FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, NW, SUITE 9500
WASHINGTON, DC 20001

July 21, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2009-137-M
Petitioner	:	A.C. No. 02-02683-163944
v.	:	
	:	
EUREKA ROCK, LLC,	:	Mine: Eureka Portable Screening Plant
Respondent	:	

DECISION

Appearances: Jan M. Coplick, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, on behalf of the Petitioner;
Thomas Mattics, President, Eureka Rock, LLC, Ashfork, Arizona, on behalf of the Respondent.

Before: Judge Melick

This case is before me 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 "Act," charging Eureka Rock, LLC, (Eureka) with multiple violations of the standard at 30 C.F.R. § 50.30(a) and proposing civil penalties $448.00 for those violations. The general issue before me is whether Eureka Rock violated the cited standards as charged and, if so, what is the appropriate civil penalty for those violations. Additional specific issues are addressed as noted.

Eureka first argues that the operations and products of its mine do not affect interstate commerce and that therefore its mine is not subject to the Act. Section 4 of the Act provides that "each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act." In *D.A.S. Sand and Gravel Inc. v. Chao.* 386 F.3d 460 (2nd Cir. 2004), the Circuit Court, relying on the language of section 4 of the Act, held that Congress unambiguously expressed its intent to regulate mines to the full extent of its power under the Commerce Clause. The Court of Appeals in that case further noted that the Supreme Court has long held that "the Commerce Clause does not preclude Congress from regulating the activities of an economic actor whose products do not themselves enter interstate commerce, where the activities of such local actors taken together have the potential to affect an interstate market the regulation of which is within Congress' power". 386 F.3d at 463.

It is undisputed that the Eureka mine crushes volcanic rock (although the crusher has been inoperative since 2004) and screens that product for sizing to use in the local region primarily for landscaping and as a base for driveways. Eureka also produces a sand product for use as a bedding material around outside water tanks and gas and sewer lines to protect them from rocks. There is

no evidence that Eureka directly gives or sells any mine product out of the State of Arizona. Within this framework of evidence and consistent with prior decisions, however I find that interstate commerce was nevertheless affected in this case because of the "cumulative effect small scale operators can have on interstate pricing and demand. See *United States v. Lake*, 985 F.2d 265 (6th Cir. 1993); *Tide Creek Rock, Inc.,* 24FMSHRC 201 (February 2002)(ALJ); *Darwin Stratton and Son, Inc.,* 24 FMSHRC 403 (January 2002)(ALJ).

It is further undisputed that in his business, Mr. Mattics, Eureka's president, uses a Verizon cell phone and the U.S. Postal Service and a post office box. He also obtains diesel fuel for his screen and utilizes a Hough front end loader manufactured by International Harvester in his mining activities. It may reasonably be inferred that the diesel fuel was obtained from an out- of- state source and that the manufacturer of his front end loader was located out of state. These factors are indicia of interstate commerce. *U.S. v Dye Construction Co.,* 510 F.2d 17, 83, (10th Cir. 1975)

Eureka next argues that owner/operators, having no employees cannot be a "mine" within the purview of the Act. I find no such exclusion in the mine Act and indeed Federal Courts have agreed. See *Marshall vs. Conway,* 491F. Supp. 1123 (D.C. PA 1980).

The Alleged Violations

Citation number 6416594 alleges a violation of the standard at 30 C.F.R. § 50.30(a) and charges as follows:

> The operator did not report total hours worked on MSHA Form 7000-2 for the second quarter of 2007. The operator acknowledges hours worked during this quarter but refuses to report the hours. Each operator of a mine in which an individual worked during any day of a calendar quarter shall complete an MSHA Form 7000-2 in accordance with the instructions and criteria in Sec. 50.30-1 and submit the original to the MSHA Office of Injury and Employment Information, P.O. Box 25367, Denver Federal Center, Denver, CO 80225, within 15 days after the end of each calendar quarter.

Citations Number 6416595, 6416596 and 6416597 allege the same violation of 30 C.F.R. § 50.30(a) but with respect to the third quarter of 2007, the fourth quarter of 2007 and the first quarter of 2008, respectively.

The cited standard, 30 C.F.R. 50.30(a), requires, in essence, that each operator of a mine in which an individual worked during any day of a calendar quarter shall complete an MSHA form 7000-2 in accordance with instructions and criteria in Section 50.30-1 and submit the original to the MSHA Office of Injury and Employment Information within 15 days after the end of each calendar quarter.

30 C.F.R. § 50.30-1(g)(3) provides, in relevant part, as follows:

Total employee-hours worked during the quarter: show the total hours worked by all employees during the quarter covered.

MSHA form 7000-2 also provides a space for the mine operator to report "total employee hours worked during the quarter". (Exhibit G-1A)

Eureka argues that since Mr. Mattics is the owner of Eureka and has no "employees" it is in full compliance with both the cited standard and the instructions on form 7000-2 in not reporting the number of "employees". It therefore argues that it is not in violation as charged and the citations should be vacated. In reading the language of 30 C.F.R §50.30-1(g)(3) and applying the ordinary definition of the term "employees" Eureka's interpretation is understandable .

The Secretary notes however that the term "employees" is defined in another subsection of the cited standard as including "all classes of employees (supervisory, professional, technical, proprietors, owners, operators, partners, and service personnel) on your payroll full or part time." See 30 C.F.R. § 50.30-1(g)(2). The Secretary argues therefore that under the rules of regulatory construction, that definition applies as well to the term "employees" used in 30 C.F.R §50.30-1(g)(3) The Secretary is clearly correct in this regard. Administrative regulations are generally subject to the same principles of construction as statutes. *Miller v. United States,* 294 U.S. 435, 442 (1935). In analyzing the rules of statutory construction, the Supreme Court of the United States has stated that the established canon of construction is that similar language contained within the same section of a statute must be accorded a consistent meaning". *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.,* 522 U.S. 479, 501 (1998). The Supreme Court has further held that "there is a natural presumption that identical words used in different parts of the same acts are intended to have the same meaning. *Atlantic Cleaners & Dryers, Inc. v United States,* 286 U.S. 427 (1932). Furthermore, in *Morton Int'l Inc.,* 18 FMSHRC 533 (Apr 1996), this Commission held that "regulations should be read as a whole giving comprehensive, harmonious meaning to all provisions". Id at 536.

Therefore, as a matter of law, the definition of the term "employees" found in 30 C.F.R § 50.30- 1(g)(2) is applicable to the term "employees" found in 30C.F.R. § 50.30-1(g)(3) and, accordingly, Mr. Mattics as owner/operator of Eureka is required to report his own hours as an " employee" on MSHA Form 7000-2. His failure to do so constitutes a violation of 30 C.F.R § 50.30 (a) as charged.

Civil Penalties

Under section, 110(i) of the Act, in assessing civil monetary penalties the Commission and its judges must consider the operator's history of previous violations, the appropriateness of a penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of the violation. No evidence of the operator's history of "final" violations was presented at the hearings nor was clear evidence of abatement. It is likely that the violation was not "abated" because Mr. Mattics continued to maintain that he was not an employee. The Secretary has

alleged that the violations were of low gravity and I cannot disagree. Eureka is also a small business and there is no evidence that the proposed penalties would affect its ability to stay in business. The Secretary also alleges that the violations were the result of Eureka's high negligence on the grounds that it is undisputed that Eureka's owner, Mr. Mattics, has previously been cited for the same violations as those at bar and had been repeatedly warned by MSHA officials of the Secretary's alleged interpretation of the cited standard i.e. owners and operators must report themselves as "employees" under the provisions of 30 C.F.R. § 50.30-1(g)(3).

I disagree with the Secretary's position and find that Eureka is chargeable with but little negligence. A lay person, such as Mr. Mattics, cannot, without an authoritative and binding legal opinion, be expected to understand the arcane and sometimes bizarre legal concepts of regulatory construction as applied herein and that the term "employees" as used in 30 C.F.R. § 50.30.-1(g)(3) is the definition that one would not ordinarily find in common usage and in a standard dictionary. The arcane legal definition of the term "employees" found in 30 C.F.R. § 50.30.-1(g)(2) would not, to a layman, appear to be applicable to 30 C.F.R. § 50.30.-1(g)(3). In particular, considering the threats posted on the reverse of MSHA Form 7000-2 that "an individual who knowingly makes a false statement in any report shall, upon conviction, be punished by a fine of not more than $10,000.00 or imprisonment for not more than five years, or both", the failure of Mr. Mattics to have reported himself as an employee is even more understandable.(Exhibit G-1A page 2). I find therefore that Mr. Mattics was complying in good faith with the terms of the cited standard and MSHA form 7000-2. I further find that his persistent non-compliance on the unique facts of this case should not result in a finding of high negligence.. However, if Mr. Mattics does not choose to seek review before this Commission of the instant decision or, upon seeking review, this decision is affirmed by the Commission, Mr. Mattics would be on notice regarding the interpretation to be placed on the cited standard and further non- compliance would likely result in findings of high negligence in the future with commensurate higher levels of civil penalties.

Under all the circumstances, I find that civil penalties of $50.00 each for the citations at bar are appropriate.

ORDER

Citations Number 6416594, 6416595, 6416596, and 6416597 are hereby affirmed with civil penalties of $50.00 each. Eureka Rock, LLC, is hereby directed to pay civil penalties totaling $200.00 with 40 days of the date of this decision.

Gary Melick
Administrative Law Judge
(202) 434-9977

Distribution: (Certified Mail)

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