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SOL (MSHA) V. COUNTY OF OURAY
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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 86-8-M A.C. No. 05-04036-05501
v.	Docket No. WEST 86-9-M A.C. No. 05-04036-05502
COUNTY OF OURAY, COLORADO, RESPONDENT	Docket No. WEST 86-66-M A.C. No. 05-04036-05503
	Ouray County Gravel Pit

Apperances: James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Petitioner; Richard P. Tisdel, Esq., Tisdel, Mathis, Reed, Hockersmith & Bennett, Ouray, Colorado, for the Respondent.

DECISION

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, in these consolidated cases 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 the merits took place on September 4, 1986, in Grand Junction, Colorado.

Stipulation

At the hearing it was agreed that respondent, Ouray County, is a County and as such a political subdivision of the State of Colorado. Further, respondent operates the mine and it has 36 employees, including one at the site in question. Respondent further admitted the violations and penalties with the exception of Citation 2376690 in docket number WEST 86Ä9ÄM. The parties further stipulated that the briefs in Jefferson County Road and Bridge Department, 9 FMSHRC 56 (1987), could be entered as post-trial briefs in these cases.

Summary of the Evidence

Collin R. Galloway, a duly authorized representative of the Secretary of Labor, inspected the Ouray County gravel pit on June 24, 1985 (Tr. 18, 19). As a result the inspector issued Citation 2376690 for the alleged failure of respondent to notify MSHA of the accident. (FOOTNOTE 1) The accident, which caused a fatality, occurred when a highwall fell on a front-end loader (Tr. 19, Ex. P1, P2).

Galloway's investigation disclosed that the fatality was discovered at the quarry at 2:30 p.m. on June 24, 1985 (Tr. 21, 22).

MSHA's records indicate that the agency was notified by telephone at 0945 hours on June 25, 1985 (Tr. 20, 33). Agency policy requires immediate notification. The primary purpose of the regulation is to insure that no further lives are endangered in any recovery operation. Further, the purpose of the regulation is to insure that the accident site is not substantially altered (Tr. 22). It is MSHA's policy to direct recovery operations (Tr. 30, 31). In the inspector's opinion there was no one present at the scene with the necessary expertise to conduct the recovery operations (Tr. 31, 32). However, the inspector admitted he was not knowledgeable as to the experience of those present (Tr. 32, 33).

In this situation the recovery operation started at 3:15 p.m., when the victim was pronounced dead. During the recovery it was necessary to withdraw personnel twice because of additional sloughing of the highwall. The victim was removed from under the highwall after five and one-half hours (Tr. 23, 24, 28, 34).

No MSHA personnel were present during the recovery operations and the inspector believed this factor involved a hazard to the recovery team (Tr. 24, 34).

During the recovery operations the loader was adjacent to the foot of the 45 to 50 foot highwall (Tr. 27, 28). The angle of repose of the highwall was 90 degrees (Tr. 28).

Patrick O'Donnell and Ronald Phelps testified for respondent.

Patrick O'Donnell, the Ouray County Administrator, is involved in all aspects of county government (Tr. 36). The County's gravel pit is operated as part of the County's Road and Bridge Department.

The United States Government through its agency, BLM, (FOOTNOTE 2) owns the land. BLM has issued a Free Use Permit to Ouray County to extract gravel from the pit with county employees and equipment (Tr. 37, 66, Ex. R1) The pit consists of 39.87 acres (Tr. 69). None of the materials that are removed are sold, bartered or traded (Tr. 38, 40, Ex. R1). Ouray County does not engage in commerce with the products from the gravel pit. The material is screened and used only for road construction in Ouray County, Colorado (Tr. 39).

BLM inspects the pit and their inspectors will point out any problems they observe (Tr. 40).

The witness was present at the site at approximately 3:15 p.m. He attended to the removal of the deceased who had been buried by a 45Äfoot vertical highwall. O'Donnell also checked the top of the highwall for fractures (Tr. 41, 42, 62, 63). After his inspection O'Donnell directed that the recovery operations cease (Tr. 43). Thereafter, they attempted to remove the equipment by pulling it out with a cable. They were unsuccessful with this effort (Tr. 43).

An attempt at removal by using a backhoe was also unsuccessful (Tr. 43, 44). The witness and the County Commissioner finally were able to remove the deceased (Tr. 44). Subsequently, after considerable gravel had been removed, they were able to start the trapped loader and remove it (Tr. 44).

During the rescue operations it had not occurred to O'Donnell to notify MSHA (Tr. 44, 45). Mr. O'Donnell had previously met with MSHA's representative Phelps but he had never been told of the necessity of contacting MSHA in the event of an accident (Tr. 45). O'Donnell was not aware of the 24Ähour number in Washington, D.C. (Tr. 45). O'Donnell notified MSHA and BLM the following morning (Tr. 46).

The recovery operations terminated about 10:30 p.m. (Tr. 46).

Before the fatality, on May 20, 1985, MSHA Inspector Ron Phelps conducted a CAV inspection at the gravel pit (Tr. 46, 47). This was the first MSHA inspection in the 20 years that the pit has been in operation (Tr. 47, 49). The purpose of the CAV inspection was to determine if there were any problems at the pit. No penalty assessments are issued as a result of a CAV inspection. The pit is operated on a seasonal basis and it was not in operation at the time of the CAV inspection (Tr. 48). As a result of the inspection, non-penalty CAV notices were issued (Tr. 49, Ex. R2, R3). The notices dealt mainly with deficiencies in screening equipment and shielding (Tr. 51).

As a result of the fatality, MSHA issued six citations to Ouray County.

None of the citations in the instant cases deal with the matters that were discussed in the prior CAV report (Tr. 52). The County did everything required of them by the CAV notices. Further, if the County had been advised of any other deficiencies it would have abated any violative conditions (Tr. 53).

Citation 2355137 deals with operations under a dangerous highwall. This highwall was not in existence on May 20 (Tr. 53). An illegal highwall is one that exceeds the height of the loader bucket, or about 14 feet (Tr. 54, 62). There was such a highwall in existence on May 20 but the County was not advised of any such deficiency (Tr. 54, 79, 80).

Citation 2355138 deals with failure to establish standards for safe control of a pit highwall. The situation in regard to this regulation was the same on June 25 as it was on May 20 (Tr. 54).

Citation 2355139 deals with the failure to provide a suitable communication system. There was no such system in existence on May 20 (Tr. 56).

Citation 2376689 deals with an employee operating alone in the workplace. On May 20 this was the customary practice at the site (Tr. 56).

After receiving the citations the County submitted a new mining plan to BLM (Tr. 57).

With the exception of Citation 2376690 (failure to notify MSHA), all of the conditions for which the County was cited after the fatality, existed on May 20, 1985 (Tr. 80).

O'Donnell had heard that a BLM official had told Ouray County that the highwall had to be sloped on an angle of one to three. But that was for reclamation (Tr. 63Ä65).

The witness believed the people involved had sufficient expertise to conduct recovery operations but in failing to notify it, MSHA was denied the opportunity to make a similar judgment (Tr. 65).

Ronald Phelps, an MSHA inspector with 20 years of mining experience, conducted the CAV inspection at the County pit (Tr. 82, 83).

At the time of the inspection he inspected the highwall where the fatality subsequently occurred (Tr. 84). When the regulation uses the term highwall it does not distinguish between a highwall and a pit wall or pit face (Tr. 85). The highwall at the time of the CAV inspection was sloped to a safe angle of repose of one-and-one-half to one. The highwall did not constitute a hazard at that time (Tr. 86).

During his first visit the inspector discussed the County's mining methods with Mr. O'Donnell. At that time the inspector advised him that the pit must meet minimum sloping requirements (Tr. 87, 89). Mr. O'Donnell indicated they followed a safe angle of repose of approximately two to one (Tr. 88). During their conversation the inspector also indicated that they should be cautious about mining the toe of the highwall (Tr. 88). During the CAV inspection the highwall was discussed with Pat O'Donnell and Ken Williams, a County Commissioner (Tr. 89). Areas of the pit with vertical highwalls were discussed (Tr. 89, 90). At the base of the highwall, there was considerable slough that would prevent a person from being exposed to the hazardous conditions (Tr. 90).

At the time of the CAV inspection the inspector did not think there was a hazard because the vertical wall area was blocked off from employees (Tr. 91).

At the time of the CAV inspection the inspector was advised that the County was not mining the area at the vertical highwall.

In addition, the area under the vertical highwall was blocked off so employees could not go into the area (Tr. 91). In areas where they planned to mine there was a safe angle of repose (Tr. 91).

Inspector Phelps' field notes made at the time indicated the highwall sloping was discussed [with Pat O'Donnell and Ken Williams] (Tr. 94; Ex. P5).

The witness visited the site approximately 30 days after the fatality. Exhibits P1 and P2 depict the highwall. No condition as indicated in the photographs existed at the time of the CAV inspection. If he had observed the loader operating under the highwall he would have immediately issued a withdrawal order. He would also have caused the highwall to be sloped at a safe angle of repose and benches installed (Tr. 95, 96).

Phelps prepared the CAV notices. Their purpose was to disclose hazardous conditions and give the operator a time to correct them (Tr. 96). Notices are only written on conditions as they exist at the time of an inspection. First-aid training and first-aid supplies are mentioned in R3 but not R2 (Tr. 98; Ex. R2, R3). These were not put in the CAV notices because the crew was not on site to see if anyone had a first-aid card; further, the inspector could not determine if first-aid supplies were kept on the pickup truck. The pickup truck was not on the site (Tr. 98).

The witness inquired about the method of operations, the equipment used and the number of employees who normally worked at the pit. He also learned they had a radio on the pickup (Tr. 98, 99). The inspector spent about two hours going over various subparts of 30 C.F.R. with Mr. O'Donnell (Tr. 99). The communication system working alone would not have helped Martinez since he was working alone.

The witness agrees with O'Donnell's testimony that a highwall with a vertical surface in excess of 14 feet would be unsafe. When the inspector visited the site he saw vertical surfaces in excess of 14 feet (Tr. 100). These areas had apparently been mined some time in the past (Tr. 101).

In rebuttal, witness O'Donnell testified he did not remember any discussions with Phelps about the highwall.

O'Donnell acted on the CAV notices he received from MSHA. He would have taken action on the highwall if he had received such a notice.

Discussion

Respondent generally asserts that the issues in the instant cases are identical to the issues involved in Jefferson County Road and Bridge Department, 9 FMSHRC 56 (1987).

The identity urged by respondent is limited to certain threshold issues of jurisdiction and defective filing procedures, hereinafter discussed. Respondent's additional arguments address estoppel and the substance of the violation of Citation 2376690 (Tr. 8Ä14, 113Ä115).

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 Metropolitan Transit Authority, ÄÄÄ U.S. ÄÄÄÄ, 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 %y(3)27" (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 %y(3)27 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 %y(3)27 mines in order to prevent death and serious bodily harm %y(3)27" (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 resourceÄthe miner", 30 U.S.C. 801.

A reading of the legislative history establishes the clear intent of Congress. S.Rep. No. 95Ä181, 95th Cong., 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 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. (Emphasis added)
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> S.Rep. No. 95Ä181, 95th Cong., 1st Sess. %y(4)6D (1977), reprinted in 95th Cong., 2nd Sess. Legislative History of the Federal Mine Safety and Health Act of 1977, 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 (3d Cir., 1979); Marshall v. Nolichuckey 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 Metropolitan 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 while 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 (x).

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 definitions, 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 mines is not sold. It is, in fact, used exclusively to surface the county roads. In addition, Ouray 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 Metropolitan Transit Authority, supra; Marshall v. Kraynack, 604 F.2d 231 (3d Cir.1979); Godwin v. OSHRC, 540 F.2d 1013 (1976) (9th Cir); United States v. Dye Construction Co., 510 F.2d 78 (1975) (10th Cir.); Brennan v. OSHRC, 492 F.2d 1027 (2d Cir.1974); Wickard v. Filburn, 317 U.S. 111, 63 S.Ct. 82.

In this case the testimony of witness O'Donnell is uncontroverted that the gravel is used solely on county roads. The extracted materials are not sold, bartered or traded. However, it is apparent that if the County relinquished its lease it would be required to purchase the material from a commercial source. The lease and removal of the gravel accordingly "affects commerce" as that term is contemplated by 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 it was not properly sued. Specifically it relies on Section 30Ä11Ä105, C.R.S. (FOOTNOTE 3) Colorado appellate courts have construed this statute and held that an action brought against a county under a designation that does not comply with the statute is a nullity and no valid judgment can be entered, Calahan v. County of Jefferson, 163 Colo. 212, 429 P.2d 301 (1967).

I reject respondent's argument.

This is not a proceedings under the Colorado statutes but it is an adjudicatory proceedings provided for in 30 U.S.C. 113(a) and the applicable Rules of Procedures, 29 C.F.R. 2700 et seq. To like effect on this issue see the case decided by the Interior Board of Mine Operations in Harlan No. 4 Coal Company, 4 IBMA 241 (1975).

An additional issue centers on whether the Secretary can be estopped in the factual scenario involved here. Respondent asserts estoppel arises because MSHA conducted a CAV inspection before the Martinez fatality occurred. Briefly stated, the County complied

and corrected all of the deficiencies raised by the CAV inspection. Therefore, if the CAV inspector had mentioned the defective highwall the County would have corrected the defect and thereby avoided the subsequent fatality.

At the outset I agree that equitable estoppel is a rule of justice which, in its proper field, prevails over all other rules. City of Chetopa v. Board of County Com'rs, 156 Kan 290, 133 P.2d 174, 177 (1943). Generally four elements must be present to establish the defense of estoppel. These are (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury. United States v. Georgia Pacific Company, 421 F.2d 92, 96 (1970), (9th Cir.).

In this case it is clear that the CAV inspector did not learn that mining was ever taking place under the highwall. The authority for a CAV inspection arises from an MSHA memorandum. The thrust of the memorandum mandates such inspections may only be made when the mine is not operating.

I credit the inspector's testimony and expertise in this respect. If he had observed a miner working under the highwall he would have issued an immediate withdrawal order. Further, the inspector's notes reflect that he discussed the sloping of the highwall with the County officials at the CAV inspection. For these reasons it is clear the party to be estopped had not been apprised of the operative facts. In sum, he had not been advised that the County was mining at the highwall (Ex. P5).

A factual setting might well arise that would invoke the doctrine of equitable estoppel. However, the doctrine should only be applied in limited circumstances, otherwise, it would deprive miners of the protection of the Mine Safety Act because of a public official's erroneous act. Maxwell Company v. NLRB, 414 F.2d 477 (1969); Udall v. Oelschlaeger, 389 F.2d 974 (1968). For a general discussion of the doctrine of collateral estoppel also see the Commission decision of King Knob Coal Company, Inc., 3 FMSHRC 1417 (1981).

Respondent's final argument addresses the substance of the single contested citation for the violation of 50.10.

The uncontroverted evidence establishes that Mr. Martinez was killed at the quarry and his body discovered at 2:30 p.m. on June 24, 1985. MSHA was not notified until 0945 hours the following

morning. The facts are that the County did not "immediately" contact MSHA. Accordingly, the citation should be affirmed.

Based on the record and the stipulation of the parties I conclude that the Commission has jurisdiction to decide this case. Further, all citations and penalties herein should be affirmed.

Based on the stipulation, the facts and the foregoing conclusions of law I enter the following:

ORDER

The following citations and proposed penalties are affirmed:

WEST 86Ä8ÄM

Citation	Penalty
2376545	$20
2376546	20
2376547	20
2376548	20

WEST 86Ä9ÄM

Citation	Penalty
2355137	$200
2355138	500
2355139	50
2376688	200
2376689	100
2376690	50

WEST 86Ä66ÄM

Citation	Penalty
2633933	$54
2633934	20

John J. Morris
Administrative Law Judge

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~FOOTNOTE_ONE
1 30 C.F.R. 50.10, the regulation allegedly violated, provides as follows:

50.10 Immediate Notificatio

If an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA District or Subdistrict Office, it shall immediately contact the MSHA Headquarters Office in Washington, D.C., by telephone, toll free, at (202) 783Ä5582.

~FOOTNOTE_TWO
2 Bureau of Land Management

~FOOTNOTE_THREE
3 The cited statute provides:

30Ä11Ä105. Title of suits by or against county.

In all suits or proceedings by or against a county, the name in which the county shall sue or be sued shall be, "The board of county commissioners of the county of ; but this provision shall not prevent county officers, when authorized by law, from suing in their name of office for the benfit of the county.