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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

AIR PRODUCTS AND CHEMICALS,
INC.,

CONTESTANT

v.

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

CONTEST PROCEEDING

Docket No. PENN 91-1488-R
Citation No. 3486528; 9/5/91

Cambria Co-Generation Facility
Mine ID 36-99999

DECISION

Appearances: R. Henry Moore, Esq., Buchanan Ingersoll
Professional Corporation, Pittsburgh,
Pennsylvania, for the Contestant;
Robert Cohen, Esq., Office of the Solicitor, U.S.
Department of Labor, Arlington, Virginia, for the
Respondent.

Before: Judge Melick

These expedited contest proceedings were filed by Air Products and Chemicals, Inc., (Air Products), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Mine Act," to challenge a citation issued by the Secretary of Labor for Air Products' refusal to permit an inspector of the Federal Mine Safety and Health Administration (MSHA), to enter its Cambria Cogeneration Facility (Cambria CoGen) in alleged violation of section 103(a) of the Mine Act.1 The preliminary issues before me are whether those areas of the Cambria CoGen facility at issue in this case are a "coal mine" within the meaning of the Mine Act and therefore subject to MSHA jurisdiction, and if so, whether MSHA has exercised its authority in a manner sufficient to displace enforcement authority by the Occupational Safety and Health

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Administration (OSHA) under section 4(b)(1) of the Occupational Safety and Health Act, 29 U.S.C. 653(b)(1) (OSHAct).² For the reasons that follow, I find that while the cited areas of the Cambria CoGen facility herein come within Mine Act jurisdiction, MSHA has failed to exercise its authority in a manner sufficient to displace OSHA enforcement authority and that, accordingly, the citation at bar must be vacated.

Cambria CoGen is an electrical generating facility utilizing two combustion boilers with bituminous coal refuse as its primary energy source to power a steam turbine-generator. Its primary business is to produce and sell electricity to the Pennsylvania Electric Company but it also produces steam for a local nursing home.

The fuel is obtained from bituminous coal refuse piles located at a mine owned by RNS Services, Inc. (RNS), and supplied by RNS. The coal refuse is delivered by truck to the Cambria CoGen facility and dumped into a hopper at the refuse receiving building. The product then passes through a grizzly which screens out large objects, including rock, slate, timbers, roof bolts, and large pieces of coal. The product is then transported to a refuse storage building and then conveyed as needed to the Bradford breaker building. It is there fed onto a rotating Bradford drum breaker which further screens and sizes the material for easier handling and to prevent damage to other equipment in the facility.

The remaining minus-6 inch material then proceeds onto the C-1 belt to a refuse storage dome. A stacker distributes the piles and a reclaim machine places coal on another conveyor as needed. The C-2 belt then transports coal to the crusher building where screens separate minus-2 inch material. That material is then further crushed to one-quarter inch to zero-inch size with a roll crusher. This product is then conveyed to the boiler building storage facility, where it is stored until conveyed to the boilers by way of the boiler plant feed belt. The Secretary acknowledges that MSHA jurisdiction would not extend beyond the point where the coal product is dumped onto the plant feed belt.

In addition to refuse coal, run-of-mine coal is used in the boilers to maintain a proper mix of combustibility. This coal is delivered by truck and transported by belt to the run-of-mine coal storage tepee. That material then proceeds to the crusher

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building where it is screened down to one-quarter inch by zero-inch size. The material is then fed to the boiler building but stored separate and apart from the refuse coal for later mixing as needed for the boilers. The general areas over which MSHA claims inspection jurisdiction and authority are depicted in Government Exhibit No. 2 attached hereto as Appendix A, in the lower portion of the schematic marked with the letter "M".

The evidence is in essential respects not disputed. On August 2, 1989, shortly after construction of the facility began, officials of Cambria CoGen met with MSHA subdistrict manager Timothy Thompson to discuss the plant's coal handling systems for determination of Mine Act authority. It was represented at these discussions that RNS would perform onsite processing of the coal refuse before delivering it to the Cambria CoGen facility and that upon arrival at the facility, the coal would only be customized by crushing and sizing to meet the one-quarter-inch size specification. Based on this information, Thompson concluded, and advised the Cogen representatives, that the operation would not come within MSHA inspection authority.

According to Thompson, MSHA later learned, upon examination of an RNS ground control plan, that RNS would in fact not be performing any onsite processing and that Cambria CoGen would be purchasing unprocessed coal refuse. That coal would then require additional processing at the Cambria CoGen facility and the addition of a Bradford breaker. Thompson thereupon changed his opinion and advised Cambria CoGen in an October 31, 1990, meeting that under these changed circumstances, MSHA would assume inspection authority.

Thompson testified that he was aware of the OSHA-MSHA Interagency Agreement³ but concluded that it did not need to be invoked because he felt there was no interagency conflict. In this regard, just before the October 31, 1990, meeting with Cambria CoGen, he called Terry Lane, an OSHA regional administrator, and explained the basis for his belief regarding MSHA jurisdiction at the coal preparation and cleaning facility. According to Thompson, Lane stated that he would not attend the meeting and in fact no one from OSHA showed up at that meeting. Thompson acknowledges that he has had no further contact with any OSHA official regarding this matter. He further indicated that Lane never stated whether he agreed or disagreed with his position regarding MSHA's assertion of inspection authority at the facility.

According to the undisputed testimony of Cambria CoGen plant manager Mark Reed, the Cambria CoGen plant was built with OSHA specifications in mind and the training of employees was

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performed with OSHA training regulations in mind. In addition, according to the undisputed testimony of James Stango, project manager for the Cambria CoGen facility, OSHA conducted a 3 day inspection in August, 1990, with three to five-person-teams of inspectors and issued citations in areas over which MSHA now claims inspection authority, including the Bradford breaker building, the tepee building, and the BMR building.

Plant manager Reed testified that he expects OSHA will return for further inspections of the entire Cambria CoGen facility. Reed and Stango both noted a number of potential conflicts between MSHA and OSHA including training requirements, guardrail and berm requirements and fire extinguisher examination requirements. They noted that additional conflicts were also likely since some of their subcontractors perform maintenance work in both the areas over which MSHA now maintains it has inspection authority and in areas of the plant MSHA has not yet claimed such authority.

It was also noted that at least one conveyor belt performs two functions -- to remove ash from the boilers and to carry reject coal refuse material from the crushers. According to supervisory MSHA coal mine inspector James Biesinger, when the conveyors bring ash from the boiler plant, they would not be under MSHA inspection authority. However, when the same conveyor carries reject material from the coal processing presumably it would be under MSHA inspection authority. It is further noted that even as of the date of hearing, MSHA was not certain as to the full extent of the processes or areas over which it intends to assume inspection authority. The apparent arbitrary delineation of particular parts of roadways, over which MSHA now claims inspection authority (See Government Exhibit No. 2, Appendix A), also highlights the uncertain and ambiguous boundaries between the claimed MSHA inspection areas and those presumably left to OSHA.

Section 3(h) of the Mine Act provides in part as follows:

(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

(2) For purposes of subchapters [titles] II, III, and IV of this chapter [Act], "coal mine" means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities.

Section 3(h) of the Mine Act thus defines a "coal or other mine" and "coal mine" to include the "work of preparing the coal." Section 3(i) of the Mine Act defines the "work of preparing the coal" as "the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine."

Within this framework, it is clear that in at least a portion of the Cambria CoGen facility cited by MSHA in this case, coal refuse is broken, crushed, sized, and/or cleaned in preparation for consumption in the generating facility. These activities are all within the scope of "work of preparing coal" within the meaning of section 3(i) of the Mine Act. It is also clear that the area at issue includes "structures," "equipment," and "machinery" that are "used in or to be used in" the "work of preparing the coal." It is therefore clear that the areas cited in this case were indeed subject to Mine Act jurisdiction. In this regard it is also noted that Air Products acknowledges that the nature of the facility herein is essentially indistinguishable from the nature of the facility found by the Commission in Westwood Energy Properties, 11 FMSHRC 2408 (1989), to be within Mine Act jurisdiction.

The problem in this case arises, however, from the failure of the Secretary to have clearly designated whether OSHA or MSHA should exercise regulatory authority over the working conditions herein. In Westwood Energy Properties the Commission discussed the issue as follows:

As in Pennsylvania Electric, [11 FMSHRC 1875 (1989)] a brief overview of the statutory interplay between the Mine Act and the OSHAct is necessary to a proper analysis of the issue. The OSHAct is the most broadly applicable statute regulating the safety and health aspects of the working conditions of American

workers. The OSHAct, like the Mine Act, is enforced by the Secretary of Labor. Although broadly applicable, section 4(b)(1) of the OSHAct provides:

Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

29 U.S.C. 653(b)(1). Therefore, OSHA standards pertaining to the working conditions at the culm bank would be applicable unless another federal agency, with a proper grant of jurisdiction over such working conditions, exercises its authority in a manner displacing OSHA coverage. See, e.g., *Southern Pacific Transportation Co. v. Usery*, 539 F.2d 386, 389 (5th Cir. 1976), cert. denied, 434 U.S. 874, 98 S.Ct. 221, 54 L.Ed.2d 154 (1977); *Southern Rv. Co v. OSHRC*, 539 F.2d 335, 336 (4th Cir. 1976), cert. denied, 429 U.S. 999, 97 S.Ct. 525, 50 L.Ed.2d 609 (1976).

It is undisputed in this case, however, that both OSHA and MSHA have asserted inspection authority at the cited facility. Indeed OSHA has cited violations of its regulations in the same areas over which MSHA also claims inspection authority, and there is no reason to believe OSHA will not return for further inspections in these areas. Moreover, neither the MSHA representatives nor the Secretary's counsel at hearing could provide assurances that OSHA would not continue its inspections in these areas.

The record also shows that there has been but one communication between MSHA and OSHA officials regarding the Cambria CoGen facility, and that conversation by telephone as reported at hearing was ambiguous and lacking in detail. Accordingly, there is no evidence that a clear delineation of OSHA/MSHA inspection authority has been made at the facility and it is likely under the circumstances that both OSHA and MSHA will continue to perform duplicative inspections over the same areas now claimed in this case by MSHA. Significantly, MSHA subdistrict manager Thompson has expressed the belief that there is no need in this case to utilize the OSHA-MSHA Interagency Agreement. This Agreement was promulgated in 1979 by the agencies to prescribe the appropriate interagency procedure for resolving general jurisdictional questions between the two agencies and provides in part as follows:

When any question of jurisdiction between MSHA and OSHA arises, the appropriate MSHA District Manager and OSHA Regional Administrator or OSHA State Designee in those

states with approved plans shall attempt to resolve it at the local level in accordance with this Memorandum and existing law and policy. Jurisdictional questions that can not be decided at the local level shall be promptly transmitted to the respective National Offices which will attempt to resolve the matter. If unresolved, the matter shall be referred to the Secretary of Labor for decision.

44 Fed. Reg. 22827, 22828 (1979).

In sum, there is no evidence in this record that the MSHA inspection of the Air Products' facility "reflects a reasoned resolution of the jurisdictional question by the Secretary and her agencies" but rather the evidence suggests that the inspection "simply resulted from an ad hoc unilateral assertion of jurisdiction by MSHA." Westwood Energy, 11 FMSHRC at 2417. See also Pennsylvania Electric Company, 12 FMSHRC 1562 (1990), and 11 FMSHRC 1875 (1989). Under the circumstances, Citation No. 3486528 must be vacated.

ORDER

Citation No. 3486528 is vacated.

Gary Melick
Administrative Law Judge

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FOOTNOTE START HERE

1. Section 103(a) of the Mine Act provides in part that "[f]or the purpose of making any inspection or investigation under this Act, the Secretary [of Labor] or the Secretary of Health, Education, and Welfare, with respect to fulfilling his responsibilities under this Act, or any authorized representative of the Secretary or the Secretary of Health, Education, and Welfare, shall have a right of entry to, upon, or through any coal or other mine."

2. Section 4(b)(1) of the OSHAct provides in part that "[n]othing in this Act shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health."

3. 44 Fed. Reg. 22,827 (1979) and 48 Fed. Reg. 7521 (1983).
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APPENDIX A

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