FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 New Jersey Avenue, Suite 9500
Washington, DC 20001
July 16, 2003

COLORADO LAVA, INC., Contestant,	:	CONTEST PROCEEDING
	:	Docket No. WEST 2001-27-RM
v.	:	Citation No. 7941183;9/28/00
	:	
ELAINE CHAO, SECRETARY, OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION Respondent.	:	Antonito Plant
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ELAINE CHAO, SECRETARY, OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner,	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 2001-537-M
	:	A.C. No. 05-04232-05525
v.	:	
	:	
COLORADO LAVA, INC., Respondent.	:	Antonito Plant

DECISION

Appearances: Lydia S. Tzagoloff, Esq., Edward Falkowski, Esq., U.S. Department of Labor, Denver, Colorado, attorneys for the Secretary of Labor;
Mark W. Nelson, Esq., Harris, Karstaedt, Jamison & Powers, PC, 282 Inverness Drive South, Suite 400, Englewood, Colorado, attorney for the Operator.

Before: Judge Avram Weisberger

These cases are before me based upon a Notice of Contest and Petition for Assessment of Civil Penalty filed pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 815. At issue is whether the Mine Safety and Health Administration ("MSHA") had jurisdiction over Colorado Lava Inc.'s ("Colorado Lava") operation at the subject site, and whether Colorado Lava violated a mandatory safety standard. A hearing was held before Administrative Law Judge August Cetti on Tuesday, May 21, 2002, in Denver Colorado. Subsequent to the hearing, Judge Cetti retired, and these cases were reassigned to me. The parties waived the opportunity to seek a new trial, or to proffer additional evidence, and agreed to submit these cases for decision based upon the record that has been adduced before Judge Cetti.

Findings of Fact

Colorado Lava excavates and sells volcanic rocks of various sizes. Its operation includes two sites: the Red Hill Mine and Antonito Plant, which are approximately 23 miles apart and employs nine workers. Colorado Lava acquired these sites from Mountain West Colorado Aggregate ("MWCA") on June 6, 2000. MSHA has exerted jurisdiction over both Red Hill Mine and Antonito Plant ever since their inception. Red Hill Mine is a surface mine from which lava rock is crushed, screened, and sized. Once the product is sized, it is transported to Antonito Plant to be prepared for shipping to customers.

Antonito Plant consists of two sites which are located approximately one mile apart; the rail loadout facility and the bagging plant. At the rail loadout facility, rocks are loaded onto a hopper, screened, sprayed with water and, finally, loaded onto rail cars. Rocks are screened to at least three approximate sizes: "fines," ¾ to 1 inch, and 1 ½ inch. Colorado Lava Plant Manager, Ronald McCarroll, characterized "fines" as "dust." At the bagging plant, rocks are screened, sprayed with water, and then bagged. The fines, although considered waste by Colorado Lava, are sometimes sold to customers from the bagging facility of the Antonito Plant.

After Colorado Lava's acquisition of Red Hill Mine and Antonito Plant, Colorado Lava instructed its attorney, Mark Nelson, to request that MSHA reconsider its assertion of jurisdiction over Antonito Plant. Nelson wrote letters on July 28, 2000, August 14, 2000, and October 5, 2000 to MSHA's South District Office requesting that MSHA reassess its claim of jurisdiction. In the letters, Nelson asserted that there was neither sizing nor washing being performed at Antonito Plant. He also noted that Colorado Lava had removed its secondary screen from its bagging facility at Antonito Plant, although there is a discrepancy between the parties as to the date on which this removal occurred.[1]

On September 12, 2002, MSHA Inspector Ronald Simpson, employed in the Lakewood Colorado Office, was sent to Antonito Plant to determine whether MSHA had jurisdiction. Based upon his observations, he concluded that MSHA had jurisdiction over the plant. The inspector returned to the plant on September 28, 2000 and issued a citation to the company for failing to file a Legal Identity Report pursuant to 30 C.F.R. § 41.13. He visited the site again on October 11, 2000 and terminated the citation based upon Colorado Lava's October 6, 2000 filing of the Legal Identity Report.

Conclusions Of Law

I. Jurisdiction

The threshold issue in this case is whether MSHA had jurisdiction over Antonito Plant to issue a citation for Colorado Lava's failure to file a Legal Identity Report. The more specific issue

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[1] The terms "secondary screen" and "double-decker screen" are considered interchangeable.

is whether Colorado Lava engaged in "milling" within the meaning of the Act.

Section 4 of the Act provides, in pertinent part that "[e]ach coal or other mine, the products of which enter commerce, . . . shall be subject to the provisions of this Act." 30 U.S.C. § 803. The Act includes in the definition of a "coal or other mine" "facilities . . . used in . . . milling of . . . minerals." 30 U.S.C. § 802(h)(1)(C). While the term "milling" is not defined in the Act, it is defined in the Interagency Agreement ("Agreement") - an agreement between MSHA and the Occupational Safety and Health Administration ("OSHA") delineating areas of authority between the two agencies. 44 Fed. Reg. 22827 (Apr. 17, 1979). The Agreement defines milling as "the art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives. The essential operation in all such processes is separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated," *supra* at 22829. The Agreement further lists definitions of milling processes over which MSHA has authority to regulate, including "washing" and "sizing," which are the processes presently at issue, *supra* at 22829, 22830.

As a preliminary matter, I conclude that the Agreement is a reasonable interpretation of the Act and is not in derogation of the Act. Accordingly, I find the Secretary of Labor's ("Secretary") definition of milling to be controlling in the case at bar. *See, Watkins Engineer & Constructors*, 24 FMSHRC 669, 673 (Jul. 2003). Accordingly, I accept the Secretary's interpretation of "milling" as defined in the Agreement.

The Secretary's argument is that Colorado Lava was washing and sizing at Antonito Plant, and, therefore, it is subject to Mine Act regulations. I conclude that the Secretary has failed to establish the occurrence of "washing," but she has established the occurrence of "sizing," and, thus, has established jurisdiction.

A. Washing

"Washing," as defined in the Agreement, involves "cleaning mineral products by the buoyant action of flowing water," *supra* at 22830. Colorado Lava concedes spraying water on its products before they enter the bag house at the plant. However, the company contends it was not "washing" the product, but, rather, was using the water as a means of dust control. On the other hand, Inspector Simpson testified that he observed the "washing" of rocks by a "high pressure-type wash system." (Tr. 55-56).

The Secretary's argument rests on Inspector Simpson's observation of "wash-type nozzles" at the rail loadout site. Jake DeHerrera, Acting Assistant District Manager in MSHA's Denver Office, testified that the difference between washing and dust control is that washing requires a high-pressure water system, while dust control requires a low-pressure water system. DeHerrera also testified that if washing were occurring, there would be an accumulation of water. The Secretary contends that even though Inspector Simpson did not observe a "big accumulation" of water on the ground, he did observe some water under a screen where there was a "heavy concentration of water [being] sprayed." (Tr. 378). Colorado Lava essentially argues that the Secretary failed to establish a "buoyant action of flowing water" because there was no accumulation of water on the ground.

The issue to be resolved is whether the evidence established that the operation at the site involved the "cleaning" of materials by the *buoyant* action of flowing water. (Emphasis added), *supra* at 22830. For the following reasons, I conclude that the Secretary has not demonstrated the occurrence of washing as defined in the Act, but not for the reasons proffered by Colorado Lava.

"Buoyant," is defined in *Webster's Unabridged Dictionary* 278 (2nd ed. 2001) as "tending to float in a liquid." Hence, "washing," i.e., the cleaning of particles by the buoyant action of flowing water, requires the finding of particles *floating* in water. Even assuming there was a high-pressure water system, no testimony or exhibits were offered that tended to show particles *floating* in water. I find that it is to speculative to conclude that the mere presence of an accumulation of water establishes the existence of particles actually floating in water. Therefore, as the Secretary has failed to establish this fundamental fact, she has not demonstrated the occurrence of washing.

B. <u>Sizing</u>

"Sizing," as defined in the Agreement, is "the process of separating particles of mixed sizes into groups of particles of all the same size, or into groups in which particles range between maximum and minimum sizes." 44 Fed. Reg. 22827 at 22829. At trial, Colorado Lava president Ronald Bjustrom admitted that screening was performed at the plant, however, he claimed the company did so for dust control purposes. He stated that if the company did not screen out the fine particles, it would have to soak its product, in order to control dust, which would add a significant amount of weight. Further, the company contends that because the screens at Antonito Plant were the same size as those at Red Hill Mine, no sizing could have taken place at the plant. Moreover, Inspector Simpson was unable to identify either the "maximum" or "minimum" size to which the rocks were sized at the plant, which, the company further argues, is required by the Agreement.

Contrary to Colorado Lava's arguments, Inspector Simpson testified that he actually observed the rocks being separated into various sizes at the subject site's bagging plant. He testified that employees used a caterpillar to load material out of a pile brought from Red Hill Mine and then dumped the material into a feed hopper. The material flowed first through a triple-decker screen, which separated out the oversized product. The sized material dropped down to the product belt. Finally, the remaining material dropped down a bit further and went through the double-decker screen, which produced products of *two different sizes*. In sum, the inspector testified to have observed four different sized materials: the oversized material screened through the triple-decker, the sized product from the triple-decker screen, and two materials screened through the double-decker screen. Inspector Simpson also testified that he observed sizing occurring at Antonito's rail loadout facility. He observed raw, unsized material going into the feed hopper and then down into a screen. He saw three separate sizes of rocks produced: ¾ to 1 inch, 1 ½ inch, and fine. The 1 ½ inch rock went onto rail cars as a finished product, and the other two sized materials went into separate piles.

Although Colorado Lava disputes there having been a double-decker screen present at the mine during the September 28, 2002 visit, Ronald McCarroll, Plant Manager of the Antonito Plant,

conceded that materials were screened at the plant, which produced the ¾ inch to 1 inch material and the fine material, although, he contended these materials were waste products. McCarroll also admitted to screening out as many nuggets as possible before loading the product into the railroad out cars.

The Secretary has demonstrated that sizing occurred at Antonito Plant. The definition of sizing, as set forth in the agreement, *supra*, clearly indicates that sizing occurs if particles of mixed sizes are grouped into particles of the same size or into groups of particles ranging between maximum and minimum sizes. Inspector Simpson testified to having seen materials going into the feed hoppers and separated into four different sizes at Antonito's bagging plant and into three different sizes at the rail loadout facility. This activity falls squarely in line with the first part of the definition of sizing. Colorado Lava admits to having screens at Antonito Plant and to separating out fine material and ¾ to 1 inch material. Whether those materials were waste or actual saleable products is irrelevant to the determination as to whether sizing occurred. Upon the company's own admission, rocks went into the feed hoppers and came out of the screens separated into different sizes.

I am also unpersuaded by Colorado Lava's argument that sizing could not occur because the screens at Antonito Plant are the same size as the screens at Red Hill Plant. The company asserts that the product was not screened to produce rocks of a smaller size, but, rather, was screened to minimize dust. The company further contends that the rock products are "fragile" and tend to break apart en route from Red Hill Mine to Antonito Plant. Also, it asserts that the screening process reduces dust, not only for the integrity of the product, but also for the safety of Antonito employees and neighbors of the plant. While I am unconvinced that screening was occurring at Antonito Plan solely for dust control purposes. However, even if that were the case, that screening process, the separating out of dust, is encompassed within the term "sizing," which relates to the separation of *particles* of mixed sizes into groups of particles of the same size, *supra*. In this connection, I note that Dust, according to *Webster's*, *supra*, is defined as "earth or other matter in fine, dry *particles*," *supra* at 608 (Emphasis added). Dust, therefore, is included within the ordinary meaning of the word "particle" as defined in the Act. Therefore, even if the screening were just for dust control purposes, it would still be "sizing."

i. <u>Elam Exception</u>

Colorado Lava argues, in the alternative, that even if sizing occurred at Antonito Plant, MSHA has no jurisdiction pursuant to the Commission decision in *Secretary of Labor v. Oliver P. Elam*, 4 FMSHRC 5 (Jan. 1982). In *Elam*, the Commission held that a company's coal crushing was not "coal preparation" within the meaning of the Act if it performed those activities solely to facilitate its loading business, and not to meet its customer's specifications, nor to render the product for any particular purpose. *Id.* at 8. Colorado Lava claims that even if its product were being sized at Antonito Plant, the sizing was not for any particular purpose, and, therefore, it was not engaging in mining activities.

I conclude that the *Elam* exception is inapplicable to the instant case. The issue at hand

involves "milling," which is specifically addressed in the Agreement. The Agreement unequivocally states that milling activities, including sizing, are under MSHA jurisdiction. In *Elam*, the court addressed the issue of coal preparation, which is not addressed in the Agreement. As discussed above, Colorado Lava's activities constitute sizing at the plant, which, subjects the plant to MSHA jurisdiction.

II. The Citation

The final issue is whether MSHA alleged a violation of the wrong standard as assessed by the company, and if so, whether the citation should be vacated. I conclude that the Secretary has established a violation of the correct standard.

On September 28, 2003, Inspector Simpson issued Citation No. 7941183 to Colorado Lava pursuant to 30 C.F.R. § 41.13 for the company's failure to timely file a Legal Identity Report upon change of ownership of the mine. The standard provides:

> Failure of the operator to notify the Mine Safety and Health Administration, in writing, of the legal identity of the operator or any changes thereof within the time required under this part will be considered to be a violation of section 109(d) of the Act and shall be subject to penalties as provided in section 110 of the Act. 30 C.F.R. § 41.13.

Section 41.12, which identifies the time period within which operators are required to comply with section 41.11, provides:

> Within 30 days after the occurrence of any change in the information required by § 41.11, the operator of a coal of other mine shall, in writing, notify the appropriate district manager of the Mine Safety and Health Administration in the district in which the mine is located of such change. 30 C.F.R. § 41.11.

Colorado Lava concedes it failed to file a legal identity report within 30 days of its acquisition of the Antonito Plant. However, the company submits it *did* timely file the report in compliance with 30 C.F.R. § 41.20 (Subpart C), which, it contends, is the applicable provision. This section provides:

> Each operator of a coal or other mine shall file notification of legal identity and every change thereof with the appropriate district manager of the Mine Safety and Health Review Administration by properly completing, mailing, or otherwise delivering form 2000-7 "legal identity report" . . .
> 30 C.F.R. § 41.20.

Colorado Lava argues that since it was not aware it was a "mine" subject to MSHA jurisdiction, it would have had no idea it was required to comply with 30 C.F.R. §§ 41.10 - 41.13

(Subpart B). It is Colorado Lava's position, in essence, that all the sections in Subpart B, supra, should be read together. Section 41.11(a) requires the operator of a *new mine* to file a legal identity report with the appropriate MSHA district office. 30 C.F.R. § 41.11(a). Section 41.12, *supra*, requires the operator to file the report within 30 days of the occurrence of any change. The company argues that section 41.13, *supra*, applies only to a "new mine," not a new operator taking over the operation of an existing mine. The company contends the applicable standard is set forth in section 41.20, *supra*, which refers to notification requirements of an operator of *a mine* in contrast to a *new mine*. Colorado Lava points out that section 41.20 does not have a specific time period for compliance. The company argues, in essence, that since it did ultimately file the legal identity report, and there is no time period set forth in section 41.20, *supra*, no violation exists.

In contrast, the Secretary argues that Colorado Lava failed to timely file a legal identity report notifying MSHA of its acquisition of Antonito Plant pursuant to section 41.13, *supra*. The Secretary asserts that whether Colorado Lava knew it was operating a mine is irrelevant because knowledge is not a required element of the regulation. Furthermore, she contends that section 41.12, *supra*, requires the reporting of any changed information, regardless of whether the mine is "new."

I am unconvinced by Colorado Lava's argument, and I conclude that the Secretary has established a violation of section 41.13, *supra*. First, the Secretary is correct in stating the Colorado Lava's lack of "knowledge" that Antonito Plant was a mine is irrelevant. The Commission has held that a company's lack of knowledge that it is in violation is not a defense because the Mine Act is a strict liability statute, having no regard for fault. *Watkins Engineers*, 24 FMSHRC 669, 680-81 (Jul. 2003). Second, Subpart B of Part 41 of the Code of the Federal Regulations (sections 41.10 – 41.13), *supra*, requires the operator to inform MSHA of its legal identity and any subsequent changes. It also sets forth that failure to notify shall be considered a violation of Section 109(d) of the Act, and subject to the penalties imposed by Section 110(i) of the Act. Subpart C (sections 41.20, *supra*, and 41.30), deals with the administrative mechanics for implementing Subpart B, *supra*, i.e., what document to file, what information, and to whom. There is no indication that Subpart B, *supra*, is limited to "new mine[s]." Colorado Lava correctly notes that section 41.11(a), *supra*, specifically mentions "new mine[s]." This limitation, however, does not appear in any other subsection of section 41.11, *supra*, or in any other section of Subpart B. In fact, section 41.10 - which sets forth the scope of Subpart B - requires *all* mine operators to file their legal identities and any subsequent changes. Thus, section 41.12, *supra*, - the 30 day notice requirement - is triggered by changes at the mine, not necessarily by the opening of a "new mine."

Colorado Lava also argues that the citation must be vacated because of Colorado Lava's agreement with DeHerrera that the company would not be cited for its failure to comply with part 41 until the jurisdictional issue had been resolved. However, Inspector Simpson visited the mine on September 12, 2002 and gathered evidence, which, according to MSHA, established that MSHA had jurisdiction. The Secretary reasonably concluded that MSHA, not OSHA, was the proper regulatory agency.

Accordingly, I conclude the citation is valid, and, because Colorado Lava failed to file the legal identity report on or before July 28, 2003, the company was in violation of section 41.13,

supra. I also find that, considering the criteria set forth in section 110(i) of the Act, a penalty of $200.00 is appropriate for this violation.

Order

It is **ORDERED** that Colorado Lava pay a civil penalty of **$200.00** within 30 days of the date of this decision.

Avram Weisberger
Administrative Law Judge

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