

CCASE:
SOL (MSHA) v. JEWELL SMOKELESS COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, Virginia 22041

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

CIVIL PENALTY PROCEEDING
Docket No. VA 91-60
A.C. No. 44-00649-03535

v.

JEWELL SMOKELESS COAL CORP.,
RESPONDENT

Coronet Jewell Prep. Plant 2

DECISION

Appearances: Glenn M. Loos, Esq., U.S. Department of Labor,
Office of the Solicitor, Arlington, Virginia;
Joseph W. Bowman, Esq., Street, Street, Street,
Scott & Bowman, Grundy, Virginia.

Before: Judge Weisberger

I. STATEMENT OF THE CASE

This case is before me based upon a petition for civil penalty filed by the Secretary (Petitioner) seeking a total penalty of \$59 for violations by Respondent of two mandatory standards set forth at 30 C.F.R. 77.1301(c)(6) and 30 C.F.R. 77.1301(c)(9). The Operator, (Respondent) filed an answer in which, in essence, it denied that the Mine Safety and Health Administration has jurisdiction over the facility in which the alleged violations occurred. In a telephone conference call initiated by the undersigned on April 25, 1990, with counsel for both parties, the parties agreed that they would each submit motions for summary decision in order to resolve the issues presented herein. The parties further indicated an intention to engage in discovery, and the parties were consequently allowed until July 31, 1991, to file their respective motions. On July 31, 1991, the parties each filed a motion for summary decision.

II. FINDINGS OF FACT

In their respective motions, the parties set out enumerated facts, which are adopted and are set forth below as follows:

1. Jewell Smokeless Coal Corporation is the owner and operator of the Jewell Equipment Shop which is the subject of this proceeding.

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2. Federal Mine Safety and Health Inspector Leslie E. Slowey was acting in his official capacity when he issued Citations No. 3507039 and 3507040, except that Jewell Smokeless does not admit that Inspector Slowey had jurisdiction to issue the Citations at the equipment shop.

3. True copies of Citations No. 3507039 and 3507040 were served upon Jewell Smokeless Coal Corporation or its agent as required by the Mine Act.

4. The proposed penalty assessments for Citations No. 3507039 and 3507040 are reasonable in light of the conditions stated in those citations, and such penalties will not adversely affect Jewell Smokeless Coal Corporation's ability to continue in business.

5. Citations No. 3507039 and 3507040, are true and accurate in their statement of the conditions existing at Jewell Smokeless Coal Corporation's machine shop on September 5, 1990.

6. The violations stated in Citations No. 3507039 and 3507040 were timely abated.

7. Jewell Smokeless Coal Corporation operates an equipment shop ("the shop") located north of Virginia State Route 638 and Dismal River near Vansant, in Buchanan County, Virginia. The exact location of the shop is indicated in green on the map attached as "Exhibit B" to the parties' motions.

8. The shop owns, and operates, maintains and repairs through its employees the following types of equipment: bulldozers, dump trucks, cement trucks, a hydoseeder, a vacuum truck, spreader trucks, a road grader, tractor trucks, a rollback trailer, a lowboy trailer, a gradeall, a crane, and loaders.

9. The shop has twenty-five employees: two supervisors, four carpenters, four mechanics and fifteen equipment operators.

10. From its inventory of equipment and employees, the shop supplies equipment and operators to Jewell Smokeless Corporation, and to Dominion Coal Corporation and Jewell Coal & Coke Co., affiliated companies. All work done by the shop for Jewell Smokeless Coal Corporation, Dominion Coal Corporation and Jewell Coal & Coke Co., is charged by the shop to the company for which the work is done.

11. Jewell Smokeless Coal Corporation operates a coal tipple which is located south of State Route 638 and on the north and south sides of Dismal River near Vansant, in Buchanan County, Virginia. The exact location of the coal tipple is indicated in red on the map attached as "Exhibit B" to the Parties' motions. Equipment and operators are supplied by the shop to Jewell Smokeless Coal Corporation for such things as road construction and maintenance and pond construction and maintenance. The shop

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does not supply equipment or operators such as tipple equipment, tipple operators, tipple mechanics, car droppers, etc. When the equipment and operators of the shop are supplying services at the tipple of Jewell Smokeless Coal Corporation, they are subject to regulation by MSHA.

12. Dominion Coal Corporation operates several underground coal mines in Buchanan County, Virginia. The nearest mine to the shop is located approximately one and one-half miles from the shop, and the farthest mine is located approximately twenty miles from the shop. Equipment and operators are supplied to Dominion Coal Corporation for such things as mine construction and face-up work, road construction and maintenance, mine reclamation work, etc. The shop does not supply equipment or operators such as continuous miners, continuous miner operators, roof bolters, roof bolter operators, or other such underground mining equipment or operators. When the equipment and operators of the shop are supplying services at the mines of Dominion Coal Corporation, they are subject to regulation by MSHA.

13. Jewell Coal & Coke Company operates a coke manufacturing facility which is located south of Virginia State Route 630 and on the north and south sides of Dismal River near Vansant, in Buchanan County, Virginia. The exact location of the coke manufacturing facility is indicated in black on the map attached as "Exhibit B" to the Parties' motions. Equipment and operators are supplied by the shop to Jewell Coal & Coke Company for such things as construction, road construction and maintenance, clean-up activities, etc. When the equipment and operators of the shop are supplying services at the coke ovens of Jewell Coal & Coke Company, they are subject to regulation by OSHA.

14. The actual site of the shop consists of a road leading from State Route 638, a parking area for the shop employees and for equipment not in use or awaiting maintenance or repair, and two buildings, one of which contains an office and three repair bays, where maintenance and repair of the shop's equipment is performed. Two of the bays have grease pits. The other building has bays in which to park equipment, and is used primarily for the purpose of sheltering equipment during the winter and providing access to electrical outlets into which diesel engine heaters can be connected during cold weather. The shop through its employees performs maintenance and repair services on the shop equipment identified above at the shop site. No maintenance or repairs are done at the shop on mine equipment of Dominion Coal Corporation or tipple equipment of Jewell Smokeless Coal Corporation such as that previously identified.

15. The shop has separate supervision from any of the aforesaid mines, tipple or coke manufacturing facility, and has no MSHA mine identification number.

16. The only issue presented in this action is whether the equipment shop at which Inspector Slowey issued Citation No. 3507039 and 3507040 comes within the jurisdiction of the Mine Safety and Health Administration.

III. DISCUSSION

The facts indicate that at the shop maintenance and repair services are performed on the following types of equipment: bulldozer, dump trucks, cement trucks, a hydroseeder, a vacuum truck, spreader trucks, a road grader, tractor trucks, a rollback trailer, a lowboy trailer, a gradeall, a crane, and loaders. These items of equipment are used at a coke manufacturing facility, which, when at that site, are subject to regulation by the Occupational Safety and Health Administration. In addition, they are used at a tipple and several mines in Buchanan County, Virginia, for road and pond construction and maintenance and mine construction and face-up work.

In analyzing whether the shop is within the jurisdiction of the Mine Safety and Health Administration, I take cognizance of the definition of a coal mine set forth in section 3(h)(i) of the Federal Mine Safety and Health Act of 1977, (The Act) in relevant part, as "lands . . . structures, facilities, equipment, machines, tools, or other property . . . on the surface . . . used in, or to be used in . . . the work of extracting (coal) from (its) natural deposits . . . or the work of preparing." The Commission has indicated that although this definition is not without bounds it ". . . is expansive and is to be interpreted broadly." (U.S. Steel Mining Co., Inc., 10 FMSHRC 146, at 149 (1988).) In this connection, the legislative history of the Act explicitly sets forth the Congressional intent with regard to a broad construction to be accorded the Act's definition of a coal mine. The Senate report on the bill that became the Act states as follows:

[T]he Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 602.

The various equipment in question, being used to maintain

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and construct roads at the site of mines, and in mine construction, are thus used in activities that perform an integral part of the work of extracting coal, given a broad construction to that term, as was done implicitly by the Commission in U.S. Steel, supra.) (Footnote 1). Accordingly, the shop wherein such equipment is parked, maintained, and repaired, is considered "within the scope . . . structures, facilities, . . . on the surface . . . used in, or to be used in . . . the work of extracting [coal] . . . or the work of preparing coal." (See, U.S. Steel, supra.

In light of this conclusion Respondent's motion for summary decision is DENIED and the motion for summary decision by Petitioner is GRANTED. Inasmuch as the only issue presented for resolution was whether the citations 3507039 and 3507040 are within the jurisdiction of the Mine Safety and Health Administration, and inasmuch as that issue has been answered in the affirmative, judgment in this case shall be entered in favor of the Petitioner based upon the allegations contained in the petition for assessment of civil penalty.

ORDER

It is ordered that Respondent's pay \$59 as a civil penalty for the violations set forth in the petition for assessment of civil penalty.

Avram Weisberger
Administrative Law Judge

Footnotes start here:-

1. In U.S. Steel, supra, the Commission, was presented with the issue of whether a facility for the repair and maintenance of electrical and mechanical coal mining equipment was subject to the provisions of a mandatory standard requiring examinations of surface coal mines. In deciding this issue, the Commission took cognizance of the parties' stipulations that the facility in questions exists and functions to repair and maintain equipment used in, or to be used in, coal mines, that the facility has a separate mine identification number, and that it has a history of regulation and citation by MSHA. Based on these stipulations the Commission held that the facility "consists of land . . . structures, facilities, equipment, machines, tools, or other property . . . on the surface . . . used in, or to be used in . . . the work of extracting [coal] . . . or the work of preparing coal and, therefore is a surface coal mine subject to the examination requirements of section 77.1713(a)" (U.S. Steel, supra at 149).

In the instant case, the shop does not have an MSHA identification number, and there is nothing in the record to indicate that it has a history of regulation and citation by MSHA. The absence of these factors herein do not distinguish the instant case from U.S. Steel, supra. Inasmuch as, according to the Act, supra, a facility, is a coal mine if it is used in the work of extracting or preparing coal, the critical element is the function of a facility, and not how it has been identified by MSHA or the Operator. In this connection, it is significant that in the instant case as in U.S. Steel, supra, the shop at issue repairs equipment used at a coal mine.