

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 28, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 99-1-M
Petitioner	:	A.C. No. 39-01315-05512
	:	
v.	:	
	:	HM-2 Crusher
HIGMAN SAND & GRAVEL, INC.,	:	
Respondent	:	

DECISION

Appearances: Mark W. Nelson, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for Petitioner;
 Jeffrey A. Sar, Esq., Baron, Sar, Goodwin, Gill & Lohr, Sioux City, Iowa, for Respondent.

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 801 et seq., the “Mine Act” charging Higman Sand & Gravel, Inc. (hereafter Higman) with a violation of Section 103(a).¹ of the Mine Act with respect to Inspector Sprague’s inspection of the mine

¹ Section 103(a) of the Mine Act provides, in pertinent part:

Authorized representatives of the Secretary ... shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines,...and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act for the purpose of making any inspection or investigation under this Act, ... any authorized representative of the Secretary ... shall have a right of entry to, upon, or through any coal or other mine.

known as HM-2 Crusher Mine, I.D. No. 39-01315, which is located at the Volin Pit just outside the city limits of the town of Volin, South Dakota.

The primary issue presented in this case is whether or not Higman violated Section 103(a) of the Mine Act with respect to Inspector Sprague's April 30, 1998, inspection of the HM-2 Crusher Mine.

Section 103(a) of the Mine Act, in pertinent part, provides that for the purpose of making any inspections under the Mine Act, any authorized representative of the Secretary "shall have a right of entry to, upon or through any coal or other mine." All parties agree that an authorized inspector has that right of entry. The issue presented is whether Inspector Sprague's right of entry "to or upon or through" the HM-2 Crusher Mine was hindered in any way that constituted either a direct or indirect denial of his right to inspect the HM-2 Crusher Mine.

One aspect of this issue is the question of whether Higman's actions under the facts and circumstances of this case constituted a denial of Inspector Sprague's "right of entry to, upon or through" the mine designated as the HM-2 Crusher Mine. The Secretary has the burden of proof on this issue. Upon careful evaluation of all the evidence, I find that the preponderance of the evidence fails to establish a violation of 103(a) of the Act for the reason described below.

Citation No. 7916226, which is the sole citation challenged in the proceeding, identifies the HM-2 Crusher Mine, No. 39-01315, as the mine which Inspector Sprague was inspecting and the mine to which Sprague was denied entry. The citation reads as follows:

Mr. Harold Higman, owner of Higman Sand & Gravel Inc. refuses to provide an authorized representative (sic) of the Secretary the information that he needs to locate the crushing unit. This refusal to provide this information constitutes (sic) a denial of right of entry and is a violation of the provisions of 103 of the Mine Act. Mr. Higman is engaging in aggravative conduct, inexcusable conduct consisting of more than ordinary negligence. (Emphasis added).

It is well established that it is a very serious violation of the Mine Act to prohibit an MSHA inspector from inspecting a mine to investigate or to determine compliance with the Mine Act and the safety regulations.

A denial of entry can include not only direct denials of entry but also indirect denials by action intended to prevent inspection of the mine by interference, delays, or harassment. MSHA's Program Policy Manual - Volume I - describes indirect denials of entry as follows:

Indirect denials are those in which an operator or his agent does not directly refuse right of entry, but takes roundabout action to prevent inspection of the mine by interference, delays, or

harassment. There must be a clear indication of intent and proof of indirectly denying entry. For example, access to the mine is blocked by a locked gate or other means of blockage. However, a locked gate or other means of blockage, in and of itself, does not necessarily constitute a denial of entry. Mine management may have only closed the mine for the day and blocked the mine access road to prevent vandalism. However, when a locked gate is accompanied by continued production and deliberate avoidance of communication with the inspector, the mine operator is denying MSHA right of entry to the mine property. Other examples are listed below. The list is not meant to be all-inclusive, and reference is made only to some of the situations which may constitute an indirect denial.

- a. Refusal to furnish available transportation on mine property when it is difficult or impossible to inspect on foot;
- b. Refusal to provide information regarding, or to accompany inspectors into areas considered unsafe to travel without specific knowledge of the subject mine (e.g., knowledge of on-shift blasting schedules in metal mines;
- c. Withdrawing mine personnel when the inspector arrives;
- d. Removing power from the mine or the mine ventilation system when an inspector arrives (before or after production);
- e. Denying access to equipment or the immediate work area;
- f. Deliberately withholding vital information (ownership, responsible person, name of operator, disposition of product, ownership of equipment, etc.); and
- g. Denying entry for failure to have a search warrant. The Supreme Court, in the 1981 case of *Donovan v. Dewey and Waukesha Lime and Stone Company*, upheld the authority of MSHA to conduct warrantless inspections.

When the mine has an I.D. number and the operator is known and present and does not verbally refuse right of entry, but takes indirect action to prevent inspection of the mine, the inspector should explain the particular actions which are considered to be a denial of entry, and then should proceed

in accordance with the above instructions pertaining to Section 103(a) of the Act, Denials of Entry.

The Program Manual also states with respect to inspection of small mines the following:

IV.G-7 Inspection of Small Mines

Small operations often do not have the resources normally available to larger mines. Time devoted to accompanying inspectors often must be subtracted from productive endeavors and may be a financial burden on the operator. In addition, while the Act entitles the operator to accompany the inspector there is no standard requiring the operator to do so. (Emphasis added).

Background

_____ Higman operates three different sand and gravel surface mines. Each mine has a different location and Mine I.D. No. Each mine is located at a different well-known gravel pit. One mine I.D. No. 1300691 is located at Akron Pit in Akron, Iowa, where the company has its headquarters. A second mine I.D. No. 39-00993 designated as "Screener Pit No. 1" is located at the Grothe Pit in South Dakota and the third mine which is the mine we are specifically concerned with in this proceeding, has the designated name of "HM-2 Crusher" and is located at the Volin Pit next to the town of Volin, South Dakota. The evidence presented satisfactorily established that various MSHA inspectors have inspected the HM-2 Crusher Mine at that site since the 1980s. It is undisputed that the "HM-2 Crusher" Mine is properly registered with MSHA as an "intermittent mine."

It satisfactorily appears from the record that at least since the 1980s the HM-2 Crusher Mine has been operating at the Volin Pit located within one-half mile of the city limits of the town of Volin, South Dakota. It has been inspected by various MSHA inspectors at that location without any impediment.

Stipulations

The parties at the beginning of the hearing entered into the record the following stipulations:

1. Respondent is engaged in the mining and selling of sand and gravel in the United States, and its mining operations affect interstate commerce.
2. Respondent is the owner and operator of the HM-2 Crusher Mine, I.D. No. 39-01315.
3. Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ et seq. (“the Mine Act”).
4. The Administrative Law Judge has jurisdiction in this matter.
5. The proposed penalties will not affect the Respondent’s ability to continue in business.

Additional Stipulations

As the hearing progressed the parties made these significant additional stipulations.

The Respondent proposed and the Secretary’s counsel, after conferring with MSHA Inspectors King and Sprague, stipulated that Colleen A. Olson and Mark Rasmussen, if called, would testify as follows:

Colleen Olson

A. Colleen Olson, if called, would testify that she is an employee of Higman Sand & Gravel; that she works at the Volin Pit in Volin, South Dakota. She started her employment at the Volin Pit on September of 1991 and has been there ever since. She still works there.

Ms. Olson lives in the town of Volin and is at the Volin Pit almost every day. On the days or the times during the day when she is not actually at the pit, she transfers the phone to her house or to whatever different phone number where she might be.

Ms. Olson would testify that the pit is open for business continuously; that customers come and go on a regular basis; that Higman trucks come and go on a regular basis; that the Higman trucks are driven by Higman employees. When there is not a loader operator on-site, the Higman driver will operate the loader to load his truck.

Olson will testify that her duties include weighing trucks and taking orders; that the scale house which serves as her work area is heated so that she can be there year-round.

Ms. Olson would testify it has been several years since they actually conducted any crushing operation at the plant at the Volin Pit; but that more often the most common activity at the Volin Pit is removing materials from the stockpiles.

Ms. Olson would testify she has not heard of a machine called “HM-2 Crusher;” she has been there when MSHA inspectors have come around -- that they are welcome to inspect the pit; and that, if asked, she would show them around the pit. More commonly, the loader operator, which might be Jim Abbott or Mark Rasmussen, would actually show the inspector around the pit. But if asked, she would be happy to do so, and would not require the approval of either Harold Higman or David Higman to allow the inspector to examine the pit or any of the equipment that is located there.

Mark Rasmussen

B. Mark Rasmussen, if called, would testify to the same things as Colleen Olson. Specifically, Mark Rasmussen, if called, would testify that he started with Higman in the spring of 1974. He has been a full-time Higman employee since that date; he has worked at all three of the pits — Volin, Richland, and Akron — from time to time.

He would testify that among the things he has done at the Volin Pit are operating a Grizzly, which is basically a machine with bars that allows the really big rocks to pass on through and the small ones to pass down the bars, and the smaller materials to fall through; he has frequently operated a loader at Volin and, on occasion, has operated a screen at Volin. He would testify that there hasn't been any actual crushing at the Volin site in the last few years; that at Volin they can and do pull material out of the bank with a loader; that material doesn't require anything significant by way of processing; he frequently operates the loader; and when he's not there, the loader, most of the time, is left behind so the drivers of Higman trucks can operate the loader themselves and load their material.

Inspector John R. King

Inspector John R. King did not issue the citation in question but was the first witness called by the Secretary. King testified he inspected the HM-2 Crusher operation in Volin, South Dakota, on September 18, 1996. Along with him was his supervisor Tyrone Goodspeed. King had no trouble finding the HM-2 Mine at the Volin Pit one-half mile from the town of Volin, South Dakota. He got the location of the mine from the report of the inspector who had previously inspected the HM-2 Mine at that same location. At the mine site King talked to three mine employees. In addition to talking to Colleen Olson who worked at the mine scale house, he talked to Jim Abbott the mine's foreman at the Volin Pit and to Mr. Bringman, the equipment operator. The sole citation King issued as a result of the inspection was for a seat-belt violation. King again stopped at the HM-2 Crusher Mine in July 1997. The only person he saw at the mine site on that visit was the scale house operator, Colleen Olson, who told him they were “not running.” King stated he concluded from that statement “they were just simply running out of

their stockpiles.” King testified that, in addition to seeing the employee Colleen Olson, he recalls seeing a front-end loader and the equipment listed in Ex.2B, Tr. 60.

He did not see a crusher machine on any of his visits to the Volin Pit mine site. On cross-examination King conceded that there is no list of equipment nor any equipment listed as being associated with the HM-2 Crusher Mine and that most operations similar to the HM-2 Mine bring different types of equipment in and out of the mine site. (Tr. 58). The Secretary through counsel stated that it is not the Secretary’s or MSHA’s position that a machine called the HM-2 Crusher existed at the HM-2 Crusher Mine site. (Tr. 62).

Olson’s statement that they were “not running” in the context of the facts established at the hearing, obviously meant the mine, at that time was not engaged in production activity such as extracting sand or rock from the earth or engaged in actively processing such material. Respondent presented evidence that the mine was continuously open for mining activity needed to take care of customer orders for sand and rocks including loading and delivery of material from the mine’s stockpiles. Cf Robert L. Weaver, Docket Nos. YORK 93-25-M et al., 15 FMSHRC 2117 (Oct. 4, 1993) (ALJ Melick). Evidence was presented that the sand and rock taken from the Volin Pit needed very little processing other than segregating rocks by size. Respondent also presented evidence that rocks and sand at the mine were intermittently extracted from the earth to meet the demands of their customers and the necessary mining equipment to do that was kept at the mine site. Evidence was also presented that the rock at the Volin Pit was so hard it was not economically feasible to crush it. The mine screens out the larger boulders with a grizzly and generally sells these large boulders to the U.S. Army Corps. The smaller rocks only need segregation as to size.

Inspector Jeran Sprague and the Higmans

On April 30, 1998, Inspector Jeran Sprague, who issued the citation in question, drove to the HM-2 Crusher Mine site at the Volin Pit at Volin, South Dakota, for the purpose of inspecting the HM-2 Crusher Mine. He had no problem locating the mine site or entering the mine site. It is undisputed that he could have freely inspected any and every part of the 350 acre HM-2 Mine site if he wished to do so. He observed the scale house and testified he saw a limited amount of mining equipment. He saw a trap conveyor screener. He explained that a “trap” is the equipment in which the mined material is dumped. He saw the conveyor that conveys the mined material from the trap to a screen that screens the material out the top. He believes he saw a dump truck. He did not see any crushing machine. He did see some weeds that had grown up. It appeared to Inspector Sprague that the mine site at the Volin Pit may have been abandoned and might be operating at a new site that had not been reported to the MSHA office.

Not seeing anyone and seeing only a limited amount of equipment on his arrival at the HM-2 Crusher Mine site he drove to the Higman office located at the gravel pit in Akron, Iowa, even though it was outside his normal travel area. As he arrived at the Akron, Iowa, mine site he saw a crushing plant behind the Higman office. On entering the office he first saw David

Higman, who is the office man for the company. David Higman was talking to a customer. Sprague states he asked if they had someone who could go with him and look at the area out back of the office. Sprague testified that he was told that they did not. Later he talked to Harold Higman who is the field man for Higman. Harold, upon seeing the inspector, told him he appeared to be the inspector who on a prior occasion, on leaving the mine property, spun the wheels of his vehicle throwing rocks, one of which struck and injured his son's eye. Sprague denied he was the one who did that. Shortly thereafter Harold Higman left the office to keep a doctor's appointment.

Higman testified that they were bewildered when Sprague came into the office at the Akron pit at Akron, Iowa, and asked them where the HM-2 Crusher Mine was operating. They told him that the HM-2 Crusher Mine was where it always has been at the Volin Pit where he and other inspectors had always freely made their inspections. In essence, Higman told Inspector Sprague he could inspect the HM-2 Mine and Higman's other two mines without any restrictions just as he had done in the past.

There is ambiguity in Sprague's testimony as to what he was asking for when he entered the Higman office on April 30, 1998, and told Higman he wanted to see or inspect the HM-2 Crusher. They were bewildered because they were sure he knew where that mine was located. They told him that the HM-2 Crusher Mine was where it had always been, where he had inspected it before at the Volin Pit. Apparently, Sprague refused to accept that answer as to the location of the HM-2 Crusher Mine and insisted that they show him the crushing machine named or designated the HM-2 Crusher. Higman told Sprague that they had no crusher machine or other machine that was named, numbered, or designated HM-2 Crusher. Sprague apparently refused to accept that answer and, thereafter, told Higman he was going to issue a citation charging Higman with a violation of Section 103(a) of the Act if they did not show him the HM-2 Crusher machine. At that time Higman had in the area in back of the office at the Akron Pit all four of the crusher machines they owned. Three of the crushers were operational and a fourth, a blue crusher had a "For Sale" sign on it, was not operational. Inspector Sprague showed no interest in seeing or inspecting any crusher machine other than the one named or designated HM-2 Crusher. No proof of the existence of such a crusher was offered. Sprague told Higman he was going to issue a citation for a violation of 103(a) of the Mine Act for not showing him the HM-2 crushing machine. Higman told him to do whatever he had to do.

Sprague left Higman's office and phoned his supervisor. He then returned that afternoon to the Higman office and waited for the Higmans to return to their Akron office. When David Higman returned, Sprague served the citation at issue in this proceeding to David Higman and, in addition, gave Higman a deadline of 30 minutes to show him the HM-2 Crusher machine. Sprague told David Higman if you don't show me or tell me where the HM-2 Crusher is located within the next 30 minutes I'm going to close you down. David Higman testified he thought real hard on how he could keep the business from being shut down and decided that the blue crusher with the "For Sale" on it was as likely as any of their crushers to be one that may have been used at the HM-2 Crusher Mine at the Volin Pit sometime in the past. He told Sprague that blue crusher with the "For Sale" sign on it was probably the one he was looking for. He did not tell

Sprague the HM-2 Crusher Mine at Volin was for sale. That information apparently satisfied the inspector. He did not inspect or request to see the crusher with the “For Sale” on it or any of the three operable crushers that were “out back” of Higman’s office at the Akron site. He did not issue an order closing the mine down.

The testimony of Inspector Sprague, as well as the citation itself, demonstrates Sprague issued the citation because he was not shown or told the location of a crushing machine named or designated HM-2 Crusher. Sprague wrote in his field notes, Pet. Ex. 4 top line of page 2, that when Higman asked which one of the crushers he was talking about he told them “whichever crusher is assigned that number” in obvious reference to the mine named HM-2 Crusher. The Higman’s phoned the MSHA field office after Sprague left their office and to make sure there was no confusion informed Sprague’s supervisor that they were not selling the HM-2 Crusher Mine operation at the Volin Pit.

Conclusion

I agree with counsel for the Secretary that “mine operators are required to supply relevant, available information pertaining to where operations are being conducted when it pertains to a particular mine I.D. number, irrespective of the equipment that’s being operated at any given time.” (Tr. 291). I also agree that consensual exchange of information between MSHA and operator is to be encouraged.

I find in this case, however, based on the record that the preponderance of the evidence presented fails to establish that Respondent materially impeded an inspection of the HM-2 Crusher Mine. It is elementary but important to not lose sight of the well-established fact that, in an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation; *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1294 (Aug. 1992); *Jim Walter Resources Inc.*, 9 FMSHRC 903, 907 (May 1987). In this case the Secretary failed to carry her burden of proof. The evidence presented fails to establish a violation of 103(a) of the Act. The citation must be vacated.

Finding of Facts

1. Higman Sand & Gravel, Inc., operates three gravel pits. “HM-2 Crusher” is just outside of Volin, South Dakota. “Iowa Portable No. 1 is at Akron, Iowa. The Grothe pit, otherwise known as “Screener Pit No. 1”, is outside of Richland, South Dakota. (Tr. 202-204).

2. HM-2 Crusher in the context of this case refers to the HM-2 Crusher Mine located at the Volin Pit just outside the city limits of the town of Volin, South Dakota. (Tr. 211).

3. There has been no crushing done at the Volin pit in several years. (Tr. 210).

4. The Higmans told Inspector Sprague that the HM-2 Crusher Mine was at the Volin Pit, South Dakota, and that he could inspect it any time without any impediment just as he had done on prior occasions.

5. "HM-2 Crusher" is an intermittent operation for at least the last several years. There is mining equipment there, such as trucks, pay loader, conveyor, generally a grizzly, a scale house, and fuel storage. (Tr. 235-238).

6. There is no particular list of equipment associated with "HM-2 Crusher" (Tr. 58). and the Higman Sand & Gravel has not given names to any of its crushers or other machines. (Tr. 204-208).

7. Neither of the Secretary's two witnesses were aware of any instances that anyone had refused an MSHA inspector the opportunity to inspect the HM-2 Crusher Mine at Volin, South Dakota, pit or at the other two Higman pits. (Tr. 63, 69-72, 78, 136).

8. Inspector Sprague was mistaken when he assumed that the HM-2 Crusher Mine had moved its operation away from the Volin Pit site.

9. On April 30, 1998, MSHA Inspector Jeran Sprague entered upon Higman's Akron, Iowa pit and asked Harold Higman and David Higman, officers of Higman Sand & Gravel, Inc., to see a particular crusher assigned the name "HM-2 Crusher". (Tr. 222, 14-141).

10. Higman Sand & Gravel has no particular machine named or designated "HM-2 Crusher" and so informed Inspector Sprague. (Tr. 221, 269-270).

11. MSHA Inspector Jeran Sprague at all relevant times was afforded the opportunity to freely inspect the "HM-2 Crusher" which was the mine located just outside Volin, South Dakota as well as Higman's other two mines. (Tr. 136, 223, 272-273, 276).

ORDER

It is **ORDERED** that Citation No. 7916226 alleging a violation of 103(a) of the Act shall be and is hereby **VACATED** and the above-captioned case is **DISMISSED**.

August F. Cetti
Administrative Law Judge

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