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SOL (MSHA) v. C. D. LIVINGSTON
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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. WEST 84-150-M A.C. No. 04-04700-05501
v.	Digmore Placer Mine
C.D. LIVINGSTON, RESPONDENT	

DECISION

Appearances: Carol Fickenscher, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;
Mr. C.D. Livingston, Iowa Hill, California, pro se.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges respondent with violating a provision of the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq., ("the Act").

After notice to the parties, a hearing on the merits was held in Sacramento, California on March 19, 1985.

The parties filed post-trial briefs.

Citation 2363602

This citation alleges respondent violated Section 103(a) of the Act which, in its pertinent portions, provides as follows:

> Sec. 103.(a) Authorized representatives of the Secretary shall make frequent inspections and investigations in coal or other mines each year for the purpose of . . . (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, except that . . . In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its

> entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and his experience under this Act and other health and safety laws. For the purpose of making any inspection or investigation under this Act, the Secretary, . . . with respect to fulfilling his responsibilities under this Act, or any authorized representative of the Secretary, . . . shall have a right of entry to, upon, or through any coal or other mine.

Issues

The issues are whether respondent, a one man operator of any underground gold mine, is subject to the Act.

If so, did respondent violate the Act in refusing entry to the MSHA inspector. If the Act was violated, what penalty is appropriate?

Summary of the Evidence

MSHA Inspector Esteban visited the Digmore Placer Mine on May 17, 1984.

At the time Mr. Livingston was doing some work around the mine portal. He told the inspector that MSHA had no jurisdiction over the mine. However, he agreed to a courtesy (CAV) inspection. The inspector on that occasion found four conditions that violated the regulations. He issued notices for the violations. He also issued one citation when he found a situation involving a condition of imminent danger. This arose because a gasoline driven loader was being used underground. Carbon monoxide poisoning can occur in these circumstances (Tr. 7-9).

The inspector returned June 21, 1984 to abate the previous citation and to conduct a regular inspection. On that occasion Mr. Livingston repeated his statement that MSHA lacked jurisdiction over the mine. He further told the inspector that he should have a search warrant together with the sheriff with him (Tr. 10). The inspector then stated that he would issue an order for denial of entry and he issued a citation under Section 104(a) and 107(a) of the Act. When Mr. Livingston refused to accept the citation the inspector mailed it to him (Tr. 10).

Ronald Stockman and Don Robinson testified for respondent. Mr. Stockman, a miner, indicated that Mr. Livingston has no employees but he (Stockman) has been "helping out" since 1984. Further, he was in the mine about the same time as when the

inspections occurred (Tr. 21-25). Stockman considered that he and Mr. Livingston's son were not employees of respondent because they were "free to come and go." It was further the opinion of the witness that a small operator is not subject to the Act (Tr. 25, 26, 30).

In Stockman's view Mr. Livingston is a professional miner who is concerned about safety (Tr. 31).

Don Robinson testified that he has not worked at the Livingston mine. But he came down to visit on a Sunday and he asked if he could help move some dirt. Miners, in such circumstances that occurred here, help each other (Tr. 32, 33).

Mr. Livingston indicated that his son did not work at the mine in May or June 1984 (Tr. 37).

Discussion

The evidence is insufficient in this case to establish that C.D. Livingston employed miners at the Digmore Placer mine at the time this citation was issued in June, 1984.

However, Inspector Esteban indicated that Mr. Livingston himself was doing some work around the portal of the mine at the time of an inspection in May, 1984 (Tr. 8).

When he returned after the courtesy inspection he was denied entry to the premises.

Thus, the ultimate issue presented for consideration here is whether a one man underground gold mining operation is subject to the Act. On this point the parties have filed extensive briefs.

It is clear that since its passage the present Act has been broadly construed. In Cypress Industrial Minerals Corp., 3 FMSHRC 1 (1981) the Commission ruled that: "The Act provides an expansive definition of a "mine' which Congress stated must be given the "broadest possible interpretation', with doubts resolved in favor of inclusion," 3 FMSHRC at 2. In El Paso Rock Quarry, Inc., 1 FMSHRC 2046, 3 FMSHRC 673 (1981), it was held that customers and employees of customers who did not comply with standards on mine property are "miners" within the meaning of the Act. Further, the operator was held liable for their failure to comply.

Respondent's factual defense rests on the proposition that he has no employees and, therefore, he is not subject to the Act. However, the failure to have employees was rejected as a defense by the Sixth Circuit in Marshall v. Sink, 614 F.2d 37 (1980). Specifically, the Court observed that, 614 F.2d at 37:

> Sink owns and operates without employees a small mine in West Virginia. When federal coal mine inspectors

> attempted to make a routine inspection of Sink's mine pursuant to 30 U.S.C. 813, Sink refused entry. (Emphasis added).

The Court, citing several cases, noted that "it is settled that Sink's mine is subject to federal regulation" 614 F.2d at 38.

It is true that Sink operated a coal mine whereas respondent operates an underground gold mine. But the MSHA regulations are nevertheless applicable here, particularly in view of the broad Congressional definition of a mine. This is apparent when the Congress enacted this definition:

> (h)(1) "coal or other mine' means (A) an area of land from which minerals are extracted in nonliquid form . . . 30 U.S.C. 802(3).

Respondent's post-trial brief raises many issues. Respondent initially asserts that MSHA has applied a harsh interpretation of the Act without taking into consideration the true intent of Congress. Respondent claims the true intent of Congress was to exclude small operators such as himself.

I disagree. The Congressional intent is clear and convincing. The Senate Committee, which was largely responsible for drafting in final mine safety legislation, stated as follows:

> 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.
>
> See S.Rep. No. 181, 95th Congress., 1st Sess. 14 (1977), reprinted in Senate Sub-Committee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 602 "Legis.Hist."

Respondent further argues the substantial differences between coal and gold mining render MSHA without jurisdiction.

Contrary to respondent's assertion the legislative history clearly shows the Congressional concern and review of the injuries and diseases affecting the broad spectrum of the mining industry. Legis.Hist. at 366, 595, 645.

Respondent's brief also states that the actual facts are that he was in the process of prospecting and had not yet begun to operate any mine.

Respondent did not testify on this subject. The only evidence, from Inspector Esteban, establishes that Mr. Livingston on May 17, 1984 was doing some work around the portal of the mine (Tr. 8). In addition, on June 21, 1984 when the inspector returned, Mr. Livingston was operating his mill (Tr. 10).

If engaged in milling activities respondent would clearly be within the statutory definition of a "coal or other mine". This is apparent because the plain words of the statutory definition state, in part, that a "coal or other mine" includes the "milling of such minerals" 30 U.S.C. 802(3)(h)(1).

But to address issue raised by respondent in his brief: mere exploration by using a loader underground can constitute mining under the Act. This analysis is in line with the definition of exploration contained in A Dictionary of Mining, Mineral, and Related Terms, U.S. Department of Interior, Bureau of Mines (1968). The definition states as follows:

> Exploration. a. The search for coal, mineral, or ore by (1) geological surveys; (2) geo-physical prospecting (may be ground, aerial, or both); (3) boreholes and trial pits; or (4) surface or underground headings, drifts, or tunnels. Exploration aims at locating the presence of economic deposits and establishing their nature, shape, and grade and the investigation may be divided into (1) preliminary and (2) final. See also preliminary exploration. Also called prospecting. Nelson. b. Work involved in gaining a knowledge of the size, shape, position, and value of an ore body. Lewis, p. 20, c. A mode of acquiring rights to mining claims. Fay.

Respondent further states that if MSHA's position is sustained as to exploration then they will have to conduct inspections on those gold miners who are panning, suction dredging or mining recreationally. The facts here involve underground mining exploration activities, as noted. It is not necessary in this case to rule on respondent's hypothetical factual situations.

Respondent also argues that the doctrine authorizing warrantless searches does not apply here Cf. Donovan v. Dewey, 101 S.Ct. 2534 (1981). He contends that the mine in the cited case was commercial property whereas in this situation his residence was located on the property inspected by MSHA.

The purpose of the hearing was for all parties to present their evidence. There is some evidence that respondent's office was located in his home. But, it was not shown that respondent's home or office were searched in any manner. It is not possible to apply constitutional principles in a factual vacuum. I, accordingly, reject respondent's warrantless search arguments.

Respondent also states that since he is a small owner operator the controlling case law is contained in Marshall v. Wait, 628 F.2d 1255, 9th Cir. (1980) and Morton v. Bloom, 373 F.Supp. 797 (1973).

It is true that the above cited cases hold that the Act is not applicable to a small owner operated mine.

However, both Wait and Bloom stand virtually alone. Compare the better reasoned decisions of Marshall v. Standt's Ferry Preparation Co., 602 F.2d 589 (3rd Cir.1979); Marshall v. Sink, supra; Marshall v. Texoline Co., 612 F.2d 935 (5th Cir.1980); Marshall v. Nolichuckey Sand Co., Inc., 606 F.2d 693 (6th Cir.1979), cert denied --- U.S. ---- 100 S.Ct. 1835.

The Review Commission has the obligation to establish a national policy as to the scope of the Federal Mine Safety Act. As one of the judges of the Commission the writer is obliged to follow Commission precedent. Accordingly, I reject the pronouncements of the law as set forth in Wait and Bloom.

Respondent also urges that it stretches credibility beyond reason when the Secretary claims his operation affects interstate commerce merely because the shovel or gasoline he buys has been manufactured in another state.

In connection with this argument I note that the Federal Mine Safety and Health Act applies to mines "the products of which enter commerce, or the operations or products of which affect commerce" 30 U.S.C. 803. The above language was taken from the Coal Mine Safety Act of 1969 and it indicates that the Congress intended to exercise its full authority under the Commerce Clause. Cf. Capitol Aggregates, 2 FMSHRC 2373 (1980). Judicial interpretation of the term "affect commerce" includes indirect activities which in isolation might be deemed to be merely local but which none-the-less affect commerce. N.L.R.B. v. Superior Lumber Company, 121 F.2d 823 (3rd Cir.1971, 50 A.L.R.2d 1228, 1235). In addition, the size of the business enterprise involved 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. An example of the size of an enterprise which has been determined to have an affect on commerce may be found in Wickard v. Filburn, 317 U.S. 111, 63 S.Ct. 82 wherein a farmer exceeded his wheat allotment of 11.1 acres. It was held that the 11.9 excess acreage was prohibited by the statutory scheme of the Agricultural Adjustment Act of 1938 (as amended).

Respondent's arguments also attack MSHA's programs. He asserts there is a lack of professional conduct on MSHA's part in pursuing small miners and prospectors.

The evidence does not support this claim. MSHA is obliged by Congressional mandate to pursue those operators who are subject to the Act. MSHA cannot be faulted for seeking to inspect respondent's gold mine.

I have carefully considered respondent's arguments and found them to be without merit. I, accordingly, conclude that the citation should be affirmed.

Civil Penalty

In assessing a civil penalty the Secretary, in accordance with his regulations, proposed a special assessment.

On the basis of the facts available to him he concluded that on June 21, 1984, the owner and operator of the underground mine denied entry to the inspectors to conduct their official inspection duties without a search warrant. After a discussion of the matter, the owner, C.D. Livingston, continued to deny the inspectors the right to conduct the inspections.

On June 21, 1984 a Section 104(a) a citation was issued to C.D. Livingston for violating Section 103(a) of the Federal Mine Safety and Health Act of 1977.

On the same day, after the expiration of a reasonable period of time to allow management to comply with the citation, a Section 104(b) Order of Withdrawal was issued for failure to abate Citation No. 2363602.

In proposing his penalty the Secretary concluded that it constituted an extremely serious violation of the federal law to prohibit federal mine inspectors from inspecting the mines to determine compliance efforts. Such a practice could only be the result of intentional conduct on the part of management.

There were no previously assessed civil penalties for denial of entry. The size of the company was noted as 520 production tons.

The Secretary finally concluded that based on the six criteria set forth in 30 C.F.R. 100.3(a) and on the information available to the Office of Assessments, he would propose a civil penalty of $250.

Based on the record here I deem that a civil penalty of $250 is appropriate and it should be affirmed.

Conclusions of Law

Based on the entire record and the findings herein the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.

2. Citation 2363602 and the proposed penalty of $250 should be affirmed.

ORDER

Based on the findings of fact and conclusions of law herein I enter the following order:

Citation 2363602 and the proposed penalty of $250 are affirmed.

John J. Morris
Administrative Law Judge