

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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April 5, 2000

COX TRANSPORTATION CORP./COX	:	CONTEST PROCEEDINGS
ROCK PRODUCTS, INC.,	:	
Contestant	:	Docket No. WEST 99-155-RM
	:	Citation No. 7911843; 2/5/99
	:	
	:	Docket No. WEST 99-156-RM
v.	:	Citation No. 7911745; 2/5/99
	:	
	:	Docket No. WEST 99-157-RM
	:	Citation No. 7911846; 2/5/99
	:	
SECRETARY OF LABOR,	:	Docket No. WEST 99-158-RM
MINE SAFETY AND HEALTH	:	Citation No. 7911783; 2/8/99
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. WEST 99-159-RM
	:	Order No. 7911784; 2/8/99
	:	
	:	Cox Rock Portable #3
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 99-369-M
Petitioner	:	A.C. No. 42-02201-05501 G3S
	:	
v.	:	Docket No. WEST 99-370-M
	:	A.C. No. 42-02201-05502 G3S
	:	
COX TRANSPORTATION CORP./COX	:	
ROCK PRODUCTS, INC.,	:	Docket No. WEST 99-371-M
Respondent	:	A.C. No. 42-02201-05503 G3S
	:	
	:	Cox Rock Portable #3

**ORDER DENYING COX TRANSPORT CORPORATION'S  
MOTION TO DISMISS AND FOR SUMMARY DECISION**

Cox Transport Corporation ("Cox Transport") filed a motion to dismiss and for summary decision on the basis that the Department of Labor's Mine Safety and Health Administration lacked jurisdiction over the area where an employee of Cox Transport was fatally injured. The Secretary opposes the motion and asserts that MSHA had jurisdiction.

The driver of a bottom-dumping truck was fatally injured when his clothing became entangled in the clamshell dump at the bottom of the truck. He was on his way to an aggregate mine to receive his first load of material for the day when the accident occurred. He was found under the truck on an unpaved road outside the mine's gateposts. The road was not closed to the public. The site of the accident was about 300 feet from the mine's scale house. The driver was employed by Cox Transport and he was assigned to pick up material from the mine and deliver it to a road construction site. This was his first trip of the day and he had not entered the active areas of the mine.

Cox Transport maintains that there is no basis for MSHA jurisdiction in these cases. It argues that:

[t]he truck was well outside the entrance to the mine, parked in a public area where no mining activities occurred, and this was an area distinct from any mining activity. In short, the area where the truck was located at the time of the accident is not part of the "parcel" of land on which the pit, crusher, and scale house were located.

(CT Surreply 2). Cox Transport's analysis fails to take into consideration the broad reach of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 802 and 803. The starting point for an analysis of Mine Act jurisdiction is 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, ... structures, facilities, equipment, machines, tools, or other property ... on the surface or underground, used in, or to be used in ... 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, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 14 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95<sup>th</sup> Cong., 2<sup>nd</sup> 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).

Cox Transport argues that because the road where the accident occurred was open to the public and the truck had not yet entered the mine that day, MSHA lacked jurisdiction. Cox Transport notified Utah-OSHA not MSHA of the fatal accident.

Jurisdictional issues under the Mine Act are often factually complex. The Commission and various federal circuit courts have wrestled with these issues. The circuit court decisions cited by the parties base their holdings on the precise facts presented and these decisions are not entirely consistent. A slight change in the facts may change the results in a jurisdictional case. The Secretary takes what is often called a "nooks and crannies" approach when interpreting OSHA

jurisdiction. OSHA fills in the nooks and crannies that other safety statutes do not cover. Whether MSHA has jurisdiction under the specific facts at issue here will be one of the key issues in these cases.

I find that there are too many open factual issues for me to rule that MSHA did not have jurisdiction over the accident. For example, although it appears that the road was open to the public, it is not clear whether the road was on land owned by the mine operator. Ownership may be an important issue of fact. It is also not clear whether this road also leads to non-mining related properties or whether it is primarily used to gain access to the mine. It appears from the photographs submitted by the Secretary that the “gateposts” referred to by Cox Transport may be nothing more than two posts set into the ground on either side of a road. Cox Transport puts great significance on the fact that the accident occurred outside these gateposts, but is not clear how these gateposts relate to the road in question and whether they have any real significance. Cox Transport’s argument that the area where the accident occurred was “not part of the ‘parcel’ of land on which the pit, crusher, and scale house were located” is unclear. Mine Act jurisdiction has never been analyzed by reviewing land, parcel by parcel, to determine which individual parcels fit within the definition in section 3(h). A facility is considered as a whole when determining whether it is a mine.

I find that Cox Transport has not established the two prerequisites to granting summary decision set forth in Commission Rule 67(b): that there are no genuine issues of material fact and that Cox Transport is entitled to summary decision as a matter of law. As stated above, there are a number of genuine issues of material fact. In addition, even if I accept all of the facts presented by Cox Transport, I cannot hold that Cox Transport is entitled to summary decision as a matter of law because the record is not complete. For the same reason, I cannot grant Cox Transport a judgment on the pleadings under *Fed. R. Civ. P.* 12(c).

In denying the motion, I do not hold that the Secretary has jurisdiction over the accident site. I only determine that I need additional facts to resolve the jurisdictional issues presented in these cases with the result that summary disposition is not appropriate. Accordingly, Cox Transport’s motion to dismiss and for summary decision is **DENIED**.

Cox Transport also separately challenges the validity of Citation No. 7911846, which alleges that Cox Transport failed to notify MSHA of the accident. As stated above, Cox Transport notified Utah-OSHA and it contends that such notification was all that was required. Cox Transport maintains that MSHA did not claim jurisdiction until six days after the accident, after Utah-OSHA released the accident scene. Cox Transport asks that the citation be vacated because it was not trying to hide the accident from MSHA and Utah-OSHA had an obligation to notify MSHA if it did not have jurisdiction.

Although Cox Transport characterizes this challenge as separate from its jurisdictional challenge, it is really intimately tied to the jurisdictional challenge. If, after the hearing, I find that MSHA did not have jurisdiction, then this citation will be vacated. If, on the other hand, I find that MSHA did have jurisdiction, whether the citation should be vacated will depend on many

factors that are not in the record at this time. The OSHA/MSHA Interagency agreement does not necessarily resolve the issue. For example, in some states the state OSHA agency has concurrent jurisdiction over mines and the OSHA/MSHA agreement may not apply to Utah-OSHA in any event. Cox Transport has not established that it is entitled to summary decision under Commission Rule 67(b) or a judgment on the pleadings under *Fed. R. Civ. P.* 12(c).

In denying the motion, I do not hold that the Citation No. 7911846 is valid. I only determine that I need additional facts to resolve the issues presented with the result that summary disposition is not appropriate. Accordingly, Cox Transport's motion to vacate Citation No. 7911846 is **DENIED**. The hearing will commence at 9 a.m. on May 30, 2000, in Salt Lake City, Utah, as previously scheduled.

Richard W. Manning  
Administrative Law Judge

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