FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 17, 2006

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 DENYING MOTION TO CERTIFY

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. The cases are scheduled to be heard on December 19, 2006, in Mobile, Alabama.

A major issue in the cases, perhaps *the* major issue, is whether MSHA has jurisdiction to issue the citations. Weaver contends it is not covered by the Act, that it is not a "mine" as the word is defined in section 3(h)(1). 30 U.S.C. § 802(h)(1). The Secretary takes the opposite view. The parties' arguments are set forth in cross motions for summary decision.

On July 13, 2006, I granted the Secretary's motion and denied Weaver's motion. In rejecting Weaver's contention that MSHA lacks jurisdiction, I noted that if MSHA has jurisdiction it is by virtue of the fact that the transportation, crushing and sizing of gravel at Weaver's plant is "milling" within the meaning of section 3(h)(1). I found the agency properly exercised its authority by applying the facts, as I understood them from the parties' pleadings, to the statute and the Interagency 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). Order 4. I also noted that in resolving jurisdictional questions "the benefit of the doubt goes to the Secretary" and that this is especially true when the Secretary chooses, as she has here, between MSHA and OSHA coverage. *Id.* 3-4.

The parties have responded with a blizzard of paper. Weaver's counsel has filed a motion to certify the ruling for interlocutory review and, clairvoyantly as it turns out, a simultaneous petition for discretionary review and an alternative petition for interlocutory review. The Secretary has filed a motion to dismiss and an opposition to Weaver's petitions.

Under the Commission's rules, the sole matter before me is Weaver's motion to certify the July 13 order for interlocutory review. I can do so only if I find: (1) that interlocutory review involves a controlling question of law; and (2) that review will materially advance the final disposition of the case. 29 C.F.R. § 2700.76(a)(1).

The motion to certify states that "[i]t is in the interest of judicial efficiency for the Commission to determine whether or not the finding of MSHA jurisdiction was legally and/or factually erroneous before proceeding at the ALJ level." Mot. to Cert. Dec. 1-2. This is only partly true. It is accurate to state that the question of jurisdiction is a controlling question of law (indeed, as I have noted, it is probably *the* controlling question), but it is not correct that interlocutory review will materially advance the final disposition of the case. If it did, then, interlocutory review would be warranted for every order denying summary decision on jurisdictional grounds, and clearly the Commission's rules do not contemplate that result.

Jurisdictional issues such as this are inextricably tied to the factual circumstances of the facility and processes MSHA seeks to regulate. In the subject cases the parties have not stipulated to the pertinent facts regarding those circumstances and processes. Rather, I have interpreted the facts from the parties' pleadings. If, as Weaver argues to the Commission, I have made critical factual errors in reaching my conclusion regarding the appropriateness of MSHA's jurisdiction, I fail to see how it will materially advance a resolution of the case to have the Commission review the question based on a record devoid of stipulated and/or trial-based factual findings.

In my view, the best course for the parties is to proceed to hearing or to resubmit the question based on joint stipulations of fact. Accordingly, Weaver's motion to certify is **DENIED**.

David F. Barbour
Administrative Law Judge
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