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SOL (MSHA) V. MELLOT TRUCKING & SUPPLY
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. SE 87-123-M A.C. No. 31-01799-05501
v.	
MELLOT TRUCKING AND SUPPLY, INC., RESPONDENT	Lee Mine

DECISION

Appearances: Ken S. Welsch, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia for Petitioner;
Calvin A. Mellott, Carrboro, North Carolina for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et. seq., the "Act," charging Mellott Trucking and Supply Company, Inc., (Mellott) with two violations of regulatory standards.

Preliminary Issues:

Respondent raises several preliminary issues that could be dispositive of these proceedings. He first claims that the area of land owned by he and his wife, from which sand was being removed and on which it was being processed, was not a "mine" within the meaning of the Act since it was merely a land reclamation project adjunct to his alleged primary business of farming.

Section 3(h)(1) of the Act reads in part as follows:

> "coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form ... (B) private ways and roads appurtenant to such area, and (C) lands excavations, underground passageways, shafts, slopes, tunnels and workings,

> structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, ... or to be used in, the milling of such minerals, or the work of preparing coal or other minerals ...

There is no dispute that on the date these citations were issued Mellott was extracting minerals (sand) in non-liquid form from the cited area. Moreover Mellott's power screen and stacker are within the scope of structures "used in, or to be used in, he milling of such minerals, or the work of preparing ... minerals". Under the circumstances it is clear that Respondent was operating a "mine" within the meaning of the Act. It is immaterial that land may have also been reclaimed as a result of the mining activity.

Respondent next contends that he was not engaged in interstate commerce and therefore this Commission is without jurisdiction over his activities. Section 4 of the Act provides that "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 in such mine shall be subject to the provisions of this Act." "commerce" is defined in Section 3(b) of the Act as follows: "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."

The evidence in this case is that Mellott was using machinery and equipment in its mining business that was manufactured outside of its home state of North Carolina. It is undisputed that its front-end loader was made in Illinois, and the power screen in Kentucky. Use of equipment that has moved in interstate commerce affects commerce. See United States v. Dye Construction Co., 510 F.2d 78 (10th Cir.1975). In addition, although the evidence shows that the sand extracted, processed and sold by the Mellott facility was used only intrastate, it may reasonably be inferred that such use of the mine product would necessarily impact upon the interstate market. See Fry v. United States, 421 U.S. 542, 547 (1975). Under the circumstances it is clear that the operations and products of Mellott affect commerce and that its operation is therefore under the coverage of the Act.

Mellott next maintains that the warrantless inspection of its operation by employees of the Federal Mine Safety and Health Administration (MSHA) on April 16, 1987, which led to the citations at bar was in violation of the provisions against unreasonable searches and seizures under the Fourth Amendment to the United States Constitution. In Donovan v. Dewey, 452 U.S. 594 (1981), the Supreme Court held however that warrantless inspections of mines authorized by section 103(a) of the Act do not violate the Fourth Amendment. The court found that an exception to the warrant requirement was permissible in these cases because there is a substantial Federal interest in improving mine safety and health and because the certainty and regularity of inspection programs under the Act provide a constitutionally adequate substitute for a warrant. Mellott's contention herein is accordingly contrary to the prevailing law.

Finally, Mellott maintains that it was denied its constitutional right under the Seventh Amendment to the United States Constitution to a trial by jury. In Atlas Roofing Co. Inc. v. OSHRC, 430 U.S. 442 (1977), the Supreme Court held that under the Seventh Amendment jury trials are required only in suits at common law and that the Seventh Amendment did not purport to require a jury trial where none was required before. Within this legal framework it is clear that these statutorily created proceedings do not require a trial by jury. It is noted that this civil penalty proceeding is similar to the penalty proceeding at issue in the Atlas case before the Occupational Safety and Health Review Commission.

The Merits:

The general issues before me on the merits are whether Mellott violated the cited regulatory standards as alleged, and, if so, whether the violations were of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, i.e. whether the violations were "significant and substantial." If violations are found, it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

Citation 2859882 alleges a violation of the standard at 30 C.F.R. 31Ä01799 and charges as follows:

> The automatic reverse signal alarm was not operating on the Cat 950 B loader working in the

pit area. There was an obstructed view to the rear.

The cited standard provides as follows:

> 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 testimony of MSHA Inspector Thel Hill in support of this violation is largely undisputed. According to Hill the only worker at the mine site on April 16, 1987, a Mr. Bruell, represented himself to be the foreman. Bruell was operating the Catapillar Model 950B front-end loader removing sand from the pit area and transporting it to the processing equipment. Hill observed the front-end loader in action and saw that the backup alarm was not functioning. Bruell conceded that the backup alarm had not been operating for several days. There was no observer to signal when it was safe for the equipment to back up. Hill found that the engine on the equipment obstructed the view to the rear for some 2 to 3 feet on level ground so that persons as tall as 5 foot 6 inches could not be seen in that obstructed area. The exhaust arrangement (muffler) also interfered with rear vision.

Hill felt that the violation was not "significant and substantial" because of only limited exposure to danger. There were no other employees on site and he concluded that the truck drivers remained in their trucks while being loaded.

Calvin Mellott, Respondent's president, did not dispute that the back-up alarm was not functioning and that there was at least a partially obstructed view to the rear of the loader. Mellott maintained however that it was Bruell's responsibility to bring such problems to his attention and that back up alarms were in stock. Mellott suggested that Bruell may have been sabotaging his operations because Bruell later purportedly worked for a competitor. The credible evidence does not however support this contention.

Within this framework of evidence it is clear that the violation is proven as charged. I accept Inspector Hill's testimony however that the violation was not serious because of the limited exposure to the hazard I must accept that finding. I conclude that the violation was caused by

operator negligence since the condition was known to have existed for several days. Moreover, proper inspection of the equipment on a daily basis should have led to discovery of the violative condition.

Citation No. 2859883 alleges a "significant and substantial" violation of the standard at 30 C.F.R. 56.14001 and charges that "the tail pulley on the sand stacker was not guarded."

The cited standard provides that "[g]ears; 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.

Inspector Hill observed that the sand stacker conveyed materials from the screen to the stockpile and that its height could be adjusted. At the time of the alleged violation a 4 to 4 1/2 foot build-up of spillage was found at the tail pulley. Thus the pulley would be located at arm level to an individual passing nearby. The pulley was not guarded and there was nothing to prevent a person from contacting it. The pulley was in operation at this time and Hill believed that fatal injuries were likely. In reaching this conclusion Hill observed that Bruell admitted that he greased the tail pulley while it was in motion (because it would be easier to grease) and acknowledged that he passed nearby the pulley several times a day as he was performing the duties of both plant operator and loader operator.

Calvin Mellott admitted that the tail pulley was not protected but disagreed that there was any danger of contact. I find the testimony of Inspector Hill to be more credible in this regard. Indeed Bruell admitted that he greased the tail pulley while it was moving and that he passed in close proximity to the pulley during his workshift. It is therefore reasonable to infer that there was a reasonable likelihood of contact and injury and that such injuries would be serious or fatal. Accordingly I find that the violation is proven as charged and was "significant and substantial" and serious. See Secretary v. Thompson Brothers Coal Company, Inc. 6 FMSHRC 2094, (1984); Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984).

I also find that the violation was the result of operator negligence. It is apparent that company president Calvin Mellott knew the tail pulley was not guarded and he should have known of Bruell's practice of greasing that tail pulley while it was in motion.

In assessing civil penalties in this case I have also considered that the operator is small in size and has no reported history of violations. I have also considered that the violations were abated promptly. Under the circumstances I find that the following civil penalties are appropriate; Citation No. 2859882 - $20; Citation No. 2859883 - $68.

ORDER

Mellott Trucking and Supply Company, Inc., is hereby directed to pay civil penalties of $88 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge
(703) 756Ä6261

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ORDER CLOSING RECORD

At hearing in this case held January 5, 1988, the Respondent was given the opportunity to file a brief within three weeks after the Petitioner filed her brief. Petitioner filed her brief on February 26, 1988, and, accordingly, Respondent's brief was due on or before March 18, 1988. Respondent has not filed a brief as of this date and accordingly the record of these proceedings is closed.

Gary Melick
Administrative Law Judge
(703) 756Ä6261