UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. SOUTHERN CRUSHED CONCRETE, Respondent.	OSHRC DOCKET NO. 10-2556

Appearances:

Karla S. Jackson, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas
For Complainant

John D. Smart, Esq., Winstead Law Firm, Dallas, Texas
For Respondent

Before: Administrative Law Judge James R. Rucker, Jr.

DECISION AND ORDER

Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 *et seq*. ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of a "Pug Mill" located on a Southern Crushed Concrete ("Respondent") worksite, known as Ponderosa Timbers, in Conroe, Texas between June 25 and June 29, 2010. As a result of the inspection, OSHA issued a *Citation and Notification of Penalty* to Respondent which alleged one serious and one other-than-serious violation of the Act with a proposed total penalty of $1,750.00. Respondent contested the proposed violations and this matter was assigned to the undersigned for adjudication.

Respondent promptly moved for dismissal of this proceeding based upon purported preemption of OSHA jurisdiction over Respondent's Pug Mill by the Federal Mine Safety and Health Administration

("MSHA"). The court has now reviewed and considered the following submissions of the parties on that issue: (1) *Respondent's Verified Objection to Assignment for Simplified Proceedings and Motion to Dismiss*, (2) *Complainant's Response to Respondent's Verified Objection to Assignment for Simplified Proceedings and Motion to Dismiss*, (3) *Respondent's Reply to Complainant's Response to Respondent's Verified Objection to Assignment for Simplified Proceedings and Motion to Dismiss*, (4) *Respondent's Verified Supplemental Brief Regarding Respondent's Motion to Dismiss*, and (5) *The Secretary's Supplemental Brief in Support of Response to Motion to Dismiss.*

Discussion

Respondent owns and operates an above ground sand mining operation in Conroe, Texas which primarily consisted, at the time of inspection,[1] of a dredging operation which extracted sand from the San Jacinto River and then processed the sand through the point at which it was ready for sale to customers. (Resp. Motion, p. 1; Comp. Supp. Brief, p.1). Respondent extracted sand, dirt, and water through an auger and deposited it onto the shore. (Resp. Supp. Brief, p.2). The wet mixture of sand and mud was then transported by conveyor belt to a front-end loader, where it was carried 60 yards to a "classifier" machine, which separated sand particles according to size. (Resp. Supp. Brief, p.2). The sorted sand was then moved by one of two sand screw conveyors to an area where it was washed and dirt particles were removed. (Resp. Supp. Brief, p.2). All of the sand was then dried and moved 100 yards to the Pug Mill with a front-end loader. (Resp. Supp. Brief, p.2). At the Pug Mill, dried sand (99%) was mixed with cement (1%) to create "stabilized sand," which was then trucked off the facility for sale to customers. (Resp. Supp. Brief, p. 2). The entire process, from sand extraction to finished product, was a single, integrated, continuous operation all located within a 400-500 foot area. (Resp. Supp. Brief, p.2).

It is undisputed that MSHA frequently inspects Respondent's entire dredging and sand processing operation, with the lone exception being the facility at issue in this proceeding: Respondent's Pug Mill.

(Resp. Supp. Brief, p. 1; Comp. Supp. Brief, p. 4). In fact, in the six months prior to OSHA's inspection in this case, Respondent estimates that MSHA inspectors spent 43 hours examining Respondent's facility for safety and health regulatory compliance. (Resp. Supp. Brief, p.2). Respondent now moves for dismissal of this OSHA enforcement case based on a legal argument that its Pug Mill, just like the rest of its facility, is subject to exclusive MSHA jurisdiction.

Apparently, after an MSHA inspection of the facility in June 2010, local MSHA and OSHA officials decided that, although MSHA regulates and inspects all other aspects of Respondent's sand dredging and processing operation at the Ponderosa Timbers location, OSHA has jurisdiction over the activities at the Pug Mill. (Comp. Response, Ex. C). The court notes, however, that MSHA Assistant District Manager Fred Gatewood does not represent in his declaration that he has been delegated authority from the Secretary of Labor to establish official jurisdictional boundaries for MSHA nor does his declaration assert that he has any direct personal knowledge of the activities that take place in the Pug Mill. It appears from the supporting declaration submitted by Complainant that the local MSHA Inspector informally concluded that MSHA does not have jurisdiction over the Pug Mill, then described the Pug Mill to Assistant District Manager Gatewood, who then agreed with the MSHA Inspector's jurisdictional conclusion.

The declaration of OSHA's Houston (North) Area Director, David Doucet, is equally unpersuasive. As with Mr. Gatewood's declaration, there is no indication that Mr. Doucet has been delegated authority by the Secretary of Labor to establish official jurisdictional boundaries for OSHA, nor any indication that he personally observed the activities of the Pug Mill. He too appears to base his jurisdictional conclusions on the verbal descriptions and conclusions of the local MSHA Inspector. (Comp. Response, Ex. A). These local, informal, hearsay-based conclusions, fall woefully short of official Agency positions on the boundaries of Federal statutory and regulatory jurisdiction, and therefore, do not necessitate a significant

1 Respondent's Pug Mill operations at the Ponderosa Timbers location have now ceased. (Resp. Motion, p. 2).

level of judicial deference.[2] See *Carolina Stalite*, 734 F.2d 1547, 1552 (D.C. Cir. 1984); *Watkins Engineers & Constructors*, 24 FMSHRC 669 (2002).

When an employer asserts preemption of OSHA jurisdiction by another Federal agency, it must establish that: (1) the other Federal agency has the statutory authority to regulate the cited working conditions, and (2) the other Federal agency has actually exercised that authority by issuing applicable regulations. *Chao v. Mallard Bay Drilling*, 122 S.Ct. 738 (2002); *JTM Industries*, 19 BNA OSHC 1697, 2001 CCH OSHD ¶32,502 (No. 98-0030, 2001).

OSHA, unless preempted by another Agency or barred by statute, generally possesses regulatory jurisdiction over safety and health issues in any business operating in any industry which affects interstate commerce. *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005). MSHA possesses regulatory jurisdiction over safety and health issues in mining operations, which includes "lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, use in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits...used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals..." 30 U.S.C. §802(h)(1). Since both agencies regulate employee safety and health issues, MSHA and OSHA entered into an Interagency Agreement ("Agreement") in 1979 which attempted to articulate boundary lines between their two respective jurisdictions. 44 F.R. 22827. While this Agreement between the two agencies certainly does not carry the force and effect of law, it is relevant in a judicial analysis of a jurisdictional dispute such as this one. *Carolina Stalite* at 1552, supra.

2 The Agreement between MSHA and OSHA regarding jurisdictional boundaries, at ¶B(8), directs that first level decisions be made by the OSHA Regional Administrator and MSHA District Manager, with ultimate authority over jurisdictional conflicts under the Agreement resting with the Secretary of Labor. None of the declarations submitted by Complaint in this case come from officials designated with authority to declare Agency jurisdictional boundaries.

The dispute here focuses on the question of whether Respondent's mixing of dredged sand with cement constituted "milling," and therefore, "mining" under the Mine Act. The Agreement, in Appendix A, 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." However, the Agreement then lists eighteen examples of activities which constitute milling, many of which have no relationship whatsoever to the separation of extracted materials. For example, the Agreement includes crushing, grinding, pulverizing, roasting, calcining, sawing, cutting, and heating in the category of milling. These inconsistencies in the definition of milling within the Agreement have been recognized by several courts, with MSHA jurisdiction having been established where operations clearly included mixing or blending of extracted minerals with non-extracted materials, as in the present case. *Watkins Engineers*, supra; *Carolina Stalite* at FN 10, supra; *Stoudt's Ferry*, 602 F.2d 589 (3rd Cir. 1979).

It is undisputed that Respondent's activity in the Pug Mill was "mixing" and not one of the eighteen enumerated milling activities listed in Appendix A of the Agreement between OSHA and MSHA. (Comp. Supp. Brief, p. 2; Resp. Supp. Brief, p. 5). It is equally clear, however, that Respondent's Pug Mill mixing activities do not fit neatly into any of the categories listed in the Agreement where MSHA's authority ends and OSHA's authority begins. Arguably, the closest category is "Concrete Ready-Mix or Batch Plants," terms which are not defined in the Agreement. Respondent addressed this issue by asserting that "the Pug Mill is not a concrete plant of any kind as SCC did not mix, create, or sell concrete anywhere at Ponderosa Timbers, much less at the Pug Mill." (Resp. Reply, p. 4). Complainant agreed, conceding that the end product after processing within the Pug Mill is "stabilized sand," not concrete. (Comp. Supp. Brief, p. 1 & Ex. A).

The terms "mine" and "milling," which are key to determining whether MSHA has jurisdiction here, have repeatedly been given an expansive interpretation. *Carolina Stalite* at 1551, supra. "Milling and preparation can be perceived as words used, in a loose sense, interchangeably to describe the entire process of treating mined minerals for market." *Id.* In analyzing jurisdiction under the Mine Act, the term "mine" and "milling" can readily encompass "structures" and "facilities" which are not even located on the same property where minerals are extracted, but simply continue the processing of those minerals for market. *Id.* at 1552; *Stoudt's Ferry*, supra. Even the Agreement itself recognized flexible and expansive concepts of mining and milling, as Paragraph B(4) states "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." In resolving jurisdictional conflicts, the term "mine" was intended "to be given the broadest possible interpretation and [ ] doubts [were to] be resolved in favor of inclusion of a facility within the coverage of the [Mine] Act." *Stoudt's Ferry* at 592, supra.

The following factors are determinative in this jurisdictional analysis: (1) All other areas of Respondent's sand dredging and sand processing operation (aside from the Pug Mill) are undisputedly subject to MSHA jurisdiction, (2) Respondent's Pug Mill is an integral part, technologically and geographically, of Respondent's sand processing operation, (3) the same employees who perform dredging work also perform the mixing activities at the Pug Mill,[3] (4) Respondent's activities at this location clearly constitute a single, uninterrupted, integrated process from the initial extraction of sand from the earth to the end creation of "stabilized sand" for market, (5) MSHA had inspected this facility numerous times for safety and health compliance prior to this OSHA inspection, and (6) MSHA has applicable regulations addressing the issues cited by OSHA in this case: 30 C.F.R. §56.12016 (MSHA surface mine regulation on energy isolation procedures) and 30 C.F.R. §56.5005 (MSHA surface mine regulation on respirator use).

3 This fact was presented during oral argument by the parties during a conference call on the jurisdictional issue.

Accordingly, the court finds that OSHA jurisdiction in this case is preempted by the existence and exercise of MSHA regulatory authority. *Chao v. Mallard Bay Drilling*, supra; *JTM Industries*, supra.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, Respondent's *Motion to Dismiss* is GRANTED. The *Citation and Notification of Penalty* is hereby VACATED.

___/s/_____
JAMES R. RUCKER, Jr.
Judge, OSHRC

Date: May 4, 2011
Denver, Colorado