

NOTICE

1. Enclosed is a copy of a decision by an Administrative Law Judge of the Federal Mine Safety and Health Review Commission. The issuance date of this decision appears on the first page of the Decision.

THIS DECISION MUST BE POSTED ON THE MINE BULLETIN BOARD BY THE OPERATOR.

2. You may petition for review of this decision by the Commission. A PETITION FOR DISCRETIONARY REVIEW must be received by the Commission within thirty (30) calendar days after the issuance date of the decision to be considered [29 C.F.R. § 2700.5(d) and .70(a)]. If this decision is an ORDER OF TEMPORARY REINSTATEMENT, the Petition for Review must be received within 5 days of the receipt of the order [29 C.F.R. § 2700.45(f)]. Petitions are accepted by facsimile. If you mail the petition, you should allow enough time for delivery by the thirtieth day. Petitions (original plus six copies) should be filed at:

DOCKET OFFICE
FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION
1331 Pennsylvania Ave., N.W., Suite 520N
WASHINGTON, D.C. 20004-1710
telephone No. (202) 434-9950
fax no. (202) 434-9954

3. The Federal Mine Safety and Health Review Commission's Rules of Procedure specify that a petition may be filed only on one or more of the following grounds:
 - A. A finding or conclusion of material fact is not supported by substantial evidence.
 - B. A necessary legal conclusion is erroneous.
 - C. The decision is contrary to law or to the duly promulgated rules or decision of the Commission.
 - D. A substantial question of law, policy or discretion is involved.
 - E. A prejudicial error of procedure was committed.

Each issue shall be separately numbered and plainly and concisely stated, and shall be supported by detailed citations to the record when assignment of error are based on the record. Statutes, regulations or principal authorities shall be relied upon. Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge has not been afforded an opportunity to pass. For further details on the filing of documents and the review process, see 30 U.S.C. § 823(d) and Commission rules 5 through 9 and .70 through .78 [29 C.F.R. §2700.5-.9 and .70-.78].

4. A Petition for Review must be served on the opposing party.
5. If a petition is filed, each party will be notified of the Commission's action on the petition.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

721 19th STREET, SUITE 443
DENVER, CO 80202-2500
303-844-5267/FAX 303-844-5268

February 12, 2014

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

v.

MAXXIM REBUILD COMPANY, LLC,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. KENT 2013-989
A.C. No. 15-10753-327883

Mine: Mine #1

DECISION AND ORDER

Appearances: Mary Sue Taylor, Office of the Solicitor, U.S. Department of Labor, Nashville, TN on behalf of the Secretary of Labor;
R. Henry Moore, Jackson Kelly, PLLC, Pittsburgh, PA on behalf of Respondent.

Before: Judge Miller

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, Mine Safety and Health Administration (“MSHA”) against Maxxim Rebuild Company, LLC, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. The docket involves two citations issued by MSHA under section 104(a) of the Mine Act at Maxxim’s fabrication shop at Mine No. 1, located in Sidney, Kentucky.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

On October 23, 2013, I issued a decision, after hearing, regarding several citations at the Maxxim Rebuild fabrication shop. 35 FMSHRC 3261 (October 2013). The primary issue in that case was whether the fabrication shop was subject to MSHA jurisdiction. The parties presented testimony and evidence at hearing, and submitted post-hearing briefs. I issued a decision finding that jurisdiction was proper and addressed the various violations. The operator appealed the case to the Commission and a decision has not yet been issued by the Commission. Shortly thereafter, this docket was assigned to me and the same issue of jurisdiction was raised by Maxxim.

During a conference call about this case, the parties agreed that the central issue was identical to the jurisdiction issue pending before the Commission in the Maxxim case decided in October, 2013. The parties further agreed that they would stipulate to the facts surrounding the violation so that a decision could be issued and the mine operator would preserve the issue of jurisdiction for purposes of appeal. On January 24, 2014, the parties filed joint stipulations,

which are marked as a joint exhibit and are the basis for this decision. In addition, the facts and circumstances of the earlier case, which are identical here, are the basis for my determination that MSHA does properly maintain jurisdiction of the Maxxim fabrication facility. This case, therefore, should be consolidated, or otherwise decided along with the case on appeal to the Commission.

a. Jurisdiction

In the first Maxxim decision, the mine asserted that the Secretary did not have jurisdiction in this matter because the facility is not a “mine” as contemplated by the Act, its activities are too remote from the mining process, the facility repairs and rebuilds mining equipment for Alpha Resources and on a limited basis for other mine operators, and MSHA has inconsistently applied jurisdiction over the site and similarly situated repair shops. In response, the Secretary argued that, due to the nature of the work performed at the facility, it is a “mine” and, accordingly, is within the jurisdictional reach of the Act. I agreed with the Secretary and found that the fabrication facility is a mine, relying primarily on *Jim Walters Resources*, (“*JWR*”), 22 FMSHRC 21 (Jan. 2000) in which the Commission addressed a situation similar to the instant one. Given that this Maxxim fabrication shop is the one addressed in the earlier Maxxim decision, the reasoning and findings in the earlier case are applicable here and I find that the Maxxim facility is subject to MSHA jurisdiction.

b. Citation No. 8289289

On June 19, 2013, Inspector Randal Thornsbery issued Citation No. 8289289 to Maxxim for a violation of section 77.505 of the Secretary’s regulations. The cited standard requires that cables “[s]hall enter metal frames of motors, splice boxes, and electric compartments only through the proper fittings...” 30 C.F.R. § 77.505. The citation alleged that “[p]ower leads of the 480 volt AC Co. No. 2 heater ...are not properly entranced into the metal framing”. Thornsbery determined that an injury was unlikely to occur, that one employee was affected, and that the negligence was moderate. A civil penalty in the amount of \$100.00 has been proposed for this violation.

According to the stipulations of the parties, Maxxim does not dispute the facts of the violation and only disputes the jurisdiction over the facility. The parties agree that the \$100.00 penalty as proposed is appropriate pursuant to the criteria set forth in Section 110(i) of the Act. (Joint Stip. 9,10.) Therefore, I affirm the violation as issued and assess a \$100.00 penalty.

c. Citation No. 8289290

Inspector Thornsbery issued Citation No. 8289290 to Maxxim for an alleged violation of section 77.502 of the Secretary’s regulations. The cited standard requires that electrical equipment “shall be frequently examined, tested and properly maintained by a qualified person...” 30 C.F.R. §77.502. The citation alleged that the Lincoln 600 volt MIG welder was not being maintained because the insulated outer jacket of a positive lead was damaged. Thornsbery determined that an injury was unlikely to occur, that one employee was affected and

that the negligence was moderate. A civil penalty in the amount of \$100.00 has been proposed for this violation.

The mine operator has agreed and stipulated that there is no dispute as to the fact of the violation and that the operator only disputes the jurisdiction over the facility. (Joint Stip. 12.) The parties further agree that the \$100.00 penalty is appropriate under the criteria set forth in Section 110(i) of the Act. (Joint Stip. 13.) Accordingly, I find that the violation occurred as cited, the citation is affirmed and a penalty of \$100.00 is assessed.

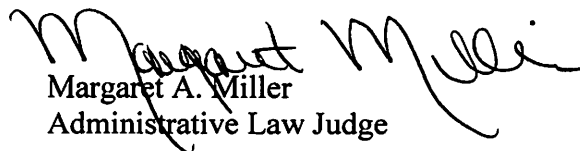
II. PENALTY

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 requires that, “in assessing civil monetary penalties, the Commission [ALJ] shall consider” six statutory penalty criteria which includes the previous history of violations, the size of the operator, the negligence, gravity and good faith abatement.

The history of assessed violations was not addressed in the stipulations but the MSHA website indicates very few violations at this mine. The operator has stipulated that the penalties as proposed will not affect its ability to continue in business. The gravity and negligence of each violation is discussed above and the operator demonstrated good faith in abatement. As noted above, I assess a total penalty of \$200.00.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the penalties listed above for a total penalty of \$200.00. Maxxim Rebuild Company, LLC is hereby **ORDERED** to pay the Secretary of Labor the sum of \$200.00 within 30 days of the date of this decision.


Margaret A. Miller
Administrative Law Judge

Distribution:

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