FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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May 20, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 95-201-M A.C. No. 04-04678-05522
v.	:	Docket No. WEST 95-496-M A.C. No. 04-04678-05523
AGGREGATE PRODUCTS INC., Respondent	:	API Pit & Plant

DECISION

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalties filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Aggregate Products, Inc. ("API"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act"). The petitions allege seven violations of the Secretary's safety regulations.

The parties filed a joint stipulation of facts in lieu of presenting evidence at a hearing. The only issue in the case is whether MSHA has jurisdiction over API's screening plant. This issue was fully briefed by the parties. For the reasons set forth below, I find that MSHA does have jurisdiction over the screening plant. Accordingly, I assess penalties in the amount of $380.00.

I. STIPULATED FACTS

The parties presented the following stipulated facts:

1. The citations in this proceeding are true and accurate in their statement of conditions existing at Aggregate Products Inc., screening plant.

2. The said proposals were duly filed against Respondent in accordance with the Rules of the Federal Mine Safety and Health

Review Commission published in Title 29, Code of Federal Regulations, Section [2700.25] and duly contested.

3. Respondent has contested the instant violations on the basis of MSHA's alleged lack of jurisdiction over the Screening Plant operated by API, and in the context of said contest has sought a formal legal opinion to that effect.

4. OSHA is not asserting jurisdiction over the subject screening plant, and has not issued citations or inspected API's screening plant.

5. The Civil Penalties as proposed will not adversely affect the operator's ability to remain in business.

6. The citations in this proceeding were timely abated by the respondent in good faith.

7. John Corcoran, President of Aggregate Products, Inc., owns the property on which the extraction, milling, and asphalt operations are situated.

8. The contractor, DCL hired and paid by API, is responsible for the initial extraction process of the material. DCL operates its own equipment including front-end loaders, crusher, and conveyors.

9. DCL produces crushed sand and gravel for API according [to] size specifications mandated by API. DCL employs approximately three to four employees in this operation. The material produced by DCL is stockpiled for use by API.

10. API employs approximately 15 to 20 employees in its operation which consists of a screening plant and asphalt plant.

11. API, using API employees and equipment, transports the crushed material by use of a front-end loader from the stockpile provided by DCL to the Screening Plant feed bin operated by API. The screening plant is located approximately 300 feet from the DCL stockpile. The material is then conveyed approximately 80 feet to the top of the Screening Plant where it is processed into the size necessary for the production of Asphalt.

12. The screening plant owned and operated by API screens the crushed sand and gravel into specific sizes required for the Asphalt operation. The Screening Plant is a 6' X 16' "Simplicity" Screening Plant consisting of three screening decks for the required size and several conveyors which transport the sized rock to their respective stockpile. Normally, there are four

separate stockpiles consisting of 3/8, 1/2, 3/4 inch size rock for use in the Asphalt Plant [for] the production of asphalt.

13. API collects the appropriate sized rock and deposits the rock in the required cold feed bin for mixing with the Asphalt Operation.

14. Approximately 1% to 4% of the material from these specific stockpiles is sold to the consuming public. The remainder is sold to other contractors or used within the asphalt operation.

II. SUMMARY OF THE PARTIES' ARGUMENTS

A. Secretary of Labor

The Secretary argues that the definition of the term "coal or other mine" in section 3(h)(1) of the Mine Act should be broadly construed to include Respondent's screening plant. He argues that Respondent's screening plant is a mill that sizes the material mined by DCL. He contends that a screening plant need not be owned by the same firm that extracts the minerals for Mine Act jurisdiction to attach. In making its arguments, the Secretary relies upon the Interagency Agreement between the Occupational Safety and Health Administration ("OSHA") and MSHA. 44 Fed. Reg. 22827 (April 17, 1979) and several court decisions that discuss Mine Act jurisdiction.

B. API

API contends that the mining and milling cycle consists of the extraction of the material, the crushing and screening of the material by DCL, and the storage of the crushed and screened product by DCL in a stockpile. It believes that the hot-mix asphalt cycle begins when the previously milled material arrives at API's hot-mix screening facility for refining to the grade necessary for asphalt. Thus, it contends that Mine Act jurisdiction ends at DCL's stockpile of crushed aggregate. API argues that its screening plant is incident to and part of its manufacture of hot-mix asphalt and is not subject to MSHA jurisdiction.

III. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

The starting point for any analysis of Mine Act jurisdiction is the definition of coal or other mine. A coal or other mine is defined, in pertinent part, as: "(A) an area of land from which minerals are extracted ..., (B) private ways and roads appurte-

nant to such area, and (C) lands, excavations ... structures, facilities, equipment, machines, tools, or other property ... used in, or to be used in the work of milling of such minerals, or the work of preparing ... minerals." 30 U.S.C. § 802(h)(1).

The Senate Committee that drafted this definition stated its intention that "what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and ... that doubts be resolved in favor of inclusion of a facility within the coverage of the Act." S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 602 (1978)(Legis. Hist.).

The issue is whether API is milling minerals at its screening plant in Imperial County, California. The term "milling" is not defined in the Mine Act and the parties base their arguments, in part, on the MSHA-OSHA Interagency Agreement ("Interagency Agreement"). It is important to understand that in some respects the Interagency Agreement is not applicable to API's facility. API's screening plant is not subject to inspection by OSHA because the State of California has assumed responsibility for occupational safety and health inspections under its own program ("Cal/OSHA"). In California, mines are subject to periodic inspection by Cal/OSHA despite the fact that MSHA also inspects these facilities. *See generally*, Cal. Lab. Code § 6303.5; 30 U.S.C. § 955(a). Thus, there is overlapping safety and health jurisdiction at mines in California. The Interagency Agreement is relevant in this case only as it describes the Secretary's interpretation of the boundaries of MSHA jurisdiction, not the limits of OSHA jurisdiction.

The Interagency Agreement provides, in pertinent part, that "milling consists of one or more of the following processes: crushing, grinding, pulverizing, sizing, concentrating, washing, drying...." 44 Fed. Reg. at 22829 (emphasis added). 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. The Interagency Agreement further states that "OSHA jurisdiction includes ..., whether or not located on mine property: ... asphalt batch, and hot-mix plants." Id. at 22827. Finally, the Interagency Agreement provides that OSHA authority commences at an asphalt-mixing plant "after arrival of sand and gravel or aggregate at the plant stockpile." Id. at 22829-30. These provisions of the Interagency Agreement provide an appropriate guideline for analyzing this case. The Commission is required to

give "weight" to the "Secretary's interpretations of the law." Legis. Hist. at 637.

All of the citations were issued at API's screening plant. If the screening plant is part of the milling process then MSHA has jurisdiction over it. If, on the other hand, the screening plant is part of API's hot-mix plant, MSHA does not have jurisdiction over it. API contends that it takes finished product from DCL and uses this product in connection with its production of hot-mix asphalt. It maintains that it "uses its screening facility solely for the purpose of separating gravel into various sizes which in turn is used by API itself to manufacture hot-mix asphalt." (Br. at 5). According to API, its screening of gravel is part of the manufacturing process.

I conclude that the screening plant is subject to MSHA jurisdiction. I have analyzed this case without regard to ownership or control. The facts show that DCL owns equipment at this facility and controls part of the operation, API owns equipment and controls other parts of the operation, and Mr. Corcoran, President of API, owns the real property on which the extraction, milling, and hot-mix production takes place. The issue of jurisdiction in this case does not hinge on questions of ownership and control. *See, e.g.* United Engineering Services, Inc. v. FMSHRC, 35 F.3d 971, 975 (4th Cir. 1994). The result would be the same if one individual or corporation owned and controlled the entire facility. The key to this case is what happens at each stage of the operation as the material flows through the facility.

The first stage is the extraction of material from the ground. This function is clearly subject to MSHA jurisdiction. Next, the material is crushed. This stage is part of the milling process and all agree that it is under MSHA's jurisdiction. The third stage is the initial screening. Two piles are produced by this screening, a product stockpile and a waste stockpile. The parties do not dispute that this initial screening is under MSHA jurisdiction. Next, a front-end loader takes the material from the product stockpile and transport it about 300 feet to a hopper. The material is then transported on a conveyor belt to the top of the screening plant that is the subject of this case. As described in the stipulation, this screening plant separates the material by size. Three or more stockpiles are generally created, each with its own distinct mix of material. It is this material that is deposited in the cold feed bin of the hot-mix asphalt plant for use in the production of asphalt.[1]

[1] The parties agree that the hot-mix plant is not subject to MSHA jurisdiction.

API's screening plant sizes the material for use in the asphalt plant. Sizing is included in the definition of milling in the Interagency Agreement. This plant takes particles of mixed sizes that are present in DCL's product stockpile and separates the particles into groups of particles of the same size or range of sizes. This screening process fits precisely into the Secretary's definition of sizing in the Interagency Agreement. As stated above, the fact that API performs this function rather than DCL is irrelevant in this case. DCL's initial screening to remove waste material occurs about 300 feet from the screening that sizes the material. I find that both screening facilities are part of the milling operation despite the fact that two different companies accomplish these tasks.

In addition, under the Interagency Agreement, OSHA's authority at asphalt mixing plants "commences after arrival of sand and gravel or aggregate at the plant stockpile." 44 Fed. Reg. at 228830. In this case, I find that API's stockpiles containing the screened material is the "plant stockpile" for purposes of the Secretary's interpretation. Although Cal/OSHA has jurisdiction over the entire operation, this portion of the Interagency Agreement still provides guidance as to the boundaries of MSHA's jurisdiction. MSHA's jurisdiction ends upon arrival of the sized material at API's stockpiles.

API asserts that neither the courts nor the Commission has "asserted jurisdiction over a facility that handles and/or processes minerals in connection with its manufacturing operations." (Br. at 2). API distinguishes the facts of a number of Commission and court cases and states that these cases held that an employer is subject to MSHA jurisdiction "where the employer is only engaged in the transportation and processing of raw materials." (Br. at 8) (emphasis in original). It states that the decision in Donovan v. Carolina Stalite Co., 734 F.2d 1547 (D.C. Cir. 1984), is not applicable because the Stalite facility processed slate and sold its raw slate product to other companies which manufactured masonry blocks. API believes that it is significant that the employer in that case did not manufacture masonry blocks. API also believes that the decision in United Engineering, 35 F.3d 971, does not apply because the employer handled and processed raw coal as an end product. API believes that Mine Act jurisdiction attached to the employer's facilities because the coal it transported and processed was not used in any manufacturing process or incorporated into some other product. Rather, the coal was consumed in its raw state at the employer's power plant.

API contends that its activities are analogous to the situation that existed in Oliver M. Elam, 4 FMSHRC 5 (January 1982). The Commission determined that MSHA did not have jurisdiction over the employer in that case because it crushed and conveyed coal solely to load it for shipment and not to meet customer specifications or to render the coal fit for any particular use. API maintains that it does not operate its screening plant to meet customer specifications or to render the product fit for any particular use, but rather it operates the plant as part of its hot-mix asphalt plant.[2]

I disagree with API's arguments. First, contrary to API's position, API does not take "finished" product from the DCL product stockpile. API screens this material to produce stockpiles of different-sized rock. The material in DCL's stockpile is not a finished product but is raw material. Second, API screens the material to render it fit for a particular use, the production of asphalt. The material is not sized to make it easier to handle or to ship, as in Elam, it is sized so that it can be used to make asphalt. Thus, it is sized to meet customer specifications. The fact that API is also the customer is not important. The material is sized to meet the specifications of API's asphalt plant.

Finally, the fact that the sized rock is ultimately used in a manufacturing process does not change the result. The material produced by the employer in Carolina Stalite was used to manufacture masonry blocks. The employer did not own the manufacturing plant and such a plant was not located at the site, but those facts do not change the result. There is no indication in Carolina Stalite that the court would have reached a different conclusion if the employer also operated a masonry block plant on the same site. In addition, United Engineering cannot be distinguished on the basis that the coal was burned "in its raw state" at a power plant rather than incorporated into a product. In the case of coal, it is crushed, sized, and prepared for use in a particular power plant. The crushed material that API obtained from DCL was sized for use in a particular asphalt plant.

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[2] The parties dispute the meaning of paragraph 14 of their stipulated facts. Apparently, some of the material in API's stockpiles is sold to the public, but the parties disagree as to the amount that is sold. API contends that the amount sold is insignificant while the Secretary maintains that API is in the business of selling screened sand and gravel. Because of this dispute, I have assumed that all of the material screened by API is used in its hot-mix asphalt plant.

In United Energy, the fact that the prepared coal was a fossil fuel that was consumed as it was used is not determinative.

IV. CIVIL PENALTY ASSESSMENT

API did not contest the specific allegations set forth in the seven citations. Accordingly, I affirm the citations. MSHA proposed a penalty of $380.00 for the citations. I have considered the representations and documentation submitted in these cases, and I conclude that the proposed penalty is appropriate under the criteria set forth in section 110(i) of the Mine Act.

V. ORDER

Accordingly, the citations in these proceedings are **AFFIRMED**, and Aggregate Products Inc. is **ORDERED TO PAY** the Secretary of Labor the sum of $380.00 within 40 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

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