FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 15, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. SHINE QUARRY INC., Respondent	: : : : : : : :	CIVIL PENALTY PROCEEDING Docket No. WEST 95-165-M A.C. No. 45-03208-05515 Shine Quarry

DECISION

Appearances: Cathy L. Barnes, Esq., Office of the Solicitor, for Petitioner;
Erwin P. Jones, Jr., Sequim, Washington, for

Before: Judge Amchan

Background

On August 18, 1994, MSHA Inspector Wallace Myers issued Imminent Danger Order/Citation No. 4341786 alleging that Respondent violated sections 107(a) and 104(a) of the Act, and section 56.3200 of Volume 30 of the Code of Federal Regulations. MSHA subsequently proposed a $315 civil penalty for this alleged violation. The penalty was contested and this matter came to hearing on June 8, 1995, in Seattle, Washington.

Section 56.3200 provides as follows:

> Ground conditions **that create a hazard** to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective action is completed, the area shall be posted with a warning against entry and when left unattended, a barrier shall be installed to impede unauthorized entry (emphasis added).

The August 18, 1994 inspection

Respondent operates a basalt rock quarry on the Olympic Peninsula, west of Seattle, Washington. The basalt is separated from the quarry wall by drilling and blasting (Tr. 71, 103-04). It is crushed, sized and then sold primarily to small local contractors for use on private driveways and in the construction of ornamental walls (Tr. 111). There is no evidence that any of

the mine's product is sold outside of the State of Washington (Tr. 111).

When Inspector Myers arrived at the quarry on August 18, 1994, he observed one of Respondent's employees operating a Caterpillar front-end loader approximately 14 to 20 feet from the quarry wall. The loader operator was clearing rocks off of a roadway on the quarry floor (Tr. 14-15, 38-39, 63, 89-90).

The quarry wall is approximately 700 feet long and from 50 to 70 feet high (Tr. 16, 71). Respondent had blasted sections of this wall on August 12 and on August 17, 1994 (Tr. 41, 104, 109, 118). On the day of the inspection Myers observed several large boulders on the quarry wall which he considered unstable. He also observed some smaller rocks dribbling down the slope of the wall for approximately a minute (Tr. 15-34).

Beneath the newly blasted areas were "muck piles" which are ramp-like projections extending out from the wall approximately 30 to 50 feet (Tr. 45, 119-20, Exhs. P-7, 8 and 9, R-2 and 3). In some areas there were indications that a muck pile had been disturbed by some of Respondent's equipment (Tr. 38, P-8). Inspector Myers concluded that the unstable boulders presented an imminent danger to the front-end loader operator and any other miner who might go near the quarry wall. He therefore issued section 107(a) order/section 104(a) Citation No. 4341786.

In response to this order, Respondent erected a barricade of rocks (Tr. 47, Exh. P-7). On the day after the order/citation was issued, Respondent's driller/blaster Lloyd Fultz drilled four holes and then blasted one large boulder off the quarry wall (Tr. 126-28). On August 22, 1994, Inspector Myers returned to the quarry and the citation/order was terminated (Tr. 124-25).

Respondent's Quarry is Subject to the Mine Act

Respondent argues that because it sells only to local contractors who construct driveways and ornamental walls, it is not engaged in interstate commerce and thus is not subject to the Federal Mine Safety and Health Act. However, Respondent buys parts and supplies from a firm in Portland, Oregon, and uses Caterpillar brand equipment (Tr. 113-14), which is generally manufactured in the State of Illinois. I find these factors alone sufficient to establish MSHA jurisdiction, United States v. Dye Construction Company, 510 F.2d 78, 83 (10th Cir. 1975).

Congress intended to exercise its authority to regulate interstate commerce to the "maximum extent feasible" when it enacted the Mine Act, Jerry Ike Harless Towing, Inc. and Harless, Inc., 16 FMSHRC 683 (April 1994); U.S. v. Lake, 985 F.2d 265, 267-69, (6th Cir. 1985). Thus, if Respondent's quarry falls within the scope of the commerce clause, it is subject to MSHA jurisdiction.

Purely local activity falls within the commerce clause if it affects interstate commerce, Wickard v. Filburn, 317 U. S. 111 (1942). Indeed, regardless of the strictly local nature of a particular business, Congress can regulate its affairs on the basis of the class of activity in which it engages, Perez v. United States, 401 U.S. 146 (1971).

In enacting the Federal Mine Safety and Health Act, Congress found that "the 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," 30 U.S.C. ' 801(f). Thus, regardless of the local nature of its business, Respondent is subject to the Act simply by virtue of the fact that it is engaged in mining.

The evolution of Supreme Court cases since Wickard v. Filburn has brought virtually every commercial activity in the United States within the purview of the commerce clause. This trend continues despite the recent decision in United States v. Lopez, 514 U.S. ___, 131 L.Ed 2d 626, 115 S Ct ___ (1995). In Lopez, the Court invalidated the Gun-Free School Zones Act of 1990 on the grounds that it exceeded congressional authority under the commerce clause.

Chief Justice Rehnquist stated in the opinion of the court that to determine whether an activity affects interstate commerce "the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce," 131 L.Ed 2d at 637. However, it is clear that the decision rests

on the proposition that the invalidated statute has nothing to do with "commerce" or any sort of economic enterprise, 131 L.Ed 2d at 638, 642 (Chief Justice Rehnquist), and 653 (Justices Kennedy and O'Connor, concurring). I therefore conclude that the decision has no bearing on whether a mining operation, even one which is purely intrastate in scope, is subject to the Act. Thus, as was the case before United States v. Lopez, Respondent falls within the commerce clause and is covered by the Federal Mine Safety and Health Act.

The Substantive Issue Presented

Respondent's President, Clifford Larrance, arrived at the quarry on August 18, shortly after Inspector Myers departed from the mine (Tr. 87). Larrance contends that the quarry wall did not create a hazard to persons because the muck piles prevent any loose material on the wall from reaching any miner who works on the pit floor (Tr. 92-93, and 100-101, testimony of Lloyd Fultz). The muck piles consist of loose, unconsolidated material which absorbs the energy of any rocks that may fall, preventing them from rolling or bouncing down to the pit floor (Tr. 92-93).

The essence of this case is whether, in view of the muck piles underneath the recently blasted areas, the condition of the quarry wall was shown to create a hazard to persons[1]. As this is a subjective judgement, the question under Commission law is whether a reasonably prudent employer familiar with the mining industry and the protective purposes of the standard would have recognized that the condition of Respondent's quarry wall posed a hazard to persons on the pit floor, Ideal Cement Company, 12 FMSHRC 2409 (November 1990).

It is a normal condition to have loose material on a quarry wall after blasting (Tr. 65). MSHA does not require that all such material be taken down before miners are allowed to work below it. Thus, before finding an operator in violation of section 56.3200, it is only proper that conditions be shown to pose a danger from an objective standpoint.

Given the instant record, I find that the Secretary has not

[1]Respondent's driller/ blaster, Lloyd Fultz, testified about a rock that "looked pretty bad" at first glance but upon close examination "wasn't that bad" (Tr. 105). From this one might conclude that a particular boulder did pose a potential hazard to persons on the pit floor. However, without evidence as to why Respondent's muck pile was inadequate to protect miners on the quarry floor, I decline to draw such an inference.

established a violation of section 56.3200. I therefore vacate Citation No. 4341786 and the proposed penalty. Although Inspector Myers considered the quarry wall hazardous, he has limited training and experience in ground control and related disciplines (Tr. 6-8, 57, 66). I do not regard his opinion as representing the standard of care of a reasonably prudent mine operator in this case.

In view of what appears to be an honest difference of opinion as to the safety of Respondent's quarry, the Secretary must do more than present the opinion of a non-expert inspector to meet its burden of proof under a general standard such as section 56.3200. For example, in Cyprus Tonopah Mining, 15 FMSHRC 367 (March 1993), the Commission upheld a violation of this standard where the Secretary's case was supported by the testimony of a mining engineer regarding the stability of the operator's wall.

Much of the testimony in this matter, which appears to be relevant at first glance, has little bearing on the validity of the citation. For example, there was some discussion as to whether the muck pile had been disturbed and whether the loader operator would have been closer to the quarry wall than he was when observed by Inspector Myers.

I conclude that the only issue is whether the Secretary has shown that the muck piles were insufficient to protect employees from loose material on the quarry wall. Since I find that he has not done so, it does not matter how close the loader operator, or other employees, may have come to the muck pile. There is no evidence that would support a finding that any person went on top of the muck pile, had reason to go on the muck pile, or that any muck pile was disturbed at a time when the portion of the quarry wall above it posed a hazard[2].

ORDER

Citation No. 4341786 and the corresponding proposed penalty are **VACATED.**

Arthur J. Amchan

[2]A muck pile was apparently disturbed with a Caterpillar shovel on or before August 12, 1994 (Tr. 38, 72-74).

Administrative Law Judge

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