

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 Pennsylvania Avenue NW, Suite 520N  
Washington, D.C. 20004

**NOV 23 2015**

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

v.

HAMMERLUND CONSTRUCTION, INC.,  
Respondent

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2014-124-M  
AC No. 21-03479-335864

Mine: Harris Pit - Portable Crusher

**SUMMARY DECISION**

Before: Judge Bulluck

This case is before me upon a Petition for the Assessment of a Civil Penalty filed by the Secretary of Labor (the “Secretary”) on behalf of the Mine Safety and Health Administration (“MSHA”) against Hammerlund Construction, Incorporated (“Hammerlund”), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (the “Act”), 30 U.S.C. § 815. The Secretary seeks a total penalty of \$216.00 for two alleged violations of his mandatory safety standards regarding site-specific hazard awareness training, and roadside berms or guardrails.

The Secretary filed a Motion to Plead in the Alternative alleging that Hammerlund also violated a mandatory safety standard regarding the unloading of equipment or supplies. Hammerlund responded by filing its Motion for Summary Decision and Opposition to the Secretary’s Motion to Amend the Pleadings (“Resp’t Mot. I”), supported by Affidavits of Daniel Rehkamp (“Hamm. Ex. 1”) and David Nartnik (“Hamm. Ex. 2”), and the Bid Request from St. Louis County Public Works (“contract”). I granted the Secretary’s Motion to Plead in the Alternative. The Secretary, thereafter, filed a Motion for Summary Decision (“Sec’y Mot.”), supported by the Declaration of MSHA Inspector Wilbert Wayne Koskiniemi, his inspection notes, and the contested citations. (“Gov. Exs. 1 through 5”). Hammerlund subsequently filed its Supplemental Points and Arguments (“Resp’t Mot. II”), and Joint Stipulations (“Jt. Stips. 1 through 69”).

As a preliminary matter, I note that during a conference call with the parties on May 29, 2015, Hammerlund agreed that should I find that MSHA had jurisdiction over the portable crusher, unprocessed material dumpsite, and processed material stockpile, rather than the portable crusher alone, it would accept the citations, as issued, and pay the Secretary’s proposed penalties in-full. See Jt. Stips. 60, 61. Accordingly, the parties’ Cross-Motions raise one issue for resolution in this case: whether issuance of the citations was a valid exercise of MSHA’s jurisdiction under the Act.

## **I. Standard of Review Governing Summary Decision**

Commission Rule 67(b) states that a Judge shall only grant a motion for summary decision “if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) [t]hat there is no genuine issue as to any material fact; and (2) [t]hat the moving party is entitled to summary decision as a matter of law.” 29 C.F.R. § 2700.67(b).

Analogizing that standard to the U.S. Supreme Court’s interpretations of Rule 56 of the Federal Rules of Civil Procedure, the Commission calls upon Judges to look to the whole record “‘in the light most favorable to . . . the party opposing the motion,’ and . . . ‘the inferences to be drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion.’” *Hanson Aggregates N.Y., Inc.*, 29 FMSHRC 4, 9 (Jan. 2007) (quoting *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

For the reasons set forth below, I conclude that the Secretary is entitled to summary decision as a matter of law on the issue of whether MSHA acted within its jurisdiction. Accordingly, I **AFFIRM** Citation Nos. 8740638 and 8740639, as issued, and order payment of the Secretary’s proposed penalties.

## **II. Joint Stipulations**

The parties stipulated as follows:

1. Hammerlund Construction, Inc. (“Hammerlund”), is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et. seq.* (the “Mine Act”).
2. The Administrative Law Judge has jurisdiction over this proceeding pursuant to section 105 of the Act.
3. Inspector Wilbert Wayne Koskiniemi, a representative of the Mine Safety and Health Administration (“MSHA”), was acting as a duly authorized representative of the United States Secretary of Labor, assigned to MSHA, and was acting in his official capacity when conducting the inspection and issuing the citations from the docket at issue in this proceeding.
4. The citations at issue in this proceeding were properly served upon Hammerlund as required by the Mine Act, and were properly contested by Hammerlund.
5. Hammerlund owns the portable crusher with Mine ID 21-03479 (the “crusher”) that was cited by Inspector Koskiniemi on August 13, 2013.

The portable crushing plant travels between multiple locations to perform material processing.

6. At all relevant times, the products of the Harris Pit entered commerce, or the mine operations or products affected commerce, within the meaning of the Mine Act, 30 U.S.C. §§ 802(b) and 803.
7. In 2013, Hammerlund was contracted by the St. Louis County, Minnesota Public Works Department to provide crushing services at four St. Louis County properties.
8. The “Request for Bids” or contract which is attached to Hammerlund’s Motion for Summary Decision is a true copy of the bid document and describes the project for which Hammerlund was awarded the contract.
9. Under the contract, Hammerlund was contracted to crush, screen and stockpile Aggregate Base, Class 5 (Modified) material at four pits owned and operated by St. Louis County.
10. The contract provided that Hammerlund would produce a total amount of 112,600 tons of Class 5 (Modified) material for use and sale by St. Louis County and several other public entities.
11. Hammerlund anticipated the entire crushing project (at all four of the County’s pits) to last about two weeks.
12. Citations Nos. 8740638 and 8740639 both allege violations that occurred at the Harris Pit.
13. The Harris Pit is owned by St. Louis County.
14. Inspector Koskiniemi conducted an E01 inspection of Mine ID 21-03479.
15. On August 13, 2013, Inspector Koskiniemi issued Citation No. 8740638 to Hammerlund Construction at Mine ID 21-03479.
16. Citation No. 8740638 was issued under 30 C.F.R. § 46.11(a) for failure to provide site-specific hazard awareness training before any person designated under the section was exposed to mine hazards.
17. On August 13, 2013, Inspector Koskiniemi issued Citation No. 8740639 to Hammerlund Construction at Mine ID 21-03479.

18. Citation No. 8740639 was issued under 30 C.F.R. § 56.9300(a) for failure to provide and maintain berms or guardrails on the banks of roadways where a drop-off existed of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.
19. There were multiple stockpiles at the Harris Pit. Unprocessed material was maintained in stockpiles to be transported to the crusher. Material processed by the crusher was fed into stockpiles by Hammerlund conveyors. Processed and unprocessed stockpiles were located on opposite ends of the crushing plant.
20. The material dumpsite and location of the unprocessed stockpile was approximately 80-100 feet from the crusher.
21. Under the contract, St. Louis County designated where the stockpiles at each location were to be located.
22. The material to be crushed by Hammerlund was provided by St. Louis County “without cost” to Hammerlund.
23. Under the contract, Hammerlund was to incorporate existing stockpiles of bituminous and concrete at some of the County’s pits into the final aggregate base materials produced. At the Harris Pit, the stockpiled material included bituminous, but not concrete.
24. Under the contract, “additional materials required to augment existing soils shall be hauled and stockpiled within the limits of the pit by the County prior to the start of production.” “If stockpile locations are not finalized at the time of pre-bid review, the contractor’s bid price included the cost of retrieving and transporting augmenting materials from anywhere within the pit limits.”
25. Under the contract, Hammerlund was to “retrieve materials from existing stockpiles located within the limits of the pit and transport to the crusher location for inclusion into the final product. The District Superintendent will identify the bituminous and concrete stockpiles to be utilized during pre-bid reviews.”
26. Under the contract, “[w]hen crushing operations begin, the Contractor assumes liability and responsibility for maintaining compliance with all rules and regulations prescribed by OSHA, MSHA as well as the County Planning and Zoning Department.”

27. At the time of the inspection, Hammerlund owned and operated the following equipment at the Harris Pit: a feed hopper/jaw crusher, 2 conveyors, a cone crusher/screener, a stacker conveyor, an operations booth, a genset trailer, a Caterpillar 246(c) skid-steer, and a Caterpillar 988(h) front-end loader.
28. In accordance with the contract, Hammerlund's liability terminated when all equipment was removed from the pit.
29. In accordance with the contract, if Hammerlund identified a specific type of augmenting material [that] was insufficient in quantity, Hammerlund was required to notify the District Superintendent immediately to discuss a course of action to remedy the situation.
30. During the life of the contract, Hammerlund agreed to provide and "have at all times" a competent superintendent in charge of the gravel pit sites who would be personally available at the site of work within 24 hours' notice.
31. Under the contract, "[g]ravel for the purposes of the contract shall be furnished by the County without cost to the Contractor."
32. Under the contract, all material would be obtained in County-designated pits as indicated in the schedule of price sheets. "The material shall be stockpiled in a manner so as to minimize segregation and promote a well-blended aggregate. All operations necessary in building, shaping, or blending of the stockpile, shall be considered incidental work and shall be included in the unit price for the work."
33. Under the contract, the County designated hours of operation between 7:00 a.m. and 8:00 p.m., Monday through Saturday.
34. Under the contract, "the Contractor shall notify the District Superintendent at least 72 hours in advance of any proposed work in any pit as the Contractor mobilizes between pits during the project."
35. St. Louis County controlled access to the Harris Pit property, on which the Hammerlund crusher was operating.
36. Under the contract, the St. Louis County District Superintendent was responsible [for] "resolv[ing] all questions relating to pit operations and materials produced which did not meet specifications."

37. Under the contract, site preparation within the gravel pits was performed by St. Louis County.
38. Under the contract, St. Louis County agreed to conduct site preparation by clearing, grubbing, [and] stripping an area and/or face adequate to meet the contract quantities.
39. Hammerlund was required to notify the St. Louis County District Superintendent in writing if the pit was not satisfactorily prepared.
40. Hammerlund was instructed by St. Louis County employees where to set-up the portable crushing plant.
41. Hammerlund used its front-end loader to bring materials from the stockpiles to the portable plant for crushing.
42. Only Hammerlund employees operated the crusher and fed material into the portable plant with the front-end loader.
43. On or around August 13, 2013, the crusher was conducting crushing operations at the Harris Pit, when MSHA Inspector Koskiniemi conducted a regular inspection.
44. At the time the inspection began, the crusher was in operation.
45. At the time of the inspection, Hammerlund had two employees on the site. One employee monitored the portable plant; the second employee operated the front-end loader.
46. Other than the two citations at issue here, Inspector Koskiniemi issued five citations on August 13, 2013 to Hammerlund for safety violations on the transfer conveyor, cone crusher/screener feed conveyor and the stacker conveyor.
47. After Inspector Koskiniemi issued the violations on the crushing plant equipment, Hammerlund shut down the crusher until abatement was completed.
48. During his inspection, the inspector observed two dump trucks owned and operated by St. Louis County [that] delivered binding material to the stockpiles (“dumpsite”) to use in production of Class 5 material.
49. Hammerlund did not provide site-specific hazard awareness training to St. Louis County truck drivers prior to issuance of the citation.

50. St. Louis County also owned and operated a bulldozer that operated around the Harris Pit, maintaining roadways and the dumpsite.
51. Inspector Koskiniemi observed the bulldozer pushing material into stockpiles at the dumpsite and knocking down berms constructed by Hammerlund employees.
52. The Inspector would testify that during the inspection, he observed a St. Louis County employee walk unaccompanied through the mine site to collect samples from processed stockpiles while the crusher was in operation.
53. Hammerlund's policy was that the crusher would stop operating or run without processing material any time that samples were being obtained from the processed material stockpile.
54. Hammerlund's policy was that a Hammerlund employee would take a companion sample to any sample taken by St. Louis County, in order to verify the accuracy of any sample results taken by the County.
55. Hammerlund did not remove or transfer any material from the processed stockpiles.
56. Under the contract, acceptance of materials produced would be based upon individual tests taken by the St. Louis County Superintendent from the stockpile.
57. The citations at issue in this proceeding were properly served upon Hammerlund as required by the Mine Act, and were properly contested by Hammerlund.
58. Hammerlund demonstrated good faith in abating the violations.
59. Without Hammerlund admitting the propriety or reasonableness of the penalties proposed herein, the proposed penalty of \$216.00 will not affect the ability of Hammerlund to continue in business.
60. The "Condition or Practice" section of Citation No. 8740638 is accurate and describes a violation of 30 C.F.R. § 46.11(a).
61. The "Condition or Practice" section of Citation No. 8740639 is accurate and describes a violation of 30 C.F.R. § 56.9300(a).

62. The gravity of Citation No. 8740638 is assessed as “Reasonably Likely” and “Fatal.”
63. The gravity of Citation No. 8740639 is assessed as “Reasonably Likely” and “Fatal.”
64. The “Number of Persons Affected” section of Citation No. 8740638 is assessed as affecting one person.
65. The “Number of Persons Affected” section of Citation No. 8740639 is assessed as affecting one person.
66. Hammerlund’s negligence with regard to Citation No. 8740638 was “Low.”
67. Hammerlund’s negligence with regard to Citation No. 8740639 was “Low.”
68. A penalty of \$108.00 is appropriate for the condition alleged in Citation No. 8740638.
69. A penalty of \$108.00 is appropriate for the condition alleged in Citation No. 8740639.

### **III. Background**

In early August of 2013, Hammerlund contracted with St. Louis County, Minnesota Public Works Department to process, i.e., crush, screen, and stockpile, aggregate base Class 5 (modified) material, for road construction and maintenance by St. Louis County and other public entities, over a two-week period at four separate sites, including the County-owned Harris Pit. Hamm. Ex. 1 at 1; Resp’t Mot. I at 2; Jt. Stips. 7, 9, 11, 13. To perform the work, Hammerlund brought to the pit and operated its portable crushing plant, two conveyors, stacker conveyor, operations booth, genset trailer, skid-steer, and front-end loader. Jt. Stip. 27. An unprocessed material dumpsite and a processed material stockpile were located on opposite sides of the crushing plant; the unprocessed material dumpsite was approximately 80 to 100 feet from the crusher. Jt. Stips. 19, 20. Tandem-axel dump trucks, owned and operated by St. Louis County, made deliveries to the unprocessed material dumpsite, and a County-owned and operated bulldozer maintained roadways around the Harris Pit, including the unprocessed material dumpsite. Jt. Stips. 48, 50. Hammerlund used its front-end loader to transport material from the unprocessed material dumpsite to feed the crusher. Jt. Stips. 41, 42. A Hammerlund conveyor took the crushed product to the processed material stockpile. Jt. Stip. 19.

On August 13, 2013, MSHA Inspector Wilbert Koskiniemi conducted a regular inspection of operations at the Harris Pit. Gov. Ex. 1 at 2. During his inspection, Koskiniemi



observed St. Louis County truck drivers dumping binding material at the unprocessed material dumpsite, where berms were inadequate at the six to eight foot drop-off to prevent overtravel and rollover hazards. Gov. Ex. 1 at 2-3; Jt. Stip. 48. He also observed the Hammerlund loader operator repairing the berms which, subsequently, a County bulldozer, pushing dumped unprocessed material into stockpiles, proceeded to knock over. Gov. Ex. 1 at 2-3; Jt. Stip. 51. Also, while the crusher was in operation, Koskiniemi observed an unaccompanied County employee walk past the crusher and conveyor belts to the processed material stockpile, where he collected product samples. Gov. Ex. 1 at 2; Jt. Stip. 52. Thereafter, Koskiniemi reviewed Hammerlund's training records, and determined that St. Louis County employees were not provided with site-specific hazard awareness training. Gov. Ex. 1 at 2; Jt. Stip. 49. Consequently, he issued Citation Nos. 8740638 and 8740639.

#### **A. Citation No. 8740638**

Koskiniemi issued 104(a) Citation No. 8740638, alleging a "significant and substantial" violation of section 46.11(a) that was "reasonably likely" to cause an injury that could reasonably be expected to be "fatal," affecting "one person," and was caused by Hammerlund's "low" negligence.<sup>1, 2</sup> The "Condition or Practice" is described as follows:

No site specific hazard training was given to the St. Louis County workers operating tandem dump trucks and dozers on the mine site while providing binding material for Hammerlund Construction crushing operation. Also on site was a St. Louis County material sampler who would enter the mine site to collect material samples from the stock piles that Hammerlund Construction was producing. This condition exposed persons to various mine hazards with resulting injuries. The County workers were observed backing a tandem axle dump truck on a dump site with no berms. They stated that they didn't know it wasn't allowed.

Gov. Ex. 2. The citation was terminated on August 13, 2013, after site-specific hazard awareness training was provided to the St. Louis County workers.

#### **B. Citation No. 8740639**

Koskiniemi issued Citation No. 8740639, alleging a "significant and substantial" violation of section 56.9300(a) that was "reasonably likely" to cause an injury that could

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<sup>1</sup> Generally speaking, a violation is significant and substantial if it is reasonably likely that a hazard contributed to by the violation will result in an accident causing serious injury. *Cement Div., Nat'l Gypsum*, 3 FMSHRC 822, 825 (Apr. 1981).

<sup>2</sup> 30 C.F.R. § 46.11(a) requires a mine operator to "provide site-specific hazard awareness training before any person specified under this section is exposed to mine hazards." Section 46.11(b) requires training for a host of non-miners, including customers and delivery workers.

reasonably be expected to be “fatal,” affecting “one person,” and was caused by Hammerlund’s “low” negligence.<sup>3</sup> The “Condition or Practice” is described as follows:

Inadequate berms were provided on the material dump located on the west side of the pit area where the St. Louis county truck drivers were delivering binder material for the Hammerlund crushing plant to use in the production of Class 5 material. The county’s tandem axle trucks wound back onto the dump without adequate berms to stop them from going over the edge, exposing them to roll over hazards. The trucks delivered numerous loads per shift. At one point the Hammerlund loader operator fixed the berms, only [to] have the county employee push them over with the county dozer. The county employee was unaware that berms were necessary. No site specific hazard training was done. See citation 8740638.

Gov. Ex. 4. The citation was terminated on August 13, 2013, after adequate berms were constructed at the unprocessed material dumpsite.

#### **IV. Jurisdiction**

It is uncontroverted that the crusher, itself, is registered with MSHA as a mine, and is subject to MSHA’s jurisdiction. Resp’t Mot. I at 8; Jt. Stip. 5. In fact, Hammerlund accepted and paid five citations, also issued during Kosiniemi’s August 13 inspection, for safety violations pertaining to the condition of the crusher itself, including the transfer conveyor, cone crusher/screener feed conveyor, and the stacker conveyor. Resp’t Mot. I at 6; Jt. Stip. 46. However, Hammerlund argues that Citation Nos. 8740638 and 8740639 should be vacated because they concern conditions at the unprocessed material dumpsite and the processed material stockpile, areas that it contends were not under its authority or control and, therefore, not part of its mine. Thus, the question boils down to whether the crusher, alone, or the crusher, and the processed and unprocessed stockpiles, constituted the mine over which Hammerlund bore compliance responsibility. Resolution of this issue requires an analysis of the extent to which the cited conditions reflected mining operations under the control or supervision of Hammerlund, in its capacity as a mine “operator,” performing its duties under the contract.

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<sup>3</sup> 30 C.F.R. § 56.9300(a) provides that “[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.” Alternatively, the Secretary alleges a violation of 30 C.F.R. § 56.9301, which provides that “[b]erms, bumper blocks, safety hooks, or similar impeding devices shall be provided at dumping locations where there is a hazard of overtravel or overturning.”

## A. Indicia of Operational Control

In pertinent part, section 3(h)(1)(C) of the Act defines a “mine” to include “lands . . . or other property . . . on the surface or underground . . . used in, or to be used in, the milling of . . . minerals, or the work of preparing . . . [such] minerals.” 30 U.S.C. § 802(h)(1)(C). The Commission has interpreted this definition “expansively,” and has stated that questions of jurisdiction “must be resolved within the Act’s overall purpose of protecting miners’ safety and health.” *W. J. Bokus Indus., Inc.*, 16 FMSHRC 704, 707-08 (Apr. 1994). “Congress intended the Mine Act to protect individuals from potential hazards that are incidental to entry into a mine, even if the potential hazards are not located on land owned by the mine operator.” *TXI Operations, LP*, 23 FMSHRC 54, 60 (Jan. 2001) (ALJ); *Ellis & Eastern Co.*, 37 FMSHRC 1607, 1612 (July 2015) (ALJ) (“the extraction and processing areas, rather than the legal property boundaries, determine the zone of MSHA’s authority”); *Pickett Mining Grp.*, 36 FMSHRC 2444, 2451-52 (Sept. 2014) (ALJ).

The touchstone of an entity’s liability under the Act and, therefore, whether it is subject to MSHA’s jurisdiction, is whether and to what extent it “operates, controls, or supervises” a “mine.” 30 U.S.C. § 802(d) (defining “operator”); *see Berwind Nat. Res. Corp.*, 21 FMSHRC 1284, 1293 (Dec. 1999) (to be an “operator,” an entity must have “substantial involvement” in the operation of the mine); *Youngquist Bros. Rock, Inc.*, 36 FMSHRC 2492, 2494 (Sept. 2014) (ALJ) (“an entity cannot be held liable unless it ‘operates, controls, or supervises’ the mine”) (citation omitted).

Among the factors considered when determining whether an entity is an “operator” of a mine is whether it has the authority to supervise or control the conditions of the mine. *Sec’y of Labor v. Nat’l Cement Co. of Cal.*, 573 F.3d 788, 795 (D.C. Cir. 2009); *Ames Constr., Inc.*, 33 FMSHRC 1607, 1611 (July 2011); *Berwind*, 21 FMSHRC at 1293 (evaluating whether a parent corporation was an operator under the Act based on the extent of its involvement in the mine’s engineering, finances, production, personnel, and health and safety matters). Also instructive in determining an entity’s control is the connection between the entity and the disputed area of the mine - - specifically, the relationship between its activities and operation of the mine, and the extent of its presence at the mine site - - factors considered when determining whether an entity is an independent contractor. *Otis Elevator Co.*, 11 FMSRHC 1896, 1902 (Oct. 1989); *Joy Tech., Inc.*, 17 FMSHRC 1303, 1307 (Aug. 1995).

These factors are considered in light of the Commission’s “longstanding view that the purpose of the Act is best effectuated by citing the party with immediate control over the working conditions and the workers involved when an unsafe condition arising from those work activities is observed.” *Old Dominion Power Co.*, 6 FMSHRC 1886, 1892 (Aug. 1984) (citing *Phillips Uranium Corp.*, 4 FMSHRC 549, 553 (Apr. 1982)).

The Secretary argues that the contract allocated responsibility and liability associated with the entire Harris Pit to Hammerlund, because Hammerlund was responsible for compliance with MSHA regulations, Hammerlund agreed to use its front-end loader to retrieve material from

the unprocessed dumpsite to feed its crusher, and because Hammerlund agreed to provide a superintendent to take charge of the gravel pit sites. Sec’y Mot. at 4-5; Jt. Stips. 25, 26, 30, 41.

Hammerlund argues that the contract cannot support a finding of requisite operational control over the Harris Pit, because St. Louis County retained too much authority. For example, it points out, St. Louis County owned the land on which the crushing operation was located, was responsible for site preparation, controlled access to the pit, selected the material that constituted the unprocessed stockpile, selected the location of the stockpiles and crusher, and delivered unprocessed material to the pit with County-owned and operated dump trucks. Resp’t Mot. I at 2, 12; Resp’t Mot. II at 2, 3; Jt. Stips. 13, 21, 22, 35, 37, 38. Hammerlund further contends that it lacked sufficient operational control, because the St. Louis County Superintendent had authority to “resolv[e] all questions” related to the operation of the Harris Pit, and the County owned and operated the bulldozer that maintained the roadways and the unprocessed material dumpsite. Resp’t Mot. I at 15; Resp’t Mot. II at 3, 4; Jt. Stips. 36, 50, 51.

### **B. Hammerlund’s Control of Operations**

Based on application of the indicia of operational control, i.e., Hammerlund’s control over the processed material stockpile and unprocessed material dumpsite, I find that the undisputed facts establish that MSHA’s jurisdiction extended beyond the crusher to include the stockpiles integral to Hammerlund’s mining operation of crushing, screening, and stockpiling Class 5 material.

Hammerlund had the exclusive contractual duty to retrieve materials from unprocessed stockpiles to be processed by the crusher. Retrieving material from the unprocessed material dumpsite, then, became an integral component of Hammerlund’s operation of the crusher. Similarly, Hammerlund owned and controlled the conveyors used to move the final product of crushed materials to the processed stockpile, and Hammerlund maintained the stockpile, i.e., built, shaped, and blended it. Based on these activities, Hammerlund had the “bottom line authority” over production activities related to the processed and unprocessed stockpiles. See *Berwind*, 21 FMSHRC at 1294.

It was a Hammerlund employee that Koskiniemi observed repairing berms at the unprocessed material dumpsite. Building berms is an example of Hammerlund’s acceptance of the contractual provision holding the contractor responsible for compliance with safety regulations. Furthermore, despite Koskiniemi’s observation of the St. Louis County worker taking product samples while the crusher was operating, Hammerlund had a policy of stopping the crusher or running it without processing material during sample retrieval - - a clear demonstration of its authority over safety at the processed material stockpile. Jt. Stip. 53; see *Ames Constr., Inc.*, 33 FMSHRC 1607, 1613 (July 2011) (noting that “the ability to stop unsafe work implies supervisory authority”); *Berwind*, 21 FMSHRC at 1293 (noting that control over health and safety is indicative of supervisory control); *Otis*, 11 FMSHRC at 1902 (finding an entity to be an operator where its employees “had a direct effect on . . . safety”); *Youngquist*,

36 FMSHRC at 2497 (finding an operator's safety policy, that had applicability to the disputed area of the mine, indicative of the operator's control over that area).

Regarding the connection between Hammerlund's contractual obligations and its utilization of the stockpiles contested as components of the "mine," it is undisputed that Hammerlund moved material to the crusher from unprocessed stockpiles, and fed product from the crusher to processed stockpiles. I find Hammerlund's activities with respect to these areas essential to its mining operation. *See Joy*, 17 FMSHRC at 1308 (finding that the continuous miner and shuttle cars sufficiently relate to the mine because without them, "[c]oal could not be mined"); *Otis*, 11 FMSHRC at 1902 (finding elevator service contractor's services to be sufficiently related to the extraction process of the mine where the contractor was exposed to mining hazards and had a direct effect on the safety of others); *Lewis-Goetz and Co., Inc.*, 35 FMSHRC 2192, 2195 (July 2013) (ALJ) (finding fabrication, maintenance, and repair of conveyor belts to sufficiently relate to the mine, as they are essential parts of the mining process and, therefore, not incidental or *de minimis*); *Kempton Transp., Inc.*, 37 FMSHRC \_\_\_\_, slip op. at 3, No. WEST 2014-998; WEST 2015-20 (Oct. 28, 2015) (ALJ) (finding sufficient relation to mining process where haul truck drivers unload material to be crushed and processed on the mine site).

Hammerlund's crushing operation was performed at the Harris Pit for three to four days, during the course of a two-week period. The Commission has found that even "relatively limited" periods of contact with a mine may be sufficient to uphold liability where the activities performed by the entity are an integral aspect of the mining process. *Lang Bros., Inc.*, 14 FMSHRC 413, 420 (Sept. 1991) (finding seven to ten days of presence on a non-continuing basis to be sufficient for liability). I find Hammerlund's relatively short period of mining at the Harris Pit to be counterbalanced by its authority and control over mining operations at the processed material stockpile and the unprocessed material dumpsite - - operations critically related to completing its contractual obligations.

When these factors are considered with Congressional intent that MSHA's jurisdiction under the Act be construed inclusively, I find that the undisputed facts establish that Hammerlund had operational control over the unprocessed material dumpsite and the processed material stockpile and, therefore, that these areas, in addition to the portable crusher, constituted the mine. Accordingly, I find that MSHA acted within its jurisdiction in issuing Citation Nos. 8740638 and 8740639.

Having found MSHA jurisdiction over the disputed stockpiles, I also find, by the parties' stipulations as to the accuracy of Citation Nos. 8740638 and 8740639 and Hammerlund's agreement to accept the citations, as issued, and pay-in-full the Secretary's proposed penalties, that Hammerlund violated sections 46.11(a) and 56.9300(a), as alleged.

**ORDER**

**WHEREFORE**, the Secretary's Motion for Summary Decision is **GRANTED**, and Hammerlund's Motion for Summary Decision is **DENIED**; and Hammerlund Construction, Incorporated, is **ORDERED TO PAY** a total civil penalty of \$216.00 within thirty days of the date of this Decision.<sup>4</sup>



Jacqueline R. Bulluck  
Administrative Law Judge

Distribution:

Gregory Tronson, U.S. Department of Labor, Office of the Solicitor, 1244 Speer Boulevard,  
Suite 216, Denver, CO 80204

Nicholas W. Scala, Esq., Law Office of Adele L. Abrams, P.C., 4740 Corridor Place, Suite D,  
Beltsville, MD 20705

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<sup>4</sup> Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket number and A.C. number.