FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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January 22, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 2001-53-M
Petitioner	:	A. C. No. 43-00396-05537
v.	:	
	:	Harvey Bushlot
U.S. QUARRIED SLATE PRODUCTS, INC.,	:	
Respondent	:	

SUMMARY DECISION

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against U.S. Quarried Slate Products, Inc., under section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges four violations of the Secretary's mandatory health and safety standards and seeks a penalty of $456.00. The parties have filed cross-motions for summary decision.[1] For the reasons set forth below, I deny the Respondent's motion, grant the Secretary's, affirm the citations and assess a penalty of $456.00.

Findings of Fact

The Respondent owns and operates the Harvey Bushlot mine located in Fair Haven, Rutland County, Vermont. The mine is a surface quarry producing slate. The site has an office in the center with an old building to the left and a new one to the right.[2] The quarry is directly behind these facilities. The mine employs approximately 30 employees, three in the quarry and the rest in the buildings.

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[1] Commission Rule 67(b), 29 C.F.R. § 2700.67(b), provides that: "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."

[2] The Respondent refers to these buildings as a "manufacturing, warehouse and packaging, and distribution facility." (Affidavit of William Turner.) The Secretary calls them "mills." (Declaration of Walter E. Morgan.)

The quarry is entered by going down a long haul-road which is beside the new building. Slate is mined by loosening it from the working face with explosives. It is then dug out with an extractor, sorted as to quality, loaded into pit trucks and carried to the block yard, an area near the new building. In the block yard, large pieces of slate are graded and sorted by color and size before being broken down by an air chisel and taken into the new building.

The company also buys slate blocks from other quarries. These are delivered to the block yard, where they are handled in the same manner as slate from the Respondent's quarry.

A slate-sizing machine is located to the immediate right of the doorway of the new building. Further down the right side are several trimming machines used to trim the slate to specific sizes. To the left of the doorway is a block saw which saws the slate into blocks. The blocks then go to splitting stations where they are split with hammers and chisels to a desired thickness before being placed on pallets to be moved to the trimmers.

The old building contains a large, slate saw. In addition the building has a slate punching area and an area where slate is placed on pallets by hand and readied for transport.

Some of the mine's products are: roofing slate; floor tiles, in natural cleft or tile honed and polished; head stones; and building cladding, in natural cleft, sawn finished, flame finished or polish finished. All of the mine's products are finished goods. No raw or crude material is offered for sale.

At the present time, there are 55 active operations producing a sized, slate product in MSHA's Northeastern district. Thirty-seven are in the Rutland area; eight are in neighboring Washington County, New York; seven are in Eastern Pennsylvania and one each is in Bennington County, Vermont, Hampshire County, Massachusetts and Lewis County, Virginia. All of these have historically been subject to MSHA's jurisdiction.

MSHA has conducted inspections of the quarry, buildings, machinery and work activities at the Harvey Bushlot mine since 1985. On January 17, 2001, MSHA Inspector Walter E. Morgan conducted an inspection of the site, which resulted in the issuance of the four citations,

Citation Nos. 7734488,[3] 7734489,[4] 7734490[5] and 7734491,[6] in this case. At the time of the inspection, the old building was being renovated and the large saw was not in operation.

The Respondent asserts that MSHA does not have jurisdiction over the old and new buildings. The company bases this claim on the 1979 interagency agreement between MSHA and the Occupational Safety and Health Administration (OSHA). Interagency Agreement, 44 Fed. Reg. 22,827 (April 17, 1979). MSHA, of course, disagrees.

The parties have stipulated, for the purposes of this case, that they

> agree that if the Court . . . were to rule that MSHA does have jurisdiction over the processing facilities at the Harvey Bushlot Mine, then the four citations . . . issued on January 17, 2001, for . . . violations found in the processing facilities for a total penalty amount of $456.00 were properly issued and valid."

Conclusions of Law

The Mine Act

Determination as to whether an entity is subject to the jurisdiction of the Mine Act begins with the terms of the Act. Section 4 of the Act, 30 U.S.C. § 803, provides that: "Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the

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[3] The citation alleges a violation of section 56.14112(b) of the Secretary's regulations, 30 C.F.R. § 56.14112(b), because a "machine guard on a four foot section of the chain drive rollers had been removed for maintenance and not replaced. The unguarded section was in the saw room of the new mill and was in operation at the time of the inspection."

[4] The citation alleges a violation of section 56.12032, 30 C.F.R. § 56.12032, in that "[a] cover plate for the junction box of the #3 exhaust fan located in the splitting area of the new mill was found damaged."

[5] The citation alleges a violation of section 56.14112(a)(1), 30 C.F.R. § 56.14112(a)(1), because: "The machine guard for the drive motor belt and pulley on the #3 trimming machine in the new mill was not sufficient in that it did not cover the pinch point area as required."

[6] The citation alleges a violation of section 56.14112(b), because: "The machine guard on the chain drive for the roller assembly located in the saw room of the old mill was not replaced after maintenance was performed. The roller assembly was in use at the time of inspection and employees were observed in the area."

provisions of this Act." Section 3(h)(1) of the Act, 30 U.S.C. § 802(h)(1), defines "coal or other mine," in pertinent part, as:

> (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 . . . and workings, structures, facilities, equipment, machines, tools, or other property . . . used in, or to be 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, or the work of preparing coal or other minerals . . . . 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[.]

As the Commission has noted, the legislative history of the Mine Act indicates that Congress intended a broad interpretation of what constitutes a "mine" under the Act. *Oliver M. Elam, Jr., Co.*, 4 FMSHRC 5, 6 (Jan. 1982). Thus, the Senate Committee declared that "what is considered to be a mine and to be regulated under this Act [shall] be given the broadest possibl[e] interpretation, and . . . doubts [shall] be resolved in favor of . . . coverage of the Act." S. Rep. No. 95-181, 95th Cong., at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978). *See also Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589, 591-92 (3d Cir. 1979) *cert. denied*, 444 U.S. 1015 (1980).

The Interagency Agreement

In an attempt to carry out the mandate of the Mine Act and to provide guidance to employers and employees in industries that might be affected by both MSHA and OSHA, the two agencies of the U.S. Department of Labor entered into an interagency agreement. The preamble to the agreement states that the parties, "have entered into this agreement to delineate certain areas of authority, set forth factors regarding determinations relating to convenience of administration, provide a procedure for determining general jurisdictional questions, and provide a procedure for coordination between MSHA and OSHA in all areas of mutual interest."

Part B of the agreement concerns "Clarification of Authority." Paragraph 4 of Part B provides that: "Under section 3(h)(1), the scope of the term milling may be expanded to apply to mineral product manufacturing processes where these processes are related, technologically or geographically, to milling." Paragraph 5 sets out some non-exclusive factors to be considered in determining what constitutes mineral milling, but concludes with this statement: "The

consideration of these factors will reflect Congress' intention that doubts be resolved in favor of inclusion of a facility within the coverage of the Mine Act."

Paragraph 6(a) states that: "MSHA jurisdiction includes salt processing facilities on mine property; electrolytic plants where the plants are an integral part of milling operations; stone cutting and stone sawing operations on mine property where such operations do not occur in a stone polishing or finishing plant; and alumina and cement plants." Paragraph 6(b) provides that: "OSHA jurisdiction includes the following, whether or not located on mine property: brick, clay pipe and refractory plants; ceramic plants; fertilizer product operations; concrete batch, asphalt batch, and hot mix plants; smelters and refineries."

Finally, Appendix A to the agreement sets out some definitions as well as some specific examples of MSHA and OSHA areas of authority. With regard to milling, it provides that MSHA has authority to regulate the following types of milling processes: "crushing, grinding, pulverizing, sizing, concentrating, washing, drying, roasting, pelletizing, sintering, evaporating, calcining, kiln treatment, sawing and cutting stone, heat expansion, retorting (mercury), leaching and briquetting." Of particular pertinence to this case, it states that: "Sawing and cutting stone is the process of reducing quarried stone to small sizes at the quarry site when the sawing and cutting is not associated with polishing or finishing." On the other hand, it provides that OSHA has jurisdiction over "custom stone finishing," which "[c]ommences at the point when milling, as defined, is completed, and the stone is polished, engraved, or otherwise processed to obtain a finished product and includes sawing and cutting when associated with polishing and finishing."

Discussion

The Respondent asserts that, because it produces finished products at the Harvey Bushlot site, it comes within the exception to MSHA's authority in paragraph 6(a) of the agreement, as the stone cutting and sawing on mine property occurs in a "finishing" plant. Likewise, it claims that, because the agreement assigns OSHA authority over custom stone finishing, it is not subject to MSHA jurisdiction. Taking into consideration the legislative history of the Mine Act and the fact that the Mine Act determines the breadth of MSHA's jurisdiction, not the interagency agreement which merely attempts to set out some considerations to be used in determining whether there is jurisdiction under the Act, I find that the violations alleged in the four citations are within MSHA's jurisdiction.

The Act specifically provides that in determining what constitutes milling under it, "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 language "gives the Secretary discretion, within reason, to determine what constitutes mineral milling . . . ." *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1552 (D.C. Cir. 1984). Since MSHA has historically inspected the type of slate facility operated by the Respondent and has specifically inspected the Harvey Bushlot mine since 1985, it is apparent that the Secretary has determined that there is a convenience of

administration in having MSHA inspect such facilities where the employees work at one physical establishment. That "determination is to be reviewed with deference . . . by the Commission . . . ."[7] *Id.*

Furthermore, the interagency agreement supports, rather than contradicts, the Secretary's determination in this case. Thus, it states in paragraph 3 under Clarification of Authority that: "Notwithstanding the clarification of authority provided in Appendix A, there will remain areas of uncertainty regarding the application of the Mine Act, especially in operations near the termination of the milling cycle and the beginning of the manufacturing cycle." Such a situation is what exists here.

Next, the agreement states in paragraph 4 that "the scope of the term milling may be expanded to apply to mineral product manufacturing processes where these processes are related, technologically or geographically, to milling." Not only is this statement consistent with the discretion given the Secretary under the Act, but all of the processes at the Respondents facility are related both technologically and geographically.

Finally, turning to the specific sections of the agreement relied on by the Respondent, it would appear that missing guards on chain drive rollers in saw rooms, a missing cover plate from a junction box in the splitting area and a guard on a trimming machine all involve the process of reducing quarried stone to smaller sizes and not sawing and cutting associated with polishing and finishing. If so, this would put the areas under MSHA's jurisdiction even under the agreement.

It is not necessary, however, to reach such a conclusion in this case. There is insufficient evidence to determine exactly where in the facility the violations occurred so that a line between milling and manufacturing can be drawn with accuracy. Nevertheless, since both the Act and the agreement permit the Secretary to include a complete facility under MSHA jurisdiction, as the Secretary has done in this instance, it does not make any difference whether the sawing and cutting was associated with milling or manufacturing.

Conclusion

MSHA has historically inspected slate operations such as the Respondent's. It has been inspecting this particular mine, in it's entirety, since 1985. Obviously, then, the Secretary has determined that MSHA has jurisdiction over the mine. Given the desire of Congress that the term "mine" be given the widest possible interpretation and the guidance and discretion allowed the Secretary in the Act, this determination is perfectly reasonable and entitled to deference. Contrary to the company's position, nothing in the interagency agreement militates against that

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[7] "In this highly technical area deference to the Secretary's expertise is especially appropriate." *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1552 n.9 (D.C. Cir. 1984) (citations omitted).

determination.[8] Therefore, I conclude that the entire Harvey Bushlot complex is subject to MSHA's jurisdiction.[9]

Civil Penalty Assessment

As previously noted, the parties have stipulated that the four citations and the penalties assessed for them "were properly issued and are valid." Consequently, I conclude that the proposed penalties of $150.00 for Citation No. 7734488, $55.00 for Citation No. 7734489, $55.00 for Citation No. 7734490 and $196.00 for Citation No. 7734491, for a total of $456.00, are appropriate under section 110(i) of the Act, 30 U.S.C. § 820(i). Hence, I assess a penalty of $456.00.

Order

Accordingly, the Motion for Summary Decision of the Respondent is **DENIED**, the Secretary's Motion for Summary Decision is **GRANTED**, the four citations are **AFFIRMED** and U.S. Quarried Slate Products, Inc., is **ORDERED TO PAY** a civil penalty of **$456.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

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[8] If it did, it is clear that jurisdiction is ultimately controlled by the Act, not the interagency agreement.

[9] It is apparent from some of the statements made in the Respondent's motion that its real complaint is not that MSHA has jurisdiction over it, but with manner in which MSHA exercises that jurisdiction. Such a complaint, if valid, has no bearing on whether MSHA has jurisdiction and cannot be remedied in this forum.