FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

April 16, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2000-201-M
Petitioner	:	A.C. No. 35-03489-05501
	:	
v.	:	Docket No. WEST 2000-202-M
	:	A.C. No. 35-03489-05502
RICHARD E. SEIFFERT RESOURCES,	:	
Respondent	:	Bailey Quarry

DECISION

Appearances: Paul A. Belanger, Conference and Litigation Representative, Mine Safety and Health Administration, Vacaville, California for Petitioner; Marcel Roy Bendshadler, Portland, Oregon, for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Richard E. Seiffert Resources ("Seiffert Resources"), 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 Portland, Oregon.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Preliminary Issues

Seiffert Resources operates the Bailey Quarry in Washington County, Oregon. On November 9-10, 1999, MSHA Inspector David Brown inspected the Bailey Quarry. MSHA was not aware of the quarry until it received a hazard complaint from an employee at the quarry. Inspector Brown was sent to the quarry to investigate the complaint. Inspector Brown determined that the quarry was subject to MSHA jurisdiction and he conducted an investigation. He also inspected the quarry for violations of the Secretary's safety standards.

These cases involve 22 citations issued under section 104(a) of the Mine Act. Two of the citations allege that Seiffert Resources failed to notify MSHA that it had opened the quarry. These citations allege violations of 30 C.F.R. § 41.11 and §56.1000. Inspector Brown determined that the quarry had been in operation for about three months. (Tr. 38). Seiffert Resources contested one of these citations in WEST 2000-165-RM.

From the outset of these proceedings, Seiffert Resources took the position that MSHA does not have jurisdiction to inspect the quarry. In the related contest proceeding, the parties briefed the jurisdiction issue. The parties agreed that the fundamental facts surrounding the jurisdiction issue are not in dispute and that this issue was amenable to written presentations. In a decision issued on October 26, 2000, I held that the Secretary has jurisdiction under the Mine Act to conduct warrantless inspections of the Bailey Quarry. Seiffert Resources did not appeal that decision. My decision in WEST 2000-165-RM is binding in this case.[1]

Seiffert Resources was represented by Marcel Roy Bendshadler at the hearing. He is not an attorney, but he calls himself a "Constitutional Counselor." I permitted Mr. Bendshadler to represent Seiffert Resources under 29 C.F.R. § 2700.3(b)(4). Seiffert Resources raised a number of jurisdictional issues at the hearing in these cases. Most of these arguments were previously raised and are rejected for the reasons set forth in my previous decision. It argues, for example, that the quarry is located in the "Republic of Oregon" and that the United States government does not have jurisdiction over private property within Oregon. This argument and others like it are rejected.

Seiffert Resources also raises a number of other issues. It argues that the material that it digs from the earth is not a mineral because it has no intrinsic value. It maintains that it digs up worthless rock and crushes it for use by customers. It argues that ordinary rock is not a mineral, as that term is used in section 3(h)(1) of the Mine Act.

For purposes of the Mine Act, the term "mineral" is very broadly defined. The term "mineral" is defined as "any of various naturally occurring homogeneous or apparently homogeneous ... solid substances (as ore ... sand, gravel ...) obtained for man's use usually from the ground." *Webster's Third New International Dictionary* 1437 (1993). The term may have many meanings depending on the context, and generally includes anything dug out of a mine or quarry, such as stone. Indeed, the term "rock" is defined as "an aggregate of one or more minerals" and the term "stone" is defined as "a mineral or group of consolidated minerals either in mass or in a fragment of pebble or larger size." *Dictionary of Mining, Mineral, and Related Terms* 464, 540 (American Geological Institute, 2d ed. 1997). I find that stone, rock, gravel, and sand are minerals as that term is used in the Mine Act.

Seiffert Resources suggested that all of the citations should be vacated because no employees were injured as a result of any of the cited conditions. It argues that because no employee had been injured, Inspector Brown should have honored the posted "No Trespassing" signs. The Secretary's jurisdiction to conduct warrantless inspections of quarries is not dependent on the presence of an injury. In addition, the Commission and the courts have uniformly held that mine operators are strictly liable for violations of safety and health standards. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989). "[W]hen a violation of a mandatory safety standard

[1] The Commission did not publish my decision in WEST 2000-165-RM. Consequently, that decision is attached as an appendix to this decision for publication.

occurs in a mine, the operator is automatically assessed a civil penalty." *Id.* at 1197. The Secretary is not required to prove that a violation creates a safety hazard, unless the safety standard so provides.

> The [Mine Act] imposes no general requirement that a violation of MSHA regulations be found to create a safety hazard in order for a valid citation to issue. If conditions existed which violated the regulations, citations [are] proper.

Allied Products, Inc., 666 F.2d 890, 892-93 (5th Cir. 1982)(footnote omitted). The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in determining the amount of the penalty. Thus, if a safety standard is violated, a penalty is assessed even if there was no injury and the chance of an injury was not very great.

Seiffert Resources also argues that Title 30 of the United States Code does not have the force of positive law. (Tr. 166). It contends that since Title 30 is not positive law, it only applies within the United States and it was not established that the quarry is "within the United States." (Tr. 57). As stated above, Seiffert Resources' arguments concerning the jurisdiction of the United States government are rejected. Although Title 30 is not positive law, it is "prima facie evidence of the laws" contained within it. (Preface to the United States Code, 1994 Edition). The Mine Act itself is positive law and I have relied upon the Mine Act not Title 30 in rendering my decision in these cases. Any references to Title 30 in this decision are merely for the convenience of the reader.

Seiffert Resources also argues that the law of contracts, the Uniform Commercial Code, and the law of secured transactions applies in these cases. At the hearing, Seiffert Resources repeatedly asked me whether it is being "addressed" as a creditor or a debtor in these cases. (Tr. 5-20, 160). It also maintains that the concept of procuration applies. (Tr. 16-17). The term "procuration" simply refers to the act of appointing another as one's attorney-in-fact or agent. Seiffert Resources seems to believe that it has been appointed as an agent of MSHA and the Commission. It states that it has "put forth paperwork [to] tell the people responding that we [Seiffert Resources] are going to do the work for you [the judge] since you seem not to be able to do your job on your own...." (Tr. 17; Ex. R-1). This argument is without merit. As I stated at the hearing, this proceeding has nothing to do with the law of contracts or the creditor-debtor relationship. It is a regulatory proceeding under the Mine Act which grants MSHA jurisdiction under Article I, Section 8, Clause 3 of the United States Constitution.

Seiffert Resources offered no testimony concerning the individual citations at the hearing. Mr. Richard E. Seiffert testified that he is the operator of the Bailey Quarry, that MSHA does not have jurisdiction over his quarry, and that he is declaring "diplomatic immunity." (Tr. 163-64). When asked for the basis of his declaration of diplomatic immunity he simply stated "that's for a matter that's going to continue later." *Id.* This argument is without merit. The "Republic of

Oregon" does not exist; Oregon is one of the several states over which MSHA has jurisdiction under the Mine Act.

In its opening statement, Seiffert Resources stated that Mr. Seiffert "would simply like to continue peacefully going about his existence, harming no other, as he expects others not to harm him." (Tr. 23). The purpose of the MSHA inspection was to help Mr. Seiffert prevent accidents. One of his employees believed that Mr. Seiffert was not doing enough to provide a safe working environment so he called MSHA for help. Numerous fatal and serious accidents have occurred at small quarries like Mr. Seiffert's. Thus, MSHA inspected the quarry to help Mr. Seiffert make sure that he, in fact, does not harm others.

B. Discussion of the Citations

At the outset of the inspection, Mr. Seiffert told Inspector Brown that he thought he had obtained all of the permits necessary to open the quarry. (Tr. 36). Mr. Seiffert was unaware of MSHA's existence or the requirements contained in the Secretary's safety standards. He was very cooperative during the inspection. (Tr. 50). At the hearing, the Secretary presented testimony with respect to each citation at issue in these cases. Seiffert Resources cross-examined the MSHA inspector but did not present any evidence as to the merits of the citations.

I affirmed Citation No. 7973945 in my decision in WEST 2000-165-RM.[2] I affirm Inspector Brown's determination that the violation was not serious, was not of a significant and substantial nature ("S&S"), and that the negligence of Seiffert Resources was low. (Tr. 41). I assess a penalty of $20. Citation No. 7973947 alleges that Seiffert Resources violated 30 C.F.R. § 56.1000 by failing to notify MSHA's Metal/Nonmetal District Office that he was commencing operations. The Secretary established a violation of this standard. (Tr. 52-55). I affirm the inspector's determination that the violation was not serious, not S&S, and that the negligence was low. I assess a penalty of $20.

Inspector Brown issued Citation No. 7973946 in response to the hazard complaint. This citation alleges that there was a section of loose material that was about 15 feet high, 8 feet wide, and 4 feet thick in a high wall at the quarry. It states that one of the fractures in the rock was about eight inches wide. The citation further states that the fractured section was directly above the loading area in a narrow slot that was about 25 feet wide and several hundred feet long. The citation alleges a violation of section 56.3200, which requires that ground conditions that create a hazard to persons be taken down or supported.

Inspector Brown testified that if this condition were not corrected the loose material could have fallen in an area where people are required to work. (Tr. 43). He reached this conclusion because the area was cracked on both sides. The vibration of the equipment working in the area

[2] As a result of a typographical error, that decision refers to an incorrect citation number for this citation. The correct citation alleging a violation of section 41.11 is No. 7973945.

could have brought the material down. *Id.* He also testified that rain would tend to wash out the fine material making the high wall more likely to fall. (Tr. 44). The inspector stated that the narrow work area increased the hazard.

No equipment or employees were working in the area at the time he issued his citation. He observed fresh tracks in the slot between the two high walls that appeared to be from a track hoe and a haul truck. (Tr. 47-48). He was also told by Mr. Seiffert that they excavated material from within this slot. (Tr. 48). There were no barricades preventing anyone from entering the area. The inspector did not know when the cracks in the high wall developed. (Tr. 66). Inspector Brown determined that the violation was serious and S&S, and that the operator's negligence was moderate. The inspector testified that Mr. Seiffert immediately abated the condition.

Seiffert Resources believes that this citation should be vacated because the inspector did not know how long the cracks had been present nor did he have sufficient expertise to determine whether the high wall presented a hazard to employees. (Tr. 166). I find that the Secretary established a violation. As a result of his MSHA training and his prior experience working in quarries, Inspector Brown had sufficient expertise to determine that the high wall presented a hazard. In addition, Seiffert Resources did not offer any evidence to the contrary. I credit the inspector's testimony with respect to this citation.

I also find 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 (Jan. 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 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 fact that employees worked in a narrow 25-foot wide area between two high walls increased the chance that someone could be injured. The vibrations from the machinery and the rainy weather also increased the likelihood of an accident in which an employee could be seriously

injured. I find that the violation was serious and that the operator's negligence was moderate. I assess a civil penalty of $113.

Citation No.7973948 alleges that the electrical trailer contained several electrical control boxes that were open in the back, in violation of section 56.12032. Inspector Brown testified that 480-volt conductors entered these control boxes through these open backs. He determined that the violation was not S&S because the trailer was dry and well kept. He believed that an injury was unlikely. (Tr. 74, 76). He determined that the operator's negligence was moderate.

I find that the Secretary established a violation. The openings in the backs of the starter boxes created a hazard that moisture, dirt, or other foreign objects could create a short circuit. The inspector agreed that the risk was not high. I find that the violation was not serious and that the negligence of Seiffert Resources was moderate. The $55 penalty proposed by the Secretary is appropriate.

Citation No. 7973949 alleges that the V-belt drives on the generator were not guarded, in violation of section 56.14107(a). Employees could become entangled in the pinch points. The citation states that the drives are adjacent to the start-up area for the generator. Seiffert Resources does not dispute that the pinch points were not guarded. (Tr. 80). The inspector determined that the violation was not S&S and that the negligence was moderate.

Seiffert Resources maintains that, because the manufacturer of the generator did not provide guards for the V-belt drives, Seiffert Resources should not be charged with a violation. It believes if anyone is charged with a violation of this standard it should be the manufacturer of the equipment. (Tr. 82-84). I find that the Secretary established this violation. Manufacturers often do not provide all the guards that are required by MSHA. It is the responsibility of the quarry operator to make sure that all pinch points are guarded. I affirm this citation in all respects and I assess a penalty of $55.

Citation No. 7973950 alleges that the 110-volt wiring between two fluorescent light fixtures in the generator trailer contained a splice that was not insulated to a degree at least equal to the original and sealed to exclude moisture. (Tr. 85). The wires were attached using a twist on cap without any additional protection. The citation alleges a violation of section 56.12013(b). The inspector determined that the violation was not S&S and that the negligence was moderate.

Seiffert Resources stated that the wiring was in the cited condition when the generator trailer was purchased. It argues that the safety standard is too vague to be enforceable. I find that the Secretary established a violation. The splice must be insulated to the same degree as the original wiring or a junction box must be installed. (Tr. 87). The fact that Seiffert Resources purchased the trailer in this condition does not negate the violation. I affirm this citation in all respects and I assess a penalty of $55.

Citation No. 7973951 alleges that the 480-volt power cord for a conveyor had pulled away from the fitting on the control box. It states that inner conductors in the power cord were exposed. (Tr. 9192). The citation alleges a violation of section 56.12008. The inspector determined that the violation was not S&S and that the negligence was moderate.

Seiffert Resources questions whether the conveyor was in operation at the time of the inspection. Through its cross-examination, it infers that the conveyor may have been under construction at the time of the inspection. (Tr. 94). Inspector Brown credibly testified that the conditions he observed showed that the conveyor was in an operable condition. *Id*. He testified that the conveyor was part of the crushing circuit that had been operating, at least for testing purposes. (Tr. 99). Although the crusher may not have been in production, the inspector believed that it had been run. (Tr. 101) The electrical circuit for the conveyor was not energized at the time of the inspection (Tr. 102). The citation states that the "conveyor was not in operation due to repairs to that portion of the plant and power at the main switch was in the 'off' position." Seiffert Resources did not offer any evidence to contradict Inspector Brown's testimony that the conveyor had been used. There was no testimony that Seiffert Resources was in the process of correcting the cited condition. I find that the Secretary established a violation because the power cord was not properly seated in the fitting. I affirm this citation in all respects and I assess a penalty of $55.

Citation No. 7973952 alleges that the self-cleaning tail pulley for the rear conveyor was not provided with guards to protect employees from contacting the rotating tail fins. It states that the pulley was about 60 inches above the ground. There was spillage around the tail pulley. (Tr. 104). The citation alleges a violation of section 56.14107(a). The inspector determined that the violation was not S&S and that the negligence was moderate.

Seiffert Resources indicated that guards were not provided by the manufacturer. As stated above, it is the mine operator that bears the ultimate responsibility. I affirm this citation in all respects and I assess a penalty of $55.

Citation No. 7973953 alleges that the power cord supplying power for the motor on the horizontal impact crusher was not securely fastened to the fitting. Electrical tape was used to secure the cord where it entered the junction box. (Tr. 108). The citation alleges a violation of section 56.12008. The inspector determined that the violation was not S&S and that the negligence was moderate. The Secretary did not propose a penalty for this citation. The citation is not included in "Exhibit A" attached to the Secretary's Petition for Assessment of Civil Penalty. Under section 105(a) of the Mine Act, the Secretary is required to "notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation cited...." Because a penalty was not proposed by the Secretary, I do not have authority to assess a penalty for this citation.

Citation No. 79783954 alleges that the junction box on the end of the feed motor had a hole in the side of the box that would allow moisture and dust to enter the junction box. The

junction box was missing one of the knockouts. (Tr. 110). The citation alleges a violation of section 56.12032. The inspector determined that the violation was not S&S and that the negligence was moderate. I affirm this citation in all respects and I assess a penalty of $55. Although the likelihood of an injury was low, the condition violated the safety standard.

Citation No. 7973955 alleges that a small quantity of flammable liquid was kept in a container that was not a safety can, in violation of section 56.4402. A safety can is defined at 56.2 as "an approved container ... having a spring-closing lid and spout cover." There is no dispute that the cited plastic container was not an approved safety can. The inspector determined that the violation was not S&S and that the negligence was low. The plastic container contained gasoline and was properly labeled. (Tr. 113, 115). Seiffert Resources suggests that the word "shall" in the safety standard means "maybe," citing Black's Law Dictionary. (Tr. 114). Its argument is rejected. The word "shall" means "has a duty to" or "is required to." *Black's Law Dictionary* 1379 (7th ed. 1999). I affirm this citation in all respects and I assess a penalty of $20.

Citation No. 7973956 alleges that several fire extinguishers at the site had not been inspected on an annual basis in violation of section 56.4201(a)(2). Inspector Brown testified that the violation was not S&S and the operator's negligence was low. (Tr. 116-17). Seiffert Resources may have had other fire extinguishers that complied with the standard and other firefighting equipment may have been present. I affirm this citation in all respects and I assess a penalty of $20.

Citation No. 7973957 alleges that none of the employees at the quarry had been given first-aid training as required by section 56.18010. Inspector Brown testified that the violation was not S&S and the operator's negligence was low. (Tr. 121-22). As with Citation No. 7973953, a penalty for this citation was not proposed by the Secretary. Consequently, this citation cannot be included within this decision.

Citation No. 7973958 alleges that toilet facilities were not provided that were readily accessible to employees, in violation of section 56.20008(a). The inspector testified that the violation was not S&S and that the operator's negligence was low. (Tr. 123). The inspector further testified that Mr. Seiffert advised him that there was a trailer at the site that he was going to equip with a toilet. (Tr. 124). I affirm this citation in all respects and I assess a penalty of $20.

Citation No. 7973959 alleges that there were no documents at the quarry to show that work place examinations were being made, in violation of section 56.18002(b). Inspector Brown testified that the violation was not S&S and the operator's negligence was low. (Tr. 125-26). He stated that Mr. Seiffert was not aware of this record keeping requirement. I affirm this citation in all respects and I assess a penalty of $20.

Citation No. 7973960 alleges that the brake lights on a GMC dump truck were not in working order, in violation of section 56.14100(b). Inspector Brown determined that malfunctioning brake lights were a defect that affect safety because other vehicles in the quarry

would not know when the truck was slowing down or coming to a stop. (Tr. 127). The inspector determined that the violation was not S&S and that the negligence was moderate. I affirm this citation in all respects and I assess a penalty of $55.

Citation No. 7973961 alleges that the windshield wiper on the driver's side of this same dump truck was not functioning. The citation also charges a violation of section 56.14100(b). Inspector Brown determined that the malfunctioning wiper was a defect that affects safety. He also determined that the violation was not S&S and that the negligence was moderate. Inspector Brown was not sure if the wiper was vacuum operated or electrically operated. (Tr. 130-31). In order to test a wiper that is operated by vacuum, one must start the engine to build up air pressure. (Tr. 131). The mine operator advised Inspector Brown that the wiper had been working. (Tr. 132-33). The inspector testified that the passenger side wiper must have been working because he did not include that wiper in the citation. In addition, the truck was started during this inspection as evidenced by Citation No. 7973962. I find that the Secretary established that the cited wiper was not functioning. I affirm this citation in all respects and I assess a penalty of $55.

Citation No. 7973962 alleges that the low air warning device on this same dump truck was not maintained in a functioning condition. The citation alleges a violation of section 56.14100(b). The low air warning device did not alert the inspector to low air pressure as the pressure was dropped to 0 psi. (Tr. 137). The inspector determined that the violation was not S&S and that the negligence was moderate. I find that the Secretary established that the malfunctioning warning device was a device that affects safety. The operator of the vehicle would not be aware if the air pressure became too low to operate the brakes. I affirm this citation in all respects and I assess a penalty of $55.

Citation No. 7973963 alleges that the seatbelt installed on the 35 ton Mack haul truck did not meet the requirements of section 56.14130(h). The seat belt was an ordinary seat belt installed on trucks for use on public highways and it was in good condition. (Tr. 139-40). Mr. Seiffert was unaware that the existing seatbelt was not adequate. Inspector Brown testified that the violation was not S&S and the operator's negligence was low. I affirm this citation in all respects and I assess a penalty of $20.

Citation No. 7973964 alleges that the air activated windshield wiper on this same haul truck was not functioning, in violation of section 56.14100(b). The operator of the vehicle could operate the wiper by hand. (Tr. 142). Inspector Brown testified that the violation was not S&S and the operator's negligence was low. I affirm this citation in all respects and I assess a penalty of $20.

Citation No. 7973965 alleges that guards were not provided for the fan and V-belt drives in the engine compartment of this same haul truck. The citation alleges a violation of section 56.14107(a). Inspector Brown testified that it appeared that the truck had once been provided with the required guards. (Tr. 143). Inspector Brown testified that the violation was not S&S

and the operator's negligence was moderate. He stated that the areas that required guarding were within reach of a person checking the oil. (Tr. 144). I find that the Secretary established a violation. I affirm this citation in all respects and I assess a penalty of $55.

Citation No. 7973968 alleges that the seats belts were not provided in the Caterpillar front-end loader. The citation states that the front-end loader was not in operation at the time of the inspection, but it had been used the day before. He obtained this information from mine personnel. (Tr. 151-52). The citation alleges a violation of section 56.14130(a)(3). Inspector Brown testified that the loader was built after 1969. (Tr. 147-48). He further stated that the quarry was fairly level. He also stated that because the suspension on this type of loader is rigid, the ride is not smooth. (Tr. 149). He determined that the violation was S&S because it was reasonably likely that the cited condition would contribute to an injury of a reasonably serious nature. *Id.* The inspector testified that the operator of the loader would be bounced around quite a bit and that, if the operator had to make a sudden stop, he could be injured. Inspector Brown determined that Seiffert Resources' negligence was moderate.

I find that the Secretary established a violation. I credit Inspector Brown's testimony. I affirm this citation in all respects and I assess a penalty of $113.

Citation No. 7973969 alleges that guards were not present on the sides of the engine compartment on this same loader to protect employees from contacting moving machine parts. The citation alleges a violation of section 56.14107(a). This citation is similar to Citation No. 7973965. He did not consider the violation to be S&S. He determined that the operator's negligence was moderate. He testified that the likelihood of an injury was not great because of the exposure and location. (Tr. 153). He believes that normal maintenance is performed with the engine off. I find that the Secretary established a violation. I affirm this citation in all respects and I assess a penalty of $55.

Citation No. 7973970 alleges that employees of Seiffert Resources had not been reporting and recording safety defects on mobile equipment. Section 56.14100(d) requires that safety problems on self-propelled equipment be corrected immediately or reported to and recorded by the mine operator. Inspector Brown testified that there were no records for any of the safety defects he found during his inspection. (Tr. 155). When he asked Mr. Seiffert for such records, he was advised that such records did not exist. *Id.* Inspector Brown testified that the violation was not S&S and the operator's negligence was moderate. I find that the Secretary established a violation. I affirm this citation in all respects and I assess a penalty of $55.

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 no citations were issued at the quarry during the two years preceding the inspection. Seiffert Resources is a small operator. All of the citations were abated

in good faith. The penalties assessed in this decision will not have an adverse effect on Seiffert Resources's ability to continue in business. The gravity of the two S&S violations is moderate, but the gravity for the other violations is low. My findings with regard to negligence is set forth above. I reduced the penalties for citations alleging low negligence. 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
WEST 2000-201-M		
7973945	41.11	$20.00
7973946	56.3200	$113.00
7973947	56.1000	20.00
7973948	56.12032	55.00
7973949	56.14107(a)	55.00
7973950	56.12013(b)	55.00
7973951	56.12008	55.00
7973952	56.14107(a)	55.00
7973954	56.12032	55.00
7973955	56.4402	20.00
7973956	56.4201(a)(2)	20.00
7973958	56.20008(a)	20.00
7973959	56.18002(b)	20.00
7973960	56.14100(b)	55.00
7973961	56.14100(b)	55.00
7973962	56.14100(b)	55.00
7973963	56.14130(h)	20.00
7973964	56.14100(b)	20.00
7973965	56.14107(a)	55.00
WEST 2000-202-M		
7973968	56.14130(a)(3)	113.00
7973969	56.14107(a)	55.00
7973970	56.14100(d)	55.00
	Total Penalty	$1,046.00

Accordingly, the citations contested in these cases are **AFFIRMED** as set forth above and Richard Seiffert Resources is **ORDERED TO PAY** the Secretary of Labor the sum of $1,046.00 within 40 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

Distribution:

Paul A. Belanger, Conference & Litigation Representative, Mine Safety & Health Administration, 2060 Peabody Road, Suite 610, Vacaville, CA 95687 (Certified Mail)

Mr. Marcel Roy Bendshadler, P.O. Box 11561, Portland, OR 97211 (Certified Mail)

Mr. Richard E. Seiffert, Richard Seiffert Resources, P.O. Box 388, Banks, OR 97106 (Certified Mail)

RWM

ATTACHMENT

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

October 26, 2000

RICHARD E. SEIFFERT RESOURCES,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEST 2000-165-RM
	:	Citation No. 7973945; 11/09/99
v.	:	
	:	
SECRETARY OF LABOR,	:	Bailey Quarry
MINE SAFETY AND HEALTH	:	Id. No. 35-03489
ADMINISTRATION (MSHA),	:	
Respondent	:	

DECISION

Before: Judge Manning

This case is before me on a notice of contest filed by Richard E. Seiffert Resources ("Seiffert") against the Secretary of Labor and the Mine Safety and Health Administration ("MSHA"), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et. seq.* (the "Mine Act"). Seiffert brought this case to contest the jurisdiction of the Secretary, MSHA, and this Commission over its operations at the Bailey Quarry. The citation at issue in this proceeding alleges a violation of 30 C.F.R. § 41.11 because Seiffert failed to notify MSHA when it opened the Bailey Quarry.

This case was initially set for hearing. Because there are no factual disputes and the jurisdictional issues are more amenable to a written presentation, I canceled the hearing at the request of the parties and required them to brief the issues. For the reasons set forth below, I find that MSHA has jurisdiction to inspect the Bailey Quarry and to issue citations for violations of its safety standards and regulations. I also affirm Citation No. 7973945.

I. BACKGROUND

Seiffert operates the Bailey Quarry in Washington County, Oregon. On November 9, 1999, MSHA Inspector David Brown inspected the Bailey Quarry. At the time of his inspection, the crushing plant was in operation, a haul truck was transporting material from the lower pit area to the crushing plant, and this material was being dumped in an area adjacent to the feeder for the crushing plant. A track hoe was picking up and placing this raw material into the crushing plant for processing and a dump truck was transporting the finished product to the stock pile area, which contained inventories of crushed and sized rock products.

The Bailey Quarry consists of three areas. The upper level contains crushing, screening, and processing equipment. The crushing equipment includes a feeder, screening devices, crushing devices, and connecting conveyors. The middle level contains stockpiles of finished crushed product. The lower level is the pit area where the raw material is excavated with a track hoe. Inspector Brown observed a number of pieces of equipment being used at the quarry that were not manufactured in the State of Oregon, including a GMC haul truck, a Mack haul truck, a Komatsu dozer, and various pieces of Caterpillar equipment.

II. SUMMARY OF THE PARTIES' ARGUMENTS

C. Secretary of Labor

The Secretary contends that the Bailey Quarry is a mine subject to the jurisdiction of the Mine Act. She argues that the quarry is a "coal or other mine," as that term is defined in section 3(h)(1) of the Mine Act. Minerals are extracted from the earth and then crushed and screened at the quarry site in preparation for sale. The Secretary maintains that these operations clearly fit within the cited definition. She points to the fact that this definition includes the milling of minerals. According to the Secretary, the crushing and screening operations at the quarry qualify as mineral milling under this definition. Thus, she contends that the extraction and milling operations at the quarry are included within the definition of "coal or other mine."

The Secretary next argues that the Bailey Quarry meets the requirements of section 4 of the Mine Act because the products produced at the quarry enter or affect commerce. The Secretary emphasizes that the language of the Mine Act and the Mine Act's legislative history demonstrates that Congress intended to exercise its full power under the commerce clause of the U.S. Constitution when it enacted the Mine Act. The Secretary also maintains that the Bailey Quarry affects interstate commerce because it uses equipment manufactured outside the State of Oregon. Finally, she contends that the quarry affects interstate commerce because the Mine Act was passed to reduce the number of mining accidents and mining-related diseases in the nation's mines. She argues that disruption of a mine's production because of accidents and mining-related diseases affects interstate commerce.

D. Richard E. Seiffert Resources

Seiffert argues that the federal government does not have jurisdiction to regulate operations at the Bailey Quarry because the quarry is located on private property. Because Seiffert's argument in this case is about 145 pages in length, I can only briefly summarize its major points. Seiffert contends that MSHA has "jurisdictional authority within the District of Columbia and federal territories only with regard to activities that occur specifically 'within' federal possessions located inside the territorial boundaries of Oregon state." (Motion to Dismiss at 4). It further contends that, because the quarry is not located on federal property, MSHA does not have territorial jurisdiction to inspect it. In support of this position, Seiffert cites a number of authorities including the U.S. Constitution, the *Federalist Papers*, court cases from the 19th and

20th centuries, and a report, apparently prepared in 1957 by the federal government in conjunction with state Attorneys General, that discusses federal and state jurisdiction over federal lands within the states.[3] Seiffert cites other authorities as well. Its brief includes a discussion of the development of property rights from 15th century England to present day America and a discussion of Federal judicial authority from the colonial period to the present. Seiffert also filed a supplemental brief on October 23, 2000, which raises additional arguments.

III. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Jurisdiction

Seiffert's arguments center around its interpretation of Federal jurisdiction. Its position, however, is based on a misinterpretation of the U.S. Constitution and the development of constitutional law over the past 60 years. I find that Congress granted the Secretary of Labor jurisdiction under the Mine Act to conduct health and safety inspections at privately owned mines within the states as long as the activities at the mines affect interstate commerce.

Seiffert places great reliance on the Report discussed above. The Report discusses Article I, Section 8, Clause 17 of the U.S. Constitution. That provision of the Constitution concerns the District of Columbia and lands over which the Federal government exercises exclusive jurisdiction. It provides, in pertinent part, that "Congress shall have power to ... exercise exclusive legislation in all cases whatsoever, over such District ... and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings..." Under this provision of the constitution, the Federal government cannot exercise exclusive jurisdiction over an area within a state without the consent of that state's legislature. This provision was designed to prevent the Federal government from purchasing lands within a state and displacing the state's authority without the consent of the state legislature. It does not deal with jurisdictional issues on private lands or jurisdictional issues on lands owned by the federal government where the federal government has neither sought nor been granted exclusive jurisdiction by the state legislature.

The federal government can acquire property in a state, but it can only acquire jurisdiction over that property if both the state and federal governments agree to that transfer. *See, e.g., Paul v. United States*, 371 U.S. 245, 264 (1963). Otherwise, the United States does not take jurisdiction over the property and is merely a proprietor of the property. If the United States has jurisdiction over property in a state, it is often referred to as a "federal enclave" and state law

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[3] The report that Seiffert relies upon is entitled, *Jurisdiction Over Federal Areas Within the States: Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States* (the "Report"). Seiffert did not provide a citation for this report. I have relied upon Seiffert's extensive quotations from the Report in analyzing the arguments presented in its brief.

does not apply to that property. For example, in *Lord v. Local Union No. 2088*, 646 F2d. 1057, 1063 (5th Cir. 1981), *cert. denied*, 458 U.S. 1106, the court held that Florida's right-to-work law did not apply to a federal enclave in that state. That federal enclave had been previously established with the consent of the Florida legislature.

Seiffert applies the concepts in the Report to all lands within a state, not just federally owned lands. For example, the Report, as quoted by Seiffert, states that the "federal government cannot, by unilateral action on its part, acquire legislative jurisdiction over any area within the exterior boundaries of a state." (Brief in Support of Motion to Dismiss at 20). Seiffert uses that sentence to support its position that the Secretary lacks territorial jurisdiction over the Bailey Quarry. Article I, Section 8, Clause 17 of the Constitution, however, merely provides that federal enclaves cannot be created without the consent of the host state. It does not pertain to federal regulation of businesses located on private property. The Report merely discusses the implementation of that clause of the constitution to federal lands within a state. Thus, the above quote from the Report is taken out of context by Seiffert.

More importantly, the words "legislative jurisdiction" in the quote refer to exclusive legislative jurisdiction as specified in Article I, Section 8, Clause 17. The Secretary is not contending that the federal government has exclusive jurisdiction over the Bailey Quarry or that the quarry is a "federal enclave." Laws passed by the State of Oregon are also applicable to the Bailey Quarry. Thus, the federal government has neither sought nor acquired "legislative jurisdiction" over the Bailey Quarry. Thus, I conclude that Article I, Section 8, Clause 17 of the constitution and the Report are irrelevant to this proceeding.

Seiffert's other arguments also revolve around Article I, Section 8, Clause 17 of the U.S. Constitution. Seiffert cites criminal cases in which the issue is whether federal or state criminal statutes apply to federal military bases. For example, in *United States v. Lovely*, 319 F2d 673 (4th Cir. 1963), the defendant was convicted of sexual assault on a military reservation under a federal criminal statute. The defendant attempted to have his conviction reversed on the basis that jurisdiction over the reservation had not been properly ceded to the federal government by the state. Seiffert cites numerous cases discussing jurisdictional issues on federally owned lands or on ships at dock. (Motion to Dismiss 4-6; Brief in Support of Motion to Dismiss 11-20, 21-30).

From these cases, Seiffert reaches the conclusion that "federal jurisdiction extends only over the areas where it possesses the power of exclusive jurisdiction..." (Brief in Support of Motion to Dismiss 11). It believes that "to hold otherwise would destroy the purpose, intent, and meaning of the entire Constitution for the United States of America." *Id.* Seiffert believes that these principles were made clear in *Unites States v. Bevans*, 16 U.S. 336 (1818) and have been followed by federal courts since that time. For example, in *Fort Levenworth R. Co. v. Lowe*, 114 U.S. 525 (1885), the court held the "consent of the states to purchase lands within them ... is essential, under the constitution, to transfer to the [federal] government, with the title, of political jurisdiction and dominion." *Id.* at 531. "Where lands are acquired without such consent, the

possession of the United States ... is simply that of an ordinary proprietor ... subject to the legislative authority and control of the states equally with the property of private individuals." *Id.*

In its supplemental brief, Seiffert set forth additional arguments that focus on jurisdiction over federal lands. It cites 40 U.S.C. § 255, entitled "Approval of Title Prior to Federal Land Purchases..." for the proposition that, because the federal government did not obtain title to the Bailey Quarry, MSHA must obtain the approval of the Governor of Oregon to "'operate' its scheme of warrantless inspections upon private property located within the external boundaries of Oregon...." (Supplemental Brief 2). It also makes broad constitutional arguments based on the relationship between the federal government, state governments, and the rights of citizens. For example, it cites cases in which the Supreme Court struck down the authority of the federal government to require states to administer federal regulatory programs. *See New York v. U.S.*, 505 U.S. 144 (1992); *Printz v. U.S.*, 521 U.S. 98 (1997).

Based on the Report and the cases cited in its briefs, Seiffert makes the following argument that is at the heart of its case:

> Federal jurisdiction results only from a conveyance of state jurisdiction to the federal government for lands owned or otherwise possessed by ... the United States, and this federal jurisdiction is extremely limited in nature. There is no federal jurisdiction if there is no grant or cession of jurisdiction by the state to the federal government. Therefore, federal territorial jurisdiction exists only in Washington, D.C., the federal enclaves within the states, and the territories and possessions of the ... United States.

(Brief in Support of Motion to Dismiss 14-15).

These cases and the other cases discussed in Seiffert's brief discuss a very narrow issue: federal and state jurisdiction on federal enclaves and other federal property. They do not consider the power of the federal government to regulate businesses, such as mines on private property. While it is true that the federal government can exercise *exclusive* legislative jurisdiction only with the consent of the states, it can exercise nonexclusive jurisdiction on private property under the commerce clause of the Constitution: Article I, Section 8, Clause 3. That provision states that "Congress shall have power to ... regulate commerce with foreign nations, and among the several states, and with the Indian Tribes...." As stated in section 4 of the Mine Act, the Mine Act was enacted under the authority of the commerce clause. Since the early 1940s, the commerce clause has been interpreted very broadly by the Supreme Court and the inferior courts. For example, in *Wickard v. Filburn*, 317 U.S. 111, 125 (1942), the Supreme Court held that the federal government's power to regulate private economic activities under the commerce clause is not confined to the regulation of commerce between the states, but extends to a local activity if "it

exerts a substantial economic effect on interstate commerce...." "Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States...." *Fry v. United States*, 421 U.S. 542, 547 (1975). The commerce clause is an independent and distinct source of federal jurisdiction that is not based on the ownership of land.

Congress and the courts have determined that mines, including quarries, exert a substantial economic effect on interstate commerce. In *Donovan v. Dewey*, 452 U.S. 594, 602 (1981), the Supreme Court stated:

> As an initial matter, it is undisputed that there is a substantial federal interest in improving the health and safety conditions in the nation's underground and surface mines. In enacting the statute, Congress was plainly aware that the mining industry is among the most hazardous in the country and that the poor health and safety record of this industry has significant deleterious effects on interstate commerce.

The Court relied upon the legislative history and the preamble to the Mine Act in reaching this conclusion. The Court determined that MSHA had the authority to conduct a warrantless inspection of a stone quarry that was located on private property in Wisconsin.

The circuit courts have uniformly recognized MSHA's authority to inspect mines under the commerce clause. For example, in *U.S. v. Lake*, 985 F3d 265, 268 (6th Cir. 1993), the court of appeals held that "the language of the [Mine] Act, its broad remedial purpose, and its legislative history combine to convince us that Congress intended to exercise its full power under the Commerce Clause." I conclude that the arguments presented by Seiffert are irrelevant to this case because the Mine Act was enacted under the authority granted Congress under the commerce clause. Jurisdiction under the Mine Act is not dependent upon the authority of Congress to establish the District of Columbia and other federal enclaves under Article I, Section 8, Clause 17. [4] In addition, the Mine Act does not require states to enact or administer any of the enforcement provisions of the Mine Act. Consequently, its argument that Congress cannot compel the State of Oregon to enforce the Mine Act is beside the point. I reject all other arguments presented by Seiffert that are not specifically discussed herein.

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[4] Seiffert also refers to Article IV, Section 3, Clause 2 of the Constitution. That provision provides that "Congress shall have power to dispose of and make needful rules and regulations respecting territorial or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or any particular state." This provision also deals with federal lands and, for the same reasons, it has no bearing on this case.

For the reasons set forth below, I find that the Bailey Quarry is a mine and that its operations affect commerce. An analysis of Mine Act jurisdiction starts with 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, excavations, ... 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 undisputed facts demonstrate that the Bailey Quarry clearly fits within this definition. Minerals are extracted from the earth at the quarry and are milled at the site for sale to customers. The Bailey Quarry is a "coal or other mine" as that term is defined in the Mine Act.

Section 4 of the Mine Act, entitled "Mines Subject to Act," provides that "[e]ach 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." 30 U.S.C. § 803. The facts set forth above demonstrate that the Bailey Quarry affects interstate commerce. The machinery and equipment used to produce the products at the quarry were manufactured outside the State of Oregon and the products of the quarry are sold to customers, which thereby affects interstate commerce. I conclude that Seiffert's Bailey Quarry is subject to the provisions of the Mine Act. Consequently, the Secretary has the authority to conduct warrantless inspections of the Bailey Quarry, to issue citations and orders for violations of her safety and health regulations, and to propose civil penalties for those violations.

B. Citation No. 7973954

Citation No. 7973954 alleges a violation of 30 C.F.R. § 41.11 because the operator failed to notify MSHA within 30 days that it opened a new mine. Inspector Brown determined that the violation was not serious, was not of a "significant and substantial" nature, and was the result of Seiffert's low negligence. Section 41.11 provides, in part, that within "30 days after ... the opening of a new mine ... the operator of a coal or other mine shall, in writing, notify the appropriate district manager of [MSHA] of the legal identity of the operator...."

The undisputed facts establish a violation. Seiffert opened a new mine and failed to notify MSHA of its existence within 30 days after it opened. Accordingly, the Secretary established the violation. I affirm the citation as written by Inspector Brown.

IV. ORDER

For the reasons set forth above, I hold that the Secretary of Labor has jurisdiction, as authorized by the Federal Mine Safety and Health Act of 1977, to conduct warrantless inspections of the Bailey Quarry in Washington County, Oregon, owned and operated by Richard E. Seiffert Resources. For the same reasons, I hold that this Commission has jurisdiction over this case under section 113 of that Act. 30 U.S.C. § 823. Citation No. 7973954 is **AFFIRMED** and the notice of contest filed by Richard E. Seiffert Resources in this proceeding is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

Distribution:

Mr. Richard E. Seiffert, Richard Seiffert Resources, P.O. Box 388, Banks, OR 97106 (Certified Mail)

Eugene Dayton Pringle, Jr., c/o 12820 SE Park Street, Vancouver, WA 98683 (Certified Mail)

Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203-1954 (Certified Mail)

RWM