FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004

June 8, 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 2015-596 A.C. No. 33-04502-385170
v.	Docket No. LAKE 2015-639 A.C. No. 33-04502-387619
THOMPSON ELECTRIC, INC., Respondent	Mine: Sober Sand & Gravel

SUMMARY DECISION

Appearances: Lisa A. Cottle, Esq., U.S. Department of Labor, Office of the Solicitor, Cleveland, Ohio, on behalf of the Petitioner;
Keith L. Pryatel, Esq., Kastner Westman & Wilkins, LLC, Akron, Ohio, on behalf of the Respondent.

Before: Judge Feldman

These consolidated civil penalty proceedings are before me based on petitions for assessment of civil penalties filed by the Secretary of Labor ("Secretary") under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended ("the Mine Act" or "Act"), 30 U.S.C. § 815(d), against the Respondent, Thompson Electric, Inc. ("Thompson Electric"). Thompson Electric is an independent contractor that performed electrical services at the Sober Sand & Gravel mine ("Sober Mine") in Portage County, Ohio. The Sober Mine, which is owned and operated by Ray Bertolini Trucking Co., is a facility where a dredge is used to excavate submerged sand and gravel. The services performed by Thompson Electric consisted of disconnecting and reconnecting electrical power to a dredge to allow for the movement of the dredge on mine property.

During the course of an April 29, 2015, Mine Safety and Health Administration ("MSHA") inspection of the Sober Mine facility, Thompson Electric was cited for three violations of the Secretary's mandatory safety standards: Citation No. 8842392, which alleges that a Thompson Electric employee failed to use adequate fall protection; Citation No. 8842396, which alleges a failure to develop and implement a written plan for new miner training; and Order No. 8842394, which alleges a failure to provide new miner training.

Thompson Electric does not dispute the facts that the Secretary relies on to support the alleged violations. *See Jt. Stip.*, at 1-4 (Feb. 10, 2017). However, on March 29, 2017, Thompson Electric filed a Motion for Summary Decision seeking that the violations be vacated based on a lack of Mine Act jurisdiction. *See Resp. Br.*, at 1-2 (Mar. 29, 2017). While the Secretary does not object to resolving this matter summarily, the Secretary opposes Thompson

Electric's denial of jurisdiction. *See Sec'y Br.*, at 7 (Apr. 19, 2017). As both parties agree that a summary decision is appropriate in resolving the issue of Mine Act jurisdiction, I construe the parties' pleadings as cross-motions for summary decision.

In furtherance of resolving this matter via summary decision, the parties have filed joint stipulations of material facts. The parties' Joint Stipulations provide:

1. The Sober Mine is a surface "mine" as that term is defined in section 3(h) of the Mine Act. The Sober Mine is owned and operated by Ray Bertolini Trucking Co. Joseph F. Bertolini is the President of the Sober Mine and Eric Gross is a Foreman of the Sober Mine.

2. At all material times involved in this case, the commodities of the Sober Mine (construction sand and gravel) entered commerce, or the operations or products thereof affected commerce, within the meaning and scope of Section 4 of the Mine Act.

3. Respondent Thompson Electric is an independent contractor that performed electrical services on a dredge at the Sober Mine in Portage County, Ohio.

4. Thompson Electric is not an "owner" or "lessee" of the Sober Mine within the meaning of 30 U.S.C. § 802(d), nor does Thompson Electric "control" or "supervise" the Sober Mine within the meaning of 30 U.S.C. § 802(d).

5. The only equipment that Thompson Electric's employees worked on or performed services on at the Sober Mine was a single dredge owned by the Sober Mine. The dredge is used to excavate submerged sand and gravel from the mine.

6. The scope of Thompson Electric's work at the mine was to disconnect the electrical power to the dredge where it was originally located on the mine property, and then later once the dredge was relocated by the Sober Mine, re-connect electrical power to the dredge.

7. The new location of the dredge was approximately 1,500 feet from its original location and 2,500 feet from the entrance to the Sober Mine. At the new location, the dredge was scheduled to be re-connected to an electrical sectioning cabinet.

8. At the time of the alleged MSHA citations at issue . . . the dredge had already been moved to its new location by the Sober Mine.

9. Thompson Electric employees were at the Sober Mine property a total of six (6) days.

10. On the first day (12/24/14), a single Thompson Electric employee disconnected the dredge power source. That Thompson Electric employee was present for

seven (7) hours at the Sober Mine property. During this work, the dredge was locked-out from its power source and the Sober Mine was operating.

11. On the second and third days (4/22/15 and 4/23/15), two employees of Thompson Electric worked on electrical connect components of the dredge at its new location. Both Thompson Electric employees worked seven (7) hour days. During this work, the dredge was locked-out from its power source and the Sober Mine was operating.

12. On April 24 and 27, 2015, four (4) Thompson Electric employees worked on the electrical connect components of the dredge at its new location for seven (7) hours each day. During this work, the dredge was locked-out from its power source and the Sober Mine was operating.

13. April 24, 2015, was the first day that the worker (Pete Aglioti) who committed the fall protection infraction at issue in Citation No. 8842392 was at the Sober Mine site during the six (6) day period at issue in the citations.

14. On April 29, 2015, two Thompson Electric employees arrived to work at the Sober Mine. However, the Sober Mine had not moved the power cable to the new location. Therefore, two additional Thompson Electric employees were sent to the Sober Mine to also work on the dredge at its new location.

15. On April 29, 2015, MSHA issued Thompson Electric Citation No. 8842392 because Thompson Electric employee Pete Aglioti failed to utilize fall protection. At the time, Joe Bertolini of the Sober Mine was handing a power cable for the dredge to Pete Aglioti who was on the dredge, approximately 13 feet above ground level, without wearing fall protection. Pete Aglioti had been trained by Thompson Electric about the need to wear fall protection whenever working from a surface four or more feet above ground level. Thompson Electric immediately (i.e. on 4/29/15) sent Pete Aglioti home for disciplinary reasons, and ultimately issued him a 3-day suspension for failing to wear fall protection as he had been trained.

16. On April 29, 2015, the dredge was locked-out from its power source and the Sober Mine was operating.

17. On April 29, 2015, MSHA issued Thompson Electric Order No. 8842394 for failing to provide four employees with newly hired inexperienced miner training pursuant to 30 C.F.R. § 46.5(a). Thompson Electric admits that it did not provide newly hired inexperienced miner training to the four employees.

18. On April 30, 2015, MSHA issued Thompson Electric Citation No. 8842396 for failure to develop or implement a Part 46 Training Plan. Thompson Electric admits that it did not develop or implement a Part 46 Training Plan. On April 30,

2015, the dredge was locked-out from its power source and the Sober Mine was operating.

19. Thompson Electric did not complete its work at the Sober Mine. Once the MSHA officer, on April 29, 2015, informed Thompson Electric of its intention to cite the Respondent for MSHA violations, Respondent promptly exited the Sober Mine location and did not return.

20. Thompson Electric timely contested all of the issued MSHA citations.

Jt. Stip., at 1-4.

Thompson Electric seeks to have the subject citations and order vacated on jurisdictional grounds. As noted, Thompson Electric has stipulated to the facts surrounding the issuance of the citations and order. If Mine Act jurisdiction is found, the parties have proffered conditional settlement terms with respect to the issues of significant and substantial (S&S) and degree of negligence, and the proposed civil penalty for each of the three cited conditions. However, the parties reserve the right to appeal any adverse finding as a consequence of this Summary Decision.

Thus, there are two threshold issues to be resolved in this Summary Decision: 1) whether Thompson Electric is subject to Mine Act jurisdiction; and 2) whether Thompson Electric is subject to Part 46 training requirements. As discussed below, although I have found that Thompson Electric is subject to Mine Act jurisdiction, the Part 46 training violations shall be vacated. Consequently, the parties' motions for summary decision shall each be granted in part, in that the Secretary has prevailed on the issue of Mine Act jurisdiction, and Thompson Electric has prevailed with respect to the inapplicability of Part 46.

I. Mine Act Jurisdiction

a. Thompson Electric's Jurisdictional Challenge

Thompson Electric argues that it should not be subject to Mine Act jurisdiction because it was not "engaged in the extraction process" and because its activities were *de minimis* in that they were limited solely to electrical maintenance on a dredge. *Resp. Br.*, at 10. In this regard, Thompson Electric asserts that it was never present at the Sober Mine for more than five consecutive work days, and that at all times its employees were performing electrical maintenance on a dredge that was "locked out from its power source," was "completely inoperable," and "was not excavating any aggregates." *Id.* at 5-6; *Jt. Stip.*, at ¶ 9-14. Finally, Thompson Electric reportedly left the Sober Mine location immediately after being cited for the alleged violations and has no intention of returning. *Id.* at 7; *Jt. Stip.*, at ¶ 19.

In support of its motion, Thompson Electric relies on the Fourth Circuit decision in *Old Dominion Power Co. v. Donovan*, 772 F.2d 92 (4th Cir. 1985), wherein the court concluded that a power company that installed, maintained, and took monthly electric meter readings at a substation that was separated from the rest of mine property by a chain link fence was not

"an operator" within the meaning of section 3(d) of the Mine Act, which includes contractors performing services at a mine. Thompson Electric further relies on *N. Illinois Steel Supply Co. v. Sec'y of Labor*, 294 F.3d 844, 848 (7th Cir. 2002) (citations omitted), in which the court stated "there may be a point ... at which an independent contractor's contact with a mine is so infrequent or *de minimis* that it would be difficult to conclude that services were being performed." In *N. Illinois Steel*, the Seventh Circuit held that a company whose employees drove delivery trucks onto mine property and helped unload those vehicles was not subject to Mine Act jurisdiction. *Id.* at 848-49.

Finally, Thompson Electric heavily relies on the recent Sixth Circuit holding in *Maxxim Rebuild Co. v. FMSHRC*, 848 F.3d 737 (6th Cir. 2017), which held that a contractor that repairs mining equipment in a repair shop at an off-site location is not subject to Mine Act jurisdiction. The distance of the repair shop from a mine site was not specified by the Sixth Circuit in *Maxxim Rebuild* as the repair shop serviced the equipment for a number of different mines. *Id.* at 737.

The Secretary argues that the electrical contract services provided by Thompson Electric on the dredge located on Sober Mine property were essential to the sand dredging process and, thus, are subject to Mine Act jurisdiction, despite the fact that the electrical work was performed for only six non-consecutive days. *Sec'y Br.*, at 4-5.

b. Statutory Provisions

The jurisdictional question must be resolved based on application of the statutory definitions of "a mine" and "a mine operator." Section 3(h)(1) provides, in relevant part, that a mine is "an area of land from which minerals are extracted ... [and] private ways ... appurtenant to such area." 30 U.S.C. § 802(h)(1). Included within the statutory definition of a mine is "equipment [and] machines ... used in, or to be used in ... the work of extracting such minerals from their natural deposits...." *Id.* As noted above, the Mine Act's definition of a mine operator includes "any independent contractor performing services ... at [a] mine." 30 U.S.C. § 802(d).

c. *Otis Elevator* Test

In its *Otis Elevator* cases, the Commission established a two-pronged test for determining whether an independent contractor shall be considered an "operator" under section 3(d). 11 FMSHRC 1896 (Oct. 1989) ("*Otis I*") and 11 FMSHRC 1918 (Oct. 1989) ("*Otis II*"), *aff'd on other grounds*, 921 F.2d 1285 (D.C. Cir. 1990). The first inquiry is the degree of "the independent contractor's proximity to the extraction process" and whether its work is "sufficiently related" to that process. *Otis I*, 11 FMSHRC at 1902. The Commission has determined a contractor's activities are sufficiently related to the extraction process when its employees are exposed to mining hazards and they have "a direct effect on the safety of others...." *Id.* Second, the Commission examines "the extent of [the contractor's] presence at the mine." *Id.* The Commission has articulated that the essence of this test is whether the contractor's "contacts with the ... mine were not so rare, infrequent and attenuated as to bring [the] case within the holding of *Old Dominion*...." *Otis II*, 11 FMSHRC at 1922-23; *see also Joy Technologies Inc.*, 99 F.3d 991, 999 (10th Cir. 1996) (expressly rejecting the *Old*

Dominion approach and adopting the broad jurisdictional reach in *Otis Elevator*); *see also Bulk Transp. Services Inc.*, 13 FMSHRC 1354, 1357 (Sept. 1991) (broadly construing section 3(d) in finding that a coal haulage company was a statutory operator that performed an essential service on mine property).

In applying the *Otis Elevator* criteria, we first look to the independent contractor's proximity and relationship to the extraction process. Thompson Electric's reliance on *Old Dominion* and *Maxxim Rebuild* to support its apparent assertion that it was insufficiently connected to the mining process is misplaced. Unlike this case, both *Old Dominion* and *Maxxim Rebuild* concerned activities that either were performed in an area fenced off from the active mine, or not performed on mine property. As noted, *Old Dominion* concerned off-site meter readings at a substation separated from the rest of mine property by a chain link fence. 772 F.2d at 93. *Maxxim Rebuild* concerned "repairs [of] mining equipment at a site that is neither adjacent to nor part of a working mine." 848 F.3d at 737. In finding a lack of Mine Act jurisdiction, the court in *Maxxim Rebuild* focused on the statutory definition of a "coal or other mine," which, as previously noted, includes "facilities" and "equipment ... used in, or to be used in ... the work of preparing coal or other minerals." *Id.* at 740 (citing 30 U.S.C. § 802(h)(1)). In considering the Mine Act's statutory definitions, the court stated:

> ... [C]ontext and perspective are everything. In pulling back the lens, we see several indications that the power of the Mine Safety and Health Administration extends only to such facilities and equipment if they are in or adjacent to — in essence part of — a working mine.
>
> Start with what § 802(h)(1) defines: a "coal or other mine." The term is locational. And the location concerns mines. Equipment by itself tells us nothing about where it is. And a facility by itself does not say anything about whether it is connected to a mine. As the title of the Act (the Federal *Mine* Safety and Health Act) and the title of the pertinent agency (the *Mine* Safety and Health Administration) suggest, the definition of "coal or other mine" relates to a place — land and things in or connected to a mine.

Id. (emphasis original). It is significant that, in finding an absence of jurisdiction, the Sixth Circuit "pulled back the lens" to focus on the off-site location of the subject repairs — a focus that Thompson Electric seeks to ignore. Thus, similar to the physically isolated location of the substation in *Old Dominion*, it was the off-site location of the repairs that served as the basis for the Sixth Circuit's finding of an absence of Mine Act jurisdiction.

With regard to the question of the relationship of the electrical services performed by Thompson Electric to the extraction process, Thompson Electric relies on the Seventh Circuit's holding in *N. Illinois Steel*, which exempted contractors delivering steel on mine property from Mine Act jurisdiction. 294 F.3d at 844. The Seventh Circuit held that the independent contractor's delivery services were "so attenuated [from the mining process] as to remove it from the jurisdiction of MSHA." *Id.* at 848. In this regard, the court stated:

> ... [T]he work performed by the NIS drivers at the mine can only be described as *de minimis.* In fact, there is nothing to distinguish NIS's deliveries of steel from deliveries by other vendors or parcel delivery companies of supplies to be used by the miners.

Id. at 849.

In *Otis II*, the D.C. Circuit found Mine Act jurisdiction over a contractor who had conceded that it had performed "limited but necessary" service at mines. 921 F.2d at 1290 n.3. So too, this case concerns the maintenance of heavy mining equipment, specifically a dredge, which is indispensable to the sand and gravel dredging process. The delivery and offloading of steel on mine property in *N. Illinois Steel* clearly is distinguishable from the maintenance of mine equipment *on mine property* — activities that are explicitly regulated by Part 56 of the Secretary's mandatory safety standards governing metal and nonmetal surface mines. *See* 30 C.F.R. Part 56.

In this regard, section 56.14105 specifically requires that repairs and maintenance of electrical equipment may only be performed when power is off and the equipment is blocked. 30 C.F.R. § 56.14105. To exempt on-site contract employees performing maintenance services on mine equipment from the protective provisions of section 56.14105 makes no sense. Thompson Electric's apparent assertion that maintenance on locked-out de-energized equipment is exempt from Mine Act jurisdiction due to its inoperable status is a distinction without a difference that must be rejected. Thus, de-energizing equipment prior to maintenance is a requirement of the safety standards, rather than a basis for an exemption from them.

The remaining criterion of the *Otis Elevator* test concerns the extent of the contractor's presence at the mine. Thompson Electric asserts that its six-day presence at the Sober Mine was sufficiently infrequent and *de minimis* to exempt it from Mine Act jurisdiction. *Resp. Br.*, at 4-13. Moreover, Thompson Electric reportedly has no intention of performing further services at the Sober Mine site. *Resp. Br.*, at 7; *Jt. Stip.*, at ¶ 19.

Resolving jurisdiction based on the degree of a contractor's presence at a mine site must be based on an analysis of the facts as they existed at the time of the issuance of the citations, rather than a speculative and self-serving estimation by the contractor regarding the extent of its future activities, or absence thereof, at a mine site. In other words, Thompson Electric cannot achieve a self-imposed exemption from the Act's jurisdiction by simply asserting that it will not return to the Sober Mine. Therefore, Thompson Electric's presence at the Sober Mine for only six days is not dispositive of the jurisdictional question.

Both parties agree that summary decision based on their joint stipulations is the preferable vehicle for resolving the jurisdictional issue. *See Sec'y Br.*, at 7-8; *Resp. Br.*, at 22. Commission Rule 67(b) provides that a motion for summary decision shall be granted if there is no genuine issue as to any material fact, and the moving party is entitled to summary decision as a matter of law. 29 C.F.R. § 2700.67(b); *see also Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 8-9 (Jan. 2007) (citations omitted). Moreover, in determining if a motion for

summary decision should be granted, the court must construe the undisputed material facts in a light most favorable to the opposing party.[1] *Hanson*, 29 FMSRHC at 9.

Construing the evidence in a light most favorable to Thompson Electric, there are no outstanding issues of material fact to conclude that the services performed by Thompson Electric were so attenuated from the dredging process to warrant an exemption from Mine Act jurisdiction. Rather, Thompson Electric's performance of maintenance services on mining equipment on mine property falls squarely within the statutory reach of the Mine Act. Consequently, as an "independent contractor performing services" at a mine, Thompson Electric must be considered a statutory "operator" that **is subject to the Act's jurisdiction**. *See* 30 U.S.C. § 802(d).

II. Part 46 Training Requirements

As a consequence of MSHA's April 29, 2015, Sober Mine inspection, Thompson Electric received two citations alleging violations of Part 46: Citation No. 8842396, which alleges a failure to develop and implement a written plan for new miner training in violation of 30 C.F.R. § 46.3(a)[2]; and 104(g)(1) withdrawal Order No. 8842394, which alleges a failure to provide new miner training in violation of 30 C.F.R. § 46.5(a)[3,4].

In addressing the validity of the alleged violations of Part 46, it is necessary to differentiate the statutory term "miner" in section 3(g) of the Mine Act from the regulatory term "miner" in 30 C.F.R. § 46.2(g). Section 3(g) of the Act broadly defines a "miner" as "any individual working in a coal or other mine." 30 U.S.C. § 802(g).

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[1] Thompson Electric is, in essence, the opposing party to the Secretary's cross-motion for summary decision on this jurisdictional question.

[2] Section 46.3(a) provides:

> [Operators] must develop and implement a written plan, approved by [MSHA] under either paragraph (b) or (c) of this section, that contains effective programs for training new miners and newly hired experienced miners, training miners for new tasks, annual refresher training, and site-specific hazard awareness training.

[3] Section 46.5(a) provides, in pertinent part:

> ... [Operators] must provide each new miner with no less than 24 hours of training.... Miners who have not yet received the full 24 hours of new miner training must work where an experienced miner can observe that the new miner is performing his or her work in a safe and healthful manner.

[4] Section 104(g)(1) of the Mine Act requires the withdrawal from the mine of miners who have not received the requisite safety training. 30 U.S.C. § 814(g)(1).

On the other hand, Part 46 defines a "miner" as follows:

> (1) *Miner* means: (i) Any 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 (ii) Any construction worker who is exposed to hazards of mining operations.

30 C.F.R. § 46.2(g). However, not every contractor performing services at a mine is subject to Part 46. In this regard, section 46.2(g)(2) provides:

> The definition of "miner" [in Part 46] does not include ... maintenance or service workers who do not work at a mine site for frequent or extended periods.

30 C.F.R. § 46.2(g)(2).

Thus, the Secretary acknowledges, given the section 46.2(g)(2) exemptions, that a statutory "miner" under section 3(g) of the Mine Act may not be considered a *per se* "miner" for the purposes of Part 46. Rather, it is the frequency and extent of a contract employee's presence at a mine that determines whether the contract employee is subject to the training requirements of Part 46.

The parties have stipulated that Thompson Electric's employees were present at the Sober Mine to perform electrical maintenance on a dredge for a total of six days: one day in December 2014 and five work days in April 2015. *Jt. Stip.*, at ¶ 9-14. The Secretary does not dispute that Thompson Electric's services were limited in scope, in that they only required disconnecting and re-connecting power to a dredge to allow for its repositioning. *Id.* at ¶ 6. Consequently, Thompson Electric argues that its employees' infrequent and limited presence at the mine exempts it from Part 46 training requirements. *Resp. Br.*, at 16-20.

Conversely, the Secretary argues that Thompson Electric's employees spent significant time at the mine performing work on a dredge that was integral to the extraction process. *Sec'y Supp. Br.*, at 2 (May 24, 2017). Moreover, the Secretary notes that, had MSHA's intervention not triggered a work stoppage, Thompson Electric would have maintained a continuing presence at the mine for additional time. *Id.*

In considering the proper interpretation of the "miner" exemption in section 46.2(g)(2), it is axiomatic that, to the extent that a regulation is silent or ambiguous on a particular point, the Commission follows the doctrine of deference established in *Bowles v. Seminole Rock and Sand Co.*, 325 U.S. 410 (1945), and reaffirmed in *Auer v. Robbins*, 519 U.S. 452 (1997). Under this doctrine, the promulgating agency's interpretation of the regulation is entitled to full deference (referred to as *Auer* deference) unless the interpretation is unreasonable, plainly erroneous, or inconsistent with the regulation, or there is reason to suspect it does not reflect the agency's fair and considered judgment on the matter. *Drilling & Blasting Sys., Inc.*, 38 FMSHRC 190, 194 (Feb. 2016) (citations omitted).

Here, the Secretary's application of the operative phrase "for frequent or extended periods" must be consistent with its plain meaning. Determining the appropriateness of the Secretary's application of the Part 46 "miner" exemption requires a qualitative and quantitative analysis. Qualitatively, although the services provided by Thompson Electric were essential, they were very limited in scope. Quantitatively, the services only required the presence of its employees for a short period of time. To permit such a limited presence at a mine site to overcome the exemption in section 46.2(g)(2) would render the exemption meaningless. Here, the record reflects that Thompson Electric's employees were present at the mine for a total of six days. On balance, I do not view as persuasive the Secretary's argument that a six day presence (one day in December 2014 and five work days in April 2015) is sufficient to overcome the explicit exemption promulgated by the Secretary in section 46.2(g)(2), given the limited scope of the services rendered.

In apparent recognition that the five days spent on reconnecting the dredge may not have been sufficient to trigger the Part 46 training requirements, the Secretary asserts that Thompson Electric's presence at the mine would have been greater had it not abruptly left the mine after being informed of MSHA's jurisdiction.[5] *Sec'y Supp. Br.*, at 2. However, given the parties' stipulations, even if finishing the limited task of reconnecting the dredge's power supply required Thompson Electric's additional presence for a short period of time, the limited scope of the services performed would still exempt Thompson Electric from the Part 46 training requirements.

I note that although Thompson Electric has been relieved of its obligation to satisfy Part 46 training requirements, it is still subject to the Secretary's mandatory safety and health standards.[6] In fact, Thompson Electric requires its employees to tie down when there is a danger of falling. *See Jt. Stip.*, at ¶ 15. Nevertheless, the Secretary is seeking to impose the burden of formulation of a Part 46 training plan on a contractor that has a very limited presence at a mine, despite the Secretary's own promulgation of the exception in section 46.2(g)(2).

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[5] The Secretary refers to MSHA's Program Policy Manual, which states that the term "extended" presence in section 46.2(g)(2) means more than five consecutive work days. *Resp. Br.*, at 18 (citing MSHA Program Policy Manual Vol. III, Part 46 at p. 9 (May 16, 1996)). Although the stipulations reflect that Thompson Electric was not present at the mine for five consecutive work days (it was absent on April 28, 2015), nevertheless, as the Secretary is aware, the Commission is not bound by pronouncements contained in MSHA's policy statements. *Old Ben Coal Co.*, 2 FMSHRC 2806, 2809 (1980).

[6] While I have found that the employees of Thompson Electric are not "miners" as contemplated by the definition in section 46.2(g), the provisions of 30 C.F.R. § 46.11 nevertheless require that its employees must be provided site-specific hazard awareness training. Section 46.11 has not been cited by the Secretary in this matter.

In view of the above, the record stipulations reflect that Thompson Electric is exempt from the training requirements of Part 46 as its presence at the Sober Mine was sufficiently limited in scope and frequency. Accordingly, Citation No. 8842396 and Order No. 8842394 **shall be vacated.**

III. Fall Protection Citation

On April 29, 2015, an MSHA inspector observed a Thompson Electric employee failing to utilize fall protection when he was reaching for a power cable while standing on a dredge while located approximately 13 feet above the ground. As a consequence, the MSHA inspector issued Citation No. 8842392 alleging a violation 30 C.F.R. § 56.15005, which requires that safety belts be worn when there is a danger of falling.

Thompson Electric has stipulated to the fact of the violation of Citation No. 8842392. *Jt. Stip.*, at ¶ 15. However, the parties' proffered settlement terms regarding Citation No. 8842392 reduce the degree of negligence attributable to Thompson Electric from "moderate" to "low," with a corresponding proposed penalty reduction from $540.00 to $250.00. The parties' settlement terms seek to maintain the S&S designation. The reduction in negligence and civil penalty is supported by the parties' stipulation that the employee who committed the violation was suspended immediately by Thompson Electric as he had been trained to wear fall protection. *Jt. Stip.*, at ¶ 15.

The mitigating circumstances noted above support the parties' proposed reduction in negligence and civil penalty. Having determined that Thompson Electric is subject to Mine Act jurisdiction, I conclude that the proffered settlement is appropriate under the statutory penalty criteria set forth in section 110(i) of the Mine Act.[7] Consequently, the parties' settlement terms regarding Citation No. 8842392 **shall be approved**. As previously noted, the parties' settlement terms are contingent on final disposition of these matters. Thus, the parties' have reserved their right to appeal the jurisdictional question, as well as any adverse finding regarding Part 46 applicability.

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[7] 30 U.S.C. § 820(i) provides:

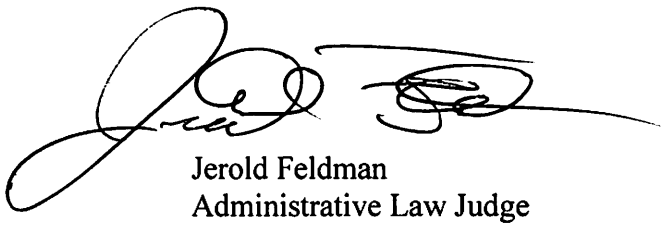
> In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

ORDER

In view of the above, Thompson Electric, Inc., as an independent contractor performing services at a mine, is a statutory "operator" as contemplated by section 3(d) of the Mine Act. Accordingly, **IT IS ORDERED**, consistent with the parties' settlement terms, that Thompson Electric, Inc. **PAY**, within 40 days of this Order, a $250.00 civil penalty in satisfaction of Citation No. 8842392.[8]

IT IS FURTHER ORDERED that Citation No. 8842396 and 104(g)(1) withdrawal Order No. 8842394, which concern the training provisions of Part 46, **ARE VACATED.**

IT IS FURTHER ORDERED that upon timely receipt of the $250.00 civil penalty, the captioned matters **ARE DISMISSED.**



Jerold Feldman
Administrative Law Judge

Distribution:

Lisa Cottle, Esq., U.S. Department of Labor, Office of the Solicitor, 1240 East Ninth Street, Room 881, Cleveland, OH 44199

Keith L. Pryatel, Esq., Kastner Westman & Wilkins, LLC, 3550 West Market Street, Suite 100, Akron, OH 44333

/acp

[8] 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. Please include the Docket No. and A.C. No. noted in the above caption on the check.