FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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May 30, 2008

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2006-229-M
Petitioner	:	A.C. No. 26-02556-75931
	:	
	:	Docket No. WEST 2006-275-M
	:	A.C. No. 26-02556-78850
	:	
	:	Red Rock
v.	:	
	:	Docket No. WEST 2006-226-M
	:	A.C. No. 26-02400-75744
	:	
	:	Docket No. WEST 2006-306-M
	:	A.C. No. 26-02400-81378
SOUTHERN NEVADA PAVING,	:	
Respondent	:	Towncenter/Flamingo #9
	:	
	:	Docket No. WEST 2006-100-M
	:	A.C. No. 26-02478-68079
	:	
	:	Charleston #7

ORDER GRANTING THE SECRETARY'S MOTION FOR SUMMARY DECISION ON MINE ACT JURISDICTION

These cases are before me upon petitions for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (the "Mine Act"). They involve 21 citations issued to Southern Nevada Paving ("SNP") at three facilities in Clark County, Nevada. The Secretary has moved for summary decision on the issue of the jurisdiction of the Department of Labor's Mine Safety and Health Administration ("MSHA") to inspect SNP's operations at Red Rock, Towncenter/Flamingo #9, and Charleston #7. The Secretary contends that SNP engaged in the milling of minerals at these facilities with the result that they fall within the jurisdictional definition of a "coal or other mine" in section 3(h)(1) of the Mine Act. SNP opposes the motion and contends that no mining or milling took place at any of the three facilities cited by MSHA.

The parties entered into detailed stipulations of fact. The relevant stipulations are set forth below. I have not included the stipulations that merely describe the attachments to the stipulations.

The Secretary of Labor . . . , hereinafter referred to as the "Secretary" or "MSHA" and Southern Nevada Paving, hereinafter referred to as "Respondent" or "SNP," by and through their attorneys, stipulate and agree as a matter of fact, solely for the purpose of proceedings related to determining jurisdiction under the [Mine Act] concerning SNP facilities known as Red Rock, Towncenter/Flamingo #9, and Charleston #7 (jointly and severally referred to by the parties, solely for ease of reference, as the "Summerlin Facilities") that, at all material times, the statements set forth below are true.

. . .

1. Since in or about 1994, Howard Hughes Properties, LP ["Howard Hughes"] has engaged in an extensive construction project in Summerlin, Nevada, west of Las Vegas, Nevada, consisting of excavating, landscaping, filling, grading, and preparing construction sites for residential buildings, commercial buildings, utilities, Beltway 215, and other roadways.

2. Howard Hughes Summerlin construction projects included scraping, excavating, loading, moving, and depositing spoil materials ("construction spoil material" or "construction waste material") consisting of soils, shrubs, roots, trash, and organic and non-organic materials. Several construction contractors performed these construction services, including but not limited to Acme, Contri, Summit Sand & Gravel, Pools-by-Grube, SNP, Regency Landscaping, and Sunstate. The excavation construction work throughout developments in Summerlin produced a large amount of construction waste/spoil material.

3. Contractors removed and trucked such excavation waste/spoil material to sites designated by Howard Hughes within Summerlin. Construction contractors paid SNP a fee to deposit construction excavation waste/spoil at sites including the [Summerlin Facilities]. Excavation spoil was deposited in piles at [these Summerlin Facilities]. The excavation waste/spoil material contained no known mineral of value and was not excavated for the purpose of mining or milling.

4. SNP performed services under contract with Howard Hughes concerning such construction activity. SNP provided these services at various locations and sites owned by Howard Hughes Properties, including the [Summerlin Facilities]. These facilities and services were co-located with ongoing construction projects within Summerlin.

5. The excavation, mining and milling of minerals at the [Summerlin Facilities] is prohibited by agreement between SNP and Howard Hughes, as referenced and attached [to these stipulations]. SNP did not excavate, extract or

quarry minerals at these sites. The existence of any mineral contained in construction excavation spoil material deposited at [the Summerlin Facilities] was incidental to and not the primary purpose of construction excavations in Summerlin.

6. OSHA safety standards apply to excavation and construction activities throughout Summerlin.

7. Piles of construction spoil materials at [the Summerlin Facilities] included materials from various Summerlin construction contractors and construction sites. Spoil or waste materials that originated from different contractors or different construction sites were not kept separate at [the Summerlin Facilities] but were deposited in several piles.

8. [The Summerlin Facilities] were not open pit or strip mines. [These facilities] were situated on residential and commercial development property in Summerlin, Nevada. [They] did not extract or process coal and did not extract any other mineral.

9. For purposes of these stipulations, "excavation" includes any man-made cut, cavity, trench, or depression in an earth surface, formed by earth removal within the meaning of 29 C.F.R. 1926.650(b), "soil" includes excavated material withing the meaning of 29 C.F.R. 1926.652, Appendix A, "earthmoving equipment" includes scrapers and other equipment within the meaning of 29 C.F.R. 1926.602(a), and "spoil" includes excavated soil materials within the meaning of 29 C.F.R. 1926.651(j).

10. MSHA mine identification number 2602556 had been obtained in or about 1995 by a predecessor owner concerning Red Rock.

11. MSHA mine identification number 2602400 had been obtained in or about 1999 by a predecessor owner concerning Towncenter/Flamingo #9.

12. MSHA mine identification number 2602478 had been obtained at an unknown date by a predecessor owner concerning Charleston #7.

13. Prior to 2004, MSHA had issued citations related to MSHA mine identification numbers associated with Red Rock, Towncenter/Flamingo #9, and Charleston #7 facilities.

14. In 2004, SNP became a wholly-owned subsidiary of Bardon U.S. Corp., operating since that date under different ownership and management.

15. SNP has managed [the Summerlin Facilities] sites pursuant to its construction agreement with [Howard Hughes]. SNP disputes being a mine operator under the [Mine Act] at those facilities, and since 2006 has consistently asserted that the subject facilities are not mines within the meaning of the [Mine Act].

16. SNP notified MSHA in 2005 that MSHA mine ID numbers and regulations should not apply to facilities such as Red Rock, Towncenter/Flamingo #9, Charleston #7, and Summerlin #8, that citations concerning these facilities should be vacated for lack of jurisdiction, and that related MSHA mine ID numbers should be deactivated.

17. Since 2005, SNP has observed MSHA requirements under protest at these facilities pending the resolution of these proceedings after receipt of correspondence from the Secretary's counsel in 2005, a copy of which is attached as Exhibit A [to these stipulations].

18. Nevada OSHA, a state plan agency under the Occupational Safety and Health Act pursuant to 29 U.S.C. 667 and 29 C.F.R. 1952.290 - 1952.297, has not cited SNP's facilities at Towncenter/Flamingo #9 and Charleston #7, but has cited the Regal Ready-Mix Concrete Plant at the Red Rock facility. Regal Ready-Mix is a corporate affiliate of SNP. The Regal Ready-Mix concrete plant is subject to regulation by Nevada OSHA pursuant to 29 C.F.R. 1952.290 - 1952.297 and is not subject to regulation by MSHA.

19. Red Rock is located adjacent to the Summerlin Red Rock Casino construction site.

20. SNP's [Summerlin Facilities] have been closed and the sites at these locations have been prepared for residential, commercial, and road construction. A concrete plant operated by Regal Ready-Mix is still located at Red Rock. Residential buildings, commercial buildings, and streets in various stages of construction now and/or will occupy the sites where Charleston #7 and Towncenter/Flamingo #9 facilities once were located.

21. SNP did not blast, heat, press, or wash the excavation spoil material at these facilities. SNP screened the piles of excavation waste or spoil material using a grizzly to remove trash, shrubbery, organic material, and expandable soil. SNP then crushed the screened material into Type II fill material. The Type II material was described by the DOT specifications set forth in section 704-03.03 of the Nevada Administrative Code. Type II material was used primarily for leveling and filling purposes.

22. The content of the Type II material was not assayed to determine its composition. The Type II material was not crushed, screened, and /or washed to obtain a uniform size or consistency, but contained non-expandable soil and hard materials of different sizes and shapes. No other material was crushed at these facilities.

23. SNP did not use hydraulic shovels or haul trucks at [the Summerlin Facilities]. At different times in the past, these facilities used a scraper, loader, and other earthmoving equipment, small cone crusher, small VSI crusher, and a crew of 2 to 4 employees at [each Summerlin Facility]. At different times in the past, the storage trailer and control trailer with electrical equipment were located at these sites. SNP used its own equipment at [the Summerlin Facilities]. Construction contractors that deposited excavation spoil or picked up Type II material at these sites used their own equipment.

24. SNP delivered some of this Type II material to construction sites in Summerlin for grading, filling, and leveling purposes. Contractors also picked up Type II material from [the Summerlin Facilities] for filling, leveling, and grading construction sites. SNP was compensated by the ton for such Type II material.

25. The Regal Ready-Mix Concrete Plant at Red Rock used some of the finer material crushed at Red Rock to manufacture concrete.

I. BRIEF SUMMARY OF THE PARTIES' ARGUMENTS

A. Secretary of Labor

The Secretary argues that there can be no dispute that, at the time the citations were issued, the Summerlin Facilities were subject to Mine Act jurisdiction. SNP screened stockpiled material that was previously excavated from the ground at various excavation sites in Summerlin. After SNP screened the material, it crushed it in a small cone crusher or a VSI crusher. SNP produced what it calls Type II material, which in reality is a type of gravel. Indeed, SNP's contract with Howard Hughes provides in Exhibit C to the agreement ("Excavations and Operations Plan") as follows:

> [SNP] will, for the purposes of producing sand and gravel products, excavate soils from various locations within the Subject Property.
>
> . . . .
>
> Crushing operations shall be portable, self-contained set-ups energized by a generator housed in a trailer and shall be comprised of jaws, cone crushers, stacking conveyors, screens and belts configured to result in certain gravel products. The crusher will be fed either by scrapers dumping over a hopper, a dozer pushing soils into a grizzly or fed directly by the loader.

(Ex. B to Stipulations).

The Secretary contends that while some of the crushed aggregate produced by SNP at the Summerlin Facilities is used at the site, many tons of crushed aggregate are sold by SNP to sand and gravel customers. (Ex. K to Stipulations). Exhibit K consists of customer tickets for product purchased from SNP. The Secretary maintains that these tickets show that SNP sells sand and gravel to such customers as Randy's Aggregate Sales, DW Iron Gravel, Karen I. Lamb Middle School, South Coast Casino, and Mtn. Edge Paving.

The Secretary argues that SNP's operations, as described in the stipulations, is entirely indistinguishable in fact and law from the many other sand and gravel crushing operations inspected by MSHA as mineral milling operations under the Mine Act. Material is excavated from the ground, transported to a dump site to be screened and crushed to produce gravel and sand products. Each of SNP's crushers engages in mineral milling and is therefore a mine as that term is used in section 103(h)(1) of the Mine Act. Stone, rock, gravel, and sand are "minerals" as that term is used in the Mine Act and mineral milling includes any crushing, grinding, or screening of minerals. MSHA has been inspecting these crushers for many years and the change of ownership of the company does not alter the fact that mineral milling occurs at the facilities.

Finally, mineral milling need not involve the separation of a valuable ore from undesired contaminants. The only support for this interpretation of the term mineral milling is in the Interagency Agreement, as discussed below. While mineral milling often involves such separation, nothing in the language of the Mine Act suggests that such separation of materials must occur in order for milling to occur.

B. <u>Southern Nevada Paving</u>

SNP argues that the stipulations do not support the Secretary's motion for summary decision. SNP's construction-related activities on commercial and residential development property within Summerlin do not establish jurisdiction under the Mine Act. SNP was engaged in a large scale construction project to build the commercial and residential community of Summerlin, Nevada. SNP contracted with Howard Hughes to provide essential services as part of this huge construction project. The Secretary "dwells" almost exclusively on the operation of crushers. (SNP Response 9.) SNP argues that operating a crusher as an integral part of the Summerlin construction process does not convert construction to mining. The material was not screened and crushed to obtain a uniform size or consistency. The finished product contained non-expandable soil and "hard materials of different sizes and shapes." *Id.* The crushing that occurred is not the type of crushing that can be regarded as mining. The stipulations only support "the fact that SNP screens and crushes excavation spoil material containing no known mineral of value for reuse in filling and grading commercial and residential construction developments." (SNP Response 9-10). The contract between SNP and Howard Hughes specifically prohibited SNP from operating a mine or carrying on mining, milling, or processing operations at Summerlin.

The Secretary argues that because SNP used a crusher, it was engaged in mining. The stipulations show that SNP was not screening or crushing in connection with an excavation or for purposes related to mining but that it screened and crushed spoil material as part of the construction of roads, commercial properties, and housing for Summerlin, Nevada. SNP's operations did not separate worthless spoil from valuable minerals. It simply screened out trash, vegetation, and expandable soils. Crushing, for purposes of MSHA jurisdiction, occurs when rock is crushed into smaller usable sizes. At Summerlin, only excavation spoil was crushed as part of the construction process and no mineral extraction or processing occurred. In addition, SNP did not engage in sizing sufficient to confer MSHA jurisdiction because products of a uniform size or consistency were not produced.

II. DISCUSSION AND ANALYSIS OF THE ISSUES

The Commission's Procedural Rule at 29 C.F.R. § 2700.67(b) sets forth the grounds for granting summary decision, as follows:

> A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:
> (1) That there is no genuine issue as to any material fact; and
> (2) That the moving party is entitled to summary decision as a matter of law.

For the reasons set forth below, I find that there are no genuine issues as to any material fact, with respect the jurisdictional issues raised by the parties, and that the Secretary is entitled to summary decision as a matter of law. SNP took material that had been excavated from the earth and crushed this material into an aggregate product that was used by other contractors during the construction of the community of Summerlin, Nevada. The cases involve 21 citations issued for conditions related to SNP's crushing operations such as citations alleging violations of machine guarding standards and other equipment standards.

Section 3(h)(1) of the Mine Act defines "coal or other mine" as "(A) an area of land from which minerals are extracted . . . (B) private ways and roads appurtenant to such area, and (C) . . . structures, facilities, equipment, machines, tools, or other property . . . used in, or resulting from, the work of extracting such minerals from their natural deposits . . . or used in, or to be used in, the milling of such minerals. . . ." 30 U.S.C. § 802(h)(1). The Commission set forth the framework to follow when analyzing jurisdictional disputes with respect to issues surrounding the milling of minerals in *Watkins Engineers & Constructors*, 24 FMSHRC 669, 672-77 (July 2002). Based on the Commission's analysis, I believe it is fair to conclude that the phrase "facilities . . . used in . . . the milling of . . . minerals" in section 3(h)(1) of the Mine Act is to be construed broadly. The term milling is not defined in the Mine Act. As used in the mining industry, the term "milling" can be defined as "[t]he grinding or crushing of ore" and it "may

include the operation of removing valueless or harmful constituents. . . ." Am. Geological Institute, Dictionary of Mining, Mineral, and Related Terms 344 (2d ed. 1997) ("DMMRT").

The Secretary provided interpretative guidance on this issue in an interagency agreement between MSHA and the Occupational Safety and Health Administration ("OSHA") (the "Interagency Agreement"). 44 Fed. Reg. 22827 (April 17, 1979) (http://www.msha.gov/regs/1979mshaoshammu.HTM). The Interagency Agreement attempts to draw a line between milling operations that are subject to MSHA inspection from other facilities that are subject to OSHA inspection. Appendix A of the Interagency Agreement sets forth a list of "milling processes" that are subject to MSHA inspection. This list includes "crushing," which is defined as the "process used to reduce the size of mined materials into smaller, relatively course particles."

The parties agreed that SNP "crushed the screened material into Type II fill material." (Stip. 21). The Nevada Department of Transportation sets standards for Type I and Type II fill material in a document entitled "Standard Specifications for Road and Bridge Construction." (Attachment to the Secretary's Memorandum; http://www.nevadadot.com/business/contractor/standards/documents/2001StandardSpecifications.pdf, pp. 492-93). This material is described as "Aggregate Base" and the document sets forth the requirements for this type of aggregate. Other sections of the document set forth requirements for other types of aggregate, such as aggregate used to make concrete. *Id.* at 499. The term "aggregate" can be defined as "any of several, hard, inert materials, such as sand, gravel, slag, or crushed stone, mixed with cement or bituminous material to form concrete, mortar, or plaster, or used alone as in railroad ballast or graded fill." (DMMRT at 8-9). The material produced by SNP fits into this definition of aggregate. The parties stipulated that the material that was screened and crushed at the Summerlin Facilities was used for "filling, leveling, and grading construction sites." (Stip. 24). Material used as an aggregate base does not have to meet the same standards as aggregate used to produce concrete. The parties stipulated that the end product contained non-expandable soil and rock. Although this material was not of a uniform size, it met the criteria for Type II fill material under standards developed by the Nevada Department of Transportation. I hold that the crushing of material to make aggregate base is mineral milling under the Mine Act.

SNP argues that, although it used crushers at the cited locations, it did not separate one or more valuable desired constituents from the undesired contaminates with which it is associated. As a consequence, it did not engage in "milling" as that term has been defined by the Secretary in Appendix A to the Interagency Agreement. I reject SNP's argument. First, it stipulated that some of the finer material crushed at Red Rock was used to manufacture concrete. Thus, in at least one location, SNP separated the crushed material into different classifications for different uses. More importantly, in *Watkins Engineers* the Commission made clear that the separation of valuable material from that which is not valuable or useful is not a prerequisite to a finding that mineral milling is occurring. (24 FMSHRC at 674-76). In spite of the referenced language in Appendix A, the Secretary has consistently interpreted the term milling to include milling operations in which the separation of valuable from valueless materials does not occur. In *Donovan v. Carolina Stalite Co*., 734 F.2d 1547, 1552-53 & n. 10 (D.C. Cir. 1984), the court of

appeals determined that milling can include operations that do not separate valuable constituents from undesired contaminants.

The primary theme of SNP's arguments in these cases is that because it was engaged in construction rather than mining, the Summerlin Facilities should be subject to inspection by OSHA. It states that the Summerlin Facilities "were situated on and within a large residential and commercial construction development in Summerlin." (SNP Response at 10). SNP maintains that the Secretary's arguments ignore "the inherent nature and purpose of the activities that occurred at the three sites. . . ." *Id*. at 2. I find SNP's arguments to be unpersuasive. The sand, gravel, crushed stone/aggregate industry is always directly related to the construction industry. The products produced by sand, gravel, and crushed stone operations are used to make concrete, build roads, construct commercial and residential buildings, provide fill material, and otherwise support construction activities. There is nothing unique about SNP's relationship to construction except the fact that the crushing was being performed on some of the land that was being developed by Howard Hughes. Whether screening and crushing of excavated material occurs on the site of the construction activity or at another location does not change the nature of the operations being performed. I find that the stipulations establish that SNP was screening and crushing material that had been excavated from the earth. SNP was producing a product that was used in the construction of Summerlin. I hold that the stipulations establish that SNP's screening and crushing operations at the Summerlin Facilities was mineral milling and, as a consequence, these operations were subject to the jurisdiction of MSHA.

SNP also contends that the spoil material that was screened and crushed was not "mined" but was simply excavated during the construction process. This spoil material had no known mineral value and its contract with Howard Hughes prohibited it from mining, milling, or processing any minerals at Summerlin. I disagree. The stipulations establish that, once the spoil material was screened and crushed, it did have value to the contractors working at Summerlin. Contractors purchased this "Type II gravel" for use at Summerlin. (Stips., Exhibit K). If these contractors had not purchased this crushed material, they would have had to purchase similar material on the open market. Thus, the crushed spoil had intrinsic value to those who purchased it. (*See Richard E. Seiffert Resources*, 23 FMSHRC 426, 427 (April 2001) (ALJ)). The fact that the material that was screened and crushed was excavated as part of the construction process does not change the result. (*Drillex, Inc.*, 16 FMSHRC 2391 (Dec. 1994)). In *Drillex*, the respondent argued that the material was not extracted and crushed for its intrinsic properties but merely as an incidental operation during the construction of roads. *Id.* at 2394. The Commission determined that its crushing operation was subject to MSHA jurisdiction.

SNP argues that the Summerlin Facilities functioned as borrow pits because the material was used by contractors "as fill and grade material based on its bulk and not used for its intrinsic properties." (SNP Response at 9). In section B(7) of the Interagency Agreement, the following definition is provided:

> "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 earth 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 the 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.

It is clear that the Summerlin Facilities were not borrow pits. The excavation was not performed by SNP at the cited facilities. Moreover, as discussed in this order, mineral milling was occurring at the Summerlin Facilities. After trash, organic matter, and expandable soils were removed, the material was crushed to meet the specifications for Type II material.

Section 3(h)(1) of the Mine Act mandates that, in making a determination of what constitutes mineral milling, 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." This provision makes clear that the Secretary has wide discretion to determine what constitutes mineral milling and that her determination on this issue is to be reviewed with deference by the Commission and courts. This language provides guidance with respect to one factor to be considered by the Secretary in exercising this discretion. It is clear that the excavation of the material by contractors of Howard Hughes was part of the construction process and is subject to OSHA jurisdiction. Likewise, once the material crushed by SNP was removed by contractors, the activities surrounding the use of the crushed material was subject to OSHA jurisdiction. A case can be made that "convenience of administration" would dictate that the entire construction process should be inspected by OSHA and that interjecting MSHA in the middle of this process is illogical and inconvenient. Although this argument has merit, I find that the Secretary did not abuse her discretion when she determined that the cited activities conducted by SNP were subject to Mine Act jurisdiction. Although the Secretary must give consideration to the convenience of administration, it is only one factor that the Secretary is authorized to consider. In this instance, it is clear that the Secretary put great weight on the nature of the work being performed by SNP at the Summerlin Facilities. The Secretary did not abuse her authority in determining that this work was mineral milling subject to Mine Act jurisdiction.

In summary, I find that there is no genuine issue as to any material fact. SNP was screening and crushing material that was dug from the earth. After SNP crushed the material, the

resulting produce met the requirements of Type II fill material, generally known as aggregate base. As explained above, this aggregate base was used during the construction of Summerlin. The stipulations, including Exhibit K, demonstrate that this aggregate base had commercial value. I also find that the Secretary is entitled to summary decision as a matter of law. Although the phrase "the milling of such minerals" in section 3(h)(1) of the Mine Act is not defined, the Secretary has consistently taken the position that the term milling includes the crushing of rock. The Commission and the courts have upheld the Secretary's position on this issue. I hold that the crushing conducted by SNP at Summerlin was mineral milling under the Mine Act. As a consequence, the Secretary had the authority to inspect SNP's Summerlin Facilities.

III. ORDER

For the reasons set forth above, the Secretary's motion for summary decision on the issue of jurisdiction is **GRANTED**.

Richard W. Manning
Administrative Law Judge

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