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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
1730 K STREET NW, 6TH FLOOR  
WASHINGTON, D.C. 20006

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
v. : Docket Nos. YORK 92-106-M  
W.J. BOKUS INDUSTRIES, INC. : YORK 92-107-M

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

DECISION

BY THE COMMISSION:

This civil penalty proceeding against W.J. Bokus Industries, Inc. ("Bokus Industries") arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)("Mine Act" or "Act"). The issue is whether equipment in a garage used by both the operator's sand and gravel mine and an asphalt plant was subject to Mine Act jurisdiction. Administrative Law Judge Avram Weisberger vacated a citation and orders issued to Bokus Industries by the Department of Labor's Mine Safety and Health Administration ("MSHA") because, in the judge's view, the Secretary of Labor had not established Mine Act jurisdiction over the cited equipment. 15 FMSHRC 1321 (July 1993)(ALJ). The Commission granted the Secretary's petition for discretionary review. We reverse and remand.

I.

Factual and Procedural Background

William Bokus ("Bokus"), the president and owner of Bokus Industries, owns a 63-acre tract of land in Warren County, New York, which is divided by a stream. Bokus Industries operates a sand and gravel mine on the west side of the stream. On the east side of the stream is an asphalt plant, leased to Palette Stone Corporation ("Palette Stone") by High Peaks Asphalt, Inc. ("High Peaks"), another entity owned by Bokus.

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1 Commissioner Nelson participated in the consideration of the case. He passed away before the decision was issued. 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.

Until 1990, off-site mines supplied the asphalt plant with "aggregate," the raw material composed of sand and gravel used to make asphalt. In that year, Bokus Industries' sand and gravel mine began supplying High Peaks with aggregate. A screen on the east side of the property separates the gravel by size and the material is then crushed in a secondary, non-permanent crusher. 15 FMSHRC at 1322; Tr. 185-88.

High Peaks also owns and leases to Palette Stone a maintenance and storage garage adjacent to the asphalt plant. The garage is used primarily for the support of the asphalt plant. 15 FMSHRC at 1322; Tr. 133. Under its lease with High Peaks, Palette Stone has joint use of the garage with Bokus Industries. B. Post-hearing Br. at 2. Employees of both entities use the garage to store, repair and maintain equipment used in both operations. 15 FMSHRC at 1324; Tr. 108-15, 194-97. Crushing and screening equipment for the sand and gravel operation is also fabricated there. Tr. 196-97. Next to the garage is an office staffed by a Bokus Industries employee. Truck drivers transporting raw material from the mine weigh their trucks at a scale and report the weight at the adjacent office. 15 FMSHRC at 1323; Tr. 215-16.

On October 22, 1991, MSHA Inspector Randall Gadway conducted a regular inspection of the mining operation and issued a number of withdrawal orders pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. 814(d)(1). (Footnote 2) He also inspected the garage, where a miner employed by Bokus Industries and a Palette Stone employee were working. The inspector observed seven unsecured compressed gas cylinders and issued a section 104(d)(1) order to Bokus Industries alleging a significant and substantial ("S&S") violation of 30 C.F.R. 56.16005 caused by its unwarrantable failure to comply with the standard. (Footnote 3) Two of the cylinders were without valve covers and the inspector issued another section 104(d)(1) order alleging a violation of 30 C.F.R. 56.16006. (Footnote 4) A third section 104(d)(1) order alleging a violation of 30 C.F.R. 56.14115 was issued because the peripheral hood and tool rest had

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2 Pursuant to a 1979 interagency memorandum of understanding between MSHA and the Occupational Safety and Health Administration ("OSHA"), the sand and gravel facilities are inspected by MSHA and the asphalt plant is inspected by OSHA. 44 Fed. Reg. 22827, 22829-30 (April 17, 1979); see Tr. 13, 293-94.

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Section 56.16005 provides: "Compressed and liquid gas cylinders shall be secured in a safe manner."

The S&S and unwarrantable failure terminology, taken from section 104(d)(1) of the Act, are special findings referring to more serious types of violations.

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Section 56.16006 provides: "Valves on compressed gas cylinders shall be protected by covers when being transported or stored, and by a safe location when the cylinders are in use."

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been removed from a grinder.(Footnote 5) The inspector also issued an imminent danger order pursuant to section 107 of the Act, 30 U.S.C. 817, with an accompanying citation, alleging a violation of 30 C.F.R. 56.12030 because a wire leading to a fan mounted on a wood stove was exposed.(Footnote 6) During the same inspection and on a return visit the next day, the inspector issued further withdrawal orders and a citation alleging a defective loader and a hole three feet deep near the walkway between the office and the scales. See 15 FMSHRC at 1325-30.

The Secretary proposed civil penalties against Bokus Industries for the alleged violations. Bokus Industries contested the proposals and the matter was heard by Judge Weisberger.

The judge concluded that the Secretary had failed to establish that the cited cylinders, grinder, and stove fan were subject to Mine Act jurisdiction. Referencing the definition of "mine" in section 3(h)(1) of the Act, the judge reasoned that "structures, facilities, machines, tools, or equipment are considered a mine ... only if they are used in ... the extraction, milling, or preparation of minerals." 15 FMSHRC at 1323-24.(Footnote 7) The judge stated that,

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A grinding machine is used for sharpening tools. See Tr. 223-24. A peripheral hood encloses the grinding wheel to contain the wheel if it breaks apart. Tr. 218. A tool rest is a piece of metal placed in front of the grinding wheel to prevent objects from being drawn into the moving wheel. Tr. 219, 224.

Section 56.14115 provides:

Stationary grinding machines. . . shall be equipped with --

(a) Peripheral hoods capable of withstanding the force of a bursting wheel...;

(b) Adjustable tool rests set so that the distance between the grinding surface of the wheel and the tool rest [is] not greater than 1/8 inch....

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Section 56.12030 provides: "When a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized."

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7 In relevant part, section 3(h)(1) of the Act provides:

"[C]oal or other mine" means ... an area of land from which minerals are extracted in nonliquid form ..., and ... lands, ... 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 ..., or used in, or to be used in, the milling of such minerals, or the work of preparing ... minerals....

although it was "possible" that miners "might" use the cylinders or grinding machine, the Secretary had failed to establish that such use "was more likely than not." Id. at 1324.(Footnote 8) The judge also found insufficient evidence establishing Bokus Industries' ownership of the cylinders. Id. Accordingly, the judge vacated the citation and the four orders related to items in the garage. Id. at 1330. With respect to the loader and the hole near the walkway, he found that the loader and the office-scale area were integral to the mining operation and concluded that the operator had violated the cited standards. Id. at 1325-30.

II.

Disposition

On review, the Secretary contends that it is not necessary to establish jurisdiction over the individual pieces of equipment in the garage because the garage is subject to Mine Act jurisdiction as a "structure" or "facility" within the meaning of section 3(h)(1) of the Act.(Footnote 9) He reasons that, if a facility is a "mine" within the meaning of section 3(h)(1), then everything within it is subject to the Act under section 4.(Footnote 10) Alternatively, the Secretary argues that, even if he were required to establish jurisdiction over the individual items, he proved that they were used in mining. Bokus Industries did not file a brief on review.

Section 3(h)(1)(n.7 supra) broadly defines "mine" to include "equipment, machines, tools, or other property ... used in, or to be used in, ... the work of extracting ... minerals ... or ... the milling of such minerals, or the work of preparing ... minerals...." (Emphasis added.) The legislative history indicates that the Act's definition of "mine," although not without limits, is to be interpreted expansively. The Senate Committee largely responsible for drafting the Mine Act stated: "[W]hat is considered to be a mine and to be regulated under this Act [shall] be given the broadest possible interpretation, and ... doubts [shall] be resolved in favor of ... 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 ~~AAAAAAAAAAAAAAAAAAAA~~  
30 U.S.C. 802(h)(1).

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The judge did not expressly rule on whether the garage was a facility subject to Mine Act jurisdiction. The parties' arguments below addressed whether the cited equipment in the garage was subject to Mine Act jurisdiction. See 15 FMSHRC at 1323-24.

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The Secretary asserts that the judge "accepted that MSHA had jurisdiction over the garage." He infers that the judge would not have examined jurisdiction over items in the garage unless he assumed that MSHA had jurisdiction over the garage itself. S. Br. at 4 & n.7.

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10 Section 4 provides broadly that each mine involved in commerce, and each operator of, and miner in, such mine, is subject to the Act. 30 U.S.C.

Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 602 (1978). See also, e.g., *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1551-55 (D.C. Cir. 1984); *Cyprus Industrial Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1118 (9th Cir. 1981); *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589, 591-92 (3d Cir. 1979), cert. denied, 444 U.S. 1015 (1980). Moreover, such questions of statutory coverage must be resolved within the Act's overall purpose of protecting miners' safety and health. E.g., *Carolina Stalite*, 734 F.2d at 1553-55.

We reject the judge's analysis and his conclusion as a matter of law. The judge imposed upon the Secretary an inappropriate evidentiary burden by requiring that he prove it was "more likely than not" that miners would use the equipment in question. See 15 FMSHRC at 1324. Further, the judge's application of such a test is inconsistent with the protective purposes of the Act. Under section 3(h)(1), the Secretary need only establish that the items in issue were used or to be used in mining.

We find that the record supports the Secretary's assertion of Mine Act jurisdiction. It is undisputed that Bokus Industries miners worked in the garage on mining-related tasks. The gas cylinders in the garage were essentially indistinguishable. Bokus Industries owned some of them and its miners used any available cylinder to perform their work. See Tr. 59-61, 67-69, 77-81, 195. The judge based his determination, in part, on insufficient evidence of ownership of the cylinders. 15 FMSHRC at 1324. However, the record reflects that formality of title to the cylinders was not observed. We also note the inspector's testimony that a defective cylinder could become a "missile" striking anyone in the garage. See, e.g., Tr. 23-24, 211. The evidence thus shows that all the cylinders were used or to be used in mining and that, irrespective of ownership, the cited conditions could affect miners in the garage.

The grinder and the exposed wire on the stove fan present similar considerations. The grinder was so situated that it was used or to be used in maintaining mining equipment. Further, the grinder's cited defect could injure miners working in the garage. Likewise, the stove warmed the garage where miners worked and, thus, is an item of equipment used or to be used in mining. The exposed fan wire could also injure miners working in the garage.

Accordingly, we reverse the judge's determination as to Mine Act jurisdiction. Our conclusions harmonize with the judge's other findings that a loader and a walkway between the scales and the office were properly subject to Mine Act jurisdiction. See 15 FMSHRC at 1325, 1327. Given the basis of our disposition, we need not reach the issue raised by the Secretary, that the garage was a "structure" or "facility" used in mining and, therefore, a "mine" within the meaning of section 3(h)(1) of the Mine Act.

III.

Conclusion

For the reasons discussed above, we reverse and vacate the judge's determination as to jurisdiction. We remand for resolution of the remaining issues as to the merits of the citation and orders in question, special findings and appropriate penalties for violations found.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner