FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
721 19th Street, Suite 443
Denver, CO 80202-2536
303-844-3577 FAX 303-844-5268

May 24, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. CENT 2022-0010-M A.C. No. 41-00009-542457
v.	
CACTUS CANYON QUARRIES INC., Respondent	Fairland Plant & Qys

DECISION

Appearances: Felix R. Marquez, Esq.,[1] Office of the Solicitor, U.S. Department of Labor, Dallas, Texas for Petitioner;
Andy Carson, Esq., Marble Falls, Texas for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Cactus Canyon Quarries Inc. ("Cactus Canyon") 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"). The parties presented testimony and documentary evidence at a hearing held via the Commission's secure video conferencing system and filed post-hearing briefs. Three section 104(a) citations with a total proposed penalty of $375.00 were adjudicated at the hearing. Although I have not included a detailed summary of all evidence or each argument raised, I have fully considered all the evidence and arguments. For reasons set forth below, I **MODIFY** Citation No. 9643094 and **AFFIRM** Citation Nos. 9643093 and 964395.

Cactus Canyon Quarries operates the Fairland Plant (the "facility"), a surface facility in Burnet County, Texas. The facility prepares rock for use in terrazzo flooring. Andy Carson[2] is

[1] Felix Marquez entered his appearance as counsel for the Secretary on December 13, 2022. Prior to that date, the case was handled by a different attorney in the Dallas Solicitor's office.

[2] Carson is a licensed attorney, geologist by training and practice, and the President and head of operations for Cactus Canyon. Ex. F. Carson assisted with initial construction of the Fairland Plant. Tr. 139. Carson and another individual handle all electrical installation repairs at the Fairland Plant. Tr. 139.

the president of Cactus Canyon and is also an attorney. Carson represented Cactus Canyon at the hearing and testified as its only witness. MSHA Inspector Ray Hurtado[3] was the Secretary's sole witness at the hearing.

I. BACKGROUND AND PRELIMINARY MATTERS

This case has a complicated history. On October 4, 2021, Cactus Canyon mailed its Notice of Contest for the three subject citations to MSHA. Subsequently, on November 26, 2021, i.e., more than 45 days after receipt of the Notice of Contest[4], the Secretary filed a Motion for Extension of Time to File Initial Pleading citing the need for "additional time to allow the parties to thoroughly explore settlement in this matter." The motion asked for a 60-day extension of time and did not provide any justification for the delay in filing the penalty petition other than saying that the time could be used to settle the case. November 26, 2021 was the Friday after Thanksgiving and the motion noted that the Secretary's counsel emailed the operator on that date to see if it objected to the motion but did not receive a response. On December 1, 2021, which was three workdays after the Secretary filed the motion for extension of time, the Commission's Chief Administrative Law Judge (the "Chief Judge") found that the Secretary had shown good cause and issued an order (the "Chief Judge's Order") granting the Secretary's motion and affording the Secretary until January 18, 2022, to file the initial pleading.[5]

After first asking the Chief Judge to reconsider the Chief Judge's Order, which was not granted, Cactus Canyon filed a petition for discretionary review ("PDR") with the Commission on December 23, 2021, challenging the validity of the Chief Judge's Order and asking that the case be dismissed. On January 4, 2022, the Commission issued a notice stating that "after

[3] Hurtado has been an MSHA inspector for 10 years. Tr. 7. As part of Hurtado's training to become an inspector he attended the National Mine Academy and was trained on electrical hazards. Tr. 9, 69-70. Hurtado conducts 60 to 80 inspections per year and estimates that 80 to 90 percent of the job sites he inspected had electrical hazards that he cited. Tr. 10-11. Prior to working for MSHA Hurtado worked for 10 years in the highway construction industry. Tr. 7-8, 68. During his time in the highway construction industry Hurtado worked as a job foreman at sites where electrical tools were used and inspected daily. Tr. 69. Although Hurtado is not a certified electrician, at hearing he demonstrated a reliable working knowledge of residential electrical wiring. Tr. 71-72.

[4] Commission Procedural Rule 28(a) requires the Secretary to file his petition for assessment of civil penalty ("penalty petition") within 45 days of receipt of an operator's notice of contest. 29 C.F.R. § 2700.28(a).

[5] Commission Rules 8(a) and 10(d) allow a party eight days, excluding weekends and holidays, to file an opposition to a motion. 29 C.F.R. § 2700.8(a) and 10(d).

consideration by the Commissioners, no two Commissioners voted to grant the petition [for discretionary review] or to otherwise order review."[6]

On January 10, 2022, Cactus Canyon filed a petition for review of the Commission's order denying the PDR with the U.S. Court of Appeals for the Fifth Circuit. (Case No. 22-60030).

On January 18, 2022, the Secretary electronically filed the petition for assessment of penalty with the Commission and served the same upon Cactus Canyon via email. After Cactus Canyon filed its answer, the case was assigned to me on February 14, 2022.

On April 27, 2022, I granted the Secretary's motion to stay the case, over Cactus Canyon's objection, pending the outcome of the petition for review before the Fifth Circuit. I subsequently lifted the stay on July 20, 2022, two days after the Fifth Circuit dismissed the petition for review for lack of subject matter jurisdiction.[7]

A hearing in this case was held on February 28, 2023. Several motions were filed by the parties prior to the hearing, including a motion for summary decision filed by Cactus Canyon on May 9, 2022. Among other things, the motion raised the same arguments relating to the chain of events surrounding the Chief Judge's Order that were raised in both the motion to reconsider and PDR, asked that the citations be vacated, and the case dismissed. I denied the motion by order dated August 18, 2022. *Cactus Canyon Quarries Inc.*, 44 FMSHRC 609 (Aug 2022) (ALJ). In denying the motion for summary decision, I relied to a large extent on the fact that the Chief Judge determined that good cause had been shown for the Secretary's motion for an extension of time to file the penalty petition, that his determination was the law of the case, and that I was not in a position to overturn his determination.

II. JURISDICTION

One of the principal issues in this case is whether MSHA had jurisdiction to inspect Cactus Canyon's Fairland Plant on July 27, 2021, the date the subject citations were issued. The Secretary argues that the Fairland Plant is subject to Mine Act jurisdiction because mineral milling takes place at the facility.[8] Cactus Canyon contends, among other things, that the nature

[6] In its motion for reconsideration and the PDR, Cactus Canyon argued that the Commission's decision in *Salt Lake County Road Dep't.*, 3 FMSHRC 1714 (July 1981), as well as other Commission case law, provides that the Secretary must show good cause for its failure to timely file a penalty petition and that the Secretary failed to do so in this case.

[7] Through every stage of this litigation Cactus Canyon has maintained that the Chief Judge's order was invalidly issued. Cactus Canyon has argued the Secretary failed to timely file and serve the penalty petition or show good cause for why the late filing should be excused and has consequently asked that the case be dismissed.

[8] The Secretary spent much of his brief arguing that the Fairland Plant is not a "borrow pit" and, as a result, does not qualify for the "borrow pit exception" to Mine Act jurisdiction in the

of its operation has changed in recent years with the result that the facility no longer fits within the definition of "coal or other mine" in Section 3(h)(1) of the Mine Act. 30 U.S.C. § 802(h)(1).[9] For reasons set forth below, I find MSHA had jurisdiction to inspect Cactus Canyon's Fairland Plant and issue the subject citations.

a. Summary of Testimony on the Issue of Jurisdiction

Both Hurtado and Carson offered testimony relating to the issue of MSHA jurisdiction to inspect the Fairland Plant. Hurtado initially testified that rock or mineral was extracted at the Fairland Plant site, but later conceded no extraction occurred there and, instead, Cactus Canyon brought in all material from other locations, including Mexico, for processing at the Fairland Plant. Tr. 65-67, 75.

Hurtado testified that milling, in the form of crushing, screening, and sizing of material, did occur at the facility. Tr. 76-77. Specifically, Hurtado testified that he observed mobile equipment that loaded material into "two independent plants, both equipped with screens for sizing rock and crushers to make a certain size of product[,]" as well as dump trucks that moved material as needed. Tr. 77, 81.

Carson testified regarding the history of the Fairland Plant and its operation. While the facility previously produced material for architectural precast concrete projects, it currently produces material for terrazzo stone floors from dimension stone. Tr. 141, 144, 148.

According to Carson, no extraction occurs at the Fairland Plant and all dimension stone processed into terrazzo stone at the facility is bought from other sources.[10] Tr. 149. However, Carson also acknowledged that 10 to 15 percent of Cactus Canyon's business comes from "something that we've mined ourselves."[11] Tr. 152.

MSHA-OSHA Interagency Agreement. Sec'y Br. 5-10. However, I need not address that issue because Cactus Canyon did not argue at hearing, in its brief, or in its reply brief that the Fairland Plant is a borrow pit.

[9] In previous cases, Cactus Canyon stipulated to MSHA jurisdiction. *See Cactus Canyon Quarries*, 44 FMSHRC 289 (April 2022) (ALJ). Cactus Canyon now maintains that its operations have changed since that time so that the facility should be inspected by OSHA and not MSHA.

[10] Carson testified Cactus Canyon brings in rock from Mexico, a Vulcan Materials Mine, and a from "a Texas landowners' mine." Tr. 149-150. Although some of the rock that arrives at the facility is a minimum of five inches in diameter, other rock is a minimum of ten inches in diameter. Tr. 147.

[11] Although Carson did not so state, Cactus Cayon may have mined this rock at the "Texas landowner's mine."

Carson explained that dimension stone is delivered to the Fairland Plant via truck or rail. Following delivery, the stone may be laid out on concrete, washed/sprayed with water, and inspected to make sure it meets certain specifications, including proper color and size, before being sorted and stored in piles by color on the property. Tr. 148, 153. At current sales rates, the piles of dimension stone can remain on-site anywhere from 20-45 years. Tr. 147-148. According to Carson, on average, 20 years pass between when the dimension stone is placed into a pile and then processed into terrazzo stone at the Fairland Plant. Tr. 150. Carson intends to make all the dimension stone on site into terrazzo stone or find another market for the material in its current condition. Tr. 170.

According to Carson, to get the stone to the right size and shape for Cactus Canyon's terrazzo stone customers, the Fairland Plant utilizes a slow, deliberate, "closed circuit system" where the dimension stone is fed into a hopper, crushed, and then oversized material is screened out so it can be recirculated and "crushed down," or "size reduced," again. Tr. 146, 171, 175-176. On average, materials pass through the system five to six times before the correct size and shape is reached, with only 10-15 percent of the material lost to fines.[12] Tr. 145, 147, 152, 176. The same process is used for all rocks on the property. Tr. 177.

Carson testified that almost all material produced is bagged and sold. Tr. 176. He stated that "[t]oday we sell across North America and occasionally the Far East." Tr. 147.

b. Findings of Fact and Conclusion of Law on the Issue of Jurisdiction

Section 4 of the Mine Act states that "[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act." 30 U.S.C. § 803. Accordingly, for MSHA to have had jurisdiction to inspect the Fairland Plant, the evidence must establish, first, that the Fairland Plant was a "coal or other mine" under the Act and, second, that the products of the Fairland Plant enter commerce or the operation or products of the Fairland Plant affect commerce.

[12] Carson testified that the dimension stone is reduced to a size less than 3/8 of an inch, but greater than 1/16 of an inch, and "almost purely cubicle in shape." Tr. 145,151-152. In order to get the correct shape, the plant "can't run very fast at all[,]" and the material goes through "a lot smaller cone crushers" that are run "a lot wider" than the plant previously used. Tr. 145-146. Carson acknowledged some material brought to the Fairland Plant must be broken with a hammer attached to an excavator before it can be processed. Tr. 175. Carson testified that "[a]ll we're doing is size reducing[,]" and asserted that "none of the stone delivery is crude or ore. It's all finished. We don't separate minerals from the gangue or crude or ore. There is never any grind, concentration, washing, drying, roasting, pelletizing, centering, evaporating, calcining, kiln treatment, sawing, or cutting the stone, heat expansion, retorting, leaching, briquetting at this location." Tr. 150-151.

Is the Fairland Plant a "coal or other mine" under the Mine Act?

In the case at hand, the Secretary seeks to establish Mine Act jurisdiction over the Fairland Plant via subsection (C) of section 3(h)(1) of the Act, which, in pertinent part, defines a "coal or other mine" to include "structures, facilities, equipment, machines, [and] tools . . . used in … the milling of … minerals." 30 U.S.C. § 802(h)(1).[13]

The Mine Act does not define the term "milling". When a statutory term is not expressly defined it should be accorded its commonly understood definition. *Drillex Inc.*, 16 FMSHRC 2391, 2395 (Dec. 1994). In *Watkins Eng'rs & Constructors*, 24 FMSHRC 669, 674-675 (July 2002) the Commission, when analyzing the commonly understood definition of "milling" and related terms, stated the following:

> Within the industry, milling is defined as: "The grinding or crushing of ore. The term *may* include the operation of removing valueless or harmful constituents … ," while mill is defined as a "mineral treatment plant in which crushing, wet grinding, and further treatment of ore is conducted." . . . [*Dictionary of Mining, Mineral, and Related Terms* 344 (2d ed. 1997) ("*DMMRT*")] (emphasis added); *see also Alcoa Alumina & Chems., L.L.C.*, 23 FMSHRC 911, 914 (Sept. 2001) (using *DMMRT* to determine usage in mining industry). The ordinary meaning of "to mill" is "to crush or grind (ore) in a mill," and the term "a mill" is defined as "a machine for

[13] The Mine Act defines "coal or other mine" as follows:

> (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment;

30 U.S.C. § 802(h)(1).

> crushing or comminuting some substance." *Webster's Third New Int'l Dictionary (Unabridged)* 1434 (1993); *see also Nolichuckey Sand Co.*, 22 FMSHRC 1057, 1060 (Sept. 2000) ("Commission … look[s] to the ordinary meaning of terms not defined by statute").

Although the Mine Act does not expressly define the term "milling," it does grant the "Secretary discretion, within reason, to determine what constitutes mineral milling. . . [.]" *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1552 (D.C. Cir. 1984).[14] In 1979 the Secretary exercised that discretion when MSHA and OSHA entered into an interagency agreement to delineate certain areas of authority between the two agencies and set forth guidelines for resolving jurisdictional questions involving milling. MSHA-OSHA Interagency Agreement, 44 Fed. Reg. 22827 (April 17, 1979) amended by 48 Fed. Reg. 7,521 (Feb. 22, 1983) ("Interagency Agreement" or "the Agreement"). Among other things, the Interagency Agreement clarifies the agencies' intent that the Mine Act, as opposed to the OSH Act, be applied to milling operations, and reiterates Congress's intent that jurisdictional doubts be resolved in favor of inclusion of a facility within coverage of the Mine Act. [15] *Id*.

Appendix A to the Agreement describes "milling" as a process "to effect a separation of the valuable minerals from the gangue constituents of the material mined" as well "the art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives. The essential operation in all such processes is separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated." 44 Fed. Reg. at 22829.

In addition, Appendix A also contains a list of "general definitions of milling processes for which MSHA has authority to regulate[,]" which includes the terms "crushing" and "sizing." "Crushing" is defined as "the process used to reduce the size of mined materials into smaller, relatively coarse particles[,]" and "may be done in one or more stages, usually preparatory for the sequential stage of grinding, when concentration of ore is involved." 44 Fed. Reg. at 22829. "Sizing" is defined as "[t]he process of separating particles of mixed sizes into groups of particles of all the same size, or into groups in which particles range between maximum and minimum sizes." 44 Fed. Reg. at 22829-22830.

---

[14] Section 3(h)(1) of the Act states that "[i]n making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment[.]" 30 U.S.C. § 802(h)(1).

[15] In *Donovan v. Carolina Stalite Co*. the D.C. Circuit Court of Appeals recognized "every company whose business brings it into contact with minerals is not to be classified as a mine within the meaning of section 3(h). The jurisdictional line drawn by the statute rests upon the distinction, which is somewhat elusive, to say the least, between milling and preparation, on the one hand, and manufacturing, on the other. Classification as the former carries with it Mine Act coverage; classification as the latter results in Occupational Safety and Health Act regulation." 734 F.2d 1547, 1551 (D.C. Cir. 1984).

Although the Interagency Agreement is not dispositive, it can assist in determining whether the Secretary's application of the term "milling" to a particular facility is reasonable. *See Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1552 (D.C. Cir. 1984).

I find that Cactus Canyon engaged in "milling" at the Fairland Plant by crushing the dimension stone to reduce the size of the material to a cubic shape that can be used in the construction of terrazzo flooring. Hurtado and Carson both testified to the presence of crushers at the Fairland Plant. Carson explained that, at the facility, dimension stone is taken from the on-site piles, broken up with a hammer attached to excavator if needed, dropped in a hopper, crushed, albeit slowly and deliberately, screened for a particular size, then recirculated through the same system as many times as necessary to achieve the correct size and shape for Cactus Canyon's terrazzo stone customers. Carson himself stated that "[a]ll we're doing is size reducing." Tr. 150.

As outlined in *Watkins Eng'rs & Constructors*, the mining industry's understanding of the terms "milling" and "mill," as well as the common dictionary definitions of "a mill" and "to mill" all contemplate the crushing of material. Here, Cactus Canyon was crushing dimension stone to produce stone used to construct terrazzo flooring. Moreover, Cactus Canyon's use of crushers to reduce the size of the dimension stone clearly amounted to "crushing" as that term is defined in the Interagency Agreement.[16]

Cactus Canyon engaged "milling" at the Fairland Plant by "sizing" the material it processed. In *State of AK Dept.of Transp.*, 36 FMSHRC 2642, 2649 (Oct. 2014), the Commission cited the Interagency Agreement's inclusion of "sizing" in its list of milling processes and found that the operator "clearly engag[ed] in 'milling' under section (h)(1)" where it used a screen to separate material "based on size, with oversized rock separated out entirely." Here, like the operation at issue in *State of AK Dept.of Transp.,* the Fairland Plant screened material to separate that which was correctly sized from that which was still oversized. While the operation at issue in *State of AK Dept.of Transp*. screened out oversized rock, wood and trash from the material it was extracting, here, as discussed above, Cactus Canyon subjected oversized material to further "milling" via additional crushing to further reduce the size and shape of the rock. Ultimately, the purpose of screening and crushing the material was to

[16] The *DMMRT* 135 (2d ed. 1997), defines "crushing" as "size reduction into relatively course particles by stamps, crushers, or rolls." The Interagency Agreement's definition of the "crushing," *supra*, is almost identical to that of the DMMRT, but also includes a supplemental statement that "[c]rushing *may* be done in one or more stages, *usually* preparatory for the sequential stage of grinding, when concentration of ore is involved." Cactus Canyon, in its brief, seemingly argues that this supplemental statement changes the definition of "crushing" to *require* that the act be preparatory to the sequential stage of grinding and concentration of ore. CC Br. 3-4, 9-10. However, the supplemental statement says only that crushing "may" be done in one or more states and "usually" is preparatory for grinding when concentration of ore is involved. Given the use of the qualifying terms "may" and "usually," I decline to find that "crushing," as defined in the agreement, *requires* that the act be preparatory to the sequential stage of grinding and concentration of ore.

produce a product that, according to Carson, was less than 3/8 of an inch, but greater than 1/16 of an inch, and "almost purely cubicle in shape." Given that Cactus Canyon crushed and screened rocks of various size to produce a product between a maximum and minimum size, I find that it clearly engaged in "sizing" material as that term is defined in the Interagency Agreement.

Finally, I find that the processes described above and utilized at the Fairland Plant fit within the Interagency Agreement's description of "milling." Cactus Canyon utilized those processes to reduce the dimension stone to a certain specified size and shape so it could be sold for use in terrazzo stone flooring. At hearing, when responding to a question the court asked regarding the processes used at the facility, Carson stated that "when we're doing it right now, we lose 10 percent to fines. 15 percent to fines." Tr. 176. The materials lost to fines had to be removed from the terrazzo stone product Cactus Canyon produces and sells.[17] The separation of valuable terrazzo stone material from fines generated during crushing and sizing is the type of process contemplated by the Interagency Agreement's definition of milling, i.e., a separation of the valuable minerals from materials that cannot be used in terrazzo flooring.[18]

Based on the above analysis, I find that "milling," as that term is understood both in the mining industry and commonly, occurred at the Fairland Plant. Moreover, I find that the Fairland Plant's operation squarely fits within the Interagency Agreement's definitions of "crushing" and "sizing" and that the Secretary reasonably applied the term "milling" to the facility.

The Commission has explained that "milling" "independently qualifies . . . [an] operation as a 'mine' within the meaning of the Act." *Drillex Inc.*, 16 FMSHRC 2391, 2395 (Dec. 1994). Moreover, the legislative history of the Act makes clear Congress intended "that what is considered to be a mine and to be regulated under this Act be given the broadest possibl[e] interpretation, and . . . that doubts be resolved in favor of inclusion of a 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., L*egislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978) ("Legis. Hist"). Accordingly, I find that the Fairland Plant is a mine under the Act because "milling" occurred at the facility.

Before turning my attention to whether the products of the mine enter commerce or the operation or products of the mine affect commerce, I must first address one of Cactus Canyon's primary jurisdictional arguments, which merits further discussion.

---

[17] Carson explained that the terrazzo industry depends on good quality control. Tr. 144.

[18] I note that in *Watkins Eng'rs & Constructors*, 24 FMSHRC 669, 675 (July 2002) the Commission stated that "[i]n enacting the Mine Act, Congress did not impose upon the Secretary a technical definition of milling based on the separation of valuable from valueless materials, nor in the Act's legislative history did it intimate that separation was critical to the determination that 'milling' took place."

Cactus Canyon argues the Fairland Plant is not subject to MSHA jurisdiction because it is not a "mine" under the Act, nor is it at, adjacent to, appurtenant to, or connected to an area of land where minerals were extracted from their natural deposits. CC Br. 6-8. In support of its argument, Cactus Canyon cites the Commission's decision in *KC Transport, Inc.*, 44 FMSHRC 211 (Apr. 2022)[19], as well as two cases relied upon by the Commission in that decision, i.e., *Maxxim Rebuild Company LLC v. FMSHRC*, 848 F.3d 737 (6th Cir. 2017) ("*Maxxim*"), and *Dep't of Labor v. Ziegler Coal Co.*, 853 F.2d 529, 533-34 (7th Cir. 1988) ("*Ziegler*").

I disagree with Cactus Canyon's interpretation. None of the three cited cases involved milling,[20] and language in those decisions contradicts Cactus Canyon's asserted interpretation.[21] Moreover, Cactus Canyon's interpretation contradicts precedent of the Commission and courts that "milling" operations independently qualify as "mines" under the Act. *Drillex Inc.*, 16 FMSHRC 2391, 2395 (Dec. 1994); *see Sec'y of Labor v. National Cement Co. of Cal. Inc.*, 573 F.3d 788, 795 (D.C. Cir 2009) (subsection (C) of the Act's definition of "mine" can reach facilities "not located within an extraction area."); *see also Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1551-1552 (D.C. Cir. 1984) (the Act "does not require that . . . [structures and facilities used in milling] be owned by a firm that also engages in the extraction of minerals from the ground or that they be located on property where such extraction occurs.")

---

[19] The Commission's decision in *KC Transport* is currently on appeal to the D.C. Circuit Court of Appeals, Docket No. D.C. No. 22-1071.

[20] *KC Transport* involved the Secretary's attempt to exert jurisdiction over trucks parked at a maintenance facility, as well as the facility itself, which was operated by an independent trucking company that provided hauling services to multiple businesses, including coal operators. *Maxxim* involved the Secretary's attempt to exert jurisdiction over a shop that made and repaired mining equipment. *Ziegler* involved a question of jurisdiction over a repair shop. In each case, the facility, shop or equipment was not on, adjacent, or appurtenant to an extraction, milling, or preparation site.

[21] In *KC Transport* the Commission noted that the Coal Act, the predecessor to the Mine Act, included in its jurisdiction "'lands' where extractive mining, milling, or preparation occurs." 44 FMSHRC at 218. There, the Commission expressly acknowledged that in passing the Mine Act Congress did not intend to expand the scope of jurisdiction and stated that "MSHA must thoroughly inspect operations conducting mining, milling, and preparation activities and all instruments and instrumentalities used in such operations." 44 FMSHRC at 219-220. Similarly, in *Maxxim*, the Sixth Circuit Court of Appeals noted that the text and context of the Mine Act "limit the agency's jurisdiction to locations and equipment that are part of or adjacent to extraction, milling, and preparation sites." 848 F.3d at 744. Finally, the Commission in *KC Transport* cited *Ziegler's* recognition of the "'geographical component' of the situs of a facility [that] . . . '[t]he statutory definition of a coal mine plainly contemplates that the facilities used in the work of extracting coal must be located on or below the area of land where the coal is extracted, *milled*, or prepared.'" 44 FMSHRC at 223 (emphasis added).

The Commission in *KC Transport* found that there is "locational" element to the Mine Act's definition of "coal or other mine." My reading of that decision, in conjunction with other case law, is that the locational element limits jurisdiction under subsection (C)[22] to "lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds" used in, or to be used in, or resulting from the work of extracting minerals, *as well as* "lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds" where minerals are milled or prepared. Here, although there was no extraction at the Fairland Plant, there was "milling."

Based on the above analysis, I find that the lack of an extraction site, on, adjacent to, or appurtenant to the Fairland Plant is not fatal to MHSA's assertion of jurisdiction over the facility.

Do the products of the Fairland Plant enter commerce or the operation or products of the Fairland Plant affect commerce?

The Secretary asserts that the products of the Fairland Plant affect interstate commerce and beyond because, according to Carson, they are sold "across North America and occasionally the Far East." Sec'y Br. 10. Cactus Canyon argues that because the dimension stone delivered to, and processed at, the Fairland Plant already entered commerce, the facility cannot be subject to Mine Act jurisdiction. CC Br. 3

The Commission has recognized that "[b]ecause Congress, in the Mine Act, intended to exercise the full reach of its authority under the Commerce Clause, the Secretary has a minimal burden to show that . . .[a mine's] operations or products affect interstate commerce." *Jerry Ike Harless Towing, Inc. and Harless Inc.*, 16 FMSHRC 683 (Apr. 1994); *State of AK Dept.of Transp.*, 36 FMSHRC 2642, 2645 (Oct. 2014).

I find that the Fairland Plant's products affect "commerce" as that term is used in the Act.[23] Carson testified at hearing that Cactus Canyon sells terrazzo stone produced at the Fairland Plant "across North America and occasionally the Far East." Tr. 147. I have already found that Cactus Canyon engaged in "milling." In *State of AK Dept.of Transp.* the Commission stated that "any mining or milling that an entity engages in for its own use constitutes 'commerce' under section 4 of the Mine Act." 36 FMSHRC at 2645. Here, Cactus Canyon not only engaged in milling, but also sold milled products "across North America" and other places. The Act's definition of "commerce" includes "trade . . . between a place in a

[22] Neither subsection (A) or (B) are at issue in the instant proceeding. As a result, my analysis and consideration of any locational element is restricted to subsection (C).

[23] Section 3(b) of the Mine Act defines "commerce" as "trade, traffic, commerce, transportation, or communication among the several States, or between a place in a State and any place outside thereof, or within the District of Columbia or a possession of the United States, or between points in the same State but through a point outside thereof[.]" 30 U.S.C. § 802(b).

State and any place outside thereof[.]" 30 U.S.C. § 802(b). I find that Cactus Canyon's sale of terrazzo stone produced at the Fairland Plant "affected commerce" under the Act.

Cactus Canyon's argument that the Fairland Plant cannot be subject to Mine Act jurisdiction because the dimension stone had already entered commerce is unavailing.[24] Mine Act jurisdiction covers not only mines' whose products enter commerce, but also mine operations or products of those operations that affect commerce. Here, I found that the Fairland Plant's products affected commerce. The fact that most of the stone used in the milling process was purchased on the open market does not negate MSHA jurisdiction.

Finally, although not critical to my analysis, I note that Carson testified that "[t]oday we've only - - 10 percent of business, 15 percent of our business is something that we've mined ourselves." Tr. 152. If Cactus Canyon is milling material that it mined, then it stands to reason that the material would not enter commerce until Cactus Canyon milled it and sold it as terrazzo stone.

It must be noted that whether a facility is subject to Mine Act jurisdiction is factually dependent. I relied exclusively on the evidence presented at the hearing in this case. A change in a facility's operations, or different evidence produced at a hearing, could alter the result.

Having determined that the Fairland Plant's products affect commerce, I find that the Secretary had jurisdiction to issue the citations discussed below, two which were issued for conditions observed in structures related to bagging the milled material, and one of which was issued for a condition observed in an onsite maintenance shop.[25]

---

[24] In support of its argument, Cactus Canyon cites *Herman v. Associated Elec. Coop., Inc.*, 172 F.3d 1078 (8th Cir. 1998) for an apparent "bright line" rule for jurisdiction "based upon where the output of the mine was processed into a marketable form." CC Br. 12-13. There MSHA was found to not have jurisdiction over an electric utility plant that bought crushed coal, then further crushed the coal and removed debris before burning it in its generator. However, the facts of that case are distinguishable from the case at hand. Unlike the Fairland Plant, the utility plant in *Herman* was not "in the business of selling a raw or processed mineral product. An electric utility sells electricity. The coal was used as an end product at the plant, and hence the utility was the final consumer of the coal." *In re Kaiser Aluminum & Chem. Co.*, 214 F.3d 586, 592–93 (5th Cir. 2000). Here, Cactus Canyon was "in the business of processing, or as MSHA claims, 'milling,' a mineral product for sale to others" in the form of terrazzo stone. *Id*. The final product in this case is not the terrazzo stone made at the facility but rather the terrazzo flooring is constructed elsewhere.

[25] Carson argues that the citations were issued in areas that have "no relationship in time, in function, or in location to any 'Working Place' or 'Mill.'" CC. Br. 14, 15, 17. However, both the Mine Act and Interagency Agreement state that the Secretary "shall give due consideration to the convenience of administration resulting from the delegation to on Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment." 30 U.S.C. § 802(h)(1), 44 Fed. Reg. at 22828. Here, the bagging and maintenance structures where the citations were issued were at the same physical establishment

III. CITATIONS AT ISSUE

a. Citation No. 9643093

On July 27, 2021, MSHA Inspector Hurtado issued Citation No. 9643093 under section 104(a) of the Mine Act for an alleged violation of section 56.12004 of the Secretary's safety standards, which states, in pertinent part, that [e]lectrical conductors exposed to mechanical damage shall be protected." 30 C.F.R. § 56.12004. The citation alleges:

> The power cables for the Inside Bagging Belt reverse switch had cracks in the outer jacket. The inner conductors were visible and exposed to damage. The switch is located near the bagging station that is operated by miners. The switch is used as needed during normal operations. This exposed miners using the switch to an electrical hazard and electrocution injuries from damage to the conductors.

Hurtado determined that an injury or illness was unlikely to occur but any injury could reasonably be expected to be fatal. He designated the violation as not being significant and substantial ("S&S"), one person would be affected, and the violation was the result of Cactus Canyon's moderate negligence. The Secretary proposed a civil penalty in the amount of $125.00.

Summary of Evidence

Inspector Hurtado testified about the conditions he observed and the reason why he determined that an injury was unlikely. He said that although the outer jackets on the two power cables had cracks in them, the insulation surrounding the conductors inside the cables was not damaged with the result that the copper wires were not exposed. Tr. 27, 44. Nevertheless, he believed that the insulated conductors were exposed to mechanical damage because of the cracks he observed in the outer jackets for both cables. Tr. 27-28. He determined that the condition could result in a fatal accident as the current in the conductors was 220 volts. Tr. 28. The inspector testified that these cracks must have developed over time and were caused by vibration and the stress placed on the outer jacket at the cited location. Tr. 57-58, 91, 100-01. Any miner who operates the bagging machine was exposed to the hazard because the cracks in the outer jacket were near the operating controls for the bagging unit. Tr. 35. Inspector Hurtado took photos of the condition he observed, and the Secretary relied on these photos as part of his proof of a violation. Ex. 6.

Inspector Hurtado further testified that "mechanical damage" is any damage to which a cable could be exposed including environmental damage. Tr. 84. In the area where the cited cracks were present there was no protection for the insulated conductors. Tr. 90. In addition, the cracks in the outer jacket would likely get larger over time because of the stress on the cables. He said that it was a matter of time before the insulation surrounding the copper wires would

---

as the crushing plants and screens that were used for milling, i.e., the Fairland Plant. The Fairland Plant is located on one integrated piece of property. Ex. G

also crack thereby exposing the copper wires. Tr. 93. If the cables vibrate when the bagging machine is operating, the cracks in the outer jacker could develop more quickly. Tr. 101. The cited condition was abated when Cactus Canyon installed new cables.

Carson testified that because no copper was showing, the Secretary failed to show that any hazard was present. Tr. 160. In addition, because it would be difficult for anyone to get their fingers inside the cracks, no hazard was present. *Id*.

Analysis

A "conductor" is defined as "a material, usually in the form of a wire, cable, or bus bar, capable of carrying an electric current." 30 C.F.R. § 56.2. The language of the safety standard was designed to ensure that mines protect electrical conductors in locations where they are exposed to mechanical damage. Installing an electrical cable with an outer jacket meets the requirements of this standard. In this instance, Cactus Canyon installed two electrical cables that included an outer jacket that protected the inner electrical conductors from mechanical damage. Thus, when the cables were installed, Cactus Canyon met the requirements of the safety standard. I find that the evidence establishes that the cracks in the outer jacket of two cables had developed over time and that, more than likely, the cracks were created because the cables were bent at very extreme angle at the location of the cracks.[26] The cables appear in the photos to be bent to an angle of about 90 degrees. Ex. 6. This put the cables under stress and subject to slowly developing damage.

The issue is whether the cracks in outer jackets of electrical cables violated the safety standard. The standard requires that electrical conductors that are "exposed to mechanical damage" be protected. As a consequence, in order to meet his burden of proof for section 56.12004, the Secretary must establish that the cited cables were exposed to mechanical damage. For the reasons set forth below, I find that the Secretary met this burden.

The cracks in the outer jackets developed as a result of the environment where the cables were installed. It is not clear how long the cables had been in use, but I find that the evidence establishes that the cracks in the outer jacket had been developing for some time rather than from a sudden event. Nothing in the safety standard suggests that the damage that a conductor could be exposed to must be the result of blunt force in order for the standard to apply. These cracks exposed the inner insulated conductors to further environmental damage. The bagging room can get dusty. Dust and dirt can cause further degradation to the outer jacket and the inner conductors. In addition, it is likely that, if the condition was not abated, the cracks would expand thereby increasing the exposure of the insulated conductors to damage.

[26] The Secretary argues that the cited condition could have been caused by vibrations, but it is not clear that the cables were, in fact, subject to vibrations. The inspector never observed the bagging unit in operation and when asked if either cable vibrates when the bagging unit was in use, he simply replied "[i]t could." Tr. 93-94.

In *Northern Illinois Service Co*., 36 FMSHRC 2811, 2818 (Nov. 2014) (ALJ), the outer jacket of an electrical cable was torn for about a half of an inch exposing the inner insulated conductors. The power cable was located in an outdoor area. The inspector determined that the "breach in the cable's outer jacket exposed the inner electrical conductors to possible mechanical damage such as 'equipment, material, weather, and UV radiation.'" *Id.* Based on this evidence, the administrative law judge affirmed the citation and determined that "[a]ssuming normal and continuing mining operations, even factoring in the twenty-five or less production days during a normal work year, it is reasonably likely the breach in the outer insulation would cause the insulation on the inner conductors to fail due to the effects of weathering and/or friction." *Id.* at 2819.

In *Knock's Building Supplies*, 20 FMSHRC 535, 546-47 (May 1998) (ALJ), the judge determined that a violation existed where the inner conductors of a power cord were exposed due to cracks in the cord's "mechanical protection." Although the operator argued that there was no violation because the inner wires were still insulated, the Judge determined that this argument may be relevant in evaluating whether a violation is S&S but not in determining whether there was a violation of the safety standard. [27]

Consistent with these decisions, I find that the Secretary established a non-S&S violation of section 56.12004. The violation was unlikely to result in an injury. Inspector Hurtado determined that if a miner was injured as a result of this violation, it could reasonably be expected to be fatal because the cables carried 220 volts. Tr. 111. I find his analysis on this issue to be superficial. Many factors must be considered when determining whether an electrical violation could reasonably be expected to cause a fatality, not just the voltage. Given that the cracks were quite narrow and difficult to reach, I find that the gravity of the violation was low. I affirm the inspector's determination that the violation was the result of Cactus Canyon's moderate negligence because the violative condition was in plain sight. A penalty of $125.00 is appropriate.

b. Citation No. 9643094

Citation No. 9643094, issued under section 104(a) of the Mine Act on July 27, 2021, also alleges a violation of Section 56.12004. The Condition or Practice section of the citation states, in pertinent part, as follows:

> The power cable for the 120 volt outlet in the Dust/ Fines Bagging Room was not attached to the fitting at the outlet box. This exposed the inner conductors to damage from not having protection from the outer jacket secured to the fitting. Damage to the conductors can cause an electrical hazard and expose a miner working in the

[27] In *Northern Aggregate Inc*., 37 FMSHRC 562, 574, 581-83 (March 2015) (ALJ), a judge vacated a citation alleging a violation of section 56.12004 on the basis that the conductor was not exposed to mechanical damage due to its location but affirmed a different citation alleging a violation of the standard on the basis that the conductor was exposed to damage.

> bagging room to electric shock or burn injuries. The bagging room outlet is used as needed.

Inspector Hurtado determined that an injury was unlikely to be sustained, but that if an injury were sustained it could reasonably be expected to result in lost workdays or restricted duty. He further determined that the condition was non-S&S, affected one person, and was the result of the operator's moderate negligence. The Secretary proposed a penalty of $125.00 for this alleged violation.

Summary of Evidence

Inspector Hurtado testified that he observed the condition when he examined the 110-volt outlet box. Tr. 41. He took photos which show the conditions he cited. Ex. 7. He testified that the power cable for the outlet was not properly attached to the fitting at the outlet, which exposed the inner conductors to mechanical damage. Tr. 37-39. He stated that this violation exposed anyone using the outlet to a hazard of electrical shock. Inspector Hurtado assumed that the condition had existed for "some time" after something pulled on the wire. Tr. 105. He admitted that no copper wires were exposed and that the gap from the fitting to where the outer jacket began was small. Tr. 103-04.

Carson testified that section 56.12008 should have been cited, which requires that "(p)ower wires and cables shall be insulated adequately where they pass into or out of electrical compartments." He also stated that the outlet was in an area that was rarely used and a long distance from active operations. Tr. 164. There was still fabric surrounding the insulated wires in the power cord. Tr. 163. He cannot recall anyone ever using the outlet. Finally, he testified that the electrical cables in the cited area would not be exposed to any mechanical damage.

Analysis

I find that the Secretary established a non-S&S violation. Only a small part of the jacket for the power cord was not under the clamp on the outlet. Ex. 7. The insulation on the conductors was still present. The condition may have existed when the outlet was initially installed or the power cord could have been pulled out of the clamp at some point. Whether the power cord was subject to mechanical damage is a close question. After exiting the outlet, the power cord ran inside a channel on what Carson called a "purlin." Tr. 107; Ex 7 p. 2. Given its location resting inside a channel it is hard to envision how anything could pull on the power cord to cause additional mechanical damage. Nevertheless, as with the previous citation, environmental conditions could further damage the exposed area of the power cord, thereby creating a hazard. If the insulation surrounding the individual wires were to degrade, someone could be exposed to an electric shock hazard when using the outlet. I find that this violation was not serious because the events necessary to actually expose anyone to a hazard were unlikely.[28]

I find that it was unlikely that the violation would result in an injury and that any injury would most likely not be serious. I credit the testimony of Carson that this outlet was rarely, if

[28] I agree with Carson that section 56.12008 is more applicable to the condition cited.

ever, used. I also find that the cited condition was not easy to see. As a consequence, I find that Cactus Canyon's negligence was low. A civil penalty of $125.00 is appropriate.

c. Citation No. 9643095

Citation No. 9643095, issued under section 104(a) of the Mine Act on July 27, 2021, alleges a violation of Section 56.12019 of the Secretary's safety standards, which requires that "[w]here access is necessary, suitable clearance shall be provided at stationary electrical equipment or switchgear." 30 C.F.R. § 56.12019. The Condition or Practice section of the citation states, in pertinent part, as follows:

> Suitable clearance to the breaker box located in the rear-left corner of the maintenance shop was not maintained. The access to the breaker box was blocked with welding machines, utility cart, and buckets. The breaker box provides power to the shop. This exposed a miner to electric short or burns should an electrical hazard occur and not being able to access the breaker box to de-energize power. The shop is used daily.

Inspector Hurtado determined that an injury was unlikely to be sustained, but that if an injury were sustained it could reasonably be expected to result in lost workdays or restricted duty. He further determined that the condition was non-S&S, affected one person, and was the result of the operator's moderate negligence. The Secretary proposed a penalty of $125.00 for this alleged violation.

Summary of Evidence

When Inspector Hurtado entered in the maintenance shop, he observed that there was "no suitable clearance to the breaker box . . . that's mounted on the wall in the rear left corner." Tr. 48. He testified that there were portable welder units, miscellaneous parts, boxes, buckets and carts blocking access to the breaker box. Tr. 48-49. He referenced the photograph he took in the maintenance shop to illustrate the conditions he observed. Ex. 8 p. 1. The photo clearly shows that an employee would have a difficult time reaching the cited breaker box.

On cross examination, the inspector testified that the breaker box was electrical equipment that was subject to the requirement of the safety standard. Tr. 116-17. He believed that the circuit breakers in the breaker box controlled power for lighting and outlets used for welders. Tr. 118. He stated that anyone operating a welder who encountered a problem would first attempt to switch it off and unplug it from the outlet, but that a situation could arise where the safest option would be to switch it off at the breaker box. Tr. 119-21, 131. He determined that an injury was unlikely because there were several ways to deenergize a welder in the shop.

Carson testified that a breaker box is not electrical equipment because it is not the end user of the power being supplied. Tr. 165-66. In its brief, Cactus Canyon argues that it is "unsupported nonsense to urge equivalence." CC. Br. 17. It also argues that the inspector "could not identify any reasonable circumstances where anyone using plugged-in equipment

would not first disengage (let go of the trigger), then unplug a welder instead of running across the room to throw a breaker." CC Br. 17-18.

Analysis

Although the Commission has not addressed section 56.12019, at least one Commission judge has done so. In *VT Unfading Green Slate Co. Inc*., 23 FMSHRC 310 (Mar. 2001) (ALJ) a judge affirmed a violation of 56.12019 where an inspector testified that a truck tire, cardboard boxes and pallets prevented access to electrical panel boxes in a storage shed.

I find that the Secretary established a non-S&S violation of section 56.12019. It would have been difficult to reach the breaker box without tripping or falling. Indeed, the evidence shows it would have been impossible to reach the breaker box without first moving pieces of equipment. Ex. 8 p. 1. Circuit breakers serve to stop the flow of electrical current in the event of an overload or short circuit. The Secretary's regulations do not define the term "switchgear." However, dictionaries, as well as other sources, make clear that "switchgear" includes circuit breakers and other types of electrical devices that serve to switch, interrupt, control, meter, protect, and regulate the flow of electricity. *See e.g. DMMRT* 557 (2d ed. 1997). Although the inspector apparently viewed the breaker box as a piece of stationary "electrical equipment," I need not determine whether that characterization was correct given that the breaker box was quite clearly "switchgear."

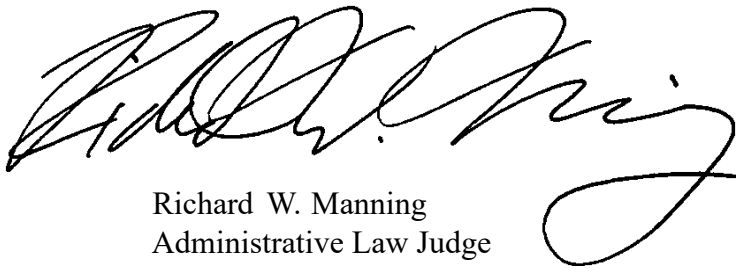
The fact that there were other means to deenergize electrical equipment in the shop relates to the gravity of the violation. Even assuming that gaining access to the breaker box would not typically be necessary in an emergency, having the area clear provided an extra measure of safety in the event that immediate access to the breaker box was necessary. It has long been held that safety standards should be interpreted to maximize the safety of miners. I also find that the violation was unlikely to result in an injury and that any injury would, at most, lead to lost workdays or restricted duty. I affirm the inspector's determination that the violation was the result of Cactus Canyon's moderate negligence because the violation was obvious. A penalty of $125.00 is appropriate.

IV. CIVIL PENALTIES

I determined an appropriate penalty for each violation taking into consideration the provisions of sections 110(i) and 110(k) of the Mine Act. My findings with respect to gravity and negligence are discussed above. Cactus Canyon has a history of six paid citations in the 18 months preceding the July 2021 inspection. Ex. 1. The parties did not present evidence as to Cactus Canyon's size but Exhibit A to the penalty petition indicates that it was assigned 3 penalty points for the size criterion, which correlates with a small metal/nonmetal mine operator. 30 C.F.R. § 100.3 Table III. The penalties I assess will not affect Cactus Canyon's ability to continue in business. Based on the penalty criteria I assess a total penalty of $375.00. The Secretary proposed the minimum penalty for each citation. *See* 30 C.F.R. § 100.3(g), Table XIV (2021) (Considering the 10% good faith abatement reduction). Given the low penalties, a penalty reduction for Citation No. 9643094 is not appropriate.

V. ORDER

For reasons set forth above, I find that milling occurs at the Fairland Plant with the result that it is subject to Mine Act jurisdiction. Citation No. 9643093 is **AFFIRMED** as issued. Citation No. 9643094 is **MODIFIED** to reduce the negligence but otherwise **AFFIRMED** as issued. Citation No. 9643095 is **AFFIRMED** as issued. Cactus Canyon is **ORDERED TO PAY** the Secretary of Labor the sum of $375.00 within 40 days of the date of this decision.[29]



Richard W. Manning
Administrative Law Judge

Distribution:

Felix R. Marquez, Esq., Office of the Solicitor, U.S. Department of Labor, 525 Griffin Street, Suite 501, Dallas, TX., 75202, Email: (Marquez.Felix.R@Dol.gov)

Andy Carson, Esq., Cactus Canyon Quarries, 7232 CR 120, Marble Falls, TX 78654 (acarsonmarblefalls@aol.com)

[29] Payment (check or money orders) should be sent to U.S. Department of Labor, Mine Safety and Health Administration, Payment Office, P.O. Box 790390, St. Louis, MO. 63179-0390; Electronic payments can be applied via https://www.pay.gov/public/form/start/67564508 Please include Docket Number & A.C. Numbers with payment.