FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

December 21, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2004-109-M
Petitioner	:	A.C. No. 41-03266-18191
	:	
v.	:	Docket No. CENT 2004-186-M
	:	A.C. No. 41-03266-28177
KERR ENTERPRISES, INC.,	:	
Respondent	:	Docket No. CENT 2004-201-M
	:	A.C. No. 03266-30940
	:	
	:	BEECO Mine

ORDER LIFTING STAY
CONSOLIDATION ORDER
ORDER GRANTING SECRETARY'S MOTION FOR SUMMARY DECISION
DECISION APPROVING SETTLEMENT
AND
ORDER TO PAY

Docket No. CENT 2004-109-M was stayed on August 4, 2004, to enable the parties to reach factual stipulations for the filing of cross-motions for summary decision on the question of whether the BEECO Mine operated by Kerr Enterprises, Inc. (Kerr), is covered by the Federal Mine Act Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (Mine Act). The motions for summary decision having been filed, the stay in Docket No. CENT 2004-109-M **IS LIFTED**. Docket Nos. CENT 2004-186-M and CENT 2004-201-M also involving the BEECO facility, were recently assigned. Accordingly, these three docketed civil penalty proceedings concern the same jurisdictional issue and **ARE CONSOLIDATED** for disposition.

These cases contain a total of nine citations issued by the Mine Safety and Health Administration (MSHA) for alleged violations of mandatory safety standards in Parts 47 and 56 of the Secretary's regulations governing surface mines. 30 C.F.R. Parts 47 and 56. The violations cited in eight of the nine citations were designated as non-significant and substantial (non-S&S) in nature. A violation is non-S&S if it is unlikely that the hazard contributed to by the violation will result in the occurrence of a serious injury. *Nat'l. Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). The Secretary has proposed a civil penalty of $60.00 for each of the eight non-S&S citations, and $875.00 for the remaining citation in Docket No. CENT 2004-201-M. Thus, the Secretary proposes a total civil penalty of $1,355.00.

During a July 30, 2004, telephone conference, Kerr's counsel represented that the fact of the occurrence of the violations in Docket No. CENT 2004-109-M is not in dispute. In a subsequent telephone conference on December 14, 2004, Kerr's counsel stated, if it is determined that Kerr's facility is subject to Mine Act jurisdiction, Kerr will pay the $480.00 civil penalty proposed by the Secretary for the eight non-S&S citations in Docket Nos. CENT 2004-109-M and CENT 2004-186-M. With respect to the citation in Docket No. CENT 2004-201-M, on December 15, 2004, the Secretary's counsel reported that the parties have agreed to reduce the civil penalty from $875.00 to $650.00. Thus, the parties have agreed on a total civil penalty of $1,130.00 if the facility is covered by the Mine Act. I construe the parties' representations to be a contingent joint motion for the approval of settlement.

Specifically, the jurisdictional question is whether Kerr's BEECO facility is a "borrow pit" subject to Occupational and Health Administration (OSHA) jurisdiction as contemplated by the 1979 OSHA-MSHA Interagency Agreement on Jurisdiction, 44 *Fed. Reg.* 22827 (April 17, 1979). Kerr's Motion for Summary Decision was filed on October 25, 2004. The Secretary's motion was filed on October 27, 2004. The factual stipulations in the parties' motions are based on the August 3, 2004, deposition testimony of Melvin Keith Turner who is the manager of the BEECO facility. The transcript of Turner's testimony will be referred to in this decision.

I. Background

The BEECO facility in Orange County, Texas, has been operated by Kerr for more than five years. During this period activities have remained relatively unchanged. Turner has been employed by Kerr since 1992, and he is the senior on-site person at the BEECO facility. (Tr. 5-7). The facility is a full-time operation that operates fifty weeks a year and employs four full-time employees. (Tr. 21).

At BEECO, Kerr extracts earthen material from a pit. The extracted material consists of clay, sand, topsoil, and a sand/clay mix which occurs naturally in the soil. Excavation is by means of trackhoes or front-end loaders. The only "processing" that is performed at the facility is through the use of a power grid or scalping screen, on about 20 percent of the materials, in order to remove roots and other wood debris. No sizing of materials is otherwise performed. (*Resp. Mot.* 1).

Material extracted from the BEECO site is sold to more than fifty customers, none of whom are organizationally affiliated with Kerr. (Tr. 29). The customers, situated throughout the Beaumont-Port Arthur-Orange metropolitan area, are located as far as twenty-five miles away from the BEECO location. (Tr. 29-30). BEECO's customers include landscape companies, refinery contractors, construction contractors and concrete companies. (Tr. 22-26).

II. Findings and Conclusions

As a threshold matter, the *Dictionary of Mining, Mineral and Related Terms* 62 (2nd ed. 1997) defines a "borrow pit" as:

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

(Emphasis added).

In 1979, MSHA and OSHA, divisions of the Department of Labor, entered into an Interagency Agreement to provide guidance to affected employers on the principles and procedures for distinguishing between Mine Act and Occupational Safety and Health Act (OSH Act) jurisdiction. *Interagency Agreement*, *supra*; *see also Sec'y v. Island Constr. Co.*, 11 FMSHRC 2448, 2453 (Dec 1989) (ALJ Broderick). The Interagency Agreement addresses the jurisdictional parameters of "borrow pits." Paragraph B.7 of the Interagency Agreement provides:

> "Borrow Pits" are subject to OSHA jurisdiction except those borrow pits located on mine property or related to mining. (For example, a borrow pit used to build a road or construct a surface facility on mine property is subject to MSHA jurisdiction). "Borrow Pit" means an area of land where the overburden, consisting of unconsolidated rock, glacial debris, other earthen material overlying bedrock is extracted from the surface. *Extraction occurs on a one-time only basis or only intermittently as need occurs, for use as fill materials by the extracting party in the form in which it is extracted*. No milling is involved, except for use of a scalping screen to remove large rocks, wood and trash. *The material is used by the extracting party more for its bulk than its intrinsic qualities on land which is relatively near the borrow pit*.

44 Fed. Reg. at 22828. (Emphasis added).

MSHA adopted interpretive guidelines in 1996 to clarify the 1979 Interagency Agreement with respect to borrow pits. The Interpretation and Guidelines provides in pertinent part:

> 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).

Section 4 of the Mine Act, 30 U.S.C. § 803, provides that each "coal or other mine" shall be subject to the Act. Section 3(h)(1) of the Mine Act defines "coal or other mine" as "an area of land from which minerals are extracted . . . and lands . . . used in . . . the milling of such minerals . . . ." 30 U.S.C. § 802(h)(1). Although the Mine Act does not define "extracted" or "milling," the Commission and courts have recognized the legislative history called for activities conferring Mine Act jurisdiction to be broadly construed. *Drillex, Inc.*, 16 FMSHRC 2391, 2394 (December 1994). (Citations omitted). As a general proposition, the term "extraction" means the separation of a mineral from its natural deposits in the earth. *Id.* at 2395. Extraction includes the removal by excavation of a composite of minerals, even if the minerals are not individually separated from the earthen material. *Id.*

Either mineral extraction or milling independently provides a basis for Mine Act jurisdiction. *Id.* Thus, pit excavation and/or scalping would ordinarily give rise to Mine Act jurisdiction. However, the Interagency Agreement exempts a "borrow pit" from the broad reach of the Mine Act if certain conditions are met. The Secretary's 1996 Interpretation and Guidelines extend the exemption even if the user of the material extracted from the pit is a purchaser of the material rather than the owner of the pit. However, while the Secretary's interpretive guidelines extend the borrow pit exemption even if the extracted material is sold to a third party, the guidelines retain "the other criteria" in the Interagency Agreement that must be met to qualify as a "borrow pit."

I am unpersuaded by Kerr's assertion that the nature and extent of its BEECO operations satisfy the criteria for a "borrow pit." As noted, the industry considers a "borrow pit" to be a "special classification" where "source of material [is] taken from some location near an embankment where there is insufficient excavated material nearby." Similarly, the Interagency Agreement notes that borrow pit material ". . . is used by the extracting party more for its bulk than its intrinsic qualities on land which is relatively near the borrow pit." In other words, borrow pit material is fill material that is extracted for the limited purpose of providing bulk fill at a nearby location.

Moreover, to qualify as a "borrow pit" the Interagency Agreement requires extraction "on a one-time only basis or only intermittently as need occurs." 44 Fed. Reg. at 22828. The full time continuous extraction and commercial sale at the BEECO facility to numerous customers, for a variety of uses, some of whom are located twenty-five miles away, is a far cry from the one time, or intermittent, local fill dirt activity contemplated for OSHA jurisdiction in the Interagency Agreement.

The only activity at BEECO that can occur at a site that is properly characterized as a "borrow pit" is Kerr's use of a scalping screen to remove debris. However, the use of a scalping screen does not alter the routine, commercial surface mine nature of the BEECO operation. Rather, as the Secretary suggests, the BEECO facility is no different than sand and gravel operations, rock quarries or clay pits that sell extracted material to customers. (*Sec'y Mot.* 5-6*). See, e.g., Jerry Ike Harless Towing, Inc.*, 16 FMSHRC 683 (April 1994). Moreover, since the BEECO facility is not a 'borrow pit," the on-site scalping constitutes "milling" under Section 3(h)(1) that provides an additional basis for Mine Act jurisdiction. Thus, the "borrow pit" exception to Mine Act jurisdiction, that also excludes jurisdiction of limited milling activity, does not apply to the BEECO facility.

As a final matter, Kerr argues that it is the victim of selective enforcement because MSHA has not asserted jurisdiction over similarly situated competitors. Section 103(a) of the Mine Act authorizes the Secretary to "make frequent inspections and investigations in coal or other mines each year." 30 U.S.C. § 813(a). In this regard, section 103(a) *requires* the Secretary to "make inspections . . . of each surface or other mine in its entirety at least two times a year." *Id*. Thus, although MSHA has the prosecutorial discretion not to exercise enforcement authority with respect to a particular condition or practice at a mine site, MSHA *must* exercise its jurisdiction over all mine sites. *Air Prods. and Chems., Inc.*, 15 FMSHRC 2428, 2435 n.2 (December 1993) (concurring opinion). Consequently, allegations of selective enforcement cannot provide a basis for exemptions from Mine Act coverage.

ORDER

In view of the above, the BEECO facility operated by Kerr Enterprises, Inc., is subject to Mine Act jurisdiction. Consequently, the Secretary's Motion for Summary Decision **IS GRANTED** and Kerr Enterprises, Inc.'s Motion for Summary Decision **IS DENIED**.

With respect to the civil penalty to be assessed, I have considered the representations and documentation submitted in this matter and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. **WHEREFORE**, the parties' settlement agreement **IS APPROVED,** and **IT IS ORDERED** that Kerr Enterprises, Inc., pay a total civil penalty of $1,130.00 within 45 days of this Decision in satisfaction of the nine citations in issue. Upon receipt of timely payment, the captioned civil penalty cases **ARE DISMISSED**.

Jerold Feldman
Administrative Law Judge

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