHA) V. RIVERSIDE CLAY
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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. SE 81-62-M A.C. No. 01-01112-05002 R
v.	Riverside Pit & Plant
RIVERSIDE CLAY COMPANY, RESPONDENT	

DECISION

Appearances: Terry Price, Esq., Office of the Solicitor, U.S Department of Labor, Birmingham, Alabama, for Petitioner Lee H. Zell, Esq., Berkowitz, Lefkovits and Patrick, Birmingham, Alabama, for Respondent

Before: Judge Broderick

STATEMENT OF THE CASE

Petitioner seeks a civil penalty for an alleged violation of section 103(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 813(a) ("the Mine Act"), for Respondent's refusal to permit a duly authorized representative of the Secretary of Labor to conduct an inspection of its facility. Respondent contends that its facility is not a mine but a refractory plant, and that pursuant to an Interagency Agreement between MSHA and the Occupational Safety and Health Administration ("OSHA"), the jurisdiction to regulate the facility is under OSHA. Pursuant to notice, the case was called for hearing in Birmingham, Alabama, on April 12, 1983. Barton M. Collinge and Lawrence J. E. Hofer testified on behalf of Petitioner. John C. Morris and Denis A. Brosnan testified on behalf of Respondent. Both parties have filed posthearing briefs with proposed findings of fact and conclusions of law. Based on the entire record, and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. Respondent operates a clay pit from which it extracts clay and a plant, located several miles from the pit, in which it produces a refractory clay called Alapatch and various other clay and non-clay refractories which it sells to customers.

2. The plant employs about 60 workers, five of whom are engaged in milling the clay preparatory to either bagging it and shipping it to customers, or transporting it to a mixing area in the plant.

3. In the mixing area the clay is mixed with other materials including silicon carbide, graphites, tar and other materials to make products such as anhydrous tap hole materials used in blast furnances, plastic refractories, and castable refractories. Alapatch is used in some of the refractory manufacturing processes, as well as clay from other sources. Thus, some of the plastic refractories contain Alapatch and some do not. The so called neutral refractories and fixed shape refractories, also produced at the plant, do not contain Alapatch.

4. In fiscal year 1981, approximately 70 to 75 percent of the dollar volume of Respondent's sales from the plant was received for refractory specialties and 25 to 30 percent for Alapatch.

5. MSHA conducted regular, spot and survey inspections of Respondent's Pit and Plant beginning in August, 1973. [Respondent does not contest MSHA's jurisdiction to inspect its clay pit, but only its jurisdiction over the plant]. The last regular inspection was conducted on May 8, 1979. An accident investigation was conducted at the plant on February 4 and 5, 1981, following a fatal accident on February 3. On February 10 and 11, an attempt was made to follow up the investigation and the inspector was refused entry. This proceeding arose out of that refusal of entry.

6. On May 9, 1979, following the execution of an Interagency Agreement between MSHA and OSHA on March 29, 1979, MSHA notified Respondent by letter that it was agreed that refractory clay operations such as Respondent's plant would come under the authority of OSHA while the clay mining would remain under MSHA. On September 6, 1979, this decision was reversed and Respondent was notified that MSHA and OSHA agreed that MSHA would have jurisdiction over the pit and plant. OSHA has never inspected the plant.

7. Section A(3) of the Interagency Agreement provides that the Mine Act would apply to mine sites and milling operations, except where the Mine Act does not cover or apply to occupational safety and health hazards on mine or mill sites (e.g. hospitals on mine sites), or where no MSHA standards are applicable, then the OSHAct would be applied.

8. Section B(2) of the Agreement refers to the Mine Act which gives MSHA authority over mineral extraction and mineral milling, and directs the Secretary in making a determination of what constitutes mineral milling, "to 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."

9. Section B(4) of the Agreement provides that the term milling may be expanded to apply to mineral product manufacturing processes which are related to milling or the term may be narrowed to exclude processes listed in Appendix A where such processes are unrelated technologically or geographically to mineral milling. Determinations shall be made by agreements between MSHA and OSHA.

10. Section B(5) of the Agreement provides that the following factors shall be considered in determining what constitutes mineral milling: the processes conducted at the facility, the relation of all processes at the facility to each other, the number of individuals employed in each process, and the expertise and enforcement capability of each agency with respect to the safety and health hazards associated with all the processes conducted at the facility. The consideration of these factors will reflect Congress' intention that doubts be resolved in favor of inclusion of a facility under Mine Act coverage.

11. Section B(6)(b) provides inter alia that OSHA jurisdiction includes refractory plants whether or not located on mine property.

12. Section B(8) provides that questions of jurisdiction shall be resolved if possible by MSHA District Manager and OSHA Regional Administrator in accordance with this agreement and existing law and policy. If a question cannot be resolved at the local level it will be transmitted to the National offices and, if necessary, to the Secretary.

13. Appendix A to the Agreement defines milling as "the 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 Appendix further provides that milling consists

of one or more of the following processes: crushing, grinding, pulverizing, sizing, concentrating, washing, drying, roasting, pelletizing, sintering, evaporating, calcining, kiln treatment, sawing and cutting stone, heat expansion, retorting, leaching, and briquetting. Each of these processes is defined in the Appendix.

ISSUE

Whether MSHA has jurisdiction under the Mine Act to inspect the operation of Respondent's Plant.

CONCLUSIONS OF LAW

1. The Federal Mine Safety and Health Review Commission and the undersigned Administrative Law Judge are empowered to determine whether the operation of the facility in question come within the coverage of the Mine Act. "MSHA's authority to regulate a workplace is determined by the scope of the Mine Act's coverage . . . ." Secretary v. Carolina Stalite Company, 4 FMSHRC 423, 425 (1982).

2. Doubts as to whether a facility is covered under the Mine Act are to be resolved in favor of coverage.

DISCUSSION

In its Report on S. 717 which became the Mine Act, the Senate Committee Human Resources stated

> "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. No. 95-181, 95th Cong., 1st Sess. at 14 (1977), reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977 at 602 (1978).

3. The Mine Act includes in its coverage the "milling of . . . minerals, or the work of preparing . . . minerals." Section 3(h)(1) of the Act directs the Secretary "in making a determination of what constitutes mineral milling" to "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."

4. Although the MSHA-OSHA Interagency Agreement cannot finally determine the jurisdiction of the agencies involved, Secretary v. Carolina Stalite Company, supra, the Commission will give due deference to the interpretation of that agreement advanced by the Secretary.

5. Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977 in the operation of the Riverside Plant.

DISCUSSION

It is clear and Respondent concedes that part of the work performed in the Plant consists of mineral milling and is therefore under the coverage of the Mine Act. Respondent argues that milling constitutes only a small part of the operation of what is essentially a refractory plant. The expert witnesses for Petitioner and Respondent differ sharply in their definition of refractory. MSHA's expert testified that in his opinion at least some of the refractory producing activities in Respondent's plant involved milling. The Commission observed in Carolina Stalite, supra at p. 424 that ". . . "milling' and "preparation' can be perceived as words used, in a loose sense, interchangeably to describe the entire process of treating mined materials for market . . . we believe the 1977 Mine Act's use of both terms signals an expansive reading is to be given to mineral processes covered by the Mine Act, rather than requiring a clear distinction between what is a milling or a preparation process."

I conclude based on an expansive reading of the term that at least a part of Respondent's refractory production (that using mined or milled minerals) involves the milling or preparing of minerals and therefore comes under the Mine Act. All of the work at the Plant is performed in a single facility, although in separate buildings. The Secretary has determined that administrative convenience would be served by delegating the authority over health and safety at Respondent's plant to MSHA even though part of the plant activities would normally fall under OSHA's jurisdiction. The Mine Act gives the Secretary this authority and there is no evidence in this case to justify the Commission's overturning his exercise of that authority.

6. The refusal of Respondent to permit the MSHA inspector to enter its plant to conduct an inspection is a violation of section 103(a) of the Mine Act.

7. Respondent is not a large operator. It employs 60 people at its plant and an unknown additional number at its clay pit. From July 1, 1980 to February 28, 1982, its sales of Alapatch amounted to $352,376.11, and its sales of "specialties" amounted

to $2,639,781.84. From July 1, 1982 to December 31, 1982, it sold 276,085.86 Alapatch and 1,995,160.85 specialties. I conclude that it is of moderate size.

From August 1973 to February 1981, approximately 274 violations were assessed against Respondent's pit and plant. I conclude that this is a moderate history and a penalty otherwise appropriate in this case should not be increased because of it. There is no evidence that a penalty in this case will have any effect on Respondent's ability to continue in business, and I conclude that it will not.

8. I conclude that the violation here was very serious. It involved the refusal to permit an inspector to follow up on a fatality investigation. The facts surrounding the fatality are not part of the record in this case, but such an investigation is of the greatest importance to the proper enforcement of the Act and the protection of the safety and health of the employees. Cf. Secretary v. Waukesha Lime & Stone Company, 1 FMSHRC 512 (1979) (ALJ).

9. Respondent contends that any penalty assessed in this case should be nominal since Respondent is merely seeking through this proceeding to have a determination made as to whether MSHA or OSHA has jurisdiction. But the evidence shows that MSHA has inspected the facility for many years. Although one letter from MSHA indicated that OSHA had jurisdiction, it was promptly corrected. OSHA has never inspected the facility. It is important to note that Respondent's refusal to admit the inspector followed a fatal injury to an employee. I conclude that Respondent knew or should have known that MSHA had authority to inspect. The violation was willful.

10. Based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is $500.

ORDER

Based on the above findings of fact and conclusions of law, Respondent is ORDERED to pay the sum of $500 within 30 days of the date of this decision for the violation found herein to have occurred.

James A. Broderick
Administrative Law Judge