CCASE:
SOL (MSHA) V. DRILLEX INCORPORATED
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. SE 92-130-M
	:	A.C. No. 54-00340-05501
v.	:	Proyecto Montehiedra
DRILLEX INCORPORATED, Respondent	:	

DECISION

Appearances: Jane Snell Brunner, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York for the Petitioner;
Doris Qui¤ones-Tridas, Esq. and Miquel E. Bonilla-Sierra, Esq., for Respondent.

Before: Judge Barbour:

STATEMENT OF THE CASE

In this civil penalty proceeding, brought by the Secretary of Labor ("Secretary") against Drillex Incorporated ("Drillex") pursuant to sections 105(d) and 110(a) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. 815(d) 820(a), the Secretary charges Drillex with 13 violations of mandatory safety standards for surface metal and nonmetal mines found in Part 56, Title 30, Code of Federal Regulations ("C.F.R."), and with one violation of the legal identity reporting requirements found at Part 41, 30 C.F.R. In addition, the Secretary asserts that several of the alleged violations were significant and substantial contributions to mine safety hazards. ("S&S" violations).

The alleged violations were cited on August 17, 1992, by inspectors of the Secretary's Mining Enforcement and Safety Administration ("MSHA") during an inspection of Drillex's Montehiedra Project (the "Project"). In answer to the Secretary's subsequent proposal for the assessment of civil penalties, Drillex did not deny the existence of the violations or that they were S&S, but rather raised a more fundamental issue by asserting the Project was not a "mine" within the meaning of the Act and therefore that MSHA was without jurisdiction to issue the citations in question.

The matter was one of a series of cases involving different operators that was called for hearing in San Juan, Puerto Rico.

At the commencement of the hearing, counsels for the parties stated that they had reached stipulations regarding all factual issues, thus obviating the need for the taking of testimony. Tr. 4-5. They further agreed the controlling issue of law was "whether Respondent's operation was a mine, conducting activities covered by the Act." Tr. 4.

The stipulations were read into the record by counsel for the Secretary and in written form were entered into the record as a joint exhibit. Tr. 5-8; Jt. Exh. l. In addition, I questioned counsels in order to clarify my understanding of the stipulations, and I requested the submission of briefs, which were duly submitted.

STIPULATIONS

The parties stipulated in pertinent part as follows:

> 1. That on February 1, 1993, the U.S. Department of Labor filed a proposed Assessment of Civil Penalty with the Federal Mine Safety and Health Review Commission against Drillex . . . for alleged violations of the [Mine Act] at the . . . Project.
>
> 2. That [Drillex] contested the proposed assessment of civil penalties on the grounds that the operation conducted by Drillex . . . at the . . . Project does not fall within the jurisdictional scope of the foregoing statute, arguing that . . . [Drillex] is not a mine performing operations covered by the Act. Whether . . . [Drillex] has engaged in [i]nterstate commerce is not a contested issue in the instant case.
>
> 3. That the following stipulation of facts is submitted by the parties in order to resolve the jurisdictional issue presented by . . . [Drillex]:
>
> > a. That on or about July 10, 1992 . . . Drillex . . . entered into an agreement with A.H. Development Corporation under which Drillex was to preform drilling, blasting, rock excavation and crushing of a minimum of 20,000 cubic meters of stone to be used as fill for embankment and road base at the . . . Project.[(Footnote 1)(Footnote 1)] The specified work was

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1In response to my question why the Project should not be considered as coming within Mine Act jurisdiction if drilling, blasting, rock excavation and crushing was conducted at the site, co-counsel for Drillex emphasized that the crushing of stone was undertaken only for the building of roads at the construction site. Tr. 12.

> the only work preformed by Drillex at the . . . Project and the material was processed an average of three . . . times a week.
>
> b. The [Project] . . . is a privately owned construction project wherein over two-hundred . . . residential units are being built.
>
> c. The material processed by Drillex . . . was extracted from the project site and hauled to the crusher area located within the project.
>
> d. The extracted material was to be reduced to gabion size by one . . . employee using a hydraulic hammer.[(Footnote 2)] The remaining stone was reduced to three . . . inches down in size with the use of a portable jaw crusher plant.[(Footnote 3)] Two . . . employees were retained for this purpose including the project supervisor.
>
> e. Drillex . . . removed six trucks of contaminated material (stone mixed with clay) from the project site. Said material was deposited in a property adjacent to Canteras de Puerto Rico in Guaynabo, which is in the process to be acquired by Drillex.[(Footnote 4)] Said material will be used to provide temporary access road for trucks and equipment in the property.
>
> f. None of the referred material was marketed or sold.

2I inquired regarding the meaning of "gabion size"? Counsel for Drillex replied, "Gabion size is stones of about one-foot big, 12 inches in size." Tr. 8. She further explained, "Those were broken down with a hydraulic hammer and not with a crusher." Id.

3Counsel for Drillex further explained, "We have two sizes, we have the gabion size, which is done with a hammer, and not with the crusher, and then we have the three inches down in size, which is processed with a crusher." Tr. 8.

4Counsel for Drillex stated Canteras de Puerto Rico is a quarry located in Guanynabo. According to counsel, the stone mixed with clay that was removed from the Project was not deposited at the quarry but rather was put in the ground at property adjacent to the quarry, property that is being acquired by Drillex. It takes about ten to fifteen minutes to drive from the Project to the property where the material was deposited. Tr. 9-11

> 4. The parties further stipulate that the only legal matter to be determined will be limited to whether [Drillex's] operations at the . . . Project constitute a mine under the provisions of the . . . [Mine Act.] [Drillex] is not contesting the existence of the violations underlying the citations issued by MSHA.

Jt. Exh. 1.

THE ISSUE

Was the Montehiedra Project subject to the jurisdiction of the Mine Act on August 17, 1992.

PARTIES' ARGUMENTS

THE SECRETARY

The Secretary's counsel argues that the stipulations compel the conclusion the Project was subject to Mine Act jurisdiction. She bases her argument on both Commission precedent and the 1979 agreement between MSHA and the Secretary's Occupational Safety and Health Administration ("OSHA") (the "Agreement").(Footnote 5)
Counsel focuses initially upon the nature of the activities undertaken at the Project -- the drilling, blasting, excavation and crushing of rock to be used as fill for embankment and road base and the separation of waste from the rock and the removal of waste from the site. Counsel states that two Commission cases, Mineral Coal Sales, Inc., 7 FMSHRC 615 (May 1985), and Alexander Brothers, Inc., 4 FMSHRC 541 (April 1982), have held that the process of excavation and separation of minerals for a particular use causes Mine Act jurisdiction to vest. Since these processes were undertaken by Drillex, the Project came within the jurisdiction of the Act. Sec. Br. 4-7. Further, under the Agreement the specific activities which Drillex carried out at the Project are allotted to MSHA's authority and thus were covered by the Act. Sec. Br. 7-9.

DRILLEX

Counsel for Drillex counters that there is no precedent for finding MSHA jurisdiction at construction sites in which the extraction of minerals is not performed for their intrinsic qualities as minerals, but rather is an incidental operation needed for the construction of roads in the construction project. Drx. Br. 3. Counsel notes the Act's definition of "mine"

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5The Agreement was published in the Federal Register, 44 F.R. 2287 (April 17, 1979) and was subsequently amended, 48 F.R. 7521 (February 22, 1983). The Agreement is reprinted in the BNA Mine Safety and Health Reporter and notations herein referencing the Agreement are cited to the Reporter.

includes the milling of minerals and that milling may consist of crushing. She asserts, however, that for the Mine Act to apply, the crushing of minerals must be associated with a process in which, as the Agreement states, "one or more valuable desired constituents of the crude is separated from the undesirable contaminants with which it is associated," something counsel argues Drillex did not do. Id. 3-4. At the Project the stone was reduced in size but it was not separated from any valuable desired constituent. Id. 5. Rather, the activities at the Project were similar to a "borrow pit," an operation the Agreement reserves for OSHA jurisdiction.

Counsel asserts that:

> [A] jurisdictional line should be drawn between crushing as part of a milling process and crushing as an incidental operation to extraction. Classification as the former will undoubtedly carry with it Mine Act coverage; classification as the latter results in [OSHAct] regulation.

Drx. Br. 5.

JURISDICTION

I conclude the Secretary's exercise of Mine Act jurisdiction at the Project was permissible. I reach this conclusion despite the fact the Project is far from what is viewed traditionally as a "mine." More than fifteen years have passed since the effective date of the Act, yet it has been clear, almost from the inception of enforcement, that the Act's pervasive regulation is intended to apply not only to conventional mines, but also to entities that are not engaged in "mining" in the classic sense. Thus, while it may be true, as Drillex maintains, that there is no precedent for the imposition of Mine Act jurisdiction at a construction project where minerals are extracted solely for road construction at the project -- a purpose incidental to the main objective of the project -- that does not signal a prohibition of the exercise of Mine Act jurisdiction.

The Act states that "[e]ach coal or other mine, the products of which enter commerce . . . shall be subject to the provisions of this Act. 30 U.S.C. 803. Section 3(h)(1) of the Act defines the facilities and processes that constitute a "coal or other mine." 30 U.S.C. 802(h)(1). If what was done at the Project came within this definition, Mine Act jurisdiction applied.

The statutory definition of "coal or other mine" states in part:

> (A)an area of land from which minerals are extracted in nonliquid form . . . and (C) lands, excavations . . . workings, structures, facilities, equipment, machines, tools or other property . . . used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits . . . 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 Act classifies as mining and subjects to its coverage, the extraction, milling and preparation of minerals. The Act does not further define the terms "milling of minerals" or "work of preparing . . . minerals." However, the Commission has expressed its opinion that use of the terms "signals an expansive reading is to be given to mineral processes covered by the Mine Act," Carolina Stalite Company, 4 FMSHRC 423, 424 (March 1982) n.3, rev'd sub nom. Donovan v. Caroline Stalite Company, 734 F.2d 1547 (D.C. Cir. 1984), a view consistent with the Commission's recognition that a "broad interpretation is to be applied to the Act's expansive definition of a mine." Oliver M. Elam, Jr., Co., 4 FMSHRC 5, 6 (January 1982); see also Cyprus Industrial Minerals Co. v. FMSHRC, 664 F.2d 1116, 1117 (9th Cir. 1981); Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589, 592. (3rd Cir. 1979).

The dispositive question here is whether mineral extraction, preparation or milling was engaged in at the Project? In mining, the word "extraction" connotes the process of removing a mineral from its natural deposit in the earth. See U.S. Department of Interior, A Dictionary of Mining, Mineral and Related Terms (1968) at 404. Mineral preparation and milling while not specifically defined in the Act, are terms whose meanings involve the processes by which a mineral is made ready for use. As the parties have emphasized, MSHA and OSHA have entered into the Agreement in order to delineate their respective areas of authority with regard to mineral milling. Under the Agreement, "milling" is defined as "the art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives. The essential operation in all such processes is separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated." MSHA - OSHA Interagency Agreement, Mine Safety & Health Reporter (BNA) 21:1101 (1983).

The Agreement gives examples of milling processes that MSHA has authority to regulate. It states that milling consists of one or more of various processes, including crushing and sizing, and it defines "crushing" as "the process used to reduce the size of mined materials into smaller, relatively coarse particles" and "sizing" as consisting of "the process of separating particles of mixed sizes into groups of particles of all the same size, or into groups in which parties range between maximum and minimum size." Id. 21.1103.

Given the meaning of the terms extraction and milling, I find these activities were carried out at the Project and, consequently, that the Project was a mine subject to Mine Act jurisdiction. The parties have stipulated that Drillex, pursuant to its agreement with A.H. Development Corporation performed drilling, blasting and rock excavation at the Project. Rock is a mineral or a composite of minerals and drilling, blasting and excavation were conducted to remove the rock from the earth. They were a part of the extraction process.

The parties have stipulated further that once the rock was extracted it was reduced to gabion size by an employee using a jack hammer and that what remained was further reduced to 3 inch size or less by a crusher. The stipulations also reflect that the rock was separated from the "contaminated material," stone mixed with clay. Despite Drillex counsel's argument to the contrary, I conclude these activities constituted milling. In this instance the rock itself was the "valuable desired constituent of the crude" and it was separated from the waste material, the stone mixed with clay. It was then reduced into "smaller relatively coarse particles" in two stages and was separated into groups according to size. In other words, the rock was crushed and sized.

Moreover, because the Secretary's decision to exercise MSHA authority at the Project was based on the statutory definition of "mine," I must accord it deference. Carolina Stalite Co., 734 F.2d at 1552. In doing so, I am mindful of the admonition from the Act's legislative history that "what is considered to be a mine and to be regulated under [the] 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. 95-181, 95th Cong., 1st Sess., 14 (1977), reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977, at 602.

It is true, as Counsel for Drillex points out, that the Secretary has allotted jurisdiction over barrow pits to OSHA.

The Agreement states:

> "Barrow Pits" are subject to OSHA jurisdiction except those borrow pits located on mine property or related to mining . . . "Barrow pit" means an area of land where the overburden consisting of unconsolidated rock, glacial debris, or other earth material overlaying bedrock is extracted from the surface. Extraction occurs on a one-time only basis or only intermittently as need occurs, for use as fill materials by the extracting party in the form in which it is extracted. No milling is involved except for the use of a scalping screen to remove large rocks, wood and trash. The material is used by the extracting party more for its bulk than its intrinsic quantities on land which is relatively near the borrow pit.

Mine Safety & Health Reporter, (BNA) 21:1102 (1983). While the stipulated operations at the Project were in some respects similar to a barrow pit as defined in the Agreement, there are crucial differences. At the Project extraction was not on a one-time only basis or intermittent but was undertaken pursuant to an agreement to produce a total of 20,000 cubic meters of stone and was carried out approximately three times a week. More important, milling, in the form of separation, crushing and sizing, was carried out following extraction. Further, it was the particularly sized stone that was used primarily for a specific purpose -- for road base and embankment fill -- and not the bulk material originally extracted. When these factors are added to the fact that the Secretary, who drafted and administers the Agreement, has concluded MSHA jurisdiction is appropriate under the Agreement, I am compelled to reject the barrow pit analogy. See New York State Department of Transportation, 2 FMSHRC 1749 (July 1980) (ALJ Laurenson).

For the foregoing reasons I hold the Secretary properly exercised Mine Act jurisdiction when inspecting the Project.

THE VIOLATIONS AND CIVIL PENALTIES

Drillex does not contest the existence of the alleged violations, and I find they occurred. I further find that in proposing civil penalties for the violations the Secretary properly considered all applicable civil penalty criteria and that the proposed penalties are appropriate. Therefore, I assess the penalties as proposed.

CITATION/ORDER NO.	DATE	30 C.F.R.	PENALTY
3611057	8/17/92	56.1000	$ 50
3611058	8/17/92	41.20	$ 50
3611059	8/17/92	56.15001	$ 50
3611060	8/17/92	56.12028	$108
3611221	8/17/92	56.18012	$ 50
3611222	8/17/92	56.15002	$189
3611223	8/17/92	56.15003	$157
3611224	8/17/92	56.11002	$119
3611225	8/19/92	56.14132(a)	$119
3611227	8/17/92	56.14130(g)	$119
3611228	8/17/92	56.11001	$119
3611229	8/17/92	56.14200	$337
3611230	8/17/92	56.4203	$ 50
3611231	8/17/92	56.18002(b)	$ 50

ORDER

The citations/orders referenced above are AFFIRMED. Drillex is ORDERED to pay the civil penalties for the violations as assessed totalling one thousand five hundred and sixty-seven dollars ($1,567) within thirty (30) days of the date of this decision.

This proceeding is DISMISSED.

David F. Barbour
Administrative Law Judge

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