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SOL (MSHA) V. ISLAND CONSTRUCTION
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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. SE 89-95-M A.C. No. 38-00595-05506
v.	Yaupon Plantation Pit
ISLAND CONSTRUCTION CO., INC., RESPONDENT	

DECISION

Appearances: Michael K. Hagan, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for the Secretary of Labor (Secretary); John B. Bailey, President, Island Construction Co., Inc., Charleston, South Carolina, for Respondent, Island Construction Co., Inc. (Island).

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks civil penalties for nine alleged violations of mandatory safety standards at Island's Yaupon Plantation Pit, all cited on January 18, 1989. Island denies that the operations at the Yaupon Plantation Pit are subject to the Mine Safety Act, and denies that its operation affects interstate commerce. It denies that the violations alleged took place, and contests the proposed penalties.

Pursuant to notice, the case was called for hearing in Charleston, South Carolina, on November 1, 1989. Merle Slaton and Kelly Fulz testified on behalf of the Secretary. The Secretary also called John Bailey as an adverse witness. Bailey testified on behalf of Island.

At the close of the hearing, the parties argued their positions on the record and waived their rights to file posthearing briefs. I have considered the entire record and the contentions of the parties, and make the following decision.

FINDINGS OF FACT

I

Island's primary business is the grading of land for new residential subdivisions, for shopping centers and for roads and highways. The Yaupon Plantation Pit is apparently slated to become a residential subdivision at some future time. The annual gross receipts of Island are approximately 2 to 3 million dollars. Island also sells sand to customers--private contractors and governmental agencies. This part of its business brings in gross annual receipts of more than $100,000. In percentage terms about 5 to 10 percent of its gross annual income is received from the sale of sand to the general public. Such sales are made to trucking companies, construction companies, road building agencies, and water and sewer construction agencies. The sand is used for filling and grading. It is apparently not fit for making concrete or for use in construction activities, other than as a fill.

Island does not excavate or produce gravel. It removes the overburden, then removes the sand which is used in its grading operations and sold to the general public. Sand is of course nonliquid.

Sand is defined in A Dictionary of Mining, Mineral, and Related Terms, (U.S. Dept. of the Interior, 1968) as:

> a. Separate grains or particles of detrital rock material, easily distinguishable by the unaided eye, but not large enough to be called pebbles; also, a loose mass of such grains, forming an incoherent arenaceous sediment.
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> * * * * * * *
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> b. In geology, any loose or moderately consolidated bed consisting chiefly of sand; often used in the plural, even in the name of a single deposit.
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> * * * * * * *

I find that in excavating sand, Island is extracting a mineral from the earth's surface.

In January 1989, the Yaupon Plantation Pit was composed of two separate facilities: the Mt. Pleasant Pit and the Johns Island Pit. The Mt. Pleasant facility is no longer producing sand. Island had 50 to 60 pieces of equipment, including trucks, loaders, graders, dozers and a pump. The equipment includes a

Caterpillar Motor Grader manufactured in Illinois, an Allis-Chalmers loader and an International dozer, both manufactured outside of South Carolina. Island also had a Mercedes-Benz fuel truck and a pump, both manufactured outside of South Carolina. Since 1984, MSHA has made 18 to 20 regular and follow-up inspections at Island's facilities.

II

On January 18, 1989, MSHA Metal/Nonmetal supervisory inspector Merle Slaton and inspector Kelly Fulz inspected the Yaupon Plantation Pit. Fulz at the time was in training. He became a designated representative of the Secretary on September 27, 1989. As a result of the inspection, 9 citations were issued.

> A. Inoperative Service Brakes. Citations 2856484 and 2856485 charged violations of 30 C.F.R. 56.14101(a) because of inoperatiave services brakes on a Caterpillar motor grader and an Allis-Chalmers front end loader, both located at the Johns Island facility. The grader appeared to have been recently operated and the vehicle operator said it had been used that morning. When the inspector (Fulz) pushed the brake pedal with his hand, it offered no resistance but went all the way to the floor. The foreman said that there was a leak in the hydraulic system. The front end loader was in operation during the inspection. The inspector noticed that the loader operator stopped it by dropping his bucket. When he was questioned the vehicle operator said that the brakes on the machine were inoperative.

30 C.F.R. 56.1410(a) provides in part:

> (a) Minimum requirements. (1) Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels.
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> * * *
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> (3) All braking systems installed on the equipment shall be maintained in functional condition.

Inspector Slaton issued the citations involved in this proceeding. I find as a fact that the braking systems on the Caterpillar Motor Grader and the Allis-Chalmers front end loader were not maintained in functional condition. I further find that the violations were serious and resulted from Island's negligence.

B. Inoperative Parking Brakes. Citations 2856487 and 2856504 were issued charging violations of 30 C.F.R. 56.14101(a)(2) because of inadequate parking brakes on a Terex front end loader and a Mercedes-Benz fuel truck. The front end loader was being operated at the Mt. Pleasant facility, and the fuel truck at both locations.

30 C.F.R. 56.14101(a)(2) provides:

> (2) If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels.

I find as a fact that the parking brakes on the loader and the fuel truck were inoperative. The vehicles were used on level ground, and the violations were considered nonserious.

> C. Seat Belt violations. Citation 2856483 was issued charging a violation of 30 C.F.R. 56.14130(f)(2) because an International Dozer, equipped with roll over protection, did not have seat belts. Citations 2856486 and 2856506 charged violations of 30 C.F.R. 56.14130(g) because operators of two different loaders were operating their vehicles and not using seat belts. 30 C.F.R. 56.14130(a) requires ROPS and seat belts on crawler tractors (dozers).

30 C.F.R. 56.14130(f)(2) provides:

> (f) Exemptions.
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> * *
>
> (2) Self-propelled mobile equipment manufactured prior to October 24, 1988, that is equipped with ROPS and seat belts that meet the installation and performance requirements of 30 C.F.R. 56.9088 . . . shall be considered in compliance with paragraphs (b) and (c) of this section.

30 C.F.R. 14130(g) requires that seat belts be worn by equipment operators.

I find as a fact that the International dozer cited was not equipped with seat belts. I further find that the loader operators cited were not wearing seat belts. The violations were considered nonserious.

D. Back-up Alarm and Horn. Citation 2856503 charged a violation of 30 C.F.R. 56.14132 because the audible signalling device (horn) and reverse signal alarm were inoperative. 30 C.F.R. 56.14132(a) requires all self-propelled mobile equipment to have horns in functional condition. Section 14132(b) requires such equipment to have a functioning back-up alarm when the equipment operator has an obstructed view to the rear.

I find as a fact that the cited fuel truck did not have an operative horn or back-up alarm. I find that the operator of the truck had an obstructed view to the rear. Persons were in the area on foot. The absence of the alarms was a serious violation.

> E. BERMS. Citation 2856505 charged a violation of 30 C.F.R. 56.9300 because there was no berm at an open ditch by the roadway on the pit property. The length of the roadway was about 500 feet. The ditch was about 15 feet deep and the drop off was vertical. 30 C.F.R. 56.9300 requires berms or guardrails on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.

I find as a fact that no berm or guardrail was provided on the bank of the roadway cited. I find that a drop off existed of such grade and depth that a vehicle could overturn. I find that the violation was serious and was evident to visual observation.

ISSUES

1. Was Island subject to the jurisdiction of the Mine Act in the operation of the Yaupon Plantation Pit?

2. If so, did the violations charged in the citations involved herein occur?

3. If they did, what are the appropriate penalties?

CONCLUSIONS OF LAW

I. JURISDICTION

Section 3(h)(1) of the Mine Act defines a "coal or other mine" in part as "(A) an area of land from which minerals are extracted in nonliquid form . . . " I have found that sand is a mineral, and that Island extracts it from an area of land. I conclude, therefore, that Island operates a mine as that term is used in the Act.

In 1979, the Mine Safety and Health Administration and the Occupational Safety and Health Administration, both in the department of Labor, entered into an Interagency Agreement. 44 F.R. 22827, April 17, 1979, effective March 29, 1979. The purpose of the agreement was to guide the agencies and affected employers and employees of the general principle and procedures to be followed in determining the jurisdiction of the two statutes (Mine Act and OSHAct). The general principle is set out as follows: ". . . as to unsafe and unhealthful working conditions on mine sites . . . , the Secretary will apply the provisions of the Mine Act and standards promulgated thereunder . . . " The agreement refers (B.5) to "Congress' intention that doubts be resolved in favor of inclusion of a facility within the coverage of the Mine Act."

Paragraph B.7 refers to "borrow pits." It states that borrow pits are subject to OSHA jurisdiction except when located on mine property or related to mining. It defines a borrow pit as "an area of land where the overburden, consisting of unconsolidated rock, glacial debris, or other earth material is extracted from the surface. Extraction occurs on a one-time only basis or intermittently as need occurs, for use as fill materials by the extracting party in the form in which it is extracted . . . the material is used by the extracting party more for its bulk than its extrinsic qualities on land which is relatively near the borrow pit."

Island's operation is located on mine property and is related to mining (the extraction of sand). The extraction is not on a one-time basis or intermittently. The extraction is used in the form in which it is extracted as fill material, but not exclusively by the extracting party, since some of the extracted material is sold to the general public.

I conclude that under the MSHA-OSHA Interagency Agreement, Island's facility is not made subject to OSHA jurisdiction.

Section 4 of the Act provides that each mine, the products of which enter commerce, or the operations or products of which affect commerce is subject to the Act. The evidence indicates that Island's sales of sand are made to customers within the State of South Carolina. This does not remove it from the Act's requirements. It used substantial amounts of equipment manufactured in other states or countries. Its products were sold intrastate but clearly affected interstate commerce. See Wickard v. Filburn, 317 U.S. 111 (1942); Marshall v. Bosack, 463 F.Supp. 800 (E.D. Pa. 1978); Marshall v. Kilgore, 478 F.Supp. 4 (E.D. Tenn. 1979); Secretary v. R&S Coal Company, 8 FMSHRC 1333

(1986 ALJ). I conclude that Island's operations and products affected interstate commerce.

II. VIOLATIONS

I conclude that each of the violations cited in this proceeding has been established by the preponderance of the evidence to have occurred. Mr. Bailey stated on the record: "Brought down to a direct yes or no, I would have to say that what I got a citation for more than likely did exist at the time the inspectors looked at it, but I think it's more to it than just the yes or no." (R. 151). He then discussed the specific citations more in terms of gravity than in terms of the existence of the violations. Island is a small mine operator and has a favorable history of prior violations. All the violations involved herein were abated promptly in good faith.

Citations 2856483, 2856486, 2856487, 2856504 and 2856506 were considered nonserious by the inspectors. I accept their determination as to these violations. Twenty dollars ($20) is an appropriate penalty for each of these violations.

Citation 2856484 charges a violation of 30 C.F.R. 56.1410(a) because of the absence of brakes on a caterpillar motor grader; Citation 2856485 charges a violation of the same standard because of the absence of brakes on an Allis-Chalmers front end loader. These are very large machines. The absence of brakes is a serious safety hazard and therefore a serious violation. The inspector rates Island's negligence as moderate. The foreman told the inspector that with respect to the grader, he was aware of a hydraulic leak in the braking system. There is no factual evidence of negligence with respect to the front end loader. One hundred fifty dollars ($150) is an appropriate penalty for the violation cited in 2856484; $75 for that cited in 2856485.

Citation 2856503 charges a violation of 30 C.F.R. 56.14132 because of the absence of a horn and a back-up alarm on a fuel truck. There were persons in the area on foot. The violation was serious and should have been obvious to Island. Seventy five dollars ($75) is an appropriate penalty.

Citation 2856505 charges a violation of 30 C.F.R. 56.9300 because of the absence of a berm at an open ditch. The ditch was about 15 feet deep and the drop off was verticle. The violation was serious in that a vehicle could overturn which would result in serious injuries. The absence of the berm was evident and resulted from Island's negligence. One hundred fifty dollars ($150) is an appropriate penalty.

ORDER

Based on the above findings of fact and conclusions of law and considering the criteria in section 110(i) of the Act, IT IS ORDERED:

1. Citations 2856483, 2856484, 2856485, 2856486, 2856487, 2856503, 2856504, 2856505, and 2856506 are AFFIRMED.

2. Respondent Island Construction Co., Inc. shall within 30 days of the date of this decision pay the following penalties:

CITATION	PENALTY
2856483	$ 20.00
2856484	150.00
2856485	75.00
2856486	20.00
2856487	20.00
2856503	75.00
2856504	20.00
2856505	150.00
2856506	20.00
TOTAL	$ 550.00

James A. Broderick
Administrative Law Judge