FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 20, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 99-272
Petitioner	:	A.C. No. 29-00097-03501 1JW
	:	
v.	:	Navajo Mine
	:	
JUSTIS SUPPLY & MACHINE SHOP,	:	
Respondent	:	

DECISION

Appearances: Ned D. Zamarripa, Conference and Litigation Representative, Mine Safety and Health Administration, Denver, Colorado, for Petitioner;
George R. Carlton, Jr., Esq, Godwin, White and Gruber, Dallas, Texas, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Justis Supply and Machine Shop ("Justis"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). A hearing was held in Albuquerque, New Mexico. The parties presented testimony and documentary evidence and filed post-hearing briefs.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Navajo Mine is a surface coal mine operated by BHP Minerals, Inc. ("BHP") in San Juan County, New Mexico. Draglines are used at the Navajo Mine to remove the overburden above the coal. On January 5, 1999, MSHA Inspector Peter Paul Saint conducted an inspection of the Navajo Mine. As part of the inspection, he inspected the site where a new dragline was being assembled. This site, hereinafter the "dragline site," was about one mile from the area where coal was being excavated. (Tr. 93). An earthen berm surrounded the dragline site and the site could be accessed directly from a road that was open to the public. (Tr. 66-67) Another entrance to the dragline site lead directly to the mine.

The dragline was being assembled by a company referred to by the parties as CDK. Employees of the Navajo Mine were not directly involved in the assembly of the dragline. CDK

contracted with Justis to do some cutting and welding on the dragline at the dragline site. Justis operates its business in Farmington, New Mexico, and its employees drove a welding truck owned by Justis from Farmington to the dragline site when working there. When Justis's employees first drove to the dragline site to start the welding project, they entered the mine gate and met with representatives of the mine operator before traveling down mine roads to the dragline site. After that first trip, however, Justis's employees always entered and exited the dragline site by traveling down roads that were open to the public. Thus, after the first day, Justis's employees did not travel through the Navajo Mine.

When Inspector Saint inspected the dragline site, he traveled on mine roads to get there. He issued three citations under section 104(a) of the Mine Act. Justis contested each citation and also maintains that MSHA did not have jurisdiction over the dragline site.

A. Jurisdiction

1. Arguments of the Parties

The Secretary contends that MSHA had jurisdiction to inspect the dragline site because this site was a mine, as the term "coal or other mine" is defined in section 3(h) of the Mine Act, 30 U.S.C. § 802(h). She argues that those employees who were engaged in the work of cutting and welding the dragline were "miners" as that term is defined in section 3(h). The Secretary maintains that the dragline site was selected by the operator of the Navajo Mine and "sectioned out" with a berm for the purpose of assembling the dragline. (S. Br. 15). Once assembled, the dragline was to be used to remove the overburden at the pit. She contends that the dragline site was on or adjacent to mine property about one mile from the area where coal extraction was taking place. The Secretary characterizes the dragline site as "a dedicated off-site facility of the mine operator where the assembly of the dragline was to be performed." *Id.* As such, she contends that the dragline site was a mine and that Justis was an "operator" performing services at the mine. The services were welding and cutting on the dragline. The Secretary states that these services were essential to the assembly of the dragline and the work "subjected" workers at the site to "hazards associated with this type of project." (*Id.* at 16).

Justis contends that the Secretary failed to show that the dragline site was a mine. The Secretary did not offer any proof that the site was owned or operated by BHP. It states that the only evidence the Secretary offered was Inspector Saint's "subjective belief that the [dragline site] was part of the Navajo Mine." (J. Br. 2). Justis maintains that because the dragline site was over a mile away from the actual mining operations and Justis's employees used public roads to get to and from the site, the site was not a mine. It also points to the fact that only CDK and Justis employees worked at the dragline site and that anyone could have driven into the site without passing through the mine. In addition, when Justis's employees first drove to the dragline site through the Navajo Mine, BHP's representatives told them that the site was exempt from MSHA regulations because it was not part of the mine. The record does not indicate who owned or leased the land at the dragline site.

2. Discussion

For the reasons explained below, I find that MSHA had jurisdiction to inspect the dragline site under the Mine Act. The starting point for an analysis of Mine Act jurisdiction is the definition of the term "coal or other mine," in section 3(h)(1). A coal or other mine is defined, in pertinent part, as "(A) an area of land from which minerals are extracted ..., (B) private ways and roads appurtenant to such area, and (C) lands, ... structures, facilities, equipment, machines, tools, or other property ... on the surface or underground, used in, or to be used in ... the work of extracting minerals from their natural deposits, ... or used in ...the milling of such minerals...." 30 U.S.C. § 802(h)(1). The Senate Committee that drafted this definition stated its intention that "what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and ... that doubts be resolved in favor of inclusion of a facility within the coverage of the Act." S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 602 (1978); *see also Donovan v. Carolina Stalite Co.*, 734 F.2d 1547 (D. C. Cir. 1984).

The record does not disclose who owned or leased the land at the dragline site. Inspector Saint testified that BHP's walkaround representative told him that the site was on BHP's property. I cannot enter a finding based on that evidence because this BHP representative might have been misinformed. I can safely assume, however, that CDK was not a trespasser on the land. CDK was the principal employee at the site and exercised control over the site. Although the site could be accessed by roads that were open to the public, the site was private and it can be assumed that CDK could exclude individuals unknown to it from the area. The only activity at the site was the construction of the dragline. There is no evidence that CDK was performing any other activities at the dragline site or that it was performing services for other customers at the site. More importantly, the record makes clear that employees of Justis were only at the site to do welding and cutting on the dragline. Justis was not providing services for other customers at the dragline site.

Before Justis began work at the dragline site, CDK asked Justis's employees to drive to the mine gate so that BHP's contract security personnel could look over the trucks. These security guards also gave the Justis employees a training handbook. It was at this time that Justis's employees were told that the dragline site was exempt from MSHA regulations.

I find that the dragline site fits within the definition of a "coal or other mine" in section 3(h). The dragline site was dedicated to the construction of a dragline to be used at the Navajo Mine. By necessity, the final assembly of a dragline must occur near a mine because it is such a large piece of equipment. It is not clear who owned the site, but it is clear that the site was under the control of CDK. The bermed-off site existed for the sole purpose of assembling the dragline.

The Commission has stated, "[t]he definition [of 'coal or other mine'] is not limited to an area of land from which minerals are extracted, but also includes facilities, equipment, machines, tools and other property used in the extraction of minerals from their natural deposits ...."

Harless, Inc., 16 FMSHRC 683, 687 (April 1994)(citation omitted). Although the dragline was not used in the extraction of minerals, it was being assembled to be used in the extraction process. Justis's argument that the Secretary failed to show that the dragline was being assembled for use at the Navajo Mine is not well taken. CDK and Justis would not have been assembling and welding the dragline at this site if it was not going to be used at the Navajo Mine. Indeed, Inspector Saint testified that it was being used at the mine at the time of the hearing. (Tr. 19).

Justis was at the dragline site for a limited purpose. It did not have a shop or other facilities at the site or at the mine. It was present at the dragline site to perform cutting and welding on the dragline. The work it was performing was essential to the construction and assembly of the dragline.

If Justis was welding a piece of mining equipment at its shop in Farmington that was to be used at the Navajo Mine, such activities would not be subject to Mine Act jurisdiction. Likewise, I believe that if it operated a commercial welding shop in an area immediately adjacent to the Navajo Mine, it would not be subject to MSHA jurisdiction even if most of its welding work was for the mine. In this case, however, Justis was not operating a welding business at the dragline site. It was performing welding services on a dragline for CDK which, in turn, was assembling the dragline for use at the Navajo Mine. Justis was not open for public business at the dragline site.

Justis relies heavily on the fact that the dragline site was a mile away from the pit where coal extraction was taking place, its employees never entered the Navajo Mine after the first visit, and there was no showing that the dragline site was owned by the mine operator. Although these are factors to be considered, they do not resolve the issue. The Commission's recent decision in *Jim Walter Resources, Inc.*, 22 FMSHRC 21 (January 2000) is instructive. In that case, Jim Walter Resources ("JWR") operated a common supply shop for several of its mines and the shop was not located at any of the mines. The shop was used to warehouse materials and supplies used at its mines and preparation plants. The Commission held that this supply shop was subject to Mine Act jurisdiction "because a 'mine' includes 'facilities' and 'equipment ... used in or to be used in' JWR's mining operations or coal preparation facilities." (*Jim Walter* at 25). In a footnote, the Commission stated:

> This case does not involve, and we therefore do not address, whether an off-site supply warehouse operated by a vendor, mining equipment manufacturer, or distributor would be covered by the Act, or even whether an off-site facility operated by a mining company or subsidiary that is open for "commercial" business would be covered.

Id. fn 7.

The present case is somewhat similar to the *Jim Walter* case except for the fact that it involves an independent contractor. The dragline site was immediately adjacent to the Navajo

Mine. Indeed, anyone exiting the site via the mine road would immediately enter the area of the mine where extraction activities were taking place. In the context of a western open pit coal mine, a mile is a very short distance. The dragline site was a dedicated facility that was used by CDK and Justis solely for the assembly of the dragline. It was not open for any other business.

I find that Justis was an "operator" as defined by section 3(d) of the Mine Act because it was an "independent contractor performing services or construction at [a] mine." The fact that Justis may not have had a written contract with BHP or CDK is not controlling because a common law contractual relationship is not required. *Joy Technologies, Inc. v. Secretary of Labor*, 99 F.3d 991, 995-99 (10th Cir. 1996). In addition, the fact that Justis did not have the authority to control any mining-related operations does not defeat a finding that it was an independent contractor. *Id.* Justis was an operator because it performed services at a mine. *Id.* at 999-1000; *Otis Elevator Co. v. Secretary of Labor*, 921 F.2d 1285, 1290 (D.C. Cir. 1990).

If BHP employees were assembling the dragline at the dragline site, there is no doubt that the site would be deemed a mine and these activities would be subject to MSHA jurisdiction. The fact that these same activities were being performed by independent contractors at the dragline site should not change the result. Accordingly, I find that the dragline site was a mine and the activities occurring at the site and equipment used there were subject to MSHA jurisdiction.

B. Citations

1. Citation No. 7602366

Citation No. 7602366 alleges a violation of 30 C.F.R. § 77.410(a)(1), as follows:

> Mobile equipment was not provided with a back-up alarm with an obstructed rear view that gives an audible alarm when the equipment is put in reverse. The Ford welding truck ... was not provided with a back-up alarm. The foreman stated that this was a new truck and had not had a chance to put the alarm on the truck. This truck is used at the contractor CDK site and person observed working and walking in the area of the truck. This condition would allow the truck to run into or over person working or walking around the truck.

Inspector Saint determined that the violation was of a significant and substantial nature ("S&S") and was the result of Justis's moderate negligence. Section 77.410(a)(1) provides, in part, that "[m]obile equipment such as ... trucks, except pickup trucks with an unobstructed rear view, shall be equipped with a warning device that gives an audible alarm when the equipment is put in reverse." The Secretary proposes a penalty of $66 for this alleged violation.

There is no dispute that the welding truck was not equipped with a back-up alarm. The truck was a Ford 350 with a gas powered welder mounted behind the cab. Oxygen and acetylene

bottles were also mounted on the bed of the truck. Tool boxes were mounted along the sides of the bed. This equipment obstructed the rear view from the cab of the truck. (Tr. 25-27). The tool boxes along the sides of the bed made it difficult to see behind the truck using the side mirrors. *Id.*

The rear of this truck was used as a work bench and was equipped with a vise and rack. The truck was parked head-first about 40 feet from the dragline. CDK and Justis employees work in the area. It is highly likely that someone would back up the truck.

Justis argues that the welding truck is a "service vehicle" as that phrase is used in MSHA's program policy manual ("PPM") and is not required to be equipped with a back-up alarm. The paragraph of the PPM that discusses section 77.410 states as follows:

> The warning device required by this section need not be provided for automobiles, jeeps, pickup trucks, and similar vehicles where the operator's view directly behind the vehicle is not obstructed. Service vehicles making visits to surface mines or surface work areas of underground mines are not required to be equipped with such warning devices.

(Ex. G-6). Justis argues that the welding truck is a service vehicle and that Inspector Saint admitted that fact. (Tr. 57).

The Secretary contends that Justis's welding truck was not a "service vehicle" as that phrase is used in the PPM. She states that the truck was used not only to transport people and supplies to the dragline site, but was "engaged in work activities associated with the assembly of the dragline." (S. Br. 17). The Secretary maintains that the exemption in the PPM applies to vehicles that make deliveries to a mine.

I find that the welding truck was not a "service vehicle making visits to" a surface mine. Although the PPM is not entirely clear, the language indicates that the exemption applies only to vehicles that "visit" a mine. Examples of such visiting vehicles would include Postal Service trucks, UPS trucks, soft drink delivery trucks, and other trucks delivering parts or supplies. Such vehicles are generally not inspected by MSHA when they make deliveries to mines. A truck used at a mine site by an independent contractor is subject to MSHA jurisdiction. In this instance, the welding truck was an integral part of the welding services that Justis provided. The truck was used as a mobile work station at the dragline site. Justis's interpretation of the PPM would exempt a large percentage of trucks used by independent contractors at mines. Inspector Saint did not testify that the welding truck was a service vehicle making visits to the dragline site; he stated that it was a "service" truck because Justis was providing welding services at the dragline site. (Tr. 56, 76-78).

Based on the testimony and exhibits, I find that the Secretary established a violation. I also find that the Secretary established that the violation was S&S. An S&S violation is

described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard." A violation is properly designated S&S "if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming "continued normal mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988).

The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, a measure of danger to safety, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

The Secretary established the violation and that the violation contributed to a discrete safety hazard. Inspector Saint testified that about 20 individuals worked at the dragline site. (Tr. 17). Two Justis employees were working at the site and both employees used the welding truck. The inspector stated that an injury was reasonably likely because people work at the back of the welding truck and there was a pronounced blind spot in that area from the cab of the truck. (Tr. 26, 28-29). The inspector believed that, given the noise and activity in the area, it was reasonably likely that someone would be seriously injured if the truck were to be put in reverse. (Tr. 30). He concluded that if the violative condition were allowed to continue, it would cause an accident of a serious nature. (Tr. 31). I credit Inspector Saint's testimony in this regard.

I find that Justis's negligence was low. It relied in good faith upon information provided by BHP's security guards that it would not be subject to MSHA regulation. Justis did not normally perform work at mines and it did not have an MSHA identification number. It was unfamiliar with MSHA's regulatory program. I enter this finding notwithstanding the fact that Justis was aware that the truck did not have a back-up alarm. A penalty of $50 is appropriate for this violation.

2. <u>Citation No. 7602367</u>

Citation No. 7602367 alleges a violation of 30 C.F.R. § 77.402, as follows:

> Hand-held power tools [were] not being maintained with controls that require constant hand or finger pressure to operate the tool, located at the CDK contractor work site. The Black and Decker 110-volt hand-held grinder was observed with a control that would

> lock the equipment in the on state when in use. This condition would allow a person to be injured if the wheel would jam and break or turn the equipment around.

MSHA determined that the violation was not S&S and was the result of Justis's low negligence. Section 77.402 provides, in part, that "[h]and-held power tools shall be equipped with controls requiring constant hand or finger pressure to operate the tool ...." The Secretary proposes a penalty of $55 for this alleged violation.

The cited grinder was equipped with a trigger lock that allowed the grinder to remain running even when there was no pressure on the trigger. The grinder was inside a locked toolbox on the side of the welding truck. (Tr. 51). The grinder was not tagged-out or otherwise marked to indicate that it should not be used. (Tr. 36). The grinder was the personal property of one of Justis's employees. Inspector Saint testified that, in his experience, as long as equipment is on the property and is available for use, a employee will use it if he needs it whether it is owned by his employer or another individual. (Tr. 36-37). The inspector determined that the condition was not serious because Justis representatives told him that the grinder was more likely to be used at the shop than at the dragline site. I credit the inspector's testimony.

I find that the Secretary established a violation. The fact that the grinder was owned by an employee rather than Justis is not a defense to the violation because the grinder was available for use at the dragline site. Although the grinder was in one of the locked tool boxes on the welding truck, the key to the tool box was in the cab of the truck. (Tr. 73). Thus, it was available for use by the two Justis employees.

The violation was not serious. Justis was not negligent with respect to this violation. There is no showing that Justis was aware that the grinder was on the truck or, if it was aware, that it was equipped with a trigger lock. A penalty of $10 is appropriate for this violation.

3. <u>Citation No. 7602368</u>

Citation No. 7602368 alleges a violation of 30 C.F.R. § 77.404(a), as follows:

> Mobile and stationary equipment was not being maintained in safe operating condition. Located on the Ford truck ... at the CDK contractor site. A 3-ton chain hoist was observed without the safety latches on the hook to prevent cable from coming off the hooks.

MSHA determined that the violation was not S&S and was the result of Justis's moderate negligence. Section 77.404(a) provides, in part, that "[m]obile and stationary machinery and equipment shall be maintained in safe operating condition ...." The Secretary proposes a penalty of $55 for this alleged violation.

Inspector Saint testified that the hook at the end of the chain for the hoist was not equipped with a safety latch. (Tr. 40). Such a latch is designed to prevent anything that is being hoisted from sliding out or slipping off the hook. He stated that hoists of this type are used to lift motors or pieces of metal. The inspector referred to the hoist as a "three ton hoist" and it was on the back of the welding truck. (Tr. 41-42, 53). Inspector Saint determined that the condition was not serious because Justis was not using the hoist at the time of his inspection.

There is no dispute that the hook was not equipped with a safety latch. Based on the testimony of Inspector Saint, I find that this condition violated the safety standard. The hoist was not maintained in safe operating condition. I agree that the violation was not serious because there was no showing that it would be used at the dragline site. I also find that Justis's negligence was quite low. The hoist was laying on the bed of the truck, but there was no indication that it was going to be used. The cutting and welding described by the parties did not include any hoisting activities. A penalty of $10 is appropriate for this violation.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. I find that Justis was not issued any citations during the two years prior to this inspection. Justis was a small operator that worked less that 10,000 man-hours annually and employed two people at the dragline site. The violations were rapidly abated in good faith. The penalties assessed in this decision will not have an adverse effect on Justis's ability to continue in business. My findings with regard to gravity and negligence are set forth above. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

III. 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
7602366	77.410(a)(1)	$50.00
7602367	77.402	10.00
7602368	77.404(a)	10.00

Accordingly, the citations contested in this proceeding are **AFFIRMED** as set forth above, and Justis Supply and Machine Shop is **ORDERED TO PAY** the Secretary of Labor the sum of $70.00 within 40 days of the date of this decision. Upon payment of the penalty, this proceeding is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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