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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 84-96-M A.C. No. 04-00030-05501
v.	BrubakerÄMann
BRUBAKERÄMANN INCORPORATED, RESPONDENT	

DECISION

Appearances: Rochelle Ramsey, Esq., Office of the Solicitor, U.S. Department of Labor, Los Angeles, California, for Petitioner;
Steve Pell, Esq., Ventura, California, for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges respondent with violating two safety regulations promulgated under 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 commenced in Los Angeles, California on June 11, 1986.

The parties filed post-trial briefs.

Issues

The issues are whether the Secretary's acts in issuing his citations exceed the powers legislated by Congress since the State of California has a mine safety program equal or superior to MSHA; further, whether the Secretary's conduct was arbitrary and capricious in violation of the 5th Amendment; finally, whether respondent has a right not to be inspected by MSHA when California has a viable mine safety program.

The above threshold issues and the contentions raised by respondent require a review of certain uncontroverted evidence by witnesses Byron M. Ishkanian and William Mann.

Bryon M. Ishkanian, testifying by deposition, identified himself as the principal engineer for mining and tunnelling for the State of California (D. 5, 6). He has 27 years experience in mine safety and for the last three years he has supervised 17

subordinates engaged in the California mine safety programs (D. 6, 7). Mines are defined by the state as activities involving the extraction of mineral resources (D. 7). Its inspectors are hired on the basis of formal training and experience (D. 19, 33).

Brubaker Mann has been inspected by the state at least once a year. The company has one of the best safety records in the state. It is one of 904 mining locations within California (D. 7Ä9, 13, 14). Inspections by California encompass mechanical guarding of head and tail pulleys, explosives, reverse alarms, seat belts and junction boxes on 220 volt drive motors (D. 10). If workers were exposed as alleged in the MSHA citations California could have issued citations (D. 13, 14).

Before 1977 there were no MSHA inspections and the State was the sole inspecting authority in California (D. 16).

The State has assisted in training MSHA and MESA inspectors. MESA also adopted some of California's regulations (D. 16, 17). MSHA's regulations are more general than California's and the MSHA inspector has a greater degree of discretion (D. 18).

Mr. Ishkanian has no jurisdiction over MSHA but he has received numerous complaints about the dual enforcement presence in the State (D. 20Ä22). An additional complaint is the lack of continuity in inspections because MSHA rotates its inspectors (D. 24).

The efforts at mine safety by the state of California and MSHA are duplicative (D. 13, 14).

The witness discussed duplicate efforts with federal officials William C. Frohan, Tom Shepuk and Ray Bernard (D. 28, 31). But their response was negative (D 29). The witness had no input in the drafting of the Federal Act (D. 35, 36).

Norton Pickett, of the State of Nevada, has a job similar to that of the witness. Pickett has also complained about the duplication of safety efforts in Nevada. Pickett has worked for legislation in the U.S. Congress to correct this condition (D. 23, 24).

Mr. Ishkanian can see no need for the duplicative efforts in California. MSHA's efforts could be better used elsewhere. Twenty-three or twenty-five states have mine safety programs but some states do not (D. 27Ä32). Section 512(a) of the Federal Act says its purpose is to avoid duplication of effort (D. 31, 32).

The thrust of the federal act is towards mine safety. Title 8 of the California Administrative Code (attached to deposition as Exhibit A) deals with mine safety (D. 36, 37).

The testimony of witness William Mann outlined here is generally relevant to the threshold issues raised in the case. Additional testimony of the witness appears hereafter in relation to certain specific citations, infra.

Mr. Mann testified that he is the owner and operator of BrubakerÄMann, Inc. The company, engaged in rock crushing, has been in operation for 36 years. The company has worked hard for safety; in addition, there has never been a fatality or an overnight accident (Tr. 209, 210, 247).

The company's president also indicated that previous MSHA inspectors had not cited the company for the conditions now alleged in WEST 86Ä82ÄM and WEST 86Ä94ÄM (Tr. 227; Ex. R1). In fact, the company relied on previous MSHA inspections in 1980, 1981, and 1982 when the company was found not to be in violation of the regulations (Tr. 293, 294; Ex. R1). MSHA inspects the company two to four times a year (Tr. 213).

Mr. Mann stated that the inconsistent application of regulations and the duplication of efforts by MSHA and the State of California are a hardship on business (Tr. 295, 297). MSHA has different inspectors coming to the mine but the state uses the same inspector (Tr. 298). MSHA inspectors seems unfamiliar with milling (Tr. 299).

Generally, in relation to the machinery, Mr. Mann testified that the company's various machines are never maintained, lubricated or oiled while they are operating. In fact, the plant is closed for maintenance from 3:30 p.m. to 5 p.m. daily as well as from 7 a.m. to noon on Saturdays (Tr. 211). In the absence of a major breakdown, maintenance takes place only when the plant is shut down (Tr. 211). In any event, the company's workers would not put their hands into the machinery (Tr. 211).

Respondent's initial contention centers on the proposition that Congress intended that MSHA should not exercise jurisdiction in states having a mine safety and health program. In support of its argument respondent cites portions of the Act, namely 30 U.S.C. 801(g) and 959.

Section 801(g), in part, provides as follows:

> (g) it is the purpose of this chapter (1) to establish interim mandatory health and safety standards and to direct the Secretary of Health and Human Services and the Secretary of Labor to develop and promulgate improved mandatory health or safety standards to protect the health and safety of the Nation's coal or other miners; ... (3) to cooperate with, and provide assistance to, the States in the development and enforcement of effective State coal or other mine health and safety programs; and (4) to improve and expand, in cooperation with the States and the coal or other mining in

> dustry, research and development and training programs aimed at preventing coal or other mine accidents and occupationally caused disease in the industry.
>
> Section 959 provides as follows:
>
> (a) The Secretary shall make a study to determine the best manner to coordinate Federal and State activities in the field of coal or other mine health and safety so as to achieve (1) maximum health and safety protection for miners, (2) an avoidance of duplication of effort, (3) maximum effectiveness, (4) a reduction of delay to a minimum, and (5) most effective use of Federal inspectors.

Respondent contends the Secretary not only failed to make his report (FOOTNOTES 1) but the evidence shows a duplication of effort by MSHA and the State of California; it further shows a lack of coordination of such mine safety activities, a lack of maximum effectiveness and a lack of effective use of federal inspectors.

Respondent's contentions lack merit. There is no indication in the federal Act that Congress intended MSHA to withdraw if a viable state program existed. To "cooperate" with a state is in no way legislatively equivalent to withdrawing MSHA's enforcement action.

The legislative history of the Act sets forth a view directly contrary to the position urged by respondent. The relevant legislative history states as follows:

Effect on State Laws

> Under the Metal and Nonmetal Act States are encouraged to develop and enforce their own State plans meeting Federal requirements. Six States have State plans currently in effect. These are Arizona, Colorado, North Carolina, New Mexico, Utah, and Virginia. Under the Metal and Nonmetal Act the Secretary delegates his authority to States with approved plans to carry out his functions.
> Because State plans are not funded under the Metal and Nonmetal Act, but are entirely self-supported, Federal funds would not be removed from these plans with the repeal of the Metal and Nonmetal Act. As a result, these State plans would be expected to continue in conjunction with Federal enforcement under H.R. 4287. It would be a dual system which encourages State participation while at the same time not relinquishing Federal enforcement. However, the Federal law would supersede any State law in conflict with it. State laws providing more stringent standards than exist under the Federal law, however, would not be held in

> conflict with the act. (Emphasis added). House of Representatives, 95th Cong, 1st Sess (1977) reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Congress, 1st Session, 381 (May, 1977).

Stark v. Wickard 64 S.Ct 559, 321 U.S. 288 (1944) relied on by respondent, states a well established principle of law. But respondent's position is not supported by the terms of federal statute or its legislative history.

Respondent's argument that the Secretary was only to establish "interim" safety regulations is misdirected. The 1969 Act provided that such "interim" regulations were to be in effect until superseded in whole or in part by improved mandatory health standards promulgated by the Secretary ... 201(a), Public Law 91Ä173, 83 Stat 760.

Respondent's further argument centers on the view that many of the citations in the instant cases involve conditions for which respondent was not previously cited. Further, respondent was cited for conditions that have existed for 20 years or more. Respondent also relies on witness Ishkanian's testimony regarding MSHA requiring a generator to be moved (D. 22).

Respondent's arguments and its cited cases are not persuasive. The evidence (Ex. R1) clearly supports the view that respondent was not cited for a number of years for conditions for which it is now cited. This is a basic estoppel argument. Generally, an operator's reliance on prior inspections and the lack of citations from such inspections does not estop the Secretary from issuing a citation at a subsequent inspection. Inspectors tend to have different expertise and it is certainly possible that one inspector may believe a violation existed but another may lack the expertise to make such a determination. On the doctrine of estoppel see the Commission decision of King Knob Coal Company, Inc., 3 FMSHRC 1417 (1981); also Midwest Minerals Inc. 3 FMSHRC 251 (1981); Missouri Gravel Co., 3 FMSHRC 1465 (1981); Servtex Materials Company, 5 FMSHRC 1359 (1983). In short, the mere fact that a violative condition existed for 20 years is not a defense. The Tapo road incident described by witness Ishkanian is not relevant here. It involved a mine operator other than this respondent (D. 22). In addition, witness Ishkanian's testimony about the lack of MSHA enforcement in Texas and Oklahoma is not relevant here.

In sum, the Secretary does not have to justify enforcement proceedings in other states to proceed with these penalty proceedings in California.

The contributions by the State of California to mine safety (D. 17, 27) are commendable. But such contributions do not require the Secretary to withdraw from the enforcement of the federal regulations in that State.

Respondent's final position is that it has a property interest in the right not to be inspected by MSHA. This is so because the State of California is adequately making health and safety inspections of open pit gravel mines and it was the Congressional intent that MSHA avoid duplicative efforts.

This is a restatement of the first argument. Even agreeing the state program is adequate, the federal Act is not open to the construction respondent urges.

In Leis v. Flynt, 439 U.S. 438, 99 S.Ct 698 (1979), cited by respondent, the Court ruled that the asserted right of an out of state lawyer to appear pro hoc vice in an Ohio Court did not fall among those interests protected by the due process clause of the 14th Amendment. The cited case is not controlling in this situation.

For the foregoing reasons respondent's threshold contentions are without merit and they are denied.

Stipulation

The parties stipulated that respondent is a small operator. Further, respondent is subject to the Act unless MSHA's jurisdiction is pre-empted by the California Occupational Safety and Health Administration (Tr. 191, 249).

Citation 2246288

This citation charges respondent with violating 30 C.F.R. 56.14Ä1 which provides as follows:

> 56.14Ä1 Mandatory. Gears; sprockets; chains; drive, head, tail, and takeup 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.

Summary of the Evidence

Ronald G. Ainge, a person experienced in mining, issued this citation on January 18, 1984 (Tr. 15Ä17, 36, 67).

The inspector observed that the conveyor was in use. Further, the head pulley and the tail pulley were unguarded. Both pulleys were accessible (Tr. 37, 40, 101, 108; Ex. P5, P6).

If a worker came in contact he could be pulled into the tail pulley (Tr. 38).

In the inspector's opinion it was highly likely that a worker could come in contact with the pulley with a resulting loss of limb (Tr. 39, 40). The inspector was told that the machine had just been moved to a new location to replace a chute. But it was in production (Tr. 101Ä103).

William Mann, owner of the respondent company, testified that this machine had been moved and was not ready for operation. The company was getting ready to test it. The photographs fail to indicate any dust or rock in the area (Tr. 234).

Evaluation of the Evidence

This case presents a basic credibility conflict as to whether the conveyor was in operation. In this regard I credit the testimony of William Mann. As the operator of the plant he should know whether the conveyor was in use or whether they were preparing to test it.

While the inspector indicated the equipment was in use he concedes that he was advised that it had been moved to this location. The photographs support respondent's version since they failed to show any dust or rock on the equipment (Ex. P5, P6).

Since I conclude the conveyor was not in use, it follows that the exposed moving parts could not be contacted by any workers.

For the foregoing reasons, citation 2246288 and all penalties therefor should be vacated.

Citation 2246291

This citation charges respondent with violating 30 C.F.R. 56.20Ä3(a) which provides as follows:

> 56.20Ä3 Mandatory. At all mining operations; (a) Work-places, passageways, storerooms, and service rooms shall be kept clean and orderly.

Summary of the Evidence

This citation was issued by MSHA inspector Ainge. The cited condition was hazardous because of the spillage of fine sandy like material. This was evidenced by the amount of the spillage and its angle of repose (Tr. 46, 85). The depth on one side was 18 to 24 inches and the angle of repose was straight up. It had filled the walkway including a four-inch kick plate on the outer edge. There was a 30Äfoot drop to the ground. The railings on the walkway conformed to existing requirements. But if a man tripped and slid underneath the bottom midrail (21 to 24 inches above the walking level) he could slip to the ground resulting in a possible fatality (Tr. 46, 47, 75, 76; Ex. P12).

The area was used several times a day to provide access to one section of the plant (Tr. 47, 87).

In the inspector's opinion on this slippery surface, it was more than likely that an accident could occur (Tr. 49, 71Ä73, 86). The potential for injury increases with any increased increment of time (Tr. 72). Abatement was achieved by blocking off access to the area and by providing an alternative route (Tr. 49).

Mr. Mann indicated the spillage was not a hazard. Each time the rock color is changed the area is cleaned (Tr. 237, 238). There are guard rails around the tank and no one has been injured by this condition (Tr. 238).

Evaluation of the Evidence

The factual setting establishes a violation of the regulation. I reject Mr. Mann's testimony that no hazard existed. This was a passageway that was obviously not clean within the meaning of the regulation. Mr. Mann does not deny the existence of the condition.

Citation 2246291 should be affirmed.

Civil Penalty

The mandate to assess civil penalties is contained in Section 110(i) now 30 U.S.C. 820(i) of the Act. It provides:

> (i) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

Concerning prior history: the computer printout (Ex. P34) shows that respondent had no violations in the two year period ending March 5, 1985. The printout shows two violations before March 6, 1983. But, as the respondent contends, these would appear to be the two citations vacated in BrubakerÄMann, Inc., 2 FMSHRC 227 (1980). Accordingly, I conclude that the Secretary has failed to prove any adverse history on the part of respondent. The size of the penalty appears appropriate in relations to the small size of the operator and the penalty is not likely to affect the ability of the company to continue in business since the company grosses approximately $1,000,000 annually. The operator was negligent inasmuch as this accumulation most likely occurred over a period of time and it could have been observed. The gravity of the violation is low due to the fact that the walkway was equipped with standard guard rails. The respondent's good faith is apparent inasmuch as it rapidly abated the violative condition.

On balance, the Secretary's proposed penalty of $74 is excessive. I deem that a penalty of $24 is appropriate for the violation of 30 C.F.R. 56.20Ä3(a).

Briefs

The parties have filed excellent briefs (FOOTNOTE 2) which have been most helpful in analyzing the record and defining the issues. However, to the extent they are inconsistent with this decision, they are rejected.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portion of this decision, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.

2. Respondent did not violate 30 C.F.R. 56.14Ä1.

3. Respondent violated 30 C.F.R. 56.20Ä3(a).

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

ORDER

1. Citation 2246288 and all penalties therefor are vacated.

2. Citation 2246291 is affirmed and a penalty of $24 is assessed.

John J. Morris
Administrative Law Judge

1 It was not established at the hearing whether the Secretary did or did not make such a report.

2 Companion cases filed simultaneously involving these parties are docketed as WEST 84Ä103ÄM; WEST 85Ä157ÄM; WEST 85Ä177ÄM; WEST 86Ä82ÄM and WEST 86Ä94ÄM.