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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATIVE (MSHA) PETITIONER	Civil Penalty Proceeding Docket No. SE 80-131 A.O. No. 40-02577-03001
v.	Daysville Tipple
UNITED MINERALS, RESPONDENT	

DECISION

Appearances: Carole M. Fernandez, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for petitioner;
N. F. Tankersley, United Minerals, Crossville, Tennessee, for respondent.

Before: Judge Koutras

Statement of the Proceeding

This civil penalty proceeding concerns proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent with three alleged violations of mandatory safety standards. Respondent filed a timely answer and a hearing was held on March 10, 1981, in Knoxville, Tennessee. Upon the completion of testimony and oral arguments, the parties were given the opportunity of submitting posthearing briefs, and both parties filed written arguments on May 4, 1981, and they have been considered in the course of this decision.

Issues

The principal issues in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposals for assessment of civil penalties filed, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act.

Furthermore, respondent has challenged the jurisdiction of the Act, posing the additional issue of whether its tipple is a "coal or other mine" within that definition under the Act.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., Pub. L. 95-164.

2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).

3. Section 3(h) of the 1977 Act.

4. Commission Rules, 29 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 5):

1. At the time the citations were issued, the tipple was a new facility which had just started production, and it had no prior history of violations.

2. The tipple processes approximately 40,000 tons of coal annually and is a small operation.

3. Assuming the citations in question are affirmed, any civil penalties imposed will not adversely affect respondent's ability to remain in business.

Jurisdictional Question

Respondent argues that its tipple is not a coal mine subject to the regulations under Part 77 of Title 30, Code of Federal Regulations, and the mandatory standards contained therein. It maintains that its only regulatory authority is OSHA. As support for this defense, respondent raises four arguments, a discussion of which follows.

Respondent first points out that it is not required to have a mining permit from either the State or Federal Governments, and that it has no written contracts with any mining operations to load coal. Next, respondent refers to the Mine Safety and Health Act of 1977, section 3, part 2, and concludes that its tipple operation does not come within the scope of the definition for a coal mine. It maintains that the words "custom coal preparation facilities" refers only to activities conducted on, or processing plants located at, a particular coal mine. Since its tipple is not on the mine premises, it is not subject to the Act or its regulations. Finally, respondent examines the legislative history of the Act and asserts that the dangers which Congress sought to prevent in implementing the Act are not those associated with a coal tipple. Therefore, respondent maintains it should not be subject to the regulations under the Act.

Respondent's second defense refers to several cases issued by the Department of the Interior's Office of Hearings and Appeals. One such case, Western Engineering v. Office of Surface Mining, 1 IBSMA 202 (1979), held that Western's river terminal was not subject to the regulations under the Surface Mining Control and Reclamation Act of 1977 since the ambiguity of the definition for a surface coal mine made it unclear whether the Act was intended to cover Western's operations. By analogy, respondent argues that the definition for a coal mine under the Mine Safety and Health Act is equally as ambiguous and should not be applied to its tipple operation.

As a third defense, respondent appeals to the Commission's sense of economic justice to support its position on this jurisdictional question. From respondent's perspective, the costs and benefits of regulating tipples do not warrant their being subject to the Mine Safety and Health Act.

In its pleadings, respondent asserts that it is not a bituminous, anthracite or lignite coal mine, but rather, a tipple which crushes and loads coal, the bulk of which comes from 35 to 84 miles away, with most of it going to the Department of Energy at Oak Ridge, Tennessee.

In addition to the assertions made by the respondent in its pleadings and brief filed in this matter, the testimony of the witnesses reflects that respondent owns several tipples, one of which has been regularly inspected and regulated by MSHA for 2 or 3 years, and that respondent has a number of customers for whom it processes coal at its tipple. This process includes the crushing, cleaning, and sizing of coal which is brought to the tipple. Respondent concedes that while some of the coal is from intrastate customers, the tipple also processes coal which crosses state lines (Tr. 139, 140).

Petitioner argues that respondent is subject to the jurisdiction of the Act in that respondent's tipple is a "coal or other mine" within the meaning of section 4 of the Act, 30 U.S.C. 803, the products of which enter commerce or the operations o products which affect commerce. In support of its position, petitioner distinguishes those cases cited by respondent, issued by the Board of Surface Mining Appeals, pointing to the different concerns of that agency and the Federal Mine Safety and Health Administration. Petitioner argues that the definition of a coal mine under the Mine Safety and Health Act includes Respondent's tipple. Finally, respondent refers to Marshall v. Stoudt's Ferry Preparation Company, 602 F.2d 589 (3rd Cir. 1979), cert. denied, NA 79-614 (January 7, 1980), which it maintains supports its position that a tipple is subject to the provisions of the Act.

After a careful review and consideration of all of the jurisdictional arguments presented in this case, I conclude that the tipple in question is a mine within the meaning of that term as defined by the Act, and therefore is subject to MSHA's enforcement jurisdiction. Section 3(h)(1)(c) of the Act defines "coal or other mine" as "lands * * * on the surface or

underground * * * used in, or to be used in, * * * the milling of such minerals, and includes custom coal preparation facilities."

The Dictionary of Mining, Mineral and Related Terms, Bureau of Mines, 1968 edition, page 859, defines the term "preparation plant" as including any facility where coal is "separated from its impurities, washed and sized, and loaded for shipment." The term "tipple" is defined at page 1145 as:

> Originally the place where the mine cars were tipped and emptied of their coal, and still used in that sense, although now more generally applied to the surface structures of a mine, including the preparation plant and loading tracks * * *. The dump; a cradle dump * * *. The tracks, trestles, screens, etc., at the entrance to a colliery where coal is screened and loaded. [Emphasis supplied.]

In my recent decision, Harman Mining Corporation v. Secretary of Labor and UMWA, Docket Nos. VA 80-94-R through VA 80-97-R (January 2, 1981), I concluded that based on the testimony and evidence presented, there was no question that Harman's tipple preparation plant was in fact a "coal or other mine." As the facts here do not warrant a different conclusion, my rationale in Harman Mining is applicable.

In my prior decision, I noted that the legislative history of the Act supports a broad interpretation of the Act's coverage requiring that doubts be resolved in favor of the Mine Act's jurisdiction. The report of the Senate Committee on Human Resources states:

> 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 possible 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. (May 16, 1977) at 14; Legislative History of the Mine Safety and Health Act, Committee Print at 602.

In Marshall v. Stoudt's Ferry Preparation Company, 602 F.2d 589, 592 (1979), cert. denied, No. 79-614 (January 7, 1980), the Third Circuit held that "the work of preparing coal or other minerals is included within the Act whether or not extraction is also being performed by the operator." Therefore, I cannot agree with respondent's assertions that the plain words of the Act or the legislative history support a finding that its tipple, which is not on the mine premises, is not subject to the Act or its regulations.

The cases cited by respondent under the Federal Surface Mining Act are neither controlling or persuasive authority in deciding the instant jurisdictional issue. By merely examining the definition of surface coal mining operations in 30 C.F.R. 700.5, it is obvious that its coverage is more narrow than that

provided by the definition of "coal or other mine" under

the Federal Mine Safety and Health Act. The definition of surface coal mining operations refers to "activities conducted on the surface of lands in connection with a coal mine." Such activities include processing or preparation of coal "at or near the mine site."

The definition of "surface coal mining operations" under the Surface Mining Act, by using limiting clauses, restricts the coverage of that law to those processing plants that are "in connection with" or "at or near the mine site." The three cases cited by respondent concern themselves with defining the scope of these limiting clauses in determining the jurisdiction of that law. Specifically, Drummond Coal Company v. Office of Surface Mining, IBSMA 80-56 (August 6, 1980), established a two-part test for coming within the definition of a surface coal mining facility. A plant must be "conducted on the surface or in connection with a surface coal mine," and secondly, it must be located "at or near a coal mine." To satisfy these tests, a judge must look to ownership of the facilities in question and the relative distances between the plant and the mine. No such analysis is required under the Federal Mine Safety and Health Act of 1977. The definition of a "coal or other mine" does not include limiting clauses which restrict coal preparation facilities to those in connection with or near a coal mine. In the absence of restrictive language, the Act encompasses all coal preparation facilities.

Although respondent raises various economic arguments against jurisdiction over its tipple, I cannot consider these matters in light of the plain meaning of the statute and its legislative history. Additionally, since respondent processes coal which crosses state lines, it operates a mine whose products affect commerce. See Andrus v. P-Burg Coal Company, Inc., 495 F. Supp. 82, 84 (S.D. Ind. 1980).

Testimony and Evidence

MSHA surface coal mine inspector, Lee Aslinger, confirmed that he visited the Daysville Tipple on June 2, 1980, as part of a regular construction site inspection. He stated that he had previously inspected the tipple on two occasions prior to the time it went into full operation, and during the second inspection, about 2 to 3 weeks before the tipple began to operate, he prepared a list of potential violations and gave it to Mr. Tankersley, the owner of United Minerals. Although it was just a representative sampling, he thought the list would be helpful to Mr. Tankersley. Three weeks later, Mr. Aslinger made an official inspection at which time he issued the citations in question (Tr. 6-11). On cross-examination, Mr. Aslinger admitted that he had been instructed by the respondent to prepare a list of everything required for compliance prior to the time the tipple went into operation and became energized (Tr. 17).

In response to bench questions, Mr. Aslinger clarified the nature of his inspections, and stated that in both February and May 1980, he inspected the construction site, at which time he

was authorized to issue citations for violations in connection with health and safety during construction. Instead of issuing citations, Mr. Aslinger gave the operator a list of potential violations (Tr. 18-22).

Don A. McDaniel, MSHA coal mine electrical inspector, testified that he conducted an electrical inspection at the tipple in May 1980, although the tipple was not yet in operation. According to Mr. McDaniel's supervisor, this was a courtesy inspection that had been requested by Mr. Tankersley, and he noted that citations are not normally issued during courtesy inspections. Although he did not prepare a written list, he remembered showing a mine employee the violations his inspection had revealed. He could not recall whether he had indicated the need for signs or fire extinguishers (Tr. 73-77).

On cross-examination, Mr. McDaniel testified that none of the mine employees had requested a list of the violations. Since the primary purpose of his courtesy inspection was to check the electrical facilities and not to look for potential fire hazards, he did not offer his opinion on the latter issue, and he sensed a lack of interest on the part of the operator since no one accompanied him during his inspection (Tr. 82-84).

Respondent examined Steve Hastings, an employee at the Daysville Tipple. Mr. Hastings stated that Mr. Aslinger had been requested to give a complete list of potential violations which he discovered during his courtesy inspection, but Mr. Hastings was not aware of whether Mr. McDaniel had provided a list of electrical violations (Tr. 95-101).

Citation No. 985423

This citation states that "the entire length of the conveyor was not visible from the starting switch and a positive audible or visible warning system was not installed to warn persons that conveyors will be started."

Inspector Aslinger confirmed that he issued the above citation on June 12, 1980, because the conveyor belt was not equipped with an audible alarm to warn others when it was being started. He explained that the belt operator is located in an electrical installation about 5 to 6 feet below ground level. Since this facility is covered entirely with tin and has no windows, it is impossible for the operator to know whether there is an employee doing work on the conveyor belt. He believed that an employee who is working on the equipment when the control switches are energized, might suffer a permanent or fatal injury.

Although Mr. Aslinger observed no one working on the conveyor belt, he saw grease guns and shovels in the area and concluded that employees had been working on the belt at some earlier time. He also testified that Mr. Tankersley abated the violation by installing an audible alarm system within the 8-day compliance period (Tr. 6-17). On cross-examination, Mr. Aslinger could not remember whether the conveyor belt had been started on the day the citation was issued (Tr. 17).

In response to bench questions, Mr. Aslinger stated that he could not remember discussing the requirement of an audible warning device at his construction site inspections in February

and May. He used a diagram to explain

the location of the electrical control station in relation to the conveyor belt, and stated that at the point where the on-off switch was located, the operator could not see what was going on at the conveyor belt. The control switches activated the five different belts in the tipple, and it was possible for all the conveyor belts to be energized at one time. He then stated that although it only took two people to operate the conveyor and move the coal onto the belt, he had seen as many as four people around the belt at a given time. He testified that the operator abated the violation by installing a bell-type alarm which rang when the machine was started (Tr. 27-34, ALJ Exh. 1).

Steve Hastings testified that the standard procedure, before starting the conveyor belt, was to call out each man's name and wait for a response. Additionally, there were guards on the belt to keep people from getting hurt (Tr. 97-98). Mr. Hastings stated that he had asked the inspector to explain the requirement of an audible alarm. He told the inspector about their method of calling out the names of each worker, but that the inspector was not satisfied that this method would work (Tr. 110-111).

Citation No. 985424

This citation states that "a suitable danger sign was not posted at the major electrical installation at this surface facility."

Inspector Aslinger confirmed that he issued this citation when he noticed that there was not a suitable danger sign posted at the major electrical installation facility. He was concerned that this presented a danger to both the employees and the people living in the family dwellings located within 100 yards of the facility. He had seen children playing near the homes nearby, and he noted that there was nothing to keep them out. Since there was no fence enclosing the area, intruders could come in and not be aware of the electrical hazards. He reasoned that this presented a danger of electrical shock. The building was not locked, and the only evidence of it being an electrical establishment was the wires entering it (Tr. 38-41). On cross-examination, the inspector admitted that the switchboxes have signs stating "Danger High Voltage" (Tr. 49).

Don McDaniel, testified that the tipple had a major electrical installation which presented a danger because it was made of tin and contained switchboxes on one side. Although he did not remember observing a danger sign, he believed that one stating that the building contained energized power should be required (Tr. 77-78).

Steve Hastings testified that all electrical switchboxes have a tag on them stating their size and also a sign indicating the possible danger. He explained that the electrical building is locked whenever the tipple is closed and that only the employees are allowed in the facility when it is open. He had never seen any children playing around the tipple. Furthermore, he had received instructions requiring him to tell children and

visitors to leave (Tr. 98-101).

Citation No. 985425

This citation states that "fire extinguishers were not provided for the permanent electrical installation at this surface facility."

Inspector Aslinger testified that he issued this citation because there were no fire extinguishers at the electrical installation. Since the building had wooden floors and contained combustible materials, the lack of visible fire extinguishers presented a danger. He noted that there was also grease, lubricants, and coal dust present in the facility, and observed two employees entering the building. He also maintained that Mr. Tankersley was aware of the requirement, since 2-1/2 to 3 years earlier, he had issued a citation for the same violation at another tipple owned by Mr. Tankersley. The present citation was abated by installing a fire extinguisher (Tr. 51-57).

On cross-examination, Mr. Aslinger stated that he could not remember listing the need for a fire extinguisher during his previous personal inspections (Tr. 58-59). In response to bench questions, Mr. Aslinger testified that he issued this citation based upon his observations of the facility's needs. He noted that it took only one large fire extinguisher to abate the violation (Tr. 61).

Don McDaniel testified that an inspector uses certain reference books to determine the various standards and requirements for fire extinguishers. These books include definitions of potential fire hazards, and they also instruct the inspector on the size and type required and the distance at which the fire extinguisher should be located (Tr. 78-81). On cross-examination, Mr. McDaniel indicated that the size and type of the fire extinguisher depended upon its distance from the electrical installation building (Tr. 84-85).

Steve Hastings testified that there was a fire extinguisher located on the end loader which was usually parked within 20 feet from the electrical house. He stated that his instructions were to allow the building to burn if it caught on fire. If someone was inside, however, he would try to get them out of the building (Tr. 95-96). On cross-examination, Mr. Hastings stated that there were three fire extinguishers within 20 feet of the electrical operation. He admitted that one was located on a service truck which was used during the day for running errands or picking up fuel. The other two were on a portable drill and a front-end loader (Tr. 101-106). He also stated that the service truck usually stays in one place because it contains their tools. It is always parked in the same place and rarely leaves the site (Tr. 110).

In response to bench questions, Mr. Hastings could not remember whether he told the inspector about the fire extinguisher on the service truck. He stated that he though that the standard required that the fire extinguisher be located in the building and not 20 feet away (Tr. 111-112).

Upon recall, Mr. Aslinger testified that he observed the service truck parked about 80 to 100 feet from the tipple's electrical facility, but noted

that it moved from one part of the job site to another. He observed the front-end loader, about 150 to 200 feet from the electrical installation, picking up bumper rails in the woodland. At the time he issued the citation, it was more than 20 feet from the electrical facility. The core drill was located about 250 to 300 feet from the building, and he observed no fire extinguisher within 20 feet of the electrical building (Tr. 116-120).

Findings and Conclusions

Fact of Violations

Citation No. 985423

30 C.F.R. 77.1607 requires that "when the entire length of the conveyor is not visible from the starting switch, a positive audible or visible warning system shall be installed and operated to warn persons that the conveyor will be started."

Petitioner's evidence establishes that the electrical control station was 5 to 6 feet below ground level and that the operator controlling the switches in the station could not see whether someone was working on the conveyor belt. Although respondent's witness testified that the practice at the tipple was to call out each man's name before starting the conveyor belt, I find that this type of warning is inadequate. The safety standard requires that an audible or visible warning system be installed and respondent offered no evidence that it had installed a proper system. Accordingly, the citation is AFFIRMED.

Citation No. 985424

30 C.F.R. 77.511 requires that "suitable danger signs shall be posted at all major electrical installations."

The evidence and testimony presented establishes that there was not a suitable danger sign at the electrical facility. Testimony established that the electrical facility was made of tin and contained energized power, and the only warning of a possible danger were the tags on the switchboxes which alerted the reader to the danger of high voltage. Upon considering the testimony of the inspector that there was no fence enclosing the facility and that the tipple was near a residential neighborhood, I find that the tags on the switchboxes were not a "suitable danger sign." Although respondent's wintess stated that he had been instructed to keep all children and visitors off the tipple grounds, this statement of company policy is no defense to the violation, and the citation is AFFIRMED.

Citation No. 985425

30 C.F.R. 77.1109(d) states that "fire extinguishers shall be provided at permanent electrical installations commensurate with the potential fire

hazard at such installation in accordance with the recommendations of the National Fire Protection Association."

Testimony by the inspector revealed that the electrical building had wooden floors and presented a potential fire hazard since it contained grease, lubricants and other combustible materials. Having found this testimony to be credible, I also find that this type of facility requires that a fire extinguisher be available in both a permanent and accessible location. While evidence disclosed that there were three fire extinguishers which were usually located within 20 feet of the electrical operation, it was clear that they were not affixed in a permanent position. Respondent's witness indicated that one was located on a service truck, another on a portable drill, and a third on a front-end loader. Since each of these machines is either mobile or portable, I must conclude that the machines containing the fire extinguishers could possibly move to an inaccessible distance from the electrical installation. Respondent's argument that the service truck had to stay in one place because it held the workers' tools was contradicted by the witness' statement that this same truck was used during the day for running errands or picking up fuel. I find, therefore, that a preponderance of the evidence indicates that a fire extinguisher was not provided for the permanent electrical installation in question, and this citation is AFFIRMED.

Good Faith Compliance

I find that abatement of the above citations was achieved in good faith within the time fixed and extended by the inspector. Petitioner indicates that the operator made a conscientious effort to achieve rapid compliance on two of the violations and should be given credit for its effort. I have considered this in assessing the civil penalties in this case.

Gravity

The lack of an audible warning device for the conveyor belt suggests a possibility of serious injury if someone were working on the equipment when the control switches were energized. But since respondent offered evidence of an alternative warning system in that each man's name was called before the system was turned on, I find the seriousness of this violation to be somewhat mitigated. Additionally, although the inspector claimed to have seen as many as four people around the belt at a given time, respondent's witness testified that there were guards on the belt which decreased the probability of harm. I conclude that this violation was nonserious.

I find that the absence of a sign warning of the danger at the major electrical facility to be a nonserious violation. As noted by the inspector, electrical wires entering the building were visible from the exterior of the building. Most employees would be aware of the power contained in the building. Moreover, although the inspector observed children playing in the area outside the tipple grounds, testimony revealed that it was

unlikely that they would be found in or around the facility. The electrical building was locked when the tipple was closed and employees had been instructed to

keep out all children and visitors. Therefore, the probability of an injury due to electrical shock was not great.

I find that the absence of a fire extinguisher in or near the permanent electrical installation was serious. I agree with petitioner's contention that there was a likelihood of injury to one or more persons if there were a sudden fire. Mitigating the seriousness of this violation is the evidence of three fire extinguishers which were usually located near the building. The probability of a fire is reduced, thereby lessening the degree of gravity.

Negligence

In evaluating the degree of negligence on the part of the operator, I have carefully considered the effect of the preoperation inspections conducted in February and May of 1980. Inspector Aslinger admitted that he had been instructed to give a list of everything required for compliance prior to the time the tipple went into operation. Mr. Hastings confirmed that this request had been made. Electrical inspector McDaniel's testimony also indicates that the operator attempted to comply with all safety requirements, and he stated that he had been requested by Mr. Tankersley to make a courtesy inspection in May of 1980. He could not recall whether he mentioned the need for either signs or fire extinguishers. While Mr. McDaniel claimed that his primary purpose was to check the electrical facilities, it seems reasonable that he should have warned Mr. Tankersley of the need for signs indicating a potential electrical danger or the need for a fire extinguisher where a fire hazard existed.

Although an operator is presumed to know the law, I find that the operator reasonably relied on the inspector's prepared list and Mr. McDaniel's courtesy inspection, and that the respondent was attempting to comply with the law in that he requested these inspections and specifically asked for a list.

Weighing against a finding of no negligence based on reasonable reliance is the fact that this operator had owned another tipple for some time. Inspector Aslinger testified that Mr. Tankersley should have been aware of the fire extinguisher requirement since he issued a citation for the same violation at his other tipple about 2 to 3 years earlier. Therefore, upon balancing the operator's past experience with his reasonable reliance on the courtesy inspections, I find a low degree of negligence on the part of the respondent, but conclude that they all resulted from ordinary negligence in that respondent failed to exercise reasonable care to prevent the cited conditions.

History of Prior Violations

The parties stipulated that this was a new operation and the operator had no history of prior violations, and I have considered this fact in assessing the civil penalties in this case.

Size of Business and Effect of Penalties on Respondent's Ability to Remain in Business

The parties stipulated that the respondent is a small operator and that any civil penalties imposed will not adversely affect respondent's ability to remain in business. I adopt this as my finding on this issue.

Penalty Assessment

On the basis of the foregoing findings and conclusions, I find that the following penalties proposed by the petitioner are reasonable and appropriate, and I adopt them as the civil penalties assessed by me as follows:

Citation No.	Date	30 C.F.R. Section	Penalty
985423	6/12/80	77.1607(bb)	$30
985424	6/12/80	77.511	14
985425	6/12/80	77.1109(d)	52

ORDER

Respondent is ORDERED to pay civil penalties in the amount of $96 for the citations which have been affirmed in this case and payment is to be made to MSHA within thirty (30) days of the date of this decision and order. Upon receipt of payment, this matter is DISMISSED.

George A. Koutras
Administrative Law Judge