

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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July 17, 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 93-482-M
Petitioner : A.C. No. 45-03284-05501
v. :
: Docket No. WEST 93-649-M
COWLITZ VALLEY SAND & GRAVEL, : A.C. No. 45-03284-05502
Respondent :
: Docket No. WEST 94-78-M
: A.C. No. 45-03284-05503
:
: Docket No. WEST 94-237-M
: A.C. No. 45-03284-05504
:
: Cowlitz Valley Sand & Gravel

DECISION

Appearances: Cathy L. Barnes, Esq., Office of the Solicitor,
U.S. Department of Labor, Seattle, Washington
for Petitioner;
James A. Nelson, Esq., Toledo, Washington
for the Respondent

Before: Judge Melick

These consolidated cases are before me upon the petitions for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801, et seq., the "Act," charging Cowlitz Valley Sand and Gravel (Cowlitz) with multiple violations under the Act and proposing civil penalties for those violations. A preliminary issue is whether Cowlitz, during relevant times, was under the jurisdiction of the Act. A bench decision was rendered on this jurisdictional issue following hearings and that decision follows with only non-substantive corrections:

THE COURT: All right. I'm prepared to rule. First of all, let me note that the issue is very well framed by Respondent in its memorandum of law. That memorandum sets forth the basis for jurisdiction under the Mine Safety and Health Act of 1977, which I'll refer to as the Mine Act, over any mine as dependent upon interstate commerce as set

forth in the Mine Act. Section 4 of the Mine Act reads as follows: "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."

Section 3(b) of the Mine Act defines commerce 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 in the same state but through a point outside thereof."

As Counsel for Cowlitz notes also in his memorandum, as of March 1, 1993, Cowlitz had not commenced production. I believe there's no dispute that no products had in fact entered commerce as of March 1, 1993. Again, Cowlitz's Counsel states correctly, I believe, the issue then is as of March 1, 1993, had the operations of Cowlitz Valley Sand & Gravel Company affected commerce within the meaning of that term and Section 4 of the Mine Act.

I'm relying to a large extent on a Ninth Circuit decision, *Cyprus Industrial Minerals Co. v. Federal Mine Safety and Health Review Commission*, 664 F.2d 1116 (1981) in which the drilling of an exploratory shaft in search of a commercially exploitable deposit was found subject to the Act. Several Commission Judges have also found jurisdiction under similar circumstances. *Secretary v. SH&M Coal Co.*, 11 FMSHRC 1154 (June 1989), a decision of Judge Koutras and Judge Amchan recently in *Secretary v. The Pit*, (September 1994). Each of these cases supports the proposition that since the operator was preparing for activities that clearly would effect commerce that is sufficient to bring it within the scope of jurisdiction under the Mine Act.

There's no need to review the evidence in this case because it is undisputed and it is in effect essentially stipulated that Cowlitz was in preparation for activities that clearly would affect commerce at the time of the March 1, 1993, inspection. But just to review the evidence on this issue, we have first of all Exhibit No. 2 submitted by the Petitioner, which is a letter dated November 18, 1992, from Ms. Wallace [on behalf of Cowlitz], which states that, among other things, "We have also started to move

overburden to the west side of the equipment site in order to stockpile on the west side and create a berm to help prevent any unknown problems unseen at this time." There are other statements in that letter indicating preparation for commencement of mining of crushed rock that was to be sold in commerce.

The testimony of Mr. Sam Tomes [a Cowlitz foreman] also corroborates that they were beginning preparations or were continuing preparations for the sale of mine product, which he testified actually began in July of 1993. Mr. Tomes testified that they were, prior to March 1, 1993, setting up crushers, conveyers, welding legs on conveyers, building chutes, and partially removing a hill at the facility in order to set up the plant. Also that they were constructing an access road beginning as early as January and through April of 1993 to permit better access to the mine site. That they were continuing -- and he was continuing to perform tests on the crushers. That he was adjusting the crushers and actually placing product through the crushers to further adjust the crushers.¹

I don't even have to go into the inspectors' testimony on this point to establish clearly that these were activities in preparation for activities that would clearly affect commerce. Again, I would cite to you the *Cyprus Industrial Minerals* case, as well as the two Administrative Law Judges' decisions, and also the case cited by the Secretary, that is *Godwin v. the Occupational Safety and Review Commission*, 540 F.2d 1013, a Ninth Circuit decision in 1976.

I would also note in this case the Respondent's use of equipment that, by the testimony of Mr. Tomes again, originated out of the state of Washington. That is the equipment that was manufactured in Iowa and Oregon.

I also note that under Section 3(h)(1) of the Mine Act itself a coal or other mine is defined -- and this is a long definition but within that definition there is the plain language itself explicitly that equipment that is located at a site where mining will take place and will be used in the

¹ To the extent that mine product was used on the premises of the Cowlitz mine to improve the access road this operation also affected commerce within the meaning of the Act. See *Fry v. United States*, 421 U.S. 542, 547 (1975); *Wickard v. Filburn*, 317 U.S. 111, 128 (1942)

extraction of minerals or the milling of minerals is subject to Mine Act jurisdiction even if mining has not commenced.

That section reads in part as follows: "'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 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 forms or used in or to be used in the milling of such minerals."

Under the circumstances, jurisdiction lies under the Mine Act over this operation and did so as of March 1, 1993.

Conditioned upon this finding of jurisdiction the parties thereafter reached a settlement in which the Petitioner vacated Citation Nos. 4127598 and 4128390 and with respect to the remaining violations agreed to reduce the proposed penalties from \$874 to \$500 based in part on the operator's good faith belief that it had not yet become subject to MSHA jurisdiction. The Secretary subsequently filed a written motion in support of the settlement. I have considered the representations and documentation submitted in these cases and I conclude that the proffered settlement is acceptable under the criteria set forth in Section 110(i) of the Act.

WHEREFORE the Motion for Approval of Settlement is **GRANTED** and it is **ORDERED** that Respondent pay a penalty of \$500 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge
703-756-6261

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