

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 6, 2014

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

v.

BOWMAN CONSTRUCTION CO. INC.,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2011-1056-M
A.C. No. 21-02393-263615

Mine: Rainier Quarry

DECISION

Appearances: Suzanne F. Dunne, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois; Dan L. Venier, Conference and Litigation Representative, Mine Safety and Health Administration, U.S. Department of Labor, Duluth, Minnesota, for Petitioner; Deborah Bowman, Bowman Construction Company, International Falls, Minnesota for Respondent

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Bowman Construction Co., Inc., (“Bowman Construction” or “Respondent”) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Act” or “Mine Act”). The parties introduced testimony and documentary evidence at a hearing held in Duluth, Minnesota. In lieu of filing post-hearing briefs, the parties presented closing argument at the hearing.

Though primarily engaged in the construction industry, Bowman Construction owns and operates the Rainier Quarry (“Quarry”) on its 500 acre property in International Falls, Minnesota (the “Property”). (Tr. 45). Most of the activity at the Property relates to Respondent’s construction business. At the Quarry, Bowman Construction engages in drilling, blasting, and processing aggregate with a crusher, a wash plant, and various screening devices. (Tr. 21). Bowman Construction contested the three citations at issue in this case because it does not believe that MSHA had jurisdiction over the areas cited.

I. THE CITATIONS

On June 13, 2011, MSHA Inspector John Koivisto inspected the Property. He was accompanied by Darwin Johnson, a foreman at the Property. Deborah Bowman, the office manager for Bowman Construction, testified that Bowman Construction has existed for 75 years. MSHA typically inspects the Quarry once each year and Ms. Bowman testified that, until the

present inspection, MSHA only inspected areas in and around the Quarry. She contends that the inspector strayed into areas of the Property that are not subject to MSHA jurisdiction.

Inspector Koivisto issued Citation Nos. 6560616 and 6560617 for conditions he discovered upon a Maxx Super 512 trommel. One citation alleges that guarding was required on both sides of a tail pulley on the trommel and the other alleges that the back side of the trommel was not posted to warn people that they could be hit by falling material. (Exs. G-1, G-5). Citation No. 6560618 was issued for a tripping hazard in a shed. (Ex. G-9). Bowman Construction is not contesting the conditions described in the citations or the inspector's determinations as to gravity and negligence. The Secretary proposed a penalty of \$100.00 for each citation. For the reasons discussed below, I find that the trommel was subject to MSHA jurisdiction at the time of the inspection but the Secretary did not establish that MSHA had jurisdiction over the shed.

II. BASIC LEGAL PRINCIPLES

Section 4 of the Mine Act provides, in part, that "each coal or other mine . . . shall be subject to the provisions of this Act." 30 U.S.C. § 803. Section 3(h)(1) of the Act, in pertinent part, defines "coal or other mine" as:

(A) an area of land from which minerals are extracted . . . (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* . . . 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 . . . *used in or to be used in, the milling of such minerals, or the work of preparing coal or other minerals* In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

30 U.S.C. §802(h)(1) (emphasis added).

The Senate Committee that drafted the Mine Act noted: "What is considered to be a mine and to be regulated under this Act [shall] be given the broadest possible interpretation, and it is the intent of this committee that doubts be resolved in favor of inclusion of a facility within coverage of the Act." S. Rep. No. 95-181, at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative history of the Federal Mine Safety and Health Act of 1977* ("*Legis. Hist.*") at 602.

To further clarify questions of jurisdictional reach, the Secretary of Labor facilitated an interagency agreement ("*Interagency Agreement*") between MSHA and the Occupational Safety

and Health Administration (“OSHA”). 44 Fed. Reg. 22827 (April 17, 1979). This agreement also provides procedures to resolve general jurisdictional questions between the two agencies.

III. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citations issued at the Trommel

Bowman Construction owned and operated a Maxx Super 512 trommel. A trommel is a large, round, horizontal drum that turns as a short conveyor loads material into it. (Exs. G-6, R-3 at 3). The drum is a screen and the desired material falls through the screen onto a belt that transports the material onto a stack. Larger material is separated from the desired material and falls out of the open end of the drum. The trommel is typically used by Bowman Construction to process black dirt at other locations. When processing black dirt, the trommel is not subject to Mine Act jurisdiction because it is only removing roots and rocks from top soil. During the inspection, the trommel was on the Property but it was not located at or near the Quarry. (Exs. G-17, R-1).

Inspector Koivisto testified that he issued Citation No. 6560616, alleging a violation of section 56.14107(a), after noting that neither side of the 12” diameter self-cleaning tail pulley on the trommel was guarded. (Tr. 14-15). He issued Citation No. 6560617, alleging a violation of section 56.20011, after finding that a dangerous zone below the trommel screen was not properly barricaded, which allowed rocks to fall 15’ onto the ground below. (Tr. 24). Inspector Koivisto testified that he noted a round 4” rock that had fallen into the danger zone. (Tr. 24-26).

Inspector Koivisto testified that he could not cite the trommel if it was processing exclusively recycled material. (Tr. 17). He recognized that MSHA would only have jurisdiction over the trommel when it processes virgin material. (Tr. 17). When asked what the trommel processed the day of the inspection, Inspector Koivisto testified that Johnson described the material as “bank run” from offsite. Inspector Koivisto’s examination of the trommel led him to believe that the material fed into the trommel was pit run material, which afforded jurisdiction to MSHA. (Tr. 20-23, 26, 38, 74). Darwin Johnson told him that at least some of the sand the trommel discharged would be taken to the wash plant for further processing. (Tr. 17). Inspector Koivisto testified that MSHA has jurisdiction over wash plants. (Tr. 38-39). After examining the trommel and talking to Johnson, Inspector Koivisto determined that he had jurisdiction to issue the two citations.

Deborah Bowman emphasized that mining was a very small part of Respondent’s construction business, occupying only 5 acres of the 500 acre Property. (Tr. 41-42, 45). She further testified that Bowman Construction employs two miners, each for 120 days per year. (Tr. 82-83). She testified that the trommel exclusively processed recycled material and that the sand from the trommel was not taken to the wash plant. (Tr. 45-56, 61-62). On cross-examination, Bowman could not explain why Johnson described the material as “bank run” or why he told Inspector Koivisto that the wash plant would be processing the sand. (Tr. 63-65). Bowman also noted that she had no record of what the trommel processed that day. *Id.*

The Secretary argues that MSHA jurisdiction over the trommel is proper because the trommel processed virgin material and the sand exiting the trommel would be sent to the wash plant for further processing. The Secretary relies upon the conditions that the inspector observed as well as statements made by Johnson. The material being processed appeared to consist of the “crude crust of the earth” rather than recycled material and the material exiting the trommel was sand. (Interagency Agreement at Appendix A; Ex. G-6). Bowman Construction’s stockpile of recycled material was a considerable distance from the trommel. In addition, Johnston told the inspector that the pit run material was fed into the trommel and that at least some of the sand was to be taken to the wash plant.

Bowman Construction contests both of these points. It argues that the trommel is outside of MSHA jurisdiction because the trommel processed exclusively recycled material. (Tr. 47). The maps submitted by both parties and Inspector Koivisto’s statements all confirm that the trommel was not located near the Quarry. (Tr. 61-62; Exs. G-17, R-1). Bowman Construction also argued that the trommel was not processing material from the Quarry. Ms. Bowman testified that only angular basalt is found on the Property. (Tr. 44; G-7). The presence of a round rock, therefore, proves that the materials in the trommel came onto the Property from a construction site. (Tr. 46). Similarly, Respondent argued that its pit is not a natural source of sand, so the sand exiting the trommel originated elsewhere. (Tr. 44-46). Bowman explained the origin of these materials by noting that Respondent often recycles sidewalks and excess material from landscaping sites. (Tr. 45, 49). Bowman Construction did not provide specific details about what recyclable material was on the property that day. Finally, Respondent argues that it would not have had any reason to wash the sand produced by the trommel.

Discussion and Analysis

I find that the Secretary established that MSHA had jurisdiction to inspect the trommel. Section 3(h)(1) of the Mine Act defines a mine in broad terms. The Act asserts jurisdiction over the extraction process and also “milling” and “preparing” minerals. 30 U.S.C. § 802(h)(1). Although the Mine Act does not define “milling,” the Interagency Agreement defines it as: “the separation of one or more valuable desired constituents of the crude [crust of the earth] from the undesirable contaminants with which it is associated.” 44 Fed. Reg. at 22829. The term “crude” is defined to mean “any mixture of minerals in the form in which it occurs in the earth’s crust.” *Id.* Thus, MSHA jurisdiction exists, generally, when valuable minerals are separated from earthen material.

The Interagency Agreement also provides examples of milling procedures. Among many other processes, MSHA jurisdiction exists where minerals are “sized” (that is, separated into groups by size) or “washed” (that is, cleaned by flowing water). 44 Fed. Reg. at 22830.

Bowman Construction did not present evidence to establish that the trommel processed exclusively recycled material other than Ms. Bowman’s vague statement that Respondent often recycles material from construction sites. Indeed, she testified that the material that was being fed into the trommel came from the “ground” at an offsite location. (Tr. 46-47). It is irrelevant that the material did not originate in Bowman Construction’s Quarry. The evidence establishes that the material screened by the trommel was excavated from the crude crust of the earth. There

is no evidence to establish that the material being screened was recycled material from another source.¹

The evidence persuades me that Bowman Construction's trommel engaged in milling and sizing at the time of the inspection and was therefore subject to MSHA jurisdiction. As stated above, trommels are rotating cylindrical screens. When a loader or conveyor drops material onto the trommel, the sand sifts through the screen onto a conveyor below, while large rocks, roots, and other material remain captured by the screen. As defined by the Interagency Agreement, this process of separating constituents from a mixture of minerals from the earth's crust triggers MSHA jurisdiction.

In consideration of the foregoing, I **AFFIRM** Citation Nos. 6560616 and 6560617.

B. Citation issued at the Shed.

Bowman Construction also owned a small shed that was a considerable distance away from the Quarry. (Ex. R-2 at 1 and 2). According to Ms. Bowman, the shed stores equipment and supplies used in Respondent's construction business. The jurisdictional issue is whether miners entered the shed.

Inspector Koivisto testified that he issued Citation No. 6560618, alleging a violation of section 56.20003(a), for tripping hazards in what he called a "sign-out" shed located on the Property. (Tr. 28). He noted that the clear path inside the shed was only 16 inches wide and that a distracted employee could easily trip upon the items in the shed. (Tr. 29-31). Inspector Koivisto testified that Johnson told him that miners entered the shed every day to fill out their time sheets and get supplies. (Tr. 29-30). Although Inspector Koivisto recognized that he did not have jurisdiction over the construction employees, he issued the citation because "miners were entering" the shed. *Id.*

Bowman testified that she visited the shed many times and that no mining equipment or supplies are stored therein. (Tr. 59-61). Instead, she stated that the shed exclusively stores construction equipment, rendering it beyond the reach of MSHA jurisdiction. (Tr. 51-52). She testified that miners do not fill out any paperwork in the shed and noted that the shed is on the opposite side of the property from the Quarry. (Tr. 50-53, 59-61). She did not know why Johnson told the inspector that miners use the shed. (Tr. 69-71).

Discussion and Analysis

Inspector Koivisto testified that Johnson told him that miners fill out their time sheets or retrieve items from the shed daily. (Tr. 29-30). Bowman contradicted this testimony by testifying that the shed only stores construction equipment and that no miners use the shed. (Tr.

¹ The Secretary also contends that MSHA jurisdiction is proper irrespective of the material processed by the trommel because the wash plant processed the sand from the trommel. I do not need to reach this issue of fact because it is clear that the trommel screened virgin material from the earth.

59-61). The photos presented by Inspector Koivisto show what appears to be construction equipment. (Ex. G-10, 11, 12, 13, 14). Further, the parties agree that the shed is a considerable distance from the mining area. (Tr. 33-37).

The Commission has held that facilities which are available to miners as well as employees who are not miners fall under the jurisdiction of the Mine Act. *See W.J. Bokus Indus.*, 16 FMSHRC 704 (Apr. 1994). I have followed this precedent in other cases. *See e.g. Titan Constructors, Inc.*, 34 FMSHRC 403 (Feb. 2012) (ALJ).

I find, however, that the evidence presented at the hearing does not establish that miners enter the shed and the Secretary, therefore, did not fulfill his burden to show that MSHA had jurisdiction over the shed. There is no evidence, other than the inspector's hearsay testimony, that the shed stores equipment or supplies used in mining. The shed is a considerable distance from the Quarry and the associated screening and crushing equipment. (Exs. G-17, R-1). It seems odd that miners employed by Respondent would be required to travel to this shed to fill out any paperwork. Miners as well as other Bowman Construction employees pass by the scale house/office every day when they enter and exit the Property. Miners would not appear to have any reason to pass by shed. It also does not appear that the shed would be the type of structure where records are kept. (Exs. G-10, 11, 12, R-3).

The only evidence the Secretary offered to establish jurisdiction over the shed was the hearsay testimony of Inspector Koivisto. In contrast, physical evidence observed by the inspector and Ms. Bowman's own testimony helped establish MSHA jurisdiction over the trommel. Without an opportunity to examine Johnson and ask him questions, I cannot determine whether the shed was subject to inspection by MSHA. It is not clear exactly what Johnson told the inspector and Johnson could not be questioned about this issue.² The Secretary bears the burden of proof and I cannot uphold Mine Act jurisdiction over the shed based solely upon the inspector's hearsay testimony that miners enter the shed to sign out at the end of their shift or get supplies. Citation Nos. 6560618 is **VACATED**.

It is important for Bowman Construction to understand that I am not holding that MSHA does not have the authority to inspect the subject shed. I only hold that in this particular case, the Secretary was unable to prove MSHA jurisdiction over the shed. If miners enter the shed, even if only occasionally for short periods of time, MSHA would have the authority to inspect it.

IV. APPROPRIATE CIVIL PENALTIES

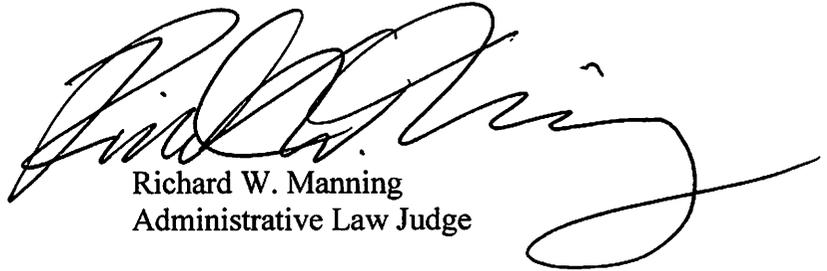
Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. Bowman Construction is a small operator that only employs two miners, both of whom are employed in such capacity on a seasonal basis. Bowman Construction did not receive any citations or orders in the 15 months preceding the subject inspection. The citations were abated in good faith. The penalties assessed below will not affect the company's

² I recognize that hearsay is generally admissible in Commission proceedings, but I believe it imprudent to hold that the Secretary established MSHA jurisdiction in this case solely on the basis of hearsay. I reach this conclusion even though Johnson was a management employee.

ability to continue in business. The gravity and negligence findings are set forth in the citations. The penalties proposed by the Secretary are appropriate for the two citations for the trommel.

V. ORDER

Citation Nos. 6560616 and 6560617 are **AFFIRMED** and Citation No. 6560618 is **VACATED**. Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), Bowman Construction Company, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$200.00 within 30 days of the date of this decision.³



Richard W. Manning
Administrative Law Judge

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³ Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.