# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, D.C. 20001

July 13, 2006

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| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDINGS |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. SE 2005-301-M |
| Petitioner | : | A. C. No. 01-02936-63063 |
| | : | |
| | : | Docket No. SE 2006-131-M |
| v. | : | A.C. No. 02-02936-78967 |
| | : | |
| | : | Docket No. SE 2006-167-M |
| HOSEA O. WEAVER & SONS, INC., | : | A.C. No. 01-02936-83942 |
| Respondent | : | |
| | : | Plant #1 |

## ORDER CONSOLIDATING PROCEEDINGS
## ORDER DIRECTING RESPONDENT TO ANSWER
## ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION
## AND
## ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY DECISION

In these civil penalty proceedings the Secretary of Labor (Secretary), on behalf of her Mine Safety and Health Administration (MSHA), petitions to assess Hosea O. Weaver & Sons (Weaver) civil penalties for three alleged violations of the Secretary's mandatory training standards found in Part 46, Title 30, Code of Federal Regulations (C.F.R.), and for ten alleged violations of various mandatory safety and health standards for metal and nonmetal mines found in Part 56, Title 30, C.F.R.

## ORDER OF CONSOLIDATION

The parties have moved for consolidation of the cases. The motion is **GRANTED**. The three dockets are **CONSOLIDATED** for hearing and decision.

## ORDER DIRECTING RESPONDENT TO ANSWER

A review of the record in Docket No. SE 2006-167-M indicates Weaver has yet to file an answer. Weaver is **ORDERED** to do so within 30 days of the date of these orders.

## THE SUMMARY DECISION MOTIONS

Cross motions for summary decision have been filed in Docket No. SE 2005-301-M. In moving for the consolidation of Docket No. SE 2005-301-M with Docket Nos. SE 2006-131-M and SE 2006-161-M, the parties have made clear the motions apply to the latter two dockets. Accordingly, I will treat the motions as having been filed in all three dockets.

In its motion, Weaver challenges the Secretary's jurisdiction over its plant. The company denies it owns or operates a "mine" as that word is defined in section 3(h)(1) of the Mine Safety and Health Act of 1977 (Mine Act or Act).[1] 30 U.S.C. § 802(h)(1). Therefore, in Weaver's view, MSHA is without authority over its operation.

Rather than a "mine," Weaver contends it operates an OSHA-regulated manufacturing facility, that it complies with OSHA standards and that it trains its workers pursuant to OSHA requirements.[2] Weaver asserts that the subject facility, Plant No.1, is one of three hot mix asphalt plants it owns and operates. At the plant, Weaver produces asphalt for commercial sale. The asphalt is used in highway and road construction. Resp. Mot. 2. In manufacturing asphalt,

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[1] Section 3(h) (1) states:

> "[C]oal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form . . . (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and working 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 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 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.

[2] While Weaver acknowledges it has been inspected by MSHA four times since 1993, it maintains that it "never has acquiesced to MSHA jurisdiction." Resp. Mot. 2.

Weaver utilizes gravel, which it purchases on the open market, primarily from one gravel company.

After delivery to Plant No. 1, the gravel is stockpiled. The gravel is used as delivered in the asphalt manufacturing process, or, depending on the hot mix formulation, the gravel is crushed into smaller sizes before it is added to the hot asphalt mixture. Less than 4.5% of the plant's total hot mix asphalt production involves the use of crushed gravel. Resp. Mot. 3. None of the company's 165 workers are involved in the extraction or production of minerals and none are required to enter any mines or other work sites where minerals are extracted or produced. *Id.* In sum, Weaver argues that "because it does not engage in mineral extraction, production or milling at Plant [No.] 1 . . . and because [Weaver] does not utilize raw, unprocessed minerals in its manufacturing process . . . [Weaver] is entitled to judgement [on the jurisdictional issue] as a matter of law". Resp. Mem. of Law 2.

The Secretary counters that undisputed material facts establish MSHA has jurisdiction over a part of Weaver's operation. The Secretary acknowledges that Weaver buys raw 9/16-inch to 2-inch gravel from an outside company. She agrees that Weaver uses the gravel for asphalt production. She emphasizes that although the gravel is mined, screened and washed by the gravel company, after it is delivered to a stockpile on Weaver's property, Weaver at times moves the gravel approximately 100 feet by front end loader to the hopper of a crushing and screening plant [[3]] where Weaver crushes and sizes the gravel. Sec. Mot. 2-3. The crushed and sized gravel is then moved approximately 300 feet by front end loader to Weaver's hot mix plant. Sec. Mot. 3. The Secretary is not asserting jurisdiction over the delivery of gravel to Weaver's facility or over its use in the asphalt hot mix plant. Rather, she is asserting Mine Act authority over Weaver's crushing and screening operations, including the front end loader used to transport the unprocessed gravel to the hopper and the processed gravel to the hot mix plant

## RESOLUTION OF THE JURISDICTIONAL ISSUE

The parties agree if MSHA has jurisdiction over the crushing and screening plant and the front end loader it is by virtue of the fact that the transportation, crushing and sizing of the gravel is "milling" within the meaning of section 3(h)(1) of the Act. Section 3(h)(1) includes within the definition of "'coal or other mine' equipment, machines, tools, or other property . . . used in . . . the work of extracting . . . minerals . . .or used in, or to be used in, the work of milling . . . such minerals." The section gives the Secretary the duty of determining "what constitutes mineral milling." *See* Sec. Mot. 6. The Secretary points out she has exercised that duty in an Interagency Agreement (Agreement) between MSHA and the Occupational Safety and Health Administration ("OSHA"). 44 Fed. Reg. 22, 827 (April 17, 1979), *amended by* 48 Fed. Reg. 7, 521 (Feb. 22, 1983). The Agreement states that "milling consists of one of more of the following processes: crushing, grinding, pulverizing, sizing". . . ." 44 Fed. Reg. at 22829. "Crushing" is defined as

[3] The "crushing and screening plant" is also referred to by the Secretary as the "crushing and sizing plant". Resp. Mot. 3.

"the process used to reduce the size of mined materials into smaller relatively coarse particles." *Id.* "Sizing" is defined as "the process of separating particles of mixed sizes into groups of particles of all the same size, or into groups in which particles range between maximum and minimum sizes." *Id.* 22829-30.

I conclude that application of the Agreement and the exercise of deference resolve the issue. The parties are in accord that, depending upon customer specifications, some of the gravel must be crushed and sized before it is used in the asphalt manufacturing process and that Weaver does this crushing and sizing. As noted, the term "milling" is defined in the Agreement as including crushing and sizing. *Id.* at 22829. "Crushing" is further defined as "the process used to reduce the size of mined materials into smaller, relatively coarser particles." *Id.* "Sizing" is defined as "the process of separating particles of mixed sizes into . . . particles of all the same size, or into . . . particles [which] range between maximum and minimum sizes." *Id*. The parties agree that at the plant the gravel is "reduced in size," that is to say, it is "crushed." They also agree it is "separat[ed]" into ½- inch size particles, that is to say, it is "sized." These processes correspond exactly to the activities the Agreement brings within the perimeters of the Act.

Not surprisingly, Weaver takes issue with this simple analysis. The company points to Appendix A of the Agreement, which states milling requires "separation of one or more valuable desired constituents of the crude from the undesirable contaminants with which it is associated." 44 Fed. Reg. at 22828. Weaver emphasizes that its crushing and sizing of gravel does not involve the "separation of one or more valuable desired constituents . . . from . . . undesired contaminants". *Id.* Weaver describes its work as "simply custom sizing to meet a manufacturing specification for asphalt products." Resp. Mem. of Law 7.

Despite the fact that no separation on constituents takes place at Weaver's facilities, I believe that Weaver's crushing and sizing comes within the Agreement. The Commission has noted the statement in Appendix A regarding "separation of one or more valuable desired constituents from crude" is "not the only relevant definitional provision" and that the "general definitions" in the Agreement -- in this case, the references to "crushing" and "sizing" -- may be determinative when resolving a jurisdictional issue. *Watkins Engineers & Constructors*, 24 FMSHRC 669, 673-674, 675 (July 2002). Thus, I return to the main point, which is that Weaver engages in activities that clearly come within the definition of "milling" and, therefore, which bring it within MSHA's jurisdiction.

I further find that additional factors buttress MSHA's assertion of jurisdiction. First, when resolving jurisdictional questions of this sort, the benefit of the doubt goes to the Secretary. As the Commission stated in *Watkins*, "Congress clearly intended that . . . jurisdictional doubts be resolved in favor of coverage by the Mine Act. 24 FMSHRC at 675-676 (*citing* S. Rep. No. 95-181, at 14 (1977) *reprinted in* Senate Subcomm. On Labor, Comm. On Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978)).

A second, and related factor is that, as the Secretary correctly points out, the courts and, by implication, the Commission and its judges, have been reluctant to second guess the Secretary when she makes choices involving MSHA and OSHA coverage. She is the one whose duty it is to administer the acts and when, in the course of her administration, she makes informed and reasoned jurisdictional determinations, judicial decision makers have been wary of overruling her. *See* Sec. Mot. 7.

In this instance, the Secretary has made an informed and reasoned determination. She states that MSHA's expertise with the inspection and regulation of crushing and sizing equipment at rock quarries extracting gravel – equipment identical to the subject equipment – gives MSHA the best background for the effective inspection and regulation at the subject facilities. Sec. Mot. 12-13. She further states the fact that Weaver's crushing and sizing operation is separate from the asphalt hot-mix plant provides a clear line of demarcation between MSHA and OSHA jurisdiction. These are informed and reasonable administrative considerations to which Weaver has no effective rejoinder.

Third, Weaver's assertion that if its re-sizing of gravel is "milling," the milling is minimal and is not subject to MSHA's jurisdiction, is not persuasive. Weaver Mem. of Law 6-7. Although the Secretary counters that the Act does not contain an exception for "so called '*de minimis*' milling operations," I need not reach that issue. Sec. Resp. 2. Rather, I hold the subject activities are not *de minimis* in the context of Weaver's overall operation. *See* Sec.'s Response to Resp.'s Mot. 1-3. The subject crushed and screened gravel is used in making the plant's reason d'etre, hot-batch asphalt. Of the six employees working at Plant No. 1, two are involved in the gravel crushing process, and one works around the crusher. Resp. Mot. 4, 11. Further, crushed gravel must be incorporated into the hot mix asphalt to meet certain customers' specifications, and the crushed gravel comprises up to 18% of the total amount of gravel incorporated. *Id.* 5, 10. These are not trifling or insignificant considerations. Even if, as Weaver maintains, only 4.5 % of the plant's total asphalt output involves the use of crushed gravel, active involvement of three of six employees of Plant No. 1 in crushing and sizing entitles those employees to the regulation the Secretary deems most effective for their safety.

For these reasons, I conclude MSHA properly exercised its jurisdiction over the crushing and screening operation at Weaver's Plant No. 1. Weaver's motion for summary decision is **DENIED**. The Secretary's motion is **GRANTED**, but only to the extent it involves the jurisdictional issue. The Secretary's allegations regarding the existence of the alleged violations and the penalty aspects of the cases remain to be resolved.

David F. Barbour
Administrative Law Judge
(202) 434-9980

Distribution:

Amy R. Walker, Esq., Office of the Solicitor, U.S. Department of Labor, 61 Forsyth Street, S.W., Room 7T10, Atlanta, GA 30303

Adele L. Abrams, Esq., Law Office of Adele L. Abrams, P.C., 4640 Corridor Place, Suite D, Beltsville, MD 20705

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