

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

July 6, 2007

POWDER RIVER COAL, LLC,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEST 2006-514-R
	:	Citation No. 7610111; 7/18/2006
v.	:	
	:	
SECRETARY OF LABOR,	:	North Antelope Rochelle Mine
MINE SAFETY AND HEALTH	:	Id. No. 48-01353
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2007-197
Petitioner	:	A.C. No. 48-01353-106519
	:	
v.	:	
	:	North Antelope Rochelle Mine
POWDER RIVER COAL, LLC,	:	
Respondent	:	

**DECISION**

Appearances: R. Henry Moore, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for Powder River Coal, LLC;  
Gregory Tronson, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Secretary of Labor.

Before: Judge Manning

These cases are before me on a notice of contest filed by Powder River Coal, LLC (“Powder River”) and a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”) 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”). Powder River contested a citation issued under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 50.20(a). An evidentiary hearing was held in Denver, Colorado. The parties introduced testimony and documentary evidence and filed post-hearing briefs.

## I. BACKGROUND

Powder River owns and operates a large surface coal mine known as the North Antelope Rochelle Mine in Campbell County, Wyoming. The mine employed about 836 people in May 2006 and produced about 88.5 million tons of coal in 2006. The mine is in a remote location surrounded by ranch lands.

On May 27, 2006, Lee Boyd, a miner at Powder River, was leaving the mine at the end of his shift. He lost control of his motorcycle and skidded off the road onto the shoulder. At the time of the accident, Boyd was traveling west on County Road 31. He was about 2 miles beyond Powder River's guard shack and 1.5 miles from Campbell County Road 4 (Antelope Road). (Tr. 15, Ex. G-5). The accident occurred within the outside permit boundary of the mine and adjacent to surface land owned by Powder River. Boyd sustained serious injuries.

Deborah Diedrich, Powder River's safety and training manager, was notified of the accident.<sup>1</sup> Because the accident involved serious injuries, she called Allyn Davis, MSHA's District 9 Manager, to report the accident. The Campbell County Sheriff's Office and MSHA investigated the accident. (Ex. G-3). MSHA Inspector William Younkin issued Citation No. 7610111 alleging a violation of section 50.20(a) because Powder River failed to file an accident/injury report with MSHA within 10 days of the accident. The citation states:

The mine operator did not complete and mail a Mine Accident Injury Report Form 7000-1 to MSHA within ten working days after the motorcycle injury accident that occurred on May 27, 2006 at 7:15 pm. The accident makes reference to employee Lee Boyd, the motorcycle operator that received the injuries.

Inspector Younkin determined that an injury was unlikely but that any injury resulting from the violation is likely to result in lost workdays or restricted duties. He determined that the violation was not of a significant and substantial nature ("S&S") and that Powder River's negligence was high. The regulation provides, in part, that "[e]ach operator shall report each accident, occupational injury, or occupational illness at the mine." The regulation sets forth the form to be used for reporting and states that this form must be mailed within ten working days after the accident or occupational injury. Section 50(2)(e) defines occupational injury, in part, as "any injury to a miner which occurs at a mine for which medical treatment is administered . . . ." The Secretary proposes a penalty of \$500.00 for this citation.

The parties do not dispute that Boyd was seriously injured in his motorcycle accident. Powder River contends, however, that the injuries did not occur at its mine because the road on which the accident occurred was a public road.

---

<sup>1</sup> In some of the testimony and exhibits, Ms. Diedrich is referred to as Deborah Heimann, which is her maiden name.

## II. SUMMARY OF THE EVIDENCE

Inspector Younkin testified that he issued the citation when Powder River did not file the accident form. The inspector relied, in part, on MSHA's Program Policy Manual ("PPM") in issuing the citation. (Tr. 17; Ex. G-2). In his testimony, Inspector Younkin pointed out that the officer from the Campbell County Sheriff's Department indicated on his report that the accident occurred on private property. (Tr. 19; Ex. G-3). Inspector Younkin also relied on signs along the roadway between the County Road 4 and the accident site that read "Permit boundary. North Antelope Rochelle Complex. Notice: Restricted Area. Keep Out." (Tr. 25; Ex. G-5 p. 1). These signs face west so that "people driving east, towards the mine site" would see them. *Id.* The inspector also relied on a sign that included the following language: "Powder River Coal Company, North Antelope/Rochelle Mine." (Tr. 26; Ex. G-5 p. 4). He testified that this sign was located "at the antelope entrance towards the access road, on the west end." (Tr. 26). He admitted that these signs were on the other side of the fences on the lands adjacent to the roadway and that they warned people to keep off those lands. (Tr. 54). He also admitted that there were no signs restricting access to the road. Similar signs are posted along County Road 4.

Inspector Younkin also testified the road was the primary access road to the mine and that the entire road was built by Powder River Coal Company in 1982. (Tr. 28). He notes that all of the mine's employees used the road to access the mine, as well as "all the vendors, contractors that are required to accomplish work on the mine site" and "commercial and industrial" vehicles that carry equipment to be used on the mine site. (Tr. 28-29). He testified that the primary use of the road is for those traveling to or from the mine.<sup>2</sup> *Id.* The inspector testified that this road is different from other county roads because it is not a "throughput destination" that allows traffic to enter from different directions. The road terminates at the mine access road. In addition, it is not labeled with a road name and there were no "signs of any kind designating it as part of Campbell County's jurisdiction." *Id.* Inspector Younkin admitted that this road also provides access to parts of the Bridle Bit Ranch Company ("BBRC").

In addition, Inspector Younkin testified that Don Gibson, a supervisory MSHA inspector, discussed the road with Powder River in 2004 because he was concerned about the adequacy of the berms on one section of the road. The company showed Gibson the design specifications for the road and berms, which satisfied him. (Tr. 31-33). No citations were issued.

Inspector Younkin testified that an independent contractor of Powder River was cited for not reporting an accident on the same road in September 2005. (Tr. 34; Ex. G-8). The sheriff's report for that accident also indicated that it occurred on private property.

Finally, Inspector Younkin testified that the mine access road has "undergone a complete change" since he issued the citation. There is a sign at the entrance of the road on County Road 4

---

<sup>2</sup> Coal is transported from the mine on railroad cars, so coal haul trucks do not travel on County Road 31.

that states that the new access road for the mine is 1.3 miles to the north. (Tr. 35; G-9). This change occurred because Powder River is planning to expand the pit into the area occupied by that part of the access road that is closest to the mine.

Ms. Diedrich testified on behalf of Powder River. She stated that she advised the independent contractor to contest the citation it received for not reporting the accident on the road, but the contractor just wanted to pay the fine. (Tr. 69).

Diedrich also testified that when she discussed the road with Inspector Gibson in 2004, she brought up the jurisdictional issue with him. Gibson, on the other hand, testified that he could not recall having a conversation with Diedrich about jurisdiction over the road prior to the May 2006 accident. (Tr. 118). The area of concern to Inspector Gibson was closer to the guard shack and the company installed additional berms at that location. (Tr. 70-72). Powder River used its own employees to complete this work. (Tr. 79).

Ms. Diedrich made the decision to call Mr. Davis at MSHA when she was told that Boyd was seriously injured in the accident. (Tr. 73). She stated that she called Davis despite “differing opinions as to jurisdiction on that road” to “err on the cautious side to make the report.” *Id.* Diedrich added that she informed Davis that she did not believe that MSHA had jurisdiction, but she called anyway. *Id.* She states that Davis asked her “who maintains the road” and she told him that the mine did. *Id.*

Diedrich says she traveled to the accident site after Inspector Younkin arrived that day. She took a number of photos the next day and labeled them. (Tr. 74; Ex. R-11). Based on her examination of the evidence she determined that Boyd “was traveling too fast, and as he went around this slight curve, he failed to negotiate appropriately and he skidded off the road.” (Tr. 76).

Diedrich testified that the area of the road where the accident occurred was open to the public. (Tr. 78). She does not dispute that a “majority of the use on that road is for Powder River purposes.” (Tr. 80-81). Also, in response to her conversation with Inspector Gibson in 2004, Powder River installed signs that read “Caution Low Shoulder” in several locations. (Tr. 81; Ex. G-5 p. 3). She also admitted that Powder River built and maintained the road along its entire length. (Tr. 82).

Curtis Belden, a senior manager of engineering for Powder River’s strategic planning office, testified that he prepared Exhibit G-7, a map of the mine and access road. The aerial photography on which the map was based was completed two days before the accident occurred. (Tr. 88). The access road is color coded on the map into three parts. The first section, which connects to County Road 4 is labeled “U.S.F.S. Dedication,” the middle section is labeled “Peabody Coal Company Dedication,” and the section closest to the mine is labeled “NARM

Access Road.”<sup>3</sup> The accident occurred on the middle portion of the road denoted as the Peabody Coal Company Dedication. Belden noted that the “BBRC Ranch Approach” labels on the map show the access roads off County Road 31 that “give Bridle Bit Ranch company employees and owners access to the properties they control on both sides of the road.” *Id.*

Belden testified that the portion of the road where the accident occurred was dedicated by Peabody to the county. He stated that Peabody gave the county the right to occupy a 100 foot wide tract of land for use as a county road. (Tr. 91; Ex. R-2). He testified that the road was built so that the center line of the road is in the center of the right-of-way. (Tr. 92).

Belden then testified that the portion of the road identified as a U.S.F.S. dedication was a conveyance of an easement by the United States of America, through the Forest Service to Campbell County for a right-of-way for a public road. (Tr. 93; Ex. R-3). After the two rights-of-way were granted to the county, “the Campbell County commissioners passed a resolution to dedicate this road as a county road.” (Tr. 94; Ex. R-4). The resolution establishes the road “as a public county road” and references both the right-of-way from Peabody and the easement from the Forest Service. (Tr. 95; Ex. R-4). Belden testified that County Road 31 was shown on the county’s database of county roads. *Id.* He stated that it is not unusual for a county road to dead end at a ranch or other property. (Tr. 96). County Road 31 begins at its intersection with County Road 4 and ends at the NARM access road. The map denotes this end point as “End CR #31.” (Ex. G-7). Belden stated that the road was created mostly for the benefit of the mine and that the county would not have built the road independently. (Tr. 112). Belden admitted that a “majority of the use of that road at the time of the accident was for Powder River.” (Tr. 113-114). Before the road was built, there was a dirt “two-track” road in the same location, with grass growing between the tracks.

Belden said that the maintenance of the road is performed by Powder River “pursuant to a maintenance agreement with the county.” (Tr. 96; Ex. R-5 & R-6). The road maintenance is completed using Campbell County road standards. *Id.* He also noted that Powder River assists in clearing snow from County Road 4. (Tr. 97).

Belden testified that the subject road is no longer being used by vehicles traveling to and from the mine because Powder River will be expanding the pit through part of the NARM access road. (Tr. 98). Powder River requested that Campbell County vacate the road and the county formally abandoned the road in October 2006. (Tr. 98; Ex. R-22). Upon vacation, the ownership of the road reverted back to the surface owners. Most of the road is now a private road that is used by various people to get to the Bridle Bit Ranch and other properties from County Road 4. (Tr. 111). Powder River no longer uses the road.

---

<sup>3</sup> U.S.F.S. refers to the United States Forest Service. Peabody Coal Company is Powder River’s parent company. NARM refers to the North Antelope Rochelle Mine.

Using Exhibit G-7, Belden testified that intersections on County Road 31 used by Bridle Bit Ranch were “constructed . . . with appropriate drainage that allow[s] larger trucks to exit County Road 31 and go north and south on the Bridle Bit Ranch property.” (Tr. 99). He stated that Bridle Bit Ranch employees use its roads to tend livestock on the property and that suppliers for Bridle Bit Ranch “bring repair equipment or supplies on the property to repair fences, to maintain water wells, to bring in the winter . . . feed onto the property.” (Tr. 100). Belden contacted the Bridle Bit Ranch foreman and was told that “the ranch used those accesses on average three to six times a week and in the wintertime . . . everyday.” *Id.* Vehicles used by BBRC include a “three-quarter ton pickup . . . and in some cases larger trucks” and trucks to transport livestock such as “large stock trailers pulled by a large pickup truck, or in some cases they have had 18-wheel stock trailers.” (Tr. 102). The Bridle Bit Ranch access points are at several locations along County Road 31. The subject road is still used by BBRC to travel to and from County Road 4.

Oil and gas operators also used County Road 31 to access their operations. These operators send large tank trucks down the road to collect the oil. (Tr. 105). These wells are also serviced on a regular basis. *Id.* Belden also testified that gas pipelines pass through the area and that crews used County Road 31 to access these pipelines about once a month. *Id.* Power distribution lines run through the area and were checked “about once a month” by crews who traveled to them via County Road 31. (Tr. 106). Qwest also uses the road to access the telephone lines. (Tr. 107). Belden admitted that these utilities are present in the area primarily to service the mine. Though the road is now private, BBRC and the other entities still use the road by right of their oil and gas development or because of pre-existing relationships with the surface land owners. (Tr. 112).

Belden stated that the signs testified to by Inspector Younkin that restricted access to the property adjacent to the roadway were required to be placed and oriented in a specific way by the Wyoming Department of Environmental Quality. (Tr. 108). He says these signs “are intended to convey the location of the permit boundary that is approved by the Wyoming Department of Environmental Quality” and to warn people that the surrounding property is an active mining operation. He testified that these signs concern the area behind the fence and not the road. *Id.*

### **III. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW**

#### **A. Brief Summary of the Argument**

The Secretary argues that the access road was “related to the mining activity of NARM and was used in the manner of a private road from the date it was constructed by the mine to the date the mine decided to mine through the road.” (S. Br. 6). Because the road was constructed by Powder River solely for the purpose of providing access to the mine and it was maintained by Powder River for its benefit, it exercised sufficient control over the road to consider it to be a

private road appurtenant to the mine for the purposes of the Mine Act. Signs posted along the road indicate that the road was intended for private use.

Powder River argues that because the road was a county road open to the public it was not subject to MSHA jurisdiction. The access road was declared to be a public road by Campbell County in 1982 and it remained so for the 24 years leading up to the accident. The road was also actually used as a public road. Indeed, many vehicles on the road were going to other destinations, such as the Bridle Bit Ranch. Although Powder River performs all maintenance on the road, it does so using Campbell County road standards as required by the maintenance agreement. The fact that Powder River was granted the authority to keep the road in good repair does not confer Mine Act jurisdiction over the road.

## **B. Analysis**

Section 3(h)(1) of the Mine Act defines “coal or other mine” as:

(A) an area of land from which minerals are extracted . . . (B) *private ways and roads* appurtenant to such area, and (C) lands, excavations, . . . workings, 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 . . . .

30 U.S.C. § 803(h)(1) (emphasis added).

I find that the portion of the access road where the motorcycle accident occurred is not included within the definition of coal or other mine because it was not a private way or road. Consequently, MSHA did not have jurisdiction over the road or the accident that occurred on the road. The evidence demonstrates that Peabody and the Forest Service granted Campbell County a right-of-way for the establishment of a road. In 1982, the Campbell County Board of Commissioners created County Road 31 on this right-of-way. All of the instruments necessary to effectuate the creation of this road were duly executed and recorded.<sup>4</sup> (Exs. R-2 through R-7). There were no legal or physical restrictions on anyone entering the road from County Road 4 and driving down the road past the location of the accident. The accident occurred on the road near the intersection of a dirt road leading south onto the Bridle Bit Ranch to an active oil and gas well. This part of County Road 31 had been dedicated to the county by Peabody and the land on either side of the road was North Antelope Rochelle Mine property. (*See* Ex. G-7). No extraction or other mining activities were taking place near the accident site.

---

The evidence shows that officers with the Campbell County Sheriff’s office checked the “Yes” box on traffic accident report forms where the form asks “On Private Property?” (Exs. G-3 & G-8). This fact does not have the effect of turning a public road into a private road.

There is no dispute that the county did not construct or maintain the road. Powder River agreed to perform those functions at its cost under a maintenance agreement it entered into with the county. Nevertheless, the road was a county road open to the public. The Secretary argues that the road is essentially Powder River's road because most traffic on the road is generated by the mine and Powder River built and maintains the road. Thus, the Secretary contends that, because Powder River effectively "controlled" the road, she has the authority to exercise jurisdiction over the road under the Mine Act. The Secretary ignores the fact that the language of the Mine Act specifically grants MSHA jurisdiction over *private* roads. The Mine Act does not grant MSHA jurisdiction over a public road if a mine operator built and maintained the road or exercises some degree of control over the road. In this instance, the county allowed Powder River to build and maintain the road but Powder River does not have the right to control the traffic on the road. It is clear that Powder River does not have the authority to limit the amount or type of traffic on the road. In addition, it is worth noting that mines are usually located in rural areas. In most cases, a high percentage of the traffic on local public roads near such mines is directly related to the mining activity. This fact does not give MSHA jurisdiction over a public road. Indeed, much of the traffic on County Road 4, which is clearly not subject to MSHA jurisdiction, also travels to and from the mine.

The Secretary also relies on the warning signs Powder River posted along the road. I find that it is clear that these signs warn people to keep out of the land adjacent to the road and they do not restrict access to the road. (*See Ex. G-5*). Similar signs are located along County Road 4. These signs are similar to "No Trespassing" signs that are often found on land adjacent to rural roads. Indeed, these signs support the position of Powder River that the road is open to the public. If the road were private, there would be no need for such signs. All that would be necessary for a private road would be a gate, warning signs, or no trespassing signs at the entrance of the road.

The Secretary relies on MSHA's PPM to confer jurisdiction. The section of the PPM introduced at the hearing states that MSHA has the authority to assume jurisdiction of mine roads which pass through federal land administered by agencies that do not have responsibility for health and safety on those roads. (*Ex. G-2*). The PPM states that the presence of any of several factors should weigh in favor of including of the road under MSHA jurisdiction. Included among the factors listed in the PPM are whether the road is maintained by the operator, whether the operator has the legal right to bring the road into compliance with MSHA regulations, whether the road provides a major means of access for mine vehicles, and whether the road was built by or for the mine operator. *Id.* I hold that the Secretary does not have the authority to confer jurisdiction over public roads to MSHA through the PPM. If a road is a public dedicated road, that is the end of the question because the Mine Act specifically limits MSHA jurisdiction to private ways and roads. Both the federal government and Powder River granted a right-of-way to Campbell County for the purpose of creating a public road and such road was actually established by the county.



At least one court as well as the Commission have addressed similar issues. In *Bush & Burchett, Inc. v. Reich*, the Sixth Circuit held that a road used to connect a surface mine on one side of a river to a rail load-out facility on the other side was not a mine because the road was conveyed to the state after it was constructed. (117 F.3d 932 (6<sup>th</sup> Cir. 1997)). The road was open to public use even though it was constructed for the benefit of the mine and the mine operator was a primary user of the road. In *National Cement Co. of Calif.*, the Commission determined that a private road constructed and used by a mine operator was not subject to the Mine Act because the operator did not exercise sufficient control over the road. (27 FMSHRC 721 (Nov. 2005)).<sup>5</sup> Use of the road was restricted to those traveling to the mine, the adjacent ranch, and those authorized by the state. A majority of the Commissioners held that, although the road was private, it was not appurtenant to an area of land from which minerals are extracted. National Cement had been cited for not constructing a berm along the road. Looking at the statutory framework as a whole, the majority reasoned that a “finding of Mine Act jurisdiction over the subject road in this instance would not simply mean that National Cement would be obligated to install guardrails or berms along the road; such a finding would raise a host of issues regarding compliance with the Mine Act and Mine Act standards under circumstances where National Cement could not control other users of the road.” (27 FMSHRC at 730). The Commission further stated that a finding that property is a coal or other mine “has far ranging consequences under the Act.” The decision set forth some of these potential consequences in detail. (27 FMSHRC at 731-35).

These two decisions support a finding that County Road 31 is not a coal or other mine. If the road is a coal mine, not only would Powder River be required to report all traffic accidents on the road to MSHA, but all of the terms and conditions of the Mine Act and the Secretary’s safety and health standards would apply to the road. For example, section 3(g) defines a miner as “any individual working in a coal or other mine.” If an employee of the Bridle Brit Ranch were to commit a violation of a safety standard while driving down the road for his employer, he could be considered to be a miner because he would be an individual working in a coal or other mine. It is important to remember that the Mine Act is a strict liability statute. If the road is deemed to be part of its coal mine, Powder River’s liability under the Mine Act would expand significantly to include individuals over which it can exercise little or no control. Thus, I find that the road is not appurtenant to an area of land from which minerals are extracted.

In summary, I hold, based on the definition contained in section 3(h)(1) of the Mine Act, that the subject road is not a coal or other mine. The road is not a private way or road.<sup>6</sup>

---

The Secretary appealed the Commission’s decision to the D.C. Circuit, where the case is still pending (No. 06-1094).

My holding in this case is limited to those portions of the road that were dedicated to the county to create County Road 31. I do not make any jurisdictional findings for that portion of the road between the designations “End CR 31” and “Security Gate,” labeled as the “NARM Access Road” on Exhibit G-7. This distinction is somewhat moot under the facts here because, after the

Secondarily, I find that the road is not appurtenant to an area of land from which minerals are extracted because Powder River is unable to control the use of the road by others. It is not disputed that Powder River made modifications to some berms because of concerns raised by Inspector Gibson and that Ms. Diedrich called Mr. Davis to notify MSHA of the accident. These facts do not prevent Powder River from raising the jurisdictional issues in this case. Because I find that County Road 31 is not a coal or other mine, MSHA did not have jurisdiction to issue Citation No. 7610111 to Powder River and the citation must be vacated. In addition, because section 50.20(a) requires mine operators to report injuries that occur at “the mine,” Powder River was not required to report Mr. Boyd’s accident because it did not occur at the mine.

#### IV. ORDER

For the reasons set forth above, Powder River’s notice of contest is **GRANTED**, Citation No. 7610111 is hereby **VACATED**, and these proceedings are **DISMISSED**.

Richard W. Manning  
Administrative Law Judge

Distribution:

R. Henry Moore, Esq., Jackson Kelly PLLC, Three Gateway Center, Suite 1340, 401 Liberty Avenue, Pittsburgh, PA 15222 (Certified Mail)

Gregory W. Tronson, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202 (Certified Mail)

RWM

---

citation was issued, the road was vacated and Powder River constructed a new mine access road to the north of the pit. A decision on the merits was necessary to resolve Powder River’s contest of the citation. In addition, my resolution of the issues may help resolve similar issues along the newly constructed road.