FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 31 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING
v.	Docket No. PENN 2016-0107-M A.C. No. 36-10157-400887
	Docket No. PENN 2016-0144-M A.C. No. 36-10157-403006
JERMYN SUPPLY CO., LLC, Respondent	Mine: Mayfield Quarry

DECISION[1]

Appearances: John R. Slattery, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Secretary of Labor

Christopher B. Jones, Esq., for Jermyn Supply Co., LLC, Respondent

Before: Judge Lewis

STATEMENT OF THE CASE

This cases arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 *et seq.* (the "Act" or "Mine Act"). By consent of the Court and the parties, the sole question at hearing was limited to whether the federal Mine Safety and Health Administration ("MSHA") has jurisdiction over Respondent's property, the Mayfield Quarry. A hearing was held in Scranton, Pennsylvania, on March 22, 2017, where the parties presented testimony and documentary evidence. After the hearing, the parties submitted post-hearing briefs, which have been fully considered.

FINDINGS OF FACT AND CONCLUSION OF LAW

The findings of fact are based on the record as a whole and the undersigned's careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, the undersigned has taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the

[1] An Order Bifurcating Hearing was issued on October 28, 2016, by this Court. Due to the initial hearing being limited to whether the Mayfield Quarry is subject to Mine Act jurisdiction, there were no Joint Stipulations agreed to by the parties.

witnesses. In evaluating the testimony of each witness, the undersigned has also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on the undersigned's part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel,* 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

I. SUMMARY OF TESTIMONY

Gary Merwine

On September 22, 2015, MSHA Inspector Gary Merwine inspected the Mayfield Quarry.[2] This facility had not been previously inspected by MSHA, and Merwine was instructed to inspect it by his supervisor. Tr. 15. After reviewing an overview map of the site (satellite image) of Respondent's property, Merwine traveled to the entrance where a cable was down and unlocked. Tr. 16-17. Merwine observed an excavator feeding a portable plant, which fed a second portable plant. Tr. 17. Both Portable plants and the excavator were in operation. Tr. 17.

Merwine interviewed the excavator operator, Richard Dipple, who said he was employed by owner/operator of the site, Joseph Virbitsky. Tr. 17- 18. Dipple indicated that the Pennsylvania Department of Environmental Protection ("Pennsylvania DEP") inspected the site. Tr. 18. Dipple telephoned Virbitsky, who arrived at the site within 15 to 30 minutes. Tr. 19. During this time period Merwine observed five different products of materials that "appeared [to have come] from the portable screening plants." Tr. 20. A dump truck had also entered the property, and Dipple loaded stone onto the truck. Tr. 20.

Upon arriving, Virbitsky advised Merwine that the site had been in operation for approximately 10 years and that the Pennsylvania DEP had been the only agency that had been inspecting the site. Tr. 21. Virbitsky described the following uses of the property: some of the material was used to level off the site; some of the material was used at his construction business to build foundations; and a small amount was used to go to his supply yard. Tr. 21.

Merwine explained to Virbitsky that his operation would fall under MSHA jurisdiction and that a "Legal Identity Report" ("LIR") needed to be filled out. Tr. 21-22. Merwine filled out the report based upon information provided to him by Virbitsky. Tr. 23; GX-17[3]. Merwine

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[2] Gary Merwine had been hired by MSHA in June of 2006 and was currently working as Mine Safety and Health Inspector. Tr. 11. He had previously worked as supervisor of the Wyomissing field office during 2010-2011 and 2014. Tr. 12. Merwine had 25 years of underground coal mining experience, working as a laborer, supervisor/miner, and owner/operator. Tr. 13. His inspector training included six four week training sessions at the Beckley Mining Academy. Tr. 13. Additionally, Merwine had revisited the Mining Academy, taking a two week advanced electrical course and a FBI course concerning the obtaining and securing of evidence and interviewing. Tr. 14.

[3] The Secretary's exhibits will hereinafter be referred to as "GX" followed by the exhibit number. No exhibits were submitted by the Respondent.

further indicated that Virbitsky signed and dated the report after reviewing it for correctness. Tr. 23. At Section 8 of the report, Virbitsky indicated sand and gravel was produced at the site. Tr. 24; GX-17.

Merwine then proceeded to inspect the site for possible hazards and safety violations. Tr. 24. At hearing Merwine referenced multiple photographs that he had taken of the site. Referring to the photograph in GX-9A, Merwine described the function of a "portable plant," and explained that there were two at the quarry. Tr. 25. The portable plant had material fed into a hopper which goes up onto a screen, made up of different sized holes depending upon the material desired. Tr. 25. Any material not falling through the holes proceeds to a conveyor belt and is deposited onto the ground or into a truck. Tr. 26. Material falling through the holes may be dropped onto a second screen which could have smaller holes in it, the process continuing in like fashion. Tr. 26. At the site, materials falling through the screen could fall onto a separate conveyor belt fed into the second portable plant which then screened material to different products. Tr. 26.

GX-9B was Merwine's photograph of the yellow colored excavator that Dipple was operating and feeding the blue portable plant (depicted in GX-9A). Tr. 26. The material being excavated was coming from the embankment to the left of the yellow excavator (See, GX-9B) and was being deposited into the hopper of the blue portable plant. Tr. 27. Material placed on the blue portable plant hopper would go onto three separate conveyor lines on the plant, one coming out the front of the plant, another out of the right of the plant, and the third on the left which then fed material onto a stacked conveyor belt which then fed the material to a second portable plant. Tr. 27. The purpose of having one portable plant feed into another portable plant was to make more separate products by using a different sized screen on the second portable plant. Tr. 28.

On the date of the inspection, only one of the two excavators onsite was in operation. Tr. 28. The material coming off the blue portable plant appeared to be sand. Tr. 29; GX-9C. Referring to GX-9D, Merwine indicated that the material in the foreground was consistent with sand, and the material to the right was "rock material, an aggregate material, consistent with what we identify as a four minus size." Tr. 29. The photograph contained in GX-9E was a "closer shot" of the GX-9D scene, the material, and excavator being more easily seen. Tr. 30.

In GX-9F the second (red) portable plant was photographed being fed from the first (blue) portable plant. Tr. 30-31. The pile of material to the left of the second (red) portable plant appeared to be sand product different from the material to the right of the photograph which was called "modified stone." Tr. 31.

Modified stone is stone that is smaller than a baseball but bigger than a golf ball. Tr. 31. Unwashed modified stone includes some dirt in the rock. Tr. 31. Washing modified stone can help it to meet the specifications for uses such as state road construction or other uses that specify no dirt in the (excavated) material. Tr. 31.

Merwine further photographed Dipple digging material out of an embankment and putting it into the first portable plant. Tr. 31. GX-9H depicted a pile of material at the site that would be consistent with four minus stone. Tr. 32. Dipple was operating a Caterpillar front end

loader, as depicted in the photograph contained in GX-9I, putting materials into a dump truck. Tr. 32. The pile of material photographed in GX-9H and GX-9I was considered by MSHA to be a four minus stone. Tr. 32-33. The photograph in GX-9J showed a front end loader used to load stone into a dump truck with three stockpiles of different material that had come from the portable plant. Tr. 33. GX-9K depicted a pile of material that MSHA would consider modified stone and GX-9L was a photograph of a separate stockpile that would be considered a sand product. Tr. 34. The picture in GX-9L depicted a stockpile of stone which, given its size, the industry would classify as "2B." Tr. 34.

Merwine described the different classifications for excavated material: sand material, which is very fine and which looks like beach sand or play box sand; 2A stone which is dime-sized or "a little smaller"; number 57 stone which is roughly a nickel size; 2B size which is approximately a quarter size; 4 minus and 6 minus which range from baseball size to a little smaller. Tr. 35. At the Mayfield Quarry site, the MSHA inspector observed sand, modified stone and 4 minus coming off the conveyor belt while the screening plants were in operation. Tr. 36.

Merwine also visited the supply yard owned by Virbitsky that was located approximately a half mile away. Tr. 36. The yard had multiple products for sale, including mulch and paving stone for sidewalks, bins with sand, and different sizes of stone. Tr. 36-37; GX-19, GX-20. There were three bins that had materials consistent with the materials being produced out of the screening plants at Mayfield Quarry. Merwine had taken photographs of the bins which contained modified stone, four minus stone, and 2B stone. Tr. 37, 38; See also GX-9N, GX-9O, GX-9P.

Virbitsky identified the types of materials processed at his Mayfield Quarry as "Modified," "Waste," and Sand. Tr. 39. Referring to his inspection and investigation data summary and field notes (GX-5), Merwine indicated that Virbitsky had identified the conveyors at the portable plant(s) as being a feed conveyor, modified conveyor, and sand conveyor. Tr. 41-43. Virbitsky further identified stockpiles at the site as sand stockpile, modified stockpile, and waste stockpile. Tr. 44; GX-5. Additionally, Virbitsky indicated that the material at the site was used for construction projects that his supply company was engaged in. Tr. 45. According to Merwine's field notes, Virbitsky indicated that material not used to level the quarry site was also used at sites by Jermyn Supply to construct buildings. Tr. 45-46. The material was further sold at his supply company, mostly as a mix to make loam. Tr. 46. Loam is a mixture of fine sand and top soil, a mixture for back filling. Tr. 46.

Virbitsky reported that his quarry site was open for approximately two weeks during the present year. Tr. 45. Additionally, in Merwine's field notes, Virbitsky reportedly indicated that the operation is operated "sporadically" during the year and is in operation "several weeks" per year. GX-5.

In depositional testimony, Virbitsky also stated that the materials from the mine were used at his construction sites to backfill foundations and for leveling off other properties owned by Virbitsky for possible resale in the future. Tr. 46.

Merwine noted that Virbitsky had obtained a "Large Non Coal Mine Operator's License" from the Pennsylvania DEP. Tr. 48; GX-10, GX-11. Virbitsky had also obtained a permit from the Pennsylvania DEP for small noncoal mining. Tr. 48; GX-12.

Referencing the Interagency Agreement between MSHA and the Occupational Safety and Health Administration ("OSHA"), Merwine opined that the sizing of the materials which he had observed at the quarry site fell within the parameters of MSHA's authority over milling. Tr. 49; GX-21.

Cross Examination of Merwine

Some of the photographs of the Respondent's site had been obtained from Merwine's supervisor, William MacDonald. Tr. 57-58. Merwine knew of no complaints from residents in the area regarding Respondent's quarry site, nor did he know what motivated MacDonald to ask him to inspect Respondent's site. Tr. 58-59.

Merwine had only observed MSHA-related activity being conducted at Mayfield Quarry on one occasion, the date of inspection, September 22, 2015. Tr. 59-60. He did not observe any further activity during his subsequent four visits to the quarry. Tr. 59-61. When he had gone to the quarry site in October and November of 2015, the cable was up and locked. Tr. 61. In December of 2015, Dipple and Virbitsky were onsite engaged in Non-MSHA related activities. Tr. 61. Virbitsky did report that some of the equipment on the site was related to his construction business. Tr. 62. Merwine did not inspect such. Tr. 62. According to Virbitsky's deposition, "a lot" of the materials on the grounds of his quarry were materials hauled from construction jobs and dumps. Tr. 62. Merwine opined that Virbitsky's quarry was affecting interstate commerce because Merwine believed that materials such as sand and gravel were excavated from the quarry and then sold at Virbitsky's nearby Jermyn Supply yard to any customer stopping by. Tr. 63.

Merwine did not dispute that some of the bins at Jermyn Supply may have contained materials from third party suppliers. Tr. 65. However, three of the bins contained materials that had the consistency of rock that was being screened at the Mayfield Quarry. Tr. 65. Merwine further conceded that he had no personal knowledge whether the materials observed at Respondent's supply yard had come from Mayfield Quarry. Tr. 65.

As to the LIR, Inspector Merwine stated that he had hand-written all the answers. Tr. 66; GX-17. For Question eight, what type of product is produced, Merwine recorded "sand and gravel." Tr. 66. Merwine based the classifications of the materials based upon his own observations at the site and not Virbitsky's actual description. Tr. 66; GX-17. Merwine categorized the quarry site as "surface open" rather than an underground mine or dimensional stone mine. Tr. 67. He did not witness any underground mining. Tr. 67.

Referring to his photograph at GX-9A, Merwine stated that the pile directly in front of the red portable plant and next to the white dump truck was identified as sand and not dirt. Tr. 68. Merwine concluded that the material was sand based upon his personal observations and Virbitsky's statement that one of the conveyor belts was a sand conveyor. Tr. 68. However, he neither took a sample from the pile nor tested it. Tr. 68. Merwine further did not know if the pile

of material, which he had identified as sand, had ever been removed from Mayfield Quarry to Jermyn Supply. Tr. 69. Merwine defined sand as being "fine granular particles of rock." Tr. 71.

Based upon his experience of 11 years in the industry, Merwine opined that the pile of material depicted in GX-9E was sand and not finely graded top soil. Tr. 72. In reference to the overhead photograph of Respondent's supply yard in GX-19, Merwine did not personally know where the products in the bins came from but instead relied upon Virbitsky's statement that some of the supply had come from the quarry. Tr. 74, 75-76.Virbitsky had advised Merwine that he sold the products displayed in his supply yard to the general public but did not specifically mention sand. Tr. 75.

Merwine agreed that various bins at the supply yard contained materials that did not resemble materials observed at the quarry. Tr. 76-78; GX-20. The material depicted in GX-9N appeared to resemble the 4 minus stone observed at the quarry but Merwine did not actually know where the product had come from. Tr. 78. The modified stone pictured in GX-9O also appeared to resemble the stone observed at the quarry but Merwine was again unsure of its actual origin. Tr. 78-79. Merwine testified that the consistency of the stone pictured in GX-9O at Jermyn Supply was similar to the consistency of the stone depicted in GX-9K at Mayfield Quarry. Tr. 79-80. Merwine did not actually touch the material pictured at the quarry in GX-9L. Tr. 81.

Virbitsky never stated that OSHA, as well as the Pennsylvania DEP, inspected the quarry. Tr. 82. Merwine denied that Virbitsky had raised any objections to answering or signing the LIR (GX-17). Tr. 83-84.

On redirect examination, Merwine expressed his belief that the same materials being screened at the quarry site were being sent to the supply yard was based upon his observations of the consistency of the materials at both sites and Virbitsky's statement acknowledging such as recorded in Merwine's field notes. Tr. 85. The majority of the products sold at the supply yard would not, in Merwine's opinion, have come from Mayfield Quarry. Tr. 86.

On recross examination Merwine testified he had observed three bins of material at the supply yard containing 4 minus rock, modified rock, and 2B rock. Tr. 86. However, he did not observe any sand, only an advertisement for the sale of it on the internet. Tr. 86-87.

Joseph Virbitsky

The Respondent, Joseph Virbitsky testified the site at issue was a "borrow pile/spoil pile." Tr. 95. Virbitsky's employee had phoned him to come to Mayfield Quarry to speak with Merwine, who was already onsite. Tr. 96. Merwine had explained to Virbitsky that he was a federal agent, "higher than the FBI" and "more protected than the bald eagle." Tr. 96. Virbitsky testified that he had not wanted to stay at the site to answer Merwine's questions and did not wish to sign the LIR. Tr. 96-97; GX-17. As to section 8 of the LIR, Virbitsky testified that he had not given the description "sand and gravel" as to the commodity produced at the site and that this had been Merwine's designation. Tr. 97; GX-17. Virbitsky further concluded that there in fact was no sand at Mayfield Quarry, although Jermyn Supply did sell sand. Tr. 96-97. Virbitsky

had been essentially forced to sign the LIR form before Merwine allowed him to leave the premises. Tr. 97; GX-17.

Virbitsky testified that neither sand nor gravel was produced at the quarry nor were those materials present at the site. Tr. 98. Virbitsky defined sand as "a product that is generally washed through a process" and gravel as "a product that is produced, sized, crushed, and milled." Tr. 98.

As to the overhead photograph of Mayfield Quarry, Virbitsky disagreed that it was an accurate depiction of how the site appeared on the date of inspection, September 22, 2015. Tr. 99; GX-18. He further asserted that the pile of material depicted in GX-9A and described by Merwine as sand was in fact a pile of dirt. Tr. 99-100. Virbitsky used this "fill dirt" to level out nine properties that he owned. Tr. 100. Likewise, the photographs in GX-9D, GX-9E, and GX-9F also depicted piles of dirt, not sand. Tr. 100-101. As to the pile of material depicted in GX-9L, Virbitsky also described such as dirt, further commenting that he wished it were sand, as he would be "a millionaire." Tr. 101. Virbitsky denied that he had ever told Merwine that he took material from the quarry to Jermyn Supply for sale to the general public. Tr. 102. He also denied identifying material at the quarry in any discussion with Merwine as sand or modified rock. Tr. 102.

Virbitsky testified that his construction company was his "main focus." Tr. 103. Sometimes he took "a year or two off" from the quarry operation. Tr. 103. He received no income from the quarry operation. Tr. 103. The income would be derived from future sales of the property. Tr. 103.

Additionally, Virbitsky emphasized that there was no rock or stone taken from the quarry and sold at Jermyn Supply. Tr. 103. Any materials taken from the quarry were used to fill and grade other properties owned by Virbitsky which were located within approximately half a mile of the site within the state of Pennsylvania. Tr. 104.

Cross Examination of Virbitsky

Virbitsky further explained that the quarry site was open for no more than two weeks per year and that the workday consisted of two hours (often he completed his work at his other properties). Tr. 104. He normally would go to the site during "the driest point," October and November, to obtain material for filling potholes. Tr. 104.

On cross-examination, Virbitsky estimated that approximately "20 tons of material, 15 yards of material" would get screened in two hours' time. Tr. 105. Virbitsky had owned the property since 2002. Tr. 105. He described the activity involving the two portable plants as being that of "scalping." Tr. 105. This included "removing the dirt, rocks, and wood out of the material that's there to put it in different piles so I could use it." Tr. 105.

Virbitsky agreed with his prior deposition testimony that the material was separated into piles—small, medium, and large. Tr. 106. He further agreed that he had informed Merwine that the portable plants produced five different products, with every belt having a form of different rock coming out. Tr. 106.

In reference to the photograph at GX-9F, Virbitsky characterized the pile pictured on the right side of GX-9 as "fill rock," "over burden rock," and "unclassified with different sizes of material." Tr. 107. He agreed that the material pictured was coming off the portable plant. Tr. 107. In reference to the photograph of the quarry site at GX-9M, Virbitsky agreed that all of the material pictured had been screened by the portable plants. Tr. 107. Merwine had repeatedly described the material as 2B stone but Virbitsky described it as "smaller fill material," "smaller fill product." Tr. 107-108.

Regarding his Pennsylvania DEP license authorization, Virbitsky testified that Section 4, titled "Minerals Mined," referred to 7,542 tons of noncoal materials which were moved to different locations on the quarry site. Tr. 108-109. This figure did not refer to materials leaving the site but was a "reclamation" sum indicating materials which "a dozer just pushed...over the bank" to level off the site. Tr. 108-110; GX-10.

Virbitsky conceded that some of the material processed through the portable plants at Mayfield Quarry was used in construction projects for Virbitsky Masonry. Tr. 110. Virbitsky was asked if he recollected past deposition testimony in which he stated that "maybe on some occasions" material from Mayfield Quarry was sold at Jermyn Supply consisting of "some fill and dirt," "some spoil pile's material." Tr. 111. He agreed that some of the material screened at Mayfield Quarry by the portable plants was used to level and grade some of the properties that he owned. Tr. 112.

On redirect examination, Virbitsky again indicated that he sold various products obtained from third parties at Jermyn Supply. Tr. 114.

At hearing this Court took judicial notice of 228 pages of invoices identifying materials from third parties which were sold at Jermyn Supply. Tr. 114-115.

II. ISSUES PRESENTED

The issues before this Court are:

1. Whether the Respondent's Mayfield Quarry facility is subject to MSHA jurisdiction based on whether the Mayfield Quarry site was/is a "coal or other mine" within the meaning of Section 3(h)(1)(c) of the Mine Act;

2. Whether the products of Mayfield Quarry entered the stream of commerce or affect commerce within the meaning and scope of Section 4 of the Mine Act and;

3. Whether the Mayfield Quarry site essentially functions as a "borrow pit" where any mining activities, including the milling of materials, would be considered "*de minimis*" in nature?

III. CONTENTIONS OF THE PARTIES

A. The Secretary's Contentions

The Secretary asserts the Mayfield Quarry site, meets the definition of a "Mine" and "Operator," respectively under Section 3(h)(1), 30 U.S.C. §802(h)(1), of the Mine Act, and therefore, falls under MSHA's jurisdiction. Sec'y.'s Post-Hearing Br. 10.[4] The Secretary cites *Marshall v. Stoudt's Ferry Preparation Company*, 602 F.2d 589 (3rd Cir. 1979), and *Harman Mining Co. v. FMSHRC*, 671 F.2d 794 (4th Cir. 1981), to argue that Congress intended the Mine Act and the definition of a "mine" to be interpreted broadly, thus expanding the scope of the Mine Act, and consequently MSHA's jurisdiction. *Id.* Specifically, the Secretary contends that the language contained in Section 3(h)(1) of the Act, which defines "coal or other mine," to include "lands, excavations,. . . equipment. . .used in . . . the milling of. . . minerals," demonstrates Congress's clear intent to delegate extensive authority to the Secretary to determine what constitutes mineral milling. *Id.*

The Secretary contends his interpretation of the term "sizing," a milling process contained within the MSHA-OSHA Interagency Agreement ("Interagency Agreement"), should be entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). SPHB 11. To support his position, the Secretary cites *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1552 (D.C. Cir. 1984), arguing considerable deference must be accorded to his determination of what constitutes "milling," as defined within the Interagency Agreement. *Id.* The Secretary further argues because the Respondent operates portable screening plants to screen and separate material into different sizes, the Respondent engages in "Milling" and therefore is subject to MSHA jurisdiction. SPHB 12.

The Secretary further contends that because the material screened at Mayfield Quarry is sold at the Respondent's supply yard, Jermyn Supply, and utilized in Respondent's different businesses and properties, these activities affect commerce. SPHB 15. As a result, the Secretary argues these actions are subject to MSHA jurisdiction under the Mine Act. *Id.* Moreover, the Secretary argues that even if the Respondent can establish that he did not sell any material from the Mayfield Quarry to the public, the Respondent's quarry activities still affected commerce. SPHB 16. The Secretary supports this contention by arguing that the material was utilized not only in Respondent's construction business, but also in improving nine other properties owned by the Respondent for future development. *Id.*

Additionally, the Secretary contends that under the test developed in *Oliver M. Elam Jr., Co.*, 4 FMSHRC 5, 6 (Jan. 1982), the Respondent is subject to the jurisdiction of the Mine Act because he engages in work normally conducted by a mine operator by performing activities to make the extracted material suitable for a particular use. SPHB 17. The Secretary argues that the

[4] Hereinafter, the Secretary's Post-Hearing Brief that was submitted on June 20, 2017 shall be abbreviated "SPHB," followed by the page number. Likewise, the Respondent's Post-Hearing Brief that was submitted on June 19, 2017 shall be abbreviated "RPHB," followed by the page number.

reason Respondent sizes material at Mayfield Quarry is because he wants to make sure the material meets specific market specifications. *Id.*

Furthermore, the Secretary argues that the Respondent does not operate a "borrow pit" because the material at Mayfield Quarry is sized which is a part of the milling process and falls under MSHA jurisdiction. SPHB 18. The Secretary notes the Commission has traditionally applied a strict interpretation to the term "borrow pit." SPHB 18-19. The Secretary contends because the Respondent processes material through portable plants and separates stockpiles of stone, the material is not "in basically the same form," and therefore does not meet an essential requirement of a borrow pit as defined by the Interagency Agreement. SPHB 19. Thus, the Secretary asserts Respondent's work at Mayfield Quarry fails to constitute a borrow pit. *Id.*

Lastly, the Secretary contends there is no "*de minimis*" exception to activities covered under the Mine Act. SPHB 20. The Secretary cites to *State of Alaska Dept. of Transportation*, 36 FMSHRC 2642, 2645 (October 2014) and *Bonanza Materials Inc.*, 15 FMSHRC 1355 (July 1993) (ALJ) in support of her argument that even if Respondent's operations are indeed intermittent, these activities would still fall under MSHA's jurisdiction because the Commission has consistently held any activity which is functionally integrated with mining activity is subject to Mine Act regulation. SPHB 21.

B. Respondent's Contentions

Conversely, the Respondent contends that Mayfield Quarry is not subject to MSHA jurisdiction, but rather OSHA jurisdiction, because the site meets the definition of a "borrow pit" as defined by the Interagency Agreement. RPHB 3. Respondent supports this contention by arguing that he does not conduct any milling activities at Mayfield Quarry, rather, he merely engages in scalping to remove wood, dirt, and rock. RPHB 4. Furthermore, the Respondent argues because the MSHA inspector did not test the materials onsite there is no way to confirm that the material in question was sand or gravel. *Id.*

The Respondent also contends that any extraction of bulk fill at the site occurs only intermittently and all of the material is utilized "relatively near the borrow pit." RPHB 4. To support this position, the Respondent cites *David Duquette Excavating*, 37 FMSHRC 744 (Apr. 2015) (ALJ), which it argues contains nearly identical facts to the instant case. *Id.* Accordingly, Respondent argues that just as in *Duquette,* MSHA does not have authority to exercise jurisdiction over Respondent's extraction of bulk fill at the Mayfield Quarry because the site meets the definition of a borrow pit, and therefore is exempt from MSHA jurisdiction. RPHB 4-5.

Finally, the Respondent contends he is not in the business of "preparing a mineral" because he does not screen the bulk fill to remove impurities or to ensure that it is appropriately sized to be sold in the stream of commerce. RPHB 5. Thus, Respondent contends MSHA has no authority to regulate his operations at the Mayfield Quarry. *Id.*

IV. DISCUSSION

A. The Secretary's Burden of Proof and Standard of Proof

The burden of persuasion is upon the Secretary to prove the gravamen of a violation by a preponderance of the evidence. *Jim Walter Res., Inc.*, 28 FMSHRC 983, 992 (Dec. 2006), *RAG Cumberland Res., Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987). This includes every element of the citation. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.*, 17 FMSHRC 872, 878 (Aug. 2008).

Commission precedent has held that "[t]he burden of showing something by a 'preponderance of the evidence' the most common standard in the civil law, simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence.'" *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *quoting Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California*, 508 U.S. 602, 622 (1993).

B. Whether the Respondent Operates a "Mine" under the Mine Act

The central issue presented in this matter is whether MSHA possesses jurisdiction over the Mayfield Quarry.[5] For the reasons set forth below, this Court finds that the Mayfield Quarry conducts mining operations. Consequently, MSHA can assert its jurisdiction over the facility.

Under the Mine Act, MSHA has jurisdiction over "each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce...each operator of such mine, and every miner in such mine." 30 U.S.C. § 803. Section 3(h)(1) of the Act defines the term "coal or other mine" as:

> (h)(1)(A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, 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 in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration

[5] This Court notes that MSHA's jurisdiction over an individual facility must be decided on a case-by-case basis, looking to the statutory language and assessing the nature and purpose of the individual facility. *See Pennsylvania Electric Company v. FMSHRC*, 969 F.2d 1501 (3rd Cir. 1992).

> resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

30 U.S.C. § 802(h)(1).

The legislative history of the Act leaves no doubt Congress wanted "[A]ny [facility] considered to be a mine and to be regulated under this Act be given the broadest possible interpretation. . . ." S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 602 (1978). Congress was unambiguous that if any uncertainty existed to whether a facility or site should come under MSHA jurisdiction, those "doubts [shall] be resolved in favor of coverage by the Mine Act." *Watkins Engineers & Constructors,* 24 FMSHRC 669, 675-76 (July 2002). Although MSHA's jurisdiction is expansive, it "is not universal and must be based upon specific facts." *Clarkson Constr. Co., Inc.*, 37 FMSHRC 450, 454 n.5 (Feb. 2015) (ALJ) (noting deference shall not be accorded to the Secretary if her interpretation of the statute is deemed unreasonable).

Under the Act, covered mining operations include the milling of mine products; however, the Act does not define the term "milling." Instead milling is defined within an Interagency Agreement between MSHA and OSHA, which delineates areas of authority between the two agencies. *See Interagency Agreement, Mine Safety and Health Administration, Occupational Safety and Health Administration*, 44 Fed. Reg. 22,827 (Apr. 17, 1979) (GX 21). The agreement defines milling as follows: "[T]he art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives. The essential operation in all such processes is the separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated." *Id.* at 22,829.

As a preliminary matter, this Court must note that "The Commission and its judges have been reluctant to second guess the Secretary when she makes choices involving MSHA and OSHA coverage." *Hosea O. Weaver & Sons, Inc.*, 28 FMSHRC 688, 692 (Jul. 2006) (ALJ). In situations where an entity is deemed to be subject to either MSHA or OSHA regulations, the Secretary merely engages in an act of "adjusting the administrative burdens between [his] various agencies." *Donovan v. Carolina Stalite Co.*, F.2d 1547 (D.C. Cir. 1984). After all, it is the Secretary who has the duty to administer the statutes and if he makes an informed jurisdictional determination, the Commission has traditionally afforded broad deference to such determinations. *See e.g., Hosea O. Weaver & Sons* 28 FMSHRC at 692 (finding because MSHA inspectors possess expertise in a highly specialized field the Secretary's reliance on an inspector's determination is especially appropriate).

Here, the Secretary contends that under the Mine Act, MSHA had sole jurisdiction over the Mayfield Quarry because the Respondent conducted milling operations onsite. Specifically, the Secretary argues it is undeniable that "sizing" took place at the Mayfield Quarry. The Respondent, however, contends that MSHA did not have jurisdiction over the facility because Respondent did not engage in sizing; rather he merely "scalped" the material to remove rock, dirt, and wood." RPHB 4.

When conducting a review of whether MSHA correctly interpreted its authority under the Mine Act, the undersigned must first ask "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc v. Natural Res. Def. Council*, 467 U.S. 837, 842-843 (1984); *Watkins Eng'rs & Constructors*, 24 FMSHRC at 672-73.

Although the Mine Act does not specifically address what the "milling" process entails, Congress was cognizant when enacting the statute that decisions concerning complex matters in a highly technical field, such as mining, were best left to the experts. *In re Kaiser Aluminum & Chemical Co. v. Dep't of Labor*, 214 F.3d 586, 591 (5th Cir. 2000); *see also Donovan* 734 F.2d at 1552 (finding because the Secretary has the expertise in the specialized field of mining he should be given deference to determine what types of activities constitute milling). In fact, in the Act itself, Congress expressly delegated authority to the Secretary of Labor to determine "what constitutes mineral milling for the purposes" of the Act. 30 U.S.C. § 802(h)(1)(C). In situations such as here, where Congress has left the agency with the task of crafting technical definitions, deference is particularly appropriate. *Chisholm v. F.C.C.*, 538 F.2d 349, 358 (D.C. Cir. 1976), *cert denied*, 429 U.S. 90, 97 S.Ct. 247, 50 L.Ed.2d 173 (1976). Therefore, as long as the Secretary's interpretation is within reason, this Court must accord deference to his determination. *Kaiser*, 214 F.3d at 591.

Because the Mine Act is silent on the point in question, we will proceed to the second prong of *Chevron* to determine whether the Secretary's interpretation of milling was appropriate. *Chevron U.S.A. Inc.* at 843. *Chevron*'s second prong asks "whether the agency's answer is based on a permissible construction of the statute." *Id.* Deference shall be accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy W. Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (*citing Chevron*, 467 U.S. at 844; *Joy Techns., Inc. v. Sec'y of Labor*, 99 F.3d 991, 995 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1691 (1997)). Thus, "The agency's interpretation of the statute is entitled to affirmance as long as that interpretation is one of the permissible interpretations the agency could have selected." *Watkins*, 24 FMSHRC at 673 (citations omitted).

The Secretary expressly specified in the Interagency Agreement that the following activities constitute milling: "[C]rushing, grinding, pulverizing, ***sizing***, concentrating, washing, drying, roasting, pelletizing, sintering, evaporating, calcining, kiln treatment, sawing, and cutting stone, heat expansion, retorting (mercury), leaching, and briquetting." *MSHA-OSHA Interagency Agreement*, 44 Fed. Reg. at 22,829 (*emphasis added*). Notably, only one of these activities must be conducted for MSHA to assert jurisdiction over the facility or property. *Colorado Lava, Inc.*, 25 FMSHRC 405, 407 (July 16, 2003) (ALJ) (finding sizing alone was enough for MSHA to establish jurisdiction over operator who failed to file a Legal Identity Report).

"Sizing," as defined in the Interagency Agreement, is "the process of separating particles of mixed sizes into groups of particles of all the same the size, or into groups in which the particles range between maximum and minimum sizes." *MSHA-OSHA Interagency Agreement*, 44 Fed. Reg. 22,827 at 22,829; *see also* U.S. Dep't of the Interior, *Dictionary of Mining, Mineral and Related Terms* 1020 (1968). Yet, because no significant difference exists between sizing and

scalping, no bright line test is available to provide clarity on which process is being conducted. *New York State Dept. of Transp.*, 2 FMSHRC 1749, 1768 (July 1980) (ALJ). Instead, the factfinder must carefully scrutinize all of the relevant facts contained within the record on a case-by-case basis. *Id.*

Here, Gary Merwine,[6] an experienced MSHA inspector, immediately observed Robert Dipple, an employee of the Respondent, operating an excavator feeding extracted material into a portable screening plant, which then fed that very same material into a second portable screening plant.[7] Tr. 17. After the material was separated by the second portable plant, Merwine observed three different sized piles created in front of the second portable plant. Tr. 28; GX-9C, GX-9F.

Shortly after Dipple stopped operating the excavator so he could phone the Respondent, Merwine noticed a total of five, *separate piles,* consisting of different sized products in front of the portable plants. Tr. 20; GX-9C. Merwine testified he was certain three of the piles contained the exact products produced from the portable plants that he observed upon entering the site. Tr. 20. Once Dipple returned, he began loading one of the products, a pile of stone, into a dump truck which had arrived on site. Tr. 20. After the dump truck was loaded, the truck left the site to transport the material to an unknown destination. Tr. 20.

At hearing, Merwine testified that a benefit of operating two portable plants simultaneously is that it allows an operator to separate additional products into different sizes by using a different sized screen on the second portable plant. Tr. 28. Merwine testified he had observed the following products coming off the conveyor belts of the portable plants during his inspection: sand, modified stone, and four minus stone (both varieties of stone are types of gravel). Tr. 36. Furthermore, Merwine testified that all of the excavated material he observed being fed into the plants during the inspection had their own unique features. Tr. 35. Notably, all of the materials were of different sizes than the others. Tr. 31, Tr. 36. For example, Merwine testified that four minus stone "ranges from baseball size to a little smaller," however, "modified stone is stone that is smaller than a baseball but bigger than a golf ball." Tr. 35; Tr. 31.

The Respondent admitted at deposition, and again when testifying, that he separates all of the material screened into different piles-small, medium, and large. Tr. 106. Respondent further agreed that the portable plants produced five different types of products. Tr. 106. Moreover,

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[6] Before being employed by MSHA, Merwine had spent 25 years working in the coal industry in various capacities. For the first two years he was employed as a laborer/miner. He then served as supervisor/miner for the next 13 years. His supervisory role was followed by him operating a mine as an owner/operator for 10 years. During his tenure at MSHA, Merwine worked as a supervisor of the Wyomissing field office during 2010-2011 and 2014. His inspector training included six four week training sessions at the Beckley Mining Academy. The training sessions included taking a two week advanced electrical course and a FBI course concerning the obtaining and securing of evidence and interviewing. Tr.13-15.

[7] Screening is defined as the "use of one or more screens to separate particles into defined sizes." The process is also referred to as "sizing." *See American Geological Institute, Dictionary of Mining, Mineral, and Related Terms* 486 (1997).

Respondent conceded all of the extracted material onsite (documented in Merwine photographs) were screened through his portable plants at Mayfield Quarry. Tr. 107.

The Respondent, however, did not agree with Merwine's characterization of the material and instead described it either as dirt, "fill rock," "over burden rock," or "unclassified with different sizes of material." Tr. 107. At hearing, Respondent testified that neither sand nor gravel was produced at the quarry; rather the materials Merwine observed were "dirt." Tr. 98-100. Moreover, he stated the function of the plants was to simply scalp the material to "remove the dirt, rocks, and wood out the material that's there to put it on different piles so I could use it." Tr. 105.[8] Lastly, Respondent takes issue with the process used by Merwine to identify the material during the inspection. RPHB 4. [9]

At hearing, Merwine opined that the sizing of the materials which he had observed at the quarry site fell within the parameters of MSHA's authority over milling. Based on the testimonial evidence, as well as the photographic evidence admitted at hearing, this Court finds the inspector's testimony and conclusions to be more credible.

The Commission and the D.C. Circuit have long been unequivocal, if an operator extracts sand or gravel, it will fall under MSHA's jurisdiction. *See, e.g., Jerry Ike Harless Towing, Inc.*, 16 FMSHRC 683, 688 (Apr. 1994) (operator's extraction of "sand, a mineral, from its natural deposit covered by the Mine Act."); *Donovan*, 734 F.2d. at 1548 (slate gravel quarry operator, including its conveyors, subject to Mine Act). Furthermore, both courts have upheld the Interagency Agreement's classification of sizing as mineral milling. *Id.* at 1553 (upholding Secretary's determination that a slate gravel processing facility, which did not extract but instead crushed and sized the slate for sale, constituted a "mine" under section 3(h)); *State of Alaska, Dep't of Transp.*, 36 FMSHRC 2642, 2649 (Oct. 2014) (finding a state agency that used a screener to size sand and gravel for road construction engaged in mineral milling).

Although Merwine did not conduct sampling of the materials at the quarry during his inspection, this does not vitiate the Secretary's case. Rather there are other persuasive evidentiary considerations that exist which corroborate the Secretary's case, such as Merwine's extensive mining experience. Indeed, the Commission has held that the informed opinion of an experienced inspector, such as Merwine, is entitled to significant weight. *See Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998) (relying on the opinion of an experienced inspector to conclude that substantial evidence supported an ALJ's S&S determination). Here, the evidence submitted and testimony presented by the Secretary at hearing, sufficiently corroborates Merwine's determination that sizing took place on the property. SPHB 12.

Throughout the inspection, Merwine took numerous photographs, which captured critical moments. Merwine was able to document in real time the layout of the site and all activities

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[8] Respondent alleges he used all of the screened material as bulk fill for his properties and construction projects that he was involved in. RPHB 4.

[9] Respondent's Counsel notes in his brief that Merwine did not test or take samples of the material at the quarry. RPHB 4.

being conducted on the day of the inspection. The photographs further documented Dipple excavating material from an embankment located on the property and then feeding that material into the first portable screening plant. GX-9B. Other photographs depicted what appeared to be sand coming off of the first plant (GX-9C), a pile of "rock material" to the right of the first plant (GX-9D), and the second plant being fed a sand product that was different from the rock material to the right of the first plant (GX-9F); Tr. 29-31. Lastly, Merwine documented a stockpile of four minus stone (GX-9H), Dipple loading the four minus stone into the dump truck (GX-9I), and the front end loader used to load stone into the dump truck parked with three stockpiles of different material behind it that had come from one of the portable plants. GX-9J; Tr. 28-33.

State of Alaska provides a close analogy to this case. 36 FMSHRC at 2642. In *State of Alaska*, the Commission held the agency's use of a portable screening plant to size excavated sand and gravel material constituted milling as the term is interpreted in the Interagency Agreement. *Id.* at 2649. Similar to the portable plants at issue here, the function of the portable screening plants was not merely to "scalp away large rocks, wood, and trash from the material it was extracting." *Id.* Rather, the plants were used specifically to separate material into three different sized piles of rock. *Id.* Likewise, the function of the Respondent's plants was to make various different sized products which were then stockpiled and separated on site according to size. Tr. 27-29.

The Respondent relies largely on *Duquette* to support his assertion that the plants were used solely for scalping purposes. RPHB 4. Notably, Respondent claims the facts of the present case are "nearly identical" to those in *Duquette*. RPHB 4. In *Duquette*, Judge Feldman found the Respondent's earthen material extraction site to be exempt from MSHA jurisdiction because no milling was involved in the extraction operation. *Duquette*, 37 FMSHRC at 751. Rather the Respondent extracted material stipulated by both MSHA and the Respondent, to be "generally clean fill" from an embankment. *Id.* A single scalping screen was employed only when necessary to remove large rocks, wood, and trash. *Id.* The material was then subsequently loaded onto a dump truck for transport offsite where it was used in the form it was extracted as bulk fill. *Id.*

Here, unlike *Duquette*, the material extracted was not suitable solely for bulk fill usage. Instead, the Respondent employed not one, but two, portable screening plants to separate the various types of material into different sized stockpiles. Tr.17. Additionally, the Respondent indicated that the various materials stockpiled at the quarry were used for different purposes. Tr. 21. Some of it was used for construction projects, some to construct buildings, and some of it was transported to his supply yard. Tr. 21. In *Duquette*, all of the material that went through a scalping screen was then subsequently deposited into the same dump truck for transport. 37 FMSHRC at 751. Here, however, the materials were separated into five different stockpiles in which only one of the materials, four minus stone, was loaded into the dump truck for use offsite. Tr. 20.

Screening material to be sized and then stockpiled for further use are functions normally performed by a mine operator. *See Watkins Engineers,* 24 FMHRC at 673-675 (finding the process of sizing and stockpiling of extracted material were sufficient for MSHA to establish jurisdiction over the operator); *see also Tamko Roofing Products*, 27 FMSHRC 486, 487 (May 2005) (ALJ) (screening limestone into different sizes constituted milling, which was accordingly

subject to MSHA jurisdiction). As noted above, sizing alone is sufficient to establish MSHA jurisdiction. *Colorado Lava*, 25 FMSHRC at 407.

At hearing, the Respondent admitted that screening was performed at the quarry; however, he claimed he did it only for scalping purposes. Tr. 105. Yet, Merwine testified he witnessed an employee of the Respondent use a Caterpillar excavator to load extracted material from an embankment and then dump that material into a hopper. Tr. 27; *see also* GX-9B. The material then flowed through a screener, made up of different sized holes depending upon the material desired. Tr. 25. Any material placed on the plant hopper would then go to one of three separate conveyor lines. Tr. 27. One of these lines then fed material onto a stacked conveyor belt which fed the material into a second portable plant where products could be sized even further. Tr. 27-28. It was at this point Merwine observed the second plant produce products of two different sizes. Tr. 31. In sum, Merwine testified that he observed five different sized piles of products "that appeared to have come from the portable screening plants;" different materials screened through two different plants, and an excavator loading one of the uniquely sized piles into a dump truck. Tr. 20.

Given the evidence presented by the Secretary and the reasonable inferences flowing from that evidence, this Court concludes the Secretary has proven that it is more likely than not that sizing occurred at Mayfield Quarry. The Interagency Agreement, expressly states "sizing occurs if particles of mixed sizes are grouped into particles of the same size or into groups of particles ranging between maximum and minimum sizes." *MSHA-OSHA Interagency Agreement*, 44 Fed. Reg. 22,827 at 22,829. Here, Merwine testified to having observed materials going into the feed hoppers and separated into three different sizes and observed at least five different sized piles of material stockpiled at the quarry. Tr. 36; Tr. 20. These types of activities fall within the first part of the definition of sizing. *See* 44 Fed. Reg. 22,827 at 22,829. Although the Respondent contends the extracted materials were actually dirt and waste their makeup is irrelevant to the determination of whether sizing occurred. Accordingly, this Court finds the Secretary's conclusion that the Respondent conducted sizing at the Mayfield Quarry to be an appropriate interpretation of the Act.

C. Whether the Products of the Mayfield Quarry Affect Commerce

Article I, Section 8, Clause 3 of the Constitution provides Congress the authority to "regulate commerce . . . among several States." The Supreme Court has consistently upheld Federal regulations of seemingly local activities due to the belief that such activity could affect interstate commerce. Although many of these ostensibly local activities appear to be purely intrastate, if they are the type of activity which falls within a class of regulated activity, they will be deemed to have affected interstate commerce. *See Wickard v. Fillburn*, 317 U.S. 111 (1942) (growing wheat solely for consumption on the farm on which it is grown affects interstate commerce); *Fry v. United States*, 421 U.S. 542, 547 (1975) (stating even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similar situated, affects commerce among the States or with foreign nations).

Mining is one of those classes of regulated activities and therefore has been subject to the broadest reaches of Federal regulation under the Commerce Clause due to the extent its activities affect interstate commerce. *Marshall v. Kraynak*, 457 F. Supp. 907, (W.D. Pa, 1978), *aff'd*, 604

F.2d 231 (3d Cir. 1979), *cert. denied*, 444 U.S. 1014 (1980). Notably, "the Act does not require that the effect on interstate commerce be substantial; any effect at all will subject [the operator] to the Act's coverage." *Marshall v. Bosack*, 463 F. Supp. 800, 801 (E.D. Pa. 1978).

Section 4 of the Mine Act states that: "[e]ach coal or other mine, the products of which enter commerce or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act." 30 U.S.C. § 803. In enacting the mine safety statutes, Congress intended to exercise its authority to regulate interstate commerce to "the maximum extent feasible through legislation." *Secretary v. Shingara*, 418 F. Supp. 693 (M.D. Pa. 1976), quoting S. Rep. No. 1055, 89th Cong., 2d Sess. 1 (1966), *U.S. Code Congressional and Administrative News*, 89th Cong., 2d Sess. 2072.

Indeed, courts have consistently held that even mines with solely local sales will still affect interstate commerce and therefore fall within the ambit of Congress' Commerce power. *See e.g., U.S. v. Lake*, 985 F.2d 265, 269 (6th Cir. 1993) (finding that a coal mine operator who was solely purchasing mining supplies from a local dealer and whose sales were entirely local affected commerce because these activities in combination with other activities could affect interstate coal markets); *D.A.S. Sand & Gravel, Inc. v. Chao*, 386 F.3d 460 (2nd Cir. 2004), *cert denied*, 544 U.S. 1048 (2005) (affirming Commission holding that the Mine Act applies to sand and gravel company that sold their products entirely intrastate).

Likewise, Commission judges have held that any operator that engages in milling, even if for personal use, will be found to affect interstate commerce. *Cobblestone Ltd.*, 10 FMSHRC 731, 733 (June 1988) (ALJ) (finding that the operation of a family owned gravel pit which was used solely for building a family residence affected commerce). To determine whether the Respondent's quarry operation affects commerce, this Court must "focus on whether such actors taken together would have the potential to affect the interstate market at issue." *State of Alaska*, 36 FMSHRC at 2645. Recently this Court had the chance to apply the analysis to an operator sizing sand and gravel through the use of a screening plant, the court declared unequivocally that "there is no question that such potential is present with respect to entities that mine or mill sand or gravel for their own use." *Id.*

Similar to the homeowner in *Cobblestone*, the Respondent indicated during the inspection of his property that the materials located onsite were used to construct buildings and utilized in various construction projects. Tr. 45-46. All of this work was conducted offsite. Tr. 46. Additionally, the Respondent admitted at his deposition that he used some of the material from the quarry at construction sites to backfill foundations of buildings he constructs. Tr. 46. Furthermore, Merwine testified that the Respondent conceded that some of the materials screened at the quarry were sent to the Respondent's supply yard, where products can be purchased by the public.[10] Tr. 21.

The day after the inspection, Merwine visited Respondent's supply yard which is located approximately a half mile away, to continue his investigation. Tr. 36. Merwine testified that he observed bins with sand, and different sizes of stone for sale. Tr. 36-37; GX-19, GX-20. Three of

[10] Merwine documented the encounter with the Respondent in his field notes. GX-5.

the bins he observed contained the same type of stone materials that he observed being processed through Respondent's screening plants at the quarry the day before. Tr. 37, 85-86; see also GX-9N, 9O, and 9P. Notably, Merwine observed four minus stone in one of the bins. Tr. 37, 38. This was the same type of stone Merwine had observed being loaded into a dump truck at the quarry for shipment offsite. Tr. 37, 38; *see also* GX-9N, GX-9O, GX-9P.

Even though no direct evidence was presented to show that the stone material contained in the bins at the supply yard originated from the quarry, given that the Respondent consistently stated he sent screened material from the quarry to the supply yard, both during the inspection and his deposition, coupled with Merwine's photographs, testimony, and field notes, this Court finds it more likely than not the Respondent sold at least some of these products at his supply yard. Moreover, it is also reasonable to infer that some of the equipment Respondent was using such as the Caterpillar excavator or portable plants were manufactured outside the Respondent's home state of Pennsylvania. It has been held that use of equipment that has been moved in interstate commerce affects commerce. *See United States v. Dye Construction Co.*, 510 F.2d 78, 82 (1975).

Even if the Respondent was not selling screened material from the quarry through his supply yard, he still affected commerce. The Respondent has conceded that he used the material from the quarry for construction projects. Tr.45-46. Specifically, Respondent admitted he used some of the screened material from the quarry to backfill foundations of buildings he constructs. Tr. 46. As the Secretary astutely points out in his Post Hearing Brief, if the Respondent was not able to obtain this material from the quarry, he would have to acquire it from the open market. SPHB 16. Indeed, the Court has long held that products affect commerce where they have an intrinsic value as a commodity which would have to be purchased elsewhere if not produced by the operator. *See, N.Y.S. Department of Transportation*, 2 FMSHRC 1749 (July 1980) (ALJ); *Island County Highway Department*, 2 FMSHRC 3227 (Nov. 1980) (ALJ); and *County of Ouray, Colorado*, 9 FMSHRC 1205 (July 1987) (ALJ).

Although it may be true that the Respondent never took material from the Mayfield Quarry to Jermyn Supply for sale to the general public, given the broad interpretation and coverage of the Act as intended by Congress, and as construed by the courts, it may be reasonably inferred that Respondent's activities as a whole had an impact on interstate commerce. *See Fry* 421 U.S. at 547.

Therefore, this Court concludes that the Mayfield Quarry's sand and gravel processing activities, including all of the equipment and machines used in the processing of the materials for various uses in the Respondent's construction businesses, constitute a mining operation covered by the Act, affect interstate commerce within the meaning of the Act, and that the Respondent is within the Act's reach.

D. Whether Under the *Elam* Test the Respondent is Subject to MSHA Jurisdiction

The Commission has emphasized when making a determination regarding jurisdiction this Courts inquiry must focus on the nature of the functions that occur at the site. *Sec'y of Labor (MSHA) v. Oliver M. Elam, Jr.*, 4 FMSHRC 5, 7 (1982). To determine whether a site falls within

the ambit of MSHA jurisdiction, a reviewing court must engage in a two-prong analysis: (1) A party must engage in activities normally performed by a mine operator and (2) The party must perform these activities in order to make the extracted material suitable for a particular use or to meet market specifications. *Id.* at 8.

Here, the Respondent used portable plants to screen material into different sizes. Tr. 106. As discussed in detail *supra*, this process is referred to as "sizing," and falls within one of the categories of milling, as set forth in the Interagency Agreement. *See* 44 Fed. Reg. at 22,829-22,830 (Apr. 17, 1979). Moreover, the agreement recognizes milling as a mining operation. *Id.* Consequently, because the Respondent engaged in milling at the Mayfield Quarry, an activity that is normally performed by a mine operator, the Respondent satisfies the first prong of the *Elam* test.

In *Elam*, coal was not sized for any particular use; rather the coal was sized into one size to help facilitate the loading process at Respondent's dock. 4 FMSHRC at 5. Unlike *Elam*, the Respondent operated two portable screening plants to separate material into five separate stockpiles, with each stockpile containing material of a distinct size. Tr. 20; Tr. 106. Notably, these stockpiles appear to be stored onsite until they are needed for a particular use offsite. Tr. 20.

If the Respondent's true intent was to use the material for bulk fill on his properties then it would defy logic for the Respondent to have spent time and resources to screen the material into different groups of particles based on their size. Rather, the Respondent could have simply taken the material from the embankment and loaded it onto the dump truck to be used as bulk fill. This did not occur. Instead the material is used for its intrinsic properties, and appears to be used over a relatively wide area of locations where the Respondent conducts activities related to his construction businesses. Accordingly, the Respondent's sizing of extracted materials at Mayfield Quarry in order to make the extracted material suitable to meet market specifications satisfies the second prong of the *Elam* test. Thus, having satisfied both prongs of the *Elam* test, this Court finds the Mayfield Quarry well within the ambit of Mine Act jurisdiction.

E. Whether the Respondent's Operation is a Borrow Pit

The Respondent further asserts that MSHA jurisdiction was inappropriate because the Mayfield Quarry operation is a "borrow pit," and therefore not subject to inspection. RPHB 4-5. Respondent supports this contention by arguing that the material extracted was merely bulk fill and only used on land relatively near the borrow pit. RPHB 4.

The Interagency Agreement defines borrow pits as follows:

> "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 earth 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 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 qualities** on land which is relatively near the borrow pit.

MSHA-OSHA Interagency Agreement, 44 Fed. Reg. at 22,828; (*emphasis added*); GX-21.

In 1996, MSHA adopted interpretive guidelines to provide further clarity on the agreement. The Interpretation and Guidelines stated:

> Thus, if 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.

I, MSHA, U.S. Dept. Of Labor, *Program Policy Manual,* Section 4, I.4-3 (1996). (*Emphasis added*).

The Commission and its Judges have traditionally applied a narrow interpretation of the term "borrow pit." *Jones Bros., Inc.*, 39 FMSHRC 399, 401 (Feb. 2017) (ALJ), *citing Drillex, Inc.*, 16 FMSHRC 2391, 2396 (Dec. 1994); *Kerr Enterprises, Inc.*, 26 FMSHRC 953, 957 (Dec. 2004) (ALJ); *N.Y. State Dep't of Transp.*, 2 FMSHRC 1749, 1761 (July 1980) (ALJ). For example, state agencies that extracted and screened sand for traction control purposes on runways and roadways during the winter months were found to be mine operators and consequently did not qualify for the "borrow pit" jurisdictional exception. *See N.Y. State Dep't of Transp.*, 2 FMSHRC at 1761. In *New York Department of Transportation*, the Court held that when materials are processed through a shaker screen for the purpose of shaping them into a particular size for their "intrinsic qualities," the operator will not be found to be operating a *"borrow pit"* within the meaning of the MSHA-OSHA Interagency Agreement. *N.Y. State Dep't of Transp.*, 2 FMSHRC at 1758-59. Additionally, the court held the operator's usage of a portable screening plant to select 1-1/2" gravel constituted "milling." *Id.* at 1761. This "milling" removed the NY DOT from the MSHA-OSHA Interagency Agreement definition of "borrow pits." *Id.*

Here, Respondent employed two portable screening plants to size sand and gravel particles, which are then subsequently stockpiled throughout the property based on their unique characteristics and most importantly, their distinct sizes. As noted above, Respondent conceded during his deposition that the stockpiles of separate materials were further grouped into piles by size, "small, medium, and large." Tr 106. Furthermore, after the materials are processed through the screening plants, the stockpiles of gravel and sand are not "in basically the same form" as

they were extracted. As such, the Respondent's use of screeners to "mill" or "size" the sand and gravel materials is no different than any other sand and gravel operation that is subject to MSHA jurisdiction.

Even the use of a minimal "scalping screen" has been found sufficient for MSHA to assert jurisdiction when the operator of the screen does not use the product for bulk fill on nearby sites. *Kerr Enterprises*, 26 FMSHRC at 957. In *Kerr Enterprises*, although the operators use of a scalping screen to remove wood debris from earthen material was in accordance with the definition allowed for in the Interagency Agreement the operator still did not qualify for a borrow pit exception because the material was used for purposes other than bulk fill. *Id.* at 957.

Once again, Respondent's reliance on *Duquette* is mistaken. *See Duquette,* 37 FMSHRC at 744. In *Duquette*, the operator was an excavation contractor who extracted material solely for the purpose of using it as bulk fill for commercial or residential construction projects. Id. at 749. Notably, the operator did not conduct any milling processes. *Id.* at 751. Rather, he only engaged in scalping "to remove debris to make the material suitable for bulk fill usage." Furthermore, the bulk material extracted was used as found and was not altered to make the material "uniquely suitable for a particular purpose that can satisfy market specifications." Thus, the excavation contractor in *Duquette* closely mirrored the example set forth in the MSHA Program Policy Manual. Accordingly, the court found the excavator contractor to satisfy the requirements of operating a borrow pit.

Unlike *Duquette*, the Respondent conducted milling activities on his property. Tr. 106. Although the Respondent's first portable screening plant did in fact remove large rocks, wood, and trash, this is not the end of the process. Rather, after the material goes through the first plant where large rocks, trash, and wood are scalped away, the screening process continued with a second portable plant where the material was then altered even further into three additional sizes of rock. Tr. 27-28. The material was then stockpiled based on size and other characteristics until needed for a specific use. Tr. 20.

The "milling" of materials at the Mayfield Quarry dictates that the area qualifies as a mine. Moreover, it must be noted that even if borrows pits do exist on the property they are still located on mine property and most importantly are related to mining. Therefore, the Mayfield Quarry was appropriately subject to MSHA inspection.

F. Whether a *De Minimis* Exception Exists to Activities Usually Subject to MSHA Jurisdiction

Lastly, this Court at hearing requested that both parties address whether there is a *de minimis* exception to the activities that would otherwise fall under the jurisdiction of the Mine Act. [11]

[11] Although Respondent's Counsel did not address this issue adequately in his brief the Secretary asserts in her brief that the Act does not contain such an exception for operators, only independent contractors. SHPB 20. I need not address that issue here. Rather, this Court holds the subject activities are not *de minimis* in the context of the Respondent's overall operation.

Here, Respondent alleges his quarry is open for no more than two weeks per year and a normal workday consists of only two hours. Tr. 104. Respondent testified that he receives no income from the operation and that he is mainly focused on his construction company. Tr. 103. Furthermore, the Respondent alleges that during certain periods of time the operation can be dormant for up to two years. Tr. 103.

Although the Respondent purports to conduct a very limited operation the evidence submitted contradicts this assertion. According to the Respondent's application for a DEP Large Non Coal Mine Operator's License issued by the Commonwealth of Pennsylvania on July 6, 2015, the Respondent reported that 7,542 tons of Non-Coal minerals were mined at his operation in 2014. *See* GX-14. Additionally, the Respondent testified that in just two hours he was able to screen 20 tons of extracted material per day. Tr. 104-105. Yet, as the Secretary emphasizes in his Post Hearing Brief, if the Respondent did indeed only screen 20 tons of extracted material per day in 2014, it would have taken Respondent over 377 days to process the 7,542 tons of material at the Mayfield Quarry. This cannot be considered *de minimis* activity.

The amount of time spent extracting materials, however, is irrelevant to the instant matter. As the Commission has made clear "sand and gravel mining operations, whether year round, or ***intermittent***, have long been subject to Mine Act regulation." *State of Alaska,* 36 FMSHRC at 2647 (*Emphasis added*). The attempts of operators to escape jurisdiction by arguing that only a small portion of their activities could reasonably be subject to Mine Act regulation is not a new phenomenon in the mining industry. *See Hosea O. Weaver & Sons*, 28 FMSHRC at 692 (finding that even though the gravel crushed onsite comprised only 4.5% of asphalt plant's total output this was not a *de minimis* activity) *see also Austin Powder Co.*, 37 FMSHRC 1337, 1355-1356 (June 2015) (ALJ) (holding that an operator who used only up to 10% of its stored materials should not be considered *de minimis* activity because the items stored were used directly in the mining process). The courts have made clear that "the governing jurisprudence . . . [holds] that any activity which is functionally integrated with the mining activity necessitates the imposition of MSHA jurisdiction even where that activity is minor or removed from the mining site." *Bonanza Materials Inc.*, 15 FMSHRC 1355, 1359 (July 1993) (ALJ).

Here, Respondent contends that all of the operations conducted at Mayfield Quarry were performed intermittently. As such, Respondent argues his sporadic milling activities should be exempt from MSHA jurisdiction.[12] Although Respondent's quarry operation may indeed be secondary to his construction business, this Court finds Respondent's sizing activities to be

[12] At hearing, Respondent's Counsel contended that *Duquette* stood for the proposition that any activities performed at a mining facility in operation less than 200 hours a year would be considered *de minimis*. Tr. 92-93. Again, Respondent is mistaken. Rather, in *Duquette* both parties merely stipulated that an MSHA inspector mentioned to the operator there was a provision suggesting operators in service less than 200 hours a year would be taken off the MSHA inspection list. *See Duquette* 37 FMSHRC at 745. This Court has found that no such provision exists in the Act or any relevant case law to support such a contention. Furthermore, this Court is not bound by any stipulations from an unrelated matter before a different ALJ.

functionally integrated with a mining activity, milling. Thus, whether the Respondent sporadically conducts sizing at Mayfield Quarry or not is irrelevant.

As Respondent concedes, the Mayfield Quarry operation has been active for at least 10 years. During that time period the Respondent was able to conduct mining operations without any oversight or accountability from the appropriate mining regulatory authority. This Court finds such lack of oversight to be of great concern and fear that the Respondent may have been able to evade numerous Mine Act violations.[13] Moreover, this Court is deeply troubled that former and current employees may have been put in harm's way due to hazardous working conditions prior to MSHA inspecting the site.

The legislative history of the Mine Act is clear regarding the link between "hazards involved with ... mining" and "the need to provide for the health and safety of the nation's miners." S. Rep. No. 95-181, at 1 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977,* at 589 (1978). Indeed, as set forth in Section 2(a) of the Act, "the first priority and concern of all in the [mining] ... industry must be the health and safety of its most precious resource - the miner." 30 U.S.C. § 801. Simply put, the Mine Act was enacted to protect miners, not mines. To permit the Respondent to evade the regulations of the Act due to a *de minimis* exception would fly in the face of Congress's intent that what is considered to be a mine be given the broadest possible interpretation.

G. Whether the Respondent was in the business of Preparing Minerals

Finally, the Respondent contends that because he "did not engage in screening the bulk fill to remove impurities or ensure size quality, did not dry or clean it, and did not engage in the process of loading the bulk fill in separate containers according to size to be sold to third parties," he does not engage in in the process of "preparing minerals." RPHB 5. Accordingly, Respondent contends he is not subject to MSHA jurisdiction. However, "milling" and "preparation" are used interchangeably in the context of the Act. Both words detail what the process of treating mined minerals for market entails. For example, in *A Dictionary of Mining, Mineral and Related Terms* (U.S. Bureau of Mines, 1968) at 707, milling is defined as including "preparation for market." Thus, one can understand how both terms-milling and preparation—became part of the Act without either term being designated by Congress as an entirely separate process.

As described in detail *supra*, the Respondent engaged in milling which is part of the process of preparing minerals for the market. The Act's use of both terms indicates that both processes under the Act should be read broadly. Accordingly, MSHA jurisdiction was appropriate under the plain reading of the Mine Act and under the Secretary's interpretation.

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[13] Respondent argues in his brief because the citations issued in the instant matter are not related to respiratory issues from dust circulation the Respondent has not violated any of the types of safety concerns that MSHA was established to remedy. RPHB 5. I find the Respondent's argument somewhat attenuated from reality. In the instant case the Respondent was cited for 17 violations, all of which dealt with potential safety hazards.

ORDER

Based on the above, I find that MSHA had jurisdiction over the Mayfield Quarry and that a hearing on the merits will be set shortly.

John Kent Lewis
Administrative Law Judge

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