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November 9, 2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. SE 2014-236-M A.C. No. 54-00447-344931
v.	
EMPRESAS MUNDO REAL, INC., Respondent	Cantera Mundo Real

ORDER GRANTING THE SECRETARY'S MOTION FOR SUMMARY DECISION
ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION
ORDER TO PAY CIVIL PENALTY

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Empresas Mundo Real, Inc., pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). Respondent operates a crushed limestone quarry in Puerto Rico. Before the case was assigned to me, the parties filed cross-motions for summary decision. The parties agreed to 13 stipulated facts, presented the deposition transcripts of three individuals, and provided other documents. The parties both assert that no material facts are in dispute. The only issue in dispute in this case is whether MSHA had jurisdiction to issue the subject order of withdrawal.

After the case was assigned to me, I ordered the parties to file supplemental briefs to address issues that were not discussed in their cross-motions. For reasons that follow, the Secretary's motion is **GRANTED** and Respondent's motion is **DENIED**.

I. BACKGROUND

On January 7, 2014, MSHA Inspector Isaac E. Villahermosa issued Order No. 8733455 to Respondent under section 104(g)(l) of the Mine Act, 30 U.S.C. § 814(g)(1), alleging a violation of section 46.7(a) of the Secretary's safety standards. 30 C.F.R. § 46.7(a). The order states, in part:

> A miner had not received appropriate task training before being assigned to use the Grove Model RT625 crane. The miner had experience operating another crane. The mine operator was aware of the part 46 training requirements.

Inspector Villahermosa determined that an injury was unlikely, that the violation was not of a significant and substantial ("S&S") nature, but that any injury could reasonably be expected to be fatal. He determined that Respondent's negligence was high and that one person would be affected. Section 46.7(a) provides, in part, that every mine operator "must provide any miner who is reassigned to a new task in which he or she has no previous work experience with training in the health and safety aspects of the task to be assigned[.]" The Secretary proposed a penalty of $212.00 for this order.

II. STIPULATED FACTS

1. The Federal Mine Safety and Health Review Commission has jurisdiction over these proceedings pursuant to section 105(d) of the Mine Act, 30 U.S.C. § 815(d).
2. Respondent Empresas Mundo Real was/is a mine within the meaning of Section 4 of the Federal Mine Safety and Health Act, 30 U.S.C. § 804, and has/had products which entered interstate commerce and/or operations or products which affected interstate commerce within the meaning of § 4 at the time of the violation alleged in the citation. Respondent operates a crushed stone mine in Isabela, Puerto Rico.
3. Respondent Empresas Mundo Real was/is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 801 et seq. at the time of the violation alleged in the citation.
4. Santiago Varela is the President of Empresas Mundo Real.
5. Eddie Cajigas has worked for Empresas Mundo Real for twelve years as a welder and maintenance person at the mine's quarry. Mr. Cajigas supervisor is Jorge Crespo.
6. On November 2013, Empresas Mundo Real rented a "Grove" crane. The crane was used to assist in the construction of a silo and concrete plant at the mine. Respondent intended to use the silo and concrete plant to store sand and gravel and manufacture concrete. Eddie Cajigas and other mechanics repaired the crane before Respondent put it in service. Thereafter, Mr. Varela instructed Mr. Cajigas to operate the crane to collect materials - beams, channels and angle irons - that would be used to build the concrete plant.
7. Due to adverse economic conditions in Puerto Rico at the time of the construction of the silo and concrete plant, Respondent only operated its Quarry three days each week; Mr. Cajigas worked in the Quarry those three days. On the remaining two days each week, Mr. Cajigas worked on the construction of the silo and concrete plant. He did so between November 2013 and August 2014.
8. Santiago Varela supervised Mr. Cajigas at the construction site. Mr. Cajigas received one pay check for working both places.
9. Empresas Mundo Real did not train Mr. Cajigas to operate the "Grove" crane before it instructed him to do so.
10. On or about January 7, 2014, MSHA Inspector Isaac Villahermosa conducted an inspection of Respondent's Cantera Mundo Real Mine.
11. At the end of his inspection, Mr. Villahermosa issued one citation which alleged that respondent violated 30 C.F.R. § 46.7(a) because it did not provide appropriate task training to Mr. Cajigas before it assigned him to operate the "Grove Crane." The agency assessed a penalty of $212.00 for the violation. Respondent timely contested the citation.
12. Empresas Mundo Real trained Mr. Cajigas to operate the "Grove" crane on January 9, 2014.

13. In the interest of judicial economy, the parties hereby request that the Court resolve this citation via Motions for Summary Judgment.

III. SUMMARY OF PARTIES' ARGUMENTS

On February 25, 2015, the Secretary filed a Motion for Summary Judgement and Memorandum of Law in Support of the Motion in which he argued that no material facts were in dispute, that Respondent's mechanic, Eddie Cajigas, was a miner, and that Respondent did not train Cajigas in the operation of its "Grove" crane before assigning him to operate it, thereby violating section 46.7(a) of the Secretary's regulations. Sec'y Mot. 1. The Mine Act defines a "miner" as "any individual working in a coal or other mine." 30 U.S.C. § 802(g); Sec'y Memo. 4-5. The Secretary asserted that, because Cajigas' was working to construct the silo and concrete plant "at the mine," he was a "miner" under the Act. Sec'y Memo. at 5; Jt. Stip. 6. According to the Secretary, "Respondent intended to use the silo and concrete plant to store sand and gravel – which it extracted from its quarry – and to manufacture concrete." *Id.* Further, Crespo and Varela supervised Cajigas while he worked at the construction site and Cajigas was issued one paycheck for his work at the quarry and construction site. Sec'y Memo. 5-6. Given that Respondent had stipulated that Cajigas was not trained in the operation of the crane before he was tasked with operating it, the Secretary argued that Respondent violated section 46.7(a) which requires, in pertinent part, that every mine operator "must provide any miner who is reassigned to a new task in which he or she has no previous work experience with training in the health and safety aspects of the task to be assigned[.]" 30 C.F.R. § 46.7(a); Sec'y Memo at 6. Finally, the Secretary argued that the proposed penalty of $212.00 is appropriate and should be affirmed. Sec'y Memo 6-7.

On March 14, 2015, Respondent filed a responsive Motion for Summary Judgement in which it argued that the concrete plant being constructed did not come within the Act's definition of a "mine." Empresas Mot. 1-3. Respondent cited the "MSHA/OSHA Interagency Agreement" for the proposition that the concrete plant under construction was separate from the mine and came under the jurisdiction of the Occupational Safety and Health Administration ("OSHA") and not MSHA. *Id.* at 3. Respondent argued that training under the cited standard was not required because MSHA did not have jurisdiction over the concrete plant and the order should be vacated.

This case was assigned to me on September 3, 2015. On September 17, 2015, I issued an Order to File Supplemental Briefs in which the parties were instructed to address the following issues. First, does the evidence provided establish that Respondent was constructing a batch plant, as that term is used in the Interagency Agreement, on the same property as the Cantera Mundo Real? Second, if a batch plant is generally considered by the Department of Labor to be under the jurisdiction of OSHA whether or not located on mine property, would the batch plant being constructed be subject to OSHA jurisdiction once it is completed? Third, is the construction of a concrete batch plant at a mine site subject to OSHA or MSHA jurisdiction? Fourth, should the fact that Cajigas worked at the quarry and also operated the crane at the batch plant being constructed affect the outcome of this case?

The Secretary, in his Supplemental Memorandum of Law in Support of the Motion, argues that the Interagency Agreement makes clear that OSHA's jurisdiction over a concrete

batch plant commences only after the completion of construction of the plant and the arrival of sand and gravel or aggregate at the plant's stockpile. Sec'y Supp. Memo. at 2-3. Because it is undisputed that a concrete batch plant at the mine site was only under construction, OSHA did not have jurisdiction. *Id.* at 1-2. The language of the Interagency Agreement provides that MSHA retains jurisdiction over employee safety and health at mines during the construction of concrete batch plants at mine sites. *Id.* at 3. Moreover, the Secretary points to the legislative history of the Act and Commission case law which states that jurisdictional doubts should be resolved in favor of coverage by the Mine Act. *Id.* at 4. The Secretary again argues that Cajigas was a miner because he was working at the mine and, in the alternative, that he was a construction worker at a mine and was covered by the Mine Act. *Id.* at 4-7. Finally, the Secretary asserts that Respondent exposed its employees to potentially serious injuries through Cajigas' operation of the crane. *Id.* at 8. In support, the Secretary asserts that when the crane arrived on site it was stored in the mine's maintenance area for three to four months and then, at some point, Respondent's mechanics assisted Cajigas in repairing and testing the crane to make sure that it was working before Cajigas moved the crane from the mine's maintenance area to the construction site where it was used to construct the concrete batch plant. *Id.* at 7-8 (citing Varela Depo.; Tr. 14-18, and Cajigas Depo Tr. 20).

Respondent, in its Supplemental Memorandum concedes that the batch plant was under construction but argues that, because there was no extraction of material from the earth nor milling of that material at the construction site, MSHA did not have jurisdiction. Empresas Supp. Memo. 1. Moreover, Respondent argues that the Interagency Agreement unambiguously states that concrete batch plants come within OSHA's jurisdiction and not MSHA's. *Id.* at 2. Further, Respondent argues that it would be illogical to grant jurisdiction to MSHA during the construction of the batch plant, since it would impose two distinct sets of safety guidelines on the plant: one during the construction phase and one during operation of the plant. *Id.* Finally, Respondent argues that the fact that Cajigas was an employee of the quarry should have no bearing on the question of jurisdiction over the construction site. *Id.* at 3.

IV. DISCUSSION AND ANALYSIS

Commission Procedural Rule 67 sets forth the grounds for granting summary decision, as follows:

> A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:
> (1) That there is no genuine issue as to any material fact; and
> (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b). The Commission has long recognized that "'summary decision is an extraordinary procedure.'" *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981)). The Commission has also analogized Commission Procedural Rule 67 to Federal Rule of Civil Procedure 56. *Hanson*

Aggregates New York, Inc., 29 FMSHRC 4, 9 (Jan. 2007); *See Also Energy West*, 16 FMSHRC at 1419 (citing *Celotex Corp v. Cartrett*, 417 U.S. 317, 237 (1986)).

I find that the construction site was subject to MSHA jurisdiction. It is undisputed that Respondent's Cantera Mundo Real Mine is a "mine" within the meaning of the Act and is subject to the jurisdiction of MSHA and that the construction of the silo and concrete batch plant occurred "at the mine." Jt. Stips. 2, 3, 6. MSHA has jurisdiction over the extraction of material from the earth and the milling of that material to obtain the desired product. Because what constitutes milling, as opposed to manufacturing, is not always clear, MSHA and OSHA have entered into an agreement which provides guidance concerning the boundary between the two agencies' jurisdiction. MSHA/OSHA Interagency Agreement, 44 Fed. Reg. 22827 (Apr. 17, 1979), amended by 48 Fed. Reg. 751 (Feb. 22, 1983) ("Interagency Agreement").

The Interagency Agreement explicitly states that concrete batch plants, "whether or not located on mine property," are subject to OSHA jurisdiction. *Id.* at ¶B.6. However, Appendix A to the agreement, in a section under the heading "MSHA Authority Ends - OSHA Authority Begins," states that, for concrete ready-mix or batch plants, OSHA regulatory authority "commences after arrival of sand and gravel or aggregate at the stockpile." *Id.* at Appendix A. The Secretary asserts, and I agree, that the language in Appendix A of the agreement makes clear that a "triggering event" must occur for MSHA authority to end and OSHA authority to begin, namely the arrival of sand, gravel or aggregate at the batch plant stockpile. Accordingly, I find that, consistent with Interagency Agreement, until such triggering event occurs, MSHA retains authority. Here, the proposed plant was located on mine property, was still under construction, and the event which would have triggered OSHA jurisdiction had not yet occurred. It is the operation of batch plants that is subject to OSHA jurisdiction under the Interagency Agreement.

While Respondent argues that it would be illogical to impose two different sets of safety guidelines over the area based upon whether the plant was under construction versus when it was in operation, I find that the Interagency Agreement does just that. It is undisputed that the plant was being built "at the mine." Jt. Stip. 6. The fact that the plant was being built at the mine certainly lends credibility to the Secretary's concern that individuals constructing the plant would be exposed to mining hazards. While Respondent may disagree with the Secretary's determination as to when jurisdiction begins and ends, I find the Secretary's determination that "MSHA retains jurisdiction over employee health and safety at mines during the construction of concrete batch plants" to be reasonable.[1] Sec'y Supp. Memo. at 3. Accordingly, I find that MSHA had jurisdiction over the construction site and crane at the time the order was issued. In reaching this finding I am mindful of Congress' direction that "what is considered to be a mine and to be regulated under this Act be given the broadest possibl[e] 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 [Mine] Act." S. Rep. No. 95-181, at 14 (1977), *reprinted in* Senate Subcomm.

[1] Moreover, I note that at the direction of Varela, Cajigas drove the crane from in front of the mine office where the mine parks all its equipment to the construction site. (Cajigas Depo. Tr. 20; Varela Depo. Tr. 16-17). Employees were exposed to hazards when the crane was operated by Cajigas, both in the moving of the crane to the construction site and the use of the crane at the construction site.

on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978).

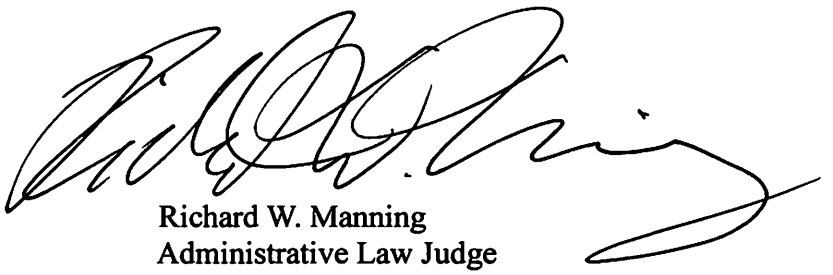
The record does not disclose the distance between the construction site and the quarry/plant site but they were all on the same area of land. The parties stipulated that Respondent was constructing a "silo and concrete plant *at the mine*." Jt. Stip. 6 (emphasis added); (Varela Depo. Tr. 49-50).

I find that Cajigas was, without question, a "miner" both as that term is defined in the Act and as used in the cited regulation. The Act defines a "miner" as "any individual working in a coal or other mine." 30 U.S.C. § 802(g). Cajigas was clearly working at the mine. The parties stipulated that Cajigas was a welder and maintenance person at the quarry, and repaired and operated the crane while working to construct the batch plant. Jt. Stips. 5, 7. Moreover, section 46.2(g)(1) defines a "miner" as "[a]ny person, including any operator or supervisor, who works at a mine and who is engaged in mining operations. This definition includes independent contractors and employees of independent contractors who are engaged in mining operations; and . . . [a]ny *construction worker* who is exposed to hazards of mining operations." 30 C.F.R. § 46.2(g)(1) (emphasis added).

Respondent did not challenge the merits of the order and acknowledged that Cajigas had not been provided training as required by section 46.7(a). Jt. Stip. 9. The Secretary, in his motion and memo, set forth facts in support of his proposed penalty of $212.00. Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. Respondent had a history of eight violations during the 15 months preceding the issuance of the subject citation. (Exhibit A to Petition for Assessment of Civil Penalty). Respondent is a small operator and worked only 19,272 hours. *Id.* The Secretary designated the negligence as "high" because Crespo told Varela that Respondent should train Cajigas how to operate the crane before it assigned him to do so, but Varela forgot to do so. Sec'y Mot. 7 (citing Exhibit 1 of Motion, Villahermosa Declaration). The Secretary determined that an injury was unlikely because Cajigas had received training on other cranes; however, if a miner were struck by a load being transported, the Secretary determined that the injury could reasonably be expected to be fatal. Sec'y Mot. 7. The Secretary determined that, because Respondent failed to train Cajigas despite being told to do so, the violation was not abated in good faith. *Id.* I note however, that Respondent fully trained Cajigas on January 9. Finally, the Secretary asserted that Respondent could not "reasonably contend that a $212 penalty would adversely affect its ability to remain in business." *Id.* Respondent did not challenge the inspector's findings regarding gravity, negligence, or the other penalty criteria in either its answer, its responsive motion for summary decision, or supplemental memorandum. I conclude that the Secretary's proposed penalty of $212.00 is appropriate.

V. ORDER

The Secretary's Motion for Summary Decision is **GRANTED**. Respondent's Motion for Summary Decision is **DENIED**. Order No. 8733455 is **AFFIRMED** as issued. Empresas Mundo Real is **ORDERED TO PAY** the Secretary of Labor the sum of $212.00 within 30 days of the date of this order.[2]



Richard W. Manning
Administrative Law Judge

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