FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19th STREET, SUITE 443
DENVER, CO 80202-2536
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

February 2, 2017

JONES BROS., INC., Contestant, v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent.	CONTEST PROCEEDINGS Docket No. SE 2016-218 Citation No. 8817595; 04/06/2016 Docket No. SE 2016-219 Citation No. 8817596; 04/06/2016 Mine: S.R. 141 Project, DeKalb Co. Mine ID: 40-03454
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. JONES BROTHERS INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. SE 2016-246 A.C. No. 40-03454-410595 Mine: Jones Brothers Mine

ORDER DENYING MOTION FOR SUMMARY DECISION

Before: Judge Miller

This case is before me upon notices of contest and a petition for assessment of a civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). At issue is a rock pit used by Jones Brothers, Inc., to provide fill material for an adjacent roadway. Jones Brothers has filed a Motion for Summary Decision on the basis of a lack of jurisdiction under the Mine Act. For the reasons that follow, I deny the motion.

I. FACTUAL BACKGROUND

In early 2015, Jones Brothers contracted with the Tennessee Department of Transportation ("TDOT") to repair a portion of roadway in DeKalb County, Tennessee. A. Williams Dep. 13-14. In August 2015, the company began preparing a pit adjacent to the road repair site to supply rock for use as fill material for the road. A. Williams Dep. 13-14, 20-21. TDOT agreed to pay the company $14.25 per ton for 68,615 tons of rock. Hinson Dep. 22-24. The company first removed overburden from the site, then excavated rock from the pit through drilling and blasting. A. Williams Dep. 21-22; Hinson Dep. 32, 34-35. The rock was then

loaded onto trucks using a slotted bucket to remove any dirt and transported to the road site. A. Williams Dep. 33. A hoe ram was used to break up rock that was too large to fit into the bucket, but the rock was otherwise transported to the road site in the form in which it was excavated. Hinson Dep. 50-51; D. Williams Dep. 77-78. There was no rock crusher on site. D. Williams Dep. 69. Workers were on site up to six days a week. Hinson Dep. 44.

TDOT required that the excavated material meet the standard of "graded solid rock" in order to be used as fill for the roadway. Hinson Dep. 21. The material was required to be of sufficient hardness and not "thin [and] slabby." Hinson Dep. 33; McCullough Dep. 20; Sec'y Ex. B (TDOT Specifications for Graded Solid Rock). There were also size requirements: at least 50 percent of the rock had to be between one and three feet in diameter, and no more than 10 percent could be less than two inches in diameter. Sec'y Ex. B (TDOT Specifications for Graded Solid Rock). Prior to beginning excavation, the company provided a core sample to TDOT to ensure that the rock would meet its standards. A. Williams Dep. 14-16; Hinson Dep. 42. Once production began, TDOT personnel visited the site to conduct visual inspections of the material. A. Williams Dep. 16-17; Hinson Dep. 32-33; McCullough Dep. 23.

On April 5, 2016, MSHA Inspector Danny Williams visited the pit after noticing it near his home. D. Williams Dep. 92. He discussed the operation with employees on site, then returned to the MSHA office to discuss MSHA's jurisdiction over the pit with his field office supervisor. D. Williams Dep. 54-55. The issue was also referred to the MSHA district office in Birmingham, and MSHA decided that it had jurisdiction over the pit. *Id.* Williams conducted an inspection of the pit on April 6, 2016, and issued the nine citations and orders at issue in this docket. Jones Brothers obtained a mine identification number from MSHA as part of its abatement of the citations and orders. The company completed work at the pit in the summer of 2016. A. Williams Dep. 37-38.

II. SUMMARY DECISION STANDARD

Commission Rule 67 provides:

> A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:
>
> (1) That there is no genuine issue as to any material facts; and
> (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b).

In reviewing the record on summary decision, the judge must consider the record "in the light most favorable to ... the party opposing the motion." *Hanson Aggregates N.Y., Inc.*, 29 FMSHRC 4, 9 (Jan. 2007) (citing *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962)). The judge should not rely solely on the parties' claims, but must conduct an independent review of the record. *KenAmerican Res., Inc.*, 38 FMSHRC 1943, 1946 (Aug. 2016). Inferences drawn from the facts in the record must also be viewed in the light most

favorable to the party opposing the motion. *Id.* (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

III. DISCUSSION

Jones Brothers argues that MSHA had no jurisdiction to issue citations to the Jones Brothers operation because the operation was a "borrow pit" as defined in the MSHA/OSHA Interagency Agreement of 1979, and therefore subject to OSHA rather than MSHA jurisdiction. The Secretary argues that MSHA had jurisdiction. I find that there is no dispute as to the material facts and the issue is a question of law.

The Mine Act provides that "Each coal or other mine, the products of which enter commerce ... shall be subject to the provisions of this Act." 30 U.S.C. § 803. The definition of "coal or other mine" includes "an area of land from which minerals are extracted in nonliquid form." 30 U.S.C. § 802(h)(1)(A). However, an Interagency Agreement allocating responsibility between MSHA and OSHA accords OSHA jurisdiction over "borrow pits." MSHA & OSHA Interagency Agreement, 44 Fed. Reg. 22,827, 22,828 (Apr. 17, 1979). A borrow pit is defined as:

> an area of land where the overburden, consisting of unconsolidated rock, glacial debris, or 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.

Id.

The legislative history of the Act makes clear that Congress wished that "what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act." S. Rep. No. 95-181, at 14 (1977). Consistent with this, past decisions from the Commission and its ALJs have applied a strict interpretation of the term "borrow pit." *See, e.g., 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 instance, in *New York State Department of Transportation*, the New York Department of Transportation owned and operated a shaker screen that only allowed material one quarter inch or less to pass through. 2 FMSHRC at 1755. The department stockpiled the sand at a gravel quarry for highway ice control during the winter. *Id.* The judge determined that the sand was not being used as "fill" merely for its bulk, but rather that the department used the shaker screen to select sand of a particular size for its "intrinsic qualities." *Id.* at 1759. Thus, the judge found that the department did not operate a "borrow pit" within the meaning of the MSHA-OSHA Interagency Agreement. *Id.* at 1758-59.

The Commission has clarified that any processing other than the removal of large rocks, wood, and trash, disqualifies an operation as a borrow pit. *See Alaska, Dep't of Transp.*, 36 FMSHRC 2642, 2649 (Oct. 2014) (finding that operation was not a borrow pit where a screening process was used to sort materials by size and type); *Drillex, Inc.*, 16 FMSHRC 2391, 2396 (Dec. 1994) (finding that operation was not a borrow pit where stone was crushed into smaller particles). The timing of the operation is also a factor: in *Drillex, Inc.*, the Commission excluded an operation from the borrow pit exception in part because it engaged in extraction three times a week, which did not qualify as "intermittently." 16 FMSRHC at 2396.

Further, locations where drilling and blasting are used to extract materials do not meet the definition of borrow pits. *See Drillex, Inc.*, 16 FMSHRC at 2396 (finding that location where blasting occurred was not a borrow pit). The Interagency Agreement states that the materials that may be removed from a borrow pit are "unconsolidated rock, glacial debris, [and] other earth material overlying bedrock." 44 Fed. Reg. at 22,828. Unconsolidated rock and glacial debris are both materials that can be removed without blasting, and "other earth material" should thus be interpreted to refer to materials sharing that characteristic. This interpretation is consistent with the example used to illustrate a borrow pit in MSHA's program policy manual, an operation using a loader to move bank run material to fill potholes. I MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Sect. 4, at 4 (2013) ("*PPM*").

The Jones Brothers operation involved drilling and blasting rock, then breaking the large pieces up with a hoe ram. Next, the material was removed with a bucket and trucks to a nearby roadwork site where the rock was used as fill. The company emphasizes that it did not crush or size the rock before using it, but rather transported it to the road site where it was used in the form in which it was excavated. However, the drilling and blasting, along with the use of the hoe ram, did break up the material. While the company insists that any sizing was only done to fit the rocks into the bucket, the TDOT regulations also contained minimum and maximum size restrictions for the fill material.

Further, the Interagency Agreement limits borrow pits to those where work is done "on a one-time only basis or only intermittently as need occurs." 44 Fed. Reg. at 22,828. Work was done at the Jones Brothers operation up to six days a week for approximately a year and therefore the work does not qualify as intermittent or one-time-only work. *Cf. Drillex, Inc.*, 16 FMSRHC at 2396 (finding that work done three days a week was not "intermittent").

The company also insists that it used the rock "more for its bulk than its intrinsic qualities," as described in the Interagency Agreement. 44 Fed. Reg. at 22,828. However, Jones Brothers admits that TDOT required rock, not dirt, as fill material. The company submitted a sample of the material to the department for testing because TDOT required rock of a certain hardness. It is thus clear from the record that the intrinsic properties of the material were important to the company. *See also Drillex, Inc.*, 16 FMSHRC at 2396 (finding that operation was not a borrow pit where "the stone was not used for its bulk alone but was sized for its intended use as fill"). The company's reliance in its motion on the case *State of Alaska, Department of Transportation* involving a similar material test is misplaced because that ALJ decision was reversed by the Commission. *Alaska, Dept. of Transp*, 34 FMSHRC 179 (Jan. 2012) (ALJ), *rev'd*, 36 FMSHRC 2642 (Oct. 2014). The Commission's decision in that case

emphasized that where an operation "did more than 'scalp' away large rocks, wood, and trash from the material it was extracting," it was not a borrow pit. *Alaska, Dept. of Transp.*, 36 FMSHRC at 2649. Here, like the *Alaska* case, a certain kind of rock was better suited for the job and the material was tested to be certain it met the requirements for that particular construction.

Finally, the company argues that its operation was limited to the removal of overburden. The Interagency Agreement defines borrow pits as operations where "overburden, consisting of unconsolidated rock, glacial debris, or other earth material overlying bedrock is extracted from the surface." 44 Fed. Reg. at 22,828. However, the record indicates that the company had to remove trees and dirt and then blast in order to remove the desired material. The language of the Interagency Agreement suggests that a borrow pit is limited to an area where material can be easily removed by a loader or similar machinery. *See* 44 Fed. Reg. at 22,828; I *PPM*, Sect. 4 at 4. In contrast, the Jones Brothers operation involved removing a layer of materials, the overburden, then extracting a separate layer through blasting and drilling. The drilling and blasting of a layer of material is not consistent with the definition of a borrow pit.

Based on these considerations, I find that the pit was not a borrow pit for purposes of the Interagency Agreement. Because the pit was "an area of land from which minerals are extracted in nonliquid form," it qualifies as a mine and thus is subject to MSHA jurisdiction.

IV. ORDER

Based on my review of the relevant law and facts, I find that MSHA properly asserted jurisdiction over the Jones Brothers pit. While there is no question of material fact on the issue, the company is not entitled to summary decision as a matter of law. Respondent's Motion for Summary Decision is **DENIED**. The case will proceed to hearing on February 15, 2017, as previously scheduled.

Margaret A. Miller
Administrative Law Judge

Distribution: (U.S. First Class Mail and Electronic Mail)

Willow Fort, Office of the Solicitor, U.S. Department of Labor, 618 Church St, Suite 230, Nashville, TN 37219 Fort.Willow@dol.gov

Noelle Holladay True, Rajkovich, Williams, Kilpatrick & True, PLLC, 3151 Beaumont Centre Circle, Suite 375, Lexington, KY 40513 true@rwktlaw.com