FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. ELLIS & EASTERN COMPANY, Respondent.	CIVIL PENALTY PROCEEDING Docket No. CENT 2014-0451 A.C. No. 39-00008-351487 Mine: Sioux Falls Quarry

DECISION AND ORDER

Appearances: Daniel McIntyre, Trial Attorney, Office of the Solicitor, U.S. Department of Labor, Denver, CO, for Petitioner;

Jeffrey A. Sar, Esq. Baron, Sar, Goodwin, Gill & Lohr, Sioux City, IA, for Respondent.

Before: Judge L. Zane Gill

This proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), involves a 104(a) citation, 30 U.S.C. § 814(a), issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Ellis & Eastern Company ("E&E" or "Respondent") at its railroad shop in Sioux Falls, South Dakota. E&E is a railroad company which primarily transports quarry products, building materials, lumber, fly ash, and cement. (Mulloy[1] Supplemental Aff. at 1–2)

The parties submitted briefs, affidavits, and documentary evidence, the last of which was received on June 22, 2015. All submissions pertain to the sole issue of MSHA's asserted jurisdiction over the Sioux Falls railroad shop. The Secretary asserts jurisdiction over the shop either as part of a mine, a place where mining equipment is repaired, or as an independent contractor's facility. E&E claims MSHA has no jurisdiction because E&E is not a mining company, and additionally requests that its Independent Contractor Identification Number be vacated. (Resp. Br. at 15) For the reasons stated below, I find that there is no genuine issue of material fact, and the Respondent is entitled to Summary Disposition as a matter of law because

[1] Jon Mulloy ("Mulloy") is President of E&E, holding that position since 2001. (Mulloy Aff. at 1) Mulloy began working at E&E in 1988, as Operations Superintendent, immediately after its incorporation. *Id.* In 1994, Mulloy was appointed E&E's Vice President and General Manager. *Id.*

MSHA does not have jurisdiction over the railroad shop, even though E&E is an independent contractor. Citation No. 8753373 is vacated.

Background History

E&E considers itself a railroad corporation, and solely under the jurisdiction of the Federal Railway Administration ("FRA"). (Resp. Br. at 2) As described in the affidavits, E&E daily brings empty railcars into Concrete Materials' Sioux Falls quarry, which are then loaded by miners during the night shift. (Zahn[2] Aff. at 1–2; Schmidt[3] Aff. at 4) The railcars are moved by E&E on Concrete Materials' private tracks which connect into the Burlington Northern Santa Fe ("BNSF") railroad system. (Mulloy Aff. at 2) The BNSF is a "general railroad system of transportation," and under FRA jurisdiction. (Schmidt Aff. at 3); *See also* (Sec. Br. at 12–13) The tracks lie between the E&E railroad shop and Concrete Materials' mining pit, ending in the mine's screening and washing area where the railcars are loaded. (Ex. GX 1) A public road must be crossed to travel from the mine's quarry or processing areas to E&E's railroad shop. *Id.*

Historically, MSHA inspected the railway shop on February 17, 2010, and issued two citations. (Mulloy Aff. at 2–3); (Ex. GX 4); (Ex. GX 5) MSHA later vacated the citations because of concerns that E&E had not received sufficient notice of its jurisdiction. (Peck[4] Aff. at 1–2) In its letter vacating the citations, MSHA explicitly asserted jurisdiction over E&E's "tracks, railcars, and maintenance shop." (Ex. GX 6)

On March 19, 2014, MSHA Inspector Alan Roberts[5] ("Roberts") inspected E&E's railroad shop. (Resp. Br. at 1) E&E informed Roberts before the inspection that it did not acknowledge MSHA's authority over the building. *Id.* Prior to 2010, the maintenance shop was solely inspected by the FRA. (Mulloy Aff. at 2) Citation No. 8753373 was issued because the parking brake was not set on a truck inside the railroad shop. (Resp. Br. at 2) The only question examined in this motion is whether MSHA had jurisdiction over the maintenance shop where the citation was issued.

Standard of Review

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[2] George Zahn ("Zahn") has been the Quarry Superintendent at the Sioux Falls Mine since 2002. (Zahn Aff. at 1) Zahn began working at the Concrete Materials mine in 1970. *Id.* Zahn's positions at Concrete Materials have included equipment hauler, loading operator, and quarry head man. *Id.*

[3] Bill Schmidt ("Schmidt") is the Operations Superintendent at E&E. (Schmidt Aff. at 1) Schmidt entered the railroad industry in 1984, working at D & I Railroad. *Id.* In 1995, Schmidt became a locomotive engineer. *Id.* Schmidt joined E&E in 2002, has attended and taught numerous classes on railroad safety. *Id.* at 2.

[4] James Peck ("Peck") is a Staff Assistant to the MSHA District Manager in Duluth, MN. (Peck Aff. at 1) Peck's career in the mining industry began in 1982 as an underground miner. *Id.* Subsequently, Peck worked as a mobile equipment and mine operator at various private enterprises. *Id.* Peck joined MSHA in 2008, and has served as a Conference Litigation Representative and Inspector. *Id.*

[5] The Secretary did not present Inspector Roberts' qualifications or attach an affidavit from him.

The Commission held that "summary decision is an extraordinary procedure." *Mo. Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981). It is "granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67. When weighing the parties' arguments, all inferences are "viewed in the light most favorable to the party opposing the motion." *Hanson Aggregates NY, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007) (citations omitted).

Chevron Deference

When judging the validity of an MSHA statutory interpretation, the first issue is "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). If the "statute is clear and unambiguous, effect must be given to its language." *Watkins Eng'rs & Constructors,* 24 FMSHRC 669, 672–73 (July 2002) (citations omitted). If the statute is ambiguous or silent on a point in question, further analysis is required to determine whether the agency's interpretation of the statute is reasonable. *Id.*

"It is only when the plain meaning is doubtful or ambiguous that the issue of deference to the Secretary's interpretation arises." *Bluestone Coal Corp.,* 19 FMSHRC 1025, 1028 (June 1997) (*citing Pfizer Inc. v. Heckler,* 735 F.2d 1502, 1509 (D.C. Cir. 1984)). Deference is accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy W. Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (*citing Chevron*, 467 U.S. at 844). "The agency's interpretation of the statute is entitled to affirmance as long as that interpretation is one of the permissible interpretations the agency could have selected." *Watkins,* 24 FMSHRC at 673 (citations omitted). Furthermore, "the statutory provision underlying the regulation, as well as any related statements accompanying the regulation's publication in the *Federal Register*, may illuminate the regulation's meaning." *Lehigh Southwest Cement*, 33 FMSHRC 3229, 3234 (Dec. 2011)(ALJ Paez) (*citing Lodestar Energy Inc.*, 24 FMSHRC 689, 693 (July 2002)). Additionally, "[i]n the absence of a statutory or regulatory definition of a term, or a technical usage, we look to the ordinary meaning of the terms used in a regulation." *Bluestone*, 19 FMSHRC at 1029 (*citing Peabody Coal Co.,* 18 FMSHRC 686, 690 (May 1996)).

Definition of a Mine

Section 4 of the Mine Act provides that "[e]ach coal or other mine... shall be subject to the provisions of this Act." 30 U.S.C. § 803. "Coal or other mine" is defined in Section 3(h)(1) of the Act as:

> (h)(1) "coal or other mine" means (A) *an area of land from which minerals are extracted...* (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... used in, or to be used in, *or resulting from, the work of extracting such*

> *minerals*... or used in, or to be used in, the milling of such minerals, or *the work of preparing coal or other minerals*, and includes custom coal preparation facilities.

30 U.S.C. § 802(h)(1) (emphases added).

The work of preparation includes "breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and *loading*" of mining products "as is usually done by the [mine] operator..." 30 U.S.C. § 802(i) (emphasis added). Specifically on the issue of jurisdiction, the Senate Committee on Human Resources specified that

> there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the *broadest possibl[e] interpretation*, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

S. Rep. No. 95-181 at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 602 (1978) (emphasis added). The Commission holds that "questions of statutory coverage must be resolved within the Act's overall purpose of protecting miners' safety and health." *W.J. Bokus Indus., Inc.*, 16 FMSHRC 704, 708 (Apr. 1994) (citation omitted).

The Railroad Shop is not a Private Way Appurtenant to the Mine

MSHA claims jurisdiction over E&E's railroad maintenance shop in several ways, and asserts all of them are entitled to *Chevron* deference. Essentially, the Secretary argues that miner safety is affected by the condition of the train tracks and railcars because miners daily load the locomotives. (Sec. Br. at 8) Therefore, the building in which the trains are maintained should be under MSHA supervision. *Id.* at 1–2.

The Secretary's first argument alleges that E&E's railroad shop is a mine. (Sec. Br. at 6) Citing Mine Act Section 802, the Petitioner argues the railroad tracks are a "private way appurtenant to" the quarry and is thereby part of the mine. *Id.* The words "private" and "appurtenant" as used in 30 U.S.C. § 802(h)(1), are recognized by the Commission as being ambiguous. *Nat'l Cement Co. of Cal., Inc.*, 30 FMSHRC 668, 670 (Aug. 2008). Therefore, the question is whether the Secretary's interpretation of these terms as including E&E's maintenance shop is reasonable. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

MSHA's authority over appurtenant ways extends to roads not owned by the mine, if they are integral to the operation. *See TXI Operations, LP*, 23 FMSHRC 54, 60 (Jan. 2001)(ALJ Feldman). E&E admitted that Concrete Materials owns the train tracks connecting the mine to the BNSF rail system. (Resp. Reply Br. at 2) However, MSHA's asserted jurisdiction over the railway is immaterial because the citation was issued for a violation inside the maintenance shop,

rather than for a condition or activity on the outside train tracks. Additionally, while private ways to mines are under MSHA jurisdiction, the vehicles which travel upon them are not. *Nat'l Cement Co. of Cal., Inc.*, 573 F.3d 788, 793 (D.C. Cir. 2009). The shop where the citation was issued only repairs locomotives, over which MSHA has no jurisdiction. *Id.*

The Secretary cites two cases supporting its claim that the railroad shop is a mine, however those precedents are distinguishable. *Harman Mining Corp.* and *CML Metals Corp.*, both dealt with hauling accidents on railways adjacent to mine loading areas. 671 F.2d 794, 796 (4th Cir. 1981); 35 FMSHRC 1962, 1962–63 (June 2013)(ALJ Miller). In *Harman*, MSHA retained jurisdiction because the accident's close proximity to the loading machinery made it incidental to the mine. *Id.* However in E&E's case, the cited truck was in a building physically separated from loading and all other mining processes.

In conclusion, the E&E railway repair shop is not a mine under the Mine Act. The Secretary's interpretation, which asserts jurisdiction over the shop because its proximity to the railroad tracks somehow makes it part of the mine, is unreasonable and not entitled to deference.

The Railroad Shop does not Repair Mining Equipment

The Secretary claims E&E's trains are mining equipment, and therefore MSHA has authority over the railroad shop as part of its general jurisdiction over maintenance areas. (Sec. Br. at 6); *E.g. U.S. Steel Mining Co., Inc.*, 10 FMSHRC 146, 149 (Feb. 1988); *W.J. Bokus Indus., Inc.*, 16 FMSHRC 704, 708 (Apr. 1994); *Jim Walter Res., Inc.*, 22 FMSHRC 21, 25 (Jan. 2000). Classifying E&E's trains as mining equipment is essential to MSHA's jurisdiction claim, because the railroad shop does not repair any other alleged mining machinery. (Schmidt Aff. at 4; Zahn Aff. at 2) However, the railcars are not used in any of the 30 C.F.R. § 802(i) mining activities of "breaking, crushing, sizing, cleaning, washing, drying, mixing, storing... [except for] loading." I do not find this language to be ambiguous, and therefore, restrict the analysis to its plain meaning.

However, even the loading process is done by Concrete Materials' miners rather than E&E's railway workers. (Zahn Aff. at 1) Based on this evidence, it is inaccurate to designate the railcars as mining equipment, because loading is simply incidental to their primary usage in transportation. *Id.* While loading is an activity listed in the Mine Act, the Commission has provided guidance that an operation should be considered holistically to determine whether it engages in mining. *Oliver M. Elam, Jr., Co.*, 4 FMSHRC 5, 7 (Jan. 1982). This is based on the Mine Act, which extends MSHA jurisdiction to activities "usually done by the operator of the coal mine." 30 C.F.R. § 802(i). In *Elam*, a coal barge loader's operation was ruled not to be a mine because the nature of the business was fundamentally different. 4 FMSHRC at 7. The inherent differences between barge loading and mining outweighed the fact that the operator broke, crushed, sized, and loaded coal, all of which are activities associated with mining. *Id.* at 5–6. Similarly, based on the nature of E&E's business, its vehicles are properly viewed as railroad, rather than mining, equipment.

Furthermore, none of E&E's railroad vehicles enter the quarry extraction area. (Schmidt Aff. at 3) As noted in *Pickett Mining Grp.*, equipment must be used in mining to come under

MSHA jurisdiction. 36 FMSHRC 2444, 2452 (Sept. 2014)(ALJ Rae). Specifically, MSHA cannot "regulate equipment that is not located within the boundaries of the extraction area, is not a component of an appurtenant road or way, is not used by the operator's employees, and bears no relation to its mining operations." *Id.* at 2451. The extraction and processing areas, rather than the legal property boundaries, determine the zone of MSHA authority. *Id.*

I find that E&E's equipment is not mining equipment because it is not used in activities "usually done by the operator," according to the Mine Act's plain meaning. 30 C.F.R. § 802(i). None of the cases cited by the Secretary demonstrates MSHA's jurisdiction over buildings exclusively dedicated to transportation equipment maintenance. I find that the machinery E&E maintains in railroad shop is not mining equipment, and therefore it is not under MSHA jurisdiction.

E&E and Concrete Materials are not a Single Operation

Alternatively, the Secretary argues that Concrete Materials and E&E are "integral components of a single operation," run by their parent company Sweetman Construction ("Sweetman"). (Sec. Br. at 1, 7) Therefore, jurisdiction over the mining company Concrete Materials also encompasses the E&E railroad corporation. *Id.* To support this contention, the Secretary argued that: (1) Many of the same individuals are E&E's and Concrete Materials' chief officers; (2) Sweetman owns the property on which the mine and railroad shop are located; (3) In 1995, approximately 90% of the materials E&E transported were Concrete Materials' products; (4) Both corporations share the same website; (5) and E&E stated that it is "primarily transporting aggregate products for Concrete Materials." *Id.* at 2-4, 7, 10; (Ex. GX 1; Ex. GX 8; Ex. GX 9; Ex. GX 10). E&E did admit that its stock "is owned by Sweetman as is the quarry which Sweetman operates under the name of Concrete Materials." (Resp. Reply Br. at 2)

Citing *Mineral Coal Sales, Inc.*, the Secretary alleges E&E and Concrete Materials are in substance a single company. 7 FMSHRC 615, 620–21 (May 1985). However, *Mineral Coal Sales*, primarily dealt with the issue of companies dividing mining processes functionally into separate corporations to limit liability. *Id.* The reliance on this case law is misplaced because Concrete Materials has not decreased or attempted to decrease its liability for the mine's conditions. Here, the goods E&E delivers are finished products, (Resp. Br. at 11) costumers often pick up finished goods from mines, and operators are liable for any violations customers commit onsite. *El Paso Rock Quarries, Inc.*, 1 FMSHRC 2046, 2047–48 (Dec. 1979)(ALJ Moore); *C.D. Livingston*, 7 FMSHRC 1485, 1487 (Sept. 1985)(ALJ Morris) (citation omitted). However, operators are never liable for the conditions of costumers' offsite transportation maintenance facilities. Concrete Materials is not dodging any liability it would normally bear.

The fact that both E&E's and Concrete Materials' worksites are on the same property is immaterial because clear boundaries exist between the work areas. (Sec. Br. at 4) Physical barriers prevent direct access from E&E's facility to Concrete Materials' mine. (Mulloy Aff. at 2); (Resp. Ex. 102) Traveling from the quarry to E&E's shop necessitates briefly going on a public road. (Resp. Br. at 3) Both facilities have separate entrance gates, and a wooded drop off

lies between the E&E shop and Concrete Materials quarry. (Goembel[6] Aff. at 2–3); (Resp. Ex. 124; Resp. Ex. 128) MSHA does not possess jurisdiction over facilities even when they are adjacent to a mining operation, unless they have a connection with the mine. *See Clarkson Constr. Co., Inc.*, 37 FMSHRC 450, n.1 (Feb. 2015)(ALJ Manning). I find no connection between the mine and railroad shop, other than the maintenance of trains which distribute some of the quarry's products, therefore, MSHA does not have jurisdiction over E&E's shop.

Lastly, the Respondent presented persuasive evidence showing E&E and Concrete Materials are different companies. Only 15% of E&E's volume in 2014 originated from the Sioux Falls quarry. (Mulloy Supplemental Aff. at 1) Business from outside Sweetman accounted for nearly half of the goods E&E shipped in 2014. *Id.* at 1–2. Other companies contracting with E&E include "GCC Dakotah Cement, Holcim Cement, and Headwaters Fly Ash." (Schmidt Aff. at 5) Besides quarry products, E&E also transports "rebar, re-enforcing steel, and scrap metal." (Resp. Br. at 5) Lastly, 73% of E&E's revenue came from sources besides Sweetman's various subsidiaries. (Mulloy Supplemental Aff. at 2) These facts demonstrate that E&E is a separate company for the purposes of the Mine Act. The overlap in Concrete Materials' and E&E's senior management is irrelevant. (Sec. Br. at 3) Many companies have diverse holdings, and common senior management teams indicate little about whether they are a single mining operation.

I find that E&E and Concrete Materials cannot reasonably be treated as a single operation. Both corporations have sufficiently diverse holdings and interests to merit treatment as distinct companies.

E&E is an Independent Contractor

Respondent argues it is not an independent contractor because it only provides *de minimis* services to Concrete Materials. (Resp. Br. at 9) For this reason, E&E requests that its Independent Contractor Identification Number be vacated. *Id.* at 15. Specifically, E&E's relationship with the mine is limited to the delivery of finished products. *Id.* at 11. E&E relies on the view that "delivery of coal to a consumer after it is processed usually does not fall under the coverage of the Mine Act." *United Energy Servs., Inc.*, 35 F.3d 971, 975 (4th Cir. 1994). However, *Bulk Transport. Servs., Inc.* demonstrates that distributors can be held liable as independent contractors. 13 FMSHRC 1354, 1358 (Sept. 1991). Respondent attempted to distinguish *Bulk* as primarily a precedent on subcontractor liability. (Resp. Reply Br. at 11–12) While *Bulk* addresses this topic, the holding still undermines E&E's position because a distributor was found to be an independent contractor. 13 FMSHRC at 1358. Like *Bulk*, E&E maintained a continuing presence at the mine through the daily drop off and shipment of railcars. (*Id.*; Schmidt Aff. at 4)

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[6] Kevin Goembel ("Goembel") is the Safety Director at Concrete Materials. (Goembel Aff. at 1) Goembel began working at Concrete Materials in 1978 as a quarry laborer. *Id.* Between 1978 and 1988, Goembel was a heavy equipment operator. *Id.* In 1988, Goembel became night shift foreman at the Sioux Falls quarry. Goembel has also been a supervisor at Concrete Materials' various plants, including the sand and gravel operation.

The meaning of an operator under the Mine Act is very broad and includes "*any* independent contractor performing services at a mine." *Otis Elevator Co.*, 921 F.2d 1285, 1290 (D.C. Cir. 1990). However, a business relationship can be "so infrequent or *de minimis* that it would be difficult to conclude that services were being performed." *Id.* at n.3 (citation omitted). Not working at a mine for five years is a sufficient time gap for a company's services to become *de minimis* and outside MSHA's jurisdiction. *See Clarkson Constr. Co., Inc.*, 37 FMSHRC 450, 453 (Feb. 2015)(ALJ Manning). Additionally, the services rendered do not have to be "significant" to bring a company under MSHA's purview. *Williams Natural Gas Co.*, 19 FMSHRC 1863, 1868 (Dec. 1997). Some activities, like weekly deliveries, are insubstantial enough to be considered *de minimis*. *N. Ill. Steel Supply Co.*, 294 F.3d 844, 848–49 (7th Cir. 2002). Although E&E cites *N. Ill. Steel Supply Co.*, to support its characterization of its services as *de minimis*, its relationship is much more substantial than the "once or twice a week" deliveries made in that case, because its locomotives transport goods for Concrete Materials daily. *Id.* at 845; (Zahn Aff. at 1–2; Schmidt Aff. at 4)

The services E&E performs are not *de minimis*. At a minimum, E&E carries 10% of Concrete Materials' quarry products. (Mulloy Supplemental Aff. at 1) Furthermore, the affidavits describe E&E as dropping railcars off daily for loading during the nightshift. (Zahn Aff. at 1–2; Schmidt Aff. at 4) This means that during a normal operating day, E&E's trains enter the worksite at least twice. Although both Concrete Materials and E&E have other transportation and revenue sources, the relationship between the two companies is significant. *Id.* at 2. Furthermore, the concept of *de minimis* often represents the amount of time spent at the mine. *See D.Q. Fire & Explosion Consultants, Inc.*, 34 FMSHRC 2318, 2330 (Aug. 2012). The minimum time necessary to pass the *de minimis* requirement is quite small, "as little as 1.5 hours per week in the mine." *Id.* at 2332. (citations omitted) E&E's daily presence at the Sioux Falls quarry makes its services greater than *de minimis*. (Schmidt Aff. at 4) While no evidence has been presented directly on the amount of time E&E's workers spend at the mine, it is reasonable to conclude that it surpasses 90 minutes per week.

Since E&E's services to Concrete Materials are not *de minimis*, its request that the Independent Contractor Identification Number be vacated is denied.

E&E's Railroad Shop is not Under MSHA Jurisdiction as an Independent Contractor

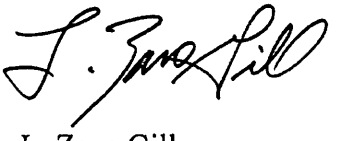
While operators and independent contractors are liable for all violations committed on mine property, *Cemex, Inc.*, 33 FMSHRC 1169, 1172 (May 2011)(ALJ Paez), the shipping of mine products is at the outer bounds of MSHA's authority because the "delivery of coal to a consumer after it is processed usually does not fall under the coverage of the Mine Act." *United Energy Servs., Inc.*, 35 F.3d 971, 975 (4th Cir. 1994); *See also PA Elec. Co.*, 969 F.2d 1501, 1504 (3rd Cir. 1992). Additionally, even if located adjacent to a mine, an independent contractor's repair facility is not subject to MSHA jurisdiction if outside the extraction area. *See Justis Supply & Mach. Shop*, 22 FMSHRC 544, 547 (Apr. 2000)(ALJ Manning). Here, E&E's maintenance shop is outside MSHA jurisdiction because it is off the mine site and only involved in the repair of transportation equipment used to deliver finished goods.

I find that E&E's repair shop is located outside of the mining areas and that MSHA cannot reasonably assert jurisdiction under the Mine Act. Because MSHA does not have jurisdiction over the facility, there is no need to consider whether there is a conflict with the FRA's authority.

Conclusion

I find that there is no genuine issue as to any material fact, and therefore, the moving party is entitled to summary decision as a matter of law based on jurisdiction. As such, while E&E is an independent contractor, its maintenance shop within which the citation was issued is outside MSHA's jurisdiction as defined by 30 U.S.C. § 802(h)(1). Therefore, E&E cannot be liable for a violation of 30 C.F.R. § 56.14207, which requires operators to set the parking brakes on unattended vehicles, in that building.

WHEREFORE, Citation No. 8753373 is **VACATED** and E&E's request that the Independent Contractor Identification Number be vacated is **DENIED**.



L. Zane Gill
Administrative Law Judge

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