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SOL (MSHA) V. LOUISA SAND AND GRAVEL
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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. KENT 88-206 A. C. No. 15-12672-03510
v.	River Dredge
LOUISA SAND AND GRAVEL, COMPANY, INC., RESPONDENT	

DECISION

Appearances: Anne T. Knauff, Esq., Office of the Solicitor,
U.S. Department of Labor, for the Secretary;
Mr. Gene A. Wilson, Louisa, KY, for Respondent.

Before: Judge Fauver

This proceeding was brought by the Secretary of Labor for civil penalties for alleged violations of safety standards, under 110 (a) of the Federal Mine Safety and Health Act of 1977, 3 U.S.C. 801 et seq.

The case involves two citations. At the hearing the parties moved for approval of a settlement of Citation 2773586, for a civil penalty of $20. The settlement was approved, and the amount is included in the Order below.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following Findings of Fact and additional findings in the Discussion below:

FINDINGS OF FACT

1. Respondent and its predecessors-in-interest have operated a river dredging operation year-round on the Big Sandy River, near Louisa, Kentucky, for more than eight years. Legal Identity Forms filed with the Mine Safety and Health Administration show that the operation was called Gene A. Wilson Enterprises on December 22, 1980, the name was changed to Rivco Dredging Corporation on November 28, 1983, and changed again on

February 1, 1988, to Louisa Sand and Gravel Company, Inc.(FOOTNOTE 1) Despite the name changes, the Federal ID number has been the same since its inception, and there is a clear continuity of successors-in-interest at this dredging site.

2. The Big Sandy River is the boundary between Kentucky and West Virginia. Respondent dredges sand, coal and debris from the river bottom to its processing plant on the Kentucky shore. Interstate sales and distribution of coal are regular.

3. At all relevant times, near the center of Louisa's operations, between the preparation plant and the garage, there was a 3,000-gallon fuel tank used to fuel Respondent's vehicles. An electrical box on a utility pole was next to the tank. A #10 wire ran from the pole to a fuel pump near the tank.

4. During an electrical spot inspection on June 21, 1988, Federal Mine Inspector Thomas E. Goodman, an electrical inspector, observed that proper overload or short-circuit protection was not provided for the #10 wire, which transmitted 110/220 volt single-phase power to the plugs on the utility pole and beyond to the fuel pump. The #10 wire was connected to a 220-amp circuit breaker. The inspector believed that, in the event of a fault in the electrical current, the wire probably would have burned with a high danger of a fuel explosion at the tank. He issued Citation 2769952, under 104(a) of the Act, charging a violation of 30 C.F.R. 77.506, which provides:

> Automatic circuit-breaking devices or fuses of the correct type and capacity shall be installed so as to protect all electric equipment and circuits against short circuit and overloads.

DISCUSSION WITH FURTHER FINDINGS

Respondent has challenged the jurisdiction of MSHA's Division of Coal Mine Safety and Health, and the characterization of its dredging operation as a "mine." It contends that, although it is subject to the Act, its operations should come under the Metal/Nonmetal Mining regulations (30 C.F.R. Part 56) instead of the Coal Mining regulations (Part 77), and it should be investigated by MSHA's Division of Metal and Nonmetal Mine Safety and Health, and not the Coal Mine Division.

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The Act has a broad definition of a "coal or other mine" as follows (30 U.S.C. 802):

> (h) (1) "coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such areas, 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 if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes minimal milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment;
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> (2) For purposes of titles II, III, and IV, "coal mine" means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities * * *.

Respondent acknowledges that most of what it sells is coal and that at all times relevant it did not sell the sand dredged from the river. Six to eight per cent of what is dredged from the river is coal and "the remainder is sand and other debris and stuff" (Tr. 137-138).

In Marshall v. Stoudt's Ferry Preparation Co., 602 F. 2d 589 (3rd Cir. 1979), the court held that the process of separating from dredged refuse a burnable product "akin" to coal, sold as a low-grade fuel, came within the Act's definition of "mining." A fortiori, Respondent's work of dredging material from a river and separating coal for sale is "mining" within the meaning of the Act. As the court stated, the legislative history of the Act shows that "what is to be considered a mine and to be regulated under the Act is to be given the broadest possible interpretation and . . . doubts [are] to be resolved in favor of inclusion of a facility within the coverage of the Act." 602 F. 2d at 592.

Respondent does not dispute that its dredging business is engaged in commerce and is therefore subject to the Act. If contends, however, that it is mining sand, and the coal dredged is only an incidental product. It relies upon the decision in Kanawha Dregding and Minerals Co., Ltd. v. U.S., 47 CCH Federal Excise Tax Reports 7045 (U.S.D.C. S.D. WV 1987), holding that a coal dredging operation was not subject to the Black Lung Excise Tax Law and regulations. The law involved in that case imposed an excise tax on "coal sold by the producer from mines in the United States at the rate of [$1.00] per ton in the case of coal from underground mines" and "[50] cents per ton in the case of coal from surface mines." The court found that the coal dredged had spilled into the river in the transportation of coal produced by other companies, that the required tax on the coal had already been paid by the original coal producers, and that the dredging company therefore was not a ""producer' of coal from a mine within the meaning of the Black Lung Excise Tax Law and regulations . . . . " That case is not relevant to the question of jurisdiction in this proceeding.

The same issue involved here was raised by Respondent in an opinion request to MSHA before the instant citation was issued. In a letter to Respondent dated February 11, 1987 (a copy of which is attached to the Secretary's posthearing brief), MSHA stated that Respondent's selling of clean coal processed from material removed from the river is sufficient to bring its operation under the jurisdiction of MSHA's Coal Mine Division rather than its Division of Metal and Nonmetal Mine Safety and Health.

On September 8, 1988, in a civil penalty case against Respondent's predecessor-in-interest (Rivco Dredging Corporation), Commission Judge Maurer held that its dredging and preparation operations were covered by the Act. Judge Maurer declined to rule on the company's contention that the operations should be investigated by MSHA's Division of Metal and Nonmetal Safety and Health instead of its Division of Coal Mine Safety and Health.

I hold that (1) Respondent's dredging and preparation operations are covered by the Act and (2) such operations are

subject to 30 C.F.R. Part 77. It follows from this that MSHA's Division of Coal Mine Safety and Health is an appropriate agency to conduct safety and health inspections of Respondent's operations.

Gene A. Wilson testified that he had notice of a problem with the wiring to the fuel tank in 1986, when MSHA's Field Office Supervisor Wayne Wefenstette inspected the area and told him, "I want this cord off the ground. I want you to put it in [a] conduit . . . . Somebody could get electrically shocked here." Tr.38. The wire was put into a conduit.

Mr. Wefenstette testified that he conducted a courtesy inspection(FOOTNOTE 2) of Respondent's operations in the summer of 1986; that he is not qualified to do an MSHA electrical inspection (Tr. 7); that he checked only the "outside areas" of electrical installations, not the circuit breakers (Tr. 7), and that he does not recall observing the electrical pump wire during his courtesy inspection (Tr. 54), or talking to Mr. Wilson about wiring to a fuel tank (Tr. 35). Mr. Wefenstette also stated that, had he seen the extension cord lying in the dirt with a plug nearby, he would have advised the operator that the cord should have been off the ground and in a conduit.

Respondent contends that putting the electric cord into a conduit and getting it off the ground was done to comply with an MSHA directive and that MSHA should not be penalized for the the absence of a proper circuit breaker discovered in a later inspection.

Protection of the cord by a conduit is unrelated to the safety requirements for an appropriately-sized circuit breaker. The two situations are covered by different sections of the Code of Federal Regulations. I reject Respondent's contention that a nonelectrical inspector's courtesy advice about the need for a conduit excused Respondent from having a certified electrician ensure that the circuit breaker was the right size for the wire to the fuel pump.

I find that the violation was due to moderate negligence. I also find that it was a substantial and significant violation. The use of an excessive circuit breaker created a serious risk of an electric shock or fire causing serious injuries, with a reasonable likelihood that such injuries would occur if mining operations continued without abatement of the violation.

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An updated compliance history of this mining operation (marked as an update of Government Exhibit 2) shows delinquent civil penalties of $488 out of total assessments of $1,547 in the two-year period before the subject citation. If the non-payment record is accurate, Respondent is responsible for these delinquencies either as the named operator or as a successor-in-interest and the delinquencies would be considered as part of Respondent's compliance history. However, Respondent's attorney states in a letter of September 11, 1989, that "all citations have been taken care of" and "No citation penalties are known to be outstanding." This representation has not been rebutted by the Secretary. Therefore, it is presumed there are no delinquencies of penalties due.

Considering all of the criteria for a civil penalty in 110(i) of the Act, I find that a penalty of $130 is appropriate for the violation found herein.

CONCLUSIONS OF LAW

1. The judge has jurisdiction over this proceeding.

2. Respondent violated 77.506 as alleged in Citation 2769952.

3. Respondent violated 77.204 as alleged in Citation 2773586.

ORDER

Respondent shall pay the above civil penalties of $150 within 30 days of this Decision.

William Fauver
Administrative Law Judge

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FOOTNOTES START HERE
~FOOTNOTE_ONE

1. To conform to the evidence as to the correct corporate name, the name of Respondent in this Decision and in the caption is changed to read "Louisa Sand and Gravel Company, Inc."

~FOOTNOTE_TWO

2. A courtesy inspection, also known as a compliance assistance visit (CAV), is like a regular MSHA inspection, but enforcement citations are not issued. Instead, the inspector informally advises to the operator of any conditions he observes that require correction to comply with safety or health standards.