

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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October 30, 2003

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 2003-165-M
Petitioner : A.C. No. 34-01348-05529
v. : Docket No. CENT 2003-166-M
ALLIED CUSTOM GYPSUM, : A.C. No. 34-01348-05530
Respondent : Docket No. CENT 2003-193-M
: A.C. No. 34-01348-05531
: Mine: Bessie Plant

ORDER DENYING MOTION TO DISMISS
FOR LACK OF JURISDICTION

Before me for consideration is a Motion for Summary Decision filed by Allied Custom Gypsum ("Allied") asserting that its Bessie Plant ("the Plant"), a gypsum salt processing facility, is not subject to the jurisdiction of the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq. (1994) ("Mine Act or "Act") because it is an off-site facility that is not located where the raw materials are extracted.1 Allied's motion primarily is based on its assertion that an Interagency Agreement between the Mine Safety and Health Administration (MSHA) and the Occupational Health and Safety Administration (OSHA), 44 Fed. Reg. 22827 (April 17, 1979), provides MSHA with jurisdiction of salt processing facilities only if such facilities are located on mine property. Allied Mot. at p.5. The Secretary opposes Allied's motion. For the reasons discussed, Allied's motion shall be denied.

Allied's Bessie facility is a gypsum plant located in Bessie, Oklahoma. Gypsum is a salt. Specifically, gypsum is the sulfate salt of calcium. Id. The Plant obtains its gypsum from Allied's Bouse Junction Mine located approximately seventy miles away. Id.

1 Allied also filed for summary decision with respect to 15 of the 34 citations in issue in these proceedings. Allied's motion for summary decision concerning these citations was denied during a telephone conference as these citations, in the absence of relevant stipulations agreed to by both parties, present genuine issues of material fact.

The gypsum is transported to the Plant by truck and conveyed through a series of hoppers and conveyors until it reaches the milling area.² At the milling area, the Plant utilizes a Raymond roller mill to crush and grind the gypsum until it is sized to meet the specifications provided by a particular customer. *Sec'y Mot.* at pp.2-3.

During the crushing and grinding process, heat is also applied to the gypsum to remove moisture. The heat is either applied by a burner, or it is generated by the Raymond mill. The heating process utilized is determined by the degree of moisture in the gypsum. *Id.*

After the gypsum is sized and dried, it is moved by another series of conveyors and hoppers to the bagging area where it is prepared for distribution to customers. Allied's customers include Fleischman's Yeast, Anheuser-Busch, Sara Lee, Earthgrain Bakeries, Innovative Cereal and Archer Daniels Midland. *Id.*

A. Whether the Bessie Plant Engages in "Milling"

In support of its motion, Allied argues that the processing at its Bessie Plant "is best characterized as a salt distribution facility" rather than a gypsum milling operation because the sizing and drying performed does not separate non-ore waste material from the extracted mineral.³ *Allied Mot.* at p.4. Allied relies solely on Appendix A of the Interagency Agreement wherein the term "milling" is described as:

. . . the art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives. The essential operation in all such processes is separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated.

44 Fed. Reg at 22829.

² The information concerning the processing and sales activities at the Bessie facility was provided in the Secretary's Cross-Motion for Summary Decision. *Sec'y Mot.* at pp.2-3. The information was obtained from the August 12, 2003, deposition testimony of Randall Gene Wenninger, the Bessie Plant Manager. Allied has concurred with Wenninger's deposition testimony regarding the processes that occur at Bessie. *Resp. Reply* at p.1. Consequently, there are no issues of material fact with respect to the Plant's activities.

³ This proposition was advanced in Allied's Motion for Summary Decision filed on August 21, 2003. Allied did not continue to rely on its "separation of desirable from undesirable constituents from the earth's crude crust theory" in its subsequent October 14, 2003, Reply to the Secretary's September 23, 2003, Cross Motion for Summary Decision. Instead, Allied asserted, ". . . regardless of the processes utilized at the Bessie Facility . . .," the Secretary's Interagency Agreement limits MSHA jurisdiction only to salt processing facilities located on mine property. *Allied Reply* at p.3.

Section 4 of the Mine Act provides that “[e]ach coal or other mine” shall be subject to its statutory provisions. 30 U.S.C. § 803. Section 3(h)(1) of the Mine Act defines a “coal or other mine” to include “facilities . . . used in . . . the milling of . . . minerals.” 30 U.S.C. § 802(h)(1). Although the term milling is not defined in the Mine Act, in section 3(h)(1), Congress expressly delegated the authority to the Secretary to determine what constitutes milling. The Secretary’s interpretation of milling is entitled to deference if it is reasonable. *Energy W. Mining Co. v. FMSHRC*, 40 F3d 457, 460 (D.C. Cir. 1994); *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984).

To further delineate MSHA jurisdiction, in 1979 the Secretary formulated an Interagency Agreement between MSHA and OSHA that incorporated the guiding principle that the elimination of “. . . unsafe and unhealthful working conditions on mine sites and in milling operations. . . .” will be accomplished through application of the Mine Act’s provisions. 44 Fed. Reg. at 22827. The Secretary identified the processing activities constituting milling that gives rise to Mine Act jurisdiction. *Id.* at 22829, 22830. Sizing and drying are among the activities identified by the Secretary as “milling.”

The Secretary’s Promulgation of the Interagency Agreement in furtherance of the legislative authority delegated to her in section 3(h)(1) establishes reasonable parameters for milling and may not be disturbed by this Commission. See *Watkins Engineers & Constructors*, 24 FMSHRC 669, 673 (July 2002) citing *United States v. Mead Corp.*, 533 U.S. 218, 226-27, 229 (2001) (Congress delegates to an agency the authority to speak with the force of law when it authorizes the agency to clarify ambiguities in a statute). In this regard, the Commission has noted that the list of “general definitions of the milling processes for which MSHA has authority to regulate” provided in Appendix A of the Interagency Agreement “. . . are commonly associated with the concept of milling and fall squarely within the Secretary’s interpretation of that term.” *Id.* at 673-74, 675; see also 44 Fed. Reg. at 22829. As the Commission noted, the ordinary meaning of “to mill” is “to crush or grind (ore) in a mill,” and “a mill” is defined as “a machine for crushing” *Id.* at 674 citing *Webster’s Third New Int’l Dictionary (Unabridged)* 1434 (1993). The Raymond roller mill at the Bessie Plant crushes, grinds and dries the gypsum. *Sec’y Mot.* at pp.2-3.

Moreover, the Commission has expressly rejected the assertion that “. . . [non-mineral] separation was critical to a determination that ‘milling’ took place,” because neither the statutory language nor the legislative history imposes such a technical definition of milling on the Secretary. *Watkins*, 24 FMSHRC at 675. In this regard, the legislative history reflects jurisdictional doubts should be resolved in favor of inclusion under the Mine Act. *Id.* at 675-76 (citations omitted). Accordingly, the Secretary’s interpretation of the term “milling” is entitled to deference because the interpretation is consistent with the general usage of the term in the mining industry, consistent with the legislative intent for jurisdictional inclusion, as well as consistent with the statutory mandate delegated to the Secretary in section 3(h)(1) of the Mine Act.

**B. Whether Off-Site Salt Milling Facilities
Are Subject to Mine Act Jurisdiction**

Section B(6)(a) of the Interagency Agreement provides that “MSHA jurisdiction *includes* salt processing facilities on mine property.” (Emphasis added). 44 Fed. Reg. at 22828. Section B(6)(b) of the Agreement provides that “OSHA jurisdiction . . . *includes salt . . . distribution terminals* not located on mine property, and milling operations associated with gypsum board plants not located on mine property.” *Id.* (Emphasis added).

Allied views the declaration in section B(6)(a) of the Interagency Agreement that MSHA jurisdiction includes salt processing facilities **on** mine property as exclusive rather than illustrative. Thus, Allied argues the Interagency Agreement must be interpreted as reflecting that the converse is true, *i.e.*, that salt processing facilities located **off** mine property are not subject to MSHA jurisdiction. *Allied Reply* at p.3.

Allied’s view of the Interagency Agreement fails for several reasons. As a threshold matter, as discussed above, Congress expressly delegated to the Secretary the authority to determine the nature and location of the activities that constitute the milling of minerals that give rise to Mine Act jurisdiction under section 3(h)(1). Second, Allied’s proffered interpretation rings hollow in that Allied has stipulated that “MSHA has been inspecting the Bessie facility for more than ten years.” *Allied Mot.* at p.2. Third, Allied’s interpretation is contrary to the plain meaning of Section B(6)(b) that excludes only salt distribution terminals, and, milling operations associated with gypsum board plants, that are not located on mine property. Since Congress intended that doubts concerning Mine Act jurisdiction should be resolved in favor of inclusion, the Secretary’s expressed exclusion of only milling associated with off-site gypsum board plants and salt distribution terminals rather than all off-site gypsum milling is consistent with MSHA’s jurisdictional claim over the Bessie Plant. *Watkins*, 24 FMSHRC at 675-76. Finally, and most significantly, the Commission has expressly rejected the assertion that stand-alone milling operations are not mines subject to MSHA’s Part 48 training requirements simply because the milling facilities are not part of surface or underground mines. *Alcoa Alumina & Chemicals, L.L.C.*, 23 FMSHRC 911,916 (September 2001).

Accordingly, the Secretary’s application of section 3(h)(1) to include the sizing and drying processes at the Bessie gypsum plant under the penumbra of ‘facilities used in the milling of minerals’ as contemplated by the Mine Act is reasonable, consistent with Congressional intent, and consistent with the Secretary’s history of dispatching MSHA inspectors to the Bessie facility during the prior ten year period. Finally, MSHA’s exercise of jurisdiction over the Bessie facility, which is neither solely a salt distribution terminal nor a gypsum board processing plant, is consistent with the terms of the Secretary’s Interagency Agreement. Accordingly, the Bessie Plant is a milling operation subject to Mine Act jurisdiction. Consequently, Allied’s Motion for Summary decision on the jurisdictional issue **IS DENIED**.

Although these matters had been scheduled for a hearing on September 16, 2003, in the vicinity of Oklahoma City, Oklahoma, further proceedings were stayed on August 21, 2003, pending a decision on Allied's Motion for Summary Decision. Having denied Allied's motion, **IT IS ORDERED** that the parties initiate, **within 14 days of the date of this Order**, a telephone conference with the undersigned to lift the stay and discuss a mutually satisfactory hearing date.

Jerold Feldman
Administrative Law Judge
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