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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 PROCEEDINGS Docket No. WEST 80-111-M A.C. No. 05-03431-05001
v.	Alcott Pit
SOUTHWAY CONSTRUCTION COMPANY, INC., RESPONDENT	Docket No. WEST 81-295-M A.C. No. 05-03586-05001 BY2 Sargents Pit

DECISIONS

Appearances: Robert J. Lesnick, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
J.O. Lewis, Esq., Alamosa, Colorado, for Respondent.

Before: Judge Carlson

These two cases, consolidated for hearing, arose out of inspection of respondent's gravel pits and crushing operations. The cases were heard at Pueblo, Colorado, under provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the "Act"). The Secretary seeks civil penalties for seven alleged violations of safety standards promulgated under the Act.

The parties waived the filing of post-hearing briefs.

ISSUES

The questions to be decided are:

(1) Whether respondent's operation constituted "mining" within the contemplation of the Act.

(2) Whether respondent's operation affected commerce within the contemplation of the Act.

(3) If respondent was covered by the Act, whether it committed the violations alleged, and if so what civil penalties are appropriate.

THE MINING ISSUE

All testimony in this case was provided by two federal inspectors. (FOOTNOTE 1) Counsel for Southway Construction Company, Inc. (Southway) called no witnesses, and was content to cross examine the inspectors. The undisputed evidence showed that respondent, at the times of inspections, was extracting river rock and gravel from natural deposits forming a bench along a stream bed. The river rock, in formation, was sufficiently loose to be removed directly by the buckets or scoops of front-end loaders. The product was screened on the site to separate small, gravel-size rock, which needed no further processing, from larger stones which required crushing to make aggregate.

Section 3(h)(1) defines a "coal or other mine" as "an area of land from which minerals are extracted in non-liquid form. . . ." This definition must be given a broad reading. Cyprus Industrial Minerals Corporation, 3 FMSHRC 1 (1981). Sand and gravel pit operations clearly fall within the definition. Marshall v. Wallock Concrete Products, Inc., (U.S. District Court for the District of New Mexico), 1 MSHC 2237 (1980); B & N Construction, Inc., 3 FMSHRC 427 (1981) (ALJ).

I therefore hold that the Southway operation was a "mine" within the meaning of the Act.

THE COMMERCE ISSUE

Southway denied that it was engaged in an enterprise affecting commerce, and put the government to its proofs upon that issue. The government undertook to supply those proofs by showing that Southway provided crushed rock or aggregate to the Colorado State Highway Commission for use in highway construction; that Southway used equipment manufactured outside the State of Colorado; and that Southway used the telephone, an instrument of interstate commerce, in the conduct of its business.

The Act covers all mines "the products of which enter commerce or the operations or products of which affect commerce." 80 U.S.C. 803. This language gives the widest jurisdiction obtainable under the commerce clause of the Constitution. Brennan v. OSHRC, 492 F.2d 1027 (2d Cir.1974).

Inspector Leo Garcia inspected the Southway's Alcott pit on June 28, 1979. The aggregate produced at the site, he testified, was being trucked to the City of Delta, Colorado, for use in a street resurfacing project.

The evidence shows that Southway closed down its Alcott operation shortly after Garcia's inspection and moved to a location known as the Sargents pit. Inspector Porfy Tafoya inspected that location with another MSHA inspector on September 4, 1979. This site was also adjacent to a waterway. Tafoya testified that the foreman acknowledged that Southway was crushing aggregate for the Colorado Highway Department. He further testified that the Highway Department had representatives at the site and that he observed the aggregate being hauled away in Highway Department trucks. None of this evidence was challenged.

It has long been clear that even businesses which sell their product within a single state fall within the broadest application of the commerce power. This is so because of the cumulative impact of small producers upon interstate transactions. Wickard v. Filburn, 317 U.S. 111 (1942); Fry v. United States, 421 U.S. 542 (1974). Respondent's affect on commerce is doubly clear in this case because its aggregate product was used in the construction of public roads and highways which play an inevitable part in interstate transportation, B.L. Anderson, Inc., 3 FMSHRC 1019 (1981) (ALJ), aff'd. sub nom B.L. Anderson, Inc. v. FMSHRC, 668 F.2d 442 (1982); John Petersen, d/b/a Tide Creek Rock Products, 4 FMSHRC 2241, 2247 (1982) (ALJ).

Moreover, Inspector Tafoya testified that he ascertained that several of the pieces of heavy mobile equipment used in the pit were manufactured outside of Colorado. His knowledge was based upon up-to-date listings maintained by MSHA in connection with its licensing and approval of mining equipment. Familiarity with such information, he indicated, was essential to the performance of his duties. Under such circumstances the information is inherently credible, and not subject to exclusion under the hearsay rule as respondent contends. Use of equipment which has moved in interstate commerce affects commerce within the meaning of the Act. Avalotis Painting Company, 9 OSHA 1226 (1981); United States v. Dye Construction Company, 510 F.2d 78 (10th Cir.1975).

The Secretary also attempted to show that Southway used a telephone in the conduct of its business, a further indication of commerce. That issue is not further examined here since other evidence plainly shows that the Southway enterprise "affected commerce."

THE VIOLATIONS

Docket No. WEST 80-111-M (The Alcott Pit)

Citation 327198

At the Alcott Pit, Inspector Garcia saw several oxygen cylinders on the floor of the pit. The cylinders, he testified, were upright and unsecured by straps or wires. Gauges showed the cylinders to be full. He cited this condition as a violation of the safety standard cited at 30 C.F.R. 56.16-5 which provides:

> Compressed and liquid gas cylinders shall be secured in a safe manner.

The inspector indicated that the nearest employee, approximately 15 feet away, was operating a crusher. Immediately upon citation, Southway moved the cylinders up against a trailer, and secured them. The danger presented by unsecured cylinders, the inspector stated, was that if they were accidently tipped or turned over, the gauges could break, creating a possibility of ignition, or the cylinders themselves could "shoot out," propelled by the liberated gasses.

These facts, all undisputed, clearly establish a violation of the cited standard.

The inspector, in his citation, classified the violation as "significant and substantial." That statutory term was defined in Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981), where the Commission held that it applied to those violations in which there exists "a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Respecting this citation, the inspector testified that he did not now consider that the violation qualified as significant and substantial under the National Gypsum test. Counsel for the Secretary joined in that view and moved to amend the charge to eliminate the significant and substantial designation.

Although this judge has in the past had occasion to scrutinize such motions closely, the Secretary's reappraisals will be accepted in this case since the original penalty assessment amounts were quite small-an indication that the violations were relatively minor.

The civil penalty sought by the Secretary is $24.00. The parties stipulated to several of the factual elements which go toward determination of penalty for all violations in this proceeding. Southway's operation was small, and at the time of Garcia's inspection it had no history of violations. The evidence showed that all violative conditions were abated immediately. Respondent's good faith was not challenged.

As to this particular violation, workers exposure to the hazard of the unsecured oxygen bottles was minimal. Under all the circumstances only a light penalty is justified. The originally proposed penalty of $24.00 is light, however, and I deem that amount appropriate. A penalty of $24.00 is therefore assessed.

Docket No. WEST 81-295-M (The Sargents Pit)

Citation No. 326265

Inspector Tafoya testified that he observed that insulation on a splice on a 480 volt electrical cable furnishing power to a conveyor motor was inadequate, exposing the interior wires of the cable. The area of which he complained was very near the point at which the cable entered the motor case. Also, the bushing designed to protect the cable from wear and the effects of vibration where it entered the motor casing was not in the proper place. It therefore offered no protection to the cable. These conditions caused the inspector to charge a violation of 30 C.F.R. 56.12-8, which, as pertinent here, provides:

> Power wires and cables shall be insulated adequately where they pass into and out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings.

The inspector maintained that the cable presented a hazard of electrical shock or electrocution to any of the four employees who might for any reason touch the cable or the motor housing. I hold that this uncontradicted testimony establishes the violation alleged. The cable was neither adequately insulated, nor was the fitting at the engine cover "proper".

The inspector maintained that this violation was significant and substantial as the original citation alleged. He feared that the combination of the defective splice and the misplaced bushing could lead to electrocution or severe shock. Four employees were potentially exposed to this hazard, and he singled out a worker doing clean-up in the immediate area of the belt. I agree with the inspector's assessment, and conclude that the violation carried with it the reasonable likelihood of injury of a reasonably serious nature. It was therefore properly classified as significant and substantial.

The Secretary seeks a penalty of but $40.00. Giving due consideration to the penalty criteria discussed earlier, together with the gravity of the violation, a $40.00 penalty is surely not excessive. The proposed amount will therefore be assessed.

Citations 326266 and 573521

These two citations represent virtually identical conditions on two separate conveyor systems at the pit. On each conveyor Inspector Tafoya observed take-up pulleys with exposed or unguarded pinch points. The exposed pinch points on both machines were situated about four or five feet above ground level. Neither danger point was protected by any natural obstruction which would tend to isolate employees from contact. The inspector acknowledged that no employees were working in proximity to the pulleys at the time of his visit, but observed that clean-up of conveyor spillage would necessarily be done in the immediate area from time-to-time. Unwary workers, he indicated, could have clothing caught up in the pinch point, with resulting personal injury. He cited these conditions as violations of 30 C.F.R. 56.14-1, which provides:

> Gears; sprockets; chains; drive head, tail and take-up pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

The facts establish violations. Here again the violations were originally charged as significant and substantial, but the Secretary moved at trial to delete that designation owing to the inspector's belief that the circumstances did not meet the National Gypsum test. The inspector's view was apparently based on the fairly remote possibility that workers would be near the danger area presented by the pulleys. While the validity of that view may be arguable, I am not disposed to quibble with it in a case of this magnitude. The violations will not be deemed significant and substantial.

The Secretary seeks a civil penalty of $40.00 for each violation. Since I see no useful distinction between the penalty-related facts affecting these violations and those affecting the oxygen bottle citation discussed earlier, consistency suggests the same result here. Consequently, a civil penalty of $24.00 will be assessed for each.

Citations 573520 and 573522

While at the site, Inspector Tafoya determined that two pieces of heavy mobile equipment were operating without audible reverse signal alarms. Both machines, a front-end loader and a Caterpillar bulldozer, were equipped with such automatic devices. On both machines, however, the alarms were out-of-order. The inspector also testified that operators of the machines had obstructed views to the rear, and that while he watched backing maneuvers, neither operator was provided with an observer to signal when the way was clear. Tafoya cited these conditions as violations of 30 C.F.R. 56.9-87, which provides:

> Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up.

The inspector indicated that there was no employee foot traffic in the area of the cited equipment while he watched. There were, however, no impediments to the presence of workers, and there was thus a "potential" for endangerment. The evidence shows that the alleged violations occurred.

The Secretary seeks a penalty of $36.00 for each reverse alarm violation. Even if not significant and substantial, I consider these violations of greater gravity than those for which lesser penalties have been assessed herein. Large pieces of mobile equipment need functioning back-up alarms whenever there is any possibility of foot traffic on the pit floor. The $36.00 penalty amounts will be affirmed.

Citation 573523

The inspector described four electrical boxes located in Southway's generator trailer which controlled electrical current to a variety of equipment in the pit, including the conveyors and crushers. None of these boxes, he testified, was labeled to show which piece of equipment it controlled. This condition caused him to cite the respondent for violation of 30 C.F.R. 56.12-18, which provides:

> Principal power switches shall be labeled to show which units they control, unless identification can be made readily by location.

The inspector acknowledged that the foreman of the operation and the other three employees probably knew the purpose of each box. He nevertheless pointed out that in the event of an emergency persons other than employees might need to deenergize a particular circuit without delay or any need for study or experimentation.

The requirement of the standard is unconditional; the violation was proved.

The Secretary does not retreat from his original position that the violation was significant and substantial. Curiously, however, the proposed penalty at $22.00 was smaller than that for any other violation in this proceeding. While the condition of the control boxes was clearly violative of the standard, I find the likelihood of an accident, and hence any injury, quite remote under the facts of record. I must therefore hold that the Secretary failed to establish the significant and substantial element of the charge.

The $22.00 penalty proposed is appropriate and will be assessed.

CONCLUSIONS OF LAW

Consistent with the facts found true in the narrative portions of this decision, the following conclusions of law are made:

(1) Southway was engaged in "mining" under the Act and its mining operations and production affected commerce. It was thus subject to the Secretary's enforcement jurisdiction.

(2) Southway violated the safety standard published at 30 C.F.R. 56-16.5 as alleged in citation 327198 in Docket No. WEST 80-111-M. The violation was not significant and substantial within the meaning of the Act. A civil penalty of $24.00 is appropriate.

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(3) Southway violated the safety standard published at 30 C.F.R. 56.12-8 as alleged in citation 326265 in Docket No. WEST 81-295-M. The violation was "significant and substantial" within the meaning of the Act. A civil penalty of $40.00 is appropriate for the violation.

(4) Southway violated the safety standard published at 30 C.F.R. 56.14-1 as alleged in citations 326266 and 573521 in Docket No. WEST 81-295-M. The violations were not "significant and substantial" within the meaning of the Act. A civil penalty of $24.00 is appropriate for each violation.

(5) Southway violated the safety standard published at 30 C.F.R. 56.9-87 as alleged in citations 573520 and 573522 in Docket No. WEST 81-295-M. The violations were not "significant and substantial" within the meaning of the Act. A civil penalty of $36.00 is appropriate for each violation.

(6) Southway violated the safety standard published at 30 C.F.R. 56.12-18 as alleged in citation 573523 in Docket No. WEST 81-295-M. The violation was not "significant and substantial" within the meaning of the Act. A civil penalty of $22.00 is appropriate for the violation.

ORDER

Accordingly, all citations, as modified herein, are ORDERED affirmed, and the respondent Southway shall pay to the Secretary of Labor civil penalties totalling $206.00 within 30 days of the date of this order.

John A. Carlson
Administrative Law Judge

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~FOOTNOTE_ONE

1 The transcript of the evidentiary hearing was of lamentable quality. Despite the frequent errors, the substance of the testimony was preserved and neither party sought corrections. Therefore no correcting orders are entered.