FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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December 9, 2009

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 2007-844-M A.C. No. 26-01977-123952
v.	:	
ROYAL CEMENT COMPANY, INC., Respondent	:	Royal Cement Company

ORDER GRANTING SECRETARY'S MOTION FOR SUMMARY DECISION

Before: Judge Manning

This case is before me on a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et. seq*. (the "Mine Act"). The case involves one citation alleging a violation of section 47.51 of the Secretary's regulations and a proposed civil penalty of $60.00. 30 C.F.R § 47.51. The case was set for hearing in Las Vegas, Nevada. During a conference call before the hearing, the parties agreed that they do not dispute the essential facts. I suggested that both parties file briefs on the issues, which I would treat as cross-motions for summary decision, in lieu of holding an evidentiary hearing. The parties agreed to this procedure for the resolution of this case and each party filed a brief setting forth its position.

Royal Cement Company operated a quarry and cement plant in Clark County, Nevada. On April 16, 2007, MSHA Inspector Manuel Palma issued Citation No. 7985457 alleging a violation of section 47.51. The citation alleges that the company did not have a current materials safety data sheet for each hazardous chemical used at the site. The inspector determined that an injury or illness was unlikely and that the violation was not significant and substantial. The regulation provides that all mines must have a material safety data sheet available for each hazardous chemical it uses. There is no dispute that material safety data sheets were not present at the site. Royal Cement contends that the facility has been shut down since 2003 and that MSHA did not have jurisdiction to inspect the property.

Royal Cement was started by Aldo R. DiNardo in the late 1980s and the company has operated the facility on an intermittent basis since that time. Royal Cement states that it shut down the quarry in August 2003 and that it never reopened. The Secretary does not dispute this fact. No minerals were extracted from the quarry after that date. The citation was issued at the adjacent cement plant, which had also been shut down. At the time of the inspection, several

people were at the cement plant attempting to repair it. Royal Cement stated that in 2007 and 2008, it did some repair work at the plant "hoping to reopen the mine in the future." (DiNardo letter dated April 14, 2009). The MSHA inspector arrived while this repair work was taking place. DiNardo said "[w]hen it became obvious that reopening the mine was an impossible dream, we ceased all operations." *Id.* The issue in this case is whether the repair work that was being conducted at the plant subjected the facility to Mine Act jurisdiction.

I. SUMMARY OF THE PARTIES' ARGUMENTS

A. Secretary of Labor.

The Secretary states that when Inspector Palma arrived, about 16 employees of Royal Cement were working at the kiln for the cement plant. They had torn out the old concrete and brick and were getting ready to rebrick it. The MSHA-OSHA Interagency Agreement ("Interagency Agreement") provides that MSHA has jurisdiction over "lands, structures, facilities, equipment, and other properties used in, to be used in or resulting from mineral extraction." (Written Arguments of Sec'y at 3). The cement plant is a facility that was "set up to crush, screen, and preheat clinker material to be milled through rod or ball mills in order to grind [the material] into cement powder." *Id.* As a consequence, the plant was subject to MSHA jurisdiction.

B. Royal Cement

Royal Cement does not deny that MSHA has authority to regulate and impose standards on mines and miners. It argues, however, that MSHA does not have this same authority over a mine that was shut down three years before the subject inspection. No minerals were extracted after August 2003. In 2007, Royal Cement began "deferred maintenance repairing machinery in the adjacent cement shop." (Written Arguments of Royal Cement at 1). When the MSHA inspector arrived, he was advised that no mining was taking place. In response, the inspector said "[y]ou are all miners." *Id.* Royal Cement contends that the citations are "unfair and illegal since a mine did not exist." *Id.* In the twelve months that this repair work was going on, the company had no accidents. The citation represents petty harassment. The Interagency Agreement with OSHA does not create a mine or justify MSHA overstepping its mandate. Mining stopped in 2003 and has never resumed. In 2004 another MSHA inspector visited the mine and stated that he was "closing the file." *Id.* at 2. "Absent any substantiation that MSHA is correct in labeling machinery maintenance employees as miners, Respondent requests that all proposed penalties be denied." *Id.* The Secretary failed to establish that "an active mine existed which the Mine Act empowers [her] to regulate." *Id.*

II. ANALYSIS

Section 67 of the Commission's Procedural Rules, 29 C.F.R, § 2700.67(b), 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.

I find that there is no genuine issue as to any material fact. The quarry and plant operated intermittently until August 2003, at which point both were closed. Royal Cement was removed from MSHA's active mine records. Sometime in 2007, Royal Cement began repairing equipment and machinery at the cement plant with the intent of restarting operations. MSHA inspected the plant while these repairs were being made and issued several citations, including the one at issue in this case. Neither the quarry nor the plant ever reopened for production after this inspection. For purposes of this decision, I find that the only work performed at Royal Cement after 2003 was the repairs described above.

Section 3(h)(1) of the Mine Act defines the term "mine." 30 U.S.C. § 892(h)(1). For purposes of this case, a mine is defined as "structures, facilities, equipment, machines, tools, or other property . . . used in, or to be used in, the milling of . . . minerals." *Id.* The Commission as well as courts have held that the term "mine" must be interpreted broadly to effectuate the intent of the Mine Act. *See, e.g. Cyprus Industrial Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1118 (9th Cir. 1981). The Secretary, in interpreting the limits of her jurisdiction under the Mine Act and the Occupational Safety and Health Act ("OSH Act"), promulgated the Interagency Agreement to help remove any confusion as to the respective authority of those agencies. In the Interagency Agreement, the Secretary determined that cement plants are covered by the Mine Act rather than by the OSH Act. In section B(6) of that agreement, the Secretary specifically provided that MSHA has jurisdiction over "alumina and cement plants." 44 Fed. Reg. 22827 (April 17, 1979); http://www.msha.gov/regs/1979mshaoshammu.HTM.

In *Watkins Engineers & Constructors*, the Commission held that cement plants are mines under the Mine Act. 24 FMSHRC 669 (July 2002). The Commission agreed with the Secretary's argument that cement plants are "milling" operations and therefore fall within the Mine Act's definition of a "mine." *Id.* at 676. Specifically, the Commission found the Secretary's interpretation of "milling" to include cement plants to be consistent with "the general usage of the term within the mining industry, . . . the legislative history of the Mine Act, the Secretary's past enforcement, relevant precedent, and the [Interagency] Agreement." *Id.*

It is important to note that the respondent in *Watkins* was a construction contractor that was constructing a new facility at an existing cement plant owned by a different company. Thus, its employees were not "miners" in the everyday meaning of that word, yet their work was subject to the jurisdiction of the Mine Act. The respondent in *Watkins* challenged the authority of the Secretary to include cement plants under the jurisdiction of the Mine Act, but the Commission rejected these arguments. *Id.* 676-677.

Based on the above, I find that work being performed at a cement plant is subject to the jurisdiction of the Mine Act because the definition of the term "mine" includes mineral milling and "mineral milling" has been defined to include cement plants. The next issue is whether the repair work being performed at the Royal Cement plant was covered by the Mine Act given that the plant was not in operation and no extraction was taking place at the adjacent quarry.

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 not only facilities presently being used to mill minerals, but also facilities where mineral milling will be taking place in the future. 30 U.S.C. § 802(h)(1) (emphasis added). This interpretation is bolstered by a court of appeals decision referencing, with general approval, the interpretation of "to be used" to mean "contemplated use." *Lancashire Coal Co. v. Sec'y of Labor*, 968 F. D 388, 390 (3rd Cir. 1992). Another federal court held that activities conducted at a site in preparation for future mining may bring the site within the Mine Act's definition of "mine" for the same reason. *Cyprus Industrial Minerals Co.* at 1117-1118.

I find that the activities taking place at the plant on April 16, 2007, were subject to the jurisdiction of the Mine Act. Although no extraction was taking place at the quarry and cement was not being produced at the plant, Royal Cement employees were making repairs to the kiln at the cement plant. DiNardo stated that these repairs were being made in anticipation of reopening the facility. The repairs were being made to "structures," and "facilities," at the plant using "equipment" and "tools." These facilities had been previously used to make cement and it was Royal Cement's intention to use these facilities for that purpose again. Indeed, the only reason the repairs were being made was to get the plant ready to reopen. One of the principal arguments of Royal Cement is that there can be no jurisdiction if minerals are not being extracted from the ground. The Mine Act and associated case law make clear, however, that a cement plant is a "mine" and actions taken in preparation of opening a mine will bring the site within the jurisdictional reach of the Mine Act. As a consequence, the repair work being performed at the plant brought the site under the MSHA jurisdiction and Inspector Palma had the authority to issue the subject citation to Royal Cement.

III. APPROPRIATE CIVIL PENALTY

Citation No. 7985457 is affirmed. Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. 30 U.S.C. § 110(i). MSHA's online records show that Royal Cement plant had a history of nine citations in the two years prior to April 16, 2007. These same records show that Royal Cement was a small, intermittent operator that employed about 20 people and worked about 10,400 hours in the second quarter of 2007. The violation was abated in good faith. According to MSHA's website, the quarry and cement plant have now been abandoned. The violation was the result of the company's moderate to low negligence and the gravity was very low. Based on the penalty criteria, I find that the Secretary's proposed penalty of $60.00 for the citation is appropriate.

IV. ORDER

The Secretary's motion for summary decision is **GRANTED** and Royal Cement's motion for summary decision is **DENIED**. Citation No. 7985457 is **AFFIRMED** and Royal Cement Company is s **ORDERED TO PAY** the Secretary of Labor the sum of $60.00 within 40 days of the date of this decision.[1]

Richard W. Manning
Administrative Law Judge

Distribution:

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RWM

[1] Payment should be sent to Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.