FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
Office of Administrative Law Judges
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004

September 16, 2016

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 2014-176-M
Petitioner,	:	A.C. No. 30-03879-354202
	:	
	:	Docket No. YORK 2015-96-M
	:	A.C. No. 30-03879-379161
v.	:	
	:	Docket No. YORK 2015-143-M
	:	A.C. No. 30-03879-387176
	:	
H. BITTLE & SON, INC.	:	Mine: H. Bittle & Son
Respondent.	:	

ORDER ON CROSS-MOTIONS FOR SUMMARY DECISION

These proceedings are before me upon the petitions for the assessment of civil penalty filed by the Secretary of Labor ("Secretary") against H. Bittle & Son, Inc. ("Bittle" or "Respondent"), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815, which Bittle timely contested. Chief Administrative Law Judge Robert J. Lesnick assigned to me Docket Nos. YORK 2015-176-M, YORK 2015-96-M, and YORK 2015-143-M. On February 18, 2016, I consolidated these three dockets and set this matter for hearing. On March 21, 2016, I granted the parties' request to continue the hearing given representations they sought to resolve a jurisdictional dispute through cross-motions for summary decision.

The parties filed Joint Stipulations addressing the material facts involved in the dispute on April 29, 2016. The parties then filed cross-motions for summary decision on May 13, 2016. In his motion for partial summary decision on jurisdiction, the Secretary asserts that Bittle engages in mineral milling and therefore falls under the Mine Act's purview. (Sec'y Mot. at 4–9.) In contrast, Bittle claims in its motion for summary decision that its operation is too remote from any actual mining activity to be defined as a "mine" under the statute and seeks dismissal of its pending dockets before me for lack of jurisdiction. (Resp't Mem. at 1; Resp't Mot. at 1–2.)

I. STIPULATED FACTS

The parties have stipulated to the following facts:

1. H. Bittle & Son, Inc. ("Bittle") has operated a materials construction yard ("Bittle site") in the County of Suffolk, State of New York since 1988.

2. The Bittle site is a twenty six (26) acre area that consists of construction trailers, office buildings, parking, and piles of material largely consisting of sand and gravel.

3. Bittle is the owner of the Bittle site.

4. On April 23, 2013, MSHA issued the Bittle site Mine ID No. 30-03879.

5. On April 23, 2013, MSHA issued Bittle 26 citations.

6. Bittle paid all the citations issued by MSHA on April 23, 2013.

7. Bittle purchases sand and gravel that is excavated from construction sites on Long Island by construction companies and land developers.

8. The construction sites and land development sites where the material is excavated is between three (3) and sixty (60) miles away from the Bittle site.

9. The sand and gravel is trucked from the construction sites and land development sites over public roads to the Bittle site.

10. Bittle stockpiles and screens the sand and gravel at the Bittle site.

11. Sand and gravel is "screened" is when it is separated into groups by size (i.e. "sized").

12. Bittle was the owner of the cited Chieftan 1400 Powerscreen (the "powerscreen") and portable stacker when the citations were issued in dockets YORK 2014-0176, YORK 2015-0096, and YORK 2015-0143.

13. The powerscreen and stacker were physically located at the Bittle site when the citations were issued in dockets YORK 2014-0176, YORK 2015-0096, and YORK 2015-0143.

14. Bittle used the powerscreen and portable stacker to screen unprocessed sand and gravel into fine grain sand and two other sizes of gravel, all of which was then deposited into separate piles.

15. The powerscreen had three separate discharge conveyors. Two of the conveyors screened two different sizes of gravel and one conveyor screened sand.

16. Bittle sells the screened sand and gravel to the public for various uses, including so it can be applied to Long Island roads for ice control.

17. The powerscreen and portable stacker was machinery and equipment that was manufactured outside of New York.

18. The powerscreen was made in Northern Ireland.

19. On April 22, 2014, MSHA Inspector Gary C. Merwine issued seven (7) citations to Bittle at the Bittle site (i.e. Citation Nos. 8800523, 8800524, 8800525, 8800526, 8800527, 8800528, and 8800529).

20. The guards were missing from the powerscreen as alleged in Citation Nos. 8800523, 8800524, 8800525, 8800526, and 8800527.

21. On February 24, 2015, MSHA Inspector Michael C. Hammond issued five (5) citations to Bittle at the Bittle site (i.e. Citation Nos. 8807122, 8807123, 8807124, 8807125, and 8807126).

22. The guards were missing from the powerscreen as alleged in Citation Nos. 8807122, 8807123, 8807124, 8807125, and 8807126.

23. On June 6, 2015, MSHA Inspector issued seven (7) citations to Bittle [at] the Bittle site (Citation Nos. 8916030, 8916031, 8916032, 8916033, 8916034, 8916035, and 8916038).

24. Citation No. 8916038 involves the Sanvik QE340 Plant (i.e. Sanvik stacker), which is owned by the operator and was physically located on the Bittle site.

25. The guards were missing from the powerscreen, portable stacker, and Sanvik stacker as alleged in Citation Nos. 8916030, 8916031, 8916032, 8916033, 8916034, 8916035, and 8916038.

(Joint Stipulations at 1–3.)

II. PRINCIPLES OF LAW

A. Summary Decision

Commission Procedural Rule 67(b) provides that 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) [t]hat there is no genuine issue of material fact; and (2) [t]hat the moving party is entitled to summary decision as a matter of law." 20 C.F.R. § 2700.67(b). The Commission has consistently held that summary decision is an "extraordinary procedure" and analogizes it to Rule 56 of the Federal Rules of Civil Procedure.[1] *Lakeview Rock Prods., Inc.*, 33 FMSHRC 2985, 2987 (Dec. 2011) (citations omitted). The Supreme Court, as the Commission observes, has determined that summary judgment is only appropriate "upon proper showings of the lack of a genuine, triable issue of material fact." *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)). The Supreme Court has also held that both the record and "inferences drawn from the underlying facts" are viewed in the light most favorable to the party opposing the motion. *Id.* at 2988 (quoting *Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464, 473 (1962); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

[1] Federal Rule of Civil Procedure 56(a) provides for the filing of motions for summary judgment and states that: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

B. Mine Act Jurisdiction

Section 4 of the Mine Act provides, in part, that "[e]ach coal or other mine, the products of which enter commerce . . . shall be subject to the provisions of this Act." 30 U.S.C. § 803. Section 4 unambiguously expresses Congress' intent to regulate the mining industry to the full extent under the Commerce Clause, which includes the power to regulate mines whose products are sold entirely intrastate. *D.A.S. Sand & Gravel, Inc. v. Chao*, 386 F.3d 460, 464 (2d Cir. 2004). In the legislative history of the Act, Congress instructed "that what is considered to be a mine and to be regulated under this Act be given the broadest possibl[e] interpretation" and that "doubts be resolved in favor of . . . coverage of the Act." S. Rep. No. 95-181, at 14 (1977).

Section 3(h)(1) of the Act defines "coal or other mine" to include "workings, structures, facilities, equipment, machines, tools, or other property . . . used in, or to be used in, *the milling of such minerals*, or the work of preparing coal or other minerals[.]" 30 U.S.C. § 802(h)(1) (emphasis added). Section 3(h)(1) expressly delegates authority to the Secretary to further define what constitutes mineral milling.[2] *Id.*; *Watkins Eng'rs & Constructors*, 24 FMSHRC 669, 673 (July 2002); *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1552 (D.C. Cir. 1984) (stating section 3(h) "gives the Secretary discretion, within reason, to determine what constitutes mineral milling").

In 1979, MSHA and the Department of Labor's Occupational Safety and Health Administration ("OSHA") entered into an agreement (hereinafter, "Interagency Agreement") to provide notice and guidance to the regulated community on the two agencies' jurisdiction. 44 Fed. Reg. 22,827 (Apr. 17, 1979). The Interagency Agreement places sand and gravel under MSHA's regulation and states that "[m]illing consists of . . . crushing, grinding, pulverizing, [and] *sizing*," among other processes. 44 Fed. Reg. at 22,829 (emphasis added). Given the explicit delegation in section 3(h)(1) of the Mine Act to the Secretary, the Interagency Agreement is to be deferred to whenever it is reasonable in light of the Mine Act's definition of "mine." *State of Alaska, Dep't of Transp.*, 36 FMSHRC 2642, 2648 (Oct. 2014) (citing *Donovan*, 734 F.2d at 1552).

Both the D.C. Circuit and Commission have specifically upheld the Interagency Agreement's classification of sizing as mineral milling. *Donovan*, 734 F.2d 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 at 2649 (finding that a state agency used a screener to size sand and gravel for road construction and therefore engaged in mineral milling); *see generally In re Kaiser Alum. & Chem. Co.*, 214 F.3d 586, 592 (5th Cir. 2000) (holding that the Secretary's interpretation of "milling" as including liquid-based alumina extraction was reasonable in part because the Interagency Agreement expressly included alumina within MSHA's jurisdiction).

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[2] Section 3(h)(1)(C) provides that "[i]n making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration 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)(C).

III. ANALYSIS AND CONCLUSIONS OF LAW

Bittle stipulates to owning and operating a materials construction yard containing piles of sand and gravel. (Joint Stipulations at 1–2, Nos. 1–3, 10.) Likewise, Bittle stipulates that it "sizes" the sand and gravel. (*Id.* at 2, Nos. 11, 14.) Additionally, Bittle utilizes machinery manufactured outside of New York, including a powerscreen made in Northern Ireland. (*Id.* at 2, Nos. 17–18.) The Interagency Agreement defines mineral milling to include "sizing" sand and gravel. 44 Fed. Reg. at 22,829. Given the stipulated facts, the Interagency Agreement, and well-established case law upholding the Interagency Agreement's classification of "sizing," it appears that Bittle engages in mineral milling and is subject to the Mine Act's jurisdiction.[3] Nonetheless, given that subject matter jurisdiction may be raised at any juncture in a proceeding,[4] I entertain and dispose of Bittle's arguments *infra*.

First, Bittle argues it is not subject to the Mine Act because the sources from which it collects sand and gravel extract these minerals incidental to construction activities, such as installing pools and constructing roads.[5] (Joint Stipulations at 2, Nos. 7–9; Resp't Mem. at 1–3.) Bittle relies on MSHA's Program Policy Manual ("PPM") stating that "MSHA does not have jurisdiction where a mineral is extracted incidental to the primary purpose of the activity" because "the company is not functioning for the purpose of producing a mineral." I MSHA, U.S. Dep't of Labor, *Program Policy Manual*, §§ 3-1, 4-1, at 1–3 (2013). Here, because Bittle screens minerals primarily for market for various uses, including application to Long Island roads for ice control, I determine that Bittle functions for the purpose of producing a mineral. (Joint Stipulations at 2, Nos. 14, 16.) Contrary to Respondent's arguments, the PPM supports a determination that Bittle is subject to the Mine Act.

Second, Bittle stipulates that it stockpiles sand and gravel at the Bittle site and uses machinery to size the minerals for sale on the market. (Joint Stipulations at 2, Nos. 10–11, 14, 16.) The Commission has held that a mine "is not limited to an area of land from which minerals are extracted, *but also* includes facilities, equipment, machines, tools and other property used in . . . *the milling or preparation of the minerals*." *Maxxim Rebuild Co.*, 38 FMSHRC 605, 608 (Apr. 2016) (quoting *Jim Walter Res., Inc.*, 22 FMSHRC 21, 25 (Jan. 2000)) (emphasis added). As the D.C. Circuit explained, milling and preparation "do not, on their face, appear to include the process of extracting a mineral substance" but rather describe the separate process of treating

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[3] This may explain why Bittle initially paid the civil penalties associated with 26 citations issued to it by MSHA in 2013. (Joint Stipulations at 2, Nos. 5–6.)

[4] Fed. R. Civ. P. 12(h)(3); *see* 20 C.F.R. § 2700.1(b) (Commission Judges shall be guided as far as practicable by the Federal Rules of Civil Procedure); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006) ("[t]he objection that a federal court lacks subject matter jurisdiction may be raised by a party, or by a court on its own initiative, at any stage in the litigation . . . .") (citation omitted).

[5] The Commission has held that an entity extracting or processing sand and gravel solely for construction purposes may be subject to the Mine Act. *State of Alaska, Dep't of Transp.*, 36 FMSHRC at 2646-50 (holding a state's transportation department subject to the Mine Act because it extracted and screened sand and gravel in order to maintain a highway).

minerals for market subsequent to their extraction. *Donovan*, 734 F.2d at 1551.[6] Consequently, the activities undertaken to treat and process minerals for sale are independently subject to the Mine Act regardless of who performs the extraction of those minerals. *See, e.g.*, *Donovan*, 734 F.2d at 1551-54 (stating a "mine" need not "be owned by a firm that also engages in the extraction of minerals from the ground or . . . be located on property where such extraction occurs"); *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589 (3d Cir. 1979) (holding that an operator who purchased dredged refuse from the State of Pennsylvania in order to separate substances in the material for sale is subject to the Mine Act); *Shamokin Filler Co.*, 34 FMSHRC 1897, 1906 (Aug. 2012) (holding that operator who purchased prepared anthracite coal and screened the coal for bulk sale engages in the "work of preparing coal"), *aff'd*, 772 F.3d 330 (3d Cir. 2014). Case precedent, therefore, firmly supports a determination that Bittle is subject to the Mine Act regardless of how the minerals Bittle processes are extracted and later utilized by other entities.[7]

Finally, Bittle contends it should not be subject to the Mine Act because no other similarly situated material supply business in its area has been inspected by MSHA or subject to the Mine Act. (Resp't Mot. at 1–3, Heinlein Aff. at 1–2.) Even if Bittle had provided specific evidence of this allegation, which it did not, MSHA has broad discretionary authority to cite operators. *See Speed Mining, Inc v. FMSHRC*, 528 F.3d 310, 314 (4th Cir. 2008) (holding that the Secretary has unreviewable discretion to cite an independent contractor, a mine owner, or both for violations committed by the independent contractor). Regardless, I must base my determination on the law and stipulations as they apply to Bittle, not its competitors.

After reviewing the evidence provided by the parties I conclude that Bittle is an "operator" under the Mine Act, inasmuch as it engages in mineral milling at the Bittle site and is thus a "mine" whose business and products affect interstate commerce. Based on the record, I

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[6] Bittle cites to dicta in *Donovan* to suggest that what constitutes mineral milling depends on the physical proximity of the minerals' extraction to where milling occurs. (Resp't Mem. at 4); *Donovan*, 734 F.2d at 1551 (stating "the physical proximity and operational integration" of the extraction and milling processes made the court's decision "less artificial"). Contrary to Bittle's suggestion regarding the lengthy distance here from the extraction points, the court in *Donovan* distinguished "milling [and] preparation" from "extraction" and determined that each process is separately subject to the Mine Act, emphasizing the Mine Act's expansive definition of a mine. (Joint Stipulations at 2, Nos. 8–9); *Donovan*, 734 F.2d at 1551.

[7] Bittle offers a six-factor test posited by an Occupational Safety and Health Review Commission ("OSHRC") ALJ to suggest it does not engage in mining activity. (Resp't Mem. at 4–5.); *Southern Crushed Concrete*, 23 BNA OSHA 1778 (No. 10-2556, 2011) (ALJ). Yet OSHRC ALJ decisions are not binding on me, and the OSHRC ALJ's decision was never subsequently examined and adopted by OSHRC or a reviewing court. Moreover, the OSHRC ALJ applied the factors only after concluding that the operator's activity was ambiguous under the Interagency Agreement and ultimately found the operator subject to MSHA's jurisdiction. 23 BNA OSHA 1778. Here, no ambiguity exists because Bittle engages in "sizing," which the Interagency Agreement specifically defines and categorizes as milling. 44 Fed. Reg. at 22,829.

determine that there is no genuine issue of material fact as to the Mine Act's jurisdiction over Bittle. I therefore conclude that, when viewing the record in the light most favorable to the party opposing each motion respectively, the Secretary is entitled to partial summary decision as a matter of law.

VI. ORDER

In light of the foregoing, it is hereby **ORDERED** that the Secretary's motion for partial summary decision on the question of jurisdiction is **GRANTED**, and Respondent's motion for summary decision is **DENIED**.

Accordingly, this matter will be set for a hearing on the merits regarding the pending citations issued by MSHA to Bittle.

Alan G. Paez
Administrative Law Judge

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