FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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November 23, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2008-721-M
Petitioner	:	A.C. No. 32-00837-159178-01
	:	
v.	:	Docket No. CENT 2008-722-M
	:	A.C. No. 32-00837-159178-02
BEYLUND CONSTRUCTION, INC.,	:	
Respondent	:	Mine: Crusher

DECISION

Appearances: Ronald Goldade, Conference and Litigation Representative, U.S. Dept. of Labor, Denver, Colorado on behalf of Petitioner.
Steve Beylund, President, Beylund Construction Inc., Bowman, North Dakota on behalf of Respondent.

Before: Judge Miller

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor ("Secretary"), Mine Safety and Health Administration ("MSHA") pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the "Act"), charging Beylund Construction, Inc. ("Beylund") with a total of 18 violations of mandatory standards and proposing penalties totaling $4,059 for those violations. The general issue before me is whether Beylund violated the cited standards, and if so, what is the appropriate civil penalty to assess in accordance with section 110(i) of the Act.

Beylund operates a scoria pit and crusher at its location in Ward County, North Dakota. The parties submitted signed joint stipulations in which they agreed that, among other things, the operation is a "mine" as defined by the Act, that the mine affects interstate commerce, that all persons working at the crusher are "miners" within the meaning of the Act, and that the Commission has jurisdiction to hear this case.

Prior to the hearing, the parties initiated a conference call with the Court. Mr. Steve Beylund represented Beylund Construction, and the Secretary was represented by a Conference and Litigation Representative ("CLR"). Mr. Beylund explained during the call that he preferred for the Secretary to put on her case without him present, and suggested that he show up later for

an hour to explain his side. He further explained that he didn't have a quarrel with the citations that were issued, but wanted his day in court to protest the fact that MSHA was able to come onto his property over his objection. I explained the purpose of the hearing to Mr. Beylund and instructed him to bring any documents or photographs that he believed would help explain his position, including any financial documents if he thought that his ability to pay the civil penalties was an issue.

At the outset of the hearing, Mr. Beylund again expressed his position that he had no real issue with the violations as issued by the MSHA inspector. The parties signed and submitted a stipulation that included provisions admitting that each violation occurred as set forth in the citation. (Tr. 8, Ex. 27). When questioned, Mr. Beylund was unclear about what he had signed and about what he intended to explain to the Court. Therefore, it was determined that the Secretary's witness, MSHA inspector Shane Julien, would testify as to each violation and Mr. Beylund would then have the opportunity to ask questions and respond. During the course of the hearing, Mr. Beylund once again stated that he admitted the violations and did not want to proceed through each of the 18 citations that were issued, and instead preferred to use his time to voice his dissatisfaction with MSHA. (Tr. 76-77).

Findings of Fact

Beylund Construction, Inc. operates a scoria pit and crusher in remote North Dakota. In 2007 an MSHA inspector discovered the Beylund pit and crusher operation after noticing a number of Beylund trucks hauling material near Bowman, North Dakota. Because no one was present at the mine, the inspector left his business card on the fence. (Tr. 19). In January 2008, Mr. Beylund called the MSHA office in Rapid City, South Dakota. The office supervisor, Inspector James Weisbeck, testified that he spoke with Mr. Beylund on the phone and explained the MSHA requirements at that time. (Tr. 19-21).

Inspector Weisbeck informed Mr. Beylund of, among other things, what MSHA had to offer to small operators, the purpose of MSHA, how inspections worked, and who was subject to the Mine Act. Further, Weisbeck offered to conduct a courtesy inspection at the mine and help Beylund come into compliance with MSHA regulations. Mr. Beylund refused the offer and replied that he wanted nothing to do with MSHA or its inspectors. (Tr. 22-24, 82).

Several months after the conversation between Weisbeck and Beylund, MSHA Inspector Shane Julien returned to the Beylund scoria pit. The Beylund operation, as observed by the inspector, consists of a surface scoria pit, crusher plant, dozer, back hoe, excavator, haul trucks and other heavy equipment. (Tr. 42). On the day of Julien's visit, there were three employees working at the operation, including Mr. Beylund and his son. Julien testified that he "observed that the mine was loading trucks, doing maintenance, [and] cleaning up around the operation." (Tr. 32-33).

As inspector Julien and an MSHA inspector trainee were entering the mine site, they encountered a pickup truck carrying Mr. Beylund, his son, and another Beylund employee. (Tr. 35, 43). The inspectors explained the MSHA inspection scheme and the right of the inspectors to enter the mine to conduct an inspection. Mr. Beylund was not welcoming. He raised his voice and told the inspectors that the mine had been sold and they could not conduct an inspection. Again, the inspector explained the Mine Act and the inspector's right to be on the property, but Mr. Beylund denied them entry. (Tr. 36, 39). The inspectors left, traveled a short distance down the road, and stopped to call the MSHA field office about the denial of entry. Shortly thereafter, Mr. Beylund approached the inspectors, acknowledged that his lawyer had informed him that MSHA could enter without a warrant, and told the inspectors they could return to the mine and inspect. (Tr. 36-37).

The inspectors returned to the mine and conducted a regular inspection of the pit and the crusher operation. They took notes and photographs of each violation and explained them to Mr. Beylund during the close out conference. The inspectors observed the scoria pit, the crusher, an excavator, dozers, back hoe, and several trucks. It appeared that the mine crushed the scoria for several days at a time, and then loaded it on the haul trucks to be delivered. The inspectors discovered that Mr. Beylund, his son, and one other employee did the bulk of the work at the pit and the crusher. As a result of the inspection, sixteen citations and two orders were issued, including citations for failing to properly guard equipment, failure to file a mine identification, and failure to train any person who worked at the mine. (Tr. 42). Subsequently MSHA issued eight 104(b) orders for failure to abate a number of the violations in a timely manner. At the time of the hearing, one citation, number 6327959 citing a violation of 30 C.F.R § 46.5(a) was not abated. The citation was issued because "[t]wo miners, Steve Beylund and Michael Beylund, had not received the MSHA required 24 hour new miner training within 90 days after beginning work at the mine." (Ex. 10).

As indicated above, Mr. Beylund had no quarrel with the violations as issued but used the opportunity to tell the Court about his experience with MSHA and his difficulty with the inspection. At one point during his testimony Mr. Beylund acknowledged that he had operated the pit and the crusher for at least three years. At another point, he attributed a longer operational time frame for the pit and crusher. Mr. Beylund was not consistent in his testimony and I question his credibility. Since Mr. Beylund agreed that the violations as issued are correct, I will not address each citation. Instead, I will briefly address Mr. Beylund's arguments regarding jurisdiction and the amount of penalty to be assessed for each violation.

Conclusions of Law

Mr. Beylund first argues that he didn't understand the law and therefore cannot be found "guilty" of these violations. He declared a number of times that he's not a criminal, and did nothing wrong. (Tr. 84). At the same time, Mr. Beylund argued that if the mine doesn't size the material "then he is home free." In other words, on one hand, he said he didn't understand the

law, while on the other, he argues that if the crusher is not in operation, he does not have to comply with the law. (Tr. 85, 91). I find that while Mr. Beylund may not have been familiar with all MSHA standards, he was certainly aware that he could be subject to MSHA regulation. His view is, if MSHA does not catch him, then he is not subject to the law. Mr. Beylund cannot plead ignorance of the law while at the same time trying to avoid it, or develop his own theory about when he does and does not have to comply. Further, MSHA supervisor James Weisbeck had told Mr. Beylund at least six months prior to the inspection that Beylund was subject to MSHA regulation. If he was not aware of the law for the three or more years while he was operating, he certainly became aware six months before the inspection when he was offered assistance to come into compliance. Beylund's response to the offer of assistance by Supervisor Weisbeck was that he didn't want anything to do with MSHA and that MSHA could "catch [him] if [it] can." (Tr. 19).

Mr. Beylund made no effort to learn the law, but instead did everything he could to avoid it. His lack of specific knowledge and his actions to avoid MSHA do not excuse the violations. First, as a general matter, the Mine Act is a strict liability statute. As such, the Mine Act assesses liability without regard to the individual operator's fault. *International Union, UMWA v. FMSHRC*, 840 F.2d 77, 83 (D.C. Cir. 1988). However, fault may be considered in setting the level of the civil penalties by considering whether the operator was negligent. 30 C.F.R. § 100.3. When a person operates a mine, it is his duty, at a minimum, to make an inquiry regarding his status and the safety standards he is expected to meet.

Beylund's next argument, that MSHA should not have the right to enter the property without a warrant, also fails. (Tr. 88). It is well established that MSHA can and must enter any mine to conduct the inspections required by the Act. The Act provides for such entry. 30 U.S.C. § 813. Safety concerns and enforcement needs justify warrantless inspections of mines. *Marshall v. Texoline Company,* 612 F.2d 935 (5th Cir. 1980). While Mr. Beylund did not like the fact that MSHA had the right to enter his property without a warrant, he agreed, after speaking to his attorney, that the law gives that right to the MSHA inspectors. He presented no legal reason for his argument regarding the warrantless search except to say that the government should not have such a right.

The primary thrust of Beylund's defense is that MSHA has no jurisdiction over the pit and crusher operations, unless the plant is in operation at the time the inspectors arrive. (Tr. 88). Mr. Beylund maintains that if he operates the crusher, and MSHA does not catch him operating, then he cannot be issued any citations. Consequently, he was operating on Saturdays and Sundays in order to avoid an MSHA inspection. (Tr. 83). The Secretary argues that the extraction of scoria and operation of the crusher brings the facility within the Act's definition of a mine, and therefore the equipment, facilities, and employees are all subject to MSHA's jurisdiction.

Beylund commenced crushing operations at this site at least three years ago. (Tr. 27). Beylund did not request a mine identification or seek to come into compliance with MSHA regulations at start up. The scoria pit operated for a number of years without MSHA notice and Mr. Beylund admits that he often operated on Saturdays and Sundays because he knew that

MSHA inspectors did not work on those days. Mr. Beylund urges the Court to vacate the citations that were issued because the mine was not sizing rock, and therefore was not operating at the time the inspectors arrived. He averred that MSHA would have to catch him operating and believed that until it did, it could not inspect the premises. He did not argue that his operation was outside of MSHA jurisdiction, but simply that jurisdiction only applied if the pit and crusher were in operation.

The legislative history of the Act makes clear that Congress intended that the Act's coverage provisions be interpreted broadly. The Senate Committee report emphasized that "what is considered to be a mine and to be regulated under this Act [should] be given the broadest possible interpretation, and . . . doubts [should] 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). The Commission and the courts have recognized this broad Congressional intent and have applied the Act's provisions to a wide variety of mining operations, including mining and crushing facilities similar to those at Beylund's site. *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589 (3rd Cir. 1979) (facilities for processing of material dredged from a river bed were within the Act's definition of the term "coal or other mine"); *W.J. Bokus Ind.*, 16 FMSHRC 704 (Apr. 1994) (equipment in garage used by both the operator's sand and gravel mine and asphalt plant is subject to the Mine Act's jurisdiction); *Marshall v. Cedar Lake Sand and Gravel Co., Inc.*, 480 F.Supp. 171 (E.D. Wisc. 1979) (pit from which sand and gravel are removed falls squarely within the Act's definition of a mine); *Marshall v. Gilliam*, 462 F.Supp. 133 (E.D. Mo. 1978). A small, family-run gravel business was held to be a mine and MSHA's jurisdiction to inspect and enforce the Act was upheld as to a gravel pit, screening plant and equipment used, or that had been used, in the operation. *Jeppesen Gravel*, 30 FMSHRC 324 (Apr. 2008) (ALJ).

Several aspects of Beylund's operation clearly fall within the Act's definition of a mine. The removal of scoria from its natural deposits in the pit, crushing and sizing the rock, and transporting the rock, all constitute mining. (Tr. 42, 90). Mr. Beylund, his son, and another employee extracted minerals from the pit, crushed the rock, and then loaded the rock onto the haul trucks. Beylund maintained and repaired mining equipment, including a dozer, back hoe and crusher. Whether specific items that were cited, such as gas cans or oxygen cylinders, were actually used in mining activities, the presence of those items in the area where miners worked mandated that Beylund comply with MSHA's regulations. *W.J. Bokus Ind.,* 16 FMSHRC at 708-709; *Marshall v. Gilliam*, 462 F.Supp. at 135.

While the crusher is only operated on an "as needed" basis, it was evident that it had recently been operated and that the pile of scoria recently crushed was being loaded onto the trucks and transported. The site was being cleaned up from the most recent crushing operation. (Tr. 42). Equipment and facilities that are available for use by miners must be maintained in compliance with applicable safety standards, and are subject to inspections whether or not they are actually being used at the time. *See, e.g., Ideal Basic Ind., Cement Div*., 3 FMSHRC 843 (Apr. 1981) (equipment located in a normal work area and capable of being used must be in compliance with safety standards).

I further find that additional factors buttress MSHA's assertion of jurisdiction. First, when resolving jurisdictional questions of this sort, the benefit of the doubt goes to the Secretary. As the Commission stated in *Watkins Eng'rs & Constructors,* "Congress clearly intended that . . . jurisdictional doubts be resolved in favor of coverage by the Mine Act. 24 FMSHRC at 675-676 (*citing* 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)).

A second related factor is that the courts and, by implication, the Commission and its judges, have been reluctant to second guess the Secretary when she makes choices involving MSHA and OSHA coverage. She is the one whose duty it is to administer the acts, and when, in the course of her administration, she makes informed and reasoned jurisdictional determinations, judicial decision makers have been wary of overruling her. See *Watkins Eng'rs & Constructors,* 24 FMSHRC at 672-673, 676.

For all of these reasons, Beylund's challenge to MSHA jurisdiction must fail. Finding no merit to any of the defenses raised by Beylund, the citations are affirmed as issued.

Penalty

I conclude that the penalties initially proposed by the Secretary would not adequately effectuate "the deterrent" purpose underlying the Act's penalty assessment scheme. *Sellersburg Stone Co.,* 5 FMSHRC 287, 294 (Mar. 1983), *aff'd,* 736 F.2d 1147 (7th Cir. 1984). I reach this decision based upon my conclusion that Beylund did everything it could to avoid MSHA inspection, and for years operated on days Mr. Beylund felt MSHA would not find the crusher in operation. In addition, Mr. Beylund suffered life-threatening injuries when he fell from the crusher and the same could have easily been the fate of other employees. Yet, he failed to abate the citations as required, and, as of the date of hearing, he and his son had not received the training necessary to operate the crusher and equipment safely.

The principles governing the authority of Commission Administrative Law Judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. 815(a) and 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires, that "[i]n assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg,* 5 FMSHRC at 292. Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is "bounded by proper consideration of the statutory criteria and the deterrent purpose[s] . . . [of] the Act. *Id.* at 294; *Cantera Green,* 22 FMSHRC 616, 620 (May 2000).

While I find no reason to question the degree of negligence and gravity assessed by the inspector and used by the Secretary in proposing the penalties in these two cases, I do, however, question Mr. Beylund's good faith abatement. Eight of the original eighteen violations were not abated within the time required by the citations. The most troublesome failure to abate concerns the training of employees at the mine. Training is so important to the safe operation of the mine and the serious injuries sustained by Beylund might have been avoided if he had been properly trained. The fact that a large number of citations were not abated in a timely manner, that most of the violations could have easily been abated within the time set, and that the training citation remains unabated, all weigh heavily on the determination of the increased penalties for those violations.

Beylund is a small operator and agreed that the penalties as assessed would not interfere with its ability to continue in business. Since Beylund had not been inspected prior to June, 2008, it has no history of violations. I find the following penalties appropriate in this circumstance.

Citation/ Order#	**Standard**	**Reason for Change**	**S&S**	**Assessed Penalty**	**Final Penalty**
6327943	41.11(a)	None	N	$100	$100
6327948	56.14107(a)	None	Y	$270	$270
6327949	56.12030	Failure to abate	Y	$270	$300
6327956	56.12028	None	Y	$270	$270
6327959	46.5(a)	Failure to abate	Y	$971	$1,000
6327960	46.6(a)	None	Y	$897	$897
6327944	56.12008	Failure to abate	N	$112	$120
6327945	56.11003	Failure to abate	N	$112	$120

6327946	56.14107A	Failure to abate	Y	$121	$140
6327947	56.12008	Failure to abate	N	$112	$120
6327950	56.14107A	None	N	$100	$100
6327951	56.16006	Failure to abate	N	$112	$120
6327952	56.4203	None	N	$100	$100
6327953	56.14132A	Failure to abate	N	$112	$120
6327954	56.18010	None	N	$100	$100
6327955	47.31A	None	N	$100	$100
6327957	50.30	None	N	$100	$100
6327958	46.3	None	N	$100	$100
Total				$4,059	4,177

Consistent with this decision, it is **ORDERED** that Beylund Construction Inc., pay a total civil penalty of $4,177 for the 18 violations contained in these dockets. Such payment shall be made within 30 days of the date of this decision.[1]

Margaret A. Miller
Administrative Law Judge

Distribution:

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[1]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.