FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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July 27, 2007

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2006-258-M
Petitioner	:	A.C. No. 14-01651-94799
	:	
v.	:	
	:	Higgins Ranch
HIGGINS RANCH,	:	
Respondent	:	

DECISION GRANTING THE SECRETARY'S MOTION FOR SUMMARY DECISION

Before: Judge Manning

This case is before me upon 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 "Act"). The Secretary filed a motion for summary decision. The case involves two citations issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") under section 104(a) of the Act. Higgins Ranch has agreed to pay the Secretary's proposed $60.00 penalty for Citation No. 6332403.

On June 1, 2006, MSHA Inspector Chrystal Dye issued Citation No. 6332448 to Higgins Ranch alleging a violation of 30 C.F.R. § 56.9300(a), as follows:

> The scales were not provided with railings on either side to prevent vehicles from over traveling. The drop off is approximately 3½ to the ground. There is minimal truck traffic crossing the scales and the clearance is adequate. There are markers at each end of the scale for visual reference. The company had begun the process back in March 2006. The pipes were ordered and cut, however, the project was never finished.

Inspector Dye determined that an injury was unlikely but that any injury could reasonably be expected to be permanently disabling. She determined that the violation was not of a significant and substantial nature but that the negligence was high. The safety standard provides that "[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." On June 26, 2006, Inspector Dye issued a section 104(b) order because Higgins

Ranch had not terminated the citation. The Secretary proposes a penalty of $2,793.00 for this citation.

At the conclusion of discovery, the Secretary filed a motion for summary decision under Commission Procedural Rule 67. (29 C.F.R. § 2700.67). The motion is supported by an affidavit signed by Inspector Dye. Higgins Ranch did not respond to the Secretary's motion even after I granted it an extension of time to respond. In its answer to the Secretary's petition for the assessment of penalty, Higgins Ranch stated that, because the scale is in a separate location from both Higgins Ranch and Higgins Stone Company, it is not a mine. It argues that the scale house is not connected to any other mining site. It states that the Mine Act does not authorize MSHA jurisdiction over "the activities of a truck scale 'appurtenant' only to cattle operations." It further states that the sole purpose of the scale is to weigh trucks and that "neither Higgins Stone nor Higgins Ranch [requires] trucks carrying stone that has been sold by either Higgins Ranch or Higgins Stone to weigh at the scale house." The drivers of these trucks can use other scales if they wish. The land on which the scale is located is owned by Michael W. Higgins and it is connected only to the cattle pens and cattle lots by means of a private gate." The only way to get to the scale from the quarry is on a public road.

The Secretary maintains that there are no issues to be resolved at a hearing and that she is entitled to summary decision as a matter of law. The Commission's Procedural Rules provide that a "motion for summary decision shall be granted only if the entire record, including pleadings, depositions, answers to interrogatories, admissions, and affidavits shows: (1) that there is no genuine issue as to any material facts; and (2) that the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b). The Commission's procedural rule further states that a motion for summary decision must be supported. As stated above, the Secretary's motion is supported by the affidavit of MSHA Inspector Chrystal Dye.

There is no dispute that the conditions described in the citation existed at the time the citation was issued. I find that Higgins Ranch admitted these facts in its response to the Secretary's discovery requests. It denies, however, that MSHA has jurisdiction over the scale and scale house.

Higgins Ranch operates a stone quarry. Higgins Ranch extracts rock at the quarry and sizes some of this rock at a nearby plant, known as Higgins Stone, which is operated under a separate MSHA identification number. (Dye Affidavit). The scale house, which is located about 0.59 of a mile from the Higgins Ranch mine entrance, is used by both Higgins Ranch and Higgins Stone. Inspector Dye stated that when customer trucks leave the Higgins Ranch quarry filled with stone, they often use the scale house to weigh the stone. Customer trucks also use the scale when they transport crushed stone from the Higgins Stone plant. Inspector Dye states that, although she cannot say that every truck that transports stone from Higgins Ranch uses the cited scale, "a majority of customer trucks do get weighed at the scale house." *Id.* She concluded that the scale house is "an essential part of the mining operations at Higgins Ranch. . . ." *Id.*

In its discovery responses, Higgins Ranch agrees that MSHA has jurisdiction over its quarrying operation. It maintains that MSHA does not have jurisdiction over its scale house because it is at a separate location and it does not otherwise qualify as a mine under section 3(h) of the Mine Act. It is accessible from the quarry only by traveling on public roads. No employees of Higgins Ranch work at the scale house. Higgins Ranch does not deny that some customer trucks use the scale after leaving the quarry.

I find that MSHA has jurisdiction to inspect the scale and scale house. The term "coal or other mine" is defined in section 3(h)(1) as:

> (A) an area of land from which minerals are extracted, . . . (B) private ways and roads appurtenant to such area, and (C) lands, excavations, . . . workings, structures, facilities, equipment, machines, tools, or other property . . . on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits . . . or used in, or to be used in, the milling of such minerals . . . .

30 U.S.C. 802(h)(1). The scale house and scale are "structures, facilities, equipment . . . used in . . . the work of extracting . . . minerals from their natural deposits. . . ." The definition of a mine is quite broad and "is more encompassing than the usual meaning attributed to it . . . ." *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589, 591-92 (3d Cir. 1979), *cert. denied*, 444 U.S. 1015 (1980). The scale house and scale are used to weigh trucks that have been filled with stone from the quarry so that Higgins Ranch will know how much stone was purchased. This operation is an integral part of its mining operations. Whether the drivers of these trucks are permitted to use other scales is not determinative. Because the quarry is located in a rural area in Kansas, the scale provided by Higgins Ranch is the scale that is most likely to be used. The land under the scale is owned by Michael W. Higgins, who also owns Higgins Ranch and is an owner of Higgins Stone.

The land used for the scale house need not be contiguous to the quarry. In *Jim Walter Resources, Inc.,* 22 FMSHRC 21 (2000), the mine operator owned and operated a machine shop and a supply shop that were not on the same property as its extraction activities. These machine and supply shops were between 1 and 25 miles from the operator's four mines. The Commission held that these shops were "facilities" and "equipment" used in the company's mining operations. 22 FMSHRC at 25. The Commission rejected the operator's argument that MSHA did not have jurisdiction over the shops because they were not on land from which minerals are extracted. *Id.* In *W.J. Bokus Indus., Inc.*, 16 FMSHRC 704, 708 (April 1994), the Commission held that MSHA properly cited equipment in a storage garage that was shared by a sand and gravel operation and an asphalt plant. The Commission rejected the argument that title to the cited equipment was determinative. Similarly, in *Justis Supply & Machine Shop*, 22 FMSHRC 1292 (Nov. 2000), the Commission held that a dragline that was being assembled in a bermed off area about a mile from extraction activities was subject to MSHA inspection because the dragline was equipment to be used in the extraction of minerals.

The record demonstrates that the scale and scale house are integral parts of the mining operations of Higgins Ranch. The fact that the scale is a self-service facility does not change that fact. Many stone and aggregate operations let truck drivers weigh their own trucks. The scale is present so that customers can weigh their trucks to determine the amount of stone they have purchased from the Higgins Ranch quarry.

As stated above, Higgins Ranch does not dispute the facts set forth in the "condition or practice" section of the citation, as set forth above. As justification for the high negligence determination, Inspector Dye states that Higgins Ranch had started the process of installing posts and rails but had not completed the project. (Dye Affidavit). During a compliance assistance visit January 2006, Inspector Dye issued a CAV notice advising Higgins Ranch that guard rails needed to be installed at the scale. During an inspection on March 8, 2006, she was told that pipes and posts were being cut and that a guard rail would be installed in about a week. *Id.* Guard rails had not been installed by June 1, 2006. Inspector Dye stated that "the operator was aware of and on notice of the need and the requirement to provide rails around the scales, but did not bother to complete the project." As stated above, she issued a section 104(b) order of withdrawal on June 26, 2006, because the guard rails had still not been installed. Higgins Ranch did not offer any evidence to dispute these facts. I hold that the Secretary established that the violation was the result of the operator's high negligence.

The Secretary seeks a civil penalty of $2,793.00. I find that this penalty is not appropriate taking into consideration the penalty criteria set forth in section 110(i) of the Mine Act. Higgins Ranch is a very small operation. It employed about three people and worked about 7,500 hours in 2006. Higgins Stone Company, a related company, employed about 12 people and worked about 23,400 hours in 2006. The violation was neither serious nor significant and substantial. The negligence was high and Higgins Ranch did not abate the violation in good faith. Higgins Ranch was issued six citations prior to June 1, 2006. MSHA assigned a high number of penalty points for the mine's history of previous violations because of the relatively high number of "violations per inspection day." Information at MSHA's website makes clear that MSHA's first inspection at the mine was on October 18, 2005. Four of the previous citations were issued on that day. Consequently, I have reduced the penalty because the "violations per inspection day" was high due to the fact that the mine had only been inspected for a short time. A penalty of $1,800.00 is appropriate.

ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

Citation No.	30 C.F.R. §	Penalty
6332488	56.9300(a)	$1,800.00
6332403	62.130(a)	60.00

Accordingly, the Secretary's motion for summary decision is **GRANTED**, the citations contested in this case are **AFFIRMED**, and Higgins Ranch is **ORDERED TO PAY** the Secretary of Labor the sum of $1,860.00. This penalty shall be paid within 40 days of the date of this decision unless Higgins Ranch makes other payment arrangements with counsel for the Secretary.

Richard W. Manning
Administrative Law Judge

Distribution:

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