

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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April 8, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 97-16
Petitioner	:	A.C. No. 03-01772-03501
v.	:	
	:	Hoover Mine
JAMES FORK MINING COMPANY,	:	
Respondent	:	

DECISION

Appearances: Mr. Ned Zamarripa, Conference & Litigation Representative, U. S. Department of Labor, Mine Safety and Health Administration, Denver, Colorado, for Petitioner;
Ms. Anna M. Boden, James Fork Mining Company, Manfield, Arkansas for Respondent.

Before: Judge Weisberger

I. Statement of the Case

At issue in this civil penalty proceeding is the validity of an order issued by the Secretary of Labor (Secretary) under Section 104(g)(1) of the Federal Mine Safety and Health Act of 1977 (The Act), alleging a violation of 30 C.F.R. ' 48.26(a), and three citations alleging violations of 30 C.F.R. ' 48.3(a)(3), 30 C.F.R. ' 75.160 and 30 C.F.R. ' 77.1000-1 respectively. At the hearing on this matter held in Fayetteville, Arkansas, on March 12, 1997, the parties stipulated as follows: A . . . the sole issue in this matter is whether or not the operator of this mine was engaged in work activity in preparation to mine coal and is subject to the Mine Act. This issue alone will determine whether the alleged violations occurred.@

It was further agreed that should I find that James Fork Mining Company (the operator), is subject to the Act, then the order and three citations at issue are to be affirmed as written, and the penalties proposed by the Secretary for these violations are to be affirmed. It also was agreed that should I find that the operator is not subject to the Act, then the order and citations at issue are to be dismissed.

II. Findings of Fact

The subject site, consisting of 20 acres, is located in Sebastian County, Arkansas. An underground coal mine located on the property has not been operated since 1977. The portals leading to the underground mine have been sealed.

Steven Marusich is the general manager of James Fork Mining Company, a sole proprietorship. Marusich who has more than 40 years mining experience, buys and sells mining equipment. Sometime in 1994, he purchased a conveyor system consisting of belt drives, and tail pieces. In the same time period, he obtained a bolter machine as payment for services rendered. All this equipment, and other mining equipment such as mine wire, pumps, and a cutting machine, were placed on the property by Marusich in 1995. On or about April 1995, Steven Marusich placed a mobile home, 14 feet by 80 feet on the property and commenced to live there with his family.

On April 26, 1995, Marusich, listing himself as operator and owner, filed with the Arkansas Department of Pollution Control and Ecology, a document entitled A notice of plan to conduct exploration activities on the subject site. He indicated that the reclamation activities were as follows: Aarea would be graded back to approx. original contours and seeded.@(Exh. G-4). Marusich noted that exploration for coal was planned and 250 tons would be removed. He indicated that the method of exploration would be Adozer work@(Ex G-4). Marusich indicated the extent of anticipated exploration as follows: A[m]ax. depth of penetration is approx. 20' disturbed area approx. 1.5 acres@(sic) (Ex. G-4). He indicated that exploration would be carried out for about three months.

In May 1995, Marusich intended to hire an independent contractor to do exploration and reclamation work on the property to reduce some of the dangers located therein. Marusich contacted the Arkansas Department of Pollution Control and Ecology, in connection with a request to obtain an exploration permit, and explained that he was A . . . proposing to open up a small area near my house that has some Hartshorne Crop Coal under it.@ He indicated further as follows: AI would hope to permit a surface mining operation on these properties if all goes well.@ (Respondent's Exhibit 2).

On April 10, 1996, Marusich filed with the Mine Safety and Health Administration, a Legal Identity Report which set forth James Fork Mining Company as the operator for the subject site. The mine name was listed as the Hoover mine. The words Acoal mine-underground@, were placed on the report under the following: Acommodity (type of product and operation-surface, underground or facility)@(Ex. G-3, P.2).

By letter dated June 1, 1996, Marusich submitted to the District Manager of MSHA in Denver, Colorado, a Fan Stoppage Plan. Marusich indicated that the plan was being submitted A . . . as required by 30 C.F.R. ' 75.314.@(Ex. G-5. tab 1, P.2)

On June 10, 1996, Marusich submitted to the District Manager, MSHA, Denver, Colorado, a Smoking Prohibition Plan Aas required by Section 75.1702, C.F.R., Title 30.@ The plan, inter alia, provides that all persons entering the mine will be subject to a systematic search for smoking articles, and that ANo Smoking@ signs shall be prominently displayed at all mine entrances. (Ex. G-5, tab 3)

A training plan for the Hoover mine was received by the MSHA in McAllister, Oklahoma

office on June 21, 1996. The plan, entitled Part 48, Training Plan Surface indicates that the approximate number of miners employed is 25.

In June 1996, Lester Coleman, an MSHA inspector inspected the subject property, and noted that an old structure on the site constituted a hazard. He agreed that the reclamation work being performed was removing some of the hazards present on the property. Coleman placed the mine in an active non-producing status.

On August 5, 1996, MSHA, Inspector Jimmy Stewart inspected the site, and issued the order and citations that are at issue in this proceeding.

III. Discussion

A. The operator's position

Marusich testified that when the site was purchased it presented various hazards. He indicated that there were eroded areas, banks that contained unconsolidated materials, cracks in the spoil piles, and highwalls with steep slopes. He also noted the presence of concrete with exposed sharp edges, and an old building with exposed metal parts. Marusich indicated that all these conditions presented hazards to persons walking in the area, especially to his seven years old son who lived on the property. According to Marusich, hazards were mitigated or eliminated by decreasing the slopes, trimming the highwall back eight feet, leveling, sloping, and grading the reclaimed area, creating a pond to prevent erosion, and removing the old metal structure. Also, Marusich removed a dam on the property that could have created hazardous conditions to persons traveling on adjacent roadways, as the dam leaked when it rained. It is Marusich's position that all these operations were taken, not to prepare the site for mining, but to eliminate hazardous conditions. He also indicated that he does not have the necessary financial funds to open a mine. Instead, he would like to sell the property to another person who could operate it as a mine.

B. Analysis

Section 4 of the Act provides that each coal mine . . . shall be subject to the provisions of this Act. The term "coal mine" is defined in section 3(h)(1) of the Act as follows:

(h)(1) "Coal or other mine" means (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 the work of preparing coal or other minerals,

In deciding whether the activities that were being performed by the operator are within the

scope of the definition of a coal mine as set forth in Section 3(h)(1), supra, I am guided by the legislative history of the Act. In this connection, I take cognizance of the following expression of legislative intent set forth in the Senate Report,¹ as relied upon the District of Columbia Circuit in Donovan v. Carolina Stalite Co., 734 F.2d 1547 (D.C. Cir. 1984) A> . . 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.= Id. (Emphasis added). Close jurisdiction question are to be resolved in favor of inclusion of a facility within the coverage of the Act.=Id.@ (734 F.2d. supra at 1554).

In applying the definition in Section (h)(1) of the Act and the legislative history to the case at bar, I note first of all, as indicated by photographs of the site, the extensive nature of the grading and leveling performed by the operator. Marusich testified that he did not consider the operation on the property A... as preparation for underground coal mine@(sic) (Tr. 111). He alleged that no exploration had taken place. He also stated that at the present time A... it's in planning stage and permitting stage@(sic) (Tr. 109). However, is significant to note that he indicated that A in the future we want to open coal mine. We are working toward opening coal mine@(sic) (Tr. 109). Also, although he indicated that it was not yet decided where to perform exploration on the site, he has interviewed persons familiar with the old abandoned mine on the property in order to determine the best sites for exploration. Further, the operator, has already taken actions to enable it to operate a mine such as filing for and obtaining a mine identity number, filing a Notice of Plan to Conduct Exploration Activities with the Arkansas Department of Pollution Control and Ecology, and the filing of a training plan, and unintentional fan stoppage plan with MSHA. I find that the reclamation work herein in combination with these enumerated activities placed the property in question of the purview within the term Acoal mine@, especially considering the legislative intent to give the broadest possible interpretation to the Act. I find that the operator was under the jurisdiction of the Act when cited in August 1996. I thus further find, in conformity with the parties= agreement at the hearing, that since jurisdiction attaches, the order and citations at issue are to be affirmed as written, and the penalties sought by the Secretary are also to be affirmed.

IV. Order

It is ordered that, within 30 days of this decision, the operator shall pay a total civil penalty of \$418. It is further ordered that the order and citations at issue in this proceeding shall be affirmed as written.

Avram Weisberger
Administrative Law Judge

¹S. Rep. No. 181, 95th Cong., 1st Sess. (1977).

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