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SOL (MSHA) V. NEVADA MINERAL PROCESSING
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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 88-273-M A.C. No. 26-02050-05501
v.	Docket No. WEST 88-278-M A.C. No. 26-02050-05502
NEVADA MINERAL PROCESSING, RESPONDENT	Docket No. WEST 88-306-M A.C. No. 26-02050-05503
	Nevada Mineral Mill

DECISION

Appearances: George B. O'Haver, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;
Annelie Hoyer, Secretary-Treasurer, Nevada Mineral Processing, Mina, Nevada, for Respondent.

Before: Judge Lasher

This matter arises upon the filing by the Secretary of Labor of three petitions for penalty assessment in the three subject dockets which collectively contain 7 Citations issued during the month of March 1988, at Respondent's operation located in the vicinity of Mina, Nevada.(FOOTNOTE 1)

Contentions of the Parties

At the outset of the hearing, the parties stipulated that the seven violations charged did occur (T. 6, 7). The Respondent's primary defense raised the question whether its milling operation (which allegedly was under construction but not in production at the time of the subject inspection in March, 1988) was within the jurisdiction of MSHA's enforcement authority and the coverage of the 1977 Mine Act (T. 11, 13). Respondent was also concerned that it was not allowed the courtesy of a CAV (Compliance Assistance Visit) for its new plant. Petitioner contended that 2 of the Citations (numbered 3070667 and 3070675 in Docket WEST 88-278-M) were so-called "significant and substantial" (S&S) violations and presented evidence on this issue. The remaining requirement is the penalty assessment for the seven violations involved.

Jurisdictional Matters

The first question is whether Respondent's custom mill is a "mine" covered by the Act. Respondent is a Nevada corporation with offices in 2 states, i.e., in Mina, Nevada, and Blaine, Washington. It does not engage in actual extraction of the gold and silver ore processed in its custom mill, but processes such for "small miners in the vicinity" (T. 48, 49).

During the period March 21 through 24, 1988, MSHA Mine Inspector John F. Myer, at the direction of his supervisor, conducted an inspection of Respondent's operation -- which he described as a "small mill" consisting of a "crusher, mill, conveyors, leach solution tank system, a lab, a small shop and an assay lab." (T. 18, 19, 27). At the time of inspection, 16 employees were working (T. 19, 72) and the operation was in the final stages construction. Inspector Myer observed the following kinds of work being carried on:

> ". . . there was some welding being done outside on some conveyors and an ore bin that feeds the crusher. There was some electrical work being done in the mill. There was assaying being done in the lab and there was shop work being done." (T. 19, 20).

Inspector Myer was advised by Respondent's Project Manager, Steven York, that some of the ore in the 15 to 20 ton stockpile was from a mine in California (T. 20, 21).

At the time of inspection the mill itself was not producing but its assay lab was operating. Thus the Inspector testified:

> "The mill itself wasn't operating. The assay lab was operating. They were prep sampling. They had a bucking

> room with a small Bilco Chipmonk crusher, pulverizer, furnace for fire assay and that portion of the mill was operating, assaying samples, custom samples, for miners in the area. I don't really know where the ore came from but it was being assayed there." (T. 19) (emphasis added)

The work in the "bucking room" was described as follows:

> "The bucking room is where they get the ore, the material, and they run it through a chipmonk crusher. That's a small crusher that they do just maybe a sack full of ore and it runs through the crusher, then it's taken out of there and put in a pulverizer. It's pulverized to almost powder and then it's put in crucibles and put in the furnace, along with lead and some flux to determine the content of the gold or silver in the ore." (T. 20).

Section 3(h)(1) of the Act, 30 U.S.C. 802(h)(I), defines a "mine" in the following language:

> "Coal or other mine" means (A) an area of land from which minerals are extracted * * * (B) private ways and roads appurtenant to such area, and (C) lands * * * facilities, equipment * * * or other property * * * used in, or to be used in, or resulting from the work of extracting such materials from their natural deposits * * *, or used in, or to be used in the milling of such minerals, or the work of preparing coal or other minerals, . . . "
> [Emphasis added].

Under this definition, it is clear that a "mine" includes facilities and equipment "used" in the work of milling or preparing minerals, such as Respondent's custom mill.

A preparation facility or milling facility need not have a connection with the extractor of the mineral in order to be subject to the Act's coverage. Carolina Stalite Co., 6 FMSHRC 2518, 2519 (1984); Alexander Brothers, Inc., 4 FMSHRC 541, 544 (1982). Further, the construction of the mill itself is an activity covered under the Act. Bituminous Coal Oper. Ass'n v. Secretary of Interior, 547 F. 2d 240, 244, 245 (1977). In any event, on the inspection day, Respondent's "bucking room" was in operation. Thus, while the mill itself was not in full production, that part of the custom mill was in operation and ore was in fact being processed for the purpose of assaying. It is thus concluded for these independent reasons that Respondent's mill was a mine covered by the Act at all material times.

Commerce

With respect to the question whether Respondent's operation "affects commerce", Judge August F. Cetti, pointed out in his

decision in Secretary v. Cobblestone, Ltd., 10 FMSHRC 731, 733 (June, 1988) that the use of the phrase "affect commerce" in the Mine Act triggers a broad reach of regulatory coverage:

"Looking first to the Act itself, Section 4 of 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, 332 U.S. 643 (1944); Godwin v. OSHRC, F.2d 1013 (9th Cir. 1976)."

Here, Respondent, which has offices in two states (Nevada and Washington), had ore in its stockpile which had been obtained from a mine in California. Even if all the ore Respondent were to process was obtained from the state of Nevada and was not shipped out of Nevada after processing such circumstance would not insulate it from affecting commerce since its mere presence in the intrastate market would have an effect on the supply and price of such mineral in the interstate market. See Marshall v. Kilgore, 478 F. Supp. 4 (E.D. Tenn. 1979); Fry v. U.S., 421 U.S. 542, 547 (1975).

It is concluded that Respondent is engaged in a mining activity affecting commerce and that such is covered by the Mine Act.

CAV Rights

Respondent contends that it should not be assessed penalties since it was not afforded the right to request a CAV (Compliance Assistance Visit) prior to the inspection. At the hearing, Inspector Myer explained the nature of CAVs:

Q. What is the policy of your agency, and can you explain for purposes of the record what a CAV inspection is?

A. A CAV inspection is a Compliance Assistant Visit. As an inspector, we go to the mine, when they're ready to go into production before they produce and we make a courtesy tour and we inspect the mines and any hazards or corrections that need to be made, we issue written notices which are non-penalty notices that are to be corrected and that they're not assessed. And we do this by written notice prior to their startup that they request.

Q. Your testimony is that in order to be a CAV inspection, it has to be requested in advance by the operator, is that your testimony?

A. Yes.

Q. And is that the policy of the agency as dictated by your head office in Washington, is that correct?

A. As far as I know, yes. (T. 24)

The Inspector also convincingly explained why Respondent was not given a CAV prior to the inspection:

"Q. Mr. Myer, talking about the internal memo, why couldn't respondent not qualify under your internal guidelines for a CAV inspection?

A. Well, number one, we never were notified, or a request sent to us in writing that they wanted one. Nor were we notified that they were a mill under construction.

Q. So your testimony is that you had no knowledge of their operations until you were told by your supervisor to go out and do this inspection, is that your testimony?

A. That's right." (T. 27)

With respect to this question, it is first noted that the "compliance assistance visit" process (Ex. P-2) is not a mine operator's absolute right and such is not provided for in the Act. Secondly, even under MSHA's internal CAV policies, since it was not notified by Respondent that the mill (mine) was under construction, there was no opportunity for MSHA, had it chosen to exercise its discretion and grant a CAV, to conduct such. Finally, Respondent was apparently unaware of such process at the time (T. 23-24, 54-56), and did not request a CAV. On the other hand, the mine in question is clearly subject to the Mine Act and

inspections thereof are mandated by the Act. Section 103(a), 30 U.S.C. 815. In conjunction therewith, Sections 104(a) and 110(a) of the Act require that a Citation be issued and a penalty be assessed when a violation occurs. See Old Ben Coal Co., 7 MSHRC 205, 208 (1985). Accordingly, the contention of Respondent based on its failure to receive a prior CAV is found to lack merit and is rejected.

"Significant and Substantial" Allegations

The Inspector designated two of the Citations as involving "significant and substantial" (S & S) violations, i.e., Citations numbered 3070667 and 3070675 in Docket No. WEST 88-278-M.

Citation No. 3070667 charges a violation of 30 C.F.R. 56.9087, to wit:

> "There was no audible reverse signal alarm on the Clark 275 B(FOOTNOTE 2) front end loader working in the mill yard area. Four employees were in the area on foot. The size of the loader caused an obstructed view to the rear. No spotter or signal man was being used to signal the operator when it was safe to back up."

30 C.F.R. 56.9087, relating to "Audible warning devices and back-up alarms", provides:

> "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."

Inspector Myer testified that the subject front end loader is considered heavy duty mobile equipment, i.e. it weighs approximately 61,000 pounds with tire height of approximately 7 feet. He said that because of the height of the equipment the ground behind it is not visible to the rear for "quite aways," i.e., 25-30 feet (T. 36). While the loader was equipped with an audible signal alarm, it was not operable and there was no signal man being used. Four miners, in addition to the loader operator, were working in the area.

Inspector Myer described the hazard as follows:

"A. Well, people on foot, no signalman, and they're engrossed in their work and the loader backs up they're very apt not to see it. The operator cannot see directly behind you and they can be run over, backed over.

Q. Would death or serious injury result.

A. Very definitely the size of this loader and the weight. It would be fatal. Fact of the matter our latest fatality in Nevada is with a front-end loader backing over an employee." (T. 35)

The Inspector also testified that two of the miners were working alongside the loader "because they were going with him to help him unload what he was carrying." Although the other two miners were working separately, the loader "probably passed" within six feet of them (T. 37).

Citation No. 3070675 charges an infraction of 30 C.F.R. 56.14001:

"There was no guard covering the flywheels and V-Belts and pulleys on the Bilco Chipmunk Jaw Crusher in the bucking room. The wheels were 51 inches around with 4 spokes in the wheels. The center or hub of the wheel was 4-ft up from the floor level. The employee bucking samples was exposed to the moving wheel when feeding samples into the crusher."

30 C.F.R. 56.14001 provides:

"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."

On the day of inspection, Inspector Myer observed an exposed flywheel on the Bilco crusher in the bucking room (T. 38). He described the crusher as "a small jaw that's used to sample small amounts of ore for assay purposes". It is driven by V-Belts and pulleys and a flywheel on each side. The Inspector said the flywheel travels at a "good speed" and that it is fed by "reaching over the flywheel to put ore into the crusher to feed the crusher" (T. 38-39). He actually observed an employee operating the crusher. The employee was required to stand at one side of the crusher which was in a small, approximately 6 foot by 8 foot, room. The Inspector indicated that ". . . you could only come up to the one side of it where . . . the employee had to put the ore in" (T. 39). His testimony regarding the nature of the hazard and probabilities follows:

"A. Well, its an unguarded moving machine part. Its accessible to employees that were working right, right at the, right at it and having to reach over.

Q. They could get their arm caught in the flywheel?

A. Flywheel or the V-Belts and pulleys, either one.

Q. What type of any injury would occur from that type of an accident?

A. I would--- permanent disability you could lose an arm. You could lose fingers.

Q. Do these accidents occur frequently in this area?

A. Yes, probably one of the highest of accidents are due to injuries caused by moving machine parts in the mining industry." (emphasis added)

(T. 39-40)

A violation is properly designated S & S "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1 (1984), the Commission listed four elements of proof for S & S violations:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In the United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (1985), the Commission expounded thereon as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co, 6 FMSHRC 1834, 1836 (Autust 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation

> to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

It is concluded that the Petitioner carried its burden of proof under Mathies, supra, with respect to both Citations. Thus, the violations themselves were initially conceded, and both clearly contributed a measure of danger to the miners who were exposed to the hazards described and specified by the Inspector. Both violations, had the hazards actually come to fruition, would have resulted in serious bodily harm to the miners jeopardized. Indeed, the violation described in Citation No. 3070667 might well have resulted in a fatality. The record is clear that with respect to both violations the miners exposed worked at least at times in close proximity to the hazard. With respect to the "inoperable backup alarm" violation, vision was obstructed for some 25 feet behind the loader. With respect to the unguarded crusher violation, the operator thereof was required to work "right at" the hazard in a small confined space and "reach over" moving machine parts when feeding the crusher. I therefore find and infer from the unrebutted evidence of Petitioner cited above that both hazards which were significantly and substantially contributed to by the violations were reasonably likely to occur. Accordingly, both violations are found to be "significant and substantial."

Assessment of Penalties

Petitioner, at hearing, conceded that Respondent proceeded in good faith to abate all seven violations after notification thereof (T. 41%9B. Respondent conceded that penalties assessed at the monetary levels proposed by the Secretary would not jeopardize its ability to continue in business (T. 69). Presumably, since this is a new operation evidence of previous violations was not proffered and it is inferred that Respondent has no prior violations. In terms of size, Respondent is small (T. 42) having 16 employees when the Citations were issued and 9 at the present time. Tonnage and/or sales figures were not available since Respondent had not commenced normal "production" as of the time of hearing. In connection with the remaining mandatory penalty assessment criteria, negligence and seriousness, the record with respect to the five non-S & S violations is not remarkable. In view of the strength of Respondent's belief that it was not a mine subject to the Act, and that if it had been it would have expected a CAV inspection, its negligence in committing all sevenviolations is found to be of a relatively low degree. Also, all seven citations were issued on its first inspection. The two S & S violations are found to be serious.

After consideration of the foregoing criteria, the penalties proposed by the Secretary for the seven violations involved (five

of which are $20 single penalty assessments) are found reasonable and appropriate, and are here assessed as follows:

Citation No.	Penalty
3070664	$ 20.00
3070665	20.00
3070676	20.00
3070677	20.00
3070678	20.00
3070667	85.00
3070675	68.00
TOTAL	$253.00

ORDER

1. The Citations involved in this matter, including the "significant and substantial" designations on Citations numbered 3070667 and 3070675, are affirmed.

2. Respondent, if it has not previously done so, is ordered to pay the Secretary of Labor within 30 days from the date hereof the sum of $253.00 as and for the civil penalties above assessed.

Michael A. Lasher, Jr.
Administrative Law Judge

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FOOTNOTES START HERE
~FOOTNOTE_ONE

1. With respect to docket No. WEST 88-306-M, which originally contained Petitioner's request for assessments for 2 Citations, Nos. 3070665 and 3070679, copies of these 2 Citations were attached to the Petition. However, other paperwork attached to the petition showed #3070679 involved a violation of 30 C.F.R. 56.200026., whereas the Citation itself alleged a violation o "30 C.F.R. 56.20001e". At the hearing, after the 2 parties had reached meaningful stipulations and given testimony regarding the issues and the seven violations involved, it became apparent that Citation No. 3070679 was not one of the Citations they understood was involved in Docket WEST 88-306-M. Rather, it was Citation No. 3070678, which alleged a violation of 30 C.F.R. 56.13015(i). This also did not jibe with some of the paperwork (specifically, page 2 of the "Proposed Assessment") attached to the Petition. Counsel for the Solicitor indicated that Citation No. 3070678 was, in his files, the second Citation contained in Docket 88-306-M. Since the parties had prejudicially acted on this belief both before and during the hearing, the Petitioner's petition was amended at hearing to show Citation 3070678 instead of 3070679, and copies of 3070678 were substituted for 3070679 as attachments to the petition in the Commission's file.

~FOOTNOTE_TWO

2. Respondent pointed out at the hearing (T. 66) that the correct number is 275A rather than 275B.