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SOL (MSHA) V. INTERMOUNTAIN SAND
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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June 29, 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. WEST 93-95-M A.C. No. 42-01071-05517
v.	:	Intermountain Pit
INTERMOUNTAIN SAND COMPANY, Respondent	: :	

DECISION

Appearances: Robert J. Murphy, Esq., Office of the Solicitor, Denver, Colorado, for Petitioner;

K. Dale Despain, Pro Se, Provo, Utah, for Respondent.

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act". The Secretary of Labor on behalf of the Mine Safety and Health Administration (MSHA), charges Intermountain Sand Company (Intermountain) with three mandatory safety standards set forth in 30 C.F.R. Part 56 and seeks civil penalties for those violations.

The primary issues raised by the parties at the hearing are jurisdiction, whether Intermountain violated the cited safety standards and, if so, the appropriate penalty to be assessed.

I

Jurisdiction

The Respondent, Intermountain Sand Company, is a small specialty sand company with a small open pit mine that extracts sand and gravel from the ground. The mine employs a foreman and two

or three other miners. It has a crusher, a screen, three conveyor belts and a dryer. It produces primarily traction sand for railroads and a special sand that is used in the production of a spray product used to spray the interior surface of tunnels for fire protection. This product is sent to Yuma, Arizona, Nevada atomic test site, Wyoming, Idaho and Colorado. (Tr. 46).

The Mine Act Section 4 (30 U.S.C. 803g) states:

> "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."

Congress by its use of the phrase "which affect commerce" in Section 4 of the Act, indicates its intent 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, 322 U.S. 643 (1944) Godwin v. OSHRC, F.2d 1013 (9th Cir. 1976).

The Mine Act, as well as the Act's legislative history, reflect a congressional determination that all mining-related accidents and diseases unduly burden and impede interstate commerce. Section 2(f) of the Mine Act, 30 U.S.C. 801(f), states

> [T]he disruption of production and the loss of income to operators and miners as a result of coal or other mine accidents or occupationally caused diseases unduly impedes and burdens commerce.

The Mine Act defines the Act's scope as including "the Nation's coal or other mines," with no express limitation or exception. 30 U.S.C. 801(c), (d), and (g). The legislative history of the Federal Coal Mine Health and Safety Act of 1969, the statute from which the Mine Act derived, also indicates that Congress intended to regulate mining "to the maximum extent feasible through legislation." S. Rep. No. 1055, 89th Cong., 2d Sess. 1 (1966). Thus, in enacting the Mine Act, Congress chose to regulate mines as a class. See Marshall v. Kraynack, 604 F.2d 231, 232 (3rd Cir. 1979), cert. denied, 444 U.S. 1014 (1980) (applying Coal Act to family-owned mining operation).

Congressional intent to counter the adverse effect of mining accidents and injuries by regulating the mining industry as a whole has been recognized by the Supreme Court. In Donovan v. Dewey, 452 U.S. 594, 602 (1982), a case involving a surface

limestone quarry, the Supreme Court stated that ". . . Congress was plainly aware that the mining industry is among the most hazardous in the country and that the poor health and safety record of this industry has significant deleterious effects on interstate commerce." Congress's finding was "based on extensive evidence showing that the mining industry was among the most hazardous of the Nation's industries. (See S. Rep. NO. 95-181 (1977); H.R. Rep. No. 95-312 (1977)." Id. at 602 n. 7.

It is well established that when Congress regulates a class of activity under the Commerce Clause, all members of the class are covered and when Congress has determined that an activity affects interstate commerce, "the courts need inquire only whether the finding is rational." Hodel v. Virginia Surface Mining and Recl. Assn., 452 U.S. 264, 277 (1981). As stated in Donovan v. Dewey, supra, 452 U.S. at 602 n. 7, the Supreme Court properly deferred to the express findings of Congress, set out in the Mine Act itself and based on extensive evidence, about the effects of mining-related injuries and diseases on interstate commerce. 30 U.S.C. 301(f).

A congressional finding that an activity affects interstate commerce is presumed to be valid, and a reviewing court will invalidate such legislation "only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends." Hodel v. Indiana, 452 U.S. 314, 323-324 (1981). In the instant case Intermountain has never even attempted to show a lack of any rational basis for Congress's finding that mining-related accidents and diseases at all mines burden and impede interstate commerce. Clearly the legislative history of the Mine Act indicates that Intermountain's mine is properly the subject of congressional regulation and its mining activities fall within the broad scope of jurisdiction contemplated by the Mine Act.

II

Federal Mine Inspector Ronald Pennington testified that he and Inspector Jim Skinner inspected this small open pit sand and gravel mine. The inspectors observed three violations of applicable mandatory safety standards. The observations made by the inspectors are set forth in the three citations issued to Respondent after the inspection.

Citation No. 2653442

Citation No. 2653442 is a 104(d) S&S citation that charges Respondent with the failure to provide a handrail on a 20-foot high work platform in violation of 30 C.F.R. 56.11027.

The citation reads as follows:

> Handrails were not provided on the work platform near the top of the dryer elevator building. A ladder leads to this work platform. This platform is approximately 3 feet X 3 feet in area and it is likely that a person could easily fall from the platform to the ground. A serious injury could result from the fall of approximately 20 feet (6.096 M). A tie-off system for this platform was not in effect and employees use this platform to service the elevator motor and V-belt drive.

Inspector Ronald Pennington testified that the 20-foot high, 3-foot square, work platform was used to service two V-belt drives and a motor that was located just above the work platform. The inspector testified that there was no fall protection whatsoever and it would be quite easy to fall or inadvertently step off of this small platform. The 20-foot fall would likely result in serious injury or death.

The inspector asked the foreman at the site if they had any safety lines. None could be produced and none were observed. Nothing was provided to enable an employee working on the service platform to tie off.

The inspector testified that he found the violation to be significant and substantial. He stated that the 20-foot high platform was so small that it was reasonably likely that an employee working on it without a handrail or other fall protection could easily fall off it and would sustain serious injury.

I credit the testimony of Inspector Pennington. I agree with his opinion and conclusion that the violation was significant and substantial. The preponderance of evidence presented established all four elements of the Mathies formula which is discussed in greater detail below under the heading "Significant and Substantial."

Citation No. 2653443

This 104(a) citation charges the operator with failure to guard moving machine parts to protect persons from contacting the V-belt and pulley drives as mandated by 30 C.F.R. 56.141072. The citation describes the violative condition as follows:

> The elevator motor and V-belt drive was not guarded. This motor and drive is located approximately 4 feet above the work platform

> and can be contacted when standing on the platform. This motor is located in a low traffic area and it is unlikely that an accident would happen.

The inspector testified that the electric motor located 4 feet above the work platform had a V-belt drive with two pulleys. There was nothing to protect a person working on the platform from contacting the pinch points of the V-belt drive. The injury could result in permanent disability such as the loss of a finger.

Mr. Despain, owner and operator of the mine, testified that during prior inspections no inspector had ever issued a citation for failure to guard the V-belt drives at that location.

I credit the testimony of Inspector Pennington and based on his testimony find that there was a failure to guard a person working on the platform from contacting the pinch points of the V-belt pulley drive. The violation of 30 C.F.R. 56.141072 was established.

I agree with the inspector's conclusion that due to the location of the hazard, injury was unlikely and that the inspector properly found this violation to be non S&S.

Citation No. 2653481

This 104(a) citation charges Intermountain Sand Company with a S&S violation of 30 C.F.R. 56.14107(a) which requires the guarding of moving machine parts. The citation describes the violative condition observed by the inspector during his inspection as follows:

> The main V-belt drive for the Allis Chalmers screen plant was not adequately guarded. The pinch points of the V-belt drive could be contacted if a person would slip or fall while walking down the adjacent walkway. This walkway is on a steep decline and it is likely that a person could fall into moving machine parts.

It is undisputed that the walkway adjacent to the pinch points of the V-belt drive had a steep decline of approximately 15 or 20 degrees.

The inspector, based upon the conditions he observed, was concerned that a person could slip or trip and fall as he walked down the steep decline of the walkway and thus make contact with the "big V-belts and the wheels." The pinch points could be contacted from the top. On making contact, a person would likely

sustain an injury that would result in permanent disability such as a loss of a hand or arm.

Mr. Despain, while admitting he is not "regularly" at the mine, contended that employees do not approach or service the machinery while it is running.

III

No Collateral Estoppel

Mr. Despain testified in general terms that on numerous prior MSHA inspections of the mine no citations were issued for the violative conditions cited in this case. After due consideration I conclude that the claim of lack of prior citations is no defense in this proceeding. The claimed lack of prior citations could be due to many possible reasons, none of which is a defense in this proceeding. They include such things as failure to see or to observe, regulatory error, interpretation error, and others that could come to mind. Inspectors being human, at times do make errors of observation and judgment much like anyone else. MSHA is not estopped from the issuance of a citation because of an operator's reliance on the fact that no citation was issued on earlier inspections. The doctrine of collateral estoppel is not applicable and cannot be invoked under the facts of this case to deny miners protection of the Mine Act.

IV

Significant and Substantial Violations

The inspector in issuing Citation No. 2653442 found that the failure to have a railing on the 20-foot high 3 foot square service platform was a significant and substantial violation. The inspector also made such a finding in Citation No. 2653442 for failure to adequately guard against employee contact with moving machine parts while walking down the steep decline of the adjacent walkway.

A "significant and substantial" violation is described in Section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. 814(d)(1). A violation is properly designated significant and substantial "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, 3-4 (January 1984), the Commission explained:

> 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 United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated:

> 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 (August 1984). (Emphasis in original).

Any determination of the significant nature of a violation must be made in the context of continued normal mining operations. National Gypsum, supra, at 329. Halfway, Inc., 8 FMSHRC 8, 12 (January 1986); U.S. Steel Mining Co., 7 FMSHRC supra, at 1130 (August 1985).

With respect to the two citations in question, the first two elements of the Mathies formula are clearly established. I also find in the context of continuing normal mining operations that the preponderance of the credible evidence established the third and fourth elements of the Mathies formula. Thesond is severed the power will go to the frame of the equipment (Tr. 300-301). He also agreed that with the grounding method that was cited, as depicted in Exhibit G-19, where two wires are attached at one end to a single track bond, if the

track bond is severed, the equipment will become energized at 300 volts (Tr. 302).

Mr. Eddy stated that he holds a degree from Fairmont State College in electrical engineering technology and that he is a certified underground and surface electrician and certified mine foreman (Tr. 303-304). He confirmed that none of the three prior citations issued by Mr. Kalich had anything to do with section 75.701-5, or with how many clamps were used to attach grounds to the grounded power conductor. The citations concerned the single bond, the tacking of the other end of the rail bond (Tr. 309).

William J. Helfrich, was called in rebuttal by the petitioner and he was accepted as an expert witness in electrical matters (Exhibit G-31). Mr. Helfrich holds a B.S. degree in electrical engineering from the Pennsylvania State University and is employed by MSHA as Chief of the Mine Electrical Systems Division. His experience includes membership on committees rewriting MSHA's electrical regulations, teaching electrical courses, and publishing a number of technical reports.

Mr. Helfrich stated that he was familiar with the cited regulation and the issues presented in this case, and has over the past ten years "poured over these regulations and I've rewrote several or many times these regulations" (Tr. 312). Referring to the track bond demonstration model referred to in this case, he stated that it was not in compliance with the intent of section 75.701-5. He stated that the regulation requires that the frame grounding wire be attached to the track by a separate completely independent connection, and that in this case it was tied to a conductor. He further explained why the connection cited was a violation, and why he believed it did not constitute a grounded power conductor (Tr. 312-315).

On cross-examination, Mr. Helfrich stated that the connections shown in Exhibit G-19, show only one connection to the rail, and other wire conductors are all tied together with one clamp rather than two separate ones (Tr. 319).

Section 104(d)(2) "S&S" Order No. 3717744, issued on July 22, 1992, by MSHA Inspector Joseph A. Migaiolo, cites an alleged violation of 30 C.F.R. 75.1403. The order states that the 5,800 foot supply track on the two (2) left section was not being maintained, and the relevant cited conditions are described as follows:

The track