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J. IKE HARLESS TOWING V. SOL (MSHA)
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

JERRY IKE HARLESS TOWING, INC.	:	
and HARLESS, INC.	:	
	:	
v.	:	Docket No. CENT 92-276-RM
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

BEFORE: Holen, Chairman; Backley and Doyle, Commissioners(Footnote 1)

DECISION

BY THE COMMISSION:

This contest proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)("Mine Act" or "Act") presents the issue of whether the sand-dredging operation of Jerry Ike Harless Towing, Inc. ("Harless Towing") is subject to the jurisdiction of the Mine Act. Following an evidentiary hearing, Administrative Law Judge Jerold Feldman determined that Harless Towing's dredging operation is subject to Mine Act jurisdiction. 15 FMSHRC 1052 (June 1993). For the reasons that follow, we affirm the judge's decision.

I.

Factual and Procedural Background

On May 12, 1992, Inspectors John Ramirez and Steve Montgomery of the Department of Labor's Mine Safety and Health Administration ("MSHA") visited the main office of Jerry Ike Harless Towing, Inc. ("Harless Towing") and Harless Inc., in Lake Charles, Louisiana. They spoke with Mr. Harless, the chief executive officer of Harless, Inc. and Harless Towing, about the Mine Act's requirement that all mines file a legal identity report with MSHA.(Footnote 2)

1 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.

2 Section 109(d) of the Mine Act provides, in pertinent part:

Each operator of a coal or other mine subject to this Act shall file with the Secretary the name and

Mr. Harless stated that Harless Towing did not operate a mine and questioned MSHA's jurisdiction. Nevertheless, Mr. Harless permitted the MSHA inspectors to inspect Harless Towing's dredging operation on the Calcasieu River. They found no violations of MSHA's safety and health standards. Mr. Harless refused to complete the MSHA legal identity form and on May 19, Inspector Ramirez issued a citation,(Footnote 3) alleging a violation of 30 C.F.R. 56.1000.(Footnote 4)

Harless Towing employs from four to eight workers and dredges sand from a designated section of the Calcasieu River, a navigable waterway, pursuant to an Army Corps of Engineers permit. It has been extracting sand from the river bed four to six months a year for about 30 years, apparently without inspection by MSHA.

Harless Towing dredges the sand using a vessel containing dredging machinery, with several barges in tow. The dredge hydraulically suctions sand, sediment and water from the river bottom through a piping system that directs the material onto a screen barge. On that barge, the material is pumped through a 7 inch mesh screen that removes debris. From the screen barge, the sand and water are pumped through a flume to another barge, the heart barge, where the sand and water are separated.

The heart barge is towed to one of two off-loading terminals, owned by Harless, Inc. The sand is removed by Harless, Inc. and stockpiled. Harless, Inc. sells the sand to customers, including large industrial operations. The river sand is used primarily for fill under foundations and for various
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address of such mine and the name and address of the person who controls or operates the mine.

30 U.S.C. 819(d).

3 The citation was issued to Harless, Inc. rather than Harless Towing because the MSHA inspector was not aware of the two corporate entities. 15 FMSHRC at 1052 n.1. At the hearing, the judge ruled that Harless Towing was subject to the jurisdiction of the Mine Act but that Harless, Inc. was not. Id. at 1058-59 & n.8. No objection was raised at the hearing and this issue is not before the Commission on review.

4 Section 56.1000 states, in pertinent part:

The owner, operator, or person in charge of any metal and nonmetal mine shall notify the nearest Mine Safety and Health Administration and Metal and Nonmetal Mine Safety and Health Subdistrict Office before starting operations, of the approximate or actual date mine operation will commence. The notification shall include the mine name, location, the company name, mailing address, person in charge, and whether the operations will be continuous or intermittent.

industrial applications. Harless, Inc. also sells limestone aggregate, gravel, and other types of sand, all of which it purchases from other suppliers.

The judge determined that Harless Towing is engaged in commerce as that term is used in section 4 of the Mine Act.(Footnote 5) 15 FMSHRC at 1056. He concluded that, by dredging in the navigable waters of the United States under permit of the U.S. Corps of Army Engineers, Harless Towing engaged in commerce. Id. In addition, he found that, when the sand produced by Harless Towing is sold, commerce is affected. Id.

Relying on Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589 (3d Cir. 1979), cert. denied, 444 U.S. 1015 (1980),(Footnote 6) the judge also concluded that Harless Towing's extraction and preparation of sand are included within the Mine Act's definition of "coal or other mine" in section 3(h)(1). 15 FMSHRC at 1058. He rejected Harless Towing's argument that sand is not a mineral as well as their alternative argument that the sand is extracted in liquid form without the use of underground workers. Id. The judge dismissed Harless Towing's contest of the citation and the Commission granted its petition for discretionary review.

II.

Disposition

A. Effect on Commerce

Harless Towing argues that its facilities are not subject to Mine Act jurisdiction because it is not engaged in commerce, as that term is defined in section 3(b) of the Act.(Footnote 7) It maintains that all the sand it produces is sold

5 Section 4 of the Mine Act states:

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.

30 U.S.C. 803.

6 In Stoudt's Ferry, the court held that a business that processes and sells sand and gravel from material that has previously been dredged from a river operates a mine under the Mine Act.

7 Section 3(b) of the Mine Act states:

"commerce" means 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

in Louisiana and does not affect interstate commerce. The Secretary contends that, because Harless Towing operates a sand-dredging operation on a navigable waterway, he has jurisdiction over its operation under section 4 of the Mine Act. The Secretary further maintains that it has long been established that Congress has authority to regulate dredging activities in beds of navigable waters.

The Commerce Clause of the Constitution has been broadly construed for over 50 years. Commercial activity that is purely intrastate in character may be regulated by Congress under the Commerce Clause, where the activity, combined with like conduct by others similarly situated, affects commerce among the states. *Fry v. United States*, 421 U.S. 542, 547 (1975); *Wickard v. Filburn*, 317 U.S. 111 (1942)(growing wheat solely for consumption on the farm on which it is grown affects interstate commerce). Congress intended to exercise its authority to regulate interstate commerce to the "maximum extent feasible" when it enacted section 4 of the Mine Act. *Marshall v. Kraynak*, 604 F.2d 231, 232 (3d Cir. 1979), cert. denied 444 U.S. 1014 (1980); *United States v. Lake*, 985 F.2d 265, 267-69 (6th Cir. 1993). In *Lake*, the mine operator sold all its coal locally and purchased mining supplies from a local dealer. 985 F.2d at 269. Nevertheless, the court held that the operator was engaged in interstate commerce because "such small scale efforts, when combined with others, could influence interstate coal pricing and demand." *Id.*

The judge correctly determined that Harless Towing's sand-dredging operation affects interstate commerce. Because Congress, in the Mine Act, intended to exercise the full reach of its authority under the Commerce Clause, the Secretary has a minimal burden to show that Harless Towing's operations or products affect interstate commerce. It dredges sand from a navigable waterway of the United States. In addition, the sand produced by Harless Towing is sold to corporations that operate in more than one state, such as Gulf States Utilities, Pittsburgh Plate Glass Co. and Occidental Petroleum. 15 FMSHRC at 1056. The sand is transported on public highways and waterways and is used in manufactured products, such as glass, that are sold outside Louisiana. *Id.* Thus, Harless Towing's products enter interstate commerce. The sale of its sand by Harless, Inc., does not change that. As a consequence, Harless Towing's sand-dredging operation affects commerce as that term is used in the Mine Act.

B. Definition of "coal or other mine"

Harless Towing argues that its operation is not a mine, as that term is defined in section 3(h)(1) of the Act, because it is not "an area of land from which minerals are extracted in nonliquid form." Harless Towing maintains that a floating dredge that suctions sand from a river is not a mine, since the operation takes place, not on an area of land, but on a river and since its extraction of liquid minerals does not employ workers underground.

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a possession of the United States, or between points in the same State but through a point outside thereof.

Finally, it argues that the judge's reliance on Stout's Ferry is misplaced because that case dealt with the processing of coal and other material after it had been dredged from a river and did not address whether the dredging of sand is subject to Mine Act jurisdiction. The Secretary argues that Harless Towing operates a mine because its sand-dredging facilities consist of "structures, facilities, equipment, machines [and] tools" that are "used in ... the work of extracting [such] minerals from their natural deposits." S. Br. 11 quoting Section 3(h)(1).

The term "coal or other mine" is defined broadly in the Mine Act.(Footnote 8) The definition is not limited to an area of land from which minerals are extracted, but also includes facilities, equipment, machines, tools and other property used in the extraction of minerals from their natural deposits and in the milling or preparation of the minerals. See, e.g., *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547 (D.C. Cir. 1984); *Oliver M. Elam, Jr. Co.*, 4 FMSHRC 5 (January 1982). In determining coverage, we must give effect to Congress' clear intention in the Mine Act, discerned from "text, structure, and legislature history." *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989). Congress determined to regulate all mining activity. The Senate Committee stated that "what is considered to be a mine and to be regulated under this Act [shall] be given the broadest possibl[e] interpretation, and ... doubts [shall] be resolved in favor of inclusion of a facility within the coverage of the Act." S. Rep. No. 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).

This broad interpretation has been adopted by the courts. See, e.g., *Carolina Stalite Co.*, 734 F.2d at 1554. The definition of "coal or other mine" has been applied to a broad variety of facilities that are not "an area of land from which minerals are extracted." See, e.g., *Harman Mining Corp. v. FMSHRC*, 671 F.2d 794 (4th Cir. 1981)(operator loaded previously extracted and prepared coal onto railroad cars for transportation); *Stoudt's Ferry*, 602 F.2d 589 (3d Cir. 1979)(operator separated sand and gravel from material that had been dredged from a river by the Commonwealth of Pennsylvania); *Carolina Stalite*, 734 F.2d 1547 (D.C. Cir. 1984)(operator heated previously mined slate

8 Section 3(h)(1) states, in pertinent part:

"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, ... and (C) ... 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 form, or if in liquid form, with workers underground....

30 U.S.C. 802(h)(1).

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in a rotary kiln to create a light-weight material used in making concrete blocks).

Harless Towing extracts sand, a mineral, from its natural deposit. The fact that Harless Towing's sand is transported in a slurry from a river does not make the sand a liquid mineral. We conclude that Harless Towing's sand-dredging facilities are covered by the Mine Act.

III.

Conclusion

For the foregoing reasons, we affirm the judge's decision.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner