CCASE:
SOL (MSHA) V. THE PIT
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 94-97-M
	:	A.C. No. 24-01958-05502
v.	:	
	:	Docket No. WEST 94-40-M
	:	A.C. No. 24-01958-05501
THE PIT, Respondent	:	

DECISION

Appearances: Kristi Floyd, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for Petitioner;
Alfred J. Luciano, Eureka, Montana, Pro Se, for Respondent.

Overview

These cases arise out of two inspections by MSHA Representative Ronald Goldade, of a sand and gravel pit located on a ranch near Eureka, Montana, operated by Alfred Luciano and his family (Tr. 8, 197, 223-24). The first inspection occurred in September 1992 and the second in September 1993. At neither inspection did Inspector Goldade observe the production of sand and gravel or the production of crushed rock (Tr. 22-23, 31-32, 48, 62). However, based on his observations, Goldade issued Respondent six citations in 1992 and eight in 1993, most of which allege a failure to guard moving machine parts.

Respondent does not dispute the factual allegations contained in the citations (Jt. Exh. 1, Stipulation # 5). Its primary contention is that it was not subject to the Mine Act at the time of either inspection because it was engaged in setting up and adjusting its equipment rather than production (Tr. 9-10).

The company also contends that the 1993 citations were issued to the wrong business entity. In 1992 the site was operated by "The Pit", a business owned by Alfred Luciano's son, Dan, (Tr. 140-42, Exh. G-21). By 1993, Respondent contends the site was operated by the JFL trust, which was set up by

Alfred Luciano for his wife and children (Tr. 223). Dan Luciano had sold his equipment to the trust and worked for it at the time of the 1993 inspection (Tr. 142-43). (FOOTNOTE 1)

Respondent also argues that, because it was not producing, it was not engaged in or affecting interstate commerce. However, since it was preparing for activities that clearly would affect commerce, I conclude that Respondent was subject to the commerce clause at the time of the inspections, See, e.g., Cyprus Industrial Minerals Co. v. FMSHRC, 664 F. 2d 1116 (9th Cir. 1981) [drilling of exploratory shaft in search of commercially exploitable deposits is subject to Act]; Godwin v. OSHRC, 540 F.2d 1013, 1015, (9th Cir. 1976).

Another factor leading me to the conclusion that Respondent's operations were subject to the commerce clause is the use of equipment and supplies by Respondent which originated outside the state of Montana (E.g. Jt. Exh-1, stipulation # 2). Moreover, Respondent advertised its product on a public highway only a few miles south of the Canadian border (Tr. 15, 33-35).

I also reject Respondent's primary contention that it was not subject to the Mine Act because it had not started production at the time of either inspection. Section 3(h)(1) of the Federal Mine Safety and Health Act, 30 U.S.C. 802(h)(1), defines a "coal or other mine" as:

> (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...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 used in, or to be used in, the milling of such minerals...(emphasis added).

The plain language of the Act, therefore, makes it clear that equipment that is located at a site where mining will take place, and will be used in the extraction of minerals, or the milling of minerals, is subject to MSHA jurisdiction--even if mining has not commenced. Cyprus Industrial Minerals, supra., S H M Coal Company, 11 FMSHRC 1154, 1173-74 (ALJ, June 1989). Moreover, semantics aside, it logically follows from the general

FOOTNOTE 1

Additional equipment, most notably a Cedar Rapids brand crusher, had been brought to the site by the trust in the period between the two inspections (Tr. 33-34).

scheme of Federal regulation of occupational safety and health, that the installation and adjustment of equipment at a mine site is subject to the Act prior to the commencement of production.

The Federal government regulates job safety and health primarily under two statutes, the Occupational Safety and Health Act for non-mining industries and the Mine Safety and Health Act for mining. The essential purpose of these statutes is to prevent occupational injuries and illnesses at all stages of economic activity, rather than simply those at which goods are actually produced, or services rendered. These statutes are intended to protect employees from injury whether they are setting up equipment or engaged in production.

Thus, I conclude that Congress intended that employees be protected so far as is possible, either by OSHA or MSHA in pre-production activities which may pose occupational hazards. Furthermore, the Mine Act clearly establishes MSHA jurisdiction over employees who are setting up equipment at a worksite at which mining is to take place in the future.

The last sentence of section 3(h) of the Mine Act provides:

> In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary [of Labor] shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary [of Labor] of all authority with respect to the health and safety of miners employed at one physical establishment.

Thus, Congress did not intend that the working conditions of employees at a worksite be subject to OSHA during one phase of economic activity, and subject to MSHA at another. Even more importantly, it did not intend that employees or miners be unprotected from hazards during pre-production activities.

The Citations in both inspections were properly issued to "The Pit".

Prior to the September 1992 inspection, a legal identity report was filed with MSHA designating "The Pit" as the name of the operator of the sand and gravel mine on the Luciano ranch (Tr. 18-19, Exh. G-2). When Inspector Goldade returned to the mine in September 1993, no changes to the legal identity form had been filed with MSHA (Tr. 29-30). Goldade informed Alfred Luciano on September 2, 1993, that the legal identity form had to be updated if ownership of the mine had changed (Tr. 65). Mr. Luciano either told Goldade that he did not wish to update the ID form, or that the citations should be issued to "The Pit" in order not to confuse matters (Tr. 65-66).

MSHA's regulations at 30 C.F.R 41.12 require an operator to notify the agency of any changes in the information contained in the legal identity form within 30 days. Given the fact that Respondent did not comply with the regulation and that Mr. Luciano represents that he told Inspector Goldade that the 1993 citations should be issued to "The Pit", I conclude that Respondent is estopped (legally precluded) from claiming that these citations were issued to the wrong entity.

The individual citations

The parties signed and introduced stipulations, which included the following paragraph, number 5:

> ...the citations are admitted into evidence for the truthfulness and relevancy of the facts and designations contained therein. The sole issue remaining with regard to the citations is whether or not the plant was in operation at or about the time of the inspections. This issue alone will determine whether the alleged violations occurred (Jt. Exh-1).

While the question of whether the plant was in operation has no relevance to the non-machine guarding citations, it is relevant to the 10 citations issued alleging a violation of 30 C.F.R 56.14107(a). The standard provides that:

> Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.

A related regulation at 30 C.F.R 56.14112(b) states that:

> Guards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard.

During presentation of its case, Respondent elicited considerable evidence questioning whether it would have been able to guard the cited moving machine parts during the set-up, testing, and adjustment of its equipment. Contract Electrician John Dunster testified that it was, at times, impossible to take his strobe light readings with guards in place (Tr. 100). Contract Welder Carl Hammond testified that, to adjust Respondent's conveyor belts, the guards for those belts had to be removed in places (Tr. 125-26, 129-30).

On the other hand, Inspector Goldade, who had experience setting up similar equipment as a contract welder in the 1980s

contends that it can be set-up, adjusted and aligned with the guards in place (Tr. 93-94). Although the burden of proving that compliance with an MSHA regulation is impossible is on the operator, Climax Molybdenum Co., 2 FMSHRC 1884, 1886 (ALJ July 1980), the standard, in this instance, recognizes that guards cannot be kept in place in certain circumstances.

Given the fact that the testimony of Respondent's witnesses is more specific regarding the facts in this case regarding the feasibility of guarding the company's equipment, I credit those witnesses. Welder Carl Hammond testified that some areas could be guarded prior to the inspection and others could not (Tr. 125-30). Since Inspector Goldade's testimony that set-up and adjustment can be done with guards in place is not tied to the specific circumstances of the citations, I find that the preponderance of the evidence is that these areas could not have been guarded at the time of the inspections. The fact that Respondent did guard the cited areas after the inspection does not necessarily indicate that the company could have performed the set-up and adjustment work of September 1, 1993, or the testing of September 17, 1992, with guards in place.(FOOTNOTE 2)

The preponderance of the evidence also supports Respondent's contention that its equipment was not run for purposes other than testing or making adjustments at the time of and prior to the inspections (Tr. 121, 153, 164-68). As the evidence thus fails to establish that guarding could have been maintained on these occasions, I vacate citations 4122660, 4122661, 4122662, 4122663, 4122664, 4331764, 4331765, 4331766, 4331767 and 4331768.

The issue of whether Respondent's plant was operating has no bearing on the validity of the remaining 4 citations. Thus, pursuant to the stipulation of the parties, these citations are affirmed.

Assessment of Civil Penalties

Section 110(i) of the Act provides that the Commission shall assess civil monetary penalties after giving consideration to the operator's history of previous violations, the size of the operator's business, the negligence of the operator, the gravity of the violations, the good faith of the operator in achieving rapid compliance after notification of the violation, and the

FOOTNOTE 2

For example, MSHA verified that guards had been installed on September 22, 1993, when conditions may have been very different than on September 1, 1993, see, e.g., Citation page 4331764-1, block 12.

effect of the penalty on the operator's ability to stay in business. The parties' stipulation addresses three of these factors.

The proposed penalties of $917 for the 14 violations will not affect Respondent's ability to stay in business (Jt. Exh.-1, paragraph # 7). Respondent demonstrated good faith in abating the violations (Jt. Exh.-1, paragraph 8), and is a small operator (paragraph 9).

Exhibit G-1 shows no citations issued to Respondent other than those at issue in these proceedings. Thus, the most critical factors to assess are the negligence of the operator and the gravity of the violations.

I assess a $25 penalty for citation 4122665, which alleges a violation of 30 C.F.R 56.4101 in that the area of the mine site where diesel fuel and gasoline was stored, was not posted with an appropriate warning sign of no smoking and open flame on September 17, 1992. As there is no evidence as to smoking or open flames in this area, I view the gravity of the violation fairly low. There is no evidence in the record regarding negligence.

A $60 penalty is assessed for citation 4331760, which alleges a violation of 30 C.F.R 56.9300(a) on September 1, 1993, in that no berm or guardrail was provided on the outside edge of an elevated ramp used by a front-end loader (Exh. G-2). The gravity of injuries that are likely to result, if such a violation produced an injury, warrants this amount. The record establishes that the cited ramp was used by a front-end loader in the construction of Respondent's equipment (Tr. 132-33).

A $100 penalty is assessed for citation 4331763. That citation alleged a violation of 30 C.F.R 56.12025, in that a ground circuit was not provided for a 220-volt switch box. The record establishes that at least a temporary ground could have been maintained (Tr. 100-102). Therefore, Respondent's negligence warrants a civil penalty of this magnitude. Finally, I assess a $25 penalty for Respondent's failure to comply with section 56.18002(b) [no workplace examination by a competent person] as specified in citation 4331770.

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ORDER

The citations herein are affirmed and Respondent (FOOTNOTE 3) is ORDERED to pay the $210 in total penalties within 30 days of this decision.

Arthur J. Amchan
Administrative Law Judge
703-756-6210

Distribution:

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/jf

FOOTNOTE 3
Regardless, of whether "The Pit" still exists as a business entity, I expect that these penalties be paid, either by the JFL Trust, or by Alfred or Dan Luciano in some other capacity.