FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 19, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. CENT 2012-906-M A.C. No. 41-04510-298298
v.	
MILLER SPRINGS MATERIAL, L.L.C., Respondent	Mine: Cove Quarry

ORDER GRANTING RESPONDENT'S CROSS-MOTION FOR SUMMARY DECISION

Before: Judge Feldman

This case is before me upon a petition for assessment of a civil penalty filed by the Secretary of Labor ("the Secretary") against the Respondent, Miller Springs Material, LLC ("Miller Springs"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended. 30 U.S.C. § 815(d). This matter concerns Citation No. 8628189, the single citation at issue, which alleges a violation of 30 C.F.R. § 56.1000. This mandatory reporting standard states in relevant part that "when any mine is closed, the person in charge shall notify the nearest [Mine Safety and Health Administration ("MSHA")] district office . . . and indicate whether the closure is temporary or permanent." The Secretary seeks to impose a $100.00 civil penalty for Citation No. 8628189. The Secretary has filed a Motion for Summary Decision in this matter. Relying solely on joint stipulations, Miller Springs opposes the Secretary's Motion.

Cove Quarry, the subject site in this proceeding, is a crushed limestone, rock and gravel facility. (Jt. Stip. 2). The question presented is whether a mine may be deemed to be "closed" pursuant to section 56.1000 during a period in which the Secretary concedes Miller Springs periodically continued to fill orders from an existing stockpile in response to the needs of its customers. (*See* Jt. Stip. 13). The Secretary argues that the mine must be considered closed because there were no ongoing production-related activities. (Sec'y Mot. at 4-5).

I. Background

On January 11, 2012, Miller Springs notified MSHA's San Antonio field office that the Cove Quarry mine was on intermittent, producing status. (Jt. Stip. 12). On June 28, 2012, MSHA Inspector Homer Pricer arrived at Cove Quarry to conduct an inspection. At that time, he found no mine personnel or production activities at the site. (Jt. Stip. 10). Pricer contacted the plant manager, who informed him that production had stopped in December 2011, although

orders were continuing to be filled from existing stockpiles throughout 2012. (Stip. 13 of Ex. 2, *Declaration of Inspector Pricer*; Jt. Stip. 13). Based on his observation of a lack of activity at the mine, and on the information he received from the plant manager that the crusher had been removed for repairs since December 2011 although intermittent loading activities had continued, Pricer concluded that Miller Springs had violated the reporting requirements of section 56.1000 because it had failed to notify the MSHA district office that the mine was closed. (Jt. Stip. 10, 15). The alleged failure to report was designated as non-significant and substantial, and attributable to a low degree of negligence.

On December 6, 2013, the Secretary filed a Motion for Summary Decision, with joint stipulations of material fact. On January 7, 2014, Miller Springs represented by email that it did not oppose disposition by summary decision, although it declined to file a brief in opposition to the Secretary's Motion for Summary Decision. I construe Miller Springs' acquiescence to disposition by summary decision as a Cross-Motion for Summary Decision.

As discussed below, the Secretary's assertion that a mine is deemed closed despite ongoing stockpile operations is inconsistent with analogous ALJ Decisions concerning the substantive significance of loading activities. In addition, the Secretary's apparent willingness to relinquish MSHA oversight of stockpile loading activities is contrary to the authority delegated to MSHA to conduct inspections to ensure that mobile loading equipment and stockpiles are maintained in safe condition. Accordingly, the Respondent's Cross-Motion for Summary Decision shall be granted. Consequently, Citation No. 8628189 shall be vacated.

II. Joint Stipulations

The parties have stipulated to the following facts for purposes of summary decision:

1. Miller Springs Materials LLC ("Respondent") owns and operates the Cove Quarry (Mine ID 41-04510) in Kempner, Texas ("the Mine").

2. The Mine is a crushed limestone, rock, and gravel operation.

3. Respondent is engaged in mining operations in the United States and the company's operations affect interstate commerce.

4. The Mine is subject to the Federal Mine Safety and Health Act of 1977 ("The Act"), 30 U.S.C. § 801 et seq.

5. The Mine is subject to regulation by the Mine Safety and Health Administration ("MSHA").

6. The Federal Mine Safety and Health Review Commission has jurisdiction over the Mine, the parties and the subject matter of this proceeding.

7. The proposed penalty will not affect Respondent's ability to continue to do business.

8. Respondent demonstrated good faith in abating the cited conditions.

9. MSHA Inspector Homer Pricer ("Inspector Pricer") was acting as an authorized representative of the Secretary of Labor ("Secretary") at the time of the inspection at issue in this case.

10. On June 28, 2012, Inspector Pricer arrived at the Mine to conduct a regular E01 inspection. There were no mine personnel or production activities on site.

11. Inspector Pricer instead conducted an E16 inspection.

12. On January 11, 2012, Respondent notified the San Antonio field office that the Mine was on intermittent, producing status.

13. *Respondent filled orders at the Mine from the existing stockpile of material throughout 2012.*

14. Inspector Pricer Issued Citation No. 8628189 for a violation of 30 C.F.R. § 56.1000.

15. Citation No. 8628189 states:

> The mine operator failed to notify the nearest District, Sub district, or Field Office of the Mine Safety and Health Administration of their intent to close (permanently or temporarily) the mine. Plant Manager stated that the crusher which had been moved for repairs has not operated at this location since December 2011. Failure to notify MSHA of the mine status is a violation of a mandatory standard.

16. Respondent terminated the citation by notifying MSHA on June 28, 2012 of its non-producing status.

(Jt. Stip. 1-16) (emphasis added).

III. Procedural Framework

Disposition by summary decision is appropriate provided the entire record establishes that there is no genuine issue as to any material fact, and that the moving party is entitled to summary decision as a matter of law. 29 C.F.R. § 2700.67(b). *See*, *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

The parties agree that no material facts remain at issue in this matter. Section 56.1000 requires that operators notify the nearest MSHA office when a mine closes. It is uncontested that at the time of the June 28, 2012, inspection, the Cove Quarry Mine was on record with MSHA's San Antonio office as "intermittent, producing" rather than "closed." (Jt. Stip. 12). It is also uncontested that, although no production activities were occurring on site on June 28, 2012,

Miller Springs continued to fill customer orders from a stockpile at the Cove Quarry Mine throughout 2012.[1] (Jt. Stip. 10, 13). As noted above, the issue to be resolved is whether a mine is properly deemed "closed" when the only activity occurring on-site is loading from a stockpile.

IV. Discussion and Evaluation

The operative language in section 56.1000 requires mine operators to notify MSHA "when any mine is closed." The Commission has recognized:

> "When the meaning of the language of a statute or regulation is plain, the statute or regulation must be interpreted according to its terms, the ordinary meaning of its words prevails, and it cannot be expanded beyond its plain meaning." *Western Fuels-Utah, Inc*., 11 FMSHRC 278, 283 (Mar. 1989); *Consolidation Coal Co*., 18 FMSHRC 1541, 1545 (Sept. 1996). It is a cardinal principle of statutory and regulatory interpretation that words that are not technical in nature "'are to be given their usual, natural, plain, ordinary, and commonly understood meaning."' *Western Fuels*, 11 FMSHRC at 283 (citing *Old Colony R.R. Co. v. Commissioner of Internal Revenue*, 284 U.S. 552, 560 (1932)). It is only when the plain meaning is doubtful that the issue of deference to the Secretary's interpretation arises. *See Pfizer Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984) (deference is considered "only when the plain meaning of the rule itself is doubtful or ambiguous") (emphasis in original).

Akzo Nobel Salt, Inc., 21 FMSHRC 846, 852 (Aug. 1999) (holding that the term "two or more separate escapeways" is plain on its face and not subject to interpretation). The relevant plain meaning of "closed" is "to bring to an end; terminate," "to stop the operations of permanently or temporarily." *The American Heritage Dictionary* 349 (4th ed. 2009). Judge Manning has addressed the issue of "temporary closure" as it relates to section 56.1000 in *John Richards Construction*, 23 FMSHRC 1045, 1049-50 (Sept. 13, 2001) (ALJ). Judge Manning stated that section 56.1000 "is designed to cover situations where an operation closes permanently or is closing for some definite period of time." *Id.* Consistent with Judge Manning, I believe that a mine may not be considered "closed" within the context of its plain meaning, when periodic ongoing loading activities dictated by the needs of customers continue to occur.

However, the Secretary contends that the word "closed" is ambiguous, given the fact that it is not defined in the Secretary's regulations. Hence, the Secretary maintains that a mine is "closed" when it is not engaged in the act of extracting or processing material. Consequently, the Secretary argues that activities solely related to filling orders from a preexisting stockpile do not render the mine "open." (Sec'y Mot. at 4-5).

[1] The record does not reflect, nor does Miller Springs contend, that it engaged in any production activities at Cove Quarry after it notified the San Antonio Field Office on January 11, 2012, that it was on intermittent, producing status.

Where a statutory provision is ambiguous or silent, deference is owed to the Secretary's interpretation of the provision as long as that interpretation is reasonable. *Bill Simola, employed by United Taconite LLC*, 34 FMSHRC 539, 542-43 (Mar. 2012), *citing Chevron USA, Inc., v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842-44; *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994). Giving the Secretary the benefit of the doubt that there is ambiguity, the Secretary's proffered interpretation of the word "closed" must be rejected as unreasonable because it is inconsistent with previous ALJ decisions, as well as Commission decisions addressing the question of what constitutes "mining." Perhaps more importantly, the Secretary's position is contrary to the Mine Act's fundamental goal of fostering a safer working environment, given the absence of a showing of any feasible method by which personnel performing loading activities can be protected from hazardous equipment or mine conditions if Cove Quarry were deemed closed.

In arguing that the Secretary's interpretation is reasonable, the Secretary relies on *Nelson Quarries*, 32 FMSHRC 1422 (Oct. 7, 2010) (ALJ Rae). (Sec'y Mot. at 4-6). In *Nelson Quarries,* the operator had notified MSHA that a plant would be closed from February 2 to February 28, 2009. However, when the inspector arrived in May 2009, he determined that the site was still closed, and issued a citation for failing to provide MSHA with a corrected start date as required by section 56.1000. 32 FMSHRC at 1425. The parties stipulated that there had been no drilling, blasting, or extracting of materials in the intervening months. Moreover, Nelson Quarries failed to provide any documentation indicating that mechanics had been on-site to service equipment. Significantly, as distinguished from this case, the testimony as to whether customers had been loading trucks from a stockpile was inconclusive. *Id.* at 1426-28. Accordingly, the judge held that the mine was still closed as of May 2009, and the citation alleging a violation of section 56.1000 was affirmed. *Id.* at 1428. Thus, the Secretary's reliance on *Nelson Quarries* is misplaced, in that there was no definitive evidence of any activities occurring at the mine.

While *Nelson Quarries* does not support the Secretary's assertion that its interpretation is reasonable, there are ample Commission Judges' decisions that have held that loading from a stockpile constitutes sufficient activity for a mine to be designated as "open" as contemplated by section 56.1000. In *John Richards,* Judge Manning found that a sand pit was open on intermittent status where employees were only on site when customers requested loading assistance. 23 FMSHRC at 1049-50 (vacating an alleged violation of section 56.1000 for failing to notify MSHA of a mine shutdown). Similarly, in *Robert L. Weaver,* the judge found that a mine was operating intermittently where miners were not present when the inspector arrived, but came on-site to fill customer orders by loading material from the mine stockpile. 15 FMSHRC 2117, 2120-21 (Oct. 4, 1993) (ALJ Melick) (vacating an alleged violation of section 56.1000 for failing to notify MSHA of a temporary closure). *See also, Concrete Materials,* 35 FMSHRC 690 (March 26, 2013) (ALJ Manning) (finding a violation of section 56.1000 where a mine notified MSHA that it had closed, but in fact it was not closed because the mine had "maintenance and load-out activity throughout the winter as weather permitted").

Although jurisdictional status and operating status are admittedly distinct issues, the Commission's caselaw on jurisdiction is instructive. In this regard, the Secretary's contention that a mine must be considered closed if the sole activity is loading from a stockpile, because

filling customer orders is too far removed from the extraction process, is belied by Commission caselaw on jurisdiction. In determining whether an operation is properly classified as "mining," the Commission has consistently looked to whether the activities being undertaken are usually performed by the operator and are undertaken to make the extracted material suitable for a particular use or to meet market specifications. *See Shamokin Filler Co., Inc.*, 34 FMSHRC 1897, 1902 (Aug. 2012), *citing Oliver M. Elam, Jr., Co.*, 4 FMSHRC 5, 7-8 (Jan. 1982).

Specifically, *Elam* involved a business entity that operated a commercial dock on the Ohio River. Elam's customers were coal brokers who paid Elam to load and transport coal on barges leaving from the dock. The Commission noted that Elam's activities with respect to coal related solely to loading it for shipment. Thus, the Commission concluded that Elam's facility was not a mine subject to the Mine Act. In reaching this conclusion, the Commission stated:

> Thus, inherent in the determination of whether an operation properly is classified as "mining" is an inquiry not only into whether the operation performs one or more of the listed work activities, but also into the nature of the operation performing such activities. In Elam's operations, simply because it in some manner handles coal does not mean that it automatically is a "mine" subject to the Act.

4 FMSHRC at 7 (emphasis in the original).

While *Elam* dealt with a jurisdictional question, the case stands for the proposition that loading in response to a customer's needs is not mining when the business entity performs no activities normally associated with the extraction and preparation processes. Here, Miller Springs' loading activities in response to customer orders at the very site where the limestone, rock and gravel are extracted and crushed, cannot be disassociated from the mining process itself. In short, Miller Springs' loading activities utilizing front end loaders and other relevant equipment at the Cove Quarry Mine, albeit intermittently, remain under MSHA's jurisdiction to inspect and, as such, may not be considered evidence of inactivity justifying the characterization of the mine as "closed."[2]

The primary purpose of the Mine Act is to preserve "the health and safety of its most precious resource – the miner." 30 U.S.C. § 801(a). Inspections are the means by which this purpose is achieved. 30 U.S.C. § 813(a). Presumably, only mines listed as "open" are inspected. Requiring Cove Quarry to be listed as "closed" while loading activity is occurring on-site

[2] It is noteworthy that Congress has expressed that "what is considered to be a mine *and to be regulated under this Act* [should] be given the broadest possible interpretation, and . . . doubts [should] be resolved in favor of inclusion of the facility within the 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* at 602 (1978) (emphasis added). The interruption of crushing and/or extraction, apparently due to repair of the crusher, does not alter MSHA's continuing jurisdiction over Cove Quarry, given its intermittent loading activities. (*See* Jt. Stip. 15).

endangers the health and safety of the operators of the mobile equipment performing the loading activities. *See, e.g.*, *Concrete Materials*, 35 FMSHRC at 692 (noting that allowing the mine to be classified as "closed" when activities were occurring onsite endangers the health and safety of personnel in the mine); *Hansen Truck Stop, Inc.*, 26 FMSHRC 293, 297 (March 9, 2004) (ALJ Zielinski) (noting that a mine operating on intermittent status is subject to MSHA scrutiny, while a mine listed as closed is not). The only way for MSHA to determine if stockpiles and mobile loading equipment are maintained safely is to retain MSHA oversight, rather than relinquishing inspection responsibility because a mine is considered to be closed.

In the final analysis, the motivation behind the Secretary's assertion that the mine should be deemed closed is pragmatic rather than substantive. In this regard, in his brief, the Secretary states:

> Due to the absence of equipment, personnel, and activity at the mine, Inspector Pricer was unable to determine whether Respondent operated the Mine in a safe manner. Instead, he unnecessarily expended MSHA resources to travel to a closed mine which failed to update its status as required by 30 C.F.R. § 56.1000.

(Sec'y Mot. at 5-6) (citation omitted).

It is difficult to distinguish the Secretary's asserted hardship in inspecting mines in which activities are limited to periodic loading from the Secretary's apparent acceptance of its responsibility to inspect mines that are designated with "intermittent status." As noted, Miller Springs informed MSHA that the Cove Quarry mine was on intermittent status as of January 11, 2012. Miller Springs was cited for failing to notify MSHA that it was closed as a result of Pricer's June 28, 2012, inspection that found no mine personnel at the mine at that time. The difficulty of complying with the notification requirements of section 56.1000 with regard to mine closure are self-evident in instances where activities are dictated by the demands of customers. Judge Manning addressed this very issue in *John Richards*:

> In the case of this pit, it remained open all winter, but it had employees present only when there was a demand for its products. If Richards Construction had notified MSHA that it was closed at the end of December 1998, the standard would have required it to notify MSHA every time a customer called for sand. I do not read section 56.1000 imposing such a requirement on intermittent operations.

23 FMSHRC at 1050. While I understand MSHA's dilemma, the problem is one of scheduling inspections rather than compliance with section 56.1000. The procedures best known to MSHA for efficiently inspecting intermittent mines should have prevented or minimized the possibility of Pricer's unnecessary travel to the unattended Cove Quarry mine on June 28, 2012.

Consequently, the Secretary has failed to demonstrate by a preponderance of the evidence that the Miller Springs intermittent loading activities warranted changing the status of the Cove Quarry mine from "intermittent" to "closed," as loading at a mine site constitutes mining. Accordingly, Citation No. 8628189 citing an alleged violation of the reporting requirements in section 56.1000 shall be vacated.

As a final note, this decision should be viewed in the context of the undisputed facts in this case. It is significant that the Secretary has stipulated that Miller Springs intermittently continued to fill orders from an existing stockpile throughout 2012.

ORDER

In view of the above, **IT IS ORDERED** that the Secretary's Motion for Summary Decision **IS DENIED**, and the Cross-Motion for Summary Decision filed by Miller Springs Material, LLC, **IS GRANTED**.

Accordingly, Citation No. 8628189 **IS VACATED**, and the captioned civil penalty proceeding **IS DISMISSED**.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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