CCASE:
SOL (MSHA) V. D. BROWN (SKAGIT QUARRY)
D. BROWN d/b/a WHATCOM SKAGIT QUARRY V. SOL (MSHA)
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. WEST 94-298-M
	:	A. C. No. 45-02184-05503
	:	Whatcom Skagit Quarry
DAVE BROWN, d/b/a WHATCOM SKAGIT QUARRY, Respondent	:	
	:	
DAVE BROWN, d/b/a WHATCOM SKAGIT QUARRY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. WEST 94-511-RM
	:	Order No. 4341707; 6/29/94
	:	Whatcom Skagit Quarry
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Mine ID 45-02184

DECISION

Appearances: William W. Kates, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington for Petitioner/Respondent
Robert A. Carmichael, Esq., Simonarson, Vissar, Zender & Thurston, Bellingham, WA for Contestant/Respondent.

Before: Judge Weisberger

I. Introduction

Dave Brown, doing business as Whatcom Skagit Quarry, ("Operator") owns and operates a quarry known as Whatcom Skagit Quarry. The quarry produces stones (decorative rocks) that are sold for use in decorative landscaping rocks. On December 15, 1992, Walter E. Turner, an MSHA supervisory inspector, issued a citation alleging a violation by the operator of 30 C.F.R. 56.14130(a)(3) based on his observation that a Caterpillar 98 B-front end loader was not equipped with a roll-over protective structure (ROPS). Turner set January 15, 1993 as the date for the operator to abate the violation. Dennis D. Harsh, an MSHA inspector, inspected the subject site on March 29, 1994, and extended the abatement to June 1, 1994. On June 29, 1994 when Harsh reinspected the subject site, he observed the subject loader still was not equipped with any ROPS. He issued an Order under Section 104(b) of the Federal Mine Safety and Health Act of 1977 ("the Act").

On April 22, 1994, the Secretary of Labor ("Secretary") filed a Petition for Assessment of Civil Penalty concerning the citation that had been issued on December 15, 1992. (Docket No. WEST 94-298-M). On July 5, 1994, the Operator filed a Request for Temporary Relief (Docket No. 94-511-RM). On July 7, 1994, in a telephone conference call that I initiated with counsel for both parties, it was agreed that the Request for Temporary Relief be consolidated with the civil penalty proceeding, and that both matters shall be heard in Seattle, Washington on July 13, 1994. At the hearing, Turner, Harsh, and Brown, testified for the Secretary, and Brown testified on behalf of the Operator. The parties waived their right to file post-hearing briefs, and in lieu thereof presented closing oral arguments.

At the hearing, the parties agreed that a resolution of the issues presented by the Petition for Assessment of Civil Penalty, will be dispositive of the Request for Temporary Relief.

II. Jurisdiction

In disposing of the issues presented by the Petition for Assessment of Penalty, it must be initially decided whether MSHA has jurisdiction over the subject quarry. In this connection, Section 4 of the Act, provides that each mine ". . . the operations or products of which affect commerce," shall be subject to the Act.(Footnote 1) Dave Brown, the sole owner and operator of the subject quarry is the only person who works there. The quarry, which is located in Skagit County in the state of Washington, produces decorative landscape stone. According to Brown, the stones produced at the quarry are sold to landscapers, the majority of whom are located in Whatcom County and adjoining Skagit County. The Operator introduced in evidence affidavits from 15 of his customers. The affidavits contain statements indicating that these customers have used the decorative rocks
purchased from the Operator exclusively within the state of Washington, and either in Skagit or Whatcom Counties or in adjacent counties. According to Brown, due to the expense involved in trucking landscape stones, the stones that he produces are not transported to customers more beyond a 100 mile radius of the quarry. Brown testified that, in general, this is the practice in the industry. He also indicated that he does not know of any of his products being shipped to another state. He

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1 In its petition the Secretary alleged that, in essence, jurisdiction attaches since the Operator's products affects commerce. At the hearing, the parties proceeded to address the issue of whether the Operator's operations affect commerce. At the conclusion of the hearing, the Secretary moved to amended his pleadings to conform to the proof, and to allege that the Operator's operations affect commerce. The Operator opposed the motion, but did not allege any legal prejudice. After hearing argument on the motion, the motion was granted.

indicated that there are two other stone quarries in Skagit and Whatcom Counties, and that neither he nor these other quarries ship their products to Canada due to the bother of having to pass through customs.

Trucks that haul the Operator's quarried products travel over public roads. The various mobile equipment that operate at the quarry site are powered by diesel fuel, which is delivered to the site by a Chevron supplier. Explosives used on the site in the excavation of stone are delivered by a firm located in the state of Washington. Materials used to service and maintain equipment located at the quarry are supplied by firms located in Skagit County.

In Jerry Ike Harless Towing, Inc., and Harless, Inc., (16 FMSHRC 683 (April 11, 1994)), the Commission analyzed the scope of the Commerce Clause of the Constitution as follows:

> The Commerce Clause of the Constitution has been broadly construed for over 50 years. Commercial activity that is purely intrastate in character may be regulated by Congress under the Commerce Clause, where the activity, combined with like conduct by others similarly situated, affects commerce among the states. Fry v. United States, 421 U.S. 542, 547 (1975); Wickard v. Filburn, 317 U.S. 111 (1942) (growing wheat solely for consumption on the farm on which it is grown affects interstate commerce). Congress intended to exercise its authority to regulate interstate commerce to the "maximum extent feasible" when it enacted Section 4 of the Mine Act. Marshall v. Kraynak, 604 F.2d 231, 232 (3d Cir. 1979), cert. denied 444 U.S. 1014 (1980); United States v. Lake, 985 F.2d 265, 267-69 (6th Cir. 1993). In Lake, the mine operator sold all its coal locally and purchased mining supplies from a local dealer. 985 F.2d at 269. Nevertheless, the court held that the operator was engaged in interstate commerce because "such small scale efforts, when combined with others, could influence interstate coal pricing and demand." Id. Harless, supra at 686.

In essence, it is the Operator's position that Lake, 985 F.2d supra, does not control. The Operator argues that although the coal produced by the operator in Lake, supra, was sold only intrastate, in general, coal is sold interstate. The Operator argues that, in contrast, decorative rocks are not commonly transported in interstate commerce, and are sold within a radius of only 100 miles from where their are quarried. These two assertions are based solely on the testimony of Brown. I do not accord much weight to the testimony of Brown on these matters. I find his opinion testimony conclusory, as there were insufficient facts adduced to support these conclusions. Browns' testimony is insufficient to support a conclusion, that, nationally, decorative rocks are sold only intrastate. Clearly, stones mined at a quarry may be sold for uses other than for decorative landscaping. Also, even if quarried decorative rocks are, in general, shipped no more than a 100 mile radius from the

quarry, it is clear, that, such a distance might encompass another state or states. I thus find, under the broad principles enunciated by the Commission in Harless Towing supra, and based upon the authority of the Sixth Circuit in Lake, supra, that the Operator's operations did affect interstate commerce.(Footnote 2)

III. Violation of 30 C.F.R. 56.14130(a)(3).

The front end loader in question was manufactured on May 20, 1971. Brown did not contradict or impeach the testimony of Turner, and Harsh, that this vehicle was not equipped with a ROPS. In essence, Brown testified that the vehicle would have to undergo major modifications in order for a ROPS to be installed. On January 5, 1993 Brown received a letter from J.C. Barton, of Caterpillar, Inc., which states as follows: "The 9K2670 ROPS mounting conversion group for the tractor and the associated 9K7240 overhead structure group are discontinued and are no longer available. Third-party suppliers may or may not be able to provide and certify a ROPS field conversion for the tractor, but we have no recommendation." Brown also indicated that he spoke to a person who performs maintenance on his equipment, and

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2 In support of its argument, Contestant relies on Morton v. Bloom, 373 F.2d 797 (1973) (W. D. Pa) wherein the District Court held that it could not conclude that a one-man coal operation whose products were sold only in intrastate would substantially interfere with the regulation of interstate commerce. Morton, supra, has not been followed as precedent for later decisions. Hence, I choose not to follow it. Instead, my decision in this matter is based upon the subsequent decisions of the Commission in Harless Towing, supra, and the Circuit Court of Appeals in Lake, supra. Also, I choose to follow the following decisions of Commission judges: Sanger Rock and Sand, 11 FMSHRC 403, 404 (March 22, 1989) (Judge Cetti) (In holding that a sound and gravel operation affected interstate commerce, Judge Cetti remarked as follows: "It may reasonably be inferred that even intrastate use of the gravel would have an affect upon interstate commerce"); Mellott Trucking and Supply Co., Inc., 10 FMSHRC 409, 410 (March 24, 1988) (Judge Melick) (In holding that a sand operation affects commerce based on evidence that the operator was using equipment manufactured outside its home state, Judge Melick reasoned as follows: "In addition, although the evidence shows that the sand extracted, processed and sold by the Mellott facility was used only intrastate, it may reasonably be inferred that such use of the mine product would necessarily impact upon the interstate market. See, Fry v. United States, 421 U.S. 542, 547 (1975)"); Jefferson County Road and Bridge Department, 9 FMSHRC 56 (January 9, 1987) (Judge Morris). (A gravel operation was held to affect commerce where the extracted gravel was not sold, but was used exclusively to surface county roads). There are no decisions by Commission Judges holding that a mine operation whose products do not enter interstate commerce does not affect commerce.

who also had worked for Caterpillar. Brown stated that this individual told him that he knew of no one who could instill a ROPS on the vehicle in question.

As long as Section 56.14130(a)(3) supra remains in effect, and not modified to suit Browns' equipment, it must be complied with. Based on the uncontradicted testimony of Turner, and Harsh, I find that Brown did violate Section 56.14130(a)(3).(Footnote 3)

I find that a penalty of $50.00 is appropriate for this violation.

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3 Based on my finding that Brown did violate Section 56.14130, supra, the Request for Temporary Relief is DENIED.

Additionally, at the hearing the parties, jointly requested that I make findings regarding the propriety of the Section 104(b) order issued by Harsh on June 29, 1994.

According to Harsh in March 1994, in preparation for his inspection of subject site, he checked with Medford Steel whose representative informed him that a ROPS for the cited vehicle was not in stock but they had the blue prints, and could manufacturer one to fit this loader. He was informed that this procedure could take four to six weeks. In addition, Harsh indicated that a Caterpillar dealer in Salt Lake City, Utah told him that he had ROPS in stock. On March 29, Harsh met with Brown the latter and showed him a letter that he had received from Caterpillar indicating that ROPS for the vehicle in question was no longer available (Exhibit O-21). Brown told Harsh that, due to the cost of installing the ROPS, he was not going to have one installed. Harsh extended the abatement time to June 1, 1994.

When Harsh inspected the site on June 29, 1994, he observed that the cited vehicle still was not equipped with a ROPS. Harsh then issued a Section 104(b) order.

Section 104(b) of the Act provides that an inspector shall issue a withdrawal order if he finds (1) that a cited violation has not been abated within the period of time originally fixed or subsequently extended and, (2) the time for abatement should not be further extended.

I find that, considering the above summarized evidence, Harsh did not abuse his discretion in not extending the abatement, and in issuing the Section 104(b) order.

ORDER

It is Ordered that, within 30 days of this decision, the operator shall pay a civil penalty of $50. It is further ordered that Docket No. WEST 94-511-RM be DISMISSED.

Avram Weisberger
Administrative Law Judge
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