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JUNE 13, 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. WEST 86-255-M A.C. No. 05-03950-05503
v.	Docket No. WEST 87-25-M A.C. No. 05-03950-05504
COBBLESTONE, LTD., Respondent	Triangle One Mine

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; Mr. Leonard W. Lloyd, Owner, Cobblestone, LTD., Pagosa Springs, Colorado, pro se

Before: Judge Cetti

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges Cobblestone LTD. (Cobblestone) with violating five safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. $ 801 et seq., (the Act). These cases are before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Act.

Threshold Issue:

Respondent raises a threshold issue of jurisdiction which could be depositive of these proceedings. Respondent contends that he was not engaged in interstate commerce and therefore the Mine Safety and Health Administration (MSHA), is without jurisdiction over his activities at his gravel pit, particularly on the date of inspection through the date set for abatement. Respondent contends that the Secretary failed to establish that the activities in which respondent was engaged at the time of inspection affected interstate commerce.

The gravel pit in question is a family owned and operated enterprise. The owner, Mr. Lloyd, testified that he operates the pit with the help of his son, daughter and wife. He does 90 percent of his own labor. His only employee works part time.

Mr. Lloyd testified that he purchased the ten acres on which the pit is located solely for the purpose of building a family residence. Some years later he discovered a gravel deposit on the property and commenced extracting crushing and stock piling gravel. He extracts and crushes rock only when the weather permits. However, he is open all year round for sale of his stock piled gravel products to various contractors. Cobblestone's gross volume averages a little over $100,000 a year. It uses United States mail and telephones in its business operations.

The primary product is crushed gravel from four-inch minus to three-quarter inch minus which is used for sub road and top road base. The contractors haul the purchased gravel from the site in their own trucks. Cobblestone has never delivered any of its products. The pit is located a little over a quarter of a mile from the public road.

There are two loaders on the property. The primary loader is a Michigan 275B rubber tire loader. Other equipment used at the site are a 955 Caterpillar, a D-8 Caterpillar and several crushers including a jaw crusher, and a roller crusher.

Respondent's gravel pit and crush stone operation is a mine within the meaning of the Act. 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, ... workings, structures, facilities, equipment, machines, tools, or other property ... 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 used in, or to be used in, the milling of such minerals ...

Respondent was extracting minerals (rock) from their natural deposit in nonliquid form, crushing it, and stock piling it for sale to various contractors throughout the year. Thus it is clear that respondent's gravel pit and crushed stone operation is a "mine" as defined in $ 3(h)(1) of the Act.

Cobblestone, however, contends that it was not engaged in interstate commerce and therefore MSHA had no authority or jurisdiction to issue the citations in question on May 14, 1986. Respondent's contention is based upon the owners unrebutted testimony that on the date of inspection he was crushing and producing gravel solely for his own personal use on the mile and a half roadway which he maintains all year round on the property where he has his family residence and the gravel pit. The owner

testified that his production of gravel for his own personal use from May 12 to May 28, 1986, was not an isolated incident. Each year since he commenced operating the pit, approximately six years ago, he has produced gravel for his personal use on the driveway to his residence and on his gravel haul road.

Cobblestone also presented evidence that the gravel pit had been closed for production of gravel for commercial purposes since the Fall of 1985. The owner operator testified that he planned not to reopen the pit for production of gravel for commercial sale until June 9, 1986 and had so notified the MSHA Regional Office in Grand Junction, Colorado. This is reflected in MSHA's records.

Looking first to the Act itself, Section 4 for the Act states 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 within the same state but through a point outside thereof."

The use of the phrase "which affects commerce: in Section 4 of the Act, indicates the intent of Congress to exercise the full reach of its constitutional authority under the commerce clause. See Brennan v. OSHRC, 492 F.2d 1027 (2nd Cir. 1974); U.S. v. Dye Construction Co., 510 F.2d (10th Cir. 1975); Polish National Alliance v. NLRB, 322 U.S. 643 (1944); Godwin v. OSHRC, F.2d 1013 (9th Cir. 1976).

On reviewing the relevant case law, I conclude that Respondent's contention that MSHA had no authority to issue the citations on the day of the inspection (May 14, 1986) because at that time he was producing gravel only for his personal use is contrary to the prevailing law. United States Supreme Court has ruled that a farmer growing wheat solely for his own needs affects interstate commerce. The Court stated that while the farmer's contribution to the demand for wheat may be insignificant by itself the cumulative impact of all such production by others similarly situated is significant and has an impact on interstate commerce. See Wickard v. Filburn, 317 U.S. 111, 128, (1942); Fry v. United States, 421 U.S. 542, 547 (1975).

Even though no evidence was presented to show that the gravel respondent produced for sale to contractors was or was not used solely intrastate, nevertheless it may reasonably be inferred that even intrastate use of the gravel would impact upon the interstate market. It is also reasonable to infer that some of the equipment respondent was using such as the 955 Caterpillar, the D-8 Caterpillar and the Michigan 275B rubber tired loader were manufactured outside the respondent's home State of Colorado. It has been held that use of equipment that has been moved in interstate commerce affects commerce. See United States v. Dye Construction Co., 510 F.2d 78, 82 (1975).

It has been stated that accidents in mines disrupts production and causes loss of income to operators which in turn impedes and burdens commerce. See 30 U.S.C. Section 801(f). Thus any disruption of a mines operations in safety and health hazards affects interstate commerce. See Marshall v. Kilgore, 478 Supp. 4; Marshall v. Bosack, 463 F. Supp. 800. The United States Supreme Court in Donovan v. Dewey, 452 U.S. 594, 602 (1981) stated "As an initial matter, it is undisputed that there is a substantial federal interest in improving the health and safety conditions in the Nation's underground and surface mines. In enacting the statute, Congress was plainly aware that the mining industry is among the most hazardous in the country and that the poor health and safety record of this industry has significant deleterious effects on interstate commerce."

It is concluded that under prevailing law the operations and profits of Cobblestone affect interstate commerce and that its operation is subject to the provision of the Act.

Docket WEST 86-255-M

Citation No. 2634705

This citation charges Cobblestone with a violation of 30 C.F.R. $ 56.15002 which provides as follows:

> All persons shall wear suitable hard hats when in or around a mine or plant where falling objects may create a hazard.

The Mine Safety inspector during his inspection of May 14, 1986, observed that Respondent's part time employee, Mr. Hagar, was not wearing a hard hat while operating the jaw crusher. The inspector testified that the intake opening at the top of the jaw breaker where the material is dumped did not have a screen. Consequently, when some of the stones dumped into the top opening were pinched by the jaws and flew up in the air there was nothing to prevent the stones from falling on the operator's unprotected head.

The part-time employee was observed again on May 28th working in the plant area without a hard hat. At that time the citation was replaced by a 104(b) noncompliance order. Thereafter the employee wore a hard hat. Both the citations and the noncompliance order state that only one person was affected by the violation.

On the basis of the mine inspectors testimony it is found that at the time of the inspection the operator of the jaw crusher was not wearing a suitable hard hat while operating the jaw crusher. It is therefore concluded that there was a violation of 30 C.F.R. $ 56.15002.

The appropriate penalty for each citation will be discussed below under the heading penalty.

Citation No. 2634707

This citation charges respondent with the violation of 30 C.F.R. $ 56.15003 provides as follows:

> All persons shall wear suitable protective footwear when in or around an area of a mine or plant where a hazard exists which could cause an injury to the feet.

During the May 14, 1986 inspection Roy Trujillo, the MSHA mine inspector, observed the owner-operator wearing a pair of tennis shoes while working in and around an area of the plant where there was a hazard from falling rocks that could cause injury to his feet. The mine inspector presented evidence that tennis shoes were not a suitable protective footwear when a person is in or around an area of the mine or plant where such a hazard exists.

The evidence presented establish a violation of 30 C.F.R. $ 56.15003.

On May 28, 1986, the citation was replaced by a 104(b) noncompliance order. The citation and the 104(b) noncompliance order were terminated June 17, 1986.

Citation No. 2634706

The citation charges respondent with a violation of 30 C.F.R. $ 56.12028 which provides as follows:

> Continuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent tests shall be made available on a request by the Secretary or his duly authorized representative.

This citation states that "a continuity and ground resistance test hadn't been performed this year since the operator started". The mine inspector presented undisputed testimony that the required test had not been performed.

On May 28, 1986, the mine inspector replaced the citation with a 104(b) noncompliance order because the operator failed to have records showing the resistance of the grounding system.

The operator testified that the test was made as soon as he could get a qualified person to make the test. The citation was terminated June 17, 1986.

The evidence presented established a violation of 30 C.F.R. $ 57.12028.

Citation No. 2634737

This citation charges the operator with a violation of 30 C.F.R. $ 57.14001 which provides as follows:

> 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.

The mine inspector presented evidence that there was no guard on the V-Belt drive for the jaw crusher's electric motor. The belt was opposite the bull wheel inby the ladder used to climb to the crusher platform. The absence of the guard created a pinch point hazard. The pinch point was located five feet four inches above the ground.

The evidence presented establish a violation of $ 57.14001.

At the time of his re-inspection the mine inspector observed that the operator had not installed a guard for the V-Belt drive on the jaw crusher. He therefore replaced the citation with a 104(b) noncompliance order.

The violation was corrected and terminated on June 17, 1986.

Docket No. WEST 87-25-M

Citation No. 2634736

Respondent was charged with a violation of 30 C.F.R $ 56.12032 which provides as follows:

> Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.

The mine safety inspector presented evidence that the cover was missing on the junction box for the electric motor that drives the jaw crusher. It was undisputed that a big rock had fallen and smashed the junction box. The electrical connection within the junction box was exposed to the weather.

On the re-inspection of May 28, 1986 the mine inspector observed that the junction box still did not have a cover. Consequently, he replaced the citation with a 104(b) noncompliance order. The violation was terminated on June 17, 1986. On July 7, 1986, the citation was modified by MSHA from a significant and substantial to a non significant and substantial violation.

The evidence presented established a violation of 30 C.F.R. $ 56.12032.

Penalties

Section 110(i) of the Act mandates Commission consideration of six criteria in assessing appropriate civil penalties:

> (1) the operator's history of previous violations; (2) the appropriateness of the penalty to the size of the business of the operator; (3) whether the operator was negligent; (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation; and (6) whether good faith was demonstrated in attempting to achieve prompt abatement of the violation. 30 U.S.C. $ 820(i).

The parties stipulated to the small size of the operator's business. This stipulation is appropriate and accepted. It was a small family enterprise with the operator performing most of the work with the help of his family and only one part-time employee.

The record reflects the operator has at least a moderate history of previous violations.

The operator testified as to his substantial financial obligations including the payment of a heavy mortgage on the equipment and property. Nevertheless, I find no persuasive evidence that the imposition of authorized penalties would adversely affect respondent's ability to continue in business.

The operator was negligent in failing to comply with the standard alleged in each of the citations. Although there was no accident or injury during the years the respondent operated the gravel pit, the violations if continued unabated could have resulted in serious injury.

In determining the appropriate penalty I have also taken into consideration that most of the work was performed by the operator himself and that each of the citations reflect that only one or two persons were affected by the violations.

The operator's failure to promptly abate the violations during the period of time from the May 14th inspection to the May 25th reinspection is serious. However, I am satisfied from the record that the operator was sincere though mistaken in his belief that MSHA did not have jurisdiction or authority to issue the citations because during that period of time the owner-operator was producing gravel solely for his personal use.

Taking into consideration the six statutory criteria set forth in Section 110(i) of the Act particularly the size of this family enterprise, the appropriateness of the penalty to the size of the business and the operator's sincere though mistaken belief that MSHA had no authority to issue the citations during the period May 12th to May 28th, I find that the appropriate civil penalty for each of the violations is $50.00.

Conclusions of Law

1. The Commission has jurisdiction to decide this case.

2. Respondent violated the mandatory safety standards as alleged in each of the citations.

3. The appropriate civil penalty for each of the violations is $50.00.

ORDER

Each of the citations herein is affirmed and the respondent is ordered to pay a civil penalty of $250.00 to the Secretary within 30 days of the date of this decision.

August F. Cetti
Administrative Law Judge

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