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SOL (MSHA) V. JEFFERSON COUNTY
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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 85-125-M A.C. No. 05-04014-05501
v.	
JEFFERSON COUNTY ROAD & BRIDGE DEPARTMENT, RESPONDENT	Docket No. WEST 85-126-M A.C. No. 05-04014-05502 Docket No. WEST 85-127-M A.C. No. 05-04014-05503
	Harris Pit

DECISION

Appearances: Robert Lesnick, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Cile Pace, Esq., Jefferson County Road & Bridge Department, Golden, Colorado, for Respondent.

Before: Judge Morris

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

A hearing on this matter took place on December 11, 1985 in Denver, Colorado.

The parties filed extensive briefs in support of their positions.

Issues

The issues are whether the Secretary has enforcement authority over respondent and, if so, may the Secretary assess civil penalties.

Stipulation

At the hearing the parties stipulated that if respondent is held to be subject to the Act and not entitled to a CAV inspection then respondent does not challenge the individual citations and penalties in the cases (Tr. 5, 6).

The parties further stipulated that the respondent, in its mining operations, uses equipment manufactured outside of the State of Colorado (Tr. 21).

Summary of the Evidence

The threshold issues require a review of the evidence. Bud Smead, Sam Nankervis and Louis Gabos testified for respondent. Jake DeHerrera and Arnold Kerber testified for the Secretary.

Bud Smead has been the Director of Public Works for Jefferson County, Colorado since 1978. The county operates five gravel pits called Harris, Dog Pound, Green Valley, Golden Gate and Pine Junction (Tr. 8-10). Smead is in charge of the County's Road and Bridge Department which is within the Public Works Division (Tr. 9).

Jefferson County does not sell any of its gravel. It is used exclusively for the surfacing of Jefferson County roads. Some of those roads connect to state and federal highways (Tr. 9, 14).

The operation of a Jefferson County gravel mine is approved by the County Commissioners of Jefferson County and by the State of Colorado Board of Mine, Land and Reclamation (Tr. 9, 10).

Mr. Smead indicated the county requested a CAV inspection. Mr. Gabos made an oral request for such an inspection (Tr. 13).

Sam Nankervis, director of the Jefferson County Road and Bridge Department, is responsible for maintenance and crushing for Jefferson County. The county has sustained one loss time accident (Tr. 15, 16).

The witness was first aware of the events after Lou Gabos called MSHA representative Carmoc Gardner for what the county thought would be a courtesy inspection (Tr. 18). The request for the CAV was after they had moved the crusher to a different pit. MSHA said they would inspect but it would not be a "courtesy" inspection (Tr. 19, 20).

Louis Gabos, a professional engineer and assistant director of the Jefferson County Road and Bridge Department, handles reports for the federal government and for land reclamation (Tr. 22, 26). Witness Gabos filled out the MSHA form and indicated the official business name as "Jefferson County Road and Bridge Department" (Tr. 26).

On March 18 Gabos called Gardner at MSHA. He said they were ready and running but he didn't mean they were crushing anything (Tr. 23). Gardner said there could be no courtesy inspection if the pit was in operation (Tr. 23).

The current practice of the respondent is to call MSHA when they move from one mine to another. Every time they now move they receive a courtesy inspection (Tr. 24).

Gabos filled out the MSHA legal identity form at the direction of his supervisor, Sam Nankervis (Tr. 26; Ex. 1). The form was dated July 12, 1985 (Tr. 27). All of the county gravel pits are titled in the same fashion (Tr. 28).

Gabos indicated the county complies with safe mining practices but they are not required to do so (Tr. 28, 29).

Jake DeHerrera, an MSHA inspector experienced in mining, inspected the Jefferson County pits (Tr. 30, 31).

At one point in time there was a lack of funds to inspect such pits. But he visited the site when he was advised they had been funded to inspect such property (Tr. 32, 33).

A CAV inspection is to assist the operator in complying with the Act prior to a mine reopening after it has been shut down for a time. For such a CAV inspection MSHA requires two weeks notice in writing. Further, MSHA requires that pit not be in operation (Tr. 33). Penalties are not issued under a CAV inspection (Tr. 34).

In January 1985 the Dog Pound pit was in operation and in the process of stock piling material. The inspector observed four to six workers in the area (Tr. 34).

Arnold Kerber, an MSHA inspector since 1974, visited the Dog Pound pit in January 1985. He also visited the Harris Pit on March 21, 1985 and issued 20 or 21 citations (Tr. 38-41).

The parties stipulated that the pit was in operation at the time of the inspection (Tr. 42).

Discussion

The County argues that the Secretary lacks authority to enforce the federal Mine Act against respondent for a number of reasons.

Initially, it is asserted that Congress in passing the Act did not intend to regulate states or political subdivisions thereof. This is so because neither the statutory definition of "operator" or "person" speak to the regulation of state or local governments. Cognizant of federalism concerns, Congress explicitly brings state and local governments within the purview of the statutory scheme if it intends to regulate their activity. For example, Congress so acted in amending the Fair Labor Standards Act, 29 U.S.C. 203(d), (x), See also Garcia v. San Antonio Mass Transit Authority --- U.S. ----, 105 S.Ct. 1005 (1985).

This issue is a matter of statutory construction and legislative intent.

The federal Mine Act defines an operator as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine . . ." (emphasis added) 30 U.S.C. 802. In the preamble of the Act Congress explicitly stated that it recognized "the existence of unsafe and unhealthful conditions and practices in the Nation's . . . mines (emphasis added). Accordingly, the Act was promulgated to meet the "urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's mines in order to prevent death and serious bodily harm . . ." (emphasis added). It is apparent here that a mine operated by a county is one of the Nation's mines. The Act was designed and Congress declared that "the first priority of all in the coal or other mining industry must be the health and safety of its most precious resource--the miner", 30 U.S.C. 801.

A casual reading of the legislative history establishes the clear intent of Congress. Senate Report No. 95-181 shows the congressional views:

> The Committee believes that it is essential that there be a common regulatory program for all operators and equal protection under the law for all miners. Thus, a principal feature of the bill is the establishment of a single mine safety and health law applicable to the entire mining industry.
> Further, 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 possibly 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. (Emphasis added).

Sen. Report, 95th Congress, 1st Session (1977) reprinted in the Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Congress, 2nd Session, 601, 602.

Sand, gravel and crushed stone operations, whether privately operated or operated by a local government unit have been covered by the federal mine safety law since 1966 when the Federal Metal and Nonmetallic Mine Safety Act (Metal Act) was enacted. Historically there has never been any serious question that sand and gravel are minerals and that their extraction is mining, Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589 (3rd Cir., 1979); Marshall v. Nolichucky Sand Co. Inc., 606 F.2d 693 (6th Cir., 1979). Sand and gravel operations are classical

mining operations. The methods and equipment used in sand and gravel mining are similar, if not identical to, the methods and equipment used in the mining of many other minerals. The hazards faced by workers engaged in extracting sand, gravel, and crushed stone are similar and in many cases they are identical to the hazards faced in other mining operations.

The Metal Act was repealed in 1977 and all mining operations were placed under the present statute. However, the safety and health standards applicable to sand, gravel, and crushed stone operations issued under the Metal Act continue in effect under the 1977 Act.

Because sand, gravel, and crushed stone operations are "mines" as defined in section 3(h)(1) of the Act, they are subject to the provisions of the Act and the regulations issued thereunder. The fact that a pit is operated by a governmental unit rather than a private party is immaterial. When a state or local government engages in an activity subject to Congressional regulation, such as in operating a railway or a mine, the state or local government is subject to regulation in the same manner as a private citizen or corporation. Parden v. Terminal Ry. of Ala. State Docks Dept, 377 U.S. 184, 84 S.Ct. 1207 (1964).

Respondent further argues that Congress explicitly brings state and local governments within the purview of the statutory scheme if it intends to regulate their activity citing such legislative action in amending the Fair Labor Standards Act, 29 U.S.C. 203(d)(1) and relying on Garcia v. San Antonio Mass Transit Authority, supra.

I agree that Congress certainly may legislate by particularly naming those entities that are subject to the legislation. In fact, Congress did so in extending minimum wage coverage over a period of time and gradually expanding the coverage.

When FLSA was enacted in 1938, its wage and overtime provisions did not apply to local mass-transit employees, the subject of the Garcia case, 3(d), 13(a)(9), 52 Stat, 1060, 1067. In 1961 Congress extended minimum wage coverage to employees of any mass-transit carrier whose annual gross revenue was not less than one-million. Fair Labor Standards Amendments of 1961, 2(c)9, 75 Stat. 65. 71. In 1966 Congress extended FLSA coverage to state and local government employees for the first time. Fair Labor Standards Amendments of 1966, 102(a) and (b), 80 Stat. 831. In 1974 Congress provided for the progressive repeal of the surviving overtime exemption for mass transit employees. Fair Labor Standards Amendments of 1974, 21(b), 88 Stat. 68. At the same time Congress simultaneously brought the states and their subdivisions further within the ambit of the FLSA by extending FLSA coverage to virtually all state and local government employees, 6(a)(1) and (6), 88 Stat 58.60, 29 U.S.C. 203(d) and (1).

As noted above Congress gradually expanded FLSA coverage and finally specifically included states and local governments. Congress could have specifically named the states and counties in the Mine Act but it is not obliged to legislate in that fashion. In addition, the gradual extension of the FLSA coverage indicates a piece-meal approach to coverage under that Act. A similar legislative approach did not occur in the enactment of the federal Mine Act. The broad statutory definition supported by the legislative history establish that Congress intended to include all mines and miners within the ambit of the federal Mine Act.

Respondent further contends that its gravel pits are not subject to the Act's coverage because its products neither enter commerce nor affect it.

The evidence is uncontroverted that the gravel from the respondent's mines is not sold. It is, in fact, used exclusively to surface the county roads. In addition, Jefferson County's roads do not extend beyond the boundaries of the State of Colorado. The Act encompasses within its coverage the following:

> Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner shall be subject to the provisions of this chapter. 30 U.S.C.A. 803.

Further, commerce is defined as follows:

> (b) "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between a place in a State and any place outside thereof, or within the District of Columbia or a possession of the United States, or between points in the same State but through a point outside thereof. 30 U.S.C.A. 802(b).

The issue to be addressed is whether the county's gravel operations "affect commerce." As a threshold matter the term "affecting commerce" has been given a broad judicial interpretation. Garcia v. San Antonio Mass Transit Authority, supra; Marshall v. Kraynack, 604 F.2d 231 (3rd Cir.1979); Godwin v. OSHRC, 540 F.2d 1013 (1976) (9th Cir); United States v. Dye Construction Co., 510 F.2d 78 (1978) (10th Cir.); Brennan v. OSHRC, 492 F.2d 1027 (2d Cir.1974); Wickard v. Filburn, 317 U.S. 111, 63 S.Ct. 82.

In the instant cases the parties stipulated that the county uses equipment in its mines manufactured outside of the state. Such activity clearly "affects commerce" as stated in the above cited case law.

Morton v. Bloom, 373 F.Supp. 797 (D.C.Pa.1973), relied on by respondent, presents a unique factual situation of a mine operated by one man. In that circumstance, the Court ruled that

the local nature of the mine did not affect commerce. The case has not been followed as precedent for later decisions. In short, it appears to have a very narrow application not applicable here.

The Commission has yet to consider the jurisdictional issues raised here but decisions by judges of the Commission have held that a governmental gravel operation is subject to the federal Act. New York State Dept of Transportation, 2 FMSHRC 1749 (1980), Laurenson, J.; Island County Highway Department, 2 FMSHRC 3227 (1980), Morris, J; Salt Lake County Road Dept, 2 FMSHRC 3409 (1980), Vail, J.

Respondent further contends that the Jefferson County Road and Bridge Department is not a legal entity. It is, therefore, not subject to suit under Colorado law. Further, it is not subject to service within the federal system, citing Rule 4(d)(6), F.R.Civ.P.

The respondent here is "Jefferson County Road and Bridge Department". The evidence at the hearing shows that Louis Gabos, assistant director of the department, filled out the MSHA legal identity form at the direction of his supervisor. Only one legal identity form appears in the record but witness Gabos indicated they were all titled in the same fashion. The form contains the federal identification number as well as the mine name and its address. In Government Exhibit 1 the mine name is identified as "Public Works Quarry #5 (formerly called Harris Pit)" and under address there appears "Jefferson County Road and Bridge Dept/Division of Public Works."

The Secretary's regulations as set for at 20 C.F.R. 41.10 et seq. require the operator of a mine to file with the Secretary of Labor the legal identity of the operator of a mine and the regulation further requires the reporting of all changes in the legal identity as they occur. The regulations further state that "[t]he submission of a properly completed Legal Identity Report Form No. 2000-7 . . . will constitute adequate notification of legal identity to the Mine Safety and Health Administration".

Since respondent identified itself as the "Jefferson County Road and Bridge Department" it is hardly in a position to disavow its own representations. In any event this is not a proceeding under the Colorado statutes but it is an adjudicatory proceedings provided for in 30 U.S.C. 113(a) and its Rules of Procedure, 29 C.F.R. 2700 et seq.

Respondent's reliance on Rule 4(d)(6), F.RCiv.P. meets the same infirmity. To like effect on the issue of incorrectly naming a respondent in notices of violation and petition for assessment see the case decided by the Interior Board of Mine Operations in Harlan No. 4 Coal Company, 4 IBMA 241 (1975).

The final issue concerns the assessment of civil penalties. Respondent argues that the Act is replete with provisions demonstrating congressional intent to cooperate with states. Secondly, the federal government is cognizant of the need for fiscal independence of states and their political subdivisions. Thirdly, the imposition of fines will not foster mine safety and respondent immediately abated the violative conditions.

I agree with respondent that the federal Act is replete with legislative assertions of cooperation. Further, the federal government is cognizant of the financial status of the states. However, I believe the imposition of penalties will foster mine safety. Such penalties, as well as further sanctions carefully structured under the Act, as in Section 104(d), can provide a strong incentive for a gravel operator to comply with safety regulations. Further, the text and legislative history of Section 110 of the Act require the Secretary to propose a penalty assessment for each violation and the Commission and its judges to assess some penalty for each violation found. Tazco Inc., 3 FMSHRC 1895 (1981). Nominal penalties have been assessed in extenuing circumstances as in Potochar and Potochar Coal Company, 4 IBMA 252, 1 MSHC 1300 (1975. However, the primary reasons for assessing civil penalties is to deter future violations. Eddie Higgs, d/b/a Higgs Trucking Co., 6 FMSHRC 1215 (1984). Respondent here continues to operate its quarries and civil penalties are therefore appropriate.

Respondent further asserts that no penalties should be assessed because respondent was entitled to a CAV inspection. If respondent was entitled to such an inspection then no penalties should have been proposed.

The parties presented evidence concerning the nature of the alleged CAV inspection but neither parties offered any evidence concerning any regulation or other authority for such an inspection. Accordingly, the judge issued a post-trial order directing each party to submit any relevant regulation or other authority for such an inspection.

Respondent did not reply. The Secretary, although denying its applicability, filed a copy of an internal MSHA memorandum from Robert B. LeGather, assistant Secretary for Mine Safety and Health.

The broad thrust of the memorandum focuses on the proposition that under Section 502 of the Mine Act the MSHA inspectors are authorized to visit mine sites to point out potential violations where such calls involve (1) new mines not yet producing, (2) seasonal, closed or abandoned mines prior to opening and (3) new installations in mines prior to their becoming operational. Generally, the directive provides that if the inspector observes a violative condition he will issue a notice but no penalty will be assessed or proposed.

The evidence here shows that respondent was not entitled to a CAV inspection since its pits were in operation at the time of the inspection. The evidence shows that Lou Gabos, according to witnesses Smead and Nankervis, called MSHA's Gardner and requested a courtesy inspection (Tr. 18).

The testimony of witnesses Smead and Nankervis is not persuasive particularly when it was contradicted by witness Gabos himself who stated that the mine was in operation when MSHA first appeared to inspect it (Tr. 22).

I accordingly reject respondent's evidence and credit MSHA's evidence that in January 1985, at the Dog Pound pit the inspector observed four to six workers in the area. The pit was then in operation and they were stock piling material.

Concerning the Harris pit, the parties stipulated that it was in operation when inspector Kerber conducted his inspection (Tr. 40-42).

Respondent currently relies on the CAV inspection process when moving to new sites (Tr. 23-24). However, respondent was not entitled to a CAV inspection on the date the citations were issued in the cases at bar.

For the foregoing reasons the threshold contentions raised by respondent are rejected.

Briefs

The parties have filed detailed briefs which have been most helpful in analyzing the record and defining the issues. I have reviewed and considered these excellent briefs. However, to the extent they are inconsistent with this decision, they are rejected.

Conclusions of Law

Based on the stipulation of the parties, 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. An order should be entered affirming the citations and the proposed penalties.

ORDER

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

1. In WEST 85-125-M the following citations and proposed penalties are affirmed:

Citation No.	$30 C.F.R. Violated	Penalty
2355924	56.14-1	$54.00
2355925	56.14-1	54.00
2355926	56.14-1	54.00
2355928	56.14-1	36.00
2355929	56.14-1	20.00
2355930	56.14-1	54.00
2355931	56.14-3	36.00
2355932	56.14-1	54.00
2355933	56.11-2	54.00
2355936	56.9-87	20.00
2355937	56.12-28	20.00
2355938	56.12-25	20.00
2355939	56.4-2	20.00
2355940	56.12-25	20.00
2357724	56.11-27	36.00
2358543	56.9-54	63.00

2. In WEST 85-126-M the following citation and penalty therefor are affirmed:

Citation No.	30 C.F.R. Violated	Penalty
2355927	56.14-1	$54.00

3. In WEST 85-127-M the following citations and proposed penalties are affirmed:

Citation No.	30 C.F.R. Violated	Penalty
2355922	56.14-1	$ 54.00
2355923	56.14-1	54.00
2355934	56.11-12	79.00
2355935	56.9-87	20.00
2358542	56.9-87	20.00

John J. Morris
Administrative Law Judge