FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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August 15, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2002-146-M
Petitioner	:	A.C. No. 42-02283-05506
	:	
v.	:	
	:	Rattlesnake Pit
DARWIN STRATTON & SON, INC.,	:	
Respondent	:	

DECISION

Before: Judge Manning

The Secretary of Labor filed a petition for assessment of civil penalty against Darwin Stratton & Son, Inc. ("Darwin Stratton") proposing a penalty of $1,000 for Citation No. 6281686. The citation alleges a violation of section 103(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 813(a), for refusing to permit an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") to inspect the Rattlesnake Pit. When Darwin Stratton did not file an answer to the petition, as required by 29 C.F.R. § 2700.29, the Commission's chief administrative law judge issued an order to show cause to Darwin Stratton. In response to the order to show cause, Mr. Pat Morgan acting for Darwin Stratton filed a letter stating:

> We do not feel that FMSHRC can be or will be fair and impartial in the hearing of Docket No. WEST 2002-146-M, A.C. No. 42-02283-05506 in regard to the CANCELED and Permanently Closed Mine ID No. 42-02283. The former alleged Rattlesnake [Pit] situs NEVER was a mine or pit and NEVER was under the jurisdiction of MSHA. Therefore, your March 19, 2002, ORDERED threat of default and penalty (punishment) continues the process of force and fear by FMSHRC, MSHA, and the Office of the Solicitor.

(emphasis in original). Darwin Stratton enclosed a number of documents, including a Motion for the Voluntary Recusal of the Honorable David Sam,[1] a memorandum in support of this recusal motion, and a copy of MSHA's Quarterly Employment Form for the first quarter of 2002 on which Morgan had stamped "CANCELED." The chief judge accepted this response to the order to show cause and the case was assigned to me.

Citation No. 6281686 was issued on November 8, 2000, by MSHA Inspector Stephen Wegner and alleges a violation as follows:

> Pat Morgan, a consultant acting on Darwin Stratton & Son Inc.'s behalf, refused to allow an authorized representative to enter the mine for the purpose of conducting an inspection of the mine. Mr. Morgan refused to acknowledge Judge Manning's October 3, 2000, decision stating that MSHA has jurisdiction to inspect the Rattlesnake Pit. Mr. Morgan felt that he had canceled all review commission action last July. Mr. Morgan was told that refusal to allow the inspection was in violation of the provisions of section 103(a) of the Mine Act.

In *Darwin Stratton & Son, Inc.*, 22 FMSHRC 1265 (Oct. 2000), I held that the Rattlesnake Pit is a mine subject to the jurisdiction of MSHA. In that case, Darwin Stratton requested a hearing on citations and orders issued at the Rattlesnake Pit. I set the case for hearing, at Darwin Stratton's request, but Darwin Stratton and Mr. Morgan refused all mail service from me and from the Office of the Solicitor. 22 FMSHRC 1269-70. No representative from Darwin Stratton appeared at the hearing held in Washington, Utah, on October 3, 2000.

Based on evidence presented by the Secretary at the hearing, I concluded that the Rattlesnake Pit was subject to the jurisdiction of MSHA at the time of the inspection in late April 2000. I based this determination, in part, on the fact that the wash plant at the facility was used to prepare excavated rock and that this rock was then fed into a hopper and conveyed to a single-deck screen to separate out oversized material. 22 FMSHRC 1267-69. The Mine Act defines a mine broadly to include "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, or to be used in, the milling of such minerals, or the work of preparing . . . minerals . . . ." 30 U.S.C. § 802(h)(1). Thus, the fact that Darwin Stratton was, at a minimum, milling or preparing minerals at the site that had been extracted from their natural deposits, established

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[1] The Secretary brought an action against Darwin Stratton in the United States District Court for the District of Utah seeking temporary and permanent injunctions against Darwin Stratton for refusing to allow MSHA inspectors to enter its facilities. Judge Sam sits on the District Court and I presume he has jurisdiction over the injunction actions.

MSHA jurisdiction. Stone, rock, gravel, and sand are "minerals" as that term is used in the Mine Act. *Richard E. Seiffert Resources*, 23 FMSHRC 426, 427 (April 2001) (ALJ). I also held that the sale of the prepared minerals entered or affected interstate commerce. 22 FMSHRC 1269. I entered similar findings with respect to Darwin Stratton's Airport Pit in *Darwin Stratton & Son, Inc.*, 24 FMSHRC 403 (April 2002).

On May 17, 2002, I issued a prehearing order in the present case directing the parties to confer in an effort to settle the case. I also addressed the jurisdiction issue raised by Darwin Stratton and stated that if Darwin Stratton permanently closed the Rattlesnake Pit between April and November 8, 2000, MSHA jurisdiction may have terminated.

By letters dated June 28, and July 8, 2002, John Rainwater, counsel for the Secretary, advised me that he had made several unsuccessful attempts to contact Mr. Morgan to discuss the case. He also talked to people at Darwin Stratton's office who advised him that Mr. Morgan would be available by phone in Darwin Stratton's office on July 1, 2002. Mr. Rainwater was unable to reach Mr. Morgan and Mr. Morgan did not return any of his phone calls.

On July 16, 2002, I issued an order directing Darwin Stratton to advise me, in writing, whether it will appear at a hearing and present evidence on the jurisdictional issues. In his response, Mr. Morgan reiterated that Darwin Stratton canceled ID. No. 42-02283 and that MSHA officials have "first-hand knowledge" of this cancellation. Mr. Morgan stated that he previously notified me that Darwin Stratton was "waiving the prehearing order and request to a review on the CANCELED MINE ID No. 42-02283." (emphasis in original).[2] With respect to settlement, Mr. Morgan stated that the jurisdiction issue must be resolved "in the District Court venue and, if necessary, even to the Supreme Court." In the final paragraph, Mr. Morgan stated that "Respondent once again waives its request for a hearing by the FMSHRC due to the fact that it cannot be fair or impartial to the Respondent." (emphasis in original).

Based on the statements contained in documents filed by Darwin Stratton in this case, I conclude that Darwin Stratton is no longer requesting a hearing. Under 29 C.F.R. § 2700.3(b)(4), Mr. Morgan is authorized to represent Darwin Stratton and he is the only person who has responded to the Commission's orders in this case and the other cases involving Darwin Stratton. Consequently, I enter findings of fact and conclusions of law based on the record in this case and the record in previous cases before me involving the Rattlesnake Pit.

On April 21, 2000, an employee of Darwin Stratton was fatally injured at the Rattlesnake Pit when she became entangled in a moving conveyor-belt tail-pulley that was not

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[2] Mr. Morgan attached a letter addressed to me, dated June 24, 2002, which states that Respondent has "decided to waive the prehearing order and proceed to resolve this whole matter in the District Court venue." I do not recall seeing this letter but, because it does not contain a docket number, it may have been misfiled.

guarded. MSHA conducted an investigation and issued a number of citations against Darwin Stratton. I held a hearing in that case on October 3, 2000, but no representative of Darwin Stratton appeared at the hearing. The Secretary presented evidence as to the nature of the operations at the Rattlesnake Pit. Based on that evidence, I concluded that the Rattlesnake Pit was a "coal or other mine" as that term is defined in section 3 of the Mine Act. 22 FMSHRC at 1267-70. I described the Rattlesnake Pit as follows:

> The Rattlesnake Pit is a small sand and gravel mine owned and operated by Darwin Stratton near Hurricane, Utah, in Washington County. Sand and gravel is extracted from a dry stream bed, transported by truck to an adjacent wash plant, and stockpiled. The stockpiled material is fed into a hopper and conveyed to a single-deck screen where oversized material is separated. The sand is then fed into a screw classifier and mixed with water to remove unwanted material.

22 FMSHRC at 1267. In my prehearing order in the present case, I advised Darwin Stratton that if it permanently shut down the Rattlesnake Pit between April and November 2000, MSHA's jurisdiction may have ceased, but it waived its right to present evidence on this issue.

I conclude that the Rattlesnake Pit is a "coal or other mine" and that it is subject to the jurisdiction of the Secretary under section 4 of the Mine Act. Consequently, I find that Darwin Stratton violated section 103(a) of the Mine Act when it refused to allow an MSHA inspector onto its property at the Rattlesnake Pit.

Section 110(i) of the Mine Act sets out six criteria to be considered in determining an appropriate civil penalty for a violation of the Mine Act. The petition for penalty states that 27 citations were issued at the pit during the previous 24 months. Darwin Stratton is a small operator. The citation was not abated in good faith and section 104(b) Order No. 6281687 was issued. There has been no showing that the penalty assessed in this decision will have an adverse effect on Darwin Stratton's ability to continue in business. The violation was serious because it was reasonably likely that an inspection would have revealed hazardous conditions that needed correction. Darwin Stratton's negligence was high because it intentionally refused to allow the inspection in the face of a previous finding of jurisdiction. Darwin Stratton had not notified the local MSHA office that it closed the pit after April 2000 and it did not so advise Inspector Wegner. It simply stamped "Canceled" on MSHA documents to indicate that it was refusing MSHA jurisdiction. An operator cannot unilaterally nullify MSHA jurisdiction. Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess a penalty of $1,000 for this violation.

ORDER

Accordingly, section 104(a) Citation No. 6281686 and section 104(b) Order No. 6281687 are **AFFIRMED** and Darwin Stratton & Son, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of $1,000.00 within 40 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

Distribution:

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