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

July 14, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEST 2016-237-M A.C. No. 05-04600-399463
v.	Nine Pit
PARK COUNTY ROAD & BRIDGE, Respondent	

ORDER DENYING MOTION FOR SUMMARY DECISION

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Park County Road & Bridge ("Park County") 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"). Park County filed a motion for summary decision in which it maintains that the two citations at issue in this case must be vacated.[1] The Secretary filed an opposition to the motion to which Park County filed a reply. For the reasons set forth below, the motion for summary decision is denied.

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 analogized

[1] In its answer to the penalty petition and in its motion for summary decision, Park County stated that "Park County Road & Bridge" is not a proper party in this case and that it is not waiving its objection to this proceeding by filing the motion. In its answer, however, it admitted that the Nine Pit is operated by Park County, Colorado. I have not addressed this issue in this order as the Secretary has not responded to this claim.

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, 327 (1986)). When the Commission reviews a summary decision under Rule 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. SUMMARY OF ARGUMENT

A. Park County

Park County contends that Citation Nos. 8932192 and 8932193 should be vacated. The citations were issued to Park County because a "Community Clean-up Day" was being held on county property on October 3, 2015. Park County argues that this Clean-up Day was being held on a flat piece of ground located near, but not in, an idle gravel pit at which no mining operations were being conducted and at which no mining equipment was present. Park County engaged Mountain View Waste to operate the Clean-up Day.

In the motion, Park County presents what it labeled as "Undisputed Facts" in support of its motion. Because the Secretary argues that these undisputed facts do not include all pertinent information, I have labeled these facts as "Park County Facts" in this order. These facts, with only minor edits, are as follows:

1. Park County, Colorado, is a Colorado county organized and existing under Title 30 of the Colorado Revised Statutes. C.R.S. § 30-1-101.

2. Park County is the owner and operator of the Nine Pit, Mine ID No. 0504600, a gravel pit used only intermittently to produce road base for Park County roads. (Affidavit of Thomas Eisenman attached as Exhibit 1).

3. In the early autumn of 2015, Park County scheduled three "Community Clean-up Day" events, on various dates and locations, at which residents of Park County would be allowed to drop off waste material in dumpsters. The dumpsters would then be hauled away and the waste material disposed of. *Id.*

4. The October 3, 2015, location of the Community Clean-up Day was property near the Nine Pit but "off to [the] side of [the] main property." (General Field Notes prepared by MSHA Inspector Kathleen T. Gearity dated October 3, 2015 attached as Exhibit 2, page 3). Community Clean-up events have been held at this location several times before in previous years without incident since the property adjacent to the Nine Pit is an ideal location for this activity. (Affidavit of Thomas Eisenman).

5. On October 2, 2015 at 3:14 p.m., MSHA received an anonymous telephone call "requesting an inspector to go there [to the Community Clean-up] and shut this event down." (MSHA Escalation Report attached as Exhibit 3).

6. Rather than call Park County to inquire about the Community Clean-up, MSHA dispatched an inspector, Kathleen T. Gearity, to the event on October 3, 2015, where Gearity made observations and took notes and photographs. (Exhibit 2).

7. On October 3, 2015 "no portable plant or mining equipment [was] visible" and "no mining equipment was on site." (*Id.* at pages 1 and 3).

8. On October 3, 2015, according to the records of MSHA the "Mine has a status of temp[orary] idle." (*Id.* at pages 1).

9. At the conclusion of her inspection, Gearity noted: "Due to temp idle status no mining equipment; and location off to side of main property, question of jurisdiction. Will review w/ Field Office Supervisor prior to issuing citations." (*Id.* at page 3).

10. No citation was issued by Gearity on October 3, 2015. Instead, she "[a]dvised [the County to call] in next time to be certain they are in compliance." (*Id.* at page 5).

11. On October 6, 2015, Gearity "[r]eviewed the situation w/ Shane Julien, Field Office Supervisor. Per district recommendation we will not issue citations due to question of jurisdiction. Ultimately – negative findings." (*Id.* at page 5).

12. This conclusion was reiterated in MSHA's Miscellaneous Inspection Information report in which it is stated: "Per Field Office Supervisor and District Staff there were no issuances due to question of jurisdiction due to mine temp idle status and no mining activity on site." (Miscellaneous Inspection Information attached as Exhibit 4, page 2).

13. At some point subsequent to the events of October 2015, MSHA apparently issued Citations 8932192 and 8932193. (Copies attached as Exhibit 5). However, the citations were not served upon or provided to Park County until January 8, 2016, when Shane P. Julien of MSHA sent copies to the Park County Transportation Director attached to an email reading, in pertinent part: "Tammy, My apologies, here are the missing citations they did not get sent out by AR as originally thought. We intended to send them to Mr. Eisenman but did not." (Email from Shane P. Julien to Tammie Crawford dated January 6, 2016, with attachments, attached as Exhibit 6).

14. None of the reports prepared by MSHA personnel identify any mine hazard at the site of the Community Clean-up. (*See* Exhibits 1, 2 and 3).

15. The Community Clean-up event was not conducted on an area where mining operations occur. (Exhibit 2; Affidavit of Thomas Eisenman).

16. Mountain View Waste did not perform any services at the Nine Pit but, instead, merely supplied roll off dumpsters on County-owned property adjacent to the Nine Pit Mine Site for the Community Clean-up. (Affidavit of Thomas Eisenman).

17. At no time on October 3, 2015 was any person exposed to mine hazards. (Affidavit of Thomas Eisenman).

Citation No. 8932192 charges a violation of section 46.11(a) and alleges, in part, that five employees of Mountain View Waste were on mine property for a community trash day and had not received site-specific hazard awareness training. 30 C.F.R. § 46.11(a). Citation No. 8932193 charges a violation of section 46.12(a)(2) and alleges, in part, that Mountain View Waste employees were on mine property at Nine Pit for a community trash day and they were not given site-specific hazard awareness training. 30 C.F.R. § 46.12(a)(2).

Based on these facts, Park County argues that Citation No. 8932192 must be vacated. The cited regulation provides that "site-specific hazard awareness training [must be provided] before any person specified under this section is exposed to mine hazards." Persons specified under this regulation includes "any person who is not a miner as defined by § 46.2 of this part but is present at a mine site." 30 C.F.R. § 46.11(b). The term "mine site" is defined as "an area of the mine where mining operations occur." 30 C.F.R. § 46.2(f). The Secretary has defined "mining operations" to mean "mine development, drilling, blasting, extraction, milling, crushing, screening, or sizing of minerals at a mine; maintenance and repair of mining equipment; and associated haulage of materials within the mine from these activities." 30 C.F.R. § 46.2(h). Park County maintains that it is undisputed that there were "absolutely no mining operations in progress on October 3, 2015, that there was no mining equipment on site, that the Nine Pit was in 'temporary idle status,' and that the Community Clean-up event was conducted not on the mine site, as that term is defined [in section 46.2(f)], but 'off to [the] side of [the] main property.'" (Motion at 7 quoting Resp. Ex. 2, p. 3). Under the undisputed facts, no person was "exposed to mine hazards." The Community Clean-up was not being conducted in an area of the Nine Pit "where mining operations occur."

Based on the same facts, Park County also contends that Citation No. 8932193 must be vacated. The cited regulation provides that "[e]ach production-operator must provide information to each independent contractor who employs a person at the mine on site-specific mine hazards and the obligation of the contractor to comply with our regulations, including the requirements of this part." 30 C.F.R. § 46.12(a)(2). The citation states that Mountain View Waste, the firm hired to deliver and remove dumpsters at the clean-up event, did not receive information on site-specific hazards and was not advised by the County that it must comply with MSHA regulations. Park County argues Mountain View Waste was not an "independent contractor" as that term is defined by the Secretary because it did not perform any services at the Nine Pit site but, instead "merely supplied roll-off dumpsters on County-owned property adjacent to the Nine Pit Mine Site for the Community Clean-up." (Motion at 11; Resp. Ex. 1, Affidavit of Thomas Eisenman). The Secretary has defined the term "independent contractor" to mean "any person, partnership, [or] corporation . . . that contracts to perform services at a mine under this part." 30 C.F.R. § 46.2(e). Read in context and applying the plain and ordinary meaning of the words used in this definition, the phrase "perform services at a mine under this part" means that the "entity must be performing mine related work." (Motion at 12). Park County contends that under any other construction of the definition the words "at a mine" and "under this part" would have no meaning and would be superfluous. *Id.* "Delivery and removal of roll off dumpsters for a non-mining related Community Clean-up day is simply not the

performance of 'services at a mine under this part.'" *Id.* Consequently, Mountain View Waste was not an independent contractor as that term is defined by the Secretary. In addition Mountain View Waste never employed anyone at a mine as it simply supplied roll-off dumpsters. Finally, because no mining activities were taking place at the Nine Pit, Park County was under no obligation to "provide information" to Mountain View Waste "on specific mine hazards."

B. Secretary of Labor

The Secretary takes issue with many of the "undisputed" facts listed by Park County, as discussed below. With respect to Park County Fact 4, whether the Clean-up Day was held "off to [the] side of [the] main property," it was still on mine property. To get to the clean-up day, the "public drives into the mine gate [and onto] mine property [and] past existing stockpiles." (Sec'y Opposition at 4, quoting Sec'y Ex. 6, p. 2). Being near stockpiles and behind mine gates strongly indicate that Mountain View Waste was on mine property.

Park County Fact 5 leaves out the concern of the anonymous caller that "[t]here will be a front loader being operated and drivers driving trucks with no training." (*Id.* at 5, quoting Sec'y Ex. 4). Park County Fact 7 fails to mention that Inspector Gearity found a front-end loader in operation at the site and the equipment operator was not wearing a seatbelt. (Sec'y Opposition at 5, quoting Sec'y Ex. 6 p. 2). The equipment operator would have known of his obligation to always wear a seatbelt had he received the proper MSHA training.

Park County Fact 14 states that MSHA failed to identify any mine hazards at the site of the Clean-up Day. To the contrary, Citation No. 8932192 lists a number of hazards including "stockpiles, the pit, and mine equipment such as the screening plant and front-end loader." In addition, no County or Mountain West Waste employee at the site had received any hazard training.

Park County Fact 15 incorrectly states that the Clean-up Day was not held on an area where mining occurs. Although neither extraction nor milling were taking place on October 3, mine records show that as recently as September 29 miners engaged in nine hours of material screening at the Nine Pit. Park County Fact 16 incorrectly states that Mountain View Waste merely supplied roll-off dumpsters. The facts show, however, that there were five Mountain View Waste employees at the site and one of these employees was operating a front-end loader.

The Secretary also disputes Park County's legal arguments. With respect to Citation No. 8932192, Park County relies exclusively on the inspector's passing phrase that the Clean-up Day was off to the side. When the facts are analyzed taking into consideration the definition of a "coal or other mine" in section 3(h)(1) of the Mine Act, it becomes clear that the Clean-up Day took place at a "mine." 30 U.S.C. § 802(h)(1). As a consequence, the requirements of section 46 applied to the Clean-up Day. With respect to Citation No. 8932193, the Secretary argues that although "Mountain View Waste was not assisting in the removal of sand and gravel from the mine site; [it was] nevertheless performing services on mine property at the invitation of the mine operator, [Park County]." (Sec'y Opposition at 8).

C. Park County's Reply

In response to the Secretary's opposition, Park County makes the following argument. First, it contends that the Secretary's opposition rests on mere allegations and denials rather than specific facts supported by affidavits or other verified documents as required by 29 C.F.R. § 2700.67(d). Second, the Secretary did not address most of the Park County Facts set forth in the motion for summary decision. Third, Park County responded to specific statements made by the Secretary in opposition to the Park County Facts. With respect to Park County Fact 7, Park County notes that it did not mention the front-end loader because it "had absolutely nothing to do with the mine but was owned, operated, and used by Mountain View Waste to move dumpsters and pick up trash." (Park County Reply at 6). The presence of the front-end loader is totally irrelevant to the issues in this case because it was not mining equipment. In addition, the "facts" set forth in the two subject citations are mere allegations that were prepared at a later date and should not be considered in response to a motion for summary decision because the allegations are not supported by an affidavit. With respect to Park County Fact 15, it is immaterial that mining occurred at the Nine Pit in the past. The key fact that the Secretary cannot dispute is that no mining, milling, or stockpiling has ever occurred at the site of the Clean-up Day. Finally, Park County maintains that it is undisputed that no employees of Mountain View Waste entered the pit or traveled to other areas on the property other than the site of the clean-up activity where no mining activity was taking place. (Park County Reply at 8). It cannot be disputed that employees of Mountain View Waste "never engaged in mining operations and were never exposed to any mine hazards, as is recited in the Eisenman Affidavit." *Id.* at 9.

II. DISCUSSION AND ANALYSIS

The only issue before me at the present time is whether summary decision can be granted. I reject Park County's argument that the Secretary failed to comply with Commission Procedural Rule 67(d). Although the Secretary did not include a declaration or affidavit in his opposition, he did provide documents to support his position that there are genuine issues of material fact that must be resolved. I may also rely on the conditions described in the two citations as specific facts that the Secretary is prepared to establish at an evidentiary hearing. (Exs. 1-7).

I find that there are a few genuine issues of material fact that need to be resolved before I can rule on Park County's motion, as follows:

1. The photographs attached to Park County's motion show a number of stockpiles of aggregate and other material. It is not clear how close those stockpiles were to the dumpsters and to the activities of the Mountain View Waste employees. In his affidavit, Thomas Eisenman stated that he "personally confirmed with Mountain View Waste that no employees entered the pit area nor were any employees of Mountain View Waste exposed to any mine hazards since no mining operations were occurring on October 3, 2015 and the Clean-up Day activities were not at the mine site." (Affidavit ¶ 7). There was no evidence that the pit was near the location of the Clean-up Day or that the any "structures, facilities, equipment, machines, [or] tools . . . used in, or to be used in, or resulting from, the work of extracting . . . minerals from their natural deposits . . . or used in, or to be used in, the milling of such minerals" were anywhere near the Clean-up Day location. 30 U.S.C. § 801(h)(1). Consequently, only the stockpiles were potentially close

enough to the Clean-up Day location to pose a potential mine hazard. I need to know whether these material stockpiles were produced as a result of mining or screening activities at the Nine Pit. If so, I need evidence of the minimum distance between these stockpiles and the Clean-up Day activities on October 3, 2015. If the exact distances are not known, a reasonable estimate would be sufficient. If the Secretary believes that these stockpiles were close enough to the area where Mountain View Waste employees were working, I need evidence as to how the stockpiles exposed these employees to mine hazards.

2. Park County stated that Mountain View Waste "merely supplied roll off dumpsters on County-owned property adjacent to the Nine Pit Mine Site for Community Clean-up." (Eisenman Affidavit ¶ 7). Yet, five Mountain View Waste employees apparently were present at the Clean-up Day and a front-end loader was used during the event. In its reply to the Secretary's opposition to the motion, Park County stated that the front-end loader "was owned, operated and used by Mountain View Waste to move dumpsters and pick up trash." (Park County Reply at 6). This statement contradicts the affidavit of Mr. Eisenman. I need more evidence as to what the front-end loader was used for and how closely it operated to the stockpiles shown in the photographs.

I do not believe that an evidentiary hearing will be necessary to resolve these evidentiary issues. If the parties are unable to settle the case, time will be allowed for them to supplement their previous filings based on a schedule developed during a conference call with me.

Although I am denying the motion for summary decision because there remain genuine issues of material fact, I am offering some thoughts on the merits of the case. With respect to Citation No. 8932192, the hazard training requirement in section 46.11(b) only arises if specified persons are "exposed to mine hazards." Those specified persons are individuals who are not miners but who are present at a "mine site." Section 46.2(f). A "mine site" does not encompass the entire mine but only those parts of the mine in which "mining operations occur." *Id.* "Mining operations" include "mine development, drilling, blasting, extraction, milling, crushing, screening, or sizing of minerals at a mine; maintenance and repair of mining equipment; and associated haulage of materials within the mine from these activities." Section 46.2(h). If the Secretary is unable to establish that the five Mountain View Waste employees were present at a "mine site," as defined by the Secretary, and were "exposed to mine hazards," then I will vacate the citation. Establishing that these individuals were present at a "coal or other mine," as that term is defined in the Mine Act is insufficient to establish a violation of section 46.11(a) in this instance. In addition, the mere fact that Mountain View Waste brought the dumpsters through the mine gate would be insufficient

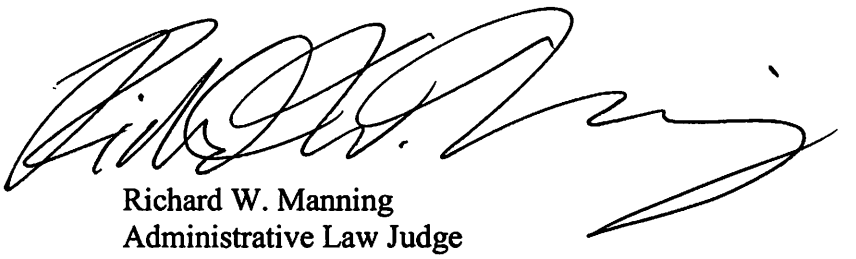
With respect to Citation No. 8932193, a key issue will be whether Mountain View Waste was an independent contractor as that term is defined in section 46.2(e). Generally, any contractor performing services at a mine is considered to fit within the definition of independent contractor in the Mine Act, unless "an entity's contacts with a mine would be so attenuated as to remove it from the jurisdiction of MHSA." *Northern Illinois Steel Supply Co. v. Sec'y of Labor*, 294 F.3d 844, 848 (7th Cir. 2002). There comes "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 under the Mine Act." *Id; See also Otis Elevator Co. v. Sec'y of*

Labor, 921 F.2d 1285, 1290 n. 3 (D.C. Cir. 1990). If I find that the activities of Mountain View Waste were *de minimis*, I will hold that it was not an independent contractor of Park County and I will vacate the citation. If I find that Park County was an independent contractor, the Secretary would be required to establish that Mountain View Waste's employees were exposed to specific mine hazards for which hazard awareness training would be required.

I strongly encourage the parties to settle this case taking into consideration this order. If you are unable to settle the case, please advise me by no later than **August 9, 2016,** so that I may schedule a conference call to discuss further proceedings.

III. ORDER

For the reasons set forth above, the motion for summary decision filed by Park County is **DENIED**. I find that there are genuine issues of material fact that remain in dispute.



Richard W. Manning
Administrative Law Judge

Distribution:

Michelle A. Horn, Esq., Office of the Solicitor, U.S. Department of Labor, 1244 Speer Blvd., Suite 216, Denver, CO 80204-3518
horn.michele.a@dol.gov

Herbert C. Phillips, Esq., PO Box 1046, Fairplay, CO 80440
lee@law-hcp.com

RWM