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LITTLE COAL V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

LITTLE SANDY COAL SALES, INC.,
CONTESTANT

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

NOTICE OF CONTEST

Docket No: KENT 83-178-R
Order No: 2053590; 3/18/83

No. 1 Tipple

DECISION

Appearances: Edward H. Fitch, Esq., Office of the Solicitor, U.S.
Department of Labor, 4015 Wilson Boulevard, Arlington,
Va, for Respondent

Before: Judge Moore

This case was set for hearing in Pikeville, Kentucky, on September 8, 1983, at 10:00 A.M. After arriving in the Pikeville area on September 7, I received a call from my secretary stating that Mr. Everman, owner of Little Sandy Coal Sales, Inc. the contestant, was ill and could not attend the hearing on the following day. Mr. Everman left two numbers at which he could be reached. One was his office number and the other was his home number, and he announced to my secretary that he would be at the home number after 4:00 P.M.

On the following day, after several inspectors, the Solicitor's attorney, and I had arrived at the hearing site and waited until twenty minutes after 10:00 A.M. for Mr. Everman to appear, I called my secretary and asked her to get in touch with Mr. Everman. My secretary called Mr. Everman's office and was informed that he was not there at the time but was expected. She then called Mr. Everman's home and let the phone ring 9 times; there was no answer.

Mr. Everman had requested an expedited hearing in this case and it appeared that Mr. Fitch and the inspectors had tried to accommodate Mr. Everman in reaching a speedy determination as to whether his operation was a mine, subject to the Federal Mine Safety and Health Act. In fact, the inspectors have extended the abatement time of other citations so that Mr. Everman will not have to litigate those citations until a determination has been made as to the legal status of his operation. I think Mr. Everman owed the government a little more than a last-minute call to my office saying that he was too sick to attend the hearing.

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At the hearing I did not hold Mr. Everman in total default but did rule that by his failure to appear he had waived his right to cross-examine the government witnesses. I announced that I would communicate with Mr. Everman after the trial to determine whether or not he had good reason to be absent.

The government was then allowed to elicit testimony and exhibits from a supervisory inspector. The inspector identified the exhibits and described the Little Sandy Coal Sales operation. In short, the company buys raw coal, puts it through a crusher, refines it by screen into 3 sizes and then sells the coal. I asked the inspector how this operation differed from that of a normal tipple. His answer was that in the typical tipple which is not located at a mine itself, the tipple operator does not own the coal. He crushes and sizes somebody else's coal, whereas Mr. Everman buys the coal, processes it and then sells it.

Mr. Everman telephoned me as soon as I got back to our Virginia office and apologized for not attending the hearing. He said he would get a doctor's certificate showing that he was too ill to participate in the hearing. I told him that if he would send me that doctor's certificate I would allow him to submit further evidence but that I would not reconvene the hearing to allow him to cross-examine the MSHA inspector. He said that he would like to submit some material but that he would like to look at the transcript first. I then transferred the call to my secretary, who gave him the necessary information concerning the court reporter.

Whether Mr. Everman changed his mind about the copy of the transcript or managed to get one before one was delivered to this office, I don't know. But he did submit a substantial amount of information (similar to a brief) on September 26, 1983. Attached was a note from Dr. Shufflebarger which said "Mr. Everman was unable to attend due to illness." In the circumstances, I hold the excuse insufficient to justify Mr. Everman's failure to appear at the hearing. The note does not say what was wrong with Mr. Everman, or how ill he was. And he was well enough to be in his office. I will nevertheless, consider the material he submitted.

In the handwritten portion of his submission, Mr. Everman makes a number of important points. He compares his operation to that of the Allied Chemical plant in Ashland, Kentucky, which is considered by MSHA as a coke manufacturing plant and not a mine. The plant receives coal by rail, grinds it to the proper size to make coke to be shipped to various customers. At his plant, Mr. Everman says, he takes coal "and manufactures stoker".

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He also points out that his operation is considered manufacturing by the State of Kentucky in regard to sales tax and workmen's compensation insurance and that he is not considered a mine by the federal Office of Surface Mining or the Kentucky Department of Surface Mining. His most telling argument however, involves the case of Secretary of Labor vs. Oliver M. Elam, Jr. Company, 4 FMSHRC 5, (January 7, 1982). Elam's operation is quite similar to that of Little Sandy. Elam got paid for loading coal that it did not own on to barges that it did not own. Some coal was loaded directly on to the barges by conveyor belts, but other pieces of coal were too big and had to be run through a crusher in order to fit on the covered conveyor belts. Little Sandy, on the other hand, owns the coal it processes, and the crushing, sizing and loading is to make the coal marketable and not just so that it will fit his conveyors. It is a small difference but it is enough. Secretary of Labor v. Alexander Brothers, Inc. 4 FMSHRC 541 (April 5, 1982).

I sympathize with Mr. Everman. I hope this decision does not put him out of business as he claims it will, and I hope he takes an appeal to the Commission for a final determination.

I reject all of Mr. Everman's arguments to the effect that the facts, as related by him, as well as by the inspector, indicate that he is not a mine operator. I find that the violation occurred, that the operation is covered by the Federal Mine Safety and Health Act, and I accordingly AFFIRM the citation for failure to have sanitary toilet facilities.

Charles C. Moore, Jr.,
Administrative Law Judge