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SOL (MSHA) V. TRIPLE B CORPORATION  
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)  
Office of Administrative Law Judges

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

v.

TRIPLE B CORPORATION,  
RESPONDENT

CIVIL PENALTY PROCEEDINGS

Docket No. KENT 87-21  
A.C. No. 15-05407-03501 M75

Docket No. KENT 87-23  
A.C. No. 15-08382-03501 M75

No. 1 Surface Mine

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor,  
U.S. Department of Labor, Nashville, TN, for Petitioner;  
Gary A. Branham, President, Triple B Corporation,  
Prestonsburg, KY, for Respondent.

Before: Judge Fauver

These consolidated proceedings were brought by the Secretary of Labor for civil penalties for alleged violations of safety standards under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following:

FINDINGS OF FACT

1. At all pertinent times, Respondent was an independent contractor at the Southside Surface No. 1 Mine in Pilgrim, Martin County, Kentucky, and at the No. 1 Surface Mine in Lovely, Martin County, Kentucky, both of those coal mines being subject to the Act.

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2. Respondent was an independent contractor engaged by Daniels Construction Company, Lovely, Kentucky, to construct a portion of roadway that led into an underground coal mine area of the No. 1 Surface Mine.

Citation 2783877

3. MSHA Inspector Andrew Reed issued Citation 2783877 to Respondent, charging a violation of 30 C.F.R. 77.1605(k), because it had failed to provide a berm or guard to the outer bank of the roadway, which was elevated 20 to 50 feet above the adjacent terrain and had a grade of about eight percent.

4. About six months before the issuance of the above citation, Inspector Reed had issued a citation to Daniels Construction Company for a violation of the same standard on this roadway within one-quarter mile of the area for which the citation was issued to Respondent.

5. On April 29, 1985, MSHA Inspector R.C. Hatter had issued a citation to Respondent for a violation of 77.1605(k) at No. 1 Surface Mine.

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6. Respondent was engaged as an independent contractor doing reclamation work for Martin County Coal Corporation at the latter's Southside Surface Mine No. 1 in Martin County, Kentucky.

7. The reclamation work by Respondent included the use of bulldozers, trucks, and other equipment for grading, sloping, seeding, and mulching areas of Martin County Coal Corporation's strip mines that were required by federal and state law to be reclaimed.

8. Respondent used the overburden (i.e. rocks and dirt) that had been removed by Martin County Coal Corporation during its mining cycle to carry out grading, sloping, and backfilling work in reclaiming the surface of the mine.

9. Martin County Coal Corporation was actively strip mining coal at the mine site where the Respondent was doing reclamation work.

Citation 2784979

10. A D65E Komatsu bulldozer used in reclamation work, as described above, was not equipped with a fire extinguisher.

Citation 2784980

11. Another D65E Komatsu bulldozer used in reclamation work was not equipped with a fire extinguisher.

Citation 277626

12. The D65E Komatsu bulldozer for which Inspector Reed issued Citation 2784980 for the lack of a fire extinguisher also did not have a reverse alarm.

Citation 2776262

13. A hydroseeding truck used by Respondent for reclamation work at Martin County Coal Corporation's mine site was used to spray water, mulch, grass seed, and fertilizer to promote the growth of vegetation in the areas being reclaimed.

14. The hydroseeding truck did not have operative headlights, tail lights, brake lights, or turn signals. In addition, it was missing a muffler and heat shield around the exhaust pipe on the passenger's side. The rear steps used to mount the back of the truck and the right side hand hold were also missing.

Citation 2776263

15. The above hydroseeding truck did not have a fire extinguisher.

Citation 2776264

16. The above hydroseeding truck did not have a reverse alarm.

DISCUSSION WITH FURTHER FINDINGS

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In this case Respondent filed the following answer to the petition for civil penalties:

We contest the above violation for the following reasons. We were hired as a contractor to construct a length of road for Daniels Construction Company, Lovely, Kentucky. It was our understanding that the road was to be used for employee travel to their assigned work areas. We were employed on a hourly basis and worked at their direction. The work was in a construct phase with no through traffic permitted. We feel the violation is in error against our company and should be dismissed.

Respondent offered no proof at the hearing to rebut the Government's evidence of the violation charged, nor did it offer any proof that the road construction was not covered by the Act. The Act and regulations allow the Secretary to cite an independent contractor for violation of a safety standard under the Act. Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533 (D.C.Cir.1986).

The allegations of Citation 2783877 as to a the violation, negligence and gravity were proved by a preponderance of the credible evidence.

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In this case, Respondent filed the following answer:

We contest the above violations for the following reasons. We were contracted for reclamation work at the above mine. There was no active mining at the locations. Therefore, we were not subject to MSHA jurisdiction, therefore, these violations are in error.

The following definitions are relevant to this case (30 U.S.C. 802):

(d) "operator" means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine;

(h)(1) "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, (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, 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. In making

a determination of what constitutes mineral milling for purposes of this chapter, 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;

(2) For purposes of subchapters II, III, and IV, of of this chapter "coal mines" means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities;

[Emphasis Added.]

Respondent meets the definition of an operator under the above definitions. It was performing services at Martin County Coal Corporation's mine to reclaim land conditions that "resulted from" coal mining. Respondent provided a significant and continuing service to Martin County Coal Corporation which was required by its (Martin County's) need to comply with federal and state laws regarding reclamation.

Respondent's employees were using bulldozers and large trucks identical to or similar to those used in day-to-day strip mining operations. The services supplied by Respondent could not be considered incidental or tenuous but were an important part of Martin County's mining operation and, therefore, constituted activities covered by the Act.

Civil Penalties

The allegations of the following citations as to the violations, negligence, and gravity were proved by a preponderance of the credible evidence. Considering all the criteria for a civil penalty in 110(i) of the Act, I find that the following civil penalties are appropriate:

Citation	Civil Penalty
2783877	\$98
2776261	68
2776262	39

~394

2784979	39
2784980	39
2776263	39
2776264	68

\$390

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in these proceedings.
2. Respondent violated the mine safety standards as charged in the above citations.

ORDER

WHEREFORE IT IS ORDERED that Respondent pay the above civil penalties in the total amount of \$390 within 30 days of this Decision.

William Fauver  
Administrative Law Judge