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, v. DAVID DUQUETTE EXCAVATING and JESSICA RUSSELL, Respondent.	CIVIL PENALTY PROCEEDING Docket No. YORK 2012-303-M A.C. No. 19-01232-296289 Mine: Extec 6000S S/N 5045

DECISION GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

Before: Judge Feldman

This matter presents the issue of whether the extracting and scalping of earthen material by David Duquette Excavating ("Duquette") for use as land fill in its excavation business is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, as amended, U.S.C. § 801 *et seq.* ("Mine Act"). On October 25, 2012, the Secretary of Labor ("Secretary") filed a Petition for Assessment of Civil Penalty. On November 20, 2012, Duquette, appearing *pro se*, filed an Answer to the Petition, asserting lack of jurisdiction by the Mine Safety and Health Administration ("MSHA").[1] Duquette maintains that its earthen material extraction site is exempt from MSHA jurisdiction because it is a "borrow pit." On October 6, 2014, the Secretary moved for summary decision of the jurisdictional issue. As discussed below, I construe Duquette's continuing objections to jurisdiction in this matter as a cross-motion for summary decision on the issue of jurisdiction.

I. Background

As specified below, the parties have stipulated to the material facts in this case. In May 2012, MSHA Inspector Zane Burke was traveling near Hinsdale, Massachusetts, when he observed screening equipment at Duquette's extraction site. (Stip. 1). Having not previously encountered or inspected Duquette's operation, Burke stopped at the site and observed a truck driver loading earthen material from the site into a dump truck bearing the name "Duquette Excavating". (Stip. 2). The material was loaded into the dump truck in preparation for

[1] The civil penalty matter in Docket No. YORK 2014-4-M concerning David Duquette Excavating involves the identical jurisdictional issue. YORK 2014-4-M has been stayed pending resolution of the present case.

transportation to a Duquette residential excavation construction site where it was to be used as land fill. (Stip. 23, 25-27).

Burke was uncertain whether Duquette's extraction activities were subject to Mine Act jurisdiction and sought the opinion of his supervisor, who advised him that there was "MSHA jurisdiction because the material was going into interstate commerce." (Stip. 11-12). Thereafter, Burke conducted an inspection of the extraction site and issued nine citations, six of which were designated as non-significant and substantial (non-S&S) in nature. The violations concerned maintenance of the dump truck and of a front-end loader, as well as berm conditions and Duquette's failure to notify MSHA of commencement of its operations. Burke required David Duquette to complete a mine operation identification form. (Stip. 14). MSHA ultimately designated Duquette's extraction site as Mine ID No. 19-01232. The Secretary proposes a $908.00 civil penalty for the nine citations.

II. Stipulations

The Secretary relies upon the following stipulated facts in support of his motion for summary decision on jurisdiction:

1. In May 2012, Zane Burke, a safety inspector employed by MSHA's Field Office in Albany, New York, was traveling in Western Massachusetts when he saw two screens in a pit he had not previously encountered.

2. Mr. Burke drove into the pit area and observed that Milton Blakely, a truck driver, was loading a Mack dump truck bearing the name "Duquette Excavating" and a telephone number "413-623-5517".

3. Mr. Burke learned from Mr. Blakely that the owner was not present.

4. While he was on the pit site, Mr. Burke observed Mr. Blakely stock piling material at the Extec screen plant.

5. Mr. Burke drove to a garage on the site which had a telephone number for Mr. Duquette and called him. He identified himself as being from MSHA and said that he wanted to speak to Mr. Duquette about his pit.

6. Mr. Duquette arrived and Mr. Burke explained that MSHA had jurisdiction over his single deck screen.

7. For some period of time previously, MSHA did not inspect single screens, but in May of 2012 the policy in effect was to inspect single as well as double decked screens.

8. Mr. Duquette replied that he had purchased the screen two years previously and that an MSHA inspector had told him (Duquette) that he (Duquette) was not under MSHA jurisdiction.

9. Mr. Burke told Mr. Duquette that there was a provision that if you did not run 200 hours, then you would be taken off the list. Mr. Duquette told Mr. Burke that the pit was in service less than 200 hours.

10. Mr. Burke was told that after scalping was done, that the material that was dug was used in Mr. Duquette's excavation business as fill.

11. Mr. Burke then called a supervisor at the Metal/Non-Metal District Office, Dennis Yesko, to discuss MSHA's jurisdiction.

12. Mr. Yesko informed Mr. Burke that the plant and the pit were under MSHA jurisdiction because the material was going into interstate commerce.

13. Mr. Burke relayed what Mr. Yesko had told him (Burke) to Mr. Duquette.

14. Mr. Burke then presented a mine identification card to Mr. Duquette and asked him to fill it out.

15. Mr. Duquette stated that he did not have time to fill it out but would call Mr. Burke in the morning.

16. At a telephonic conference with Judge Feldman, Mr. Duquette was asked whether any of the material he excavated from his pit was moved off site as part of the excavation business Mr. Duquette engaged in.

17. Mr. Duquette stated that material excavated from his pit is used to provide fill when foundations are dug off site as part of his excavation business.

18. Mr. Duquette has claimed that prior to Mr. Burke's inspection of his pit in May of 2012, that an MSHA inspector, John Moon, told Mr. Duquette that MSHA did not have jurisdiction over his pit because only one product was in use at the pit, and after scalping the material off the boulders, little scalped material was staying on site.

[The parties omitted a stipulation number 19.]

20. Mr. Duquette has also claimed that there is no MSHA jurisdiction over his pit because his pit is a "borrow pit."

21. In 2012, Mr. Duquette had a total of himself, plus one employee working for his excavation company.

22. Mr. Duquette took material off-site three (3) times.

23. Mr. Duquette took bank-run raw material[] and loaded [it] on a dump truck.

24. The material was generally clean fill.

25. The material was then transported off site in Mr. Duquette's dump truck.

26. The purpose was to fill in a back yard to level it out.

27. It was beneficial to the home owner because the yard was made more usable.

28. Material (transporting) in 2011 and 2012 was done very infrequently as the economy around Berkshire County was not very good. It occurred approximately three (3) times in 2011 and 2012.

Parties' Agreed Statement of Facts (Oct. 6, 2014).

III. Procedural History

The Secretary has moved for summary decision on the jurisdictional question. As noted, Duquette is appearing *pro se*. The Commission has long-facilitated the participation of parties appearing *pro se* in Commission proceedings. *See, e.g., Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992) (explaining special considerations for *pro se* litigants); *see also* 29 C.F.R. §§ 2700.3(b), 2700.4 (permitting participation in Commission proceedings without counsel).

In *Kanaval's Excavating & Gravel*, 36 FMSHRC 2795, 2797 (Oct. 2014) (ALJ), Judge Paez construed a *pro se* respondent's silence as a failure to participate in a summary decision motion where the *pro se* respondent had wholly failed to participate in the proceedings despite the judge's repeated efforts to elicit a response from the respondent. Unlike in *Kanaval*, Duquette's jurisdictional objection has been consistent and its position has been acknowledged in the Secretary's filings. As such, I construe Duquette's previous objections to the citations at issue based on a lack of MSHA jurisdiction over the subject activities as a cross-motion for summary decision.

IV. MSHA/OSHA Interagency Agreement

Section 3(h)(1) of the Mine Act defines a "mine" as "excavations . . . resulting from, the work of extracting . . . minerals from their natural deposits . . . [and/or] the milling of such materials." 30 U.S.C. § 802(h)(1)(C). As a general proposition, it has been held that the screening of earthen material to enhance its value, by satisfying market specifications, gives rise to Mine Act jurisdiction. *See, e.g., Drillex Inc.*, 16 FMSHRC 2391, 2395-97 (Dec. 1994) (holding that the drilling, blasting, rock excavation, and crushing of stone to be used as fill for embankment and road base purposes in furtherance of road construction constitutes "mineral extraction and milling," giving rise to Mine Act jurisdiction). However, as discussed below, the

Secretary has recognized an exception to such jurisdiction when the extraction of earthen material constitutes a "borrow pit."

A "borrow pit" generally is defined as:

(a) The source of material taken from some location near an embankment where there is insufficient excavated material nearby on the job to form the embankment. Borrow-pit excavation is therefore a special classification, usually bid upon as a special item in contracts. It frequently involves the cost of land or a royalty for material taken from the land where the borrow pit is located; it also often requires the construction of a suitable road to the pit. This type of excavation therefore usually runs higher in cost than ordinary excavation.

(b) An excavated area where borrow has been obtained.

Dictionary of Mining, Mineral and Related Terms 62 (2nd ed. 1997).

In 1979, MSHA and the Occupational Safety and Health Administration ("OSHA"), divisions of the Department of Labor, entered into an interagency agreement to provide guidance to affected employers on the principles and procedures for distinguishing between Mine Act jurisdiction and Occupational Safety and Health Act jurisdiction over "borrow pits." Paragraph B.7 of the 1979 Interagency Agreement delineated the parameters for a "borrow pit." The Interagency Agreement provides:

> *"Borrow Pits" are subject to OSHA jurisdiction* except those borrow pits located on mine property or related to mining. (For example, a borrow pit used to build a road or construct a surface facility on mine property is subject to MSHA jurisdiction). "Borrow Pit" means an area of land where the overburden, consisting of unconsolidated rock, glacial debris, other earthen material overlying 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 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 qualities on land which is relatively near the borrow pit.

44 Fed. Reg. at 22828 ("Interagency Agreement") (emphasis added).

MSHA adopted interpretive guidelines in 1996 to clarify the 1979 Interagency Agreement with respect to borrow pits. The interpretive guidelines provide, in pertinent part:

> . . . [I]f earth is being extracted from a pit and is used as fill material in basically the same form as it is extracted, the operation is considered to be a "borrow pit." For example, if a landowner has a loader and *uses bank run material to fill* potholes in a road, *low places in the yard*, etc., and *no milling or processing is involved, except for the use of a scalping screen*, the operation is a borrow pit. *The scalping screen can be* either portable or *stationary and is used to remove large*

> *rocks, wood or trash.* In addition, *whether the scalping is located where the material is dug*, or whether the user of the material from the pit is the owner of the pit or a purchaser of the material from the pit, *does not change the character of the operation, as long as it meets the other criteria.*

MSHA *Program Policy Manual*, Section 4, I.4-3 (1996) ("Interpretive Guidelines") (emphasis added).

V. Analysis

a. *Elam* Test

As a threshold matter, I recognize that the statutory definition of a mine should be broadly construed. *See, e.g., Marshall v. Stoudt's Ferry Prep. Co.*, 602 F.2d 589, 592 (3rd Cir. 1979); *Cyprus Indus. Minerals Corp.*, 3 FMSHRC 1, 2-3 (Jan. 1981), *aff'd* 664 F.2d 1116 (9th Cir. 1981), *citing* S. Rep. No. 181, 95th Cong., 1st Sess. 15 (1977). However, it is also true that questions of Mine Act jurisdiction should be resolved on the basis of: (1) whether the subject activities are normally performed by a mine operator; and (2) whether the activities performed are undertaken to make the extracted material suitable for a particular use or to meet market specifications. *Oliver M. Elam*, 4 FMSHRC 5, 8 (Jan. 1982). Obviously, the extraction of bulk fill dirt necessary for commercial or residential construction is not a process that is normally viewed as mining. Moreover, the bulk material extracted by Duquette lacks intrinsic value because is not uniquely suitable for a particular purpose that can satisfy market specifications. Consequently, as a general matter, Duquette's activities do not satisfy the Commission's *Elam* criteria for Mine Act jurisdiction.

Notwithstanding *Elam*, the Secretary's stipulation that interstate commerce may be a relevant consideration in resolving the jurisdictional issue despite the plain meanings of the 1979 Interagency Agreement and MSHA's 1996 Interpretive Guidelines begs the question. (*See* Stip. 12). The Commerce Clause provides the authority for Congress' promulgation of the Mine Act. The Commerce Clause, alone, cannot confer Mine Act jurisdiction. Whether the activities sought to be regulated by the Mine Safety and Health Administration can be reasonably construed to constitute mining is not an inconsequential matter.

b. *Kerr* Case

I have previously addressed the circumstances under which the extraction and screening of earthen material provide a basis for Mine Act jurisdiction in *Kerr Enterprises, Inc.*, 26 FMSHRC 953 (Dec. 2004) (ALJ). In *Kerr*, the material extracted by the operator consisted of clay, sand, topsoil, and a sand/clay mix, which occurred naturally in the soil. *Id.* at 955. Extraction occurred by means of backhoes or front-end loaders. *Id.* The only "processing" that was performed at the facility was through the use of a power grid or scalping screen on about twenty percent of the materials in order to remove roots and other wood debris. *Id.* No sizing of materials was otherwise performed. *Id.* The material extracted from the site was sold to more than fifty unaffiliated customers. *Id.* The customers included landscape companies, refinery contractors, construction contractors, and concrete companies. *Kerr*, 26 FMSHRC at 955.

In *Kerr*, the operator's attempt to elude Mine Act jurisdiction by asserting that its excavation activities constituted a borrow pit was rejected. Rather, the full-time continuous extraction and commercial sale to numerous customers to fulfill their specific needs, based on the material's extrinsic value, such as topsoil for landscapers, and sand and clay for concrete companies and refinery contractors, was held to be "a far cry from the one time, or intermittent, local fill dirt activity contemplated for OSHA jurisdiction [of a borrow pit] in the Interagency Agreement."[2] *Id.* at 957.

c. *Duquette* Jurisdictional Question

Turning to the circumstances in this case, unlike *Kerr*, Duquette's operation essentially falls squarely within the parameters for a borrow pit set forth in the Secretary's Interagency Agreement and Interpretive Guidelines. Namely:

(1) Duquette's extraction of earthen material "occur[red] only intermittently as need occur[red]." *See* Interagency Agreement.

The parties have stipulated that Duquette transported its screened bulk material off-site sporadically (approximately three times in two years). (Stip. 22, 28). This is clearly distinguishable from the "full-time continuous" material extraction and transportation held to be mining in *Kerr* and comports with the Interagency Agreement's requirement that material be extracted "only intermittently as need occurs."

[2] For example, as distinguished from fill dirt, the Commission has held that the Alaska Department of Transportation's extraction and screening of sand and gravel from roadside pits constitutes "open pit mining" of "[s]and and [g]ravel" that is subject to Mine Act jurisdiction. *State of Alaska, Dept. of Transp.*, 36 FMSHRC 2642 (Oct. 2014) (remand decision). Similarly, a Commission ALJ has held that the extraction and transportation of sand for stockpiling at an airport for use winterizing runway surfaces contemplated the sand's intrinsic value, rather than its bulk, and thus cannot be exempt from Mine Act jurisdiction as a borrow pit. *State of Alaska, Dept. of Transp.*, 33 FMSHRC 1550, 1553 (Jun. 2011) (ALJ). Likewise, the open pit extraction of sand used for its abrasive qualities to control ice on local road surfaces has been held to be subject to Mine Act jurisdiction. *New York State Dept. of Transp.*, 2 FMSHRC 1749, 1759 (Jul. 1980) (ALJ).

(2) The material extracted by Duquette was "fill material" used "in the form in which it [was] extracted" and "used [by Duquette] more for its bulk than its intrinsic qualities." *See* Interagency Agreement.

The Secretary does not allege, nor does the record reflect, that there was any increase in the intrinsic value of the subject earthen material as a result of Duquette's scalping. Rather, the parties stipulate:

> 23. Mr. Duquette took bank-run raw material[] and loaded [it] on a dump truck.
>
> 24. The material was generally clean fill.

(Stip. 23, 24).

(3) "No milling [was] involved [in Duquette's extraction operation] except for use of a scalping screen to remove large rocks, wood and trash." *See* Interagency Agreement.

The parties have stipulated that the material extracted by Duquette was generally clean fill. (Stip. 24). Scalping was performed as necessary to remove debris to make the material suitable for bulk fill usage. (Stip. 10, 24). In other words, Duquette's scalping activities alone do not provide justification for Mine Act jurisdiction.

(4) Duquette used "bank run material to fill . . . low places in the yard." *See* Interpretive Guidelines.

In this regard, the parties have stipulated that:

> 23. Mr. Duquette took bank-run raw material[] and loaded [it] on a dump truck.
>
> 26. The purpose was to fill in a back yard to level it out.
>
> 27. It was beneficial to the home owner because the yard was made more usable.

(Stip. 23, 26, 27).

(5) The location of the scalping is not determinative because "whether [or not] the scalping is located where the material is dug . . . does not change the character of the operation, as long as it meets the other [borrow pit] criteria." *See* Interpretive Guidelines.

The parties have stipulated that the extracted earthen material was transported off-site by dump truck for use as fill when foundations were dug and for grading yards, in furtherance of Duquette's excavation business. (Stip. 17, 25, 26). Thus, the fact that the scalping occurred at the extraction site, rather than where the fill was ultimately used, does not preclude consideration of Duquette's extraction site as a borrow pit.

Finally, the thrust of the Secretary's argument is that Duquette's extraction site does not constitute a borrow pit because it is unclear whether the extracted material was being used "on land which is *relatively near* the borrow pit," as required by the Interagency Agreement. Sec'y Mem. in Supp. of Mot. for Summ. Dec., at 4-5 (Oct. 6, 2014). Since it is clear that borrow pit scalping can occur at the extraction site or off-site, the transportation of the bulk material, in and of itself, does not negate a borrow pit characterization. Obviously, "relatively near" connotes an unspecified range of distance. The Secretary bears the burden of establishing Mine Act jurisdiction. The Secretary has not provided any evidence that Duquette's excavation project sites were so far removed from its extraction site that they undermine Duquette's assertion that its extraction site should be classified as a borrow pit. Rather, the overwhelming balance of the evidence reflects that Duquette's extraction site constitutes a borrow pit, as contemplated by the Secretary in his Interagency Agreement and Interpretive Guidelines.

VI. Conclusions of Law

Commission Rule 67(b) provides that a motion for summary decision shall be granted only if there is no genuine issue as to any material fact, and the moving party is entitled to summary decision as a matter of law. 29 C.F.R. § 2700.67(b); *see also Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 8-9 (Jan. 2007) (citations omitted). Moreover, in determining if a motion for summary decision should be granted, the court must construe the undisputed material facts in the light most favorable to the opposing party. *Hanson*, 29 FMSRHC at 9.

I have construed the evidence in the light most favorable to the Secretary with respect to the stipulations proffered by the Secretary and agreed to by Duquette. In evaluating Duquette's cross-motion for summary decision on the jurisdictional question, it is clear that Duquette's extraction facility satisfies the borrow pit criteria contained in the Secretary's Interagency Agreement and Interpretive Guidelines. As such, Duquette's extraction facility is not subject to Mine Act jurisdiction.

ORDER

In view of the above, **IT IS ORDERED** that David Duquette Excavating's cross-motion for summary decision **IS GRANTED**. Accordingly, **IT IS FURTHER ORDERED** that Docket No. YORK 2012-303-M **IS DISMISSED** for lack of Mine Act jurisdiction.

Jerold Feldman
Administrative Law Judge

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