FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20004-1710

OCT 16 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2008-1490-M
v.	:	
STATE OF ALASKA, DEPARTMENT OF TRANSPORTATION	:	

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). At issue are the sand and gravel operations the State of Alaska Department of Transportation ("AKDOT") conducts in conjunction with maintaining the Dalton Highway, which is used by vehicles to service the Alaska Pipeline. An Administrative Law Judge granted AKDOT's motion to dismiss the proceeding for a lack of jurisdiction under the Mine Act. 34 FMSHRC 179 (Jan. 2012) (ALJ). The Secretary of Labor petitioned for review. For the reasons that follow, we reverse the determination of the Administrative Law Judge and conclude that the AKDOT operations are subject to the Mine Act.

I.

Factual and Procedural Background

The Dalton Highway is a gravel road, approximately 420 miles in length, that is used year-round, even when it is frozen. 34 FMSHRC at 180-81. During the original construction of the road, 40 or so pits were developed near it. AKDOT uses its equipment during a limited period in the summer to remove sand and gravel from the pits as needed for AKDOT's use in maintaining the road during the following year. *Id.* at 181. A large piece of equipment known as a "SAG Screener" is employed by AKDOT in connection with its sand and gravel operations; the SAG Screener travels from pit to pit. *Id.* at 179, 181.

With regard to such multi-site operations, the Department of Labor's Mine Safety and Health Administration ("MSHA") takes the position that it considers the location at which portable equipment is being used to be a "mine" for purposes of enforcing the Mine Act.[1] In 2002, MSHA requested that the portable screeners that AKDOT uses in road and other operations be registered with MSHA. Consequently, the SAG Screener was issued an MSHA Mine ID number that year. 34 FMSHRC at 181.

In June 2008, when the pit and screening operation was taking place near Mile 144 of the Dalton Highway, it was the subject of an MSHA inspection. The MSHA inspector stated that he observed AKDOT employees

> excavating material from a "gravel pit," [and] loading the material into a screener which separated it into different sizes of rock and placed the rock in different piles based on its size. Three different sizes of rock were being produced because there were three conveyor belts carrying the rock from the screener to three separate piles. In addition, there was a conveyor for the oversize. The sized rock had commercial value.

Sec'y's Resp. to Show Cause Order, Decl. of James E. DeJarnatt, ¶ 5. The MSHA inspector stated that the screener was approximately 1/4 mile from the road at one of the pits and that a bulldozer was being used to expand the pit. In total, there were three individuals working there. *Id.*, ¶¶ 3-4, 6.

The inspector issued two citations to AKDOT for violations he found with respect to two of the front-end loaders it was using in the operation.[2] After MSHA proposed penalties of $100 for each of the violations, AKDOT moved to dismiss the citations on the ground that its operations in question were beyond MSHA's jurisdiction under the Mine Act. 34 FMSHRC at 179.

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[1] *See* PPM Vol. III, sect. 41-2 (May 16, 1996) (construing 30 C.F.R. Part 41 Notification of Legal Identity requirements to provide that "[w]hen a mine operator has a portable plant which operates in several different locations, the mine identification number is to be assigned to the plant only and not to the pit. Mine operators will need to submit only one legal identification form for each portable plant.").

[2] One citation was for exposed wires from a bushing on a loader in violation of the mandatory standard in 30 C.F.R. § 56.12004 requiring that such conductors be protected from mechanical damage. The other citation was for an inoperable backup alarm on a second loader in violation of 30 C.F.R. § 56.14132(a)'s requirement that backup alarms be maintained in functional condition. 34 FMSHRC at 179.

In ruling on AKDOT's motion to dismiss, the Judge concluded that because the road being maintained was used in support of the Alaska Pipeline, AKDOT's operations affected interstate commerce. 34 FMSHRC at 182. The Judge went on to hold, however, that the screening by AKDOT did not rise to the level of "milling" of the excavated material, which is necessary to confer jurisdiction on MSHA under an interagency agreement between it and the Department of Labor's Occupational Safety and Health Administration ("OSHA").[3] Rather, according to the Judge, "bulk" material was being extracted from the pits as a matter of convenience, and therefore under that agreement those pits were "borrow pits" and thus the subject of OSHA, not MSHA, jurisdiction. *Id.* at 184. The Judge further found the operations to be excluded from the ambit of Mine Act jurisdiction because the screening that was occurring was neither a principal activity normally performed in the mineral milling process nor an activity undertaken to make the material suitable for a particular use meeting market specifications. *Id.* at 187.

II.

Disposition

The Secretary maintains that the Judge not only erred in concluding that the Interagency Agreement did not confer upon MSHA jurisdiction over the cited AKDOT operations as a "milling" operation, but that he also ignored other evidence that established that the AKDOT operations constituted a "coal or other mine" under section 3(h)(1) of the Mine Act, 30 U.S.C. § 802(h)(1).

AKDOT does not address the question of milling, but instead argues that the Judge's decision can be upheld on three grounds: (1) the products resulting from AKDOT's operations do not enter or affect commerce, and thus under section 4 of the Mine Act, 30 U.S.C. § 803, those operations cannot be regulated by the Mine Act;[4] (2) AKDOT's operations are conducted within the right-of-way of a public road, and thus fall outside the scope of the definitional provisions of section 3(h)(1) of the Mine Act; and (3) AKDOT's extraction of material falls within the "borrow pit" terms of the Interagency Agreement, and therefore is subject to OSHA, not MSHA, jurisdiction.[5]

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[3] *MSHA-OSHA Interagency Agreement*, 44 Fed. Reg. 22,827 (Apr. 17, 1979), *amended by* 48 Fed. Reg. 7521 (Feb. 22, 1983) ("the Interagency Agreement").

[4] As the prevailing party below, AKDOT may urge in support of the decision under review even those arguments that the Judge considered and rejected. *See, e.g., Sec'y on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1529 (Aug. 1990).

[5] With its response brief, AKDOT submitted a motion that the Commission hear oral argument in the case. Commissioners were polled and denied that request.

We agree with the Judge regarding his interpretation of section 4 of the Act and find that the operations of AKDOT in question affect interstate commerce. We conclude that in determining that the AKDOT operations did not constitute a "coal or other mine" under section 3(h)(1), the Judge failed to properly apply the terms of the statute. The Judge also erred in his interpretation of the meaning of "milling" in the Interagency Agreement. We reverse his decision and find that the AKDOT operations are a "coal or other mine" under the Mine Act and that they are subject to MSHA's regulatory jurisdiction.

A. Whether AKDOT's Sand and Gravel Operations "Affect Commerce."

Section 4 of the Mine Act provides that "[e]ach 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 provisions of this Act." 30 U.S.C. § 803. The scope of section 4 of the Mine Act was addressed in *D.A.S. Sand & Gravel, Inc. v. Chao*, 386 F.3d 460 (2d Cir. 2004). Applying *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984), the court concluded that "the language of [the section], the language and design of the Mine Act as a whole, and the Act's legislative history" all indicate that Congress intended to regulate mine safety to the full extent of its power under the Commerce Clause. 386 F.3d at 462. Drawing in part on the Supreme Court's holding that even wheat grown solely for personal consumption was the proper subject of federal regulation under the Commerce Clause (*Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942)), the *D.A.S.* court further concluded that even though the operator sold its products entirely within the state in which the products were mined and produced, the operator was subject to the Mine Act. 386 F.3d at 464; *see also Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 275-83 (1981) (holding that legislation regulating surface mining of private land was within Congress' Commerce Clause powers).

We read the court's decision in *D.A.S.* to mean that any mining or milling that an entity engages in for its own use constitutes "commerce" under section 4 of the Mine Act. The Supreme Court in *Wickard v. Filburn* made it clear that, with regard to purely local actors, the focus is on whether the activities of such actors taken together would have the potential to affect the interstate market at issue. There is no question that such potential is present with respect to entities that mine or mill sand or gravel for their own use.

AKDOT nevertheless maintains that the Dalton Highway is so remote that the sand and gravel it produces there could not be marketed anywhere else due to prohibitive transportation costs. Therefore, according to AKDOT, even when AKDOT's production is considered together with local actors similarly situated, there would be no impact on the interstate market for the product. In support, AKDOT cites two Ninth Circuit cases deciding issues under the Alaska Claims Settlement Act ("ACSA"). Neither case, however, supports the conclusion AKDOT would have the Commission reach.

In the first case, *Chugach Natives, Inc. v. Doyon, Ltd.*, 588 F.2d 723, 732 (9th Cir. 1979), the court found that, for purposes of allocating the rights to profit from various property interests granted under the ACSA, the value of sand and gravel deposits is highly dependent on their proximity to developed areas that will use such material, and that they are unprofitable to ship over long distances. The court used similar reasoning with regard to rock when later presented with the question of whether the holder of timber rights to land under the ACSA had a right to acquire at a reasonable cost the rock underlying the land to use in constructing such roads as are necessary to harvest the timber; the transportation cost of shipping rock to the site was prohibitive relative to the value of the timber rights. *See Koniag, Inc. v. Koncor Forest Resource*, 39 F.3d 991 (9th Cir. 1994).

The two cases are of no import here, because there was no finding in this case that the construction and continued existence of the Dalton Highway was in any way dependent on its proximity to sources of sand and gravel. In marked contrast, the importance of continued operation of the Alaska Pipeline and the need for use of the Dalton Highway to maintain it means that sand and gravel from some source has to be used to maintain the road, even if it would have to be transported from elsewhere. The fact that AKDOT is able to produce sand and gravel locally means that it does not have to purchase it. Because this is the type of effect on commerce that was sufficient to bring the wheat in *Wickard v. Filburn* within the ambit of the Commerce Clause, the two Ninth Circuit cases do not provide any basis on which to depart from court and Commission precedent regarding the "commerce" language of section 4 of the Mine Act.

B. Whether the AKDOT Operations Are a "Mine" under the Mine Act.

The term "coal or other mine" is defined in pertinent part in section 3(h)(1) of the Mine Act as:

> (A) *an area of land from which minerals are extracted* . . . , (B) private ways and roads appurtenant to such area, *and* (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, *equipment, machines, tools,* or other property . . . , on the surface or underground, *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,* and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this chapter, 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.

30 U.S.C. § 802(h)(1) (emphases added).

In the legislative history of the Act, Congress made it clear "that what is considered to be a mine and to be regulated under this Act be given the broadest possibl[e] interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act." S. Rep. No. 95-181, at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978) ("*Legis. Hist.*"). Accordingly, the Commission has consistently construed section 3(h)(1) broadly in favor of Mine Act coverage. *E.g., Calmat Co. of Arizona*, 27 FMSHRC 617, 622, 624 (Sept. 2005).

1. AKDOT's Extraction Activities

a. The Language and History of the Mine Act

Sand and gravel mining operations, whether year-round, intermittent, or seasonal, have long been subject to mine safety regulation. *See* S. Rep. No. 95-181, at 57, *Legis. Hist.* at 645 (detailing scope of industries subject to one of Mine Act's predecessor statutes, the Metal and Non-metallic Mine Safety Act of 1966, and that would therefore be subject to the Mine Act). Without question, any entity that engages in the extraction of sand or gravel falls within the definition of "coal or other mine." *See, e.g., Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1548 (D.C. Cir. 1984) (slate gravel quarry operator, including its conveyors, subject to Mine Act); *Jerry Ike Harless Towing, Inc.*, 16 FMSHRC 683, 688 (Apr. 1994) (operator's extraction of "sand, a mineral, from its natural deposit . . . . covered by the Mine Act.").

Because AKDOT conceded from the outset of this proceeding that it extracts material from its pits that it then processes on the spot to produce sand and gravel, its operations plainly fall within section 3(h)(1).[6] The AKDOT excavation pits are covered under subsection (A) – areas of land on which extraction occurs. Moreover, the screening process and the trucks and conveyors that it uses are covered under subsection (C) – equipment, machines, or tools used in mining. *See W.J. Bokus Indus., Inc.*, 16 FMSHRC 704, 708 (Apr. 1994) (equipment used in "mining-related tasks" covered by section 3(h)(1)).

AKDOT nevertheless argues that because all of its pit and screening operations occur within the right-of-way of the Dalton Road, and the Mine Act specifically includes only "private roads" within the definition of "mine," the Secretary exceeds the scope of the Mine Act when he seeks to treat as a mine an operation occurring within a public road right-of-way. *See* 30 U.S.C. § 802(h)(1)(B) (extending jurisdiction to "private ways and roads appurtenant to [areas of land from which minerals are extracted]").

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[6] Mike Oden, Sr., an AKDOT safety manager, in an affidavit supporting AKDOT's Motion to Dismiss, stated that to meet its need for sand and gravel to maintain the Dalton Highway for safe year-round access, AKDOT "produces and stockpiles sand and gravel in borrow pits located along the Dalton Highway right-of-way," and that such pits "provide[] construction and maintenance materials" for the highway. ¶¶ 5, 9.

However, even if all of AKDOT's operations at issue occur within the dedicated right-of-way, that does not resolve the question of Mine Act jurisdiction. While mining operations within a public road right-of-way may be unusual, there is nothing in the language of section 3(h)(1) of the Mine Act that forecloses application of the Act to such operations conducted on public road rights-of-way.

The definition of "mine" was drafted in the conjunctive. It begins with subsection (A), the area of land from which minerals are extracted, and extends out beyond such areas to include subsection (B) appurtenant private roads, and in subsection (C) to such things as equipment used in mining or milling. The fact that the terms of subsection (B) foreclose extending jurisdiction over a public road under that subsection does not mean that operations or activities conducted on a public road right-of-way also fall outside the scope of subsections (A) or (C). And it is both those subsections of the definition that plainly encompass the AKDOT pit and screening operation. Consequently we hold that AKDOT's operations clearly fall within the terms of section 3(h)(1)'s definition of "coal or other mine."

b. The MSHA-OSHA Interagency Agreement

AKDOT also argues that the sand and gravel should be considered mere "fill," and thus its pits are simply "borrow pits." AKDOT's argument is premised on the "determination" which the Secretary made pursuant to the final sentence of section 3(h)(1)(C). That determination is the aforementioned Interagency Agreement that allocates between MSHA and OSHA the responsibility for various types of operations that may involve the milling of extracted minerals. While the Judge agreed with AKDOT, neither applicable law nor the evidence in this proceeding supports his conclusion on the issue.[7]

Deference is owed to an agency's reasonable interpretation of the jurisdictional terms of the statutory provisions it is charged with administering. *City of Arlington, Tx v. FCC*, 133 S. Ct. 1863, 1868-73 (2013). Given the explicit delegation in section 3(h)(1) of the Act to the Secretary, the Interagency Agreement is to be deferred to whenever it is reasonable in light of the Mine Act's definition of "mine." *Donovan v. Carolina Stalite Co.*, 734 F.2d at 1552.

Appendix A to the Interagency Agreement, in setting forth specific examples of unquestioned MSHA authority under the Mine Act apart from milling, includes operations involving the "[o]pen pit mining" of "[s]and and [g]ravel." 44 Fed. Reg. at 22,829. Thus, the

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[7] When reviewing an Administrative Law Judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the Judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

Interagency Agreement provides MSHA jurisdiction over the AKDOT operations at issue here before the question of milling is even reached.

We recognize that the Interagency Agreement generally accords OSHA, and not MSHA, jurisdiction over "borrow pits." However, it limits what can be considered a "borrow pit" to:

> 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.

Id. at 22,828. In concluding that AKDOT was excavating materials from such borrow pits along the Dalton Highway, the Judge focused on AKDOT's intermittent use of the pits as well as an example discussed in MSHA PPM, Vol. I, at sect. 4-3 (1996). There, MSHA stated that where a landowner uses material in basically the same form as it is extracted to fill potholes in a road, the excavation will be considered a borrow pit and thus not subject to MSHA jurisdiction. 34 FMSHRC at 184-85.

The Judge ignored the evidence that the screening process AKDOT was engaged in did more than "scalp" away large rocks, wood, and trash from the material it was extracting. As noted by the inspector, it was being used by AKDOT to size the material into different piles. Decl. of James E. DeJarnatt, ¶ 5. Moreover, in response to the Judge's Order Requesting Clarification, AKDOT's counsel compiled statements from State employees and offered to provide declarations of the employees if the Judge required. Counsel summarized that "[t]he materials stored in each pit originate from natural deposits in each pit. The natural deposits at each pit make certain pits a better source for a particular construction of [sic] maintenance material: to wit, riprap (big rock), rock, gravel, or sand." AKDOT Resp. to Request for Clarification at 2. Thus, the evidence contradicts the Judge's conclusion that AKDOT's excavations are borrow pits it uses to provide material that is used in basically the same form as it is extracted.

2. AKDOT's Subsequent Processing Activities

The Judge concluded that AKDOT's use of the SAG Screener did not constitute "milling" under section 3(h)((1). 34 FMSHRC at 182-185. The Judge erred in concluding that "milling" was not occurring.

The Interagency Agreement states that "[m]illing consists of one or more of the following processes: crushing, grinding, pulverizing, *sizing*, ... 44 Fed. Reg. at 22,829 (emphasis added). "Sizing" is defined in the Interagency Agreement as "[t]he 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.* at 22,829-30. The uncontradicted Declaration of MSHA inspector DeJarnatt, quoted *supra*, establishes that AKDOT used the Sag Screener to separate the material from the pit into separate piles based on size, with the oversized rock separated out entirely. Because the evidence establishes that AKDOT was using the SAG Screener to size the material it was extracting, AKDOT was clearly engaging in "milling" under section (h)(1) as that term is interpreted in the Interagency Agreement.

III.

Conclusion

For the foregoing reasons we reverse the Judge's determination that the AKDOT Dalton Highway sand and gravel operations are not a "mine" under the Mine Act and remand this case for further proceedings.

Patrick K. Nakamura, Acting Chairman

Robert F. Cohen, Jr., Commissioner

William I. Althen, Commissioner

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