

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

May 31, 2005

TAMKO ROOFING PRODUCTS, INC., Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. YORK 2004-72-RM
	:	Citation No. 6019683; 8/11/2004
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, MSHA, Respondent	:	Docket No. YORK 2004-73-RM
	:	Citation No. 6018684; 8/11/2004
	:	Docket No. YORK 2004-74-RM
	:	Citation No. 6018685; 8/11/2004
	:	Frederick Grinding Mill
	:	Mine ID 18-00750
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. YORK 2005-11-M
	:	A. C. No. 18-00750-37602
v.	:	Docket No. YORK 2005-79-M
	:	A. C. No. 18-00750-37602
TAMKO ROOFING PRODUCTS, Respondent	:	Frederick Grinding Plant

PARTIAL SUMMARY DECISION

Before: Judge Melick

On May 9, 2005, the Secretary filed a Motion for Summary Decision seeking (a) a determination that the Frederick Grinding Mill operated by Tamko Roofing Products Inc., (Tamko) is subject to the jurisdiction of the Department of Labor's Mine Safety and Health Administration (MSHA) under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et. seq.* "the Act", and, (b), to affirm the three citations at issue in this proceeding with a civil penalty of \$60.00 for each. For the reasons set forth below the motion is granted as to issue (a), above, the jurisdictional issue, but denied as to issue (b).

Under Commission Rule 67, 29 C.F.R. § 2700.67 a summary decision may be granted if the pleadings, depositions, answers to interrogatories, admissions, and declarations show there is no genuine issue as to any material fact and that the moving party is entitled to summary decision as a matter of law. As stated in her motion, the Secretary relies herein on the observations of MSHA Inspector Paul Pelesky, statements made to Inspector Pelesky by Tamko's supervisors and stipulations contained in Tamko's prehearing statement. According to Pelesky's affidavit, on August 2004, the date of the alleged violations herein, Pelesky observed that the subject mill was engaged in the process of sizing limestone by screening and then further milling the limestone to a dust-like size.

Tamko responds only by asserting that the cited milling operation, which it owns and operates, is no longer owned by the adjacent limestone quarry where limestone is extracted and, indeed, does not receive any mine product from that quarry. The Secretary counters by arguing that whether or not Tamko receives limestone from the adjacent mine is irrelevant in determining whether there is MSHA jurisdiction under the Act.

Section 4 of the Act states in relevant part, that "each coal or other mine, the product of which enters commerce, ... shall be subject to the provisions of this Act." Section 3(h)(1) of the Act defines a "coal or other mine" to include "facilities...used in... the milling of... minerals." Sections 3(h)(1) further provides that, in determining "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." "Milling" is not defined in the Act but is defined in an agreement between the Mine Safety and Health Administration and the Occupational Safety and Health Administration which sets forth the areas of authority of the two agencies. 44 Fed. Reg. 22827 (April 17, 1979). The agreement defines milling as "the art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives. The essential operation in all such processes is the separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated." *Id* at 22829. The agreement further lists specific milling processes, and their definitions, over which MSHA has jurisdiction, which include grinding, pulverizing and sizing. *Id* at 22829-22830.

There is no dispute that limestone rocks were being sized and processed to a dust-like size at the cited mill. Within the above framework, these processes constitute milling, which is subject to MSHA jurisdiction under the Act. See *Secretary v. Watkins Engineers and Constructors*, 24 FMSHRC 669,673-675 (July 2002). Tamko cites no authority for its proposition that the milling facility must be part of the extraction facility in order to be within MSHA's jurisdiction and, indeed, the proposition is without legal support. Under the circumstances, I find that the MSHA has jurisdiction under the Act to cite the Tamko facility and the Secretary's Motion for Summary Decision is granted as to this jurisdictional issue.

With respect to the Secretary's motion Part (b), Tamko argues that several issues remain in dispute including, *inter alia*, whether Tamko's health and safety training plan under the Occupational Safety and Health Administration may be substituted to meet the training requirements under MSHA, whether the MSHA inspector issued the citation for an improper purpose, and whether the citations are redundant and, therefore, excessive. To the extent that these issues may reflect upon the civil penalty criteria set forth in Section 110(i) of the Act and therefore reflect upon the amount of appropriate civil penalty, if any, to be assessed, they are matters in dispute and the motion for Summary Decision with respect to the merits of the citations and the appropriate civil penalty must be denied. Hearings will accordingly be scheduled in the near future on these issues.

Gary Melick
Administrative Law Judge
202-434-9977

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