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SOL (MSHA) V. DRILLEX
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 93-130-M
DRILLEX, INCORPORATED	:	

BEFORE: Jordan, Chairman; Doyle, Holen and Marks, Commissioners

DECISION

BY THE COMMISSION :

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988) ("Mine Act" or "Act"), presents the issue of whether the operations of Drillex, Incorporated ("Drillex") at the Montehiedra Project (the "Project") in Puerto Rico fell within the definition of a "mine" as set forth in section 3(h)(1) of the Mine Act, 30 U.S.C. 802(h)(1). Administrative Law Judge David F. Barbour determined that

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1 Section 3(h)(1) of the Mine Act provides that:

> "coal or other mine" means . . . an area of land from which minerals are extracted in nonliquid form or . . . lands, excavations, . . . facilities, equipment, . . . or other property . . . used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, . . . or used in, or to be used in, the milling of such minerals, or the work of preparing . . . minerals . . . .

30 U.S.C. 802(h)(1).

Drillex's operations were subject to Mine Act jurisdiction. He affirmed the citations and orders issued to Drillex and assessed civil penalties. 15 FMSHRC 1941 (September 1993) (ALJ). The Commission granted Drillex's petition for discretionary review, which challenges only the judge's determination of jurisdiction. For the reasons that follow, we affirm the judge's decision.

I.

Factual and Procedural Background

The parties stipulated as follows:

> 1. [O]n February 1, 1993, the U.S. Department of Labor filed a proposed Assessment of Civil Penalty with the . . . Commission against Drillex . . . for alleged violations of the [Mine Act] at the . . . Project.
>
> 2. [Drillex] contested the proposed assessment of civil penalties on the grounds that the operation conducted by Drillex . . . at the . . . Project does not fall within the jurisdictional scope of the [Mine Act] . . . .
>
> 3. [T]he following stipulation of facts is submitted by the parties in order to resolve the jurisdictional issue presented by . . . [Drillex]:
>
> > a. [O]n or about July 10, 1992 . . . Drillex . . . entered into an agreement with A.H. Development Corporation under which Drillex was to perform drilling, blasting, rock excavation and crushing of a minimum of 20,000 cubic meters of stone to be used as fill for embankment and road base at the . . . Project. The specified work was the only work performed by Drillex at the . . . Project and the material was processed an average of three . . . times a week.
> >
> > b. The [Project] . . . is a privately owned construction project wherein over two-hundred . . . residential units are being built.
> >
> > c. The material processed by Drillex . . . was extracted from the project site and hauled to the crusher area located within the project.

> d. The extracted material was to be reduced to gabion size by one . . . employee using a hydraulic hammer.[] The remaining stone was reduced to three . . . inches . . . in size with the use of a portable jaw crusher plant. Two . . . employees were retained for this purpose including the project supervisor.
>
> e. Drillex . . . removed six trucks of contaminated material (stone mixed with clay) from the project site. Said material was deposited in a property adjacent to Canteras de Puerto Rico in Guaynabo, . . . to be acquired by Drillex. Said material will be used to provide temporary access road for trucks and equipment in the property.
>
> f. None of the referred material was marketed or sold.

15 FMSHRC at 1942-43 (footnotes omitted). The parties further stipulated that the only matter to be determined was whether Drillex's operations were subject to Mine Act jurisdiction. Tr. 7. Drillex did not otherwise contest the alleged violations. Id.

The judge determined that Drillex's operation constituted a "mine" within the meaning of section 3(h)(1) of the Mine Act. 15 FMSHRC at 1945-48. He reasoned that Drillex had engaged in both mineral "extraction" and "milling" and that the Secretary of Labor's interpretation of the term "mine," as demonstrated by his exercise of jurisdiction, was entitled to deference. Id. at 1946-47. The judge also found that, because Drillex did not extract minerals on a one-time or intermittent basis and milled minerals for a specific purpose, its work site differed from a "borrow pit," which would have been subject to the jurisdiction of the Department of Labor's Occupational Safety and Health Administration ("OSHA") rather than its Mine Safety and Health Administration ("MSHA") pursuant to the MSHA-OSHA Interagency Agreement, 44 Fed. Reg. 22827 (April 17, 1979), amended, 48 Fed. Reg. 7521 (February 22, 1983) ("Interagency Agreement"). Id. at 1948. Accordingly, the judge affirmed the alleged violations and assessed the civil penalties of $1,567 proposed by the Secretary. Id. at 1949.

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2 Gabion size is approximately 12 inches. Tr. 8.

II.
Disposition

Drillex argues that MSHA's assertion of jurisdiction over its work site was unauthorized. It contends that it did not extract and process rock for the material's intrinsic qualities but, rather, performed such activities merely as an "incidental operation . . . for the construction of . . . roads . . . ." Petition for Discretionary Review ("PDR") at 6. Additionally, Drillex asserts that, under the terms of the Interagency Agreement, its site was subject to OSHA jurisdiction as a borrow pit because extraction occurred only intermittently and no milling was involved. Id. at 7-8.

The Secretary responds that "the crushing, sizing, and separation of . . . stone from contaminants [performed by Drillex] cannot be characterized as 'an incidental operation,' but rather constitutes 'mineral milling' as contemplated in the Mine Act and as defined in the Interagency Agreement." S. Br. at 9 (citations omitted). He also contends that the judge correctly distinguished Drillex's operation from a borrow pit and that, in any event, the Interagency Agreement is not legally binding on the Secretary. The Secretary argues further that deference must be accorded to his interpretation of the Act.

Section 4 of the Mine Act, 30 U.S.C. 803, provides that each "coal or other mine" affecting commerce shall be subject to the Act. Section 3(h)(1) of the Mine Act defines "coal or other mine," in part, as "an area of land from which minerals are extracted . . . and . . . lands, excavations, . . . facilities, equipment, . . . used in, or to be used in, the milling of such minerals . . . ." 30 U.S.C. 802(h)(1). The Act does not further define "extracted" or "the milling of . . . minerals." The Commission and courts have recognized, however, that the legislative history of the Mine Act indicates that a broad interpretation is to be applied to the Act's definition of a mine. See, e.g., Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589, 592 (3rd Cir. 1979); Cyprus Indus. Minerals Corp., 3 FMSHRC 1, 2-3 (January 1981), aff'd, 664 F.2d 1116 (9th Cir. 1981), citing 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.").

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3 Drillex designated its PDR as its brief.

4 The report of the Senate Committee on Human Resources states:

> the definition of 'mine' is clarified to include the areas, both underground and on the surface, from which minerals are extracted . . . and areas appurtenant thereto. . . . The Committee notes that there may be a need to resolve jurisdictional conflicts,

We conclude that Drillex engaged in both mineral extraction and milling, either of which independently qualifies its operation as a "mine" within the meaning of the Act. In general, absent express definitions, statutory terms should be defined according to their commonly understood definitions. See 73 Am. Jur. 2d Statutes 223 (1974). The term "extraction" means the separation of a mineral from its natural deposit in the earth. See Bureau of Mines, U.S. Dept. of Interior, Dictionary of Mining, Mineral, and Related Terms 404 (1968) ("DMMRT"). As the judge correctly found, Drillex engaged in mineral extraction by drilling, blasting, excavating and, thereby, separating rock, "a mineral or a composite of minerals," from its deposit in the earth. 15 FMSHRC at 1946-47. See DMMRT at 932.

The term "milling" includes processes by which minerals are made ready for use. See DMMRT at 706; Webster's Third New International Dictionary, Unabridged 1434 (1971). The Interagency Agreement further 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 separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated.

44 Fed. Reg. at 22829. The Interagency Agreement includes "crushing," "the process used to reduce the size of mined materials into smaller, relatively coarse particles," among milling processes subject to MSHA's regulatory authority. Id. Drillex crushed stone into gabion and smaller particles and separated usable stone from undesired contaminants. Therefore, Drillex engaged in milling. See Donovan v. Carolina Stalite Co., 734 F.2d 1547, 1551-54 (D.C. Cir. 1984).

We also conclude that substantial evidence supports the judge's determination that the site did not qualify as a borrow pit subject to OSHA jurisdiction. The Interagency Agreement provides:

> but it is the Committee's intention that what is considered to be a mine and to be regulated under [the] Act be given the broadest possibl[e] interpretation, and . . . that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

Legis. Hist. at 602.

5 We need not reach the issue of whether deference must be accorded to the Secretary's interpretation of the Act.

> "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, or 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.

44 Fed. Reg. at 22828. As the judge found, extraction did not occur intermittently or on a one-time basis. Drillex excavated and processed material approximately three times each week in order to fulfill its agreement to produce at least 20,000 cubic meters of stone. Tr. 6. It also performed milling processes, beyond merely using the scalping screen, by crushing stone into smaller particles. Furthermore, the stone was not used for its bulk alone but was sized for its intended use as fill.

Substantial evidence also supports the judge's conclusion that Drillex's extraction and processing of minerals were not merely incidental to road construction and, thus, its operations do not fall within the exception for such activities referenced in MSHA's Program Policy Manual, Vol. I at 3. Cf. RBK Constr. Inc., 15 FMSHRC 2099, 2100-01 (October 1993). Drillex contracted with A.H. Development Corporation expressly to extract and crush a specific quantity and quality of stone needed for the Project. Tr. 6.

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6 We need not reach the issue of whether the Interagency Agreement is legally binding on the Secretary.

III.

Conclusion

For the foregoing reasons, we conclude that Drillex engaged in mineral extraction and milling and affirm the judge's determination that its site constituted a "mine" within the meaning of section 3(h)(1) of the Mine Act.

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Marc Lincoln Marks, Commissioner