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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner v. THE CREATOR'S STONE, Respondent	CIVIL PENALTY PROCEEDING Docket No. CENT 2020-0067 A.C. No. 03-02067-504511 Mine: The Creator's Stone

DECISION AND ORDER

Appearances: Felix Marquez, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas 75202 for Petitioner

Mr. Charles Mosely, pro se, President and CEO, The Creator's Stone, Subiaco, Arkansas, 72865

Before: Judge William B. Moran

This matter is before the Court upon a petition for the assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(d), ("Mine Act" or "Act.") Two section 104(a) citations were issued to The Creator's Stone, ("Creator's Stone" or Respondent), one for failure to notify MSHA of the operation's opening and the other for failure to provide a record of miner training, but the larger issue and chief contention in this matter is the Respondent's position that his location is not a mine and that the activity carried out there does not constitute mining. For the reasons which follow, the Court finds that while the Respondent's business and the activity carried out at its business location is on the very low end of the spectrum of jurisdiction under the Mine Act, The Creator's Stone is a mine and the activity carried out there constitutes mining pursuant to 30 U.S.C.§802 (h)(1) and §803 of the Mine Act and case law determinations issued by the Federal Mine Safety and Health Review Commission ("Commission") and Federal Court of Appeals.

Findings of Fact regarding Mine Act jurisdiction of The Creator's Stone

As noted above, two citations spawned this litigation, but the challenge here is fundamentally about The Creator's Stone's position that its operation is not a mine. The Findings of Fact relating to the jurisdictional issue are first presented, while the Findings relating to the citations which were issued will follow.

A virtual hearing was held on February 2, 2021, with the testimony from that hearing reflected in the following findings of fact. The Respondent contends that his operation is not a mine and accordingly there was no duty to notify MSHA of the business and, from that premise, that the two employees cited in one of the citations are not miners. Tr. 16. Preliminarily, the Court noted, based on one of the Respondent's exhibits, which included five photos, that the description with those photos stated: "The first five photos of *the quarry* that the DOL is calling a mine, The Creator's Stone quarry." Tr. 17 (emphasis added). Given those descriptive words associated with the photos, the Court inquired whether the Respondent agreed that his operation is a quarry. The Respondent answered, "I am calling [it] rock, and I would say quarry best depicts it, a quarry or a borrow pit." *Id.* Amplifying his response, Mr. Mosley added, "[w]hat we do there is very comparable to a borrow pit, yes. …but it's not a mine, and it's not a quarry in the sense that I'm pulling rock out and crushing it and sizing it either." Tr. 18. Mr. Mosley's position, in part, was expressed as his "underlying point of all of that is, if there are no risks and there's no imminent danger in all of the definitions that are in the CFRs and acts that don't apply, how can I be a mine." Tr. 38.

Dave E. Smith, an inspector for the Mine Safety and Health Administration testified, as the government's first witness. Tr. 47. He has been an MSHA Inspector since 2008. His mining background includes working as an assistant quarry manager at a dimensional stone quarry, which he described as "much like Mr. Mosley's [quarry]." Tr. 48-49.

Regarding the inspection for this matter, which took place on May 14, 2019, the inspector went to the Respondent's site in order to determine if it was a mine. Tr. 50. The site is located in between Midway and Subiaco, in Logan County, Arkansas. Tr. 117. When making such visits, Smith will "look for evidence of heavy equipment having been traveled in and out.[1] That would usually mean excessive dirt and mud on the turnout for the driveways, ruts, things of that nature." Tr. 52.

When the inspector arrived at the potential mine site, there was no signage, and nothing identifying it as The Creator's Stone. He did see "large ruts, roads that had been traveled by heavy equipment, such as semis and such." Tr. 52. He then traveled the road "to another gate at the edge of this property, which opened up into what [he] saw, which [he described as] a quarry."

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[1] The government's exhibits, numbering 1 through 35, were all admitted. Tr. 118. From the Respondent's Exhibits, Ex. 3 at page 4, the inspector identified the skid steer he had previously referred to in his testimony. Tr. 120, 121.

Id. He stated observing "dimensional stone stacked [and as he] entered to the right there was a miner stacking stone onto pallets." *Id*. Elaborating on the term "dimensional stone," the inspector explained

> it can vary in sizes, … [and] [i]t can be 1 to 2 inches, 2 to 4 inches, and they're stacked accordingly as they're classified. And they'll stack this on a pallet, a typical pallet, and stack it upwards of 3 to 4 feet high. And it'll weigh about 1 to 2 tons.

Tr. 55.

Explaining the removal process generally, the inspector stated, "[t]his stone is removed from the earth in laminated layers." Tr. 55. After first clearing overburden, which consists of dirt, sand, mud, and things that are less desirable, such an operation will pull the stone up in laminated layers and break them up. *Id*. Then the stone will be classified "in different ways in 1 to 2 inches, 2 to 4 inches, depending on the size, depending how they're selling the stone." *Id*.

The inspector stated that he observed the same process at The Creator's Stone. Tr. 56. Elaborating, Smith stated he

> could see evidence of heavy equipment usage, land being cleared, and … [he] … could see that there was a miner in a skid steer, which is a small piece, specialized piece of equipment with a bucket that's used to load material or to remove material … [and he saw a person] actually pulling this stone from there.

Tr. 56-57. That person, seeing Smith, stopped his work to determine who he was. *Id.* The inspector confirmed to the Court that he observed the material being put on pallets and that the material appeared to be coming from the site. Tr. 59. Smith saw the material being removed from the ground, observing that it had been pulled from the ground. In terms of the material being put on pallets, it was broken into triangular or trapezoidal shapes one to two inches in thickness. Tr. 62. He informed that such material typically is used for patio or house siding. *Id*.

He also saw where land had been cleared and a bulldozer and a skid steer, which was being operated, pulling stone up from the ground. Tr. 50, 56-57. Adding more detail to his observations upon first arriving at the site, he saw a person stacking stone onto pallets. Tr. 54. That person "was stacking stone onto pallets. There was in excess of 20 or so pallets that had been stacked. And these pallets are going to weigh between 1 to 2 tons." Tr. 54.

The inspector added that upon entering the property through a gate, to the right, off the road, was a palletizer and approximately 50 yards further down the road he saw the skid steer, and learned it was being operated by Brandon Boss. Boss was the first person he spoke with. Tr. 64. The inspector stated that it appeared he was "removing stone from the ground, breaking it into smaller sizes and preparing it to be palletized." Tr. 65. He was performing this with the skid steer bucket. Tr. 65, 68. The inspector elaborated about the function of a skid steer, informing it is "machinery that [ ] does not have a steering wheel, … [and is] controlled by levers and by foot pedals. … it has [a] single seat." Tr. 65. It has a bucket on the front and it is hydraulically driven, and it is used much like a front-end loader. The bucket is used "to pull material up or to move material or to clear material." Tr. 66.

In terms of the size of the property, the inspector stated it was not more than 2 acres, at least as to the land that was excavated. Tr. 68. It is a small operation. Tr. 113. The inspector stated there was no mine office at the site. Tr. 81-82. The individuals the inspector met on that day informed him that they were employees of The Creator's Stone. Tr. 83.

Regarding other equipment at the property, the inspector saw a bulldozer "directly in front as [he] entered the property." Tr. 69. Compared to the skid steer he saw, the bulldozer was five to six times larger. Tr. 70. While the dozer was not running at that time, he saw tracks reflecting it had been moved and that it appeared to be ready for use. Tr. 71.

After identifying the purpose of his presence at the property, the inspector asked about training and whether the site had registered with MSHA. Tr. 71-72. As for the training issue, the inspector informed that some training is transferable from another operation but there is a separate requirement for "site-specific" training. Tr. 73.

The inspector also saw a second individual during his inspection; that person was palletizing stone. Tr. 74. That process, palletizing, was described as "several different pieces of stone piled up near [the individual who] was using a chisel to clean off the flat surface of [the pieces] … to break off rougher ends, sizing it a little bit further" by breaking it down so that the pieces could fit on the pallet. Tr.74. Thus, the individual "was using his hammer and chisel to clean off the edges, to clean off the flat surface, and then to actually fit and palletize -- fit the stone to the pallet. So stacking the, stacking it in layers on the pallet." *Id.* The pallets were about 3 ½ feet in height. Tr.75.

On the subject of training, the inspector determined that one individual, Mr. Cabrera, the one doing the palletizing, had received some training, but not site specific nor task training. Tr. 78-79. However, the skid steer operator, Mr. Boss, did not have training. Later, the inspector determined that another person, Mr. Noyce,[2] the bulldozer operator, did not have training. Tr. 76-77. Only Boss and Noyce were listed in the inspector's citations. Tr. 78.

In the inspector's process of deciding to issue a citation for an alleged violation of 30 C.F.R. § 56.1000, a standard requiring mines to inform MSHA of openings and closings, the inspector believed he had observed enough to conclude that the site was a mine. Tr. 84. In his experience, the inspector stated that he had viewed 20 to 30 mines of this size and nature. *Id.* His determination that The Creator's Stone is a mine was based upon concluding that it was engaged in removing minerals from the earth, which minerals entered commerce. Tr. 85. This was based on seeing active removal of minerals, evidence that minerals had been removed in the past and upon learning that the site was selling stone, the latter determination of sales being derived from the inspector's speaking with Mr. Mosely. Tr. 85.

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[2] Although Respondent, through the testimony of Mr. Barnes suggested that Mr. Noyce did little at the site, stating that "[i]t would be hard to say. Mostly he just stops by to drop off a little fuel," [Tr. 184], the Court finds that the inspector's more detailed testimony is a more reliable description of that individual's activity at the site.

The inspector stated that he did consider whether The Creator's Stone could be deemed outside of the Mine Act's jurisdiction by being classified as a borrow pit. Tr. 88. He defined a borrow pit as "generally a one-time use or infrequently used pit where they remove the material and place it in a nearby location in virtually the same state. So basically dig a hole, fill a hole." Tr. 88. Elaborating, he stated, a borrow pit

> would generally be close to [the] site that they were moving the material to. … [there] won't be sizing going on, and … to the extent there is sizing going on, it may be removing large rocks from the dirt to be filled. A lot of times they're used on construction sites and such to build pads and things like that. … [t]he material is not used for its intrinsic value. It's just used for its fill.

Tr. 89-90. As an example, the inspector continued,

> [a] borrow pit would be … on a construction site if they had a shale pit, and they would be removing the shale and taking out the larger rocks, you know, too large to make a pad out of. And they would remove the shale from this borrow pit and then either build a pad or, like I said, they could also potentially fill holes with. … [a]nd that's generally what it is. They're just using the material for fill. It's removed and replaced in basically the same state it's removed.

Tr. 90.

> The inspector determined that The Creator's Stone was a mine, not a borrow pit,
>
> [b]ecause the stone was being sized on at least three different occasions, the initial removal, the breaking up into smaller pieces, and then onto the pallets. It was being sized in that way. It was being removed because of its intrinsic value because it was to be sold as stone patio.

Tr. 90-91. Mr. Mosley informed the inspector that the stone was being sold. Tr. 95.

The inspector, having determined that the Respondent's site was a mine, cited it for not complying with standard 56.1000 because mining operations are to notify MSHA of their intent to engage in that activity *prior* to mining. Tr. 91. No such notification was made to MSHA. *Id.* The inspector did later learn from Mr. Mosley that a newspaper, the Paris Express, in Logan County, contained a notification about the business but that is not a substitute for notifying MSHA. Tr. 92. Instead, a mine is to notify MSHA of "their intent to mine, their company name, their location, their owner's name, contact information, and address is [the inspector] believe[d] the majority of what is [required] on that standard." Tr. 92. Although the Paris Express contained much of that information, the inspector stated that does not displace the notification requirements which are to be made directly to MSHA. Tr. 96-97. In fact, driving home the importance of informing MSHA directly, the inspector informed that he lives in Paris but did not see that notice in the local paper. Tr. 93. As a practical matter, the inspector noted that MSHA

can't be in the business of scouring all the publications in a given state in search of such notices.[3] *Id.*

While the inspector could not recall the source of the information, his citation asserted that The Creator's Stone had been in operation for a year or so, and therefore this was not a new start up. Tr. 96. There is no dispute in the record on this point.

Addressing the inspector's evaluation of the citation for failing to notify MSHA of the operation's start-up, the inspector noted his determinations of the negligence and gravity associated with the alleged violation. Tr. 98, 100. Regarding those evaluations, the inspector characterized the citation as a "paperwork violation." Tr. 101. The inspector then described his evaluation of the training violation. Tr. 103. This was more than a paperwork violation. Underpinning his evaluation regarding the lack of training, the inspector noted that the Mine Act itself states that "an untrained miner is a hazard to themselves and to others." Tr. 104. In the inspector's view, the new miner training is the most important one:

> That's going to be the 24 hours of training that they're required to receive to indoctrinate them into mining, you know. These are the hazards you can expect. These are, these are the hazards you need to avoid, or these are the things you need to be made aware of. It's the most important training that they receive, should have received.

Tr. 105.

He marked the gravity as "fatal" because, once again, he stated:

> this is the most important training they receive. … [t]here's overturn hazards. There's special equipment. They're in a confined area, and that was my reasoning for fatal. Whether they could be caught in a piece of equipment, struck by a piece of equipment, run over by a piece of equipment, overturn a piece of equipment, and they hadn't received the training that would pertain to specifically all those instances. …[and by equipment the inspector was referring to] the [ ] skid steer and the bulldozer that was on-site.

Tr. 106. In deciding to mark the citation as "significant and substantial," the inspector again referred to the:

> new miner training [as] the most important training that is provided to these gentlemen. Them not having that training makes them unaware of any hazards that are on-site, you know, other than what they could determine personally. But there's very specific things that [they] … have to deal with the equipment that, you know, again, it was evaluated as reasonably likely and -- loss of work days, loss or restricted work days.

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[3] Later, the inspector's supervisor would confirm that publishing a notice in the local newspaper is not a substitute manner for complying with the required notice to MSHA. Tr. 156.

Tr. 107.

Applying standard 46.5(a), the inspector identified the discrete hazard as:

> [m]iners operating equipment without the proper task training. There was a raised area in which the skid steer could have overturned on. There were no berms in place. There was no signage as to hazards that were on-site … they were in a confined area … it's a small area to be operating a large piece of equipment in. So and there's training that's supposed to be given and received that's going to have them do their checks to ensure that all the safety features on that equipment are being checked and that they are working. And there was no evidence of that having been done.

Tr. 108-109. He added that the training was especially important as it is a confined area to be operating heavy equipment. *Id.* Underscoring his view of the hazards associated at the site, as the individuals did not have the required training, the inspector issued a section 104(g)(1) order and by invoking that provision, those individuals could not continue to work at the site until they had completed the required training. Tr. 111.

Inspector Smith was cross-examined by Mr. Mosley, who began with questions about the authority of the inspector and the basis for his determination that The Creator's Stone is a mine. Tr. 124-125. The Court would note that the inspector identified himself as an authorized representative of the Secretary and that the question of whether the site is a mine is a legal question for the Court to decide based upon the factual record, as reflected in the Court's findings of fact and the application of those facts to the definition of a mine under the Mine Act, as that term has been set forth in that Act as amplified and explained in decisions of the Federal Mine Safety and Health Review Commission and the Federal Courts.

Mr. Mosley challenged the basis for the inspector's determination that "sizing" was occurring, contending that his operation is "not creating the size. [It is] not making anything uniform out of it. We're just looking at it and laying it on a pallet." Tr. 126. The inspector responded that:

> [s]izing is a process of separating particles of mixed sizes into groups and particles of the same size or into groups in which particles range between maximum and minimum sizes, and that is sizing. And as for the stone being in the ground, the stone is in the ground as one continuous sheet.

Tr. 127. The inspector affirmed that, in his view, using equipment to pull up rock constitutes sizing. Tr. 129.

He also affirmed that placing the rock on a pallet is also considered sizing, stating,

> Yes. As it states in the -- policy manual, into groups in which particles range between maximum and minimum sizes, and generally it's put, stacked on pallets.

> I'm not certain how you do yours, but it's 1 to 2 inches or 2 to 4 inches, depending on the stone that you're categorizing and selling.

Id.

In terms of the hazards he identified, the inspector repeated his earlier testimony that an untrained miner is a hazard to himself. *Id.* To that, he added his view that there were turnover hazards at the site,

> which is going to be the elevated area of the land, … and the excavated portion of the land. Berming if you are traveling on or near your overburden. The equipment itself, you have restricted views to the rear … [w]ith your skid[-]steer you have a restricted -- semi-restricted view to the rear. With your bulldozer you have safety checks that weren't being performed on all these pieces of equipment, which could relate to having [overturn] hazards.

Tr. 129-130.

Though the Court does not consider it at all critical, in response to Mr. Mosley's question asking what the inspector believes constitutes "dimensional stone,"[4] the inspector answered: "As for the actual definition, I don't know. The lay term is, you know, sized or cut, I believe is going to be a dimensional stone. Stone that -- dimensional stone is generally stone that you could handle by hand."[5] Tr. 131.

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[4] The Court takes judicial notice that "dimension stone" is defined as "natural stone or rock that has been selected and finished (e.g., trimmed, cut, drilled, ground, or other) to specific sizes or shapes. Color, texture and pattern, and surface finish of the stone are also normal requirements." *Dimension Stone*, Wikipedia, the Free Encyclopedia, https://en.wikipedia.org/wiki/Dimension_stone (last visited Apr. 15, 2021). *See also*, the National Minerals Information Center's description, which essentially repeats the first definition. *Dimension Stone Statistics and Information*, National Minerals Information Center, https://www.usgs.gov/centers/nmic/dimension-stone-statistics-and-information (last visited Apr. 15, 2021).

[5] In another issue that the Court does not consider significant to the jurisdictional issue, although the inspector referred to the equipment at the site as "highly specialized," he only meant specialized in the sense of performing certain tasks but that it could be used for other tasks and not simply for mining tasks. Tr. 131-132. Mr. Mosley pointed out that the equipment at his site may be used in many situations, including farming. Tr. 132. There is no dispute about this; the equipment at the Respondent's site is not exclusively used for mining. A recurring theme by Mr. Mosley was that he questioned the idea that such equipment was "inherently dangerous" or made "death imminent." *See, for example*, Tr. 132 and Tr. 135, 137. In this respect, the Court notes that it does not need to find either of those situations are present for Mine Act jurisdiction to apply. Such characteristics, where found, simply make the situation more serious, but they are not prerequisites to jurisdiction.

Turning to Respondent's Exhibit 3, at page 1, Mr. Mosley asked about the site's highwall, with the inspector responding that it was about a foot to a foot and a half high, possibly two feet. Tr. 133-134.

Asked again what constitutes "mining," the inspector answered that

> it's going to be removing minerals from the earth and those minerals entering commerce. And that's what mining activity is going to go into the removal of that material, the selling of that material, the sizing of that material is how it's going to -- how you would -- some of the ways you would define mining activity.[6]

Tr. 138. Thus, the inspector expressed that simply by removing the material and loading it directly onto a truck, such actions would constitute mining.[7] *Id.* As also explained, *infra*, the Court finds that, as long as such activity was more than a mere borrow pit, the inspector is correct.

The Court explained to the Respondent during the hearing that the Mine Act itself describes a mine "very simply as an area of land f[ro]m which minerals are extracted in non-liquid form. And then it includes a whole lot more in 30 U.S. Code … section 802, definitions under G, which describes … a … coal or other mine." Tr. 139-140.

Because of Mr. Mosely's particular expressed frustration with "bureaucrats," the Court took special pains to note that this definition of a mine "was created by Congress, not by bureaucrats." Tr. 140.

The Court then went on to explain that its responsibility was "to determine whether what's involved at [the Creator's Stone] site is an area of land from which minerals were extracted in non-liquid form," but then adding that "borrow pits are a recognized exception." Tr. 140. The Court followed up that comment, noting that under subsection (h)(1) of that provision,

> it's all about resulting from the work of *extracting minerals from their natural deposits* …[with the Court then adding that] [i]t talks about private ways and roads are pertinent to such area, lands, excavations, shafts -- tunnels, working structures, facilities, *equipment, machines, tools*, or other property on the surface, as in your case, or underground as it may be marginally underground, *but it's all about resulting from the work of extracting minerals from their natural deposits*.

Tr. 140-141 (emphasis added).

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[6] The Court finds, as elaborated *infra*, that the essence of the inspector's statement is accurate.

[7] As also explained *infra*, case law supports the inspector's view. Sizing is not a critical element for Mine Act jurisdiction to apply.

While Mr. Mosely took in the Court's observations, he expressed his view that he didn't "believe that the Mining Act or the legislature's intent was to apply mine status to what's going on at The Creator's Stone." Tr. 142. Although the Court respectfully accepts that to be Mr. Mosley's view, the definitions from the Mine Act, as cited above, and the case law from the Commission and the Federal Courts of Appeal, do not agree with his view, unless a site fits within the very narrow definition of a borrow pit.

The Secretary then called Dwight Shields as its next witness. Mr. Shields is the field office supervisor for Mine Safety and Health Administration's Little Rock, Arkansas field office. Tr. 148. His testimony essentially echoed that of Inspector Smith. He considered The Creator's Stone to be a mine because:

> [t]hey're extracting minerals or rock out of the ground, which rock is comprised of many minerals. We don't know what all is in those things without analyzing them. But you're extracting that out of the ground, you're sizing those, and then you're selling them. So you're affecting commerce. That's mostly the three criteria we use.

Tr. 151. Shields acknowledged that borrow pits are under OSHA's jurisdiction. He explained that a borrow pit is "material [which] is extracted just in its -- whatever state it's in, it's dug out and used basically for fill more so than it's intrinsic value I believe is what the program policy says." Tr.152.

With that in mind, he distinguished the activity at the Respondent's site because it's "taking the stone out. It's probably laminated, and typically the dimensional stone places are. So they're breaking that stuff out. They'll break it down to a size they can put on a pallet. Then they'll sell that for folks for construction." *Id.*

Adding to Inspector Smith's explanation of dimensional stone, and essentially agreeing with it, Shields stated:

> [i]t's usually laminated or in layers, and it may be anywhere -- thicknesses from -- I guess it could be a foot thick, but typically when they're using that in the building industry -- and in other word they'll call it flagstone. That's the thinner stuff. It may be 1 inch thick. And you'll see that on patios or floors or hearths around fireplaces or build up fireplaces with, that type.

Tr. 153. By that description, Shields agreed that the Respondent's operation involves dimensional stone. *Id.*

Upon cross-examination, Mr. Mosley asked Inspector Shields to distinguish the activity at The Creator's Stone from a borrow pit.[8] Tr. 158. Shields responded that the Respondent's site

[8] In a separate concern expressed by Mr. Mosley, referring to Section 101(7)(c) of the Mine Act, [30 U.S.C. § 811 (7)(c)], he noted that the Secretary of Labor may modify the application of a safety standard to a mine "if the [S]ecretary determines that an alternative method of achieving

was "sizing material [and] selling that material for its value as a -- not just a fill, but as a building stone … for … fireplaces, a rock floor, whatever, depending on the thickness of the material that they would need." Tr. 158. As to whether the action of "sizing" material Shields could not say if the level of hazards for that would be different from that of a borrow pit.[9] Tr. 159.

Inspector Shields also maintained that there is no commerce, nor sizing, associated with a borrow pit.[10] Tr. 161.

In a very real sense, Mr. Mosley expressed his overall objection to Mine Act jurisdiction on the grounds that:

> common sense would say regardless of what precedent there is that I should not fall under the Mining Act because that's [not] why the Mining Act was even created. You know, there is nothing in the Mining Act or CFRs that would suggest that they ever intended for a simple operation like [The Creator's Stone to be covered under the Mine Act].

Tr. 168-169.

As examples of the inapplicability of the Mine Act to his site, he continued,

> [as] I show in one of my pictures a little hammer and chisel. Yeah, someone can get something in his eye, but I can drive down the street and see porches that don't have any handrails in them that are far more hazardous than a 1-foot wall in the quarry. And just the application of this to this operation is to me obviously moronic. It's just impediment, overreach, burdensome regulation.

Tr. 169.

The Court does not treat Mr. Mosley's concerns and frustrations dismissively. However, as it suggested to him during the hearing, *the Court's responsibility is to determine whether, presently, the activity at the Respondent's site constitutes mining under the Mine Act. Whether*

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the result of such standard exists." Tr. 164. The Court would simply note that provision does not impact Mine Act jurisdiction. Instead, upon filing a petition, it allows for an alternative method of compliance where the same measure of protection is provided.

[9] The Court would point out that, as discussed further *infra*, it is *not* the level of hazard that determines whether an activity is classified as a borrow pit or a mine.

[10] The Court then posed a hypothetical question for the Inspector, asking if one assumes there was no sizing at all and that the Respondent's operation only removed the rock from the site, loaded it directly onto a truck, and delivered it to some other location, whether that would be classified as a mine or a borrow pit. Inspector Shields answered "If they're just dumping [the material] into a hole and using it for fill only, they're not using it for its intrinsic value then." Tr. 162-163. In such cases it would not be a mine. *Id.*

that activity should be relieved from coverage under the Mine Act is a legislative issue, and as such it is not a matter for this Court to address.

The Secretary, having rested, Mr. Mosley called Mr. Jerry Barnes as its witness. Barnes was asked if he viewed the activity at the Respondent's site to be mining. Tr. 176. Barnes expressed that

> segregating, separating the rock, you know, getting it to a uniformity where you can sell it is different than what [The Creator's Stone] is doing. [The Respondent] is taking the rock out of the ground like it was put there, and they are stacking it on pallets, but they're not making it dimensional. They're not making it an inch thick. They're not making it two inches thick. They may be separating it, yes, but they're not making it dimensional … they are using a raw product out of the ground, natural resource.

Tr. 177.

Barnes also informed as to the use of the rock derived from the site, stating, "[i]t's used in, you know, in various products. You know, it's from flower beds to building materials to mausoleums. You know, it just -- there's no way to say just exactly, you know, what the limits are for the natural stone." Tr. 177-178. He elaborated that "[i]t's [used] for building projects, whether it be a home project or a federal project, you know, it's used for building." Tr. 178. Continuing, he stated, Respondent "has some building home supply places, you know, a small individual place[s] [that buy the pallets] or by the piece, … a lot of times they just ship it on pallets because that is the most efficient way to ship it." Tr. 179.

When the Court noted, looking at Respondent's Exhibit 3 at page 5, a photo of an industrial type hammer and chisel resting on rock, and queried if together those tools would be used to size the material that had been removed from the ground, Barnes did not agree that it would be called sizing. Instead, he described their use for "cleaning purposes. You know, when it comes from the ground it's laminated, you know. And you have to take part of it off. If you'll see in that picture, there's shale on top of these rocks. That has to be removed." Tr. 181.

The Court would comment that, apart from the nomenclature preferred, sizing or cleaning, Barnes still described processing the rocks, and therefore not merely removing material and depositing it in a new location without altering its mined state.[11] As Barnes described the activity, "[w]hat you're doing is just picking it up off the ground, making it usable, and putting it

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[11] The Respondent brought out, through Mr. Barnes, that it is in The Creator's Stone economic interest to have the pieces as large as possible, as larger pieces fetch more money. Tr. 183. Smaller pieces, he noted, are called a "builder," and are "[w]hat a homeowner would use for around a flowerbed or stepping stones or something similar to that." *Id.* But, minimal processing or not, the Court notes that this testimony underscores that the site was not functioning as a borrow pit.

on a pallet." Tr. 184. One could accurately call this activity to be mining, though as this Court has noted, mining on the low end of the spectrum.

Though intended to show the absence of any "inherent risk" at the site,[12] Barnes' description also shows that the activity is more than a borrow pit, with his stating "[y]ou have the operator on the skid steer in one area, and then he is transporting the rock up to another area where the other guy's working. … He digs it up out of the ground and carries it up on top of the hill." Tr. 186-187. Thus, compared to the activity at a large quarry, Barnes described The Creator's Stone as "just a completely different operation." Tr. 192.

The Court would observe that it is fair to state that the Respondent's operation is "completely different," but only in the sense of scale, as minerals are being removed from the ground, and though with minimal action to it, then placed on a vehicle for transportation to a sales' site. This activity is not consistent with that of a borrow pit.

Mr. Barnes has had extensive experience working in mines, most of it with rock quarries. Tr. 192. In those years most of his work was for large quarries, though he had a few instances involving:

> one to two acre spots in the woods where we'd go out and find something usable, and we would, you know, capture it. And in the early days we'd just load that on the truck by hand. We didn't use pallets. And then we'd haul it to our destination and unload it there.

Tr. 193-194. In his experience, there were three such small operations, like the Respondent's. Tr. 194. He did not agree that those small operations were mines. Tr.194-195. He acknowledged that two or three of them were inspected in the past, but "since they were not sizing the material, the inspectors have not been back."[13] Tr. 195.

It was Barnes' opinion is that the Respondent's operation is a borrow pit. Tr. 200. However, Barnes did concede that, in response to the question whether "**there were activities that were going on here at The Creator's Stone where they're extracting stones and [those stones] have value, and they're being sold for a commercial purpose**," his answer was "**Yes. That's the only reason for working isn't it?**" Tr. 202-203. Thus, by Barnes' own description of the activity at the subject site, he established that the operations at The Creator's Stone is a mine.

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[12] Describing the skid steer operation, he stated, "I don't know how you could be a danger to yourself. That, you know, that the operator on the machine, that's all he's doing, you know. He [ ] very seldom get[s] off the machine. He just stays on the machine." Tr. 186.

[13] Two comments by the Court are in order regarding Mr. Barnes' remark. First, those two or three other unidentified operations are not the subject of this litigation. Second, the Court must determine whether the factual record supports a determination whether The Creator's Stone is a mine or not.

DISCUSSION

The Secretary's Post-Hearing Brief[14]

> The Secretary notes that, per 30 U.S.C. §§ 802(h)(1), "coal or *other mine*" means:
>
> (A) ***an area of land from which minerals are extracted in nonliquid form*** or, if in liquid form, are extracted with workers underground, (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 if in liquid form, with workers underground, 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 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.

Sec. Br. at 3 (emphasis added).

> Given that definition from the Mine Act, the Secretary states:
>
> [t]hese activities fall within the meaning of a mine covered by the Mine Act and, accordingly, The Creator's Stone, a dimensional stone mining operation, is a mine subject to MSHA's jurisdiction. Further, Boss and Noyce, who work at this mine, are considered miners defined by § 802(g) as "any individual working in a coal *or other mine*." As such, MSHA has properly asserted jurisdiction over Respondent.

Id. at 4.

Observing that the Respondent has asserted that its operation is a borrow pit, the Secretary, in response to this contention, points to the "MSHA and OSHA Memorandum Interagency Agreement as the source of authority for jurisdiction disputes relating to borrow pit operations. *Jermyn Supply Co*., 39 FMSHRC 1472, 1483-84, (July 31, 2017)." *Id.* at 4. The *Jermyn Supply* decision, the Secretary adds, also holds that in decisions as to whether an operation is a borrow pit, "deference is given to the Secretary's interpretation as long as the interpretation is within reason. *Jermyn Supply* at 1486." *Id.*

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[14] The Secretary advised that he would not be filing a response brief in this matter. Email from Felix Marquez, Esq., Department of Labor, to the Court (Apr. 1, 2021).

The Secretary also points to MSHA's Program Policy Manual's interpretation on Mine Act coverage, noting from that Manual that "MSHA has jurisdiction over operations whose purpose is to extract or to produce a mineral," but it acknowledges that it does not have jurisdiction "where a mineral is extracted incidental to the primary purpose of the activity." Sec. Br. at 5 (citing MSHA Program Policy Manual, Volume I, Section 4.)[15]

Case law in support of the Secretary's position that The Creator's Stone is within the jurisdiction of the Mine Act was also cited in its brief. The cases cited – *Kerr Enterprises*, 26 FMSHRC 953, 954-58 (Dec. 21, 2004); *New York State Department of Transportation*, 2 FMSHRC 1749, 1758-61 (July 3, 1980) – do indeed establish that a "borrow pit" is a narrowly defined concept. To qualify as such, terms such as "fill material," that is to say, material extracted for its bulk as opposed to its intrinsic qualities, with that material used relatively near the extraction site, with the lack of any sizing, and the process occurring on a one-time basis or intermittently as need occurs, come into play. In contrast, things like continuously extracting materials for sale to customers located nearby do not fit within the scope of borrow pits.

To its credit, and of value in better understanding the distinction between activity which constitutes mining in comparison to mere borrow pit activity, the Secretary notes a decision where the activity was determined to *not constitute* mining. *David Duquette Excavating*, 37 FMSHRC 744, 745-52 (April 8, 2015) is one such case outside of Mine Act jurisdiction "because the extraction occurred intermittently (approximately three times in two years), the extracted material was used as fill in the form it was extracted, the fill material was used more for its bulk to fill low places in a yard than for its intrinsic qualities, and the only milling involved was with a scalping screen to remove large rocks, wood and trash." Sec. Br. at 8 (citing *David Duquette Excavating*, 37 FMSHRC at 750-52).[16]

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[15] The same Program Policy Manual addresses "Borrow Pits," and nothing in that discussion conflicts with MSHA's position in this case, as that manual informs that

> '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 basis or 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*.

Sec. Br. at 5-6 (emphasis added).

[16] However, the Secretary mistakenly cites *State of Alaska, Dept. of Transportation*, 34 FMSHRC 179, 181 (Jan. 2012)(ALJ) as a second example of activity deemed outside of Mine

However, the Secretary asserts that the activities being carried out by The Creator's Stone is not like the case just referenced. A critical distinction, it cannot be denied that the "Respondent is in business of selling dimensional stones for their intrinsic value. … [t]he activities are ongoing, rather than on a one-time or an intermittent basis [and] …. the activities have been performed continuously since operations started on May 23, 2018." *Id.* at 9.

In sum, the Secretary contends that the purpose of the Respondent's operation is preparing the dimensional stones for commercial sales, a process which requires extraction of the stones with heavy equipment, such as a skid steers and bulldozers, and also involves "cleaning, sizing, and milling the unearthed stones to create various sizes, as a stone's size impacts its market value." *Id.*

The Respondent's Post-Hearing Brief and Response Brief

Respondent begins its post-hearing brief with expressions of frustrations over the manner in which MSHA handled this matter. In voicing these feelings, Respondent contends that the government has infringed upon the rights of its citizenry, citing the Declaration of Independence. Respondent believes that, in enforcing its authority, the government has acted bureaucratically, "assum[ing] authority rather than assist[ing] the public." R's Br. at 1.

Turning to its view of the facts, Respondent sees its activity at The Creator's Stone as "placing layered material on a pallet. The material is not sized or processed. The material comes out of the ground just as The Creator placed it there. The desirable material is placed on a truck by a skid steer." *Id.* at 2. Respondent contends that the chief argument advanced by the government is the claim that the operation performed "sizing." But, Respondent counters that no sizing is actually involved. It takes issue with the inspectors' claim that material is derived in one continuous sheet, asserting instead that the material has "natural seams where it comes apart," giving it a character that makes it desirable and thus smaller pieces occur by virtue of handling it. *Id.*

The Respondent then makes an argument of a different nature, namely that not only does its operation not perform what is recognized as sizing, but also that its activity is not hazardous. Respondent asserts that it merely "look[s] at a rock or lay[s] a tape measure on a rock," and, in The Creator's Stone's understanding or interpretation of such activity, that does not "constitute sizing or mining." *Id.* at 3. As for the equipment it uses at the site, none of it is highly specialized, as it all can be rented at an equipment rental shop. *Id.* Further, one renting such equipment is not required to receive training before renting it. *Id.* On the subject of

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Act jurisdiction because that judge found that "the extraction activities were relatively close to the maintenance sites (approximately one-quarter mile), conducted intermittently (seasonal use), and had no intrinsic value. … [a]lthough the material may have had 'commercial value' it did not have intrinsic value to the end-user." Sec. Br. at 8. As described *infra*, in fact the Commission reversed the administrative law judge, rejecting the determination that it was a borrow pit and finding that the Alaska operations *were* subject to the Mine Act. *State of Alaska, Dep't of Transportation*, 36 FMSHRC 2642, 2649 (Oct. 2014).

training, Respondent adds its own take that "[t]here is nothing but On-The-Job-Training that makes [one] qualified, certified, or capable of doing a good job on a piece of equipment." *Id.*

Respondent has other criticisms of MSHA's claim of jurisdiction over his operation, contending that there are no "imminent dangers" nor "occupational diseases" present. *Id.* at 4. As the Respondent sees it, given the Mine Act's statement, per section 2(d) of that Act, that "unsafe and unhealthy conditions and practices in the Nations coal or other mines is a serious impediment to future growth," it should be considered that "it is over zealous regulators that are creating conditions that impede future growth." *Id.* at 4. Underlying all of these objections to these contested citations is the Respondent's sincere belief that his place of business is a "non-mining situation." *Id.*

The Respondent then turns to a very different line of defense, namely that The Creator's Stone no longer engages in milling or sizing and no longer stacks material on pallets. Instead, it intends to make operational changes under which it

> will put the material on a dump truck, take to an area that is not considered confined and tailgate the material onto the ground. This will allow natural occurrences, rain, sun, heat and cold to clean and separate the material. At that point the only sizing that will need to be done is to measure and put on the truck.

Id. at 5.

Turning to the two citations, and first addressing the jurisdiction issue, Respondent states he had no idea that MSHA would apply to his operation. *Id.* at 6. Therefore, he claims his failure to notify was not negligent nor willful. He asserts that none of the state agencies he contacted ever mentioned the Mine Act. *Id.* at 6. As Respondent's friend, Jerry Barnes, with many years of dealing with MSHA did not think that The Creator's Stone was a mine, he claims it is unreasonable to expect the Respondent's start-up company to know this. *Id.*

As for the lack of training citation, Respondent asserts that Jerry Barnes stated that Tom Noyce "was not an employee of the pit." *Id.* In support of this contention, Respondent refers to "Subchapter H, 46.2 (2) [which] specifically states that delivery people, commercial truck drivers, maintenance workers and service workers who are not frequent or there for extended periods are not miners." *Id.* In terms of the penalty ascribed to this, Respondent contends that Barnes testified that there is no risk from a reasonable person standard and that this makes sense because, returning to its jurisdictional argument, the Respondent again argues that The Creator's Stone is not a mine. *Id.* at 7. Further, Respondent takes special note that his operation is not a mine because "[a]ll of the elements of an industrial operation with high-walls, moving parts, crushers, processors, conveyors, large equipment, detailed operations, hazardous chemicals, cat walks, ventilation systems, dust, explosives, blasting, drilling, occupational diseases and imminent danger don't exist" at his operation." *Id.*

In light of all of his arguments, Respondent asks that the citations be vacated. *Id*

Respondent's Response Brief [17]

Respondent again contends that "[due] to the nominal nature of cleaning and the lack of sizing or milling, [The Creator's Stone] did not and do[es] not feel that [it is engaged in] sizing or milling." R's Response at 1. Speaking to its contention that The Creator's Stone is a borrow pit, Respondent, asks for reasonableness in making that determination. *Id.* However, the Respondent then translates that reasonableness determination "to the level of hazard." R.'s Response Br. at 1-2.

Another argument made by the Respondent is that it has changed its operation so that it operates only intermittently, asserting that it has only been used in "nine days out of the last 45 days." *Id.* at 2. Respondent repeats its contention that it does not clean, size[18] or mill the material it removes from its natural deposit, contending that the material it removes only has "nominal cleaning." Respondent adds that it no longer palletizes the material it gets from the pit. *Id.*

Additional arguments presented include the Respondent's belief that the Secretary must prove that its activity is "somewhat likely to result in harm." *Id.* The Respondent contends that the Secretary must establish such reasonable likeliness of injury or illness. Respondent asserts that was not established by the Secretary, as The Creator's Stone has a perfect safety record for this "pit [which] has been open for about 3 years." *Id.*

Turning away from the jurisdictional arguments, the Respondent then contends that civil penalties do not deter unsafe mine operations. *Id.* at 3-4. This claim is wholly immaterial to this proceeding and will not be further addressed for that reason. This does not mean that the Court agrees with the assertion.

Shifting to the citation involving lack of miner training, Citation No. 9451586, Respondent asserts that it "does not take miner training to operate a skid steer." *Id.* at 4. Respondent also contends that one employee, Mr. Noyce, "was performing no function at the pit other than fueling or general maintenance." *Id.* at 5. Regarding employee Mr. Boss, Respondent, citing 30 C.F.R. § 46.5,[19] "New Miner Training," contends that, as Mr. Cabrera was present, Boss "could be on location without training." *Id.* at 6.

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[17] As with the parties' initial briefs, the Court considered all contentions raised in those submissions. That particular arguments may not be expressly addressed does not mean they were not considered. Rather, the Court determined that its other findings and statements sufficiently spoke to those issues, directly or indirectly, and therefore did not require additional discussion.

[18] The Respondent continues its argument that it does not engage in sizing, going so far as to assert that "[t]he inspectors want [The Creator's Stone] to be breaking and sizing in order for them to have jurisdiction. The only breaking taking place is ***during the excavation***. The layers (thickness) were already established by The Creator." *Id.* at 4 (emphasis added).

[19] The cited provision, 30 C.F.R. § 46.5, titled "New miner training," provides:

CASE LAW REGARDING MINE ACT JURISDICTION

In *Drillex, Inc.*, 16 FMSHRC 2391 (Dec. 1994), the only issue to be decided by the Commission was whether the Respondent's operations were subject to Mine Act jurisdiction. In finding that the operation was a "mine" within the meaning of section 3(h)(1) of the Mine Act, the administrative law judge found that Drillex had engaged in both mineral "extraction" and "milling." Distinguishing the Respondent's activities from a "borrow pit," the judge found that the Respondent did not extract minerals on a one-time or intermittent basis and that it milled minerals for a specific purpose.[20] The Commission affirmed the judge's decision.

The Respondent had argued 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 ... .'" *Id*. at 2394 (emphasis added). In deciding that Drillex was a mine, the Commission first turned to Section 4 of the Mine Act, 30 U.S.C. § 803, which provides that each "coal or other mine" affecting commerce shall be subject to the Act. It also noted that

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> (a) Except as provided in paragraphs (f) and (g) of this section, you must provide each new miner with no less than 24 hours of training as prescribed by paragraphs (b), (c), and (d). Miners who have not yet received the full 24 hours of new miner training must work where an experienced miner can observe that the new miner is performing his or her work in a safe and healthful manner.

The record matters. In this case, there is no evidence of a record that the miner was working "where an experienced miner can observe that the new miner is performing his or her work in a safe and healthful manner." Mr. Cabrera did not testify.

The Respondent makes similar arguments along this line, invoking 30 C.F.R. § 46.2 for the proposition that miners do not include "maintenance or service workers who do not work at a mine site for frequent or extended periods." *Id.* at 7. Again, there is no evidence to support this claim. Then, returning to his fundamental argument, the argument which is really what this case is about, Respondent cites to 30 C.F.R. § 46.2(h), for his belief that The Creator's Stone is not a mine. *Id*. However, Respondent does not take account of the full text of that provision, which provides that "[**m**]**ining operations means** mine development, drilling, blasting, ***extraction***, milling, crushing, screening, or sizing of minerals at a mine; maintenance and repair of mining equipment; ***and associated haulage of materials*** within the mine from these activities." 30 C.F.R. § 46.2(h) (emphasis added).

[20] If something were a "borrow pit," as opposed to a "mine," it would be subject to the jurisdiction of the Department of Labor's Occupational Safety and Health Administration rather than MSHA jurisdiction, pursuant to the interagency agreement between MSHA and OSHA. However, as set forth in this decision's Findings of Fact, The Creator's Stone is a mine, not a borrow pit. *See*, MSHA-OSHA Interagency Agreement, 44 Fed. Reg. 22827 (Apr. 17, 1979), amended, 48 Fed. Reg. 7521 (Feb. 22, 1983) ("Interagency Agreement.").

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 ...." *Id.* (quoting 30 U.S.C. § 802(h)(1)) (emphasis added).

Although the Commission observed that "the Act does not further define 'extracted' or 'the milling of minerals,'" it took note that both the Commission and courts have recognized 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. *Id.* (citing *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)). Those sources also took note that this view is supported by the legislative history of the Mine Act. *Id.* at 2394 (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."*)).

In finding that *Drillex* engaged in *both* mineral extraction and milling, the Commission pointed out that ***either*** of those activities **independently qualifies** as a basis to constitute the operation as a "mine" within the meaning of the Act. *Id.* at 2395. The Commission then turned to the definitions of the terms "extraction" and "milling," looking to the commonly understood definitions for those words. Those definitional sources informed that "'extraction' means the separation of a mineral from its natural deposit in the earth" and that "'milling' includes processes by which minerals are made ready for use."[21] *Id.* at 2395.

As the Court explained during the hearing and in conference calls with the parties in advance of the hearing, it is not for this Court to fashion its own determinations of what is a

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[21] For the term "extraction," the Commission cited the Bureau of Mines, U.S. Dept. of Interior, Dictionary of Mining, Mineral, and Related Terms 404 (1968) ("DMMRT") at 932. Concerning "milling," the same source defined that term to include "processes by which minerals are made ready for use." *Id*. at 706. It noted that *Webster's Third New International Dictionary, Unabridged* 1434 (1971) is in accord with that definition of "milling." The Commission also pointed out that the Interagency Agreement is in concert with those sources. That Interagency 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 separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated.

Id. at 2395 (citing the Interagency Agreement at 44 Fed. Reg. at 22829). The same Agreement defines "crushing" as "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*.

mine, but rather to look at what Congress,[22] the Commission, and the Federal Courts have said about the subject.

The Commission also specifically addressed whether an operation could be deemed a "borrow pit." In that regard it looked to the Interagency Agreement, remarking that borrow pits are subject to OSHA jurisdiction, but even borrow pits are not always under OSHA, as MSHA has jurisdiction over those borrow pits located on mine property or related to mining. A

> "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.*"

Drillex at 2396 (citing 44 Fed. Reg. at 22828) (emphasis added).

[22] Regarding Congress' intent, 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, 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.

Drillex at n. 4.

Although Respondent has called his activity a "borrow pit,"[23] the facts clearly demonstrate that it is not a borrow pit at all.[24]

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[23] Mr. Mosley stated that his site was "very comparable to a borrow pit." Tr. 18. At hearing, he said, "I'm declaring it to be a borrow pit." Tr. 27. At other times, he described it as a "quarry." For example, in Respondent's Exhibit 1, photos are described as "The first five photos of the quarry that the DOL is calling a mine, The Creator's Stone quarry." Tr. 17. However, when asked about calling it a quarry, Mr. Mosley responded, "I am calling [it] rock, and I would say quarry best depicts it, a quarry or a borrow pit." *Id.* The Court cannot ignore that in the Respondent's Exhibit 2, his various local state filings continually refer to the operation as a quarry. For example, within that Exhibit 2, a filing with the State of Arkansas Mining Program, The Creator's Stone filed a "Notification of Intent to Quarry in June 2018. Of course, the names either side attaches to the description of the activity at The Creator's Stone do not determine the outcome. Rather, the underlying facts determine the correct appellation for the site.

[24] The limited scope of a borrow pit was highlighted in a different State of Alaska case, *State of Alaska, Dep't. of Transportation*, 36 FMSHRC 2642 (Oct. 2014) ("*Alaska DOT*"). There, the Commission determined that sand and gravel operations performed by the State of Alaska Department of Transportation ("AKDOT"), which operations were conducted in conjunction with maintaining a highway used by vehicles to service the Alaska Pipeline, were subject to the Mine Act's jurisdiction. Although the Interagency Agreement generally accords OSHA, and not MSHA, jurisdiction over borrow pits, it:

> limits what can be considered a "borrow pit" to an area of land where
>
> > "[e]xtraction 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. [Interagency Agreement] at 22,828.

Alaska DOT at 2649. But contrast that MSHA describes a borrow pit as applicable to situations "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." *Id.* at 2649 (quoting underlying ALJ decision at 34 FMSHRC 179, 184-185 (Jan. 2012) (Administrative Law Judge Feldman)) (emphasis added). So too, the Commission found that "milling" occurred. Again the Commission looked to the Interagency Agreement and its statement 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. "

Although the foregoing is more than sufficient to resolve this matter, another instructive decision on the issue of jurisdiction is the D.C. Circuit's decision in *Carolina Stalite Co.*, 734 F.2d 1547, (D.C. Cir. 1984). That case involved a slate gravel processing facility. Finding that the operation was a mine within the meaning of section 3(h) of the Act, 30 U.S.C. § 802(h) (1982), the Court of Appeals upheld Mine Act jurisdiction. In fact, applying *Carolina Stalite* to this case, the Court finds that the operation at The Creator's Stone, small as it indisputably is, to be a more compelling case for jurisdiction.

Carolina Stalite owned and operated a slate gravel processing facility. Stalite's property was immediately adjacent to a quarry owned and operated by another company but the two businesses were entirely independent of each other and their interaction was solely as buyer and seller. A percentage of the quarry's stone was transported from the quarry to Stalite via conveyors. There was no dispute that the quarry was subject to Mine Act jurisdiction. Instead the court was determining if Stalite's activity, upon receiving the stone from the quarry, was also within the Mine Act's coverage. Stalite subjected the material from the quarry to intense heat in a rotary kiln and then crushed and sized the material. That end product was thereafter sold for making concrete masonry blocks.

The D.C. Circuit's analysis focused on Section 3(h) of the Mine Act. It observed that the distinction within that section involved milling and preparation as compared to manufacturing, with the latter covered by Occupational Safety and Health Act regulation, but with milling and preparation under the Mine Act.

Though separate and legally independent entities, the Court of Appeals could not ignore that the two businesses, the quarry and Stalite, constituted "a unified mineral processing operation." *Id.* at 1551. The Court also referenced that Section 3(h)(1)(C) of the Mine Act includes within the definition of a mine all facilities engaged in the milling or the work of preparing minerals. By Congress employing both those terms, the Court held it signaled that "an expansive reading is to be given to [the] mineral processes covered by the Mine Act." *Id.* Thus, all those terms can be viewed "interchangeably to describe the entire process of treating *mined* minerals for market." *Id.* Accordingly, the Court of Appeals rejected the view that the Mine Act only covers facilities which engage in mineral milling and preparation in conjunction with the initial extraction of the mineral.[25] *Id.* at 1552. It emphasized that "the Act was intended to establish a 'single mine safety and health law, applicable to *all mining activity.*'" *Id.* at 1554 (citing S.Rep. No. 461, 95th Cong., 1st Sess. 37 (1977)) (emphasis original).

Alaska DOT at 2649 (citing Interagency Agreement at 22,829-30).

[25] The Court of Appeals also held that the determination by the Secretary of Labor in deciding the whether an activity should be ascribed to OSHA or to MSHA is due deference. *Carolina Stalite Co.,* 734 F.2d at 1552-1553..

The Court of Appeals then took note that decisions "by the Third, Ninth, and Fourth Circuits accord with our interpretation of the Act, and uniformly recognize section 3(h)'s 'sweeping definition' of a mine." *Id.* (citing *Marshall v. Stoudt's Ferry Preparation Co.,* 602 F.2d 589 (3d Cir.1979), *Cyprus Industrial Minerals Co. v. Federal Mine Safety & Health Review Commission,* 664 F.2d 1116 (9th Cir.1981), and *Harman Mining Corp. v. Federal Mine Safety & Health Review Commission,* 671 F.2d 794 (4th Cir.1981)).[26]

These cases drive home the point that even in cases where the extraction has occurred that does not preclude Mine Act jurisdiction. In The Creator's Stone's very minimal operation, all of the elements for jurisdiction obtain, as it removes, that is to say "extracts," what is undeniably a mineral and then loads those extracted minerals for transportation to sale sites. Thus, The Creator's Stone's miniscule operation nevertheless carries the mining process from start to finish.

Accordingly, on the basis of the foregoing findings of fact, the discussion of the definitional terms in the Mine Act, the legislative history, and relevant case law, the Court finds that The Creator's Stone is a mine. Although the Respondent's operation is of extremely small size, a description which is both undeniable and undisputed, in every other respect Mr. Mosley's tiny operation is a mine: it extracts minerals and loads the excavated material onto a vehicle for delivery to a point of sale.

Penalty Determination

In assessing civil monetary penalties, Section 110(i) of the Act requires that the Commission consider 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. 30 U.S.C. § 820(i).

As the Commission has noted, "Administrative Law Judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co*., 8 FMSHRC 491, 492 (Apr. 1986). A Judge's penalty assessment is reviewed under an abuse of discretion standard. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 601 (May 2000)." *Knight Hawk Coal, LLC*, 38 FMSHRC 2361, 2373 (Sept. 2016).

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[26] Ever so briefly, this Court notes that in *Marshall v. Stoudt's Ferry,* though the operation didn't extract minerals, it still prepared them. In *Cyprus Industrial Minerals*, drilling exploratory drifts into hill in search of "a commercially exploitable deposit" was enough, even without any extraction, for the Mine Act to apply. Perhaps the most striking example of the breadth of the Mine Act is *Harman Mining Corp*., where jurisdiction was upheld under circumstances where the mineral had been extracted and prepared. Harman was engaged only in car dropping, which was loading the coal on railroad cars.

Penalty Factors, as applied to this case

The Creator's Stone was issued two citations: Citation No. 9451585, for an alleged violation of notification of commencement of operations and closing of mines, citing 30 C.F.R. § 56.1000; and Citation No. 9451586, for an alleged a violation of standard 46.5(a). That latter standard speaks to new miner training and the citation alleged that two employees, Mr. Boss and Mr. Noyce did not have that training. At the hearing, Respondent's owner, Charles Mosley conceded that if he does not prevail on the jurisdictional issue, he would concede the fact of violations for the two citations, but not the penalties assessed for them. Tr. 15. In a case of this nature, an extended discussion of the application of the penalty factors to the citations is unwarranted.

History of violations: The Respondent mine's history of violations is reflected in Ex. P-1. Its history consists only of the two citations in this matter. Accordingly, this factor is of no consequence in the penalty determination.

Size of operator's business: The mine act does not exempt small mines. However, the size of a mine is taken into account, as it is one of the six statutory factors to consider when imposing a civil penalty. The Respondent's mine is very small. Tr. 130, 213. Consideration of this factor warrants a lower penalty.

Good faith in compliance after notification of a violation: For the two citations involved in this docket the Respondent demonstrated good faith.

Effect on the operator's ability to continue in business: The Court finds that the Respondent did not meet its affirmative obligation to establish that the proposed penalties would have a cognizable effect on the mine's ability to continue in business. As the penalties imposed in this decision are, in total, less than the amounts proposed, this conclusion is reinforced.

Negligence and Gravity are discussed separately for these two violations.

Negligence: For the failure to notify of commencement of mining operations, citing 30 C.F.R. § 56.1000, Citation No. 9451585, the penalty was assessed at a proposed $121.00. The negligence was assessed as high for that violation, but the Court finds that it is more properly designated as 'low.' The Respondent made no attempt to hide its operation and believed, albeit incorrectly, that the Mine Act did not apply to its operation.

The same low negligence rationale applies to the other established violation, Citation No. 9451586, for the violation of the miner training standard 30 C.F.R. § 46.5(a), which was assessed at a proposed penalty of $355.00.

Gravity: For Citation No. 9451585, the failure to notify of commencement of mining operations, the inspector marked the gravity as 'unlikely,' with 'no lost workdays,' one person affected, and not significant and substantial. The Court finds each of those designations as consistent with the evidence at the hearing.

For Citation No. 9451586, the violation of the miner training standard, the inspector marked the gravity as 'reasonably likely,' 'fatal,' with two persons affected, and significant and substantial. The Court finds, based on the evidence at the hearing, that an 'unlikely' designation is more appropriate. That determination means that the significant and substantial designation is unsupported. While a fatal accident is within the realm of possibilities, given the use of heavy equipment, the unlikely injury designation is given more weight for this factor.

Conclusion

Upon consideration of the each of the statutory penalty factors, the Court concludes that the appropriate civil penalty for Citation No. 9451585, the violation of notification of commencement of operations is $50.00 and the appropriate civil penalty for Citation No. 9451586, the violation of the miner training standard, is $75.00. The Respondent should not be lulled by the imposition of these reduced penalties to assume that future Mine Act violations will be similarly treated. Each proven violation is determined on the basis of the particular facts established, which are then applied to the statutory criteria.

ORDER

For the reasons set forth above, Citation No. 9451585, is **AFFIRMED** and a civil penalty of $ 50.00 (fifty dollars) is imposed for that violation and Citation No. 9451586 is also **AFFIRMED** and a civil penalty of $ 75.00 (seventy-five dollars) is imposed for that violation

A total civil penalty of $125.00 is hereby imposed upon Respondent for these two violations. Payment is to be made to the Mine Safety and Health Administration within 30 days of the date of this Decision. Upon timely receipt of payment, the captioned civil penalty matters are **DISMISSED**.

William B. Moran

William B. Moran
Administrative Law Judge

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