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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. H. B. ZACHRY COMPANY, Respondent | FMSHRC-FCV CIVIL PENALTY PROCEEDING Docket No. CENT 88-29 A. C. No. 41-02632-03509 DB3 Martin Lake Strip Mine |
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DECISION

Appearances: Jerome Kearney, Esq., Office of the Solicitor,
U.S. Department of Labor, Dallas, Texas for Petitioner;
Richard L. Reed, Esq., Johnston, Ralph, Reed & Watt,
San Antonio, Texas 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." The Secretary charged the H. B. Zachry Company (Zachry) with three violations of mandatory standards following an investigation by the Federal Mine Safety and Health Administration (MSHA) of a fatal accident at the Texas Utilities Mining Company's Martin Lake Strip Mine on December 23, 1986. Zachry thereafter filed a Motion for Summary Decision pursuant to Commission Rule 64, 29 C.F.R. § 2700.64 and a preliminary hearing was held limited, at Respondent's request, to that motion.

Zachry argues that it is not subject to the Act because it did not have a continuing presence at a "mine" as defined in the Act and that it was not an "independent contractor" within the scope of the Act while performing repairs outside the bucket repair shop area. It further argues that its repair services were in any event "de minimis" and, therefore, under the principles set forth in *Old Dominion Power Co. v. Donovan*, 772 F.2d 92 (4th Cir. 1985) it was not subject to the Act. For the reasons that follow I find the contentions to be without merit.

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 ... and workings, structures, facilities, equipment, machines, tools, or other property .. used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form ...

This definition, while not without bounds, is expansive and is to be interpreted broadly. Secretary v. U. S. Steel Mining Inc., 10 FMSHRC 146 (1988); Dilip K. Paul v. P.B.-KBB Inc., 7 FMSHRC 1784 (1985), aff'd sub. nom. Dilip K. Paul v. FMSHRC, 812 F.2d 717 (DC Cir. 1987), cert. denied 107 S. Ct. 3269 (1987).

The evidence in this case shows that Zachry maintains a repair shop and repair yard at the Texas Utilities Mining Company's (TUMCO) Martin Lake Strip Mine. According to Ronald Goodwin, project manager for Zachry, Zachry had contracted with TUMCO to perform repair work at its mine under which TUMCO directs what is to be done and pays Zachry at an hourly rate to complete the job. Goodwin acknowledged that Zachry keeps 6 to 7 employees at the repair shop on a full-time, 40-hour-work-week basis. According to Goodwin the Zachry employees spend 90 percent of the time repairing dragline buckets at the repair yard but occasionally go to the pit areas to work at the draglines. These employees also operate forklifts or "cherry pickers" around the repair shop to lift parts or equipment necessary to make repairs. Zachry uses its own forklift, and welding and hand tools.

MSHA Inspector Donald Summers testified that the Martin Lake Strip Mine had been under his inspection area for nine years and that Zachry had been operating there for about the same period. Zachry was primarily responsible for repairs on the dragline bucket but also performed work on bulldozers, and haulers and "whatever else that the operator deems necessary for them to do". He noted that the dragline bucket is an integral part of the mining process and was used to remove the overburden from the lignite ore. Summers observed that Zachry personnel also performed repair work at the mine pit, the crusher area and the silo area of the mine.

According to Summers the shop area where most of Zachry's work is performed is not physically separated from any other part of the mine but is located between the haulage road and the mine railroad to the north of the crusher. This is approximately 60 to 80 feet from the mine haulage road, 40 to 60 feet from the mine railroad, 800 feet from the crusher area and 600 feet from the fuel truck stop.

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Within this framework of evidence it is clear that Zachry was indeed an "independent contractor" performing repair work on a daily basis at the Martin Lake Strip Mine and that its services were accordingly not "de minimis" within the meaning of Old Dominion Power Company, supra.

Zachry's other arguments--that it was not "properly notified" that the citations would be enforced and that the Secretary failed to set forth sufficient reasons for her special assessment--are also without merit. Neither allegation has an undisputed factual basis nor legal merit. The Motion for Summary Decision is accordingly denied.

Gary Melick
Administrative Law Judge

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