FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE N.W., SUITE 9500
WASHINGTON, D.C. 20001
Telephone: (202) 577 6809
Facsimile: (202) 434-9949
September 14, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. CENT 2009-444-M
Petitioner	:	A.C. No. 29-02252-184671
v.	:	
	:	
KHANI COMPANY, INC.,	:	Khani K100/Metso Crusher & Screen
Respondent	:	

Appearances:

Ronald M. Mesa, Mine Safety and Health Administration, Dallas, Texas for Petitioner

Naser Alikhani, pro se, Albuquerque, New Mexico

DECISION

Before: Judge William Moran

This case is before the Court upon a petition for civil penalty filed by the Secretary of Labor, pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq*. (the "Mine Act" or "Act"). The Petition cited Respondent for four (4) alleged violations of the Act, with a proposed penalty assessment of $100.00 for each citation, resulting in a $400.00 total proposed assessment. At a point several weeks before the hearing, the Secretary offered to vacate Citation No. 6465534. A hearing ensued on August 3, 2010 in Albuquerque, New Mexico and as a preliminary matter, that citation, No. 6465534, was vacated. Tr. 16.

While the Secretary established *prima facie* cases for each of the three remaining citations, the central controversy in this matter involves whether there was jurisdiction under the Mine Act at the time of the inspection which resulted in the issued citations. Therefore, although the citations themselves will be discussed, briefly, the decision will focus upon the jurisdictional question. For the reasons which follow, the Court finds that the violations were established, that jurisdiction existed at the time of the inspection, and that a civil penalty in the sum of $200.00 (two-hundred dollars) is appropriate.

Findings of Fact

The parties entered into a number of stipulations but, understandably from the Respondent's perspective, the Respondent did not agree with the Petitioner's proposed stipulation that Respondent's Metso Crusher and screen operation constituted mining and selling of materials, nor that such activity affected interstate commerce.

MSHA Inspector Lloyd Ferran testified the Respondent's Metso Crusher and screen is located in Deming, New Mexico and that he performed an inspection there on April 2, 2009. Tr. 28, 30, 48. Ferran described it as a sand and gravel operation. Respondent's witness, Mr. Hubble, the superintendent at the mine, agreed that was the nature of the operation. Tr. 147. Upon arriving, the inspector met Mr. Hubble and there was also a miner's representative present. Ferran stated that when he arrived at the operation, it was operating. He observed "a couple of loaders" and "stockpiles." He also observed dust "coming out of the conveyor belts" and he stated that the conveyor belts were running, that is, they were moving, and he observed materials stockpiled. Tr. 36, 43. Another indication the operation was active, Ferran heard noise and took sound level readings. Tr. 38-39. His inspection included examining a track hoe, a Cat 958, a water tank truck, and the crusher or screen plant. Tr. 41.

Inspector Ferran issued a citation on a front end loader that did not have a ROPS (i.e. "rollover protection structure") label reflecting the make and model number for which it was designed. The citation alleged a violation of Section 56.14130(c)(3). Tr. 50, Citation 6465532. As it turned out, the ROPS was the correct model for the loader, but the wrong ROPS *label* had been affixed, an error attributable to the supplier, not the mine operator. Subsequently, the manufacturer sent a letter to MSHA explaining that the wrong label had been attached to the ROPS. Tr. 55, 130. The violation was abated by affixing the correct label. Tr. 58. MSHA ultimately decided there was no negligence on the Respondent's part for the violation and it was deemed a "paper violation." A $25.00 (twenty-five dollar) penalty is appropriate for this violation.

Ferran also issued a citation for an alleged parking brake violation. Tr. 61, Citation No. 6465533. That citation involved the same piece of equipment cited for the ROPS issue, as described above. Tr. 66. The parking brake for the front-end loader in issue was not able to hold the vehicle on the grade. Tr. 65. The citation referenced Section 56.14101(a)(2), which provision requires a parking brake capable of stopping and holding the equipment on the maximum grade it travels. The inspector considered an injury unlikely to occur because the service brake did work. Yet, he believed that if such an injury did occur it would be fatal. Tr. 66, 69. Also, regarding the parking brake violation, although the Respondent suggested that the person operating the loader may not have fully engaged the parking brake during the test of its effectiveness, the critical point is that the operator did not ask that the test be repeated after the initial failure. Tr. 103.[1]

[1]MSHA called, as its second witness, Mr. Benny Lara, a supervisor from its Albuquerque filed office. Mr. Lara issues job assignments to the inspectors who work out of that field office.

The Court agrees that the $100.00 (one-hundred dollar) penalty proposed by MSHA is appropriate.

Ferran's third citation cited Section 56. 18010, for the lack of an individual holding a current first-aid training certificate. The Respondent was unable to provide any documentation to show that it had an employee with such current training. Tr. 73. Ferran accepted the Respondent's assertion that it had an employee with such training but that the certification had expired. Because he accepted that such individual had been so trained, but not re-certified, the inspector concluded that the gravity should be marked as 'unlikely.' Tr. 74. No defense was presented to the certification issue. The Court concludes a $75.00 (seventy-five dollar) penalty is appropriate.[2]

Through his questioning of Mr. Ferran, the Respondent tried to establish that while they were planning to re-open the pit, it was not yet open at the time of the inspection. Tr. 85. These questions were designed to show that the operation was in the process of setting up, as opposed to actually producing mined material. Tr. 97, 106, 128.

For its part, the Respondent provided testimony through Mr. Tom Hubble, who, as previously mentioned, is the mine's superintendent. Apart from its recent resumption of mining activities, Mr. Hubble stated that the site had, during various periods of time, prior mining activity, as evidenced by numerous old waste piles that remained there. Tr. 145. Hubble testified that they were getting the site ready to go into production at the time of the inspection. Tr. 146-147. The activity going on at the time of the inspection, as Mr. Hubble described it, was "reclaim work," that is, activity necessary to perform in order to have the site ready to resume production. Tr. 149. Apart from the dispute as to whether there was mined material running on the site's conveyor belts, Hubble agreed that, as part of getting ready to resume mining activity,

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Tr. 111-113. Although the Respondent questioned the circumstances leading to Mr. Ferran's presence at the mine on the day of the inspection, the Court explained that the outcome of this case would not depend upon any issue of whether Mr. Ferran had been properly assigned to do the inspection in this matter. Tr. 114. Mr. Lara did identify a March 2, 2009 document identified as a "Notification of Mine Opening or Closing," which document was signed by Mr. Alikhani. Tr. 115. Lara also testified that he attempted to have MSHA's Education Field Service ("EFS") visit the facility to determine if any hazards were present and to see if their paperwork was complete. Tr. 117-118. No citations are issued when there is an EFS visit. Such a visit did occur on March 13, 2009, when MSHA's Mr. Steve Bowroznik came to the facility. Tr. 119-120. The inspection in issue occurred during the first week of April which was subsequent to the EFS visit. Although the Respondent also requested a compliance assistance visit, or "CAV," MSHA advised that it did not have the manpower to provide that and that the EFS visit occurred instead. Tr. 124. Mr. Lara did agree that, at least at the time of the EFS visit, the Respondent was setting up the operation, and not producing mined product. Tr. 128.

[2] Subsequently, all the citations in this proceeding were abated and terminated. Tr. 132.

he had to run the conveyor belt, in order to ensure that it was operating properly. Tr. 148. Part of that testing process does involve having material on the belt while it is running and he agreed that such activity had occurred at some time prior to the inspector's arrival. Tr. 148. Mr. Hubble could not state an exact date, but he believed that the operation actually resumed production about 12 to13 days following the inspection in issue here. Tr. 152.

Discussion

As the Mine Act's coverage applies to mine site activities occurring prior to the commencement of removing minerals from the ground, Khani Company is subject to that Act for such pre-mining activities. Further, the Respondent's pre-mining activities come within the United States Constitution's interstate commerce clause.

A. The Mine Act applies to activities prior to mineral removal, such as the set-up of the mine.

The Respondent agreed that the heart of his dispute in this proceeding is that, while the mine was getting ready to commence mining at its mine site, the Khani K100 /Metso Crusher & Screen, it had not actually started mining when the inspection in issue here took place. Tr. 133. Because 'mining' itself, that is the removal of minerals from the earth, had not yet occurred at the time of the inspection on April 2, 2009, Khani contends that there was no jurisdiction under the Mine Act. Mr. Alikhani, President of Khani Company, acting *pro se*, did not testify, but contended that as there was no scale present at the operation, and as the mine had not produced anything that "affected commerce" at the time of the inspection, it could not be cited for mining violations. Tr. 136

The Court agrees that "mining," in the sense of mineral removal, had not commenced at the time of the inspection.[3] Instead, the Court finds that the mine was in the process of resuming the removal of minerals from the earth. That is, the operation was preparing to resume operations. However, while the removal of minerals did not actually resume until approximately two weeks after the inspection, the law is quite clear, and it has long been well-established that the Mine Act applies to such pre-mining activities.

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[3]Mr. Alikhani also contended that the inspection in issue stemmed from MSHA's intention to 'get him,' as pay back for its having to vacate some seven citations issued several years ago against the operation. Tr. 140. Mr. Alikhani agreed that his contention was that MSHA sought revenge for the embarrassment of having to withdraw those citations and therefore that the agency had an improper motive in conducting the inspection in issue in this proceeding. Tr. 141. While the Court accepts that Mr. Alikhani *believes* that the inspection here stemmed from such improper purposes, there is no *evidence* to support that belief. Consequently, the claim is rejected.

A few brief examples demonstrate the Mine Act's coverage to such "pre-mining" or "set-up"activities. In *Sec. v. Royal Cement Co.*, WEST 2007-844-M, (Dec. 2009), Judge Manning was faced with the same situation as here; an operation which was preparing to restart operations, but had not resumed the production of mineral removal.[4] There, the judge noted that the "Mine Act's use of the language 'used in, or *to be used in*, the milling of . . . minerals' indicates that, for jurisdictional purposes, a 'mine' includes . . . facilities where mineral mining milling will be taking place in the future." The judge further noted that the United States Court of Appeals for the Third Circuit has referred to the 'to be used' language as encompassing "contemplated use." *Id*., citing *Lancashire Coal Co. v. Sec'y of Labor*, 968 F. 388 (3rd Cir. 1992). So too, in *Sec'y of Labor v. The Pit*, WEST 94-97-M, 16 FMSHRC 2008 (Sept. 1994), which also involved the inspection of a sand and gravel pit, administrative law judge Arthur Amchan also relied upon the "to be used in" language employed in the definition of a mine under the Act, to conclude that coverage applies even if mining has not yet commenced. The judge noted that such a conclusion makes sense as well because the Act is intended to prevent injuries and illnesses and that such protection logically applies whether employees are setting up equipment or engaged in production. *2010.

Here, the Respondent's own witness conceded that the mine was preparing to resume mining activities and that running equipment such as the front-end loader and the operation of conveyor belts was part of that process. Certainly it is undeniable that the hazards associated with those activities are present whether they occur during the mine's set-up for operations to commence or during the actual process of mineral removal for its sale.

B. The Respondent's activities affect interstate commerce.

The second contention raised by Mr. Alikhani is the claim that the activity in question "wasn't affecting commerce." Tr. 131. This issue too is not novel and it has been long resolved that the measure of "interstate commerce" is far broader than the literal words would imply to non-lawyers.

Mr. Alikhani concedes that the equipment at the site "was transported from Arizona to New Mexico," but as he did not *purchase* it in Arizona, he believes that interstate commerce did not occur. Apart from the fact that purchases are not the determinative factor in assessing the scope of interstate commerce, the Respondent does not grasp the breadth of the commerce clause.

A few cases illustrate that Khani's contention is without merit. In *Sec'y of Labor v. Nicholson*, 16 FMSHRC 1967, (September 1994), which case also involved a sand and gravel

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[4]In fact, the circumstances in *Royal Cement* were more removed from the resumption of mining activities than those presented in this litigation, as the company only engaged in pre-mining *repairs* but it never resumed mining. In contrast, here, *Khani* did resume mining about two weeks after the inspection.

operation, Judge Weisberger addressed the claim that the activities there did not involve interstate commerce. There, he noted that the Commission addressed the scope of the Commerce Clause in *Harless Towing Inc.*, 16 FMSHRC 683 (April 11, 1994). In *Harless,* the Commission noted the long history of the broad construction of that clause, including the fact that even commercial activity which is purely intrastate in character has been found to be within its ambit "where the activity, combined with like conduct by others similarly situated , affects commerce among the states." To appreciate the breadth of the coverage of the clause, one need only turn to *Wickard v. Filburn*, 317 U.S. 111 (1942) where the Supreme Court held that wheat grown solely for consumption on the farm where it was grown still affects interstate commerce. As a closer example, in *United States v. Lake*, 985 F.2d 265, 267-69, the Sixth Circuit held that a mine operator who sold all his coal locally and purchased his mining supplies from a local dealer, still engaged in interstate commerce. This decision, like *Filburn*, is based on the realization that such small scale activities when considered with such similar activities by others, has a cumulative impact on interstate commerce. Thus, the activity is analyzed, not from a microscopic view, but rather from a telescopic one.

Accordingly, the Court finds that the activity in issue at Khani Company's operation affects interstate commerce.

CIVIL PENALTY ASSESSMENT

The three citations are affirmed and,as set forth above, civil penalties are imposed for each of three violations.

ORDER

Khani Company, Inc., Respondent, is **ORDERED TO PAY** the Secretary of Labor the sum of $200.00 (two-hundred dollars) within 30 (thirty) days of the date of this decision.[5]

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William B. Moran
Administrative Law Judge

[5]Payment should be sent to the Mine Safety and Health Administration, P.O. Box 790390, St Louis, MO 63179-0390.

Distribution:

Mr. Naser Alikhani, 102 Highway 66 East, Albuquerque, New Mexico 87123

Mr. Ronald M. Mesa, CLR, Mine Safety and Health Administration, 1100 Commerce Street, Room 462, Dallas, TX 75242-0499.