

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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February 17, 2015

CLARKSON CONSTRUCTION  
COMPANY, INC.,

Contestant

v.

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

Respondent

CONTEST PROCEEDINGS

Docket No. CENT 2014-588-RM  
Order No. 8760683; 08/05/2014

Docket No. CENT 2014-589-RM  
Citation No. 8760684; 08/05/2014

Docket No. CENT 2014-590-RM  
Order No. 8760685; 08/05/2014

Docket No. CENT 2014-591-RM  
Order No. 8760686; 08/05/2014

Bonner Springs Quarry  
Mine ID 14-01578 KTL

**ORDER GRANTING CONTESTANT CLARKSON CONSTRUCTION'S MOTION FOR  
SUMMARY DECISION**

These cases are before me upon notices of contest filed by Clarkson Construction Company, Inc. ("Clarkson") pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 (the "Mine Act" or "Act"). The parties agreed to file cross-motions for summary decision on the sole issue of whether MSHA had jurisdiction to issue the subject citation and orders. The parties agreed to 13 stipulated facts to use in conjunction with their cross-motions. The parties both assert that no material facts are in dispute and that jurisdiction should be decided based upon the stipulations before me.

**I. STIPULATED FACTS**

1. Clarkson Construction has not performed any services or construction at a mine site for approximately five years.
2. Clarkson Construction has a cement batch plant that is located on property owned by APAC-Kansas, Inc.
3. The batch plant is located at the Bonner Springs Quarry, approximately 200 feet from the office/scale house.
4. APAC-Kansas, Inc., supplies material for the batch plant from its Bonner Springs Quarry to a stockpile near the batch plant.

5. Clarkson Construction is a customer of APAC-Kansas, Inc.
6. APAC-Kansas, Inc.'s employees or contractors deliver material from Bonner Springs Quarry to a stockpile near the batch plant.
7. Clarkson Construction does not have a contract with APAC-Kansas, Inc. to perform services or construction at the Bonner Springs Quarry.
8. Clarkson Construction's employees who operate the batch plant have received site-specific hazard training.
9. On August 5, 2014, two Clarkson Construction trucks pulled into the Bonner Springs Quarry to tarp truck beds.
10. The tarping area of the mine is approximately 200 yards from the entrance to the mine property.
11. The Clarkson Construction employees driving the trucks did not perform any services or construction at the Bonner Springs Quarry on August 5, 2014.
12. Steve Gilbreath has not worked at any mine site while employed by Clarkson Construction.
13. It is the responsibility of the operator of a mine to enforce mandatory safety standards on all vehicles entering the mine property.

## **II. BACKGROUND**

MSHA Inspector Sidney Garay issued the citation and orders contested in these cases to Clarkson on August 5, 2014, as a result of a single incident at the tarping station near the entrance to the Bonner Springs Quarry, which is owned and operated by APAC-Kansas, Inc. ("APAC"). Clarkson operates a batch plant located on quarry property. The batch plant is subject to inspection by the Department of Labor's Occupational Safety and Health Administration. Under the Interagency Agreement, MSHA does not have jurisdiction over the batch plant. 44 Fed Reg 22827 (Apr. 17, 1979) *amended by* 48 Fed Reg 7,521 (Feb. 22 1983).

On August 5, 2014, Inspector Garay issued one citation, Citation No. 8760684, and two orders, Order Nos. 8760685 and 8760686, to Clarkson under section 104(a) of the Mine Act. He also issued Order No. 8760683 under section 107(a) of the Act. Citation No. 8760684 and Order No. 8760683 both state, in part:

The two truck drivers were not wearing fall protection (Safety Belts and Lines) while climbing on the side of the dump bed, in the dump bed and on top of the headache rack of the Freightliner dump truck, Co#8212, DOT#087210. In addition the truck[']s engine was running and the wheels were not chocked against motion. The freightliner dump truck was parked in the tarping area of the

mine. The two truck drivers and the truck foreman were exposed to a fall off the dump truck bed, blunt force, impact fatal injury.

(Ex. G-A at 1, 3). Order No. 8760685 states, in part:

The Freightliner Dump Truck, Co. #8212, DOT#087210 was left unattended with the engine running and wheels not chocked against motion, two truck drivers were working in the dump truck bed area, one in the bed, one hanging on the side of the bed and the truck supervisor standing on the tarping catwalk next to the dump truck.

(Ex. G-A 5). Order No. 8760686 states, in part, that “[t]here were persons working near the unattended dump truck[.]” (Ex. G-A at 7).

### III. DISCUSSION AND ANALYSIS

I find that there are no disputed material facts and Clarkson is entitled to summary decision as a matter of law because MSHA lacked jurisdiction over Clarkson; I therefore vacate Citation No. 8760684 and Order Nos. 87606843, 8760685, and 8760686.

Under the Mine Act, the term “operator” is defined as “any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine.” 30 U.S.C. § 802(d). Although the Act does not provide a definition for independent contractor, MSHA regulations do, asserting that the term “means any person, partnership, and corporation, subsidiary of a corporation, firm, association or other organization that contracts to perform services or construction at a mine.” 30 CFR § 45.2(c). The Commission has held that any independent contractor that performs “more than *de minimus* services at a mine” is an operator under § 802(d). *Musser Engineering Inc., and PBS Coal Inc.*, 32 FMSHRC 1257, 1268 (Oct. 2010); *See Northern Illinois Steel Co. v. Sec’y of Labor*, 294 F.3d 844, 848 (7th Cir. 2002); *Joy Technologies Inc., Coal Field Operations v. Sec’y of Labor*, 99 F.3d 991, 999-1000 (10th Cir. 2002); *Otis Elevator Co. v. Sec’y of Labor*, 921 F.2d 1285, 1290 (D.C. Cir. 1990). Although jurisdiction is a legal question, it is highly influenced by factual considerations; the “totality of work” performed upon the pertinent project, not just the work relating to the underlying citations, “must be considered on the jurisdiction issue.” *Musser*, 32 FMSHRC at 1269.

I must consider the above law and the undisputed facts before me in the context of a summary decision. Commission Procedural Rule 67 sets forth the grounds for granting summary decision, as follows:

A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:

- (1) That there is no genuine issue as to any material fact; and
- (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b). The Commission has long recognized that “summary decision is an extraordinary procedure.” *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981)). The Commission has also analogized Commission Procedural Rule 67 to Federal Rule of Civil Procedure 56. *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007); *See Also Energy West*, 16 FMSHRC at 1419 (citing *Celotex Corp v. Cartrett*, 477 U.S. 317, 237 (1986)).

When the Commission reviews a summary decision under Comm. P. R. 67, it looks “ ‘at the record on summary judgment in the light most favorable to ... the party opposing the motion,’ and that ‘the inferences to be drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion.’ ” *Hanson Aggregates New York Inc.*, 29 FMSHRC at 9 (quoting *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

I find that Clarkson did not perform more than *de minimus* services at the Bonner Springs Quarry, was not an independent contractor or operator under the Mine Act, and not subject to MSHA’s jurisdiction. The first of the 13 facts stipulated to by the parties is “Clarkson Construction has not performed any services or construction at a mine site for approximately five years.” Joint Stip. at 1. The parties stipulate, furthermore, that “[t]he Clarkson Construction employees driving the trucks did not perform any services or construction at the Bonner Springs Quarry on August 5, 2014.” Joint Stip. at 11. The Mine Act mandates broad jurisdiction for MSHA to regulate independent contractors. *See Sec’y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 154 (D.C. Cir. 2006). Clarkson, however, is not an independent contractor at the Bonner Springs quarry as that term is used in the Mine Act. Clarkson has no contract to perform services for Bonner Springs quarry and does not perform any services for APAC. Considering Clarkson’s actions beyond the underlying citations, its totality of work was not only *de minimus*, but, as the parties stipulate, nonexistent.<sup>1</sup> Under the stipulated facts, Clarkson Construction was not an operator or independent contractor under the Mine Act and therefore MSHA could not cite Clarkson for the alleged violations at issue in these cases.<sup>2</sup>

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<sup>1</sup> Clarkson controls a batch plant adjacent to the mine, but that plant is not under MSHA’s jurisdiction. 44 Fed Reg 22827 at ¶ B.6.b. Clarkson’s operation of the batch plant is not a service for APAC and does not provide a connection or presence at the mine upon which MSHA jurisdiction can be based.

<sup>2</sup> In *N. Illinois Steel Supply Co.*, a company’s employees routinely drove vehicles onto a mine property and helped unload those vehicles, but the Seventh Circuit found that the company was not subject to Mine Act jurisdiction. 294 F.3d at 848-49. The case before me does not include a regular, scheduled occurrence, but rather a single instance of employees utilizing a tarping station located 200 feet from the entrance to mine property, which was not at the behest of APAC and was not for APAC’s benefit. The entity in *N. Illinois Supply Co.* performed services for a mine and entered that mine on a regular basis, but its actions were *de minimus* and did not subject it to MSHA’s jurisdiction. Although it regularly uses roads appurtenant to the quarry, Clarkson performed no services for APAC; *N. Illinois Supply Co.* suggests that Clarkson is not subject to MSHA’s jurisdiction.

The Secretary argues that the Clarkson employees cited in these violations entered mine property and therefore fall under the jurisdiction of the Mine Act. Clarkson's use of mine roads alone does not confer MSHA jurisdiction over Clarkson. *Sec'y of Labor v. Nat'l Cement Co. of Cal., Inc.*, 573 F.3d 788, 795–97 (D.C. Cir. 2009). The Secretary cites numerous Commission cases to support his assertion; these cases, however, do not hold that an entity such as Clarkson falls under MSHA's jurisdiction.<sup>3</sup> The question before me is not whether MSHA has jurisdiction over the tarping area, but whether MSHA has jurisdiction to issue citations to Clarkson. Even assuming that MSHA has jurisdiction to issue citations for violations of safety standards that occur at the tarping area, I find that MSHA does not have jurisdiction to cite Clarkson for that conduct.<sup>4</sup>

The Secretary focuses upon MSHA's broad jurisdiction and cites instances where courts upheld that jurisdiction, but he does not provide precedent or convincing arguments that Clarkson is an operator or independent contractor that is subject to that jurisdiction. The Secretary stipulated that Clarkson performed no services at the mine; the Commission determines jurisdiction of an entity based upon its services performed for the mine. Although broad, MSHA's jurisdiction is not universal and must be based upon specific facts.<sup>5</sup> The stipulations do not show that Clarkson regularly used the tarping station, but they do show that any use that occurred was not in service of APAC and was not related to mining. Clarkson's

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<sup>3</sup> The Secretary cites *Calmat Company of Arizona*, which focuses upon MSHA jurisdiction of a dual use area that was used by a batch plant and a mine. 27 FMSHRC 617 (Sept. 2005). In the present case, however, Clarkson does not dispute that the cited area, or the road appurtenant to the mine, are "at a mine." At issue is Clarkson's status as an independent contractor or mine operator. The Commission did not address this issue in *Calmat* "[b]ecause the alleged violations involve an independent contractor performing work on mining equipment under the direction of a mine employee in a dual-use area[.]" *Id.* at 624. Clarkson is not an independent contractor and did not work at the direction of APAC or utilize mining equipment. In *Calmat*, moreover, MSHA cited the mine operator and not its independent contractor. *Id.* The Commission's analysis in *Calmat* does not consider the independent contractor status of an entity; it also does not suggest that MSHA has jurisdiction over Clarkson.

<sup>4</sup> I do not reach the issue of whether MSHA has jurisdiction to cite APAC for actions of Clarkson employees or for actions of any entity at the tarping facility; the issue before me is whether MSHA has jurisdiction to cite Clarkson as an independent contractor.

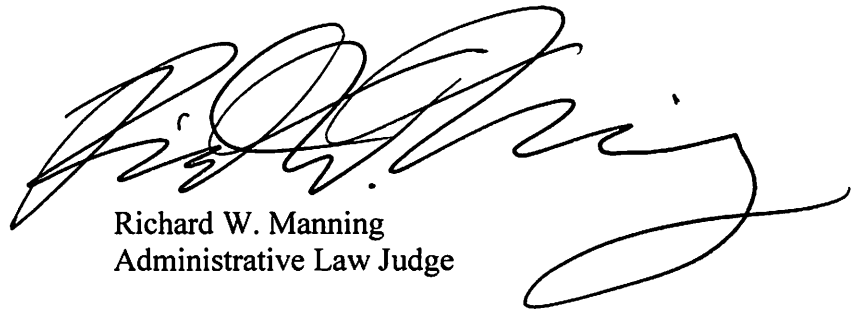
<sup>5</sup> The Secretary argues that his interpretation of the Act should be afforded deference and MSHA should have jurisdiction over Clarkson; I do not afford that deference. The language of the Act is clear; for MSHA to exercise jurisdiction, an entity must be an operator or independent contractor. Clarkson performed no services at a mine and therefore cannot be an operator or independent contractor. Even if the language were ambiguous, furthermore, the Secretary's interpretation could not be afforded deference because it is unreasonable. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Udall v. Tallman*, 380 U.S. 1, 18 (1965). The Secretary's interpretation would give MSHA jurisdiction over every person and entity who steps onto mine property, from children on field trips to trespassers.

status as a customer of the quarry,<sup>6</sup> its operation of the adjacent batch plant, and its use of the road leading to the mine to access that batch plant do not make it an independent contractor.

Clarkson did not perform services at a mine; therefore, Commission precedent and the clear language of the Mine Act dictate that Clarkson was neither an operator nor independent contractor. I find that as a matter of law, Clarkson is entitled to summary decision because MSHA did not have jurisdiction over Clarkson when it issued the subject citation and orders.

#### IV. ORDER

I hereby **VACATE** Citation No. 8760684 and Order Nos. 8760683, 8760685, and 8760686 because MSHA does not have jurisdiction over Clarkson Construction Company, Inc. Consequently, the Notices of Contest are **GRANTED** and these cases are **DISMISSED** as moot.



Richard W. Manning  
Administrative Law Judge

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<sup>6</sup> The Secretary argues that customers of a mine are subject to MSHA jurisdiction. He cites *El Paso Rock Quarries, Inc.*, an ALJ decision that is not binding upon me. 1 FMSHRC 2046 (Dec. 1979). That decision, furthermore, does not support the Secretary's argument. *El Paso Rock* addresses citations issued by MSHA to a mine operator and not a customer or contractor. 1 FMSHRC at 2048. The Secretary cites numerous decisions that do not support his position. The Secretary ignores Clarkson's status as an independent contractor.