FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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April 29, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2001-528-M
Petitioner	:	A.C. No. 42-01912-05513
	:	
	:	Docket No. WEST 2001-538-M
v.	:	A.C. No. 42-01912-05514
	:	
	:	Docket No. WEST 2001-557-M
DARWIN STRATTON & SON, INC.,	:	A.C. No. 42-01912-05515
Respondent	:	
	:	Airport Pit

DECISION

Appearances: John Rainwater, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Johnpatrick Morgan, Hurricane, Utah, 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 Darwin Stratton & Son, Inc. ("Darwin Stratton"), 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"). An evidentiary hearing was held in St. George, Utah.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Preliminary Issues

Darwin Stratton operates at least three facilities in Washington County, Utah: the Airport Pit, the Rattlesnake Pit, and a ready-mix plant. All of these facilities are in the vicinity of Hurricane, Utah. At all times during these proceedings, Darwin Stratton was represented by Johnpatrick Morgan. Although Mr. Morgan states that he lives in Hurricane, he has his mail delivered to him via general delivery in Fredonia, Arizona, which is about 64 miles from Hurricane. (Tr. 89). Mr. Morgan represented Darwin Stratton in two other sets of proceedings before me. In those cases,

Mr. Morgan refused all mail that was sent by me and all mail from the Office of the Solicitor. *See Darwin Stratton & Son, Inc.*, 22 FMSHRC 1265, 1268-69 (Oct. 2000).[1] In the present cases, Mr. Morgan accepted some of the mail that I sent him but still failed to pick up most mail. The mail was returned by the postal service stamped "unclaimed." I questioned him about that at the hearing and he replied that he will "become more diligent." (Tr. 90). I have also been sending a copy of every mailing to the office of Darwin Stratton in Hurricane. Mr. Morgan appeared at the hearing on behalf of Darwin Stratton, but he did not present any witnesses other than himself. Mr. Morgan is not an attorney but he states that he is a friend of the family that owns and operates Darwin Stratton. He apparently also has a financial interest in Darwin Stratton. I permitted Mr. Morgan to represent Darwin Stratton at the hearing under the authority of 29 C.F.R. § 2700.3(b)(4).

Mr. Morgan's primary argument is that because the Airport Pit does not sell its products in interstate commerce, the Department of Labor's Mine Safety and Health Administration ("MSHA") is without jurisdiction to inspect it. Mr. Morgan does not deny that gravel is mined and processed at the Airport Pit and that the Airport Pit is a mine. (Tr. 94, 127). Rather, he argues that all of the product is sold within Washington County, Utah, principally in and around Hurricane and La Verkin. The material is sold to local contractors and residents. (Tr. 101). The material is used in residential and commercial construction. (Tr. 125-26). The Secretary contends that MSHA does have jurisdiction because of the broad interpretation of interstate commerce under the Mine Act.

I find that the Airport Pit is a "coal or other mine" as that term is used in section 3(A)(1) of the Mine Act. 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 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). It is clear that the Airport Pit fits within this definition. Rock is extracted from the pit and this material is sized and crushed at the site. Some of the crushed rock and gravel is sold to customers and some of it is further processed at Darwin Stratton's ready-mix plant in Hurricane.

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[1] On November 24, 2000, I dismissed three other contest proceedings brought by Darwin Stratton because it failed to respond to my orders. (Docket No. WEST 2000-589-RM etc). Mr. Morgan also refused all mail service in those cases.

Section 4 of the Mine 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." This provision was enacted pursuant to Article I, Section 8, Clause 3 of the United States Constitution, which states that "Congress shall have power to . . . regulate commerce with foreign nations, and among the several states, and with the Indian Tribes . . . ." 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).

Congress and the courts have determined that mines, including quarries and pits, 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. In that case, 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." The machinery and equipment used to produce the products at the Airport Pit were manufactured outside the State of Utah and the products of the pit are sold to customers within Utah. (Tr. 28-29, 31, 33, 35; Exs. G-2 through 5). Thus, the "operations or products of [the Airport Pit] affect commerce." 30 U.S.C. § 803. I conclude that Darwin Stratton's Airport Pit is subject to the provisions of the Mine Act. Consequently, the Secretary has the authority to conduct warrantless inspections of this pit, to issue citations and orders for violations of her safety and health regulations, and to propose civil penalties for those violations.

MSHA has been inspecting the Airport Pit since at least 1989 without interference by Darwin Stratton.

B. Individual Citations

1. WEST 2001-538-M, Citation No. 7966590

On August 2, 2000, MSHA Inspector Dennis Harsh issued Citation No. 7966590 to Darwin Stratton alleging a violation of 30 C.F.R. § 50.30. The citation states that the "Operator failed to complete and submit a quarterly mine employment report (7000-2) for the second quarter of 2000." The citation states that the report was due by July 15, 2000. Inspector Harsh determined that the violation was neither serious nor significant and substantial ("S&S"), but that Darwin Stratton's negligence was high. Darwin Stratton sent the required form to MSHA but, using rubber stamps, had placed the words "NOT ACCEPTED," "CANCELED," and "WITHOUT DISHONOR U.C.C. 3-505" on every page and it had not submitted the requested information. (Ex. G-9). Section 50.30 provides, in part, that each operator of a mine "in which an individual worked during any day of a calendar quarter shall complete a MSHA Form 7000-2 in accordance with the instructions and criteria in § 50.3–1 and submit the original to [MSHA] within 15 days after the end of such quarter." The Secretary proposes a penalty of $500 for this alleged violation under her special assessment regulations at 30 C.F.R. § 100.5.

Inspector Harsh was the Field Office Supervisor of MSHA's Boulder City, Nevada, office. Because he passed away, David Pennington, the current field office supervisor, testified for the Secretary. (Tr. 77). The notes taken by Inspector Harsh indicate that when he went to the Airport Pit on or about April 22, 2000, he observed the plant running and an employee operating a loader. (Tr. 79-80; Ex. G-10 p.3). Inspector Pennington testified that Darwin Stratton sent MSHA the form used for the quarterly report but that it contained no data and that it had been marked with the rubber stamps described above. (Tr. 77-78, 80-81; Ex. G-9). Inspector Pennington stated that because MSHA's records indicate that it has been inspecting Darwin Stratton's Airport Pit since the late 1980s and had filed these reports in the past, the company was familiar with the requirements of the regulation. (Tr. 81; Ex. G-6). He believes that Darwin Stratton intentionally failed to file the required employment report.

Mr. Morgan testified that he submitted the form to MSHA with the rubber stamps on it to notify MSHA that the mine was closed to further MSHA inspections. (Tr. 95). Mr. Morgan believes that the relationship between Darwin Stratton and MSHA is a matter of contract and that by sending in the uncompleted and stamped Form 7000-1, he was canceling the contract. (Tr. 6, 61, 105-06). On April 22, 2000, there was a fatal accident at Darwin Stratton's nearby Rattlesnake Pit. *See* 22 FMSHRC at 1267-68. When MSHA officials heard about the accident, they proceeded to the Airport Pit because Darwin Stratton had never notified MSHA of the existence of the Rattlesnake Pit. Darwin Stratton's actions in the present cases are heavily

influenced by MSHA's investigation of that accident. Mr. Morgan came to the conclusion that the fatal accident was going to cost Darwin Stratton over one million dollars. (Tr. 121-22).

MSHA's jurisdiction over the Airport Pit is not the result of a contract between Darwin Stratton and the Department of Labor. The Uniform Commercial Code does not apply to MSHA or the Mine Act. Because the Secretary established that Darwin Stratton failed to submit the information required by section 50.30, a violation was established. The violation was not serious.

I affirm the Secretary's allegation of high negligence because Darwin Stratton was aware of the requirement to file the employment information. Its failure to do so was a deliberate act on its part. Darwin Stratton voluntarily chose Mr. Morgan to be its representative in these cases, as well as in the cases involving the Rattlesnake Pit. Mr. Morgan is misinformed as to the source of MSHA's jurisdiction over the Airport Pit. I reduce the penalty for this citation to $200 because of the small size of Darwin Stratton and the Airport Pit.

2. Docket No. WEST 2001-557-M, Citation No. 7984337

On August 8, 2000, MSHA Inspector Stephen Wegner issued Citation No. 7984337 to Darwin Stratton alleging a violation of Section 103(a) of the Mine Act. The body of the citation states as follows:

> Mr. Clayton Stratton, President, and Pat Morgan, a consultant for the company, refused to allow an authorized representative to enter the mine. Mr. Pat Morgan had marked "CANCELED" on the recent update to the legal Id for this property and had mailed it to MSHA. Mr. Pat Morgan claimed this action canceled any contract with MSHA. Mr. Stratton and Mr. Morgan were told that refusal to allow the inspection was a violation of the provisions of section 103(a) of the Mine Act.

Inspector Wegner determined that the violation was not S&S but that Darwin Stratton's negligence was high. Section 103(a) of the Mine Act provides that authorized representatives of the Department of Labor "shall make frequent inspections and investigations in coal or other mines each year for the purpose of . . . (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under . . . this Act." The Secretary proposes a penalty of $2,500 for this alleged violation under her special assessment regulations at 30 C.F.R. § 100.5.

As stated above, MSHA is authorized to inspect a mine without obtaining a search warrant for the purpose of determining whether the mine operator is complying with the health and safety standards. The failure to allow an MSHA inspector onto mine property is a violation of the Act. There is no dispute that Darwin Stratton, at the direction of Mr. Morgan, refused to allow Inspector Wegner onto the Airport Pit to conduct an inspection.

Mr. Morgan testified that he took this action because there was an error in the legal identity report. Darwin Stratton had previously filed a legal identity report under 30 C.F.R. § 41.11 for the Airport Pit. When MSHA discovered that Darwin Stratton also operated the Rattlesnake Pit during its investigation of the fatal accident, it required Darwin Stratton to file two new legal identity reports: a revised one for the Airport Pit that showed that the company also operated the Rattlesnake Pit and a new one for the Rattlesnake Pit. The Airport Pit and Rattlesnake Pit have different identification numbers. When the forms were being filled out, the identification number for the Airport Pit was inadvertently placed on both forms. This mistake was immediately corrected by striking out the incorrect number on the form for the Rattlesnake Pit and placing the correct number immediately above it. (Ex. R-1). For reasons that I do not completely understand, this correction was not satisfactory to Mr. Morgan. He testified that he advised Darwin Stratton to prohibit further inspections until a new legal identity report was issued for the Rattlesnake Pit. In closing arguments he also stated that:

> This is a small operator of a mine where there was written documentation that the legal identity forms were completed and done under force and fear; that there was intimidation, there was harassment, there [were] tremendously bad feelings between the operator and mine safety, and this is what precipitated these actions.

(Tr. 142). Mr. Morgan did not explain how the operator was intimidated or harassed. (Tr. 112-13). It may relate to the fact that MSHA required Darwin Stratton to execute these legal identity reports during its investigation of the accident in which a family member of the owners of Darwin Stratton was killed. *See* 22 FMSHRC at 1272. Mr. Morgan testified that the fact that the identification number for the Rattlesnake Pit had been crossed out and rewritten created "confusion on which was the Rattlesnake Pit and which the Airport Pit." (Tr. 96; Ex. R-1).[2] He further testified that he advised the company to prohibit any MSHA inspections until he could get the "legal identity report reissued." (Tr. 97). He believed that the report with the crossed out number was "inaccurate." (Tr. 97-99).

I find that the Secretary established a violation. It is clear that Darwin Stratton refused to allow Inspector Wegner to conduct a regular annual inspection on August 2, 2000. MSHA has been regularly inspecting the Airport Pit since at least 1989 and Darwin Stratton had never interfered with an inspection in the past. The revised Legal Identity report for the Airport Pit that was signed by Clayton Stratton in April 2000 did not contain any errors. Mr. Morgan wrote "CANCELED" with a rubber stamp. The new legal identity report for the Rattlesnake

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[2] Inspector Wegner testified that Clayton Stratton's wife filled out the new legal identity forms and made the correction to the Id. number on the Rattlesnake Pit form. (Tr. 131-33). Mr. Morgan stated that Inspector Harsh changed the Id. number. (Tr. 134). Although the handwriting for the corrected number appears different from the handwriting on the rest of the form, this dispute does affect the outcome in this case because it does not matter who made the change.

Pit was initially filled out with the Id. number for the Airport Pit, but that number was immediately crossed out and replaced with a new Id. number. It was signed by Clayton Stratton on April 22, 2000. (Ex. R-1). Mr. Morgan's concern about these forms is difficult to understand. The forms have no binding legal importance as far as MSHA's jurisdiction over the two properties is concerned. MSHA issues legal identity numbers for accounting purposes. It uses these numbers to identify mines and to track enforcement history at these mines. As corrected, there were no errors on these forms. Even if there had been an error, Darwin Stratton could have simply requested new blank forms from MSHA and sent then back by mail. An error on a legal identity form does not provide justification to prevent MSHA from conducting a safety and health inspection.

I agree that Darwin Stratton's negligence was high because Darwin Stratton was fully aware of MSHA's right to inspect the Airport Pit. Mr. Morgan's justification for the refusal is illogical. Mr. Morgan's uninformed and ill-advised recommendation to prohibit the inspection is attributable to Darwin Stratton because it voluntarily retained him to represent the company in this proceeding. Nevertheless, I reduce the civil penalty to $1,000 because of the company's small size and because the company prohibited the inspection based solely on Mr. Morgan's recommendation. There is no indication in the record that Darwin Stratton had interfered with an MSHA inspection in the past. I note, however, that Darwin Stratton prohibited another MSHA inspection at a later date and, as a consequence, the Secretary brought an action seeking a temporary and permanent injunction in the U.S. District Court for the District of Utah. That action is still pending.

3. WEST 2001-528-M, Citation No. 6282323

On November 21, 2000, MSHA Inspector Manuel Palma issued Citation No. 6282323 to Darwin Stratton alleging a violation of 30 C.F.R. § 56.18002(a). The citation states that a "competent person designated by the mine operator was not properly examining the crusher plant area at least once every shift for conditions which could adversely affect safety or health." The citation further states that the violation was "evidenced by the 11 citations issued for failure [to conduct] a complete examination of working places." Inspector Palma determined that the violation was S&S and that Darwin Stratton's negligence was moderate. Section 56.18002(a) provides, in part, that a "competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health." The Secretary proposes a penalty of $140 for this alleged violation.

Inspector Palma testified that he issued the citation because eleven citations had been issued during the inspection. (Tr. 43; Ex. G-8). He understood that examinations were taking place, he just believed that they were not thorough enough to comply with the safety standard. He testified that "due to the numerous violations, I felt that perhaps the designated person responsible was not doing a good job of doing a pre-shift exam in the mine property." (Tr. 37-38, 42). That was his sole basis for issuing the citation. Mr. Morgan testified that this citation was actually issued several months after November 21, 2000. He states that Darwin Stratton

was served with the citation on or about February 22, 2001. (Tr. 105; Ex. R-2). Mr. Morgan believes that this fact should invalidate the citation.

In order to determine whether a violation occurred, the requirements of the standard must be examined. The Commission has identified three requirements of section 56.18002 as follows: (1) daily workplace examinations are mandated for the purpose of identifying workplace safety or health hazards; (2) the examinations must be made by a competent person; and (3) a record of the examinations must be kept by the operator." *FMC Wyoming Corp.*, 11 FMSHRC 1622, 1628 (September 1989). The record-keeping requirement is set forth in subsection (b) of the standard. The Secretary defines a competent person as "a person having the abilities and experience that fully qualify him to perform the duty to which he is assigned." 30 C.F.R. § 56.2.

There is no dispute that the citations issued by the inspector used to support the instant citation were issued in "working places," as that term in defined in section 56.2. Inspector Palma did not establish that Darwin Stratton had not conducted examinations of the working places. He testified that he was advised by Darwin Stratton that the examinations were being done. (Tr. 43).

The Secretary did not introduce any evidence as to the competency of Darwin Stratton's examiner. The Commission held that the term "competent person" within the meaning of the standard "must contemplate a person capable of recognizing hazards that are known by the operator to be present in the work area or the presence of which is predictable in view of a reasonably prudent person familiar with the mining industry." 11 FMSHRC at 1629. In *FMC Wyoming*, the Commission determined that the examiner was not competent because he had no training or experience in asbestos recognition and was assigned to examine areas in which asbestos was being removed without his knowledge. In the present case, there is no evidence as to whether Darwin Stratton's examiner was familiar with and could recognize safety hazards that are typically present in a pit and crusher environment.

The mere fact that multiple citations are issued during an MSHA inspection is generally not sufficient to establish a violation if the mine operator demonstrates that the examinations were being conducted and the results of these examinations were being recorded. *See Dumbarton Quarry Associates*, 21 FMSHRC 1132, 1136 (Oct. 1999) (ALJ Manning); *Lopke Quarries, Inc.*, 22 FMSHRC 899, 912 (July 2000) (ALJ Hodgdon). In this case, the mine operator did not present any evidence to rebut the Secretary's *prima facie* case. The fact that the citation was actually issued later than the other citations during the inspection does not provide sufficient grounds for vacating it. Consequently, I affirm this citation.

With one exception, all of the citations issued by Inspector Palma on November 21, 2000, that were presented by the Secretary at the hearing were designated as non-S&S. (Ex. G-8). Two citations were issued because records of monthly fire extinguisher examinations were not being kept. Another citation was issued because a sign was not present on the back of the

hopper warning employees that material is loaded into the hopper from the front side. Another was issued because a breaker panel was not labeled to show what unit it controlled. Another citation was issued for a defective parking brake on a front-end loader. The S&S citation states that the brake lights on the same front-end loader were not working properly. Another citation states that the back-up alarm was not working on a service truck, that is usually parked and is seldom used. The final citation presented states that the compressed-air receiver vessel on the service truck had not been inspected by a boiler and pressure vessel inspector in accordance with the National Board Inspection Code. It appears that Darwin Stratton's examiner was not qualified to perform the vessel inspection.

Most of these citations do not allege violations that were particularly serious. Many of them cited conditions that were not obvious violations. Nevertheless, Darwin Stratton did not present any evidence to rebut the Secretary's evidence as to the S&S nature of the violation. Consequently, I hold that the Secretary established that the violation was S&S. Darwin Stratton's negligence was moderate. I assess a penalty of $75 for this violation based on the company's small size.

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 about four paid citations were issued at the Airport Pit during the two years preceding August 8, 2000. (Ex. G-11). Darwin Stratton is a small operator. Darwin Stratton did not present any evidence that the penalties assessed in this decision will have an adverse effect on its ability to continue in business. With the exception of Citation No. 7984337, the violations were abated in good faith. 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
WEST 2001-528-M		
6282323	56.18002(a)	$75.00
WEST 2001-538-M		
7966590	50.30	200.00

WEST 2001-557-M

7984337	103(a) of Mine Act	$1,000.00
	Total Penalty	$1,275.00

Accordingly, the citations contested in these cases are **AFFIRMED** as set forth above and Darwin Stratton & Son, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of $1,275.00 within 40 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

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