

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

September 8, 2014

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

v.

PICKETT MINING GROUP,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. SE 2012-101-M
A.C. No. 31-02224-270791

Mine: Pickett Mining Group

DECISION AND ORDER

Appearances: Yasmin K. Yanthis-Bailey, Esq. U.S. Department of Labor, Office of the Solicitor, Atlanta, GA, for the Petitioner

Jeff Pickett, New London, NC, for the Respondent

Before: Judge Rae

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (the Mine Act). The Respondent was issued a single citation for an alleged violation of 30 C.F.R. § 56.14107(a) for failure to guard the fan blades and alternator drive belt on a Ford tractor that was allegedly parked on a mine access road. The Secretary of Labor proposed a penalty of \$121. A hearing was held in Charlotte, North Carolina on May 6, 2014. The parties submitted post-hearing briefs, which I have considered in rendering this decision.

For the reasons set forth below, I find that the Mine Safety and Health Administration (MSHA) lacks jurisdiction over the cited Ford tractor, and accordingly I vacate the citation.

Summary of Evidence and Findings of Fact

Jeff and Tina Pickett operate a recreational campground and “pan for gold” business called Cotton Patch Gold Mine on a piece of property in New London, North Carolina. Tr. 5. On the same piece of property, Mr. Pickett runs a commercial gold mining business called Pickett Mining Group. Tr. 5. Pickett Mining Group employs several miners and has operated a single open-pit gold mine on the New London property since about 2008. Tr. 75, 86. The mine formerly was active about three or four months out of the year, but apparently the commercial pit is now abandoned. Tr. 50, 84-5.

The parties do not dispute that Pickett Mining Group is covered under the Mine Act. MSHA regularly inspects Pickett Mining Group's worksite, which includes the commercial pit, the mill site, an explosives magazine, and half of a fuel shed that is shared between Pickett Mining Group and Cotton Patch. By contrast, MSHA does not claim jurisdiction over Cotton Patch or over any part of the recreational side of the New London property. Tr. 18.

The Citation

On September 14, 2011, MSHA Inspector Cecil W. Worrell, Jr.¹ conducted a regular inspection of Pickett Mining Group's mine. Tr. 9-10; Ex. S-1. The mine was idle on the day of the inspection. Tr. 10, 13. The only employee present when Worrell arrived was Ronnie Crook, who identified himself as the lead man and plant operator who was in charge of the mine when Mr. Pickett was away. Tr. 10, 26-7. Mr. Pickett later arrived at the mine site to join the inspection party, which also included Inspector David Nichols of MSHA's Staunton, Virginia field office.² Tr. 11.

During the inspection, Worrell observed a "Ford 8N tractor" with unguarded fan blades and an unguarded alternator drive belt sitting on a road on the New London property near the explosives magazine, where Crook had parked it. Tr. 12-14; Exs. S-1, S-3. A bush hog mower was attached to the tractor. Tr. 17. Inspector Worrell believed that the tractor, which was "rather an old model" without an automatic shutoff mechanism, presented a loss-of-limb hazard to any miner who might come into contact with the unguarded moving parts. Tr. 12. Worrell interviewed Crook about the tractor, took photographs of the unguarded tractor parts, and issued Citation No. 8640280. Tr. 12; Ex. S-1; Photographs S-4, S-5, S-6. The citation alleges a violation of 30 C.F.R. § 56.14107(a) for failure to properly guard moving machine parts. Ex. S-1. After Worrell issued the citation, the tractor was tagged out of service. Ex. S-2.

MSHA Inspector Danny R. Ellis,³ who had inspected Pickett Mining Group several times in the past, terminated the citation about eighteen months later on April 3, 2013 after observing that the tractor "had been removed from mine property." Tr. 32; Ex. S-7. The bush hog mower was still attached to the tractor and the fan blades and belt drives were still unguarded. Tr. 32; Ex. S-7. Inspector Ellis was told the tractor had been towed from its former location, but at the hearing he could not recall how far the tractor had been moved. Tr. 32, 34.

¹ Worrell testified he has worked out of MSHA's Sanford, North Carolina office as a mine safety and health inspector for about six years. Previously, he worked for Arrow Products for nine years, spending his last five years there as a safety director and quality control manager. He attended the Miner Safety and Health Academy in Beckley, West Virginia to receive his training to become a mine inspector. His area of expertise is impoundments. Tr. 8-9.

² Worrell testified that Nichols accompanied him to the mine site because they had heard a rumor that Pickett Mining Group had opened a shaft underground. This rumor proved to be unfounded. Tr. 11, 23.

³ Ellis has worked as a federal mine inspector for 22 years and has worked out of MSHA's Sanford, North Carolina office since 2008. Tr. 30-1.

Use of the Cited Tractor

When he was interviewed during the inspection, Ronnie Crook averred that he uses the cited Ford tractor to mow grass on the recreational side of the New London property – i.e., the portion of the property used by Cotton Patch campground, not the MSHA-regulated portion. Tr. 17, 25; Ex. S-3. Mrs. Pickett testified that Crook works for her on the recreational side of the property on the weekends. Tr. 57-9. She indicated the Ford tractor is used exclusively to mow the lawn at Cotton Patch, and to her knowledge it has never been used without the bush hog mower attached. Tr. 59-61. The tractor is sometimes parked on the recreational side of the property during the summer and the rainy seasons, but when the grass does not need to be mowed frequently, it is parked on the non-public side of the property in the general area where the citation was issued. Tr. 73-4.

Mr. Pickett testified the tractor has never been used to haul equipment on mine property. Tr. 84. He testified that the bush hog mower has been attached to the tractor for so long, it might not be possible to remove it. Tr. 37, 75. He asserted there is no grass and therefore no use for the tractor and bush hog on the MSHA-regulated portions of the New London property. Tr. 77-8. He cited photographs of the New London property in support of his assertions.⁴ Pictures labeled “mill area” show a gravel-strewn clearing in the woods accessible by a gravel and dirt road and containing a rock crusher, springers, conveyors, a storage shelter, and other equipment. Some sparse weedy undergrowth is visible in this area, but no grass. Photographs R-1 to R-5; Tr. 41-2, 51-2.

The Secretary does not dispute that the Ford tractor is primarily used to mow the grass for Cotton Patch. The narrative portion of the citation alleges that the tractor is used by “[o]ne miner ... as needed” for “mowing purposes.” Ex. S-1. Inspector Worrell acknowledged at hearing that he would not consider Crook a “miner” when he is on the recreational side of the New London property, but indicated he would begin considering Crook a mine employee as soon as he drove the tractor onto mine property. Tr. 25-7. Worrell further acknowledged that the tractor was not in such a state that it could have been used for mining purposes on the day he issued the citation, as Pickett Mining Group would have had no use at its mine for the attached bush hog mower. Tr. 17. However, he felt that the bush hog could be easily removed and that the tractor could be used to pull stones or equipment if the bush hog were no longer attached. Tr. 18. “I didn’t see [the tractor] used that way, and I don’t know if it *would* be used that way,” he testified, “[b]ut it *could* be used that way.” Tr. 18 (emphasis added). However, he later conceded he had no reason except the tractor’s location to believe the tractor was ever used on mine property. Tr. 25.

Inspector Ellis also offered his opinion at the hearing on potential uses of the cited tractor. Like Inspector Worrell, he did not believe the tractor could be used for mining operations with the bush hog attached. Tr. 35. However, he testified that a bush hog is easily removed and opined that the cited tractor could be used to haul mining equipment and supplies if the bush hog were removed. Tr. 35-6. He also testified that the tractor had been “used” such that it fell under the jurisdiction of the Mine Act because it had been driven on mine property.

⁴ Mr. Pickett labeled each photograph with a date and location, marked where each was taken on a copy of his hand-drawn map, and numbered them 1 through 14. In this decision, the photographs will be referred to as Photographs R-1 to R-14.

Tr. 36-37. On cross-examination, Ellis conceded that he had no special knowledge of how difficult it would be to remove a bush hog from that particular model of tractor, which is a 1942 Model N Ford and an antique, according to Mr. Pickett. Tr. 7, 37. Ellis further conceded that, considering Pickett Mining Group's overall safety record,⁵ he did not believe the operator would actually use a piece of equipment like the cited tractor for mining. Tr. 38.

Location of the Cited Tractor and Layout of the New London Property

At the hearing, Inspector Worrell indicated that his sole ground for asserting jurisdiction over the cited tractor was his belief that the tractor was parked on mine property. Tr. 25. His handwritten notes from the inspection explain his rationale:

This tractor is used to mow the recreation area. However it was in the mine parked alongside the pit access road near the magazine ... The rear pit access road is used to access the pit as well as the magazine. Miner has parked this machine here. Miner could suffer loss of limb type injury due to this condition ... Ronnie Crook stated he thought this machine was exempt as it's used for recreation. However, it was parked in the mine along side the mine road.

Ex. S-3. At the hearing, Worrell testified he could see no reason a dual-usage machine would be parked where the tractor had been located, because the access road where it was parked led to the pit and magazine. Tr. 14. Thus, he apparently believed that the sole purpose of that road was to provide access to the MSHA-regulated pit and magazine. On cross-examination, when questioned as to whether he remembered the access road being used for other purposes, he testified he was unfamiliar with any dual-purpose usage of that road; did not recall a path to the creek branching off of it; and did not recall seeing lumber, railroad ties, trailers, or equipment stored on the side of the road. Tr. 50, 52-5.

When Inspector Ellis conducted an unrelated inspection of the Pickett Mining Group mine in March 2012, about six months after Worrell had issued the citation at issue here, Ellis observed the cited tractor parked in the exact same place it had been when the citation was issued. Tr. 32-3. He opined the tractor was on mine property at that time because it was between the plant and the pit. Tr. 33. Like Inspector Worrell, he saw no reason for anyone other than a miner to come to that location because he "saw no other activity that could occur in that area." Tr. 33-4.

Mr. Pickett does not dispute that at the time the citation issued, the cited tractor was parked near the explosives magazine on the side of the access road that runs between the pit and mill. However, he characterizes the access road as a dual-purpose road and the area where the tractor was parked as the main storage area for the entire New London property. Tr. 69-70, 72. At the hearing, he explained that the access road "cuts across the piece of property, and we use both sides of the property for recreational and personal storage." Tr. 79. He testified that non-miners are not allowed in the pit and mill areas, but non-miners and employees of the

⁵ Inspectors Worrell and Ellis both testified that on a scale of zero to 100, with 100 representing 100% compliance with safety standards, Pickett Mining Group's safety rating is about 90. Tr. 24, 37-8.

recreational side access the area where the tractor was cited all the time in order to move supplies and equipment to and from the storage area. Tr. 75-6, 81-2.

There are two distinct areas of the New London property, as shown in the hand-drawn map introduced by Mr. Pickett. One is the publicly accessible recreation area and the other is the non-public area. The recreation area includes Cotton Patch's campground and recreational mining pit, along with a public path to the creek. The non-public area is a wooded area at the back of the property with an access road running through it. Map, Ex. R-1.

The fuel shed is the first structure a person walking down the road would encounter when crossing onto the non-public side of the property. Ex. R-1. The fuel shed is used by both Cotton Patch and Pickett Mining Group. Ex. R-1; Tr. 24, 40. A barn, which is used for storage, is located in the same clearing as the fuel shed. Photograph R-9. MSHA apparently considers these two structures to mark the outer boundary of the mine area, with everything beyond them on the non-public side of the property constituting mine property.⁶ This would include Pickett Mining Group's commercial pit, a storage area, an explosives magazine, a path to the creek labeled "upper road to creek area," Pickett Mining Group's milling site, and the access road itself, which eventually loops back onto the recreational side of the property. Ex. R-1.

As noted, at the time the Ford tractor was cited, it was parked along the access road near where the storage area and magazine are located. Ex. R-1; Ex. S-3; Tr. 41, 52. The storage area and magazine are in the woods alongside the access road, on the same side of the road as the commercial pit. Ex. R-1; *see* Photograph R-10 (showing the magazine is just at the edge of the storage area). The magazine is an MSHA-regulated facility used exclusively by Pickett Mining Group. Tr. 41, 80, 87-8. However, the storage area is not. As seen in pictures introduced by Mr. Pickett, the storage area consists of a section of woods where machinery is parked on the side of the road and equipment and supplies are piled up in the woods beside the road. For example, one picture shows a flatbed truck and backhoe parked just off the road at the storage area with boxes, equipment, and tarp-covered piles of supplies visible in the woods beyond. Photograph R-6 (taken in May 2014). Other pictures show various equipment and supplies sitting in the woods at the storage area, including a dumpster-sized blue storage bin, piles of lumber and rail ties, and pallets of building materials. Photographs R-7, R-8, R-11 to R-14 (taken in September 2012 and May 2014). Mrs. Pickett testified the lumber and other items had been stored at that location since she and her husband moved to the New London property, and the storage trailers seen next to the barn in Photograph R-9 used to be parked there as well. Tr. 64-5. Mr. Pickett indicated that the items and equipment kept in the storage area are used on either or both sides of the property. For example, the backhoe is used on the recreational side of the property and the railroad ties are used to build barrier walls on both the recreational and MSHA-regulated sides of the property. Tr. 40, 53. Mr. Pickett testified that the equipment and trailers in the storage area have been there for years and have always been moved back and forth

⁶ Inspector Worrell testified he considered everything on the New London property "[b]eyond the fuel shed where there's now an abandoned pit" to be mine property. Tr. 50. Inspector Ellis testified that the mine area included everything on the left side of the road in Photograph R-6 (which would include the pit, storage area, magazine, and, further down the road, the upper creek path and mill area). Tr. 42; Ex. R-1.

between the recreational and commercial sides of the property, and MSHA has never before attempted to regulate them. Tr. 70-1, 76.

Mr. Pickett's map does not show where the tractor was moved after the issuance of the citation. At the hearing, Mr. Pickett asserted that at the time the citation was terminated, the tractor was parked on the same side of the access road as when the citation was issued, but had been moved about one hundred feet down the road. Tr. 70. He did not specify in which direction the tractor was moved. Inspector Ellis took a picture of the tractor in its new location at the time he terminated the citation. Tr. 34; Photograph S-9. A grainy, black-and-white copy of that photo shows the tractor parked in front of a barely discernible wooded area and a large box-shaped piece of equipment, which appears to be black and white. Photograph S-9. Initially, Inspector Ellis testified he could not identify that piece of equipment and could not say how far the tractor had been moved since the issuance of the citation. Tr. 34, 39. Mrs. Pickett offered testimony that the unidentified piece of equipment was one of two boxes, one blue and the other black-and-white, that have been sitting behind a trailer on the property for several years. Tr. 66-8. Photographs R-13 and R-14, which were taken in May 2014, show the referenced blue box sitting in the storage area on the New London property. After viewing those pictures, Inspector Ellis agreed that the blue box might be the same box pictured in Photograph S-9. Tr. 45-8. Inspector Worrell testified that the boxes in the pictures resembled each other but did not look the same to him. Tr. 55-6.

Discussion and Conclusions of Law

The issue before me in this case is whether MSHA had jurisdiction to cite the Ford tractor for a violation of 30 C.F.R. § 56.14107(a).

Statutory Definition of "Coal or Other Mine"

Section 3(h)(1) of the Mine Act contains the following three-part definition of "coal or other mine":

"[C]oal 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.

30 U.S.C. § 802(h)(1). It is well established that Congress intended this definition to be interpreted broadly. *See, e.g., Calmat Co. of Ariz.*, 27 FMSHRC 617, 622 (Sept. 2005), *citing* S. Rep. No. 95-181, at 14 (1977) ("[I]t 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.").

However, the courts have recognized that the jurisdiction of the Mine Act is not without limitations. *See, e.g., Sec’y of Labor v. Nat’l Cement Co. of Cal., Inc., et. al*, 573 F.3d 788, 794-95 (D.C. Cir. 2009) (rejecting unreasonably expansive reading of subsection 3(h)(1)(B)); *Paul v. P.B.-K.B.B., Inc.*, 7 FMSHRC 1784, 1787 (Nov. 1985) (“While we have recognized that the definition of ‘coal or other mine’ provided in section 3(h) of the Mine Act is expansive and is to be interpreted broadly ... the inclusive nature of the Act’s coverage is not without bounds.”); *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1551 (D.C. Cir. 1984).

In *Secretary of Labor v. National Cement Company of California*, the Court of Appeals for the D.C. Circuit discussed reasonable limitations on what could be considered part of a “coal or other mine” under subsections 3(h)(1)(A), (B), and (C). 573 F.3d at 793-97. In that case, the subject mine operator leased its mine site from a ranch and held an appurtenant easement to the ranch-owned road that provided the sole means of access to the mine. *Id.* at 789-90. MSHA, asserting jurisdiction under subsection (B), had cited the mine operator for failure to maintain the access road in safe condition. *Id.* at 790. The D.C. Circuit had previously expressed concerns that subsection (B) may be susceptible to an overly broad reading. *Id.* at 791. To allay these concerns, the Secretary explained that she interpreted subsection (B) more narrowly than subsection (A). She took the position that subsection (A), which covers extraction areas, extends to all the facilities and equipment within the boundaries of the extraction area, because virtually everything within an extraction area is necessarily related to mining activity. *Id.* at 794. However, she interpreted subsection (B), which covers private ways and roads appurtenant to extraction areas, to apply only to the ways and roads themselves. *Id.* Applying this interpretation, equipment and vehicles traveling on such roads would fall under MSHA jurisdiction only if they were covered under subsection (C), which covers only those facilities and equipment that are “used in, or to be used in, or resulting from” mining activities. The D.C. Circuit found that this interpretation of section 3(h)(1) was reasonable and in harmony with the Mine Act’s overall enforcement scheme. *Id.* at 794-97.

The Parties’ Positions

The Secretary asserts that because Pickett Mining Group is subject to MSHA’s jurisdiction, the only remaining question is whether the cited Ford tractor was located in an MSHA-regulated area when the citation was issued. Secretary’s Post Hearing Br. at 5-6. Acknowledging that MSHA lacks jurisdiction to issue citations on the recreational side of the New London property, the Secretary nonetheless contends that any equipment and facilities available for use by miners must comply with MSHA safety standards regardless of their location. *Id.* at 6. The Secretary asserts that the Ford tractor was subject to MSHA jurisdiction at the time it was cited because it was used by a miner, was available for use in mining, and was located on mine property. *Id.* at 7. The Secretary further argues that MSHA has jurisdiction over access roads under section 3(h)(1)(B) of the Mine Act, and therefore the tractor’s location on the side of the mine access road subjected it to MSHA jurisdiction. *Id.* at 7-8.

Pickett Mining Group asserts that the tractor was parked in a storage area the operator shares with Cotton Patch Gold Mine. Respondent’s Post Hearing Br. at 1. Pickett Mining Group contends that MSHA has historically allowed dual access to and usage of this area, which is used for storage of personal equipment and miscellaneous other items. *Id.* Pickett Mining Group

further argues that the Ford tractor has never been used on mine property because there is no grass to mow, and the tractor never will be used on mine property because the company's operational and safety protocols preclude use of a piece of equipment of the tractor's age and condition. *Id.* at 2. Pickett Mining Group also argues that MSHA has inconsistently interpreted what part of the New London property constitutes mine property, considering that MSHA determined the tractor had been moved off of mine property when it had merely been moved one hundred feet down the road. *Id.* at 3.

Analysis of the Facts

The first point the Secretary makes in his closing brief is that Pickett Mining Group's operations fall within the definition of a "coal or other mine." Petitioner's Br. at 5. Pickett Mining Group does not dispute this fact. However, a mine's MSHA-covered status does not give the Secretary authority to regulate equipment that is not located within the boundaries of the extraction area, is not a component of an appurtenant road or way, is not used by the operator's employees, and bears no relation to its mining operations. I conclude that the Secretary has impermissibly attempted to regulate such equipment in this case. For the reasons discussed below, I find that MSHA had no jurisdiction to issue a citation to the Ford tractor.

First, consistent with the Court's decision in *National Cement Company of California*, discussed above, I find that the Ford tractor is not covered under section 3(h)(1)(B) of the Mine Act because the tractor is not a component of a road. A vehicle's mere presence on "private ways and roads appurtenant to" a mine site is not sufficient to bring the vehicle within the jurisdiction of the Mine Act.

Second, I find that the tractor is not subject to the jurisdiction of the Mine Act under section 3(h)(1)(C) because there is no evidence it has been used in, will be used in, or is the product of mining activities. The Secretary argues the tractor is subject to Mine Act jurisdiction because it was used by a miner and could be used for mining. Secretary's Post Hearing Br. at 7. However, the tractor is and always has been used to tow a bush hog and mow the grass on the Cotton Patch campground. It is true that mine employee Ronnie Crook uses the tractor on the weekends, but not in his capacity as a miner. When using the tractor, he is working as a weekend campground employee and is paid out of campground funds and accounts. Tr. 57-61. It is undisputed that there is no grass on Pickett Mining Group's property and worksite, so Pickett Mining Group has no use for the bush hog mower that is attached to the tractor. Inspector Worrell suggested at hearing that the tractor could be used to haul equipment if the bush hog were removed. Tr. 18. However, Mr. Pickett testified it may be difficult or impossible to remove the bush hog without taking measures such as shearing off the bolts, considering that the tractor is an antique 1942 model and the mower has been attached to it for a very long time. Tr. 34, 70. Inspector Worrell ultimately conceded he had no reason to believe the tractor had ever been used on mine property except that it was parked on the access road, and Inspector Ellis testified he did not believe Pickett Mining Group would ever use a piece of equipment like the tractor in its mining operations. Tr. 25, 38. In short, there is no evidence that the tractor has ever been used by Pickett Mining Group's employees or in connection with its mining activities, and it appears highly unlikely the tractor would ever be used for mining considering its age, customary usage, and the difficulties and hindrance detaching the bush hog would likely entail.

Finally, at the time the citation was issued, the tractor was not located at Pickett Mining Group's commercial pit, mill, or any other location that could be deemed part of an "extraction area" under section 3(h)(1)(A) of the Mine Act. Rather, the tractor was parked along the access road between the pit and the mill near the explosives magazine, on the same side of the road as the pit. Mere proximity to the magazine or pit is not grounds for assertion of jurisdiction. At the hearing, the Secretary's witnesses advanced the theory that the tractor was parked on mine property. They variously delineated the bounds of the mine property as including (1) everything "[b]eyond the fuel shed where there's now an abandoned pit," and (2) everything on the same side of the access road as the pit. Tr. 42, 50. However, Pickett Mining Group has introduced maps, photographs, and witness testimony suggesting that the property beyond the fuel shed on both sides of the access road is a dual-purpose storage area routinely accessed and used both by miners and by non-miner employees of the Cotton Patch campground and recreational area. Specifically, Mr. Pickett testified that equipment and supplies used on both the recreational and mine sides of the New London property, such as a backhoe (used on the recreational side) and railroad ties (available for use on either side of the property as needed) have been stored along the access road for years without MSHA's oversight or intervention. Tr. 40, 53, 69-82. His wife offered corroborating testimony, stating that the lumber and equipment had been in the storage area since she and Mr. Pickett moved to the New London property several years back. Tr. 64-5. Mr. Pickett also submitted photographs taken in September 2012 and May 2014 showing machinery parked along the access road; equipment and supplies sitting in piles in the woods on the pit side of the access road; and the large storage barn across the road, which is not MSHA-regulated. Photographs R-6 to R-14; Ex. R-1. The MSHA inspector who issued the citation claimed he did not recall seeing various equipment or supplies between the pit and mill at the time he inspected the property. Tr. 52-5. However, MSHA's other witness testified he remembered seeing some of the trailers and storage boxes parked along the access road and seemed to agree that Mr. Pickett's photographs accurately depicted the storage area between the pit and mill. Tr. 39-45. On consideration, I find that the Picketts' description of a shared storage area along the access road makes sense in light of the layout and dual-purpose nature of the New London property and is credible. The tractor's location was not part of Pickett Mining Group's mine, but was part of a storage area that mine employees occasionally accessed.

Mr. Pickett testified that to abate the citation, he merely moved the tractor about one hundred feet down the same side of the access road, and MSHA was satisfied. Tr. 70. The MSHA inspector who terminated the citation could not recall how far the tractor had been moved and did not provide any details about its new location except that he felt it was no longer on mine property. Tr. 32-4. The photograph he took at the time of termination shows the tractor sitting along the edge of the woods in front of a box that is almost identical in appearance to a blue box seen in Mr. Pickett's photographs of the storage area. Photograph S-9; Photographs R-13, R-14. Mrs. Pickett testified that two boxes like the one in the termination photo had been sitting in the storage area since the Picketts moved to the property. Tr. 66-8. Taken together, the evidence weighs in favor of a finding that at the time the citation was terminated, the tractor was parked in essentially the same place it had been parked when the citation was issued. Thus, MSHA terminated the citation even though the tractor had not been moved out of the area its witnesses defined as "mine property." This further undermines the Secretary's position that the tractor was parked on MSHA-regulated mine property in the first place.

Citing various cases, the Secretary argues that because the tractor was parked in a dual-use area, it was subject to MSHA regulation so long as it was available for use by miners. However, the cases the Secretary cites are readily distinguishable from the instant case in that all of them include findings that the cited equipment was used for mining purposes.

For example, in *W.J. Bokus Indus., Inc.*, the Commission found that MSHA had jurisdiction to issue citations in a dual-use garage for improper storage of compressed gas cylinders, exposed wiring on a stove fan, and a defective grinding machine. 16 FMSHRC 704 (Apr. 1994). The Commission first found that each piece of equipment at issue in that case was “used or to be used” in mining: the gas cylinders were used by miners as needed, the grinding machine was used to maintain mine equipment, and miners used the stove to heat the garage while they were working in it. *Id.* at 708. The Commission then went on to explain how each cited condition could injure miners working in the garage. *Id.* By contrast, in this case the equipment in question is not used by miners or in mining. Moreover, the chance that the cited condition will injure a miner is virtually a nullity, as the unguarded moving parts present a hazard to miners only when the tractor’s engine is engaged while it is in a dual-purpose location, and this apparently occurs only when Ronnie Crook is working in his capacity as a recreational employee on the weekends.

The Secretary also cites *Ideal Basic Indus., Cement Div.*, 3 FMSHRC 843 (Apr. 1981), in support of his argument that equipment “available for use” is subject to regulation. In that case, the evidence definitively showed the cited equipment, a track mobile with a defective component, had been used in mining. 3 FMSHRC at 844. However, the Commission went on to find that even if the evidence had been insufficient to show actual use during the time when the defect was present, the equipment was still “used” within the meaning of the Mine Act because it was located in its normal work area (on the tracks) and was fully capable of being operated. *Id.* at 845. The Commission noted, “To preclude citation because of ‘non-use’ when equipment in such condition is parked in a primary working area could allow operators easily to use unsafe equipment yet escape citation merely by shutting it down when an inspector arrives.” *Id.* By contrast, in this case, there is no indication the cited equipment was ever used in mining or ever will be used in mining, rendering inapposite the concerns underpinning the Commission’s dicta in *Ideal Basic*.

The other three cases cited by the Secretary are Administrative Law Judge decisions which I may consider as persuasive authority. However, again, these cases are factually distinguishable from the case at hand. In *Jeppesen Gravel*, the ALJ upheld MSHA’s assertion of jurisdiction over a loader that was being used to load processed gravel into dump trucks for removal from the mine, characterizing this as an “integral part of [the] overall mining operation.” 32 FMSHRC 1749, 1750 (Nov. 2010) (ALJ). In the case at hand, the cited equipment was not a part of Pickett Mining Group’s mining operation at all. In *Titan Constructors, Inc.*, the ALJ found that MSHA could assert jurisdiction over a mechanic shop when the evidence affirmatively established that the tools and materials in the shop had been used to repair and maintain mine equipment. 34 FMSHRC 403, 412 (Feb. 2012) (ALJ). Finally, in *Beylund Construction, Inc.*, the ALJ determined MSHA had appropriately asserted jurisdiction over the equipment in question under section 3(h)(1)(A) of the Mine Act because the equipment was

located at the extraction site – that is, at the mine itself. 31 FMSHRC 1410, 1414 (Nov. 2009) (ALJ). Here, the cited tractor was not located within the bounds of the extraction site, as discussed above. After considering all the foregoing, I find that none of the cases the Secretary cites support a finding that equipment located in a dual-use area is subject to Mine Act jurisdiction when the equipment in question is not used by miners, has never and will never be used for mining activities, and does not pose a risk of injury to bystanders.

Accordingly, I find that MSHA had no jurisdiction to issue Citation No. 8640280.

ORDER

It is ORDERED that Citation No. 8640280 is DISMISSED.



Priscilla M. Rae
Administrative Law Judge

Distribution:

Jeff Pickett, Pickett Mining Group, 41697 Gurley Road, New London, NC 28127

Yasmin K. Yanthis-Bailey, Esq., U.S. Department of Labor, Office of the Solicitor, 61 Forsyth Street SW, Room 7T10, Atlanta, GA 30303