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SOL (MSHA) V. SANGER ROCK & SAND
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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 PROCEEDINGS Docket No. WEST 88-44-M A.C. No. 04-01937-05503
v.	Docket No. WEST 88-45-M A.C. No. 04-01937-05502
SANGER ROCK & SAND, RESPONDENT	Docket No. WEST 88-116-M A.C. No. 04-01937-05504
	Sanger Pit & Mill

DECISION

Appearances: George B. O'Haver, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;
Mr. J. F. Baun, President, Sanger Rock and Sand, Sanger, California, pro se.

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act". The Secretary of Labor on behalf of the Mine Safety and Health Administration (MSHA), charges the operator of Sanger Rock and Sand with 7 violations of mandatory safety standards found in 30 C.F.R., Part 56 and seeks civil penalty assessments for the alleged violations.

Respondent filed a timely appeal contesting the violations on grounds petitioner lacked jurisdiction and raising additional issues of due process of law, the existence of a violation, and the amount of the penalty as to certain citations.

Jurisdiction

At the outset of the hearing respondent orally renewed its previously filed written motion to dismiss the citations on the grounds of lack of jurisdiction. It is respondent's contention that Sanger Rock and Sand a mine located in Sanger, Fresno County, California is located outside of the territorial or geographical jurisdiction of the United States. Respondent argues that there is no such thing as a jurisdiction without geo-

graphical boundaries, that Federal jurisdiction is very limited and covers only mines and people located in Washington, D.C. or in a federal enclave within states, or in the territories or possessions. Respondent contends that all mines located in other areas, including Sanger Rock and Sand in Fresno County, California, is not subject to the jurisdiction of United States.

Respondent's contention is rejected. It is contrary to well established prevailing law.

Respondent's sand and gravel operation is a mine within the meaning of section 3(h)(1) of the Act. Its employees are engaged in extracting minerals, (rock and sand) from their natural deposits in nonliquid form and is therefore a "mine" as defined in section 3(h)(1) of the Act. Respondent admits that the products it excavates and mills are sold commercially within the State of California. In the performance of the work at the site inspected, respondent's employees handle, use, or otherwise work with machinery and equipment which is manufactured or purchased outside of the State of California. (Exhibit P-8).

Section 4 of the Act provides as follows:

> "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."

Congress by its use of the phrase "which affect commerce" in Section 4 of the Act, indicates its intent 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).

Even though no evidence was presented to show that the products respondent produced for sale in California to contractors was or was not used solely intrastate, nevertheless it may reasonably be inferred that even intrastate use of the gravel would have an affect upon the interstate market. The 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 accumulative affect of all such production by others similarly situated is significant and has an impact on interstate commerce. Fry v. United States, 421 U.S. 542, 547 (1975).

In response to petitioner's request for admissions respondent admitted that its employees "handle, use, or otherwise work with machinery and equipment which is manufactured or produced outside the State of California." (Exhibit P-8). It has been held that the 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).

The Mine Act as well as the Act's Legislative History clearly shows the Congressional determination that all mining related accidents and disease unduly burden and impede interstate commerce. Section 2(f) of the Act states:

> [T]he disruption of production and the loss of income to operators and miners as a result of coal or other mine accidents or occupationally caused diseases unduly impedes and burdens commerce.

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 statutes, 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 dilatorius effects on interstate commerce."

Respondent's operations clearly "affect commerce" within the meaning of section 4 of the Act. Congress is empowered under the commerce clause of the Federal Constitution to regulate even intrastate sales. See Wickard v. Filburn, 317 U.S. 111, 128, (1942). In a more recent case Andrus v. P-Burg Coal Co., Inc., 644 F.2d 1231, 1232 (1981). The Court reiterated that Congress is empowered to regulate a mining operation that produces coal solely for intrastate sale. The Court adopted the District Court's determination that intrastate producers compete with interstate producer, and that intrastate sales have a cumulative effect on commerce.

It is concluded that under prevailing law the operations of Sanger Rock & Sand are clearly subject to the provisions of the Act.

Citation No. 3074995

Citation No. 3074995 is a 104(a) citation alleging a violation of section 103(a) of the Act. The citation reads as follows:

> J.F. Baun - Pres at this mine today interfered with, hindered and delay the inspection of the mine by refusing to cooperate when asked for records that the inspector was required to see. Upon further argument and calling the inspector a liar for the second time after being warned that he was interfering, hindering, and delaying the inspection, the inspection was stopped and this citation issued.

Section 103(a) of the Act in relevant part provides as follows:

> "Authorized representatives of the Secretary . . . shall make frequent inspections and investigations in coal or other mines. . . . In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided. . . . [and the authorized representatives] shall have a right of entry to, upon, or through any . . . mine."

On August 14, 1987, Inspector Alvarez accompanied by trainee Inspector Henze arrived at Sanger Rock & Sand to complete their inspection which they started the day before. The mine inspectors needed to look at certain company records which they are required by law to verify when making a mine inspection. When they asked the foreman for the records, he indicated that they were kept in the office of Mr. Baun, the President of Sanger Rock & Sand. The inspectors as required by law wanted to look at a copy of the mine's legal ID, the accident reporting forms, the quarterly employment reports, and the grounding continuity records. They introduced themselves to Mr. Baun and told him why they were there. They explained the kind of records they needed to look at and asked him for them. Mr. Baun questioned the authenticity of their ID cards. He stated that anyone could manufacture the ID cards. He declined to act on their suggestion that he call the MSHA District Office or their supervisor to verify their identity as MSHA inspectors. When the inspector asked for certain records Mr. Baun pulled out a manila type folder, held it up, thumbed through it, and said "well the information is ok" and started to put the folder back away in his cabinet. When the inspector told him "that won't do", that he needed to "verify the report", Mr. Baun threw the folder at him across the desk. The folder fell off the desk and fell in a pile on the floor. Inspector Alvarez had to reach down and pick up the file and put it back together to look at it. The latest report in the file was dated 1981.

MSHA Inspector Alvarez testified that half way through the inspection Mr. Baun got up and called him a "liar". The inspector then gave Mr. Baun this warning "We're here, we're being very polite to you and civil. But if you persist in

obstructing and hindering the inspection, I will be forced to call off the inspection, stop it, and I will cite you for hindering and interfering with the inspection." Mr. Baun seemed to calm down and sat down while the inspectors proceeded with the paperwork. However, when Inspector Alvarez told him that he was going to have to cite him for not having the required records on ground and continuity tests, Mr. Baun became quite upset and told Mr. Alvarez that he, "lied to him twice". Mr. Alvarez then told Mr. Baun "I have had enough. The inspection is over." The inspector told Mr. Baun "I am going to cite you for interfering and hindering the inspection." The inspectors then went to their car and left.

On cross examination Inspector Alvarez testified that the inspection was not completed at the time he felt compelled to stop the inspection. He still needed to have a closeout discussion on the citations issued since Mr. Baun had not gone with the inspector at any time during the inspection. The inspector needed to sit down and explain to Mr. Baun why the citations were issued and what his options were. The inspectors also wanted to make Mr. Baun aware of his 10 day conference rights.

Inspector Alvarez testified that when he returned to respondent's premises on the 25th of August for the abatement inspection Mr. Baun and his employees were cooperative.

I credit the testimony of Inspector Alvarez. Since Mr. Baun was quite upset and twice called the mine inspector a "liar", it was reasonable for the inspector to stop the inspection and leave Mr. Baun's office. MSHA inspectors are not required to subject themselves to harassment or verbal abuse in order to complete an inspection. See Secretary v. Calvin Black Enterprise, 7 FMSHRC 1151 (August 22, 1985), at 1157; U.S. Steel Corp., v. Secretary of Labor, 6 FMSHRC 1423 (June 26, 1984). The violation of section 103(a) of the Act was established. Citation No. 3074995 is affirmed.

With respect to assessing the appropriate penalty there is undisputed evidence that Mr. Baun with some delay did make available to the mine inspector before they left all the records the inspector requested that were available at the premises inspected. The evidence also established that Mr. Baun and his employees were cooperative when the inspectors returned 10 days after the inspection to check on abatement. Taking this into consideration, along with all the statutory criteria set forth in section 110(i) of the Act, I find upon independent review and evaluation that $35.00 rather than the proposed $200 is the appropriate penalty for this violation under the facts and circumstances established at the hearing.

Due Process

Sanger Rock and Sand contests Citation Nos. 3074991, 3074992 and 3074993 on the ground that MSHA's review process under 30 C.F.R. 100.6 was a denial of due process of law and was merely a ". . . rubber stamp."

Under 30 C.F.R. 100.6 all parties are allowed to request a conference with the appropriate MSHA District Manager to review Citations. Subsection (c) of this section provides that it is within the sole discretion of MSHA to grant a request for a conference and to determine the nature of the conference.

Mr. Baun, respondent's president, was given the conference allowed by the regulation. His testimony shows that he discussed the merits of the citation with the District Manager until Mr. Baun believed it was "fruitless".

Due process of law does not require the conference provided by 30 C.F.R. 100.6. It is the hearing provided by the Federal Mine Safety and Health Review Commission under 29 C.F.R. 2700 et seq. which is the due process of law hearing required by the U.S. Constitution. The Act and the Commission regulations provide for a hearing before an Administrative Law Judge and review by the Commission that is fully in accord with constitutional due process of law requirements. See National Industrial Coal Operators' Association v. Klepp, 423 U.S. 400, 96 Sup. Court KT. 809 (1976).

Citation 3074810

This citation alleges a violation of 30 C.F.R. 56.12032 as follows:

> The junction box cover for the #2 primary feeder vibrator motor was missing. The junction box was located on the vibrator motor. Exposed wire nuts were in the junction box conducting 440 volts. The hazard was 8 ft above ground level.

30 C.F.R. 56.12032 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.

Jaime Alvarez, Federal Mine Safety and Health inspector testified that he inspected the junction box for the No. 2 primary feeder vibrator motor. The junction box did not have a cover. He observed 3 exposed wires that were capped off with a

screw type cap. The wires were insulated as they came into the junction box but were bare from a point where the insulation had been cut off to the edge of the cap that covered the ends of the bare wire.

On cross examination the safety inspector testified that the uncovered junction box was not protected by location. Although the junction box was 8 feet above the ground it was only 4 feet above the level on which he observed an employee working. The employee was a hortizonal distance of 12 feet from the junction box and had easy access to the junction box. If an employee were to come in contact with the exposed wire it could easily result in a fatal electric shock.

Mr. Baun testified that an employee using a ladder could intentionally contact the wires in the junction box but could not do so accidentally.

Mr. Baun also reasoned that since the vibrators were not working there must have been no electrical power to the junction box and the switch that turns on the electricity to the junction box was located several hundred feet away.

Asked why the junction box had no cover, Mr. Baun replied that normally that junction box was covered. He suggested that the cover may have "vibrated off" or someone may have been working on the vibrator.

The evidence presented clearly established a 104(a) violation of 30 C.F.R. 56.12032. The citation is affirmed.

The Secretary proposed a $20 penalty which respondent did not contest. Upon independent review and evaluation I have considered the six statutory criteria set forth in section 110(i) of the Act and find that the $20 proposed penalty is the appropriate penalty for this violation.

Citation 3074811

This citation alleges a violation of 30 C.F.R. 56.12008 which mandates power wires and cables be insulated adequately where they pass into or out of electrical compartments.

Mr. Alvarez testified that he inspected an electric sump pump motor located at the bottom of the secondary tunnel. the power cable was not bushed where the cable passes into the motor housing. The pump was sitting adjacent to a sump. It was near water and the discharge hose was connected. The power line plug was unhooked but was laying approximately two inches from the

female receptacle for the power line. There was a hazard of the electric shock from coming into contact with shorted electricity. The wet area increased the hazard.

Mr. Baun testified that the pump was a centrifugal water pump not a submersible pump. He stated that the pump was inoperable and was out of service at the time of the inspection. He did not know how long the pump had been inoperable.

Mr. Baun placed in evidence an invoice showing that he purchased parts to repair that pump. The invoice was dated August 19, 1987, six days after the date the citation was issued.

I credit the testimony of MSHA Inspector Alvarez and find that respondent violated the provision of 30 C.F.R. 56.12008 as set forth in the citation.

Respondent did not contest the amount of the Secretary's proposed $20 penalty. Upon independent review and evaluation, taking into consideration the six statutory penalty criteria set forth in section 110(i) of the Act, I find the appropriate penalty for this violation is the $20 penalty proposed by the Secretary.

Citation No. 3074991

This citation alleges a 104(a) violation of 30 C.F.R. 56.15004. The citation states:

> An employee was observed hitting the steel shell of the primary crusher bin with a double jack hammer (@ 10 1b) with a mushroom head on each end. This employee was not wearing any eye protection to prevent an injury to his eyes from a piece of metal from either the steel bin wall or the split steel heads on the double jack.

30 C.F.R. 56.15004 provides as follows:

> All persons shall wear safety glasses, goggles, or face shields or other suitable protective devices when in or around an area of a mine or plant where a hazard exists which could cause injury to unprotected eyes.

Inspector Alvarez testified he observed an employee beating on the outside of steel shell of the No. 1 bin with a double jack hammer. The employee was not using safety glasses or any other eye protection to prevent flying objects such as a fragment of the hammer hitting him in the eye. Both heads of the jack hammer were mushroomed, showing that the steel on both ends of the head

had been fragmented due to the constant use of the hammer to beat on the steel side of the bin. The employee was called down and instructed in the use of safety glasses. The employee went to his car and took out and put on a pair of safety glasses.

Mr. Baun testified that this was a new employee but there was no excuse for the employee not wearing his safety glasses. The employee had received the required safety training and had been given a copy of the company's safety rules which specifically require wearing safety glasses whenever there is a danger of getting anything in the eye.

The violation of Citation No. 3074991 was established as alleged in the citation. The citation is affirmed.

Respondent did not contest the amount of the Secretary's proposed $58 penalty. Upon independent evaluation, taking into consideration the six statutory penalty criteria set forth in section 110(i) of the Act, I find the appropriate penalty is the $58 penalty proposed by the Secretary.

Citation No. 3074992

This citation alleges a 104(a) violation of 30 C.F.R. 56.14007. The citation states:

> The side of the guard on the self cleaning tail pulley on the crusher rock belt was found not in proper maintenance in that the center of the guard had been torn off thus leaving an open hole in the guard through which an employees hand, arm or foot, leg could easily contact the moving machine parts.

Inspector Alvarez inspected the guard on the tail pulley of the crushed rock belt. It was a light expanded metal guard that was not properly maintained in that there was a hole in the middle of the expanded metal portion of the guard that was 8-9 inches in circumference. It appeared to the inspector that the hole had been cut in the guard or at least partly cut and partly torn. He testified that there was moving machinery approximately 3 or 4 inches from the opening in the guard.

Mr. Baun testified that no hole had been cut in the guard. He explained that motorized equipment that cleaned up near the guard had ripped the side of the guard with its bucket. A flap of expanded metal may have been bent back but no hole was intentionally cut.

The violation of 30 C.F.R. 56.14007 for failure to properly maintain the tail pulley guard as alleged in Citation No. 3074992 was established. The citation is affirmed.

Respondent did not contest the amount of the Secretary's proposed $20 penalty. Upon independent evaluation, taking into consideration the six statutory penalty criteria set forth in section 110(i) of the Act, I find the appropriate penalty is a $20 penalty as proposed by the Secretary.

Citation No. 3074993

This citation alleges a 104(a) violation of 30 C.F.R. 56.9022 which requires berms or guard on the outer bank of elevated roadways.

> Citation No. 3074993 alleges:
>
> The berm on the pit haulage road was not adequate (along large areas were nonexistant) to prevent one of the Euclid (R-35) 35 ton truck from going over the elevated edge of the road. The drop from the edge of the 30 ft wide road @ 40 ft down into the adjacent pond. The berms were in need of repair for a distance of @ 200 yards on which there was 2-way traffic.

Inspector Alvarez testified that he observed an elevated pit haulage road that was approximately 30 feet wide. The road extended from the plant to the pit area, a distance of approximately three-quarters of a mile. On the day of the inspection there were two 35 ton trucks using the road to haul the sand and gravel. The elevated portion of the road was approximately one-half mile long. The inspector stated that the area cited had no berm for approximately over 200 yards. The inspector measured a drop of 40 feet from the roadway down to an adjacent pond below.

Mr. Baun testified that there had been a berm along this haulage road for many years. He surmised that the blade operator had bladed off some of the berm to improve the haul road.

The violation of 30 C.F.R. 56.9022 was established. The citation is affirmed.

The Secretary proposed a $42 civil penalty. Upon independent review and evaluation taking into consideration the six criteria set forth in section 110(i) of the Act, I find the appropriate penalty is the $42 proposed by the Secretary.

Citation No. 3074997

This is a 104(a) citation alleging a violation of 30 C.F.R. 56.9087 the citation reads as follows:

> "A Komtsu-wa 600 (C # -- 11 E-14) rubber tired front-end loader was observed backing up while loading trucks in the yard without an operable back-up alarm. There was no foot traffic in the area".
>
> 30 C.F.R. 56.9087 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 undisputed evidence established that the front-end loader had an obstructed view to the rear and was fitted with an appropriate audible warning device which was working at the beginning of the morning shift. Inspector Alvarez observed the loader for a few minutes while it loaded two trucks. The back up alarm was not working. The loader was stopped and the driver questioned. The driver stated the back up alarm was working that morning when he began his work shift. He explained that sometimes the shock resulting from the bouncing of the loader causes the wires to the back up alarm to break. The driver stopped the work and took the loader to the shop where it was immediately repaired.

Respondent contends that since the loader's back up alarm was repaired immediately when discovered to be inoperative and this auditory warning device was working when the shift began, that there was no violation of 56.9087. Respondent's contention must be rejected. The view to the rear of the front-end loader was obstructed and the backup alarm was not operative at the time of the inspection. The violation of 30 C.F.R. 56.9087 was established. The citation is affirmed.

The respondent did not contest the Secretary's proposed $20.00 penalty for this violation. Upon independent review and evaluation, taking into consideration the six statutory criteria set forth in section 110(i) of the Act and the fact there was no foot traffic in the area and the fact that the alarm was working at the beginning of the shift, I find that the Secretary's proposed $20.00 is the appropriate penalty for this violation.

Conclusion

On the basis of the foregoing findings and conclusions it is found that Sanger Rock and Sand is subject to the provisions of the Act, and that respondent has been accorded due process of law, and this Commission and its undersigned judge have juris-

diction to decide this matter. All the citations are affirmed. Taking into consideration the statutory criteria set forth in section 110(i) of the Act, I conclude that the following civil penalty assessments are reasonable and appropriate for the violations which have been established.

Citation	Violation	Amount
3074810	30 CFR 56.12032	$ 20.00
3074811	30 CFR 56.12008	20.00
3074991	30 CFR 56.15004	58.00
3074992	30 CFR 56.14007	20.00
3074993	30 CFR 56.9022	42.00
3074995	Act Sec. 103(a)	35.00
3074997	30 CFR 56.9087	20.00
		$215.00

ORDER

The respondent is directed to pay the civil penalties assessed in these proceedings within thirty (30) days of the date of these decisions. Upon receipt of payment, these proceedings are dismissed.

August F. Cetti
Administrative Law Judge