CCASE:
DILIP K. PAUL V. P.B. - K.B.B.
DDATE:
19851121
TTEXT:

FMSHRC-WDC
NOV 21, 1985

DILIP K. PAUL

v. Docket No. CENT 83-42-DM

P.B. - K.B.B., INC.

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This case is before us on interlocutory review. It involves a complaint of discrimination filed by Dilip Kumar Paul against P.B. - K.B.B., Inc. ("PB-KBB"). The complaint alleges that PB-KBB discharged Paul, a mining engineer, in violation of section 105(c) of the Federal Mins Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982)("Mine Act"), because Paul reported to PB-KBB that a preliminary, exploratory shaft design violated certain mandatory ventilation standards for underground nonmetal mines. PB=KBB filed a motion to dismiss Paul's complaint for lack of jurisdiction. A Commission administrative law judge denied the motion and held that PB-KBB's Houston, Texas office was a "mine" within the meaning of section 3(h)(1)(C) of the Mine Act, and that Paul was a "miner" within the meaning of section 3(g) of the Act because he worked in the Houston office. 1/ Order Denying Respondent's Motion to

1/ Section 3(h)(1), 30 U.S.C. $ 802(h)(1), defines "coal or other mine" as:

> (A) an area of land from which minerals are extracted in modified 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,

(footnote 1 continued)

Dismiss (April 24, 1984) (unpublished). For the following reasons, we find that the judge erred in concluding that Paul is a miner and has standing to sue under the Mine Act, and we dismiss the complaint of discrimination.

PB-KBB, Inc. is a joint venture between two engineering firms -- Parsons, Brikerhoff, Quade and Douglas of New York and Kavernen Bau-Und Betriebs - Gambh of West Germany. In 1981, the United States government, through the Department of Energy ("Department"), undertook an experimental program for the underground storage of toxic waste, particularly nuclear waste. The Department hired the Battelle Corporation of Columbus, Ohio to be the government's agent to oversee this program. After receiving the contract from the Department, Battelle set about soliciting bids for a project known as the Exploratory Shaft Facility. This project entails the planning, construction, and the experimental operation of a shaft and tunnels in salt formations for the long term storage of nuclear waste.

In order to respond to Battelle's bid request, PB-KBB entered into another joint venture with Parsons, Brinkerhoff, Quade and Douglas. 2/ PB-KBB bid on and won the right to plan and design the Exploratory Shaft Facility. The contract between PB-KBB and Battelle calls upon PB-KBB to furnish all qualified personnel, equipment and materials necessary to implement the contract. The contract requires PB-KBB to provide professional engineering services to prepare designs for the construction of an experimental storage facility, as well as to provide managerial, administrative, and other services to support the design activities. The contract prohibits PB-KBB from engaging in any construction or supervision of the construction of any shaft and tunnels that may ultimately be sunk.

Paul was a mining engineer with 22 years experience. He was hired by PB-KBB on May 11, 1981. On June 18, 1982, he was assigned to work on

Footnote 1 end

> 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.

Section 3(g) of the Mine Act, 30 U.S.C. $ 802(g), defines a "miner" as "any individual working in a coal or other mine."

2/ This second joint venture is also named PB-KBB, Inc. It is the respondent in this proceeding.

the Exploratory Shaft Facility project. The work was done at PB-KBB's Houston office. During the course of this assignment Paul performed a study in connection with the creation of a ventilation plan for the proposed shaft. While performing the study, Paul consulted the mandatory safety and health standards for underground metal and nonmetal mines promulgated by the Secretary of Labor through the Mine Safety and Health Administration ("MSHA"). 30 C.F.R. Part 57. Paul became concerned that the shaft, as designed, could not comply with a number of ventilation standards. He reported his concerns to his supervisors orally and in writing. As a result of these reports, Paul was discharged on July 29, 1982. After his discharge, Paul was rehired and assigned to work on other projects. On August 6, 1982, Paul wrote a memorandum to his supervisors concerning his view of the Exploratory Shaft Facility project's noncompliance with the MSHA ventilation standards. On August 16, 1982, he was discharged again.

After Paul was discharged the second time, he filed a complaint of discrimination with the Secretary of Labor ("Secretary") claiming that he was fired because of his safety complaints in contravention of section 105(c)(1) of the Mine Act. 3/ The Secretary investigated Paul's complaint and concluded that Paul's discharge did not violate section 105(c)(1). The Secretary notified Paul of his determination but advised Paul that Paul could bring a complaint of discrimination on his own behalf before the Commission. Thereafter, pursuant to section 105(c)(3) of the Mine

3/ Section 105(c)(1), 30 U.S.C. $ 815(c)(1), provides:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any ... mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, ... or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this

Act.

Act Paul initiated this action. 4/ PB-KBB then filed its motion to dismiss for lack of subject matter jurisdiction and following the judge's denial of that motion this matter came before us.

In denying PB-KBB's motion, the judge found that the office where Paul worked and where the alleged protected activity occurred was "a 'facility: that contained 'other property' ... including 'equipment, machines, tools' and other scientific devices and data common to the practice of the profession of civil engineering," and that "this 'facility' and 'other property' ... were 'to be used' and, in fact 'were used' by [Paul] and other mining engineers ... to produce an engineering design ... that 'was to be used in the work of extracting minerals from their natural deposits.'" The judge concluded therefore that PB-KBB's Houston office was a mine within the literal meaning of section 3(h)(1)(C) of the Mine Act and that because Paul met the statutory definition of a miner, i.e., "any individual working in a coal or other mine," he was entitled to maintain the action.

While we have recognized that the definition of "coal or other mine" provided in section 3(h) of the Mine Act is expansive and is to be interpreted broadly, Oliver M. Elam, 4 FMSHRC 5, 6 (January 1982), the inclusive nature of the Act's coverage is not without bounds. Accordingly, given the facts in this case we conclude that PB-KBB's Houston office during the period relevant to Paul's complaint was not a "mine".

It may well be, as our concurring colleague suggests, that the exploratory shaft being designed would, even when completed, not fall within the Mine Act's definition of a mine. We are not prepared to premise our reasoning here on that conclusion, particularly because a more fundamental and immediate reason requires us to reach the conclusion that no mine, as defined by the Act, was in existence at the time of Paul's discharge. Put most simply - no mine, no miner, no Mine Act coverage.

In this regard, PB-KBB's Houston office contained equipment and other property which was used in producing only a preliminary engineering design for the construction of a shaft and tunnels for storing nuclear waste. The design never left the drawing board. It was never implemented.

4/ Section 105(c)(3), 30 U.S.C. $ 815(c), provides in part:

> Within 90 days of the receipt of a complaint ... the Secretary shall notify, in writing, the miner, applicant for

employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this sub-section have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission....

Indeed, a site at which to construct the shaft was not selected, and even if a site had been chosen, PB-KBB was barred by contract from participating in construction of the facility. Moreover, the work of Paul in drafting a preliminary engineering design for the experimental nuclear storage facility clearly is not the type of activity that Congress intended to be regulated by the Mine Act. See Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 (1978) ("Legis. Hist.") at 1316.

In sum, the facilities and equipment of the subject engineering firm designing a storage facility for nuclear waste are not entities "in use in connection with mining activities." Legis. Hist., id. The design work that was performed by Paul at PB-KBB's Houston office on an exploratory project is simply too far removed from what reasonably can be regarded as mining activity in order to qualify for Mine Act coverage.

Accordingly, we hold that Paul was not working in a "mine" as that word is defined in section 3(h)(1) and, consequently, that he was not a "miner" as that word is defined by section 3(g) of the Mine Act. Paul's discrimination complaint fails for lack of jurisdiction. The judge's decision is reversed and the complaint is dismissed. 5/

Richard V. Backley, Acting Chairman

L. Clair Nelson, Commissioner

5/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. $ 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

Lastowka, Commissioner, concurring:

I agree with my colleagues that the judge erred in denying respondent's motion to dismiss. I believe, however, that they try by basing their dismissal on too broad a basis. I would limit dismissal to the most narrow, fundamental ground available and leave for a case in which it is squarely raised consideration of the novel question that they prematurely address.

If I read my colleagues' opinion correctly, they are not as concerned with the type of facility being designed as they are with the fact that the facility was in the "design stage." My emphasis is precisely the opposite and I need only quote from complainant Paul's brief to demonstrate why he has no claim under the Mine Act. He states:

> These exploratory shafts were designed for the immediate purpose of allowing scientific tests of the suitability of salt deposits as a medium for storage of highly radioactive nuclear waste, with the ultimate purpose being utilization as a repository for such waste. The exploratory shafts were to be from 2200 feet to 3000 feet in depth, with tunnels and various underground workshops. Following the testing phase, the selected site was to be enlarged by the extraction of five million cubic feet of salt over a period of several years. The extracted mineral might be stored or sold, as there are no legal prohibitions against the government selling its salt.

Following enlargement, the repository would begin to receive the nuclear waste, utilizing underground workers for handling and storage functions, for approximately twenty five years or for so long as there was a capability or a need to store such material.

Complainant's Brief on Interlocutory Review at 3.

Does the foregoing passage describe a "mine"? The administrative law judge believed so because complainant was working to produce a design that "was to be used in the work of extracting minerals from their natural deposits." Order of Administrative Law Judge at 4. Under this same rationale, however, every construction project involving excavation of minerals from the earth, be it construction of downtown office buildings, subways, or tunnels would constitute "mining" subject to the Mine Act and persons designing such projects

would be "miners". Needless to say, in enacting the Mine Act Congress evidenced no intent to regulate these types of construction activities.

In order to avoid unintended results that can flow from a literal reading of the Mine Act's broad definition of "mine," the Commission previously has recognized that "inherent in the determination of whether an operation properly is classified as mining is an inquiry not only into whether the operation performs one or more of the listed work activities, but also into the nature of the operation performing such activities." Oliver M. Elam, Jr. Co., 4 FMSHRC 5, 7 (January 1982) (emphasis in original). Compare Elam with Alexander Bros., Inc., 4 FMSHRC 541 (April 1982).

An examination of the nature of the operation described by complainant, i.e., the construction of a nuclear waste storage facility for the U.S. Department of Energy, compels the conclusion that a "mine" within the meaning of the Mine Act is not and will not be present. It may very well be that various types of underground excavation and tunneling projects pose safety concerns similar to those encountered in underground mining. For this reason safe engineering and design practice would dictate consideration of pertinent federal mine safety and health regulations. In fact, this was required by the contract under which complainant was working. Nevertheless, the mandatory federal safety standards governing such underground construction activities most likely would be those promulgated pursuant to the more broadly applicable Occupational Safety and Health Act of 1970, 29 U.S.C. $ 651 et seq., rather than the Mine Act. See, e.g., 29 C.F.R. Subpart S, $ 1926.800, Tunnels and shafts.

Because the project on which complainant was performing design work would not, when and if brought to fruition, be subject to the Mine Act, on that basis alone I rest my conclusion that Paul's complaint under the Mine Act must be dismissed. As my colleagues state, "no mine, no miner, no Mine Act coverage." Slip. op. at 4.

Having stated the basis of my conclusion, I will briefly explain why I am troubled by that of my colleagues. They apparently attach controlling weight to the fact that the project at issue was in only a preliminary design stage with no actual construction having yet been undertaken. 1/ It may very well be that because at such a preliminary

1/ This consideration apparently also was controlling in the view of MSHA. In advising complainant of its refusal to investigate his complaint, it was explained:

> .... MSHA has no authority in this case to regulate the design stage of facility construction.

> MSHA's regulatory authority with respect to the planned exploratory shafts would commence, if at all, with actual physical construction. Accordingly, even if the firm did order you to design a facility or structure in such a way that the facility or structure would not comply with MSHA standards, this does not constitute a violation of those standards or the Mine Act.

Letter from Associate Solicitor for Mine Safety and Health to complainant, November 24, 1982.

stage the products or operations of a mine are not yet entering or affecting commerce, the minimal jurisdictional threshold set forth in Section 4 of the Mine Act could not be met. 30 U.S.C. $ 803. There are, however, several well-established countervailing considerations to be weighed: the avowed remedial purpose of the Mine Act; the mandate that section 105(c)'s protections against retaliation for safety-related activities be broadly construed; and the fact that section 105(c)'s proscriptions apply to "persons", not just "operators". Given these considerations, I am not willing, before any factual investigation by the Secretary of Labor or hearing before the Commission, to rule out the possibility that a cause of action may arise under the Mine Act when a person alleges that he has voiced safety concerns over the design of a structure or facility to be used in mining and further alleges that he has been retaliated against simply because those safety concerns were raised. That issue warrants further consideration in an appropriate case.

James A. Lastowka
Commissioner

~1792
Distribution

Anson D. Phipps, Esq., for PB-KBB, Inc.
Attorney at Law
3200 Marquart Street
Houston, Texas 77027

Robert M. Wood, Esq., for Dilip Paul
Attorney at Law
1310 Trailwood Village Drive
Kingwood, Texas 77339

Mr. Paul Boulon
PB=KBB, Inc.
11767 Katy Freeway, Suite 810
P.0. Box 19672
Houston, Texas 77224

Administrative Law Judge Joseph Kennedy
Federal Mine Safety and Health Review Commission
5203 Leesburg Pike, lOth Floor
Falls Church, Virginia 22041