

CCASE:
JERRY IKE HARLESS TOWING V. SOL (MSHA)
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JERRY IKE HARLESS TOWING : CONTEST PROCEEDING
INCORPORATED, HARLESS, INC., :
Contestants : Docket No. CENT 92-276-RM
v. : Citation No. 3896905; 5/19/92
:
SECRETARY OF LABOR, : Harless Inc.
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Mine ID 16-01238
Respondent :

DECISION

Appearances: Jerry Ike Harless, Lake Charles, Louisiana,
Michael E. Roach, Esq., on the brief, for
the Contestants;
Robert Goldberg, Esq., U.S. Department of
Labor, Office of the Solicitor, Dallas,
Texas, for the Respondent.

Before: Judge Feldman

This proceeding concerns a Notice of Contest filed pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. 815. A hearing was conducted on January 29, 1993, in Lake Charles, Louisiana, at which Jerry Ike Harless (Harless), the Chief Executive Officer (CEO) of Jerry Ike Harless Towing, Inc. (Harless Towing), and Harless, Inc., represented the contestant.(Footnote 1) Harless stipulated

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Harless Towing, which is involved with the dredging of sand, and Harless, Inc., which sells sand, gravel and limestone, will be referred to collectively as the contestant. Although the subject citation in this matter was issued to Harless, Inc., it is apparent that the issuing inspector was not familiar with the distinction between the two corporate entities. The inspector's confusion is understandable in view of Harless' failure to file any identity reports with MSHA distinguishing the corporations. Moreover, Harless' May 27, 1992, complaint seeking injunctive relief and his July 20, 1992, Notice of Contest in this proceeding were filed on behalf of both Harless Towing and Harless, Inc. (Gov. Ex. 2). Finally, Chief Administrative Law Judge Merlin's September 4, 1992, Order of Assignment in this proceeding notes both corporations. Accordingly, at trial, I concluded that although Harless, Inc., was cited as the operator in the subject citation, MSHA's jurisdiction over Harless Towing is also an appropriate issue for disposition in this proceeding.

(Tr. 141-143). Consequently, Counsel's posthearing assertion in

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on the record to my jurisdiction to hear this matter (Tr. 20). However, his stipulation concerning my authority was not an admission that either corporation is engaged in mining. After the trial, Harless retained Michael E. Roach as legal counsel. On April 15, 1993, Roach filed a simultaneous motion to appear and motion requesting an extension of time to file posthearing briefs which was granted by Order dated April 19, 1993. The parties filed proposed findings and conclusions on May 10, 1993.

As detailed below, Harless Towing dredges sand from the Calcasieu River. The sand is then transported by barge to a dock location at Harless, Inc., where it is off-loaded, stock-piled and sold (Tr. 115). This contest proceeding concerns the validity of Citation No. 3896905 that was issued to Harless on May 19, 1992, for violation of 30 C.F.R. 56.1000, as a result of his failure to notify the Mine Safety and Health Administration (MSHA) of his commencement of mining operations. (Footnote 2) The basic issue for determination is whether the activities of Harless Towing and/or Harless, Inc., are subject to the jurisdiction of the Mine Act.

PRELIMINARY FINDINGS OF FACT

As indicated above, Jerry Ike Harless is the CEO of Harless Towing and Harless, Inc., which are closely held corporations incorporated in the State of Louisiana. His daughters, Jeri Green and Barbara Southerland, respectively, are the President and Vice President of both corporations. Harless' wife, Mildred Whitney Harless, is the Secretary of both companies.

Harless Towing has been extracting sand from the riverbed of the Calcasieu River four to six months each year for the last 30 years. The Calcasieu River is a navigable waterway which flows into the Gulf of Mexico. Harless Towing, pursuant

fn. 1 (continued)

his proposed findings that Harless Towing is not a party in this matter is without merit.

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Section 56.1000 provides:

"The owner, operator, or person in charge of any metal or nonmetal mine shall notify the nearest Mine Safety and Health Administration and Metal and Nonmetal Mine Safety and Health Subdistrict Office before starting operations, of the approximate or actual date mine operation will commence. The notification shall include the mine name, location, the company name, mailing address, person in charge, and whether operations will be continuous or intermittent."

This notification is essential to the orderly administration and enforcement of the Mine Act.

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to a United States Corps of Army Engineers permit, extracts approximately 20,000 to 25,000 tons of sand per year. The extracted material does not contain any coal.

Harless Towing employs between four and eight individuals in its sand dredging operation. During non-dredging months these employees work at Harless, Inc., performing such duties as truck driving, loading and stockpiling. Harless Towing uses a vessel, the "D/B Betsy," with dredging machinery situated thereupon and several barges in tow. The dredge hydraulically suctions sand and sediment from the river bottom, along with river water. The dredged material is then pumped through a system of piping, wherein an initial separation process takes place separating the sand from the bulkier material. The piping then directs the sand and sediment onto a barge called the screen barge. There, the material is pumped through a 1/4 inch mesh screen where remaining debris is removed. From the screen barge the sand and water are pumped through a chute or flume to another barge, called the heart barge. On the heart barge, the sand is further processed to separate sand from the remaining water.

The sand screening process continues during the period the sand is conveyed by tug on the heart barge to one of two of Harless, Inc.'s, off-loading terminals where cranes, owned and operated by Harless, Inc., remove and stockpile the sand. The tugboat operation is regulated by the United States Coast Guard. Harless, Inc.'s main terminal is located at Bayou D'Inde Street, approximately 20 miles down river from the dredging site.

Harless, Inc., sells the sand to individual and corporate customers who are large industrial concerns such as Occidental Petroleum, Citgo Petroleum, Olin and Gulf States Utilities. The sand is used in a variety of ways including industrial use, building foundations, golf course sand traps and sand boxes. In addition to river sand, Harless, Inc., also stockpiles and sells limestone aggregate, gravel, mason sand and concrete sand. The limestone comes from Kentucky and Missouri by barge and the gravel is hauled from various quarries north of Lake Charles. Sometimes the gravel is delivered and sometimes Harless, Inc., hauls the gravel by truck.

On May 12, 1992, MSHA Inspectors John Ramirez and Steve Montgomery arrived on the Bayou D'Inde premises of Harless, Inc., where they met Harless and his daughter, Barbara Southerland. They identified themselves and explained the legal identity reporting requirements for mine operators contained in Section 56.1000. Harless and Southerland questioned whether they were subject to the Mine Act's jurisdiction. Ramirez left the Legal Identity Report (MSHA Form 2000-7) with them for completion and obtained permission to inspect Harless Towing's dredging operation located upstream. Ramirez and Montgomery drove to the dredging site where they inspected the dredge, including

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all moving components on the engine, such as shafts and pulleys. They also checked handrails and looked at the first aid kit and fire extinguishers. They did not find any violations and concluded that the dredging site "was a clean operation." (Tr. 53).

Ramirez and Montgomery returned to the Harless, Inc., site on May 13, 1992, at which time Harless and Southerland refused to complete the Legal Identity Report because they believed that they were not engaged in mining. No additional action was taken by Ramirez in order to provide Harless with the opportunity to consult an attorney. Ramirez returned on May 19, 1992, at which time Harless again refused to complete the mine registration process. Consequently, Ramirez issued Citation No. 3896905 for a violation of Section 56.1000 based upon Harless' failure to notify MSHA before commencing sand dredging operations.

On May 22, 1992, Harless challenged MSHA's jurisdiction by seeking injunctive relief in the United States District Court for the Western District of Louisiana. Thereafter, Citation No. 3896905 was modified on June 1, 1992, to extend indefinitely the termination date to allow Harless to pursue the injunction. On July 15, 1992, The Honorable Edward F. Hunter dismissed Harless' request for relief with the stipulation that he be provided with the opportunity to pursue relief through the Mine Act's administrative process. This brings us to the case at bar.

FURTHER FINDINGS AND CONCLUSIONS

Commerce Issue

As a threshold matter, regardless of whether Harless is engaged in mining, he argues that his companies are exempt from the jurisdiction of the Mine Act because they are not engaged in interstate commerce. The following discussion formalizes my bench decision that both corporate entities are engaged in interstate commerce as contemplated by the Act (Tr. 22-23). Section 4 of the Mine Act, 30 U.S.C. 803, provides:

Each coal or other mine, the product 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 (emphasis added).

In *Cobblestone, Ltd.*, 10 FMSHRC 731, 733 (June 1988), Judge Cetti, citing *Brennan v. OSHRC*, 492 F.2d 1027 (2nd Cir. 1974); *U.S. v. Dye Construction Co.*, 510 F.2d 78, 83 (10th Cir. 1975); *Polish National Alliance v. NLRB*, 322 U.S. 643 (1944); and *Godwin v. OSHRC*, 540 F.2d 1013 (9th Cir. 1976), noted that

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the phrase "which affect commerce" in Section 4 of the Mine Act is consistent with Congress' intent to exercise its full constitutional authority under the commerce clause.(Footnote 3)

Turning to the facts of this case, Harless Towing operates a vessel under the jurisdiction of the U.S. Coast Guard in the navigable waters of the Calcasieu River in order to dredge and transport sand under permit issued by the U.S. Corps of Army Engineers. These operational activities alone, without addressing the issue of the ultimate destination of the extracted sand, affect commerce and give rise to Federal jurisdiction. Therefore, Harless Towing is clearly engaged in the requisite activities that subject it to the jurisdiction of Section 4 of the Mine Act.

Harless, Inc., sells the dredged sand it acquires from Harless Towing to multi-national and national corporations such as Occidental Petroleum, Citgo Petroleum, Olin, Gulf States Utilities and Pittsburgh Plate Glass Company. Harless testified that the sand is delivered to customers by truck. It is used to manufacture glass. Its uses also include fill under roadways and use as a construction material in foundations (Tr. 21-23). It is obvious that the trucking of the sand and its use to support highways, alone, affect commerce. Moreover, the interstate activities of its customers, e.g., Gulf States Utilities, provide a basis for concluding that the sand sold by Harless, Inc., enters or affects commerce. Thus, Harless, Inc.'s business activities also satisfy the commerce criteria in Section 4 of the Act.(Footnote 4)

Mining Issue

Having determined the companies are engaged in commerce, the remaining issue is whether they are mine operators under the Act. Section 3(h)(1) of the Act defines, in pertinent part, "coal or other mine" as:

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"Commerce" is defined in Section 3(b) of the Mine Act, 30 U.S.C. 802(b) as:

"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."

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Harless' testimony relied upon in his posthearing brief that, "Our sand -- I want to say 100 percent -- I will say 99 percent is sold right here in Calcasieu Parish", is not dispositive (Tr. 21). The local sale of a product does not establish that the product does not ultimately enter or affect commerce.

(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 area, 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 (emphasis added).
30 U.S.C. 802(h)(1).

In an attempt to escape from the above statutory definition, Harless asserts that sand is not a mineral. In the alternative, he contends that the dredging of sand from a river bottom is extraction of minerals in liquid form. The assertion that sand, which is composed of quartz and other silica, is a non-mineral is frivolous (Tr. 86). Harless' remaining contention that the dredging of sand from a riverbed is the extraction of a mineral in liquid form is equally uninspiring.(Footnote 5) In this regard, the United States Court of Appeals has held that the operation of removing sand and gravel from their natural deposits is mining under Section 3(h)(1) of the Act. In fact, the Court concluded that the operation of preparing sand by separating water and other debris gives rise to Mine Act jurisdiction even if

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The contestant's posthearing brief also cites the Louisiana Civil Code to support its contention that it is not engaged in mining. Notwithstanding the fact that the Louisiana Civil Code is preempted by the Mine Act, the provisions of this state statute have nothing to do with the mine industry. What is on point are *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589, (3d Cir. 1979) cert. denied, 444 U.S. 1015 (1980) and *Fleniken's Sand and Gravel, Inc.*, 10 FMSHRC 1509 (November 1988). At my request, copies of these cases were provided to Harless by counsel for the Secretary. (Letter dated February 9, 1993, from Robert A. Goldberg, Esq., to Jerry Ike Harless). These decisions were sent to Harless to facilitate his compliance with my on-the-record statement ordering the parties to compare these cases to the current case in their posthearing briefs (See Tr. 152). The contestant's brief, however, fails to address these cases.

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the extraction process is not performed by the operator. See *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d at 591-592.(Footnote 6)

Consistent with *Stoudt's Ferry*, MSHA routinely oversees sand and gravel dredging operations. See, e.g., *Louisa Sand and Gravel Company, Inc.*, 11 FMSHRC 1820, 1823 (September 1989); *Fleniken's Sand and Gravel, Inc.*, 10 FMSHRC at 1509. Thus, it is evident that *Harless Towing's* extraction and preparation of sand through its filtering process are activities covered by Section 3(h)(1) of the Mine Act. Therefore, *Harless Towing's* contest of its obligation to complete the required Legal Identity Report as required by Section 56.1000 of the regulations must be dismissed.

Regarding *Harless, Inc.'s* status under the Act, it is clear that the primary objective of this company is the commercial sale of river sand extracted by *Harless Towing*, and the sale of gravel and limestone that it purchases from suppliers. The sales activities associated with these products also requires their off-loading, stockpiling and delivery. In order to determine if these activities should be construed as the "work of preparing minerals" under Section 3(h)(1) of the Act, it is important to determine if the subject activities are normally performed by the operator.(Footnote 7) Although the work of preparing minerals can include activities such as loading and storage, it is the nature of the operations that is dispositive of the jurisdictional issue. See *Oliver M. Elam, Jr., Company*, 4 FMSHRC 5 (January 1982). In this case, the performance of these functions is associated with sales rather than extraction and preparation. Clearly, *Harless, Inc.'s* commercial endeavors with respect to its gravel and limestone sales do not subject it to the Mine Act. Similarly, its storage and sale of sand should not provide Mine Act jurisdiction solely because it acquired the sand from *Harless Towing*, a distinct corporate entity with identical ownership. Consequently, *Harless, Inc.'s* contest concerning its responsibility to

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Although the sediment prepared by *Stoudt's Ferry* included a burnable product "akin" to coal, the Court stated that the sand and gravel preparation, alone, subjected the operator to the Act's jurisdiction as a mineral preparation facility. *Stoudt's Ferry*, 602 F.2d at 592.

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The Mine Act defines preparation of coal but does not address the meaning of the preparation of "other minerals." Section 3(i) of the Mine Act, 30 U.S.C. 802(i), defines the "work of preparing coal" as:

"[T]he breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing coal as is usually done by the operator of a coal mine (emphasis added).

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register pursuant to Section 56.1000 of the regulations is granted.

As a final matter, at trial I noted that Harless' willingness to abide by MSHA's reporting requirements if he did not prevail in this proceeding would be a factor in considering the appropriate civil penalty that should be assessed. I also noted that Harless' completion of the Legal Identity Report form would not prejudice his right to further appeal (Tr. 153-154). There is no justification for delaying implementation of this decision in view of Stoudt's Ferry and the absence of any irreparable harm to Harless Towing, particularly in view of the lack of any violations detected by Ramirez. Finally, permitting any further delay in registration would deny the employees of Harless Towing the protection provided under the Mine Act.

ORDER

Accordingly, Citation No. 3896905 IS AFFIRMED with respect to Jerry Ike Harless Towing, Inc., and the subject contest IS DISMISSED. Jerry Ike Harless Towing, Inc., IS ORDERED to file the requisite Legal Identity Report (MSHA Form 2000-7) in accordance with Section 56.1000 of the regulations within 21 days of the date of this decision. The contest of Harless Inc., IS GRANTED and Citation No. 3896905, as it applies to Harless, Inc., IS VACATED.(Footnote 8)

Jerold Feldman
Administrative Law Judge

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This decision, in effect, permits modification of Citation No. 3896905 to include Harless Towing as well as Harless, Inc., as the alleged operator. Harless is estopped from objecting to this modification since it was his failure to identify Harless Towing as the corporation involved in dredging activities that necessitates this action. Any other approach would permit an operator to conceal its identity from an inspector and then assert that a citation for failure to register as a mine operator is defective because the operator was not properly cited. Moreover, Harless can not claim that he has been surprised or otherwise prejudiced by this modification. (See fn. 1, supra).

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