

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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June 13, 2018

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION, (MSHA),  
Petitioner,

v.

JAMESTOWN QUARRIES,  
Respondent.

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION, (MSHA),  
Petitioner,

v.

ROCKY RIDGE CUSTOM CRUSHING  
LLC,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. SE 2017-252  
A.C. No. 40-03297-441925

Mine: Rocky Ridge Custom Crushing LLC

CIVIL PENALTY PROCEEDING

Docket No. SE 2017-253  
A.C. No. 40-03297-442550

Mine: Rocky Ridge Custom Crushing LLC

**DECISION**

Appearances: Mary Sue Taylor, Esq., U.S. Department of Labor, Office of the Solicitor,  
Nashville, Tennessee, for Petitioner

Howard Upchurch, Esq., Pikeville, Tennessee, for Respondent

Before: Judge Simonton

**I. INTRODUCTION**

These cases are before me upon two petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Jamestown Quarries and Rocky Ridge Custom Crushing, LLC, pursuant to the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. §801.<sup>1</sup> The petitions allege three citations against Jamestown Quarries and one citation against Rocky Ridge Custom Crushing.

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<sup>1</sup> In this decision, the transcript, the Secretary’s exhibits, and Respondent’s exhibits are abbreviated as “Tr.,” “Ex. G-#,” and “Ex. R-#,” respectively.

The Respondents share common ownership, are located in close proximity, and stipulated that if the court were to find that MSHA has jurisdiction over the Rocky Ridge Custom Processing Shop, the Jamestown Quarries Garage, or both, then the associated citations were properly issued and valid. Resp. Br. at 2; Tr. 8-9. For these reasons, the dockets were consolidated for a hearing on the jurisdictional issue.

The parties presented testimony and documentary evidence at a hearing held in Crossville, Tennessee on February 22, 2018. MSHA Inspector John Myers, Jr. testified for the Secretary. Site Foreman Gabe Clayborn and co-owner Patrick Garrison testified for Jamestown and Rocky Ridge (“Hereinafter Respondents”). The parties submitted post-hearing briefs, which have been fully considered.

## II. FINDINGS OF FACT

The Rocky Ridge Stone Quarry (“Quarry”) is located in Cumberland County, Tennessee. The Quarry mines and produces dimensional stone, or sandstone, for resale in interstate commerce. Tr. 16. Adjacent to the Quarry is a three-building complex that includes an office trailer, the Jamestown Quarries Garage (“Garage”), and the Rocky Ridge Custom Processing Shop (“Shop”). Tr. 113-14. All three operations conduct their administrative operations out of the office trailer. Tr. 111. There is no dispute as to MSHA’s jurisdiction over the common office space or the Quarry itself. Tr. 23-24.

The Quarry is entered by going down a road that passes next to the three-building complex. Tr. 139-40. Along this road, a gated fence separates the three-building complex from the Quarry and two warning signs are posted to the gate. Exs. G-14, 15; Tr. 45, 142. The first sign warns of blasting danger in the Quarry and directs individuals to register at the office trailer, receive the necessary site-specific hazard awareness training, or be accompanied by an experienced miner when entering the premises. Ex. G-15. The second sign prohibits through traffic and lists general traffic rules for the Quarry site. Ex. G-14.

The Jamestown Quarries Garage is located directly behind the office trailer and is connected to the Shop by a common breezeway. Ex. G-2. The Garage is leased to Jamestown Quarries by Rocky Ridge Stone Company, although both companies are commonly owned by Patrick Garrison and Johnny Presley as Bedrock Partnership Holdings. Tr. 102, 173. The Garage serves as a storage, repair, and maintenance building, in which Jamestown’s mechanics work on equipment that is used in the course of the owners’ business ventures. Tr. 114-15; 174. The Jamestown Quarry itself is located approximately 52 miles north of the Garage and is shut down. Tr. 178-79.

The parties dispute whether any Rocky Ridge equipment is serviced inside the Garage. The Respondents maintain that the Garage is not large enough to hold or service other equipment related to the Rocky Ridge Quarry. Tr. 114-15; 162. However, Foreman Gabe Clayborn would not unequivocally state that quarry equipment has never been serviced in the garage itself. Tr. 149-50. Inspector Myers testified that he had no doubts that Quarry equipment was maintained in the Garage because it was located so close to the Quarry. Tr. 89. He noted that the Garage also stored an inoperative rock breaker. Tr. 116. The rock breaker has been stored there for

approximately two years to protect it from adverse weather. *Id.* Respondents testified that it would be unable to use the breaker even if it was operable because it would be too difficult to transport material from the Quarry to the Garage. Tr. 116-17.

The parties do not dispute that the Garage's mechanics work on Quarry equipment in general, however. The Garage has a MSHA Contractor Identification number so that its employees may be on the Rocky Ridge Quarry site for five or more consecutive days. Tr. 172-73. Clayborn testified that Jamestown registered for a contractor ID number so that the Garage's mechanics may travel to the quarry to maintain, repair, or weld any equipment that might require service. Tr. 173-75. The mechanics use a service truck stocked with all of the tools and supplies necessary to perform these functions at the Rocky Ridge Quarry, as well as other nearby quarries. Tr. 176, 179. The truck is stored in the Garage. *Id.*

The Rocky Ridge Custom Processing Shop ("Shop") is adjacent to the office trailer and Garage to the south. Ex. G-2; Tr. 117. The Shop consists of two sections, separated by a partition stretching approximately three quarters the length of the building. Tr. 125-26. The first, larger section has a gabled roof and was constructed in 2012. Tr. 122. The entry way to the gabled portion contains a sign that reads "Rocky Ridge Stone Co. Polishing & Finishing Shop." Ex G-6; Tr. 41, 129. The gabled section contains two large rock breakers that Respondent uses to break, cut, and size rock. Tr. 124, 126. The second section has a flat roof and was constructed in 2014. Tr. 126. This section contains a saw and polisher used for additional sizing and finishing. Tr. 40-41, 126-27.

Rocky Ridge excavates the rock from the Quarry, breaks the rock, and brings some of the rock into the Shop for additional cutting, sizing and finishing per customer orders. Tr. 131-32. Respondents also break and size rock outside of the Shop, and they do not polish or finish all of the rock that is excavated from the Quarry. Tr. 157. Rocky Ridge also removes some of the rock from the building to be palletized outside of the building. *Id.* A significant amount of cut stone is palletized outside of the Shop. Ex. G-8; Tr. 133-34.

In 2016, MSHA sent the Respondents a letter informing them that it had conducted an analysis and determined that it had jurisdiction over the buildings pursuant to the Mine Act and the 1979 MSHA-OSHA Interagency Agreement. Ex. R-5; Tr. 28-29, 169. Respondents received the letter but interpreted its language to exclude the Shop and Garage from MSHA jurisdiction based on certain terms within the Interagency Agreement. Ex. R-5; Tr. 167-69. While the Respondents believed that OSHA had jurisdiction over the buildings, they acknowledged at hearing that OSHA has never asserted jurisdiction over, nor inspected any area of the property. Tr. 154-55, 172.

The interpretational differences came to a head in early May 2017 when MSHA inspector John Myers, Jr.<sup>2</sup> inspected the Rocky Ridge Stone Quarry.<sup>3</sup> Myers held two safety meetings; the

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<sup>2</sup> Inspector Myers has been an MSHA inspector for over 11 years, and began inspecting mental/nonmetal mines in 2015. Tr. 13. He has over 20 years of mining experience. Tr. 14. Myers completed training at the Mine Safety and Health Academy in Beaver, West Virginia, underwent mine rescue training and instructor training, and has taught mine safety and foreman

first took place in the Garage in front of approximately 15 employees, and the second took place in the quarry yard in front of five employees. Tr. 20. Myers inspected the surface and the common office building, but did not inspect the Garage or the Shop because management told him that they were not part of the Quarry. *Id.* When Myers returned to the MSHA office, his supervisor told him that MSHA had jurisdiction over the two buildings and instructed him to return to the site to complete the inspection. Tr. 29. Myers conducted the second inspection on May 8-9, 2017. Tr. 29. Mine management initially refused Myers entry to the buildings but eventually allowed him to inspect the areas over their objections. Tr. 29-30.

Myers issued three citations to Jamestown Quarries for violations within the Garage. Citation No. 8901448 alleged a violation of 30 C.F.R. § 56.4430(a)(1) for the operator's failure to properly store a propane tank and several spray cans containing flammable materials. Ex. G-16. Citation No. 8901449 alleged a violation of 30 C.F.R. § 56.14100(a) for the operator's failure to adequately maintain a load lifting strap. *Id.* Citation No. 8901452 alleges a violation of 30 C.F.R. § 56.12008 for the failure to properly bush a 120-VAC control box. *Id.* Myers issued Citation No. 8901451 to Rocky Ridge Custom Crushing LLC alleging a second violation of § 56.12008, this time in the Shop, for the operator's failure to substantially bush a stone saw's 120-VAC control box. Ex. G-17.

The Respondents allege that MSHA does not have jurisdiction over either building. They argue that the Garage performs no work for the Quarry, and that the Shop is explicitly exempted from MSHA jurisdiction per the MSHA-OSHA Interagency Agreement. Respondents' Post-Hearing Brief ("Resp. Br.") at 8-9. The Secretary disagrees, arguing that the proximity of the Shop and Garage to the Rocky Ridge Quarry and the work being done in each building is related to milling and within MSHA's jurisdiction. Secretary's Post-Hearing Brief ("Sec'y Br.") at 8-9.

The parties stipulated, for the purposes of this case, that if MSHA retains jurisdiction over the Garage and the Shop, the four citations that comprise the two dockets were properly issued and valid. Tr. 8-9. Based on the parties' briefs and my review of the witness testimony and the entire record, I find that MSHA's jurisdiction over both buildings is proper and accordingly affirm all four associated citations.

### III. CONCLUSIONS OF LAW

#### A. The Mine Act

The Mine Act provides that "[e]ach coal or other mine . . . and each operator of such mine . . . shall be subject to the provisions of this Act." 30 U.S.C. § 803.

The Act defines a "coal or other mine" as

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classes. *Id.* He is a certified underground mine foreman in Kentucky, and was previously certified as a surface and underground foreman in Virginia prior to letting the certification lapse. *Id.*

<sup>3</sup> Inspector Myers could not recall the exact dates of the first inspection, but noted that it took place approximately a week prior to the May 8-9, 2017 inspection at issue. Tr. 17.

(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, 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, 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 coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for the 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.

30 U.S.C. § 802(h)(1).

The legislative history of the Act indicates that the intention of Congress was that “what is considered to be a mine and to be regulated under this Act be given the broadest possibl[e] interpretation.” S. Rep. No. 95-181, at 14 (1977). Congress was clear in its intent that if any uncertainty existed to whether a facility or site should come under MSHA jurisdiction, those doubts shall be resolved in favor of inclusion of a facility within the coverage of the Act. *Watkins Engineers & Constructors*, 24 FMSHRC 669, 675-76 (July 2002).

Section 3(h)(1)(C) defines a “mine” to include “structures” and “facilities” used in “milling” or “the work of...preparing coal or other minerals.” *Id.* The section also expressly grants the Secretary the authority to determine what constitutes “mineral mining” under the Act. 30 U.S.C. § 802(h)(1); *see also Watkins*, 24 FMSHRC at 673 (citations omitted). Accordingly, the language of Section 3(h)(1) “gives the Secretary discretion, within reason, to determine what constitutes mineral milling, and thus indicates that his determination is to be reviewed with deference by both the Commission and the courts.” *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1552 (D.C. Cir. 1984). The Act does not require that the structures of facilities be owned by a firm that also engages in the extraction of minerals from the ground or that they be located on property such extraction occurs. *Id.* at 1552. However, the Court of Appeals for the Sixth Circuit recently held that MSHA’s jurisdiction extends to such structures and facilities only “if they are in or adjacent to—in essence part of—a working mine. *Maxxim Rebuild Co., LLC v. FMSHRC*, 848 F.3d 737, 740 (6th Cir. 2017).

## **B. The MSHA-OSHA Interagency Agreement**

To provide further clarification on the language of section 3(h)(1)(C) the Secretary defined “milling” in the 1979 MSHA-OSHA Interagency Agreement (“Interagency Agreement”) as “the separation of one or more valuable desired constituents of the crude [crust of the earth] from the undesirable contaminants with which it is associated.” 44 Fed. Reg. 22, 827 (Apr. 17,

1979), *amended by* 48 Fed Reg. 7, 521 (Feb 22, 1983). Appendix A of Agreement specifies that MSHA’s authority over milling processes include “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.” *Id.* Only one of these activities must be conducted in order for MSHA to assert jurisdiction over the facility or property. *Jermyn Supply Co., LLC*, 39 FMSHRC 1472, 1484 (July 2017) (citations omitted).

Relevant to this case, section 6(a) of the Agreement identifies that MSHA jurisdiction over milling operations includes “stone cutting and stone sawing operations on mine property where such operations do not occur in a stone polishing or finishing plant.” 44 Fed. Reg. at 22,828. Appendix A further defines “Custom Stone Finishing” to commence 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. *Id.* at 22,830.

However, the Agreement acknowledges that “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.” *Id.* Section B(4) provides that “Under section 3(h)(1) of the Mine Act, 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.” 44 Fed. Reg. at 22, 828. In resolving these areas of uncertainty, the Secretary should consider the processes conducted at the facility, the relation of all processes at the facility to each other, the number of individuals employed in each process, and the expertise and enforcement capability of each agency with respect to the safety and health hazards associated with all processes conducted at the facility. *Id.*

The Agreement thus defers to the language of section 3(h)(1) instructing the Secretary to “give due consideration to the convenience of administration resulting from the delegation...with respect to the health and safety of miners employed at one physical establishment.” *Id.* The Secretary’s interpretation of the term is therefore entitled to deference so long as it is reasonable. *See Watkins Engineers & Constructors*, 24 FMSHRC at 673 (holding that Congress explicitly left a gap in section 3(h)(1) of the Mine Act delegating to the Secretary the authority to interpret what constitutes “milling,” and therefore that interpretation is entitled to *Chevron* deference so long as it is reasonable).

#### IV. DISPOSITION

There is no dispute that the Rocky Ridge Stone Quarry adjacent to the Garage and Shop engages in “milling” as defined by the Interagency Agreement, and is thus subject to MSHA’s jurisdiction. Rather, The Respondents contest whether that jurisdiction extends to the Garage and Shop, respectively.

The Respondent contends that MSHA does not have jurisdiction over the Jamestown Quarries Garage because it does not engage in milling on behalf of the Rocky Ridge Quarry, nor does it service or maintain equipment related to the Quarry. Resp. Br. at 5. The Respondent

argues that the Garage lacks sufficient connection to the Rocky Ridge Quarry because they are located on different properties and are not owned by the same entity. *Id.* The Respondent argues that MSHA does not have jurisdiction over the Rocky Ridge Shop because the shop constitutes a “polishing or finishing plant” under the Interagency Agreement and is therefore subject to OSHA jurisdiction. *Id.* at 8.

The Secretary counters that the Jamestown Garage Quarry falls under MSHA’s jurisdiction because it is located adjacent to the Rocky Ridge Quarry and does in fact provide repair and maintenance services for the Quarry. *Resp. Br.* at 9. The Secretary argues that the Rocky Ridge Processing Shop falls under MSHA’s jurisdiction because it located adjacent to the Quarry and does not qualify as a “finishing plant” as defined under the Interagency Agreement. The Secretary maintains that the presence of a single polisher among other equipment used to break, cut, and size rock classifies the building as performing “milling” as defined by the Agreement. *Id.* at 8-9.

Because the jurisdictional issues differ as to each facility, the court will address them in turn.

#### **A. The Jamestown Quarries Garage**

The Jamestown Quarries Garage is primarily used for storage, repairs, and maintenance work for Garrison’s and Presley’s various other businesses. It does not conduct “milling” as defined in the Interagency Agreement, and so the issue is whether the Garage constitutes a “structure” or “facilit[y] used in “milling” or “the work of...preparing coal or other minerals.” 30 U.S.C. 802(h)(1)(C).

As an initial matter, I reject the Respondent’s contentions that MSHA’s jurisdiction is improper because the Jamestown Garage and Rocky Ridge Quarry are owned by separate entities and located on different property. *Resp. Br.* at 9. The Act “does not require that [the] structures or facilities be owned by a firm that also engages in the extraction of minerals from the ground or that they be located on property such extraction occurs.” *See Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1552 (D.C. Cir. 1984). Even if that were not the case, the Respondents’ alleged ownership distinction is illusory. While Rocky Ridge Stone Company leased the Garage to Jamestown Quarries, both of those entities, including the Quarry, are owned by Bedrock Partnership Ownings. *Tr.* 102. Likewise, the Garage and the Quarry are adjacent to one another and connected by ownership and by the access road to the Quarry.

I thus turn to whether the Jamestown Quarries Garage’s relationship with the Rocky Ridge Quarry subjects it to MSHA’s jurisdiction. In determining whether the Secretary properly exercised jurisdiction over the Garage, the court must examine the location where the cited conduct occurred and the nature of the conduct itself. *Maxxim Rebuild Co., LLC v. FMSHRC*, 848 F.3d 737, 740 (6<sup>th</sup> Cir. 2017) (holding that the jurisdiction of MSHA extends only to those facilities and equipment adjacent to or essentially part of a working mine); *see also Calmat Co. of Arizona*, 27 FMSHRC 617, 621 (Sept. 2005).

Inspector Myers issued three citations to Jamestown Quarries pertaining to the improper storage and maintenance of equipment stored or operated in the Garage. Ex. G-16. In order to be subject to MSHA jurisdiction, the Garage must have a geographical and functional relationship with a working mine. The U.S. Court of Appeals for the Sixth Circuit's recent decision in *Maxxim Rebuild Company, LLC* emphasized the importance of the disputed building's location relative to a working mine site in jurisdictional analysis under the Mine Act. *Maxxim*, 848 F.3d at 740. In that case, the Court found that MSHA did not have jurisdiction over a shop that made and repaired mining equipment because it was not located near or part of a working mine. *Id.* at 744. The Court held that even though the shop made and repaired equipment to be used in mining, the Act's definitions extended only to things that one would see in or around a working mine and not to equipment wherever it may be found or made. *Id.* at 742.

Here, the Jamestown Quarries Garage's geographic proximity to and services rendered for the Quarry distinguishes it from the Maxxim Rebuild shop and suggests that MSHA's jurisdiction is proper. Unlike the shop in *Maxxim Rebuild*, the Garage is located adjacent to the fully operational Rocky Ridge Quarry and nearby a few other working quarries. Ex. G-2; Tr. 89, 179. Miners use the same road to access the Garage and the Quarry. Tr. 139-40.

Furthermore, the Garage performs services related to the work of preparing minerals at the Rocky Ridge Stone Quarry. First, Jamestown's mechanics have a consistent presence at the Quarry. See *United Energy Services, Inc.*, 35 F.3d 971, 975-76 (4<sup>th</sup> Cir. 1994) (holding that a company that maintained a co-generation power plant was subject to MSHA jurisdiction because its employees worked on the mine property daily in connection with mine equipment). The mechanics work in the Garage and travel out to the Quarry to repair or maintain equipment. Tr. 173-75. The Garage has an MSHA Contractor ID Number so that its mechanics are permitted to perform the repair and maintenance work at the quarry for over five consecutive days as required under the Mine Act. Tr. 173-74. The employees also gathered at the garage when Inspector Myers gave a safety talk during the first inspection. Tr. 20.

Respondents contend that the Garage only services equipment unrelated to the Quarry. Resp. Br. at 3. However, Clayborn hedged this assertion at hearing, stating that "Rocky Ridge may have been serviced at some point in that building at some point in time." Tr. 150. Inspector Myers also testified that he had no doubt that the Garage serviced quarry equipment because of the locational proximity of the sites. Tr. 89.

Even if the Jamestown employees did not service Quarry equipment in the Garage, they certainly stored Quarry equipment in it. Aside from the inoperable rock breaker, the Garage houses a service truck that is used to perform repairs and maintenance at the quarry site, including welding. Tr. 176. The truck purportedly contains all of the equipment needed to service equipment at the Quarry, and is stored in the garage. Tr. 176-77. That same truck may service other adjacent mines as well. Tr. 179. These facts indicate that the Garage is not only adjacent to the active Quarry but performs services to assist in the Quarry's milling processes. The Garage is therefore a facility used in the preparation of minerals as defined by the Act.

Accordingly, I find that MSHA has jurisdiction over the Jamestown Quarry Garage and its contents.



## **B. The Rocky Ridge Custom Processing Shop**

Unlike the Garage, there is no dispute that processes labeled as “milling” under the Interagency Agreement take place in the Rocky Ridge Custom Processing Shop. The Shop is located adjacent to the Rocky Ridge Stone Quarry and breaks, cuts, saws, sizes, and polishes and finishes rock that is extracted from the Quarry. The citation at issue pertains to the saw, and the Secretary normally need only show that one of the activities listed under the Agreement’s definition of “milling” takes place in a facility to assert jurisdiction over it. *See Jermyn Supply Co., LLC*, 39 FMSHRC 1472, 1484 (July 2017). However, the Interagency Agreement carves out an exception to MSHA’s jurisdiction when cutting and sawing stone takes place in a “stone polishing or finishing plant.” 44 Fed. Reg. at 22, 828. Unfortunately, the Interagency Agreement does not define that term, and so the dispositive issue is whether the Secretary’s determination that the Shop is not a “stone polishing & finishing plant” is a reasonable one. I find that it is.

Respondents contend that the sign on the door reading “Rocky Ridge Stone Co. Polishing & Finishing Shop” and the polishing machine are sufficient proof that the Shop is a “stone polishing or finishing plant” subject to OSHA’s jurisdiction. Resp. Br. at 8-9. These factors support the Respondents’ position, but the sign and the polisher are not the only two objects in the Shop that must be considered. The mere fact that one portion of the Shop could be subject to OSHA jurisdiction does not necessarily defeat the reasonableness of the Secretary’s determination to the contrary. *Cf. Cranesville Agg. Co. Inc.*, 878 F.3d 25, 35 (2nd Cir. 2017).

The makeup and function of the rest of the Shop suggests that the equipment in the entire building as a whole is not exclusively dedicated to the finishing process. The Shop contains two rock breakers and a saw used to cut and size the rock. Tr. 122-24. Rocky Ridge does not process all of the rock extracted from the Quarry inside of the Shop, nor does it finish or polish all of the rock that is broken in the Shop. Tr. 131-32, 156. While Rocky Ridge undoubtedly finishes and polishes rock in the Shop, this activity accounts for only a portion of the Shop’s work, and there is no indication as to how much polishing and finishing takes place in the Shop in proportion to how much sawing and cutting takes place.

Respondents point to the Interagency Agreement’s definition of “custom stone finishing” as clearly including the Shop. *See* Resp. Br. at 8-9; 44 Fed. Reg. at 22, 828. Yet the Agreement does not lay out any specific guidelines as to when stone cutting and sawing ends and polishing or finishing begins, nor to how much finishing and polishing activity and equipment is necessary to constitute a “polishing and finishing plant.” What the Agreement does do is explicitly lend the Secretary discretion in these circumstances. The Agreement explicitly accounts for areas of uncertainty “in operations near the termination of the milling cycle and the beginning of the manufacturing cycle” and gives the Secretary the discretion to expand its definition of milling to include such activities when geographically or technologically related to milling. *See* 44 Fed. Reg. at 22, 828; *see also U.S. Quarries Slate Products, Inc.*, 24 FMSHRC 124, 129 (Jan. 2002) (ALJ) (deferring to the Secretary’s assertion of MSHA’s jurisdiction over mine-adjacent buildings holding finishing equipment).

This is clearly one of those circumstances, and where either MSHA or OSHA jurisdiction may apply, Commission judges and courts will defer to the Secretary's reasonable determination considering the convenience of administration of his agencies. *See Cranesville Agg. Co., Inc.*, 878 F.3d 25, 35 (2nd Cir. 2017) ("Because the Secretary has the authority to distinguish between mining and non-mining activities for the purposes of enforcement, when the Secretary reasonably applies a functional analysis, the Secretary's determination as to which act governs is entitled to substantial deference"); *Carolina Stalite Co.*, F.2d 1547 (D.C. Cir. 1984) (In situations where an entity is deemed to be subject to either MSHA or OSHA regulations, the Secretary merely engages in an act of "adjusting the administrative burdens between [his] various agencies").

Here, the Secretary's decision to assert MSHA's jurisdiction over the Shop is reasonable. While stone finishing and polishing occurs in the Shop, the breaking, cutting, and sizing processes that take place within the Shop are technologically and geographically related to the milling process. *See U.S. Quarried Slate*, 24 FMSHRC at 129. MSHA asserted jurisdiction over the Shop in a 2016 letter to the Respondents and already exercises jurisdiction over the remainder of the Rocky Ridge property. OSHA has never asserted jurisdiction over or inspected the Shop or any other part of the property. Tr. 154-55, 167-68, 172. His determination therefore aptly considered convenience of administration in declining to partition jurisdiction over a single facility between multiple agencies.<sup>4</sup>

Accordingly, I find that MSHA has jurisdiction over the Rocky Ridge Custom Crushing Shop.

## V. PENALTY

It is well established that Commission administrative law judges have the authority to assess civil penalties de novo for violations of the Mine Act. *Sellersburg Stone Company*, 5 FMSHRC 287, 291 (March 1983). The Act requires that in assessing civil monetary penalties, the Commission ALJ shall consider the six statutory penalty criteria:

(1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

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<sup>4</sup> The Commission has previously noted that adherence to strict geographical analysis in determining jurisdiction could theoretically "permit an operator at a facility, where there is both OSHA and MSHA-regulated work, to escape enforcement of one agency's regulations by moving the work to an area of the facility considered to be geographically outside of that agency's jurisdiction." *See Calmat Co. of Arizona*, 27 FMSHRC 617, 621 (Sept. 2005). As in the *Calmat* case, there is absolutely no allegation that such conduct has occurred here. Nonetheless, the court is mindful that strictly requiring the Secretary to divide a single building between MSHA and OSHA jurisdiction would increase the potential for such behavior.

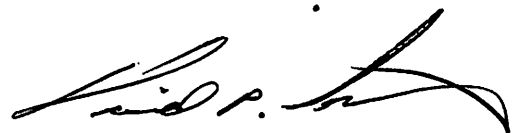
30 U.S.C. 820(i).

As noted above, the parties stipulated to the validity of the four citations if the Court affirmed MSHA's jurisdiction over the Shop and the Garage. Resp. Br. at 2; Tr. 8-9. Accordingly, the proposed penalties of \$116.00 for each of the four citations are appropriate under section 110(i) of the Mine Act and are hereby **AFFIRMED**.

## VI. ORDER

The three citations in docket SE 2017-252 are **AFFIRMED**, and Jamestown Quarries, is **ORDERED TO PAY** a civil penalty of **\$348.00** within 30 days of the date of this order.<sup>5</sup>

The single citation in docket SE 2017-253 is **AFFIRMED**, and Rocky Ridge Custom Crushing, LLC, is **ORDERED TO PAY** a civil penalty of **\$116.00** within 30 days of the date of this order.



David P. Simonton  
Administrative Law Judge

Distribution: (U.S. First Class Mail)

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<sup>5</sup> Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390