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MSHA V. CYPRUS INDUST. MINERALS
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
January 8, 1981

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA) Docket No. DENV 78-558-M

v.

CYPRUS INDUSTRIAL MINERALS
CORPORATION

DECISION

The issue before us is whether the site of the contested withdrawal order is a mine as defined by section 3(h)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (Supp. III 1979).

On August 3, 1978, an imminent danger withdrawal order was issued to Cyprus Industrial Minerals (CIM), which filed an application for review of that order. The area subject to the order was CIM's Bosal No. 1 claim. An independent contractor, Pee Wee Holmes, had contracted with CIM to establish a portal and drift in order to assess the ore on the claim. Holmes had one employee, Raymond Pederson, aiding him in per forming the work. They began operations on July 29, 1978. On August 2, they cleared away muck at the base of the portal and cleared the overburden above the portal in preparation for setting posts. They also scaled from the top of the hill and the ground, and barred and scaled the brow. On August 3, Holmes and Pederson completed the barring and scaling to their satisfaction and were in the process of setting posts, when rocks suddenly broke loose from the face of the drift. Pederson was crushed to death by the rocks. An inspector from the Mine Safety and Health Administration (MSHA) investigated the area and issued an imminent danger withdrawal order under section 107(a) of the Act.

The administrative law judge found the operation to be a mine subject to the jurisdiction of MSHA under the Act. The judge concluded that the work at the Bosal No. 1 claim "was in fact work normally associated with a talc mining operation." Dec. at 13. He stated:

> Mr. Holmes was driving a drift at the time of the accident and this work included blasting, drilling, cutting, removal and cleaning of materials, timbering, bulldozing overburden, barring and scaling of loose rock, and attempts at establishing a brow and a portal for the express purpose of extracting minerals.... Further, applicant

> conceded the existence of a mineable ore body and that Mr. Holmes' work was directly related to the eventual mining of that ore; and, by the very terms of the contract ... Mr. Holmes agreed to establish a portal and to drive an exploration drift. Under these circumstances, I conclude and find that Mr. Holmes' work at the time of the accident were in fact mining activities within the meaning of the Act, that the work being performed at the Bosal Claim was work at a "mine" as defined by the Act, and that MSHA had enforcement jurisdiction to regulate those activities through the applicable mandatory safety standards promulgated under the Act.

Id. The judge affirmed the withdrawal order and dismissed the application for review. For the reasons that follow, we affirm the judge.

The legislative history of the Act mandates a broad reading of the expansive definition of "mine" in the Act. 1/ The Senate Committee that drafted the bill including the definition adopted in the Act stated with regard to that definition:

> The Committee notes that there may be a need to resolve jurisdictional conflicts, but 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 possibl[e] interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

S. Rep. No. 95-181, 95th Cong., 1st Sess. 14 (1977), reprinted in Senate Subcommittee on Labor,Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 602 (1978). See also Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589, 592 (3rd Cir. 1979), cert. denied, 444 U.S. 1015 (1980). In addition, it is well established that safety and health legislation should be liberally construed. See, e.g., Whirlpool. Corp. v. Marshall, ___ U.S. ___, 100 S. Ct. 883, 891 (1980)(OSHAct); Freeman Coal Mining Co. v. Interior Dept. Board of Mine Operations Appeals, 504 F.2d 741, 744 (7th Cir. 1974) (1969 Coal Act).

1/ The definition of a mine is found in section 3(h)(1) of the Act:

> "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 if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities....

The purpose of the Mine Act is to protect miners against the hazards of their occupation as Congress indicated in section 2(a)-(c) of the Act. Those hazards clearly were present in this case, and the activity at the Bosal claim must be included in the jurisdiction of the Act. CIM has argued that the Bosal operations were purely exploratory and, therefore, are not mining. It fears that "virtually any action taken merely to assess the ore body, even if only the taking of surface samples or use of a geiger counter, could convert an undeveloped mining claim into a 'mine' under the Act." This case involves, however, neither exploration with a geiger counter, nor taking of surface samples. Holmes and Pederson attempted to drive a drift and establish a portal at the Bosal claim. Their work was mining activity and involved the hazards intended to be protected by the Act. Whether or not the Mine Act reaches all activity labeled "exploratory" -- a question we need not decide today -- the activity at the Bosal claim falls within the definition of mining. The Act provides an expansive definition of a "mine", which Congress stated must be given the "broadest possible interpretation", with "doubts resolved in favor of inclusion." 2/

Accordingly, the judge's decision is affirmed.

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

2/ CIM also asserts that the judge erred in finding that the activity at the Bosal claim was work normally associated with talc mining. CIM relies on the uncontradicted testimony of its production manager that CIM generally mines talc in open pits rather than from portals and drifts. It is true that the record does not contain information on "normal talc mining operations." The judge's error, if any, is harmless. The question in the case was whether the operation was mining, not whether it was "normal talc mining."

CYPRUS INDUSTRIAL MINERALS CORP.
DENV 78-558-M

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